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A critique of national self-determination

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City University of New York, 1995

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A CRITIQUE OF NATIONAL SELF-DETERMINATION

by

OMAR DAHBOUR

**A dissertation submitted to the Graduate Faculty in
Philosophy in partial fulfillment of the requirements for
the degree of Doctor of Philosophy, The City University of
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INTRODUCTION

This is a philosophical study of the concept of national self-determination and a critique of the various justifications that contemporary philosophers have given for regarding it as a moral right or political principle. The historical importance of the idea of national self-determination has long been recognized. For instance, Charles Tilly has recently written that

...for almost two centuries [national self-determination] has had extraordinary force as a justification for political action by ostensible leaders of peoples who lack states, by rulers of states who speak in a nation's name, and by third parties...who intervene in the political struggles of particular states.¹

The historical trajectories of nationalist movements that have used this idea have been amply studied; the new synoptic studies that have appeared in the last twenty years alone are now regarded as constituting a renaissance of scholarship on nationalism.²

¹Charles Tilly, "National Self-Determination as a Problem for All of Us," Daedalus 122 (Summer 1993), p. 30.

²E. J. Hobsbawm, Nations and Nationalism since 1780: Programme, Myth, Reality (Cambridge: Cambridge University Press, 1990), pp. 3-4. Among the studies that he mentions are the following: Benedict Anderson, Imagined Communities, rev. ed. (London: Verso, 1991); John Armstrong, Nations Before Nationalism (Chapel Hill: University of North Carolina Press, 1982); John Breuilly, Nationalism and the State (Chicago: University of Chicago Press, 1982); and Ernest Gellner, Nations and Nationalism (Ithaca, N.Y.: Cornell University Press, 1983); to these should be added, at a minimum, Peter Alter, Nationalism, tr. Stuart McKinnon-Evans (London: Edward Arnold, 1989); Walker Connor,

Yet, a curious feature of this scholarly work on nations and nationalism is the lack of explicit treatment of the principle of national self-determination itself. As Tilly puts it:

Every place we turn these days someone is discussing nationalism: its origins, its varieties, its intellectual history, its proper conceptualization.... But surprisingly few of the discussions I have heard, read or participated in have directly addressed the principle of national self-determination itself.³

Part of how one might account for this lacunae is the rarity of discussion of this idea by philosophers. Considering its political importance, almost no sustained reflection has been given--until quite recently--on the meaning and justifiability of nations claiming a right of self-determination. As Harry Beran wrote in 1984, "No philosophical work exists in English which subjects [the right to national self-determination] to a sustained critique or attempts to provide an adequate foundation for it."⁴ This observation is still true today (and, as far as

Ethnonationalism: The Quest for Understanding (Princeton, N.J.: Princeton University Press, 1994); William McNeill, Polyethnicity and National Unity in World History (Toronto: University of Toronto Press, 1986); Hugh Seton-Watson, Nations and States: An Enquiry into the Origins of Nations and the Politics of Nationalism (London: Methuen, 1977); and Anthony Smith, The Ethnic Origins of Nations (Oxford: Basil Blackwell, 1986). Earlier generations have also produced significant and enduring works on the subject (and two--by Alfred Cobban and Elie Kedourie--are discussed below).

³Tilly, "National Self-Determination," p. 29.

⁴Harry Beran, "A Liberal Theory of Secession," Political Studies 32 (1984), p. 23.

I can tell, is true of work in other major scholarly languages as well).

Following this introduction, the concept of national self-determination is considered in terms of its possible justifications. Each of the four chapters discusses one or more contemporary philosophers--sometimes in conjunction with earlier philosophers or with legal discourse on the subject--who attempt to justify some version of a principle of national self-determination. The intent of these discussions is critical: I seek to demonstrate in this study as a whole that there is not, nor can there be, an adequate justification for a right or principle of national self-determination. In the conclusion, I briefly discuss (again, for the most part, critically) some ideas about more limited rights that might replace a general right of national self-determination or serve some of the same functions.

In this introduction, I survey some different meanings of "nation," some reasons why the application of a principle of self-determination to nations has escaped philosophical scrutiny for so long, what the few earlier studies devoted to it have to offer, and how the idea of national self-determination is connected to some more general preoccupations of contemporary political philosophy.

Virtually every study of nationalism in recent years has pointed to the contested nature of "nation" as a term which is used by various political movements for their own

ends. Historically, the concept of a "nation" was developed from two major sources: the emergence of the "people" as a politically important entity within the context of the early modern democratic, and particularly French, revolutions, and an increasing interest in the late eighteenth and early nineteenth centuries in the variety of cultural "nations" resident within the Central European empires (the Holy Roman and the Austrian).⁵

These two sources have, in contemporary usage, led to frequent confusion between distinct meanings of "nation"--on the one hand, the political meaning of a "nation" in the sense of the "people" or inhabitants of a state, and on the other hand, the cultural meaning of a "nation" as a social group defined by kinship ties, or by particular linguistic, folkloric, or religious characteristics. Some contemporary historians locate the origins of modern nation-states as early as the sixteenth century--largely because they employ the "political" conception of a nation, which does not allow a clear distinction to be made between nations and states (since nations are considered to be equivalent to the populations of states).⁶ If there is a special character to nation-states on this account, it lies in their ability to mobilize political allegiances among a much wider population

⁵Alter, Nationalism, pp. 14-18.

⁶See, e.g., Liah Greenfeld, Nationalism: Five Roads to Modernity (Cambridge, Mass: Harvard University Press, 1992).

than was possible for earlier dynastic or theocratic states.⁷

The political meaning sometimes given to "nation" is also a source of confusion in the interpretation of contemporary international law. Despite the fact that most international documents refer to "peoples" as the entities entitled to hold various rights and despite the prevalent meaning of a "people" as the population of an existing state, legal scholars still sometimes confuse this term with the concept of a nation as an entity which is distinct from existing states.⁸ Even so careful a commentator as Peter Alter gives the following definition of a nation:

...a social group...which, because of a variety of historically evolved relations of a linguistic, cultural, religious or political nature, has become conscious of its coherence, unity and particular interests.... A nation is constituted by the social group's...consciousness of being a nation....⁹

What such a definition does is to confuse the political and the cultural meanings of the term by attempting to find a common denominator within both meanings. While this may help to explain some of the linguistic confusion between these two different meanings of "nation," it does little to

⁷Anthony Giddens, A Contemporary Critique of Historical Materialism, Vol. 2: The Nation-State and Violence (Berkeley: University of California Press, 1987), pp. 209-10.

⁸See Chapter 1 for an extensive discussion of this distinction between peoples and nations.

⁹Alter, Nationalism, p. 17 (italics added).

dispel this confusion. More helpful are those commentators who make a sharp distinction between the political and cultural meaning of a "nation." Walker Connor, for instance, argues that there is no difference between nationalism and ethnonationalism if the former term is given a precise meaning, rather than being used to encompass other entities such as peoples, populations, groups, or citizenries. A nation, Connor writes, is simply a "group of people who believe they are ancestrally related."¹⁰ What such a definition does not attempt to do is to account for every possible meaning of "nation"; rather, it serves to delineate a certain type of social group that cannot be subsumed under other terms (e.g., country, people, or state).

This definition does not assume that there is a commonality to all those political movements that may use the term "nationalist" to describe themselves.¹¹ But it has the enormous advantage of clearly separating out those political movements that use attributions of ancestral ties to make particular claims (such as that of self-

¹⁰Connor, Ethnonationalism, p. xi.

¹¹For instance, anticolonial movements that designate themselves as "nationalist" movements usually are nationalist only in the political sense of wanting independence for an already existing (and politically defined) territory, and therefore are not concerned with nations in the stricter, ethnic sense of the term. See Alter, Nationalism, pp. 144-45, on the differences between ethnonational and anticolonial "nationalisms."

determination) from other movements that have different aims. It is also worth emphasizing that nationalism is not, on this account, necessarily thought to be an ideology arising "naturally" out of prepolitical ties or affinities. On the contrary, nationalism can be more usefully thought of as a political ideology that is distinguished by the claim that there are special entitlements for those groups that believe themselves to be ancestrally related. Nationalism is, therefore, an essentially political (not cultural) phenomenon, even though the basis of its ideology is a claim about the political rights to which cultural nations are entitled.¹²

While it takes considerable effort merely to distinguish the different meanings of "nation" and "nationalism," the consideration of the principle of the self-determination of nations introduces additional complexities. There are two primary reasons for the neglect of national self-determination in contemporary history and philosophy: most historical studies of nationalism do not consider nationalism as an ideology and most contemporary

¹²This view, that nationalism is essentially political, even though its ideology is based on the idea of pre-existing cultural affinities, is one held by the majority of recent historians of nationalism. One correlary of it is that nations are essentially modern entities, since they are to a considerable degree constituted by the rise of particular nationalist movements; see e.g., the studies of nationalism by Alter, Anderson, Breuilly, Connor, Gellner, Hobsbawm, McNeill, and Seton-Watson. Two notable exceptions are the studies by Armstrong and Smith, which include assertions of the more "primordial" character of nations.

political philosophy does not regard the nation to be a philosophically interesting entity. In the first case, the dominant school of recent historical scholarship on nationalism tends to regard its object of analysis to be the nation or national identity or the nation-state. This emphasis on the political or nation-building aspects of nationalism predisposes historians to ignore--or at least to minimize the conceptual significance of--the claims of nationalists. Hugh Seton-Watson, an otherwise perceptive historian of nationalism, typifies this view of the subject when he writes that,

I...see little point in trying to analyse nationalism itself as an ideology. It may even be doubted whether nationalism deserves to be called an ideology. Its essence...is very simple: it is the application to national communities of the Enlightenment doctrine of popular sovereignty.... The rest of nationalist ideology is rhetoric.¹³

If only it were so simple! Benedict Anderson, in a more recent study, echoes Seton-Watson's view in writing that nationalism is closer to phenomena such as kinship or religion (and is their replacement in modernized societies to some extent), rather than to political ideologies such as liberalism or socialism.¹⁴

Certainly there are differences between nationalism and other modern ideologies such as liberalism, socialism, or fascism. But the difference might be put this way: if these

¹³Seton-Watson, Nations and States, p. 445.

¹⁴Anderson, Imagined Communities, p. 5.

latter forms of explicit political theorizing are ideologies in modern society, nationalism is the ideology of modern society--the most commonly voiced and yet least examined set of beliefs about how political life ought to be organized in the modern era. To a great extent, other ideologies either assume or ignore the existence and validity of the major goal of nationalism--the nation-state--but few provide arguments for or against it.

This belief in the legitimacy of the nation-state--held by many, if not most, modern political movements--can be characterized as ideological in two ways. First, it endows "ghostly" entities--the nation-state in particular--with reality and value. The modern belief in the legitimacy of nation-states fits with how Karl Marx described the belief in the legitimacy of the modern state in general: it mistakes the imaginary qualities of earthly phenomena for their real qualities: "In the state . . . man is the imaginary member of an imaginary sovereignty, divested of his real, individual life, and infused with an unreal sovereignty."¹⁵

Of course, Anderson has famously characterized nations as "imaginary communities"; but he refuses the obvious criticism contained in this designation, insisting that all

¹⁵Karl Marx, "On the Jewish Question," in Robert Tucker (ed.), The Marx-Engels Reader, 2nd ed. (New York: Norton, 1978), p. 34.

communities are imagined.¹⁶ While this is trivially true in the sense that most communities seek to "imagine" themselves as virtuous and beneficial for their members, this does not mean that all forms of community do this in fact. The consequences of imagining ourselves as members of nations first and every other group second cannot be gone into here; but, as I will argue below, there are definite ways in which these consequences can be seen to be anything but virtuous or beneficial for most persons.

The second sense of ideology that fits nationalist beliefs is the conviction about the necessary (or even natural) character of their existence. Anyone who studies nationalism cannot fail to confront the deep-seated convictions of many that the nation-state is an inevitability--if not for all societies or historical periods, certainly for ours. However ill-informed such a view may be, it is extraordinarily prevalent. And, as Iris Young has put it, this marks the ideas about which it is held as ideological: "Ideas function ideologically . . . when they represent the institutional context in which they arise as natural or necessary."¹⁷

In contrast, for many contemporary political philosophers, the nation and the nation-state, not to speak

¹⁶Anderson, Imagined Communities, p. 6.

¹⁷Iris Young, Justice and the Politics of Difference (Princeton, N.J.: Princeton University Press, 1990), p. 74.

of "national identity" more broadly, hardly appear as an object for consideration. This is changing, however, and this study bears witness to that: all of the major figures criticized in it are contemporary philosophers who have turned to the problem of national self-determination at some point. Nevertheless, the dominant tendencies in political philosophy have only very belatedly (if at all) begun to include consideration of the problems involved with establishing the legitimacy of nation-states.

This is certainly true of John Rawls and the philosophers who have taken his work as paradigmatic of what political philosophy should be concerned with. For Rawls, and for much of contemporary political philosophy, the problem of distributive justice is the central problem to be considered. As communitarian critics of Rawls have been lately pointing out, this begs a crucial question: for which political community are these problems to be examined, and who is entitled to be a member of that community?"

Rawls seems to have no answer to this question, even in his latest work on human rights and international law.¹⁹ A student of Rawls, Thomas Pogge, who has attempted to extend

¹⁸Michael Walzer is the critic who has emphasized this problem of "membership" the most; see his book, Spheres of Justice: A Defense of Pluralism and Equality (New York: Basic Books, 1983), as well as the discussion of this issue in Chapter 4 below.

¹⁹See John Rawls, "The Law of Peoples," in Stephen Shute and Susan Hurley (eds.), On Human Rights: The Oxford Amnesty Lectures 1993 (New York: Basic Books, 1993).

Rawls' work to the international arena, also does not consider the specific role of nations in international affairs, beyond an observation that nationality is a "contingency" similar to class and ought to be disregarded as a precondition for participation in deciding the nature of a just distribution of goods (i.e., from the "original position").²⁰ For Pogge, and for Rawls, a "nation" continues to be a state and "self-determination" simply means self-government.

In other words, the problems that concern nationalists and their internationalist opponents--for instance, whether nations ought to "have" states--cannot even be formulated within the terms of contemporary liberal contractarian theory.²¹ This is because they are primarily questions not

²⁰Thomas Pogge, Realizing Rawls (Ithaca, N.Y.: Cornell University Press, 1989), p. 247.

²¹One figure in this philosophical school who has (briefly) considered questions of nationality and self-determination is Charles R. Beitz, in his book, Political Theory and International Relations (Princeton, N.J.: Princeton University Press, 1979). But Beitz considers self-determination only in terms of colonial situations, which he regards as embodying a problem of social injustice, rather than political obligation. While his treatment of the question of "eligibility" for citizenship includes consideration of the nationalist view of this matter, he does not discuss the thornier issue of whether national groups might have rights to determine eligibility--only whether nationality can reasonably be considered a relevant criterion of membership. Beitz's discussion, while not a bad one, has the marks of a digression from the more important issue of international distributive justice, rather than of the consideration of a political principle that could potentially trump claims for any particular distribution of goods.

about distributive justice but about political obligation-- for instance, to which state are individuals obligated? and are there groups (nations) that can claim states of their own (i.e., are not obligated to remain within their states of origin)?

Further consideration will be given below (particularly in Chapter 4) to the communitarian view of these questions and whether its criticism of contractarian theories is warranted. But it is worth discussing here the work of some of the few scholars who have directly studied the ideology of nationalism, and in particular the concept of self-determination. The most prominent and interesting of these are the early studies by Alfred Cobban (1945) and Elie Kedourie (1960).

Immediately after the end of World War II, the historian Alfred Cobban published a study of national self-determination, still the only book-length consideration of the subject.²² Cobban was concerned not so much to develop a philosophical justification or critique of the idea, as to show how it was being discussed and applied by a number of political movements throughout the world. A secondary interest was the ways in which this idea could be dealt with through the evolving institutions of international law.

Two features of Cobban's study are apparent to this

²²The Nation State and National Self-Determination, rev. ed. (New York: Crowell, 1970).

contemporary reader--the dated character of his sources (particularly the political debates in various world regions) and the timely nature of his normative conclusions about nationalism. Cobban wrote before the demise of the colonial empires in the 1950s, before the elaboration of an international law of human rights in the 1960s, and before the contemporary revival of ethnonationalist movements for secession.

The latter is particularly significant in this context; the 1940s were marked by the discrediting of ethnic nationalism in Europe and North America through its association with Nazi ideology during the second world war.²³ Yet, a generation later, an "ethnic revival" in the First, the Third, (and more surreptitiously) the Second Worlds was gathering strength.²⁴ In the last five years, ethnonationalist ideas, movements, and conflicts of an intensity not seen since the 1940s have occurred.²⁵ Cobban, needless to say, wrote in a period in which these ideas were largely discredited; we exist today amidst the revival of

²³Wentworth Ofuatey-Kodjoe, The Principle of Self-Determination in International Law (New York: Nellen Publishing Co., 1977), p. 30. Of course, outside Europe there were counterexamples--the most prominent being the Zionist and Indian Muslim movements that resulted in the independence of Israel and Pakistan.

²⁴See Orlando Patterson, Ethnic Chauvinism: The Reactionary Impulse (New York: Stein & Day, 1977).

²⁵See Henry Kamm, "Yugoslav Refugee Crisis Europe's Worst since 40's," New York Times, July 24, 1992.

nationalism in all its forms.

Not the least remarkable feature of this revival is the philosophical respectability of ideas thought to have been discredited and/or irrelevant a generation or two ago. For instance, in contemporary discourse one can find advocacy of the "new nationalism," even the "new tribalism," and defenses (under certain conditions, of course) of individuals' identification with the state, of restrictions on political participation, of the withdrawal of citizenship from resident populations, and of their forcible removal (recently designated as "ethnic cleansing") from their homes.²⁶

Cobban did not anticipate these recent developments in political philosophy; but he did have what might constitute an appropriate response to them. He made three points in the conclusion to his book: (1) the idea of national identity is not a stable or reliable guide to peoples' culture or loyalties; (2) the idea of the nation-state cannot solve the problem of sovereignty--that is, it cannot determine when a state is legitimate; and (3) there is no

²⁶See Albert Blaustein, "The New Nationalism," American Journal of Comparative Law, Supplement (1982); Michael Walzer, "The New Tribalism," Dissent (Spring 1992); Yael Tamir, Liberal Nationalism (Princeton, N.J.: Princeton University Press, 1993); Allen E. Buchanan, Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec (Boulder, Colo.: Westview Press, 1991); Harry Beran, "Who Should Be Entitled to Vote in Self-Determination Referenda?" in Terrorism, Protest, and Power, ed. M. Warner & R. Crisp (London: Edward Elgar, 1990); and Chapters 2-4 below.

historical necessity to the nation-state--on the contrary, it is historically an exception.

The idea of national identity, according to Cobban, implies that individuals' identities are unitary and separable along national lines, when in actuality, "[n]ationality . . . is never stationary; it is constantly being built up or broken down."²⁷ This fluid situation means that the idea implicit in the concept of national self-determination--that all states should be nation-states--is an impossibility: "The attempt to make the culturally united nation state the one and only basis of legitimate political organisation has proved untenable in practice. It was never tenable in theory."²⁸

The goal of achieving nation-states, however unrealizable, can nevertheless prove politically potent. This means that as nationalities enter into conflicts with one another or with states over claims to sovereignty, the destruction of one or the other group or country becomes virtually inevitable. The nation-state cannot be the solution to such conflicts: "National sovereignty . . . is irreconcilable with any solution of the fundamental political problems of the modern world."²⁹ Nevertheless, nationalities sometimes have legitimate demands requiring

²⁷Cobban, National Self-Determination, p. 125.

²⁸Cobban, National Self-Determination, p. 129.

²⁹Cobban, National Self-Determination, pp. 141-42.

redress; the fact that nation-states are not the form this redress should take does not negate the real existence of problems of national oppression and discrimination.³⁰

The solution lies in finding a new form of limited state sovereignty that respects individual liberties while maintaining the necessary cohesion for "organized social life."³¹ This new form of sovereignty is not a quixotic search for limits on the powers of the state because, Cobban insists, it is the nation-state that has been historically exceptional:

To limit the rights of national sovereignty and self-determination is in effect to reverse the process by which cultural and political nationality became allied, and to separate them once again. This may be condemned as flying in the face of history, but in fact what we are doing is calling on a thousand years of history to redress the balance of a century and a half. Nationality developed and national cultures flourished for century after century in the absence of any idea of national sovereignty.³²

Kedourie, in his intellectual history of nationalism,³³ agrees with Cobban that the nation-state is a deeply flawed idea. But Kedourie makes a much more thoroughgoing case against national self-determination: he rejects the very idea of self-determination as a political norm. National self-determination is regarded by Kedourie as the central

³⁰Cobban, National Self-Determination, pp. 148-49.

³¹Cobban, National Self-Determination, p. 139.

³²Cobban, National Self-Determination, p. 147.

³³Nationalism, 4th ed. (Oxford: Blackwell, 1993).

doctrine of nationalism;³⁴ in his definition of it, the role of the will--in this case, the "national will"--is important: "National self-determination is, in the final analysis, a determination of the will; and nationalism is, in the first place, a method of teaching the right determination of the will."³⁵

Self-determination, in Kedourie's view, was first regarded as a political goal by Immanuel Kant and J. G. Fichte, who traced it to the value of autonomy as a primary moral norm. The state is seen both as the means for achieving an autonomy of the individual will and as deserving of political autonomy in its own right. Kant, in Kedourie's controversial interpretation of him, subordinates all other considerations of valid personal goals and social institutions to this norm of autonomy:

[In Kant] is evident with particular clarity that process of reasoning which makes autonomy the essential end of politics. A good man is an autonomous man, and for him to realize his autonomy, he must be free. Self-determination thus becomes the supreme political good. For its sake Kant is prepared to accept brutality; to it he subordinates all the other benefits of social life; self-government, as a well-known slogan was later to put it, is better than good government.³⁶

In Fichte, Kedourie finds the transition from the individualism of Kant to the focus on a state that can embody a universal will. The connection between the moral

³⁴Kedourie, Nationalism, p. 31.

³⁵Kedourie, Nationalism, p. 76.

³⁶Kedourie, Nationalism, p. 22.

idea of self-determination (in Kant) and the national/political idea of it (in Fichte), is the notion that "freedom is . . . an internal state, a determination of the will according to self-imposed commands" ³⁷ Since individuals are, for Fichte, "phantoms," it is only in their subsumption within a "universal consciousness"--that of the nation-state--that freedom can be found.

This view of the philosophical basis of nationalism leads Kedourie to see the idea of national self-determination as essentially ideological in a special sense. While nonnationalistic politics is concerned with identifying the "common concerns" of a society and the form of government best able to satisfy these concerns,

Ideological politics [e.g., nationalism] is very different. Such a politics is concerned to establish a state of affairs in society and state such that everyone...will live happily ever after. To do so, the ideologist will...look upon state and society as a canvas which has to be wiped clean, so that his vision of justice, virtue and happiness can be painted on this tabula rasa.... A...moment's reflection will lead one to see that the very attempt to wipe the canvas clean must entail arbitrariness, lawlessness and violence on a stupendous scale, such that the ideological vision of perpetual peace and joy must recede further and further into the horizon. ³⁸

Kedourie contrasts nationalism, based on an ideology of national self-determination--that every nation ought to have its autonomy through an independent nation-state--with a

³⁷Kedourie, Nationalism, p. 30.

³⁸Kedourie, Nationalism, pp. xiii-xiv.

constitutionalism that aims at "good government" without regard for such demands. Good government is nonideological in that it is an accommodation to circumstances more than an espousal of absolute goals:

The truth is that good government depends as much on circumstances as on a desire for freedom and there are regions of the globe which may never know its blessings. But it is characteristic of doctrines such as self-determination to disregard the limits imposed by nature and history, and to believe that a good will alone can accomplish miracles....³⁹

Kedourie provides a powerful critique of the delusions contained in the idea of national self-determination, a critique that will be discussed more below. But he errs in condemning the idea of self-determination as such. It is the ways in which national self-determination is different from ideas of personal and political self-determination, not the ways in which it is similar, that can explain the inadequacies of its justification and the deleterious consequences of its implementation. Nations are a very different type of entity from individuals or states--and this is something that Kedourie overlooks in his criticisms of other uses of self-determination that attack social hierarchies and traditional forms of authority.

Nevertheless, Kedourie's advocacy of limits on the political project of self-realization embodied in nationalism is an important aspect of any critique of the idea of national self-determination. The exact nature of

³⁹Kedourie, Nationalism, p. 104.

these limits--once a blanket condemnation of any type of self-determination is rejected--remains to be defined.

Today, the political idea of self-realization is often designated as the "politics of identity." But whereas Kedourie traced the notion of a collective national will (that seeks self-realization as political autonomy) back to the will of individuals, the identity of groups is now much more likely to serve as the basis for claims to national autonomy and self-determination. In a recent essay on identity politics (which he calls the "politics of recognition"),⁴⁰ Charles Taylor has described a different intellectual history from the one presented by Kedourie--a history of the emerging idea of group identity or "difference" that is to be recognized in its own right.

In the idea of the recognition of difference, group identities acquire the importance that individual wills had in modern theories of the social contract. Instead of the equal rights of individuals to enter into contractual relations, identity politics espouses the fundamental value of different group identities--each of which can claim rights because of their uniqueness:

...with the politics of difference, what we are asked to recognize is the unique identity of this individual or group, their distinctness from everyone else. The idea is that it is precisely this distinctness that has been ignored, glossed

⁴⁰See Charles Taylor, "The Politics of Recognition," in Multiculturalism and the "Politics of Recognition," ed. Amy Gutmann (Princeton, N.J.: Princeton University Press, 1992).

over, assimilated to a dominant or majority identity.⁴¹

There are two features of this identity politics that make it the philosophical basis for the concept of national self-determination, though Taylor does not make this connection explicit. First, there is the idea that what needs recognition--and political recognition in particular-- is the actual value of particular identities. This is distinct from the more universalistic "politics of equal dignity," in which people's potential for development requires respect:

In the case of the politics of difference [a] demand has recently arisen: that one accord equal respect to actually evolved cultures...the demand for equal recognition extends beyond an acknowledgment of the equal value of all humans potentially, and comes to include the equal value of what they have made of this potential in fact.⁴²

This demand for recognition of cultural identities tends then to usher in a claim for political identity (or self-determination), since only with the possession of independent states can the recognition of national-cultural identities supposedly be assured.

Second, the focus on identity requires a conception of community within which the process of recognition can occur. But the community, in order to ensure the recognition of a group's identity, must be precisely the kind of community that suppresses difference--in other words, a nation-state.

⁴¹Taylor, "Politics of Recognition," p. 38.

⁴²Taylor, "Politics of Recognition," pp. 42-43.

This consequence is apparent if the communitarian origins of the notion of recognition in the thought of Jean-Jacques Rousseau and G. W. F. Hegel are made explicit:

The struggle for recognition can find only one satisfactory solution, and that is a regime of reciprocal recognition among equals. Hegel follows Rousseau in finding this regime in a society with a common purpose, one in which there is a "'we' that is an 'I,' and an 'I' that is a 'we'". . . . But...equality of esteem requires a tight unity of purpose that seems to be incompatible with any differentiation. . . .⁴³

While Taylor gives a useful history of the origins of the contemporary politics of identity--one that is more discerning of the different forms that such a politics can take than Kedourie's--Taylor does not see (or admit) some of the dangers of the focus on identity. This is because, for Taylor, the primary contrast is between a "liberal proceduralism" that ignores the problem of "cultural survival" and an identity politics that focuses only on this issue. Taylor does argue that there can be a way of reconciling concern for cultural identity with the protection of individual rights, but only if each is weighed against the other and can be forgone for consequential reasons:

...other models of liberal society...are willing to weigh the importance of certain forms of uniform treatment against the importance of cultural survival, and opt sometimes in favor of the latter. They are thus in the end not procedural models of liberalism, but are grounded very much on judgments about what makes a good life--judgments in which the integrity of

⁴³Taylor, "Politics of Recognition," pp. 50-51.

cultures has an important place.⁴

Certainly the idea that a political community must be founded on some conception of the good life--and not just on a system of individual rights and entitlements--is an important, if controversial, point. But Taylor confuses this idea--that there must be some substantive agreement on needs and goals in a legitimate political community--with the idea that this agreement must involve the survival of purportedly traditional cultures. Furthermore, Taylor assumes that it is legitimate for the state to take an active role in ensuring cultural survival (and this is where the unacknowledged connection between identity politics and nationalism arises).

But, for at least one "proceduralist," Jürgen Habermas, the dichotomy between cultural survival and a system of universal rights is a false one. Though Habermas is a proceduralist in the sense that he does not acknowledge the necessity of a substantive conception of the good for a legitimate political community, he also does not espouse an "abstract" or individualistic proceduralism. As he has put it in an interview, universalism does not assume the primacy of rights of unattached individuals, but rather the idea of an openness in attachments:

What then does universalism mean? Relativizing one's own form of existence to the legitimate claims of other forms of life, according equal rights to aliens

⁴Taylor, "Politics of Recognition," p. 61.

and others with all their idiosyncrasies and unintelligibility, not sticking doggedly to the universalization of one's own identity, not marginalizing that which deviates from one's own identity, allowing the sphere of tolerance to become ceaselessly larger than it is today--all this is what moral universalism means today.⁴⁵

In an important article on nationalism, Habermas has pointed to the inadequacies of conceiving of national identities as anything but modern forms of "cultural integration."⁴⁶ This also means that the ways in which national identities are formed allows their manipulation for the purpose of achieving political domination by elites:

Nationalism...is a form of collective consciousness which both presupposes a reflexive appropriation of cultural traditions that have been filtered through historiography and which spreads only via the channels of modern mass communication. Both elements lend to nationalism the artificial traits of something that is to a certain extent a construct, thus rendering it by definition susceptible to manipulative misuse by political elites.⁴⁷

The issue of cultural survival--which implies a notion of identity that is relatively unaffected by modern forms of politics and communication--is therefore beside the point in understanding the relation between identity and political sovereignty. Peoples' cultural identity cannot, in

⁴⁵"Interview with Jürgen Habermas: Ethics, Politics, and History," Philosophy and Social Criticism 14 (1988), p. 436.

⁴⁶Jürgen Habermas, "Citizenship and National Identity: Some Reflections on the Future of Europe," Praxis International 12 (Apr. 1992): 1-19. This article and other work by Habermas will be discussed at more length below; see especially Chapter 4.

⁴⁷Habermas, "Citizenship and National Identity," p. 3.

Habermas' view, be a condition for their membership in a political community.⁴⁸

The current interest in identity politics has not often been connected explicitly with the earlier development of nationalism; yet, nationalism was historically the first form of identity politics. This means that, as the above discussion has briefly indicated, a critique of the idea of national self-determination is also a critique of the legitimacy of at least one version of identity politics. Though the larger issues in this critique are beyond the scope of this work, this connection can profitably be kept in mind.

The four chapters that follow each discuss and criticize a major type of justification for the claim that there is a legitimate right or principle of national self-determination. Chapter 1 is a discussion of a deontological justification that is sometimes given within the context of international law, where national self-determination has been most extensively debated. Chapter 2 concerns a consequentialist justification, as presented principally by Joseph Raz. Chapter 3 is a consideration of a consensual justification, especially in the work of Harry Beran. Finally, Chapter 4 is an evaluation of a communitarian justification, particularly that given by Michael Walzer. All are found wanting, though there is a gradual shift to

⁴⁸Habermas, "Citizenship and National Identity," p. 17.

greater conceptual clarity and political sophistication from first to last. The cumulative effect of these discussions should be the comprehensive rejection of the justifications commonly given today for the belief that there is a general right of nations to self-determination. The conclusion returns briefly to the issue of identity mentioned in this introduction, as well as considering a more limited or "remedial," right of self-determination.

CHAPTER 1
Peoples and Nations in International Law

THE DEONTOLOGICAL JUSTIFICATION OF NATIONAL SELF-
DETERMINATION

Today, claims for self-determination are often made by reference to the Charter of the United Nations, adopted by the original signatory states in 1945. In that document, one purpose of the new organization is said to be "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace" ¹ Further on, it is stated that the U.N. should take measures "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" ²

These passages, by linking a number of undefined concepts of great suggestive power, have subsequently provided a basis for the assertion of a principle of self-determination within international law. Yet, this does not mean that self-determination for nations has been recognized in international law. To understand the relation between

¹Charter of the United Nations and Statute of the International Court of Justice (New York: United Nations, 1989), Article 1, Section 2, p. 3.

²Charter of the United Nations, Art. 55, p. 30.

legal declarations of the rights of peoples and political claims for the self-determination of nations is not an easy task.

Above all, there is the problem of determining whether nations--in some sense of that term--correspond to the concept of a people as it is used in international legal documents. A perusal of the legal literature on self-determination reveals that peoples are the entities that may claim (in certain circumstances) a right of self-determination. An essential part of assessing what status nations have in international law is therefore determining whether a nation can be a people (and therefore be entitled to the legal rights of peoples).

This issue furthermore can form the basis for assessing whether there can be a "formal" or deontological justification for a right of national self-determination. Such a justification, if it is possible, would be founded on characteristics which all nations could be said to have. In that case, such characteristics would form the basis for a right of nations to self-determination that could be (even if it were not presently) recognized in international law.

The idea that national self-determination is a formal right is based on the idea that all agents of a particular kind are entitled to equal consideration because of their capacities as agents. If nations are agents of a certain kind--that is, if they are equivalent to peoples as defined

in international law--then they are entitled to equal consideration on that basis. Two ideas are contained in this notion of a formal or deontological justification of national self-determination: (1) that there is a moral equivalency between all agents (in this case, groups) of a certain kind; and (2) that this equivalency is the result of the equal "dignity" of all such agents. The general idea of such a justification is that the "essence of self-determination is human dignity and human rights"³ Thus, the supposed dignity of nations would mandate that they have a right of self-determination to the extent that nations are equivalent to other groups that already justifiably have such a right (i.e., those recognized as having such a right in international law).

The fact that the general principle of self-determination has increasingly become a part of international law in the last fifty years means that, if nations have the requisite characteristics, capacities, or traits that would mandate such a right, international law would be an appropriate venue for its recognition. Such recognition would take the form of according "nations" the status of "peoples" in international law. But should nations be accorded this status? In short, is there a good

³Lung-chu Chen, "Self-Determination as a Human Right," in Michael Reisman & Burns H. Weston (eds.), Toward World Order and Human Dignity: Essays in Honor of Myres S. McDougal (New York: Free Press, 1976), p. 242; see also p. 210.

case to be made for a right of national self-determination on deontological grounds?

After clarifying the nature of a deontological justification of national self-determination, the argument that this justification is not a good one will proceed in four steps: (1) the origins of the concept of self-determination and its gradual acceptance in international law will be summarized; (2) the current definition of a "people" in international law and its difference from nationalist attempts to expand that definition to include "nations" will be described; (3) the equivalency between peoples and nations that nationalists claim exists will be examined; and (4) two reasons that a reinterpretation of international law cannot provide a deontological justification of national self-determination will be given.

Claims that all nations have a right to self-determination because only such an equality of rights can guarantee a just and peaceful international order have frequently been made, at least since Woodrow Wilson's assertions of these points toward the end of World War I.⁴ But the idea that all nations should be able to claim such a right is to assert something more fundamental than that such a right may or should be guaranteed in international law.

⁴For Wilson, see his statement, quoted by Cobban, that, "The equality of nations upon which peace must be founded if it is to last must be an equality of rights..." (in National Self-Determination, p. 76).

The idea that national self-determination can be derived from the formal equality of nations is a moral idea at least as much as it is a legal one. Yet, interpretations of international legal doctrine provide the best context for understanding this idea since such doctrine already recognizes a wide array of rights for individuals and peoples.⁵ Why, then, should nations not be regarded in this way as well?

This question raises the issue of how such rights are justified: can a right to self-determination for nations be justified on the basis of an assertion of their equal worth (as peoples)? At this point, a distinction between types of justification in legal and in political discourse needs to be made.⁶ The reason that a deontological justification of a right is best considered within the context of an already existing legal system is that laws establish categories which can serve as the basis for claims concerning the proper extent of particular rights. Membership in a legal category (e.g., peoples) mandates recognition of all rights

⁵For a general summary of the status of rights in international law, as well as relevant human rights documents, see James W. Nickel, Making Sense of Human Rights: Philosophical Reflections on the "Universal Declaration of Human Rights" (Berkeley: University of California Press, 1987).

⁶For a discussion of the distinction between justification in legal and in political theory, see Virginia Held, "Justification: Legal and Political," Ethics 86:1 (Oct. 1975), and Rights and Goods: Justifying Social Action (New York: Free Press, 1984), esp. Chs. 3, 7, & 9.

and duties pertaining to that category.

This form of justification can be contrasted with that which pertains in political discourse, where not the formal properties of a right but the consequences of its recognition dictate whether it is to be recognized. Deontological justification, though it may not be applicable to morality as a whole, is highly relevant to discussions of legal rights.⁷

Once the legal system of rights, duties, prohibitions, and so forth is considered as a whole, however, a deontological form of justification seems inadequate. This is because, within certain broad limits, whether a particular legal system is justifiable or not is itself dependent on prior normative commitments of a different nature.⁸ Thus, as will be shown below, while the rights of nations can be argued for on the basis of an existing system of legal rights, such an argument--even if correct on its own terms--must ultimately refer back to more fundamental commitments in order to justify why the system of rights ought to be construed in a certain way.

The operative assumption of the nationalist reinterpretation of international law is that nations and

⁷For further discussion and criticism of the deontological approach to rights, see Chapter 2.

⁸Louis Henkin et al., International Law: Cases and Materials (Saint Paul, Minn.: West Publishing Co., 1980), pp. 211-12.

peoples are the same type of entities--that is, that they are both a similar type of social group. This assumption will be shown to be erroneous in that it overlooks what is distinct about nations and peoples and what consequences about political rights follow from these differences. But first, the history and current status of these terms needs to be made clear.

DEVELOPMENT OF THE IDEA OF SELF-DETERMINATION

As a number of commentators have noted, the concept of self-determination as it is applied to groups, peoples, or nations was derived from a prior philosophical commitment to the equality of persons.⁹ The general transition from an individualistic emphasis on the entitlement of discrete persons to equal treatment and consideration to the idea that communities or groups of some kind have rights themselves has been well documented.¹⁰ However, a distinction between different types of collective rights and between the collectivities that might have such rights are not always made in such accounts.

The idea of national self-determination was predicated on two notions that had a long historical germination. The

⁹Edward M. Morgan, "The Imagery and Meaning of Self-Determination," New York University Journal of International Law and Politics 20 (Winter 1988), p. 359; Heather Wilson, International Law and the Use of Force by National Liberation Movements (Oxford: Clarendon Press, 1988), p. 55.

¹⁰See Kedourie, Nationalism, passim.

first was the idea that any equality that is worth having by nations is a political one--i.e., exclusive control of a particular state by a national group. The second is the view that all nations are entitled to political rights on an equal basis--that some are not more deserving than others. The history of the idea of national self-determination is a story of the gradual combination of these two notions.

Some high points of the development of this idea can be seen through the writings of such thinkers as Kant, J. G. Herder, Fichte, and Giuseppe Mazzini. Kant has usually been regarded as originating the philosophical concept of self-determination,¹¹ though in his view it is applicable only to individuals. A conception of freedom from constraint was regarded by Kant as the principal--and indeed, in his view, the only--right that is applicable to all human beings.¹² While in his Metaphysics of Morals, Kant discusses a right of states, there is no mention of specifically national rights.¹³ Here he is following the usage of Jean-Jacques Rousseau, who viewed nations as the political entities comprised of those individuals who had joined together to form a people, rather than as cultural communities of

¹¹Kedourie, Nationalism, pp. 21ff.; Morgan, "Imagery and Meaning," pp. 358-59.

¹²Immanuel Kant, The Metaphysics of Morals, tr. Mary Gregor (Cambridge: Cambridge University Press, 1991), p. 63.

¹³Kant, Metaphysics of Morals, pp. 130ff.

persons with similar identities.¹⁴

This latter view of nations was formulated largely by thinkers critical of the Enlightenment philosophies of Rousseau and Kant. Such critics as Herder are often taken to be a part of an intellectual movement that has been called preromanticism, the counter-Enlightenment, or Expressivism.¹⁵ An important part of this reaction to the universalistic view of human capacities found in Kant and other Enlightenment thinkers was Herder's belief that only in the multiplicity of human cultures could such capacities be realized.¹⁶

This belief was based on the idea that different cultures or "nations" exemplify human adaptations to diverse physical environments. Herder's well-known view that "each [nation] bears in itself the standard of its perfection, totally independent of all comparison with that of others"¹⁷

¹⁴See Jean-Jacques Rousseau, "On the Social Contract," in Rousseau, Basic Political Writings, tr. Donald A. Cress (Indianapolis: Hackett Publishing Co., 1987), esp. Bk. 1, Ch. 5.

¹⁵In Leonard Krieger, Kings and Philosophers, 1689-1789 (New York: W. W. Norton & Co., 1970), pp. 233-36; Isaiah Berlin, "The Counter-Enlightenment" (1973), reprinted in Berlin, Against the Current: Essays in the History of Ideas (Harmondsworth, Britain: Penguin Books, 1979), pp. 9-10; and Charles Taylor, Hegel (Cambridge: Cambridge University Press, 1975), pp. 13-15, respectively.

¹⁶J. G. Herder, Reflections on the Philosophy of History of Mankind, tr. T. O. Churchill (Chicago: University of Chicago Press, 1968), p. 98.

¹⁷Herder, Reflections, p. 98.

follows from this belief in the nature of human adaptation. But what puts these divergent adaptations in harmony with one another is not a political conception of the rights of nations, but the philosophical "fact" that all nations act in accordance with a single principle, that of reason, even while they realize this principle in quite distinct ways.¹⁸ Astute philosophers of history can therefore perceive that reason actually creates a kind of world unity of all the different (cultural) nations. This unity is not an actual political unity, but simply the philosophical realization that all nations have a role to play in this actualization of human rationality.

While Herder affirmed the equality of nations, but only in a cultural sense, Fichte moves us closer to a conception of self-determination by espousing a belief in the absolute political rights of a culturally-defined nation. Fichte used a conception of freedom derived from Kant's moral philosophy; yet, he applies it much more directly to peoples (rather than only to persons) than Kant did. Fichte defines the principal purpose of government to be that of securing the conditions under which a people can be free.¹⁹ And what is this freedom for? It is to ensure that the "higher purpose" of the nation is achieved--that higher purpose

¹⁸Herder, Reflections, p. 99.

¹⁹J. G. Fichte, Addresses to the German Nation, tr. R. F. Jones & G. H. Turnbull (New York: Harper & Row, 1968), p. 119.

being "that the eternal and divine may blossom in the world and never cease to become more and more pure, perfect, and excellent."²⁰

A great emphasis is placed on patriotism or "love of fatherland" in Fichte's philosophy, since it is this that provides the crucial link between the "eternal, regular, and continuous development of what is purely human" and the possession of the state power that can ensure a secure environment in which this development can occur.²¹ Fichte, like Herder, affirmed the intrinsic worth of nations; yet, at the same time, he maintains that only the use of the state can realize this worth.

It may be instructive to consider Fichte's successor in Berlin, G. W. F. Hegel, who, unlike Fichte, advocated a universal-historical narrative within which alone any nation has value. Hegel viewed nations as not only cultural entities, but more essentially as political associations. In some ways, Hegel advanced the notion of the rights of nations by formulating a political conception of nations that, at the same time, left room for the role of what he called the "national spirit itself"--that is, the cultural preconditions for the realization of a particular type of

²⁰Fichte, Addresses, p. 118.

²¹Fichte, Addresses, p. 125.

constitutional regime.²² As Hegel writes in the Philosophy of Right, "A nation does not begin by being a state."²³ But it does not survive without becoming one either.

Yet, Hegel was not a nationalist, and even in the end argues against the equality of nations. In Hegel's view, nations have value only to the extent that they embody the "universal principle," that is, reason.²⁴ Yet, unlike Herder, Hegel thought it a hopelessly romanticized view of history to think that all nations would or even could further the realization of reason through the working out of a more rational constitution. As he put it in his Philosophy of World History, nations only become "world-historical" to the extent that they are "moments of the one universal spirit"²⁵; this is because "It is only the right of the world-mind which is absolute without qualification . . ."²⁶ In any given historical epoch, only one nation can lay claim to playing an important role on the world-historical stage. In contrast, the other nations "are

²²G. W. F. Hegel, Lectures on the Philosophy of World History, Introduction: Reason in History, tr. H. B. Nisbet (Cambridge: Cambridge University Press, 1975), pp. 96-97.

²³G. W. F. Hegel, Philosophy of Right, tr. T. M. Knox (Oxford: Oxford University Press, 1967), p. 218.

²⁴Hegel, Philosophy of World History, p. 145.

²⁵Hegel, Philosophy of World History, p. 65.

²⁶Hegel, Philosophy of Right, p. 34.

without rights, and . . . count no longer in world history."²⁷ Hegel thus veers away from a general affirmation of national rights despite his acceptance of certain aspects of a protonationalist view of nationhood.

It is only in the writings of the Italian nationalist Mazzini that all aspects of the concept of national self-determination come together, albeit not in a philosophically sophisticated form. For Mazzini, the task of Italian nationalism is but a part of a larger task that all nations (at least those that he recognized as nations!) must undertake. In his best-known work, the Duties of Man, Mazzini combines an advocacy of the "duties to country" with the "duties to humanity." In fact, it is the purpose, in a sense, of nationalism to achieve the common good of humanity: "In laboring according to true principles for our country we are laboring for humanity; our country is the fulcrum of the lever which we have to wield for the common good."²⁸

According to Mazzini, the nation provides a means of realizing goods that are desired by all human beings; thus any nation (or at least any European nation) can, and indeed must, claim an equal role in providing these means. But the immediate task for Italians, as well as for many other

²⁷Hegel, Philosophy of Right, p. 218.

²⁸Joseph Mazzini, "The Duties of Man" and Other Essays, tr. unknown (London: J. M. Dent & Co., n.d.), p. 55.

nationalities, is to secure the political unity of the nation. Only then can Italy or other nations play the equal role to which they are entitled in the community of nations: "Before associating ourselves with the nations which compose humanity we must exist as a nation. There can be no association except among equals; and you [Italians] have no recognized collective existence."²⁹

Mazzini's advocacy of the equality of nations played a role in encouraging the growth of European nationalist movements in the mid-nineteenth century.³⁰ But this was not the only early indication that the idea of national rights (especially to self-determination) was beginning to be distinguished from the prerogatives of existing states. As early as the Congress of Vienna (1815), there had been some recognition of the idea that nations, even when they were not embodied in independent states, had certain rights. The Congress stated that Poland, a country that had been forcibly partitioned between Russia, Austria, and Prussia in the century before, had rights to political representation and cultural autonomy. These rights were in fact institutionalized in the largest, Russian-ruled section of

²⁹Mazzini, Duties of Man, p. 55.

³⁰The effectiveness or lack thereof of Mazzini's advocacy of Italian nationalism is the subject of some debate; for a positive assessment, see N. Gangulee, Introduction to Giuseppe Mazzini, Selected Writings, tr. unknown (Westport, Conn.: Greenwood Press, 1974), esp. pp. 27, 29, & 37; for a view minimizing Mazzini's influence, see Kedourie, Nationalism, p. 99.

the country, as well as, much later, in the granting of autonomy by Austria to the largely Polish region of Galicia.³¹

Nevertheless, until after 1900, neither philosophical statements nor political arrangements could be found that gave systematic expression to the idea of self-determination. This was a concept which did not find succinct statement until the period just before the First World War--and not until the end of that war would it gain wide exposure as an idea that could constitute the basis for a new international order.

Two statements of the idea of self-determination set the basis for discussion of this notion in the three decades before the U.N. Charter in 1945. In 1914, just a few months before the outbreak of World War I, V. I. Lenin wrote in his essay, "The Right of Nations to Self-Determination," that

the principal practical task...of [all] nationalities [is] that of day-by-day agitation and propaganda against all state and national privileges, and for the right, the equal right of all nations, to their national state.³²

³¹On the Congress of Vienna, see Lee C. Buchheit, Secession: The Legitimacy of Self-Determination (New Haven, Conn.: Yale University Press, 1978), p. 61; on Polish nationalism in the nineteenth century, see Breuilly, Nationalism and the State, pp. 83-85; on Galicia, see Robert A. Kann, A History of the Hapsburg Empire, 1526-1918 (Berkeley: University of California Press, 1974), pp. 349-50.

³²V. I. Lenin, "The Right of Nations to Self-Determination," in Lenin, On the National Question and Proletarian Internationalism, tr. unknown (Moscow: Novosti Press Agency Publishing House, 1970), p. 31.

Four years later, and less than a year before the conclusion of the war, President Woodrow Wilson addressed the United States Congress and outlined fourteen points as the basis for a new postwar order. In his address, Wilson made the following statement:

An evident principle runs through the whole programme I have outlined. It is the principle of justice to all peoples and nationalities, and their right to live on equal terms of liberty and safety with one another, whether they be strong or weak. Unless this principle be made its foundation no part of the structure of international justice can stand.³³

Both the meaning and the import of these statements were ambiguous. Lenin's article in favor of national self-determination was actually part of an argument with the Polish socialist Rosa Luxemburg, who opposed self-determination for nationalities.³⁴ Yet, it was in line with

³³Woodrow Wilson, "An Address to a Joint Session of Congress, 8 January, 1918," in Arthur Link (ed.), The Papers of Woodrow Wilson, Vol. 45 (Princeton, N.J.: Princeton University Press, 1966), p. 539; see also Wilson's February 11 address to Congress, in which he makes the following statement:

Peoples are not to be handed about from one sovereignty to another by an international conference or an understanding between rivals and antagonists. National aspirations must be respected; peoples may now be dominated and governed only by their own consent. "Self-determination" is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.

("An Address to a Joint Session of Congress, 11 February, 1918," in Link, Papers of Woodrow Wilson, Vol. 46, p. 321)

³⁴Rosa Luxemburg, "The National Question and Autonomy," in Horace B. Davis (ed.), The National Question: Selected Writings by Rosa Luxemburg (New York: Monthly Review Press, 1976), pp. 101-287.

the main tendency of the Russian Social Democratic Party, which was struggling with ways to unite the various nationalities of the Russian Empire in opposition to the Tsarist state. As early as 1903, the party had, at its second congress, adopted an article in favor of national self-determination.³⁵

Following Lenin's articulation of the view that would become known as "proletarian internationalism"--that is, socialists' support of movements for national self-determination, including secession--it was substantially adopted after the Bolshevik Revolution by two different bodies. In 1920, both the Second Congress of the Communist International and the First Congress of the Peoples of the East, held in Baku, affirmed their support for the rights of all nations to self-determination.³⁶ Once Stalin consolidated his control over the Soviet state in the 1920s, his own pamphlet on nationalism, written in 1913 and possibly the basis for some of Lenin's ideas, became the canonical work on the subject and the basis for Comintern policy, as well as Soviet foreign policy, at least until the mid-1940s.³⁷

³⁵Horace B. Davis, Toward a Marxist Theory of Nationalism (New York: Monthly Review Press, 1978), p. 57.

³⁶Ronaldo Munck, The Difficult Dialogue: Marxism and Nationalism (London: Zed Books, 1986), pp. 89-90.

³⁷J. V. Stalin, Marxism and the National Question, tr. unknown (Tirana, Albania: "8 Nentori" Publishing House, 1979); see especially pp. 31-32.

Wilson attempted to incorporate his advocacy of national rights not only in the settlements arising from the Versailles conference, but in the covenant of the new League of Nations. Yet, he faced substantial opposition within his own administration as well as from other parties to the negotiations concerning the covenant. Both Wilson's Secretary of State, Robert Lansing, and his legal adviser, David Hunter Miller, opposed mention of national rights in the text of the League of Nations covenant.³⁸ Wilson himself was to admit to confusion and anxiety about the large number of demands for consideration due to his articulation of a principle of national self-determination.³⁹ In response, he maintained that the principle applied only to the settlement of postwar disputes and not as a basis for "inquiry into ancient wrongs."⁴⁰

Nevertheless, Wilson's efforts were largely in vain. The League of Nations covenant, to which the United States Congress refused to be a signatory, did not end up

³⁸Robert Schaeffer, Warpaths: The Politics of Partition (New York: Hill & Wang, 1990), pp. 51-52; Buchheit, Secession, pp. 65-66.

³⁹See Wilson's statement that, When I gave utterance to those words ["that all nations had a right to self-determination"], I said them without the knowledge that nationalities existed, which are coming to us day after day.... You do not know and cannot appreciate the anxieties that I have experienced as the result of many millions of people having their hopes raised by what I have said. (quoted in Buchheit, Secession, p. 115)

⁴⁰W. Wilson, cited in Buchheit, Secession, p. 63.

incorporating Wilson's proposed Article 3 on the recognition of national rights. And in 1920, in the Aaland Islands case, the League of Nations' Committee of Jurists refused to recognize national self-determination as a valid principle of international law.⁴¹

The principle of national rights thus did not become an issue within international relations until the adoption of the U.N. Charter in 1945 compelled diplomats and jurists to interpret the articles cited above. It is indicative of the limitations of even a generous interpretation of the Charter that the Universal Declaration of Human Rights, adopted by the new U.N. General Assembly in 1948, included no mention of national rights (though Article 15 did specify the right of individuals to a nationality).⁴²

The adoption of the U.N. Charter containing a mention of the self-determination of peoples transformed debate about the principle of self-determination from one about philosophical principles into one concerned with the interpretation of international law. While jurists prior to World War II for the most part agreed that there was no legal recognition of nations outside of their existence as states, and that self-determination was not a legal right or

⁴¹H. Wilson, Use of Force by National Liberation Movements, pp. 56-58.

⁴²See United Nations, "Universal Declaration of Human Rights" (U.N. Doc. A/811), 10 Dec. 1948, in Ian Brownlie (ed.), Basic Documents in International Law, 2nd ed. (Oxford: Clarendon Press, 1972), pp. 144-49.

principle, legislation and interpretation following the war has made this a point of controversy.⁴³ Consideration of the claims on both sides of the issue about whether nations are recognized to have rights, and in particular a right to self-determination, in international law has become a principle arena of contention between nationalists and internationalists since 1945. Before evaluating the claims that have been made about self-determination, the development of legal precedent concerning the standing of nonstate entities in international law needs to be outlined.

SELF-DETERMINATION IN MODERN INTERNATIONAL LAW

The nature of international law is a matter of considerable controversy. Its sources--whatever their standing as binding legal documents--are various: U.N. General Assembly resolutions, special U.N. covenants, World Court decisions and opinions, state constitutions, interstate treaties, nongovernmental organizations' charters and declarations, and special declarations from adhoc international meetings of jurists. For purposes of this discussion, the significant categories of potential precedent in international law are as follows: (1) U.N. General Assembly Resolutions, (2) World Court decisions, (3) discussions among international jurists of attempts at

⁴³Ofuatey-Kodjoe, Self-Determination in International Law, pp. 149-50; H. Wilson, Use of Force by National Liberation Movements, pp. 78-79.

secession, and (4) special declarations and charters concerning collective rights in international law.

The period of the late 1940s and 50s was not marked by any significant developments in terms of the law of self-determination. Yet, this era saw the growth--and increasing success--of so-called national liberation movements aimed at overthrowing the colonial empires of France, Britain, Portugal, and Belgium. These movements eventually contributed to a shift in international diplomacy in favor of decolonization and the recognition that formerly subjugated peoples could possess rights on the basis of their status as oppressed groups. In the 1960s, this shift was explicitly institutionalized in international law, both at the U.N. and in other ways.

The first indication of this shift was the passing of U.N. General Assembly Resolutions 1514 and 1541 in 1960.⁴⁴ Resolution 1541 constituted a set of criteria that was meant to be used to determine when a trust territory had become self-governing. The earlier and more influential Resolution 1514, however, set out principles pertaining to the process of decolonization, which was already well underway. Above all, the resolution included the statements that there

⁴⁴U.N.G.A. Res. 1514 (XV) ("Declaration on the granting of independence to colonial countries and peoples"), Dec. 14, 1960; U.N.G.A. Res. 1541 (XV) ("Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter"), Dec. 15, 1960.

should be "respect for the principles of equal rights and self-determination of all peoples," that "all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory," and above all, that "All peoples have the right to self-determination" ⁴⁵

This U.N. document was the first of almost yearly reaffirmations of peoples' rights to self-determination that were expressed in General Assembly Resolutions and other documents. ⁴⁶ One example of this was the resolutions concerning Algerian independence that were passed in 1960 and 1961 (U.N.G.A. Res. 1573 (XV) & 1724 (XVI)), recognizing the right of the Algerian people to self-determination, even though Algeria had previously been formally incorporated into France. ⁴⁷ There were limits to the international recognition of claims to self-determination during this period, however. For instance, the attempted secession of

⁴⁵United Nations, Resolutions adopted by the General Assembly during its Fifteenth Session, Vol. I (20 Sept.-20 Dec. 1960), Suppl. No. 16 (A/4684) (New York, 1961), pp. 66-67. For a comparison of the "revolutionary" resolution 1514 with the "evolutionary" 1541 (that is, in relation to the U.N. Charter's statements about self-determination), see Michla Pomerance, Self-Determination in Law and Practice: The New Doctrine in the United Nations (Hague, Netherlands: Martinus Nijhoff, 1982), pp. 10-11.

⁴⁶See H. Wilson, Use of Force by National Liberation Movements, p. 70, for a list of subsequent U.N. General Assembly resolutions affirming self-determination.

⁴⁷H. Wilson, Use of Force by National Liberation Movements, pp. 65-67.

Katanga province from the former Belgian Congo (1960-63) went unrecognized by the U.N., and was ultimately suppressed by Congolese and European forces.⁴⁸

By the mid-1960s, there was an increasing interest in the U.N. in formally recognizing some right to self-determination. This interest was demonstrated by the General Assembly's final passage of the International Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights in 1966. These covenants, originally drafted in the mid-1950s but blocked from U.N. acceptance in part by the United States, accorded self-determination a prominent place. Article 1 of both covenants states that "All peoples have the right of self-determination," and that "The States Parties to the present Covenant . . . shall promote the realization of the right of self-determination"⁴⁹

Perhaps one result of the increasing acceptance of the notion of peoples' rights in the late 1960s was the eventual recognition of the Palestinians first as a distinct people and later as meriting self-determination as a right. This was the first instance of a nonstate entity achieving

⁴⁸H. Wilson, Use of Force by National Liberation Movements, p. 84.

⁴⁹The International Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights, are reprinted in Brownlie, Basic Documents in International Law, pp. 150-86.

official recognition by the U.N.⁵⁰ Two U.N. General Assembly Resolutions in 1969 and 1973 respectively (U.N.G.A. Res. 2535B (XXIV) and 3089D (XXVIII)) marked this recognition of the Palestinians.⁵¹

Even under the new dispensation of an increasingly accepting attitude toward some version of self-determination, limits could still be reached. The case of the Biafran war of secession from Nigeria (1967-70) was an example of this. Not only was it widely held that the Biafran case was not covered by the legislation mentioned above, but the case was never even brought up for discussion at the U.N.⁵²

In many ways, the culmination of a decade of U.N. and other international legislation and debate about the rights of peoples and nations was the adoption of U.N. General Assembly Resolution 2625 (XXV) in 1970 (designated the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in

⁵⁰H. Wilson, Use of Force by National Liberation Movements, p. 74.

⁵¹For documentation of the rationales for these resolutions and for the general U.N. approach to the Israeli-Palestinian conflict, see Committee on the Exercise of the Inalienable Rights of the Palestinian People, The Right of Self-Determination of the Palestinian People (New York: United Nations, 1979), and W. Thomas Mallison & Sally V. Mallison, An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question (New York: United Nations, 1979).

⁵²H. Wilson, Use of Force by National Liberation Movements, p. 86.

accordance with the Charter of the United Nations"). This declaration was in some ways a reaffirmation and extension of the 1960 Resolution 1514 on decolonization.

But in other ways it was something of a departure. Resolution 2625 was a combination of an affirmation of self-determination with a reassertion of the rights of existing states against foreign interference or dismemberment. On the one hand, the declaration states that "the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law," and that "The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention." On the other hand, the declaration stresses the point that "Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country," and that "All States enjoy sovereign equality The territorial integrity and political independence of the State are inviolable" ⁵³

The ways in which such statements may or may not be consistent will be discussed below. But in any case, Resolution 2625 ushered in a new era of even greater recognition of collective rights in international law.

⁵³Resolutions adopted by the General Assembly during its Twenty-Fifth Session (15 Sept.-17 Dec. 1970), Suppl. No. 28 (A/8028) (New York: United Nations, 1971), pp. 122-24.

Another institution, the International Court of Justice (the "World Court"), also played a role in this process of increasing recognition. Two cases in the early 1970s were noteworthy in this regard. In its "advisory opinions" in both the Namibia and Western Sahara cases (1971 and 1975, respectively), the World Court recognized the increasing support for self-determination in international law.⁵⁴

Another instance of this increase in support for the principle of self-determination was the eventual recognition of former East Pakistan, or Bangladesh, as a member of the U.N. after a war of secession from Pakistan in 1971. The eastern region of Pakistan had not previously been considered non-self-governing, a designation that usually determined the legitimacy of a claim of self-determination. Nevertheless, Bangladesh was recognized as a legitimate state and admitted to the U.N. in the 1970s.⁵⁵

Finally, in the late 1970s and early 80s, two non-U.N. documents became instrumental in furthering the general cause of the equality of peoples or nations through self-determination. First, the Universal Declaration on the Rights of Peoples, or Algiers Declaration, was issued by a

⁵⁴"Namibia Advisory Opinion," International Court of Justice Reports (1971), p. 31; "Western Sahara Advisory Opinion," International Court of Justice Reports (1975), p. 32. For a discussion of these opinions, see H. Wilson, Use of Force by National Liberation Movements, pp. 76-77.

⁵⁵See H. Wilson, Use of Force by National Liberation Movements, pp. 82-83, for a discussion of the East Pakistan case.

group of jurists without official status, in 1976. One distinctive feature of this declaration was its distinction between peoples, as bearers of particular rights, and their states. The status of this declaration as an influential edict in international law, however, remains unclear.⁵⁶ Following the Algiers Declaration, the Organization of African Unity adopted the African Charter on Human and Peoples' Rights (also called the Banjul Charter) in 1981 (though it was not completely ratified by members until 1986). In this document, the concept of peoples' rights was given formal recognition by one of the largest interstate organizations other than the U.N.⁵⁷

THE CURRENT STATUS OF SELF-DETERMINATION IN INTERNATIONAL LAW

Given this history of the gradual development of a right of peoples to self-determination, the definition of a "people" is a notoriously difficult problem in international law. What one commentator has remarked about the International Covenants on Rights is generally true of most international documents--that they offer "no useful guidance as to what counts as a 'people'" In all the

⁵⁶For a discussion of the Algiers Declaration, see Richard N. Kiwanuka, "The Meaning of 'People' in the African Charter on Human and Peoples' Rights," American Journal of International Law 82 (1988), esp. p. 83.

⁵⁷On the Banjul Charter, see Kiwanuka, "Meaning of 'People' in the African Charter," passim.

⁵⁸Beran, "Self-Determination Referenda," p. 152.

numerous declarations in which the rights of peoples are affirmed, an explicit delineation of what entity can claim these rights is never found.

Some have maintained that this lack of explicit definition renders the very idea of self-determination problematic. The most famous statement of this view was given by Ivor Jennings: ". . . the doctrine of self-determination [on] the surface . . . seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people."⁵⁹ Jennings makes it clear that he believes this decision must be a largely arbitrary one.

Historically, the problem of defining a "people" in contradistinction to other entities such as nations only gradually became a recognizable issue in international law. In the first flush of concern for the interests and rights of groups that were not states, there was little explicit distinction made between different kinds of groups that might make claims of existing states and interstate organizations. When, in the era of World War I, the rights of peoples were invoked, it was not clear to what they referred. It was, however, commonly thought at that time that culturally-defined nations were able to claim these

⁵⁹Ivor Jennings, The Approach to Self-Government (Cambridge: Cambridge University Press, 1958), p. 56.

rights, at least in some instances.⁶⁰

Nevertheless, nations have never been accorded equal standing with states in international law, despite some early indications to the contrary.⁶¹ There are a number of reasons for this. Certainly one is the vagueness of the concept of a nation, and the inability of politicians or jurists to reach agreement on its meaning.⁶² Another reason is the historical provenance of the concept of national rights, which has served, until recently, to discredit it as a basis for claims to self-determination. During the 1930s and 40s, this idea was used by German diplomats to justify reordering the states and boundaries of Europe.⁶³ Subsequent concepts of a people have been circumscribed in order to avoid association with this usage.⁶⁴

Some jurists, nevertheless, have argued for the recognition of nations as peoples in international law.⁶⁵

⁶⁰Rupert Emerson, "Self-Determination," American Journal of International Law 65 (1971), p. 463.

⁶¹Ofuatey-Kodjoe, Self-Determination in International Law, p. 25.

⁶²Buchheit, Secession, p. 16.

⁶³Ofuatey-Kodjoe, Self-Determination in International Law, pp. 30-31.

⁶⁴Though perhaps this is now changing somewhat; see, for instance, the discussion of recent uses of the concept of "ethnic cleansing" in the former Yugoslavia in Kamm, "Yugoslav Refugee Crisis."

⁶⁵See especially Chen, "Self-Determination as a Human Right," p. 244; as well as Lung-chu Chen, "Self-Determination: An Important Dimension of the Demand for

Whether this is justifiable is to a great extent an issue of whether such recognition is compatible with other norms and mandates of international law. But, it is also a matter of whether there are good reasons to change international law in order to accommodate an expanded conception of peoples.

What then is the current status of national self-determination as a legal right? There is considerable controversy even with regard to a right of self-determination for peoples. Most commentators make a distinction between the self-determination of peoples as a political principle and as a legal right. Many argue that while it may be a legitimate political principle, self-determination cannot be viewed as a legal right of peoples.

Some have viewed self-determination as no different

Freedom," American Society for International Law Proceedings 75 (1981); Istvan Bibo, The Paralysis of International Institutions and the Remedies: A Study of Self Determination, Concord among the Major Powers, and Political Arbitration (New York: Wiley, 1976); Ian Brownlie, "The Rights of Peoples in Modern International Law," in James Crawford (ed.), The Rights of Peoples (Oxford: Clarendon Press, 1988); Kiwanuka, "Meaning of 'People' in the African Charter"; Ofuatey-Kodjoe, Self-Determination in International Law; and Gebre Hiwet Tesfagiorgis, "Self-Determination: Its Evolution and Practice by the United Nations and Its Application to the Case of Eritrea," Wisconsin International Law Journal 6 (1987). It must be emphasized, however, that these scholars are uniformly cautious in suggesting that the right of self-determination may be extended to nationalities, and that virtually all the other legal sources and scholars mentioned in this chapter concur in noting that nations as such do not have a right of self-determination. This idea is much more commonly formulated as a moral imperative (which would mandate the extension of current interpretations of the international law of self-determination to nations) by various philosophers cited in this and subsequent chapters.

from any other principle of international law, inasmuch as, once the basic principle has been formulated in legal documents, it simply requires further definition before it is conclusively accepted within the body of international law.⁶⁶ Yet, in light of other juridical opinions, this view appears too sanguine. For instance, an extremely different assessment is given by Gerald Fitzmaurice, who wrote in 1973 that, ". . . juridically, the notion of a legal 'right' of self-determination is nonsense . . . for can [an] as yet juridically non-existent entity be the possessor of a legal right?"⁶⁷ Another critic of self-determination, Leo Gross, reached much the same conclusion about the same time (1975): ". . . it is clear that nowhere has a right to self-determination in the legal sense been established."⁶⁸

Other jurists hold diametrically opposed views. U. O. Umozurike, for instance, maintained in the early 1970s that self-determination was already established as a "fundamental principle of positive international law."⁶⁹ Chen agreed with this view, though with the caveat that no legal

⁶⁶Ofuatey-Kodjoe, Self-Determination in International Law, p. 150.

⁶⁷Gerald Fitzmaurice, quoted in Henkin et al., International Law, p. 211.

⁶⁸Leo Gross, "The Right of Self-Determination in International Law," in M. Kilson (ed.), New States in the Modern World (Cambridge, Mass.: Harvard University Press, 1975), p. 139.

⁶⁹U. O. Umozurike, Self-Determination in International Law (Hamden, Conn.: Archon Books, 1972), p. 271.

principle admits of "unlimited application."⁷⁰ More recently, Michla Pomerance has referred to what he calls the "New United Nations Law of Self-Determination" as being widely accepted.⁷¹ Probably the fairest assessment of the current state of legal opinion with regard to this concept is that of G. H. Tesfagiorgis, who wrote in 1987 that, "The debate on whether self-determination is a political right or a legal principle itself is far from settled in international law circles."⁷²

Why is it that a right of self-determination in international law is so controversial? Here a reminder of the problems mentioned above is appropriate. Defending self-determination (and even more so, national self-determination) as a concept in international law encounters two difficulties. First, it must be shown to have a purpose that connects it with other central concerns of contemporary international law, particularly those involving notions of human rights. Second, it must not be incompatible with central rights and priorities that have already been incorporated into international legal doctrine, above all the rights of existing states. And in order to claim a right of self-determination for nations, the additional

⁷⁰Chen, "Self-Determination as a Human Right," p. 225.

⁷¹Pomerance, Self-Determination in Law and Practice, p. 12.

⁷²Tesfagiorgis, "Self-Determination," p. 88.

problem of establishing the standing of nations as such in international law must be solved.

Before considering (and then rejecting) the central assumption of nationalists--that nations qualify for the same claims and rights as peoples in international law--it is important to get clear about what self-determination actually means in a legal context. Far from being a general assertion of the political rights of particular groups, self-determination is viewed as legitimate only when certain conditions apply. It is these conditions that determine the applicability of the principle to particular groups or situations.

Self-determination has often been characterized as being of two types--internal and external. Internal self-determination means that a people possesses the ability to choose its own political institutions and authorities, without interference from others.⁷³ It could accordingly be taken to be a mandate for the creation of democratic decisionmaking processes within existing states. But this would suggest a separation between the people or citizenry of a country and its state--a point of continuing controversy in international law. A more frequent interpretation is that internal self-determination

⁷³Antonio Cassese, "The Self-Determination of Peoples," in Louis Henkin (ed.), The International Bill of Rights: The Covenant on Civil and Political Rights (New York: Columbia University Press, 1981), pp. 97-98.

constitutes a prohibition against intervention by some states in the affairs of other states, and is thus somewhat redundant when considered in conjunction with the general advocacy of nonintervention in international law.⁷⁴

External self-determination means the ability of a people to create institutions of self-government when they are in a condition of dependency or subjugation.⁷⁵ It thus has meaning primarily in the context of the transition of non-self-governing territories such as colonies to independence. External self-determination constitutes the chief impetus behind the 1960 declaration on decolonization, as well as other documents addressing the status of colonies or former colonies. As in the case of internal self-determination, in the absence of a clear colonial situation to which the principle can be applied, external self-determination tends to shade over into the general body of customary international law that prescribes respect for the sovereignty of states (and, by extension, of the peoples inhabiting those states).⁷⁶

There is, in addition, one newer area of application of a right of external self-determination: a right to the control of natural resources--and even to development as such. In the International Covenants on Rights, as well as

⁷⁴Emerson, "Self-Determination," p. 466.

⁷⁵Cassese, "Self-Determination of Peoples," pp. 98-100.

⁷⁶Cassese, "Self-Determination of Peoples," p. 101.

in subsequent U.N. resolutions dealing with issues of development, peoples are granted the right to control the natural wealth and resources of their states.⁷⁷ This has been extended by some jurists to encompass a general right to development, though this is a controversial claim in current legal discourse.⁷⁸

In both types of self-determination recognized in international law, self-determination is justified only when the fundamental right of peoples in international law to self-rule has actually been violated. A simple assertion of the rights of a people, independent of the presence or absence of specific types of governance, is insufficient to warrant a claim to self-determination.

There is, however, one aspect of self-determination that could be grounded on assertions of national rights irrespective of the nature of particular political systems. This is the right to the secession of distinct peoples from existing states. The issue of secession at this point is whether it can be seen to be an aspect of the general right to self-determination as defined in international law.

The first thing to be said about this is to distinguish between independence and secession as such. A right to self-determination may result in a claim to independence--

⁷⁷Cassese, "Self-Determination of Peoples," p. 103.

⁷⁸For a critique of the idea of a right to development, see Brownlie, "Rights of Peoples," pp. 14-15.

such as for a colony or trust territory. But secession proper means the breakup of an established country or state into different independent entities.⁷⁹

A number of jurists have pointed out that, though independence may be warranted as a means to self-determination in certain instances, it is not in any sense required for self-determination to be achieved. Other means to self-determination include the association, integration, or federation of peoples within existing states.⁸⁰ Independence is therefore permissible but not mandated in cases of legitimate claims of peoples to self-determination.

Secession is viewed much more problematically than independence in international law. The standard judgment about this is that secession is not only not synonymous with self-determination, but that it is not even a justifiable part of it, "at least as any continuing right."⁸¹ Of

⁷⁹There is a special case of secession in which it seems to be clearly justified--that in which there is a right of secession for already demarcated units of a federal state that is recognized in the constitution of that state. An example of this is the breakup of the Soviet Union: the legal secession of the various Soviet Republics was allowed in the Soviet constitution. Yugoslavia may present another example of this case. Of course, these examples are indicative of a formal legal right which may not be justifiable on broader moral grounds.

⁸⁰Emerson, "Self-Determination," p. 470; Ofuatey-Kodjoe, Self-Determination in International Law, p. 159; Kiwanuka, "Meaning of 'People' in the African Charter," p. 93.

⁸¹Emerson, "Self-Determination," p. 464; see also H. Wilson, Use of Force by National Liberation Movements, pp. 84-85.

course, some have maintained that this means that little is left of a right to self-determination, except in cases of decolonization.⁸² Nevertheless, it seems to be the case that secession can be justified according to standard legal doctrine only when the people concerned is non-self-governing in contradistinction to the rest of the country in which it resides.⁸³ But this is to make the legitimacy of secession dependent not on claims for national rights, but on the existence of a pattern of political domination by one group over another within a particular state.

Whether self-determination is therefore considered to be internal, external, concerning only persons or natural resources as well, or involving independence from a foreign power or secession from an oppressive state, it is not generally applicable to all members of any category (such as nations) by right--but only when appropriate conditions pertain. Nevertheless, in order to make even a preliminary claim to self-determination, a group must possess a certain status, according to virtually all legal documents asserting the principle. This status, as previously mentioned, is that of a people. Thus, prior to any determination of whether the conditions for justifiably claiming a right of self-determination apply, a determination must be made as to

⁸²Emerson, "Self-Determination," p. 465.

⁸³Ofuatey-Kodjoe, Self-Determination in International Law, p. 162; H. Wilson, Use of Force by National Liberation Movements, p. 87.

whether the claimant is in actuality a people entitled to make such a claim. This, in turn, becomes a question of what a people is in international law, and whether nations are to be considered peoples.

THE DEFINITION OF "PEOPLES" IN INTERNATIONAL LAW

Despite continuing controversy about this point, some jurists insist that state and interstate practice can set useful guidelines for determining the nature of a people even when international legal documents have not.⁴ It is therefore worthwhile surveying the different possibilities concerning the legal character of peoples to ascertain whether there is some consensus about it.

A preliminary distinction may be made for purposes of clarification between a people and a nation, and the rights of self-determination appropriate to them. Tesfagiorgis points to this distinction in writing that,

"the right of a people to self-determination" has come to mean the right of a people to have a government resulting from its own free choice without any external or internal domination [while] "the right of a nation to self-determination" has come to mean the right of a nation to independence....⁵

This distinction suggests that "peoples" and "nations" refer to different entities. Whether nations can be regarded as

⁴Brownlie, "Rights of Peoples," p. 5; H. Wilson, Use of Force by National Liberation Movements, p. 80; Tesfagiorgis, "Self-Determination," p. 80.

⁵Tesfagiorgis, "Self-Determination," p. 79 (italics added).

satisfying the legal definition of a people is what is in question. Yet, the distinction between peoples and nations will, in the end, still be an important one, if only in the political uses to which these terms have been put.

The differentiation that is made in current international law between peoples and nations seems to be one of considering peoples to be essentially territorial entities--that is, inhabitants of existing states--while nations may be groups of persons defined in other ways (such as by their ethnic identities).⁶⁶ This sense of "peoples" accords with the emphasis put on states and boundaries in international law, and its strong presumption against recognition of nonstate entities.

The emphasis on territory as the principal determinant of a people was codified only after 1945, and even more so, after the 1960 U.N. declaration on decolonization. Prior to that, especially in the interwar period, peoples were often considered to embody an ethnic identity. This was, however, as pointed out in the discussion of Lenin and Wilson, a contentious and ill-defined view at the time. Above all, it gained (temporary) currency in the context of the reorganization of Europe after World War I. The more current definition, and the one that finds seemingly more emphasis in international documents is of a people as a

⁶⁶H. Wilson, Use of Force by National Liberation Movements, p. 80.

group that shares some political identity--for instance, as the citizenry of a state or as a population subject to rule by another state.⁸⁷

It should be remembered that "peoples" have largely been defined in international law within the context of particular resolutions or declarations dealing with specific problems of interstate relations. The primary context of the original definitions of peoples (such as in the U.N. Charter and in the 1960 declaration) has been one of decolonization.⁸⁸ This means that the primary category of "peoples" that may uncontroversially lay claim to self-determination is that of the populations of "non-self-governing territories" such as colonies or trust territories.⁸⁹

A couple of implications follow from this emphasis on peoples as the inhabitants of non-self-governing territories. First, the claim of self-determination, which is by definition limited to "peoples," must be understood to also be limited to that of dependent peoples--those who are denied self-government.⁹⁰ Second, self-determination

⁸⁷Emerson, "Self-Determination," p. 463.

⁸⁸Malcolm Shaw, "The International Status of National Liberation Movements," Liverpool Law Review 5 (1983), p. 21.

⁸⁹H. Wilson, Use of Force by National Liberation Movements, p. 82.

⁹⁰Ofuatey-Kodjoe, Self-Determination in International Law, p. 169.

applies to peoples as the populations of whole states, and it does not therefore "extend to insistence by one sector of the population . . . on its own form of self-determination"91

Since non-self-governing territories are generally taken by international jurists to be the paradigmatic cases of legitimate claims to self-determination, the extent to which the notion of dependence or lack of self-rule can be used to cover cases other than colonies has become a major issue in the postcolonial era. There are three instances in which the notion of non-self-governance might be extended: (1) nominally independent states that are effectively under the full or partial control of foreign powers; (2) states that suppress political participation or representation; and (3) sections of the population of a state that are excluded from political self-rule.

The idea that self-determination may apply to independent states as well as to colonies is based on the view that international law is basically concerned with interstate relations. Above all, as Hans Kelsen has noted, the idea of equal rights applies in particular to states: "

⁹¹Kiwanuka, "Meaning of 'People' in the African Charter," pp. 88-89. This stipulation is presumably given because the issue of self-government would be the same for all parts of a non-self-governing territory. In addition, it ensures compatibility with the basic international legal principle of the territorial integrity of states--including potential new states (see the discussion of this principle in the next section of this chapter, below).

. . . the term 'peoples' . . . in connection with 'equal rights'--means probably states, since only states have 'equal rights' according to general international law."⁹²

Concretely, the idea that independent states would have a right of self-determination--distinct from the general rights of territorial integrity and freedom from aggression found in international law--has been construed as a claim for control over a state's own natural resources. Thus, non-self-governance has sometimes been understood to be a justification for claims to economic self-determination. This is evident in a number of U.N. General Assembly resolutions from the 1960s and 70s such as the resolution on sovereignty over natural resources in 1962 and the declaration on a "new international economic order" in 1974.⁹³

A second case of the extension of non-self-governance beyond the category of formal colonies and possessions is that of peoples denied self-rule. In this case, the issue of self-determination concerns the relation of the population of a territory to its government. A people may "have collective rights against their state."⁹⁴

What these rights are has become a matter of

⁹²Hans Kelsen, quoted in Buchheit, Secession, p. 131; see also Brownlie, "Rights of Peoples," p. 11.

⁹³U.N.G.A. Res. 1803 (XVII) & 3201 (S-VI).

⁹⁴Kiwanuka, "Meaning of 'People' in the African Charter," p. 99.

considerable controversy in recent years. Whether or not there is an emerging right of democratic government (understood as a system of legislative representation) has been a source of debate at least since the 1990 Copenhagen meeting of the Conference on Security and Co-Operation in Europe adopted a document affirming such a "right to democracy."⁹⁵ While this might seem to be a justifiable extension of the right of external self-determination (a right invoked against the subjugation of a people, usually by a colonial power), a number of complicated issues are raised by asserting that representative democracy is the only legitimate form of self-government.

Above all, there is considerable potential for conflict with the right of internal self-determination, since violation of a "right to democracy" could be construed as grounds for intervention into a state by other states, alone or in concert. This type of response occurred in the case of South Africa, where the apartheid system was understood to violate the right of a people to self-government. Apartheid was, however, understood within international legal organizations as an exceptional situation mandating an

⁹⁵Conference on Security and Co-Operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension, June 29, 1990 (reproduced by the U.S. Department of State, Washington, D.C.). For an influential argument that a "right to democracy" has been recognized in international law, see Thomas Franck, "The Emerging Right to Democratic Self-Governance in International Law," American Journal of International Law 86 (Jan. 1992): 46-91.

extraordinary response, rather than an example of a new "right to democracy."⁶⁶

Another example of this type of definition of a non-self-governing people was the state of Southern Rhodesia (later Zimbabwe), which was nominally self-governing from the early 1960s, but in fact disenfranchised the majority of its population. In 1962, the U.N. passed a resolution designating Southern Rhodesia as a non-self-governing territory, despite its formal provisions for home rule.⁶⁷ The operative principle was that the majority population in Southern Rhodesia was not allowed any participation in self-government.

Finally, the case of a part of a country being non-self-governing has only very occasionally been recognized in international law. Again, when this is the case, the determining factor has been effective lack of self-rule, not simply the existence of ethnic or cultural differences, or the assertion of a desire for autonomy or separation from the state.⁶⁸

This can be illustrated by the contrasting cases of Bangladesh on the one hand and Katanga and Biafra on the

⁶⁶Emerson, "Self-Determination," p. 468.

⁶⁷U.N.G.A. Res. 1747 (XVI); see H. Wilson, Use of Force by National Liberation Movements, p. 81f., for a discussion of the Southern Rhodesian case.

⁶⁸H. Wilson, Use of Force by National Liberation Movements, pp. 82-84.

other. While the latter two cases are examples of the general tendency in international law to withhold recognition from separatist movements, the former case shows that there can be acceptance of a subgroup of the population of a country as a distinct people under some conditions. Though the principal condition must be the denial of effective self-rule to a part of the country's population, it is probably also true that--as in the case of East Pakistan--other special circumstances must obtain for a large number of states to recognize this denial.⁹⁹ In the case of East Pakistan, the most important special circumstance seems to have been the de facto "denial of human rights in the territory," regardless of its de jure status as part of a self-governing country.¹⁰⁰

The crucial question, however, is determining whether a group within a state--e.g., a nation--can be understood to be a people entitled to a right of self-determination when conditions of political oppression do not necessarily obtain. There is one case in which jurists often concede this right: the case of nationalities within explicitly multinational states (such as the former U.S.S.R. or Yugoslavia). The key to the acceptance of a claim of self-determination for nations regardless of state boundaries in

⁹⁹Kiwanuka, "Meaning of 'People' in the African Charter," p. 90.

¹⁰⁰H. Wilson, Use of Force by National Liberation Movements, p. 83.

this case is that the legitimacy of such a claim has already been recognized constitutionally within the (multinational) state. On this view, such constitutional recognition accords the separate nations some standing in international law that they would not otherwise have. This differentiates them from the case of minority nationalities that do not have any particular constitutional status within a state.¹⁰¹

This latter case, however, is crucial for the nationalist view that the equality of nations irrespective of state boundaries permits claims to self-determination. There have been some jurists who have thought that this case is covered by international doctrines of self-determination under certain circumstances. Most important is the fulfillment of criteria that the minority group be a people. Two criteria were cited by the International Commission of Jurists investigating the situation in East Pakistan: that the group or community in question share certain historical, cultural, ethnic, economic, religious, or geographical attributes in common, and that it "becomes conscious of its

¹⁰¹Cassese, "Self-Determination of Peoples," pp. 94, 101. Whether a state recognizes its nationalities or not seems to be a matter of historical contingency--particularly of whether a federal state system organized along ethnonational lines was adopted at some point--rather than principle. But this does not mean that any general justification for national rights can be derived from the fact that some states have, for contingent reasons, recognized such rights in the past.

own identity and asserts its will to exist."¹⁰²

What is most crucially at stake here is whether minority populations in a state might be considered to be a people, and thus able to claim equality with other "nations" that may have states of their own. One commentator maintains that, provided self-determination is "unrestrictively interpreted," minorities could be considered to be peoples.¹⁰³ However, this begs the crucial question: should "self-determination" be given this "unrestrictive" interpretation? Another jurist maintains that, on the basis of the International Covenants on Rights, "minorities as such do not have a right of self-determination (and secession) generally."¹⁰⁴

This view is supported by another study that concludes that no rights follow from the claim of communities--as homogeneous groups rather than as legally recognized entities--to create homogeneous states of their own. Evidence for this is that virtually all peoples that have been recognized internationally as legitimately claiming self-determination have been "ethnically and culturally

¹⁰²International Commission of Jurists, The Events of East Pakistan (1972), p. 70 (cited in Tesfagiorgis, "Self-Determination," p. 88).

¹⁰³Kiwanuka, "Meaning of 'People' in the African Charter," p. 94.

¹⁰⁴Cassese, "Self-Determination of Peoples," p. 96.

heterogeneous."¹⁰⁵

The nature of peoples in international law therefore seems, on balance, to be different from that of nations as culturally distinct entities. Legal doctrines of the right of peoples to self-determination seem not to apply directly to nations inasmuch as they claim rights in their capacity as national groups; and to apply to them at all only when other criteria--such as prior constitutional recognition or a history of systematic political oppression--also apply. In particular, it seems clear that, at present, there is no legal consensus on recognizing a right of self-determination either for noncolonial peoples or for minority peoples in existing states.¹⁰⁶ Nevertheless, a group of eminent international jurists has concluded that the question of whether or not self-determination applies only to clear cases of colonies and other non-self-governing entities will continue to be controversial because it "depends on political value-judgments of a complex character."¹⁰⁷

While the issue of whether nations have a legal right to self-determination may ultimately remain unresolved, it

¹⁰⁵O'Fuatey-Kodjoe, Self-Determination in International Law, p. 159. The recognition of Israel by the international community in the late 1940s would seem to be an exception to this rule.

¹⁰⁶Hurst Hannum, Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights (Philadelphia: University of Pennsylvania Press, 1990), pp. 48-49.

¹⁰⁷Henkin et al., International Law, pp. 211-12.

is worth recalling the two basic conditions of a legitimate claim to self-determination in current international legal doctrine. In order to make a claim for self-determination, nations would have to satisfy these conditions. They are: (1) that a people constitutes an entity--in other words, that it has "political coherence," and (2) that it also exists under an oppressive regime and accordingly has "subject status."¹⁰⁸

The first condition is a requirement that a group must have the political wherewithal to make a claim to self-determination and to carry it out if accorded recognition. Nationalists might argue that all nations at least potentially possess the "political coherence" necessary to claim a right of self-determination. Nevertheless, international practice suggests that such a criterion refers to existing states, rather than to nations that could become states.

The second condition is important in that only in actual conditions of oppression may a people make a justifiable claim to self-determination, since the purpose of the idea of self-determination is to redefine a relationship between a dominant and a subjugated population so that self-government can be extended or strengthened. The basis of self-determination is the value of self-

¹⁰⁸Ofuatey-Kodjoe, Self-Determination in International Law, p. 157-58.

government means that claims by groups who do not lack self-rule to self-determination could be seen to be "meaningless."¹⁰⁹

SHOULD NATIONS BE REGARDED AS PEOPLES?

Though nations do not presently have legitimate claims to a right of self-determination in international law, the claim could be made that international law should be changed to incorporate such a right. But to extend international legal doctrine to include the rights-claims of nations, such claims must be compatible with the principles governing relations between already existing states that are at the core of international law.¹¹⁰

In addition, it must be shown that nations possess the type of political agency necessary to make a legitimate claim of self-determination. Neither condition for granting nations the same status as peoples can be met. First, to grant nations the same standing as peoples would be inconsistent with other major principles of international law. Second, nations do not have the same kind of agency as peoples; while they possess some type of agency, it is not

¹⁰⁹Ofuatey-Kodjoe, Self-Determination in International Law, p. 156.

¹¹⁰It could, of course, be maintained that the core principles of international law are either based on deeper principles that mandate a principle of national rights or that these core principles ought themselves to be changed. See the discussion later in this section on this point.

of a kind that can warrant political rights-claims.¹¹¹

In order for nations to make claims to self-determination on the basis of an expansion of the category of a people, such claims must be consistent with the governing norms of international law. What is often regarded as the most basic principle of international law, and perhaps the very foundation of any system of interstate relations, is the prohibition of the use or threat of force between states. This prohibition, found, for instance, in Article 2, Section 4 of the U.N. Charter, has been called the "principal norm of international law of our time."¹¹²

In terms of the concrete rights and duties of states pursuant to this norm, there are two that define the limits within which debate about self-determination as a legal right has generally occurred. These rights (of states) are territorial integrity and political sovereignty.¹¹³ The first right is one that states possess to ensure that their internationally recognized boundaries are respected by other states. The second right is that by which states can condemn interference or intervention by other states in

¹¹¹This contention, which may appear unduly categorical, will be argued for in the next section, below.

¹¹²Louis Henkin, "The Reports of the Death of Article 2 (4) Are Greatly Exaggerated," American Journal of International Law 65 (1971), p. 544.

¹¹³Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations (New York: Basic Books, 1977) p. 53.

their internal political affairs.

When peoples are considered to be equivalent to the populations of already existing states, the possibility for conflict between claims to self-determination and these principles of integrity and sovereignty are relatively slight. The self-determination of peoples would be a matter of ensuring the internal self-government and external independence of countries within existing borders.

But when self-determination is considered applicable to nations, the possibility of conflict with international norms increases. In terms of political sovereignty, nations that are defined across international frontiers may provide occasions for intervention into certain states by others seeking a unified national territory. When nations are considered to reside in parts of existing states, the territorial integrity of those states may be threatened, and the danger of internal conflicts (civil wars) increases accordingly.

On the nationalist view, since nations are defined ethnically and not territorially, the correct boundaries of nation-states (as based on their hereditary national homelands) may bear little resemblance to the borders of presently existing states. To realize the self-determination of their nations, nationalists may try to rearrange boundaries or even to dissolve entire countries. It is not surprising that jurists have usually viewed this

possibility as indication that national self-determination, as a general justification for secession or other forms of territorial reorganization, is incompatible with central tenets of international law.¹¹⁴

Nationalists view the matter differently. They argue that particular tenets of international law should be subordinate to the more fundamental principles--such as that of national self-determination--upon which they are based. Whether or not such a principle is more fundamental depends on one's view of the relation between the self-determination of nations and the territorial integrity of states. The standard view is that territorial integrity takes priority over claims to self-determination. A reason that has been given for this is that while self-determination may be a goal set forth by documents such as the U.N. Charter, sovereignty is a principle designed to be acted upon by states and other organizations: ". . . self-determination, in contrast to sovereignty and all that flows from it, was not originally perceived as an operative principle of the [U.N.] Charter . . . it was one of the desiderata of the Charter rather than a legal right that could be invoked as

¹¹⁴Stanley French & Andres Gutman, "The Principle of National Self-Determination," in Virginia Held, Sidney Morgenbesser, & Thomas Nagel (eds.), Philosophy, Morality, and International Affairs (Oxford: Oxford University Press, 1974), p. 147; Ofuatey-Kodjoe, Self-Determination in International Law, p. 189.

such."¹¹⁵ So, even if self-determination were to apply to nations, it would still not be able to override considerations of the territorial integrity of already existing states.

From a nationalist perspective, however, self-determination is what legitimizes rights-claims, while territorial integrity is a subordinate means of ratifying a system of states that is already legitimate: "compliance with the principle of self-determination is the essence, the real legitimacy of a status quo, while territorial stability stands for formal, institutionalized legitimacy"¹¹⁶

This fundamental disagreement in interpretation concerning the relative priority of norms in international law indicates the depth of the problem with invoking legal precedent to settle conflicts about the legitimacy of a principle of self-determination. Though it seems clear that the weight of precedent is on the side of those arguing for the priority of territorial integrity over national self-determination, this does not mean that an argument could not still be made that a principle of national self-determination should override the weight of precedent.

Such an argument is possible because law is an

¹¹⁵Yehuda Z. Blum, "Reflections on the Changing Concept of Self-Determination," Israel Law Review 10 (1975), p. 511 (quoted in Pomerance, Self-Determination in Law and Practice, p. 9).

¹¹⁶Bibo, Paralysis of International Institutions, p. 75.

essentially interpretive enterprise. The crucial question is whether there are any limits on legal interpretation.¹¹⁷ This is a particularly acute problem in international law, given the lack of written constitutions, binding agreements, and enforcement mechanisms.¹¹⁸

It is almost always possible to construe legal documents in such a way as to make a new interpretation seem a reasonable one. International law has few resources with which to adjudicate this kind of dispute. Some jurists have noted that this conflict between the prerogatives of states and those of nationalist movements is "too great to be

¹¹⁷Ronald Dworkin, Law's Empire (Cambridge, Mass.: Harvard University Press, 1986), p. 90. As to the question of limits, Dworkin writes that, "Law cannot flourish as an interpretive enterprise in any community unless there is enough initial agreement about what practices are legal practices..." (pp. 90-91). Such agreement is possible, he believes, because "In fact we have no difficulty identifying collectively the practices that count as legal practices in our own culture" (p. 91, italics added). The limits on interpretation more generally are to be found in the principles underlying a particular legal system--principles that are basic to the nature of the political community of which that legal system is a part; see Law's Empire, passim.

¹¹⁸This lack of international legal institutions has been taken by international "realists" as evidence that international law is an impossibility (or at least, an irrelevance); see, e.g., David Fromkin, The Independence of Nations (New York: Praeger, 1981), p. 77. However, international law can also be viewed more positively as constituting a form of "normative initiative" through which the uninhibited actions of states can be limited; see Richard Falk, The Promise of World Order: Essays in Normative International Relations (Philadelphia: Temple University Press, 1987), esp. p. 202. It is instructive that Dworkin, who is optimistic about the possibility of consensual legal interpretation (see note 117), does not mention international law in Law's Empire.

solved by international consensual procedures."¹¹⁹

Nationalists who argue for the equivalence of nations with other internationally recognized peoples as the basis for claims to self-determination seek to change the prevailing climate of international legal doctrine in favor of such an as yet unrecognized norm. The increasing recognition of nonstate actors in international legal disputes provides an opening for this attempt. Nevertheless, given the nature of international law as a whole it will be hard to decisively change the current consensus against the rights of nations. Claims for national rights are often based on a particular interpretation of international documents such as U.N. resolutions and declarations. Yet, such documents have no definite standing in international law. They are only accorded recognition to the extent that the practice of states ratifies the principles invoked in the documents.¹²⁰

The emphasis on state practices is probably inherent in a legal system in which states have (at least until recently) constituted both the primary litigants and adjudicators. International law, even when it acknowledges nonstate actors, continues to be defined by the ways in which states (and particularly dominant states) seek to set

¹¹⁹Henkin et al., International Law, p. 212.

¹²⁰H. Wilson, Use of Force by National Liberation Movements, pp. 10-11.

the limits of acceptable actions. It is generally only in reviewing state practices that a sense of current norms can be reliably ascertained in the international arena.¹²¹

Two conclusions follow from this assessment of international legal practice. First, it is fairly clear that, with the exception of some dissident jurists, the weight of current legal doctrine does not recognize a principle of national self-determination as a legitimate extension of the principle of political self-determination. While self-determination for peoples has increasingly been recognized in international law, it has not generally been applied to nations (when understood as ethnocultural groups); even an "unrestrictive interpretation" of crucial documents concerning self-determination would probably not result in legitimizing self-determination for all national groups.

But the second conclusion to be drawn is that international law is a notoriously indeterminate enterprise, and leaves room for just such unrestrictive interpretations to be advocated by jurists and put into practice by particular states. Nationalists can take advantage of the indeterminacy of international law to argue for new concepts of national rights, even when they are not taken to be implicit in current doctrine by most commentators. One

¹²¹Judge Tanaka (International Court of Justice), quoted in Self-Determination of Palestinian People, p. 9; H. Wilson, Use of Force by National Liberation Movements, p. 9.

jurist has called such attempts to reinterpret and extend international law "enthusiastic legal literature," because it is based not on the "actual expectations and commitments of governments" but on the "incantations of secular or religious morality."¹²²

Nevertheless, such arguments will probably continue to be made. But it should at least be clear that the law as presently interpreted does not warrant such an interpretation. Whether a reinterpretation is justified must in the end be a question, not simply of generalization from state practices, but also of "some consensus concerning what ought to happen" in international relations.¹²³

If the notion of national self-determination cannot be found within international law as it currently exists, this does not mean that it might not be accepted as such in the future. But for this to happen, national self-determination must be legitimated in the same manner as other political norms. This, it has been argued, is characteristic of law in general in any case, since "every branch of [legal] doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it

¹²²Brownlie, "Rights of Peoples," pp. 14-15.

¹²³Buchheit, Secession, p. 32.

deals."¹²⁴

But just as reference to legal doctrine cannot provide any definitive means for justifying a conception of national self-determination, it cannot definitively exclude such a conception either. The nature of legal disputation is not in any essential way distinct from debate in political philosophy.¹²⁵ Any argument for a reconceptualization of rights or goods involves an attempt to redefine the boundaries of permissible discourse and action. To evaluate the direction and necessity of change in legal doctrine, we must go beyond reference to precedent and interpretation. This may result in an attempt to change the law in ways that accommodate new demands and requirements; or it may reinvigorate the defense of prevailing legal norms.¹²⁶

The view that self-determination is a fundamental basis for other international norms does not, by itself, justify the view that nations in particular are entitled to that right and therefore to recognition as legitimate actors in international law. What is required is an argument for the

¹²⁴Robert Mangabeira Unger, The Critical Legal Studies Movement (Cambridge, Mass.: Harvard University Press, 1983), p. 8.

¹²⁵Dworkin, Law's Empire, passim.

¹²⁶In this connection, see the concept of "enlarged doctrine" in Unger, Critical Legal Studies, p. 16; also, for a defense of the adequacy of current international law in enunciating principles limiting the range of state power, see Jeremy Brecher, "'The National Question' Reconsidered from an Ecological Perspective," New Politics 1 (New Series/Summer 1987): 95-112.

assumption that nations are similar to the political communities--peoples, and their countries and states--that are already entitled to claim a right of self-determination. The understanding of self-determination that is required is one that views the principle, not as a right of political association, but as a "right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives" From this perspective, the rights of peoples and nations both "involve essentially the same idea The external participation of culturally distinct groups in the political process is essentially the same as that of individual States in respect of the Law of Nations."¹²⁷

But to argue for the essential similarity--and therefore entitlement--of nations and peoples requires a conception of social groups that establishes, rather than simply asserts this similarity. Above all, the question that needs to be answered is whether these two types of groups--each of which, it is true, has some type of "distinct character"--have the same type of character. In what sense, if any, are ethnic nationalities and political associations the same kind of entities? To argue that nations ought to be recognized as having the same kind of political agency as peoples--that is, recognized as being entitled to rights of self-determination as embodied in

¹²⁷Brownlie, "Rights of Peoples," pp. 5-6.

contemporary international law--there has to be some demonstration of such a similarity. In order to show this similarity of nations to peoples (or political associations), two other questions must first be answered: what kind of a group is a nation? and does this kind of group have the type of agency that would enable it to legitimately claim a right of political self-determination?

NATIONS AS SOCIAL GROUPS

In arguing for the rights of nations as an extension of the rights of persons and peoples, some commentators have been tempted to define "nations" so broadly that they are equivalent to any social group with some kind of distinct identity. But this approach is not helpful when we attempt to disentangle differing meanings of "nation" from those of "people," "country," "state," and so forth. What, then, is a nation?

One of the most thoughtful answers to this question was given by Otto Bauer, one of the leading Austro-Marxists, in his work, The Nationalities Question and Social Democracy (1907). Bauer defined a "nation" (using a phrase that was to have a great subsequent influence) as "the totality of men bound together through a common destiny into a community of character."¹² While Bauer outlined a number of

¹²Otto Bauer, Die Nationalitätenfrage und die Sozialdemokratie, excerpted in Tom Bottomore & Patrick Goode (eds.), Austro-Marxism (Oxford: Clarendon Press, 1978), p. 107 (italics added).

constituents of such communities of character, his emphasis was on the different ways in which they could be constituted. No one element--language, territory, history--was absolutely required to constitute nations. Rather, it was the coming together in different ways of these and other elements that created a common culture from which a national community could arise.

Bauer's most influential critic, Joseph Stalin, thought Bauer's definition too psychologistic and implicitly nationalist.¹²⁹ There is some truth to this criticism; but Stalin's own solution was to define a nation as an entity that must include a large number of characteristics--including some that Bauer had maintained might upon occasion be omitted. A nation, in Stalin's view, must have a history, common language, territory, economic life, and "psychological make-up." Moreover, "It must be emphasized that none of the above characteristics taken separately is sufficient to define a nation. More than that, it is sufficient for a single one of these characteristics to be lacking and the nation ceases to be a nation."¹³⁰

The problems with this definition, however, are equally weighty. Ernest Renan, who wrote a classic meditation on the difficulties of defining nations, "What Is a Nation?"

¹²⁹Stalin, Marxism and the National Question, pp. 21, 51.

¹³⁰Stalin, Marxism and the National Question, p. 16.

(1882) asks rhetorically: "Why is Switzerland, with its three languages, its two religions, and three or four races, a nation, when Tuscany, for example, which is so homogeneous, is not?"¹³¹ Presumably, Stalin would have maintained that Switzerland, and other such countries, are not nations. Yet, this probably excludes too much that nationalists (as well as historians) might want to characterize with this term.

Renan's own definition, while finding an echo in Bauer's, is somewhat more evocative of the complexities of defining nations:

A nation is a soul, a spiritual principle. Two things, which are really only one, go to make up this soul or spiritual principle. One of these things lies in the past, the other in the present. The one is the possession of a rich heritage of memories; and the other is actual agreement, the desire to live together, and the will to continue to make the most of the joint inheritance.¹³²

Renan emphasized, more than Bauer, the ways in which nations were continually reconstituted by almost constant choices of affiliation by living persons. Hence, his most famous comment on the subject:

A nation implies a past; while, as regards the present, it is all contained in one tangible fact, viz., the agreement and clearly expressed desire to continue a life in common. The existence of a nation is...a daily plebiscite, just as that of

¹³¹Ernest Renan, "What Is a Nation?" in Alfred Zimmern (ed.), Modern Political Doctrines (London: Oxford University Press, 1939), p. 192.

¹³²Renan, "What Is a Nation?" pp. 202-3.

the individual is a continual affirmation of life.¹³³

But Renan's insight into the fluctuating character of nations (and the "national"--really, personal--identities that underlie them) destabilizes any attempt to clearly define nations. Contemporary scholars have generally emphasized one of the two parts of Renan's definition given above: either the historical accumulation of memory in a national identity or the current, ideological commitment to a unitary community. But most of these scholars have effectively given up on positing a stable definition of nations. Rather, the subjective, historically variable elements that constitute nations are emphasized.

Thus, on the one hand, many commentators focus on the actual political manifestations of nationalist sentiments--the better to gauge the results of the "daily plebiscite." For instance, David Copp, who argues that nations are characterized by the desire of their members to live in a nation-state, also argues that divisions among people on the question of statehood constitute "evidence that the group is less a nation, other things being equal."¹³⁴

On the other hand, some commentators focus more on the "spiritual," prepolitical identities of persons that may be

¹³³Renan, "What Is a Nation?" p. 203 [italics added].

¹³⁴David Copp, "Do Nations Have the Right of Self-Determination?" in Stanley G. French (ed.), Philosophers Look at Canadian Confederation (Montreal: Canadian Philosophical Association, 1979), p. 82.

labeled "national." Yael Tamir, for instance, rejects the idea that nations can be objectively defined in terms of a set list of characteristics, concluding that "There is only one subjective fact necessary for the existence of a nation--a national consciousness."¹³⁵ The problem with this definition is that it then simply postpones the accounting to the moment at which one must define "consciousness." This becomes a critical problem when nations are considered to be potentially equivalent to peoples.

Both nations and peoples can certainly be viewed as social groups. The question is whether they are the same kind of social group. Recent work on the theory of social groups has tended to develop what can be called a "relationist" view of groups. This view regards groups as particular relations between individuals, relations which nevertheless can manifest themselves independently of the intentions of individual persons. The relationist approach is a third alternative to the classic characterizations of groups as reducible to collections of individuals or as first-order entities that are organically constituted and of which individuals are component parts.¹³⁶

¹³⁵Yael Tamir, "The Right to National Self-Determination," Social Research 58:3 (Fall 1991), p. 574.

¹³⁶For the individualist view of groups, see, e.g., J. W. N. Watkins, "Methodological Individualism and Social Tendencies," in Alan Ryan (ed.), The Philosophy of Social Explanation (Oxford: Oxford University Press, 1973). For two versions of the organicist view, see Maurice Mandelbaum, "Societal Facts," British Journal of Sociology 6 (1955):

The relationist view of social groups is summarized by Larry May as follows: ". . . social groups should be analyzed as individuals in relationships. Groups themselves do not exist in their own right; but the individuals who compose groups also are often not understandable as acting in isolation from one another."¹³⁷ The relations through which groups are established vary considerably. But they tend to have a similar underlying structure. This is a structure of "affinity" that results from different processes of social interaction. But what is important to understand is that, though these processes are often not voluntary in terms of individual choice to affiliate or not with a particular group, the interaction also lacks a substantial quality--historical, psychological, or otherwise--that organicists have often attributed to groups. Rather, as Iris Young points out, the attribution of

305-17, and Ernest Gellner, "Holism versus Individualism in History and Social Science," in Patrick Gardiner (ed.), Theories of History: Readings from Classical and Contemporary Sources (Glencoe, Ill.: Free Press, 1959). Both the individualist and organicist views have a long history prior to the more recent debates; discussion of some nineteenth-century antecedents can be found in Maurice Mandelbaum, History, Man, and Reason: A Study in Nineteenth-Century Thought (Baltimore: Johns Hopkins University Press, 1971). Additional readings by Watkins, Mandelbaum, Gellner, and a number of other thinkers on this topic can be found in John O'Neill (ed.), Modes of Individualism and Collectivism (London: Heinemann Educational Books, 1973).

¹³⁷Larry May, The Morality of Groups: Collective Responsibility, Group-Based Harm, and Corporate Rights (Notre Dame, Ind.: University of Notre Dame Press, 1987), p. 9.

membership in a group to an individual is a result of a "subjective affirmation of affinity with that group, the affirmation of that affinity by other members of the group, and the attribution of membership in that group by persons identifying with other groups."¹³⁸

In order to understand how nations work as a particular type of social group, a three-fold typology of groups needs to be outlined. This typology is organized on the basis of different types of social interactions or relationships that in turn establish different types and intensities of affinity. The three types of groups are: aggregates, associations, and ascriptive groups. Aggregates are collections of people based on a particular attribute that all members of the aggregate share.¹³⁹ There may be no other affiliation or affinity than the common characteristic shared by these particular persons--for instance, all people with red hair or all the people attending a baseball game on a given day.

Associations, in contrast, embody a stronger relation between persons: it is one of sharing membership in a group that has common goals and purposes. There are thus reasons for relations to be established between individuals--these reasons are shared commitments to the goals and purposes for

¹³⁸Young, Justice and the Politics of Difference, p. 172.

¹³⁹Young, Justice and the Politics of Difference, pp. 43-44.

which the association was created. In this case, one might think of a study group, a union, or, most importantly, some form of political community--a town meeting, social movement, or state. One important part of an associative group is that it has a formal organization of some kind that can take measures toward the achievement of the goals for which the association was created.¹⁴⁰

Finally, ascriptive groups are distinct in that they are formed through a process of the ascription of common characteristics to persons. The important point in understanding ascriptive groups is to determine who does the ascribing. Ascription may occur either because persons ascribe to themselves certain characteristics (class, gender, age, nationality) or because other persons ascribe such characteristics to them. These others may be either those that share this characteristic or those that do not.

Two important points about this process of ascription are worth noting. First, though individuals may ascribe to themselves certain characteristics, or membership in a particular group, this does not mean that membership is necessarily then conferred. Ascription is a truly social relation in the sense that "society"--others with which the individual comes into contact--must also ascribe these characteristics to a person before membership in an ascriptive group can exist. In other words, ascriptive

¹⁴⁰Young, Justice and the Politics of Difference, p. 44.

identities must be recognized. Conversely, ascriptions may be made to persons in spite of their rejection of them. A person may be thrust into an ascriptive group, so to speak, despite their own choice not to be.

This means that, second, ascriptive groups are not created, founded, established, or maintained by any identifiable set of individuals--they are found, recognized, or accepted. One or many individuals' rejection of membership in an ascriptive group does not mean that that group will cease to be, or even that they will cease to be members of it. As Young writes:

...one finds oneself as a member of a group, which one experiences as always already having been. For our identities are defined in relation to how others identify us, and they do so in terms of groups which are always already associated with specific attributes, stereotypes, and norms...one first finds a group identity as given, and then takes it up in a certain way.¹⁴¹

It should now be apparent where nations are to be placed in this typology of social groups: they are a clear case of an ascriptive group. The process of the recognition of national identities that nationalists have pointed to as essential to the establishment and maintenance of nations is in fact an example of the process of ascriptive group formation.

This is the importance of understanding the ethnocultural basis of nations: it is precisely ethnicity that is ascribed to individuals in order to form a sense of

¹⁴¹Young, Justice and the Politics of Difference, p. 46.

national identity. Donald Horowitz, for instance, has argued that ethnicity must be identified through such a process of ascription: "Ethnicity is based on a myth of collective ancestry, which usually carries with it traits believed to be innate. Some notion of ascription, however diluted, and affinity deriving from it are inseparable from the concept of ethnicity."¹⁴²

Similarly, as Copp points out, nations are constituted on the basis of identification with a particular tradition and history and, above all, by ascribing an identity based on this history to a group of individuals as members of the putative nation: ". . . if a group of people is a nation, then the members of the group identify with a certain history and tradition in the same way and accept one another as members."¹⁴³ Nations establish themselves through a process of ascribing characteristics to members and by having these traits ascribed to them by other groups as well.

When nations are understood as specifically ascriptive groups, the difference between them and peoples becomes clear: the latter are associative groups of a particular kind--political associations--but are not formed in the same way as nations. This means that the fact that peoples may

¹⁴²Donald L. Horowitz, Ethnic Groups in Conflict (Berkeley: University of California Press, 1985), p. 52.

¹⁴³Copp, "Do Nations Have the Right of Self-Determination?" p. 73.

be able to claim a right of self-determination on the basis of their possession of a certain political agency does not mean that nations may similarly claim such a right.

It might be well to ask at this point why even peoples have the capacity to claim rights of any kind. A short answer would be that peoples, as political associations, engage in a collective form of decisionmaking that could be regarded as "rational," that is to say, as moral. On the usual deontological account of rights, the fundamental condition of entitlement is the possession of a rational agency or will that enables a person--or a people--to claim a right to something. This is, of course, based on the idea that rights embody a commitment to the dignity of all rational agents and that that is what defines an essentially moral nature.

The fact that political associations include--or should include--a decision procedure of autonomous choice (in other words, self-government in some form) ensures that peoples have the means to make rational, and therefore moral, assessments of their duties to their members and to other groups. It also means that membership in these associations is potentially open to all who wish to abide by the decision procedure (form of self-rule) used in a particular country. Nations, as ascriptive groups, do not have this "moral nature" that would designate them as also having a rational agency capable of making moral choices. Why?

It has sometimes been claimed that groups of all kinds are constituted either by common interests or by the capacity for joint actions.¹⁴⁴ While this may not serve as an adequate characterization of certain kinds of groups-- aggregates, for example--it can serve to indicate attributes of at least some types of groups. The significance of this point is that morality is often thought to be a characteristic of any agents having interests or a capacity for actions. The reason for this is that the interests and actions of agents are thought to indicate an intentionality that is evidence of a moral nature. So the claim that groups possess interests or a capacity for acting is taken as evidence for the fact that there can be collective moral intentions held by particular groups.¹⁴⁵

It should be clear that if groups are defined by definite interests or actions, then this cannot apply to aggregative groups. These are defined by the possession of a certain attribute, irrespective of the internal relations of the group--while such relations would necessarily be a deciding factor in determining whether a group had common interests or could engage in joint actions.

But such an interest- or action-oriented definition of groups does apply to associative groups, since the affinities by which such groups are defined just are common

¹⁴⁴May, Morality of Groups, p. 10.

¹⁴⁵May, Morality of Groups, p. 67.

interests, projects, goals, or ends. Thus, peoples, as well as unions, social movements, and so on, have a capacity for a moral nature inasmuch as they are--often explicitly--oriented toward certain definite ends. This makes these ends, and by extension, these groups, susceptible to moral evaluation.

Ascriptive groups do not seem to be goal-oriented in the same way as associations. They are based not on the pursuit of common interests or goals, but on the basis of ascribed identities, without regard for the intentions of the members of the group (including their intentions to identify themselves in this way).

Nationalists might argue that ascriptive groups such as nations could become associative groups over a period of time by transforming themselves into political movements for independence, for example. Thus, a nationalist party might incite members of a nationality to associate for the purpose of political independence, self-determination, or secession.

But what would determine whether a group does have common interests or goals--whether they are a genuine associative group--would be the degree to which they would be willing to give up their ascriptive conditions for membership in the course of becoming a true association. To retain an identity as an ascriptive group--as a nation, e.g.--would mean that the group would also retain an interest in excluding persons from membership solely on the

basis of some ascribed (national) identity.

This would also mean that such a group could potentially exclude individuals who were in every way suited to associate with them in terms of common interests and actions--such as a desire for political independence, for instance--except in terms of their ascribed identities.¹⁴⁶ Ascriptive groups could therefore only become associative groups by ceasing to be ascriptive in nature--by giving up their distinctive national identities--in which case they would no longer be ascriptive groups in any meaningful sense.¹⁴⁷

Nevertheless, ascriptive groups have had intentions attributed to them on the basis of purportedly common interests or joint actions--such as nations having "desires" for self-determination. If it were the case that ascriptive groups could have such common or joint interests or actions, would this be sufficient to accord them a moral capacity or nature?

¹⁴⁶A recent example of this dilemma for protonationalists is the attempted exclusion of non-Baltic nationalities, particularly Russians, from the newly independent Baltic states. This exclusion has affected Russians and others who supported the secession of these republics--and attempted to work for separation from Russia--just as much as those who did not support it.

¹⁴⁷A former president of Israel, Yitzhak Shamir, has captured this problem for nationalists in stating that, "The Jewish state cannot exist without a special ideological content.... We cannot exist for long like any other state whose main interest is to insure the welfare of its citizens" (quoted in the New York Times, July 14, 1992).

In the case of common interests, there does not seem to be sufficient warrant for according rights on that basis. This is because similar interests do not necessarily generate similar intentions on the part of the holders of those interests. Intentionality seems to be a product, not only of interest, but also of will--and this is precisely where the "moral" component of choice comes in. But if there is a capacity for joint action on the part of a group, then there is at least potentially the capacity for "moral" action. Thus, if groups have a capacity for joint actions, they may be able to claim rights.

Do ascriptive groups have this capacity for action? This is a controversial point. Some have maintained that intentions attributed to nations, for instance, are actually attributable to a subgroup that in various ways imposes its will on the group as a whole. For instance, Stanley French and Andres Gutman write that, "National will is composed of the preferences and beliefs that an elite has formally taught, and otherwise cultivated, by all and any means at its disposal, into the population."¹⁴⁸ While this is undoubtedly often the case, it is not clear that it has to be so. If we assume that ascriptive groups including nations can have a capacity for joint (and intentional) actions, does that also give them the capacity for moral

¹⁴⁸French & Gutman, "Principle of National Self-Determination," p. 149.

actions, and therefore a moral nature?

The answer to this question hangs on what it takes for collectivities to have a capacity for moral actions. Some, such as May, seem to suggest that a simple capacity for action is enough to indicate a capacity for moral action. Yet, at least in the case of moral actions based on universal principles, this would not seem to be true. For a capacity for action could simply be a capacity for taking the instrumental measures necessary to achieve limited ends.

If morality is not conceived in teleological terms as concerned with specific ends (such as human well-being), but is thought of in terms of the moral attributes of human will(s), then more would be needed to indicate evidence of a capacity for moral intentions. Thomas Donaldson has made this point with reference to agents in general: ". . . some entities [e.g., cats or computers] appear to behave intentionally which do not qualify as moral agents One seemingly needs more than the presence of intentions to deduce moral agency."¹⁴⁹

In order for a group such as a nation to have a capacity for moral agency, it must embody within its procedure for taking joint actions--its decisionmaking procedure--a capacity to consider moral reasons. In other words, the decisionmaking procedure for groups must be a

¹⁴⁹Thomas Donaldson, Corporations and Morality (Englewood Cliffs, N.J.: Prentice-Hall, 1982), p. 22.

moral decisionmaking procedure--it cannot limit its deliberations simply to deciding the most efficient means for the achievement of goals already decided upon. As Donaldson writes (with reference to corporations),

In order to qualify as a moral agent, a corporation would need to embody a process of moral decision-making...[which would include the] capacity to use moral reasons in decision-making [and the] capacity of the decision-making process to control not only overt corporate acts, but also the structure of policies and rules....¹⁵⁰

Do nations possess this process of moral decisionmaking? One feature of ascriptive group identity, it should be recalled, is the attribution of such identities to individuals, often without their consent; in fact, the character of whole groups may be ascribed to them irrespective of their desires or intentions (e.g., in cases of prejudice or discrimination). Ascriptive groups just are constituted by a process of involuntary selection (whether inclusive, exclusive, or both). This is what it means for a group to be ascriptive.

A consequence of this is that ascriptive groups could not consider actions or goals that do not assume the ascriptive basis of the group as a given--at least not without threatening the existence of themselves as a group. For instance, a proposal to take actions that would lead to changes in a national identity or to the dissolution of that nation (through some form of integration with others, for

¹⁵⁰Donaldson, Corporations and Morality, p. 30.

instance) would not be considered rational within the context of the group. This is because the very basis of group identity--unlike in an associative group--rests not on reasons for mutual interest or joint action, but on a prereflective basis of affinities and/or prejudices.

Reasons for action, moral or otherwise, that do not assume this basis for ascriptive identity, would be seen as quite unreasonable within the context of an ascriptive group's decisionmaking process. Nations, therefore, cannot engage in a process of moral decisionmaking. This further means that, since the capacity for moral decisionmaking is the sign of whether a group has a moral nature, ascriptive groups in general and nations in particular cannot have such a moral nature. They accordingly lack the capacity to claim self-determination as a right on deontological grounds.

THE DEONTOLOGICAL JUSTIFICATION REFUTED

The idea of justifying national self-determination on the basis of the equal claim of nations and peoples to consideration by the international community founders on two grounds. On the one hand, there is a problem of consistency between a right of national self-determination and other major principles of international law. On the other hand, nations as a type of social group are different in kind from peoples and cannot be regarded as entitled to the same rights.

In order to preserve a modicum of international

stability and the basic integrity of states (as the principal international actors), nations cannot be considered on an equal footing with existing states. Were they to be considered equivalent entities, few states would be able to argue for their legitimate sovereignty over divergent national groups. Nationalities could claim the right to disrupt or rearrange international boundaries in accordance with their own definition of national homelands. Self-determination can be consistent with the fundamental norms of political sovereignty and territorial integrity only if it does not apply to nations as distinct from peoples.

The problem of agency is also fatal to a deontological conception of national self-determination. If rights are a function of moral agency--in this case, of groups--then nations must possess the same type of agency as peoples who can already justifiably claim rights of self-determination. Yet, what distinguishes political communities (of which peoples are the members) is their foundation in processes of association on the basis of interests and goals.

What, on the other hand, distinguishes nations is their creation through a process of ascribing characteristics to individuals--characteristics which concern prereflective identities rather than consciously chosen ends and means. Nations do not coalesce around interests, but around identities. Thus, no right based on common goals and

interests--such as a right to self-determination for political communities (or peoples)--could apply to group claimants who identify themselves primarily on the basis of cultural characteristics.

If there is to be a right of self-determination for nations, it must be a moral right in the sense of its being justified by the consequences of its realization, rather than by the inherent features of group agency. The essential traits and capacities of nations can neither yield a right that is congruent with widely agreed upon principles of international law, nor can it provide the basis for a commitment to a deontologically based right of all groups, including nations. If national self-determination is to be justified as a right, it must be on the basis of specifically consequentialist considerations, such as the effects of adopting such a principle on the claimant-nation, its individual members, and others.

CHAPTER 2
Nationality, Morality, and Group Rights

A CONSEQUENTIALIST JUSTIFICATION FOR NATIONAL SELF-DETERMINATION

While self-determination cannot be justified as a formal or deontological right of nations, this does not exhaust the possibilities for providing a moral argument for its validity. It is conceivable that an instrumental or consequentialist argument could be made and in fact one has recently been put forward, most notably by the philosopher Joseph Raz, along with other figures such as Avishai Margalit and Yael Tamir.¹ This chapter will examine in detail the ways in which they attempt to argue first, that nationality is morally significant because of its instrumental value for the realization of certain social goods and second, that nations may accordingly claim a right of self-determination on consequentialist grounds.

In the last chapter, the idea that nations might legitimately claim rights on the basis of their formal equivalence to peoples in international law was shown to be

¹I refer here primarily to Avishai Margalit & Joseph Raz, "National Self-Determination," Journal of Philosophy 87, 9 (Sept. 1990): 439-61. The philosophical foundations of their argument can be found principally in Joseph Raz, The Morality of Freedom (Oxford: Clarendon Press, 1986). In addition, see the work of Raz's student, Yael Tamir, particularly "Right to National Self-Determination" and Liberal Nationalism. Recently, Raz's view of the nation-state seems to have changed slightly; see his article, "Multiculturalism: A Liberal Perspective," Dissent 41, 1 (Winter 1994): 67-79.

flawed. This was partly the result of the fact that nations possess a different type of collective agency from that of peoples as currently defined in international law. This difference was shown to be one between social groups that are associative, such as peoples, and those that are ascriptive, such as nations.

Yet, it may still be the case that ascriptive groups could claim a legitimate right of self-determination--not on the basis of their similarity to existing peoples, but on the basis of their unique contribution to human well-being. While ascriptive groups are not the same as associations, this does not mean that they may not, in their own way, play an invaluable role in human life. And if this is the case, then it may be possible for such groups to claim rights, such as that of self-determination.

The consequentialist argument will therefore be based on a general assessment of the value of membership in groups for human well-being and the necessity of a right of self-determination in order to ensure the well-being of these groups. Of course, the issue for claims to a right of self-determination for nations is whether the political enfranchisement of nations as a particular type of group does in fact contribute to human freedom and well-being. This issue is most often dealt with in terms of arguments that the good of a nation contributes to the good of its members as individuals. The connection between the good of

(individual) persons and the rights of nations begins with the assertion that one aspect of individuals' freedom is their desire (and therefore their need to be able) to form themselves into--and to identify with--distinct groups of persons. Chen makes this connection between the general value of group membership and a right of self-determination when he writes that,

...self-determination is an important dimension of the demand for freedom in our contemporary world. It is the demand of human beings to form groups and to identify with groups that can best promote and maximize their pursuit of values both in individual and aggregate terms.²

This purported need for group identification as an aspect of individual freedom entails a further need for recognition of these identities. Recognition in this sense has two aspects. First, the members of a group must be able to recognize each other in order to assert their common identity. Without a right to engage in this process of recognition, individuals cannot freely form their identities. But a second dimension of the need for the recognition of identity is that groups must themselves be recognized by other groups for their members to be able to live their lives in accordance with their perceived identities.³

The need of individuals to be recognized as members of

²Chen, "Self-Determination," pp. 88-89.

³Tamir, "Right to National Self-Determination," p. 487.

groups is therefore seen as essential to the realization of the very humanity of individuals. Recognition of groups--specifically, national groups--accordingly becomes a necessary feature of what it means for persons to be free.⁴ The political aspect of this individual need for recognition is a corresponding need of groups to determine what their status as groups (that is, their political affiliation) will be.⁵

The next section will examine the nature of a consequentialist justification of rights and how national groups might be considered to have rights on this basis. Subsequent sections will examine the two fundamental aspects of the consequentialist argument as contained primarily in Raz's work--the idea of nations as "encompassing groups" and the importance of nations attaining self-government--as well as some crucial problems with the argument. It will be shown that, while an instrumental or consequentialist justification for national self-determination overcomes the lack of consistency and the inadequate understanding of groups contained in the legal-deontological justification, there are other equally fatal complications. In particular, the alleged connection between the recognition of national

⁴Chen, "Self-Determination," p. 94.

⁵J. Herman Burgers, "The Function of Human Rights as Individual and Collective Rights," in Jan Berting et al. (ed.), Human Rights in a Pluralist World: Individuals and Collectivities (Westport, Conn.: Meckler, 1990), p. 73.

groups and the well-being of individuals will be shown to be unfounded. In order for such a connection to be demonstrated, much more directly political arguments (of either a contractarian or communitarian kind) will have to be made. Such specifically political arguments for national self-determination are the subject of subsequent chapters.

A CONSEQUENTIALIST PERSPECTIVE ON RIGHTS

The generic idea of rights has often been viewed as mandating a disregard for goods that are contingent on particular individuals' or groups' conceptions of their own well-being. Rights, on this view, are regarded as constraints designed to prevent actions that would violate the dignity of individual persons. Rights are therefore seen as justifiable constraints even on actions that would lead to improvements in general well-being. They enter into our assessment of particular actions, as well as affecting our choice of a course of action (to the extent that we respect such rights) as limitations on actions rather than as enabling conditions of them.⁶

Traditionally, the limits that rights put on actions have been tied to the dignity and capacity for self-respect of individual persons. It is often thought that rights serve these individual attributes or capacities by constraining collective actions that might override such

⁶Amartya Sen, "Rights and Agency," Philosophy and Public Affairs 11:1 (1981), p. 5.

attributes for a supposedly greater good. Nevertheless, the ways in which such collective goods might themselves serve the dignity and self-respect of persons has had to be taken into consideration by advocates of deontological theories of rights. A modified position has sometimes been taken in which rights are seen as constraining actions in most instances, though perhaps not in cases of "special urgency." On this view, a right is a constraint that acts to establish a "certain threshold weight against collective goals in general" ⁷ Only goals of extraordinary importance might be allowed to override such constraints.

But this view of rights does not constitute an instrumentalist view. An instrumentalist conception of rights entails the notion that rights themselves are justified only to the extent that they enable the achievement of particular goods.⁸ This instrumental view of rights is congruent in certain respects with criticisms of rights that see them as derivative of other values.⁹

Raz, for instance, who is critical of "right-based moralities," maintains that rights do have a place--albeit an instrumental one--in what he calls "narrow morality."

⁷Ronald Dworkin, Taking Rights Seriously (Cambridge, Mass.: Harvard University Press, 1977), p. 92.

⁸Sen, "Rights and Agency," p. 4.

⁹Richard Norman, Free and Equal: A Philosophical Examination of Political Values (Oxford: Oxford University Press, 1987), pp. 136ff.

This place is that of the restriction of the unhindered pursuit by individuals of their distinct interests.¹⁰ But what a right-based morality, or what is here designated as a formal or deontological justification of rights, cannot provide is the broader conceptions of value by which it is decided whether particular actions are moral. This is a question, from the instrumentalist perspective, of the choice of worthy goals of action--and this question occurs prior and not subsequent to the postulation of particular rights.¹¹

A purely instrumentalist view of rights tends also, however, to be unable to account satisfactorily for the ways in which the needs and interests of some can be ignored or discounted by the interest calculations of other individuals or groups. The notion of rights, some would maintain, is specifically designed to make this type of calculation impossible. If a system of rights does not do this, then it does not do anything different from other means of conceptualizing goods. The specific idea of rights, often taken to mean a code of permissions and prohibitions,¹² must

¹⁰Raz, Morality of Freedom, p. 214.

¹¹Raz, Morality of Freedom, p. 214. Cf. Norman, Free and Equal, p. 143.

¹²Wesley Newcomb Hohfeld, Fundamental Legal Conceptions (New Haven, Conn.: Yale University Press, 1919); a section of Hohfeld's work concerning rights is excerpted in Joel Feinberg & Hyman Gross (eds.), Philosophy of Law, 4th ed. (Belmont, Cal.: Wadsworth Publishing Co., 1991), pp. 357-67.

serve to set limits on--as well as to expand the possibilities of--particular plans of action.

Both formal and instrumental conceptions of rights are inadequate in certain ways. How then to reconceptualize the nature of rights so that particular rights-claims, such as those of nationalists to self-determination, can be evaluated? On what basis can such rights-claims be justified? Amartya Sen argues that both intrinsic and instrumental views of rights suffer from a similar deficiency: the failure to evaluate rights as an aspect of the goals of action, rather than as an aspect of agency in general, or of the consequences of particular actions.¹³ Instead, he suggests that we understand rights as a particular type of goal, and the justification of a right as an argument that its realization fits with our other ethical goals into a "goal rights system." A goal rights system is one "in which fulfillment and nonrealization of rights are included among the goals, incorporated in the evaluation of states of affairs, and then applied to the choice of actions through consequential links"¹⁴

Two features of the idea of a "goal right" are worth

¹³Sen, "Rights and Agency," p. 15.

¹⁴Sen, "Rights and Agency," p. 15; Sen's view of rights is in some ways comparable to the modified rule-utilitarianism advocated by Thomas Scanlon in his article, "Rights, Goals and Fairness," in Stuart Hampshire (ed.), Public and Private Morality (Cambridge: Cambridge University Press, 1978), esp. pp. 101-8.

emphasizing. First, evaluation of the justification of a right (such as self-determination) is an evaluation of the consequences of adopting the right within an overall system of goods and norms.¹⁵ It is therefore a means of regarding rights (and duties) teleologically--as goods and not only as permissions or prohibitions in the strict sense.

Second, the relation of the goals that the rights are designed to realize, rather than of the actions taken to meet these goals, becomes crucial. Rights are often regarded as stipulating relations between two or more persons; thus, one way to view goal rights might be to evaluate them in relation to the goals of other persons. The problem with this approach, however, is that it could easily devolve into the evaluation of actions rather than goals as such. Since actions are based, in an ethical sense, on the posited goals of the actions, it is more to the point to view rights in relation to particular capacities for action in any individual, rather than between different individuals.¹⁶

But what capacities should form the basis for the postulation of goal rights? In this context, it is unnecessary to make the claim that all rights conform to the idea of a goal right. It is possible that the deontological

¹⁵Sen, "Rights and Agency," p. 39.

¹⁶Sen, "Rights and Agency," p. 16.

view of rights may be appropriate in some cases.¹⁷ In the case of so-called national rights, the argument from the alleged moral agency of nations to a right of self-determination has been shown to be an inadequate one. But what it is still possible to argue is that making self-determination a right of nations might better realize certain human capacities (e.g., a capacity for free choice). If this is the case, the goal ought therefore to be a right.

The reference to a capacity for freedom is a constant in debate about national rights, and in fact, of modern debate about rights in general. Yet, what constitutes freedom is of course very much up for discussion. There are two dimensions to the discussion that are of some relevance in this context. First, there is the metaethical question of how best to conceive of a capacity for freedom. While deontological theories often characterize freedom as the voluntary recognition of duties, consequentialists usually regard freedom as the realization of wants and desires.

The deontological conception of ethics has often been seen to be essentially a matter of stipulating appropriate duties and rights. Any conception of rights that did

¹⁷The deontological idea that a formal equality of agents with like capacities mandates a set of rights applicable to all seems peculiarly appropriate to legal systems. It does, however, not adequately address the question of how the norms of a given legal system are initially justified (as was discussed in Chapter 1 with regard to international law). On the distinction between justification in legal and political systems, see especially Held, "Justification," *passim*.

nothing more than attempt to systematize the performance of duties as a goal would therefore take on a circularity: from where would the duties that are to be posited as goals come in the first place? This is of course the problem of the formalism of deontological ethics; the underlying norms and values of actually existing ethical systems cannot be derived from the formal characteristics of morality itself.¹⁸

The strictly consequentialist--that is, utilitarian--conception of the nature of ends and goods, on the other hand, is overly formal in a different sense. Once ends are identified primarily as wants, they lose their capacity as justifiable ends: the teleological, or purposive, aspect of any goal--in this case, freedom--becomes identified simply with particular, current configurations of desires or interests. The idea of a good therefore becomes formal in the sense that a good is whatever is posited as such within

¹⁸This point has frequently been made in criticisms of Kantian and of deontological ethics generally. For a recent version of the criticism which exempts Kant himself from the exaggerated formalism of subsequent deontological ethics, see Ross Poole, Morality and Modernity (London: Routledge, 1991), pp. 23-24. Of course, as Poole points out, Kant escapes this criticism only at the cost of importing metaphysical assumptions into his ethical theory that are today unlikely to gain assent. For these assumptions, see especially the section on the "Dialectic of Pure Practical Reason" in Immanuel Kant, Critique of Practical Reason, 3rd ed., tr. Lewis White Beck (New York: Macmillan Publishing Co., 1993); for a discussion of the essentially theological nature of the assumptions underlying Kant's conception of morality, see Allen W. Wood, Kant's Moral Religion (Ithaca, N.Y.: Cornell University Press, 1970).

a particular utilitarian "calculus." If freedom is seen as the realization of such goods then it becomes whatever is seen to be desirable within a particular society--regardless of its relation to a deeper, more historically conscious sense of what freedom might be or must entail.¹⁹

Once rights are separated from both the narrowly deontological and consequentialist versions of goods, they can become a way both of delineating the nature of human freedom and a means of realizing that nature. On the one hand, rights conceived as goals are a means of characterizing freedom in the sense that they indicate the unfinished or incomplete nature of every attempt at defining freedom. When rights are taken to be absolute in the sense of an entitlement to intrinsically human capacities, the ways in which the requirements of human freedom vary or may change is overlooked. Rights are, in a sense, substituted for freedom.²⁰

¹⁹Poole, Morality and Modernity, pp. 8-10, 23. Cf. Charles Taylor, "The Diversity of Goods," Philosophical Papers, Vol. 2: Philosophy and the Human Sciences (Cambridge: Cambridge University Press, 1985), pp. 230-47.

²⁰This criticism of rights is essentially the same as Karl Marx's, who insisted that, while certain rights-claims might have some uses as articulations of goals, the actual attainment of these goals was greatly preferable to the granting of "abstract" rights. See, for instance, his statement that "In place of the pompous catalogue of the 'inalienable rights of man'...the modest Magna Carta of a legally limited working-day...shall make clear 'when the time which the worker sells is ended, and when his own begins'" (Capital, Vol. 1: A Critical Analysis of Capitalist Production, tr. Samuel Moore & Edward Aveling (New York: International Publishers, 1967), p. 302). Whether Marx's

On the other hand, when rights are viewed instrumentally as goals, they become a means toward the realization of freedom, rather than a substantive understanding of freedom as such. Freedom is here understood to mean self-realization in the sense of a developing consciousness of the conditions for human fulfillment. Rights (understood as goals) constitute a way of characterizing the idea of self-realization that mediates between institutional and anti-institutional conceptions of what constitutes a developed sense of human freedom.²¹ Goal

comment is seen as indicating a rejection of rights rhetoric in general, or merely the abstractions of classical liberal ("bourgeois") rights-claims, depends on a more comprehensive interpretation of Marx's ethical theory; on this issue, see note 21, below, as well as Allen E. Buchanan, Marx and Justice: The Radical Critique of Liberalism (Totowa, N.J.: Rowman & Littlefield, 1982), esp. Chs. 4 & 7.

²¹The idea of an ethics of self-realization that is neither consequentialist nor deontological, but critical of both, can be found most recently in Allen W. Wood, Hegel's Ethical Thought (Cambridge: Cambridge University Press, 1990), and "Does Hegel Have an Ethics?" Monist 74, 3 (July 1991): 358-85. For the place of this notion in Marx, see Steven Lukes, Marxism and Morality (Oxford: Oxford University Press, 1985). My own position differs from those of Wood and Lukes on a number of points, particularly concerning how thoroughgoing was Marx's critique of rights. Wood rejects the idea that Marx had any ethical theory at all; see Allen W. Wood, "The Marxian Critique of Justice," along with responses by Ziyad Husami and George Brenkert, in Marshall Cohen et al., Marx, Justice, and History (Princeton, N.J.: Princeton University Press, 1980). Lukes, while arguing that Marx had an ethical theory (of emancipation), rejects the idea that there could be a positive Marxian conception of rights; see Steven Lukes, "Can a Marxist Believe in Human Rights?" Moral Conflict and Politics (Oxford: Clarendon Press, 1991), pp. 173-88. My views are closer to that of, e.g., Jack Donnelly, in that I would argue that while Marx would reject deontologically grounded conceptions of human rights, his "constructivist"

rights are a means both of defining the nature of current understandings of what freedom entails and a means of realizing that freedom. At the same time, since goal rights are not inviolable or inalienable, they are subject to revision or abandonment when they interfere with new means of achieving freedom or when they are no longer needed for this purpose.

Nevertheless, the idea that rights are properly understood as designating social goals can be taken to mean that rights constitute recognition of particular human needs. Arguments for particular rights as legitimate goals can therefore be seen as needs-based claims for rights in the sense that they are claims for the priority of satisfying certain needs over other goals or interests of state (or interstate) policy. As Joel Feinberg writes, needs-based claims are not exactly rights (yet), but "permanent possibilities of rights" which give their advocates "a powerful way of expressing the conviction that they ought to be recognized by states here and now as potential rights and consequently as determinants of present

notion of norms might allow a conception of rights viewed as means to an end of emancipation--i.e., rights as goals. See Jack Donnelly, The Concept of Human Rights (New York: Saint Martin's Press, 1985), pp. 41-43. It is still, however, worth remembering, as Allen Buchanan emphasizes in his book, Marx and Justice, that Marx looked forward to a communist society that could dispense with rights altogether, precisely because emancipation had been achieved.

aspirations and guides to present policies."²²

THE NATURE OF A MORAL RIGHT OF NATIONS

Before moving directly to the question of how a right of national self-determination could be justified consequentially, it is worth considering what kind of right self-determination would be when it is claimed by nations. Four issues arise in placing a right of nations within a general typology of rights. First, is it a special or general right? (These are conventionally designated as in personam and in rem rights.²³) Second, is it a negative or a positive right? Third, is it a right of individuals or groups? And fourth, is it a political or a cultural right?

The distinction between special and general rights concerns the person, agency, or audience to which a rights-claim is addressed.²⁴ Special or in personam rights are

²²Joel Feinberg, "The Nature and Value of Rights," Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy (Princeton, N.J.: Princeton University Press, 1980), p. 153. An argument for the recognition of certain rights (but not self-determination!) that proceeds along these lines can be found in Henry Shue, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy (Princeton, N.J.: Princeton University Press, 1980).

²³Joel Feinberg, Social Philosophy (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1973), p. 59.

²⁴On special and general rights, see H. L. A. Hart, "Are There any Natural Rights?" in Jeremy Waldron (ed.), Theories of Rights (Oxford: Oxford University Press, 1984), p. 84; on in personam and in rem rights, see Feinberg, "Nature and Value of Rights," p. 154. These concepts seem close enough to be used synonymously. Waldron wants to distinguish between them, however, on the following basis: while in personam and in rem rights are distinguished as to

rights held against some individual or institution. Such individual or institution, once having acknowledged the rights-claim, must act to satisfy it. General or in rem rights are rights to something; they lack a specific addressee, but must be acknowledged by any and all agents while the rights-claimant acts to realize the right.

Are national rights to self-determination special or general rights? In certain circumstances it may appear that nations hold a claim to self-determination against a particular state or other nation. For instance, in a case of secession in which a nation entirely contained within the boundaries of an already existing state seeks statehood, a claim to self-determination may seem to be held only against that state.²⁵ But this is an inadequate characterization of claims to national self-determination in general. First, it does not account for those nations that seek to establish

addressee, special and general rights are distinguished in terms of whether the right is a result of a special transaction or relationship (special rights) or not (general rights). Waldron wants to distinguish rights in this way in order to account for Locke's "original acquisition" theory of property rights--a special transaction that is nevertheless a right with no particular addressee. He admits that this is the only case that he can find that does not conform to the symmetry between in personam and special rights on the one hand, and in rem and general rights on the other. It thus seems acceptable (when not referring to Locke's justification for private property!) to treat these distinctions as equivalent. See Jeremy Waldron, The Right to Private Property (Oxford: Oxford University Press, 1988), pp. 106-9.

²⁵An example of this might be the secessionist movement in Quebec; on the specific character of this movement, see Hobsbawm, Nations and Nationalism since 1780, pp. 165-66.

new states from parts of two or more already existing states--sometimes in the process reconstituting or dismembering the original states in such drastic ways that they are no longer substantively the same entities.²⁶ But second, and perhaps more important, national self-determination must be a general right overall because it necessarily includes a claim to diplomatic recognition by the international community as a whole.²⁷ Without such recognition, a nation (as embodied in a nation-state) could not claim to have achieved its desire to exist as a self-determining entity. This is just as true of the self-contained nationality in the first example as it is of the fragmented one in the second example. So national self-determination must be a general right that is to be recognized by all actors in international relations; and such actors must at least not impede the realization of the right.

The second point of classification is more controversial. Positive rights are rights in which definite

²⁶The claims of the Kurdish people, presently living in parts of Iraq, Iran, Syria, and Turkey, is a classic case of a movement making claims on several states; see Smith, Ethnic Origins of Nations, pp. 223-24. The reconstitution or dissolution (depending on one's point of view) of Yugoslavia as a result of Slovenian demands for national independence is the now paradigmatic case of the extreme effects of establishing a new state on an older one; see Misha Glenny, The Fall of Yugoslavia: The Third Balkan War (Harmondsworth, Britain: Penguin Books, 1992), esp. Ch. 3.

²⁷Tony Honoré, "The Right to Rebel," Oxford Journal of Legal Studies (1988), p. 45.

actions by others are required for the right of a claimant to be realized. Negative rights are rights in which the simple forbearance of others is sufficient to allow a claimant their rights. As Joel Feinberg notes, there is some correspondence between positive and special rights, just as there is between negative and general rights.²⁸ In the first instance, a right is addressed to a specific agent, who must perform an action (keep a promise, for instance) in order for the right to be exercised. In the second instance, a right is exercised if a claimant is not obstructed or interfered with during its performance (speaking publicly, for example).²⁹

Even more controversial cases are those of negative special rights and of positive general rights. Since national self-determination seems to be a general right, only the latter case need concern us here. Feinberg views positive general rights as problematic, since they require actions to be taken by unspecified parties in order to satisfy the general claims of others. The only admissible case of this that he allows is that of the claim of accident victims to assistance from anyone who can assist them. The problem lies in the conditional nature of the claim: what if

²⁸Feinberg, Social Philosophy, pp. 59-60.

²⁹For the ways in which socioeconomic rights such as to a decent minimum income, shelter, basic medical care, or employment can be understood to fit these distinctions (perhaps as positive special rights addressed to governments), see Held, Rights and Goods, pp. 74-78.

there is no one available to take such a positive action as assisting accident victims? According to Feinberg, this may become a problem especially under what he calls "conditions of scarcity"--circumstances in which no one may be in a position to actively satisfy a rights-claim.³⁰

However, from the perspective of rights as goals outlined above, the lack of a specific agent to satisfy a rights-claim is not a problem. Since rights can be seen to mandate enabling conditions for action, rather than specific actions by particular persons, the absence of a specific addressee for a rights-claim does not mean that the claim is not in fact a rights-claim.³¹ Many of the socioeconomic rights posited in recent times by social movements and underdeveloped countries can be understood to be positive rights, in that they mandate specific forms by which the goals of greater social justice or economic development can be realized. These rights are positive in that they require recognition by all of the legitimacy of the goals contained in the rights and in that they generate prima facie obligations on all parties to enable the realization of the goals.

There is therefore nothing inherently difficult or

³⁰Feinberg, "Nature and Value of Rights," p. 153.

³¹Sen, "Rights and Agency," p. 16.

problematic about the idea of a positive general right.³² But it is important to decide whether national self-determination is such a type of right. A "libertarian" view of national rights (such as that discussed below) would suggest that national self-determination is a negative right that requires no specific actions (other than forbearance) from others in order for it to be realized. If, however, national self-determination is a positive right, it would require more definite actions by all concerned (at the very least, diplomatic recognition) in order for the right to be realized.

Is national self-determination then a negative or positive general right? Some nationalists write as if their claim to self-determination were a negative right--one to be exercised without interference. Copp makes this view explicit:

The right of self-determination would be the right of a nation not to be interfered with in forming or maintaining an independent national state if it should choose to do so...it would be an active negative claim right. If any nation has this right and chooses to form or maintain a state, then other existing states and

³²It should be noted in any case that some philosophers find the very distinction between positive and negative rights problematic. The difference between the two kinds of rights is sometimes taken (as in certain ways, by Feinberg) to privilege the idea of negative rights. For a critique of the distinction, see, e.g., Gerald C. MacCallum, Jr., "Negative and Positive Freedom," Philosophical Review 76 (1967): 312-34 (and reprinted in David Miller (ed.), Liberty (Oxford: Oxford University Press, 1991), pp. 100-122).

individuals have a duty not to interfere.³³

Yet, this does not settle the matter. To evaluate the claim that national self-determination is a negative right, the assumption that it is equivalent to a right of noninterference must also be evaluated. And this does not seem to be the case.

In the related instance of minority rights, it seems clearer that the rights claimed are positive rights. The reason is that action must be taken by a state for the right to be exercised. Rita Hauser writes of this case that,

Group demands for recognition and sustenance...[by] their nature...are demands for protection or elevation of the whole group as determined by extrinsic characteristics: race, language, ethnicity, or religion. They look toward positive action by the state, rather than non-interference in the life of the individual....³⁴

While the case of minority rights is not the same as that of national rights, there are important similarities, deriving to some extent from their both being cases of group rights. The similarities turn out to be, upon reflection, more important than the differences in determining whether national rights are negative or positive.

Is national self-determination primarily a right of noninterference (a negative right) or one of recognition (a

³³Copp, "Do Nations Have the Right of Self-Determination?" p. 79 (*italics added*).

³⁴Rita Hauser, "International Protection of Minorities and the Right of Self-Determination," Israel Yearbook on Human Rights, Vol. 1, 1971, p. 93.

positive right)? The answer to this question is itself a contested matter between those sympathetic to and those hostile to nationalist claims. For the former, self-determination tends to be seen as a matter of allowing certain national groups to "go their own way" or decide for themselves whether they want a state.³⁵ But for critics of nationalism, such a view of the matter is not accurate.

It is the role of the international community and particularly of the diplomatic recognition (or the withholding of such recognition) of new states that seems to be missing from the nationalist view of self-determination as a negative right. Such recognition has usually been essential for the viability of new states. In the case of self-determination, international recognition has often made the difference between successful and unsuccessful attempts.³⁶

³⁵For instance, see Walzer's statement that "I would be inclined to support separation whenever separation is demanded by a political movement that, so far as we can tell, represents the popular will. Let the people go who want to go" ("New Tribalism," p. 169 (italics added)).

³⁶For instance, the recent German recognition of Croatia and Slovenia (followed by recognition by the European Community and the United States) has been seen to be crucial to the success of their secession from Yugoslavia (as well as to causing the subsequent civil war in Bosnia); see Misha Glenny, "Yugoslavia: The Revenger's Tragedy," New York Review of Books, Aug. 13, 1992, p. 41. Biafra is frequently cited as a case of national self-determination that failed due to the lack of international recognition; see H. Wilson, Use of Force by National Liberation Movements, pp. 84-85, and Ofuatey-Kodjoe, Self-Determination in International Law, p. 162.

A right can only be one premised on the noninterference of others if it is possible to exercise one's right without interfering with others.³⁷ Thus, an individual may claim the right to perform an action without interference from others because its performance will not affect other persons.

This is not and cannot be the case with nations and states. In fact, if anything, it is the reverse: too many nations have conflicting claims over territory and resources that, if realized, would entail interference with other nations or states. The realization of any rights-claim the purpose of which is to establish independent nation-states must do so through a disruption of existing political and territorial arrangements.

Thus, a justification for such a rearrangement must be a justification for a duty of existing states to adjust their boundaries and sovereignties so as to enable the creation of these new nation-states. That is to say, it must be the justification of a positive general right that

³⁷Here, as at a number of other points, the parallels between a right of national self-determination and a right to private property become apparent: just as in the "noninterference" version of the former, so the "original acquisition" (Lockean) version of the latter presupposes a "free" or empty space that can be occupied, acquired, and worked on. This idea is of course dependent on underlying assumptions of a "state of nature" and of an original "grant" of untrammelled nature from God to humanity. Objections to the "original acquisition" theory of private property often begin by rightly questioning the speciousness of these assumptions; see, e.g., Alan Ryan, Property and Political Theory (Oxford: Basil Blackwell, 1984), pp. 18ff.

is to be facilitated by the relevant parties and that is acknowledged as legitimate by all others.

The question of to whom a right of national self-determination would apply also concerns whether it is an individual or a group right. It seems that, on the face of it, a right of nations would have to be a right of groups. Yet, one advocate has argued that national self-determination could be an individual right inasmuch as it is based on the wills of individuals to belong to a particular nation (and therefore, presumably also to a particular nation-state).³⁸

Raz, however, rejects the idea that national rights can be individual rights by referring to the idea of Palestinian self-determination. In his example, while Palestinians may have a right to self-determination, Yassir Arafat cannot have such a right.³⁹ The reason is that the end that the right is designed to obtain is a collective end or good. Since the justifiability of rights results from the desirability of their ends, no right that does not secure that end is justifiable. Arafat cannot exercise a right of self-determination for the Palestinians; only the Palestinians as a collectivity can do so. Therefore, Arafat cannot claim such a right.

Raz's view of national rights as being collective or

³⁸Tamir, Liberal Nationalism, p. 73.

³⁹Raz, Morality of Freedom, pp. 207-8.

group rights is a prevalent one. The basic idea is that collective rights exist because collective goods exist: "If collective goods such as membership in a society are intrinsically valuable, then it is to be expected that they provide the source both of personal goals and of obligations to others."⁴⁰

What is the connection between the existence of collective goods and that of collective rights? First, collective goods must be of a sufficiently important order to merit the obligations that they engender. Raz does think that some collective goods are of this order. For instance, he writes that,

My interest in living in a prosperous, cultured, tolerant and beautiful environment is among my most important interests. It is more important than many aspects of my bodily integrity that others are duty bound to respect. The difference is that the maintenance of a collective good affects the life and imposes constraints on the activities of the bulk of the population, in matters which deeply affect them.⁴¹

Second, it must be shown that only collective rights can secure the important collective goods. Raz believes that this is the case because the interest of any given individual in some collective good is not a strong enough reason to mandate its achievement: ". . . the fact that it is in my interest to live in such a [good] society is not normally considered sufficient to establish that I have a

⁴⁰Raz, Morality of Freedom, p. 216.

⁴¹Raz, Morality of Freedom, p. 203.

right to live in such a society."⁴² While such an interest might constitute a reason why that particular society should develop in a certain way, this does not mean that I have a right that it should develop in that way.

The existence of collective goods, however, does not necessarily mean that these goods must be appropriated collectively. It simply means that individuals must be aware of the need for the preservation of the social fabric out of which their own needs and desires arise. They may still seek to individually and differentially attain their particular goals.

If group rights play a necessary role in this effort, it may be as "rights of implementation." If individuals wish to further a political project, they must see that the community in which they live allows for political participation on the part of its citizens. While political participation may imply the existence of other collective rights, such as that of democratic assembly or independence from despotic rule, these rights only get their force from the goal of implementing individual life-plans. In the case of the idea of national rights, while the right to a nationality is an individual right,⁴³ it may be the case

⁴²Raz, Morality of Freedom, p. 202.

⁴³In the Universal Declaration of Human Rights, for instance, there are no national rights, only the right of individuals to a nationality. In this regard, article 15 of the Declaration states that: "1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his

that it can only be implemented as a right of nations--not individuals--to protect the nationality rights of their members.

Herman Burgers argues that there are actually three ways in which rights might be collective: there are rights that are exercised collectively (such as rights of assembly); there are those that are implemented collectively (such as "economic, social, and cultural rights [that] oblige the authorities to take general measures"); and there are those that are held by collectivities (such as rights against genocide or for self-determination).⁴

Thus, rights to political participation, adequate housing (as an instance of economic rights), and freedom from persecution are all understood in international law as individual rights. If they have a collective dimension, it is the way in which they may require additional rights of implementation in order for these original rights to be exercised. As Jack Donnelly writes, group rights, to the

nationality nor denied the right to change his nationality" (U.N. Doc. A/811, 10 Dec. 1948; reprinted in Ian Brownlie (ed.), Basic Documents in International Law, 2nd ed. (Oxford: Clarendon Press, 1972), p. 147). One way of understanding the controversial nature of a right to national self-determination is to try to define what further rights would be needed in addition to these in order to protect one's national identity. The nationalist must claim that a nation-state is also and always needed as well (and should therefore be a right of nations). But in this case, nation-states are often justified simply as the best means of implementing the rights of individuals to a nationality, rather than as a distinctive entitlement of nations as such.

⁴Burgers, "Function of Human Rights," pp. 72-73.

extent that they are deemed necessary, must be seen as rights of individuals who act within and through groups: ". . . if we must speak of such collective third generation, solidarity, or peoples' rights as human rights, they should be interpreted merely as the rights of individuals acting as members of social groups."⁴⁵

Raz rejects this more restricted view of group rights for a broader conception of what might be referred to as collective "rights of appropriation." Groups have the right to appropriate the conditions necessary for their existence as a group because collective goods have an intrinsic value that is independent of their role in implementing individual goals: "The notion of collective rights . . . [i]n pointing to aspects of the personal sense of identity which are inextricably bound up with the existence of communities and their common culture . . . recognizes the intrinsic value of some collective goods" ⁴⁶ The significance of conceiving of collective rights as rights of appropriation is that a model of private property rights is used to

⁴⁵Jack Donnelly, Universal Human Rights in Theory and Practice (Ithaca, N.Y.: Cornell University Press, 1989), p. 147. This view of group rights is in part informed by a concern that such rights might conflict with those of individuals. This is why Eugene Kamenka, for instance, writes of the idea of group rights that it is "valid only in so far as it extends, rather than destroys, first generation rights, i.e. the autonomy of individuals and their civil and political liberties" (in James Crawford (ed.), The Rights of Peoples (Oxford: Clarendon Press, 1988), p. 139).

⁴⁶Raz, Morality of Freedom, p. 209.

justify collective social rights. The problems with this approach will be discussed below.

Finally, the issue of whether national self-determination is a political right or a cultural right needs clarification. Ostensibly, self-determination is a political right inasmuch as it concerns the claims of various groups to self-rule or self-government. But, when claims for self-determination are made by nations, which are themselves groups that are defined culturally and not politically, the matter gets more complicated. In addition, there is the possibility that, since self-determination is a means of realizing a right of individuals to inclusion in a political decisionmaking process, already existent (in the sense of internationally recognized) rights of self-rule and citizenship can secure such an end without reference to specifically national rights.

But the idea of self-government actually includes two very different concepts--on the one hand, that of the self-rule of a people without external interference, and on the other hand, the self-rule of a nation independent of other peoples or national groups. Thus, self-determination has been said to have two versions corresponding to these two meanings of self-government--a "democratic" version and a "cultural" version.⁴⁷ These two versions are "distinct concepts . . . representing two distinct human goods and

⁴⁷Tamir, Liberal Nationalism, p. 69.

deriving their value from different human interests . . .

.⁴⁸

In fact, Tamir maintains that the crucial claim in self-determination is not that of self-rule but that of the protection of distinct groups and their ways of life:

...at the core of the right of national self-determination, lies a cultural rather than a political claim. The right to national self-determination is the right of a nation to preserve its existence as a unique social group. This right is distinct from the right of individuals to govern their lives and to participate in a free and domestic political process.⁴⁹

National groups would preserve their existence by securing a "public space" in which one "can live in accordance with the customs and the traditions of [a] people"⁵⁰

This "cultural" sense of self-determination needs to be distinguished from the idea of cultural rights prevalent in international law. In the legal doctrines of international human rights, the idea of "cultural rights" does not include a right of statehood for nations. Cultural rights, as Donnelly argues, imply instead claims by individuals or groups against an existing government or community:

..."cultural rights" refers to the rights of members of communities, especially minority communities, to preserve their distinctive culture.... Cultural rights are especially important because they protect individuals in cultural communities against the state and the majority community. All human rights provide protections against

⁴⁸Tamir, "Right to National Self-Determination," p. 581.

⁴⁹Tamir, "Right to National Self-Determination," pp. 565-66.

⁵⁰Tamir, "Right to National Self-Determination," p. 582.

incursions of the state in areas that are essential to a life of full human dignity. Cultural rights protect these essential aspects of personal dignity that are based on membership in a cultural community....⁵¹

But the idea of national self-determination is a different kind of right altogether. It is a right of cultural groups to political independence, rather than a right of cultures to protection from or consideration by existing states. The role of the state is obviously crucial here; but what is its real importance in relation to the culture of its citizens? That is the subject of the justification for national self-determination discussed below; but it may be said initially that it is what Tamir calls the "cultural essence of the state"⁵² that is believed to play a critical role in the process of recognizing the distinctive cultural identities of national groups. It is deemed important for individuals' identities to be able to live in a state that is culturally distinctive:

When one can identify one's own culture in the political framework, when political institutions reflect familiar norms of behavior, traditions, and historical interpretations, one's conception of oneself as a creator, or at least a carrier, of a valuable set of beliefs, is reinforced.⁵³

To summarize this discussion of the nature of a right to national self-determination, it may be said that such a right must be: (1) a general right to political

⁵¹Donnelly, Universal Human Rights, p. 156.

⁵²Tamir, Liberal Nationalism, p. 148.

⁵³Tamir, "Right to National Self-Determination," p. 585.

independence, not a right invoked against a specific state or political community for the redress of specific wrongs; (2) a positive right that mandates the recognition of a new nation-state by all states and international organizations, not simply their forbearance in adjudicating disputes between states and nationalist movements; (3) a right of groups--not individuals--to an independent state (which is understood to be a collective good that must be collectively appropriated); and (4) a cultural right in the sense that it is the right of culturally-defined groups to states, not simply the right of individuals to political participation or to the protection of their cultural practices.

The following sections will evaluate the consequentialist argument for a right of this kind by considering first, its theory of social groups and the goods associated with membership in them, and second, the connection of these goods to advocacy of self-government. A three-fold critique of this justification will then be made; it will consist of claims that the consequentialist justification (1) does not realize the good of protecting individual identities, but itself generates an "identity" problem, (2) is not an appropriate response to real problems of group persecution and injustice, and (3) cannot provide a justification of territorial entitlement for new nation-states. A conclusion will summarize why national self-determination cannot be consequentially justified as a "goal

right" and why, if it can be justified at all, it must be on more directly political grounds.

"ENCOMPASSING GROUPS" AND WELL-BEING

Though the idea that rights can be derived from the nature of human agency or social groups is not a part of instrumental justifications of rights, this does not mean that the nature of such entities plays no role in forming the basis of such a justification. On the instrumentalist view, moral justifications derive from establishing connections between human well-being and particular facts or states of affairs. These facts or states are to be regarded as goals, from which rights may be derived. One such fact or state of affairs is the existence of large groups with distinctive cultures, what were called ascriptive groups in the last chapter.

What is the significance of such groups? Margalit and Raz make two points about the importance of social (or ascriptive) groups in relation to the question of well-being. First, membership in groups is important for individuals, since without such membership, their well-being may be precarious. For individuals, membership "greatly affects one's opportunities, one's ability to engage in the relationships and pursuits marked by the culture."⁵⁴ Second, the significance of this membership means that what

⁵⁴Margalit & Raz, "National Self-Determination," p. 449.

happens to the group as a whole is important for the well-being of its members.

To understand how a connection is established between this notion of groups, their importance for individual well-being, and the self-determination of nations, we must first examine in more detail the nature of groups as Margalit and Raz portray them. Then we must evaluate the nature of well-being and whether it is connected with group membership in the ways that Margalit and Raz assert.

Margalit and Raz designate entities such as nations "encompassing groups."⁵⁵ They state that,

The right to self-determination derives from the value of membership in encompassing groups.... It rests on an appreciation of the great importance that membership in and identification with encompassing groups has in the life of individuals, and the importance of the prosperity and self-respect of such groups to the well-being of their members.⁵⁶

So self-determination is based on the idea that encompassing groups are vitally important for the well-being of their members.⁵⁷

In fact, an even stronger contention is made: that

⁵⁵Margalit and Raz's conception of encompassing groups is in essentials equivalent to the conception of ascriptive groups that was examined in the last chapter. This section will discuss this type of group using the terminology employed by these thinkers.

⁵⁶Margalit & Raz, "National Self-Determination," pp. 456-57.

⁵⁷The additional claim that self-determination is necessary for members of groups to enjoy their well-being will be examined in the next section.

without membership in encompassing groups, it may be hard for individuals to live satisfying lives. Certainly, it is claimed, such membership will generally make it easier to do so. This contention derives from the point referred to above that the world is in fact made up largely of "encompassing groups": "It may be no more than a brute fact that our world is organized in a large measure around groups with pervasive cultures. But it is a fact with far-reaching consequences."⁵⁸ The consequences, as noted above, are that individuals will seek, for their own well-being, membership in an appropriate group.

What then are encompassing groups? Margalit and Raz suggest six characteristics that distinguish these groups from other collective entities. First, such groups have a common character as defined by their cultural mores, aesthetic styles, distinct languages or dialects, and patterns of everyday life. These features of what, for example, might be a "national character" tend to coalesce into a "cultural tradition" that embodies these features.⁵⁹

Second, this common character of encompassing groups tends to "encompass" individuals through a process of socialization into the dominant cultural tradition of the group. While this process of socialization is not always

⁵⁸Margalit & Raz, "National Self-Determination," p. 449.

⁵⁹Margalit & Raz, "National Self-Determination," pp. 443-44.

successful, it by and large exercises its influence on individuals who grow up within the scope of influence of the group. Without this process of socialization, people cannot realize their capacities as successfully. This is the result of the fact that since "[m]ost people live in groups of these kinds . . . those who belong to none are denied full access to the opportunities that are shaped in part by the group's culture."⁶⁰

How are these opportunities realized by individuals? The third feature of encompassing groups is their capacity to identify those individuals deemed members through a process of "mutual recognition." While encompassing groups are not formal organizations, an individual's conformity with prevailing cultural norms is usually a sufficient ground for recognition as a member of the group.⁶¹

The fourth feature of encompassing groups is that membership in these groups is an important sign of personal identity. This means that the process of mutual recognition becomes a process of self-recognition as well.⁶² Membership in encompassing groups therefore serves as an important indicator "for people generally in interpreting the conduct of others," since membership is a principal way in which people identify themselves to themselves.

⁶⁰Margalit & Raz, "National Self-Determination," p. 444.

⁶¹Margalit & Raz, "National Self-Determination," p. 445.

⁶²Margalit & Raz, "National Self-Determination," p. 446.

It is also important, fifth, to note that encompassing groups are not defined by measures of achievement or excellence, but by a more intangible process of belonging to a group with common habits, tastes, and inclinations. Similarly, the marks of social class do not serve to distinguish any particular encompassing group, since despite a commonality in occupation and income, collectivities identified by achievement or occupation cannot engender a common culture of "belonging."⁶³

Finally, the size of a group is important, since an encompassing group is inevitably larger than any group defined by personal acquaintance or actual encounters. Groups based on familiarity identify their members through particular relationships, while encompassing groups are able to do so through more anonymous indicators of identity--and through the ascription of these qualifying indicators to strangers.⁶⁴

Given for the moment this conception of encompassing groups,⁶⁵ the connections between group membership and well-

⁶³Margalit & Raz, "National Self-Determination," pp. 446-48.

⁶⁴Margalit & Raz, "National Self-Determination," p. 447.

⁶⁵It is not clear whether Margalit and Raz would designate minority or ethnic groups as encompassing groups or not, since they are seemingly too geographically dispersed to warrant claims to self-determination, even on the grounds given here. On the importance of territory for Margalit and Raz's conception of national self-determination, see their article, "National Self-Determination," p. 457, as well as the last two sections of

being and that between well-being and group rights need to be established. The contribution to individual well-being that membership in an encompassing group makes, according to Margalit and Raz, is two-fold. First, the material prosperity of the group tends to be important for the prosperity and flourishing of its members.⁶⁶ The assumption here is that individual well-being is dependent to a considerable degree on its collective context--that of the group to which an individual belongs.

In addition, there is the matter of individual dignity and self-respect. While individuals may assert that they have a right to be treated with due respect regardless of their membership in one or another group, the fact that their identity is formed in relation to such groups means that their sense of themselves is inextricably connected with the general reputation or reception of their group. For individuals, dignity and self-respect "require that the groups, membership of which contributes to one's sense of identity, be generally respected and not be made a subject of ridicule, hatred, discrimination, or persecution."⁶⁷

this chapter.

⁶⁶Margalit & Raz, "National Self-Determination," p. 449.

⁶⁷Margalit & Raz, "National Self-Determination," p. 449. This view obviously contrasts with the deontological view of rights. Such a view regards individual dignity and self-respect as an entitlement of human beings *sui generis*, not as an entitlement of persons to the extent that they maintain membership in particular groups. This view of human dignity is one held even by some consequentialist thinkers

What are we to make of these claims for the importance of group membership to individual well-being? On the one hand, the idea that individuals need to live in groups, and that there is a need for these groups to be respected in order for their members to live satisfying lives, is relatively uncontroversial. On the other hand, the very obviousness of the description of this type of group and its relation to individuals begs some important questions. Above all, there is little demonstration that specifically encompassing groups play any essential role in the lives of individuals. Margalit and Raz admit both that some individuals live outside of such groups and that there are other types of groups within which individuals live. For instance, why couldn't some people live a satisfying life in a small-scale community, without having or even wanting membership in a larger encompassing group? Or why couldn't someone see fit to identify with their social class,

such as John Stuart Mill. Margalit and Raz thus make a significant break with both forms of moral individualism by asserting that the foundation of basic personal claims to respect lies in individuals' membership in groups, rather than in their right to independence from any group. Cf. Kant, Metaphysics of Morals, p. 255; and John Stuart Mill, On Liberty (Indianapolis: Hackett Publishing Co., 1978), passim.

In rejecting the individualist justification of rights (from universal attributes of human individuality), Raz argues that "fundamental moral rights cannot be conceived as essentially in competition with collective goods. On examination either they are found to be an element in the protection of certain collective goods, or their value is found to depend on the existence of certain collective goods" (Morality of Freedom, p. 254).

occupational role, or some other type of affiliation without feeling at a loss in the absence of ties to a specifically encompassing group?

These questions become important when it is remembered what is at issue: the idea that these groups have moral claims to self-determination, whatever that may entail. This idea is, of course, a considerably stronger claim than one that individuals have a right to affiliate with such groups to the extent that they so choose. Two aspects of the idea that encompassing groups constitute a necessary context for individual well-being merit further consideration in this regard: first, the notion that individuals are socialized through assimilation into the common culture of an encompassing group, and second, the idea that encompassing groups have the capacity to make moral claims (e.g., to self-determination).

In Margalit and Raz's account, the purported necessity of encompassing groups for individual well-being depends to a great extent on the idea that encompassing groups play a central role in the socialization of the young. Now there is undoubtedly much truth to this claim, understood in a general way. Certainly, the inculcation of cultural traditions in the young is a large part of how they are socialized to live in a wider world.

Margalit and Raz's specific claim, however, is that most people are socialized through the absorption of the

mores of a dominant encompassing group--even if they are not members of that group. But this cannot possibly be true in general, since numerous multicultural societies exist where processes of socialization nevertheless do occur. In such societies, significant portions of the population are not socialized within the dominant culture, nor is there sometimes even a dominant group whose culture serves as the basis for socialization.⁶⁴ The point is that in societies where a polyglot culture is the norm, socialization through secular educational systems and/or syncretic patterns of child-raising and cultural expression are also the norm. What necessity can we then attribute to the idea that encompassing groups constitute any kind of prerequisite for the well-being of individuals?

There is also a converse problem: if, in fact, an encompassing group does dominate the child-rearing and educational systems of a given country, and is able to propagate its culture in a variety of ways, then why are claims for national self-determination necessary for this purpose? If invoking a right of self-determination is supposed to protect encompassing groups, yet such groups are often able to propagate their distinctive cultures, what

⁶⁴For example, India, the second-most populous country in the world, has no dominant cultural tradition--at least not one institutionalized within an educational system (though, of course, there are "Hindu" nationalists who are trying to change this). Other obvious examples might be Switzerland, Canada, and the United States; there are many less obvious ones.

need is there for such a right?

By focusing on the ways in which encompassing groups socialize the young as a constitutive element in defining such groups, Margalit and Raz place themselves in a quandary. On the one hand, if such groups exist and are able to protect their cultures sufficiently to socialize the young, then they would seemingly have no need for a special right of self-determination. On the other hand, if they are unable to propagate their cultural traditions through socialization, they would therefore also be unable to maintain that they are in fact an encompassing group, and consequently could not claim any right to self-determination.

A standard response to this dilemma would be to argue that groups have such a right when they are persecuted, discriminated against, or oppressed--when particular conditions obtain that disrupt or destroy a group's capacity for cultural expression. But, as we will see below, Margalit and Raz maintain that a group's legitimate claim to self-determination both is and is not a function of the group's persecution by others.⁶⁹ Persecution cannot, in and of itself, constitute a basis for a claim to self-determination. Such a claim must have a stronger foundation than that in order to be a general right. The suppression

⁶⁹See both Margalit & Raz, "National Self-Determination," pp. 457 & 450-51. These passages are further discussed below.

of the socializing institutions of an encompassing group thus would not seem to be reason enough to warrant a claim of self-determination (for such claims must apply even where the institutions of groups have not been suppressed).

The second aspect of the connection between individual well-being and collective rights is the idea that encompassing groups have a capacity to make moral claims, such as to self-determination. What gives these groups such a capacity? One possibility is that there is something distinctively "moral" about a state of well-being. But what would that be? From an instrumentalist view of morality, a condition of well-being would at least qualify as a legitimate goal. But what would make it a goal right? This is where a further definition of goals becomes essential, for the transition from goal to goal right--or from condition of well-being to right to that condition--cannot be made without some relation of that goal or condition to fundamental values or norms underlying all goal rights. Otherwise, membership in an encompassing group, not unlike many things that people might want, would be an elective interest, need, or desire, and not in any way a fundamental condition of human well-being--one warranting a moral claim or right to such a condition in its absence.

It is here that Margalit and Raz assert that the essence of a claim of self-determination concerns not the substance of well-being in a material sense but the "right

to decide" about the conditions of well-being for a group.⁷⁰ If there is a core to the idea that self-determination is a moral (or goal) right, it is that the well-being of individuals includes the capacity of an encompassing group within which individuals exist to decide about crucial issues concerning their own well-being. This means that the conception of a moral claim or right is equated with a certain idea of self-government. So we need to consider the relation between encompassing groups and their capacity for and right to self-government before further aspects of the notion of a "moral" claim to self-determination can be taken up.

SELF-GOVERNMENT AND NATIONAL RIGHTS

If encompassing groups do have a right to self-determination, what does this right entail? While Margalit and Raz believe that self-determination is essentially a right to "cultural" goods, this does entail on their view a legitimate claim to determine political authority in a certain way. This consists of the right to make decisions about whether a given territory should be self-governing--a decision that encompassing groups are entitled to have given their importance for the well-being of their members.

There is an additional aspect to the argument, however. Why, it may be asked, should a right to the well-being of a

⁷⁰Margalit & Raz, "National Self-Determination," p. 454.

group necessarily imply that the group needs to be self-governing? A crucial part of the consequentialist argument for self-determination is therefore the claim that there are no other reliable means of protecting the goods enjoyed by encompassing groups. In particular, there is no international agency capable of enforcing compliance with a principle of group autonomy:

...given the absence of effective enforcement machinery in the international arena, the interest in group prosperity justifies entrusting the decision concerning self-government to the hands of an encompassing group that constitutes the vast majority of the population in the relevant territory, provided other vital interests are protected.⁷¹

The obvious question to ask about such a statement is: which territory is being referred to as containing an encompassing group? This gets to the heart of what self-government is for Margalit and Raz: it is precisely the decision to determine what the relevant territory consists of--what its boundaries are, and by extension, who are its citizens. Self-government for Margalit and Raz concerns who is to decide about what these boundaries will be and who will be citizens, rather than what precisely the boundaries or citizenship requirements are:

A group's right to self-determination is its right to determine that a territory be self-governing, regardless of whether the case for self-government, based on its benefits, is established or not. In other words, the right to self-determination answers the question "who is to decide?," not "what is the best decision?"...if [a group] has the right to decide, its decision is

⁷¹Margalit & Raz, "National Self-Determination," p. 461.

binding even if it is wrong, even if the case for self-government is not made.⁷²

This statement makes it clear that what is at stake in a claim of self-determination is a matter of political legitimacy rather than any particular conception of social justice that concerns the material aspects of well-being. While the prosperity and well-being of the group is what self-determination is ultimately designed to ensure, it is the ability of an encompassing group to decide about the nature and future of the group's territory and conditions of membership that is the core of the matter.

Thus, even if a group does not appear to need self-determination in order to solve problems of poverty or discrimination, it still may be the case that the group will choose--and should have the right to choose--to exist in an independent state.⁷³ This idea of the "right to decide" should not, however, be construed to be an extension of the political value of democratic legitimacy. It is rather a right stemming directly from the purported need of groups to maintain their own cultural traditions and lifeworlds. In this regard, Margalit and Raz separate political action from the more general public life that sustains people's

⁷²Margalit & Raz, "National Self-Determination," p. 454.

⁷³It should be emphasized here that Margalit and Raz do not use the term "self-government" to mean a democratic form of rule for all the inhabitants of a given territory, but rather a condition under which a "self" (an encompassing group--that is, a nation) has its own government.

identities: "To the extent that a person's well-being is bound up with his identity as a member of an encompassing group it has an important public dimension. But that dimension is not necessarily political in the conventional narrow sense of the term."⁷⁴

Political expression in the form of a right to self-government is justified in terms of the protection of the cultural life of groups--but this is not to give it a basis in political values. Neither the value of political participation as a particular form of experience, nor the idea of democratic rule as a universal entitlement, can constitute a justification for national self-determination. The justification is rather that self-government must remain an option for groups in order for them to have the means of protecting their cultural identities--which in turn are necessary for them to live a life of well-being and prosperity.

The major problem with this consequentialist justification of national self-determination is that the connection between the well-being of individuals and the necessity of nation-states has not really been demonstrated. This problem has three aspects: (1) the supposed link between protecting the identities of groups and ensuring the development of individual identities is not a strong one; (2) the oppression or persecution of groups does not mandate

⁷⁴Margalit & Raz, "National Self-Determination," p. 452.

a general right of self-determination; and (3) no justification from the moral properties of groups can, in and of itself, provide a justification for the transfer of territory (which is a requirement of any claim to self-determination).

THE RELATION OF GROUP TO INDIVIDUAL IDENTITIES

The fundamental value that nationalists give to the recognition of national identity has already been mentioned. The protection of a national identity is then taken to be the justification for nationalist claims to self-determination.⁷⁵ But the connection of national identity (and correspondingly, of self-determination on this account) with individual well-being is less easily established.

It should be remembered that claims for the importance of national identity are different from the right of individuals to a cultural identity that is already a part of international human rights law. The difference is that national self-determination needs a justification as a right of groups, since it cannot be justified as a right of individuals. It is also not equivalent to a right of individuals, such as that found in the International Covenant on Economic, Social, and Cultural Rights, which recognizes the "right of everyone . . . [t]o take part in

⁷⁵Chen, "Self-Determination," p. 91.

cultural life."⁷⁶

The justification of national self-determination must proceed by way of a number of intermediate premises between the espousal of the value of cultural identity for individuals and the necessity of a nation-state for the realization of this value. These premises are the following: (1) the cultural identities of persons are essentially equivalent to their national identities; (2) the secure possession of national identities requires a process of the mutual recognition of individuals as similar within national groups (or as different between different nations); and (3) this process of mutual recognition can best--and perhaps only--occur within a nation-state.

Consider the last premise first. Why should the nation-state be essential to the protection of national identities? The basic idea seems to be that national identities require a "public space" in which to exist and flourish.⁷⁷ It is not enough for persons to see themselves as members of a cultural nationality, and as embodying particular practices, customs, languages, and so on, as they choose. A more "heroic" form of cultural identification in which individuals identify themselves vicariously with a

⁷⁶Article 15, International Covenant on Economic, Social, and Cultural Rights (Annex to U.N.G.A. Res., 16. Dec. 1966); reprinted in Brownlie (ed.), Basic Documents in International Law, p. 157.

⁷⁷Tamir, "Right to National Self-Determination," p. 586.

nation through its embodiment in a state is the only means of ensuring one's own sense of national identification.⁷⁸

This view of what is entailed in national identities actually involves a choice as to what form such identities should take. Historically, and at present, most national cultures have never had states--yet they existed, and often flourished, sometimes for centuries.⁷⁹ What is actually assumed is the value, not of a national culture, but of a nation-state as the most perfect manifestation of such a culture. But this is an argument not for the preservation of national identities but for a particular type of political authority (and will accordingly be examined in Chapters 3 and 4).

Now, consider the second premise: that a process of recognition is essential for the establishment and maintenance of national identities. This idea seems to follow from the structure of national identities--that a person is a member of one nation or another, but never both: "A nation is a distinct group of individuals recognizable to each other as well as to nonmembers."⁸⁰

The assumption of this view is that there is such a thing as "national character," and that, even if it does not

⁷⁸Tamir, "Right to National Self-Determination," p. 585.

⁷⁹This point is made very tellingly in McNeill, Polyethnicity and National Unity in World History, *passim*.

⁸⁰Tamir, "Right to National Self-Determination," p. 577 (italics added).

subsume all of what we know to be culture, it is nevertheless a very important part of it:

...recognition is often based on the belief that it is possible to identify other members of one's nation, since all members of a nation share norms, beliefs, and patterns of behavior that are constitutive of their personalities, hence generating a "national character." This concept is much disliked nowadays, yet it is useful in turning our attention to the importance of cultural influences in identity formation."

But the idea that persons have one (and only one) national identity, that this identity is readily recognizable, and that it will not change, all imply an essentialist conception of culture and personal identity that contradicts the more nuanced understandings in contemporary social theory of how culture and personality are constituted.

This is why, if the idea of national character is "much disliked nowadays," it is not only because of its association with the cliches of national stereotypes, but also because of its incompatibility with what we know about the variable nature of human cultures and identities. Conceptions of national character are more than shorthand designations for important cultural differences--though they

"Tamir, "Right to National Self-Determination," p. 577. National identities could perhaps be distinguished not on the basis of a complex conception of national character, but on the basis of simple traits. One example is the different forms of prayer, such as the hand signals by which the "sign of the cross" is made, that are used by Serbs (usually Orthodox) and Croats (usually Catholic) to distinguish themselves from each other (and, in some cases, as a pretext for imprisonment and even murder). But, in these instances, the traits are usually assumed to signify more thoroughgoing cultural and characterological differences.

may sometimes be that. They also distort the very processes by which cultures are constituted by presupposing the static and necessary character of cultural differences. As Young has pointed out, the traditional view of cultural difference "assumes an essentialist meaning of difference; it defines groups as having different natures." This view would certainly include the nationalist subsumption of cultural differences within those of "national character." But another--and more accurate--view of cultural identities "defines difference more fluidly and relationally as the product of social processes."⁸²

What this means is that, while national identities are undoubtedly a part of the cultural experiences of many individuals, they are not equivalent to cultures in general.⁸³ They are therefore also not the stable reference points for individual identities that nationalists assume them to be.⁸⁴ Nations, like many other types of social

⁸²Young, Justice and the Politics of Difference, p. 157.

⁸³And as Ross Poole points out, they are only one form that cultures have taken, often by obliterating other local or transnational forms; see Morality and Modernity, pp. 98-99.

⁸⁴It is important to note that nationalists do usually assume, rather than argue for, such a view of identity. For instance, Tamir writes that,

National rights can only be consistently justified on universal grounds by referring to the value individuals find in the existence of nations, and by assuming that human beings care as much about the national environment in which they implement their life-plans as about the specific content of these plans.

groups--tribes, classes, genders, families--are, especially within increasingly "modernized" societies, temporary entities within which individuals live a part or an aspect of their lives. This does not mean that such entities are unimportant. But it does mean that any particular collective cultural identity is the result of "the activation of one or more potential individual identities"⁸⁵

Cultural identity cannot therefore be equivalent to national identity; the importance of the former does not imply the necessity of the latter. But there is a further consequence of keeping this distinction in mind when we return to the question of whether self-determination is required for individual well-being. For, if cultural identity and national identity are not equivalent, it may be the case that the protection of national identities will prevent, rather than further, the cultural identities of individuals.

There are ways in which giving nations the right to states may actually serve to restrict and undermine individual self-determination. This is because any particular cultural identity that individuals embody or

(Liberal Nationalism, p. 83 (italics added)) But this is exactly what needs to be demonstrated, not just assumed (and, in fact, there is much evidence to the contrary).

⁸⁵Dov Ronen, The Quest for Self-Determination (New Haven, Conn.: Yale University Press, 1979), p. 53.

adopt may only further their own life-plans for a period of their lives or in certain ways. It cannot be assumed that particular national identities will necessarily always serve people's ends, especially if they are viewed in ways that exclude syncretic or transformational changes in identities.⁸⁶

The ability of persons to lead fulfilling lives seems to be best served when individuals have the maximum opportunity to change their group affiliations and cultural identities in relation to changing needs and interests:

The quest for individual self-determination implies... aspiration to absolute freedom to interact with others. It implies the right to change group membership. It does not deny that we are social animals, but seeks liberation from the present institutionalization of social needs into rigid groupings.⁸⁷

The consequentialist justification of self-determination simply assumes the equivalence of national and cultural identities; it fails to show that the former is essential for the well-being of individual persons; and it minimizes the ways in which pursuit of the recognition of national identities through self-determination may actually hinder the rights of individuals to a distinctive cultural life.

⁸⁶Ronen, Quest for Self-Determination, p. 52.

⁸⁷Ronen, Quest for Self-Determination, p. 61 (italics added).

THE PROBLEM OF GROUP PERSECUTION

Exponents of the moral rights of nations who argue instrumentally for these rights, such as Margalit and Raz, usually maintain that granting these rights will enable nations to obtain particular goods. It is important to see, as Margalit and Raz admit, that a connection must be drawn between the well-being of groups and their rights-claims: "The right [of national self-determination] is conditional on its being exercised for the right reasons, i.e., to secure conditions necessary for the prosperity and self-respect of the group"⁸⁸

But what would be the wrong reasons? The example given in this passage is that of the Katangan secession from the Congo in the 1960s, which Margalit and Raz characterize as originating from the desire for "exclusive control" of the uranium mines in Katanga. Yet, it is entirely possible that the secessionists could have argued (and perhaps did argue) that their attempt at such control was based on the desire to ensure the "prosperity and self-respect"--in short, well-being--of Katanga. In this connection, it is important to recall that Margalit and Raz maintain that the right of self-determination is to be characterized as the "right to decide," even if the decision is shown to be wrong. What is essential is only that the "reasons that motivate the

⁸⁸Margalit & Raz, "National Self-Determination," p. 459 (italics added).

group's decision are of the right kind."¹⁹

Yet, if rightness is a function of motivation rather than judgment, then virtually any claim by a group that something is essential for its well-being could constitute sufficient reason for a group to make a rights-claim. What is then crucial is not the actual consequences of such a claim--its instrumental value--but the belief by a group that such a rights-claim is essential to its well-being. Once this is established--once the motivation of the claimants is accepted as genuine--assessments of "what is to be decided" rather than "who is to decide" are beside the point.

But Raz himself has made an effective criticism of just such a type of justification. In terms of the legitimacy of authority, he maintains that a form of authority cannot be justified simply on the basis of a belief by a group that the authority is trustworthy. This is because, on consequentialist grounds, authority can only be sanctioned

¹⁹Margalit & Raz, "National Self-Determination," p. 459. As for Katanga, the reason given for secession in the "Proclamation of Independence of Katanga" (July 11, 1960) was that the Congolese government was instituting a "regime of terror" in Katanga in order to effect the "disintegration of the whole military and administrative apparatus" of the province. The proclamation ends with this phrase: "To all the inhabitants of Katanga, without distinction of race or color, we ask that you gather around us to lead our country and all its inhabitants forward to political, social, and economic progress, to the betterment of all." If this is not talk about well-being, what is? See Jules Gerard-Libois, Katanga Secession, tr. Rebecca Young (Madison: University of Wisconsin Press, 1966), pp. 328-29, for this document.

if it in fact yields good consequences:

...trust in the authority is trust that the authority is likely to discharge its duties properly.... Accepting the authority as a way of identifying with a group will be justified only if the trust is not altogether misplaced. Otherwise the odd situation may result that a person will quite properly express his identification with a group by supporting an institution which grossly betrays its duties to its group.⁹⁰

Similarly, with regard to rights, a claim cannot be justified simply on the basis of a group's belief, conviction, or trust that the right will lead to an increase in the group's well-being.

Characterizing self-determination as an aspect of "who is to decide" rather than "what is to be decided" means that for self-determination to be justified on this basis, it may require not an instrumental justification that assesses the effects or consequences of claims, but an assertion of the "right to decide" without regard for consequences. The consequences, after all, as Margalit and Raz acknowledge, may not be good--the wrong decision may be made.

This now gets us back to the whole issue of the persecution of (or discrimination against, or domination over) groups and what relation, if any, they have to the legitimate rights-claims of the groups. Margalit and Raz are of two minds about this. On the one hand, the whole underlying rationale for the idea of self-determination is that the well-being of groups cannot be ensured unless they

⁹⁰Raz, Morality of Freedom, p. 55.

have the right to protect their own interests:

In our world, encompassing groups that do not enjoy self-government are not infrequently persecuted, despised, or neglected. Given the importance of their prosperity and self-respect to the well-being of their members, it seems reasonable to entrust their members with the right to determine whether the groups should be self-governing.⁹¹

Yet, the fact that self-determination is justified as a "right to decide" is important here. For, if self-determination were dependent for its legitimacy on the actual persecution of encompassing (specifically, national) groups, then there could be no general moral claim to self-determination on this basis. This is the reason that Margalit and Raz maintain that the persecution of groups cannot serve as grounds for a right of self-determination:

...a history of persecution is neither a necessary or a sufficient condition for the instrumental case for self-government. It is not a necessary condition, because persecution is not the only reason why the groups may suffer without independence.... Persecution is not a sufficient condition, for there may be other ways to fight and overcome persecution and because whatever the advantages of independence it may...only make their members worse off.⁹²

But if the case for the self-government of encompassing groups cannot be based on the lack of well-being of those groups, then on what can it be based? The case must fall back again on the idea of a "right to decide." But what can this right be, if not an instrumental response to at least

⁹¹Margalit & Raz, "National Self-Determination," p. 457.

⁹²Margalit & Raz, "National Self-Determination," pp. 450-51.

the possibility of group persecution?

Such an argument could be appropriate for justifying the intrinsic value of the self-determination of encompassing groups. It could also be an instrumental argument justifying self-government on nonmoral grounds--for instance, as an essential component of legitimate political authority. While Margalit and Raz attempt to put forward a case for an instrumental moral claim of national self-determination, such a case falters once the connection between the well-being of groups and their claims to self-government are made independent of any particular condition of persecution, domination, or oppression. Only an intrinsic claim to self-determination can be justified if considerations of the consequences of such claims cannot be considered as validating or invalidating the claims themselves.

THE PROBLEM OF TERRITORIAL CLAIMS

Self-determination might still, however, be justified morally as being instrumental to the well-being of encompassing groups (and by extension, individuals) if a direct connection could be made with self-government, so that the presence or absence of the persecution of groups need not be considered. What could such a direct connection be? It must be remembered that self-government has a special meaning in the instrumental argument for self-determination. While in political philosophy generally,

self-government is often taken to be synonymous with the idea of democratic legitimacy, with regard to national self-determination it has a quite different meaning. Here it denotes the right of nations to choose the sovereignty under which they will live--including the territorial boundaries of the states exercising that sovereignty.

The "right to decide" that Margalit and Raz defend as necessary for the "culture and self-respect" of encompassing groups is therefore the right to decide about the legitimacy of boundaries and sovereignties, not the "narrow" political right to decide on substantive matters of governance. It is precisely the need of individuals to live well in encompassing groups that justifies expanding the standard notion of political legitimacy to include the consideration of territory, boundaries, and citizenship: "[The] importance [of encompassing groups] makes it reasonable to let the encompassing group that forms a substantial majority in a territory have the right to determine whether that territory shall form an independent state in order to protect the culture and self-respect of the group"⁹³

Several conditions are imposed on legitimate acts of self-determination: respect for minorities within the redrawn boundaries, prevention of damage to the interests of other countries, and, above all, the assertion of self-

⁹³Margalit & Raz, "National Self-Determination," p. 457.

determination for the "right reasons."⁹⁴ But what, after all this, actually makes self-determination "reasonable," even granting the need of social groups for respect and cultural integrity? It is ultimately an essential or intrinsic connection between culture and territory that is assumed to exist that legitimizes the idea that nations have claims to their own states.

Margalit and Raz make this clear when they distinguish between possession of and title to territory.⁹⁵ While possession of territory resides with whomever occupies it at present, so long as they did not (recently) seize it by force, title to territory is something else altogether. The determination of possession of a given country or region is "based largely on public-order considerations." By this they mean that a "possessory right" is obtained through a correct procedure for obtaining possession--inheritance, purchase, or invitation, for instance. If possession is obtained by means of conquest, blackmail, or other acts of force, it is generally not considered to yield a possessory right, and measures may legitimately be taken to restore the prior rulers.

How is title to a territory different from this? It is a right to have possession of a particular territory. That

⁹⁴Margalit & Raz, "National Self-Determination," pp. 457, 459.

⁹⁵Margalit & Raz, "National Self-Determination," p. 442.

is to say, title is conferred not just on those who have legitimate possession of a territory, but on those who have legitimate claim to possession, even if they choose not to presently exercise their claim. Thus, a nation may "choose" to exist within a multinational state, living within its "national territory" as a component of a larger state. That nation may not therefore presently have possession of that territory independent of its membership in the larger entity. Yet, for all that, the nation still has title to the territory and can choose to exercise it at any point in the future.*

Yet, how does a group come to have such a right of title? Since neither Margalit and Raz nor other theorists of national rights have offered an explicit theory of title to territory, it must be inferred that a claim of title exists because of the particularly close and essential connection between cultures and lands.⁹⁷ But this is not a

*One inference from this theory of title is that residency is not a necessary condition for claiming a title to territory. Since a group requires a particular territory not for its livelihood but for its self-respect, it is conceivable that the territory could presently be occupied by someone else. Yet, the group still may have title to that territory, should they so assert it. Examples that come to mind are the claims of Jewish title to Palestine and Serbian title to Kosovo. Of course, such claims will inevitably clash with those groups--e.g., the Arab and Albanian populations living in these regions--who currently have possession and may also be expected to assert claims to these areas.

⁹⁷Michael Walzer has argued this point most extensively; see his Spheres of Justice, pp. 42-44, and the discussion of his theory in Chapter 4, below.

relationship of a group to a means of achieving its well-being; acquisition of the territory may or may not be instrumental in improving the group's welfare.

The relationship of national groups to national territories is deeper than that--something much more like a kind of identity between groups and territories. The trouble with this view is that there is nothing inherent in any particular connection between groups and territories. In fact, the same group may come to view itself very differently--in relation to different conceptions of a "homeland"--depending on who has possession of these territories and what is done with them.

Historically, many nationalists have asserted rights to title over territory when they feel they have been discriminated against--usually by way of the redistribution of wealth or property within a multinational state. Yet, this very problem of decline in the well-being of a group--and its consequent assertion of a right to self-determination--might be viewed very differently if the group (and its territory) is simply defined differently. This is the classic problem of defining a people, which assertions of groups' right to title does nothing to solve. Grievances, and the corresponding conflicts over possession of lands and resources that sometimes occur between national groups, have no inherent meaning. They can be viewed as conflicts between peoples or groups or conflicts within a

people or group. Allen Buchanan makes this point when he argues that,

...whether a group views itself as a victim of discriminatory redistribution will depend in part upon how it conceives of the boundaries of its own identity--whether it regards those to whom some of its resources are being transferred by government redistribution policies as its own people or as an alien group."

It is a constant of nationalist thought that this definition of a nation, people, or group is not an arbitrary or even constructed one, but rests on some essential characteristics of a group's existence. Yet, for an instrumental justification of national rights, this view is particularly inappropriate. The legitimation of moral claims must, from this perspective, be a result of an estimation of consequences, not of intrinsic or essentialist definitions of agency.

When a distinction is made between title and possession, a crucial assumption is made--that groups can lay claim to territory as their property and that such claims can override considerations of public good. But this overlooks the limited nature of property rights: most modern views of property (i.e., those after John Locke's) regard rights to ownership as limited in various ways by considerations of general welfare or distributive justice. As Buchanan argues, "Any theory of justice that allows for any redistribution whatsoever . . . must concede . . . that

"Buchanan, Secession, p. 51.

the individual right to private property is a limited right, not a right against all interference or a right of unlimited accumulation"⁹⁹

While Raz seems to maintain that property rights are an inherent feature of any social philosophy, he does concede that this does not mean that "they are either inalienable or of absolute or near absolute weight."¹⁰⁰ Yet, if this is the case, the distinction between title and possession collapses. If title can be modified or ended for reasons of general welfare or justifiable redistribution, then it is not fundamentally different from possessory rights that are maintained in accordance with "public-order considerations." If both are instrumentally justified in relation to certain conceptions of public well-being, then the distinction loses its importance. The whole idea of title, as invoked by Margalit and Raz to justify self-determination as a right distinct from conditional rights of possession, rests on an essentialist notion of the rightful ownership of territory, in which ownership is a function of some intrinsic connection between the possession and the owner. Yet, this is an idea that is insupportable by most theories of property rights (including Raz's theory).¹⁰¹

⁹⁹Buchanan, Secession, p. 42.

¹⁰⁰Raz, Morality of Freedom, p. 255.

¹⁰¹Of course, an exception is the libertarian theory of property advocated by philosophers such as Robert Nozick, who see any form of redistribution as illegitimate; see,

But even if the distinction between title and possession that seems necessary for self-determination to have any distinct meaning were established, how would title be justified? How, indeed, are property rights in general justified? The move to justify self-determination on grounds of a title to territory seems to be exactly backward: it is not political arrangements that need justification on the grounds of title to property, but property arrangements that need justification on the grounds of political norms.¹⁰²

e.g., Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974), esp. pp. 150-82. While Nozick does not differentiate terminologically between title and possession, he does argue, following Locke, for a right of ownership based on the "original acquisition" of property. This original acquisition is the basis of a right to ownership that cannot be abrogated by other considerations. Criticisms of Nozick's view may be found in Anthony Kronman, "Contract Law and Distributive Justice," Yale Law Journal 89 (1980), reprinted in Feinberg & Gross, Philosophy of Law, pp. 441-55; in various articles from Jeffrey Paul (ed.), Reading Nozick: Essays on "Anarchy, State, and Utopia" (Totowa, N.J.: Rowman & Littlefield, 1981), particularly Onora O'Neill, "Nozick's Entitlements"; and in Norman, Free and Equal, esp. pp. 144-53.

¹⁰²C. B. MacPherson has most emphatically asserted the political character of property relations--and their consequent need for justification in political terms. For instance, in his essay, "The Meaning of Property," MacPherson defines property as a "political relation between persons," and writes that,

Property is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right. This is simply another way of saying that any institution of property requires a justifying theory.... Property has always to be justified by something more basic; if it is not so justified, it does not for long remain an enforceable claim.

No direct connection, in short, can be made between the existence of encompassing groups and the legitimate title to rule over territory. The intermediate step of instrumentally justifying such title must be taken. Raz elsewhere argues just this point about rights in general:

...rights...rest on the importance of the interest of the right-holder which they serve...the importance we attribute to the protection of those interests results from their service to the promotion and protection of a certain public culture. That culture is in turn valued for its contribution to the well-being of members of the community generally, and not only of the right-holders. The importance of liberal rights is in their service to the public good.¹⁰³

"Public-order considerations" are a necessary part of justifying rights of all kinds--including property rights--and this applies to self-determination just as much as to supposedly conditional rights of possession.

THE CONSEQUENTIALIST JUSTIFICATION REFUTED

The idea that national self-determination can be justified by its consequences for encompassing groups fails for the reasons outlined above. But it is questionable whether there can even be a coherent argument for national self-determination on instrumental grounds. This doubt is provoked by the ways in which Margalit and Raz, quite

(in MacPherson (ed.), Property: Mainstream and Critical Positions (Toronto: University of Toronto Press, 1978), pp. 4, 11-12) Also, cf. MacPherson, "A Political Theory of Property," Democratic Theory: Essays in Retrieval (Oxford: Oxford University Press, 1973), pp. 120-40.

¹⁰³Raz, Morality of Freedom, p. 256.

consistently, exclude many of the conditions under which such a right is often thought to pertain. Is there any distinctive right or claim left to be made after these conditions have been invoked?

Before reviewing the major conditions for a legitimate claim of self-determination, mention needs to be made of the subsidiary conditions that must be respected once the claim is made. For instance, the interests of all inhabitants in the new state must be respected and the interests of other countries must be treated similarly.¹⁰⁴ But how often would this be possible, while still creating a new nation-state? After all, the creation of new states means the disruption of old ones, as well as the disruption of individual lives. If the right is made conditional on the absence of such disruption, how could it ever be invoked? Conversely, if it is invoked without regard for these other interests, then it will need a different justification altogether than the moral one given here.¹⁰⁵

Not only can the right of self-determination not be

¹⁰⁴Margalit & Raz, "National Self-Determination," p. 457.

¹⁰⁵This indicates the extent to which the justification of national self-determination given by Margalit and Raz is only superficially a consequentialist one. Such considerations as those just enumerated might be seen to be an occasion for balancing the gains and losses of invoking a right such as national self-determination. But, in that case, such a right would become conditional upon the satisfaction of other goods--a conclusion that Margalit and Raz want to avoid.

invoked for moral reasons if it will have deleterious effects on nonnationals; it cannot be invoked if the only reason for doing so is a desire for political independence from foreign domination.¹⁰⁶ While such a reason may have some bearing on the circumstances in which the right is claimed, it cannot provide the justification for such a right since it does not concern self-government in the sense to be justified here--self-rule of a national group within its own country.

Furthermore, self-determination cannot be claimed as a result of the persecution within a country of one group by another. While such persecutions may be the reason that some groups look to self-determination in the first place, persecution in and of itself cannot justify a right to self-determination, since such a right could not be claimed absent such a condition. Of course, if a truly instrumentalist conception of rights is maintained, a right would only be invoked under conditions of persecution or oppression. But even under such conditions, it is not apparent that self-determination would necessarily be the best recourse to ending the persecution. To ensure that such a right is available, its invocation must not be linked to persecution of the group.

But then, when could it be invoked? If a group is not

¹⁰⁶Margalit & Raz, "National Self-Determination," p. 441.

oppressed or persecuted, what is the instrumentalist warrant for the right? And if it is being persecuted, then general principles of individual human rights might warrant recourse (as a last resort) to the separation or secession of a group from its persecutors. Once again, self-determination must either be regarded as an intrinsic right of nations, deriving from their nature as groups of a certain kind, or it must be a political right based on the character of political legitimacy, rather than on specifically moral considerations.

When self-government is cited as a specific entitlement of groups, the problem of possession arises. Self-determination cannot, on moral grounds, be viewed as justifying possession of territory, since this can only be justified on prudential grounds of prior possession, international stability, and so forth. Yet, if the justification of title to territory is separated from that of possession, there is nothing left with which to justify title to particular territories. Only if recourse is made to some essential link between particular groups and particular territories--regardless of prudential considerations--can such a title be justified.

There is accordingly no distinctive right of self-determination that can be justified on the instrumental grounds of ensuring the well-being of national groups. National self-determination cannot be a goal right, since no

particular goals can be achieved by invoking such a right. If national self-determination can be justified at all, it can only be by directly justifying the connection of nations to states on political grounds--that is, on the basis of its fulfillment of the distinctive nature of a legitimate political community. There are two ways this has generally been done: either by showing how self-determination is necessary in order for individuals to consent to political authority or by showing that nations are the only legitimate form of political community, whatever form of authority such communities ultimately take. These justifications, which may be designated as consensual and communitarian justifications, will be examined in the next two chapters.

CHAPTER 3
Democracy, Consent, and Self-Determination

FROM DEMOCRACY TO SELF-DETERMINATION

A commonplace of nationalist doctrine is the idea is that nations have a right to self-determination because their choice of membership in a state is an important part of freedom generally, and political freedom in particular. The philosophical equivalent of this idea is the notion that nations should have a right of consent to the authority of the states within which they live.

These ideas indicate that, for many, national self-determination is preeminently a political idea which is designed to change the bases of citizenship, community, and authority. Yet, much of the discussion of this principle has concerned its moral legitimacy, usually based on some idea of the moral agency of groups or the desirability of group well-being. The first part of this study was designed to show that such ideas cannot provide a satisfactory justification for a principle of national self-determination. If such a justification is possible, it must therefore be specifically political in the sense that national self-determination would be warranted by the very nature of legitimate political authority.

Moral justifications of national self-determination were found to be of two kinds: formal-deontological justifications, on the one hand, and instrumental-

consequentialist justifications, on the other. Similarly, political justifications of national self-determination are of two types: a consensual (or libertarian) justification and a communitarian (or more purely nationalist¹) justification. The latter justification will be examined in the next chapter. The consensual justification is the subject of the present chapter.

Consent theory generally emphasizes a decision procedure by which individuals come to be obligated to a state. A state lacking this therefore also lacks true political authority. Such a decision procedure is a means of linking individual persons to a government through the legitimation of political authority or the acceptance of political obligation(s) on the part of those individuals. By focusing on the unmediated relation of individuals to the state, consent theory can be seen to be a form of liberal individualism²--a theory often considered to be antithetical to nationalism. Nevertheless, this chapter will examine a

¹The reasons that communitarianism is more purely nationalist than other forms of justification will be discussed in the next chapter.

²Carole Pateman, in her book, The Problem of Political Obligation: A Critique of Liberal Theory (Berkeley: University of California Press, 1979), states that: "The idea of self-assumed obligation and the theoretical perspective of abstract individualism share a common historical origin. This means that they tend to be seen as if they are integrally associated with each other..." (p. 24).

version of "individualist" (or libertarian) nationalism.³

Individualist views of political authority focus--in a way that communitarian views do not--on the precise way in which individuals come to have an obligation to a state. This topic is most often considered today under the rubric of democratic theory, since the dominant commitment in the modern theory of political authority has been to some version of a democratic state.⁴ This commitment has most

³The relations of such terms as liberalism, individualism, and libertarianism are hard to sort out. First of all, communitarianism in certain versions is not at all incompatible--at least in the views of some of its proponents--with a commitment to the standard list of liberal rights and commitments. See, for instance, Charles Taylor, "What's Wrong with Negative Liberty," and "The Nature and Scope of Distributive Justice," in Philosophical Papers, Vol. 2: Philosophy and the Human Sciences (Cambridge: Cambridge University Press, 1985), and Michael Walzer, "The Obligation to Disobey," in Obligations: Essays on Disobedience, War, and Citizenship (Cambridge, Mass.: Harvard University Press, 1970), and Spheres of Justice.

But, second, there is reason to see such self-professed liberals as John Rawls and Ronald Dworkin as quasicommunitarian thinkers who are willing to modify the thoroughgoing individualism of early liberal thinkers such as Locke. In this sense, the "true" or classical liberalism today is the libertarianism of Robert Nozick and others (including Harry Beran; see the discussion in this chapter). See Stephen Mulhall and Adam Swift's book, Liberals and Communitarians (Oxford: Blackwell, 1992), in which they make this point (on pp. x-xii).

Nationalism as a doctrine cuts across these philosophical divisions, since there are libertarians (Beran), liberals (Will Kymlicka), and communitarians (Michael Walzer) who espouse ideas such as national self-determination. Nevertheless, see the end of this chapter and the argument in Chapter 4 for why there is a particularly close fit between communitarianism and nationalism.

⁴As John Dunn, in Western Political Theory in the Face of the Future (Cambridge: Cambridge University Press, 1979), pithily expresses this as follows: "Democratic theory is the moral Esperanto of the present nation-state system, the

often been expressed through the elaboration of a concept of individual, personal consent to a state authority (and to the obligations that that entails).⁵ What has come to be called consent theory is therefore at the heart both of democratic theory generally (understood as a theory of democratic political obligation) and of an individualist or libertarian justification of national rights. This section will make explicit some of the connections between democratic theory and national self-determination. Later sections will examine in more detail the nature of consent that underlies the consensual justification of the political rights of nations.

The most developed version of the argument for national self-determination as an entailment of a basic commitment to consent in liberal democratic theory is that found in the recent work of Harry Beran.⁶ Beran gives not only a

language in which all Nations are truly United, the public cant of the modern world, a dubious currency indeed..." (p. 2).

⁵A. John Simmons, Moral Principles and Political Obligations (Princeton, N.J.: Princeton University Press, 1979), p. 57.

⁶See, especially, his book, The Consent Theory of Political Obligation (London: Croom Helm, 1987), as well as the various articles quoted in this chapter. For related views, see Copp, "Do Nations Have the Right of Self-Determination?" and Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford: Oxford University Press, forthcoming).

Nevertheless, it must be said that Beran's view of self-determination, much like Nozick's view of property rights, is very much a minority position in political philosophy today. As such, its logical significance as a

thoroughgoing defense of national self-determination, but also makes the idea absolutely essential for an adequate theory of political authority in general. But before turning to Beran's work, it is worth considering the general claim that a principle of national self-determination is a necessary corollary of an elementary commitment to democratic political processes. This idea is expressed, for example, by Copp, when he argues that the notion that people have a legitimate claim to govern themselves in a state implies that they have the right to choose within which state they will do so.⁷

Self-government as a basic democratic ideal is meant to be coextensive with the idea of majority rule. If a majority can rightfully choose a particular government for itself, why, Copp (and others) ask, cannot that majority also rightfully choose which state that government will rightfully rule over?⁸ The first question that arises about

possible argument for national self-determination greatly outweighs the number of its adherents. On the other hand, as noted subsequently in this chapter, the common idea of national self-determination as a "democratic" entitlement of some sort relies on the notion that national self-determination is an essential part of the practice of democratic consent. And this is exactly the point that Beran argues for in his work.

⁷Copp, "Do Nations Have a Right of Self-Determination?" p. 84. Copp concludes: "...given that the members of a nation desire that they be governed by a separate national state, there is a prima facie case for their being governed by such a state."

⁸Copp, "Do Nations Have a Right of Self-Determination?" pp. 87-88.

such a view concerns where a majority that claims such a right is a majority. If it is a majority of citizens of a state, then "choosing" a state is an irrelevancy. This is not so if the choice is whether or not to dissolve the state; a majority of members of a given state may of course decide to split up the entity. But this requires no special apparatus of principles or rights--it is simply the expression of the majority of an existing political community.

National self-determination is different from this because it is concerned with what democratic rights are available to groups that are not at present (or perhaps have ever been) distinct and self-governing political communities. Only if this further extension of majority rule is warranted can it be said that democratic principles entail a right of self-determination for nations. But this is exactly the claim that Copp makes:

...the [democratic] principle must also extend to groups which could feasibly be states...nations are groups of this kind.... The result is that...any state, nation, or nation-like group has the right to form or maintain a separate self-determining state if a majority of its members chooses that it do so.'

The important aspect of this claim is that democracy is progressively redefined from the majority rule of a political community to the choice of a majority of any group

⁹Copp, "Do Nations Have a Right of Self-Determination?" pp. 86-87 (*italics added*).

within a political community (or even distributed across different political communities). But what justifies this redefinition of majority rule?

The answer to this question is the subject of much of the rest of this chapter. But one preliminary aspect of this redefinition needs some consideration. Is it the case that any group whatsoever can claim self-determination as a right on the basis of democratic legitimacy? Copp argues that this "unrestricted" interpretation of the principle is unwarranted. The reason is that it would lead to the attempted construction of nonviable states, in terms of size, shape, or membership. Copp writes that, "In the case of many groups, it would be completely unfeasible to form a separate state, even if no person or collective interfered in any way, and I assume this to show these groups do not have this right." Copp further admits that such an unrestricted principle of self-determination would undermine the ability of any political community to maintain majority rule--a point to which we will return below.¹⁰

Nevertheless, most nationalists--including Beran--would maintain that self-determination should necessarily be unrestricted. This is because only a thoroughgoing application of the principle of self-determination can guarantee consistency of rights for all nations. In

¹⁰Copp, "Do Nations Have a Right of Self-Determination?" p. 86.

addition, according to Beran, self-determination is essential for an adequate consent-based system of political authority. Consent, in his view, must above all concern the choice of membership in states by individuals. Without this choice--and by extension, without a right of (national) groups to choose their political affiliation--no state could legitimately claim authority over its citizens.

SELF-DETERMINATION AND LIBERAL INDIVIDUALISM

Beran's work on national self-determination is important because he derives the principle from an individualist (or libertarian) rather than from a collectivist (or communitarian) position. Moreover, he links self-determination explicitly with a commitment to liberal political principles. In doing so, Beran seeks to rescue national self-determination from certain collectivist or communitarian ideas that he sees as weakening the case for such a principle.

While Beran starts from some minimal assumptions regarding personal rights and the good of individual fulfillment, he rejects the need for an ethical theory as a basis for the self-determination of nations. Instead, he insists on the political nature of the principle--in contrast to thinkers discussed earlier who emphasized it as a feature of "cultural rights." But what this means is that he must come up with a viable account of political authority and obligation based on a prior commitment to the good of

personal self-determination.

Beran seeks to do this by giving what is usually called consent theory a novel interpretation--one centered on the individual's initial choice of membership in a political community. He thus seeks to avoid some of the standard problems with consent theory while at the same time putting national self-determination on a stronger footing. Whether he (or anyone) can accomplish this by way of a liberal individualist account of political authority is the subject of this chapter.

It will be apparent that, in order to evaluate Beran's theory of self-determination, some major problems with the liberal theory of authority will have to be brought into the discussion. If this theory has insuperable problems itself, then it can hardly provide a basis for the rights of nations. Of course, even if a liberal-individualist political theory is not completely flawed, it may still provide inadequate grounds for a right of national self-determination. But I will maintain that the problems go deeper than that--implicating the very individualist assumptions of traditional liberal consent theory.

The core value of Beran's liberal individualist theory of authority is voluntarism. It is the "freedom of self-governing choosers to live in societies that approach as closely as possible to voluntary schemes" that underlies the right of groups such as nations to also choose the states

within which they exist."¹¹ The way in which voluntarism comes to be the basis of political legitimacy is traceable to a prior "moral right"--that of personal self-determination. This general conception of both personal and political commitments being legitimated by voluntary choice is further extended by Beran to encompass the rights of citizenship.

Political relationships are regarded as being properly a matter of personal choice, just as are working, sexual, and social relationships. Beran claims that this is the reason why consent is the basis of legitimacy in political affairs. But when consent is applied to political matters, there are two aspects in which it ought to be embodied: "the political arrangements within a state" and "the unity of the state." Therefore, "not only must the political decision making within a liberal democratic state involve the consent of the governed, but the unity of the state must also be voluntary."¹²

There are two features of this view that are worthy of note: the specific meaning of a voluntaristic view of state membership and the nature of the justification of national self-determination. In the first case, secession is an

¹¹Harry Beran, "A Liberal Theory of Secession," Political Studies 32 (1984), p. 25.

¹²Harry Beran, "Self-Determination: A Philosophical Perspective," in W. J. Allan Macartney (ed.), Self-Determination in the Commonwealth (Aberdeen, Britain: Aberdeen University Press, 1988), p. 27.

essential aspect of Beran's theory; in the second, a distinctively individualistic justification is given for group self-determination. The basic principle, again, is that "the rightful unity of the liberal democratic state must be based on the consent of its members."¹³

It is important to note that this idea of the consensual unity of the state is not a version of the idea of majority rule; it is instead the idea that groups within a given state have the right to secede if they so choose-- that the unity of a state may be dissolved by a group within the state (rather than by the whole people).¹⁴ Beran seems to regard this idea as an extension of the idea that emigration is legitimate. If this is so (for individuals or for groups), then secession is similarly legitimate, since it is usually a more viable means of realizing changes in the desire for sovereignty by a distinct group than mass emigration.¹⁵

Secession, then, is a proper means of realizing the self-determination of groups in that it is based on the "liberal" commitment to personal self-determination. That is, Beran regards secession as an extension of the personal

¹³Beran, "Self-Determination Referenda," p. 153.

¹⁴Beran, Consent Theory of Political Obligation, p. 41.

¹⁵Beran, Consent Theory of Political Obligation, pp. 38-39.

choice of political membership.¹⁶ Yet, the connection between individual self-determination and group self-determination still needs to be specified.

There are two principal aspects of Beran's views on how individuals and groups ought to be connected. First, the individualism of Beran's conception of self-determination means that the right of persons to choose political affiliations overrides the rights of majorities in states to decide matters of citizenship and sovereignty:

Since liberalism, in seeing persons as self-governing choosers, is an individualist philosophy, the sovereignty of the people cannot be an essentially collective property which can only be exercised by all the citizens of an existing state within eternally immutable borders...liberalism must also grant that territorially concentrated groups can exercise their sovereignty....¹⁷

Just as individual consent determines the legitimacy of state authority, so it can undermine that authority in favor of the sovereignty of groups such as nations that seek states of their own.

The second aspect of the connection between individual and group self-determination in Beran's view is that the voluntarism of the liberal theory of self-determination precludes the necessity of reference to the inherent or intrinsic value of national membership for individual self-

¹⁶Beran, Consent Theory of Political Obligation, p. 37; cf. Beran, "Liberal Theory of Secession," pp. 30-31.

¹⁷Beran, "Liberal Theory of Secession," p. 26; cf. Beran, "Self-Determination," p. 28.

realization. It is the right of individuals--not the separate right of groups--to directly choose membership in states that determines the legitimacy of those states: "In this voluntaristic account of the right, it is not justified in terms of the intrinsic value of nations or the value of nations to the welfare of their members. Instead, the right is derived from the right of individuals to choose their political relationships"¹⁸

But when an individualist account of political authority is given that, on the one hand, overrides the principle of majority rule, and, on the other hand, seemingly rejects the importance of national identifications, a number of questions are raised. For one thing, to what extent is the resultant theory of authority and self-determination "liberal" in its own terms? Does not the rejection of democratic majoritarianism in favor of an "unrestricted" right of self-determination, in Copp's terminology, risk the "liberal" principles it is designed to embody? For another, does a theory of voluntaristic consent that refuses adherence to majority rule in fact legitimate democratic regimes at all? In other words, does the version of consent theory that Beran advocates actually work to justify political obligations any better than other

¹⁸Harry Beran, "Border Disputes and the Right of National Self-Determination," History of European Ideas 16:4-6 (Jan. 1993), p. 484; cf. Beran, "Self-Determination Referenda," pp. 153-54.

versions?

Finally, how can a thoroughgoing individualist theory of political membership justify the rights of groups such as nations to their own states without first providing some legitimacy for the ascription of individuals into those groups? In short, is a liberal individualist justification of self-determination fundamentally different from nonindividualist justifications derived from adherence to nationalistic ideas of personal and group identity? This last question will be considered first. Then, more more general problems with the use of consent theory will be discussed.

LIBERALISM AND/OR NATIONALISM?

If liberal consent theory is voluntarist and individualist, how can it be used to derive a justification for the rights of groups such as nations? Beran argues that, while some forms of nationalism may be incompatible with consent theory, not all forms are:

...are not nationalism and consent theory incompatible, the former being a collectivist doctrine, the latter an individualist one? There are of course versions of nationalism which are incompatible with consent theory, but the assertion of a right to national self-determination is not.¹⁹

The reason that liberal consent theory and nationalism are not absolutely incompatible, on Beran's view, is that rights of nations can be derived from rights of individuals (to

¹⁹Beran, Consent Theory of Political Obligation, p. 138.

their own self-determination). This is different, however, from according rights to nations that take precedence over individual rights.

For this reason, what Beran calls the "core doctrine" of nationalism is incompatible with consent theory. This core doctrine is the idea that "the individual citizen [is] a captive of birth and history"--that is, individuals are formed primarily and exclusively within a particular nation, to which they owe primary allegiance.²⁰ Such a view yields a very different justification for national rights, in Beran's view. The adoption of the nationalist view means that the voluntary choices of individuals may be justifiably overridden by the claims of national allegiances ascribed to those individuals by others.

The problem with this idea, according to Beran, is that individuals do not necessarily fit neatly into national groups. Consequently, a theory of state membership based on national identities cannot provide a satisfactory accounting of grounds for political boundaries and citizenship rights: ". . . the cultural dividing lines between much of humanity are too indefinite to provide a comprehensive basis for rightful political borders."²¹

If nationalism cannot provide an adequate justification for legitimate political membership, then why is national

²⁰Beran, "Self-Determination," p. 31; see also p. 25.

²¹Beran, "Border Disputes," p. 481.

self-determination justifiable at all? Beran maintains that, if nationalist demands for nation-states conflict with liberal voluntarist demands for separate states, the voluntarist demands should take precedence. Conflicts may occur when nationalists attempt to maintain the unity of new nation-states in spite of further demands for separation of regions or minority groups. In such cases, the separatist demands have greater prima facie validity than the nationalist ones.

Nevertheless, "a right of national self-determination follows from the liberal democratic theory of group self-determination" ²² Beran maintains that any group that (1) views itself as distinct, (2) occupies a definite territory, and (3) can form a political community has a right of group self-determination. ²³ Nations qualify as groups of this sort: ". . . surely if there is a moral right of group self-determination at all, then the most obvious self to have such a right is a nation The right of nations . . . to self-determination is the core of the principle of self-determination." ²⁴

On the basis of these views, however, it may be asked whether a voluntarist theory of self-determination is substantively different from a nationalist theory that does

²²Beran, "Self-Determination," p. 31.

²³Beran, "Self-Determination," p. 28.

²⁴Beran, "Self-Determination," p. 24.

not make reference to consent theory or democratic rights. Beran wants to argue that the philosophical basis of the justification of self-determination is distinct. While this is true if nationalism is thought to be a nonvoluntarist, or perhaps communitarian, theory of political authority, it does not mean that the voluntarist justification of self-determination does not generate a nationalism of a different kind.

Instances of conflict between new nation-states and further secessionist movements may in fact simply be conflicts between different nationalisms. Beran's theory is a way of making distinctions between national claims, not of finding a nonnationalist basis for legitimating political communities. Finally, it will turn out that Beran's ideas do presuppose the same communitarian assumptions of other nationalist theories. But in order to show that this is the case, it is first necessary to examine his consent theory in more detail.

A CONSENT THEORY OF MEMBERSHIP

Beran's explication and defense of a consent theory of authority and obligation constitutes an attempt to revitalize the notion of consent by meeting various objections that have arisen to it since Locke's initial formulation. There are two special features of Beran's consent theory that make it a departure from past theories. First, it is a theory of actual, rather than tacit, consent

to authority; that is, only actual consent is viewed as a legitimate means of authorizing a state's monopoly of political power.²⁵ Second, consent applies, not to every decision made by government, but to an initial procedure for the choice by individuals of membership in a state; consent theory is a theory of membership as the basis for all other authority.²⁶

The result of this reformulation of consent theory is that self-determination, particularly in the form of secessions from states, plays an absolutely central role in the consensual basis of political authority. Without according rights of secession and self-determination to its citizens, in other words, no state is to be considered legitimate.²⁷ Far from being an entailment of a general theory of authority, a right of group (including national) self-determination turns out to be essential to the theory itself.

The basic meaning of consent used by Beran, and indeed within the general tradition of consent theory, is that of a voluntary act by which individuals accord a state authority

²⁵Beran, Consent Theory of Political Obligation, p. 31.

²⁶Beran, Consent Theory of Political Obligation, pp. 28-29.

²⁷Beran, Consent Theory of Political Obligation, p. 37.

or assume obligations to a state.²⁸ From this basic view of consent, Beran seeks to derive a conception of self-determination that retains the emphasis on voluntarism and individual choice. In order to do this, he distinguishes his own position from traditional consent theory and its problems in three ways: (1) consent consists of the voluntary choice of membership in a state; (2) consent must be express or actual to be legitimate; and (3) consent is continual in the sense that individuals must each engage in a decision or choice procedure--though such consent need not be by every individual in a state.

The standard problem with traditional versions of consent is that for the theory to be a theory of legitimate authority for actual states, it must incorporate some kind of tacit consent. This is because it is generally thought to be the case that every citizen cannot continually consent to every act of a government. Some mechanism must be devised for consent to be ongoing in the absence of express consent by all citizens.²⁹

²⁸Simmons defines consent theory generally as "any theory of political obligation which maintains that the political obligations of citizens are grounded in their personal performance of a voluntary act which is the deliberate undertaking of an obligation" (Moral Principles and Political Obligations, pp. 57-58). In this general formulation, it includes promises, contracts, and various types of express and tacit consent.

²⁹For instance, Simmons writes that while "express consent is a ground of political obligation...the real battleground for consent theory is generally admitted to be the notion of tacit consent. It is on this leg that consent

Consent theorists have therefore had to face the problem of how to ensure the legitimacy of states when their citizens have not expressly consented to the authority of any particular state. Critics of consent theory have argued that this shows that consent is an inadequate basis for authority--and perhaps that there can be no general justification of authority.³⁰

There are at least two major problems with the idea of tacit consent--and, to some extent, with consent as a general principle. First, tacitly consenting to something is similar to being regarded as having accepted that thing, without necessarily having wanted to accept it. In other words, when a relationship between an individual and another entity (e.g., a government) already exists, consent becomes a means of legitimating that relationship. Yet, that legitimation is not a matter of the individual having established the relationship voluntarily, but rather of their having accepted what already exists. Whether such individuals would, in the absence of the relationship, have wanted to establish it (e.g., citizenship in a state) cannot be determined by imputing consent to them.

This is a problem not only with tacit consent but with

theory must lean most heavily if it is to succeed" (Moral Principles and Political Obligations, p. 79).

³⁰See, e.g., Pateman, Problem of Political Obligation, and Simmons, Moral Principles and Political Obligations; see also Robert Paul Wolff, In Defense of Anarchism (New York: Harper & Row, 1970).

consent in general; it is simply made more acute when no express consent can be said to have been given. The lack of voluntarism in consent, tacit or express, is seen clearly when consent is contrasted with acts of promising, in which new relationships are established voluntarily between persons. Carole Pateman distinguishes between promising and consent in the following way:

A promise is an example of self-assumed obligation as the creation of a relationship of obligation. The social practice of promising enables individuals to create a new relationship where none existed before.... Consent, however, must be to something. In the case of obligation it is consent to an already existing relationship of obligation.³¹

Beran does not distinguish between promising and consenting because he maintains that, in his own version of consent theory, both relationships are subsumed within a general category of agreeing to membership in a state.³² Whether Beran's version of consent is able to incorporate more voluntaristic relationships such as that of promising remains to be seen. But it is the case that his membership version of consent is able, to some extent, to avoid this classic problem of tacit consent.

This is because Beran defines consent to membership as a form of express consent. In general terms, consent to membership in a state transforms that state into a

³¹Pateman, Problem of Political Obligation, p. 21.

³²Beran, Consent Theory of Political Obligation, pp. 29-30.

"voluntary association."³³ The means by which this occurs is that of a decision procedure which ensures that "actual personal consent must be the basis of political obligation and authority."³⁴ The purpose of the decision procedure is to make membership in a state contingent on the express agreement of the individuals concerned.

In doing this, Beran seeks to avoid the second major problem with tacit consent--what Simmons calls the "problem of 'tacit consent through residence.'"³⁵ Locke and other consent theorists have maintained that residence within a state constituted tacit consent to the authority of that state. Yet, as Simmons and others have noted, without a clear and explicit choice as to whether residence in the state is acceptable to individuals, those individuals cannot be said to have consented--in the sense of agreed--to the authority of the state.

It is only when a decision procedure is instituted that allows persons to actually choose membership in a state that consent can be said to exist (whether it therefore legitimates the state's authority is another matter,

³³Beran, "Self-Determination," p. 27.

³⁴Beran, Consent Theory of Political Obligation, p. 23 (italics added).

³⁵Simmons, Moral Principles and Political Obligations, p. 95.

however).³⁶ But even under these conditions, is consent through residence a realizable means of legitimizing authority? A decision procedure that made this a real possibility would usually be understood to allow for emigration in cases where individuals did not consent to a government.

But if emigration were allowed, or even provided for, consent would still be, in Pateman's terms, the acceptance or rejection of a prior existing relationship, rather than the postulation of a new--and purely voluntary--relationship. For emigration is often not an acceptable option for persons if the losses involved in acting upon it are considered. As Simmons notes,

The problem is that it is precisely the most valuable "possessions" a man has that are often tied necessarily to his country of residence and cannot be taken from it. Most men will treasure home, family, and friends above all things. But these goods are not moveable property and cannot simply be packed on the boat.... And this places a very heavy weight on the side of continued residence.... In that case, we would be justified in concluding that no such procedure could ever allow us to take continued residence as a sign of tacit consent to the government's authority.³⁷

³⁶Simmons maintains that Plato (through Socrates' statements) anticipates such an idea in the Crito (Moral Principles and Political Obligations, pp. 95-96).

³⁷Simmons, Moral Principles and Political Obligations, pp. 99-100. In addition, it should be noted that, even when individuals are willing to emigrate as a way of rejecting the authority of a state, the frequent unwillingness of other states to admit such persons severely limits the use of that option. Recent examples of this can be found in the U.S.' attitude toward Haitian immigrants, Germany's restriction of Turkish immigration, and so forth.

The solution that Beran offers to this problem is that secession as well as emigration must be an option in any decision procedure designed to ensure the consent of individuals to governmental authority. Residence is therefore considered to constitute consent only when the persons concerned have chosen to reside in a state--to become members of it--given the option that they could have either emigrated or seceded from it. The reason that secession is important here is that emigration, as Simmons and others have noted, has great costs and consequently is often not an option that groups will voluntarily exercise.³⁸

Consent then, according to Beran, is properly considered to be the acceptance of membership in a state, rather than actual or virtual agreement with a particular government ruling over the state. A formal decision procedure through which this acceptance is explicitly stated is a part of the theory. Three conditions must be present for this procedure to be fully legitimate: (1) there is a right to emigrate; (2) secession must be permitted; and (3) a "dissenters' territory" should be created.³⁹ The last condition means that a geographical area should be set aside for individuals who reject membership in any state.

Two additional features of Beran's "membership version"

³⁸Beran, Consent Theory of Political Obligation, pp. 38-39.

³⁹Beran, Consent Theory of Political Obligation, p. 125.

of consent theory should be noted. For one thing, the idea that every individual must consent to a government for that government to be legitimate is not implied. Beran seeks to leave room for democratic majoritarianism in deciding the legitimacy of authority. Nevertheless, Beran maintains that a minority is not bound by an obligation to a state that the majority has accepted--if it can viably exercise the options of emigration or secession.⁴⁰

Furthermore, individuals or groups cannot be bound by the choices made by prior generations to constitute a state of which the subsequent generations are to be considered members. This is because "in so freezing the status quo one generation, which exercised its freedom of choice, attempts to deprive later generations of the same freedom."⁴¹ Means must accordingly be found with which to register the choice of membership of subsequent generations, so that consent to the authority of some state can be given--or a new state created.

In this way, Beran seeks to fulfil the requirements that Pateman (and before her, Rousseau) suggested a truly voluntarist conception of authority must have: the ability to create new relationships of voluntary agreement, rather than being bound by consent or dissent to old relationships of obligation. The chief means by which Beran sees this as

⁴⁰Beran, Consent Theory of Political Obligation, p. 99.

⁴¹Beran, "Liberal Theory of Secession," p. 25.

being achieved is that of referenda to decide the membership of groups within a state.

The question of self-determination is therefore necessarily raised by the membership version of consent theory. Only if groups can determine for themselves their membership within states can these states become legitimate authorities. But this in turn requires that groups have the ability to opt out of a state, setting up a new state of their choice. Some right of self-determination is then required for consent to operate as the basis of membership (and consequently, state authority in general). It, however, remains to be seen whether the very mechanism of determining legitimate authority serves to undermine the democratic and voluntaristic norms that are supposedly fulfilled by a consent theory of authority in the first place.

REFERENDA AND SELF-DETERMINATION

Within a consent-based theory of political authority derived from individualist premises, the chief institutional means of determining the legitimacy of a state is through a referendum. The questions of what kind of referenda are permissible, who is to vote, and what changes are allowable based on the results are all questions of importance for a theory of national self-determination. Beran has emphasized a particular conception of referenda because it enables him to specify the kind of consent that he feels is necessary to

give a state some authority.

The basis of a referendum in his theory is what he calls the "reiterated use of the majority principle." This idea is designed to avoid a simple referendum of a majority of citizens within a political entity, since such a referendum may simply ratify the already existing boundaries and memberships. In order to get the desired result-- acceptance of the separation from a state by any group of its citizens--majority rule must be modified. The reiteration referred to above enables such separations to take place, since a referendum would only be given within the boundaries specified by separatists themselves: "If there is a separatist group within a state, this group may specify a territory in which a separatist referendum is to be held In each case only the people of the territory specified by the separatists should be entitled to vote in the referendum."⁴²

The idea behind allowing separatists in a given situation to determine the extent of voting in a referendum is that, without this stipulation, separatists might be outvoted and the unity of the state would not be voluntary. While Beran rejects the idea that the consent of citizens to authority need be universal--that every citizen need consent--he argues that only small minorities of citizens that reject the state would not invalidate its authority.

⁴²Beran, "Self-Determination Referenda," p. 154.

In order to ensure this outcome, significant groups of individuals wishing to exit from the state ought to be allowed to hold referenda to legitimize their wishes.

But how are the nature and extent of these groups determined? Beran argues that the only legitimate way to do so is "[b]y making groups which wish to live together as separate political communities self-defining."⁴³ This idea, of course, is designed to yield a particular result: by being allowed to define exactly who may vote in a referendum, the separatists can virtually determine the outcome. The point of this, Beran maintains, is to ensure the voluntariness of every political association.

How voluntary (or democratic) such a scheme is will be considered below. But it is worth noting that Beran indicates the possibility of limits on the ability of separatist groups to dictate the results of referenda in their own favor. The reiterative use of referenda means that even in new states, the eventual possibility of further referenda specified by other groups of separatists must be entertained. So if the original group of secessionists sets boundaries without regard for this possibility, they may undercut their own ability to set up a legitimate state of their own: ". . . the separatists have to be cautious in specifying the territory in which the referendum is to be

⁴³Beran, "Self-Determination," p. 28.

held to minimise the risk of counter-secession."⁴⁴

Nevertheless, this limitation on the ability of separatist groups can be overcome under certain conditions if additional stipulations for the conduct of referenda are made. The goal of purely voluntary consent to a state suggests that all those living in a certain area would have rights to participate in a referendum deciding whether to secede from that state. But, in fact, Beran suggests that no such presumption can be sustained.

The purpose of "self-determination referenda" is not to determine whether all individuals living in an area consent to a particular state, but whether individuals who have a right to live in that area so consent: "[A] criterion of entitlement to vote in a self-determination plebiscite is being in a territory by moral right."⁴⁵ Neither birth nor residence decisively define rights of occupancy; rather it is "being a member of a group which traditionally occupies a territory" that is the crucial factor.

Without membership of this kind--cultural membership, perhaps--there is no necessary right to participate in a decision procedure concerned with determining political membership of the inhabitants of an area. Individuals not residing by right in a certain territory would also not necessarily have the right to call a counterreferendum to

⁴⁴Beran, "Border Disputes," p. 485.

⁴⁵Beran, "Self-Determination Referenda," p. 158.

determine their own political membership.

On the contrary, individuals who reside by right in a territory also have the right to "control" immigration into that territory. This is required by the need to maintain an identifiable area within which the group may live. Otherwise, an area may be occupied by people who have no traditional right to occupancy, and who furthermore might not vote for separation in a referendum of the territory. Consequently, such immigrants, who may have occupied a territory by conquest or forceable entry of another kind "are there without the right of being there and . . . do not belong even if they have spent their whole lives there and feel they belong."⁴⁶

Finally, this implies that such people not only "may legitimately be excluded from separatist referenda." Their continued immigration and residence may also be subject to controls exercised by the rightful inhabitants of the territory. Once a group establishes a separate state as the basis of a referendum, it has the right to control future immigration into the territory in accordance with the group's need to preserve their traditional rights. But, in addition, it has the right not only to exclude certain people in the future, but also to expel such people in the present: "if the immigrants do not depart voluntarily, then

⁴⁶Beran, "Self-Determination Referenda," p. 158.

their expulsion may be morally permissible"⁴⁷ This right is based on the idea that those who have voted in a referendum for a separate state have the right to take appropriate measures to maintain the integrity and independence of that state. If immigration is not controlled, and prior immigrants not expelled, the state may not be able to maintain both its unity (and hold over the territory) and its consensual form of government.

Self-determination for nations thus means that those nations can set the nature of the decision procedure establishing the initial conditions of membership (via a separate state), control the inclusion and exclusion of individuals into the state once established, and forcibly expel others that are not members of the state by right.

NATIONAL SELF-DETERMINATION AS A DEMOCRATIC RIGHT

An important question raised by this theory is in what sense a right to national self-determination--when defined as being justified on the basis of a consent theory of political authority--can be viewed as a democratic right. In particular, in what way can self-determination be compatible with a majoritarian conception of democracy, given the restrictions on democratic process outlined above?

Beran seeks to base the legitimacy of certain restrictions on majoritarian democracy on what he calls the

⁴⁷Beran, "Self-Determination Referenda," p. 160.

principle that underlies majority rule--"respect for the political rights of all persons."⁴⁸ He contends that a strict interpretation of majoritarianism--that is, use of majority voting procedures applied across a state as a whole in all instances--does not achieve fidelity with this principle. In particular, he cites two kinds of cases in which majority rule needs to be restricted in order to comply with the idea of equal political rights: (1) cases in which a political association is founded, and (2) cases in which a minority wishes to disassociate from a majority.⁴⁹

Beran argues, first of all, that whether a political association is founded or continued is not something that can be decided by a majority vote of an already constituted association. The reasoning is that, if this were so, the vote would always be for the continuance of the association.

⁴⁸Beran, "Liberal Theory of Secession," p. 27.

⁴⁹It is important to distinguish the kinds of restrictions on majoritarianism that Beran advocates from standard views of the "tyranny of the majority," from John Stuart Mill to the present. (For the classic problem, see John Stuart Mill, On Liberty, and more recently, Dworkin, Taking Rights Seriously.)

On the latter view, the scope of majority rule needs limitation in order to protect the autonomy of individuals in their private, or nonpolitical, lives. On Beran's view, majoritarianism needs restriction in order to give people's public, or political, lives a more thoroughgoing democratic character. This view must also be distinguished from recent advocacy of modified majoritarian democracy, since such advocacy assumes the unity of the political community, whereas for Beran, that is exactly what is at issue. On the recent critique of majoritarian democracy, see, e.g., Young, Justice and the Politics of Difference, and Lani Guinier, The Tyranny of the Majority: Fundamental Fairness and Representative Democracy (New York: Free Press, 1994).

In that case, groups within the association that wished to opt out would be unable to do so. To allow for the possibility of opting out, a separatist-specified referendum must override a referendum of the majority of citizens in a given state. This is because "if all citizens of the existing state could vote in the referendum they could outvote the separatists and the unity of the state would then not be voluntary" ⁵⁰

In the second case of minorities that do not wish to consent to the existing state's authority, the important determinant of whether majority voting within the state is legitimate is the extent to which the minority might be able either to eventually consent to majority rule or to itself become a majority in the state. If neither of these conditions apply, majority rule is not acceptable as a means of legitimating compliance by minorities with the authority of the state: "If 'vast and unbridgeable' differences separate the minority and the majority and there is no genuine possibility of the minority becoming the majority, the use of the majority principle may not be legitimate." ⁵¹

The emphasis in the foregoing on the choice of political association suggests what the nature of self-determination as a democratic right of nations is meant to achieve. It is not to be thought of as a response to

⁵⁰Beran, "Liberal Theory of Secession," p. 27.

⁵¹Beran, "Liberal Theory of Secession," p. 27.

oppression, injustice, or the direct denial of human rights or elementary entitlements. Rather, self-determination is a purely political principle: it is simply meant to be the means of legitimately settling the membership of individuals in a particular community (and the authority to which they are willing to consent). In this sense, the idea of self-determination is a formal right of political actors, not a response to particular problems or shortcomings: "If a group has a moral right of self-determination at all then it should be entitled to 'freely determine its political status' whether it is being oppressed or not."⁵²

Beran gives the example of the Kurdish nationalist movement as an illustration of the above point. Even if the Kurds in their different countries of residence were not subject to mistreatment or oppression, they would still have a justifiable claim to self-determination. This is because their lack of a nation-state constitutes a disadvantage under which they are "unable to maintain, develop and express their distinctive culture adequately. A people can be severely . . . disadvantaged by arrangements which do not involve any intentional discrimination, oppression or injustice."⁵³

⁵²Beran, "Self-Determination," p. 24.

⁵³Beran, "Self-Determination," p. 24. This view of the Kurdish question is flawed in at least three ways: first, because the Kurds have been able to maintain some forms of cultural identity for at least the last six hundred years without a state; second, because, while the Kurds have

The consent theory justification of national self-determination is therefore an argument for a "formal" right of self-determination, regardless of whether the exercise of the principle is warranted by specific injustices or beneficial consequences. As Beran puts it, "according to liberalism, if secession is possible, it should be permitted even if such moral justification [as the existence of oppression] is lacking."⁵⁴ The desire for self-determination on the part of a group indicates a lack of consent to the prevailing political association, and this is sufficient reason for the claim to be honored.

The desirability of self-determination for nations is therefore not at issue. Even if in some ways it is not desirable, the fact that it is desired by a group (as determined by a referendum) is enough reason for self-determination to be allowed. Permissibility rather than desirability is what counts when it comes to national self-determination.⁵⁵ The alternative, according to Beran, is a

maintained a distinct presence in the region, they are in fact still quite divided both culturally (with separate languages and religions in the different countries) and politically (with separate parties and movements); and third, because, if there is a case to made for a Kurdish state, it has usually been made in terms of patterns of persistent discrimination by their "host" states, and not in terms either of cultural extinction or of a unified identity. See Nader Entessar, Kurdish Ethnonationalism (Boulder, Colo.: Lynne Rienner Publishers, 1992), esp. pp. 3-6.

⁵⁴Beran, "Liberal Theory of Secession," p. 28.

⁵⁵Beran, "Liberal Theory of Secession," p. 23.

paternalistic attitude to national groups in which their good is regarded as separable from their own determination of the nature of their political association. While nonnational forms of the state may have some uses, they cannot be forced on national groups that refuse them in favor of states of their own.⁵⁶

The formal political justification of national self-determination thus proceeds from an initial commitment to a distinctive form of consensual political obligation to the idea of the necessity of individual consent to membership in any political community. The means of determining consent are referenda of a specific nature, in some cases justifying restrictions on a simple majoritarian voting procedure within existing states. Finally, self-determination is arguably seen to be a formal permission granted to all groups in determining their political affiliations irrespective of consequences.

These points will be reexamined below, with emphasis on some problematic assumptions, inconsistencies, and lacunae in the consent theory of self-determination. Finally, it will be asked whether national self-determination is a principle derivable from basic democratic principles or whether it actually contradicts the nature of a democratic polity.

⁵⁶Beran, "Liberal Theory of Secession," p. 28.

SOME PROBLEMS WITH THE CONSENT THEORY OF MEMBERSHIP

It is worth recalling the problem that Beran faces in developing his membership version of consent theory. By replacing a consent theory of authority with one of membership, he hopes to avoid the problems associated with the concept of tacit consent--namely, the ways in which individuals supposedly consent indirectly to state authority. Whether through residence in a country or through other indications of consent attributed to them, persons said to tacitly consent to a government can in fact be shown to have done no such thing.

By replacing the attribution of tacit consent to individuals with a procedure by which those individuals directly choose their membership in a political community, Beran hopes to make consent a more direct process--and one less prone to doubt concerning people's actual acceptance of authority.

The key to this shift from consent to authority to consent to membership is the possibility of rejecting membership in a state--of emigration or secession. It should be asked whether changing consent theory in this way can solve the problem of individual consent to state authority. In other words, if secession is made a democratic right, can those states that do accord this right be said to be fully consensual?

The idea of consent to membership, and a choice or

decision procedure that enables individuals to exercise direct consent or withdrawal of consent, hinges on the right of groups to "opt out" of a state voluntarily. (The right of individuals to do so is equivalent to voluntary emigration and does not raise the issues of self-determination and secession with which we are here concerned.) Whether democratic principles allow such a right of opting out is what is at issue here. Lea Brilmayer, for one, argues that there is no such right:

Separatists cannot base their arguments upon a right to opt out because no such right exists in democratic theory.... Government by the consent of the governed does not necessarily encompass a right to opt out. It only requires that within the existing political unit a right to participate through electoral processes be available...participatory rights do not entail a right to secede...they suggest that the appropriate solution for dissatisfied groups rests on their full inclusion in the polity....⁵⁷

In order to understand and evaluate the idea of a "right to opt out," some of the different varieties of political consent need further consideration. The concept of secession and self-determination as a right of groups such as nations is connected by Beran to a right to form a political association, rather than to consent to an already existing political community.⁵⁸ This distinction is similar to Rousseau's conception of the formation of a "people"

⁵⁷Lea Brilmayer, "Secession and Self-Determination: A Territorial Interpretation," Yale Journal of International Law 16 (1991), 185 (italics added).

⁵⁸Beran, "Liberal Theory of Secession," p. 27.

preceding the formation of a government.⁵⁹

Pateman, however, makes a different distinction between types of consent that she refers to as "horizontal" and as "vertical" political obligations.⁶⁰ The difference between these two types of obligation is that of the difference between a commitment by persons to other members of a political association and that of individuals to an existing state. Rousseau developed this distinction into the difference between participatory and representative forms of democracy.⁶¹

Beran argues for the legitimacy of consent to membership as a way to avoid the problems engendered by conceptions of tacit consent of individuals to the actions of governments. But the idea of participation as the true meaning of consent (as suggested by Pateman and Brilmayer) is also a means of addressing the question of how people can enter into voluntary political relations. How then are we to determine whether consent is better understood as the right to secession from an existing state (as a consent

⁵⁹"...before examining the act whereby a people chooses a king, it would be well to examine the act whereby a people is a people. For since this act is necessarily prior to the other, it is the true foundation of society" (Jean-Jacques Rousseau, "On the Social Contract" [Bk. 1, Ch. 5], tr. Donald A. Cress, in Rousseau, Basic Political Writings (Indianapolis: Hackett Publishing Co., 1987), p. 147).

⁶⁰Pateman, Problem of Political Obligation, pp. 69-70.

⁶¹See, for instance, Rousseau, "Social Contract," Bk. 3, Ch. 15.

theory of membership) or as a right to participation in that state (as a theory of participatory democracy)?

The idea that a group can invoke self-determination as a means of ensuring a voluntary relationship with a state implies that the act of founding new states is an everpresent possibility. This possibility is based on the assumption that a sort of international "state of nature" always exists out of which nations are entitled to create states at will. Groups of individuals (perhaps desiring secession) are viewed as existing autonomously within this environment--and without any particular obligations to other groups or individuals with which they may coexist.⁶²

⁶²The concept of the state of nature is used here in the sense of a condition that allows for the unilateral actions of groups (nations) by right, such that these actions need not be limited either by responsibilities of the groups to others or by the rights of other groups. Such an assumption, while not explicit in Beran, cannot fail to play a role in his theory, since--despite his disavowals--the legitimacy of secession implies a lack of conflict over specific territories. Such conflict is inevitable in a world populated with various states, groups, territories, countries, and peoples--many with overlapping claims. His idea of self-determination makes more sense if it is assumed that groups operate in a relative vacuum, unpopulated by other groups with rival claims or already existing rights--or that groups do not have responsibilities to others (what Pateman calls "horizontal" obligations).

While Beran explicitly rejects the idea of an "original contract" found in Locke, among others (Consent Theory of Political Obligation, p. 45), he nevertheless assumes a type of continuing state of nature in which nations and states do not owe one another anything and in which they can furthermore legitimately act without consideration of rival claims (to territory or to mutual responsibilities). This idea of a state of nature connects Beran more with contemporary international "realists" than with the traditional contractarians. Such thinkers as Reinhold Niebuhr, Hans Morgenthau, and George Kennan maintain this

This conception of a state of nature is similar to Locke's idea that individuals have the right to possess parts of nature that they work upon without the consent of any other persons (who may previously have held it in common).⁶³ Groups wishing to opt out of a state correspondingly have the right to do so without the consent of any other persons or groups, including the other citizens of that political community.

The idea of a horizontal obligation of citizens to one another directly contradicts the assumption that there exists a state of nature out of which separate (or is it separable?!) groups may carve their own territories at will. The horizontal relation between members of a political community is based on the distinction between promising and political obligation mentioned earlier. Promising creates new relationships of mutual responsibility between the individuals directly concerned; similarly, participatory

idea of realism as the absence of reciprocal obligations (other than the minimal one of keeping international peace, where possible). Beran seems to accept this idea, at least by implication. For a critique of the "realist" approach to international relations, see Marshall Cohen, "Moral Skepticism and International Relations," in Charles R. Beitz et al. (eds.), International Ethics: A "Philosophy and Public Affairs" Reader (Princeton, N.J.: Princeton University Press, 1985), pp. 3-52.

⁶³"...it is the taking any part of what is common, and removing it out of the state nature leaves it in, which begins the property; without which the common is of no use. And the taking of this or that part, does not depend on the express consent of all the commoners" (John Locke, Second Treatise of Government (Indianapolis: Hackett Publishing Co., 1980), p. 19).

democratic relations also create direct ties of mutuality between citizens. Political life, when conceived of in this way, becomes "the area of social existence in which citizens voluntarily cooperate together and sustain their common life and common undertaking."⁶⁴

From the viewpoint of participatory democratic theory, the notion of consent that is focused on membership still suffers from the problem of all "vertical" political relations of obligation: it is a means by which persons alienate "their right to make political decisions."⁶⁵ The difference with the membership version of consent is that persons retain their right to alienate their political powers to different governmental bodies as it suits them. But this does not change the basic nature of the relationship of political obligation.

Answers to two questions are crucial in evaluating the differences between secession (or self-determination) and participation as alternative understandings of voluntary political association. First, how can a consent theory of membership eventuating in a justification of self-determination legitimize the unilateral actions of (minority) groups within political communities in dissolving those communities? (To state this problem from the viewpoint of consent theory itself: how can a participatory

⁶⁴Pateman, Problem of Political Obligation, p. 174.

⁶⁵Pateman, Problem of Political Obligation, p. 174.

theory of democracy provide a means of legitimating the membership of particular political communities without invoking a right of self-determination?⁶⁴) Second, how can a consent theory of membership--which assumes an international order of quasinatural relations between groups--justify the undoubtedly drastic rearrangements of boundaries and sovereignties that the invocation of self-determination would ensure?

An answer to the question of whether consent theory can justify self-determination as a right of groups or nations rests on determining the extent to which political obligation is thought to reside between individuals or groups and governments (the "vertical" obligation referred to above). Only if groups (of consenting individuals) have no obligations to other groups or citizens within the political community can they be said to be only exercising their political will voluntarily.

The crucial point here is how groups come to be able to assert that they alone have the right to determine whether they will remain in or opt out of a political association.

⁶⁴Beran directly criticizes Pateman's participatory theory of democracy as unrealizable in practice and as unduly pessimistic with regard to the possibilities of representative government. See Beran, Consent Theory of Political Obligation, pp. 128-35.

This debate is not directly relevant in this context except to the extent that it suggests a fundamental divergence between consent theory and radical democratic theory. The question at hand is whether either can satisfactorily account for the "moral legitimacy of political borders" (Beran, "Self-Determination," p. 23).

Brilmayer refers to this problem when she writes that,

[One] line of reasoning linking consent to secession proposes that denying a right of secession is directly contrary to the wishes of the separatist group, and thus a violation of the principle of popular sovereignty.... The fallacy of this argument is obvious; it assumes that the relevant individuals to consult are the members of the secessionist group. In consulting the population of the entire state, one might find that a majority overall wished to remain a single country. What has not been explained is why only the separatists need be consulted.⁶⁷

Perhaps Beran's explanation would be that, according to the consent theory of membership, political obligation is only "vertical"--no obligations obtain between fellow citizens of a state. There is no relation of "horizontal" obligation to be violated by a unilateral declaration of rights to self-determination on the part of a group within the country.

This idea that the only group that counts in such decisions is the group that asserts a claim to separate is based on the individualist premises that Beran and consent theory generally assume. Groups are themselves individuals in the sense that they owe nothing to others--they are autonomous and are freer to the extent that are able to act autonomously, without consideration of any possible responsibilities to other actors.

In this sense, there is a fundamental libertarianism built into the consent theory justification of national self-determination. The liberty that is invoked for nations

⁶⁷Brilmayer, "Secession and Self-Determination," p. 185.

is not contingent on the satisfaction of obligations to other groups, but is absolute in that it trumps any other considerations. Moreover, the very idea of obligations to others is overridden in favor of an easily abrogated obligation to a minimal state--one designed to ensure only that the groups (perhaps temporarily) resident within it have the greatest possible autonomy.⁶⁶

From the viewpoint of a radical (or participatory) democratic theory, by contrast, the primary or even only relation of obligation is between the members of a political association. Relations between a group and the state are not at issue because there is no relation of obligation that holds; it is rather the relations between members of the political community that are important. Thus, the primary question in determining whether a claim of secession is valid is in terms of its effect on the obligations that have been formed (that is, political "promises" that have been made) between citizens of a country.

In his criticism of Pateman's participatory democratic theory (see note 66), Beran misses this element of mutual obligation that Pateman claims is the only legitimate form of obligation within a political community. While he attacks her affirmation of participation and denigration of

⁶⁶The latent libertarianism of this brand of nationalism has been emphasized particularly by John Feffer, in "Self-Determination as a Contingency Principle," New Politics 4, 3 (1993): 137-43, especially p. 141.

representation as unrealistic on the one hand and too dismissive on the other, Beran fails to acknowledge that the importance of a horizontal conception of obligation is that it establishes ties of obligation not between individuals or groups and the state, but between those individuals and groups themselves.

This does not mean that political associations, once created, can never be dissolved. But a radical democratic theory would make such a dissolution conditional on the satisfaction of obligations between citizens or on their mutual renunciation of those obligations--not on the unilateral withdrawal of a group or nation from a political community. This is the real issue at stake in Beran's insistence that voluntarism is a principle that should, at times, override majoritarian democratic decisionmaking. What he calls voluntarism is really a product of the assumption that intergroup and international relations are a "state of nature" in which there are no relations of obligation between different groups and nations (even within states).

The second question to be answered in assessing whether consent theory can provide a viable justification for self-determination is that of the viability of its view of secession and the rearrangement of political boundaries. While Beran seems to assume that nations and groups exist in some kind of a quasinatural condition out of which they can

form new states and countries at will, he also writes that "the whole of the habitable earth is now under the jurisdiction of existing states and a territorially concentrated group which wishes to leave its state can, therefore, do so much more readily by secession than by mass emigration."⁶⁹

But the idea that secession is easier than emigration rests on two assumptions: first, that all members of a nation would ever want to exit a state, and second, that doing so through secession rather than emigration would be more acceptable to other existing states. First of all, except in extreme cases of genocide, national groups are almost always divided as to whether exit from a state is desirable or not. This means that the population transfers resulting from emigration would be smaller than those resulting from secession, in which the whole population of a region would presumably exit a state to form a new one.

Secondly, other states almost always have an interest in the breakup of existing states, though the nature of their interest obviously varies widely. Sometimes, states view the dismemberment of neighboring states as an opportunity for realizing expansionist goals of their own. Such secessions may therefore precipitate wars or invasions between the dissolving state, its parts, and other states.

⁶⁹Beran, Consent Theory of Political Obligation, pp. 38-39.

At other times, states view secessions as threats to their own territorial integrity. This is often because national groups rarely divide neatly along state boundaries, and the independence of a nationality might precipitate accompanying secessionist movements in neighboring states. These problems suggest that emigration to other states is, when compared to the disruptions frequently caused by various nations' claims of self-determination, at least as viable a path to follow for those wishing to opt out of an existing state.

In his treatment of Pateman's radical democratic theory, Beran suggests that the participatory democratic principle is hard to realize in practice. Yet, the idea of voluntaristic self-determination that he advocates (especially when achieved through a system of reiterative referenda) seems to pose at least as many problems of realization (as well as disadvantages from its enactment). Beran insists that there are conditions under which secession might not be recommended or possible; for instance, when the seceding group occupies a major part of the existing state, when it possesses the wealthiest area of the state, when it refuses to recognize its own subgroups' demands for self-determination, and so forth. But Beran maintains that "none of these conditions is an insuperable barrier to secession."⁷⁰ In the end, self-determination is

⁷⁰Beran, "Self-Determination," p. 29.

the defining principle of political authority, obligation, and legitimacy, taking precedence over other principles.

What consequences this might have for the maintenance of even rudimentary political community or cooperation is consistently ignored or underestimated by Beran. While he cannot be faulted for failing to predict the recent turn of events since the fall of communism and the collapse of governmental authority in parts of the underdeveloped world (as well as, perhaps, its imminent devolution even in some developed countries), Beran's underestimation of the dangers of legitimizing virtually any claim of secession or self-determination is striking.

For one thing, he minimizes the possibility that some secessions will lead to many more--what he calls the "domino theory of secession."⁷¹ For another, he suggests that secessionist claims will not lead to "many unviably-sized political entities." This is because "people do not disrupt the unity of an existing state lightly Moreover, political separation at one level can go hand in hand with economic (and political) integration at another . . . the fear of balkanization may be largely illusory."⁷²

⁷¹Beran, "Liberal Theory of Secession," p. 29.

⁷²Beran, "Liberal Theory of Secession," p. 30. Needless to say, the foregoing must be read in light of the disintegration of the Soviet Union, Yugoslavia, and Czechoslovakia, as well as the possibly imminent fragmentation of some of the largest, and most democratic, states in the world, such as India, Italy, and Canada.

The basic problem with this assessment is the lack of acknowledgment of the costs of according absolute rights of self-determination and secession to any group. These costs are potentially fatal to any democratic polity that seeks to establish ties of voluntaristic obligation and cooperation among its members, however these ties are conceptualized. Robert Dahl has pointed to this problem in the following terms:

Imagine that a democratic country were actually to declare political autonomy to be an absolute right. Granting such a right would make a state, or any coercive organization, impossible (or at any rate illegitimate), since any group facing coercion on any matter could demand and through secession gain autonomy.⁷³

Even if consent theory were able to provide a convincing account of why self-determination ought to be an absolute right of nations and other groups, then, it will be difficult to show that the attempted realization of such a principle will not cause massive disruptions in the ability of almost any political community to maintain its integrity. In addition, the consent theory justification of self-determination possesses two other major problems: (1) a problem of coercion with regard to the way in which referenda would be conducted and the voluntaristic and liberal principles the referenda are designed to embody and (2) a problem with whether rightful possession of territory

⁷³Robert A. Dahl, Democracy and Its Critics (New Haven, Conn.: Yale University Press, 1989), p. 196.

follows from the consent theory of membership.

REFERENDA, SELF-DETERMINATION, AND DEMOCRATIC RIGHTS

The distinctive role of referenda in the consent theory justification of national self-determination is two-fold. First, self-determination referenda provide a means of ensuring that groups within already existing states have the right to opt out of the state. This is the purpose of the reiterative use of referenda: by limiting the referendum to the area or people specified by the group desiring self-determination, the voluntaristic aspect of political authority is preserved.

Second, by providing the means for legitimately establishing the boundaries of and membership in the (new) state, referenda legitimize whatever changes in residence and possession are required. Restrictions on immigration or forcible resettlement or expulsion are justifiable if they are required to enforce changes in boundaries and citizenship that have been legitimized by a referendum.

Ordinarily, referenda are conducted according to majoritarian principles. But a special feature of Beran's formulation of self-determination referenda is that majorities of existing political associations do not necessarily vote to determine whether the association is continued or dissolved. This is justified by the idea that majoritarian democracy is based on an underlying principle of voluntary political association. The reiterative use of

referenda is designed to ensure that voluntariness is preserved even in the definition of who is to be included in the political community in the first place.

But does this attempt to restrict the scope of referenda actually extend, rather than circumscribe, democratic principles of voluntary association? To answer this question, the purpose of the membership version of consent theory that is used to justify self-determination referenda must be recalled. The idea of focusing consent on the issue of membership was to avoid problems of tacit consent and to find a means of express consent that would ensure the legitimacy of state authority. Consent to membership must be express consent or it is not consent at all.

Do self-determination referenda provide express consent to membership for the individuals involved? Certainly, for those able to participate in the referendum, they do. But what about the majority of members in a state who cannot, on Beran's model, vote in the referendum? As Brilmayer points out, the majority, in abiding with the results of a referendum in which they did not vote, must tacitly consent to the rearrangements in boundaries and citizenship that follow. While the (secessionist) minority exercises their will to form a new state, the (possibly antisecessionist) majority is not even able to vote in a referendum that might dissolve the political community of which they are members:

[While] the dominant ethnic group...cannot escape political obligations by withholding consent from the government...if some minority ethnic group withholds consent then it cannot be bound. The argument must be...that tacit consent can be attributed to members of the dominant ethnic group in the state, but not to members of the secessionist group. As to the latter, only actual consent will suffice.⁷⁴

In determining the extent and membership of states, majority voting cannot, according to the consent theory of membership, legitimately apply. Minorities must have the right to directly consent in a state of their own choosing-- apart from their participation in a process of voting within existent states. But this results in the denial of express or actual consent to a much larger body of individuals whenever a referendum to determine an issue of self-determination comes up.⁷⁵ Self-determination referenda therefore violate not only the explicit conception of majoritarian democracy in denying the majority a vote in the (re)constitution of their political community, they also deny the underlying idea of voluntaristic democratic community for the majority of persons in a given country.

When we turn to the results of self-determination referenda, which may be expressed either in the exclusion of

⁷⁴Brilmayer, "Secession and Self-Determination," p. 186.

⁷⁵This obviously applies as well to members of an area undergoing a self-determination referendum who are deemed not to be "traditional" occupants of the area, but recent immigrants, colonists, etc. These people are also prevented from participating in the referendum according to Beran's version of consent theory--and are thus denied any actual consent to whatever rearrangements of boundaries may occur.

immigrants that might change the present composition of a newly independent state or the forcible expulsion of inhabitants who are deemed not to be traditional occupants, a similar problem occurs. Clearly in cases where such people either seek to enter a new country or seek to remain there, their exclusion or expulsion will violate their own express desires to be members of that state. This is justified because they presumably have no "moral right" to residence in a territory (based on the traditional occupancy of that territory).⁷⁶

This problem is in some ways similar to one in which certain individuals refuse to consent to any procedure of political choice, however legitimate. In this case, the limits to the legitimacy of any political community become apparent. It may be, as Carol Gould has written, that the unwillingness of some individuals to accept any political authority simply shows that voluntariness cannot completely "solve" the problem of political obligation: ". . . such a case reveals the limits of the state as a voluntary association . . . the contingency involved in the relation of citizenship and place of birth sets a barrier to transforming the entire domain of political association into a fully voluntary one" ⁷⁷

⁷⁶Beran, "Self-Determination Referenda," p. 158.

⁷⁷Carol C. Gould, Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society (Cambridge: Cambridge University Press, 1988), p. 245.

Beran thinks that he has a solution to this problem of complete compliance with legitimate political choice procedures. In cases where individuals or families do not wish to abide by majority voting procedures, yet constitute too small a group to be able to establish a state, they can exit the state to a "dissenters' territory" set aside for persons unwilling to consent to any political authority.⁷⁸ But this is actually not the problem of individual consent suggested above. In that case, it is people desiring to remain in (or to enter) a territory that is newly independent that is at issue.⁷⁹

A central question for any consent theory that, through the means of referenda, seeks to justify forcible exclusion (for example, of temporary residents and "guest workers") and expulsion (of colonists and immigrants) is how such methods could be compatible with a basic value of voluntary acceptance of political authority. What becomes apparent again is how consent theory works to set up divisions between those who consent and those who don't. For the latter, consent theory is a means to compel involuntary

⁷⁸Beran, Consent Theory of Political Obligation, p. 32.

⁷⁹A recent example of this are Russians living in the newly independent Baltic states who wish to remain and yet are being discriminated against and otherwise urged to leave by the (new) majority inhabitants of Lithuania, Latvia, or Estonia. Needless to say, there are many other examples of this phenomenon.

obedience rather than voluntary agreement.⁸⁰ In the case of people actually excluded or expelled, even obedience is deemed insufficient for their continued membership in a state; they must be separated from any residence or connection with the territory--one in which they may have lived their entire lives (and even been born in).

The use of referenda to decide self-determination for nations within existing states--when such referenda are limited to the territories claimed by secessionists--therefore violates both the letter and the spirit of a voluntarist conception of political authority. No method of political choice that excludes most affected individuals from participation in the procedure itself, and then justifies the permanent exclusion or expulsion of some of them from a new state, can preserve even the appearance of voluntarism. Furthermore, a "liberal" political philosophy that uses means of majoritarian democratic decisionmaking such as referenda, yet restricts them in such a way that majorities are effectively disenfranchised, embodies the deepest inconsistencies and in fact generates a new problem of coercion over all the categories of persons barred from participation in and consent to a supposedly democratic

⁸⁰Pateman has emphasized the underlying current of submission to be found in liberal consent theory: "The basic liberal argument about the relationship of citizens to the state is that there are good reasons for obedience. Yet, the argument must be given a voluntarist appearance" (Problem of Political Obligation, p. 168 (italics added)).

political process.

TERRITORY, POSSESSION, AND CONSENT

The final, and most intractable, problem with the consent theory justification of national self-determination is that of how consent can be used to justify claims to rightful possession of territory. Consent is usually applied to people's acceptance or lack of acceptance of the authority of a government. But when consent is applied to membership in the state itself--and accordingly includes the right of secession--it must additionally justify a group's right to "take out" territory as it exits from the state's authority and jurisdiction.

Brilmayer has suggested that the very idea of self-determination is misleading for this reason; it implies that proposed solutions to claims for self-determination such as secession are fundamentally about the rights of people, while they are actually about their relation to rights over territory: "The phrase self-determination frames the separatist question in a misleading way; it obscures the territorial aspects of the dispute. At issue is not a relationship between peoples and states, but a relationship between people, states, and territory."¹¹ The connection between popular consent to authority and the legitimate possession of territory is obscured by the consent theory of

¹¹Brilmayer, "Secession and Self-Determination," p. 179; see also pp. 192-93.

membership.

The lack of an explicit justification of possession of territory makes consent theory at best an incomplete justification of self-determination. As Allen Buchanan maintains, a claim to self-determination based on the idea of popular sovereignty does not necessarily lead to the conclusion that secession is justified. In fact, he maintains, consent theory cannot justify self-determination for this reason:

...even if various objections to the consent argument could be successfully met, the most that argument would establish is that those who do not consent are not obligated. It would not show that they may appropriate territory, and hence it would not show that secession is justified...arguments from consent...contrary to initial impressions, cannot even in principle justify secession.⁸²

For a claim of secession to be legitimate, there must be an additional argument presented for why the secessionists can occupy some of the territory of the existing state. Consent theory, by itself, cannot do this.

While consent theory can indicate the extent to which certain individuals or groups no longer wish to be associated with a particular state, this at most indicates that there is a legitimate reason for those individuals or groups to emigrate. But rights to emigration do not need a claim of self-determination for their justification. Conversely, if self-determination is understood to include

⁸²Buchanan, Secession, p. 73.

more than a right of emigration, then an additional reason is needed to justify the additional claim to certain territory. This additional reason must establish a "valid claim to territory It must be shown that the secessionists have a right to the territory."³

What would such a valid claim to territory consist in? As has frequently been noted, claims to self-determination often arise when there is a perceived historical injustice--usually one of territory that has been appropriated from one people by another through conquest, settlement, or other forcible means. There is a close connection in many cases between historical claims of rectification concerning territory that has "changed hands" and claims to self-determination by national groups. But historical claims are notoriously hard to demonstrate, for a variety of reasons.

One principal reason that this is so is that historical grievances can often be counterbalanced by other more distant historical grievances without ever reaching a definitive assessment about which national group should rightfully possess a given territory. This problem is to a great extent inherent in the very pursuit of historical claims to territory: "[By] raising its historical claim the group may be relying upon a previous status quo and ignoring still earlier historical wrongs that had been committed . .

³Buchanan, Secession, p. 72; cf. Brilmayer, "Secession and Self-Determination," p. 189.

. . . Hardly a territorial boundary anywhere in the world would survive an effort to correct all historical misdeeds."⁴⁴

Were an attempt made to determine the legitimacy of historical claims, it might involve considering whether: (1) the historical grievance that is the basis of a territorial claim is relatively recent, (2) the claim has been a persistent one, (3) the territory has been resettled by new groups, and (4) the nature of the grievance indicates a history of oppression or domination, such as colonialism.⁴⁵ What is noticeable about all these conditions is that none concern a process of ascertaining consent or dissent in an existing political community. They are all concerned instead with a history of a territory and of the communities and peoples that have been resident there.

One feature of Beran's argument for self-determination is that, while it is explicitly a theory of consent, there is an assumption that a right to territory exists. Moreover, this right plays a crucial role in the theory in at least two ways. First, the idea that self-determination includes a right to secession rather than simply a right to emigration depends on the claim that a group has rights to a territory--not just rights to exit from a state if the group

⁴⁴Brilmayer, "Secession and Self-Determination," p. 199.

⁴⁵Brilmayer, "Secession and Self-Determination," pp. 199-200.

does not consent to its authority. Second, in the establishment of self-determination referenda, ascertaining who has a right to vote is a function of who has a right to occupy and/or possess the territory in dispute.

In both of these cases, the claim is made of a right to territory founded not on consent but on an historical lineage that establishes a right prior to consent or dissent. Beran's claim is that "a group of people who have traditionally occupied an area have a right to continue to occupy it" ⁶ What this means is that before invoking the rights of consent, a legitimate claim to the self-determination of a nation must invoke the rights of tradition. But this is to move the whole justification of national self-determination onto very different grounds.

The actual justification of a claim to self-determination must therefore refer back to the historical traditions and territorial entitlements of a national community before consent theory can be used to verify the actual depth of a claim in a current political situation. This is, in part, the view of those who argue that self-determination is to be justified, not from the premises of an individualist political philosophy that connects national rights directly with the rights of persons, but with a communitarian theory that explicitly invokes the rights of

⁶Beran, Consent Theory of Political Obligation, pp. 38-39 (italics added); see also Beran, "Self-Determination Referenda," p. 158.

communities such as nations as the primary determinant of political legitimacy. The evaluation of such views is the subject of the next chapter.

CHAPTER 4
Communal Autonomy and the Nation-State

TERRITORY, NATIONALITY, AND COMMUNITARIANISM

Claims that nations have a political right of self-determination have been shown to imply the idea that nationalities can have legitimate claim not only to their choice of residence and political affiliation, but also to a definite country or territory within which to further or consolidate a national identity. Yet, a justification of national self-determination that relies on a notion of individual political consent cannot yield adequate reasons for honoring claims to national territories or homelands. Only a political theory that can maintain the necessity of a connection between nationalities and specific physical localities has a chance of providing a justification for a full claim to self-determination for nations.

A distinction must therefore be made between what David Miller has recently called the "principle of nationality" and the idea of individual consent to a government.¹ Miller characterizes the difference in the following way:

The principle of nationality...holds that people who form a national community in a particular territory have a good claim to political self-determination. This principle should not be confused with a certain liberal view of the state which makes individual consent a necessary and

¹David Miller, "In Defence of Nationality," Journal of Applied Philosophy 10, 1 (1993): 3-16.

sufficient condition of a state's authority....²

Miller asserts that a consequence of the consensual justification of self-determination which disqualifies it from serving as a viable theory of self-determination is the anarchic and unstable outcomes which presumably would follow from implementation of a thoroughgoing consent-based system of nation-states. There would be no way of ensuring stable and secure boundaries when changes in the way individuals view their political loyalties could lead to continual rearrangements of state sovereignties and territories.

But there is another difference between the consent-based and the nationality-based theories of self-determination: the former relies on an essentially individualist view of political legitimacy, while the latter substitutes a "communitarian" conception in which nationalities are to be identified and their political affiliations settled, not on the basis of individual loyalties, but by defining their communal identities and determining what associations (if any) with territory and with other groups should result. The communitarian view does not completely discount the role of individuals in defining self-determination; but it does contain the suggestion that what is important in deciding about particular disputes over territory is not the will of individuals but their identities. Thus, it turns out, on

²Miller, "Defence of Nationality," p. 12.

this view, that in such disputes, the right question to ask, according to Miller, "is not 'Does this group now want to secede from the existing state?' but 'Does the group have a collective identity which is or has become incompatible with the national identity of the majority in the state?'"³

While the distinction between consensual and communitarian theories of political legitimacy could perhaps be characterized as a distinction between democratic and nondemocratic theories, this is not really accurate. A type of consent might very well have a place within a communitarian theory; but it would not be one of individual consent in every decision. Rather, consent would be seen to be more a matter of congruence between a community and its way of life and the state which is sovereign over it. This is made clear by Michael Walzer when, in writing of a right of states to be secure from intervention by others, he connects such a right with the community that it is to protect:

The rights of states rest on the consent of their members. But this is consent of a special sort.... The moral standing of any particular state depends upon the reality of the common life it protects and the extent to which the sacrifices required by that protection are willingly accepted and thought worthwhile. If no common life exists, or if the state doesn't defend the common life that does exist, its own defense may have no moral justification...the right of a nation or people not to be invaded derives from the common life its members have made on this piece of land--it had to to be made somewhere--and not from the

³Miller, "Defence of Nationality," p. 12.

legal title they hold or don't hold.⁴

Nevertheless, the main concern of communitarian thinkers such as Walzer is not the rights of individuals as such, but the needs of a community to maintain itself in the face of other, potentially hostile, communities. In a world of nation-states, every political community must, on this view, confront the problem of how to mobilize its members to fulfill duties to other members or to protect the community as a whole. This problem can be defined as the basis for solidarity within communities, and it is a major concern of communitarians. Nationalism, or what Miller calls the principle of nationality, is a central means of addressing this problem in contemporary politics:

...nationality answers one of the most pressing needs of the modern world, namely how to maintain solidarity among the populations of states that are large and anonymous.... [Many] problems can be avoided only where there exists large-scale solidarity, such that people feel themselves to be members of an overarching community, and to have social duties to act for the common good of that community.... Nationality is de facto the main source of such solidarity.⁵

Such a view of the importance and role of nationality in ensuring the solidarity of people with a state can be termed communitarian inasmuch as it focuses on the connection between a nationality as a prepolitical community and the state as a means of expressing the identity and

⁴Walzer, Just and Unjust Wars, pp. 54-55.

⁵Miller, "Defence of Nationality," p. 9.

interests of that community. Among contemporary political philosophers that could be taken to be communitarians in some sense of that term, Walzer has done the most to make a case for the aspirations and rights of nationalities, particularly their right to political self-determination. While some communitarians have been puzzlingly vague concerning the political and institutional outcomes to be expected from their affirmation of certain views of personality and morality, Walzer has given explicit justifications for the legitimacy of the nation-state and of the rights of nationalities without states to obtain them.⁶ In particular, he has used a conception of "communal autonomy" to argue for the validity of communal interests in obtaining state power. Before examining Walzer's argument for communal autonomy and national self-determination in detail, the relation of his philosophy to communitarianism generally needs to be made clear.

Much philosophy that is today designated "communitarian" is concerned with questions of moral

⁶For a selection of readings from the communitarians, as well as some responses from liberal thinkers, see Shlomo Avineri & Avner de-Shalit (eds.), Communitarianism and Individualism (Oxford: Oxford University Press, 1992); for some additional assessments of the "communitarian debate" (the first somewhat favorable to the communitarians, the second less so), see Chantal Mouffe, "American Liberalism and Its Critics: Rawls, Taylor, Sandel, and Walzer," Praxis International 8 (1988): 193-206, and Allen E. Buchanan, "Assessing the Communitarian Critique of Liberalism," Ethics 99 (July 1989): 852-82; and for a recent comprehensive survey of the major thinkers involved in the debate, see Mulhall & Swift, Liberals and Communitarians.

psychology and the role of communities in the determination of proper moral roles and conduct for individuals.⁷ However, there are a few communitarian thinkers who have turned more to political questions of legitimate authority and its relation to communal norms and cultures; Walzer is probably the most prominent of this group.⁸ He maintains that, for political philosophy, the problem of the psychological bases of morality (with which much of the debate between individualists and communitarians has been concerned) is not the primary issue. Rather, what is most importantly in dispute is whether political communities can be constituted solely on the basis of an individualist conception of voluntary association and liberal rights, or whether something more is required for communities to cohere in a morally satisfactory way.⁹ In any case, Walzer is the

⁷See particularly Alasdair MacIntyre, After Virtue: A Study in Moral Theory (Notre Dame, Ind.: University of Notre Dame Press, 1981), Michael Sandel, Liberalism and the Limits of Justice (Cambridge: Cambridge University Press, 1982), and Charles Taylor, Sources of the Self (Cambridge: Cambridge University Press, 1989).

⁸Otherwise, see Roberto Mangabeira Unger, Knowledge and Politics (New York: Free Press, 1975) (as well as his newer work, Politics: A Work in Constructive Social Theory, 3 vols. (Cambridge: Cambridge University Press, 1987)), Benjamin Barber, Strong Democracy: Participatory Politics for a New Age (Berkeley: University of California Press, 1984), and David Miller, Market, State, and Community: Theoretical Foundations of Market Socialism (Oxford: Oxford University Press, 1989); only Miller clearly identifies himself as a communitarian.

⁹In his article, "The Communitarian Critique of Liberalism," Political Theory 18:1 (Feb. 1990), Walzer states that, "The central issue for political theory is not

communitarian thinker who has most fully endorsed nationalist conceptions of political community.¹⁰

In contradistinction to communitarian ideas of authority, in which the legitimacy of government is closely tied to its ability to protect the "common life" of a community, the theory of individual consent might be viewed as a libertarian, if not exclusively liberal, philosophy. On the view of thinkers such as Beran, it is the consent of individuals that is alone relevant to the determination of whether a given state legitimately holds power. Talk of a common life is only a shorthand way of talking about the life of a group of discrete individuals--individuals who may, at any moment, disaggregate themselves in order to exit from the state.

Communitarianism as a political philosophy rejects the legitimacy, not to mention the possibility, of such actions. While individuals may--as individuals--exit from a state, their disaffection does not, in and of itself, constitute a criticism of a state's authority. Only if a divergence between the community as a whole and the government that rules it can be established might there be cause for challenging the authority of the state over all or part of

the constitution of the self but the connection of constituted selves, the pattern of social relations." (p. 21).

¹⁰But see also Miller, Market, State, and Community (an excerpt from which is reprinted in Avineri & de-Shalit, Communitarianism and Individualism).

the community.¹¹ This communitarian view of the primacy of the political community in relation to individuals accords with the earlier political philosophy known as "civic republicanism," to which certain communitarian ideas can be traced.¹²

Civic republicanism is classically distinguished from later--more individualistic--philosophies such as contractarianism or utilitarianism by its de-emphasis on the rights of individuals except when paired with corresponding notions of duties to the community in general and other citizens in particular. Thus: "Individuals do not only conceive of themselves as bearing rights, nor is their

¹¹Of course, this also includes the possibility that a state might effectively rule over more than one community, in which case, one or more such communities might be justified in "exiting." Needless to say, this is the paradigmatic case of nationalist secessions, to be discussed at length below.

¹²On the connection between contemporary communitarianism and civic republicanism, see Mouffe, "American Liberalism and Its Critics," and especially, Adrian Oldfield, Citizenship and Community: Civic Republicanism and the Modern World (London: Routledge, 1990). Oldfield cites Machiavelli, Rousseau, Hegel, and Tocqueville as primary exponents of some version of civic republicanism. Mouffe also mentions Hannah Arendt as a twentieth-century exponent of certain civic republican themes. There are a few historians who have argued for the influence of some aspects of civic republicanism on modern political philosophy in general--including individualistic theories such as contractarianism--and on American Revolutionary thought in particular; see, for instance, J. G. A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (Princeton, N.J.: Princeton University Press, 1975).

posture to forms of collective life solely instrumental."¹³ Civic republicans accordingly emphasize the role of citizenship much more strongly than do individualistic political philosophies. This is the result of conceiving of citizenship as not only a role that individuals may passively assume, but as something involving active participation by those individuals. According to Oldfield, "Within civic republicanism, citizenship is an activity or a practice, and not simply a status, so that not to engage in the practice is, in important senses, not to be a citizen . . ."¹⁴ A consequence of this view might be that citizenship is less alienable--as well as less elective--than libertarian thinkers (such as Beran) want to assert.

The relation of civic republicanism to contemporary communitarian ideas is not always easy to trace. Nevertheless, it provides a means of understanding why even "liberal" nationalists such as Walzer often reject a pure consensualist theory of authority: that theory does not seem to be able to account for the ways in which communities need to cohere through the attribution of duties and responsibilities to individuals. From a communitarian standpoint, a libertarian consent theory--even if it is used to justify "communal" goals such as the self-determination of nations--seems to point to anarchy; such a view might

¹³Oldfield, Citizenship and Community, p. 4.

¹⁴Oldfield, Citizenship and Community, p. 5.

just as easily legitimate the dissolution of communities as the formation of new ones.

Thus, recourse is often made to republican ideas that seem to be able to more fully account for the needs of solidarity and cohesion that political communities are thought to have. In another sense, however, contemporary communitarians depart from civic republican theory. It may be that there is just no ready embodiment for republican ideas in modern societies ruled through representative democratic institutions that are circumscribed by legal guarantees of individual rights and entitlements.¹⁵

Instead, Walzer argues that communitarianism constitutes a "corrective" within a liberal polity, compensating for those aspects of liberal authority that lead to the weakening of communal bonds:

Liberalism is best understood as a theory of relationship, which has voluntary association at its center and which understands voluntariness as the right of rupture or withdrawal...insofar as liberalism tends toward instability and dissociation, it requires periodic communitarian correction.¹⁶

¹⁵Walzer makes this point when he writes that,

A revival of neoclassical republicanism provides much of the substance of contemporary communitarian politics. The revival, I have to say, is largely academic...it has no external reference...there are virtually no examples of republican association and no movement or party aimed at promoting such association.

("Communitarian Critique of Liberalism," p. 19)

¹⁶Walzer, "Communitarian Critique of Liberalism," p. 21.

While within a stable and democratic polity, such correction might be embodied in civic associations existing outside both the state and the market, for polities that are new, unstable, or diverse, a communitarian corrective might involve reconstituting the very nature of the state through revolution, civil war, or secession. This is where national self-determination might find its justification--as a means of putting a community on a sounder footing so that liberal institutions might have a chance to take root.

Walzer thus seeks to combine adherence to liberal norms of individual rights with a view of communities as providing the basis for these rights through the cultivation of their own distinct characters separately from those of others. While within a community, liberal rights may be legitimate, between communities, such rights cannot directly apply. It is the pursuit of an international community of separate but equal nation-states that constitutes the only means of eventually ensuring the fullest possible adherence to liberal rights.

Walzer's attempt to formulate a liberal communitarianism that includes a right of nations does not violate any necessary features of liberal political theory, at least as presently constituted. As has been seen, liberal thinkers such as Raz can affirm both the value of communal goods and the rights of nations under a certain construal of "liberalism." But what is distinctive about

Walzer's views is his use of certain key communitarian ideas--such as the primacy of collective goods and the inability to make moral judgments of communities in terms of their internal constitutions--to justify a right of national self-determination that cannot otherwise be based either on consequentialist or on consensual grounds. What is then at issue is not the attempt to combine some form of communitarianism with some form of liberal rights,¹⁷ but the possibility of establishing rights to territory and nationhood on the basis of the fundamental value of community.

Walzer argues in a number of different ways that national self-determination is a principle of "communal autonomy" in the sense that communities ought to have a right of freedom from interference or domination by other communities. Of course, the question that arises is what type of community is included within this right. Walzer interprets the principle of nonintervention in international law as involving such a principle of communal autonomy for states: ". . . the nonintervention principle [means] always act so as to recognize and uphold communal autonomy We need to establish a kind of a priori respect for state

¹⁷For defenses of the idea that there can be a liberal form of communitarianism, or rather, that liberalism can accommodate the value of community, see Will Kymlicka, Liberalism, Community, and Culture (Oxford: Clarendon Press, 1989), and Andrew Mason, "Liberalism and the Value of Community," Canadian Journal of Philosophy 22, 2 (June 1993): 215-40.

boundaries; they are . . . the only boundaries communities ever have."¹⁸

What is interesting about this interpretation of the nonintervention principle is that it is justified, not in terms of the rights of people to participation in a political community, but in terms of the rights of another, prior and as yet unspecified, community to protection from other states. This view is made clearer when Walzer's views on the right of communities to include and exclude people are examined. It turns out that such a right is designed to protect, not the ability of a political community to function, but the character of a prepolitical community to flourish:

Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.¹⁹

Communal autonomy for political communities serves the purpose of protecting cultural communities; in other words, states are meant to ensure the existence and well-being of nations.

This meaning of communal autonomy is made clearer when Walzer suggests that the principle of nonintervention is equivalent to the idea of democracy in international

¹⁸Walzer, Just and Unjust Wars, p. 90.

¹⁹Walzer, Spheres of Justice, p. 62.

relations. The purpose of democracy is considered to be, not participation in political decisionmaking as such, but the flourishing of a "community of character"--for which political independence may be a necessary prerequisite:

...there is a general principle, which we can think of as the expression of democracy in international politics. What is at stake is the value of a historical or cultural or religious community and the political liberty of its members.... Their members...have the rights that go with membership. They ought to be allowed to govern themselves....²⁰

This idea clearly marks Walzer's views of national self-determination as communitarian: political democracy is not independently justified as a formally universalizable right of all persons to decide or participate in decisionmaking concerning themselves; it is viewed instrumentally as a means of securing nonpolitical goods for already existing communities.²¹

While this view will not perhaps give as strong a justification for a list of individual rights as a contractarian or utilitarian view, it can potentially provide a much stronger justification for the rights of groups such as nations, since the existence and health of such groups is exactly what generates the need for states,

²⁰Walzer, "New Tribalism," p. 165.

²¹But this is also the way in which nationalism is distinguishable from civic republicanism: the importance of community lies not primarily in the practice of civic virtue through political participation, but in the ways in which prepolitical forms of life supposedly nourish and enable political communities to flourish.

rights, and other political institutions in the first place. What remains to be seen is whether such a communitarian conception of self-determination can solve the problem that plagued the consensual justification--that of territorial settlement. Can a conception of communal autonomy as the basis of self-determination lead to means for the settlement of disputes between different nations over territory, and establish definite rights, not only to freedom of movement for peoples and nations, but to possession of land and resources as clear entitlements of particular nations?

To do this, Walzer must show two things: first, that political communities must be founded on the identities of particular cultural nations, and that such identities rightly set limits on membership in those communities; and second, that state sovereignty (in the sense of exclusive control over citizenship and territory) is an important, if not the only, means of securing the conditions for the flourishing of national cultures. National self-determination would therefore be justified as a primary means of securing the communal autonomy necessary for the existence and welfare of peoples' identities. In addition, the problem of territory would be solved in the sense that there would be no alternative to according nations their own territories on which to exist, inasmuch as they asserted a claim to them.

I will argue that Walzer and the communitarians'

understanding of political community is flawed--that its primary attribute is not a foundation in cultural identities; and that, in any case, attempts to protect cultural identities through the use of state sovereignty are unjustifiable, given the very real limitations of sovereignty in addressing the very problems that it is designed to solve. Just as national self-determination cannot be based on the claim of individuals to democratic rights, so it cannot be based on the claim of national communities to political autonomy. Not the least of the reasons for this will turn out to be the inability of a principle of communal autonomy to resolve the very disputes over territory and boundaries that it is supposed to settle. This will, in turn, be traced to a state-centered view of political action held by Walzer and other nationalists that seems increasingly inadequate for addressing the urgent problems of the late twentieth century.

POLITICAL COMMUNITIES, CULTURAL IDENTITIES, AND MEMBERSHIP

In arguing for self-determination by using a concept of communal autonomy, Walzer must initially establish a distinction between political communities and cultural identities. If self-determination is to be justified as a means for protecting the life of national groups, the difference between political and national groups must be made clear. This difference is, of course, suggested by the tradition of distinguishing political from cultural

"nations" (Staatsnation and Kulturnation), a tradition initiated by Friedrich Meinecke, and particularly embodied in German scholarship on nationalism.²²

To some extent, such a distinction is the product of twentieth-century political experience, since many commentators in the nineteenth century did not make this distinction. When, for instance, Renan called the nation a product of a "daily plebiscite," he was suggesting that there is no fixity to nations, but that they are products of an essentially political process of definition and redefinition.²³ And, when John Acton maintained that, "The great importance of nationality in the State consists in the fact that it is the basis of political capacity," he in fact meant by nationality, "[c]ertain political habits and ideas [that] belong to particular nations"²⁴

While such statements seem consistent with Walzer and other contemporary nationalists' claims for the importance of national communities, they are actually quite different. When Renan (or Acton) argues for the variable nature of national feelings, they mean that these feelings depend to a considerable extent not on any determinate identity which

²²See Friedrich Meinecke, Cosmopolitanism and the National State, tr. Robert B. Kimber (Princeton, N.J.: Princeton University Press, 1970); and the discussion of these concepts in Alter, Nationalism, pp. 14-18.

²³Renan, "What Is a Nation?" p. 203.

²⁴John Acton, "Nationality," in History of Freedom and Other Essays (London: Macmillan, 1907), p. 207.

the people of a given country might have, but on an act of will to affirm or deny particular affinities with others in that country, region, or group. Cultural nations have sometimes been thought to have definite, stable, and objectively determinable characteristics that would settle any questions concerning their identity and location. But contemporary nationalists such as Walzer often do not claim that nations are invariant in this way.

Nevertheless, there must be some limits to our ability to define and redefine the character and extent of nations, or they could not be used to order and if necessary rearrange political sovereignties and boundaries. In discussing what type of identity is found within national groups, Walzer states that they "are likely to share a wide range of cultural artifacts--language, religion, historical memory, the calendar and its holidays, the sense of place, a specific experience of art and music--and as a result of some or all of these, what we call 'nationality.'"²⁵ The result of this common identity made up of different "cultural artifacts" is that an "emergent nation-state . . . can be viewed by its members as an appropriate and already familiar framework for the exercise of autonomy and the formation of attachments."

If the nation has a cultural identity that is distinct

²⁵Michael Walzer, "Nation and Universe," Tanner Lectures on Human Values, Oxford University, May 1989, p. 538.

from acts of political "will-formation," how is that identity to be characterized? What gives a community its "character"? Above all, it would seem that history and geography give form to those cultural communities commonly called nations. On the one hand, a sense of memory, and on the other hand, a sense of place, seem to be the most important determinants of national identities: "A nation is a historic community, connected to a meaningful place, enacting and revising a way of life, aiming at political or cultural self-determination" ²⁶

This suggests how a communitarian solution to territorial disputes on the basis of self-determination might proceed: through the discernment of historical memories of land use, and through the delineation of contemporary patterns of settlement. But neither of these would necessarily be based on immediate expressions of sentiment indicating the simple will of inhabitants. If this were so, the communitarian theory would become indistinguishable from the consensual theory, and would be no more able to provide a basis for nationalist claims to territory.

This is not to say, however, that the affirmation of historically and geographically determined identities is not a fundamentally political act--one in which peoples around the world daily engage. Walzer refers to this as

²⁶Walzer, "Nation and Universe," p. 554.

"tribalism"--"the commitment of individuals and groups to their own history, culture, and identity."²⁷ This type of commitment, based on the ways in which human cultures have been marked by their histories and geographies, provides the one transcultural constant--the ineradicable difference of groups: ". . . our common humanity will never make us members of a single universal tribe. The crucial commonality of the human race is particularism."

The nature of this particularism is, for Walzer, fundamentally geographical; this is what enables him to subsequently argue for the importance of territory for communal autonomy. Certainly there is a general recognition that nationalities are sometimes tied more or less closely to regions, lands, or territories. This is what enables some nations to effectively fight for territorial autonomy of one kind or another. As Copp writes, ". . . the lack of a territory occupied by members of [a] group detracts from the feasibility of creating a national state."²⁸ But Walzer goes beyond this truism. The fit of nations and lands is much closer; fundamentally, nations are defined as those communities that already have countries of their own:

...national communities...came into existence, and were sustained over the centuries, on the basis of geographical coexistence.... Nations look for countries because in some deep sense they already

²⁷Walzer, "New Tribalism," p. 171.

²⁸Copp, "Do Nations Have the Right of Self-Determination?" p. 75.

have countries: the link between people and land is a crucial feature of national identity.²⁹

Of course, the sense in which nations already have countries is cultural; the political problem still to be settled is the means by which a nation will come to govern their own country. Self-determination is a means by which nations assert their right to determine this. The political result of this close link between nations and lands is that a major reorganization of boundaries and territories may be warranted. This is because it is only nations that can provide a basis for the legitimacy of a particular boundary or state: "It is the coming together of a people that establishes the integrity of a territory."³⁰ Absent this "coming together," boundaries and territories are apportioned out to states and rulers by accidents of history, without any rights necessarily following from them: "It hardly matters if the territory belongs to someone else, unless that ownership is expressed in residence and common use."³¹

The implications of this view of national identity are considerable. When combined with a communitarian view of duties and rights, it yields a moral as well as political particularism that limits the scope of any claims to moral

²⁹Walzer, Spheres of Justice, p. 44.

³⁰Walzer, Just and Unjust Wars, p. 57.

³¹Walzer, Just and Unjust Wars, p. 57.

consideration to specific, territorially bounded communities. This is because, since communities constitute the material foundations for any possible moral life, they also set the boundaries of applicability for moral claims about what constitutes proper conduct:

In practice...we show equal respect and concern only when our roles require it and then only over the population relevant to the roles.... Neither the same fellowship nor the same idea [of citizens] will be universally shared--and then what demands respect is only indirectly the individual himself; it is more immediately the way of life, the culture of respect and concern, that he shares with his fellows.³²

Walzer turns this view into a general indictment of what he calls "covering-law universalism," as we will see below. But for now, the significance of this view is that it suggests how important it is for nations to protect their communal integrity by whatever means are necessary--including establishing independent states of their own. Only then can nations erect an edifice of mores, norms, and values by which to live some kind of a good life. Furthermore, it is only by maintaining control over the entry and exit of people into a community that such a life may be cultivated. Social justice requires the ability to set limits to the scope of particular responsibilities, as well as rights. Otherwise, justice between individuals and classes or subgroups of a community may be impossible to achieve.

³²Walzer, "Nation and Universe," pp. 530-31.

This is what Walzer means by the primacy of "membership"--the fact that in the world of nation-states, claims for justice have a necessarily limited scope. Political wisdom consists in accepting this and making the best of it. Social justice therefore inevitably applies only within the restricted limits of a particular national territory or country:

The idea of distributive justice presupposes a bounded world within which distributions take place.... That world...is the political community, whose members distribute power to one another and avoid, if they possibly can, sharing it with anyone else.³³

The ability of nations to control their membership--who is and who is not a member of the nation--thus has direct impact on who can lay claim to consideration on the part of the national community. In determining what are goods and how they ought to be distributed, therefore, the first good to be considered is that of membership in a community itself:

The primary good that we distribute to one another is membership in some human community. And what we do with regard to membership structures all our other distributive choices: it determines with whom we make those choices, from whom we require obedience and collect taxes, to whom we allocate goods and services.³⁴

Once membership in a nation is settled, individuals may lay claim to the other goods available to and appropriate for

³³Walzer, Spheres of Justice, p. 31.

³⁴Walzer, Spheres of Justice, p. 31.

them. But the first issue is whether such individuals are, and can plausibly claim to be, members of the nation itself.

Aside from how such a matter is determined, how could a decision about it be enforced? The primary means is undoubtedly that of the state in its role as a "gatekeeper": by setting conditions for citizenship, the state uses its power to protect the nation from demands by others that do not merit consideration and may overwhelm the limited resources of that nation. Walzer thus moves from an assertion of the integrity of cultural-national communities based on land and memory to claims for sovereignty on the part of such communities. Cultural nations must become political nations in order to safeguard their integrity, territory, resources, and ways of life. Political self-determination becomes a justifiable and even essential demand for cultural nations to make in a world of sovereign states.

STATE SOVEREIGNTY AND NATIONAL SELF-DETERMINATION

While other nationalists (like Raz) have argued that nation-states can have good consequences for individual well-being, the communitarian justification of nation states given by Walzer is different. The good is not one that necessarily accrues to individuals as such, but is a good for communities as a whole. There is, of course, a connection between the welfare of national groups and that of their members on this account. It is the connection that

obtains between individuals that experience themselves as members of a group and the fate of that group as a whole--obviously they will be closely intertwined. But it is most especially the political life of nations that is at stake when the question of sovereignty arises. This is not subject to consequentialist calculations; without the state, no national autonomy is really possible.³⁵

This is the importance of territory and the sovereignty of nation-states: within them alone can nations develop their own internal political life--something which, in turn, is supposed to protect the integrity of a nation's identity (that is, its cultural life). What is at stake is fundamentally a matter of freedom--not of individuals, but of the nation in its desire for "self"-expression. Only the sovereignty of a territorial state is able to guarantee the possibility of such self-expression.³⁶ Thus, unlike a consensual justification of self-determination that relies on the consent of individuals to legitimate a nation's need for its own territory, the communitarian argument attributes to land and resources alone the capacity for realizing a nation's identity and ambitions.

The nationalist idea of self-determination is therefore most essentially justified by the need communities or

³⁵Walzer states, in Spheres of Justice, p. 44, that "to give up the state is to give up any effective self-determination."

³⁶Walzer, Just and Unjust Wars, p. 89.

collectivities have for autonomy.³⁷ This autonomy must, in one way or another, be achieved through the exercise of state sovereignty. But what does such sovereignty involve? Two aspects of sovereignty are essential for nations in order to secure their autonomy, according to Walzer. First, there is the establishment of boundaries within which nations can protect their autonomy from others. Second, there is the determination of membership (that is, citizenship) by which nations can preserve their integrity. Both aspects are viewed as intrinsically necessary for nations to achieve an adequate autonomy in the international arena. They are therefore also essential goods that require a right of self-determination in order that nations can obtain them.

A right of nations to possess the territory that constitutes their homelands implies that state boundaries are an important means for protecting the autonomy that nations require. Sovereignty is constituted principally by secure state boundaries. But how are the boundaries determined? Walzer admits that, while some boundaries are necessary for a nation's self-determination to be assured, where the boundaries are is not a matter easily settled or always correctly determined. In fact, the very idea of correctness is not necessarily ascertainable: "When we think of the nation we are led to think of boundaries . . . [but

³⁷Walzer, "Nation and Universe," p. 536.

there] is no sure way, given the circumstances of national life, to get them right."³⁸ What is, therefore, to be done in settling accounts between different national(ist) claims to territory?

Walzer seems to argue for a presumption in favor of separatism and partition, other things being equal.³⁹ Yet, he maintains that there is no definite assumption that political independence is always the best outcome for national groups.⁴⁰ It depends on the political relations between nationalities within a country. Nevertheless, whenever separatism is popularly supported by a national group, it is prima facie warranted. Though this might seem as if Walzer is reverting to a will-based theory of self-determination, it ought to be remembered that identities determine the initial attribution of nationhood to a group; what is later determined is whether that group seeks self-determination by way of complete political independence or not.

Once a boundary is set, the question of citizenship arises. It is axiomatic on the nationalist view that such a question can only be answered within a framework of sovereign nation-states; in Walzer's words, "There is no easy way to avoid the country (and the proliferation of

³⁸Walzer, "Nation and Universe," pp. 554-55.

³⁹Walzer, "New Tribalism," p. 169.

⁴⁰Walzer, "Nation and Universe," pp. 554-55.

countries) as we currently know it."⁴¹ But this framework already suggests an answer. Without a right of "admission and refusal," no country could maintain its identity in the face of the movements of population across the globe. This yields the significant result that only countries can themselves determine the conditions of membership, including the circumstances warranting exclusion or expulsion of nonnationals. As Walzer puts it,

The distribution of membership is not pervasively subject to the constraints of justice...states are simply free to take in strangers (or not)...the right to choose an admissions policy is...not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. At stake here is the shape of the community that acts in the world, exercises sovereignty, and so on.⁴²

In order to retain its autonomy, a (national) community must insist on its rights to determine membership; otherwise, the very purpose of sovereignty, self-determination, and the nation-state as such would be undermined.

Are there limits or restraints on the rights of nations to determine the boundaries of their territory and the characteristics of their members? Certainly there are no limits severe enough to override the right of self-determination itself. The rights of nations are not abrogated because a nation might abuse such a right by

⁴¹Walzer, Spheres of Justice, p. 44.

⁴²Walzer, Spheres of Justice, pp. 61-62 (italics added).

claiming too much territory or excluding too many people.⁴³ In settling national disputes over territory or people, there is not only a presumption of the justifiability of separation--that is, the separation of nations from one another into nation-states wherever possible. There is also a ready means--that of (further) partition of land--for the settlement of disputes that still may arise.⁴⁴ In both cases, the communitarian view is that it is better that nations separate from one another, or that they partition disputed lands into separable entities. Only in this way can national communities maintain their autonomy.

One other question about the limits of the use of a concept of communal autonomy concerns which nations may legitimately claim autonomy. After all, many nations have never had states, and others might still be deemed by some to be too small, weak, fragmented, or dependent to warrant a claim to sovereignty. Walzer, however, argues for the maximum possible extension of the principle of autonomy. Not only should it apply to "captive" nations that at one time possessed sovereignty, but "by a kind of imaginative extension, we can grant the same rights to nations that ought to have been independent, where the solidarity of the group is plain to see and the crime of the ruling power is

⁴³Walzer, "Nation and Universe," p. 519.

⁴⁴Walzer, "Nation and Universe," p. 548.

national oppression rather than conquest."⁴⁵

However, while such nationalities might lay claim to a right of self-determination, acknowledgment of such a right by others is contingent on the ability of the claimants to maintain their community as a distinct nation--if need be, in the face of "national oppression." Again, it is crucial to the communitarian case not that a willful claim is made by a nation, but that a nation exhibit the characteristics of a definite and unique identity which can mark out the contours of what could become a viable nation-state. In the world of already existing nation-states, new or aspiring nations that seek to exit from states must show their ability to do so through a process of political and sometimes violent struggle. There is no other way to be sure that a nation has an identity that can be sustained in the future:

The problem with a secessionist movement is that one cannot be sure that it in fact represents a distinct community until it has rallied its own people and made some headway in the "arduous struggle" for freedom. The mere appeal to the principle of self-determination isn't enough; evidence must be provided that a community actually exists whose members are committed to independence and ready and able to determine the conditions of their own existence. Hence the need for political or military struggle maintained over time.⁴⁶

The principle of communal autonomy can generate a

⁴⁵Walzer, "New Tribalism," p. 166.

⁴⁶Walzer, Just and Unjust Wars, pp. 93-94.

justification for the right of national self-determination, therefore, only on the condition that a nation demonstrate its identity as a distinct community--and show its capacity to act politically to mobilize its members to fight for the recognition of this identity. The marks of such a national identity are land and history--but these must be supplemented by an active will to develop an independent political community. If this is the case, then a nation may justifiably claim that it has a right of self-determination, and it is entitled to take whatever actions are necessary to establish a nation-state, ensure its sovereignty in relation to other states, and enforce citizenship policies that will guarantee the continuation of its distinct national identity.

This communitarian justification of national self-determination has a number of advantages over other attempts at justification. First, it is an explicitly political justification that avoids issues of moral rights in favor of a particular normative definition of political authority--a definition for which national rights is an important component. Second, the dilemmas of consent theory are avoided, since the rights of nations are not based on individual rights but on particular attributes of legitimate political communities as such. Finally, the issue of territorial holdings, while unresolved in various ways (as will be shown below), is nevertheless made intrinsic to the

whole justification of self-determination, since the very idea of a national community that could claim self-determination is of a community that in some sense is already defined territorially--though not necessarily within secure and internationally recognized boundaries.

Nevertheless, for the communitarian view held by Walzer, an awful lot depends on the definition of a political community, on the ascription of rights to autonomy to those communities, and on the value placed on state sovereignty as a means of resolving not only the "national question," but other problems of political authority and social justice. Each of these aspects of the communitarian defense of national self-determination will be questioned in the following sections.

POLITICAL COMMUNITY AND NATIONAL IDENTITY

The idea that a community must be based on some underlying conceptions or ideas that are shared in common by its members is a commonplace of political philosophy. It has been espoused by individualist philosophers such as John Rawls, who speaks of "certain fundamental intuitive ideas,"⁴⁷ and by communitarian philosophers such as Charles Taylor, who writes of "common meanings" as the basis of

⁴⁷John Rawls, "The Domain of the Political and Overlapping Consensus," New York University Law Review 64:2 (1989), p. 235.

communities.⁴⁴ But what is at issue is to what extent a political community must be rooted in nonpolitical ideas or meanings that are held in common by members of the community. The communitarian view held by Walzer and others is generally that political communities must also be, in some sense, cultural communities--nations--in order for the minimal amount of agreement that ensures a commonality of purpose to obtain. Individualists such as Rawls, on the other hand, have generally argued that only the most minimal agreement on specifically political matters is needed for a political community to maintain itself.

Recently, some philosophers such as Ronald Dworkin and Jürgen Habermas have taken an intermediate position--namely, that while political communities need not be based on a fundamental commonality of cultural values and identities, that "political identity" constitutes more than just a basic agreement about minimal rights and duties. It is what this "something more" is, and whether it is equivalent to a national identity, that lies at the center of the debate about whether nations might have rights to form their own political communities.

Walzer considers political identity to be, to a great extent, dependent on a prior national identity--however that

⁴⁴Charles Taylor, "Interpretation and the Sciences of Man," in Philosophical Papers, Vol. 2: Philosophy and the Human Sciences (Cambridge: Cambridge University Press, 1985), p. 39.

has been constituted. But he does reject--as do other communitarians such as Taylor--the idea that national identities have any "objective" characteristics or determinants that can be derived without human volition from racial, ethnic, linguistic, geographical, or other features of a culture. Nations are constituted historically, through "autonomous processes of cultural creativity" and "pattern[s] of mutual attachment" The question is whether these processes and patterns are necessary for the constitution of political identities and communities--and whether they provide criteria for distinguishing between legitimate and illegitimate forms of political authority.

Political identities are distinct from cultural identities in that they must be, at least in part, chosen, affirmed, or at least accepted by the participants concerned. Political communities are not like cultural communities as such, inasmuch as they are not derived exclusively from the long-term, relatively anonymous growth of folkways, customs, and relations. Political identities are formed through political acts; this is in part what the whole concept of self-determination aims at--whether applied to individuals, peoples, or nations. But whether self-determination is a right derived from pre-existing identities, or is itself constitutive of particular political identities, is what is at issue.

⁴⁹Walzer, "Nation and Universe," p. 554.

Political identities may have antecedents in prepolitical forms of life; but they cannot be simply the expressions of those forms of life, for the reason that this would rid them of exactly that feature that makes them "political"--their formation through acts of choosing, deciding, acting, and so on.⁵⁰ As Oldfield writes, political identity is at least partly about a commitment or choice to affirm some features of what we want a community to be or become:

When we describe ourselves as American, Canadian or British...we do not necessarily identify ourselves politically. We may be expressing something about our roots [but] we do not thereby say anything about the commitment which a political identity involves as it is self-consciously recognized, acknowledged and taken on. It is this choosing of a political identity that gives rise to the solidarity and cohesion of a political community.⁵¹

Nationalists might argue that this emphasis on choice or commitment in the formation of political communities is precisely the function of nationalist political demands such as self-determination--to give shape and expression to the political commitments of a national group seeking its own state. But this view would miss a second, and equally important, feature of political community--namely, the legitimacy of the choice or commitment that constitutes such communities. Political communities have certainly been

⁵⁰Oldfield, Citizenship and Community, p. 7.

⁵¹Oldfield, Citizenship and Community, p. 7.

formed historically in many different ways--not only, of course, through the demands of nationalities, but at least as much through war and conquest or through the domination of some social classes over others. But what is at issue is whether a political community can legitimately be formed on the basis of a pre-existing cultural identity.

Here thought should be given to how a peculiarly political form of association is formed. If choice is to be intrinsic to this process of formation, the choice must concern the basis for an association that can legitimately claim a monopoly on the use of force, including legal forms of coercion. One model for this kind of choice is what Dworkin has called the integrity of a political community. On the one hand, Dworkin does concede that political communities may be formed through the organization and incorporation of persons possessing particular cultural characteristics; he calls this a "bare" community. But to form a "true" community--that is, one in which the community constitutes a true associative relation--some means of determining the integrity of the relations within the community must be found.⁵²

Only what Dworkin calls a "community of principle" can fulfill the conditions, not only of choice to form a community, but of a community with integrity--with truly associative relations. Communities of principle are to be

⁵²Dworkin, Law's Empire, p. 201.

distinguished not only from bare communities based on pre-existing or historically derived ties (e.g., national communities), but from communities constituted by adherence to a set of rules designed to produce political compromises between competing groups. Communities may be said to have integrity only when they are organized on the basis of principles that have gained common acceptance. The idea of a community of principle "insists that people are members of a genuine political community only when they accept that their fates are linked in the following strong way: they accept that they are governed by common principles, not just by rules hammered out in political compromise."³³

Dworkin's idea is that the concept of integrity captures what is essential about how political communities can be seen as legitimate: only in conformity to a set of principles can a community be evaluated as legitimate or illegitimate.³⁴ If a community is based simply on a nonpolitical set of identifying characteristics, there is no way of deciding whether and when the community might rightfully embody the ideas contained in the original commitment to form that community. Habermas has put the idea of legitimacy similarly: "Legitimacy means that there are good arguments for a political order's claim to be recognized as right and just; a legitimate order deserves

³³Dworkin, Law's Empire, p. 211.

³⁴Dworkin, Law's Empire, p. 216.

recognition. Legitimacy means a political order's worthiness to be recognized."⁵⁵

Nevertheless, this view of legitimacy as based on principles does not specify what principles might go to make up the foundations of a community. Why could the principles not be those supposedly embodied in a "national character"--some set of virtues attributed to a particular national group and held up as a foundation for a "true" (national) community? Clearly, the nature of a political community cannot simply be defined by reference to the idea of principles.

If legitimate political communities are characterized provisionally as those that: (1) embody conscious choices or commitments and (2) exhibit an integrity based upon commonly held principles, then a further characterization is required in order to specify what matters about which choices are made and what type of principles might underlie claims of integrity. In the first case, it is clear from the history of political philosophy that a crucial feature of political commitment is that of commitment to common, joint, or collaborative actions or enterprises. The idea of cooperation is intrinsic to the idea of community.⁵⁶

⁵⁵Jürgen Habermas, "Legitimation Problems in the Modern State," in Communication and the Evolution of Society, tr. Thomas McCarthy (Boston: Beacon Press, 1979), p. 178.

⁵⁶Taylor, "Nature and Scope of Distributive Justice," p. 311.

Such cooperation may even be seen as definitive of political communities; as Haskell Fain has written, "Political communities . . . are constituted out of communal tasks or activities It is the common task that provides the origins of the moral bridge between 'perfect strangers' and that sanctions any 'moral power' relationship between them" ⁵⁷ The way in which this view of community differs from the communitarian view is that the latter posits prepolitical (cultural, ethnic, or national) identities as constituting the necessary basis of political identities. Yet, if political community is constructed through the execution of cooperative tasks undertaken by groups of people, the extent and membership of a community cannot be legitimately determined in advance according to prepolitical criteria. People's choice to associate should be a function of their attraction to enacting certain ideas or principles in a joint enterprise; this enterprise cannot be limited to an already constituted group of people who may or may not have joint tasks to perform.

Part of the difference between the idea of a community based on cooperative action and a community based on shared characteristics concerns the different ways in which identities are formed. One way in which this difference could be described is in terms of the two types

⁵⁷Haskell Fain, Normative Politics and the Community of Nations (Philadelphia: Temple University Press, 1987), p. 102.

of social groups discussed in Chapter 1--one that is based on ascriptions of individual characteristics and one that is based on associations for common goals. But since a national group could potentially be mobilized to seek common goals, further discussion of how political identities are formed is needed.⁵⁸ The crucial question to ask is how the common goals that define a political community are established in the first place.

Habermas' concept of a "communication community" is helpful in distinguishing between ways of determining political goals, and therefore identities. The basic idea is that a political community is defined essentially by a process of communication within which a normative ideal of mutual understanding is embedded. Political communities are examples of social interactions that can be characterized as communicative; and in communicative action, "participants are not primarily oriented to their own individual successes; they pursue their individual goals under the condition that they can harmonize their plans of action on

⁵⁸This does not mean, however, that national groups could easily transform themselves into political communities. In order to do so, they would have to abandon the prepolitical characteristics that had defined them as nations and adopt a task- or goal-oriented definition of membership. The nationalist movements in the newly independent Baltic states are one instance of where this issue has come to the fore; so far, it seems more important for the cohesion of these movements to marginalize and discriminate against nonnationals (e.g., Russians) than to transform themselves into genuine political communities. See also the discussion of the relation between ascriptive and associative groups in Chapter 1 above.

the basis of common situation definitions."⁵⁹

Social actions are inevitably communicative actions inasmuch as "the negotiation of definitions of the situation is an essential element of the interpretive accomplishments required" to act.⁶⁰ This is certainly a characteristic of political communities, in which some kind of agreement about goals is essential for effective actions to occur. To this extent, political communities therefore embody a consensual form of legitimacy, broadly speaking.⁶¹ Habermas connects consent with legitimacy in social action in that such action involves the coordination of individuals in groups, among which agreement is necessary:

To the extent that the continued existence of an action system or an order of life depends on its legitimacy, it rests in fact on "consensual validity." The consensual character of social action consists in the fact that the members of a group recognize the binding force of their norms of action and know about one another that they feel mutually obliged to observe these norms.⁶²

⁵⁹Jürgen Habermas, The Theory of Communicative Action, Vol. 1: Reason and the Rationalization of Society, tr. Thomas McCarthy (Boston: Beacon Press, 1984), pp. 285-86.

⁶⁰Habermas, Theory of Communicative Action, Vol. 1, p. 286.

⁶¹That is, consent, used not in the manner of consent theory as an act of allegiance that an individual bestows on the state, but an act by which individuals consent to act cooperatively for common ends. This would be closer to Pateman, and by extension, Rousseau's meaning of consent as a kind of "promising"; see Chapter 3 above for discussion of this point.

⁶²Habermas, Theory of Communicative Action, Vol. 1, p. 190.

The general characterization of political legitimacy is therefore the idea of a consensual agreement, achieved through a process of intersubjective communication aimed at reaching mutual understanding of particular political principles that can serve as a basis for action. The implication of this idea of legitimacy for the definition of political identity is that such identity cannot be a function primarily of a pre-given cultural identity, but must be determined through a process of communication and mutual agreement. Legitimate political communities are associations created for the achievement of common goals; no restrictions on the identities of their members can legitimately follow from their pre-political properties or affinities.

Walzer's idea that a "cultural nation" is thus in some sense a prerequisite for a legitimate "political nation" contradicts the basic meaning of political identity. The "nation" that is legitimately coterminous with the state is one that must meet the criterion of a community founded on communicative action, of which political debate is a crucial instance. No nation that is derived from prior cultural determinants can hope to serve as the basis for a legitimate political identity: "The nation of citizens does not derive its identity from some common ethnic and cultural properties, but rather from the praxis of citizens who

actively exercise their civil rights."⁶³

Consequently, political self-determination cannot be a right of cultural communities such as nations. Such communities are often formed, not through a process of mutual understanding and agreement, but by the ascription of identities to individuals without their consent or even knowledge. Such a process of ascription means that, however valuable the resultant communities for their members' moral, aesthetic, or psychological well-being, they cannot provide the basis of a political identity. Self-determination can should only serve to protect a distinctive political culture of principles, one based on mutual agreements: "The democratic right of self-determination includes . . . the right to preserve one's own political culture, which includes the concrete context of citizens' rights, though it does not include the self-assertion of a privileged cultural life form."⁶⁴

The question that Walzer might ask of this view is whether such a conception of political community based on principles is a realistic one. Undoubtedly, he would see it as a case of attempting to provide a neutral or universalistic framework from which particular communities can be evaluated as to their suitability for political nationhood. Yet, Walzer argues that the idea of a political

⁶³Habermas, "Citizenship and National Identity," p. 3.

⁶⁴Habermas, "Citizenship and National Identity," p. 17.

community that maintains a neutrality of interest between distinct national groups is largely a fiction, though perhaps one that might work well "in immigrant societies where everyone has been similarly and in most cases voluntarily transplanted, cut off from homeland and history."⁶⁵ Short of this, a nonculturally based nationality is impossible, and in cases of mixed identities within the same states, recourse should be made to partition or secession.

Underlying Walzer's rejection of the idea of a state without cultural affiliations of one kind or another is the communitarian conviction that norms and values themselves are formed and can only be fully legitimated within the lifeworld of a nation (or other group). Habermas' claim that "[i]n moral discourses, the validity of a norm is always tested under the premise of its being universally adhered to,"⁶⁶ would strike Walzer as an insight without practical consequences, since it would at most be a statement about the formal similarities between different norms and values arrived at and practiced within different cultures.

⁶⁵Walzer, "New Tribalism," p. 166. This is Walzer's view specifically of the United States as a political community, which, however, he regards as virtually unique in this respect; see his article, "What Does It Mean to Be an 'American'?", Social Research 57, 3 (Fall 1990): 591-614.

⁶⁶Jürgen Habermas, "Towards a Communication-Concept of Rational Collective Will-Formation: A Thought Experiment," Ratio Juris 2:2 (July 1989), p. 146.

Walzer does not insist that nations alone are the foundations of norms; but they are examples of the "collectivities within which moral ideas and ways of life have been elaborated" ⁶⁷ Some such collectivity, whether tribes, cities, religions, or some other group, comprise the entities within which moral norms and political communities find their origin.

Part of what is at issue in these divergent definitions of political community is the basis on which identity itself--or at least group identity--is to be understood. Habermas argues for rejecting the view that the identity of communities, collectivities, or groups in general can be understood by analogy with that of individuals--that group identities are "ego identities on a large scale."⁶⁸ To conceive of nations, and by extension political communities, as entities that are capable of a kind of identity--and therefore, of a kind of autonomy--similar to that of an individual consciousness (or ego) is to overlook the ways in which identities in general are constituted.

Walzer denies that he considers nations to be "egos." But he claims that they are something similar: "[Some] understand nationalism as a form of collective egoism. It

⁶⁷Walzer, "Nation and Universe," p. 536.

⁶⁸Jürgen Habermas, "Historical Consciousness and Post-Traditional Identity: The Federal Republic's Orientation to the West," in The New Conservatism: Cultural Criticism and the Historians' Debate (Cambridge, Mass.: Massachusetts Institute of Technology Press, 1989), p. 261.

is better understood, however, as a form of collective individualism"⁶⁹ The distinction between the nation as an ego and as an individual is meant to evoke the possibility that nations may behave better or worse toward others--"egoism" is not an inevitable outcome of a nationalist ideology. But what is interesting about Walzer's claim is not so much the distinction that he makes as his implicit admission that national identities are what Habermas would call "monological"--individual and discrete, with an identity based on the self-knowledge of a unitary consciousness.

In contrast, Habermas argues that identities are not constituted monologically, but dialogically, through a process of discursive communication between different individuals. This can be seen to be true of individual identities; it is even more the case with the identities of collectivities such as political communities. They do not need the prepolitical foundation of a nation; in fact, such a foundation can only lead to the creation of a community when it is recognized as such by other already existent communities. Thus, the process of communication, understanding, and mutual recognition is what inevitably defines communities, as well as individuals.

This view is part of Habermas' argument for a large-scale shift in philosophical sensibilities--from a "paradigm

⁶⁹Walzer, "Nation and Universe," p. 550.

of consciousness" to one of communication; from a subjective to an intersubjective model of the constitution of identities. Nationalists view the nation as an individual or ego, for whom political autonomy through self-determination is an essential demand, and for whom self-consciousness (in the sense of a nation that knows itself as having an identity) is a sufficient basis for political action. But it is a paradigm of "mutual understanding," "of the intersubjective relationship between individuals who are socialized through communication and reciprocally recognize one another,"⁷⁰ that is best able to account for the legitimacy of a political community.

Walzer, like other nationalists, is trapped within a philosophical paradigm that can no longer provide either an adequate account of the identity of a legitimate political community nor of identities in general.⁷¹ Nevertheless, even if Walzer were able to legitimize the idea of a

⁷⁰Jürgen Habermas, The Philosophical Discourse of Modernity: Twelve Lectures, tr. Frederick Lawrence (Cambridge, Mass.: Massachusetts Institute of Technology Press, 1987), p. 310.

⁷¹On the shift from a philosophy of subjective identity to that of intersubjectivity, see also Peter Dews, Logics of Disintegration: Post-Structuralist Thought and the Claims of Critical Theory (London: Verso, 1987), esp. pp. 220-242. Dews emphasizes Habermas' critique of Adorno as one origin of the philosophy of intersubjectivity, and of the inability of thinkers such as Foucault, Derrida, and Lyotard (with Lacan being a partial exception) to break decisively with the philosophy of identity. In terms of political philosophy specifically, see the discussion of identity and subjectivity in Taylor, "Politics of Recognition."

national identity as the basis of community, he would still have to argue that the autonomy of those communities, guaranteed by rights of self-determination, could adequately address the problems of defining citizenship and territorial boundaries in a way that other justifications for national self-determination have not been able to do.

CITIZENSHIP, TERRITORY, AND COMMUNAL AUTONOMY

Walzer makes two claims on the basis of the idea that communities ought to be autonomous--and consequently that they may claim a right to self-determination as a means of achieving this autonomy. First, when a community achieves autonomy, it is entitled to admit or exclude people as it sees fit: setting the terms of membership in a community is a crucial part of ensuring the community's autonomy. Second, the connection between a community and an historical and geographical setting means that granting communities autonomy will provide a means of settling territorial disputes.

Self-determination for nations is justified because it is the only legitimate way in which to determine membership in communities and to set boundaries and limits on the territorial extent of those communities. But does the principle of communal autonomy--which is for Walzer the idea that underlies national self-determination--actually provide a means of legitimating citizenship rights and territorial settlements?

The importance of citizenship rights, or what Walzer calls "membership," is not just a view common among communitarians. The determination of who is and who is not a member of a political community is, along with the settlement of its physical boundaries, also a determination of who stands to participate in and benefit from the activities of that community. Bruce Ackerman, in other particulars opposed to communitarian views, writes that "citizenship is not just another question open for resolution by the political community. It is conceptually prior to all other particular power struggles"⁷² This is why Walzer emphasizes membership as the most basic issue for a political community to settle.

The notion of communities as based on identities that require autonomy for their development leads to a particular conception of membership. The communal autonomy that is a goal, and is sought by claims to self-determination, must be maintained and ensured through the determination by the community itself of the conditions for membership. A community is regarded as an enclosure within which a nation or culture can flourish, and without which this would be impossible: "The distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as

⁷²Bruce Ackerman, Social Justice in the Liberal State (New Haven, Conn.: Yale University Press, 1980), p. 92.

a stable feature of human life."⁷³

The upshot of this view of membership is that citizenship rights must be set by the community itself according to its own standards. The implication is that the standards will depend upon prior membership in the nation or cultural group that maintains a state, since this is the primary purpose for which the state was established in the first place. Thus, membership ultimately depends on nationality.

But nationality is of course a term with different meanings, and Walzer vacillates in his discussion of this issue between different conceptions of national membership. On the one hand, the whole weight of his theory leads to the conclusion that citizenship in a state should depend on prior membership in the nation that "rules" the state. Yet, Walzer also entertains the other meaning of nationality whereby all those resident within a country have rights of citizenship there. This, he maintains, is the "principle of political justice": ". . . the processes of self-determination through which a democratic state shapes its internal life, must be open, and equally open, to all those men and women who live within its territory, work in the local economy, and are subject to local law."⁷⁴

The issue of membership comes to a head over the

⁷³Walzer, Spheres of Justice, p. 39.

⁷⁴Walzer, Spheres of Justice, p. 60.

problem of immigration. Walzer's communal autonomy principle seemingly leads logically to a restrictive immigration policy, in accordance with the nationalities of the persons involved. The reason is that "closure must be permitted somewhere"; so "something like the sovereign state must take shape and claim the authority to make its own admissions policy, to control and sometimes restrain the flow of immigrants."⁷⁵ But what happens to "political justice" in this case?

From a more "universalistic" view of immigration and citizenship rights--such as that of Habermas, for instance--the latter idea of nationality, in which all those living and working in a locality are considered "nationals," suggests that all people with a stake in the country (not just those who can claim to be members of an ethnic nation) have a right to citizenship. Citizenship is seen as a conventional arrangement within an international association of states that serves to protect individuals from state tyranny or from neglect of their basic needs. Reference to prior "communities of character" is therefore not relevant in determining citizenship.⁷⁶ Consequently, "[t]he criteria of ethnic origin, language, and education--or an 'acknowledgment of belonging to the cultural community' of the land of migration . . . could not establish privileges

⁷⁵Walzer, Spheres of Justice, p. 39.

⁷⁶Habermas, "Citizenship and National Identity," p. 5.

in the process of immigration and naturalization."⁷⁷

This is not to deny that in order for persons to establish membership in a political community, they must adhere to the political culture of that community; but this does not mean that they need be members of any other cultural or national community resident within that state.⁷⁸ If there are to be restrictions on immigration, it is only to serve the continuation of a political culture of adherence to principles. The only justifiable reason to restrict membership would be to ensure against the "enormity of claims, social conflicts, and burdens that might seriously endanger the public order or the economic reproduction of society."⁷⁹ And, of course, this would not even then necessarily be a reason for expelling anyone from the country strictly because of nationality.

Now Walzer is aware of this view, and even appears somewhat sympathetic to it.⁸⁰ In his discussion of "guest

⁷⁷Habermas, "Citizenship and National Identity," p. 16.

⁷⁸Habermas, "Citizenship and National Identity," p. 17.

⁷⁹Habermas, "Citizenship and National Identity," p. 16; note the agreement of Ackerman on this point, in Social Justice in the Liberal State, p. 95: "The only reason for restricting immigration is to protect the ongoing process of liberal conversation itself."

⁸⁰For a discussion of Walzer's views on immigration, see James L. Hudson, "The Philosophy of Immigration," Journal of Libertarian Studies 8:1 (Winter 1986), and Joseph H. Carens, "Aliens and Citizens: The Case for Open Borders," Review of Politics 49:2 (Spring 1987), esp. pp. 264-70; neither emphasizes the internal contradiction in Walzer's views to the extent that I do here.

workers," he asserts that they may have a legitimate claim to membership in a country in which they reside and work, even if their nationality is distinct from that of the longer-term residents (that is, citizens).¹¹ But what is to be done, in view of the fully legitimate rights of members of the resident nationality to set as they please the conditions of citizenship--in particular, so as to preserve the distinctive national culture of the country concerned? The guest workers "must be set on the road to citizenship."¹² And who is to do this? Those citizens of the country that perhaps feel fully justified in excluding these very guest workers from citizenship (since they are clearly not members of the nation)!

Walzer apparently does not attempt to resolve this contradiction in his views. He states that the reason for including nonnationals as citizens of a country is a concern for "political justice." Yet, it is a prerequisite of "political justice"--that is, a condition for the very existence of political communities--to accord autonomy to nations in order that they may act to preserve and protect their distinctive cultural identity. One or the other of these principles must yield, and it is clearly the idea of political justice that is the afterthought, given Walzer's

¹¹See the whole discussion of the issue of "guest workers" in Walzer, Spheres of Justice, pp. 56-61.

¹²Walzer, Spheres of Justice, p. 60.

other communitarian views.

Thus, the idea of communal autonomy ends up providing reasons for violating the very localism and sense of place which it is supposedly designed to serve¹³: it actually provides a justification, not for protecting distinctive local cultures and environments, but for protecting the "idea" of a culturally distinct and ethnically pure nation in the face of historically prevalent changes in demography, trade, labor mobility, and cultural transmission and exchange.¹⁴

The even more intractable problem of justifying the

¹³Walzer's core claim, again, is that communities depend on their right of "closure" (i.e., the ability to admit or exclude potential members): "The distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life" (Spheres of Justice, p. 39). He here compares nations with neighborhoods, clubs, and families in this respect. But notice that he writes that "Neighborhoods can be open only if countries are at least potentially closed" (p. 38).

While the free play of capitalist market forces, including the role of a global labor market that produces large demographic shifts, is undoubtedly inimical to the cultivation of sustainable local economies and cultures, it is the nature of closure--whether it will take place along lines of nationality and to what extent the nation-state need be the primary vehicle for forcibly creating closed communities--that is at issue. As I will maintain further below, the use of cultural nationality and state power as determinants of the proper limitations of community and locality is actually at odds with the values of communal self-sufficiency and sustainability that are advocated, for example, in the contemporary ecology movement. On this point, see Andrew Dobson, Green Political Thought: An Introduction (London: Unwin Hyman, 1990), p. 84.

¹⁴For a discussion of how rare ethnically pure and self-enclosed communities have been, see McNeill, Polyethnicity and National Unity in World History.

acquisition of territory by national groups is equally poorly served by the idea of communal autonomy. The problem does not lie with connecting a general justification of national self-determination with a general claim by nations to sovereignty over territory, as it did for the consensual theory of self-determination. Communitarianism establishes a clear link between nations and lands--nations are in fact, on this view, defined in part by their connection to particular territories. A nation is not understood to be simply a collection of individuals (as in consent theory), but a conglomeration of people, land, and even time (in the sense of historical memories that must be cherished and preserved--sometimes in conjunction with the possession of sacred places, monuments, relics, or documents⁵⁵). In this sense, a general link between nations and territories is clearly established. And if nations have a right to their autonomy and self-determination, then that would seem to imply that they have a right to the possession of their national lands and territories.

But the problem is not with a general linkage that can be established between nations and countries--but with specifying a manner by which one could determine which nations have rights to which territories. The concept of communal autonomy turns out to offer little help in

⁵⁵See Smith, Ethnic Origins of Nations, esp. Ch. 8, for a discussion of the creation of "imaginary histories" and "imaginary geographies" out of these types of materials.

resolving this dilemma. In fact, it may even complicate its resolution, since it would seem to accord rights to territory to any nation that claims them. At the very least, if there is a way of disqualifying nations from making certain claims, it is not readily apparent given a communitarian framework that accords nations autonomy to make such decisions about sovereignty and boundaries.

Walzer attempts to deal with the problem of territorial disputes and sovereignty in three ways: (1) by maintaining that the exercise of popular choice is a presumption that trumps other claims; (2) by arguing in favor of partition, other things being equal; and (3) by establishing a principle of "reiterative universalism" to mitigate the worst offenses of nationalist aggrandizement.

In the first case, Walzer states that, "I would be inclined to support separation whenever separation is demanded by a political movement that, so far as we can tell, represents the popular will. Let the people go who want to go."⁶⁶ Does this settle the issue? According to Wentworth Ofuatey-Kodjoe, "to assert that the right of self-determination means the right of a group to choose the sovereignty under which it shall live is simply incorrect."⁶⁷ This is because self-determination is only

⁶⁶Walzer, "New Tribalism," p. 169.

⁶⁷Ofuatey-Kodjoe, Self-Determination in International Law, p. 164.

applicable to a people, within international law at least, when that people is "under the subjugation of another community."⁸⁸

Now Walzer might reply that, "[in some societies] the only way to avoid domination is to multiply political units and jurisdictions, permitting a series of separations."⁸⁹ While this may be true, it does not, however, constitute either a justification of a general right of self-determination for all nations or a principle by which to determine the territorial sovereignties of nations that simply seek their "autonomy," however that is construed (by them). Claims by nations to autonomy cannot, in and of itself, yield any particular set of sovereignties or boundaries, not to speak of legitimate ones. There is, in addition, the problem of determining the appropriate unit within which to determine the "will of the people." By referring the resolution of disputes over sovereignty to mechanisms such as plebiscites for determining the "popular will," the dispute is simply pushed back one step to a dispute over the appropriate territory in which to conduct such a referendum.⁹⁰

⁸⁸Ofuatey-Kodjoe, Self-Determination in International Law, p. 162.

⁸⁹Walzer, "New Tribalism," p. 166.

⁹⁰This is the problem that Beran expends much effort in trying to solve--though unsuccessfully in my view. See the discussion of reiterative referenda in Chapter 3. Walzer, as far as I can tell, does not acknowledge the difficulties

Walzer takes another tack in arguing that partition, in and of itself, constitutes an adequate solution to most disputes over territory: "Partition is almost always an available (though rarely a neat) solution in territorial disputes."⁹¹ Unfortunately, this view must seek to counteract the more fundamental principle established previously--that of communal autonomy. The latter idea would seem to provide clear justifications for different nations precisely not to settle for partition of their countries or homelands. And if they do so, it may often be only a calculated retreat in a long-term campaign to recover the territory lost and the sovereignty compromised.

In any case, as Walzer himself acknowledges, there are few cases in which such a solution would really "solve" the dispute. This is because partition does not resolve national disputes so much as stimulate nations to adopt a belated revanchism. As Anthony Giddens notes,

...only in those instances where boundaries fairly closely coincide with existing language-communities is the convergence between the nation-state and nationalism a relatively frictionless one. In all other cases--by far the majority in the modern world--the advent of the nation-state stimulates divergent and oppositional nationalisms as much as it fosters the coincidence of nationalist sentiments and

involved in determining the popular will--perhaps because he believes that there can be no general solution to the problem other than to rely on particular nations' determinations of their own "wills."

⁹¹Walzer, "Nation and Universe," p. 548.

existing state boundaries.⁹²

Partitions cannot be presumed to solve territorial disputes, since there is no particular principle on which they would be based that could override or counteract the justification nations would feel in continuing to pursue the (re)unification of their presumptively divided territories or homelands.⁹³

Finally, it might be maintained that some such principle of the mutual consideration of nations for one another could be added to the fundamental value of communal autonomy--or at least this is what Walzer contends in offering a revision of his earlier position. In his 1989 Tanner Lectures, he advocates a principle of "reiterative universalism" that presumably would accord respect to all acts of groups or nations seeking autonomy: "We act immorally whenever we deny to other people the warrant for or what I will now call the rights of reiteration, that is, the right to act autonomously and the right to form attachments in accordance with a particular understanding of

⁹²Giddens, Contemporary Critique of Historical Materialism, Vol. 2, pp. 219-20.

⁹³Walzer seems to think that nationalist revanchism is not a fundamental problem for his view of self-determination, but simply something to be peacefully resolved through international forums. But he seriously neglects the political motivation given to revanchist movements by the very concept of communal autonomy that he espouses.

the good life."⁸⁴

Walzer refers to the idea of reiterative universalism as the "best account of nationalism in general and the most adequate constraint on its various immoralities"⁸⁵ Presumably the latter characterization refers to the problems of sorting out boundary and territorial disputes as nations come to have states and to act on their understanding of their own rights. It is central to the communitarian view that communities cannot be judged by standards external to them. To do so would be to advocate what Walzer calls a "covering-law universalism" which "would require us to disregard or repress processes of cultural creativity and patterns of mutual attachment that we ought to value."⁸⁶ A covering-law universalism would assess all regimes according to the same standard, with the aim of eventual conformity to one idea of a legitimate state.

By contrast, reiterative universalism only seeks a "universal model for the behavior of one nation toward the others"⁸⁷ In seeking to resolve the conflicts that he admits plague the search for autonomy and self-determination by nations, the idea that each nation's attempts at autonomy might justifiably be "reiterated" by

⁸⁴Walzer, "Nation and Universe," p. 535.

⁸⁵Walzer, "Nation and Universe," p. 547.

⁸⁶Walzer, "Nation and Universe," p. 556.

⁸⁷Walzer, "Nation and Universe," pp. 551-52.

other nations seems a pleasing possibility.

Unfortunately, it is only that; for while the idea of reiterative universalism is unobjectionable when stated so broadly, it is also less than useful in providing reasons for why nations starting from the aggressive and righteous pursuit of their own autonomy and self-determination must suddenly pause to consider the autonomy and self-determination of others. This seems particularly implausible as a way to deal with conflicts in which each nation seeks sovereignty over their homeland or country and in which these are substantially the same territory. Yet, this is the hard case that is also a frequent case in international relations; and it is this case that Walzer is concerned to address.

What is missing from this attempt to find a means of determining legitimate sovereignties is some rationale for why nations might come to renounce or modify their claims of sovereignty over specific territories. Why indeed would a nation seeking to further its autonomy accept the qualification or frustration of such a goal once it had regarded its autonomy and self-determination as rooted in the deepest values and norms of political life? Only a much more fundamental departure from the idea of communal autonomy than Walzer is prepared to make could justify such a renunciation of the goal of self-determination for nations in favor of a conception of sovereignty that is inevitably

mediated by the concerns of others.

Habermas has sketched the outlines of a justification for ameliorating the claims of nations (though Walzer would probably regard Habermas' idea as a version of "covering-law universalism"). The starting point of such a justification is that "[the] concept of popular sovereignty does not refer to some substantive collective will which would owe its identity to a prior homogeneity of descent or form of life."⁹⁸ Rather, sovereignty must be rooted in a process of communicative association based on adherence to principles, rather than to identities. Habermas characterizes this form of sovereignty as procedural: "The consensus achieved in the course of argument in an association of free and equal citizens stems in the final instance from an identically applied procedure recognized by all."⁹⁹

Actually, Habermas contends (especially with reference to the case of the European Union) that any universalistic conception of "democratic will-formation" must be given a "particularist anchoring" in "different national traditions."¹⁰⁰ These in turn would be "connected with the overlapping consensus of a common supranationally shared political culture." In this sense, the idea of a communication community would manifest itself differently in

⁹⁸Habermas, "Citizenship and National Identity," p. 4.

⁹⁹Habermas, "Citizenship and National Identity," p. 4.

¹⁰⁰Habermas, "Citizenship and National Identity," p. 7.

different countries and political cultures. This view, however, is not the same as Walzer's notion of reiterative universalism, since the basis for legitimacy in all political communities would be similar.

Habermas' view of the way in which the particularist tendencies of different states might be mediated to settle disputes--territorial or otherwise--is not burdened with the baggage of an a priori commitment to the autonomy and self-determination of nations. In fact, he argues that, "[o]ne's own national tradition will, in each case, have to be appropriated in such a manner that it is related to and relativized by the vantage points of the other national cultures."¹⁰¹

Any political philosophy that begins with a commitment to the autonomy and integrity of national cultures is going to be unable to provide much guidance in developing a procedure to determine legitimate sovereignties and to settle territorial disputes between rival nationalities. This is again a result of the identity- or consciousness-based conception of community discussed earlier. A commitment to communal autonomy does not entail any further principle (nor can it allow for any such principle) that can provide the means for limiting communal autonomies when they conflict or overlap.

This may help to account for the nature of the

¹⁰¹Habermas, "Citizenship and National Identity," p. 7.

justification of national self-determination that is given by communitarians (including Walzer). In a sense, the justification is provided by the entire philosophy of communitarianism. When community is valorized and regarded as something with an integrity and distinctiveness that cannot legitimately be compromised by general principles of any kind, the idea of national rights in general and rights to the self-determination of nations in particular follow logically. Unlike individualist justifications of national rights (such as those based on consequentialist or consensual theories), where the transition from a set of norms designed primarily to determine rightful individual conduct or legitimate individual rights must be carefully extended to nations, the communitarian justification starts from premises in which the very idea of self-determination is at least implicit.

But what this also suggests is that the deficits of communitarianism in general fatally undermine the case for national self-determination. From a theory in which the general rights of communities are accepted as bedrock principle, it becomes very hard to derive a means of restricting and limiting such rights in order to reconcile nation-states within a world of mutually conflicting claims to national homelands and territories. Yet, that is exactly what is required in order for such a set of rights to have any viability as principles of political legitimacy. While

the communitarian case for national self-determination is undoubtedly the strongest one that can be made, it is no stronger than the political theory of communitarianism itself.

THE NATION-STATE AND THE ILLUSION OF SOVEREIGNTY

Communitarians have sometimes sought to distance themselves from specific political solutions to the problem of reconstituting community. Walzer, who at least attempts to provide some answers to questions about the form of a legitimate political community, nevertheless becomes exceedingly vague when he is forced to acknowledge some of the problems inherent in a nationalist political program. Thus, he asserts that "[s]elf-determination has no absolute subject," and that "[w]hat has been called the 'national question' doesn't have a single correct answer."¹⁰²

These views register the impact of attempting to combine an adherence to a standard list of liberal rights and institutions with an advocacy of claims to national autonomy and self-determination. However difficult such an enterprise turns out to be, it is clearly of the first importance for both liberals and nationalists who try to reconcile two central aspects of the ideology of the nation-state--its role as the supposed guarantor of entitlements often won by democratic struggles against the state and its

¹⁰²Walzer, "New Tribalism," pp. 165, 166.

role as the institution responsible for mobilizing patriotic sentiments in defense of its own power.

The close linkage between liberalism and the nation-state has not often been acknowledged by liberal political philosophers.¹⁰³ This is because the linkage runs through a nationalist espousal of principles, such as self-determination, that are often at odds with other purportedly liberal values.

The communitarian justification of national self-determination is the strongest possible one because it is most implicated in the political context of the nation-state within which alone such an idea makes sense. Nationalism is the ideology of the modern (or nation-) state, not in the sense of its ideal image as a guarantor of individual rights and communal goods, but in the sense of its claim to legitimately monopolize power in the service of the "people" (or nation). As Giddens has written, "Nationalism is the cultural sensibility of sovereignty, the concomitant of the coordination of administrative power within the bounded nation-state A nation-state is a 'conceptual

¹⁰³One recent philosopher who has pointed to the essential connection between liberalism and nationalism is Yael Tamir, in her book, Liberal Nationalism; she of course sees this as an indication of the valuable complementarity of both theories. For a radical critic of both liberalism and nationalism who draws a similar connection, and yet regards the two ideologies as illuminating the inadequacies of each, see Poole, Morality and Modernity, pp. 90-109.

community' in a way in which traditional states were not."¹⁰⁴

The close relation between nationalism and the state has led to some of the strange formulations found in communitarian justifications of self-determination--namely, that the nation needs the state to safeguard its existence, while at the same time the nation already exists prior to statehood and in fact must continue to exist in order for it to legitimately claim rights to autonomy. One might naturally ask of such views: why then do nations need states? The "answer," only implicit in communitarian theory, is that, in some sense, as Giddens notes, states "need" nations. Warren Magnusson has referred to this conception of the relationship between nations and states as the "circularity of nationalist ideology": "the nation needs the state as its political embodiment, so the state has to create the nation to legitimate its own existence. Hence, nation-building is the most glorious of state activities."¹⁰⁵

Why, in communitarianism, is the justification of national self-determination linked to the well-being of the

¹⁰⁴Giddens, Contemporary Critique of Historical Materialism, Vol. 2, p. 219.

¹⁰⁵Warren Magnusson, "The Reification of Political Community," in R. B. J. Walker and Saul B. Mendlovitz (eds.), Contending Sovereignties: Redefining Political Community (Boulder, Colo.: Lynne Rienner Publishers, 1990), p. 49.

state? Undoubtedly, the notion of sovereignty is the crucial connection. As Walzer has argued in various ways, political freedom is only possible within the territorial state. Therefore, to ensure the health of the state, nationality must be used as the basis for the citizens' identification with it. As Magnusson points out, this idea is rooted in the imagery of politics as only being possible within an enclosed space of some kind.¹⁰⁶ The state serves the purpose of an enclosure only so long as it commands the allegiance of a substantial part of its citizenry. Thus, any form of identification that can facilitate this allegiance increases not only the power of the state, but the freedom of the citizens as well.

Thus, the necessity of self-determination for nations is intimately tied to the necessity of sovereignty for the creation of political communities. This is why Walzer can claim that political communities take many different forms, yet conclude that nations are perhaps the best of those forms at present.¹⁰⁷ The justification of sovereignty allows nations to appear as only one possible, but also as the best possible, form of the "closed territorial

¹⁰⁶Magnusson, "Reification of Political Community," p. 49.

¹⁰⁷Walzer, "Nation and Universe," p. 554.

state."¹⁰⁸

But in order for sovereignty to be viewed as the exclusive means of obtaining a political community, the nation-state must actually be seen as an enclosure within which political activity can function relatively freely. This is increasingly hard to countenance, however, in the face of what we know today about the limitations and shortcomings of sovereign states. In particular, two illusions about sovereignty are worth noting: (1) the idea that political freedom is in some way created once a territory is enclosed by a sovereign state; and (2) the idea that sovereign states can--by virtue of their recognition as nation-states--effectively enclose a territorial space within which the life of a nation or people can be autonomously conducted.

Historians have sometimes noted the initial and coincidental convergence of struggles for political freedom and democracy with national struggles for autonomy and self-determination. This has led some philosophers to see this

¹⁰⁸This term is meant to evoke comparison with Fichte's concept of the "closed commercial state" (see the excerpt from Fichte's work of this title in H. S. Reiss (ed.), The Political Thought of the German Romantics, 1793-1815 (Oxford: Basil Blackwell, 1955); the idea of this type of quasiauthoritarian state has been seen to be at odds with Fichte's espousal of an extreme version of subjective idealism. Yet, in light of his advocacy of the necessity of distinct national cultures in the Addresses to the German Nation, it is not so strange that individual freedom could only exist within the confines of a restricted territory, overseen by a paternalistic authority. This point has been made by Kedourie in Nationalism, pp. 30-31.

convergence as evidence for the interrelation of the two different meanings of political freedom--popular (or republican) and national(ist). Yet, the two meanings are quite distinct, as Habermas notes:

Compare "freedom" in the sense of national independence, i.e., collective self-assertion vis-a-vis other nations, with "freedom" in the sense of those political liberties the individual citizen enjoys within a country; the two notions are so different in meaning that...[o]nly briefly did the democratic nation state forge a close link between "ethnos" and "demos." Citizenship was never conceptually tied to national identity.¹⁰⁹

The illusion that political freedom is secured only within the space of a sovereign territorial state is based in part on the idea that the space is politically "empty"--that it contains no prior determinations of politically appropriate activities. This idea is held by some (such as Walzer) in spite of the fact that communitarian theorists would lead us to think that there are at least cultural determinants of the creation of nation-states. Yet, those nation-states are still viewed as neutral containers for the political activities of the nation. This view depends of course on not seeing the sovereign state as itself determinant of the range of political activities permitted.

But state-centered politics is precisely what is created by the establishment of sovereignty, while other forms of political life atrophy (or are actively repressed

¹⁰⁹Habermas, "Citizenship and National Identity," p. 4 (italics added).

by the state). Not only is this the case with explicit governmental policies of nationbuilding--the militarization of citizenship, the encouragement of patriotism, the monopolization of force by the state, and so on; even political efforts at social reform must be "addressed" to the state and seek to influence government policies. As Magnusson writes, "Groups are deemed to be political insofar as they address themselves to the process of government; i.e., insofar as they seek to influence government policy, to secure representation within the state, or, at the extreme, to take over the government itself."¹⁰

The effect of this narrowing of the focus of political activity to state-centered policy is to exclude two vital loci of political life--the local community and the social movement.¹¹ In each case, political life is not experienced as a function of the citizens' relation to the state, but rather as a part of their experience of problems or possibilities within everyday life. The idea of sovereignty serves to narrow the meaning of politics to what is acceptable to the state. This narrowing of political activity to state-centered politics has specific implications especially for those localities and movements

¹⁰Magnusson, "Reification of Political Community," p. 51.

¹¹Magnusson gives an interesting dissection of the ways in which liberal political theory tends to minimize these important types of popular political activity; see his "Reification of Political Community," passim.

that seek greater equality or liberation from oppressive conditions. Such groups usually find it harder to mobilize the rhetoric of nationbuilding and state sovereignty--often expressed as the "national interest"--in influencing the state to undertake reforms. As Giddens writes,

...the discourse of national solidarity helps block off other possible discursive articulations of interest. The discursive arena of the modern polity treats what "politics" is as inherently to do with the bounded sphere of the state. Thus if programmes of reform on the part of subordinate classes (or other groupings) are to succeed, they have normally to be made to appear in "the national interest." But dominant classes have much less difficulty representing their own policies as in "the national interest" than do oppositional groups....¹¹²

Not only does sovereignty provide an illusory political freedom in terms of what can occur within the territorial state. Often the sovereignty of states is severely limited by their ineffectuality in the face of transnational or interstate phenomena such as multinational corporations, global markets, environmental catastrophes, and large-scale migrations--not to speak of the impact of larger states on smaller ones.¹¹³ The mere attainment of sovereignty for a

¹¹²Giddens, Contemporary Critique of Historical Materialism, Vol. 2, p. 221. The use of a rhetorical anticommunism during the Cold War to articulate a nascent nationalism in the United States--and thereby to defeat proposals for demilitarization and domestic social reform--might be considered an example of this phenomenon; see H. W. Brands, The Devil We Knew: Americans and the Cold War (New York: Oxford University Press, 1993).

¹¹³Eric Hobsbawm, especially, makes this point in his assessment of the fate of new nation-states in the late twentieth century; see his book, Nations and Nationalism

nation may mean little in terms of its ability to maintain its autonomy from other nations, widespread social transformations, or more powerful states or corporations."¹⁴

A theory of political community that, like communitarian versions of nationalism, insists on the efficacy of sovereign states as vehicles for national identity and autonomy is unable to explain or even acknowledge why so few nations that have obtained states have been able to achieve a significant sovereignty in their relations with other nations or multinational corporations or in confronting global phenomena such as economic underdevelopment or environmental destruction. But this is hardly surprising, as William Connolly notes, since sovereign states (and the nationalist politics that generates them) would hardly acknowledge a critique of their own inability to solve such problems:

The reach and effects of global processes exceed the reach of sovereign states, and state-centered definitions of these matters may exclude exactly those issues and possible responses that would significantly compromise the claims of sovereignty. The state as a sovereign entity is unlikely to generate internal recognition of the need to compromise its sovereign status.¹⁵

Of course, the communitarian view of nation-states (as

since 1780.

¹⁴Magnusson, "Reification of Political Community," p. 47.

¹⁵William E. Connolly, Identity/Difference: Democratic Negotiations of Political Paradox (Ithaca, N.Y.: Cornell University Press, 1991), p. 216.

exemplified by Walzer) is that state sovereignty is still the only even partially viable form of autonomy open to groups such as nations seeking to maintain their identities against intrusions or domination by larger forces or other groups. The question of alternatives is admittedly a vexing one; but it is made less so when it is realized that the nationalist variant of communitarianism advocates a particularly extreme version of the territorial state--one that is, as well, ethnically homogeneous. There can be little expectation that such states would fare any better in a world dominated by transnational forces and processes than would other states. Furthermore, in light of the transnational migrations engendered by the increasing internationalization of labor and capital, it is quite reasonable to expect that such nation-states would fail even at their primary goal--achievement of a fully homogeneous political community, coextensive with a national group. What could be achieved, however, is an increase in tensions and conflicts between national groups as one or another of them attempt to separate and establish nation-states--states that would be "national" largely in name only.¹¹⁶

¹¹⁶Perhaps this the point to briefly consider what effect the inability to justify rights to territory on the basis of national identities has on the legitimacy of existing states. If the rightness of the territorial claims of new nationalist movements is called into question, does this not adversely affect the right of sovereignty of already existing states as well? In fact, it does this only upon one condition--that already existing states attempt to base their legitimacy on a putative national identity. If a

The communitarian justification of self-determination for nations thus lacks a convincing rationale for why national groups need sovereign states, since such states will not necessarily provide a better context within which such groups can flourish. Though communitarian theorists are certainly able to pose the problem of national autonomy more clearly than others, the communitarian justification of self-determination raises still more sharply the prospect that even if nations obtain states, take control of territories, and adopt exclusionary citizenship policies, the "nationalities problem" will be no closer to a solution--and will perhaps even be worsened by its absorption into the dubious politics of nationbuilding and state imperatives.

Self-determination cannot be justified any more convincingly by referring to nations as first-order entities that deserve control over sovereignty, territory, and membership than it can by arguing that nations need states in order to further the well-being or political rights of individuals. The attainment of nation-states will simply

state asserts its national character by suppressing minorities within its borders, then it forfeits a claim to legitimate sovereignty over the inhabitants of its territory. If, on the other hand, a state's sovereignty is asserted equally over all the inhabitants of its territory, without regard for their ethnonational identities, then, at least on this basis, it could be regarded as legitimate. (This does not mean that there are not other problems with asserting the legitimacy of states in the first place--problems touched on in Chapter 3 and which cannot be further discussed here.)

force many national groups to confront even more starkly a world of other hostile nationalities, military powers, transnational economic forces, and global inequalities that can only exacerbate the inability of such groups to attain a modicum of autonomy and self-sufficiency.

CONCLUSION

The treatment of national self-determination in the chapters above has been largely negative--the possible justifications for the principle were canvassed and found wanting. The conclusion to be drawn is that no justification for national self-determination so far given can provide adequate grounds for such a principle. To briefly reiterate the types of justifications and the problems with each, we may distinguish the formal from the substantive and the moral from the political justifications. The formal-moral (or deontological) justification consisted of the claim that nations had a formal equivalence to (and therefore should have political equality with) peoples (as the populations of existing states or dependent political communities) that do have a recognized right of self-determination in international law. The substantive-moral (consequentialist) justification did not include a claim to the equivalence of nations and states, but rather began from the claim that the actual consequences of according political recognition (i.e., self-determination) to nations were the protection or increase in the well-being of the individual members of national groups. The formal-political (or consensual) justification consists of a claim for the equality, not of nations with states, but of all individuals in their capacity, and therefore right, to consent to

membership in a particular political community--and therefore, of nations, as collections of these individuals, to claim rights to determine this membership (e.g., by claiming independence). Finally, the substantive-political (or communitarian) justification is based on a claim about the inevitability of basing political communities on prepolitical or cultural communities such as nations, an inevitability that generates a right to self-determination for nations, since only in this way can any political communities be legitimated.

These justifications suffer from various problems, some of which certain justifications could solve, but which could not be cumulatively solved by any or all of them taken together. The deontological justification has a "consistency problem" in that the granting of rights to nations would generate inconsistencies with other principles of international law--inconsistencies that do not result from the granting of a right of self-determination to peoples. This is but one way in which no equivalence between nations and states can be established--that is, aside from the extremely different nature of the social groups that nations and peoples could be said to be. What this justification does not suffer from, however, is a "territorial problem," since, if an equivalence between nations and peoples could be established, then nations would have the same rights over territory that peoples already

enjoy.

All the other justifications suffer from this problem of justifying a right to the taking of territory. The communitarian justification largely suffers only this problem, which does not make it any less fatal. The other justifications suffer from additional problems. The consequentialist justification has, in addition to the above mentioned difficulty with justifying territorial takings, an "identity problem" in the sense that the connection between the protection of group identities and the flourishing of individual identities is not well-established. Finally, the consensual justification, while escaping this identity problem by omitting identity altogether as a justifying ground of the right, generates a "coercion problem," since what looks like consent becomes coercion when applied in a consistent way to the determination of membership in a state.

But two questions remain: if nations do not have a right to self-determination, do nations have any rights at all? and is there a right of self-determination for other groups or entities? These questions lead inevitably to a consideration of whether an argument like the present one against national self-determination is inevitably an argument against any political standing for nations or any claims of self-determination. The answer to these questions is a qualified "no"; but in order to make clear in what way

such claims would be allowed, national self-determination must be carefully distinguished from other similar political ideas.

National self-determination has often been confused with other ideas that have arisen in the same context and that have sometimes deployed similar terminologies. This is partly because of the ambiguous meanings of "nation" and "nationalism"; political movements that have fundamentally different goals have been intertwined historically with properly nationalist movements so that they have come to be associated with one another. This is particularly the case in terms of nationalist movements from the nineteenth and early twentieth centuries, movements that often developed in opposition to authoritarian or colonial regimes. At least four such connected but nonnationalist historical phenomena can be identified: (1) "national liberation" movements seeking independence from colonial powers; (2) attempts by minorities to secure full rights to cultural expression; (3) movements for the democratization of authoritarian governments; and (4) attempts to achieve local or regional socioeconomic autonomy or self-sufficiency.

Perhaps the most prevalent idea with which national self-determination has come to be associated is that of "national liberation." It is therefore important to understand the difference between advocacy of national self-determination and the concept of national liberation as

such. The idea of national liberation as commonly understood in the colonial era is clearly separable from the idea of national self-determination in the contemporary sense--that is, of the rights of ethnic nationalities to states. While the idea of national liberation was essentially a conception of the legitimacy of self-government applied to colonized peoples,¹ the idea of national self-determination is an idea of ethnically based citizenship. The difficulty in separating these two ideas in colonial cases lay in the fact that the achievement of self-government often seemed to require the enfranchisement of specific nationalities that had been colonized--as well as the disenfranchisement, in some cases, of the colonizers who had settled in the colonial territories.

Once the independence of most of the European colonies was achieved after 1960, it was easier to see that the problem of national liberation is easily subsumable within the standard conception of self-determination in

¹There is also an argument against colonialism that focuses on the social injustice of the institution, rather than on the lack of self-rule. This argument is sometimes found in radical critiques of imperialism (e.g., Harry Magdoff, The Age of Imperialism: The Economics of U.S. Foreign Policy (New York: Monthly Review Press, 1969)), and has also been given liberal formulation in Beitz, Political Theory and International Relations, esp. pp. 92-105. This argument, however, would not seem to be able to avoid an imputation of paternalism, and does not therefore capture the fullest possible criticism of colonialism, which would focus on its political illegitimacy. On this point, see Frantz Fanon, The Wretched of the Earth, tr. Constance Farrington (New York: Grove Press, 1963).

international law²; the core issue was one of self-governance, not of ethnic identity. In fact, subsequent movements for ethnonational states have often been aimed at fragmenting newly independent colonial states, rather than in securing independence from the colonial powers themselves.³

Nevertheless, the claim of nations to self-determination is based on a certain similarity between anticolonial independence movements and subsequent ethnonationalist movements; it is this similarity that advocates of national rights point to when they argue for the extension of the definition of peoples to include nations. Both colonized peoples and ethnic nations are social groups with more or less distinct identities--even though the identity of the colonized is largely defined by their relation to a colonial power. Nationalists might claim that while these identities may have different sources--whether a history of colonial oppression or a belief in a common ancestry--this is less important than the fact that both identities may be the basis for a claim

²Rupert Emerson pointed out in 1971 that there are no clear indications of which entities are entitled to self-determination other than colonies, and that in the aftermath of decolonization, the meaning of self-determination has become increasingly unclear; twenty years later, this still seems to be the case. See Emerson, "Self-Determination," esp. pp. 464-65, as well as the discussion in Chapter 1 above.

³The classic case is that of Pakistan, but similar cases have been especially prevalent in Africa.

to political identity and statehood.

But the distinction between peoples and nations does have a clear warrant on the basis both of international law and of the nature of political community. In the first case, granting nations the same standing as states or colonies would violate other principles of international law--those of the territorial integrity and political sovereignty of states or protostate entities.⁴ In the second case, nations do not in fact have the same kind of agency as politically defined peoples--the distinction between these two forms of political identity is an important one.⁵ So the anticolonial movements of the early twentieth century were distinct from ethnonationalist movements in important ways.

Another common view of national self-determination is that it is based, not on the moral agency of national groups, but on their right to a cultural life of their own. National self-determination has been understood as a means for ensuring that a culture has a "public sphere" of its own.⁶ Contemporary movements for cultural rights are often found among nationalities that have at various times been denied the right to practice their culture openly--e.g., the

⁴See the discussion of this "consistency problem" in Chapter 1, above.

⁵This is the distinction between ascriptive and associative groups made in Chapter 1.

⁶See the discussion of this point in Chapter 2, above.

Kurds in the Near East, the Basques in Spain, or the Tibetans in China. Yet, though such nationalities sometimes also contain nationalist political movements advocating statehood and self-determination, this does not mean that national self-determination is itself a cultural right.

In international law, cultural rights have been recognized as pre-eminently the rights of cultural minorities in relation to majority cultures in multicultural countries. As such, minorities are entitled to the same rights of expression, organization, and association as the majority culture. This means that claims of cultural rights are addressed to existing states, rather than being expressed as claims to new states.⁷

The rights of cultural minorities are therefore not in principle or in international practice the rights of nations to states. They are, rather, the rights of minorities--which may be nationalities--to freedom of cultural

⁷See, for example, Article 27 of the International Covenant on Civil and Political Rights (1966): "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language" (in Brownlie, Basic Documents in International Law, p. 171). Interestingly, in the accompanying Covenant on Economic, Social, and Cultural Rights, there is no mention of the rights of nations; "cultural" rights are the rights of individuals to practice a culture of their choice. See also Donnelly, Universal Human Rights in Theory and Practice, p. 156.

expression.⁸ It is symptomatic of this that nationalist movements exist in the minority cultures of a number of countries that grant full minority rights--for instance, India or Canada.

An alternative image of self-determination in nationalist thought is that of a people exercising its right to democratic self-government by establishing its own state. Claims for national groups' right to secede from multinational countries on this basis have been prevalent in nationalist ideology since the nineteenth century.⁹ The right to self-government, or what might be called a right of political self-determination, is often thought to include a similar right of nations to their own states.

⁸Of course, there is an issue, which has been extensively discussed in recent years, as to whether cultural rights are those of individuals or groups. But what is important here is that whichever interpretation is correct, neither entails a right to a state--which is what is at issue in justifying national self-determination.

⁹John Stuart Mill gave a classic statement of this view:

Where the sentiment of nationality exists in any force, there is a prima facie case for uniting all the members of the nationality under the same government, and a government to themselves apart. This is merely saying that the question of government ought to be decided by the governed. One hardly knows what any division of the human race should be free to do, if not to determine, with which of the various collective bodies of human beings they choose to associate themselves.

(Considerations on Representative Government, in "On Liberty" and Other Essays, ed. John Gray (Oxford: Oxford University Press, 1991), p. 428)) Similar sentiments were expressed by Giuseppe Mazzini and various twentieth-century nationalists.

Yet, a more careful consideration of the idea of self-government suggests that rights of political self-determination and national self-determination are not the same at all. The exercise of self-government by a people presupposes the existence of a people; and it is the concern of nationalists to establish criteria for legitimately constituting a people. This is the task that the idea of national self-determination is meant to perform.

But it is still the case, that the existence of a people must be assumed before the will of that people can be determined.¹⁰ This means that the idea of self-determination, when understood in political (or democratic) terms, is quite different from the nationalist conception, which is concerned with the ways in which it is decided "who are the people."¹¹

Finally, national self-determination has sometimes been used as a principle that can justify a decentralized politics that accords greater autonomy or independence to small countries, regions, or local communities. This view assumes that nations seek self-determination in order to devolve state power to a more local level, decentralizing and defusing the power of large countries. Thus, the nationalist movements of Quebec in Canada, the Bretons in France, or the Assamese in India are often regarded as

¹⁰Jennings, Approach to Self-Government, p. 56.

¹¹Habermas, "Citizenship and National Identity, p. 4.

essentially critical of state power and the centralization of authority.¹²

This view of nationalist claims for self-determination, however, misses two fundamental characteristics of the idea of national self-determination and of nationalist politics generally: first, its basis in ethnic identities, not regional life, and second, the interest in traditional forms of state power that constitutes its desired end. National self-determination is a means, above all, to secure a state of their own for particular ethnic nations. While in some instances such a goal may coincide with a weakening of the power of large multinational states (e.g., the former Soviet Union, Yugoslavia, India, Canada), this does not mean there is any intrinsic connection. The same nationalist principle of self-determination can equally well justify the consolidation or unification of power in a larger state (e.g., West Germany's recent absorption of East Germany, or the older unifications of Germany and Italy in the nineteenth century) or the expansion of a nation-state to include new areas (e.g., the attempted annexations of the Falkland Islands by Argentina, Kuwait by Iraq, or Bosnia by Serbia).

There is no necessary connection between ethnic

¹²For an example of this view with regard to Canada/Quebec, see Jane Jacobs, The Question of Separatism: Quebec and the Struggle over Sovereignty (New York: Random House, 1980).

nationality, which it is the purpose of national self-determination to enhance, and regional or territorial autonomy. On the one hand, even when nationality is considered intrinsically tied to a certain territory, this does not mean that the people in that territory, or the way of life associated with it, are at issue in disputes with a larger state. It is the ability of a certain national community to obtain their political independence, rather than the ability of a local or regional community to protect its way of life, that is at stake. This is particularly true in two kinds of cases: first, when nationalists make claims to regions formerly occupied mainly by certain nationalities but presently occupied by others, and second, when nation-states or putative nation-states enact so-called "laws of return" that enable people regarded as members of a nationality to immigrate to the state (while often at the same time denying full citizenship to current inhabitants deemed nonnationals).¹³

These cases indicate that the real purpose of national self-determination is not the protection of local or

¹³Examples of the first case are Zionist claims to Palestine in the early twentieth century, or more recently, Serbian claims to Kosovo or Moroccan claims to the western Sahara; these claims are based not on the wishes of the current inhabitants but on prior contentions of the rights of a nation to certain territory. In the second case, laws of return in such states as Germany and Israel, usually accompanied by the refusal to grant full citizenship to certain peoples already living in the countries (e.g., Turks or Arabs), indicates the difference between nationalist and local-regional orientations.

indigenous communities or ways of life but the establishment of a nation-state on a particular land. This purpose is, of course, the result of identity, rather than locality, being the foundation of claims for the self-determination of nations.¹⁴

But it is also misleading to assume that national self-determination is used as a principle to weaken large states and their centralized authority. The creation of states is, in fact, the purpose of invoking a principle of national self-determination.¹⁵ Whether the state is large or small is less important than that it possesses the monopoly of administrative and military power in a territory that is characteristic of all modern states.¹⁶ The fact that the

¹⁴Jonathan Ree makes this point in writing that, "Local affections are one thing...national loyalties another.... It is not the haters of nationhood...but their lovers, who treat local affections with impatience and contempt. It is the nation-lovers who insist on squaring off people's geographical attachments and forcing them to conform with the boundaries ordained by legal, commercial and military power" (in "Internationality," Radical Philosophy 60 (Spring 1992), pp. 10-11).

¹⁵Ree designates this as the institution of "internationality," which he describes as "a style of thought and global social organisation which tries to generate a plurality of nations, in order that, for any piece of land, and for any human being, there should be a definite answer to the question 'which nation is responsible?' Internationality, you might say, is the tendency for the global imposition of the nation-form" ("Internationality," p. 10).

¹⁶John Gerard Ruggie characterizes modern territoriality in the following way: "The chief characteristic of the modern system of territorial rule is the consolidation of all parcelized and personalized authority into one public realm. This consolidation entailed two fundamental spatial

holding of exclusive authority by a state is often in fact partial (in relation to more powerful states or foreign corporations), and may even be increasingly tenuous, is less important to nationalists than the ideal of such state power. Such a state is invariably hostile to regional or local autonomy, since such autonomy undermines the claim of the state to its exclusive authority.

If national self-determination is to be justified, it must therefore be on the basis of arguments for the right of ethnic nations to claim states of their own in any and all instances, not only in cases of colonial domination, minority oppression, dictatorial government, or centralized authority. This is a way of saying, as was suggested in Chapter 2, that national self-determination is intrinsically a general, rather than a special, right. One response to this feature of national self-determination has been to advocate substituting for it a more limited, special or "remedial" right.¹⁷ Nations might then be able to claim specific cultural or minority rights within a state, while

demarcations: between public and private realms and between internal and external realms" ("Territoriality and Beyond: Problematizing Modernity in International Relations," International Organization 47:1 (Winter 1993), p. 151). The possession of such a public realm is the express goal of most nationalist movements. See, e.g., Tamir, Liberal Nationalism, pp. 8-9.

¹⁷Allen Buchanan has done the most to put forward this concept of a remedial right (of secession) as a replacement for a general right of nations to self-determination in his book, Secession.

broader claims to self-determination would be reserved as a response to a well-delimited range of circumstances.

This conception of a remedial right is one response to the persistence of a doctrine of national self-determination, despite continuing philosophical doubts about its coherence. As Charles Tilly has noted in a recent article, the fact that political conflicts in which national self-determination is invoked continue and are intensifying is a source of puzzlement to many scholars and commentators.¹⁸ Almost fifty years ago, Alfred Cobban, in surveying a similar period of intense nationalist conflict, wrote that,

To say that we do not believe in small states, to denounce nationalism, or to repudiate the principle of national self-determination, may be emotionally satisfactory but is no constructive solution. Denunciation will not change the facts.... The dilemma of national self-determination is not the whole problem of world peace, but it is a very important part of it. Unless we are prepared to say that the problem is insoluble and to sit back in philosophic expectation of the worst, the only constructive line of thought is to attempt to restate the issue in different and less irreconcilable terms.¹⁹

The idea of a remedial right is conceived as such an attempt to restate the issue about which national self-determination is a perceived, but inadequate, solution.

While the attempt to restate the issues involved is a

¹⁸Tilly, "National Self-Determination as a Problem for All of Us," p. 31.

¹⁹Cobban, National Self-Determination, p. 18.

necessary task, it may be doubted whether stipulating the conditions for a limited right will be sufficient to achieve a restatement of the problem that can fully substitute for the nationalist doctrine of self-determination. Buchanan, for instance, argues that a general right of national self-determination should be replaced by a limited or remedial right of secession, one that could be invoked for any of three conditions: (1) when massive and continuing human rights violations are perpetrated upon one group by another or by a state under which they reside; (2) when a pattern of "discriminatory redistribution" of wealth and resources from one group to another occurs within a state; or (3) when a group's cultural survival is at issue.²⁰

Two things about Buchanan's approach should be considered: first, whether these conditions provide satisfactory justifications for even a limited right of secession, and second, whether such a limited right will provide the needed restatement of the problems to which claims of self-determination have allegedly been addressed. In considering the enabling conditions of the limited right, two problems occur with both the second and third conditions. The first problem is about whether the enunciated goals of ending redistribution and of ensuring cultural survival are in fact legitimate ends; the second problem is about whether separate states can achieve these

²⁰Buchanan, Secession, pp. 152-53.

ends.

As for discriminatory redistribution, it has often been the case that the demands made on the basis of this principle have been made by groups who are beneficiaries of natural wealth or other economic advantages. While the redistributive policies of federal governments may give rise to "discriminatory" results, they have often been an impetus to secession when richer regions of a country try to resist a redistribution of wealth to poorer regions of the same country.²¹ Thus, justifying secession on this basis may involve violating other considerations of distributive justice that mandate redistribution on the basis of egalitarian principles. To avoid this result, an additional condition of allowing discriminatory redistribution as a justifying ground only under circumstances of actual exploitation of a group or region needs to be made.

Cultural survival as a justifying ground incurs a

²¹Buchanan gives the following definition of "discriminatory redistribution": "implementing taxation schemes or regulatory policies or economic programs that systematically work to the disadvantage of some groups, while benefiting others, in morally arbitrary ways" (*Secession*, p. 40). Of course, much depends on what counts as "morally arbitrary"; but the examples immediately given by Buchanan are the U.S. South prior to the Civil War, the Basque country in Spain, the Biafran region of Nigeria, and Katanga province of the Congo (now Zaire). In each of these cases, the region in question either benefited exclusively from a form of commerce or trade (slaves in the U.S. South, uranium in Katanga) or was more economically developed than other regions (the Basque country, Biafra) or both. Other examples of regions with secessionist movements--Slovenia and Croatia in the former Yugoslavia, southern Brazil, Quebec in Canada--tend to conform to these patterns.

similar problem: what if the culture whose survival is used as the basis for a claim to secession violates principles of human rights and individual well-being that have been adopted under a variety of international agreements and treaties? In that case, cultural survival would only be mandated if an additional condition of compliance with elementary norms of human rights were adhered to. Thus, neither discriminatory redistribution nor cultural survival can, in and of themselves, be the basis of a legitimate right of secession.

But even if these principles were modified in the ways just suggested, what would be the assurance that independent states could achieve a fairer distribution of resources or the survival of threatened cultures? Given the transnational nature of those forces, often derived from powerful states, corporations, or international bodies enforcing market or military imperatives (e.g., the International Monetary Fund or the North Atlantic Treaty Organization), that tend to undermine local attempts at creating more egalitarian societies or preserving nonmarket-oriented cultural institutions, it may be doubted whether the creation of new states can provide the goods which they are supposedly designed to ensure.

This leaves the first condition that Buchanan mentions, secession in cases of human rights violations. While this does seem to be the one clear case of a legitimate claim, it

also leave very little of the original claims, either for national self-determination or for a remedial right of secession, intact. In this sense, Cobban might be closer to characterizing the legitimate role of secession when he writes that it "can be justified, but only in certain extreme cases. Since it is generally a work of destruction, and a breaking-down of established connexions, it can hardly be a good thing in itself."²²

Concerning the second question to be considered in Buchanan's proposal, it may be asked whether a remedial right of secession will have "restated the issue" of national self-determination adequately, especially in light of the extremely limited right that I have just argued would alone be legitimate. Buchanan does recognize that actions based on what he calls the "normative nationalist principle"--the general case of a right of self-determination for all (ethnic) nations--"would entail unacceptable disruptions, dislocations of peoples, and almost certainly horrendous loss of human life."²³ But he claims that by rejecting this principle and adopting a more circumspect principle of secession, these consequences will not follow.

Yet, Buchanan also acknowledges that the nationalist doctrine has power as an evocative principle upon which to

²²Cobban, National Self-Determination, p. 146.

²³Buchanan, Secession, p. 102.

fight for a number of perceived goods. As he puts it, "the moral appeal of the principle of self-determination depends precisely upon its vagueness. It is a kind of placeholder for a range of possible principles specifying various forms and degrees of independence."²⁴ This raises the question, however, as to whether specifying a much more limited right to secession will succeed in "restating the issues" that generated the "moral appeal" of this idea in the first place.

Another way of stating this problem is to ask whether elaborating an extended framework of liberal rights--extended, that is, to include some right of secession--will be sufficient to replace a nationalist doctrine of self-determination. This seems clearly to be Buchanan's intention; yet, it is questionable whether he (or others who espouse similar compromises between liberal rights and nationalist claims²⁵) have acknowledged fully the possibility that nationalist doctrines may trump liberal restrictions on them.

This is a worry in the present context because of the dependence of liberal theories of justice and obligation upon largely unacknowledged quasinationalist ideas of community and citizenship. As Tamir has written,

...liberals have no choice but to presuppose the

²⁴Buchanan, Secession, p. 50.

²⁵See especially Kymlicka, Multicultural Citizenship.

existence of [communal] ties and "treat community as prior to justice and fairness in the sense that questions of justice and fairness are regarded as questions of what would be fair or just within a particular political community" [Ronald Dworkin].²⁶

This dependence of liberalism upon nationalism has (at least) two components: (1) the assumption of membership in a nation-state that generates a culture of "belonging," and therefore of individuals' obligation to the state, and (2) the limitation of principles of distributive justice to application within a nation-state, without consideration of whether such principles could or should be applied beyond the boundaries of that state.

The nation-state provides the larger context of a political community and of a limited citizenry within which liberal ideas might have applicability: "By absorbing national concepts, liberalism has been able to take for granted the existence of states inhabited by specific populations, and [thereby] circumvent such thorny issues as membership and immigration" ²⁷ The result is that

²⁶Tamir, Liberal Nationalism, p. 118. Obviously, when stated this generally, such a claim for the priority of community could encompass nonnationalist as well as nationalist views. The intermediate premise in Tamir and others' advocacy of nation-states is that communities are most essentially and desirably national communities (see Chapter 2 above for discussion of this point). As I suggest, for instance, below, another conception of community that more adequately captures the realities of social life and communal interdependence is urgently needed in order to show the nationalist conception as the distorted image of public life that it is.

²⁷Tamir, Liberal Nationalism, p. 139.

liberalism is not independent of the nationalist belief in the desirability of a closed community of homogeneous citizens, but is implicated in such an idea. Thus,

the fact that the liberal welfare state is necessarily predicated on certain "national beliefs" is often overlooked. Its conception of distributive justice is only meaningful in states that do not see themselves as voluntary associations but as ongoing and relatively closed communities whose members share a common fate.²⁸

This means that a limited liberal right of secession cannot be an adequate response to the "moral appeal" of national self-determination, since it cannot provide--and is not designed to provide--an alternative conception of community and citizenship. Without such an alternative conception, limited or remedial rights of secession will, in the heat of political conflict, devolve into general or absolute rights of self-determination, since the only means of establishing new communities is that upon which older ones have been implicitly based--the nationalist principle of self-determination.²⁹

It is beyond the scope of this study to explore what a more thoroughgoing alternative conception of community that could more directly challenge the "moral appeal" of

²⁸Tamir, Liberal Nationalism, pp. 117-18.

²⁹It should be mentioned that this discussion refers not to the reality of communities, but to the ideologies of community--or what was earlier referred to as the politics of identity. The claim is that liberalism has no distinctive conception of community (apart from the nationalist one)--not that nationalism accurately describes the real nature of human communities (which it certainly does not!).

national self-determination might be. But three observations can be made about this, by way of conclusion. First, the idea of a "community of principle" (Dworkin) or a "constitutional patriotism" (Habermas) constitutes the beginnings of an alternative in the sense that both conceptions replace the ascription of identities with an adherence to values as the basis of a legitimate political community.³⁰ Habermas is most explicit about the necessity of a choice between these two rival understandings of community:

...a political culture in the seedbed of which constitutional principles are rooted by no means has to be based on all citizens sharing the same language or the same ethnic and cultural origins. Rather, the political culture must serve as the common denominator for a constitutional patriotism which simultaneously sharpens an awareness of the multiplicity and integrity of the different forms of life which coexist in a multicultural society.³¹

³⁰Some might include Rawls' idea of a "well-ordered society" within this group of concepts. Yet, in his recent work, Political Liberalism (New York: Columbia University Press, 1993), Rawls states that a "well-ordered democratic society is neither a community nor, more generally, an association" (p. 40). While Rawls means to distinguish a society containing different "comprehensive doctrines" about what constitutes the good life from one that legitimizes only one such doctrine, the above statement is still indicative of a tendency on Rawls' part to refuse to specify the conditions of a public culture in favor of specifying the conditions under which individuals might come to enter into a society (the "original position"). Rawls has in recent years moved toward a more "communitarian" version of his theory (for instance, in Political Liberalism); but the individualist premises are still much more in evidence than in Habermas' discourse theory or in Dworkin's discussions of law and community.

³¹Habermas, "Citizenship and National Identity," p. 7.

Nevertheless, this adherence to principle is still insufficient to delineate the nature of a political community--to give a "thick description" of what the political culture of a multicultural society would be like. Without some stipulation of how a community would endeavor to satisfy the needs of its citizenry--upon which principles it would organize the "good life" for its members--no feelings of obligation could be expected to take root. This is a widely perceived problem with Habermas' discourse theory of legitimacy: without prior agreement on at least one substantive value, norm, or good, no process of political discourse could be expected to reach a rational understanding of the basis for a constitution.³²

What could this central value, norm, or good be upon which a need-based, rather than an identity-based, conception of community might be founded? Two general indications are all that can be offered here. First, it should be recalled that nationalism focuses on the state as the locus of identity and selfhood. Thus, an alternative understanding of community must look "below" the state at

³²The most complete statement of this critique is to be found in Agnes Heller, Beyond Justice (Oxford: Basil Blackwell, 1987), in which she states that "no discourse can result in a 'true consensus' unless the participants share at least one value, norm, or principle before entering discourse..." (p. 236). Nevertheless, she maintains that "Discourse is the only possible, and not just the best or most preferable, procedure of legislation...discourse ethics is the central moral institution of the ethics of citizenship..." (p. 241).

the actual relations of interdependence within which people sustain their lives, rather than at the "unreal universality"³³ with which the state endows its activities. The needs-satisfactions embedded in everyday life must be reconstituted as the basis for community, rather than simply as the preconditions for it. Thus, a revived sense of locality and rootedness in regional lifeworlds could be counterposed to the nationalist mythology of national "homelands."³⁴

Finally, community must also in some way encompass the transnational, as well as subnational, conditions of needs-satisfaction--if only because of the increasing global interconnectedness that conditions both the definitions and the satisfactions of human needs. It is increasingly apparent that the limits of the nation, the state, and above all, the nation-state in solving problems of environmental degradation--and the repercussions for socioeconomic well-

³³Marx, "On the Jewish Question," p. 34.

³⁴Murray Bookchin makes this point in his book, The Rise of Urbanization and the Decline of Citizenship (San Francisco: Sierra Club Books, 1987), when he writes that,

The development toward nationalism was slow, uneven, and very mixed.... There is a strong human proclivity, reaching back to the socialization process itself and familial care, that identifies "homeland" with home rather than nationalist abstractions, hence even the most consolidated nation-states are more divided internally than nationalist myths would have us believe (p. 175).

being that are entailed--are quite extreme.³⁵ Thus, a sense of global community, however circumscribed, could begin to limit the sense of nation-states as autonomous actors that can serve as the basis for the prosperity and well-being of their members.

These reflections suggest that the problem of national self-determination is only in part a question about the conditions for the legitimacy of particular political regimes. The idea of the nation-state that constitutes the goal of invoking the rights of nations is itself an idea about an ideal international regime--a regime of separable and equal nation-states dividing up the world without remainder. It is this idea that has dominated political thinking for too long despite its patent unrealizability that must be directly challenged by postulating an alternative, more variegated conception of sovereignty--one based on both local and global relations and attachments. But for now, it must suffice to have shown the unreality and

³⁵Haskell Fain sees marks of this awareness even in political philosophy:

International politics has become the subject of political philosophy because the world has been drawn together in such a way that the attainment of the good life within the single state is inextricably bound to its attachment in all others...both survival and the good life are now the business of international politics.

(Normative Politics and the Community of Nations, p. 15.)

undesirability of the doctrine of national self-determination.

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