Separation Anxiety:  
International Responses  
to Ethno-Separatist Claims

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I. INTRODUCTION

Remapping Europe with explosive force, national movements in the former Yugoslavia dispelled hopes that the liberal peace would replace communism in Eastern Europe and reversed decades of progress in affirming universal principles of humanity. That nationalism assumed brutal dimensions in Europe, the cradle of liberal universalist values, made its resurgence there astonishing but scarcely unique. The volcanic fury of ethnic assertion has been global, ranging from Liberia to Sri Lanka, from Chechnya to Rwanda, from Northern Ireland to Kashmir.

Flouting international law's bedrock principle of established states' territorial integrity, national movements from Slovenia to Eritrea have forced international institutions and governments to reckon with, ratify, and in some respects even defend their separatist claims. But while responding in piecemeal fashion, the international community has failed to develop a principled response to secessionist movements. When, if ever, should international law and institutions support separatist claims? When, instead, should the international community defend a state's right to suppress internal movements bent on its dismemberment? More particularly, how should international law and institutions respond to separatist movements that base their claims on national identity?

In the nascent years of the post–Cold War period and in light of developments in international law throughout the twentieth century, appropriate criteria for accepting new states into the society of nations are unsettled. What is clear is that core principles of international law governing acquisition of sovereignty are outmoded. Shaped centuries ago by principles of Roman law that assimilate territorial sovereignty to ownership of private property, this law has failed to adapt to profound transformations in prevailing conceptions of sovereignty.

What is needed is a contemporary framework for determining when aspirants to statehood—including ethno-separatist movements—have a legitimate claim.\(^2\)

International law has long been ambivalent in its treatment of national identity as a basis for statehood, and the confusion persists to the present day. If anything, emerging trends in relevant law have enlarged the potential for conflicts between core norms of the international legal system. In large perspective, international law has in recent decades embraced a cosmopolitan, liberal vision of states, their relationships with their citizens, and their relations with each other.\(^3\) While respect for pluralism within states is part of that vision, liberal internationalists have largely disdained ethnic particularity as an organizing principle of political legitimacy, emphasizing instead liberal republican virtues of civic equality. In similar fashion, global adherence to human rights principles in the postwar decades has affirmed a cosmopolitan faith in universal norms that would displace the parochial values of an obsolete nationalism.

The fulcrum of international law's embrace of liberal values has been its affirmation of democratic governance as a universal entitlement—only recently the object of truly global endorsement, but now deeply embedded in the rhetoric and practice of international law and diplomacy. But if the new democratic entitlement\(^4\) reflects the liberal internationalist vision, it may also inspire a largely antithetical alternative: a revival of nineteenth-century nationalism. For international law's embrace of democracy fairly raises the question, does the internationally protected right to governance by the consent of the governed include the right to determine the boundaries of political commitment? The emerging law relating to participatory government has thus far largely skirted this question, but, I will argue, has more consequential implications for separatist claims than has generally been acknowledged.

Those implications were scarcely lost on political leaders in the Age of Enlightenment. As I argue in Part II, the idea of popular sovereignty that transformed eighteenth-century political arrangements in Europe meant not only that a people could govern itself within defined borders, but also that it could determine the territorial boundaries of its sovereignty. But these implications were to remain largely a matter of principle, policy, and occasional practice, and only rarely the province of law, for some two centuries following the Age of Enlightenment.

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Long formally neutral on separatist claims, international law has in this century affirmed several distinct conceptions of the principle of self-determination. As I argue in Part III, early validations of self-determination claims familiar to international lawyers—the Wilsonian project at Versailles and the postwar decolonization process—are instructive above all for their lessons in the richly complex relationship between ethnic identity and popular sovereignty. In particular, the interwar experience showed that, for ethnically mobilized peoples, exercise of popular sovereignty has scant meaning apart from national identity. But however richly textured, these applications of the principle of self-determination were confined to special cases. When statecraft affirmed the principle of self-determination, states limited its applied sphere, precluding sweeping claims of entitlement by separatist groups.

But with the dawning of a democratic entitlement in the closing years of this century, the legal ramparts are bursting. This emerging law, which has gone a long way toward transforming eighteenth-century ideals into legal entitlements, has more far-reaching implications for ethno-separatist claims than has heretofore been recognized. In Part IV, I challenge the widely held view that questions of boundary stand wholly outside democratic theory. Instead, I argue, the norm of democracy significantly contributes to creating the problem of political unit in contemporary international law and practice. While the basic democratic proposition—that a people should govern itself—does not resolve the prior question of the territorial boundaries of self-government, this conclusion does not, as is commonly asserted, exhaust the relationship between democratic theory and the problem of defining political units. On the contrary, justifications for democratic government may have significant implications for resolving ethno-separatist claims.

Even so, the right of self-government does not justify a general rule supporting separatist claims, or even a presumption in their favor. Concerns relating to democratic governance may in fact point in the opposite direction. But if democratic theory does not compel a uniform response to separatist claims, it is a mistake to conclude that considerations relating to democratic governance are irrelevant to their resolution.

The very complexity of these issues presents singular challenges to international actors called upon to mediate disputed separatist claims. This much has become plain in the wake of the violent implosion of the former Yugoslavia. Drawing on the lessons of that experience, I argue in Part V that international institutions must be prepared to undertake the demanding role of providing an authoritative resolution of contested separatist claims. The task today is to fashion a coherent response to the challenge of ethno-separatism that promotes peaceful resolution of conflicting demands within a framework of liberal democratic values.

II. THE NATION-STATE IN HISTORY

Two claims dominate arguments in support of separatist claims based on national identity. One rests upon proponents' belief that states whose citizens
International Responses to Ethno-Separatist Claims comprise a national group are relatively stable. This claim tends to support an "objective" principle of self-determination, which holds that, to the extent possible, the borders of states should correspond with the boundaries of national communities. The second claim asserts the right of groups to control their common destiny by determining the political community to which they owe paramount allegiance. This claim is sometimes associated with a "subjective" principle of self-determination, which emphasizes groups' right to determine their political community through the exercise of collective will—notably through plebiscite.5

As a foundation for critiquing international legal and institutional responses to ethno-separatist movements, it is useful first to consider whether historical experience has validated these two core claims. What role has national identity played in the emergence, stability, and survival of states? In particular, does historical experience support the claim that states with a comparatively homogeneous polity are more stable than those comprising a highly diverse citizenry? And finally, to what extent have states and international legal institutions affirmed separatist claims based upon principles of national self-determination?

As I argue in this Part, the historical record of state-making provides ambiguous support for the claim that statehood naturally follows nationhood. In Western Europe, national identity was as much a byproduct as a basis of state-making in the early modem period. As my analysis in Part II makes clear, international legal principles concerning recognition of states derive above all from this historical experience. But since the nineteenth century, national identity has notably been an engine as well as incident of state-making.

Ironically, although this trend drew inspiration from the ideals of popular sovereignty associated with the Age of Revolution, many states that emerged as the result of self-determination movements developed comparatively weak democratic cultures and have been prone to ethnic conflict. Particularly vulnerable in this respect have been states that have experienced rapid transitions to democratic government. Manifestly regrettable, this byproduct of rapid democratization is also paradoxical. For as I argue below, the civic culture of liberal democracy is the most effective inoculation against intolerant nationalism.

A. Nations and Nationalism

The issues I address in this Part beg a basic definitional question: What are nations? Answers have proved notoriously elusive. Evoking the peculiar difficulty of defining a nation more than a century ago, Walter Bagehot's words still ring true: "'[W]e know what it is when you do not ask us,' but we cannot..."
very quickly explain or define it.”

Though ensuing generations of scholars have produced a vast literature on nationalism across several disciplines, the definitional quandary remains equally vexing today.

Although problematic, Joseph Stalin’s definition provides an instructive point of departure: “A nation is a historically evolved, stable community of language, territory, economic life, and psychological make-up manifested in a community of culture.” The chief problem with this definition is that it assumes what is often an article of faith on the part of national groups: that the essence of a nation can be captured in objective terms, in which the factual data of history loom large. Yet as chroniclers of nationalism have so often reminded us, attempts to define nations solely in objective terms inevitably fall short. Central to any adequate definition of a nation is a shared sense of communal solidarity—a sentimental identification with the group.

But if subjective will is essential to any definition of nations, it is scarcely possible to define nations solely in subjective terms. An exclusive emphasis on subjectivity would, as E.J. Hobsbawm cautions, “lead the incautious into extremes of voluntarism which suggests that . . . if enough inhabitants of the Isle of Wight wanted to be a Wightian nation, there would be one.” National consciousness may be a modern artifact, but nationalists cannot invent their histories out of whole cloth.

7. The literature is truly vast. The bibliography to ANTHONY D. SMITH, THE ETHNIC ORIGINS OF NATIONS (1986) is 25 pages long, and it omits much of the relevant legal literature.
8. Thus, Smith asserts, “In many ways it is easier to ‘grasp’ nationalism, the ideological movement, than nations, the organizational cultures. Even ethnic communities, so easily recognizable from a distance, seem to dissolve before our eyes the closer we come and the more we attempt to pin them down.” Id. at 2. In an important work on the subject, Ernest Gellner easily defines nationalism in the first sentence of the first chapter, but postpones even attempting to define nations until the fifth chapter. See ERNEST GELLNER, NATIONS AND NATIONALISM 1, 53–62 (1983). On the difficulty of defining nations, see also WALKER CONNOR, ETHNONATIONALISM: THE QUEST FOR UNDERSTANDING 89–113 (1994), which aptly entitles the chapter on the meaning of “nation” and related terms “Terminological Chaos”; E.J. HOBSBAWM, NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY 1–13 (1990); HUGH SETON-WATSON, NATIONS AND STATES: AN ENQUIRY INTO THE ORIGINS OF NATIONS AND THE POLITICS OF NATIONALISM 5 (1977); and YAEL TAMIR, LIBERAL NATIONALISM 58–69 (1993).
9. JOSEPH STALIN, MARXISM AND THE NATIONAL AND COLONIAL QUESTION 8 (I. Tovstukha trans., International Publishers, n.d.). For Stalin, it was essential that all of these constituent criteria be satisfied for a group to be a nation. See id.
10. For Max Weber, the term “nation” evoked the idea that “it is proper to expect from certain groups a specific sentiment of solidarity in the face of other groups.” MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 922 (Guenther Roth & Claus Wittich eds., 1978).
11. HOBSBAWM, supra note 8, at 8.
12. A notable expression of this view is Ernest Gellner’s claim that “[n]ationalism is not the awakening of nations to self-consciousness: it invents nations where they do not exist . . . .” ERNEST GELLNER, THOUGHT AND CHANGE 168 (1964).
13. As one writer has argued, “Nationalist intellectuals may well invent a tradition, but they cannot invent just any tradition—it must fit within some recognizable continuum of distinctive local features.” Tony Judt, The New Old Nationalism, N.Y. REV., May 26, 1994, at 44, 46. In the Greco-Bulgarian “Communities” case, the Permanent Court of International Justice applied a combination of objective and subjective factors in defining the term “communities,” which was used in the Convention Respecting Reciprocal Emigration, Nov. 27, 1919, Greece-Bulg., 1 L.N.T.S. 67, 69–70, in a sense that was virtually synonymous with ethnic nations:

By tradition, which plays so important a part in Eastern countries, the “community” is a group of persons living in a given country or locality, having a race, religion, language and
What features, then, are peculiar to national identity? Are Serbs a nation because of the importance they attach to their Slavic ethnicity? Or is it principally their Eastern Orthodox Christianity that constitutes them as a nation and distinguishes them from ethnically similar Croats and Slavic Muslims?

In this Article, I use the term “nation” to connote groups that share a sense of group solidarity based on language, lineage, ethnicity, culture, and/or religion and a sense of political community rooted in their group identity. While such a common political identity does not necessarily entail a sense of entitlement to independent statehood, it is of course a necessary basis for the separatist claims that are the subject of this Article.

As the foregoing discussion suggests, the term “nation” covers a diverse range of groups, and the defining quality or qualities of a nation may vary significantly from one nation to the next and even for the same nation across time and place. Indeed, their very diversity has contributed to the difficulty of establishing a widely accepted definition of nations.

An important dimension of that diversity is captured by the distinction between civic and ethnic models of nations. Central to the civic model is the concept of a political community defined in significant part by a common legal code and political institutions and a particular bounded territorial space within which people obey the same political and legal authorities. The paradigmatic civic model of nationalism also presupposes some measure of common culture. Still, in the civic model, citizenship is the core determinant of nationality, regardless of citizens’ ethnic lineage. In contrast, in the ethnic model, a nation is above all a community defined by common descent or, more accurately, by a myth of common descent. Also characteristic of the ethnic paradigm is the central importance of common culture, often manifested in a vernacular language and shared customs. The two models are ideal types, and elements of both can be found in most nationalisms. Still, the distinction be-

Advisory Opinion No. 17, Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration (Question of the "Communities"), 1930 P.C.I.J. (ser. B) No. 17, at 21 (July 31).

14. See Peter Alter, Nationalism 7 (2d ed. 1994); Charles A. Kupchan, Introduction to Nationalism and Nationalities in the New Europe 1, 2 (Charles A. Kupchan ed., 1995); see also Hans Kohn, The Idea of Nationalism 13–14 (1944) (“A nationality generally has several of [certain objective] attributes; very few have all of them. The most usual of them are common descent, language, territory, political entity, customs and traditions, and religion. . . . [N]one of them is essential to the existence or definition of nationality.”).

15. Some writers do, however, define nations in terms that include a claim of entitlement to an independent state. See, e.g., John Breuilly, Nationalism and the State 2–3 (2d ed. 1993).

16. The civic model is sometimes identified as a predominantly Western model of nations, while the ethnic model is associated with predominantly non-Western trajectories for nation formation. See, e.g., Anthony D. Smith, National Identity 9–13 (1991). For criticism of the view that ethnic nationalism is predominantly non-Western, see Bogdan Denitch, Ethnic Nationalism: The Tragic Death of Yugoslavia 186–88 (1994).


20. See id. at 12.

21. See id. at 13. In Smith’s view, the interaction of the two models has produced a common core of “beliefs about what constitutes a nation.” Id. These include
tween ethnic and civic nations is useful in addressing the question to which I will turn shortly: What role has national identity played in the emergence and success of states?

As suggested earlier, the ultimate focus of this inquiry will be on ethno-national movements—that is, national movements in which the ethnic model predominates—that assert a claim to statehood on the basis of their national identity. Put differently, this claim aspires to the ideal of a nation-state—"a polity whose territorial and juridical frontiers coincide with the ethnic boundaries of the national entity with which that state is identified."22

This is, of course, a form of nationalism—a term that has spawned perhaps as many definitions as the term "nation." In this Article, I use the term "nationalism" to signify the principle that nations are a proper unit—or, in the doctrine's extreme version, the proper unit—of political organization23 and also to refer to social movements that are committed to this principle24 or that act in accordance with it, whether or not pursuant to a well-formulated ideology. This range of meanings is intended to include national movements seeking a political status, such as local autonomy within an established state or independent statehood, regardless of whether the claimants believe that other nations deserve a similar status.25

B. Nations, Nationalism, and the State

The legitimating principle of politics and state-making today is nationalism; no other principle commands mankind's allegiance.26

the idea that nations are territorially bounded units of population and that they must have their own homelands; that their members share a common mass culture and common historical myths and memories; that members have reciprocal legal rights and duties under a common legal system; and that nations possess a common division of labour and system of production with mobility across the territory for members.

Id. at 13–14.

Although the distinction between civic and ethnic nations is particularly important to my analysis, other distinctions are useful in explaining the historic evolution of national movements. See, e.g., John A. Hall, Nationalisms: Classified and Explained, Dadaeus, Summer 1993, at 1, 5–9 (emphasizing, inter alia, distinction between nationalisms that historically were produced by "revolutions from above" and those that "come from below").


23. See Elie Kedourie, Nationalism at xv (4th ed. 1993) ([N]ationalism . . . saw humanity naturally divided into nations which were, which had to be, the proper unit of political organization.); see also Gellner, supra note 8, at 1 ("Nationalism is primarily a political principle, which holds that the political and the national unit should be congruent."); Hall, supra note 21, at 3 (defining nationalism as idea "that people should share a culture and be ruled only by someone co-cultural with themselves").

24. See Breuilly, supra note 15, at 2 (using term "nationalism" "to refer to political movements seeking or exercising state power and justifying such actions with nationalism arguments").

25. This category would include rebel Serbs in the recent conflicts in Bosnia-Herzegovina and Croatia and their ultranationalist supporters in Serbia. While fighting to establish a Greater Serbia, these Serbs did not recognize that Croats and Bosnian Muslims were entitled to symmetrical rights of self-determination.

26. Smith, supra note 7, at 129.
By one reckoning, in over ninety percent of contemporary countries, the state is either considerably larger or smaller than the area inhabited by the corresponding nation.\textsuperscript{27} Even so, the nation-state remains a powerful paradigm for twentieth-century statehood\textsuperscript{28}—one quite literally capable of exploding established boundaries.

Does history support this paradigm? That is, does the history of state-making provide cause to believe that nations are a natural—perhaps the ideal—unit for successful states?\textsuperscript{29}

In Western Europe, the crucible of modern states, enduring nations tended to emerge as a function of—rather than a prelude to—state-making. Further, the early history of state-making in Europe underscores the contingency of contemporary states and of the nations with which they are identified.

1. \textit{The Nation-State in History: Western Europe}

A State may in course of time produce a nationality; but that a nationality should constitute a State is contrary to the nature of modern civilisation.\textsuperscript{30}

Against the broad sweep of history, states are a peculiarly modern phenomenon. Although states have antecedents as ancient as civilization, the modern state arose out of the disintegration of the medieval Holy Roman Empire. By general acknowledgment, the Peace of Westphalia, which ended the Thirty Years’ War in 1648, inaugurated the modern European state system, including the legal system governing relations between sovereign territorial states.\textsuperscript{31}

The medieval period itself saw the gradual unification by Saxon and Frankish kings of territories they controlled, laying the foundation for the later emergence of England and France.\textsuperscript{32} Similar processes of administrative centralization unfolded in Spanish, Swedish, and Polish territories and, later, in Russia, Hungary, and Holland.\textsuperscript{33} But if the Middle Ages saw the beginning of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{27} See Ra’an, supra note 22, at 7. This observation—in which the writer is apparently using “nation” in a predominantly ethnic sense—is true even with respect to some states that generally are considered nation-states. For example, only 52% of those who inhabited Latvia at the time it regained its independence in 1991 were ethnic Latvians. See Helsinki Watch, New Citizenship Laws in the Republics of the Former USSR 1 n.1 (1992).
\item \textsuperscript{28} See Wolfgang J. Mommsen, The Varieties of the Nation State in Modern History: Liberal, Imperialism, Fascist and Contemporary Notions of Nation and Nationality, in THE RISE AND DECLINE OF THE NATION STATE 210, 226 (Michael Mann ed., 1990) (concluding that “the age of the nation state is far from over; rather we observe a revival of the national state”).
\item \textsuperscript{29} I will largely omit from consideration in this Section states that were deliberately created or reconfigured at the conclusion of World War I pursuant to the “principle of nationalities.” The discussion in this Section is in large measure a predicate for consideration of that principle and its legitimation in international law and state practice, which reached its apogee in the interwar period. For discussion of the latter, see infra Section III.D.
\item \textsuperscript{30} Lord Acton, Nationality (1862), reprinted in DYNAMICS OF NATIONALISM 5, 6 (Van Nostrand ed., 1964).
\item \textsuperscript{32} See SMITH, supra note 7, at 130.
\item \textsuperscript{33} See id.
\end{enumerate}
\end{footnotesize}
state-building processes, a more typical pattern of that period—perpetual changes in Europe’s political divisions—underscores the historical contingency of states.

By equal measure, the processes that accompanied state-building underscore the historical contingency of Western European nations (however primordial they may seem to their members). Far from being the descendants of ancient nations through an unbroken lineage, modern Western European nations were forged, with no small measure of compulsion, out of disparate peoples. Alfred Cobban described the process as “sometimes a ruthless one, as is seen in the conquest of southern France by the feudal barons of the North. Groups of related or unrelated peoples were welded into political unity during the medieval period by the force of feudal overlords, supported by their baronage.”

The early history of modern states thus reflects a paradigm in which state- and nation-making go hand in hand, rather than one in which preexisting nations constitute the natural units for new states. Still, such factors as the degree of cultural affinity among peoples in a region and the existence of natural geographic boundaries were surely relevant in determining whether an area would emerge and endure as a state.

In Renaissance Europe a spectrum of models for political organization—including city republics, principalities, and empires—still presented alternatives to the state. What, then, accounts for the state’s eventual emergence as the preeminent unit of political organization? And what role has national identity played in the process of state-making? On these questions there are as many views as there are experts, and it is scarcely possible to resolve here the debates among them. Still, there is broad consensus on several points pertinent to this Article.

First, while scholars have offered varying accounts of factors that proved decisive in the emergence and consolidation of states—and in the eventual triumph of the state over competing forms of political organization—influential theorists typically link these developments to broader aspects of modernization. These scholars explain the consolidation of nascent states during and after the Middle Ages as a byproduct of social, military, economic, and/or administrative revolutions that surfaced first in Western Europe. Second, influential

34. ALFRED COBBAN, THE NATION STATE AND NATIONAL SELF DETERMINATION 26 (rev. ed. 1969). During this period, lesser dynasties were “creating” smaller national groups out of disparate peoples. See, e.g., J.B. TREND, A PICTURE OF MODERN SPAIN: MEN & MUSIC 90, 95 (1921) (describing Catalan nation as “above all an historical product... On to the old Iberian stem have been grafted stocks that were Greek, Roman, Goth, Arab and Gaul... There is no Catalan race, in the anthropological sense...”).

35. Further, to the extent that self-determination based on national identity is justified as a corrective to historical processes of conquest and subjugation, see, e.g., LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 3 (1978). Western European history reminds us that this claim is based on assumptions that may benefit from considerable refinement.

36. See COBBAN, supra note 34, at 28.


38. See generally, e.g., GIANFRANCO POGGI, THE DEVELOPMENT OF THE MODERN STATE: A SOCIOLOGICAL INTRODUCTION (1978); SMITH, supra note 7, at 130-34; CHARLES TILLY, COERCION,
theories about the relationship between modernization and the emergence of states typically share the core claim that the forging of a common culture, manifested especially (though not necessarily) in a national language, was crucial to the long-term success of state-making processes.

Ernest Gellner, for example, attributes the development of national identity above all to the imperatives of industrialization. For Gellner, industrial society required social organization on the political scale of the state and a literate and linguistically unified culture within the state. An essential attribute of industrial society is that a government’s legitimacy depends above all on economic growth. That, in turn, requires a capacity for innovation—in particular, for ready reallocation of labor. This level of labor mobility can be assured, Gellner argues, only if there is a common medium for communication—one that is shared across the breadth of the political community (the state). Education in a common language is essential to this aim. To the extent that a common language is a core attribute of common culture, state-making—a modern concomitant of the industrial age—engenders some measure of common culture. The important point is that in Gellner’s view, nations are products of state-making.

"It is not the case," Gellner concludes, "that nationalism imposes homogeneity; it is rather that a homogeneity imposed by objective, inescapable imperative eventually appears on the surface in the form of nationalism." 39

Immanuel Wallerstein similarly emphasizes economic factors in his account of state- and nation-making. With others, he argues that the rise in the late fifteenth century of core states that controlled major economic exchanges within their territories and with others fostered an unprecedented level of economic integration within states, a process that continued over ensuing centuries. In time, state-regulated capitalism accelerated interstate rivalries while heightening interdependence among diverse regions within states. 41

Still others have emphasized the role of conflict between states in fostering national consciousness and in stimulating the development of professional militaries that depend upon the expertise of modern bureaucratic states. 42 Michael Mann, for example, has argued that from the thirteenth century onward warfare increasingly favored the type of specialized, complex, and integrated command structures that only centralized territorial states could produce and sustain. 43

Many influential accounts emphasize the central importance of the birth of administrative vernaculars, a concomitant of the rise of the bureaucratic state from the late fifteenth to the eighteenth centuries, in forging a national identity among disparate peoples. 44 For Benedict Anderson the combined impact of


39. This analysis is elaborated in chapter five of GELLNER, supra note 8, at 53–62.
40. Id. at 39 (citation omitted).
41. See 1 WALLERSTEIN, supra note 38.
42. See SMITH, supra note 7, at 132.
43. See Mann, supra note 38, at 208.
44. See, e.g., SMITH, supra note 7, at 133. Although many writers agree on the importance of a common language to state-building, there is a range of views on the nature of the causal relationship. For
print technology and capitalism, which enabled print media to be reproduced and disseminated on a massive scale, was critical to the construction of national consciousness.\textsuperscript{46} By creating “unified fields of exchange and communication,”\textsuperscript{46} the new print languages of the administrative state enabled citizens to imagine and identify with other readers—fellow citizens—and thereby constitute a political community in a society as vast as the modern state.\textsuperscript{47}

But if national identity was more a result than an engine of state-making in Western Europe before the nineteenth century, it would be wrong to conclude that cultural homogeneity was irrelevant to the success of nascent states in this period. States’ capacity to create a community of political allegiance was crucial to their success as states, and their ability to generate a common culture played a central part in this endeavor.\textsuperscript{48} And so, by the late eighteenth century, states undertook proactive efforts to foster a “committed and politically conscious citizenry” through a “standardized and patriotic culture.”\textsuperscript{49}

It was during this period that nationalism “as we understand it”\textsuperscript{50} today emerged as a political idea—or, more accurately, as a series of political movements in a number of European countries and in the Americas. In revolutionary France and in the United States nationalism worked a radical transformation in prevailing conceptions of sovereignty. The French revolutionaries seized state sovereignty from the monarchy and delivered it to “the people.” In the literature of the time, the nation “was the body of citizens whose collective sovereignty constituted them a state which was their political expression. For, whatever else a nation was, the element of citizenship and mass participation or choice was never absent from it.”\textsuperscript{51}

The nationalism of revolutionary France accepted the state form that it had inherited from the absolute monarchs, but replaced the organizing principle of governance within the state.\textsuperscript{52} Yet the democratic principle of national self-

\begin{itemize}
  \item Alfred Cobban, “the development of political unity naturally stimulated the growth of a common language and culture, and the assimilation of alien cultural elements.” \textit{Cobban, supra} note 34, at 27.
  \item \textit{See Anderson, supra} note 1, at 37.
  \item \textit{Id.} at 44.
  \item In Anderson’s words: “These fellow-readers, to whom [individuals] were connected through print, formed, in their secular, particular, visible invisibility, the embryo of the nationally imagined community.” \textit{Id.} Anderson also reminds us of the historical arbitrariness of the boundaries of modern states: “The potential stretch of these communities was inherently limited, and, at the same time, bore none but the most fortuitous relationship to existing political boundaries (which were, on the whole, the highwater marks of dynastic expansionisms).” \textit{Id.} at 46.
  \item \textit{See Morton A. Kaplan \& Nicholas deB. Katzenbach, The Political Foundations of International Law} 34 (1961) (“The growth of solidary sentiments of loyalty toward the nation gave the nation-state a strength and coherence that other forms of political organization lacked.”): \textit{Smith, supra} note 7, at 136. Still, one should not overdraw the degree of cultural homogeneity actually achieved in such early Western European states as England, France, and Spain. Each of these has significant ethnic minorities, yet each is considered a nation-state by virtue of a core national group whose “cultural-political domination . . . has been so great that it has largely dictated the forms and content of the social institutions and political life of the whole population within the borders of the territorial state.” \textit{Id.} at 139.
  \item \textit{Smith, supra} note 7, at 133–34.
  \item \textit{Kohn, supra} note 14, at 3.
  \item \textit{Hobsbawm, supra} note 8, at 18–19.
  \item Hans Kohn argued that this form of nationalism was “unthinkable before the emergence of the modern state,” which the French nationalists accepted while changing “by animating it with a new feeling of life and with a new religious fervor.” \textit{Kohn, supra} note 14, at 4.
\end{itemize}
determination that emerged in the Age of Revolution meant not only that the nation could choose its government within an established state, but also that it could choose the state to which it would belong. Cobban writes:

The revolutionary theory that a people had the right to form its own constitution and choose its own government for itself easily passed into the claim that it had a right to decide whether to attach itself to one state or another, or constitute an independent state by itself. The effect of revolutionary ideology was to transfer the initiative in state-making from the government to the people. 53

Importantly, then, although the democratic ideals of the French Revolution were not yet recognized as principles of international law, they were seen as having profound implications for peoples' right to determine the boundaries of their political communities.

The latter half of the eighteenth century also saw the emergence of a predominantly cultural nationalism in European political thought, which found fuller expression in the nineteenth-century theories of Italy's Giuseppe Mazzini and the German writers Johann Gottfried von Herder and Johann Gottlieb Fichte. 54 Where French, American, and British nationalism was essentially political, the nationalism that took shape in Germany and Italy had a more cultural orientation, celebrating the Volksgeist as manifested particularly in literature and folklore. 55

While the two manifestations of nationalism emerged as parallel developments, 56 they became entwined (but nonetheless also continued to develop as distinct strands of political thought). 57 New theories of national self-determination held that each cultural nation had the right to constitute an independent state. 58 For liberal nationalists, this view incorporated both the political principles of Enlightenment philosophy and the celebration of national culture of the Romantic movement. 59 Their vision was altruistic; they believed that a world of nation-states would secure both personal freedom within sovereign states and peace and prosperity internationally. 60

53. COBBAN, supra note 34, at 41. As noted below, in the early period of the Revolution, France indeed respected this principle by conducting plebiscites before annexing territories. See infra text accompanying note 131.
54. See Kohn, supra note 14, at 14; Mommsen, supra note 28, at 211.
55. See Kohn, supra note 14, at 4.
56. See COBBAN, supra note 34, at 34.
58. See COBBAN, supra note 34, at 39. As Cobban notes, culturally united states had existed for some centuries before the French Revolution. But where the nation-state had previously been a historical fact, it now became a theory. See id. at 35. But see Mommsen, supra note 28, at 210 ("Long before the French Revolution the idea was born that at least ideally state and nation ought to be identical with one another.").
59. See HAYES, supra note 57, at 160.
60. Despite variations among liberal internationalists, they all assumed that each nationality should be a political unit under an independent constitutional government which would put an end to despotism, aristocracy, and ecclesiastical influence, and assure to every citizen the broadest practicable exercise of personal liberty, political, economic, religious, and educational. They all assumed, moreover, that each liberal national state in serving its true interests and those of its own...
With these developments in political thought, national identity became an engine as well as a product of state-making. Where nation-states "had formerly been built up, in the course of centuries, from above, by the influence of government[,] henceforth they were to be made much more rapidly from below by the will of the people."\(^6\) The "principle of nationality" proved a potent political force, inspiring revolts against the Napoleonic and Habsburg empires and changing the map of Europe from 1830 to 1878. Its notable achievements included the unification of Germany in 1871 and of Italy in 1870; elsewhere, its effects were disintegrative, as in the division of Austria-Hungary into the Dual Monarchy following the Compromise of 1867 and the gradual dismemberment of the Ottoman Empire.\(^6\)

Where Western Europe tended to follow the state-to-nation trajectory described above, genealogical myths of descent loomed more prominently in national movements in Central and Eastern Europe.\(^6\) In some cases, notably that of German nationalism, elements of both ethnic and territorial models of the nation combined in a potent alchemy.\(^6\)

Throughout this period, various strands of nationalist thought managed to reconcile their core principles with the colonial expansionism of the time. Early on, nationalists justified colonial expansions as a means of revitalizing national culture, infusing it with new impetus while extending its benefits to non-European peoples.\(^6\) As the liberal, emancipatory element of nationalism associated with the early nineteenth century gradually yielded to more chauvinistic strands of nationalism,\(^6\) the 1880s saw an unprecedented fusion of nationalism and imperialism.\(^6\) In the age of high imperialism (roughly 1880 to 1918\(^6\)), it became commonplace for Europeans to believe that no nation-state could afford to be without a colonial empire if it were to compete successfully in global power politics.\(^6\)

2. The Global Spread of States and Nationalism

If nations and nationalism were products of discrete historical phenomena originating in Western Europe, once created they became "modular," capable of being transplanted... to a great variety of social terrains, to merge and be merged with a correspondingly wide variety of political and ideological con-

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Id. at 159.

61. COBBAN, supra note 34, at 41.
62. See HOBSBAWM, supra note 8, at 23, 42–43.
63. See KÖHN, supra note 14, ch. 7; SMITH, supra note 7, at 136–38, 140–44.
64. See SMITH, supra note 7, at 141.
65. See MOMMSEN, supra note 28, at 218–19. Some eighteenth-century liberal nationalists, such as Jeremy Bentham, saw colonial rule as antithetical to the basic principles of the nationalism they espoused. See HAYES, supra note 57, at 129–30.
66. See MOMMSEN, supra note 28, at 215.
67. See id. at 217.
68. See id. at 212.
69. See id. at 217–18.
stellations." Much the same could be said of Western-style states, which became the model that other polities, including the Chinese and Mughal Empires, had to emulate if they hoped to survive and retain their territories.\textsuperscript{71}

Both the success and the early appearance of Western nation-states made them a natural model for other regions. Colonial expansions had the ironic effect of universalizing the model—ironic, of course, because colonialism itself placed subjugated peoples under a political arrangement that could not readily be reconciled with the paradigm of civic nations comprising citizens of an independent territorial state. But as colonial powers withdrew, their former subjects were left, it seemed, with no choice but to organize themselves as territorial states\textsuperscript{72}—and in many cases with the daunting prospect of forging nations.

The postcolonial experience of African states in particular is often cited as empirical support for the ideal of nation-states. In this view, the enduring weakness of some African states is due in large measure to the arbitrariness of the postcolonial states' borders. In the standard account, many of these states are beset by "tribalism" because their borders were superimposed by colonial powers without regard for tribal communities, implicitly if not explicitly the natural unit of political solidarity in traditional Africa.\textsuperscript{73} And so, in this view, when colonial powers withdrew, they left in their wake unnatural units comprising disparate tribes brought together in doomed statehood by the fortuitous circumstances of colonial advances.\textsuperscript{74}

And yet Western European nation-states were also products of historical processes, including brutal conquests, that welded disparate peoples into civic nations.\textsuperscript{75} There is, however, a crucial difference: Postcolonial African states had to accomplish the same result—the forging of national identity—in a re-

\textsuperscript{70.} ANDERSON, supra note 1, at 4.
\textsuperscript{71.} See SMITH, supra note 7, at 132.
\textsuperscript{73.} See, e.g., Rupert Emerson, Nation-Building in Africa, in NATION-BUILDING 95 (Karl W. Deutsch & William Foltz eds., 1963); see also Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6, 50–53 (Feb. 3) (separate opinion of Judge Ajibola) (attributing recurring upheavals in Africa to its arbitrary partition in 1885).
\textsuperscript{74.} See MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 160 (6th ed. 1987) ("Colonial boundaries, particularly in Africa, are often unnatural, disregarding tribal divisions and cutting through areas which form a natural economic unit . . . ."); Howard W. French, A Century Later, Letting Africans Draw Their Own Map, N.Y. TIMES, Nov. 23, 1997, § 4, at 5 (observing that it is article of faith among African intellectuals that Europe's partition of Africa is at root of much of continent's instability). Compare these views to those of Bill Berkeley, who, while noting that Uganda's borders exemplified "colonial mapmaking at its most arbitrary," nonetheless disputes the view that "Africa's many tribes are inevitably prone to conflict and bloodshed" and notes that "most, even among Uganda's forty-odd tribes, live side by side in relative harmony." Bill Berkeley, An African Success Story?, ATLANTIC MONTHLY, Sept. 1994, at 22, 24.
\textsuperscript{75.} See supra text accompanying note 34; cf. WILLIAM PFAFF, THE WRATH OF NATIONS: CIVILIZATION AND THE FURIES OF NATIONALISM 19 (1993) ("The original nations were created by dynastic hazard, and had no unitary ethnic base.").
markably short time. Where the French and English nations had emerged across centuries, the rapid collapse of colonialism spawned new countries, many of whose citizens shared scant history as solidary nations, virtually overnight. Thus, the debility of some African states may have less to do with their ethnic diversity than with the comparative weakness of their civic culture and their dearth of nation-building experience.

In many contemporary accounts of nationalism, it is asserted that, to endure as effective states, postcolonial societies must find shortcuts to the historical processes that enabled citizens of such multiethnic states as Switzerland to forge a solidary national identity. Writing of recently decolonized states, Anthony D. Smith puts the case starkly:

> If the nation is to become a 'political community' on the Western territorial and civic model, it must, paradoxically, seek to create those myths of descent, those historical memories and that common culture which form the missing elements of their ethnic make-up, along with a mutual solidarity. It must differentiate itself from its closest neighbours, distinguish its culture from theirs, and emphasize the historic kinship of its constituent ethnie and their common ties of ideological affinity. This is done by creating or elaborating an 'ideological' myth of origins and descent.

Whether or not such myths are necessary to foster loyalty to the state, it is surely true that nascent states will remain weak if their citizens do not develop a sentimental loyalty to the state—a civic religion. Ethnic diversity within a young state may have some bearing on the success of this process. Without a common language, both literally and figuratively, it may be difficult for disparate peoples to imagine themselves as a national community. Too great a di-

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76. In contrast to the experience of some African countries, many Latin American countries seemed to adapt well to the borders established by virtue of their colonial heritage. Benedict Anderson notes that "[t]he original shaping of the American administrative units was to some extent arbitrary and fortuitous, marking the spatial limits of particular military conquests." ANDERSON, supra note 1, at 52. Nonetheless, over time these units acquired "a firmer reality under the influence of geographic, political and economic factors." Id. For example, Madrid divided these administrative units into separate economic zones. Further, in the pre-industrial age communications and travel between these units was immeasurably difficult, reinforcing each unit's self-contained nature. See id. at 52–53.

77. Rupert Emerson makes the latter point succinctly: "The prime condition for the building of nations is that they have an opportunity to age in the wood, and it is precisely this which the African peoples have been denied." Emerson, supra note 73, at 104. Equally important, African peoples had had little opportunity to develop the habits of a self-governing political community before they attained independence. In this respect the experience of postcolonial Africa bore some resemblance to that of countries that emerged from the gradual dismemberment of the Ottoman Empire, whose transition to statehood was more troubled than that of the older states of Western Europe. Writing of East Central Europe, Wolfgang Mommsen could just as easily have been describing postcolonial Africa: "Here existed little of a political tradition on which the new national movements could build; moreover, there existed a great diversity of ethnic, cultural and economic conditions." Mommsen, supra note 28, at 214.

78. SMIRH, supra note 7, at 146. Citing the case of Nigeria, Smith asserts: "Quite simply, Nigeria will have to invent ethnic ties and sentiments, perhaps by rewriting ethnic histories and conflating ethnic cultures, if the state is to form a nation out of itself." Id.

79. On the function of nationalism in developing a political community committed to the modern state, see Kupchan, supra note 14, at 2-4.

80. This poses an acute dilemma for many postcolonial countries, whose only "national" language is that of their former colonial masters. During the decolonization period some African nationalists argued that the use of colonial languages hampered the development of an African national identity, but in seeking to replace the colonial language with an indigenous official language, leaders of multilingual countries like Nigeria faced the "thorny issue of which local dialect one chooses." Kenneth
vergence between sentimental loyalty to one’s ethnic community and civic loyalty to the state may be conducive to ethnic conflict.

Still, it is not plain that a high level of ethnic diversity within a state is in itself problematic—a widely held assumption among writers on nationalism, evident in both academic publications and the popular media. While such diversity obviously presents conditions in which interethnic conflict may develop, it is scarcely inevitable that such conflict will erupt, as the essential stability of scores of multiethnic states attests. Instead, intergroup conflict in post-colonial Africa, as in other multiethnic countries beset by conflict, is usually proximately caused by the actions of political leaders who have deliberately fostered and exacerbated intergroup tensions.

Indeed, to the extent that blame for “tribalism” in Africa can be laid at the doorstep of former colonial powers, their fault may have less to do with their legacy of “artificial borders” that cage into shared citizenship inherently unsuitable compatriots than with patterns of colonial administration that heightened Africans’ awareness of their ethnic identity and fostered interethnic rivalry. Similarly, postcolonial ethnic conflicts in Africa, as elsewhere, can often be better explained as a product of elite manipulation than as the inevitable boiling over of long-simmering “ancient hatreds.” In short, the ethnic conflict associated with many African countries owes more to the general weakness of those

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81. See, e.g., Smith, supra note 7, at 147. More generally, to the extent that Gellner, Anderson, and others ascribe to common language a central role in the construction of national identity, they of course presume that some degree of cultural homogeneity is generally essential to the consolidation of modern states.

82. See, e.g., Henry Kissinger, Toward a Moment of Truth in Bosnia, Wash. Post, June 11, 1995, at C7 (implying that, in recognizing state of Bosnia and Herzegovina, U.S. policy was misguided in part because Bosnia’s multiethnic composition was antithetical to successful statehood and deprived it of key attribute of “historical European nation states”).

83. Cf. Michael E. Brown, Causes and Implications of Ethnic Conflict, in Ethnic Conflict and International Security 6 (Michael E. Brown ed., 1993) (“The first and most obvious systemic prerequisite for ethnic conflict is that two or more ethnic groups must reside in close proximity.”).


states' institutional structures and civic culture—doubtless a legacy of colonialism—than to the states' multiethnicty.

3. Diversity and Democracy

A related and important factor contributing to ethnic conflict in postcolonial African and other states has to do with the political context in which they gained independence. The world in which decolonization took place was one in which popular sovereignty had long been established as a legitimating principle of government. While multiparty democracy has come slowly to many African states, most emerged from colonialism with some form of popular enfranchisement. Faced with the challenge of marshalling public support to consolidate fragile new governments, postcolonial leaders in ethically diverse countries have had powerful incentives to play the ethnic card—a perennially potent resource for political mobilization.

In this respect, nation-building in the postcolonial world was disadvantageous vis-à-vis older Western states:

A crucial difference between the nation-building of Western Europe and that of Africa and much of Asia was that the processes in Europe occurred well before the rise of popular demands for democratic rights: Nations already existed as relatively cohesive citizenries. In postcolonial Asia and Africa, on the other hand, nation-building was the first task on the agenda of newly independent colonies, which were suddenly endowed with the full panoply of democratic institutions. . . . [D]emocratization and nation-building were to prove antithetical in circumstances of ethnic diversity.

Ironically, then, the combined impact of two developments—the flowering of popular sovereignty and the emancipation of colonial territories—often proved to be a toxic brew.

86. Cf. Henry J. Steiner, Political Participation as a Human Right, 1 HARV. HUM. RTS. Y.B. 77, 97 (1988) ("All regimes, including over time the most repressive, permit or encourage or even require some institutionalized modes of political participation.").

87. African leaders have at times justified single-party government on the ground that multiparty democracy would prove divisive in multiethnic countries with weak democratic traditions. See, e.g., Donatella Lorch, Rebels Without a Cause Terrorize Uganda's Poor, N.Y. TIMES, June 21, 1995, at A3 (noting that President Yoweri Museveni has resisted international pressure to promote multiparty democracy, claiming that this would aggravate tribal divisions). Although these claims have often been regarded as a pretext for consolidating personal rule, there is respectable support for the view that at least some exercises in multiparty democracy can aggravate intergroup tensions in these situations since politicians might be tempted to play the proverbial ethnic card for short-term political gain. Cf. Donald L. Horowitz, Making Moderation Pay: The Comparative Politics of Ethnic Conflict Management, in CONFLICT AND PEACEMAKING IN MULTIETHNIC SOCIETIES 451, 456–71 (Joseph V. Montville ed., 1991) (arguing that multiparty system in Sri Lanka developed in way that tended to encourage appeals to ethnic sentiment); Berkeley, supra note 74, at 24, 28 (quoting view of Ugandan President Yoweri Museveni that multiparty democracy is dangerous in Africa, where political parties reflect ethnic divisions, and noting that most political leaders who support "multipartyism" in Uganda are "bent on reclaiming power by aggravating ethnic divisions"); Kenneth B. Noble, Democracy Brings Turmoil in Congo, N.Y. TIMES, Jan. 31, 1994, at A3 (quoting view of government official that democratic elections in Congo "unleashed a Pandora's box of tribal hatreds that may take generations to heal").

88. David Welsh, Domestic Politics and Ethnic Conflict, in ETHNIC CONFLICT AND INTERNATIONAL SECURITY 43, 44 (Michael E. Brown ed., 1993); cf. HOBBS, supra note 8, at 43 (noting that political systems of Western nation-states in latter half of nineteenth century "still benefited from the absence of electoral democracy").
The resurgence of ethno-national assertion in Central and Eastern Europe following the collapse of communism presents a more contemporary analogue. As democracy overwhelmed communism in the Balkans and the Soviet Union, some political elites—notably Slobodan Milosevic in Serbia, Franjo Tudjman in Croatia, and Vladimir Zhirinovsky in Russia—found national appeals to be a powerful springboard for political ascendance. The ideological vacuum created by communism's rapid collapse provided the political space in which ethnic mobilization could inflate to dangerous proportions.

Yet it would be a mistake to conclude that democracy and ethnic diversity are fundamentally antithetical; distinguished theorists believe, on the contrary, that ethnic diversity provides the essential matrix for enlightened self-government. More to the point, the prolonged absence of liberal democratic institutions in colonial territories, as in Soviet-bloc countries, may have been a crucial factor in the eventual explosion of ethnic violence in postcolonial Africa and post-Soviet Eastern Europe. Bill Berkeley, an astute chronicler of ethnic conflict in Africa, notes that Uganda's recent history of conflict is due less to its ethnic divisions—the country comprises some forty ethnic groups—than to the country's "feeble institutions of law and civil society, which left the country especially vulnerable to the idiosyncratic personalities of its leaders." Others have observed that the introduction of democracy in divided societies that lack a tradition of constitutional liberalism tends to correlate with a surge in ethnic conflict. What is dangerous, then, is not the dawning of democracy in itself, but its rapid onset in a racially diverse polity lacking a tradition of constitutional liberalism. The very fragility of political institutions and civic culture makes resort to ethno-politics more likely—and more perilous.

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89. See Charles A. Kupchan, Conclusion to NATIONALISM AND NATIONALITIES IN THE NEW EUROPE, supra note 14, at 180.

90. See infra text accompanying notes 306-308, 318-326 (summarizing claims to effect that configuration of states along ethno-national lines subverts justifying aims of democratic government); cf. Fareed Zakaria, The Rise of Illiberal Democracy, FOREIGN AFF., Nov.-Dec. 1997, at 22, 33 ("India's semi-liberal democracy has survived because of, not despite, its strong regions and varied languages, cultures, and even castes."). But see infra text accompanying notes 295-319 (summarizing arguments to effect that too much diversity might be antithetical to democratic government).

91. Berkeley, supra note 74, at 25-26. Tom Gjelten similarly attributes the explosion of ethnic violence in the former Yugoslavia in part to the suppression of the civic culture of democracy during the 35-year rule of Marshal Tito: "[B]y blocking the free work of democratic institutions, Tito inhibited the growth of the civic culture Yugoslavia needed if its people were to begin thinking of themselves as citizens and not as members of rival national groups." GJELTEN, supra note 84, at 40; see also MICHAEL IGNATIEFF, BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM 24-25 (1993) (asserting that by failing to allow plural political culture to mature, Tito ensured collapse of state structure following his death; ethnic differences erupted in nationalist hatred when political elites in post-Tito 1980s manipulated nationalist emotions); Aleksa Djilas, Fear Thy Neighbor: The Breakup of Yugoslavia, in NATIONALISM AND NATIONALITIES IN THE NEW EUROPE, supra note 14, at 85, 85 (stating that communist regime established in Yugoslavia in 1945 "failed to erect the political institutions and to nurture the civic culture needed to overcome historic tensions" and its collapse therefore led to revival of nationalist rivalries); Kupchan, supra note 14, at 11-12 (offering explanations for propensity of nondemocratic states to produce aggressive strains of nationalism).

92. See, e.g., Zakaria, supra note 90, at 35, 37. Constitutional liberalism refers to the tradition that emphasizes protection of individual autonomy and dignity against coercion, relying above all on the rule of law. See id. at 26.

93. There is, finally, an irony in postcolonial Africa's experience, which highlights the distinction between an objective and subjective principle of self-determination. Implicit in some critiques of
4. Nation-States as a Historical Phenomenon: Preliminary Conclusions

These points go some way toward answering the first question posed at the outset of this Section: Does the history of state-making support the claim that nations are a natural—perhaps the ideal—unit for successful states? The first point to be made here is that the historical experiences of state-making range across a broad canvas, making any generalizations problematic. Still, some modest conclusions are possible. First, some measure of national identity—typically centered around the culture of a dominant group—helps assure the success of states, and historically the most stable states have been ones in which the predominant model of national identity is civic rather than ethnic. Perhaps ironically, the most enduring civic nations emerged from an early history in which disparate peoples were welded together, often through brute force, by medieval overlords. Despite this seemingly inauspicious genesis, the older civic nations of Western Europe benefited from a protracted period of nation-building. When, eventually, their states became democratic, these nations had developed felicitous conditions for successful self-government—a strong civic identity and stable institutional life together.

The absence of both a long tradition of shared statehood—surely conducive if not indispensable to civic nationalism—and of liberal democratic institutions has, in contrast, predisposed many postcolonial countries to ethnic tension. Here, the principal reason for these countries’ comparative instability is not ethnic diversity per se, but the relative debility of government institutions and civic culture. But these conditions need not doom a new state. While political leaders are more likely to resort to ethnic mobilization in these circumstances, enlightened government policies can avert ethnic conflict.

Still, there may be times when ethnic divisions have so rent a state polity that separation may be inevitable, or at any rate may present the best alternative to a conflictive arrangement. Even in situations that fall short of unremitting hostility, some separatist claims can be honored without risking untoward re-

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Africa’s boundaries is the claim that they configure states that are patently inconsistent with an “objective” principle of self-determination, pursuant to which political frontiers should be drawn along national lines. But it was African political leaders who elected to maintain the colonial administrative boundaries as the international frontiers of newly independent states, just as Latin American countries had done in their earlier wave of decolonization. See infra text accompanying note 231. In this respect, the configuration of many postcolonial African states results from an exercise of “subjective” self-determination.

94. See Kupchan, supra note 14, at 4–5.

95. Donald Horowitz has demonstrated the significance of institutional arrangements in either aggravating or averting ethnic conflict by comparing political institutions and levels of conflict in two multiethnic countries, Sri Lanka and Malaysia. Although at the time each achieved independence Malaysia seemed more likely than Sri Lanka to be destined for ethnic conflict, the opposite has proven true. Horowitz attributes the two countries’ disparate experiences in large part to Malaysia’s enlightened political arrangements, which created incentives for ethnic accommodation, and to Sri Lankan political arrangements that heightened appeals to ethnic outbidding. See Horowitz, supra note 87, at 660–71, 683–84; see also Arend Lijphart, The Power-Sharing Approach, in CONFLICT AND PEACEMAKING IN MULTIETHNIC SOCIETIES, supra note 87, at 491, 494–508 (advocating power-sharing approach as means of accommodating ethnic groups within state and averting partition or secession); David Wippman, Practical and Legal Constraints on Internal Power Sharing, in ETHNIC IDENTITY AND INTERNATIONAL LAW (David Wippman ed., forthcoming 1998) (manuscript at 211, on file with the Yale Journal of International Law) (arguing that ethnic power-sharing arrangements can ease ethnic tension).
International Responses to Ethno-Separatist Claims

Throughout history states have been reconfigured periodically, often when national assertion becomes, proverbially, an irresistible force, as happened in the waning period of the First World War. Even in the turbulent Balkans, Slovenia's separation from the former Yugoslavia has produced a stable and economically viable state. But if such divisions are at times unproblematic, nothing in the history of state-making suggests that a nation-to-state trajectory has been or should become the norm.

Returning to the second question posed in this Section, to what extent have self-determination-based claims of national groups been validated? Setting aside for now the interwar period, which is examined in Part III, the important point that emerges from the foregoing account is that during periods when the ideal of popular sovereignty became a force in political life, that principle was widely seen to have profound implications for the demarcation of state frontiers and not simply for the organization of political life within a state. This insight, as I will elaborate in Part IV, has significant implications for contemporary separatist claims. For today, international law has stamped its imprimatur on the democratic ideals that inspired the Age of Revolution.

III. THE NATION-STATE IN INTERNATIONAL LAW

While nationalism had a profound influence in political discourse and on the cartography of Europe during the nineteenth and early twentieth centuries, its principles registered only at the margins of international legal doctrine until the interwar period. More particularly, issues of national identity remained largely—though not wholly—irrelevant to determinations of statehood under international law until 1919, when the “principle of national self-determination” became the touchstone for peacemakers at Versailles.

Pursuant to that principle, the boundaries of new and reconfigured states in Central and Eastern Europe would, to the extent possible, be drawn along national lines, and in that respect the predominantly ethnic strand of nineteenth-century nationalism seemed finally to have triumphed in the peace of Versailles. Further, to the extent that this application of an “objective” principle of self-determination necessarily relies upon groups’ subjective identification of themselves as nations, the vindication of national claims entailed an element of “subjective” self-determination as well. Finally, by resolving that the fate of some territories would be determined by plebiscite, the Versailles peacemakers

96. Robert Dahl reminds us that “Europe consists of people who have been constituted by divisions and separations,” ROBERT A. DAHL, AFTER THE REVOLUTION? 47 (rev. ed. 1990), and these divisions have produced states that are generally regarded as models of stability. The Scandinavian countries are a case in point. Sweden was once part of Denmark; Norway part of Sweden; and Finland part of Sweden and then Russia. In Asia, the mutually consensual separation of Singapore from Malaysia stands as another example of successful division.


98. The interwar period may provide a limited exception to the observation that the nation-to-state trajectory has not played a normative role in state-making. See infra text accompanying notes 164–170.
explicitly affirmed the strand of self-determination that emphasized popular sovereignty.

But if statesmen were willing to apply the principle of self-determination to the territories they configured at Versailles, states were not yet prepared to recognize self-determination as a legal right. That would have to wait until after the next world war. And when international law finally recognized a right of self-determination, that same law drained the concept of the rich meaning it had borne at Versailles. With its elevation to the status of legal entitlement, self-determination acquired a new and inherently finite meaning: Colonial territories had a right to independence.

Yet however limited their reach, these applications of the principle of self-determination illuminated its complexity and potentially transformative power. In particular, the interwar experience highlighted the inextricable and complex relationship between national identity and the exercise of popular sovereignty.

A. The (Virtual) Irrelevance of Nations in International Law Before 1919

Although in some respects prefigured by earlier developments, the principle of national self-determination applied at Versailles represented a radical departure in international law. Before 1919, if international law enforced any conception of self-determination, it meant one thing: Established states had a right to be left alone by other states. This principle was the very linchpin of international law from its inception, and it could not have been otherwise. For that law arose, with the advent of sovereign states, as a means of regulating relations among them. States—self-regarding sovereign entities—were scarcely likely to establish a regulatory system that would compromise their own independence.

Patterns of political behavior that prevailed in the eighteenth and nineteenth centuries further buttressed international law’s insistence on states’ right to independence. The balance of power system that structured international relations in that period required flexibility of alignment among states. In a world where relationships among states were essentially competitive and pragmatic, states needed to be able to shift readily from one alliance to another when this seemed likely to enhance their security. In this setting, one state’s control of another would impair the flexibility of alignment that undergirded the security of all states.


100. In a similar vein, Kaplan and Katzenbach have written: The state was the exclusive actor or subject of international law simply because there could not be any enforceable law norms save those enforced by states within their own territory or forcibly imposed upon one state by others acting alone or in conjunction. This was so primarily because national governments claimed a monopoly of law enforcement institutions within their territories and were prepared to resist forcibly any institutional arrangement that weakened that authority.

KAPLAN & KATZENBACH, supra note 48, at 88.

101. See id. at 32.

102. See id. at 36.
It was during this period that the statist orientation of international law reached its zenith. A "fortress-like conception of state sovereignty" formed the basic pillar of international law. This conception of sovereignty was above all concerned with established states' right to determine their destiny within their territorial borders unimpeded by other states. This noninterference paradigm of sovereignty served to prevent international law from concerning itself with individuals' right to shape their government within an existing state; much less did it support any people's right to secede from an established state. Accordingly, while international law assured the independence of states—itself a key dimension of self-determination—that right vested only after states already had achieved independence.

Far from legitimizing national aspirations to statehood, international law refused even to address such claims until they had succeeded. In contrast to the relatively elaborate rules regulating transfer of territorial sovereignty between established states, when it came to changes in territory occasioned by the emergence of a new state, international law was essentially indifferent to the mode by which sovereignty was established.

While this dichotomy may seem anomalous, it can readily be explained in terms of the statist orientation of eighteenth-nineteenth-century international law. International law's extensive regulation of transfers of territorial sovereignty served to protect established states' interests, and in that respect was fully consistent with the prevailing fortress-like conception of state sovereignty. That same conception of sovereignty also meant that international law would allow governments virtually unfettered sway over matters of governance within their territory. These included questions relating to secession, a process deemed

104. This approach was exemplified in publicists' approach to questions of recognition. Writing in 1758, for example, Vattel advocated a de facto control test. See 4 EMER DE VATTEL, THE LAW OF NATIONS ch. V, § 68 (Charles G. Fenwick trans., Legal Classics Library 1993) (1758).
105. While postwar law recognizing a right to self-determination, which I address in Section III.E, infra, has established an important exception, it is still the general rule that entities are entitled to statehood by virtue of acquiring its attributes. The prevailing view in contemporary international law is that statehood is a function of objective conditions, and established states must treat an entity that possesses these qualities as a state regardless of whether they formally recognize it as such. See RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 202(1) (1987). In the words of the Restatement, "a state is an entity that has a defined territory and permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." Id. § 201. The Restatement follows the widely accepted definition set forth in the Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, art. I, 49 Stat. 3097, 3100, 165 L.N.T.S. 19, 25.
106. This approach remained characteristic of international law well into the twentieth century. See R.Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 8 (1963). The common assertion that international law generally has failed to regulate transfers of territory occasioned by the emergence of a new state is in some respects misleading. As Akehurst points out, international rules governing territorial sovereignty derived from Roman law produce a "distorted view of modern international law" because they "presuppose[] that transfers of territory take place between already existing states," whereas today the "most frequent form of transfer of territory has occurred when a colony has become independent; since territory is an essential ingredient of statehood, the birth of the state and the transfer of territory are inseparable—a state IS its territory." AKEHURST, supra note 74, at 143-44.
a domestic matter beyond the province of international regulation. Once a separatist movement succeeded in achieving effective independence, the international community would recognize the established facts of statehood, but would not intercede earlier to help secure them.

Was, then, prevailing doctrine impervious to the broader temper of nineteenth-century nationalism? Not entirely. In some respects, European nationalism in fact may have intensified the statist orientation of international doctrine. Gregory Fox writes:

States in the nineteenth century, caught increasingly in the throes of aggressive nationalism, saw their domestic political institutions as essential components of a unique national culture. In order to protect these institutions from external pressures, the dominant states of Europe shaped an international law that carved out an exclusive sphere of domestic jurisdiction.

In this respect, then, the statist version of self-determination—the right of established states to be left alone by other states—reinforced and gave legal expression to nineteenth-century ethno-nationalism.

But in other more consequential respects, international law seemed tone-deaf to the nationalism that swept nineteenth-century Europe, notwithstanding challenges to the statist vision of international law presented by advocates of liberal nationalism. Nowhere was the contrast between ethno-nationalism and international legal doctrine more starkly evident than in the 1815 settlement of the Napoleonic Wars. However offended nationalist sensibilities may have been by the Congress of Vienna, the Allied powers were unencumbered by any international legal principle when they redrew European borders in disregard of nationality (by, for example, distributing German-speaking territories among numerous kings). Beyond this, nations simply had no juridical existence in international law. As one nineteenth-century writer concluded, "Without a State, no nation."

Yet in larger perspective, evolving conceptions of the relationship between states and citizens during the eighteenth and nineteenth centuries worked subterranean transformations in international legal doctrine, prefiguring Versailles's endorsement of national self-determination. To understand that process, it is necessary to examine how, over the centuries, international law has regulated changes in territorial sovereignty.

B. The Private Property Model of State Sovereignty

The prototype for political organization during the medieval period, when the foundations for both modern states and international law began to take shape, had a lasting impact on the rules governing the establishment of territorial sovereignty. Feudal law, the public law of the time, assimilated sovereignty

108. Fox, supra note 103, at 545.
109. See Berman, supra note 5, at 1800–01 (asserting that interwar writers viewed nineteenth century as source not only of statist positivism, but also of rival vision of liberal nationalism).
110. Id. at 1801 n.35 (quoting Johann C. Bluntschli).
to a form of title to property held by the ruling king.\textsuperscript{111} Territory, the crucible of sovereignty, was something that a sovereign could transfer or acquire,\textsuperscript{112} much as private property owners transferred parcels of land among themselves.

Derived from Roman law, principles of international law governing territorial sovereignty embodied medieval, feudal notions that "confound[ed] in a common haze the right of the lord to rule in his manor and the right of our sovereign lord the king to rule in his kingdom."\textsuperscript{113} The trend toward absolutism in the sixteenth and seventeenth centuries reinforced the private property approach to territorial sovereignty; treaties ceding territory in that period resembled instruments effecting the sale of land between private owners.\textsuperscript{114} Along with the territory went its inhabitants, whose citizenship was transferred much as though it were an appurtenance to bartered land.\textsuperscript{115}

The power of monarchs to transfer a population with the territory they inhabited was of course utterly inimical to both subjective and objective dimensions of self-determination. As to the former, it meant that the affected population could acquire a new sovereign without its consent;\textsuperscript{116} as to the latter, the national identity of the transferred population was simply irrelevant to the determination of its political allegiance and the configuration of the state to which it belonged. Although eighteenth- and nineteenth-century developments abraded somewhat the private ownership model of sovereignty, the basic paradigm endured.\textsuperscript{117}

Throughout the centuries there were, however, alternative visions of the relationship between sovereignty and territory, and these had some impact on state practice while also laying the groundwork for later developments in international legal doctrine. As early as the thirteenth century, the power of kings to alienate sovereignty, including territory, was limited by what came to be seen as a "principle of state" in fourteenth-century France and England.\textsuperscript{118} The prin-

\begin{itemize}
  \item \textsuperscript{111} See Brownlie, supra note 107, at 128; Jennings, supra note 106, at 3.
  \item \textsuperscript{112} Cf. Akehurst, supra note 74, at 143 ("[T]he right of a state to transfer its territory to another state . . . is often regarded as the acid test of sovereignty over territory . . . ").
  \item \textsuperscript{113} 1 John Westlake, International Law: Peace 86–87 (1904), quoted in Jennings, supra note 106, at 3; see also Henry Sumner Maine, International Law 55 (Richard M. Pious ed., Dabor Social Science Publications, 1978) (1888) (noting that sixteenth–seventeenth-century jurists derived their view of sovereignty from Roman law and regarded "the civilised world as a space of soil divided between a number of Roman proprietors").
  \item \textsuperscript{114} See Brownlie, supra note 107, at 131; see also Akehurst, supra note 74, at 143 (noting that sixteenth–seventeenth-century theories of absolute monarchy regarded state's territory as "private estate" of prince).
  \item \textsuperscript{115} Although not compelled by international law, the basic rule was that inhabitants of the transferred territory automatically lost their prior citizenship and became citizens of the acquiring state. See Berman, supra note 5, at 1829; Diane F. Orentlicher, Citizenship and National Identity, in Ethnic Identity and International Law, supra note 95 (manuscript at 296, 313–14, on file with the Yale Journal of International Law).
  \item \textsuperscript{116} Cf. John Locke, Two Treatises of Government 427–28 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690) (writing that governments are dissolved when sovereign delivers "the People into the subjection of a Foreign Power" because this necessarily entails change of legislature, and therefore vitiates very purpose for which people enter into society—to govern themselves by their own laws).
  \item \textsuperscript{117} Notably, contemporary writers on international law still use the terms "territorial sovereignty" and "title" interchangeably. See, e.g., Brownlie, supra note 107, at 132.
  \item \textsuperscript{118} See Theodor Meron, The Authority to Make Treaties in the Late Middle Ages, 89 Am. J. Int'l L. 1, 3 (1995).
\end{itemize}
Principle of inalienability of sovereignty meant that kings and princes could not transfer public territory without some form of community assent, typically obtained through a representative institution like the assemblies of Estates in France or the Parliament in England.\(^\text{119}\)

Limitations on monarchs' power to cede territory without the consent of the local population also had influential proponents in sixteenth- and seventeenth-century publicists. Gentili believed that princes' power to alienate property was inherently limited by natural law. A ruler exercised power "not for purposes of tyranny, but of administration. And one who has free administrative power does not have the right to transfer it to others."\(^\text{120}\) For Gentili, the point was clear: People conferred sovereignty and power on princes "in order that they might be governed like men, not sold like cattle."\(^\text{121}\) Grotius and Pufendorf similarly believed that kings should transfer a territory only with the consent of its inhabitants.\(^\text{122}\)

In practice, however, kings frequently alienated territories throughout the sixteenth-eighteenth centuries\(^\text{123}\) without any meaningful concession to these publicists' views other than granting a right of option: Some treaties of cession\(^\text{124}\) contained clauses providing that inhabitants of ceded territory could choose between the two allegiances within a specified time.\(^\text{125}\) If, however, they chose to remain subjects of their former sovereign, they had to move out of the ceded territory and into the remaining territory of the ceding state.\(^\text{126}\) Even this limited right was viewed as an exception to the general rule of automatic denationalization\(^\text{127}\) and in any event could be exercised only on an individual, and not a collective, basis.

This limited qualification aside, the basic rule in international law remained what it had long been: Kings could extend their sovereignty over all inhabitants of conquered or ceded territory without regard to the people's preferences.\(^\text{128}\) Eighteenth-century sensibilities might have been offended by Genoa's sale of Corsica to the French, but this had scant impact on prevailing legal doctrine. Edmund Burke protested, "Thus, was a nation disposed of without its

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119. See id. at 2-6.
120. 3 ALBERICO GENTILI, DE IURE BELLII LIBRI TRES 372 (John C. Rolfe trans., Clarendon Press 1933) (1598).
121. Id. at 371.
123. The American historian Carlton Hayes wrote of this period: "European peoples were bartered from one reigning family to another like so many cattle, sometimes as a marriage dowry, sometimes as the booty of conquest." HAYES, supra note 57, at 8.
124. Cession is the voluntary, intentional transfer of territorial sovereignty by one state to another and is typically accomplished through treaty. See Cession of Territory (Reparation Comm’n v. German Gov’t), 1924 P.C.I.J. (ser. B) No. 199 (Sept. 3), reprinted in ANNUAL DIGEST OF INTERNATIONAL LAW CASES, 1923-24, at 344 (John Fischer Williams & H. Lauterpacht eds., 1933); JENNINGS, supra note 106, at 16.
125. See SARAH WAMBAUGH, A MONOGRAPH ON PLEBISCITES 4 (1920).
126. See id. An option clause appeared in a treaty of cession as early as 1697. See id. at 4 n.4.
127. See Berman, supra note 5, at 1829.
128. See WAMBAUGH, supra note 125, at 4.
consent, like the trees on an estate.\textsuperscript{129} Rousseau sounded the same theme: "It is making fools of people," he wrote, "to tell them seriously that one can at one's pleasure transfer peoples from master to master, like herds of cattle, without consulting their interests or their wishes."\textsuperscript{130} However offensive, such transfers were not prohibited by international law.

Still, the eighteenth and nineteenth centuries saw significant intimations of Versailles's effort to accommodate national aspirations. In the first years of the revolution France committed itself to ascertaining the popular will of local inhabitants before annexing their territory. The classic rules of international law that enabled monarchs to transfer territory without regard to popular sentiment were thought incompatible with revolutionary conceptions of popular sovereignty. Plebiscites preceded the annexation of half a dozen regions between 1791 and 1798.\textsuperscript{131} The fairness of these plebiscites became increasingly doubtful, however, and the Napoleonic era saw the abandonment of France's formal commitment to the principle of self-determination.

Though the violent turn of the French Revolution left Europe leery of the principles of self-determination initially espoused by the revolutionaries, plebiscites enjoyed a resurgence in popularity in the mid-nineteenth century. In 1848 plebiscites played a central role in effecting the eventual union of Italy and in resolving the status of Schleswig-Holstein. From 1855 to 1866, popular consultation frequently figured in the settlement of territorial disputes in Europe. Notably, an international congress, meeting in Paris in 1856 to negotiate a treaty ending the Crimean War, decided that plebiscites overseen by the great powers would determine the fate of the principalities of Moldavia and Wallachia, resulting in their union with Romania in 1859.\textsuperscript{132} This marked the first time that great powers resolved the fate of small, weak states based on the will of the affected peoples as expressed through an internationally supervised vote.\textsuperscript{133}

Further, a number of national revolts in the nineteenth century received the support of major powers. When, for example, Belgium declared its independence from Holland, major states jointly recognized Belgium's independence in 1832 despite Holland's continuing claim to the territory.\textsuperscript{134} Similarly, Western powers supported the Greek revolt against the Ottoman Empire and recognized Greece in 1827. Half a century later, the Congress of Berlin established the independence of Romania, Serbia, and Montenegro from Ottoman rule.\textsuperscript{135}

But in supporting these national movements, the major powers did not believe they were validating a general principle that nationality carries a presump-
tive entitlement to statehood. Instead, each of these settlements was seen as serving the interests of the great powers in the prevailing balance of power system. This was, in essence, great power power-brokering, not the flowering of self-determination as a principle. Still, nationality was not irrelevant to great power calculations. The above-noted arrangements followed national lines to the extent that this was thought to assure increased order and resistance to outside interference. In this respect the impact of nationality on the international community's acceptance of new states was incidental but important; at least in some instances, great powers reckoned that recognition of new nation-states would enhance international order. Yet national liberation was a byproduct of war, not the result of international efforts to apply an accepted principle—much less an established right—of national self-determination.

C. Dependent Territories

A full-blown principle of national self-determination would in fact have been anathema to the major European powers, which retained extensive colonial holdings well into the twentieth century. And so they reconciled their insistence on the principle of noninterference by one state in the affairs of another with their colonial incursions in Africa, Asia, and Latin America by contriving into international law such categories as "dependent" territories.

Although classical international law had not discriminated on grounds of race or continent, nineteenth-century positivism introduced a distinction between "civilized nations"—principally the same European powers that created and shaped international law—and others. Importantly, international law bound and protected only the former. This doctrinal move conveniently advanced Europe's acquisition of sovereignty over African territory.

While European states acquired sovereignty over some colonial territories through occupation of what was characterized as terra nullius and over other areas through conquest, in most cases transfers of sovereignty from African

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136. See id.
137. See id.
138. See COBBAN, supra note 34, at 49.
139. See KAPLAN & KATZENBACH, supra note 48, at 37. For a general discussion of dependent states, see JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 186–208 (1979).
141. See CRAWFORD, supra note 139, at 13–14.
142. Terra nullius refers to territory that was unoccupied and had not been acquired by another state. A state could establish sovereignty over terra nullius merely by effectively occupying it. See Western Sahara, 1975 I.C.J. 12, 39 (Jan. 1); CRAWFORD, supra note 139, at 173–74. Ian Brownlie writes that this doctrine was at times invoked with respect to territory that was inhabited by organized communities. See BROWNLE, supra note 107, at 128. Still, the characterization of territory as terra nullius was often successfully challenged. See, e.g., Western Sahara, 1975 I.C.J. at 39–40 (finding that "at the time of colonization [by Spain] Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them," and concluding that Western Sahara therefore was not then terra nullius). Crawford notes that only Australia and the South Island of New Zealand were found to meet the strict requirements of terra nullius. See CRAWFORD, supra note 139, at 180.
143. Later known as "subjugation," see JENNINGS, supra note 106, at 7, this mode of acquisition is no longer valid. See BROWNLE, supra note 107, at 128.
to European governments were formally effected by bilateral treaties, including treaties of cession and treaties establishing protectorates. Such treaties implicitly recognized that the African rulers who signed them possessed the attributes of sovereignty being transferred, while the treaty form implied a legal equality between the two signatories. In practice, however, during the nineteenth century African rulers often executed these treaties under considerable duress. Further, the treaties were legally relevant less as a mode of transferring rights between the two parties than as a means "by which European powers could demonstrate as against each other their occupation of a particular territory."

The law of the time also served to convert protectorates established over African territories into "instruments of absorption." Traditionally, a protectorate vested certain rights of external sovereignty in the protector, which shielded the protected entity from the hazards of interstate rivalries while leaving the protected entity's right of internal sovereignty intact. Numerous bilateral treaties between African and European states established such divided sovereignty, but in practice the internal sovereignty of African protectorates was flagrantly transgressed. During the 1884–85 Berlin Conference, the European colonial powers privately agreed that each would be free to breach the internal sovereignty of "protected" African entities.

Finally, international law's insistence on independence as a precondition of statehood served to perpetuate the exclusion of Europe's colonies from the community of states that are full subjects of international law. In effect, subordination of colonial territories by European powers became its own justification. Lacking independence, a colonial territory failed one of the basic tests of statehood—and thus was not able to assert the right of states to noninterference by other states. The logic was ingenious and self-serving: Fashioned by European powers, international law accommodated their colonial ambitions. Recognition of the principle of self-determination at the Versailles peace conference did little to change this.

144. See ALEXANDROWICZ, supra note 140, at 46.
145. See id. at 58.
146. See id. at 27, 30.
147. See id. at 38 (describing circumstances surrounding establishment of French protectorate over Tunisia through bilateral treaty imposed by force in 1881); see also id. at 80 (noting that treaties establishing protectorates often were concluded at initiation of African rulers "who needed protection within the turbulent conditions of the scramble for titles").
149. ALEXANDROWICZ, supra note 140, at 80.
150. See id. at 62.
151. See id. at 68.
152. See id. at 80, 124.
153. See CRAWFORD, supra note 139, at 48 ("Independence is the central criterion of statehood.").
154. See id. at 49 (noting that independence is a right of states); cf. Austro-German Customs Union Case (Aus.-Germ.), 1931 P.C.I.J. (ser. A/B) No. 41, at 57–58 (Sept. 5) (separate opinion of Judge Anzilotti) (suggesting that independence of states under international law connotes that they are not subject to authority of other states).
155. See infra Subsection III.D.4.
D. *The Treaty of Versailles: Enthroning the Principle of National Self-Determination...*

The importance that the principle of national self-determination assumed in the peace settlement of the First World War would have been difficult to imagine even a few years earlier. To most observers, nationalism seemed irrevocably on the decline.\(^{156}\) Going into the war, the Allies affirmed the rights of small countries, but the principle at stake was the independence of established states (however small), and not the right of national groups to form their own states.\(^{157}\) Unofficially and early on, there was some sentiment within Allied countries, such as the United Kingdom, to broaden their aims to address "national aspirations."\(^{158}\) But as long as these countries were allied to Tsarist Russia, they were in no position officially to endorse a right of national self-determination.\(^{159}\)

The fall of Tsarist Russia in 1917 decisively altered the Allies' calculations, freeing them to embrace self-determination as a key peace aim.\(^{160}\) The Russian provisional government was quick to proclaim its goal of establishing peace on the basis of "the right of the nations to decide their own destinies."\(^{161}\) With this declaration, in Alfred Cobban's words, "the ice broke, and the dammed-up waters of nationality began a wild rush which was to sweep onward until the end of the year and beyond, in an increasingly powerful and ultimately uncontrollable torrent."\(^{162}\) As the war progressed to its close, "wherever there was... a subject nationality, national armies were gathering and national governments being set up. For the stronger and better organised of the subject nationalities, self-determination... was a *fait accompli* in Europe long before the Allied statesmen sat down to discuss the new order at Versailles."\(^{163}\)

But if the Versailles conference did more in the way of ratifying established facts than fashioning states out of whole cloth, the Western powers nonetheless came to the peace table officially committed to the principle of national self-determination. Outlining the Allies' war aims in his Fourteen Points address, President Woodrow Wilson declared that the "evident principle... of justice to all peoples and nationalities" ran through the "whole programme."\(^{164}\) Soon after, he proclaimed national self-determination to be "an imperative prin-

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\(^{156}\) See COBBAN, *supra* note 34, at 48.

\(^{157}\) See *id.* at 49–50; Michla Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AM. J. INT'L L. 1, 20–21 (1976).

\(^{158}\) COBBAN, *supra* note 34, at 52 (citing views circulating within British Foreign Office in 1916).

\(^{159}\) See *id.* at 50.


\(^{161}\) COBBAN, *supra* note 34, at 50.

\(^{162}\) *Id.* at 50–51.

\(^{163}\) *Id.* at 55.

ciple of action," and indeed that principle became the capstone of the peace settlement. Notably, President Wilson assembled a group of historians, ethnologists, and geographers to provide expert guidance in his efforts to secure state borders that coincided with national identity at the Paris peace conference.

At Versailles, as at past peace conferences, power politics and strategic considerations played a significant role in determining whether and to what extent nations would come away with their own states. But this time there was a crucial difference: However much the goal of national self-determination might have been compromised in the face of competing considerations (or, in some cases, by virtue of U.S. diplomats' poor grasp of history and demography), the peacemakers at Versailles officially adopted the principle as their North Star when they set out to remap postwar Europe.

Against centuries of international law's denial of juridical status to national groups, this was a pathbreaking moment, a tectonic shift of legal paradigms. But how to characterize the precedent established or initiated by the Treaty of Versailles and related treaties is by no means a straightforward task. Did the peace of Versailles establish a universal "right" of national self-determination? And, whatever its legal status, what was the substantive meaning of the principle of "national self-determination" applied by the peacemakers? What role, finally, would international law and institutions play in implementing the assurances to national groups set forth in the peace treaties?

1. Legal Status of the Principle of National Self-Determination

In the narrow doctrinal terms in which lawyers commonly assess precedent, the answer to the first question is a straightforward "no." As Wilson readily conceded, there was no attempt to universalize the principle of self-determination to apply, for example, to the Allies' dependent territories. This, Wilson explained, would have to wait for another day:

165. ROBERT LANSING, SELF-DETERMINATION 5 (1921) (quoting address by Woodrow Wilson before both Houses of Congress on February 11, 1918).
166. Franck, supra note 4, at 53.
168. In addition to ethnographic factors, expert commissions at Versailles took into account strategic, economic, and historical considerations in proposing the boundaries of postwar states. See Pomerance, supra note 157, at 8; see also WHAT REALLY HAPPENED AT VERSAILLES 460 (Edward Mandell House & Charles Seymour eds., 1921); cf. 3 RAY STANNARD BAKER, WOODROW WILSON AND WORLD SETTLEMENT 35, 37-38 (1922) (discussing report prepared for President Wilson in January 1918 on "War Aims and Peace Terms" that espoused balance of factors, including national homogeneity, economic viability and defensive considerations, that should govern postwar determination of territorial boundaries of Italy and Poland respectively).
169. See Pomerance, supra note 157, at 5.
We were sitting there with the pieces of the Austro-Hungarian Empire in our hands . . . .
We were sitting there with various dispersed assets of the German Empire in our hands . . . .
but we did not have our own dispersed assets in our hands . . . . and therefore we had often,
with whatever regret, to turn away from questions that ought some day to be discussed and
settled and upon which the opinion of the world ought to be brought to bear.  

Further, even at Versailles “self-determination” was taken as a guiding principle,
and not a binding mandate. Where it ran up against overriding considerations,
it gave way.  

Yet the principle of national self-determination had entered the lexicon of
international diplomacy and indeed had been invoked to guide one of the most
consequential matters on which international society passes judgment: the estab-
lishment of new states. Because international law allows state practice to
play a key role in creating law, the peace settlement could become a cornerstone
in the construction of new norms. President Wilson, the chief architect of
the principle of self-determination embodied in the peace settlement, conceived
the precedent as the capstone of the global order inaugurated at Versailles.

Wilson hoped to universalize the principle applied in the postwar settle-
ments by incorporating it into the Covenant of the League of Nations, an integral part of the Treaty of Versailles. He proposed a draft provision of article III
of the Covenant that would commit the Contracting Powers to effect “such terri-
torial readjustments, if any, as may in the future become necessary by reason
of changes in present racial conditions and aspirations or present social and po-
litical relationships, pursuant to the principle of self-determination . . . .” But
the proposal encountered powerful opposition, not least among some of Wil-
son’s own advisors, and was defeated.  

But if this outcome denied Wilson’s principle the immediate force of
positive law, it would be a mistake to dismiss the framework established at
Versailles as merely a case-specific disposition of territorial issues that left no
imprint on international legal doctrine. To reduce discussion of the peace settle-
ment’s precedential import to such a narrow compass obscures both the doc-
trinal richness of the postwar settlements and the paradigms of international in-
stitutional competence that they generated—paradigms that continue to influence
international responses to nationalism.  

2. The Principle of Self-Determination: What Did It Mean?

While the principle of self-determination had several distinct renderings in
the Treaty of Versailles, it meant above all that the new borders of Europe

171. Woodrow Wilson, Address at Indianapolis (September 4, 1919), in 1 RAY STANNARD
BAKER & WILLIAM E. DODD, WAR AND PEACE 616–17 (1923).
172. See supra notes 167–168 and accompanying text.
173. Woodrow Wilson, Covenant (Wilson’s First Draft) in 2 DAVID HUNTER MILLER, THE
DRAFTING OF THE COVENANT 12 (1928).
175. For development of these themes, see Nathaniel Berman, Between “Alliance” and “Local-
ization”: Nationalism and the New Oscillationism, 26 N.Y.U. J. INT’L L. & POL. 449 (1994); and Ber-
man, supra note 5.
would, to the extent possible, be drawn along national lines. Thus the “objective” principle of self-determination that had been such a robust force in nineteenth-century Europe became, in the early twentieth century, a principle for state-making, at least in the context of a peace settlement. In this respect the Paris peace conference inverted the state-to-nation progression that had been characteristic of the formation of Western European nation-states.

But if the objective “principle of nationalities” loomed large in the peace settlement, it was not the only version of self-determination invoked by the peacemakers nor was it perfectly realized to the extent it was applied. For one thing, the Treaty of Versailles included several provisions that would, with some exceptions, automatically denationalize German nationals who resided in territories that were transferred from Germany to another state. The principle that citizenship should correspond to nationality was, of course, compromised with respect to these Germans.

More consequentially, in several important respects the Treaty of Versailles gave explicit effect to the “subjective” principle of self-determination. In some disputed regions, such as Upper Silesia and Schleswig, the fate of a territory and its population would be determined by an internationally supervised plebiscite. Still, the plebiscite principle played only a supporting role in the peace settlement; despite the importance President Wilson had attached earlier to the subjective principle of self-determination, the peace treaties provided for plebiscites only to resolve the fate of several disputed border regions.

The element of consent to sovereignty that found expression in collective terms in the plebiscite principle found expression on an individual basis in vari-

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176. This had been foreshadowed in President Wilson’s Fourteen Points speech, in which he called for, inter alia, “[a] readjustment of the frontiers of Italy . . . along clearly recognizable lines of nationality”; “the relations of the several Balkan states to one another [to be] determined . . . along historically established lines of allegiance and nationality”; and the establishment of “[a]n independent Polish state . . . which should include the territories inhabited by indisputably Polish populations.” Wilson, supra note 164, at 537–38.

177. See supra text accompanying notes 30–47. To the extent that congruence between nationality and state territory could not be fully achieved, national groups that consequently would form a minority in a new or reconfigured state received special protections through minority rights undertakings, whose implementation would be supervised by various organs of the League of Nations. Provisions protecting minority rights were included in the peace treaties of some countries, including Austria, Hungary, Bulgaria, and Turkey. Several other countries, including Czechoslovakia, Poland, Romania, Greece, and Yugoslavia, concluded minority rights treaties with the Allied and associated powers. Still other countries, including Albania, Iraq, and the Baltic states, were required to make minority rights declarations as a condition to membership in the League of Nations. These declarations set forth protections similar to those found in the minority rights treaties. See IMS L. CLAUDE, JR., NATIONAL MINORITIES 16 (1955).

178. See, e.g., Treaty of Versailles, supra note 170, art. 36 (providing that once transfer of sovereignty over certain territories from Germany to Belgium had been completed, “German nationals habitually resident in the territories will definitively acquire Belgian nationality ipso facto, and will lose their German nationality”); id. art. 91 (similar provision with respect to German nationals in Poland). As noted below, a right of option granted adult German nationals habitually resident in those territories sought to mitigate the effect of those provisions.

179. See id. arts. 88–90.

180. See id. arts. 109–14.

181. See Woodrow Wilson, The Four Principles (Feb. 11, 1920), in EXTRACTS FROM PRESIDENT WILSON’S SPEECHES IN 1918, 1 A HISTORY OF THE PEACE CONFERENCE OF PARIS 435, 437–39 (H.W.V. Temperley ed., 1969); see also Berman, supra note 5, at 1859–60 (noting that, despite Wilson’s emphasis on consent of population, postwar treaties provided for plebiscites in only few disputed regions).
ous provisions of the peace settlement assuring certain persons a right of option. For example, adult German nationals who habitually resided in certain territories transferred from Germany to other states could opt for German nationality within two years following the transfer of sovereignty.\textsuperscript{182} Still, the basic rule of automatic denationalization followed the traditional rule that citizenship followed territory, and to that extent seemed to flout both the subjective and objective principles of self-determination.\textsuperscript{183}

While the juxtaposition of subjective and objective dimensions of self-determination in the peace settlement may appear to signify inconstancy, the principle of nationalities has little meaning apart from the collective will of national groups. Throughout the peace conference the Allied powers consulted representatives of various national groups to ascertain their wishes, and were guided by their responses in their attempts to apply the principle of self-determination.\textsuperscript{184} At a deeper level, of course, the subjective will of a group is itself constitutive of national identity\textsuperscript{185}—a point that was scarcely lost on interwar legal theorists.\textsuperscript{186}

The very complexity of the peace conference’s conception of self-determination induced palpable anxiety among some participants and commentators, and surely amplified the concerns of those already chary of any version of the principle. Robert Lansing, who served as President Wilson’s Secretary of State until asked to resign in 1920, privately recorded his own misgivings during the peace negotiations: “When the President talks of ‘self-determination’ what unit has he in mind? Does he mean a race, a territorial area or a community?”\textsuperscript{187} Indeed, as so often has been noted, the question is even more complex than Lansing suggested.\textsuperscript{188} Who are the members of the “race” or “community,” and how is membership determined? How does one establish the relationship between a group and territory when there have been significant transfers of population? In these situations, how does one establish the appropriate

\textsuperscript{182}. See, e.g., Treaty of Versailles, supra note 170, arts. 37, 91.

\textsuperscript{183}. The conceptions of national identity and self-determination reflected in the peace settlement were considerably more complex and innovative than suggested by the examples noted in the text. The Treaty of Versailles established several novel juridical regimes and, in some instances, the foundation for League efforts virtually to construct a new national identity. For example, Germany’s sovereignty over the Saar region was placed in abeyance for a 15-year period, during which the region would be governed under the trusteeship of a League of Nations commission. See id. art. 49; id. annex § 16, at 218. The League commission created a novel status for inhabitants of the Saar, determining that “the status of ‘inhabitant of the Saar’ constitutes a new kind of legal subject” and entrusting inhabitants’ diplomatic protection abroad to France. See Berman, supra note 5, at 1882 (quoting HENRI COURSIER, LE STATUT INTERNATIONAL DU TERRITOIRE DE LA SAARE 99 (1925)). Contemporaneous commentators noted that the Saar territory was totally a creature of international law, with “no roots in the past.” MICHAEL T. FLORINSKY, THE SAAR STRUGGLE 11 (1934). For a fascinating analysis of these highly experimental regimes, see Berman, supra note 5, at 1874–98.

\textsuperscript{184}. See COBBAN, supra note 34, at 67.

\textsuperscript{185}. See supra text accompanying note 10.

\textsuperscript{186}. For a discussion of the views of one leading theorist, Robert Redslob, regarding the complex interplay between subjective and objective factors in the construction of national identity, see Berman, supra note 5, at 1812–16.

\textsuperscript{187}. LANSING, supra note 165, at 9. Other advisors had similar misgivings. See 2 MILLER, supra note 173, at 72 (1928) (criticizing proposed article III in Wilson’s second draft of League Covenant and urging that language regarding self-determination be omitted).

\textsuperscript{188}. See, e.g., POMERANCE, supra note 167, at 2–4.
baseline date for distinguishing between inhabitants entitled to participate in an
exercise of self-determination and those deemed "settlers" who are to be ex-
cluded? How, in any case, should a population's wishes be ascertained? Should
there be plebiscites in every case? Who may vote—just those who might secede,
or also other inhabitants of a territory from which the former might secede?
Where plebiscites are held, should their results have lasting effect, or should the
relevant population be allowed to change its mind in light of changes in its
identity and desires over time? Each of these daunting questions presented
themselves for resolution at the Paris peace conference.

Several participants and observers voiced more fundamental concerns. Even if narrowly defined to sidestep some of these conundrums, a principle of
self-determination could prove endlessly destabilizing if validated by interna-
tional law. Recalling the national movements that preceded the peace confer-
ce, Edward Mandell House, United States Commissioner Plenipotentiary at
the conference, evoked a specter that continues to influence international re-
sponses to separatist claims: "No tribal entity was too small to have ambitions
for self-determination."

As Nathaniel Berman's scholarship has elucidated, the interwar period
was one of extraordinary experimentalism in international institutional and legal
responses to these and other dilemmas presented by nationalist claims. Legal
disputes arising in that period generated a rich jurisprudence, which reflected
both the ambitious reach and doctrinal complexity of the interwar regime.

The League's resolution of one dispute in particular—a conflict over the
status of the Aaland Islands—has special pertinence to the issues addressed in
this Article. Declining to recognize a general right of self-determination, two
League of Nations bodies involved in this dispute nonetheless foreshadowed
important doctrinal developments, which have renewed relevance today. Nota-
bly, both bodies intimated that minorities might enjoy an exceptional, last resort
right of territorial exit as a remedy to intractable repression. Further, one of the
League bodies suggested that international actors may enjoy a heightened com-
petence to address separatist claims during periods of political-juridical trans-
formation—during circumstances, for example, such as those attending the
dissolution of Yugoslavia in the 1990s.

3. Aaland Islands Dispute

Many aspects of the interwar regime have a Rorschach-like quality, pro-
viding material for radically different interpretations depending on the perspec-
tive of the analyst. This is notably true of the disposition by two League bodies
of the Aaland Islands dispute. In conventional doctrinal terms, their reports are
often cited as dispelling any thought that international law recognized a general

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189. Edward M. House, The Versailles Peace in Retrospect, in WHAT REALLY HAPPENED AT
     PARIS 425, 431 (Edward Mandell House & Charles Seymour eds., 1921).
190. For discussion of three innovative legal regimes created by the Versailles peace settlement,
     see Berman, supra note 5, at 1874-98.
191. See infra text accompanying notes 198-200.
right of national self-determination.\textsuperscript{192} While this interpretation is well-founded, it obscures the more subtle and potentially far-reaching implications of the reports.

The League appointed a Commission of Jurists to determine the League's competence to examine an unresolved dispute relating to the Aaland Islands. Representatives of the islands, which were under the jurisdiction of Finland, had sought annexation to Sweden at the Paris peace conference, invoking the "right of peoples to self-determination as enunciated by President Wilson."\textsuperscript{193} While Sweden proposed that the islanders be allowed to determine their status through a plebiscite, Finland insisted that this would constitute interference in a matter that, under international law, was solely within its domestic jurisdiction.\textsuperscript{194} If Finland was right, the League would, under its Covenant, have no jurisdiction to entertain the petition submitted by Sweden.\textsuperscript{195} While the narrow issue presented to the Commission was one of League competence, its analysis led it to pronounce on the substantive question of whether international law recognized a general right of national self-determination.

In a widely cited portion of its report, the Commission asserted that, although the principle of self-determination of peoples played "an important part in modern political thought" and had been recognized in some international treaties, the latter "cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations."\textsuperscript{196} The Commission continued:

On the contrary, in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation.\textsuperscript{197}

\textsuperscript{192} See, e.g., Franck, supra note 4, at 54; Frederic L. Kirgis, Jr., The Degrees of Self-Determination in the United Nations Era, 88 AM. J. INT'L L. 304, 304 (1994).

\textsuperscript{193} 4 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: THE PARIS PEACE CONFERENCE 1919, at 172 (1943). The Aaland Islands had belonged to Sweden until 1809, when they were surrendered to Russia as a result of conquest. Finland, too, was incorporated into Russia in 1809, and the Aaland Islands were, in the words of a League of Nations Commission of Jurists, "undoubtedly part of Finland during the period of Russian rule." Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, LEAGUE OF NATIONS O.J. Spec. Supp. 3, at 9 (1920) [hereinafter Jurists' Report]. With the outbreak of the Russian revolution, Finland declared its independence from Russia, and the population of the Aaland Islands expressed their desire to be separated from Russia and reattached to Sweden. See id. at 7, 10. Finland took the position that the Aaland Islands had been incorporated into the state of Finland, which attained independence in 1918. See id. at 10.

\textsuperscript{194} See Jurists' Report, supra note 193, at 5, 11.

\textsuperscript{195} Article 15, paragraph 8 of the Covenant denied the League Council competence to make recommendations regarding the settlement of a dispute if that dispute "is claimed by one of [the parties], and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party . . . ." LEAGUE OF NATIONS COVENANT art. 15, para. 8.

\textsuperscript{196} Jurists' Report, supra note 193, at 5.

\textsuperscript{197} Id. Whether a portion of an established state's territory could determine its fate by plebiscite was, the Commission reasoned, entirely left to the sovereign discretion of the state concerned. "Any other solution, it reasoned, "would amount to an infringement of sovereign rights of a State and would involve the risk of creating . . . a lack of stability which would not only be contrary to the very idea embodied in the term 'State,' but would also endanger the interests of the international community." Id.
A report by a League of Nations Commission of Rapporteurs, which had been appointed to assess the merits of Sweden’s petition, agreed with the Jurists’ conclusion that the principle of free determination “is not, properly speaking a rule of international law.”

It is difficult to imagine a more unequivocal denial of a general right of national self-determination or a more ringing affirmation of the right of states to dispose of their territory without external interference. Yet other portions of the Commissions’ reports suggest a more innovative and far-reaching approach to national separatist claims.

After proclaiming the “sovereign rights of a State” not to be threatened by secession, the Commission of Jurists went on to reason that “all that has been said concerning the attributes of the sovereignty of a State” generally applies only to a fully and unambiguously established state, and then only “so long as it continues to possess these characteristics.” But in periods of fundamental transformation and transition when a territory’s status is unclear, international society enjoys a heightened competence to address the issues presented by that transition, which “cannot be considered as [a situation] confined entirely within the domestic jurisdiction of a State.” Because such transitions tend to lead to changes in territorial status, they “interest[] the community of States very deeply both from political and legal standpoints.”

At one level, the Jurists seemed to be using a semantic sleight-of-hand to establish League competence: If the League Council addressed a situation arising in territory that was not yet or no longer an established state, the Council could scarcely be faulted for breaching a sovereign state’s protected sphere of exclusive jurisdiction. At a deeper level, the Commission was making more radical claims. First, not only would the international community have a broader warrant to address questions of territorial sovereignty during periods of uncertain status, but it would have a profound interest in doing so. The import

198. The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7.21/68/106, at 27 (1921) [hereinafter Rapporteurs’ Report]. In this Commission’s view, international society could not long survive a rule of free determination:

To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.

Id. at 28.


200. Id. The Commission reasoned:

From the point of view of both domestic and international law, the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law. This amounts to a statement that if the essential basis of these rules, that is to say, territorial sovereignty, is lacking, either because the State is not yet fully formed or because it is undergoing transformation or dissolution, the situation is obscure and uncertain from a legal point of view, and will not become clear until the period of development is completed and a definite new situation, which is normal in respect to territorial sovereignty, has been established.

Id. at 6.

201. Id.
of this viewpoint can be appreciated when one recalls the traditional approach of international law to issues bearing on the establishment of new states (in essence, outside actors and international law itself have nothing to say about this process until it has been completed). Further, the Jurists reasoned, circumstances of fundamental transformation may enable international society to invoke and apply the principle of national self-determination—the very principle to which the Jurists had seemed emphatically to deny international legal effect.

Beyond the suggestion that periods of transition establish a juridical space—however transient—within which international society might give effect to the principle of national self-determination, the Commission of Jurists also implied that the wall of sovereign prerogative enjoyed by established states might be breached when those states abuse minority rights. The Jurists' report left open the possibility that "a manifest and continued abuse of sovereign power, to the detriment of a section of the population of a State, would, if such circumstances arose," bring an international dispute arising from the situation within the competence of the League, presumably because it would implicate international legal principles.

While the Commission of Rapporteurs reached a conclusion different from that of the Jurists with respect to Finland's sovereignty over the Aaland Islands, it too hinted at the possibility that it would support a claim of secession under narrow circumstances. Prefiguring a concept that would resurface over subsequent decades, the Commission's report suggested that secession might be available as a "last resort when the State lacks either the will or the power to enact and apply just and effective guarantees" of minority rights.

In sum, then, conventional interpretations of the Aaland Islands case correctly characterize the two Commissions' reports as affirming that international law does not recognize a general right of national self-determination. But the report of the Commission of Jurists also intimated that a different approach is justified in circumstances of profound transition, which bring into play a paradigm of heightened international engagement and competence. Further, in the view of both Commissions, even within normal juridical time established states' rights in respect of territorial sovereignty may be forfeited, at least in part, by virtue of their failure to assure basic rights of national groups in their territory.

202. See supra text accompanying notes 105-106.
203. Under circumstances of transformation, the Jurists reasoned, the principle of self-determination of peoples may be called into play. New aspirations of certain sections of a nation, which are sometimes based on old traditions or on a common language and civilization, may come to the surface and produce effects which must be taken into account in the interests of the internal and external peace of nations.
204. Id. at 5.
205. Rapporteurs' Report, supra note 198, at 28. Astonishingly, the Commission further suggested that it "should not have hesitated to consider" the solution of allowing the Aaland Islands to separate from Finland and become part of Sweden if this were "the only means of preserving its Swedish language for Aaland." Id. at 29.
206. See supra text accompanying note 192.
4. Mandates

If the Versailles peace settlement introduced an unprecedented measure of international support for national self-determination, it also demarcated the outer limits of Western states’ commitment to that principle. Notably, the Treaty of Versailles perpetuated the long-standing dichotomy in international law between “advanced” states and those that had not yet achieved full sovereign status. While the peace settlement embodied the high-water mark of international support for the principle of national self-determination, the principal beneficiaries were European nations. In contrast, the peoples who inhabited colonial territories of the defeated powers—and who, in the words of the League Covenant, were “not yet able to stand by themselves under the strenuous conditions of the modern world”—were placed under a system of Mandates. The “tutelage” of these peoples would be “entrusted to advanced nations,” acting as Mandatories on behalf of the League.

The League Covenant envisioned eventual independence for “[c]ertain communities formerly belonging to the Turkish Empire” which, after a period of tutelage by a Mandatory power, would be “able to stand alone.” But for “[o]ther peoples, especially those of Central Africa,” indefinite rule by the Mandatory was envisaged. Whatever national self-determination meant at Versailles, then, it was clear that it did not mean to undo Europe’s subjugation of colonial peoples. Instead, competence for administering colonial territories would be transferred from the defeated powers to the League of Nations.

E. Self-Determination: Decolonization

Remarkably, after the Second World War the principle of self-determination became the most dynamic concept in international relations.

One might have imagined that, with the disastrous failure of the interwar system, the principle of self-determination would have vanished from international legal doctrine with the collapse of its institutional manifestation, the League of Nations. In many respects, international law experienced a fundamental disruption with the onset of World War II, and the principle of self-determination might have seemed a leading candidate for entombment as a manifest failure of the interwar system. Yet it was impossible to contain the concept’s mobilizing power in the ensuing years and decades. The principle (later “right”) reappeared across decades in a raft of international instruments, the legitimacy of its inclusion no longer subject to serious challenge—but its meaning periodically subject to renewed contention.

207. See supra text accompanying notes 140–141.
208. Treaty of Versailles, supra note 170, art. 22.
209. Id.
210. Id.
211. Id.
212. Franck, supra note 4, at 54.
The Charter of the United Nations gave a prominent place to the "principle of self-determination," yet the sponsoring countries could not agree on the meaning of this conveniently ambiguous phrase. The U.N. Charter enshrines the principle in its first article: "The Purposes of the United Nations are... [to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...]." Different views about the meaning of this provision emerged when it was first proposed by the Soviet Union at the San Francisco Conference, and states approved the language without resolving their differences. The technical committee that recommended including this provision in the Charter described its meaning in an impenetrable verbal fog:

[The] principle of equal rights of peoples and that of self-determination are two complementary parts of one standard of conduct; that the respect of that principle is a basis for the development of friendly relations and is one of the measures to strengthen universal peace; that an essential element of the principle in question is a free and genuine expression of the will of the people...  

Other Charter provisions addressed the administration of dependent territories in terms that supported progress toward self-government but did not, on their face, establish an absolute right to independence. How the principle of self-determination became a right and acquired a distinctive meaning in the postwar period has been well chronicled and can be briefly summarized here. The "principle of self-determination of peoples" was a natural banner for the decolonization movement that swept the globe in the early decades of the United Nations's life, and it took little time for this principle, previously associated with the right of subject nationalities to form their

213. U.N. CHARTER art. 1(2).
214. On the one hand, "it was strongly emphasized... that this principle corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated." But on the other hand, "it was stated that the principle conformed to the purposes of the Charter only in so far as it implied the right of self-government of peoples and not the right of secession." Doc. 343, I/1/16, 6 U.N.C.I.O. Docs. 296 (1945).
216. Article 73, the key provision dealing with "non-self-governing territories" administered by U.N. member states, enunciates the principle that the administering states should "develop self-government,.. . take due account of the political aspirations of the [non-self-governing] peoples, and... assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement." U.N. CHARTER art. 73(b). Chapters XII and XIII establish a system for the administration by a U.N. body of, inter alia, former colonies of the Axis powers and territories placed under mandate by the League of Nations. See id. arts. 75-91. Like non-self-governing territories administered by member states, trust territories were not given an absolute right to independence. Instead, the trusteeship system aimed to promote the "progressive development" of inhabitants of the trust territories "towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned..." Id. art. 76(b).
217. See, e.g., HANNUM, supra note 72, at 33-49; Franck, supra note 4, at 54-60.
218. The anticolonialism movement had already gathered momentum in the interwar period, and during the Second World War the U.S. government's planning for a postwar international organization focused considerable attention on supervision of dependent peoples. See LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 29-30 (3d ed. 1969).
own state, to metamorphose into a right of colonial territories to break free of the metropolitan state.

In 1950, the General Assembly adopted the first of what would be many resolutions recognizing "the right of peoples and nations to self-determination" as fundamental.\(^{219}\) Among later resolutions reaffirming that right, two stand out for their normative importance. The first, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples ("Declaration on Colonial Countries"),\(^{220}\) linked the right unambiguously to a decolonization context, equating self-determination to freedom from "alien subjugation"\(^{221}\) and requiring that "[i]mmediate steps" be taken to secure the independence of "Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence."\(^{222}\) In 1970, the General Assembly adopted the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations,\(^{223}\) which reaffirmed that the "right of self-determination of peoples" was to be understood as a right to decolonization. Again, the "people" entitled to self-determination was "the people of the [territory of a] colony or non-self-governing territory . . . ."\(^{224}\) States, in turn, had a duty to assist the United Nations in "bring[ing] about a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned."\(^{225}\)

By seizing the mantle of self-determination, the anticolonial movement renewed the principle’s vitality and brought international law into harmony with the political temper of the time. And if colonial powers were not uniformly sanguine about the United Nations’s efforts to wrest colonial territories from their control,\(^{226}\) many nonetheless were relieved to see the "principle of self-determination" redefined to respond to contemporary demands while containing expectations within tolerable limits.\(^{227}\)

While supporting colonial territories’ right to free themselves from metropolitan rule, U.N. instruments affirming “peoples’ right to self-determination” simultaneously affirmed states’ right to territorial integrity.\(^{228}\) A résolution

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\(^{221}\) Id. para. 1.

\(^{222}\) Id. para. 5.


\(^{224}\) Id. at 340.

\(^{225}\) Id.

\(^{226}\) See Franck, supra note 4, at 55 (noting that "Imperial powers complained about the General Assembly’s use of Charter article 73(c) to monitor political developments in their colonies").

\(^{227}\) See Buchheim, supra note 35, at 7.

\(^{228}\) The 1960 Declaration, for example, proclaimed that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the pur-
adopted by the General Assembly the day after it adopted the 1960 Declaration on Colonial Countries left little doubt that the solidifying "right of self-determination" was limited to a colonial context. Establishing the so-called "salt-water" test, the resolution implied that the "peoples" entitled to independence were limited to inhabitants of discontiguous territories governed by European states. The "peoples" entitled to self-determination were defined as the inhabitants of a colony but not as ethnically distinct groups within those territories or established states.

It was not just established states that were eager narrowly to define the right of self-determination as a right to end colonial status. The newly independent states of Africa were keen to erect a breakwater against the spread of secessionist proclivities to subgroups in their territories. And so, with the dawning of decolonization in its continent, the Organization of African Unity adhered to the principle of uti possidetis, developed a century earlier when Latin American states acquired independence from Spain. That principle "upgraded former administrative delimitations, established during the colonial period, to international frontiers," thereby assuring their sanctity as state borders. It also provided a bright line test for assessing claims to self-determination—one that could be rationalized more readily in terms of international stability concerns than of political philosophy.

The postwar interpretation of self-determination recognized one possible exception to uti possidetis, which provided the principal conceptual link between the interwar and postwar renderings of the principle. Like the two League of Nations commissions that reported on the Aaland Islands dispute, the Declaration on Friendly Relations hinted at the possibility that established states might forfeit their right to territorial integrity if they abused the rights of minorities:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus poses and principles of the Charter of the United Nations;" G.A. Res. 1514, supra note 220, para. 6, and the 1970 Declaration contained similar language, see G.A. Res. 2625, supra note 223, Annex, at 122.


233. See id. paras. 23–24.

234. A chamber of the International Court of Justice conceded as much when it applied uti possidetis to resolve a border dispute between Burkina Faso and Mali, recognizing the principle as a general rule of international law. See id. paras. 23–24, 26.
In the postwar era, then, international law finally elevated self-determination to the status it had been denied by the League of Nations—a rule of international law. Further, by applying the principle to colonial territories, international law at last shed its centuries-long indulgence of colonizing states.

But if these aspects of postwar law seemed to augment both the status and compass of the principle of self-determination, its coupling with the principle of *uti possidetis* severely contracted its reach. If anything, *uti possidetis* reinforced the ultrastatist view of nineteenth-century law, which regarded the state as a virtually impenetrable fortress. More fundamentally, by defining the “self” entitled to exercise the right in strictly territorial terms, the postwar rendering of self-determination drained the principle of its rich interwar meaning. Self-determination thus was transformed from a principle for state-making into a corrective to the historical injustice of alien subjugation. Through this legal alchemy, international law could claim to preserve a principle that had acquired a potent symbolic power while simultaneously depriving that principle of its power to threaten established states’ territorial boundaries.

Yet even the postwar rendering of self-determination is more complex doctrinally than is suggested in its common characterization as a right of “external” self-determination—that is, a right of territorially defined peoples to emancipation from imperial rule. As elaborated by the United Nations, peoples entitled to self-determination could not only cast off their metropolitan overlords but also determine their political status through the exercise of collective will. General Assembly Resolution 1541 (XV) notes that available options in this regard include independent statehood, free association with an independent state, and integration with an independent state. In terms evocative of the Age of Revolution, the resolution makes clear that the free choice of peoples, manifested through democratic processes, was the pivot on which exercise of the postwar right of self-determination would turn. In an important opinion on the postwar law of decolonization, the International Court of Justice defined the principle of self-determination as “the need to pay regard to the freely ex-

235. G.A. Res. 2625, supra note 223, at 340 (emphasis added). Ironically, this clause has been read narrowly to apply “only to Pariah states like South Africa, which oppresses its majority on racial grounds.” Patrick Thornberry, Self-Determination, Minorities, Human Rights: A Review of International Instruments, 38 INT’L & COMP. L.Q. 867, 877 (1989). Yet the United Nations’s goal with respect to South Africa—finally realized in 1994—was a transition to nonracial democracy and not secession of the country’s long-oppressed majority black population.

236. Indeed, some publicists regard the norm as peremptory. See, e.g., BROWNIE, supra note 107, at 513.


238. See, e.g., id. princ. VII(a) (“Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes.”); id. princ. IX(b) (stating that integration with independent state “should be the result of the freely expressed wishes of the territory’s peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes”).
pressed will of peoples" after first making clear that the right was, in essence, a right of decolonization.

In its postwar incarnation, the principle of self-determination has now largely accomplished its assigned task. Yet an array of scholars and advocates are reluctant to retire the right and have earnestly sought to find it new work. A significant measure of scholarly support has begun to coalesce around the view that self-determination should once again be invested with new meaning, this time emphasizing its internal dimension—democratic governance.

This view derives persuasive power from recent developments affirming a democratic entitlement. But as I argue in Part IV, the implications of international law’s recent validation of democratic rights cannot readily be confined to those relating to internal self-determination. For the right to choose one’s government inevitably raises the question, may people choose—or reject—the state in which they will exercise the right to govern themselves?

IV. NATIONALISM AND THE DEMOCRATIC ENTITLEMENT

[It is not] conceptually or strategically helpful . . . to treat the democratic entitlement as inextricably linked to the claim of minorities to secession.

The doctrine of national self-determination is based on and inseparable from that of popular sovereignty.

Although the idea of popular sovereignty transformed the political landscape of eighteenth-century Europe and the United States, it would take more than another century and a half for international legal doctrine to support the principle outside the limited context of the Paris peace conference. And while international human rights instruments have assured a right to political participation since 1948, that right was virtually ignored for decades while other
guarantees, notably assurances of physical integrity and personal autonomy, were the focus of concerted enforcement efforts. But in recent years, the right to political participation has moved into the forefront of international advocacy concerns. In 1992, Thomas Franck noted an historic trend: "Democracy... is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes." The emerging law, Franck argued, "requires democracy to validate governance... ."

Both formal and practical support for democratic governance have figured prominently in U.N. activities in recent years, and also have loomed large in the agendas of such regional organizations as the Organization of American States and the Organization for (formerly "Conference on") Security and Cooperation in Europe. Notably, in 1994 the U.N. Security Council authorized military intervention in Haiti for the express purpose of restoring "the legitimately elected President," who had been deposed in a coup—a measure that would have been unthinkable until recently.

I will not elaborate on these developments, which have been well chronicled by others. Instead, building upon their work, I consider the implications of a democratic entitlement for ethno-separatist claims. In this inquiry, I address two distinct, though overlapping, sets of arguments. First, I examine the claim that the right of popular sovereignty imports the right not only to make political choices within established units—here, I focus on states—but also to choose the political unit within which one exercises popular sovereignty. This type of argument emphasizes the subjective dimension of self-determination and supports
ethno-separatist groups that regard themselves to be an appropriate unit of self-government.

I next consider arguments hypothesizing that, if successful, ethno-separatist claims would produce political units in which democratic values are more likely to be realized than under the previous argument. This set of claims is concerned with factors that may be instrumental to democratic governance rather than intrinsic to the basic democratic proposition—that a people should govern itself—and tends to give greater emphasis to the objective dimension of self-determination.

I challenge the widely held view that theories of democratic government have no bearing on questions of political unit. Although democratic theory does not compel a uniform response to contested separatist claims, neither is it irrelevant to their resolution.

Beyond its theoretical implications, a democratic entitlement has considerable practical implications for ethno-separatist claims. Just as the idea of popular sovereignty inspired national revolts in the nineteenth and early twentieth centuries, so the tide of democratic transition that has swept the globe in recent years has stoked the aspirations of ethno-national movements. As previously noted, the introduction of democracy in formerly authoritarian countries makes appeals to ethnic politics far more tempting—and more perilous.

A. The Problem of Unit in Democratic Theory

Democracy has, of course, no natural units.

With some exceptions, political theorists generally have failed to consider the implications of democratic theories for the unit within which self-governance should be exercised. Among those who have addressed the issue, some assert that the question of unit stands outside democratic theory. Whether the issue is how to identify nations that are entitled to their own state or local populations entitled to home rule, "there is no theory for determining..."
when one . . . polity ought to end and another begin."\textsuperscript{258} Consistent with this view, while heralding an emerging right to democratic governance, Professor Franck eschews the inference that this entitlement includes a right to choose the territorial boundaries within which self-government should be exercised or the fellow citizens with whom one will practice self-government.\textsuperscript{259}

The suggestion that democratic principles have no bearing on claims of national self-determination would surely ring false to eighteenth-century nationalists, for whom nationalism and popular sovereignty were inseparable.\textsuperscript{260} As noted in Subsection II.B.1, eighteenth-century conceptions of popular sovereignty—above all, the idea that a people had a right to choose its own government—naturally led to the claim that "the people" had the "right to decide whether to attach itself to one state or another, or constitute an independent state by itself."\textsuperscript{261}

Although, as I will argue shortly, theories of democratic government also support countervailing arguments, this claim cannot be readily dismissed. On the contrary, to the extent that international law validates a democratic entitlement it inevitably, if inadvertently, presents new justifications for at least some forms of ethno-separatist claims.

B. **Intrinsic Arguments**

1. **Arguments Derived from the Principle of Consent**

Here lies the very heart of the democratic idea: that governmental legitimacy depends upon the affirmative consent of those who are governed.\textsuperscript{262}

For some eighteenth-century nationalists—the intellectual progenitors of Franck's democratic entitlement—it seemed axiomatic that the right to self-government implies the right to choose one's fellow citizens. The point seemed equally plain to John Stuart Mill:

\begin{quotation}
258. Briffault, supra note 257, at 801.
259. Asserting that it is neither "conceptually [nor] strategically helpful . . . to treat the democratic entitlement as inextricably linked to the claim of minorities to secession," Professor Franck has opposed the view that international law supports secessionist claims. Franck, supra note 4, at 52; see also Thomas M. Franck, *Fairness to "Peoples" and Their Right to Self-Determination*, in *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 140 (1995); Thomas M. Franck, *Postmodern Tribalism and the Right to Secession*, in *PEOPLES AND MINORITIES IN INTERNATIONAL LAW* 3 (C. Brolmann et al. eds., 1993). Citing the principle of self-determination as "the historic root from which the democratic entitlement grew," Franck characterizes the principle in terms that assume the boundaries of an established political unit: "Self-determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement." Franck, supra note 4, at 52.
260. Liah Greenfeld reminds us that "[d]emocracy was born with the sense of nationality. The two are inherently linked, and neither can be fully understood apart from this connection. Nationalism was the form in which democracy appeared in the world, contained in the idea of the nation as a butterfly in a cocoon." LIAH GREENFELD, *NATIONALISM: FIVE ROADS TO MODERNITY* 10 (1992).
261. COBBAN, supra note 34, at 41.
\end{quotation}
Where the sentiment of nationality exists in any force, there is a *prima facie* case for uniting all the members of the nationality under the same government, and a government to themselves apart. This is merely saying that the question of government ought to be decided by the governed. One hardly knows what any division of the human race should be free to do, if not to determine with which of the various collective bodies of human beings they choose to associate themselves.\(^{263}\)

The argument is elegant in its simplicity: Since democracy is, by definition, government with the consent of the governed,\(^{264}\) the boundaries of political commitment should be determined in accordance with the principle of consent.\(^{265}\) The claim has special force when distinct populations within a state explicitly agree upon conditions necessary to their continued union—or sufficient to trigger their divorce\(^{266}\)—but is relevant wherever the principle of popular sovereignty is held to be the basis of governmental legitimacy.

This argument need not imply that the boundaries of states are perennially up for popular reconsideration; continuing consent of established states’ citizens generally can be presumed,\(^{267}\) and indeed this assumption is essential to the ongoing viability of democratic processes—and of states. Historically, the experience of Western European states examined in Part II justifies this assumption.\(^{268}\) Where such consent is manifestly withdrawn by a significant portion of a state’s citizens, however, the legitimacy of that state’s sovereignty over the rebel population faces a profound challenge—particularly if one agrees with Professor Franck that international law now “requires democracy to validate governance . . . .”\(^{269}\) But while this argument has intuitive appeal, it immediately runs up against the problem of determining whose consent should be decisive when groups stake conflicting claims to the same territory, a problem to which I return in Subsection IV.B.5.

2. *Secession as a Remedy for Oppressed and Permanent Minorities*

Additional arguments turn on particular justifications for democratic government and support secession in limited circumstances. In particular, variations on liberal democratic theory may support secession as a last resort remedy for permanently oppressed or outvoted minority groups.

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263. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861), in UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 187, 392 (Everyman’s ed. 1993) (emphasis added).

264. *Cf. The Declaration of Independence* para. 2 (U.S. 1776) (“[T]o secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”).

265. See Whelan, *supra* note 2, at 15.


267. *Cf. Whelan, supra* note 2, at 27 (pointing out that although consent when given is ground of legitimate government, historically consent “grows within states founded by other means (usually force), as a consequence of good government”).

268. *See supra* text accompanying notes 76–77, 94 (suggesting that protracted history of shared citizenship engenders solidary commitment to civic nation).

269. Franck, *supra* note 4, at 47. See Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT’L L. 177, 184 (1991), for the contrary view that, “[d]espite the rhetoric of liberal democracy, actual consent is not necessary to political legitimacy.”
For John Locke, the principle of consent of the governed followed from the intrinsic worth and equality of all people; if every person had inherent equal worth, none should be “subjected to the Political Power of another, without his own Consent.”270 The inherent worth of people also defined the aim of government; governments, in Locke’s view, are formed to safeguard the natural rights of citizens, which are prior to the state.271

If, with Locke, one believes that the justifying aim of governments is to protect citizens’ natural rights and that citizens therefore have a right to rebel against tyrannical regimes,272 a government would lose its legitimacy vis-à-vis a distinct segment of its citizens if it systematically failed to protect that group’s fundamental rights. This argument would justify secession at least as a last resort remedy when efforts to secure minorities’ fundamental rights within the existing state prove futile.273

Framed here in terms of political theory, this position resonates with the suggestion of the two League of Nations commissions that examined the Aaland Islands dispute274 and with the U.N. General Assembly Declaration on Friendly Relations.275 It has, moreover, received a small measure of contemporary support through the U.N.-sanctioned establishment of an autonomous zone for Kurds in Iraq, established to protect Kurds against further repression at the hands of the Iraqi government.276

More generally, a last resort remedial right of secession provides one answer to the dilemma for democratic theory presented by the permanent minority. A right to political participation manifestly entails a people’s right to choose its government and accordingly implies that members of the polity must entertain at least the theoretical possibility that their choices will prevail.277 If, however, the choices of a minority ethnic group are systematically outvoted, its members are effectively denied the opportunity to exercise meaningful self-government.278 (This observation of course assumes what should be an uncon-
troversial point—that political choices in a democratic society are sometimes exercised along group lines.\(^{279}\) This type of exclusion can, of course, be remedied through measures short of secession, such as adopting a system of proportional representation or regional autonomy. If, however, the majority government is persistently unwilling to accommodate the political aspirations of a significant minority, that group arguably can exercise self-government only by seceding.\(^{280}\)

## 3. Arguments Derived from the Value of Moral Autonomy

This same conclusion can be supported by liberal democratic theories that justify self-government in terms of the ultimate value of individual moral autonomy. Robert Dahl defines a morally autonomous person as "one who decides on his moral principles, and the decisions that significantly depend on them, following a process of reflection, deliberation, scrutiny, and consideration."\(^{281}\) For Dahl, then, moral autonomy is a form of self-governance. Democratic government furthers the value of moral autonomy by maximizing "the feasible scope of self-determination for those who are subject to collective decisions."\(^{282}\)

Since political self-determination must be exercised collectively, this argument becomes problematic if a democratic society includes a permanent minority—one whose moral choices consistently are overridden by the majority. The problem becomes acute if the minority’s choices on matters of direct and particular concern to its members are routinely outvoted.\(^{283}\) Again, the most appropriate remedy may be to devolve certain matters for self-government to particular groups, and indeed international instruments and organizations have endorsed this approach.\(^{284}\)

\(^{279}\) Cf. Miller v. Johnson, 515 U.S. 900, 944 (1995) (Ginsburg, J., dissenting) (pointing out that “ethnicity is a significant force in political life”); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1415 (1991) (arguing that strategies of second-generation voting rights litigants have been based on premise that black voters have distinctive interests, which are more likely to be addressed by representatives elected from majority-black districts than by those elected from majority-white districts).

\(^{280}\) Cf. Kirgis, *infra* note 192, at 306 (suggesting that since 1970, there has been ill-defined right of peoples to secede from state “that does not have a fully representative form of government, or at least to secede from a state whose government excludes people of any race, creed or color from political representation when those people are the ones asserting the right and they have a claim to a defined territory”).

\(^{281}\) Dahl, *infra* note 2, at 91. Dahl asserts that “the reasons for respecting moral autonomy sift down to one’s belief that it is a quality without which human beings cease to be fully human and in the total absence of which they would not be human at all.” *Id.*

\(^{282}\) *Id.*

\(^{283}\) Cf. Margalit & Raz, *infra* note 2, at 440 (“If self-government is valuable then it is valuable that whatever is a proper matter for political decision should be subject to the political decision of the group in all matters concerning the group and its members.”).

fundamentally and inalterably diverge from those of other citizens that the former can be adequately realized only through political divorce.

4. Implications for Territorial Sovereignty of a Democratic Entitlement

It remains to be noted that, whatever theory supports an emerging democratic entitlement, such a right should, in light of established doctrines governing transfer of territory, have profound implications for a population's right to determine the status of the territory in which it habitually resides. As noted in Section III.B, much of international law governing acquisition of territorial sovereignty derives from principles of Roman law that analogize territorial sovereignty to private property ownership.\textsuperscript{285} In this paradigm, a monarch historically was able to alienate territory \textit{along with its inhabitants without seeking their consent}, much as a private property holder could barter territory along with the cattle that graze on it. In the Age of Revolution, this was thought utterly incompatible with the principle of popular sovereignty, and in the early years of the French Revolution consent of populations was sought as a prerequisite to annexation.\textsuperscript{286}

Of course the principle of popular sovereignty that seemed to require popular consent to changes in territorial status was soon abandoned by the French revolutionaries and in any event failed to acquire the sanction of international law until the postwar twentieth century\textsuperscript{287} (although it was sporadically applied by great powers before then\textsuperscript{288}). But with the dawning of a democratic entitlement, the view that prevailed in the early period of the French Revolution may have acquired renewed support—this time rooted in emerging principles of international law.

The argument can be simply stated: As previously noted, a basic attribute of sovereignty is the power to alienate a portion of a state's territory;\textsuperscript{289} once international law established democracy as the only legitimate form of government, it ineluctably vested the exercise of state sovereignty in "the people"; if "the people" wish to break off a portion of the state's territory and form a new state, they possess the power to do so.\textsuperscript{290} In short, the implications of Professor identity in situations where autonomy on a territorial basis does not apply"); \textit{Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE}, June 29, 1990, art. 35, reprinted in 11 HUM. RTS. L.J. 232 (1990) (noting efforts to "protect and create conditions for the promoting of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities").

\textsuperscript{285} See supra text accompanying notes 111–115.

\textsuperscript{286} See supra text accompanying note 131.

\textsuperscript{287} See supra text accompanying notes 217–236.

\textsuperscript{288} As previously noted, plebiscites were used to resolve the disputed status of several regions following World War I and were also used periodically before then. See supra text accompanying notes 132–133, 179–180.

\textsuperscript{289} See supra note 112 and accompanying text.

\textsuperscript{290} Of course, in a representative democracy the elected leaders generally act for "the people," and presumably once elected may even dispose of state territory on "the people's" behalf. Cf. Edwards v. Carter, 580 F.2d 1035 (D.C. Cir. 1978) (finding President's conveyance of Panama Canal without congressional approval not unconstitutional). But this does not resolve the dilemma considered here—what
Franck’s democratic entitlement are potentially quite radical indeed. By affirming popular sovereignty, this emerging right may undermine international law’s bedrock principle of territorial integrity as a ground for opposing separatist claims.

5. But Which People?

A major problem with this argument is, of course, that it does not identify which “people” may decide the issue of secession if the whole population of the state from which secession is sought cannot reach common accord. If, as happened in the former Czechoslovakia, representatives of each major population consent to political divorce, the principle of popular sovereignty may not only be consistent with the breakup of a state into two or more new states, but may affirmatively support that outcome.291 More problematic, however, are situations like those presented by the dissolution of the former Yugoslavia.

When the former Yugoslav republic of Croatia resolved to secede in June 1991, its Serb minority, which comprised roughly 11.5 percent of Croatia’s population, bitterly opposed the decision. Supported in their opposition by the government in Serbia, they went to war against the Croatian army. A still more devastating war raged in the former Yugoslav republic of Bosnia-Herzegovina (“Bosnia”) for three and a half years beginning in April 1992, when the European Community and the United States recognized Bosnia as an independent state. Although sixty-three percent of Bosnia’s citizens had voted for independence in a plebiscite in February-March of 1992, most of the Serbs in Bosnia, comprising roughly thirty-one percent of the population, opposed secession and boycotted the poll.292 The nationalist Serb political party in Bosnia had already held its own plebiscite, and the Serbs polled voted for a “common Yugoslav State.”293 As further elaborated in Part V, the use of plebiscites in this situation was highly problematic.

happens when a significant and defined portion of a state’s citizens unambiguously choose to change the sovereign status of the territory in which they habitually reside? Cf. David Wippman, Treaty-Based Intervention: Who Can Say No?, 62 U. Chi. L. Rev. 607, 624–29 (1995) (arguing that although international law usually operates on fiction that government represents state when former acts on international plane, authority to bind state in authorizing future intervention in its internal affairs should be divided when, as factual matter, state’s political community is divided).

291. The reference to democratically elected representatives is deliberate. The “velvet divorce” of Czechoslovakia’s two constituent republics was initiated by Slovakia’s Prime Minister, Vladimir Meciar, and ultimately accepted by the Czech Prime Minister, Vaclav Klaus. Even after these political leaders concluded the agreement to separate, public opinion polls showed that a majority of both Czechs and Slovaks wanted the federation to continue. Further, Slovakia’s population of 5.2 million included some 600,000 ethnic Hungarians who feared that separation from the Czech republic would leave them more vulnerable. See Engelberg, supra note 253, at A1. The separation eventually was approved, after two failed efforts, by the Czech Parliament. See Division Approved by Czechoslovaks, N.Y. Times, Nov. 26, 1992, at A5.

292. See infra text accompanying note 392.

293. Conference on Yugoslavia Arbitration Commission, On International Recognition of the Socialist Republic of Bosnia-Hercegovina by the European Community and Its Member States, Opinion No. 4, Jan. 11, 1992, 31 I.L.M. 1501, 1503, para. 3(b) [hereinafter Conference on Yugoslavia Arbitration Commission, Opinion No. 4]. In contrast, Slovenia’s bid for independence in 1991 was virtually unopposed. A plebiscite there produced an overwhelming majority in favor of secession. Because minority
This conundrum may at first blush seem to be amenable to resolution when the justification for secession turns on denial of a significant minority group's fundamental rights since the population entitled to secede seems readily defined. Even here, though, secession may be problematic if the oppressed minority is territorially dispersed or, though geographically concentrated, occupies territory whose inhabitants include people who do not wish to secede.

These examples make plain the limits of democratic theory in resolving contested claims to territory. Still, considerations bearing on democratic government may be dispositive of some claims, while democratic theory may have important implications for other, more complex, situations. Specifically, some resolutions of contested claims may better promote values relating to democratic governance than others—a subject that comes into sharper focus as we turn to instrumental arguments in support of separatist claims.

C. Instrumental Arguments

Ethno-separatist movements might seek legitimacy on the ground that the values thought to be secured by democratic government are most likely to be realized when a polity is comparatively homogeneous—or, perhaps more importantly, regards itself as sharing a common commitment to core goals and values. This type of argument draws particular strength from utilitarian justifications for self-government and from civic republican visions of democracy.

1. Justifications Drawn from Utilitarian Theories

A commonly asserted justification for democracy is the claim that it is the form of government most likely to secure the interests of the greatest number of persons subject to governmental authority. For eighteenth-century utilitarians like Jeremy Bentham and James Mill, democracy was not an end in itself but a means for maximizing the realization of individuals' interests through aggregation of private preferences. But this justification may begin to fray if a polity is too diverse, at least if its diversity entails significant differences in political choices.

When individuals define their political interests in terms of the well-being of the national group to which they belong, nationalism and utilitarian justifications for democracy may converge to support national separatist movements. Some contemporary theories of national self-determination make precisely this type of argument. Asserting that the well-being of individuals is tied to the welfare of the national group to which they belong and which commands their paramount loyalty, some advocates of national self-determination argue that na-

294. See supra text accompanying notes 270–280.
295. See DAHL, supra note 2, at 93–95.
tion-states may offer the best assurance of securing the well-being of nations and their members. 297

If this argument seems radical, its basic assumptions have routinely informed decisions regarding representation of minority groups within established democratic states. In the United States, decades of experimentation under the Voting Rights Act have seen various efforts to redraw voting districts to assure racial equality in the exercise of the franchise. One such approach, largely discredited by recent Supreme Court decisions, 298 has been to create “majority-minority” districts whose demographic makeup virtually assures that the minority group comprising a majority in the district will be able to determine the outcome of an election. This approach recognized that political votes have, at times, correlated significantly with racial demography. 299 Similarly, proportional representation schemes utilized in many countries, including several Western European democracies, 300 implicitly endorse the view that ethnicity can be an appropriate basis for determining the territorial boundaries of a franchise within an established state.

2. Arguments Derived from the Republican Tradition

Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist. 301

Although the republican tradition offers a significantly different vision of democracy than utilitarianism, the former, like the latter, may provide support for at least some separatist claims. Specifically, republicanism seemingly would be furthered by the success of separatist claims if the result were two or more states whose citizens were better able than the citizens of the previous unified state to consider the common good in their democratic deliberations. 302

The core principles of contemporary versions of republicanism include a commitment to citizen participation in the deliberative process, 303 made possible by civic virtue; equality of political actors; and affirmation of the notion of a

297. See, e.g., TAMIR, supra note 8; Margalit & Raz, supra note 2.
298. The most important of these is Shaw v. Reno, 509 U.S. 630 (1993), in which the Supreme Court held that majority-minority districts in North Carolina gave rise to an equal protection claim.
299. See Guinier, supra note 279, at 1415. While critiquing this approach, Guinier offers an alternative that assumes that there are “politically cohesive minority interests”—i.e., political interests that correlate with racial identity, however fluid the correlation. Id. at 1462.
300. See DAHL, supra note 2, at 159.
301. MILL, supra note 263, at 392.
302. The discussion that follows draws upon contemporary liberal revisions of republicanism, whose more traditional versions often have been highly exclusionary.
303. In this respect republicanism falls within a broader set of justifications for democratic government—participation theories. In contrast to utilitarianism’s concern with democracy’s instrumental value in securing individuals’ rights and interests, participation theories emphasize the intrinsic value of political participation. See Steiner, supra note 86, at 100, 102. The values associated with greater citizen participation in public life include in particular greater self-realization: “Through increased participation in the institutions affecting their lives, [citizens] develop a sense of their worth and significance.” Id. at 105.
common interest or good. In the classical version of republicanism, “political participants were to subordinate their private interests to the public good through political participation in an ongoing process of collective self-determination.”

In principle, liberal renderings of republicanism not only tolerate but assume and even require some measure of diversity within the self-governing polity, and offer an alternative to utilitarianism that proponents of liberal republicanism believe is better designed to secure the interests of minorities. Republicanism rests on “a belief in the possibility of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue” and sees disagreement as a creative force that promotes political deliberation. Republicanism regards the deliberative process itself as playing a central part in the constitution of political identity; through the deliberative process, initial preferences might be modified, and the outcome of that process ideally will promote a common, rather than majority, good.

Yet this process requires not only “a commitment to political empathy, embodied in a requirement that political actors attempt to assume the position of those who disagree,” but also a capacity to empathize with citizens whose interests may be different from one’s own. The fabric of republicanism, like that of utilitarianism, might be strained by too much diversity within the polity.

It was precisely this consideration that led John Stuart Mill to conclude that “it is in general a necessary condition of free institutions that the boundaries of government should coincide in the main with those of nationalities.” Indeed, the capacity to empathize was central to Mill’s conception of nations:

A portion of mankind may be said to constitute a Nationality if they are united among themselves by common sympathies which do not exist between them and any others—which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves or a portion of themselves exclusively.

Like other arguments examined above, the claims of republicanism do not lead inexorably to a general rule favoring separatist claims. One leading proponent of liberal republicanism, Cass Sunstein, finds in republican principles themselves the potential for resolving problems posed by diversity through pro-

305. Sunstein, supra note 304, at 1547–48 (footnote omitted).
306. Id. at 1554 (footnote omitted).
307. See id. at 1562, 1575. Sunstein argues that “[m]odern republicanism is thus not grounded in a belief in homogeneity; on the contrary, heterogeneity is necessary if republican systems are to work.” Id. at 1576.
308. See id. at 1554–56.
309. Id. at 1555 (footnote omitted).
310. Cf. id. at 1556 (observing that “the republican belief in deliberation about the common good is most easily sustained when there is homogeneity and agreement about foundations”).
311. Mill, supra note 263, at 394.
312. Id. at 391.
portional representation rather than secession.313 More generally, institutional arrangements designed to promote interethic accommodation can go a long way toward assuring cooperation in multiethnic societies.314

But if the republican vision of democratic governance does not generally support separatist movements, neither is it irrelevant to their claims. In specific cases, as when part of a population declares itself inalterably hostile to the interests of another major group in the same state, republican theories may point toward political divorce on the ground that separation would produce two states in which republican democracy can be viable, instead of one in which its prospects are bleak.315

D. Countervailing Arguments

I have argued that although theories supporting democratic government do not provide a general rule for determining the ideal boundaries of a political unit, such theories point to considerations that may be pertinent in resolving boundary disputes. While the preceding sections demonstrate how democratic theories might support some separatist claims, other considerations, also derived from justifications for self-government, may point in the opposite direction.

1. Counter-Majoritarian Veto

From the perspective of separatist groups, a right to secede seems fully consistent with democratic principles. But from the vantage point of the state from which secession is sought, the very possibility imperils the democratic process.

If a secessionist movement opposed by most of a country’s citizens prevailed, its success would vitiate the principle of majority rule.316 Further, even the possibility of secession may thwart democratic deliberations, making the sort of compromise that is the warp and woof of the democratic process untenable. When secession is known to be possible, political minorities within a democracy can distort the outcome of political processes by threatening to secede if their views do not prevail.317

313. See Sunstein, supra note 304, at 1588–89.
314. See supra note 95.
316. President Lincoln invoked this argument in opposing the secession of the southern confederacy. See Lincoln, supra note 273, at 9.
317. See BUCHANAN, supra note 2, at 100; Cass R. Sunstein, Constitutionalism and Secession, 58 U. CHI. L. REV. 633, 648–49 (1991). This problem can, however, be mitigated by constitutional provisions that specify and limit the conditions that can justify secession. Such a delimitation would seek to minimize the situations in which a minority could invoke the threat of secession as a bargaining chip. See BUCHANAN, supra note 2, at 100.
International Responses to Ethno-Separatist Claims

2. Authoritarian Tendencies of Ethno-National States

To the extent that democracy is justified in terms of individuals' intrinsic and equal worth, an objective rendering of the principle of national self-determination may seem fundamentally antithetical to democratic principles. Opposing the objective principle of national self-determination in 1862, Lord Acton argued this point forcefully:

By making the State and the nation commensurate with each other in theory, [the modern theory of nationality] reduces practically to a subject condition all other nationalities that may be within the boundary. It cannot admit them to an equality with the ruling nation which constitutes the State, because the State would then cease to be national, which would be a contradiction of the principle of its existence. Accordingly, therefore, to the degree of humanity and civilisation in that dominant body which claims all the rights of the community, the inferior races are exterminated, or reduced to servitude, or outlawed, or put in a condition of dependence.

A related argument is that to configure states along ethno-national lines is to establish the conditions for authoritarian social arrangements. Such conditions are antithetical to the exercise of individual autonomy that is central to many justifications of democratic government, and imperil the natural rights of individuals—the protection of which, in Locke's view, is the justifying aim of government. This concern reflects "what is seen to be the totalizing tendency of the traditions and cultures that are invoked" in the "nationalist version of communitarianism." Lord Acton's nineteenth-century warning has renewed force today: "In a small and homogeneous population there is hardly room for inner groups of interests that set bounds to sovereign power." For Lord Acton, the multiethnic state "provides against the servility which flourishes under the shadow of a single authority, by balancing interests, multiplying associations ... diversity preserves liberty ... ."

Of course these risks can be mitigated by minority rights protections. Even with such assurances, however, elevating national self-determination to an organizing principle of states cannot help but impair the inculcation of values that sustain a democratic culture—above all, respect for all citizens' intrinsic and equal worth.

Still, it is important to distinguish between a principle of objective self-determination that would legitimize as a general organizing principle the paradigm of nation-states, and the resolution of particular secessionist claims in favor of the separatists. The latter outcome is not per se undemocratic, as Robert

318. See supra text accompanying notes 270–271.
319. ACTON, supra note 30, at 7.
320. See supra text accompanying notes 281–282.
321. See supra text accompanying note 271.
323. LORD ACTON, Nationality, in ESSAYS ON FREEDOM AND POWER 141, 165 (Meridian 1972) (1862).
324. Id.
Dahl reminds us, recalling that democratic Europe "consists of people who have been constituted by divisions and separations." 325

E. Authoritative Resolution

While these considerations argue against any general rule or presumption in favor of ethno-separatist claims, there remains an unavoidable dilemma: The international community, whether acting as autonomous states through bilateral recognition policies or collectively through such fora as the United Nations, has no choice but to respond to such claims when they are asserted. Perhaps the most acute dilemma arises in situations like those presented in the former Yugoslavia and in Russia, where significant subunits of a state wish to secede while the remaining population opposes secession. To the extent that democratic processes are brought to bear in resolving the contested claims, these situations raise the difficult question of how to identify the unit(s) that should participate.

The answer to that question will determine the outcome of the democratic process in the situations described above. Consider, for example, the juridical status of Northern Ireland and its Catholic minority. Suppose that an authoritative body undertook to resolve this dispute through a plebiscite. If that body identified Northern Ireland's Catholic minority as the relevant unit entitled to determine its own status, the voting population would likely choose to unite with the Republic of Ireland. A plebiscite conducted in the whole island of Ireland—that is, both the Republic of Ireland and Northern Ireland—might produce the same outcome. If, instead, the population of Northern Ireland were to resolve this issue, the majority would likely opt to remain in the United Kingdom and to keep Northern Ireland's Catholic minority in that union. Similarly, if pollsters consulted the entire population of the United Kingdom, the majority of voters would probably choose the status quo. 326 Each approach purports to resolve the dispute through democratic processes, yet alternative approaches may produce opposite results. Does democratic theory offer any guidance on which of these options is preferable?

From the point of view of Northern Ireland's Catholic minority, it might seem patently undemocratic to be forced to remain in a state to which it does not consent to belong. This view can be countered in terms of democratic theory if it can be demonstrated that the rest of Northern Ireland's or the United Kingdom's population has an interest in keeping Northern Ireland's Catholic minority within the United Kingdom. If such interests are established, the larger population would have a claim to participate in a plebiscite to resolve the dispute under a variation of the "all-affected" standard. As framed by Robert Dahl, that standard posits that "[e]veryone who is affected by the decisions of a government should have the right to participate in that government." 327

It takes little reflection to recognize that the entire population of a state might be profoundly affected by the secession of a constituent part of that state.

325. DAHL, supra note 96, at 47.
326. This example is drawn from Whelan, supra note 2, at 23-24.
327. DAHL, supra note 96, at 49.
International Responses to Ethno-Separatist Claims

Secession could leave the remaining state altered in several important respects: A vital portion of the state’s economic base may be lost, the demographic profile of the country might be altered in a way that changes the outcome of statewide polls, and so forth. Further, the possibility of fragmentation in itself threatens the cohesion of a state polity and its capacity to find common ground in matters of public policy. And as recent developments in the former Soviet Union and former Yugoslavia remind us, when one or more parts of a federal state assert independence, they may make inevitable the dissolution of the entire state, effectively forcing independence on republics that would have preferred the status quo. Accordingly, the all-affected principle would seem to dictate that the state’s entire population should vote on the secession of a constituent part.

One problem with using the all-affected principle to resolve the unit dilemma, however, is that it does not provide a means of weighting competing interests. Instead, it gives every voter who has an interest in the outcome of a plebiscite an equally weighted vote, even though the outcome will affect some citizens far more profoundly than others.

This type of dilemma is not inherently insoluble, but its resolution requires an entity that can authoritatively resolve the conflicting claims. Analogous dilemmas have, in fact, been resolved within states by vesting such authority in a particular government entity. In the United States, for example, the Supreme Court has recognized that federal states generally have the power to determine the boundaries within which questions of reorganization, such as whether a local governing unit will merge with another, will be decided by popular vote. But these situations are fundamentally different from the situation addressed in this Article: In theory, at least, a federal state government can consider the welfare of all of its citizens in deciding the territorial boundaries of the vote on a proposed political reorganization that does not entail secession from the state.

For example, the State of New York could be expected to take account of the relative interests of all of its citizens in deciding how to structure a vote on Staten Island’s bid to secede from the City of New York. The state govern-

329. See supra text accompanying note 316.
330. See GLENNY, supra note 293, at 143–44 ( recounting how secession of Slovenia and Croatia from former Yugoslavia induced Bosnian secession, though Bosnia would not have seceded from intact Yugoslavia); Margaret Shapiro, Identity Crisis Pulls Many in Belarus Toward Russia, WASH. POST, July 2, 1995, at A23 (describing general regret among citizens of Belarus that breakup of Soviet Union led to their country’s separation from Russia and noting, inter alia, severe economic consequences for Belarus).
331. See, e.g., Town of Lockport v. Citizens for Community Action at the Local Level, Inc., 430 U.S. 259 (1977) (rejecting challenge to New York’s procedure for reorganizing counties). There are, however, exceptions to states’ power in this area. For example, the Fifteenth Amendment forbids a state from depriving citizens of the right to vote because of their race, and this provision has been applied to invalidate some states’ discriminatory districting schemes. See, e.g., Gomillion v. Lightfoot, 364 U.S. 339 (1960); cf. Guinier, supra note 279, at 1433 (criticizing districting model of enforcing Voting Rights Act because it “ignores the role of prejudice at the legislative level”).
332. That bid has been analyzed in Briffault, supra note 257.
ment would not be an interested party in the outcome of that vote in the way that it would be if Staten Island sought to secede from the State of New York itself. And as the government of all of the citizens significantly affected by Staten Island's quest to secede—that is, both residents of Staten Island and residents of the greater metropolitan area—the state government could be expected to weigh all affected citizens' interests in an essentially impartial fashion. In short, the New York state government theoretically possessed both the requisite interest in the welfare of all of the affected groups and the necessary impartiality as between them to be entrusted with the decision about the territorial boundaries of the franchise. In cases where these assumptions may be doubted—as, for example, where a state historically has pursued racially discriminatory districting plans—the federal government can step in to provide the requisite oversight.

In contrast, there is no authoritative entity that stands in the position of the State of New York vis-à-vis the Staten Island secession bid in situations where a group seeks to secede from a country, as when Chechnya sought independence from Russia. Moscow, which opposed the Chechen rebels with brutal force, was hardly disinterested in the outcome of Chechnya's bid.

In addressing preliminary issues raised by the plebiscite principle—in particular, who will be entitled to vote and what consequences will follow in the event of an electoral split—authoritative determinations would, of course, have to be guided in part by considerations that stand outside democratic theory, such as the historical relationship of claimants to particular territory.

In sum, I have argued against the claim that democratic theories have no bearing on questions of boundary. Considerations relating to democratic governance may well be pertinent to the resolution of conflicting claims to sovereignty, even if democratic theory provides no general rules that produce a predictable outcome in all such disputes. In particular, various justifications for democratic government may provide support for separatist claims of minorities that are systematically and irremediably denied fundamental rights within a state. But these considerations can only be brought to bear in a patently legitimate fashion if there is an authoritative and disinterested entity capable of doing so—a subject I explore further in Part V.

333. While this assumption may be necessary, it doubtless is somewhat naive. Since a state government is largely the sum of its constituencies, its resolution of intrastate boundary disputes is likely to be the product above all of the most effective lobbying by affected interest groups.

334. See supra notes 298-299 and accompanying text.


336. A closer analogy to the Staten Island situation would exist if the Soviet Union were still a country when Chechnya sought to secede from the Republic of Russia; then, the national government could perform the same function that the State of New York has undertaken in mediating questions of reorganization within the state.

337. See Brilmayer, supra note 269, at 191-92. Professor Brilmayer places this factor at the center of her theory of separatist claims.
F. The Democratic Paradox

If theories of democratic government point to principles that are relevant in assessing separatist claims, the practice of democracy has profound implications for ethno-nationalism and, in particular, its relationship to the central concern of international law—maintaining peace and stability.\(^\text{338}\) As I have argued in Part II, intolerant ethno-nationalism is less likely to emerge in a robust democratic culture.\(^\text{339}\) In larger perspective, a rich body of empirical evidence now supports the core claim of Immanuel Kant’s theory of democratic peace: Liberal democratic states rarely go to war against each other.\(^\text{340}\) If not a panacea for the perennial threat of destabilizing force, the global sweep of liberal democracy nonetheless would seem to be the best inoculation against it.

And yet, another vein of empirical research discloses a correlation between democratization of autocratic regimes and increased levels of ethnic conflict.\(^\text{341}\) How can this paradox be explained? Anne-Marie Slaughter has observed that scholarship on the “democratic peace” has focused on conflicts between states, not on the intrastate conflicts characteristic of ethnic strife.\(^\text{342}\) As she notes, the systemic factors believed to account for the infrequency of wars between liberal democracies are absent in countries rent by ethnic divisions. Theories explaining the phenomenon of the liberal peace assume the operation of parliamentary control over the decision to go to war and “the deep inculcation of norms of peaceful change and positive-sum bargaining that flow from long experience of alternating parties in power.”\(^\text{343}\) Ethnic conflict is comparatively likely to emerge in countries where such alternation is rare.\(^\text{344}\)

I would like to press the analysis further: Democratic processes are highly relevant to both the incidence and intensity of ethnic conflict within a political community, but their implications depend, above all, on their cultural depth and institutional strength. As Ted Robert Gurr has noted, minorities in advanced industrial democracies typically face fewer barriers to the exercise of political power and are more likely to utilize the (democratic) tactic of protest than that of rebellion to press their claims.\(^\text{345}\) Advanced industrialized democracies structurally are more disposed to respond to the nonviolent political demands of organized constituencies, including those organized principally along ethno-national lines, and also are more likely than developing democracies to have the

\(^{338}\) For an analysis of conditions in which nationalism increases the risk of war, see Stephen Van Evera, \textit{Hypotheses on Nationalism and the Causes of War}, in \textit{Nationalism and Nationalities in the New Europe}, supra note 14, at 136.

\(^{339}\) See supra notes 75–88 and accompanying text.


\(^{342}\) See Anne-Marie Slaughter, \textit{Pushing the Limits of the Liberal Peace: Ethnic Conflict and the “Ideal Polity”}, in \textit{Ethnic Identity and International Law}, supra note 95 (manuscript at 143, on file with the Yale Journal of International Law).

\(^{343}\) Id.

\(^{344}\) See id.

\(^{345}\) See Gurr, supra note 341, at 137–38.
resources necessary to respond effectively to the demands of groups operating within a democratic framework. Further, when democracies develop alongside a tradition of constitutional liberalism, citizens enjoy systemic protections against abuse of individual and minority rights. By contrast, the very process of political liberalization in democratizing autocracies presents new opportunities for increased ethnic mobilization, and rapid democratization in autocratic societies often has correlated with heightened levels of ethnic conflict. The fragility of institutional structures and the dearth of resources for responding effectively may produce a conflictive, rather than accommodative, outcome.

What, then, is left of the liberal internationalist project? Can international policy successfully promote the deepening of a liberal democratic culture where it has not yet taken root while avoiding the minefield of destabilizing transition? In fact, there is substantial evidence that appropriate institutional arrangements in multiethnic societies can go a long way toward averting conflict and promoting accommodation in a framework of democratic governance, particularly if these arrangements are adopted early in a newly independent state’s political life. While it is beyond the scope of this Article to explore such arrangements, a rich literature on this subject provides cause to believe that wise policy initiatives can promote the global sweep of liberal democratic values while minimizing the risks of increased ethnic mobilization.

By equal measure, poorly conceived efforts to promote democracy can aggravate tensions in regions where the specter of ethnic conflict looms large. Nowhere has this been more tragically evident than in the former Yugoslavia, where a thin democratic culture provided the context in which political leaders cynically fostered predatory ethno-nationalism, leading to the country’s violent dismemberment. Although well-intentioned, efforts by the European Community to craft a democratic resolution only deepened the problem.

V. THE BREAK-UP OF YUGOSLAVIA: A CASE STUDY

However inadequate, international responses to the dissolution of Yugoslavia were extensive, presenting the nearest contemporary approximation of an authoritative resolution of ethno-separatist claims. Notably, a commitment to principles of democratic government figured prominently in international efforts to mediate the Yugoslav breakup. But efforts to apply those principles failed to achieve the liberal and pacifying aims of their proponents. The results instead demonstrated the potentially disastrous consequences of poorly conceived efforts to promote democratic processes in a context of ethnic conflict.

346. See id. at 137.
348. See Zakaria, supra note 90, at 38 (describing data demonstrating that democratizing states have gone to war significantly more often than either stable autocracies or liberal democracies in last 200 years).
349. See GURR, supra note 341, at 137–38.
350. See supra note 95.
The developments that precipitated Yugoslavia's dissolution likewise highlight the complex, at times perilous, relationship between democracy and nationalism. Above all, a weak democratic culture in post-Tito Yugoslavia provided the context in which opportunistic political leaders incited lethal nationalism. For all of these reasons, the dissolution of Yugoslavia and international responses to it merit special consideration.

A. International Responses to the Dissolution of Yugoslavia

1. Prelude to War

Legal chronologies of Yugoslavia's dissolution typically begin in the fall of 1990, when Slovenia took its first formal step toward secession. But events leading to the breakup of the Socialist Federal Republic of Yugoslavia (SFRY) were set in play several years earlier. Crucial impetus for the unraveling of Yugoslavia was provided by a rising star in Serbia's political firmament, Slobodan Milosevic. In the late 1980s, the communist system in Yugoslavia was in a state of terminal decay, and Milosevic, then head of Serbia's League of Communists, determined that he would need a new base of political support to secure a dominant place in post-communist Yugoslavia.

This was a classic case of an unscrupulous leader mobilizing ethnic hostilities to advance his political ambitions. Although Milosevic previously had condemned nationalism in his role as Communist party functionary, he now resolved that Serb nationalism would be the base from which he would propel his career forward. Beginning in the autonomous province of Kosovo, where Serbs had been defeated in battle by Ottoman Turks six hundred years earlier, Milosevic began a sustained campaign of nationalist vitriol, deliberately stoking Serb paranoia—and identifying the Serbs' cardinal enemies as other national groups in Yugoslavia.

Milosevic's program was to refashion Yugoslavia into a Greater Serbia. "If the other republics would not agree to a new Yugoslavia dominated by the Serbs," Michael Ignatieff writes, "Milosevic was prepared to incite the Serbian minorities in Kosovo, Croatia, and Bosnia-Hercegovina to rise up and demand Serbian protection. These minorities served as Milosevic's Sudeten Germans—pretext and justification of his expansionary design."

352. See GIELTEN, supra note 84, at 52-53.
353. See id. at 53-56. Understanding this background to the Yugoslav conflict is essential to an evaluation of international responses. Policymakers, including President Clinton, periodically characterized the conflict as the most recent flareup of "ancient hatreds," a phrase that has become a code word for intractability. In policy terms, this characterization implies that outside actors cannot affect the outcome of such conflicts. Cf. Morning Edition (National Public Radio broadcast, July 17, 1995) (quoting, in report by Tom Gjelten, President Clinton inaccurately stating that Bosnian conflict had roots in eleventh century, and suggesting that this account was designed to ward off pressure for United States to intervene in Bosnia).
354. IGNATIEFF, supra note 91, at 26.
Against a history of interethnic violence in Yugoslavia, it was not difficult to persuade various national groups that they would be vulnerable if left outside their national republic in a reconfigured Yugoslavia. This was notably true in Croatia, which, in contrast to relatively homogeneous Slovenia, had a sizable Serb minority, comprising some 600,000 people. The ultranationalist policies of Croatia’s leader, Franjo Tudjman, did nothing to assuage their anxieties, and indeed serious abuses were being committed against Croatian Serbs.

While Milosevic’s rhetoric preyed on Croatian Serbs’ insecurity, his expansionist policies reinforced Slovenian and Croatian nationalists’ belief that their future would be precarious if they remained in a Serb-dominated federal Yugoslavia. The first formal step toward separation came on September 27, 1990, when Slovenia’s parliament declared that federal legislation would no longer have binding force in the republic. On December 22, the Croatian parliament made a similar declaration. The following day Slovenian voters overwhelmingly supported a referendum on independence, as did Croats in May 1991. Initially, the two republics sought greater autonomy within the SFRY, but Serbia opposed any arrangement that would dilute its power, and negotiations among the leaders of the various republics during the spring of 1991 failed to bridge these differences. On June 25, 1991, both Slovenia and Croatia declared their independence.

The federal Yugoslav army, known by its acronym “JNA,” attacked Slovenia two days later but withdrew after ten days of fighting. With a negligible Serb population in Slovenia, the Serb-dominated federal government had comparatively little incentive to oppose Slovenia’s secession by force of arms. But Croatian Serbs and the JNA launched and sustained a longer attack against Croatia.

355. Despite occasional allusions by political leaders and others to the ancient roots of the current conflict in Bosnia, see supra note 353, the first major explosion of national conflict there occurred during World War II. See Morning Edition, supra note 353 (quoting John Fine).

356. See IGNATIEFF, supra note 91, at 26–27.

357. See GLENNY, supra note 293, at 123.

358. See Weller, supra note 351, at 569.

359. See id.

360. See id. at 569–70.

361. See id. Implementation of these declarations was temporarily suspended under the terms of a ceasefire agreement negotiated under the auspices of the European Community in Brioni on July 7, 1991. See id. at 573.

362. See GRIETEN, supra note 84, at 55 (indicating that as early as 1987, Milosevic rejected “the idea of a federal Yugoslavia and [began] to work toward the goal of a Greater Serbia that would incorporate Bosnia, parts of Croatia, and all other areas where Serbs lived”); Misha Glenny, Yugoslavia: The Great Fall, N.Y. REV., Mar. 23, 1995, at 56, 59 (reporting that in March 1991, Serbian President Slobodan Milosevic abandoned his earlier policy of preserving unified Yugoslavia and instead resolved to establish Serbian state); Warren Zimmerman, The Last Ambassador, FOREIGN AFF., Mar.–Apr. 1995, at 2, 13 (asserting that Milosevic favored allowing Slovenia to secede since this would enable federal army to “take on a Croatia no longer able to count on Slovenia’s support”).

363. Hostilities began during the spring of 1991, before Croatia declared its independence. In January 1992, a ceasefire was negotiated by U.N. special envoy Cyrus Vance and monitored by U.N. peacekeepers stationed in Croatia. There were, however, periodic breaches, and the Croatian army launched two major successful operations against rebel Serbs in 1995.
In contrast to the leadership of Slovenia and Croatia, the government of Bosnia-Herzegovina desperately hoped to avoid the breakup of Yugoslavia. When Germany announced its intention to recognize Slovenia and Croatia in December 1991, Bosnia's President, Alija Izetbegovic, traveled to Bonn to try to dissuade German leaders from this course, fearing that the secession of Croatia would leave Bosnia vulnerable to the territorial claims of both Serbia and Croatia. Only when it was clear that recognition of Croatia and Slovenia was inevitable did Izetbegovic decide to seek independence for Bosnia, believing that his country would fare better as an independent state than as part of a rump Yugoslavia dominated by Milosevic.

2. **EC Common Recognition Policy**

In the early stages of Yugoslavia's dissolution, the European Community (EC) took the lead in seeking a peaceful resolution of the disputes between Yugoslavia's constituent republics. On August 27, 1991, the Community decided to convene a peace conference that would attempt to resolve the disputes over territorial and political status. The European Community established an Arbitration Commission, chaired by Robert Badinter, President of the French Conseil Constitutionnel, to resolve discrete issues through the application of legal principles. Notably, principles of democratic government played a important part in the Commission's key rulings.

In its first opinion, issued December 7, 1991, the Commission concluded that, as a matter of public international law, the SFRY was “in the process of dissolution.” A key basis for this conclusion was that the SFRY had been a “federal-type State” comprising “communities that possess a degree of autonomy,” and, with four of the SFRY’s republics having claimed independence, it could no longer be said that federal authorities “meet the criteria of participation and representativeness inherent in a federal State.” With this, the Commission attached a novel juridical consequence to the SFRY’s federal structure—one that emphasized the country’s democratic character as a condition to its continuing existence as a state.

364. See GLENNY, supra note 293, at 163.
365. See id. at 164; see also infra text accompanying notes 382–388.
367. The Commission was endorsed by the governments of the United States and the Soviet Union. See id. at 1489.
368. Conference on Yugoslavia Arbitration Committee, Opinion No. 1, 31 I.L.M. 1494, ¶ 3, at 1497 (1992) [hereinafter Conference on Yugoslavia Arbitration Committee, Opinion No. 1]. This finding placed the territory of the former Yugoslavia in the type of transitional status that, in the view of the Commission of Jurists that assessed Aaland Islanders' self-determination claims during the interwar period, justified a heightened international competence to address the territory's juridical status. See supra text accompanying notes 199–201.
370. Id. ¶ 2(b), at 1496.
371. Professor Hannum criticizes this view as potentially leading to “immediate recognition of secessionist movements in federal states, while denying such recognition to equally (or more) distinct regions attempting to secede from a unitary or centralized state.” HURST HANNUM, Self-Determination, Yugoslavia
Having found that the SFRY was in the process of dissolution, it re-
mained for the Badinter Commission to determine what new configura-
tion would emerge from the wreckage of the former state. Its work centered on asc-
certaining whether Yugoslav republics satisfied the criteria for recognition by EC member states elaborated in two declarations adopted in mid-December 1991. One established a common recognition policy to guide member states' recognition of new states that might emerge from the breakup of states in Eastern Europe and the Soviet Union. A commitment to democratic principles figured centrally in this policy, which affirmed the Community's "readiness to recognize... those new states which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations."372 Respect for the "rule of law, democracy and human rights" were among the prerequisites for recognition under the common position.373

The Declaration on Yugoslavia, adopted on the same day, invited Yugo-
slav republics seeking independence to indicate by December 23, 1991, whether they wished to be recognized and accepted the commitments set forth in the EC common recognition policy as well as provisions set forth in a draft convention prepared by the EC peace conference on Yugoslavia protecting "human rights and rights of national or ethnic groups."374

In light of the circumstances surrounding the dissolution of Yugoslavia, assurances of minority rights protections figured prominently in the EC recognition criteria. Serbian nationalists' opposition to the incorporation of Croatia's Serb minority in an independent Croatia was central to the dispute between Serbia and Croatia. Later, the involuntary incorporation of Serbs in an independent Bosnia would become an even more explosive issue. The European Community addressed this concern by, inter alia, including in its common recognition pol-

373. Id. at 1487.
374. European Community: Declaration on Yugoslavia, Dec. 16, 1991, 31 I.L.M. 1485, 1486 (1992). The EC guidelines on recognition of new states and its further conditions for recognition of states emerging from the dissolution of Yugoslavia go well beyond the basic criteria for statehood long established in international law. See supra notes 372-373. The European Community made clear that its policy was not an attempt to revise international legal requirements for statehood but instead merely governed the political act of recognition of new states by EC member states. See Conference on Yugoslavia Arbitration Committee, Opinion No. 10 (July 4, 1992), 31 I.L.M. 1525, ¶¶ 4-5, at 1526; Conference on Yugoslavia Arbitration Committee, Opinion No. 1, supra note 368, 31 I.L.M. ¶ 1(a), at 1495. Faced with a situation in which territorial claims and counterclaims in Yugoslavia had already led to armed conflict, the European Community sought to utilize its member states' recognition determinations to induce peaceful resolution of the territorial disputes.
policy the requirement of "guarantees for the rights of ethnic and national groups and minorities . . .".

Even before this policy was adopted, the EC peace conference put forth as a basic principle of a proposed settlement the adoption of comprehensive arrangements to protect minority rights, including special status for certain groups and areas. In November 1991, the peace conference presented a draft convention that included a detailed elaboration of minority rights and provided for autonomous governmental structures in areas where members of a national minority form a local majority. Yugoslav republics wishing to be recognized as independent states were required to indicate not only their acceptance of the general requirements of the EC common recognition policy, but also of the provisions of this draft convention.

Yet, although the Badinter Commission expressed reservations about whether Croatian law adequately provided for autonomy in Serb-dominated areas as required in the draft convention, the presidency of the European Political Community declared on January 15, 1992, that the European Community and its member states had decided to proceed with recognition of Slovenia and Croatia. Three weeks earlier the German government had announced its intention to recognize both Slovenia and Croatia unconditionally on January 15, 1992. Although all but one of the other members of the European Community and the United States opposed Germany's desire for early recognition, key European states were unwilling to confront Germany lest this imperil the Maastricht Agreement of December 1991. To maintain a common position on recognition, the European Community had to recognize Slovenia and Croatia despite its reservations about whether Croatia met the Community's prerequisites.

Whether adequate assurances of minority protection could have satisfied nationalist Serbs and averted the subsequent conflict in Croatia cannot be known. What is clear is that, by disregarding its own requirements in this respect, the European Community vitiated whatever influence it had in addressing

376. The comprehensive peace plan proposed by the EC conference, chaired by Lord Carrington, set forth elaborate provisions for minority rights protections and political autonomy. See Weller, supra note 351, at 582. When the peace conference became a joint U.N.-EC effort, chaired jointly by Cyrus Vance and David Owen, the two co-chairmen proposed a comprehensive settlement of the Bosnian conflict that likewise included elaborate provisions for local autonomy and assurances of minority rights. See Report of the Secretary General on the International Conference on the Former Yugoslavia (Nov. 11, 1992), 31 I.L.M. 1549.
377. See Weller, supra note 351, at 583.
380. See Weller, supra note 351, at 586.
382. See Djilas, supra note 91, at 163–64.
Serb concerns about Croatia, and more generally undercut the credibility of its recognition policy.\textsuperscript{383}

3. \textit{Prologue to Disaster: Bosnia}

The tragedy lay in forcing Bosnia to choose an independence in which it could not survive.\textsuperscript{384}

EC recognition of Croatia outside a comprehensive resolution of the territorial status of the former SFRY had tragic consequences for Bosnia—and this was foreseeable. When Germany announced its decision to recognize Croatia and Slovenia unconditionally, the Secretary General of the United Nations, Javier Perez de Cuellar, implored Germany to reconsider. Its premature recognition, the Secretary General warned, would provoke "the most terrible war" in Bosnia-Herzegovina.\textsuperscript{385}

By all accounts, multiethnic Bosnia would be ravaged if Croatia separated from the former Yugoslavia outside the framework of a comprehensive settlement. As one writer put it, Bosnia cannot "belong to either Croatia or Serbia—it can act as a bridge between the two but its relationship with both republics must be equal and agreed on by both sides."\textsuperscript{386} With no group forming a majority in Bosnia, its Muslim and Croat citizens feared for their welfare in a rump Yugoslavia without Croatia, while many of its Serb citizens opposed Bosnian independence, wishing instead to remain joined to Serbia.\textsuperscript{387} Committed to Bosnia's multiethnic heritage, its leaders unsuccessfully sought to avert the breakup of Yugoslavia. Summarizing the Bosnian government's view at the time, Misha Glenny has written: "The last thing that the [Bosnian] Muslims . . . were demanding at the time was independence."\textsuperscript{388}

But once it became clear that Croatia and Slovenia would become independent states, Bosnia was faced with three options: It could remain attached to

\textsuperscript{383} This effect was compounded by the European Community's failure to accord immediate recognition to Macedonia upon the Badinter Commission's finding that the republic had satisfied the EC recognition criteria. The European Community's delay in authorizing member states to recognize Macedonia was due to Greek objections to the republic's use of the name "Macedonia," which Greece claimed implied territorial claims against Greek Macedonia. See Raymond Bonner, \textit{The Land That Can't Be Named}, N.Y. TIMES, May 14, 1995, § 4, at 6. When the European Community belatedly declared that the Yugoslav republic had met its conditions for recognition, it made its finding subject to the new state being recognized "under a name that can be accepted by all parties concerned." Declaration on the Former Yugoslav Republic of Macedonia, EPC Informal Meeting of Ministers for Foreign Affairs (Guimaraes, May 1-2, 1992), EPC Press Release 53/92.

\textsuperscript{384} See Glenny, supra note 362, at 58.

\textsuperscript{385} Glenny, supra note 293, at 163.

\textsuperscript{386} Id. at 144. On October 24, 1991, Bosnia's Assembly adopted a platform on future arrangements for the Yugoslav Community in which the Republic asserted its willingness to become a member of a new Yugoslav Community that would include both Serbia and Croatia. See Conference on Yugoslavia Arbitration Commission, Opinion No. 4, supra note 293, 31 I.L.M. ¶ 2(0), at 1502.


\textsuperscript{388} Glenny, supra note 362, at 57.
a rump Yugoslavia dominated by the ultranationalist Milosevic; it could acquiesce in its own division between Serbia and Croatia, as the leaders of those two republics had proposed between themselves; or it could apply for recognition as an independent state through the process established by the European Community. On December 20, 1991, three days before the EC deadline for applying for recognition, the Bosnian government formally requested EC recognition as an independent state.

In response, the Badinter Commission noted the opposition of a substantial proportion of Bosnian Serbs, and concluded that "the will of the peoples of Bosnia-Hercegovina to constitute the [Republic] as a sovereign and independent State cannot be held to have been fully established." It suggested, however, that its assessment "could be reviewed if appropriate guarantees were provided by the Republic applying for recognition, possibly by means of a referendum of all the citizens of the [Republic] without distinction, carried out under international supervision." In this respect, the Commission affirmed a predominantly subjective model of self-determination—a model that resonates more than an objective model with the principles underlying international law's emerging democratic entitlement.

The Commission's suggestion induced the Bosnian government to hold a plebiscite in late February–early March 1992. The results were predictable and disastrous. Although almost sixty-three percent of Bosnia's citizens voted for independence, most of the republic's Serb citizens boycotted the poll. Their leaders previously had announced that they would not accept its results, and within weeks sporadic battles broke out in several strategically important areas of Bosnia.

However tragic the consequences, Bosnia had satisfied the EC recognition criteria, and the Community (as well as the United States) recognized Bosnia on April 7, 1992. On April 6, in anticipation of EC recognition, Bosnian Serb rebels attacked the Holiday Inn of Sarajevo, instigating the war that lasted three and a half years. Backed by Serbia, Bosnian Serbs seized more than seven...
enty percent of Bosnia's territory. Along the way, they committed atrocities so sweeping and barbarous that the United Nations established the first international criminal tribunal since the Nuremberg and Tokyo tribunals to prosecute those responsible for crimes, including genocide, committed in the former Yugoslavia.397

4. **The Dayton Peace Agreement**

The conflict finally came to an end in December 1995 as a result of peace negotiations brokered by the U.S. government in Dayton, Ohio. Although the Dayton Peace Agreement398 proximately caused the cessation of hostilities, it took military action and economic sanctions to bring the warring parties to the peace table. In particular, the combined effect of air attacks on Serb targets near Sarajevo by the North Atlantic Treaty Organization (NATO), a rout of Croatian Serbs by the Croatian army in August 1995,399 and economic sanctions against Serbia400 brought Serb leaders to the point where they were willing to negotiate seriously.

Although a general assessment of the Dayton Agreement is beyond the scope of this Article, one aspect of the peace plan has special pertinence here. Pursuant to Annex 3 of the peace accord, the Organization for Security and Co-operation in Europe (OSCE) was given the mandate to organize elections in Bosnia.401 The OSCE was to "certify whether elections can be effective under current social conditions . . . and, if necessary, to provide assistance . . . in creating these conditions."402 Pursuant to this authority, the OSCE held national elections on September 14, 1996, despite the fact that independent monitors

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396. The initial attacks against Bosnian authorities were launched jointly by JNA forces and irregular Bosnian Serb forces. On May 19, 1992, the JNA publicly divided itself into the Army of the "Serbian Republic" and the Army of Yugoslavia. The latter became the armed force of Serbia and Montenegro, while the former remained in Bosnia. When the JNA ostensibly withdrew from Bosnia, it left its installations and equipment to the rebel Serbs there and encouraged its Serbian soldiers to remain in Bosnia as soldiers of the army of the "Serb Republic." *See generally* Prosecutor v. Tadic, I.T.-94-1-T at 37-44, 218-20 (May 7, 1997) (opinion and judgment).


398. The peace agreement was initialed in Dayton, Ohio on November 21, 1995, and signed in Paris on December 14, 1995, when it became effective. The agreement, which consists of a General Framework Agreement and twelve Annexes, is reproduced at 35 I.L.M. 89 (1996) [hereinafter Dayton Peace Agreement].


402. *Id.* art. I(2).
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called for postponement, arguing that conditions were not amenable to a free and fair election.

The poll stands as a cautionary tale of how ill-conceived elections can exacerbate divisions in an ethnically riven society like postwar Bosnia. Among other abuses, Bosnian Serb leader Radovan Karadzic—by then twice indicted by the U.N. Tribunal in The Hague—abused the registration process to secure Serb victories in key areas. For example, humanitarian aid programs administered in Serb-held areas of Bosnia by Karadzic’s wife were flagrantly manipulated to secure results that would ratify the results of “ethnic cleansing.”

Not surprisingly, the elections did just that, bringing into office hardline nationalists who openly oppose interethnic cooperation.

Conditions prevailing in the lead-up to these elections were so clearly inauspicious that the OSCE decided to postpone municipal elections, which initially had been scheduled to take place along with national elections in September 1996. Local elections, held on September 13–14, 1997, after a second postponement, were marred by serious allegations of fraud and coercion by nationalist political leaders and resulted in the election of nationalist politicians in most municipalities. By virtue of its role in organizing the poll, the international community legitimized the nationalist leaders whose election was all but inevitable.

B. Assessing International Responses

Neither the European Community nor any other international actor bears principal responsibility for the explosive nature of Yugoslavia’s breakup; that belongs to political leaders in the former Yugoslavia who cynically played the national card to further their political ambitions. Even so, international actors

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408. See Daily News: Bosnian Local Poll Results Show Emerging Opposition (Radio B92 Open Serbia (Belgrade) radio broadcast, Oct. 4, 1997), available in <http://b92eng.opennet.org/b92engOS/n_970504/tx1/1004971e.htm> (visited Dec. 10, 1997). Bosnian Muslims did, however, formally win political control of Srebenica, a town in eastern Bosnia where perhaps as many as 7000 Muslims were massacred in July 1995. See David Rohde, Muslims Win Vote in Town That Serbs ‘Cleansed’, N.Y. TIMES, Oct. 10, 1997, at A7. These Muslims voted almost entirely by absentee ballot, and observers believed that enforcing the election result “would be close to impossible, barring a strong show of force by NATO troops.” Id.

409. See Timothy Garton Ash, Eastern Europe’s Paradox: Why Some Nations Prosper While Others Decline, WASH. POST, Oct. 5, 1997, at C1 (“[Without the] manipulative, post-communist politics, the ethnic divisions [in several Eastern European countries] would not have turned into open sores or, in
made crucial blunders in their response to the challenge presented by Yugoslavia’s violent implosion, unwittingly abetting the violent dismemberment of a state they had pushed toward independence.

1. Utilizing Electoral Processes to Ameliorate Ethnic Divisions

Among these mistakes were several instances of imprudent insistence on democratic processes during periods of intense ethnic polarization. As noted in the preceding Section, international actors such as the European Community and OSCE pressed for elections as a means of resolving such highly charged disputes as whether Bosnia would remain part of the rump Yugoslavia or seek independence, and insisted on holding elections when they were more likely to exacerbate than ameliorate ethnic insecurities.  

This is not to say that the European Community, OSCE, and others were wrong to promote democratic principles and processes in responding to the challenge presented by the SFRY’s dissolution. Rather, the fault lies in these actors’ ill-conceived insistence on utilizing democratic polls as a principal vehicle for resolving ethnically charged disputes under conditions in which elections were likely to inflame tensions and legitimize hardline nationalists. In such conditions, it may be more constructive to emphasize programs that promote the flourishing of civil society, the sinews of a vibrant democracy.

2. Reliable Engagement by the International Community

Deficiencies in the international community’s efforts to mediate the conflicting claims that led to Yugoslavia’s implosion highlight the lack of institutional mechanisms with established and acknowledged authority to resolve such claims. Over the course of the Yugoslav crisis, principal responsibility for attempting to reach a mediated solution shifted from the European Community to

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the case of Yugoslavia, to rivers of blood.”); Djilas, supra note 91, at 85 (noting that although roots of Yugoslav crisis were not invented by nationalist intellectuals or political elites, “the Yugoslav civil war would not have happened if elites—and especially Serbia’s president Slobodan Milosevic and Croatia’s president Franjo Tudjman—had not irresponsibly and deliberately manipulated nationalist sentiments with their propaganda and policies”).

410. By the time these organizations pressed for elections, the risk that polls would heighten ethnic polarization should have been evident. National parties captured 80 percent of the vote in Bosnian parliamentary elections in November 1990. See GJELTEN, supra note 84, at 65–66. In post-Tito Yugoslavia, this type of poll may have “merely institutionalized ethnic grudges.” Robert Kaplan, Inside the Balkan Nightmare, WASH. POST, Mar. 5, 1995, Book World, at X05 (reviewing Tom Gjelten, Sarajevo Daily: A City and Its Newspaper Under Siege (1995)).

411. One commentator captured the basic flaw in this approach: “The Dayton peace plan is all about imposing government structures and then legitimizing them through elections. But this simply reinforces the power of the nationalist parties and nationalists . . . who led Bosnia into war.” All Things Considered: Civil Society (National Public Radio broadcast, Sept. 12, 1997) (commentary by Iain Guest).

412. See id. Effectively promoting civil society may require not only measures of direct support to independent institutions, but also support for the rule of law; civil society is unlikely to flourish in an environment where there are inadequate legal assurances of genuine autonomy. Cf. supra note 92 and accompanying text (suggesting that tradition of constitutional liberalism is crucial in averting conflict in multiethnic democracies).
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Among other costs, this ad hoc improvising meant that mediators were perpetually behind the curve in their efforts to address the Yugoslav crisis. If, as some believed, the breakup of Yugoslavia was likely to be violent, efforts to avert this outcome should have begun before the logic of separation became inexorable. Yet the European Community did not become seriously engaged until tensions had escalated to the point of armed conflict. It adopted its common recognition policy six months after armed conflict had erupted in Slovenia and seven months after one of the worst massacres in Croatia took place. If the European Community hoped to use its recognition policy to advance a peaceful resolution of the disputes among Yugoslav republics, it waited too long.

Of course the European Community's failure to intervene earlier is a policy failure only if timely intervention can affect the outcome of intrastate disputes over territorial status. Is there any support for this proposition? While the answer must depend on the circumstances of each case, there can be no doubt that timely intervention can at times make a contribution to the peaceful resolution of contested separatist claims. For example, the OSCE has played a constructive part in mediating disputes between Ukraine and its separatist semiautonomous Crimean peninsula, and, despite periodic setbacks in its mediation efforts, was at times the most constructive outside actor with respect to Russia's recent confrontation with separatist Chechens.

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414. The chronically belated responses of the international community were doubtless attributable, at least in part, to the low priority of the Yugoslav crisis on the foreign policy agenda of key states. David Gompert, who worked on Yugoslavia as an official in the Bush Administration, has written that American interest in the integrity of Yugoslavia per se ended with the collapse of the Soviet threat to Europe. Indeed, the strategic importance of Yugoslavia was waning at the very moment the federation was coming unglued. If the end of Tito's communism made Yugoslavia's breakup certain, the end of the Soviet communism made such a development seem less threatening to international peace and U.S. vital interests. David C. Gompert, The United States and Yugoslavia's Wars, in The World and Yugoslavia's Wars 122, 125 (Richard H. Ullman ed., 1996).

415. A United States National Intelligence Estimate that was leaked in the fall of 1990 predicted the near-term dissolution of the SFRY. Proponents of this scenario forecast ethnic violence that could lead to civil war. See David Binder, Evolution in Europe; Yugoslavia Seen Breaking Up Soon, N.Y. TIMES, Nov. 28, 1990, at A7.


418. See, e.g., Lee Hockstader, Russia, Breakaway Chechnya Sign Accord to End Fighting, WASH. POST, July 31, 1995, at A14; Michael Specter, Chechen Pact with Russia Is Reached, N.Y. TIMES, July 22, 1995, at 3; Alessandra Stanley, Chechen Voters' Key Concerns: Order and Stability, N.Y. TIMES, Jan. 24, 1997, at A3 (noting OSCE's role in organizing and monitoring first elections in Chechnya following conclusion of peace agreement between Russian and Chechen leaders in August 1996). Mechanisms designed to respond to nationalist and other conflicts of the CSCE, the precursor to the OSCE, were just being created when the Yugoslav crisis flared. While the CSCE made some constructive contributions, it simply was not yet prepared to address a crisis of the magnitude of that presented in Yugoslavia. See Weller, supra note 351, at 571, 573.
Knowledgeable observers believe that as late as December 1990 it might have been possible to devise a new constitutional order that would have addressed the respective concerns of Slovene, Croat, and Serb nationalists while avoiding the bloody breakup of Yugoslavia.\(^{419}\) In fact the presidents of the six constituent republics of the SFRY attempted to do just that during a series of meetings in the spring and summer of 1991.\(^{420}\) But to meet the enormous challenges presented at that time, statesmanship and good faith were in order, and neither Milosevic nor Tudjman was up to the job.\(^{421}\) A credible, impartial mediator was needed if negotiations were to forestall Yugoslavia’s violent dismemberment.

But if earlier engagement by outside mediators might have averted Yugoslavia’s breakup, the European Community and other critical actors also erred by insisting on preserving Yugoslav unity long after the inevitability of its breakup should have been apparent, again minimizing their ability to promote a peaceful process of territorial change. Some eight months after Slovenia made its first formal move toward secession, the states whose recognition policies would matter most to the contesting parties—the United States and EC member states—were voicing strong support for Yugoslav unity, as was the CSCE.

In April 1991, the European Community asserted its commitment to the “unity and territorial integrity of Yugoslavia”;\(^{422}\) in June, the CSCE adopted a similar declaration, which U.S. Secretary of State James Baker endorsed during a visit to Belgrade two days later.\(^{423}\) The breakup of Yugoslavia, Baker warned, “could have some very tragic consequences.”\(^{424}\) Nor, he added, would the United States recognize the independence of Slovenia and Croatia “under any circumstances.”\(^{425}\)

To many observers, the message thus transmitted was that the U.S. government would blame the breakaway republics, not Serbia, if the former persisted in seeking independence and were opposed by force.\(^{426}\) At a time when Milosevic was calculating the potential costs of aggressive force, that message was precisely the wrong one.\(^{427}\) In larger perspective, the position voiced by the

\(^{419}\) See, e.g., Glenny, supra note 362, at 56.

\(^{420}\) See id.

\(^{421}\) Cf. id. (noting that Milosevic encouraged Croatian Serbs to arm and that Tudjman disregarded Serb sensitivity).

\(^{422}\) MALCOLM, supra note 416, at 225.

\(^{423}\) See Weller, supra note 351, at 570.

\(^{424}\) The Talk of the Town, NEW YORKER, Aug. 12, 1991, at 21 (quoting Baker).

\(^{425}\) Id.

\(^{426}\) See, e.g., MALCOLM, supra note 416, at 225 (suggesting that message from Baker and European Community emboldened Milosevic to attempt to crush Slovenian and Croatian secessionists with military force). Warren Zimmerman, the U.S. Ambassador to Yugoslavia at the time of Baker’s visit, disputes this view, noting that Baker also voiced U.S. opposition to the use of force. Ambassador Zimmerman concedes, however, that no red light to Milosevic’s use of force was interposed by Baker. See Zimmerman, supra note 362, at 11–12.

\(^{427}\) When Croatia and Slovenia declared independence shortly after Baker’s visit, the State Department reaffirmed the position Baker had asserted in Belgrade:

We regret that the Croatian and Slovenian republics made unilateral assertions of independence from Yugoslavia. These unilateral acts by Croatia and Slovenia will not alter the way the United States deals with the two republics as constituent parts of Yugoslavia.

As Secretary Baker made clear in Belgrade, we will neither encourage nor reward
CSCE and Secretary Baker had the effect of disabling the CSCE and the United States, respectively, from helping to assure a peaceful evolution of the political status of the territories of the former Yugoslavia. If secession was, in their view, nonnegotiable, they could hardly play a constructive part in mediating the contested claims.

Finally, for international institutions to be effective in inducing parties to territorial disputes to submit to, and accept the results of, third-party mediation or arbitration procedures, it is incumbent on members of the sponsoring institution to observe its ground rules. When Germany broke ranks with its EC partners by announcing its unilateral intention to recognize Slovenia and Croatia, it fairly doomed the EC mediation process to irrelevance.\textsuperscript{428}

C. Authoritative Resolution

As noted above, recent initiatives by the OSCE have played a constructive part in addressing post-Yugoslavia separatist rebellions in Europe, and provide a paradigm for more effective international engagement in addressing destabilizing assertions of ethno-nationalism. But while the success of various OSCE mediators\textsuperscript{429} suggests the potentially constructive contribution of emerging mechanisms in resolving separatist claims peacefully, the more sobering record of early mediation efforts in respect of the former Yugoslavia highlights an important gap in international institutional competence.

In contrast to the period following World War I, no international institution exists that can authoritatively resolve separatist claims.\textsuperscript{430} The succession of ad hoc efforts to mediate the Yugoslav crisis highlights the uncertain competence of existing institutions—and the uncertainty that any would respond in a timely and effective fashion. Further, while various international organizations have arbitration institutions that can impose binding judgments, these mechanisms generally cannot be invoked by non-state entities wishing to resolve a territorial claim.\textsuperscript{431}

\textsuperscript{428} See supra text accompanying notes 380–381.
\textsuperscript{429} See supra text accompanying notes 417–418. Other examples of effective diplomacy under CSCE/OSCE auspices include the mediation efforts of the organization’s High Commissioner on National Minorities on behalf of Russian nationals in Latvia and Estonia. See Commission on Security and Cooperation in Europe, Human Rights and Democratization in Estonia 7–9 (1993); Commission on Security and Cooperation in Europe, Human Rights and Democratization in Latvia 20–21 (1993); Documents of the CSCE High Commissioner on National Minorities, 4 Helsinki Monitor 43–48 (1993); Orentlicher, supra note 115, at 310–11.
\textsuperscript{430} See supra notes 192–205 and accompanying text (discussing League of Nations responses to Aaland Islands dispute).
\textsuperscript{431} The Human Rights Committee established to monitor States Parties’ compliance with the ICCPR, supra note 244, can receive communications from individuals alleging violations of the Covenant by a State Party that has ratified an Optional Protocol, but does not have competence to receive secession. The United States continues to recognize and support the territorial integrity of Yugoslavia, including Slovenia and Croatia. John Fox, The Case of Yugoslavia 12 (1993) (unpublished manuscript, on file with the Yale Journal of International Law) (quoting statement by State Department spokesperson Margaret Tutwiler detailing content of private message delivered to Milosevic). “To some observers,” a former State Department officer wrote, “it was as if King Canute, having commanded the tide not to advance, expressed his disapproval that it had gone ahead and done so.” Id.
This gap could be filled by establishing binding arbitration procedures, attached to both regional organizations and the United Nations, that have authority to resolve territorial disputes and can be invoked both by states and non-state entities. At the United Nations, an arbitration body with such competence could be established as a subsidiary organ of either the Security Council or the General Assembly, both of which play a role in admitting new members to the Organization.

While such bodies would fill a major institutional lacuna, they could not resolve every disputed secessionist claim, at least in the absence of additional measures aimed at inducing recalcitrant parties to accede to arbitration and accept the results. As the Yugoslav experience teaches, parties willing to use unbridled force to secure territorial aspirations are unlikely to submit to international mediation processes unless meaningful sanctions—perhaps even military force—provide the requisite incentive.

**D. Membership in International Organizations**


432. A contemporary example of recourse to arbitration to resolve disputed territorial claims is the establishment of the Arbitral Tribunal for Dispute Over Inter-Entity Boundary in Brcko Area, which was established pursuant to the Dayton Peace Agreement to resolve the status of Brcko, a region in Bosnia whose status was not finally resolved in the Dayton negotiations themselves. See Dayton Peace Agreement, supra note 398, Annex 2, art. V.


435. The European Community appreciated that its common recognition policy alone did not provide sufficient incentive for recalcitrant political leaders in the former Yugoslavia to resolve their territorial disputes peacefully. Early on, it also banned arms exports to Yugoslavia and suspended one billion dollars in economic aid while continuing to promote peace negotiations. See Weller, supra note 351, at 573.

436. As noted earlier, during the early period of the Yugoslav crisis the European Community focused on recognition rather than membership as an inducement for peaceful resolution of contested separatist claims. See supra notes 372–373 and accompanying text. Membership in the Community—now Union—is highly selective, and new entrants must satisfy both economic and political criteria for admission. Typically this process takes years, and at the time the Yugoslav crisis began to unfold, other well-established Western democracies were still in line for admission. Finland, Austria, and Sweden did not finally join the European Union until January 1995. See Thomas Pedersen, The Common Foreign and Security Policy and the Challenge of Enlargement, in The European Community in World Politics 32 (Ole Norgaard et al. eds., 1993). In this setting, it would have made little sense for the European
respect to which membership is most coveted require, as a condition of membership, a demonstrated commitment to democracy and human rights. The historical record makes clear that these criteria can help advance human rights within established states, however slow the progress. By establishing that a condition of membership is commitment to pluralism and civic equality, such institutions can help dispel any hope on the part of political leaders that they will profit by resorting to national mobilization. At the same time, however, the tragic implications of the Badinter Commission’s suggestion that Bosnia hold a plebiscite as a precondition to recognition by EC member states underscores the need for caution in pressing applicants to pursue shortcuts to democracy during periods of volatile transition.

In the interim period before a state gains entry into such organizations, economic benefits and forms of association short of full membership should, within principled limits, be used as an inducement toward peaceful resolution of ethnic conflicts. While some practices may so offend core values that economic and other sanctions may be warranted—“ethnic cleansing” surely falls in this category—using human rights criteria as a condition of economic aid may ironically exacerbate the problems that such conditionality is meant to address. In particular, withholding financial aid may foster the very conditions of disaffection in which political elites are most tempted to resort to ethnic mobilization.

Community to rely upon its admission process to advance an acceptable resolution of the Yugoslav crisis. Some regional organizations have, however, sought to use membership-related sanctions to promote human rights improvements in the territories of the former Yugoslavia. For example the OSCE has suspended Yugoslavia’s participation in the organization’s decisionmaking on human rights grounds. See COMMISSION ON SECURITY AND COOPERATION IN EUROPE, THE OSCE AFTER THE LISBON SUMMIT 35 (1997); Miriam Sapiro, The OSCE: An Essential Component of European Security, ASIL NEWSLETTER (Am. Soc’y Int’l L., Washington, D.C.), Mar. 1997, ASIL Insight, at 2.


438. The prospect of membership in the European Community, for example, served as a positive inducement to political liberalization in Greece, Portugal, and Spain. See Laurence Whitehead, International Aspects of Democratization, in TRANSITIONS FROM AUTHORITARIAN RULE: COMPARATIVE PERSPECTIVES 3, 22-23 (Guillermo O’Donnell et al. eds., 1986). Further, anecdotal evidence suggests that some Central and Eastern European states have undertaken human rights reforms to qualify for membership in the Council of Europe. See Walker, supra note 437, at 170.

439. On the various forms of relationship with the European Union short of full membership, see Pedersen, supra note 436, at 38-41; and Baltic Nations Sign Pacts on Closer Ties to Europe , N.Y. TIMES, June 12, 1995, at A12, which describes the conclusion of association pacts between Estonia, Lithuania, and Latvia and the European Union. On the role of such ties short of membership in advancing democratic consolidation, see Twenty-Six at Europe’s Table, Editorial, WASH. POST, July 5, 1995, at A22.

440. See supra text accompanying note 84; see also Kupchan, supra note 89, at 186.
To the extent that international organizations may be disposed to judge qualifications for membership in part by an applicant’s demonstrated commitment to democratic principles, they must be prepared to assume the demanding challenge of applying this criterion responsibly. For while a liberal democratic culture may be the surest long-term guarantor of interethnic harmony, democratic processes are all too readily susceptible to ethnic mobilization, with potentially tragic results. The harsh lessons of Yugoslavia admonish us to support the emerging right to democratic government not only with active engagement, but also with prudent care.

VI. CONCLUSION

Across the centuries, international law’s response to state-seeking nationalism has evinced considerable ambivalence, ranging from formal indifference to guarded approval and, briefly during the interwar period, enthusiastic abetment. Still, the law’s otherwise disparate responses to claims of self-determination since the interwar period share a common regard for the popular will of people. What has changed in recent years is the unprecedented importance of popular sovereignty in the normative discourse of law and the political practice of states.

To all appearances, the democratic entitlement seemed the natural endpoint of international law’s broad arc of progress toward cosmopolitan universalism in the twentieth century. While the revival of ethnic particularism has seemed to belie this trend, democracy has, ironically, helped foster the very conditions in which lethal nationalism can flourish. For irresponsible politicians, appeals to ethno-nationalism have been all too tempting—and in illiberal democracies, they have been malignantly infectious.

This democratic paradox presents a singular challenge to global society in the closing years of the twentieth century. I have argued for robust international engagement in responding to that challenge. Crucial to my argument is the premise that ethnic conflicts—including those associated with separatist claims—are above all the product of deliberate elite manipulation of difference. While historical grievances often provide a taproot for contemporary assertions of ethno-nationalism, it is wrong to assume that recent explosive manifestations are the inevitable boiling over of long-simmering tensions—and therefore are, in a word, intractable. This explanation too often serves to condone international society’s acquiescence in the depredations of nationalist movements—and to justify its self-inflicted helplessness in confronting them.

But if enlightened international policy can play a constructive part in promoting a just and peaceful resolution of disputed separatist claims, it is clear that timely engagement is essential. The same global commitment to the core value of human dignity—a commitment that helped bring down the Iron Curtain—must now be renewed to assure that walls of difference do not once again rise up to divide the community of nations.