Democratic Disobedience:
Reconceiving Self-Determination and Secession at
International Law

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This Article seeks to better define the scope of the right to self-determination at international law and its relationship with unilateral secession. After an introductory overview, Part I begins by rooting internal self-determination in five societal institutions that support democratic rule. Among these institutions is the recognition of the fallibility of political systems and the acceptance of civil disobedience as an expressive claim for a new legal order. Part II seeks to “uncouple” external self-determination from unilateral secession, expanding the scope of the right to self-determination on the international plane. In doing so, it draws an analogy between unilateral succession and civil disobedience, where secessionist declarations of independence can be seen as moral claims to be legitimized through state recognition. Lastly, Part III introduces the concept of “democratic disobedience” as a means to support democratization on a global scale. It argues that the demonstration of a commitment to democratic principles can give increased force to secessionist claims in the eyes of democratic states. Furthermore, though secession is more likely to be effected from non-democratic states, democracies are not completely immune from secessionist cries and thus have an incentive to maintain healthy democratic institutions. The result is a model whereby new democracies may more readily gain international recognition and existing democracies may be self-preserving. The ideal-
tional goal is self-determination for all.

Introduction

Self-determination is a right with a historic pedigree, having roots that go back at least as far as the French and American Revolutions.1 Since the end of the Second World War, the right of all peoples to self-determination has been entrenched in numerous international instruments, including the U.N.

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takes are my own.

1. Lea Brilmayer, Secession and Self-Determination: A Territorial Interpretation, 16 Yale J. Int’l L. 177, 179–80 (1991). Scott Pegg notes that self-determination’s “intellectual roots go back to such things as the Hebrew exodus from Egypt, the Greek city-states, the American Declaration of Independence, the French Declaration of the Rights of Man and of the Citizen, and Napoleon III.” Scott Pegg, Interna-
tional Society and the De Facto State 137 (1998).

Despite its deep roots, delimiting the precise scope and content of the right to self-determination has proven notoriously frustrating. Marc Weller suggests that there are at least five different modes of right to self-determination: (i) an individual right, potentially coextensive with some form of democratic governance; (ii) a right appertaining to members of groups and perhaps groups themselves, often framed as the minority rights of national, religious, ethnic or linguistic groups; (iii) a right with particular meaning in the context of indigenous groups, potentially extending to unique forms of political and territorial autonomy; (iv) a right associated with limited territorial change, often associated with historical agreements (such as the handover of Hong Kong); and (v) a right to external determination of peoples, which implies a right to unilateral secession. 

At first glance one might describe the right to self-determination as multi-faceted or nuanced. Another view might suggest it as haphazard. I suggest that an important conclusion may be drawn after careful inquiry: there appears to be a tension at play between the notion of self-determination exercised at individual and group levels within states, and the current conception of the right to self-determination at international law. As alluded to by Weller, the former understanding of self-determination appears to be linked with democratic procedures. On the other hand, the right to self-determination at international law has historically been defined to justify unilateral state secession in certain circumstances—a position that may be deeply undemocratic. Can it be that self-determination is a right that finds expression through democratic means in the internal (intra-state) level but is limited to facially non-democratic means at the external (inter-state) level? I suggest that the answer is no.

The goal of this Article is to better define the scope of the self-determination right and what it means for both individuals and groups to exercise a full measure of self-determination on both the internal and external planes. In light of the aforementioned tension, a key component of this analysis is the "uncoupling" of self-determination at international law from the troubling yoke of unilateral secession. I hope to demonstrate that self-determina-

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2. Brilmayer, supra note 1, at 181–82; see, e.g., International Covenant on Civil and Political Rights art. 1, para. 1, adopted Dec. 16, 1966, 999 U.N.T.S. 171, 173 (“All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

3. See Marc Weller, Why the Legal Rules on Self-determination Do Not Resolve Self-determination Disputes, in SETTLING SELF-DETERMINATION DISPUTES: COMPLEX POWER-SHARING IN THEORY AND PRACTICE 20–23 (Marc Weller & Barbara Metzger eds., 2008) (hereinafter Weller, Legal Rules) (“[T]he essence of the traditional right of self-determination of peoples is that it in itself constitutes a valid basis for a claim to secede, irrespective of the wishes of the central government. Therefore, one is really talking about a right to unilateral and mostly opposed secession.”).

4. Id.
tion may in some cases be enhanced by unilateral secession, but that unilateral secession does not define or exhaust the scope and content of the former right. Indeed, there should be no “right” to unilateral secession at all; rather, unilateral secession is a moral and political process, akin to civil disobedience, that may be justified as enhancing self-determination on the external plane despite its facially non-democratic nature.

I begin the discussion in Part I of this Article by exploring the link between self-determination and democracy in the internal context. The starting assumption is that democracy is the political structure that best fosters self-determination. The aim here is to explore the structural institutions that maximize self-determination within a democratic society, at both the individual and group levels. In order to do so I create a model based on recent developments in democratic theory, focusing specifically on the epistemic proceduralist defense of democracy put forward by David Estlund.

Building upon Estlund’s foundation, numerous institutional implications flow from an epistemic (or knowledge-based) conception of democracy. In particular, a population within any particular state will have achieved a significant measure of internal self-determination when it implements five societal institutions that support democratic rule. Among these five institutions is societal recognition of the fallibility of political systems and the corresponding need to accept civil disobedience as an expressive claim for a new legal or political reality. In this manner, an individual may challenge the righteousness of a society’s democratically enacted laws or policies through the facially non-democratic action of illegal protest.

The recognition that disobedience may play an important role in achieving self-determination has important implications on the external, international plane. This issue is considered in Part II of the Article. To start, I argue for a broader conception of what it means to exercise self-determination on the external plane, just as a richer conception of self-determination is mandated on the internal plane. The difficulty here, however, is that self-determination has historically received a narrow interpretation at international law due to its connection with unilateral secession. Accordingly, a solution must be found that avoids the equation of self-determination with unilateral secession such that a broad interpretation of the former leads to the unrealistically wide acceptance of the latter. In this respect it is necessary to “uncouple” self-determination from a right to unilateral secession in order to give greater content to self-determination on the international plane.

Of course, a broader self-determination theory should nonetheless provide a plausible alternative framework for assessing the validity of unilateral secession, which may in fact be justified in certain limited circumstances. It is here that the recognition of disobedience claims comes to the fore. The model I put forward proposes that unilateral secession be seen as the external analogue to civil disobedience on the internal level. It sketches a view of unilateral secession as external disobedience, where a secessionist entity’s
unilateral declaration of independence may be seen as a moral claim to be assessed and potentially legitimized through the process of state recognition at international law. Importantly, unilateral secession claims do not exhaust the full scope and content of what it means to exercise external self-determination.

Finally, I argue in Part III that secession claims founded upon democratic ideals may have particularly strong resonance with existing democracies, giving rise to the idea of “democratic disobedience.” Democratic disobedience is situated on the international plane as a process of becoming, much like revolution (in the sense proposed by Hannah Arendt) or consensual or negotiated secession. In this respect it is suggested that democratic disobedience may be used to support democratization on a global scale. The idea is that an appeal to a shared understanding of democracy and self-determination, as demonstrated by a commitment to democratic principles, procedures and policies on the part of separatist entities, may give increased force to secessionist claims in the eyes of observer states that already provide their citizens with a high degree of internal self-determination. In addition, it is argued that secession is more likely to be effected from non-democratic states than from existing democracies, but the latter are not completely immune from secessionist cries and so have an incentive to maintain healthy democratic institutions. The result is a model whereby new democracies may more readily gain international recognition, with an ideational goal of achieving self-determination for all.

I. INTERNAL SELF-DETERMINATION AND DEMOCRACY

A. Democracy and Self-Determination

The call for self-determination is at its most basic level a call for autonomy—for freedom in self-governance rather than outside constraint. The call may be made by individuals or groups. It is a call that is informed by the classic liberal tradition, permitting individuals and groups to shape the course of their lives to the exclusion of other voices. I decide. We decide.

Liberalism, though, is not without its boundaries. As Singer notes, “Liberalism is the invitation to act in a self-interested manner, without impediment from other people, as long as what we do does not harm them.” Correspondingly, self-determination is an exercise in freedom, but that exercise must take into account the freedom of others. Quite obviously, a mechanism is required to mediate conflicting conceptions of freedom between

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7. Id. at 355.
agents presumed to have an equal right to self-determination. This Article rests on the assumption that the best such mechanism is democracy.

Of course, democracy may be a broad and amorphous concept beyond the basic bounds of majoritarian decisionmaking. Recognizing that democracy is coextensive with self-determination does little to explicate the full scope and content of the latter term. The goal of this Part is to paint a richer picture of the democratically based institutions necessary to provide both individuals and groups with a full measure of self-determination.

As a starting point it is useful to consider existing international instruments. James Crawford explains that Article 25 of the International Covenant on Civil and Political Rights—which provides that citizens have the right and opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives—“suggests that self-determination is a continuing matter, not a once-for-all constitution of the state.”

Moreover:

Article 1 [of the Universal Declaration] can be read as affirming the self-direction of each society by its people, and thus as affirming the principle of democracy at the collective level. This is certainly the view taken by the United Nations Human Rights Committee. The Committee identifies as the beneficiaries of self-determination the people of existing states. It equates their right of self-determination with the existence within the state of a continuing system of democratic government based on public participation.

The question, therefore, is what it means to have “a continuing system of democratic government based on public participation.” More simply, how might one arrange a democratic polity to ensure the self-determination of all people?

Thomas Franck suggests that the right to self-determination “now entitles peoples in all states to free, fair and open participation in the democratic process of governance freely chosen by each state.” In this respect, much of his discussion on the emerging right to democratic governance focuses on


10. Crawford, Democracy, supra note 9, at 42.

11. Note that by uncoupling secession from self-determination there is no longer a need to limit the right of “peoples” in some sort of nationalistic or ethnic sense. Instead, it may apply to all persons, in a global sense.

electoral rights and election monitoring. But this seems to be a rather narrow view of self-determination and democracy, and does not appear to provide a rich conception of self-determination beyond the suggestion that they may be achieved through majoritarian electoral “democracy” writ large. What is needed instead is a more textured view of self-determination that accounts for societal institutions that may foster and maximize self-determination within a democratic society at both the individual and group levels.

Daniel Philpott argues that “[i]f being autonomous means participating and holding representatives accountable, [its] political implication is democratic institutions, the laws and governmental structures which promote this democratic activity.” He goes on to emphasize that self-determination is fostered by guarantees “that citizens can vote, assemble, petition, speak out, and hold office. . . .” Accordingly, “self-determination is a unique kind of democratic institution, a legal arrangement that promotes participation and representation, the political activities of an autonomous person.”

I agree with Philpott’s richer conception of the institutional prerequisites to achieving a full measure of self-determination. My aim here, however, is to take the next step and provide greater specificity as to the key institutional elements necessary to guarantee self-determination while respecting the autonomy of other citizens. In order to delineate this more textured view it is useful to consider certain aspects of democratic theory. The thought is that we may translate certain underlying aspects of the democratic model into a better picture of the societal institutions needed to provide a full measure of self-determination within a state.

Many defenses of democracy have been advanced, and might be suitable for such a task. Epistemic proceduralism is relied upon here because it accounts for the generally shared view that there may be right and wrong answers in political debate. To admit that there may be a right answer to a political question—whatever it may be—is to admit that democracy involves an epistemic, or knowledge-based, process. This admission is very useful, and may aid in informing a broader view of self-determination. To this end I propose to take a brief detour into democratic theory, focusing in particular on David Estlund’s recent defense of democracy on an epistemic proceduralist basis, that is, on the basis of democracy’s procedurally fair ability to track toward “correct answers,” whatever those may be. As will be seen, Estlund’s epistemic framework for democracy is suggestive of certain institutional implications for constitutionally establishing, ordering and

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13. Id. at 63–77.
14. Philpott, supra note 6, at 357–58.
15. Id. at 358.
16. Id.
17. David Estlund, Democratic Authority 8 (2008); see also infra note 22 and accompanying text.
protecting a democratic society’s political or moral values. His analysis also counsels against non-democratic rule by elite minorities, which he terms “epistocracy.”

B. David Estlund’s Epistemic Proceduralist Democracy

David Estlund’s recent book, Democratic Authority, offers a bold new defense of democracy on the basis of epistemic proceduralism. Very broadly speaking, epistemic proceduralism suggests that a properly constituted democratic procedure can ground moral authority because democracy is an acceptably fair procedure with an epistemic tendency toward true (or correct, or just) political answers, whatever those may be. While not advocating any particular conception of the truth, he believes that moral truths exist, and more to the point, that part of democracy’s appeal lies in its modest truth-tracking ability.

It is important to recognize what is meant by the term “truth” here. Estlund explains:

[When I speak of moral truth here, I mean only the following very minimal thing: if gender discrimination is unjust, then it is true that gender discrimination is unjust. Not many readers will think nothing is just, unjust, right, wrong, and so forth, and so they accept that there are moral truths in the sense that concerns me.]

It is the combination of acceptable process and truth-tracking ability that underlies Estlund’s defense of epistemic proceduralism. As will be seen, this combination is an important one for delineating the institutions needed to provide a full measure of self-determination.

Estlund draws an analogy to the jury system that is helpful in understanding the theory. In his view, the jury system is a procedurally fair system with sufficient epistemic force to create a moral obligation for people to obey its outcomes. Importantly, the possibility that the procedure may arrive at the wrong answer is not fatal to the system’s authority: “Owing partly to its epistemic value, its decisions are (within limits) morally bind-

18. Id.
20. ESTLUND, supra note 17, at 8.
21. Id. at 5.
22. Id. at 8.
23. Id. at 5.
ing even when they are incorrect." The same rationale applies to democracy: "It is not an infallible procedure, and there might even be more accurate procedures. But democracy is better than random and is epistemically the best among those that are generally acceptable in the way that political legitimacy requires."

Estlund also introduces the expert/boss fallacy—that is, the fallacy that expertise grants authority to rule. As Estlund notes, "This expert/boss fallacy is tempting, but someone's knowledge about what should be done leaves completely open what should be done about who is to rule. You might be correct, but what makes you boss?" The unacceptability of rule by experts, or "epistocracy" as Estlund would have it, suggests that the egalitarian procedural aspect of democracy has important value, and that fairness is a crucial element underlying democratic authority.

The main points to be highlighted from the above discussion are the epistemic nature of Estlund's democratic model; his rejection of epistocracy (inherent authority to rule on the part of an elite or wise minority); and the use of the jury analogy. I will consider the first two points in the next section, sketching certain institutional implications of an epistemic proceduralist approach to democracy. The basic thesis is that self-determination is a right with multiple expressions, which may be exercised in practice by implementing the institutional consequences flowing from an epistemic proceduralist view of democracy. The jury analogy is returned to in Part III as a means of understanding the relationship between existing democracies and secession claims.

24. Id. at 8.
25. Id.
26. Id. at 3. Estlund explains:

Even if we grant that there are better and worse political decisions (which I think we must), and that some people know better what should be done than others (we all think some are much worse than others), it simply does not follow from their expertise that they have authority over us, or that they ought to.

Id.
27. Id.
28. Id. admits that the move to epistocracy is tempting and an epistocracy of the educated particularly so. Nonetheless, he suggests that it is properly subject to "The Demographic Objection," which holds that "[e]the educated portion of the populace may disproportionately have epistemically damaging features that counteract the admitted epistemic benefits of education." ESTLUND, supra note 17, at 215–22.
29. It should be noted that Estlund does not purport to solve the question of democratic legitimacy in the broader philosophical sense, as in what, beyond actual consent, may justify the coercive application of punishment in support of a system or entity with authority. Id. at 48. I, too, will avoid that task, which might best be described as quixotic. See Christopher Morris, State Legitimacy and Social Order, in POLITICAL LEGITIMIZATION WITHOUT MORALITY? 15, 17–26 (Jörg Kühnelt ed., 2008). As noted by Morris, there is "massive confusion about legitimacy" and "parties to a dispute [may] have different conceptions in mind—possibly different concepts—and may not, in effect, be talking about the same thing." Having said this, if epistemically based democratic institutions or procedures may ever establish legitimacy as a practical matter, the ones that I outline below might offer a useful starting point for discussion.
C. Self-Determination and Epistemic Proceduralism’s Institutional Implications

An epistemic proceduralist defense of democracy suggests that the system is valued in part because of its truth or justice-tracking abilities. Several implications may flow from this approach, both within and external to such democracies.

First, a search for truth implies that we think that there are truths (or just or unjust actions or right or wrong answers to morally laden questions),\(^\text{30}\) that we care about trying to discover them, and that democracy may in some manner aid in this endeavor.

Second, on the assumption that our search might be successful and that we might actually find some elements of truth—whatever they may be—it would seem appropriate for us to record or entrench any truths that we believe we have discovered, in the hope that it may assist the larger process of filling in the bigger picture of truth. Let us say that such entrenched truths are constitutional truths, and enforceable commands protecting or promoting such truths are law. Accordingly, the constitution must declare the society’s moral truths as ascertained from time to time. It must also create structural conditions for individuals to conduct their own search for truth through democracy as a form of epistemic proceduralism.

Third, and quite unfortunately in certain cases, we also know that democracy is fallible. Accordingly, in some cases we may think that we have identified a constitutional truth but be mistaken. We would therefore require a mechanism, or mechanisms, to help correct or update the constitutional truths which we have previously recorded.

Fourth, there is, in the search for constitutional truths, a tension between epistocracy and the tyranny of the majority. Our aversion to epistocracy suggests that the mere fact that one person may think that an established or potential constitutional truth is mistaken is insufficient to show that it is indeed mistaken. This pushes us toward majority rule. On the other hand, a society risks having its truths hijacked by a discrete and insular majority if the sole mechanism for establishing or correcting constitutional truths is a majoritarian procedure. I see no generally acceptable way to avoid both problems, and so the search for constitutional truth can at best try to temper both of these evils.

Assuming that these observations are correct, there may be certain institutional implications with respect to the internal functioning of a democracy that can assist in explicating the content of the right to self-determination in both the internal and external planes. In the internal context, there are five institutional implications that may flow from the adoption of an epistemic proceduralist understanding of democracy. Many if not all of these insti-

\(^{30}\) Once again I highlight that this is not a grand view of “the truth” in the sense of natural justice, but rather the accepted societal answer to a morally laden question at a given moment in time. See ESTLUND, supra note 17, at 5.
tutions will be familiar to constitutional scholars and other practitioners (for example, the requirement of some form of constitution under which to order the society). That being said, a full recognition of the epistemic value underlying these institutions may be valuable in conceiving and defending such institutions in practice.

The first two institutional implications are intertwined, consisting of the existence of a constitution and mechanisms for democratic participation in lawmaking. Not just any constitution will do. To begin, the constitution of a properly constituted epistemic democracy must create structural conditions for individuals to conduct their own search for truth. This requires institutional arrangements establishing central and subordinate government structures for a system of democratic lawmaking. By a system of lawmaking I mean a congressional, parliamentary, or other similar representative structure. I do not purport to suggest what particular structure or structures may be required. Rather, lawmaking may be an important element of internal self-determination, providing a forum for individuals or groups to influence how the society expresses its constitutionally entrenched truths through law or how the law serves to protect the constitutional system and the truths enshrined therein. The constitution must either implicitly or explicitly provide for individual challenge mechanisms, both of which are returned to shortly.

In addition, the constitution must incorporate certain entrenched rights associated with democracy itself, which I will call democratic prerequisites. This would seem to include rights to life, equality, liberty, and security of the person; freedom of speech, thought, conscience, and association; and the right to vote and other rights and freedoms essential to the proper functioning of democracy. Presumably there is some basic level of socioeconomic development required to undergird a properly functioning epistemic proceduralist democracy, but for the time being we might leave aside the contentious issue of whether economic protections should be thought of as democratic prerequisites. The key point here is that the democratic prereq-

31. I leave aside the question of whether there must be a written constitution. While I suspect that such a document would be more favorable from an epistemic perspective—if only to keep everyone on the same page of the moral framework—I do not rule out the possibility that an unwritten constitution could adequately perform the required epistemic task.


33. Id. at 637. Sunstein notes that “[t]heir protection from majoritarian processes follows from and creates no tension with the goal of self-determination through politics.” Id.

34. Democratic prerequisites might also include, if not implicitly subsumed within the above rights: freedom of expression, freedom of the press, freedom from unreasonable search and seizure, and freedom of peaceful assembly. It might also include what Sunstein, supra note 32, at 640, terms, “facilitative constitutional precommitment strategies . . . designed to solve collective action problems or prisoners’ dilemmas.” Religion, in the sense of the U.S. Constitution’s First Amendment Establishment Clause might also be included here (though the Free Exercise Clause might be better seen as a societal stipulation). Under the German Constitution, human dignity is said to be inviolable and is permanently entrenched in the constitutional order. See Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, as amended, art. 1 [hereinafter German Constitution].
uisites enhance self-determination by protecting the ability of individuals and groups to participate in the self-governance process.

Finally, the constitution should include those entrenched rights or freedoms that reflect the moral truths as understood within that society at any point in time.\textsuperscript{35} I will call these the \textit{societal stipulations}. Sunstein suggests that these might include "rights to private property, freedom from self-incrimination, bodily integrity, protection against torture or cruel punishment, and privacy."\textsuperscript{36} To this one might add minority language rights,\textsuperscript{37} education rights,\textsuperscript{38} family rights,\textsuperscript{39} or any other societal conceptions of constitutional truth that do not conflict with the aforementioned rights protecting democracy itself.\textsuperscript{40} The key point is that it is the society that determines the content of the societal stipulations in its constitution, and both individuals and groups may participate democratically in this self-determination process.\textsuperscript{41} In some circumstances it may be difficult to know where to draw the line between societal stipulations and democratic prerequisites. I do not purport to draw a bright line rule. The bottom line is that the abolition of a societal stipulation does not undermine the basic epistemic characteristics of a democracy while the abolition of a democratic prerequisite does.

Some may be concerned with references to morality or constitutional truths in setting out constitutional rights. To be clear, it is not suggested that constitutions should be framed moralistically, acting as specific moral or ethical signposts. Indeed, there is much to be said of the Rawlsian idea of public reason in promoting widespread agreement on politically framed norms, regardless of why each individual accepts their moral force.\textsuperscript{42} However, the societal stipulations discussed above all share a moral/ethical element. As will be seen, the moral element may be particularly relevant in the context of external self-determination.

The third criterion is that there be a \textit{means of constitutional amendment}. It arises from the fact that democracy is fallible and that one or more mecha-
nisms are required to help correct or update the recorded constitutional truths which have come to be rejected. The general acceptability requirement and its concomitant repudiation of epistocracy necessitates that constitutional amendment be made by way of majoritarian procedure. Accordingly, where there is a large enough majority to pass a constitutional amendment, the society may effect fundamental changes to its moral order to reflect its newfound conceptions of constitutional truth.43

The fourth criterion acts as a counter-balance to the third, and stipulates that there be individual challenge mechanisms to the existing moral order. In other words, there must be channels through which individuals in particular, but also groups,44 can help illuminate or refine constitutional truths. Individual challenge mechanisms are required primarily as a check against tyranny of the majority, but also reflect the fact that individuals may have little real impact on societal lawmaking. Such challenge mechanisms therefore enhance self-determination on an individual level as well as a societal one.45

The most obvious individual challenge mechanism would be judicial review of the constitutionality of laws, permitting challenge to particular commands or laws and/or the societal understanding of a constitutional truth.46 In this manner, judicial review may provide a strong epistemic mechanism for making minor adjustments to the society’s moral order as expressed through its constitutional law.47 Having said this, other institutional mechanisms may share judicial review’s strong epistemic traits.48

Some may worry that a judicial review approach creates moral gods in the form of unelected judges. However, the fact that a constitution may entrench moral values does not suggest that the judges may dictate those val-

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43. There is an interesting caveat to this point. A society could not effect a constitutional amendment that eliminated or fundamentally altered the democratic prerequisites without losing its status as an epistemic proceduralist democracy. To do so would undermine the very epistemic traits that establish its authority. However, the societal stipulations appear to be open to amendment or repeal, should the majority be so inclined.

44. Indeed, they might also be accessible to the state or other bodies with legal persona.

45. Some might suggest that the acceptance of individual challenge mechanisms sanctions the creation of an epistocracy. No doubt, such mechanisms would permit careful assessment of individual or group conceptions of truth, and those conceptions may be employed to shade in the existing constitutional truths in a manner contrary to the majority’s conception thereof. However, fear of epistocracy would be misplaced in light of the previously established fact that the majority retains the final word in terms of constitutional amendment. At worst, the majority may be forced to reassess its views of the constitutional truth in light of viewpoints that might otherwise have remained hidden from the public political discourse.

46. Those who would deny the moral aspect of judicial review and constitutional law might examine the U.S. Supreme Court’s First Amendment jurisprudence as it concerns obscenity. Moreover, the only alternative to a moral constitution is an amoral one, which I suspect few would defend.

47. While some might object to the characterization of a constitutional order as a living thing, it would seem difficult to suggest that a constitution is static in the sense that its normative content is unalterable.

ues. Rather, it is for the judges to identify the society’s values, be it from deeply rooted “history and tradition”\(^{49}\) or other less obvious means.\(^{50}\) That judges may overstep their bounds from time to time is obviously a risk. However, it might be seen as the price we pay to counter the tyranny of the majority in establishing societal truths. In addition, there may also be “weak form systems of judicial review”\(^{51}\) that foster dialogue between judicial and legislative spheres. As Mark Tushnet explains, “weak form judicial review provides mechanisms for the people to respond to decisions that they reasonably believe mistaken that can be deployed more rapidly than the constitutional amendment or judicial appointment processes.”\(^{52}\) Once again I do not rule out the use of other individual challenge mechanisms with strong epistemic traits.

Finally, and very much linked to the fourth criterion, the society must accept civil disobedience as an expressive moral claim rather than mere lawlessness. In this way the society accepts that its constitutional truths are fallible, and that a greater moral truth may in some circumstances prevail through channels apart from those aforementioned. Like other challenge mechanisms, civil disobedience is available to individuals as well as groups, and may be seen as a last-ditch mechanism to promote self-determination. The recognition of civil disobedience’s place in self-determination theory is important and features prominently in the discussion of external self-determination in Part II.

To recap, there appear to be five institutional consequences of adopting an epistemic proceduralist approach to democracy, each of which enhance self-determination on individual and group bases. They are: a constitution that includes democratic prerequisites, mechanisms for democratic participation in lawmaking, a means of constitutional amendment, individual challenge mechanisms, and the acceptance of civil disobedience as a moral claim. If such institutions are in place a population will have gone a significant way to achieving a full measure of internal self-determination.

Those who might question this reliance on democratic institutions as a measure of self-determination should note that other conceptions for defining the right to self-determination risk falling into the trap of epistocracy. That is, if self-determination grants more than the participatory powers and protections of epistemic proceduralist democracy, then those individuals who undemocratically charge themselves with decisionmaking authority


\(^{50}\) According to the U.S. Supreme Court, “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.” Lawrence v. Texas, 539 U.S. 558, 577–78 (2003) (quoting Bowers v. Hardwick, 478 U.S 186, 216 (1986) (Stevens, J., dissenting)). The majority purported to base its decision on constitutionally protected liberty, the reach of which, in my view, must surely be a moral choice.


\(^{52}\) Id.
may be in an epistocratic position (minority rule, presumably by the “elite”) as it relates to other citizens. The result may be other than representative government, undermining the ability of citizens to participate in their own self-governance and hindering self-determination.

Of course, it is obvious that we often do want people who know what they are talking about, to be, in Estlund’s words, “boss.” This is in part what underlies the move to federal systems, where governance is localized to ensure that those on the ground (the democratic bosses, as it were) in any given location have particular influence over local policy. This is manifestly not epistocracy, but rather a segmenting of the polity into more localized jurisdictions. Hawaii may thus regulate its internal affairs to a greater or lesser degree but it may not legislate on activities within Texas, or the whole of the United States for that matter.

But what if Texas wishes to separate from the Union? What is the position of an individual or group that pursues the above democratic avenues and still disagrees with the existing constitutional order? Is self-determination exhausted? I do not think so. Rather, it is at this stage that external self-determination comes into play.

II. **External Self-Determination and Secession Theory**

In the internal context the concept of democracy is malleable enough to be expanded in a manner coextensive with a broad self-determination right. In contrast, external self-determination has historically been equated with a right to unilateral secession. Given the international community’s general revulsion toward unilateral secession, the result is an artificial narrowing of self-determination’s scope and content on the international plane.

The solution to this problem is obvious, though not necessarily straightforward; external self-determination must to some degree be uncoupled from the right to unilateral secession. This requires an understanding of the current link between unilateral secession and self-determination, as well as a plausible model moving forward. Importantly, the model should provide a meaningful account of unilateral secession and any remaining connection to self-determination. The starting point in this task is to delineate the existing self-determination model and highlight its weaknesses.

A. **The Problematic Equation of Self-Determination with Secession**

Traditionally, the external right to self-determination at international law has been equated with a right to unilateral secession under certain narrowly

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53. As previously noted, a minority may think that an established or potential truth is mistaken, but that is insufficient to show that such truth is indeed mistaken. Were a right to self-determination to displace that principle, it would value the right of the minority over that of the majority, which creates an epistocracy.
defined circumstances. In particular, self-determination has been limited at international law to apply only to groups that constitute "peoples" and whose territorial claims fit a particular colonial mold. In this manner, international law provided a limited window for colonized peoples to break free from their colonizers though not from colonially established borders.

Somewhat ironically, given the paucity of remaining colonialist claims, the classical right of colonial self-determination has acquired jus cogens status. Moreover, the fact that few colonial regimes remain in place has done little to alter the content of self-determination. The result is to further narrow the exercise of a right to self-determination, disenfranchising groups that lack the requisite colonial background.

In effect, self-determination has been transformed from a legal right to a political rallying cry. The failure of self-determination doctrine to evolve reflects the international community’s deep hostility toward unilateral secession. In this respect both shared interests and self-interest play a role. As acknowledged in the United Nation’s Agenda for Peace: “[I]f every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve.” On the other hand, Weller cogently notes:

55. James Mayall, Nationalism, Self-Determination, and the Doctrine of Territorial Unity, in SETTLING SELF-DETERMINATION DISPUTES: COMPLEX POWER-SHARING IN THEORY AND PRACTICE 5, 9–12 (Marc Weller & Barbara Metzger eds., 2008). As Mayall explains, the doctrine of uti possidetis holds that “in the absence of a negotiated boundary adjustment, successor states would accept the borders that they had inherited at independence.” Id. at 10.
57. Id. at 24–25.
58. Mayall, supra note 55, and Weller, Legal Rules, supra note 3, highlight that the narrow strictures of self-determination in the colonial context created a whole host of additional problems by entrenching the territorial boundaries of the colonial states. I do not disagree, but do not intend to take up this issue here. For now I simply highlight that colonialism has for the most part run its course, leaving little work for a colonialism-based model of self-determination.

59. According to Weller, Legal Rules, supra note 3, at 20:

This process of disenfranchisement has traditionally proceeded in five steps. First, self-determination is intrinsically linked with, and deployed to justify, the disenfranchising doctrine of territorial unity. Second, there is the issue of the definition of the types of ‘people’ entitled to exercise this right. Third, there is the scope of application of the right to self-determination. That is to say, even if a ‘people’ is designated as a right holder, does this right trump previously existing territorial definitions, or is it exercised within these confines? Then, there is the issue of the singularity of implementation of the right—is it a continuous process, or is it a one-time-only event? Finally, there is the problem of the modalities of achieving the point of self-determination.

60. See, e.g., Pegg, supra note 1, at 140 (“[N]o matter how carefully they are crafted or how forcefully they are stated, the safeguard clauses and the attempts to constrict severely those eligible for self-determination simply do not get through to the supposedly non-eligible selves.”).
It is not surprising that the right to self-determination in the sense of unilateral and opposed secession has been defined very restrictively. After all, it is the governments that make the law in the international sphere, and they can be expected to do so according to their shared perception of central state interests.62

Though the legal right to self-determination has remained under-developed at international law, there has been extensive debate on the scope of the right in the context of liberal democratic theory. The sometimes explicit hope underlying such endeavors is that a clear and comprehensive theory of self-determination and secession may one day translate into more principled legal rules governing unilateral secession on the international plane.63 It is worth briefly examining the various approaches. As will be seen, they have failed to capture international legal consciousness and have been of little assistance in resolving secessionist disputes.

Theories of self-determination and secession have proven both diverse and comprehensive, and I do not attempt to provide a full account of the various theories here. For present purposes, I follow Allen Buchanan’s helpful typology of theories supporting a unilateral right to secede.64 He divides unilateral secession theories into two groups: Remedial Right Only theories and Primary Right theories.65

Buchanan is a strong proponent of the Remedial Right Only approach, which “conceive[s] of the right to secede as analogous to the right to revolution, as . . . a remedy of last resort for persistent and grave injustices.”66 Buchanan’s view follows from a weighing of moral arguments for and against unilateral secession,67 the result of which, in his judgment, justifies a narrow right to secede.68 Broadly stated, the theory is as follows:

Individuals are morally justified in defending themselves against violations of their most basic human rights. When the only alternative to continuing to suffer these injustices is secession, the right of the victims to defend themselves voids the state’s claim to
the territory and this makes it morally permissible for them to join together to secede.\textsuperscript{69}

Primary Right theories are generally more permissive of unilateral secession. Within the category of Primary Right theories, one may distinguish between Ascriptivist (or nationalist) theories and Plebiscitary (or majoritarian) theories.\textsuperscript{70}

Ascriptivist theories base a right to secession on the notion that particular groups (most often “nations,” which are composed of a culturally or ethnically distinct people) have a right of self-determination, as peoples or as nations, which extends up to and includes unilateral secession.\textsuperscript{71} These theories are both attractive and frightful because they tend to value cultural difference more strongly than other theories. On the one hand, they would seem especially well suited to protect societal cultures which, as Will Kymlicka has recognized, provide essential context for human life choices and expression.\textsuperscript{72} On the other hand, pitting majority and minority cultures against each other may lead to cultural, ethnic, or other sectarian violence that a well-designed self-determination theory ought to avoid, at least in principle.

Plebiscitary theories have their basis in majoritarian democratic theory, and suggest that any group of persons, regardless of their cultural or ethnic distinctiveness, may secede where the minority group chooses to do so by democratic means.\textsuperscript{73} The starting point for Plebiscitary theories tends to be moral autonomy or some other variant of personal freedom and the attendant need for consent to be governed.\textsuperscript{74} The idea is that “any group of individuals within a defined territory which desires to govern itself more independently enjoys a prima facie right to self-determination—a legal arrangement which gives it independent statehood or greater autonomy within a federal state.”\textsuperscript{75} The basic thesis is thus that the will of the people ought to prevail in political governance, and that the minority’s desire for self-government ought not to be trumped by the often oppressive majority in the broader central state.

The most striking feature of Plebiscitary theories is that they need not make injustice against the minority a prerequisite to unilateral secession.\textsuperscript{76}

Perhaps the most obvious example of this is found in a theory of secession

\textsuperscript{69} Id. at 354.
\textsuperscript{70} Buchanan, Uncoupling, supra note 64, at 83.
\textsuperscript{71} Id.
\textsuperscript{73} Buchanan, Uncoupling, supra note 64, at 83.
\textsuperscript{74} \textit{See}, e.g., Harry Beran, \textit{A Liberal Theory of Secession}, 32 POL. STUD. 21, 23 (1984); Philpott, supra note 6, at 357–58.
\textsuperscript{75} Philpott, supra note 6, at 353.
\textsuperscript{76} Id.
put forward by Christopher Wellman, who suggests that “a state should restrict political liberty in a manner analogous to the way it limits the liberty to drive a car.”77 According to this view, “all separatist groups that can adequately perform the requisite political functions (and would leave their remainder states politically viable) have a primary right to secede.”78

Perhaps in light of the unpalatable consequences of such an approach, other Plebiscitary theorists tend to add qualifications to their models. Interestingly, these qualifications seem to track toward Buchanan’s Remedial Right Only theory, suggesting that secession may be justified in limited circumstances involving “great cruelty” or “injustice.”79 The idea that secession may be morally justified in cases involving seriously opprobrious conduct is important, and will be discussed further later in this Article.

A final theory that does not map precisely onto Buchanan’s typology is one I will call the Territorial theory. Territorial theories may include Ascriptive or Plebiscitary elements, but their defining feature is the need for a territorial connection as a prerequisite to a valid secession claim. The Territorial theory is exemplified by the position of Lea Brilmayer,80 who suggests that “without a normatively sound claim to territory, self-determination arguments do not form a plausible basis for secession.”81 In her view, “[i]f secessionists argue that the current exercise of territorial power is illegitimate, and that territorial sovereignty in fact belongs to the minority group rather than to the majority, then the secessionists can base a right to secede upon a territorial claim, rather than a personalistic one.”82

The difficulty with Territorial theories is two-fold. First, the requirement of a territorial link to ground secession claims appears to make the secession right almost wholly contingent on historical happenstance. As explained by Thomas Grant, the need for a close relationship to territory suggests that, “[t]he benefits of the right . . . do not run to minorities or to newly settled peoples, though over time, populations such as those of European origin in North America, South Africa, and Australasia may acquire the traits of a people entitled to the right.”83 Accordingly, so-called Territorial theories

78. Id. at 3.
79. Philpott, supra note 6, at 382. R
80. Brilmayer, supra note 1, at 192–93; see also Duursma, supra note 61, at 78–81. Duursma’s position is well summarized in Thomas Grant, The Recognition of States: Law and Practice in Debate and Evolution 87 (1999): “The scope of self-determination according to Duursma is broad. The right belongs to all peoples, not just those under alien subjugation. To be beneficiaries of the right, a group must (1) have the character of a ‘people’; and (2) bear a close relationship to a territory.” R
81. Brilmayer, supra note 1, at 192.
82. Id. at 187. R
83. Grant, supra note 80, at 88. In addition, Brilmayer states:

Self-determination proves a misleading way to characterize the issue because it focuses attention exclusively on people, not on places. That is not to say that territorial claims are necessary for every kind of minority claim. If a minority experiences discrimination or suffers human rights violations, then it certainly has a grievance even though it claims no historical right to a particular piece of territory. I argue, however, that the minority cannot justifiably claim the
appear to be both artificially narrow and open to extensive debate with respect to what constitutes a sufficient territorial connection.

Moreover, the link to territory highlights the fundamental tension at play between democratically based internal self-determination and self-determination as a right to unilateral secession. If unilateral secession is accepted, the will of the minority is preferred over the will of the domestic majority and the existing territorial regime.84 Such a position is highly problematic. As wryly noted by Buchanan:

> It is one thing to say that individuals are obligated to a political entity only if they consent to it and another to say that by [unilaterally] consenting to form a state they thereby come to have rightful title to the land they happen to occupy, even though that territory is claimed by others.85

Buchanan tackles the issue head on. He attempts to reconcile territorial integrity and self-determination by referencing human rights norms under the Remedial Right Only theory. Under this view, a central state’s territorial rights may in certain circumstances be void. Buchanan’s claim is that “the right of the victims to defend themselves voids the state’s claim to the territory and this makes it morally permissible for them to join together to secede.”86 This outcome flows from his suggestion that the validity of a state’s claim to territory is based upon its “provision of justice, understood primarily as the protection of basic human rights.”87

remedy of secession unless it can convincingly assert a claim to territory. What distinguishes separatist from other minority claims is the fact that the group wishes to establish a new state on a particular piece of land.

Brilmayer, supra note 1, at 192–93.

84. See, e.g., Philpott, supra note 6, at 370.

85. Allen Buchanan, Self-Determination, Secession, and the Rule of Law, in THE MORALITY OF NATIONALISM 301, 314 (Robert McKim & Jeff McMahan eds., 1997) [hereinafter Buchanan, Rule of Law]. An overly simplistic example may be helpful here. Say that there is a house occupied by four brothers. Each has his own bedroom, and for a time they coexist peacefully. At some later date there is a dispute, pitting the fourth brother against the other three. It seems that the fourth brother is an outdoorsman and wishes to tear the roof off of his bedroom so that he may sleep peacefully under the stars. The dispute has gotten so heated that he proposes to wall off his bedroom, part of the kitchen and access to the bathroom (he is not so much of an outdoorsman as to forgo all creature comforts!). Moreover, he will build a new entrance and come and go as he pleases, to the exclusion of all the other brothers. The fourth brother announces that this decision is an expression of his free will as an autonomous person, and that the other brothers have no say in the matter. The fact that his actions would breach municipal building codes and property laws does not appear to bother him either.

The difficulty with this scenario is obvious. By purporting to express his free will, the fourth brother is denying that the other brothers may have any legitimate say in the matter. He is also flouting the legal regime that governs the use of property within his community. The result is equally problematic in the context of secession if one accepts the suggestion that the will of the seceding minority is to be preferred over both the will of the domestic majority and the international law governing the territorial sovereignty of states.


87. Id. at 354. He further explains:
Buchanan’s position is a reasonable one, but there appears to have been little spill-over from theory to practice despite a quarter century of theorizing on secession. Instead, a sort of legal stalemate appears to have emerged between the legal claims of secessionists on the one hand, and domestic and international denial of such legal rights on the other.

In some cases this stalemate may be positive, leading to negotiations and intra-state autonomy agreements that seek to quell secessionist fervor. Often however, the stalemate invites violence on the part of both the secessionists and the central state. It is estimated that approximately thirty armed secessionist campaigns were ongoing as of 2008, and that another fifty self-determination disputes had the potential “to turn violent if left unaddressed.” The result is frequently catastrophic from a humanitarian perspective. It does not seem immoderate to conclude, as did one author, that “self-determination claims more often than not become part of the problem [rather] than of the solution.”

The intuitive idea is that it is fairer for the people of a state whose government is persisting in profound injustices toward a subset of the people to lose part of their territory than for the victims to be barred from availing themselves of the only remedy they have for persistent and grave violations of their basic human rights. Yet the right of the injured group to avail themselves of this remedy does not affect the state’s claim to the remainder of its territory.

Id. at 355. Buchanan conducted an extensive analysis of the territorial issue in his earlier work, Buchanan, Secession, supra note 63, at 104–14, supporting the above thesis with an argument based on trust relationships. For another view of how political authority may be justified on the basis of duties of justice (specifically, duties to aid), see Burke Hendrix, Ownership, Authority, and Self-Determination (2008).

88. Contemporary philosophical debate on this issue may be traced to Harry Beran’s 1984 essay, A Liberal Theory of Secession, supra note 74, calling for renewed focus on state secession within political philosophy. For succeeding accounts of self-determination and secession, see Harry Beran, Consent Theory and Secession, in The Consent Theory of Political Obligation 37–42 (1987); Buchanan, Secession, supra note 63; Buchanan, Self-Determination, supra note 68; Hendrix, supra note 87; Wellman, supra note 77; Brilmayer, supra note 1; Allen Buchanan, Democracy and Secession, in National Self-Determination and Secession 14 (Margaret Moore ed., 1998) [hereinafter Buchanan, Democracy]; Buchanan, Rule of Law, supra note 85; Buchanan, Uncoupling, supra note 64; David Copp, Democracy and Communal Self-Determination, in The Morality of Nationalism 277 (Robert McKim & Jeff McMahan eds., 1997); Aris Gounaris, Self-determination and Secession: A Moral Theory Perspective, in On the Way to Statehood 117 (Aleksandar Pavković & Peter Radan eds., 2008); Aleksandar Pavković, Self-Determination, National Minorities and the Liberal Principle of Equality, in Identity, Self-Determination and Secession 123 (Igor Primoratz & Aleksandar Pavković eds., 2006); Philpott, supra note 6.


90. Id. at xi.

91. Id. at xii. Weller explains that “[o]verall, the all-or-nothing game of self-determination has helped to sustain conflicts, rather than resolving them. Self-styled self-determination movements see no alternative to a strategy of fight and win in order to achieve their aims. Central governments see little alternative to violent repression.” Id.

92. Mayall, supra note 55, at 5; see also Weller, Legal Rules, supra note 3, at 18 (noting that “[r]ather than preventing conflict the rule of self-determination has generated a dynamic that sustains conflict)” (alteration in original)).
What then, is the answer? Why have self-determination and secession theories failed to take hold of the legal consciousness?

The difficulty lies in the suggestion that a right to secession should at some stage trump existing state boundaries. As Buchanan proposes:

International law should unambiguously hold that (i) when [certain] conditions for a unilateral right to secede are satisfied and a group exercises the right, all states are legally obligated to recognize the new entity as a legitimate state and (ii) all states are legally obligated not to recognize secessionist entities (in cases of unilateral secession) as legitimate states unless these conditions are satisfied.

States are quite naturally averse to both of these propositions, as they would eliminate an area of vast diplomatic discretion. Moreover, the former proposition stands in opposition to the deeply entrenched principle of territorial integrity. International law—made by states with an understandable if not always morally justifiable interest in protecting their territorial integrity—has proven resistant, in accordance with the territorial principle, to the acceptance of a unilateral secession right, regardless of how narrowly it is framed.

While some may disagree with Buchanan’s justice-based territorial claims, the approach may at the very least be less contingent on historical happenstance than the territorial theory. Moreover, as a moral claim, Buchanan may be correct: the central state’s territorial claim may in some sense be morally void on account of its treatment of minorities. However, as alluded to above, Buchanan’s position is problematic because it suggests that at some stage in the game, a right to secession purports to trump the territorial rights of the central state at international law.

Of course, the mere fact that a theory fails to map onto an existing legal framework is not fatal to that theory. Indeed, the whole point of a theory

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93. The failures of self-determination and secession theories are not due to a lack of effort. Buchanan in particular has canvassed the issues extensively. See Buchanan, Secession, supra note 63; Buchanan, Self-Determination, supra note 68; Buchanan, Democracy, supra note 88; Buchanan, Rule of Law, supra note 85; Buchanan, Unwinding, supra note 64.

94. Buchanan, Self-Determination, supra note 68, at 395.

95. The interplay between self-determination and territorial integrity has been called “probably the most striking model of seemingly contradictory rules in international law.” Hendrix, supra note 87, at 22 (quoting Marcelo G. Kohen, International Law Is the Most Appropriate Moral Answer to Territorial Conflicts, 6 Geopolitics 169, 170 (2001)).


97. This has also been framed as a clash between the right to self-determination (equated with secession) and territorial integrity. See Grant, supra note 80, at 88 (“The key question is ‘when does the right of self-determination take precedence over the obligation to respect the territorial integrity of a State.’” (quoting Duursma, supra note 61)).

98. For an excellent discussion on this point in the context of democratic theory, see Estlund, supra note 17, at 258–75.
may be to provide additional impetus to alter the existing legal rules. However, in some circumstances, it may be preferable from a methodological perspective to integrate existing legal rules within the proposed theoretical framework. This is particularly true where the legal rule is seen as fundamental.

Furthermore, the incentives for both secessionists and central states may be skewed under an approach that frames unilateral secession as a legal right. The Remedial Right Only theory provides an example. From the central state’s perspective, its constitutional order will almost always demand defense of its territory in the face of secessionist claims.\(^99\) Central states facing secessionist challenges and a loss of territory may thus be driven to use all means available to them, including violence just short of the very oppression which may justify the remedial trumping of its territorial right.\(^100\) Likewise, some elements in secessionist movements may be highly incentivized to provoke violence on the part of the central state, which they can then construe as oppression to justify their claim to a legal right to unilateral secession. By setting up a clash of legal rights, current theories may track directly toward violence rather than away from it.\(^101\)

Despite these objections, what makes Buchanan’s Remedial Right Only proposal attractive is that it tends to accord with global morality as expressed through the prohibitions on serious human rights violations. It would seem, therefore, that what is required is an alternative method of conceptualizing self-determination and unilateral secession that accords with the international legal community’s fundamental legal principles and ever-evolving moral values.

\(^99\) One exception may be in situations where the constitutional order provides an explicit mechanism to effectuate secession. Cass Sunstein suggests that constitutions ought not to include such provisions. See Sunstein, supra note 32, at 634.

\(^100\) In this respect I question Buchanan’s conclusion that the Remedial Right Only theory “provides the right incentives” to states. Buchanan suggests:

> States that are just (or at least not guilty of very serious injustices) are immune from legally sanctioned unilateral secession and are entitled to international support in maintaining their territorial integrity. On the other hand, if international law recognized a unilateral right to secede as a remedy for serious and persistent injustices, this would give states an incentive to act more justly in order to safeguard their territorial integrity.

Buchanan, Uncovering, supra note 64, at 85. See also Buchanan, Self-Determination, supra note 68, at 360.

\(^101\) Donald Horowitz has made similar points in arguing vigorously against the recognition of a right to secede in international law. Horowitz notes:

> The very existence of a right to secede... is likely to dampen efforts at coexistence in the undivided state, including the adoption of federalism or regional autonomy, which might alleviate some of the grievances of putatively secessionist minorities. Since most secessionist movements will be resisted by central governments and most secessionists receive insufficient foreign military assistance to succeed, propounding a right to secede, without the means to succeed, is likely to increase ultimately fruitless secessionist warfare, at the expense of internal efforts at political accommodation and at the cost of increased human suffering.

Horowitz, supra note 96, at 50–51.
Aris Gounaris has suggested that any new interpretation of the right to self-determination should be based on the presupposition that “it is unlikely that international law will ever permit an automatic right of unilateral secession.” Buchanan has suggested that a right to secession be “uncoupled” from the right to self-determination short of full statehood. In this vein, I propose to uncouple unilateral secession from self-determination such that the latter is no longer directly equated with the former. Instead, unilateral secession should be framed as a disobedience claim on the international plane that is merely one aspect of a broader understanding of external self-determination.

B. Secession as Disobedience

I make no claim to originality in equating secession with civil disobedience. Indeed, as with most aspects of secession, Allen Buchanan has already addressed the issue in previous writings. That said, he does not appear to have dealt with the link between secession and civil disobedience in great depth.

There are numerous views on the precise scope and content of civil disobedience. The goal here is not to advocate for any particular conception, but rather to argue for the theory’s general suitability as a template for assessing secession claims. It is helpful for this purpose to have a common reference point. Accordingly, the discussion follows the model proposed by John Rawls, keeping in mind that other conceptions may be useful for future theorizing.

Rawls defines civil disobedience as “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about change in the law or policies of the government.” A civil disobedient may target the specific law being protested, but this is not strictly required.

102. Gounaris, supra note 88, at 117. I agree wholeheartedly with the first point, but I wonder if global coordination and increased legal alignment merely masks, as opposed to displaces, the principle of territorial integrity.

103. Buchanan, Uncoupling, supra note 64, at 85.

104. See, e.g., Buchanan, Secession, supra note 63, at 4, 6, 9–11.

105. See id. at 10. Buchanan notes that a “broad definition of ‘civil disobedience’ is compatible with some acts of civil disobedience being directed toward the goal of secession.” Id. In this respect, he points to Mahatma Gandhi’s use of nonviolent resistance as a means of gaining India’s freedom from colonial rule. Additionally, he frames much of his analysis in terms of morality, assessing the moral claims for and against unilateral secession. However, rather than addressing civil disobedience in detail, he instead focuses on a right to secession and how such a right might be incorporated into domestic constitutions. In his most recent text, he advocates disobedient violation of the U.N.-based law of force to help reform international law on intervention, but does not apply similar reasoning to unilateral secession.

Buchanan, Self-Determination, supra note 68, at 456–57.


108. Id.
The civil disobedient accepts that the act of disobedience is contrary to law, "at least in the sense that those engaged in it are not simply presenting a test case for a constitutional decision; they are prepared to oppose the statute even if it should be upheld." 109

Importantly, civil disobedience is an expressive political act wherein the disobedient "invokes the commonly shared conception of justice that underlies the political order." 110 Civil disobedience is thus open and overt, directly engaging public principles. 111 Rawls suggests that civil disobedience should be limited to instances of "clear and substantial injustice," and should generally be a tactic of last resort, only to be relied upon after having made good faith attempts to achieve change by way of the political process. 112 Finally, civil disobedience is generally thought to require non-violent action, 113 because it "expresses disobedience to law within the limits of fidelity to law." 114 I will refer to this last criterion as the fidelity requirement.

As Paul Harris explains, the fidelity requirement posits that the social and political systems are legitimate, but that civil disobedients "feel that they cannot, in conscience, allow it to continue on its present course in a direction they at least regard as morally wrong." 115

Many readers will have noticed that the fidelity requirement raises the specter of incompatibility between disobedience and secession. 116 Indeed, this very incompatibility may be the reason why civil disobedience has not received extensive treatment in secessionist discourse. It begs the question: how is it that secession can be equated with civil disobedience if, by definition, secessionists disavow the existing legal order and therefore do not meet the fidelity requirement?

To answer this question it is helpful to step back and consider to whom civil disobedients and secessionists direct their moral claims. To this end, a distinction may be drawn between disobedience on the internal plane (i.e., within a state) and disobedience on the external plane (i.e., outside a state, on the international plane).

On the internal plane, civil disobedience is aimed at the moral sensibilities of the broader political majority within that state. 117 The act is contrary to the laws enacted (or supported) by the majority, and it is that majority

109. Id. at 91.
110. Id.
111. Id.
112. Id. at 96–97.
113. Id. at 91.
114. Id. at 92. As Rawls makes clear, civil disobedience may be seen as "a way of setting up, within the limits of fidelity to law, a final device to maintain the stability of a just constitution." Id. at 106.
115. Harris, supra note 106, at 6.
116. Rawls suggests as much, noting that civil disobedience ought to be avoided where serious disorder may undermine the efficacy of a just constitution. Rawls, supra note 107, at 98.
117. By referring to a "majority" I am assuming that it is a democratic system, but this need not be so. I see no reason why an act of civil disobedience could not be aimed at a controlling (elite) political minority where democratic change is unavailable to the (presumably oppressed) majority.
which holds the power to alter the state’s laws in light of the moral claim. In
contrast, the view of unilateral secession that I propose posits it as an exter-
nal act of disobedience, capable of subsequent ratification through the pro-
cess of state recognition at international law. It is a rejection of the current
international polity in favor of a new one that includes the secessionist entity
as a new state. On this view, the secessionist act is contrary to the legal
regime enacted (or supported) by the international majority, and it is that
international majority which holds the power to alter the international legal
order in light of the moral claim.

At this juncture it is worth highlighting the views of Marc Weller and
James Crawford, both of whom suggest that the legality of unilateral seces-
sion is ambiguous at international law.118 State practice appears to be at the
core of their respective conclusions.119 These views are relevant because the
analogy between unilateral secession and civil disobedience appears to hold
true only insofar as unilateral secession is forbidden under international
law.120 As noted previously, civil disobedience is generally thought to be
contrary to law.

I do not deny that there is ambiguity on this issue. However, it appears to
be at least arguable that illegality flows implicitly from the aforementioned
principle of territorial integrity, from the narrow scope of self-determination
as a secession right, and from the principle of “effectivity,” described below
in greater detail. Moreover, there appears to be no particular barrier to mak-
ing unilateral secession illegal under international law, should a disobedi-
ence model be supported.

To begin, the principle of territorial integrity is a fundamental peremptory
norm of the international system.121 In light of its foundational nature, uni-
lateral breaches of territorial integrity should be viewed suspiciously at best.

With respect to the narrow scope of self-determination, Weller himself
recognizes that:

118. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 389 (2006) [hereinafter
CRAWFORD, CREATION]; Weller, Legal Rules, supra note 3. Crawford suggests at 390 that “secession is
neither legal nor illegal in international law, but a legally neutral act the consequences of which are
regulated internationally.”
119. CRAWFORD, CREATION, supra note 118, at 390; Weller, Legal Rules, supra note 3, at 23–24.
120. CRAWFORD, CREATION, supra note 118, at 391. This is not to say that the very same process of
recognition would be inapplicable where secession is an internationally lawful act. The difference would
be in the analytical theory, not the process.
121. As explained by Burke Hendrix,

Territorial integrity, which holds that only a state’s internal political processes can change
international boundaries once these have been legally determined, is probably the least contro-
versial of international law’s principles on political boundaries, as well as the oldest. This
principle derives directly from international law’s foundational premise of state sovereignty,
which provides the logical foundation for an international legal system in the first place.

Hendrix, supra note 87, at 17–18 (citations omitted).
In generating what is an exceptional entitlement to secession, self-determination appears to confirm that secession is not otherwise available in circumstances where the central government refuses to consent to a separation. This strengthens the view that a secession that is not covered by the exceptional right to (colonial) self-determination amounts to an internationally unlawful act.\textsuperscript{122}

This interpretation echoes the position of the Supreme Court of Canada in Reference Re Secession of Quebec\textsuperscript{123}, a decision that Crawford has called “by far the most important modern decision on self-determination outside the colonial context.”\textsuperscript{124}

Finally, the illegality interpretation accords with the principle of effectivity.\textsuperscript{125} As the Supreme Court of Canada explained, effectivity “proclaims that an illegal act may eventually acquire legal status if, as a matter of empirical fact, it is recognized on the international plane.”\textsuperscript{126} In this manner, “a change in the factual circumstances may subsequently be reflected in a change in legal status.”\textsuperscript{127} The baseline assumption, then, is that secession is illegal—effectivity confers legal recognition on an illegal act. Effectivity would seem to answer the suggestion that the success of past secession attempts are reflective of the act’s legality at inception.\textsuperscript{128} In any event, I can think of no good reason why unilateral secession could not be made illegal at international law. So, for present purposes it will be assumed that it could be, if such a position is not already implicit from the narrow scope of self-determination and the principles of territorial integrity and effectivity.\textsuperscript{129}

\textsuperscript{122.} Weller, \textit{Legal Rules}, \textit{supra} note 3, at 23.

\textsuperscript{123.} Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.). At paragraph 112, the Supreme Court of Canada noted,

International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people . . . .

In the same vein, Donald Horowitz has conducted a detailed examination of whether a limited right to secede exists in international law. See Horowitz, \textit{supra} note 96, at 59 (“A few international lawyers may have been a bit reckless in their willingness to countenance a right to secede, but international law certainly has not followed them.”). Accordingly, Horowitz suggests that “[t]here has been no . . . reserved exception [providing a limited right to secede] in international law, and there should not be one.” \textit{Id.}


\textsuperscript{125.} \textit{Id.}

\textsuperscript{126.} Reference re Secession of Quebec, [1998] 2 S.C.R. 217 para. 146 (Can.).

\textsuperscript{127.} \textit{Id.}

\textsuperscript{128.} \textit{Id.}

\textsuperscript{129.} Some may also be wondering why I am focusing on external illegality rather than internal illegality; surely unilateral secession is contrary to the legal regime governing the central state? I do not deny the existence of internal illegality in this context, and will explain below why it may be of limited
Assuming it is accepted that unilateral secession may be framed as a disobedience claim at international law, the next issue is how those claims come to be assessed and potentially validated by the international community. This brings up the question of state recognition.

C. Recognition and the Assessment of Moral/Political Claims

Recognition, according to Thomas Grant, “is a procedure whereby the governments of existing states respond to certain changes in the world community.” Historically, there have been two dominant theories of recognition. One theory, the declaratory theory, holds that recognition is simply “an acknowledgment of statehood already achieved.” The question in this model is whether an entity meets the criteria of statehood, to be discussed shortly. On the other hand stands the constitutive theory of recognition. In this model, “[a] state is, and becomes, an International Person through recognition only and exclusively.” As Grant explains, “[t]he central implication of this is that whether or not an entity has become a state depends on the actions of existing states. Recognition by others renders an entity a state; nonrecognition consigns the entity to non-statehood.”

importance in the success or failure of unilateral secession claims. For present purposes, however, Jorri Duursma cogently explains why it is problematic to let the internal view supersed the external view:

It should first of all be observed that the rules governing secession from an existing State do not fall under the exclusive domestic jurisdiction of that State. It is not up to one State to decide whether to reject the secession of a part of its territory, for such a decision involves the balancing of two principles of international law which should therefore be decided on the basis of international law as well. International law determines whether a people has the right to self-determination and also decides whether the territorial integrity of a State deserves protection. If this were left to the discretion of individual States, it would result in the denial of the international character of the competing rules in question.

DUURSMA, supra note 61, at 89.

130. GRANT, supra note 80, at xix. He elaborates, it may also be a means by which existing states seek to effect changes in that community. When peoples hitherto contained within existing state structures seek to break free of those structures; when domestic government undergoes radical change; or when territorial status lies in doubt recognition may come into play. Recognition is an authoritative statement issued by competent foreign policy decision-makers in a country. Through it, those decision-makers signal the willingness of their state to treat with a new state or government or to accept that consequences, either factual or legal, flow from a new situation. Recognition at times has implied approval; nonrecognition, censure.

Id. at xix.

131. Id. at 4.

132. Id. at 4–5.

133. Id. at 2 (citing LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 125 (Hersch Lauterpacht ed., Longmans 8th ed. 1955)).

134. Id. As a practical matter the analogy with civil disobedience may to some extent break down here. An unsuccessful civil disobedience claim will generally result in the disobedient’s continuing subjection under the existing internal legal regime. In contrast, a lack of recognition on the international plane may have less impact where a secessionist entity unilaterally declares independence and gains a degree of self-determination in fact.
Both theories have their weaknesses. For example, the declaratory model requires some standardized conception of a "state" against which the entity in question may be assessed. Traditionally, declaratory recognition is said to be warranted where the four criteria of the Montevideo Convention135 are fulfilled: being a permanent population, a clearly defined territory, effective governance, and the ability to engage in international relations and meet international obligations.136 Unfortunately, the Montevideo criteria have not always been seen as satisfactory in international practice,137 and finding alternative criteria has proven difficult.138

Standing in stark contrast to the rigidity of the declaratory model is the extreme flexibility of the constitutive approach. The constitutive approach has been found wanting for its lack of legal controls, "casting recognition as a device of statecraft, a tool of Realpolitik, available to forge states out of communities at the will of the recognizing state[s]."139 As Lauterpacht succinctly noted, "the cardinal defect of the constitutive doctrine as generally propounded [is] . . . that the constitutive act creative of statehood is an act of unfettered political will divorced from binding considerations of legal principle."140

Extensive debate has done little to settle the question of whether a declaratory or a constitutive theory is preferable. Indeed the discourse has to a certain extent moved on from this "great debate."141 I do not attempt to settle the issue here, but I do think the declarative/constitutive dichotomy may retain at least some relevance in the context of secession framed in terms of external disobedience.

To start, the constitutive approach to recognition would seem to most closely track the majority’s ability to alter the legal landscape in the context of a disobedience claim. On this view, as in the internal context, the act of unilateral secession is illegal until the secessionists’ claim is recognized by the international majority and the legal status of that seceding entity is constituted by the majority’s recognition.

Interestingly, this might set up a further dichotomy between unilateral and consensual secession within the domestic sphere. While unilateral secession might be seen as illegal under international law in light of the territorial claims of the central state, no such obstacle need exist in the context of consensual secession. Accordingly, it is arguable that consensual secession should not be seen as illegal under international law. In such circumstances, the seceding state is likely to meet the criteria of the Montevideo Convention.

136. Grant, supra note 80, at 5.
137. Id. at 6.
138. Id. at 6.
139. Id. at 3.
140. Id. at 2 (citing Hirsch Lauterpacht, Recognition in International Law 41 (1948)).
141. Id. at 217.
tion, pushing the act of recognition toward the declaratory model that recognizes the legality of the pre-existing state.

It is doubtful, however, that recognition can be neatly encapsulated in a binary model, with unilateral secession/constitutive recognition on one hand and consensual secession/declaratory recognition on the other. For one thing, completely consensual secession is likely to be a rarity given the nature of politics—few central governments would wish to oversee the break-up of their state. Moreover, it would seem that even under the declaratory model, each member of the international majority will conduct a political calculus prior to recognition. That is, the international majority will likely consider issues including, but not limited to, power, morality, rights, property, status, resources, ethics, and precedent in deciding whether or not to declare the seceding entity a state.

In light of this reality, it seems that the most to be hoped for is to identify different modes of examining the factors and criteria that are particularly salient in the recognition decision. This type of reasoning appears to underlie various attempts to supplement the Montevideo criteria. As Grant notes, “[t]o varying degrees, self-determination, democracy, minority rights, and constitutionality have . . . influenced the legal rule [of recognition].”

However, despite attempts at formulating legal criteria such as those under the Montevideo Convention, the decision to recognize a seceding entity remains an inherently political one. This political calculus to a large extent mirrors the process conducted by the political majority in the context of internal civil disobedience. For example, it need hardly be said that power, morality, rights, property, status, resources, ethics, and precedent played a crucial role in the American civil rights struggle.

But does this mean that the external disobedience model defaults to an acceptance of pure power politics? Is Realpolitik to reign supreme in the context of secession? To a certain extent, yes. It is virtually impossible to remove the political equation from secession and there is unlikely to be a singular set of legal criteria that can be applied to separate valid from invalid secession claims. There is, however, an obvious need to identify factors that may help guide the process of making decisions about recognition, lest the entire process lack any determinacy. Here we can return to the moral character of disobedience claims, which are well suited to the recognition context.

142. Id. at 121.

143. BUCHANAN, SELF-DETERMINATION, supra note 68, at 3. As Buchanan notes:

[M]any international relations theorists as well as international lawyers and diplomats say that whether a state grants recognition or withholds recognition from a new political entity created by secession is purely a political matter. This is false if it implies that a state’s behavior in recognizing another entity as a state or refusing to do so is not subject to moral evaluation. Recognition is not morally neutral even though it is true that under current international law states have the right to grant or withhold recognition as they see fit.
Buchanan has twice made attempts to circumscribe legitimate secession through consideration of moral norms. Though laudable in their intent, both present significant difficulties. In the first attempt he weighed the moral case for and against secession and on this basis proposed a limited constitutional right to secede.144 However, Cass Sunstein has raised a number of negative consequences that would result from constitutionalizing secession rights.145 Buchanan’s later attempts to circumscribe secession through consideration of moral norms revolve around his discussion of the Remedial Right Only theory. For Buchanan, a weighing of the moral arguments for and against secession justifies a limited right to secession in highly prescribed situations that accord with international morality as expressed through international human rights norms.146 The problem here is not that Buchanan’s moral analysis is awry, but rather that it is conducted in the abstract, resulting in a bright line legal rule against which specific factual circumstances are to be judged. While bright line legal rules may be useful in many settings, secession is not one of them for reasons previously discussed. Moreover, a bright line rule legally entrenches a single view of the abstract morality of secession. This may be problematic for states that have a different conception of the morality of secession when considered in practice as opposed to the abstract.

Nonetheless, the idea of moral balancing is very useful. Rather than a bright line rule, however, the preferable approach is an accretive one; one that assesses the morality of any given secession on the basis of specific facts considered in light of moral principles. While certain factors may play heavily into whether secession is morally justified, it is the whole of the circumstances that should inform the assessment.

Id. Moreover, he emphasizes that:

To participate without protest in a practice of recognition that empowers governments that engage in systematic violations of human rights is to be an accomplice to injustice. Once we take seriously the moral implications of granting or withholding recognition, we must examine the arguments for and against rival proposals for what the practice of recognition should be like, and this examination inevitably requires an attempt to develop a moral theory that integrates prescriptions for a just practice of recognition with a principled approach to other important issues that arise in an international legal system.

Id.

144. Buchanan, Secession, supra note 63, at 151.
145. Sunstein, supra note 32, at 633. Sunstein notes at 634 that: To place such a right in a founding document would increase the risks of ethnic and factional struggle; reduce the prospects for compromise and deliberation in government; raise dramatically the stakes of day-to-day political decisions; introduce irrelevant and illegitimate considerations into those decisions; create dangers of blackmail, strategic behavior, and exploitation; and, most generally, endanger the prospects for long-term self-governance.

I return in Part III to the idea that constitutional secession provisions may be ineffective for the very purpose they are meant to serve in light of the politicization of constitutional amendment formulae during constitutive moments.

146. Buchanan, Justice, supra note 86, at 331.
One can thus conceptualize recognition decisions as a balancing exercise involving numerous factors along spectra with varying degrees of moral and political force. It is at this stage that Buchanan’s analysis, along with many of the other secession theories discussed above, becomes particularly helpful. I say this because previous secession theories may be examined to identify important criteria in the accretive moral analysis called for in the context of democratic disobedience.

For example, while I disagree with Wellman that mere ability to form a functioning polity is sufficient to justify secession, his analysis highlights the point that a claim’s moral force may vary with the size of the group at issue. For this reason, an individual’s secession claim is ridiculous; a town’s only slightly less so; a county’s somewhat more plausible; and a state or federal region’s paradigmatic.

In a similar vein, Buchanan’s focus on violence is important. There is little doubt that the level of violence underlying any given secession claim may have a significant impact on how it is received on the international plane. It was noted earlier how legally entrenching a secession right may track toward violence. What is required, instead, is a means of considering violence in the context of secession that favors peaceful secession claims over those that descend into violence. In this respect, the ethos of non-violence associated with disobedience claims may be helpful.

Non-violence is often considered to be one of the core tenets of civil disobedience, featuring prominently in the approaches of Gandhi and Martin Luther King Jr. Two aspects of non-violence seem particularly apt in the context of secession, where violence may oftentimes seem inseparable from secession claims. First, violence may distract from the very message intended to be sent through disobedience. One group’s freedom fighter may be another group’s terrorist. Second, by adopting an accretive moral examination, both sides of the dispute may have an incentive to avoid violence where a violent act may be seen as the final straw in favor or against recognition. On one side, violence by the central state may be seen to enhance the minority’s moral claim. On the other hand, secessionists may be seen to undermine their claims when they turn toward violence themselves.

The question of timing is another element of Buchanan’s Remedial Right Only theory that may help inform the moral analysis under a disobedience approach. Buchanan considers a secession right as a remedy of last resort; so too does the Rawlsian understanding of civil disobedience. Accordingly, secessionist disobedience in the external context calls upon minorities

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147. See discussion accompanying text supra note 77.
148. Rawls, supra note 107, at 91.
149. Harris, supra note 115, at 10.
150. Id. at 10–11.
151. See, e.g., Buchanan, Self-Determination, supra note 68, at 394.
152. Rawls, supra note 107, at 96–97.
who question the existing legal order to pursue other avenues of legal redress before turning to secession. To hold otherwise is to risk the stability of existing states and to cheapen the disobedience claim through trivial overuse. Thus, if a minority group acts prematurely in unilaterally declaring independence this may be an important factor mitigating the strength of its moral claims. That said, in some cases it may not make sense for secessionists to pursue all available avenues prior to seceding. As Rawls suggests, “This condition is . . . a presumption. Some cases [of oppression or injustice] may be so extreme that there may be no duty to use first only legal means of political opposition.”

From Kymlicka, Margalit and Raz we may understand how culture plays an important role in the success or failure of a secession claim. It seems by now well established that culture provides essential context for human life choices and expression. Having said this, not all cultures are positive, which is why international society may favor states espousing a peaceful culture over a hateful one.

Additionally, Margalit and Raz recognize that cultural fulfillment need not always occur “in a political framework exclusive to one’s group or dominated by it.” This may in part explain the resistance to purely culture-based nationalistic secession claims, particularly where the secessionist culture has open access to the political process within the central state.

Finally, a potentially crucial factor is the political structure of the central state from which the secessionists purport to separate. The calculus here is somewhat complex, so I leave a more thorough analysis of the question for Part III of this Article. Reduced to its essentials, I suggest that a successful secession claim is more likely to be effected against non-democratic states than existing democracies, but that democracies are not completely immune from secession themselves.

I do not suggest that this is an exhaustive list of factors affecting recognition decisions, or that it is the only way to examine those decisions from a moral perspective. Indeed, it cannot be denied that Realpolitik may be a

153. Id. at 97.
154. KYMUCKA, supra note 72, at 75–106; see also Margalit & Raz, supra note 72, at 82.
155. By this I suggest that the international community may justifiably reject the moral claims of groups with cultural traits, values and practices akin to those arising in, say, Nazi Germany. No doubt it will rarely be so obvious that a culture is a hateful one, and the classification of cultures as peaceful or hateful may prove difficult and itself a function of culture-based norms. Indeed, cultural biases may take hold in the recognition process, artificially favouring certain cultural values over others. (On this last point, see ANTHONY CARTY, PHILOSOPHY OF INTERNATIONAL LAW 84–85 (2007), wherein Carty discusses how European concepts of culture informed the definition of statehood and provided “the conceptual framework for the subordination of non-Western countries to the West.”). Nevertheless, I think it is difficult to deny that such cultural assessments take place, and so prefer to expose them to scrutiny and discussion rather than deny their role in the context of recognition.
156. Margalit & Raz, supra note 72, at 90.
157. Another very important factor might be a history of subjugation or oppression, possibly explaining why indigenous self-determination claims are seen as sufficiently strong to warrant their own categorical approach.
strong driving force behind recognition decisions (which seems to me to be a moral view as well). However, at the very least this approach recognizes the complex calculus by which the validity of a secession claim is assessed. In this respect Lee Seymour offers another helpful formulation of relevant considerations. He suggests that "the prospects for international recognition increase as a separatist group successfully draws on . . . three sources of legitimacy": deliberative legitimacy,159 procedural legitimacy,160 and favorable outcomes.161 Seymour argues:

In legitimating claims, separatists and the governments they challenge both draw on resources available in world politics, particularly norms and symbols that they manipulate, contest and reinterpret in convincing outside states of the legitimacy of their respective claims. In this competition, "a moral economy of symbolic politics" structures the terms of bargaining and plays an important role in constructing the decision situation that outside states find themselves in vis-à-vis these competing claims.162

No doubt further analyses will be needed and heated moral debate will ensue. The disobedience model accepts the discretionary nature inherent in the recognition process and leaves it to common conceptions of political morality to dictate recognition decisions on the international plane. How-

158. Lee Seymour, Research Fellow, International Security/Intrastate Conflict Programs, Seminar to the International Security Program, Harvard University Kennedy School of Government, Pathways to Secession: Legitimacy and the Politics of Recognition (Mar. 19, 2009). Seymour was kind enough to share his speaking notes with me, from which I quote here.

159. Id. Deliberative legitimacy "involves arguments, justifications and appeals to reasons that reach beyond narrow self-interests." Id. Seymour suggests that "[i]mportant symbols here involve violations of past agreements for autonomy; a history of repressive and violent behavior towards [the] minority; and the effectiveness of a state controlled by separatists, which constitutes a tangible reality on the ground." Id.

160. Id. Procedural legitimacy holds that "the extent to which following correct and widely recognized procedures enhance the legitimacy of a claim." Id. Seymour suggests that:

Referenda and elections are important here, as are constitutional laws and principles; prior history of independent and internationally-recognized statehood within recognized borders; and being seen by outside states as negotiating in good faith according to agreed upon procedures for resolving the status of a claim to self-determination.

Id.

161. Id. The third source of legitimacy is said to rest "on favorable outcomes, or the extent to which other states stand to benefit from recognition or non-recognition . . . ." Id. This may be understood both narrowly and broadly:

Narrowly, the governments of outside states might have particular interests around a conflict as a result of shared values or identities, or security interests. Yet even these interests have to be framed in terms of legitimated norms and symbols that other states find convincing. More broadly, states care about the consistency of a given claim with the principles of an international order they value and whose rules they seek to follow. Evaluations around the effects of recognition on international peace and security, particularly the creation of a destabilizing precedent in favor of secession, are of crucial importance here.

Id.

162. Id.
ever, as will be demonstrated in Part III of the Article, the model may offer greater determinacy than at first appears. Adherence to democratic principles may be an important signal to pre-existing democracies that a secessionist entity shares common conceptions of political morality worthy of recognition on the international plane.

III. DEMOCRATIC DISOBEDIENCE AND THE INTERNAL/EXTERNAL DICHOTOMY

The focus thus far has been on exploring a richer conception of what it means to exercise self-determination internally, as well as on uncoupling secession from the right to external self-determination by framing secession in terms of a disobedience claim. This last Part of the Article attempts to tie these somewhat disparate lines of inquiry together, such that a picture emerges of the relationship between self-determination on the internal and external planes.

It is important to reiterate at the outset that the term “uncoupling” is not being used to suggest that self-determination and unilateral secession are unrelated; rather, as suggested above, unilateral secession may be framed as a disobedience claim that is an iteration of self-determination, but does not exhaust the full scope and content of self-determination on the international plane. The question that flows from this position is one regarding self-determination’s remaining scope and content.

In the internal context this question was addressed by reference to institutions that foster self-determination. However, while there may be certain institutional analogues on the external plane, it is beyond the scope of this Article to attempt to define the full scope of external self-determination in institutional terms. Instead, the focus here is on the process of becoming a self-determining state and the role of disobedient secession therein. In this respect we may turn first to the role of internal illegality in the creation of a new polity.

163. Andreas Paulus, From Territoriality to Functionality? Towards a Legal Methodology of Globalization, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 59, 63–69 (Ige F. Dekker & Wouter G. Werner eds., 2004). Paulus explored the notion that the U.N. Charter and associated international bodies may be thought of as an international constitution and mechanism for lawmaking. It is early days for such thinking, however, and it seems fair to conclude that a system of lawmaking akin to a congressional or parliamentary system is lacking on the external plane. As Paulus notes at 65, “[t]he law-making rules of the Charter and, in particular, the Statute of the International Court of Justice do not recognize a truly legislative role for the General Assembly.” Having said this, external self-determination may also include access to individual challenge mechanisms on the international plane. While still in early days, the International Court of Justice (“ICJ”) and the International Criminal Court may be seen as tentative steps toward global adjudicatory mechanisms. Such forums may provide individuals and groups the opportunity to have some say in the specification of international norms through the process of adjudication.

164. By this I mean a state on the international plane that offers its citizens a full measure of self-determination.
A. Unilateral Secession and Internal Illegality

As we have seen, unilateral secession claims may be framed as expressive acts targeted at the external, international community. It almost goes without saying, however, that the internal actions of both secessionists and central states are highly relevant to this external moral/political calculus. An important question, then, is the effect of internal illegality on the success or failure of a moral/political claim on the international plane. Does it matter that a unilateral declaration of independence may be unconstitutional within the central state? Should this not count as a strike against secessionists in the moral equation?

The answer is: it depends. Practically speaking, internal illegality may be held out as a factor in the calculus, presumably by anti-secessionist voices. Constitutionally speaking, however, the answer to the above questions veers sharply toward no. That is, the fact that unilateral secession is likely to occur in violation of the central state’s domestic constitution may not be terribly surprising; rather, a base level of internal illegality is to be expected in the context of constitutive politics, within which unilateral secession may be situated.

Sujit Choudhry’s response to the writings of Bruce Ackerman is instructive on this point. In his recent article, Ackerman’s higher lawmaking in comparative constitutional perspective: Constitutional moments as constitutional failures?, 6 INT’L J. CONST. L. 193 (2008), Choudhry examines the relevance of “constitutional moments” to secession theory. He suggests that Bruce Ackerman’s constitutional moments are best understood as constitutional collapses. According to Choudhry, Ackerman’s empirical claims supporting America’s constitutional moments are suspect, but his theory of constitutional moments is nonetheless groundbreaking for “placing illegal moments of regime change at the center of constitutional theory.” In Choudhry’s view, an appeal to higher lawmaking can be seen as a means of justifying constitutional change that is formally illegal but effectively ratified by popular will. The question Choudhry seeks to answer is why political actors turn to illegal political
processes in the face of more formal constitutional amendment procedures.\footnote{170}

To answer this question, he highlights that constitutional amendment procedures can be seen as a means of suspending political judgment on “institutions and institutional decision-making procedures in order to purchase the prospect of political settlement.”\footnote{171} Problems occur, however, when the amendment procedures are themselves seen as biased between the parties’ substantive positions, precluding suspension of political judgment.\footnote{172} In such situations, amendment formulae become politically charged, as different formulae may transfer the balance of political power to varying democratic polities.\footnote{173} Constitutive politics are thus driven toward illegality, as Choudhry explains:

\begin{quote}
[If] it becomes impossible to suspend political judgment regarding the procedures for constitutional amendment—that is, at moments of constitutive constitutional politics—there is no higher level to which the dispute can be shifted. Even if one designed a constitution to create a special set of rules to regulate amendments to the rules for constitutional amendment, the same problem might arise with respect to those rules. It is impossible to continue this strategy ad infinitum. In the absence of agreed-to procedures for constitutional decision-making, institutional settlement cannot yield political settlement. The result may be that the constitutional system itself may collapse.\footnote{174}
\end{quote}

Given that unilateral secession is at its heart a constitutive political process,\footnote{175} Choudhry’s analysis highlights that the structural limitations of constitutionalism are likely to drive secession toward illegality. Accordingly, internal constitutional illegality may be seen as a natural by-product of secessionist discourse, and its effects on the recognition of secession claims should be judged accordingly.

In contrast, the underlying political principles and arrangements of a secessionist entity may have a very important role to play in the success or failure of its disobedience claim on the international plane. In particular, one would think that unilateral secession claims are more likely to be successful when they accord with the pre-existing moral/political norms of other inter-

\footnotesize
\begin{itemize}
\item \footnote{170. \textit{Id.} at 210.}
\item \footnote{171. \textit{Id.} at 213.}
\item \footnote{172. \textit{Id.}}
\item \footnote{173. \textit{Id.} According to Choudhry, “by determining which individuals and communities can participate in political decision making, and what role those individuals and communities play, [constitutional amendment formulae] reflect controversial judgments about the locus of political sovereignty and the very identity of a political community.” \textit{Id.}}
\item \footnote{174. \textit{Id.}}
\item \footnote{175. \textit{Id.} at 215. Choudhry suggests that “[t]he debate over the right to unilateral secession, therefore, quickly turns into a problem of constitutional amendment.” \textit{Id.}}
\end{itemize}
national states. This idea is considered now, using the notion of fidelity in civil disobedience theory to frame the discussion.

B. Democratic Disobedience

In Part II of the discussion, Rawls' theory of civil disobedience was canvassed and used as a template to explain the process of state recognition at international law. In so doing there was brief mention of the "fidelity requirement." Recall that fidelity signals to the majority that there is an expressive moral claim being made; that the act is not mere lawlessness. As Rawls explains, fidelity "helps to establish to the majority that the act is indeed politically conscientious and sincere, and that it is intended to address the public’s sense of justice."176 Assuming that a disobedience model aptly characterizes unilateral secession, we may ask: to what are secessionists remaining faithful and how might this impact their claims?

I do not suggest that there is an international system of laws to which secessionists may pledge allegiance.177 In this sense the disobedience analogy may appear imperfect. Even assuming that there may one day be a deeply entrenched global system of laws worthy of fidelity, we are far from it at this stage.178 This, however, need not be the end of the inquiry. Instead it is helpful to focus on fidelity’s role in the process of recognition and the creation of global norms. The questions are whether there are any emerging principles that are shared by a significant proportion of the international community such that adherence to those principles signals some measure of fidelity on the part of disobedients, and whether their disobedient act may be seen as an expressive cry for recognition on the international plane. In this respect I once again turn the focus to democracy.

There has been increasing discussion in the literature about a right to democracy, highlighted in particular by the works of Thomas Franck179 and Diane Orentlicher.180 Franck suggests that a right to democratic governance is emerging as a "normative rule of the international system,"181 generating a community expectation of government by consent.182 Accordingly, democracy "is on the way to becoming a global entitlement, one that increasingly

176. Rawls, supra note 107, at 92.

177. Hannah Arendt highlights that: "The civil disobedient accepts, while the revolutionary rejects, the frame of established authority and the general legitimacy of the system of laws." **Hannah Arendt**, *Civil Disobedience, in Crises of the Republic* 77 (1972) (citing Carl Cohen, *Civil Disobedience and the Law*, 21 *Rutgers L. Rev.* 1, 3 (1966)).

178. This is not to discount the important strides made in the human rights realm or to minimize the importance of customary international law; it simply acknowledges that these areas of international law are far from analogous to the overarching constitutional regimes to which a civil disobedient may pledge allegiance in the context of internal civil disobedience.

179. Franck, supra note 12, at 46.


181. Franck, supra note 12, at 46.

182. Id.
will be promoted and protected by collective international processes.”  

Orentlicher goes a step further suggesting that a right to democratic governance might carry with it a limited right to secede where self-governance has been denied and human rights have been violated. Orentlicher’s view equates the denial of the right to self-determination with a limited right to secession.

For reasons previously noted I do not agree with Orentlicher’s view of a unilateral secession right. However, her analysis is helpful for highlighting the importance of democratic practices in assessing a secession claim. Indeed, as noted by Thomas Grant:

Writers assessing more recent instances of recognition and non-recognition have argued that state practice has accreted a criterion of democracy to the prerequisites of statehood. Supporting incorporation of democracy into the law of recognition, Crawford notes that states hesitated to recognize Guinea-Bissau after its unilateral declaration of independence from Portugal. This may have been motivated by concern over the undemocratic character of the revolutionary regime. Response to the break-up of the Soviet Union further demonstrated that states now seem to attach weight to democracy.

Assuming this trend continues, we may equally recognize the importance of democratic principles within the proposed disobedience model. In this respect I put forward the idea of “democratic disobedience,” wherein adherence to democratic principles may demonstrate fidelity to existing democracies by being seen as a “tangible sign of the seriousness” and proof of “commitment to the legitimacy of the social and political system.” The secessionist movement that adheres to democratic principles signals its acceptance of the primacy of self-determination in governance while calling for a different global polity.

183. Id. See also Morton Halperin & David Scheffer, Self-Determination in the New World Order 61 (1992) (“Western democracies now include, or are beginning to include, democratization as a key criterion for the type of relationship that can be built with newly emerging states as well as existing non-democratic states.”).
184. Orentlicher, supra note 180, at 25.
185. Grant, supra note 80, at 94.
186. The recognition of Kosovo may offer another example of the importance of democracy as a possible justification for statehood in the eyes of other states. See Seymour, supra note 158. In this respect it will be interesting to follow the proceedings of the ICJ as it delivers its Advisory Opinion in accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Req. for Advisory Op.) (Order of Oct. 10, 2008), available at http://www.icj-cij.org/docket/index.php?p1=3&p2=1&decode=kos&case=141&k=21 (last visited Mar. 12, 2010). It is of course quite possible that the Court rejects my suggestion that unilateral secession should be seen as an illegal act. I defer to the Court’s view in practice, of course, while attempting to provide a clearer picture in theory.
187. Harris, supra note 115, at 10.
188. Id.
Of course, democracy may provide little added weight to secession claims in the eyes of non-democratic states, where epistocratic rule may be the norm. Moreover, I agree with Diane Orentlicher when she states that: "I do not mean to suggest that principles of self-government are the only—or even the most important—values that should be brought to bear in assessing separatist claims." 189 However, a democratically-based unilateral secession claim is likely to have additional resonance with states that already provide self-determination to their citizens. As noted above, this position appears to accord to some extent with state practice. In the final section, I will show that there is good reason for this outcome in theory as well.

Before doing so, however, it is perhaps useful as a summary to offer an idealized example of how a secessionist group may be said to engage in democratic disobedience; where the expressive claim is close to "maximum volume." Consider, for instance, a minority group X with a strong historical connection to the land they occupy. Group X seeks to protect its unique language, culture and ways of life within a central state Y. Let us assume that they face some serious level of violence and majoritarian abuse from the central state, and that their language, culture and ways of life are in jeopardy. Assume further that internal mechanisms to promote internal minority self-government have been exhausted. Secession is put on the table.

Ideally, the secessionist movement would determine whether the minority wishes to secede through democratic means. Assuming strong minority support for secession, they may make a unilateral declaration of independence on the international plane, pledging to adhere to democratic principles by enacting a constitution adhering to certain democratic values. In such circumstances, the combined actions of the secessionists may be interpreted as maintaining fidelity to democratic underpinnings of a large proportion of the world’s states. As such, they may be seen as expressing a moral claim to secede despite the questionable legality of their conduct at international law. Moreover, the aforementioned strength of the claim argues in favor of recognition at international law, and existing states may focus on those factors when granting recognition without appearing to sanction uncontrolled lawlessness. The minority’s claim is enhanced by resort to democratic principles and diminished by resort to violence. So too does the conduct of the central state affect the moral/political calculus at issue.

Of course, the odds are slim that all of the above factors will align into this strengthened moral position; the example is, after all, an idealized hypothetical. The more likely scenario may involve more violence, or less democratization, or a weaker culture claim, or any number of factors that might be said to engage power politics. The democratic disobedience model accepts the discretionary nature inherent in the recognition process and leaves it to

189. Orentlicher, supra note 180, at 20.
common conceptions of political morality to dictate recognition decisions on the international plane.

A final question is thus how common conceptions of political morality interact and intersect between the internal and external planes. In this respect the final section comes full circle and links back to the idea of democratic prerequisites and societal stipulations in the internal self-determination context.

C. Democracy, Shifting Polities and a Community of Self-Determining States

In *The Will of the International Community as a Normative Source of International Law*, Tsagourias explores how shared democratic values may underlie or act as the foundation of an “international community.” Tsagourias’ analysis has been lauded as “visionary,” and offers an excellent theoretical template upon which to situate the previously discussed institutional expressions of internal self-determination and the creation of new states through democratic disobedience. His thesis draws a distinction between “international society,” “international community,” and “world community.” Tsagourias’ analysis is quite sophisticated so it is useful to quote him at some length:

International society is a society of states connected by voluntary rules that regulate their mutual external interaction. The concept of international society is constructed upon the recognition of the pluralistic personality of its members and the rational necessity of regulating their relations. The character and constitution of the international society is identified by the boundaries of its member states. It reflects the situatedness of its components in space or time. International community refers to a political unit of ideational substance, which includes states in their internal and external configuration and which has the authority to set operational and normative rules. For a legal system to exist within such community we need something more than consent. We need a consensus arising from the communal principles. The reference to states as the constituents of the international community does not preclude other actors, institutions or agents, from discharging the normative content that such a community adopts. From that it follows that the international community is purposive, dynamic and expansive in contradistinction to international society, which is value-neutral, static and inward looking.


Going one step further, the notion of a "world community" is "a prospective and engulfing concept which represents the realization of the telos of the international community and where the distinctions between international community or society are dissolved."193

Tsagourias' recognition of the interrelatedness of the internal and external planes, and his suggestion that membership in the international community is based upon normative criteria, track well with the notion of democratic prerequisites under an epistemic proceduralist approach to democracy. In particular, Tsagourias argues that beliefs and practices may help define the international community and so "there is a contemporary trend to consider the common practices of the international society as the foundations of an international community."194 He also contends that current community standards are liberal-democratic in nature.195 If this is correct, a state's adherence to the democratic prerequisites may be seen as demonstrative of its commitment to community norms,196 and this supports the aforementioned suggestion that democratic practices may evidence fidelity to the international order.

This international vision also accords with the notion of societal stipulations where there may be interplay between international and domestic norms. In the internal context societal stipulations represent a snapshot of an ongoing epistemic process at any given time. While it is unlikely that the member states in any community of democracies will arrive at the exact same societal stipulations at any point in time, many may veer in some similar directions.197 When this occurs, societal stipulations may be elevated to international rules, reflecting a measure of self-determination on an international scale.198 In this manner, "domestic political culture exists in a state..."
Of course, mere adherence to democratic principles does not automatically secure membership in the international community. Of course, mere adherence to democratic principles does not automatically secure membership in the international community.200 As discussed above, the process of becoming is not automatic, even where a claim is underpinned by democracy.201 However, recognition of the link between democratic prerequisites, societal stipulations, and the notion of international community may help us to identify which disobedience claims carry greater force on the international plane. In this respect we may conclude by situating democratic disobedience within the broader spectrum of mechanisms of becoming a self-determining state. It is helpful to turn briefly to the writings of Bruce Ackerman202 and Hannah Arendt on this point.203

In Foundations, Ackerman highlights Arendt’s rejection of the French Revolution, with its focus on social and class upheaval, as the paradigmatic revolutionary event. Instead, Arendt sees the American Revolution as the archetype of successful revolution, focusing in particular on the political (democratic) aspect of revolution.204 As Ackerman explains:

On this political interpretation, the crucial question is the extent to which a revolution inspires large numbers of people to invest their energies and identities in the collective process of political redefinition. So long as people treat revolutionary politics as a sideline, incidental to the main business of life, no “real” revolution is going on. If large numbers come to take revolutionary politics with deep seriousness, this transformation in political consciousness marks out a distinctive revolutionary reality, regardless of the polity’s success in transforming one or another social relationship.205

Accordingly, in Ackerman’s view, Arendt’s concept of revolution is one of political transformation rather than social re-alignment.206 Moreover, it is not any political consciousness that will do, but rather democracy, where, as Arendt notes, “man is master of his destiny” instead of subject to the “will and purpose [of] the anonymous force of the revolution.”207

199. Tsagourias, supra note 190, at 109.

200. Id. at 113. As Tsagourias notes, “[Though] the international community we have presented here is far from being democratic and participatory in the process of becoming, it is hoped that its realization as a world community will satisfy the democratic credentials.” Id.

201. I do not deny that there will be some level of internal variation in the democratic prerequisites among different states, but I suggest the differences are of degree, not kind (else a society cannot be called an epistemic proceduralist democracy).

202. ACKERMAN, FOUNDATIONS, supra note 166, at 203–06.

203. ARENDT, ON REVOLUTION, supra note 5.

204. ACKERMAN, FOUNDATIONS, supra note 166, at 203–04, 206.

205. Id. at 203–04.

206. Id. at 204.

207. ARENDT, ON REVOLUTION, supra note 5, at 44.
Arendt recognized revolution as the full scale transformation of a state from espistocracy to democratic self-determination. But what happens when only some of a state’s citizens awaken to the consciousness of self-governance? It is here that secession comes to the fore. While not focused on secession per se,208 Arendt’s contrasting conceptions of revolution provide a helpful foundation upon which to assess various secessionist acts. I highlight three distinct modes of secession, depending on the political circumstances in the central state and the method of governance pursued by the seceding entity.209 The first category is not revolutionary at all in the Arendtian sense, but would occur where the seceding entity exits a democratic central state belonging to the international community to form a new democratic polity. The second builds upon the Arendtian view of the French Revolution to cover circumstances where the seceding entity exits a non-democratic central state but still pursues governance by undemocratic means apart from the international community.210 Finally, the third category builds upon Arendt’s archetypal American-style revolution to cover circumstances where the seceding entity exits a non-democratic central state and transforms itself into democratic polity that seeks to join the international community.

Turning to the first category, it is useful to remember that the seceding entity will be judged in part on its adherence to the democratic community standards. This is challenging for secessionists, as they are attempting secession from a pre-existing democracy, which by definition would provide some base measure of self-determination to its population. In such situations, where the secessionists already benefit from a high degree of internal self-determination, a cry for secession may seem like the shouts of another special interest group—to be dealt with through democratic participation in lawmaking and individual challenge mechanisms. By choosing self-government, the democratic state has thus insulated itself to a high degree against secessionist claims.211

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208. Arendt’s writings on revolution are focused on the political transformation of an entire state. Secession, in contrast, seeks the division of the existing state into one or more new entities. Under the latter circumstances there may be little social or political upheaval in the remaining portions of the central state, and it may thus be somewhat inapt to speak of secession as a “revolution” writ large. Nonetheless, I think her writings are useful for the reasons described above.

209. An aside: I have already noted the possibility of consensual secession and the fact that it may accord with the declarative view of state recognition. I leave further consideration of consensual secession for another day. The discussion that follows focuses on unilateral secession.

210. I emphasize that I am not drawing any type of historical analogy here. Rather I am emphasizing that under the Arendtian view of the French Revolution and this category of secession the polity as a whole is not “master of [its] destiny.” ARENDT, ON REVOLUTION, supra note 5, at 44. The same historical caveat holds true with the respect to the first category, though in that case the polity would become “master of [its] destiny.”

211. Arguably, the central state might be able to insulate itself from secessionist movements by merely offering institutions and political mechanisms that foster self-determination for the minority group, regardless of whether these offerings are accepted. I am grateful to Ben Berger for this point.

In addition, central states may attempt to placate secessionist movements through federalism or power sharing in the context of self-determination disputes. Marc Weller has conducted extensive analysis on the subject of complex power sharing, which he defines as follows:
Having said this, democracies should still be respectful of minority rights, as the mere fact of being a democracy does not preclude secession in all situations. For example, tyranny of the majority may obviously be detrimental to or victimize a minority, even where there are checks and balances. Though minorities may rely upon the democratic prerequisites and individual challenge mechanisms for protection, it might nonetheless be possible for a tyrannical majority to create conditions sufficiently insufferable on the part of a minority to ground a recognizable claim of democratic disobedience.

Moreover, and in my view more likely, systemic abuses may plague a minority despite the use of purportedly fair procedures. Indeed, systemic problems might underlie many nationalistic secession claims that are justified in terms of the preservation of a minority culture. It is helpful to think back to Estlund’s jury example. Estlund suggests that a jury is a generally acceptable procedure with sufficient epistemic traits to ground authority.212 But what about juries with systemic flaws? For example, an obvious difficulty arises where a minority population is precluded from jury duty. In such cases the procedure might be biased against minority claims. Less obvious bias might accrue where the minority is not precluded from jury service, but is nonetheless rarely represented because of low population proportions. Once again, bias may taint what appears to be a strong epistemic system. In the real world, political, cultural or social institutions may be biased in a similar manner, leading to the slow erosion of minority culture despite the...

Complex power sharing describes a solution where there is a complex layering of public authority, both horizontally and vertically. This will include autonomous structures. This is matched by the application of consociationalist techniques, such as governmental power-sharing, guaranteed parliamentary representation for the minority, veto rights for ethnic communities or ethnic-territorial entities, the granting of minority rights and agreements on the transfer of economic resources. In addition, there is an element of international involvement in the negotiation and implementation of the settlement, and in post-conflict governance.

Where a group is sufficiently organized to engage the secessionist polity democratically, the central state is made aware of the seriousness of the underlying claims. In order to avoid secession (or to end internal conflict) intra-state autonomy arrangements may be proposed. This may have the dual effect of tempering the secessionists’ self-determination claims (by granting them a greater measure of internal self-determination), and at the very least may score moral points in the central state’s favor at the recognition stage. I do not suggest that intra-state autonomy arrangements are a panacea that will cure all secessionist ills, but they do appear to have a very important role to play under a democratic disobedience model.

Finally, a point about guaranteed parliamentary (or congressional) representation and minority veto rights: These forms of power sharing appear to run contrary to the rejection of epistocracy. I agree that from an analytical perspective such power sharing techniques may be problematic by creating a governance structure where minority groups are in some way preferred over citizens falling within a state’s majority group—this likely accounts for the objections to such structures by the majority. That being said, I suggest that such policies (akin in some sense to affirmative action polices) may be justified on the basis of inequality flowing from current and historic injustices or systemic exclusion. Presumably they are subject to some sort of implicit temporal limitation so that equality may prevail in practice once it has been achieved in substance.

212. See supra notes 24–25 and accompanying text.
adoption of a seemingly neutral policy or procedure. In theory at least, this might justify an alteration of the existing polities.\footnote{It should be highlighted that systemic problems such as those described above may be particularly difficult for the majority to accept. Consider the jury example once again. Even in the most biased example above, where the minority is excluded altogether, the majority population may view the jury system as perfectly just in light of the fact that they suffer no such similar bias in their cases.}

Perhaps more likely, as the world faces competing demands for resources, are secession claims in the second category, where secession is pursued as a means of social ordering or wealth redistribution unrelated to democratic principles. Such (non-Arendtian) revolutionary actions may also have expressive content, and states born of social revolution may be recognized despite troubling governance structures. This could be because the new order is at the very least more just than the old one, or on purely self-interested power bases. That said, an act of democratic disobedience is likely to have greater moral force on the spectrum of political change than secession intended to create a new despotic state.

Finally, the international community, composed of self-determining states, may be most likely to grant recognition where a democratic polity seeks to break free from its epistocratic chains in accordance with the third category—democratically-based secession from a non-democratic central state in order to form a new democratic polity and join the international community. The cry for self-determination in these circumstances is particularly loud when compared to a governance background that mutes the democratic voice. By transferring domestic political disputes to the international sphere, democratic disobedience may be seen as a mechanism by which members of the international community encourage undemocratic states into membership in a world community. In this manner the international community, “becomes the motor for organizing the international sphere by providing a perspective and a process for becoming,”\footnote{Tsagourias, supra note 190, at 113.} with the eventual goal of achieving a world community.

IV. Conclusion

In this Article I have attempted to give richer content to self-determination on both the internal and external planes. In so doing I set out a framework for uncoupling unilateral secession from the right to self-determination, such that the latter is no longer directly equated with the former. It will no doubt be a controversial view, given the degree to which I prefer moral and political analyses over the drawing of bright-line rules that govern the secession process. Nonetheless, I hope that this discretionary approach, bounded at the very least by the idea of shared moral norms, may succeed in capturing the political imagination where bright line rules have not.
Uncoupling secession from self-determination allows for much greater flexibility in conceptualizing what it means to exercise the right to self-determination. I have tried to paint a picture of international society slowly evolving toward an international democratic community, in part through secession as a form of democratic disobedience. While I do not support secession generally, or call for its support in any particular case, I doubt very much that international boundaries are to remain static from this day forward. Where consensual separation or full-scale revolution (in the Arendtian sense) is unlikely, a disobedience approach stressing non-violence and leading to a negotiated solution may be the preferable way forward. The goal, no doubt optimistic, is a fuller measure of self-determination for all.