Secession and Annexation: The Case of Crimea

By Amandine Catala[*]

Abstract

The recent crisis involving the territory of Crimea has been characterized both as a case of wrongful annexation and as one of rightful secession. Territory and competing territorial claims lie at the heart of the normative questions of secession and annexation. Any normative theory of secession or of annexation must therefore address their territorial aspect: It must explain why one agent rather than another has a valid claim to the disputed territory. One of the most interesting, yet controversial, normative accounts of secession has been offered by choice theorists of secession. Choice theorists adopt a rather permissive stance, based on the normative significance of political self-determination. Choice theories, however, have been widely criticized for failing to provide a satisfactory account of what legitimates the seceding group's territorial claim. This article argues that it is possible to remedy choice theories' failure to address the question of territorial justification adequately. To do so, this article offers a two-tier account of territory that is grounded in the normative significance of self-determination. It defends this account of territory by showing that it is implied by our normative condemnation of annexation. It argues that the same reasons that warrant opposition to annexation provide support for secession. In closing, this article revisits the case of Crimea in light of its two-tier account of territory, and considers what role international law and institutions might play in addressing this type of situation.

A. Introduction

The recent crisis involving the territory of Crimea has been condemned by most as the wrongful annexation by Russia of a part of Ukraine's territory, and defended by some as the Crimean people's rightful exercise of self-determination through secession: A referendum was held in the relevant territory, Crimea, and an overwhelming majority of its population voted to join Russia.[1] It is difficult to grant much normative[2] weight to the

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[1] The referendum took place on 16 March 2014. Results reported by election officials indicated ninety-five percent of votes in favor of joining Russia, based on eighty percent of popular participation. *See* BBC, *Crimea Referendum: Voters "Back Russia Union,"* (Mar. 16, 2014), http://www.bbc.com/news/world-europe-26606097 (last accessed June 18, 2015); BBC, *Crimea Exit Poll: About 93% Back Russia Union*, (Mar. 16, 2014), http://www.bbc.com/news/world-europe-26598832 (last accessed June 18, 2015).

https://doi.org/10.1017/S2071832200020988 Published online by Cambridge University Press

results of a referendum whose process involved dubious hastiness, aggressive propaganda, and military occupation. But what if the referendum had taken place in very different circumstances: What if it had looked less like it did in Crimea and more like it did in Scotland in 2014 or in Quebec in 1995? Would secession in that case have been normatively more defensible, or would the change in state borders implied by secession have warranted its rightful condemnation alongside that of annexation and of other types of process that challenge a state's territorial integrity?

Territory and competing territorial claims lie at the heart of the normative questions of secession and annexation. Therefore, any normative theory of secession or of annexation must address their territorial aspect: It must explain why one agent—a certain state or a certain group of people—rather than another has a valid claim to the disputed territory. One of the most interesting, yet controversial, normative accounts of secession has been offered by so-called "choice," or plebiscitary, theorists of secession. Choice theorists adopt a rather permissive stance, which they justify by appealing to the normative significance of political self-determination.[3] Choice theories, however, have been widely criticized for failing to provide a satisfactory account of what legitimates the seceding group's territorial claim.[4] Because of this major problem, choice theories are thought to fail irremediably. This article argues that it is possible to remedy choice theories' failure to address the question of territorial justification adequately. To support this claim, this article offers a two-tier account of territory that is grounded in the normative significance of self-determination and, more precisely, on the concepts of occupancy and peoplehood. It defends this account of territory by showing that it is implied by our normative condemnation of annexation. That is, the same reasons that warrant opposition to annexation provide support for secession. In other words, the two-tier territorial account offered in this article explains consistently both why annexation is illegitimate and why secession might be legitimate. In closing, this article revisits the case of Crimea in light of its two-tier territorial account, and considers what role international law and institutions might play in addressing this type of situation.

[2] Here and throughout, the term "normative" is used in its moral-philosophical sense, not in its legal-juridical sense.

[3] *See*, *infra* note 10.

[4] *See*, *infra* note 7.

https://doi.org/10.1017/S2071832200020988 Published online by Cambridge University Press

B. Choice Theories and Their Critics

Different types of normative theory of secession have argued for different sets of conditions under which it is morally permissible for a group to secede.[5] Choice theorists of secession offer one of the most controversial and interesting normative accounts of secession. Before turning to the question of choice theories and their treatment of territory, it will be useful to introduce the criticisms that have been leveled against them, in order to situate the debate surrounding choice theories and to understand its key stakes regarding territory.

Choice theorists advance a relatively permissive account of secession, which they justify by appealing to the value of political self-determination. Choice theories have been criticized for providing a normative account of secession that overlooks various core features of the real-world context—for example, the institutional framework of the international legal order, or the fact that secessionist claims are typically voiced by national groups.[6] Choice theories have also been criticized for failing to address the territorial aspect of secession adequately—that is, for failing to provide a compelling account of what gives the seceding group a valid territorial claim.[7] In light of those problems, critics have deemed choice theories to founder irreparably.

While the former type of criticism—regarding the real-world context—is mistaken,[8] the latter criticism—regarding territory—is warranted. However, this potentially devastating criticism deserves more attention than it has received up until this point. This article argues that critics have hitherto mischaracterized both the nature and the extent of choice theories' inadequate treatment of territory, and that a thorough analysis yields a more promising verdict for choice theories. In more accurately capturing the nature and the extent of choice theories' inadequate treatment of territory, this article's analysis might at first appear to condemn choice theories even more harshly than previous critics have. As will become clear shortly, this article's analysis indeed reveals that the territorial problem that choice theories face is in fact more fundamental, and hence more detrimental, than previous critics have realized. However, this article's analysis also reveals that choice theories already rely on the key conceptual resource needed to address this fundamental

[5] For a taxonomy and review of those different theories, see Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFFS. 30 (1997); MARGARET MOORE, *Introduction: The Self-Determination Principle and the Ethics of Secession*, *in* NATIONAL SELF-DETERMINATION AND SECESSION 1 (Margaret Moore ed., 1998).

[6] For the former type of criticism, see Buchanan, *supra* note 5. For the latter type of criticism, see MOORE, *supra* note 5.

[7] *See* ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW (2004); MOORE, *supra* note 5.

[8] *See*, *infra* Part F.

https://doi.org/10.1017/S2071832200020988 Published online by Cambridge University Press

problem—namely, the normative significance of political self-determination. It is in this sense that this article's analysis yields a more promising verdict for the potential success of choice theories.

How have current critics mischaracterized both the nature and the extent of the territorial problem that choice theories face? In other words, why is a more thorough analysis required? First, regarding the nature of the problem, current critics merely underline choice theories' inadequate treatment of territory; current critics fail to identify and to spell out the theoretical causes of this inadequacy. By contrast, this article shows that choice theories' inadequate treatment of territory is not a mere contingent incident; it is instead the direct result of the way these theories analyze the normative question of secession—namely, in terms of political legitimacy. Second, regarding the extent of the problem, current critics fail to see that choice theories' inadequate treatment of territory is not merely a problem *of* choice theories, but, more importantly, a problem *for* choice theories, because choice theories' fundamental commitment to the value of self-determination requires them to address the territorial aspect of secession adequately. In other words, while the criticism formulated by previous critics is an external one, resting on principles choice theorists do not themselves adopt,[9] the criticism presented in this article is an internal one, resting on choice theorists' very own principles. If choice theories are committed to the value of self-determination, then they must provide a satisfactory account of what gives the seceding group a valid territorial claim, otherwise they become internally inconsistent. This article then proposes a two-tier account of territory that takes into consideration the value of self-determination, thereby preserving the unique stance of choice theories while avoiding an otherwise fatal internal inconsistency.

The aim of this article is thus both diagnostic and remedial, thereby shedding light on three crucial yet hitherto utterly neglected points. Diagnostically, this article shows that (1) choice theories' inadequate treatment of territory directly follows from their analytical lens; and that (2) adequately addressing the territorial aspect of secession is necessary for choice theories to avoid a major internal inconsistency. Remedially, this article provides (3) a two-tier territorial account based on self-determination, and hence precludes the self-contradiction into which choice theories would otherwise be trapped. While this article

[9] Such as the principle that only national groups can have valid secessionist and territorial claims—as nationalist theorists of secession would argue—or that the legitimacy of an existing state is a sufficient condition not to violate its territorial integrity—as just-cause theorists of secession would argue. For examples of nationalist theories, see Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439 (1990); David Miller, *Secession and the Principle of Nationality*, *in* NATIONAL SELF-DETERMINATION AND SECESSION 62 (Margaret Moore ed., 1998); Will Kymlicka, *Territorial Boundaries: A Liberal Egalitarian Perspective*, *in* BOUNDARIES AND JUSTICE: DIVERSE ETHICAL PERSPECTIVES 249 (David Miller & Sohail Hashmi eds., 2001). For an example of just-cause theory, see ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC (1991); BUCHANAN, *supra* note 7.

https://doi.org/10.1017/S2071832200020988 Published online by Cambridge University Press

does not aim to provide a comprehensive defense of a choice theory of secession,[10] the claims formulated here are necessary to such a defense: Points (1) and (2) provide the accurate diagnosis that any successful remedy previously requires, and point (3) attempts to provide that successful remedy.

The article proceeds as follows. It begins, in section C, by establishing point (2) above, with a brief examination of choice theories' normative account of secession, underlining their commitment to political self-determination and showing that this commitment requires a satisfactory account of valid territorial claims. The article then goes on, in section D, to establish point (1) above, by analyzing why choice theories' current treatment of the territorial aspect of secession is inadequate. Finally, to remedy this inadequacy and the correlative internal inconsistency, the article establishes point (3) above, by offering, in section E, a two-tier territorial account that takes into consideration choice theories' commitment to self-determination.

C. Choice Theories' Normative Account of Secession

To situate choice theories' normative account of secession, a brief terminological clarification is in order. Two distinct senses of "self-determination" are used in the literature on secession: political self-determination and cultural self-determination.[11] *Political* self-determination refers to a group's ability to define freely its political status and endeavors. Political self-determination is a matter of degree and does not necessarily require full political independence or sovereignty: Political self-determination may also be exercised within the borders of a larger state. This is for example the case with federalism, where different regional units within the larger state enjoy some degree of self-government regionally—for example, the different states within the U.S. or the different provinces within Canada. Thus, a group's exercise of political self-determination consists in determining the degree and the form of political autonomy it will enjoy. *Cultural* self-determination refers to a group's ability to set and pursue freely its cultural aspirations. Cultural self-determination might concern certain cultural events, celebrations, holidays, and symbols, as well as the language used in official administration, education, culture, and the media. This is for example the case with the three linguistic-cultural communities in Belgium, which each have autonomous jurisdiction over those matters.

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[10] For such comprehensive defenses, see ANDREW ALTMAN & CHRISTOPHER WELLMAN, A LIBERAL THEORY OF INTERNATIONAL JUSTICE (2009); Harry Beran, *A Democratic Theory of Political Self-Determination for a New World Order*, *in* THEORIES OF SECESSION 33 (Percy B. Lehning ed., 1998); David Copp, *Democracy and Communal Self-Determination*, *in* THE MORALITY OF NATIONALISM 277 (Robert McKim & Jeff McMahan eds., 1997); Daniel Philpott, *In Defense of Self-Determination*, 105 ETHICS 352 (1995); CHRISTOPHER WELLMAN, A THEORY OF SECESSION: THE CASE FOR POLITICAL SELF-DETERMINATION (2005).

[11] *See*, *infra* notes 12–13.

https://doi.org/10.1017/S2071832200020988 Published online by Cambridge University Press

When choice theorists invoke self-determination in developing their normative account of secession, they refer to *political* self-determination. Nationalist theorists of secession have argued that cultural self-determination motivates or justifies political self-determination,[12] but choice theorists are not concerned with the relation between cultural and political self-determination. Indeed, choice theorists explicitly exclude cultural self-determination from the set of morally relevant criteria to be taken into account when determining the permissibility of secession.[13] Cultural identity is neither necessary nor sufficient for secession to be permissible on a choice account. Thus, if it is morally permissible for a national group—for example, the Quebecers, the Scots, the Flemings, or the Catalans—to secede on a choice account, it will be because the group meets certain necessary conditions, not in virtue of the fact that it shares a common cultural identity. Choice theorists thus focus solely on political self-determination to make their normative case for secession. Political self-determination will therefore be hereafter referred to simply as "self-determination." Having clarified the terminology, let us now turn to choice theorists' normative account of secession.

According to choice theories of secession, any territorially concentrated group whose majority wishes to do so may secede, regardless of national identity, provided that the new state would be viable—that is, able to create or maintain stable political institutions as well as sufficient economic resources—and respect human rights.[14] For example, if San Fernando Valley wanted to become its own independent state and were to be viable and to respect human rights, it should be allowed to secede, according to choice theories.

Choice theorists justify their rather permissive stance by appealing to a certain account of political legitimacy coupled with an emphasis on the value of self-determination. Choice theories are based on two main claims: (1) A state is legitimate if it protects its citizens' human rights; and (2) any group has a right of self-determination or the right to decide who will govern it. More precisely, the second claim is contingent on the first: The justified exercise by a group of its right of self-determination through secession is contingent upon that group's ability to protect citizens' human rights in its new state—that is, upon the legitimacy of the new state.

The emphasis that choice theorists place on the value of self-determination can be appreciated by contrasting choice theories briefly with just-cause theories. Just-cause theorists rely on the same account of political legitimacy as choice theorists do, but reach

[12] See the nationalist theories advanced by Margalit & Raz, *supra* note 9; Miller, *supra* note 9; Kymlicka, *supra* note 9.

[13] *See* ALTMAN & WELLMAN, *supra* note 10, at 47; Beran, *supra* note 10, at 42; Copp, *supra* note 10, at 278, 289; Philpott, *supra* note 10, at 365–66; WELLMAN, *supra* note 10, at 112.

[14] *See* sources cited, *supra* note 10.

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very different conclusions regarding the moral permissibility of secession. According to just-cause theorists, a territorially concentrated group may secede if, and only if, it has suffered a severe injustice in the larger state—major human rights violations, forcible seizure of territory, or discrimination in the redistribution of resources.[15] Thus, just-cause theorists, like choice theorists, hold that a state is legitimate if it protects its citizens' human rights. But from this they conclude not that any group that is able to provide such protection is therefore permitted to secede, but rather that as long as the existing state provides such protection—that is, is legitimate—it has a right to territorial integrity, and no group may permissibly secede from it. In other words, just-cause theorists view political legitimacy as a sufficient condition not to break up an existing state, whereas choice theorists view political legitimacy as a necessary condition to create a new state.

How does this contrast between choice and just-cause theories highlight the significance of self-determination in choice theories? Choice theorists approach the question of secession from the position of the secessionist group and its right of self-determination, based on its capacity to protect human rights—the legitimacy of the new state—as opposed to the position of the larger state and its putative right to the territorial status quo based on its capacity to protect human rights—the legitimacy of the current state. That is, choice theorists are concerned with the necessary conditions to create a new state, as opposed to the sufficient conditions not to break up an existing state. This sharply underlines the key role that self-determination plays in the choice case: To focus on the necessary conditions to create a new state, as choice theorists do, rather than on the sufficient conditions not to break up an existing state, as just-cause theorists do, is to grant a primary role to self-determination. Because independent statehood is the most extensive form of self-determination, a concern for the necessary conditions to create a new state reflects a prior, fundamental concern for self-determination.

This fundamental commitment to self-determination has significant implications for choice theories' treatment of the territorial aspect of secession. To avoid arbitrary partiality, any theory of secession that centrally emphasizes self-determination must take into consideration the self-determination of not only the secessionist group, but also the remainder state. If a seceding group takes a piece of territory to which it does not have a valid claim, it thereby interferes with the remainder state's rightful exercise of self-determination in its territory. This latter claim will be explained in more detail below. What should be noted for now are the substantial implications of this claim: Namely, that choice theories' fundamental commitment to self-determination in fact requires them to address the territorial aspect of secession adequately. If they do not do so, choice theories will suffer from a major internal inconsistency: Between their commitment to self-determination, which requires them to address the territorial aspect of secession adequately, and their inadequate treatment of this territorial question.

[15] For more on just-cause theories, see BUCHANAN, *supra* note 9; BUCHANAN, *supra* note 7.

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D. Choice Theories and the Territorial Aspect of Secession

The inadequacy of choice theorists' treatment of the territorial aspect of secession is the result of two related assumptions: (1) The assumption that adequate protection of human rights automatically creates a valid territorial claim—that is, that political legitimacy is sufficient to have a valid title to the territory; and (2) the assumption that the normative question of secession is therefore one of legitimate government, rather than one of territory. In other words, choice theorists view territory as essentially a non-issue. Valid territorial claims simply flow from political legitimacy and do not form a separate or prior question worth pondering on its own. This section will show that choice theorists are mistaken in thinking that political legitimacy is sufficient to establish valid territorial claims, and it will show that territorial justification constitutes not only a conceptually separate, but a logically prior question that warrants careful consideration.

According to Harry Beran, if a secessionist group (1) is territorially concentrated; (2) contains a majority in its territory in favor of secession; and (3) would protect human rights in its new state—that is, if the new state would be legitimate—then the group has a right to secede.[16] The problem with Beran's account is that it conflates a group's rightful occupation of a given territory with that group's rightful claim to that territory, should the group want to secede. In other words, Beran equates legitimate territorial occupation or the right of habitation with legitimate territorial claim or the right to secede.[17]

Yet, simply because a group has the right to live on a piece of territory does not automatically give that group the right to exit the existing state with that piece of territory. For example, if a group of recent immigrants to the U.S. or U.S. permanent residents settle in Death Valley, they may very well have the right to *live* on that territory—the right of habitation—but it is unclear how that right of habitation therefore gives them the further right to *leave* with that territory to create their own independent state—the right to secede.

One might object that the seceding group in this example is not made up of U.S. citizens, and that this is why their secession with U.S. land would be impermissible. Yet, if the entire population of Vermont—perhaps looking for warmer climes—suddenly moved to Death Valley and then likewise decided to secede, thereby taking away Death Valley from legitimate U.S. jurisdiction, it is implausible that their U.S. citizenship would make their territorial claims any more legitimate, as will be confirmed in the next section. Thus, rightful habitation does not seem to entail rightful secession.

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[16] Beran, *supra* note 10, at 32, 36, 38–39.

[17] *See id.* at 39.

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But what if the current population of the current state of Vermont wanted to secede from the U.S. to become its own independent state? This, perhaps, is closer to what Beran has in mind when equating rightful habitation with rightful secession. To back up his claim that rightful habitation entails rightful secession, Beran refers to Allen Buchanan's argument that, in a post-Westphalian world,[18] the state, with regard to its jurisdiction over its territory, is merely the agent of the people that live on that territory—that is, that the territory ultimately belongs to the people, and not to the state.[19] According to Beran, this agency relationship is not immutable. Rather, the state derives its right to its territory from the people of which it is the agent. Beran concludes that a group within the state's population may therefore decide to end the agency relationship and to exit the state with the group's territory.[20]

Beran's conclusion, however, relies on a controversial premise, which he simply assumes without further argument—namely, that the right to the territory is not held in common by all the people of the state. Yet, contra Beran, even if one agrees with Buchanan's claim that a state's territory belongs to the people and not to the state, the exact meaning of Buchanan's claim remains to be established. Indeed, Buchanan's claim is ambiguous and lends itself to two rather different readings. Buchanan's claim might mean either that (1) the entirety of the state's territory, and hence each portion of it, belongs to the entirety of the population in virtue of the political union; or that (2) each portion of the state's territory belongs exclusively to each portion of the population that occupies it. The first reading complicates the secessionists' and choice theorists' case. The second reading, which is the one Beran assumes without argument, facilitates the secessionists' and choice theorists' case. Yet, in order to make a compelling case, the choice theorist cannot simply adopt whichever reading would be more convenient to make his case—here, the second reading. A more compelling way to proceed would be to show that even the first, less convenient reading does not undermine choice theorists' rather permissive stance on secession. The next section will do just that by drawing an analogy with divorce. It will show that the choice case can be upheld only if certain conditions obtain. For now, it should be noted that even if Buchanan is correct in arguing that a state's territory ultimately belongs to the people and not to the state, it does not automatically follow that any group rightfully living on a given territory therefore has the right to take away that territory to form its own independent state. Otherwise put, rightful habitation or the right of habitation does not entail rightful secession or the right to secede, even if the secessionist group would otherwise protect human rights in its new state—that is, meet

[18] For more on the distinction between Westphalian and post-Westphalian conceptions of state sovereignty, see discussion *infra* Part E, and David Held, *Democracy: From City-States to a Cosmopolitan Order*, 40 POL. STUDS. 10 (1992).

[19] *See* BUCHANAN, *supra* note 9, at 108–09; BUCHANAN, *supra* note 7, at 219, 231.

[20] Beran, *supra* note 10, at 35.

Beran's and choice theorists' criterion of political legitimacy. Thus, Beran's choice account, because it reduces the problem of secession to a matter of political legitimacy, falls short with respect to territorial justification. His account therefore runs the risk of validating unjustified territorial claims, which in turn would legitimate wrongful interference with the remainder state's rightful exercise of self-determination in its territory—a rather problematic result for a type of theory that is fundamentally based on the value of self-determination.

Like Beran, David Copp argues that any territorial and political group—that is, any territorially concentrated group whose majority strongly wishes to form its own independent state—has the right to secede.[21] According to Copp, a state's right to its territory is not stronger than a secessionist group's right to its territory. A secessionist group has a right to the territory it occupies, a right to hold in that territory a referendum regarding the potential creation of its new state on that territory, and a right to become subsequently independently self-governing in that territory.[22]

Like Beran, Copp mentions that for its secession to be permissible, the secessionist group must have the right to occupy its territory.[23] But Copp does not clearly specify the necessary and sufficient conditions for the group to have this right. He vaguely suggests that a group may rightfully occupy a territory perhaps because it has lived on it for a long time, or perhaps because of some special claim such as historical ties to the land.[24] Copp seems to recognize the normative significance of territory when he underlines that secession involves removing part of an existing state's territory from that state's jurisdiction,[25] but he does not specify exactly what constitutes a rightful territorial claim. His vague suggestions that it may have something to do with having occupied the land for a certain amount of time, or with having once occupied the land a long time ago, are rather unhelpful. Consider, for example, the case of settler countries, such as Canada, the U.S., New Zealand, or Australia. In these cases, territorial claims become an issue precisely because one part of the population has long resided there and another part of the population has "always" resided there, or once resided there a long time ago. In other words, in those cases, Copp's two criteria conflict. According to his criteria, each side of the territorial debate is entitled to the very same territory. Like Beran's, Copp's choice account falls short with respect to territorial justification. Hence, Copp's account likewise runs the risk of validating unjustified territorial claims, and thereby of legitimating wrongful

[21] Copp, *supra* note 10, at 278, 293.

[22] *Id.* at 282.

[23] David Copp, *International Law and Morality in the Theory of Secession*, 2 J. ETHICS 219, 229 (1998).

[24] *Id.* at 227.

[25] *Id.*

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interference with the remainder state's rightful exercise of self-determination in its territory.

Daniel Philpott's choice account faces the same criticism. Philpott explicitly asserts that establishing a case for self-determination through secession requires no particular territorial argument.[26] He rhetorically asks how land might constitute an issue that goes beyond that of government.[27] For Philpott, as for Beran, Buchanan's characterization of the relation between the state and its people and its territory as one of agency is sufficient to provide secessionists with a valid territorial claim. Any self-determining group can become the new agent of its land, as long as its new government is just. This new government's jurisdictional borders may be at the regional level or at the state level, but in either case, the larger or the remainder state may not hinder the group's rightful exercise of self-government.[28] Land is merely an empirical, contingent reality, because people who live under the same government also happen to live in relative physical proximity; land should not be mistaken for the object of some suspicious "organic connection" in virtue of which some larger group or state could claim the otherwise justly governed territory of another, smaller group or state.[29] Thus, the burden of proof is on those who claim that a group should not be allowed to exercise self-determination in the territory it occupies. According to Philpott, to say that a piece of territory belongs to some group or entity is simply to say that this group or entity is justly governing that territory.[30] Philpott's claim, in effect, is that if a group provides adequate protection of human rights—that is, meets the condition of political legitimacy—it has a valid claim to the land it occupies. For Philpott, the relevant question is one of just or legitimate self-government, not one of territory.[31]

Yet, even if one grants that the state must be territorially defined in order to provide adequate protection,[32] it does not follow that (1) the ability to provide adequate protection entails the ability to justify the territorial claim. Conversely, it does not follow that (2) a group's rightful occupation of a territory entails that group's ability to provide adequate protection. While choice theorists would agree that this second assertion is false, they do hold that the first one is true. And while Philpott does note that one group's

[26] Philpott, *supra* note 10, at 355.

[27] *Id.* at 370.

[28] *Id.*

[29] *Id.* at 370, 376.

[30] *Id.* at 370–71 n. 37.

[31] Philpott, *supra* note 10, at 370.

[32] See WELLMAN, *supra* note 10, at 14–15; ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 10–53 (1974); Buchanan, *supra* note 5, at 47.

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exercise of self-determination should not hinder another group's ability to exercise its own self-determination,[33] he does not extend these considerations to territorial claims. Philpott simply does not see that the seceding group's appropriation of a part of the remainder state's territory might undermine the latter's rightful exercise of self-determination in its territory. This is because territorial justification, in Philpott's view, is essentially a non-issue. Or at least, valid territorial title is taken to follow automatically from a group's ability to provide adequate protection—that is, its ability to fulfill political legitimacy, upon which a group's right to exercise self-determination through secession is contingent.

Similarly, Andrew Altman and Christopher Wellman assert that a state has the right to resist a group's secession if, and only if, that state is required to fulfill the requisite political functions—that is, to provide adequate protection of human rights.[34] This means that if a group is able to provide adequate protection and does not wish to remain part of the larger state, it has a valid claim to the territory it wants to take from it. This is because, according to choice theorists, if territoriality is necessary for the provision of adequate protection, then it follows that a group's ability to provide adequate protection is sufficient for that group to have a valid territorial claim. Thus Wellman explains that a state's rightful jurisdictional-territorial claim is grounded in the necessity of fulfilling its function of providing adequate protection. Hence, if a secessionist group is able to provide adequate protection, the larger state is no longer needed to secure adequate protection, and the latter would not be justified in resisting the secessionist group's rightful exercise of self-determination through secession.[35]

Wellman compares this way of limiting a state's political liberty to the way in which one's liberty to drive a car is limited. Both liberties, he explains, depend on the ability to fulfill a certain function—providing adequate protection or driving safely and responsibly. In order to avoid harming many people, one's liberty to drive a car is limited by the requirement that one be able to drive safely and responsibly. Likewise, in Wellman's view, in order to avoid harming many people, a group's liberty to form its own independent state is limited by the requirement that the group be able to provide adequate protection.[36]

Yet, this analogy works only if the ability to drive safely and responsibly—the secessionist group's ability to provide adequate protection—therefore involves the liberty to take someone else's car, or a car one has been sharing with others—the secessionist group's liberty to take the territory from the larger state. But clearly, from the mere fact that I can

[33] Philpott, *supra* note 10, at 362, 364.

[34] ALTMAN & WELLMAN, *supra* note 10, at 46. Adequate protection of human rights is hereafter referred to simply as "adequate protection."

[35] WELLMAN, *supra* note 10, at 37.

[36] *Id.* at 37–38.

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drive your car at least as well as you can—that the secessionist group is able to provide adequate protection at least as well as the larger state—it hardly follows that I am therefore entitled to it—that the secessionist group is entitled to the territory it wants to take from the larger state. In other words, the car analogy assumes that it has previously been established that one owns the car one is driving. Yet, in the case of a secessionist group and the territory it wants to take, this valid title or legitimate territorial claim is precisely what is at issue and what remains to be established. Just as the ability to drive a car safely and responsibly does not give one a valid title to that car, the ability to provide adequate protection on a piece of territory does not give a group a valid claim to that piece of territory. Otherwise, choice theorists would be committed to the implausible claim, which they explicitly reject, that beneficent annexation is not wrongful. For if adequate protection is sufficient to create a valid territorial title, then it becomes unclear how the rule of beneficent annexers, who would provide adequate protection, can be rejected as illegitimate, even though their rule is clearly illegitimate. The reason why choice theorists rightly reject this implausible claim is that annexation does not respect the annexed group's rightful exercise of self-determination.[37] Yet, this idea that the group is *rightfully* exercising self-determination presupposes that the group has a valid claim to the territory on which it is rightfully exercising self-determination.[38] This goes back to the principle, invoked by choice theorists, that the territory ultimately belongs to the people, and not to the state. Yet, while choice theorists invoke this principle to make their normative case for secession, they do not specify what this principle means, and thus do not make clear how a given group comes to have a valid claim to a given territory.

To review, the previous section argued that choice theories' fundamental commitment to self-determination (1) requires them to take into consideration the self-determination of not only the secessionist group but also the remainder state; and that doing so (2) requires addressing the territorial aspect of secession adequately, because a group's appropriation of a piece of territory to which it does not have a valid claim constitutes an unjustified interference with the rightful exercise of self-determination of the group to which the piece of territory belongs, as illustrated by the case of beneficent annexation.

This section has shown that choice theories fail to meet both of the aforementioned requirements: (1) They do not consider the self-determination of the remainder state; and (2) they do not address the question of territorial justification adequately. Indeed, choice theorists' focus on the question of political legitimacy, coupled with their focus on the self-determination of only the secessionist group, turns the territorial aspect of secession into a non-issue. That is, the secessionist group's valid territorial claim is simply taken to follow automatically from the group's ability to fulfill political legitimacy in its new state; it is not taken to form a separate or prior question worth addressing on its own. As a result, choice

[37] WELLMAN, *supra* note 10, at 179; ALTMAN & WELLMAN, *supra* note 10, at 52–53.

[38] *See* discussion, *infra* Part E.

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theorists are unable to justify the secessionist group's territorial claim. Choice theories therefore run the risk of unwarrantedly legitimating the secessionist group's wrongful appropriation of part of the remainder state's territory, and thereby of unwarrantedly legitimating the secessionist group's wrongful interference with the remainder state's rightful exercise of self-determination. This is a highly problematic result for choice theorists, as it reveals a serious internal inconsistency in their theory—between their commitment to self-determination, which requires them to address the territorial aspect of secession adequately, and their inadequate treatment of this territorial question.

The next section will remedy this problem by proposing a two-tier territorial account that takes into consideration the significance of self-determination, thereby simultaneously addressing choice theories' fundamental commitment to self-determination and the correlative requirement of territorial justification. The section will defend this two-tier account of territory by showing that it is implied by our normative condemnation of annexation.

E. Self-Determination and Territory: Implications for Secession and Annexation

We have seen that entirely reducing the question of territorial justification to a matter of political legitimacy, as choice theorists do, yields problematic results. Political legitimacy, then, is not sufficient to establish valid territorial claims. This section argues that choice theorists are correct in including the question of political legitimacy when offering a territorial account, but that the question of what gives a group a valid territorial claim is a separate and prior question that has to be addressed on its own.

What gives a seceding group a valid territorial claim? To answer this question, it is useful to go back to the post-Westphalian conception of sovereignty briefly mentioned in the previous section. According to the post-Westphalian conception, state sovereignty is contingent upon state legitimacy. That is, a state's authority over its people and its control over its territory are contingent upon that state's adequate protection of its citizens' human rights. More precisely, the post-Westphalian conception of sovereignty construes territory as belonging first and foremost to the people, rather than to the state.[39] The state, in exercising jurisdiction over its territory, acts merely as the agent of the people.[40] The state's legitimate control over the territory is thus grounded in its legitimate authority over the people. Both choice and just-cause theorists adopt this post-Westphalian conception of sovereignty when developing their respective normative accounts of secession. The fact that, under the post-Westphalian conception, territorial integrity is contingent on political legitimacy explains why both choice and just-cause theorists define

[39] *See* BUCHANAN, *supra* note 7, at 219, 231; LINDA BISHAI, FORGETTING OURSELVES: SECESSION AND THE (IM)POSSIBILITY OF TERRITORIAL IDENTITY 74–75 (2004).

[40] BUCHANAN, *supra* note 9, at 108–09; BUCHANAN, *supra* note 7, at 219.

https://doi.org/10.1017/S2071832200020988 Published online by Cambridge University Press

the permissibility of secession in terms of political legitimacy. For choice theories, political legitimacy is a necessary condition to create a new state. For just-cause theories, political legitimacy is a sufficient condition not to break up an existing state.

How might the post-Westphalian principle that the territory ultimately belongs to the people help the choice case? This principle seemingly has very different implications depending on whether it means that (1) each portion of the state's territory belongs exclusively to each portion of the population that occupies it; or instead that (2) the state's entire territory—and hence each portion of that territory—belongs to the entire population in virtue of the political union. Under the first understanding, secessionists could easily justify their territorial claim. But under the second understanding, secessionists might be unable to justify their territorial claim, as it is highly unlikely that the remainder of the population will let them leave with a part of territory that, after all, belongs to the whole population collectively. The question, then, is: Does the second understanding of the principle pose a challenge to choice theorists' rather permissive stance on secession?

As secession is famously referred to as political divorce, we might begin answering this question by looking at marriage. This first step toward answering the question will not be sufficient, but it is nonetheless useful in building the full argument. The starting point here is the objection that because of the political union, the entire territory of the state belongs to the entire population—hence potentially making the secessionists' and choice theorists' territorial case more difficult. This objection is similar to the principle of community property in marriage, whereby property acquired during marriage belongs to both spouses. But the principle of community property also stipulates that any property acquired by each spouse prior to their union remains that spouse's separate property, even if, upon marriage, they decided to enjoy it jointly in virtue of their union. If the couple divorces, then, they may have to split as fairly as possible all property acquired during marriage, but any property each person acquired prior to the union would remain that person's individual property, and each person would have the right to exit the union with his or her pre-marriage property.[41]

Thus, even if the entire territory of the state belongs to the entire population in virtue of the political union, if secessionists can show that they already occupied their territory before entering the political union, then, arguably, the remainder of the population has no right to prevent the secessionists from taking a piece of territory that was already theirs before the political unit was formed. Secessionists, then, could justify their territorial claim

[41] One might object that using the principle of community property to build this analogy is question-begging: Why pick this principle rather than other possible principles of marriage contracts? Because the principle of community property constitutes a middle ground between the two extremes of complete merging and complete separation of assets. Thus, the burden of proof here is on those claiming that a more extreme principle should be used. Of course, opting for complete separation of assets would only reinforce the secessionists' case.

https://doi.org/10.1017/S2071832200020988 Published online by Cambridge University Press

and exercise self-determination by seceding, provided that their new state would be viable and respect human rights—that is, provided that choice theories' set of permissibility conditions would be fulfilled.

Here two objections might arise. First, one might ask how to ascertain that the *same* group has occupied the territory all along—that is, how to determine that a group is the same through time. Second, one might ask what warrants using the arbitrary date of the formation of a state to determine whether a secessionist group has a valid territorial claim.

To address the first objection, one might first note that a group's continued existence is not threatened by the fact that the composition of its membership changes continually. For example, we do not have any trouble identifying the same group through time when considering a sports team's number of victories since its creation, a company's number of humanitarian gifts since its foundation, or a country's number of Nobel Prizes since its formation. Similarly, one can make sense of the persistence over time of groups that wish to secede—though they obviously need not have wished to secede all along. Still, the objector might insist that some criterion must be used to determine whether the group qualifies as the same group over time. Addressing the second objection will provide such a criterion.

According to the second objection, what is normatively relevant in establishing valid territorial claims is not the fact that the group already occupied its territory *before* the political unit was formed, but rather the fact that this group has *long* occupied this territory, and that *because* of this, the group has over time developed a sustained bond or history of social and political cooperation, giving rise to shared social practices and political institutions. As this objection makes a normatively significant point, it will now be used to further develop the territorial account offered in this article. As clarified below, this sustained scheme of cooperation is the criterion that determines whether the group qualifies as the same group over time, and hence provides the answer to the first objection above.[42]

In further developing this article's territorial account, it is important to distinguish between (1) the relation between a group and the territory it occupies and (2) the relation between a state and the territory over which it has jurisdiction.[43] The former relation explains what gives a group a valid territorial claim. The latter relation explains what gives a state

[42] Otherwise put, what makes a group the same group over time is not a matter of what the group *is*—matching some set of objective criteria—but rather a matter of what the group *does*—engaged in sustained social and political cooperation.

[43] This article's territorial account is in some respects similar to, yet in other respects crucially different from, an account offered by Anna Stilz. *See* Anna Stilz, *Nations, States, and Territory*, 121 ETHICS 572, 578, 588–89 (2011). For specific differences between the two accounts, see, *infra* notes 45 and 47.

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legitimate jurisdiction over a given territory.[44] As will become apparent, choice theorists' inability to provide a satisfactory account of valid territorial claims stems from their failure to see that, aside from the relation between a state and the territory over which it has jurisdiction, there is a prior, normatively significant relation between a group and the territory it occupies. As we will see, the normative significance of this relation is what makes annexation illegitimate and secession potentially legitimate.

This article thus proposes a two-tier account of territory, based on the aforementioned distinction. Let us now look at each level in turn. As mentioned above, a group's territorial concentration fosters over time a sustained relation of social and political cooperation, bringing about common social and political practices and institutions, through which the group is able to exercise self-determination. This sustained relation of social and political cooperation will hereafter be referred to as a "relation of peoplehood." This relation of peoplehood, as the basis of the group's exercise of self-determination, over time becomes normatively significant. Preserving this relation of peoplehood requires respecting the group's occupancy of that territory. The normative significance of this relation of peoplehood, together with the correlative requirement of respect of territorial occupancy, creates a valid territorial claim for the group—providing the crucial piece currently missing from choice theorists' account of territory, namely (1) the level of the group and its territorial claim. Choice theorists indeed focus solely on (2) the level of the state and its legitimate jurisdiction—that is, the level at which the question of political legitimacy comes into play. Following the post-Westphalian conception of sovereignty, a state acquires jurisdictional rights—that is, rights to make and enforce law—over the territory a group occupies by adequately protecting the group's human rights and representing its interests sufficiently well. Representing a group's interests sufficiently well requires being sensitive to the group's interests, and hence granting the group such rights as free association, free speech, and political participation. In other words, the state's laws and institutions must track the interests of the group. If this condition is not fulfilled, the group has the right to contest the state's authority, and this contestation can take the form of secession[45]—at least after a peaceable and transparent referendum is held and fair terms of separation are reached.

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[44] *Cf.* Zoran Oklopcic, *The Idea of Early-Conflict Constitution-Making: The Conflict in Ukraine Beyond Territorial Rights and Constitutional Paradoxes*, 16 GERMAN L.J. 658 (2015).

[45] Here this article's territorial account parts ways with Stilz's, which precludes the permissibility of secession, arguably, inconsistently. *See* Stilz, *supra* note 43, at 597, 600. Indeed, the required rights of free association, free speech, and political participation would imply the rights for a group to select its political representatives and to form parties advocating secession as well as local governments holding plebiscites on the possibility of secession. If those measures are permitted, then respecting the democratic process would seem to require granting secessionists negotiations, should the majority be in favor of secession. *See* Wayne Norman, *Domesticating Secession*, *in* SECESSION AND SELF-DETERMINATION 193, 207 (Stephen Macedo & Allen Buchanan eds., 2003). Indeed, this is the position adopted by the Canadian Supreme Court in its 1998 "Reference" on the Quebec secession issue. *See* BUCHANAN, *supra* note 7, at 224.

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This article's two-tier account of territory raises several questions: (1) What *type* of group might qualify for such territorial claims; (2) what counts as *sustained* cooperation; and (3) how to address the potentially conflicting territorial claims that result from a group's simultaneous involvement in *multiple cooperation schemes*.

To answer the first question, it is not necessary to provide a list of all the groups that might qualify as potential candidates for valid territorial claims. Rather, the spontaneous identification of those groups by members and non-members alike is sufficient to start examining the validity of territorial claims and hence theorizing about the permissibility of secession. While the Scots and the rest of the UK may disagree on many important issues, neither party disputes the fact that there is such a group as the Scots that has long occupied the territory of Scotland.[46] That being said, the relevant type of group might be a state, a sub-state unit, or a tribal group,[47] and it need not be a national group—in keeping with choice theorists' exclusion of nationalist arguments from the set of morally relevant considerations to determine the permissibility of secession. As explained above, what is normatively relevant is that the group has long occupied a given territory and has thereby over time developed sustained social and political cooperation. Any territorially concentrated group engaged in such sustained cooperation might thus qualify.

Specifying an exact amount of time required for cooperation to count as sustained will always seem somewhat arbitrary. Yet, such specification is important since it will have implications for potentially legitimate territorial and secessionist claims. Such specification should thus balance a concern for securing territorial stability, on the one hand, with a concern for securing the legitimate exercise of self-determination, on the other hand. A compelling territorial account, then, will have to exclude fledgling or fleeting schemes of social and political cooperation from the range of qualifying schemes—for example, the earlier case of the Vermonters' suddenly taking over Death Valley and claiming to secede. To count these types of scheme as sustained would be to relinquish territorial stability altogether and to dilute the meaning of legitimate self-determination to the point of rendering it normatively insignificant. Requiring the span of at least three or four generations would seem to alleviate those concerns by ensuring that social and political cooperation is sufficiently maintained over time to create a normatively significant relation between the group and its territory—that is, a relation of peoplehood that would create a valid territorial claim, in virtue of which secession might then be justified.

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[46] Note that choice theorists' exclusion of nationalist arguments from the set of normatively relevant considerations to determine the permissibility of secession does not mean that national groups, such as the Scots, cannot qualify for permissible secession on a choice account. As long as the new state would meet the choice criteria of viability and of human rights protection, secession is permissible. But it is permissible in virtue of the fulfillment of those criteria, and not in light of the fact that the group is a national group.

[47] Here this article's territorial account further departs from Stilz's, according to which the relevant type of group is that which results from the formation of the state. *See* Stilz, *supra* note 43, at 579–80.

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A group, however, might be simultaneously involved in more than one scheme of social and political cooperation, and hence in more than one relation of peoplehood. For example, the Catalans are engaged in social and political cooperation both at the level of Catalonia and at the level of Spain. In this type of case, it will be important to be able to arbitrate between the potentially conflicting territorial claims that stem from the different cooperation schemes. While a secessionist group is indeed likely to be involved in two cooperation schemes—the specific one in virtue of which it wishes to create its own state, and the larger one that it is seeking to leave—it is also likely that cooperation will not be conducive to the secessionist group's exercise of self-determination equally in both schemes. Indeed, the very presence of secessionist claims would seem to confirm this. Whichever cooperation relation is more fundamental to the group's exercise of self-determination—that is, is more representative of the group's interests—will carry more normative weight, hence establishing which territorial claim is stronger, and thereby undoing the potential conflict between territorial claims.[48]

In summary, the two-tier territorial account defended in this article articulates two different levels or types of right to territory, corresponding to different right-holders and normative considerations. (1) At the level of the people and the territory it occupies, the people has a basic right of occupancy in its territory, based on its normatively significant relation of peoplehood—that is, of self-determination. (2) At the level of the state and the territory over which it has jurisdiction, the state has a derivative right of jurisdiction in its people's territory, based on normative considerations of legitimacy—that is, of adequate protection and representation.

According to this article's territorial account, then, choice theories can justify the secessionist group's territorial claim when: (1) At the group level, this group has developed a sustained relation of social and political cooperation—that is, a relation of peoplehood, which requires respecting its occupancy of that territory; and (2) at the state level, this group deems that its interests are not sufficiently well represented by the state. This two-tier account of territory takes into consideration the value of self-determination, since a group's valid territorial claim is grounded in the scheme of social and political cooperation—that is, the relation of peoplehood, through which the group exercises self-determination. This article's territorial account thus shows how a seceding group's appropriation of a piece of territory to which it does not have a valid claim interferes with

[48] Note that settling the territorial question—who has a valid claim to what territory—does not yet settle the question of secession. As mentioned at the outset, the aim of this article is not to provide a comprehensive account of morally permissible secession. In addition to the territorial component which has been the focus of this article, other considerations would have to be taken into account in order to establish a full moral case in favor of secession—for example, a peaceable and transparent referendum, the viability of the remainder state, fair terms of separation regarding economic and natural resources, *etc.* Thus, having a valid territorial claim is a necessary but not sufficient condition for secession to be permissible.

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the remainder group's rightful exercise of self-determination in its territory. Hence this two-tier territorial account reinforces the claim, made above, that choice theorists urgently need to address the territorial aspect of secession satisfactorily if they wish to invoke the value of self-determination to ground their case for the moral permissibility of secession.

Moreover, the two-tier territorial account offered in this article shows that choice theorists' inability to provide a satisfactory account of valid territorial claims lies in their failure to see that, aside from the relation between a state and the territory over which it has jurisdiction—the level at which the question of political legitimacy comes into play—there is a prior, normatively significant relation of peoplehood between a group and the territory it occupies—a level at which the question of self-determination already comes into play. While the former type of relation is what gives a state legitimate jurisdiction over its territory, the latter type of relation is what explains the principle that the territory ultimately belongs to the people. Since choice theorists invoke this latter principle, they must also specify it: They must explain what gives the seceding group a valid territorial claim. This section has argued that what gives a group a valid territorial claim is its sustained scheme of social and political cooperation—that is, its relation of peoplehood, which results from the group's long occupancy of the territory and through which the group exercises self-determination. In other words, this section has argued that this sustained scheme of social and political cooperation is what explains the principle, invoked by choice theorists, that the territory ultimately belongs to the people.

Specifying this principle in terms of occupancy and peoplehood—thereby explaining what gives a particular group a particular territorial claim—is important because it is necessary in order to account for the wrongfulness of annexation. By focusing solely on the level of the state and its jurisdiction, choice theorists are unable to explain why annexation is wrong even if it is beneficent. If a state's jurisdictional authority over a territory is legitimated solely by its ability to provide adequate protection, then one does not have the conceptual means to condemn beneficent annexation, whereby the annexing agent provides adequate protection, thereby meeting the criterion of legitimacy. As mentioned above, choice theorists respond that annexation violates a group's rightful exercise of self-determination in its territory. But without a further argument regarding territory, choice theorists' current response simply begs the question. By contrast, by additionally considering the prior level of the group and the territory it occupies—the relation of peoplehood, through which the group exercises self-determination—the two-tier territorial account developed in this article can explain why annexation, even if beneficent, is wrong—namely because, aside from the relation between a state and the territory over which it has jurisdiction, there is a prior, normatively significant relation between a group and the territory it occupies—a relation of peoplehood, which is the result of the group's long occupancy of the territory and through which the group exercises self-determination. This two-tier territorial account thus provides the crucial conceptual piece currently missing from choice theorists' account of territory.

By highlighting the normative significance of occupancy and peoplehood, this two-tier territorial account explains why annexation constitutes a violation of self-determination; that is, it explains what makes annexation wrongful. Moreover, if annexation is rightly condemned because it violates a group's rightful exercise of self-determination in its own territory—that is, it violates the annexed group's valid territorial claim—the same rationale supports a *prima facie*[49] moral case in favor of secession for a secessionist group that has over time developed a sustained relation of peoplehood in its territory, through which it exercises self-determination. If this secessionist group is able to create or maintain institutions to provide adequate protection and representation in its new state—that is, if the new state is legitimate—then opposing secession would constitute a violation of the secessionist group's rightful exercise of self-determination and valid territorial claim, as in the case of external annexation. Opposing secession would indeed turn the current, larger state into a *de facto* annexer, unilaterally imposing its jurisdiction on a people that rejects it. In other words, recognizing the normative significance of self-determination and of the territorial claim it implies requires both condemning annexation as morally impermissible and recognizing the *prima facie* moral permissibility of secession.

F. Conclusion: Crimea and the Question of International Institutions

This article has aimed both to provide a more accurate understanding of choice theories of secession and to uphold their unique stance by revealing three crucial yet entirely overlooked points: (1) The specific theoretical underpinnings of choice theories' failure to address the territorial question—that is, their focus on the level of the state and political legitimacy; (2) the internally problematic implications of choice theories' failure to address the territorial question—that is, the inconsistency of their arbitrary focus on the self-determination of only the secessionist group, and not the remainder group; (3) a possible way forward through a territorial account based on self-determination—that is, this article's two-tier territorial account that focuses on both the level of the group and its relation of peoplehood as well as the level of the state and its legitimate jurisdiction. This article has argued that this two-tier territorial account allows us to condemn annexation while inviting us to consider the moral plausibility of secession. In closing, two final questions remain to be considered. First, what does this article's territorial account tell us about the case of Crimea, which has been characterized both as a case of wrongful annexation and as one of rightful secession. Second, what does a *prima facie* moral case in favor of secession mean for international law and international institutions?

While Crimea arguably meets the criterion of peoplehood in virtue of its particular status within Ukraine—it has a history of cooperation and institutions through which it exercises self-determination—it does not meet the criterion of legitimacy—that is, adequate protection and representation. But even if it did, any plausible moral case for secession

[49] It is a *prima facie* case because other considerations might override it. *See, supra* note 48.

https://doi.org/10.1017/S2071832200020988 Published online by Cambridge University Press

previously requires a peaceable and transparent referendum, which by definition precludes dubious hastiness, aggressive propaganda, and military occupation. The case of Crimea does not meet this criterion.

The problem with the Crimean referendum is not where it took place, but how it took place.[50] The problem lies in the conditions under which the referendum occurred—which were neither peaceable nor transparent—not in the fact that the referendum included only the Crimean population, as opposed to the whole population of Ukraine. The two-tier territorial account offered above suggests that the population of Crimea has over time developed a sustained relation of social and political cooperation, through which it exercises self-determination and which requires respecting its occupancy of that territory—that is, a normatively significant relation of peoplehood, which gives the group a valid territorial claim, should it want to secede.[51] Recall that on this two-tier territorial account, Ukraine's jurisdictional right over Crimea is derivative and contingent on considerations of legitimacy—adequate protection and representation. If the population of Crimea finds that its interests are not sufficiently well represented by the state, it has the right to seek external, rather than internal, self-determination. As mentioned above, the normative significance of self-determination, together with the corresponding territorial title to which it gives rise, justifies the condemnation of annexation. In other words, the same reasons used against Russia's annexation of Crimea apply equally to Ukraine's opposition to a peaceable and transparent Crimean referendum on secession: In both cases, it would be a violation of a group's rightful exercise of self-determination in its territory.

Of course, advocating secession through a referendum, or democratically determining the demos, raises Ivor Jennings' oft-cited remark that self-determination is a "ridiculous" idea "because the people cannot decide until somebody decides who are the people."[52] There is indeed, to some extent, some circularity at play in the ideas of self-determination and peoplehood, as several contributors to the present volume note in the context of international law and of constitutional theory, respectively: Self-determination presupposes the very self or people that is supposed to emerge from it; the constitution

[50] *See also*, Malcolm MacLaren, *"Trust the People"? Democratic Secessionism and Contemporary Practice*, 16 GERMAN L.J. 631 (2015).

[51] One might object that there are minorities within the Crimean territory that might not support the secession of Crimea. *See* Brad R. Roth, *The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention*, 16 GERMAN L.J. 384 (2015); Yaniv Roznai & Silvia Suteu, *The Eternal Territory? The Crimean Crisis and Ukraine's Territorial Integrity as an Unamendable Constitutional Principle*, 16 GERMAN L.J. 542 (2015). *See also*, Oklopcic, *supra* note 44. But the problem of "trapped minorities" is not specific to newly seceded polities; it is a reality that many polities, old and new, have to face. Moreover, secession would alleviate, rather than exacerbate, the problem. Secession indeed frees a minority from the old polity in which it was previously trapped. So a concern for trapped minorities supports, rather than undermines, the case for secession. *See* MacLaren, *supra* note 50.

[52] IVOR JENNINGS, THE APPROACH TO SELF-GOVERNMENT 56 (1956).

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constitutes the people that constitutes it.[53] Yet, neither logical nor chronological priority is ultimately the issue. Rather, the issue is ultimately a normative one: peoples rightfully exercising political self-determination. If what results from the mutually constituting interaction between self and determination, or between people and constitution, are institutions that track the interests of the people they are supposed to represent, then if there is any circularity, it is virtuous rather than vicious. And the relevant self or people will speak up to break the circularity if it becomes vicious rather than virtuous—that is, if it runs counter to, rather than serves, the rightful exercise of political self-determination.

In other words, the normative significance of peoplehood that underlies the symmetry between the case against annexation and the case in favor of secession also points to a possible response to Jennings: The people should decide who the people should be. The claims of colonized peoples, indigenous peoples, annexed peoples, and secessionist peoples all show that the people is not only quite capable of, but also often justified in, determining who the people should be.[54] In other words, the answer to Jennings' "puzzle" might be as simple as Mill's self-evident observation that "the question of government ought to be decided by the governed."[55] In the case of secession, a peaceable and transparent referendum in the secessionist territory is an attempt to do just that. Short of meeting the criterion of a peaceable and transparent referendum, however, the case of Crimea is more accurately captured as a case of wrongful annexation than as one of rightful secession. Having answered the first question raised above, let us now turn to the second one.

What does a *prima facie* moral case in favor of secession mean for international law and international institutions? Given the complex specificity of each secessionist case, it would be unwise to draw any general international legal conclusions from the *prima facie* moral case derived from the territorial account defended in this article. The case of Crimea provides a telling illustration of why extreme caution is in order—that is, why institutionalizing a right of secession as a matter of international law would be much too hasty. Still, two important qualifications are in order to clarify the relation between normative theory and institutional reform: one theoretical, the other practical.

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[53] *See* sources cited *supra* note 51; MacLaren, *supra* note 50; Umut Özsu, *Ukraine, International Law, and the Political Economy of Self-Determination*, 16 GERMAN L.J. 434 (2015).

[54] This is not to say that one should ignore the normatively problematic self-serving motives that underlie the rhetoric of self-determination used by some secessionist groups and their supporters or opponents. *See* Özsu, *supra* note 53. But those can be countered or neutralized by requiring that certain conditions be met for secession to be permissible—for example, a peaceable and transparent referendum, the viability of the remainder state, fair terms of separation regarding economic and natural resources, *etc.*

[55] John Stuart Mill, *Considerations on Representative Government*, *in* UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 392 (H.B. Acton ed., 1972) (1862). *See also*, MacLaren, *supra* note 50, at 634.

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First, advocating caution with regard to the institutionalization of a right of secession does not mean adopting Allen Buchanan's methodological requirement, whereby the only plausible type of normative theory of secession must be formulated within an institutional framework. Buchanan indeed contends that normative theorizing about secession is pointless unless it takes into account the international legal and institutional context:[56] "[O]ne cannot first determine a pure, noninstitutional right to secede and then, as a separate task, determine whether institutionalizing it makes sense."[57] For Buchanan, the existence of a moral right to secede is contingent on the moral justifiability of a legal right to secede: Determining under what conditions secession is morally permissible first requires determining how morally justifiable international legal norms would regulate secession. Specifically, establishing a moral right to secede requires meeting at least three criteria for institutional reform: (1) The likelihood of its adoption by the international state system as a legal right—the criterion of "minimal realism;" (2) whether such a right would be consistent with a morally progressive interpretation of key principles of international law, such as territorial integrity or human rights—the criterion of "moral progressiveness;" and (3) whether such a right might have problematic consequences when implemented—the criterion of "absence of perverse incentives."[58] Buchanan then proceeds to show that choice theories do not meet his criteria, and concludes that they are therefore implausible.[59]

Three separate points warrant consideration to address Buchanan's claims. First, one might challenge Buchanan's methodological assertion that the moral right to secede must be inherently institutional. Several authors have indeed underlined that the moral and legal questions about secession are conceptually distinct.[60] Second, however, even if one grants the conceptual distinction between a moral and a legal right to secede, one might still consider whether Buchanan's criteria for institutional reform are nonetheless compelling. Even if those criteria do not justifiably limit the moral permissibility of secession, they might justifiably constrain the legal permissibility of secession. Third, one might question Buchanan's contention that choice theories fail to meet his criteria for institutional reform. To address those three points, we must look at Buchanan's criteria and ask, for each criterion: (1) Is it compelling? (2) If so, is it met by choice theories? Answering these questions will also shed light on (3) the aforementioned moral-legal distinction.

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[56] Buchanan, *supra* note 5, at 32.

[57] BUCHANAN, *supra* note 7, at 27.

[58] Buchanan, *supra* note 5, at 42–44.

[59] *See id.* at 44–54.

[60] ALTMAN & WELLMAN, *supra* note 10, at 53–58; Daniel Weinstock, *Constitutionalizing the Right to Secede*, 9 J. POL. PHIL. 182, 183 (2001).

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Let us first assess Buchanan's criterion of minimal realism. Imagine the antebellum South. Would it be compelling to say that because slaveholders were overwhelmingly unlikely to favor abolition as legal reform, the slave population therefore had no moral right to be free? Or think of the urgent problem of global warming, which is disproportionately affecting poorer, more vulnerable parts of the globe. Would it be compelling to say that if wealthy industrialized nations are unlikely to adopt international mitigation treaties or measures, then poorer nations have no moral right that global warming be addressed? The answer in both cases is clearly "no." The criterion of minimal realism, then, appears rather dubious.

Buchanan would likely find these two examples unfair, because he is concerned with cases where states seek to protect their legitimate interest, in a morally progressive way—territorial integrity is necessary to provide adequate protection of human rights—rather than with cases such as slavery or global warming, where states seek instead to protect their illegitimate interests, in a morally regressive way.[61] But note that in responding in this way, Buchanan is turning away from the criterion of minimal realism, and relying on a different criterion altogether: that of moral progressiveness, understood as requiring adequate protection. In other words, Buchanan is shifting the point from an empirical, procedural one—likelihood of being accepted—to a normative, substantive one—legitimacy of interests. Thus what is ultimately doing the work in Buchanan's argument is the substantive requirement of adequate protection.

Let us focus, then, on the criterion of moral progressiveness, which requires adequate protection. This does seem like a compelling criterion for institutional reform. But while adequate protection might require the territorially bounded state, it does not provide an argument in favor of preserving current states' territorial borders or territorial integrity, as Buchanan claims it does.[62] What is needed for adequate protection is *a* territorially bounded state, *not this or that* particular territorially bounded state. Adequate protection is thus quite compatible with the creation of new states through secession, and hence with the modification of current states' borders. If this is correct, then choice theories do meet the institutionally crucial requirement of adequate protection and of state legitimacy. As we saw above, if the secessionist group is able and willing to protect human rights in its new state, without undermining the remainder state's ability to do the same, then secession is consistent with Buchanan's concern for the morally progressive requirement of adequate protection, and by extension of state legitimacy. In other words, if what matters is adequate protection, then the ability and willingness to provide it can be viewed as necessary conditions to create a new state, rather than as sufficient conditions not to break up an existing one. To deny this would be to beg the question in favor of remedial

[61] Buchanan, *supra* note 5, at 49.

[62] *See id.* at 47.

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secession. Buchanan might respond that the present argument instead begs the question in favor of non-remedial secession, by smuggling into the argument considerations of self-determination that are absent from his, thereby facilitating the case for non-remedial secession. But Buchanan's argument for remedial secession implicitly, yet fundamentally, relies on the normative significance of self-determination;[63] hence this objection fails.

Let us now assess the criterion of absence of perverse incentives. As Daniel Weinstock rightly notes, it is problematic to make the existence of a moral right contingent on the potential consequences its exercise might trigger in the real world. To use Weinstock's example, we would not want to say that women do not have the right to walk by themselves at night because doing so would expose them to a greater risk of attack by others.[64] This does not mean that women should not be careful when walking by themselves at night. It might indeed be unwise to exercise the right in certain circumstances. However, this does not mean that they do not have the right to walk by themselves at night.[65]

The existence of a moral right, then, depends neither on the potential consequences of its exercise—the criterion of absence of perverse incentives—let alone on the likelihood that it should ever be adopted as a legal right by the powers that be—the criterion of minimal realism. Buchanan is mistaken to assume that whether a compelling case can be made for a *moral* right to secede, or whether an agent has a moral right, depends on whether that moral right should or could also be a *legal* right. Those are two distinct questions and conflating them yields rather strange and unpalatable implications that are normatively problematic.

Granting the aforementioned moral-legal distinction, then, might Buchanan's criteria for institutional reform nonetheless be compelling, and if so, do choice theories meet these criteria? We saw that the criterion of minimal realism is problematic, and that Buchanan's way of solving the problem is to turn to the criterion of moral progressiveness and its corresponding requirement of adequate protection. Adequate protection is a compelling criterion for institutional reform, and we saw that choice theories meet this criterion. What about the criterion of absence of perverse incentives? This criterion likewise seems like a compelling criterion for institutional reform, and one that choice theories arguably meet. If groups can secede without having previously suffered egregious violations of human

[63] Amandine Catala, *Remedial Theories of Secession and Territorial Justification*, 44 J. Soc. Phil. 74 (2013).

[64] Weinstock, *supra* note 60, at 185.

[65] Relatedly, the existence of a moral right does not depend on how easy or difficult it would be to realize that right. If you are a millionaire, it might be very easy for you to give me $100, but that does not mean I have the right to receive $100 from you. Conversely, if you hit me with your car and you have no insurance, it might be very difficult for you to compensate me appropriately, but that does not mean that I do not have the right to receive appropriate compensation.

https://doi.org/10.1017/S2071832200020988 Published online by Cambridge University Press

rights, then presumably states will be more inclined to enter into political dialogue with their minorities and to attempt to reach arrangements that will make them more likely to stay than to exit.[66]

To review the three main points of the first, theoretical clarification regarding the relation between normative theory and institutional reform: Though the moral right to secede is not inherently institutional, Buchanan still advances two compelling criteria for institutional reform—moral progressiveness and no perverse incentives—which choice theories meet. Does this mean that international law should recognize a general right to secede after all? No. This brings us to the second, practical clarification regarding the relation between normative theory and institutional reform.

Advocating caution with regard to the institutionalization of a right of secession does not mean that international law cannot recognize the peaceful and stable success of past instances of changes in state borders—for example, the secession of Norway from Sweden, of Iceland from Denmark, of Montenegro from Serbia, or the partition of Czechoslovakia—and hence the necessity of assessing each case on its own merits or demerits.[67] Moreover, even if international law does not recognize a general right of secession, international institutions and actors still have an important role to play in arbitrating secessionist claims, which will keep arising regardless of whether international law recognizes a right to secede. The case of Crimea indeed provides a telling illustration of the crucial need for international mediation in secessionist or irredentist conflicts. In other words, the complex specificity of each secessionist case, at the same time as it tells strongly against the institutionalization of a right of secession as a matter of international law, also urges international institutions and actors to provide the mediation necessary to the adequate protection of human rights and of peace, while recognizing the possibility and justifiability of those cases of changes in state borders that do not pose a threat to such adequate protection. The current international legal neutrality regarding secession[68] might provide a fitting framework for achieving these goals.

[66] ALTMAN & WELLMAN, *supra* note 10, at 62.

[67] *Cf.* Roth, *supra* note 51.

[68] *See* Jure Vidmar, *The Annexation of Crimea and the Boundaries of the Will of the People*, 16 GERMAN L.J. 365 (2015); MacLaren, *supra* note 50.

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