

***Commentaries on Lea Brilmayer,
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***Secession and Self-Determination:
One Decade Later***

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There was little reason to think in 1990 that secession might turn out to be an important topic. Since *Secession and Self-Determination* was published in *The Yale Journal of International Law*, however, the Baltic states left the Soviet Union and the rest of the Soviet Union crumbled. Yugoslavia and Czechoslovakia fractured. Eritrea asserted its independence from Ethiopia after military success and then a democratic referendum. Quebec's separatist aspirations from Canada became front page news (along with the comparable aspirations of various of the indigenous peoples of Quebec). East Timor succeeded in its drive for independence. Prior to 1990, the only successful separatist movement had been in Pakistan, where East Pakistan had left to become Bangladesh. Other separatist movements, such as Biafra's war for independence, had failed completely.

The events of the last decade have by and large borne out the analysis offered in that article. The thesis there was that what makes a separatist movement's claim to independence convincing is the possession of an historical claim that its territory was wrongfully annexed. Secession, I argued, is correctly understood as an appropriate remedy for prior illegal annexation. This analysis was vindicated by the fact that rationales for the successful separatist movements of the 1990s were all articulated in the same terms.

In this respect, the new wave of secessions can be understood as analogous to the earlier wave of decolonizations in the 1950s and 1960s. That wave of decolonizations was powered by the modern acknowledgment that earlier colonial annexations had been morally indefensible. The 1990s showed that the principle that annexation of some other group's territory is wrongful is not limited to what was known as "salt water colonialism," meaning colonial empires that stretched overseas. Whether a conquered territory is treated as a

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colony or annexed to the central portion of an empire, its people have a right to fight for their freedom. In their fight for freedom, they are called "secessionists."¹

The common characteristic of all strong cases for secession is a showing of illegal annexation. It was the historical record of illegal annexation that caused us to applaud the newfound independence of the Baltic states, of Eritrea, and of East Timor. Earlier theorists were incorrect in treating the key determinant to be homogeneity of the conquered people. What matters is not that it is "a people" who are seeking to be free. What matters is that this group—whether a homogeneous "people" or not—has a right to a particular parcel of land, a right that was wrongfully taken from them by a powerful neighbor.

It is important to ask how this obvious point might be overlooked. How could international lawyers and theorists have spent so many years assuming that the key point was ethnic, religious, or linguistic homogeneity rather than a history of wrongful annexation? When a group seeks to set up a new state on a particular piece of land, how could it not matter whether the group had a good territorial claim to the piece of land? In suggesting an answer to this question, I want to suggest that the failure to recognize this obvious point may be more general. The same odd blindness infects most Western discussions of "nationalism," to which similar misunderstandings pertain. It is caused by ignorance and by unwillingness to try to understand the moral claims of people with whom we do not identify—for reasons of differences of geographic location, race, religion, or culture.

In evaluating secessionist claims specifically, there are two different aspects of the claim on which one might focus. Traditionally, theorists had focused on the cohesiveness of the group asserting the claim—whether the group in question was a distinct "people" in the religious, linguistic, or ethnic sense. There is another issue at stake, however: the objective validity of the claim that the particular group espouses. Thus (as I argued ten years ago) the claim to a particular piece of territory will be more or less convincing depending on the existence (or nonexistence) of a historical claim to land.² Regardless of the identity of the group making the claim, the claim itself might be more or less persuasive, depending on historical fact, legal reasoning, moral argumentation, and so forth.

Similarly, but more generally, nationalist claims potentially have two different aspects to investigate. One might focus on the identity of the group

1. It is revealing that most "secessionists" reject the term. They typically claim that they are not seeking secession, but recognition of an independent state that existed all along. They argue that as the annexation of their territory was illegal, it was null and void. Thus they deny that they are trying to alter the existing territorial borders of the larger state. Instead, they claim, they are trying to preserve territorial borders as they always existed in the past.

2. In theory, there might be other bases for a claim to land. One might claim that one's group is entitled to a piece of land because it was given by God, for instance, or because one had a right to annex sufficient farm land to become food self sufficient. However, in practice, the kinds of claims to territory that we recognize are historical ones, and most groups that make territorial claims phrase these in terms of historical right.

asserting the claim and find it morally significant that the claim in question is being asserted by a distinct national group (Poles, Armenians, Serbs, or East Timorese). Instead, however, one might ask whether the claim in question is objectively justified regardless of the nature of the group that asserts it. Claims that a particular national group is entitled to something are not necessarily dependent normatively on the fact that it is a national group that is making the claim. Indeed, I would argue, they typically do not.

The standard interpretation of nationalist claims is that they are saying: "My nation, right or wrong." The assumption is that nationalist claims are not based on anything more intelligent than a desire that one's nation prevail. But nationalists typically do not mean to be making such a claim. Instead, they are typically saying: "My nation, because it is in the right." Of course, there is always the chance that the person is wrong because his or her nation is actually not in the right. But this is no more true for claims made by nations than for claims made by individual people. The fact that a person is claiming something that he or she is not entitled to means that he or she is making an unwarranted claim. It does not mean that he or she is not attempting to rely on arguments about right and wrong.

The fact that a claim is being asserted on behalf of one's nation is not thought, in and of itself, to give one a justification for advancing the claim. The nationalist essentially admits that it is theoretically possible that the claim might be unjustified, even while he or she believes sincerely and deeply that the facts and argument on which the claim is based are in fact correct. The nationalist is not claiming that so long as he or she acts on behalf of his or her nation, no justification is needed. The nationalist simply feels that an adequate justification exists.

The erroneous interpretation of nationalist claims as being all of the sort "my nation, right or wrong" has two consequences. First, this misunderstanding obscures whatever real justification might exist (or be thought to exist by the national group) for the claim in question. The outside observer has no reason, or need, to take seriously the moral or legal argument that the nationalist wishes to advance. This misunderstanding thereby relieves the outside observer of any need to become acquainted with the facts or arguments of the parties to the dispute. Discussion in the outside world becomes a highly relativistic account of "what the Serbs want" or "what the Croats think they stand to gain." Once argument is reduced to this level, there can be no right and wrong. One nationalistic argument is as good or bad as any other.

Second, this misunderstanding gives nationalistic claims a pervasively negative connotation. Nationalist claims are bad because the essence of the claim is exclusionary. One wants something for one's own group, regardless of whether that group has any entitlement, and one's own group is defined in intrinsically ascriptive and illiberal terms. Nationalism smacks of racism, xenophobia, and bigotry.

With no genuine moral issue in sight—and with the atavistic reputation that "nationalism" has come to possess—the rest of the world dismisses real

disputes, over serious matters, as “tribal” (if such disputes arise between black people) or “ethnic” (if they arise between whites). Regardless of where they arise, there is no need to take them seriously. They are bloody, primitive, and childlike. The West watches smugly.

Dismissing a position as “nationalistic” is essentially an *ad hominem* form of argument. The characterization distracts attention from the merits or demerits of the underlying claim. Dismissing claims to independence as “secessionist” is a particular application of this false and condescending logic. There truly are rights and wrongs in international relations, and the linguistic, ethnic, or religious homogeneity of the group asserting a claim has little, if anything, to do with whether a particular claim is right or wrong. The West takes seriously its own claims to what is right and what is wrong. It should take the claims of the rest of the world, and in particular the developing world, just as seriously.