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The Kaplan Lecture on Human Rights

The Case for Self-Determination

GUYORA BINDER*

I. INTRODUCTION

My purpose in this lecture is to make the case for the self-determination of peoples.

Now, defending self-determination at this late date may seem like *opening* the barn door after the liberation of the proverbial livestock. Although western governments long denied the legal authority of the principle, they helped engineer the Balkanization and decolonization of Europe's empires that produced most of the world's existing states.¹ With this process nearly complete, self-determination is now generally accepted as a legal "right" of "peoples."² And the continuing power of self-determination as a political aspiration is attested by the democratization of more than fifty states within the last five years, and the secession of

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¹ A useful account of the invocation of self-determination in disposing of Hapsburg and Ottoman territory at Versailles may be found in ALFRED COBBAN, NATIONAL SELF-DETERMINATION 16-34 (1944). For brief accounts of the European Concert's interventions in the revolts of the Ottoman Empire's Balkan provinces in 1875-78, 1908, and 1912-13, see GUYORA BINDER, TREATY CONFLICT AND POLITICAL CONTRADICTION: THE DIALECTIC OF DUPLICITY 20-21 (1988); see also SIR GEOFFREY BUTLER & SIMON MACCOBY, THE DEVELOPMENT OF INTERNATIONAL LAW 463-77 (1928). A concise but nuanced legal history of the decolonization process is available in HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 58-88 (1988) (analyzing the evolution of the right to self-determination).

² WILSON, *supra* note 1, at 88.

almost twenty within the last year.³ It seems that self-determination doesn't need *my* support.

So the first question I will turn to is why self-determination needs defense. My answer depends on a distinction between what I will call the *universalist* and *nationalist* components of self-determination. The *universalist* component of self-determination is satisfied wherever institutions of government are majoritarian. Given a polity, the universalist component of self-determination requires only that its population be fully and fairly represented.

The *nationalist* component of self-determination is satisfied to the extent that institutions of government are identified with particular communities. Hence, the nationalist component of self-determination does not permit us to take any polity as given. It applies to "peoples" rather than "populations" and includes the right of such peoples to form polities of their own.

This distinction is prompted by the observation that the end of the Cold War has not only occasioned democratization throughout the world, it has also released long-frustrated nationalist aspirations. By no mere logic did democratization require the reunification of Germany or the dissolution of the Soviet Union. Granting that the Soviet government was evil, did it follow that the Soviet Union was an evil *empire*, its people not just oppressed but conquered and colonized?

That democratization did imply national independence in the experience of so many, reminds us that the rhetoric of self-determination has long fused the potentially contradictory claims of democracy and nationalism, of majority rule and minority separatism. The recognition that self-determination has both universalist and nationalist components brings into focus a controversy that would otherwise escape our notice.

The nub of the hidden controversy is this: While majority rule has been increasingly endorsed by international law and is no longer controversial in political theory, the boundaries within which majorities rule are most often viewed as ethically arbitrary. Thus, the universalist component of self-determination, requiring democracy and civil equality, has triumphed, at least in theory. The nationalist component, identifying a polity with a particular group or "people," remains potent in practice, but quite disreputable in theory.

³ See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 47 & n.4 (1992).

The reason for this is the postwar West's discomfort with group identity. We associate group identity with prejudicial stereotyping. It follows that group separatism must be immoral, except as a remedy of last resort against discrimination, and irrational, because premised on the mistaken belief that group identity is natural or immutable. We will see that despite its apparent endorsement of self-determination, international law incorporates these skeptical attitudes toward group identity and group separatism. The continuing controversy over its nationalist component is the reason that the principle of self-determination of peoples needs defense.

So the second question I will turn to is whether the nationalist component of self-determination is defensible. And my answer will be a qualified "yes." While group identities are contingent rather than natural or immutable, they are neither unfortunate nor ethically arbitrary. Group identity is valuable in general, and good reasons may exist for creating and preserving particular group identities.

Critics of the nationalist component of self-determination see political boundaries as justified only to the extent that they protect individual rights. But political boundaries also protect group identities. And while shared parentage may not be a sufficient reason to identify with a group, shared moral purpose is. We can define and advance our moral ends only through joint action, and we are justified in forming political communities for the pursuit of those ends, exclusive though those political communities be. Because we have moral reasons to put our powers at the disposal of those who share our moral ends, the boundaries of our political communities need not be ethically arbitrary.

II. WHY DOES SELF-DETERMINATION NEED DEFENSE?

Self-determination is vulnerable to critique because it embodies an inherent tension between majority rule and minority separatism. After World War I, the Allies indulged separatism on grounds of pragmatism rather than principle; after World War II they repudiated separatism as imprudent and incoherent. The process of decolonization eventually established self-determination as a principle of law. But it did not establish the authority of minority separatism. Instead, the neocolonial powers and their post-colonial clients agreed to treat colonial secession as an exceptional departure from a general regime of state sovereignty. Recognizing that decolonization cannot be distinguished from

secession, political philosophers have denied the legitimacy of both, unless absolutely necessary to secure the political and civil rights of individuals. Hence, even the limited legal authority of the nationalist component of self-determination is unstable, resting on an indefensible distinction between secession and decolonization.

A. *The Antinomic Origins of Self-Determination*

From its inception during the romantic era, the ideal of self-determination has fused two potentially incompatible values: the popular sovereignty championed by the French Revolution and the nationalist resentment provoked throughout Europe by the French armies of occupation.⁴

This internal tension need not discredit the ideal of self-determination. In its ambivalence, self-determination was characteristic of an entire generation of dynamic concepts set in motion by the contradictions of late-Enlightenment thought. The ideal of individual self-realization articulated by such figures as Schiller, Emerson, Mill, and Nietzsche can be seen as a resolution of Kant's tortured ambivalence between freedom and duty.⁵ The romantic depiction of the self as a work of art reconciled the Enlightenment's antithetical conceptions of freedom as spontaneous self-expression and as the self-disciplined subordination of passion to reason.⁶

⁴ For the inspiring effect of the French Revolution on many German intellectuals, see CHARLES TAYLOR, *HEGEL* 33, 52-53 (1975); JOHN EDWARD TOEWS, *HEGELIANISM: THE PATH TOWARD DIALECTICAL HUMANISM, 1805-1841*, at 30-48 (1980); BERNARD YACK, *THE LONGING FOR TOTAL REVOLUTION: PHILOSOPHIC SOURCES OF SOCIAL DISCONTENT FROM ROUSSEAU TO MARX AND NIETZSCHE* 89-98 (1986). For the nationalist reaction against the revolution in Germany, see GEORG G. IGGERS, *THE GERMAN CONCEPTION OF HISTORY* 7, 16, 20 (1983); FRIEDRICH KARL VON SAVIGNY, *VON BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* (1828); TOEWS, *supra*, at 50, 57-58; cf. JAMES Q. WHITMAN, *THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA* 66-73 (1990) (arguing that the cult of Germany's "ancient constitution" preceded and shaped reaction to the French Revolution). See generally OTTO GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY 1500-1800* (Ernest Barker trans., 1934) (arguing that natural law theories implemented during French Revolution wrongly ignore importance of associations in insulating individual from state and stabilizing politics).

⁵ See RALPH WALDO EMERSON, *The Poet*, in *SELECTIONS FROM RALPH WALDO EMERSON* 222 (Stephen E. Whicher ed., 1957); RALPH WALDO EMERSON, *Self-Reliance*, in *EMERSON*, *supra*, at 147; IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (Lewis White Beck trans., 1990); JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1862); JOHN STUART MILL, *ON LIBERTY* ch. III (1859); FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* (Walter Kaufmann trans., 1974); FRIEDRICH SCHILLER, *ON THE AESTHETIC EDUCATION OF MAN* (Elizabeth M. Wilkinson & L.A. Willoughby trans., 1967).

⁶ See CHARLES TAYLOR, *HEGEL AND MODERN SOCIETY* 1-23 (1979); YACK, *supra* note

What individual self-realization was for romantic moral psychology, national self-determination was for romantic politics.⁷ Thus we can view national self-determination as one reconciliation of the competing ideals of the rule of the people and the rule of the virtuous. Figures as diverse in outlook as Marx, Mill, and Mazzini could all agree: Only by forging their own revolutionary struggles for liberty, without foreign intervention, could the craven peoples of central Europe become at once capable and worthy of self-rule.⁸ As art was for the individual, so revolution would be for the nation: an act of self-creation.

Self-determination's original associations with political revolution and artistic innovation illustrate an important point about nationalism. We often assume that nationalism must exalt some and denigrate others on the basis of characteristics that people are powerless to change. Yet the nationality exalted by romantic nationalists was something achieved rather than received, more artifact than historical fact. Among these early nationalists, patriotism tended to inspire caustic social criticism rather than complacent chauvinism. Self-determination entailed not self-congratulation, but ruthless self-examination and restless self-reform.⁹

B. *The Apparent Rise and Real Fall of Wilsonian Self-Determination*

Throughout the nineteenth century, national self-determination remained an insurgent principle, largely rejected by international law. In Napoleon's wake, the Concert of Europe strove to restore the *status quo ante* in Europe, rejecting the authority of popular will to determine either borders or the governments that ruled within them. The "society of nations" that emerged from Vienna was an exclusive club, admission to which was discretionary.¹⁰ Thus, nations had no status in international law until incorporated into a recognized state. Moreover, a state's treatment

4, at 133-84 (discussing Schiller's concept of aesthetic freedom as a response to Kantian dilemmas).

⁷ See Arnold J. Toynbee, *Self-determination*, 244 Q. REV. 317 (1925).

⁸ KARL MARX, *A Contribution to the Critique of Hegel's Philosophy of Right, Introduction*, in EARLY WRITINGS 243-57 (Rodney Livingstone & Gregor Benton trans., 1975); JOSEPH MAZZINI, *Faith and the Future*, in ESSAYS BY JOSEPH MAZZINI (Thomas Okey trans., 1894); 3 JOHN STUART MILL, *A Few Words on Non-intervention*, in DISSERTATIONS AND DISCUSSIONS 238-63 (1873).

⁹ TAYLOR, *supra* note 6, at 5-8.

¹⁰ HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 26-27 (1947); LASSA OPPENHEIM, *OPPENHEIM'S INTERNATIONAL LAW* 17-18 (1st ed. 1905) (discussing the legitimism of the European powers during the post-Napoleonic era, with the possible excep-

of foreigners was a matter of international concern only insofar as those foreigners were subjects of another recognized state.¹¹

The odd consequence of this conception of international society was that the principle of non-intervention prevented England from helping Hungarians revolt against their Hapsburg masters, but did not restrain England from conquering Africa. Unalloyed with principles of popular sovereignty and national separatism, the principle of state autonomy paradoxically authorized imperialism. Among the world powers only the United States, bent on securing its own hemisphere of influence while forcing open the door to Asian markets, dissented from this view of international society as an exclusive club.¹² Inter-American relations, where rhetorical deference to the sometimes incompatible values of non-intervention and democratic legitimacy became customary, provided the legal origins of self-determination.¹³

At the end of World War I, Woodrow Wilson urged the principle of self-determination upon the remnants of the European Concert. Yet the idea won grudging acceptance at Versailles only as a principle of statecraft, rather than justice.¹⁴ Having encouraged nationalist rebellion in Hapsburg and Ottoman territory in the latter stages of the war, the Allies were dragged along by their own propaganda.¹⁵ In addition, the political separation of ethnic minorities struck the victors as a prudent method of dismembering the European territories of the vanquished.

Implementing this policy did not entail accepting self-determination as a legal obligation of general application.¹⁶ The allied victors did not apply it in Africa or Asia, or against themselves in

tion of England), 38-39 (discussing the dominance of the constitutive view of state recognition during the nineteenth century).

¹¹ An early exception to this overall pattern was the decision at the Concert of Paris in 1856 to determine the fate of Moldavia and Wallachia by plebiscite. This decision anticipated the later use of the self-determination principle at Versailles to dismember defeated empires. See COBBAN, *supra* note 1, at 6. International intervention in the Ottoman Empire's Balkan revolts further disrupted the pattern, leading to the breakup of the European Concert system and the onset of World War I. See *id.* at 16-34.

¹² See L. THOMAS GALLOWAY, *RECOGNIZING FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES 17-27* (1978); LAUTERPACHT, *supra* note 10, at 18-23.

¹³ See James Brown Scott et al., *Editorial Comment: President Wilson and Latin America*, 7 *AM. J. INT'L L.* 329 (1913).

¹⁴ COBBAN, *supra* note 1, at 27-34.

¹⁵ *Id.* at 11-15.

¹⁶ See *id.* at 22; Woodrow Wilson, Speech of September 17, 1919, in 2 *WOODROW WILSON, WAR AND PEACE: PRESIDENTIAL MESSAGES, ADDRESSES, AND PAPERS* (1917-1923) 244 (Ray S. Baker and William E. Dodd eds., 1927); Michla Pomerance, *The United States and Self-determination: Perspectives on the Wilsonian Conception*, 70 *AM. J. INT'L L.* 1, 9, 12 (1976).

Europe.¹⁷ Even Wilson himself may have seen Balkanization more as a means of making the world safe for democracy than as a conception of democracy.¹⁸ Cynics might say that in shrinking Balkan minorities down to manageable size,¹⁹ the Allies intended only that their persecution proceed peacefully, without provoking international conflict.²⁰ And even this hope proved vain as German irredentism, ironically legitimated by Wilsonian rhetoric, dragged Europe back into war.

From the outset, critics contended that Wilson's slogan was fatally ambiguous and that by encouraging unrealistic nationalist aspirations, it would provoke violent conflict. In the midst of the Paris Peace Conference, Secretary of State Robert Lansing wondered, "When the President talks of 'self-determination' what unit has he in mind? Does he mean a race, a territorial area or a community? Without a definite unit which is practical, application of this principle is dangerous to peace and stability."²¹

By the end of World War II, Lansing's view had prevailed among Western diplomats and political theorists. At war's end Alfred Cobban concluded that

[i]f self-determination received only a limited application in the [Versailles] peace treaties, it is possible that this was not primarily because of the insincerity or ill-will of the representatives of the chief powers concerned . . . but because in the nature of things it could not be applied consistently. . . . The attempt to make the culturally united nation-state the one and only basis of legitimate political organization has proved untenable in practice. It was never tenable in theory.²²

In hindsight, Wilson's recklessly vague formulation seemed like the first step down the slippery slope from Versailles to Mu-

¹⁷ COBBAN, *supra* note 1, at 17-19; Pomerance, *supra* note 16, at 4, 25.

¹⁸ Pomerance, *supra* note 16, at 17-19, 22-25.

¹⁹ See HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 53 (1990) ("While approximately half of the population of Europe were 'minorities' in 1914, only one-fourth were minorities in 1919."); see also Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 66 NOTRE DAME L. REV. 1219, 1220 n.6 (1990) (citing Celestine Bohlen, *Ethnic Rivalries in Eastern Europe*, N.Y. TIMES, Nov. 12, 1990, at A1).

²⁰ Some have argued that far from improving the situation of minorities in Eastern Europe, the creation of nationally identified states rendered the remaining minorities even more vulnerable and isolated, thus necessitating guarantees of minority rights. See HANNUM, *supra* note 19, at 55-56; RAYMOND PEARSON, *NATIONAL MINORITIES IN EASTERN EUROPE, 1848-1945*, at 148-49 (1983).

²¹ Robert Lansing, *Self-determination*, THE SATURDAY EVENING POST, Apr. 9, 1921, at 6, 7 (quoting own diary).

²² COBBAN, *supra* note 1, at 44, 63.

nich to Auschwitz.²³ After first encouraging self-determination, the Allies found themselves appeasing nationalism and ultimately acquiescing in extermination.

The postwar West's rejection of nationalism was propelled by more than horror at Nazi atrocities, however. A worldwide mobilization for war and reconstruction had frayed the boundaries of community and nation, transforming international society into fungible battalions of soldiers, refugees, munitions workers, and other such objects of bureaucratic interest. After a decade of devoting their intellectual attention to problems of logistics, Western intellectuals had come to see themselves as equally fungible technicians. To these pragmatic problem-solvers, such formerly fashionable ideas as cultural relativism now seemed like mush-minded nostalgia. War had reduced cultural differences to rubble, while the task of post-war reconstruction was a global one, everywhere the same.²⁴ Also, where third-world intellectuals were inclined to see Nazi genocide as an extension of imperialism,²⁵ Western liberals—Americans in particular—identified it with the familiar embarrassment of racial discrimination.²⁶ Thus, cultural valences as disparate as integration and the international style converged to oppose Nazism to universalism rather than pluralism on many a moral compass.

C. *De-Emphasis in the United Nations Charter*

That national self-determination would become a central tenet of the international order established by the war against socialism would have surprised that order's architects. To the framers of the United Nations Charter, Antonio Cassese writes, "Self-determination was [still] . . . only . . . a means of furthering

²³ See WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1989).

²⁴ See, e.g., ALISON DUNDES RENTELN, *INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM* 67 (1990) (discussing association of cultural relativism with Nazism, or tolerance of Nazism); GARRY WILLS, *NIXON AGONISTES* 520-22 (1971) (pragmatic orientation of postwar American intellectuals). Consistent with this story about the culturally homogenizing effects of mobilization for war, Kymlicka notes a less principled motive for the postwar reaction against group rights: a sense that distinctive national minorities were potential pockets of irredentist disloyalty. KYMLICKA, *supra* note 23, at 213. On this view, the postwar hostility towards recognition of minority rights sprung from the same cultural forces as the wartime internment—and worse—of minority groups. The suppression of minority cultures is always ambiguous between universalist and nationalist motivations, which is another way of saying that universalistic ideologies are often nothing more than self-deluded cultural imperialism.

²⁵ See Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 *YALE L.J.* 1321, 1360-62 (1989).

²⁶ See KYMLICKA, *supra* note 23, at 4, 141-46, 214.

the development of friendly relations among states and . . . strengthen[ing] universal peace . . . with the obvious consequence that it might and indeed should be set aside when its fulfillment would give rise to tension and conflict among states.”²⁷

The scheme established by the UN Charter for the “progressive development” of “self-government” in the colonies²⁸ did not so much dictate their independence as legitimate their continued dependence. By characterizing colonial rule as a necessary means to development for the colonies, the UN Charter obscured the fact that such rule was an impediment to self-government.²⁹ Yehuda Blum has aptly concluded that “self-determination, in contrast to sovereignty . . . was not originally perceived as an *operative* principle of the Charter. It was regarded as a goal to be attained at some indeterminate date in the future.”³⁰

Although traditionally more enamored of the principle of self-determination than its new Western allies,³¹ the Soviet Union agreed that self-determination was a principle of order rather than justice. For the oft-invaded Soviet Union, self-determination meant non-intervention—in other words, respect for the very state sovereignty challenged by demands for decolonization or secession.³²

Among the victorious Allies, Britain and France retained a vested interest in the legitimacy of empire. And while the United States and the Soviet Union both originated as revolutionary states, each was strongly committed to a universalist ideology

²⁷ Antonio Cassese, *The Helsinki Declaration and Self-Determination*, in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 83, 84 (Thomas Buergenthal ed., 1977).

²⁸ See U.N. CHARTER arts. 73(b), 76(b). Under article 73(e), members were left on their own to designate territories as non-self-governing by reporting on their status to the Secretary-General. Under article 77, League of Nations mandates, territory taken from World War II losers, and territory voluntarily ceded by member states could be held in trust by willing states, subject to conditions approved by the General Assembly. See WILSON, *supra* note 1, at 59-60.

²⁹ See Lisa Stearns, *The Dilemma of Struggle Through the International Order*, 11 INT'L J. SOC. L. 65 (1983).

³⁰ Yehuda Z. Blum, *Reflections on the Changing Concept of Self-determination*, 10 ISR. L. REV. 509, 511 (1975).

³¹ See ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 131 (1986); ARNO J. MAYER, POLITICAL ORIGINS OF THE NEW DIPLOMACY, 1917-1918, at 75 (1959); Daniel Thuerer, *Self-determination*, 8 ENCYCLOPEDIA OF PUB. INT'L L. 470, 470 (1987). Regarding the complex ambivalence toward national self-determination in the rhetoric and practice of Communist parties, see generally WALKER CONNOR, THE NATIONAL QUESTION IN MARXIST-LENINIST THEORY AND STRATEGY (1984).

³² CASSESE, *supra* note 31, at 302. The Soviet conception of non-intervention ironically entailed that revolutions within the Soviet bloc could be brutally suppressed in 1956 (Hungary) and 1968 (Czechoslovakia) without the danger of Western intercession on behalf of the revolutionaries.

prescribing a single path towards modernization. Neither placed a great value on preserving cultural particularity; neither supported Wilsonian nationalism.

It was, of course, the post-colonial states themselves that sought and eventually won recognition of a right to self-determination. But in the end, they no more embraced the Wilsonian principle than had the colonial powers they fought against. The third world's surprising ambivalence toward the nationalist component of self-determination is explained by the inherent contradictions of the decolonization process.

D. *The Paradox of Decolonization*

If the internationalization of social and economic life undermined nationalist sentiment in the first world,³³ it had the opposite effect on the third world. Put bluntly, third world nationalism was engendered by Western imperialism. This is true not just in the obvious sense that oppression provokes resistance,³⁴ but in the deeper sense that nationality itself was a European export. The concept of the nation-state arose in Europe and only became meaningful in Africa and Asia in the context of colonial rule. Thus, in criticizing colonial rule as alien, third world elites ironically deployed a nationalist ideology more European than indigenous.

Nationality is frequently ascribed on the basis of shared cultural identity,³⁵ yet the self-conscious identification with a culture characteristic of nationalist movements seems necessary and desirable only under the social and political conditions associated with modernity. As Ernest Gellner puts it:

[W]hen general social conditions make for standardized, homogeneous, centrally sustained high cultures, pervading entire populations and not just elite minorities, a situation arises in which well-defined educationally sanctioned and unified cultures constitute very nearly the only kind of unit with which men willingly and often ardently identify. The cultures now seem to be the natural repositories of political legitimacy.³⁶

By inculcating a single language and literature and sweeping

³³ See *supra* text accompanying notes 24-26.

³⁴ GEORG W.F. HEGEL, *PHILOSOPHY OF RIGHT* ¶ 295 (T.M. Knox trans., 1958); DOV RONEN, *THE QUEST FOR SELF-DETERMINATION* 53-70 (1979).

³⁵ See, e.g., ERNEST GELLNER, *NATIONS AND NATIONALISM* 7 (1983).

³⁶ *Id.* at 55.

away traditional communal structures, the modern administrative state creates a national culture. The very notion of a culture, bounded, unified, and encapsulated in the canonical works of a Balzac or a Hugo, developed alongside nationalism in nineteenth-century Europe.³⁷

Thus, the efforts of European anthropologists and philologists to export this inherently modern object of study to traditional societies proved problematic. James Clifford writes that

[a]nthropological culture collectors have typically gathered what seems "traditional"—what by definition is opposed to modernity. . . . What is hybrid or "historical" in an emergent sense has been less commonly collected and presented as a system of authenticity. . . . [Margaret] Mead found Arapesh receptivity to outside influences "annoying." *Their* culture collecting complicated hers.³⁸

Stalking for trophies in the jungles of Africa and Melanesia, Westerners recognized culture as authentically traditional only when resembling the seamless cultures promulgated by the modern state. Crumbling before the vanguards of modernity, the fragile societies of the third world seemed to their invaders to have no cultures of their own. Against this background, the claims of third world nationalists to cultural authenticity are best understood as demands for Western recognition of their competence to administer states.

How did nationalist movements arise in the developing world? Nationalist ideology typically arises during the state-building process as a mechanism of adjustment between three forces: bureaucracy, traditional elites, and popular masses. In the third world, decolonization was the consequence, not the cause, of state-building. In some cases, the state-building process began with European contact: The slave-trade has sometimes been depicted as having a royalizing effect on West African politics.³⁹ In other cases, state-building commenced later in the process of colonization. European powers initially established territorial authority over much of Africa by co-opting traditional elites rather than claiming sovereignty. The resulting feudal regimes were transformed into states only when external pressures in the form of military and commercial competition from rival

³⁷ For the classic development of this argument, see RAYMOND WILLIAMS, *CULTURE AND SOCIETY, 1780-1950* (1960).

³⁸ JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE* 231-32 (1988).

³⁹ BASIL DAVIDSON, *AFRICA IN HISTORY: THEMES & OUTLINES* 184, 186 (1974); BASIL DAVIDSON, *THE AFRICAN SLAVE TRADE* 46-48, 105 (1980).

colonial powers forced territorial authorities into a direct administrative role.⁴⁰

The roots of European administrative control of Africa therefore lie in the collapse of economic liberalism in Europe.⁴¹ By the last third of the nineteenth century, economic liberalism was besieged on two fronts. The new nation-states of Italy and Germany challenged the English-dominated regime of free trade, even as an increasingly organized working class imposed social welfare responsibilities on all the states of Western Europe.⁴² The result was intensified competition for colonial resources. These resources could only be legally protected from rivals by the establishment of direct administration with all the attributes of sovereignty. This caused the "scramble for Africa" in the last two decades of the nineteenth century.⁴³

As colonial powers strove to administer Africa, they frequently undermined the authority of the traditional elites on whom they had relied for control, even as they recruited some elite members into the lower tiers of the administrative bureaucracy. As members of traditional elites found their local authority fading and their new imperial careers constrained by their colonial origins, conditions ripened for the development of nationalist ideologies.⁴⁴ A unifying nationalist ideology could enable diverse and rival local elites to cooperate in claiming support from equally diverse mass constituencies.⁴⁵ Yet, nationalism legitimated the authority of local elites not over traditional networks of social control, but over the state apparatuses within which members of these elites had already begun to function.

Ironically, nationalist competition in Europe engendered na-

⁴⁰ JOHN BREUILLY, *NATIONALISM AND THE STATE* 128 (1982).

⁴¹ The inherent contradictions and collapse of European economic liberalism are set forth in KARL POLANYI, *THE GREAT TRANSFORMATION* 135-219 (1957).

⁴² BREUILLY, *supra* note 40, at 378.

⁴³ *Id.* at 128.

⁴⁴ BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 86-88, 105-22 (1983).

⁴⁵ For a description of the state apparatus seized by local revolutionaries, see Prosser Gifford & William Roger Louis, *Introduction* to *DECOLONIZATION AND AFRICAN INDEPENDENCE: THE TRANSFERS OF POWER, 1960-1980*, at xi (Prosser Gifford & William Roger Louis eds., 1988):

The African states at the time of independence inherited: international boundaries, military and police forces that could, with varying degrees of efficiency, hold the state together; a revenue system based on agricultural products and raw materials, the external value of which would fluctuate with the world market; in the British and French cases, either elected local legislatures or elected representatives in a metropolitan parliament; and, usually, a network of government offices complete with files, typewriters, and telephones.

tionalist movements in the third world a generation or two later, just as nationalism was being repudiated in Europe. Also ironically, third world nationalism was everywhere nurtured by the intensification of Western intervention. It reflected the struggle of newly westernized elites for control of institutions of Western origin—a struggle that succeeded only when the European nation-states became too weak to hold onto their administrative extremities. The national identities so constructed were often shaped by the arbitrary boundaries of colonial administrative units. Thus despite their rhetoric of cultural authenticity, nationalist movements were useful in state-building precisely because they suppressed or amalgamated indigenous cultural identities.⁴⁶

In sum, decolonization is properly seen as an extension of the state-building process initiated by the colonial powers—a sort of metastasis of modernity making all societies more alike.⁴⁷

E. *The Emergence of a Retroactive Right to Decolonization*

Seeing decolonization as an integrative rather than a disintegrative process helps us understand the simultaneous emergence of a legal right to self-determination of peoples and the dwindling of its nationalist component.

The legal stature of the principle of self-determination of peoples grew with the representation of post-colonial states in the UN General Assembly. In 1960, a year in which 17 new states joined the United Nations, the General Assembly passed its first resolutions recognizing a *right* of all peoples to self-determination⁴⁸ and ascribing such a right to the residents of French Algeria.⁴⁹ In 1966 the International Covenant on Civil and Political Rights aroused controversy by attributing a right of self-determi-

⁴⁶ Cf. GELLNER, *supra* note 35, at 9-12, 32-40, 46 (discussing the transformation of nationalism into class struggle during the Industrial Revolution).

⁴⁷ As John Breuilly comments:

When the nationalist movement has organised itself through as much as against the institutions of the colonial state and is concerned to take power at the territorial level . . . the idea of the future state resembles a democratised version of the colonial state itself. Such an idea is also, of course, appropriate to legitimise the nationalist claim to power in terms acceptable to the imperial power and other western powers for whom the democratic nation-state represents the ideal and normal unit of political community.

BREUILLY, *supra* note 40, at 192.

⁴⁸ G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960).

⁴⁹ G.A. Res. 1573, U.N. GAOR, 15th Sess., Supp. No. 16, at 3, U.N. Doc. A/4684 (1960).

nation to all peoples.⁵⁰ The United States and the remaining colonial powers continued to deny the existence of any such right until 1970, when they participated in the General Assembly's passage by consensus of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States ("Declaration on Friendly Relations" or "Declaration").⁵¹ The Declaration on Friendly Relations, defining the right of self-determination, is generally viewed as an authoritative interpretation of the UN Charter.⁵²

This universal support for a right of self-determination was achieved by restriction of the right to the decolonization context.

The progress of decolonization itself enabled this simultaneous enactment and attenuation of the right of self-determination. By 1970, decolonization was substantially complete, and the West became more interested in nurturing neo-colonial relationships with the new states than in retaining colonies. With the achievement of state power, the interests of post-colonial nation-

⁵⁰ G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966). For the controversy, see Franck, *supra* note 3.

⁵¹ G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter Declaration on Friendly Relations or Declaration].

⁵² See CASSESE, *supra* note 31, at 126-65 (1986) (deriving a regime of "fundamental principles governing international relations" from the Declaration). The Declaration was the culmination of a lengthy effort to legitimate the U.N. Charter for its newer signatories in the developing world who took no part in its drafting. The Declaration was drafted by a committee appointed to develop an official interpretation on which the new as well as the old members could agree. *Id.* at 128.

The internal evidence of the Declaration's authoritative character includes (a) the resolution's self-description as a "Declaration" in its title; (b) the resolution's "declaration" that "[t]he principles of the Charter which are embodied in this Declaration constitute basic principles of international law," Declaration, *supra* note 51, at 124; (c) the reference in the resolution's title to U.N. Charter article 1 ("Friendly Relations") and in its first paragraph to the "Principles" of the United Nations listed in U.N. Charter article 2; (d) the observation in the Declaration's preamble that "progressive development and codification" of those principles would "promote the realization of the purposes of the United Nations," *id.* at 122; and (e) the implicit reference in this preamble to U.N. Charter article 13, conferring on the General Assembly authority to "encourag[e] the progressive development of international law and its codification." U.N. CHARTER art. 13.

The external evidence for the authority of the Declaration would include the Declaration's adoption by consensus, combined with two customary canons of construction. The first is that in treaty interpretation, "There shall be taken into account, together with the context . . . any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions," and "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3)(a)-(b), U.N. Doc. A/CONF.39.27. The second is the custom of reading constitutional texts as necessarily conferring on the institutions they establish authority to "interpret their own constitutional powers and the specific provisions" of the text so constituting them. ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 4 (1963).

alists had shifted as well. Once bent on undermining the "territorial integrity and political unity" of colonial empires in the name of nationalism, the post-colonial nationalists now faced separatist challenges of their own.⁵³

To these precarious regimes, the United States and the United Kingdom now offered support against secessionist claims. But the price of Anglo-American legitimation would be acceptance of Anglo-American criteria of legitimacy. In acceding to the West's equation of self-determination with liberal democracy, the post-colonial states would paradoxically condition their own self-determination on compliance with Western standards of governance.⁵⁴ This was the compromise that enabled the unanimous passage of the Declaration.

Never quite acknowledging a universal right of self-determination, the Declaration instead proclaimed that "by virtue of the principle of . . . self-determination of peoples . . . all peoples have the right freely to determine, without external interference, their political status."⁵⁵

What groups counted as peoples? The Declaration treated non-self-governing territories as separate territorial units, whose residents would have a full-fledged "right of self-determination." For the free determination of their "political status," the Declaration contemplated a choice among independence from, absorp-

⁵³ BREUILLY, *supra* note 40, at 222-33 (post-colonial states engender new nationalisms).

⁵⁴ For the Western bargaining position, see the U.S. and British proposals for inclusion in the Declaration of an equating of self-determination with a "representative government, effectively functioning as such to all distinct peoples within its territory." *The Principle of Equal Rights and Self-determination of Peoples*, proposal submitted to the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States, U.N. Doc. A/AC.125.L32 (1966); see UNITED NATIONS, DRAFT REPORT OF THE SPECIAL COMMITTEE ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES, U.N. Doc. A/AC.125/L.75 (1969); LEE BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 92-93, 118-21 (1978); MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS 38-39 (1982).

This formula would have protected any colonial powers who might seek to annex colonial territories and absorb colonial populations on a representative basis. At the same time, it threatened nonrepresentative post-colonial governments with internal secession and external intervention.

The United States took a similar position in the Group on Indigenous Populations of the U.N. Subcommittee on the Prevention of Discrimination and Protection of Minorities, arguing both that distinct indigenous populations could be found in post-colonial states and that its own Native American tribes were too well integrated and represented to be recognized as "peoples" with a right of self-determination. See Russel Lawrence Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369 (1986).

⁵⁵ Declaration, *supra* note 51, at 124 (emphasis added).

tion by, or association with an existing state.⁵⁶

Regarding secession, the Declaration offered a concluding assurance that

[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair . . . the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of . . . self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.⁵⁷

Note how far this supposed triumph of post-colonial nationalism departed from Wilsonian ideals. Thus the Declaration recognized a right of secession not for *peoples* at all, but for those *territories* that happened to be recognized by the United Nations as colonies. This interpretation of the right of self-determination was subsequently confirmed by the International Court of Justice decisions in the Namibia and Western Sahara cases⁵⁸ and by the General Assembly's and Security Council's disapproval of Bengali secession.⁵⁹ This formula, however, completely ignores the United Nations' neo-Wilsonian practices of partitioning such culturally divided colonies as India and Palestine⁶⁰ and absorbing

⁵⁶ *Id.*

⁵⁷ *Id.* The exclusion of any general right of secession in the Declaration is also implied by the otherwise mysterious claim that the historically controversial principle of self-determination of peoples advances harmonious relations among states. *Id.*; see HÉCTOR GROS ESPIELL, *THE RIGHT TO SELF-DETERMINATION: IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS*, ¶ 89, at 13, U.N. Doc. E/CN.4/Sub.2/405/Rev.1, U.N. Sales No. E.79.XIV.5 (1980) (outside of colonial contexts, "[w]here the territorial integrity of the State is involved, the right to self-determination does not in principle apply") (citation omitted); HANNUM, *supra* note 19, at 49 ("[T]he international community recognizes only a very limited right to (1) external self-determination, defined as the right to freedom from a former colonial power, and (2) internal self-determination, defined as the independence of the whole state's population from foreign intervention or influence."); HIGGINS, *supra* note 52, at 104 ("Self-determination refers to the right of the majority within a generally accepted political unit to the exercise of power."); cf. Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992) (detailing recent departures from the traditional reluctance to recognize secessionist movements prior to their military success).

⁵⁸ Advisory Opinion, *Western Sahara*, 1975 I.C.J. 12 (October 16); Advisory Opinion, *Namibia (S.W. Africa)*, 1971 I.C.J. 16 (June 21).

⁵⁹ INTERNATIONAL COMMISSION OF JURISTS, *THE EVENTS IN EAST PAKISTAN, 1971*, at 76-96 (1972), quoted in RICHARD LILLICH, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE* 568, 572 (2d ed. 1991).

⁶⁰ See HANNUM, *supra* note 19, at 36 (discussing U.N. recognition of the partitions of British India, Ruanda-Urundi, the Northern Cameroons, and Gilbert and Ellice Islands); G.A. Res. 181(II), U.N. Doc. A/519, at 131 (1948) (concerning partition of Palestine).

colonies such as Goa into supposedly consanguineous states.⁶¹ Outside the non-self-governing territories, the Declaration recognized self-determination merely as a principle rather than a right. The residual principle, moreover, embodied nothing more than the universalist goals of majority rule and nondiscrimination⁶² already enunciated by human rights law.⁶³ Beyond the decolonization context, then, the Declaration completely absorbed the nationalist component of self-determination into the sovereignty of existing states.

But should we at least see the Declaration's endorsement of decolonization as a vestige of nationalism? No. By reducing the *principle* of self-determination of peoples to the political and civil rights of individuals, the Declaration permitted the inference that even decolonization was a *right* only in so far as it was instrumental in securing individual political and civil rights. If even decolonization is interpreted as a means of enforcing universal human rights rather than local self-rule, the nationalist component of self-determination diminishes to nothing.⁶⁴

⁶¹ HANNUM, *supra* note 19, at 37 (discussing U.N. acquiescence in absorption by India of Goa, certain French enclaves, Hyderabad, and Sikkim; by Dahomey of Sao Joao Batista de Ajuda; by Indonesia of West Irian and East Timor; and by China of Macao and Hong Kong—all without meaningful consultation of the affected populations).

⁶² This was the understanding of self-determination urged by the Americans and the British. See *supra* note 54. There is some controversy as to how clearly the text embodies this view. Compare Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. PAPERS & PROC. 713, 732 (1971) (Western view prevailed) with POMERANCE, *supra* note 54, at 39 (arguing that the text includes only nondiscrimination and not majority rule in the principle of self-determination, since "representing the whole people . . . without distinction as to race," Declaration, *supra* note 51, at 124, might mean representing no race less than any other).

⁶³ See, e.g., U.N. CHARTER arts. 1(3), 55(c); African Charter on Human and People's Rights, June 27, 1981, arts. 2, 13, O.A.U. Doc. CAB/LEG/67/3 Rev.5 (1981), reprinted in 21 I.L.M. 59, 60, 61 (1981); American Convention on Human Rights, Nov. 22, 1969, arts. 2, 23, O.A.S.T.S. No. 36, at 2, 8, O.A.S. Doc. OEA/Ser.A/16, reprinted in 9 I.L.M. 673, 676, 682 (1970); International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 12, 1966, 660 U.N.T.S. 195; International Covenant on Civil and Political Rights, *supra* note 50, arts. 14, 24-26; European Convention for the Protection of Human Rights and Fundamental Freedoms, March 20, 1952, art. 14, 213 U.N.T.S. 221, 232; Universal Declaration of Human Rights, Dec. 10, 1948, arts. 7, 21, U.N. Doc. A/810, at 71, 73, 75 (1948); American Declaration of the Rights and Duties of Man, arts. II, XX, O.A.S. Res. XXX (1948); O.A.S. CHARTER, Apr. 30, 1948, art. 5, 2 U.S.T. 2394, 2418, 119 U.N.T.S. 3, 52.

⁶⁴ One irony is that in the nineteenth century, human rights claims were often seen as reducible to the self-determination of peoples rather than the reverse. Thus one publicist argued that humanitarian intervention was justifiable only "in behalf of a grievously oppressed people, which has never amalgamated with its oppressors on one nation, and which its oppressors have systematically treated as an alien race." LILLICH, *supra* note 59, at 580 (citation omitted). Thus, whether rule was foreign was a condition for making oppressive rule a matter of international concern.

F. *The Indeterminacy of Wilsonian Self-Determination*

The appeal of this reduction of national self-determination to individual human rights results from the frustrating elusiveness of the idea of local self-rule. We can't favor indigenous over foreign rule unless we can distinguish the indigenous from the foreign. Yet universalist critics of self-determination have long denied that this can be done. According to Cobban, "[t]he fundamental weakness of Wilson's ideas was his failure to realize how indeterminate a criterion nationality might be, and how little assistance it might sometimes give in deciding actual frontiers."⁶⁵ The Wilsonian principle of conforming political boundaries to nationality suffers from at least three types of indeterminacy, which I will call *geographic contingency*, *demographic contingency*, and *cultural contingency*.

By *geographic contingency*, I mean the frustrating fact that rival ethnic, religious, or linguistic groups are often so intermingled that no border can be drawn between them without leaving minority enclaves.⁶⁶ And once we acknowledge that nationalities are never geographically discrete, the Wilsonian principle gives us no criteria for deciding what territory to allocate to which nationality. We want to draw boundaries on the basis of the geographic distribution of nationalities, but we cannot decide which nationality has a majority in a given territory without already knowing its boundaries. Which religious group has a rightful claim to Catholic Derry, in Protestant Ulster, on Catholic Ireland, in the Protestant British Isles?⁶⁷

Even if we know which territory we are talking about, our efforts to identify it with a nationality may be frustrated by *demographic contingency*, by which I mean the problem of identifying any territory's rightful residents. Since decisions about where to reside are contingent on international boundaries and government policies, we cannot justify boundaries on the basis of residence.

⁶⁵ COBBAN, *supra* note 1, at 21.

⁶⁶ Whether they leave or stay, these minorities may face humanitarian risks. "Population exchanges" are rarely peaceful or costless to the refugees, as is testified by the casualties of the Indian-Pakistani separation, the current victims of "ethnic cleansing" in Bosnia, the Asians who were stripped of all property in the course of expulsion from Uganda in the 1970's, or the still liminal status of many Palestinian refugees. Concerning the heightened risks faced by smaller minorities in new nation-states, see *supra* note 20.

⁶⁷ See POMERANCE, *supra* note 54, at 29 (reviewing 16 examples of geographic contingency in identification of the appropriate self-determination unit).

Consider the intertwined problems of defining Palestine and the Palestinians.⁶⁸ According to the Palestinian National Charter, Palestine consists of the territory between the Jordan River and the Mediterranean Sea. Its residents include all Arabs residing therein before 1948 and their descendants and descendants of only those Jewish residents who preceded "the Zionist invasion."⁶⁹ For many international lawyers, Palestine is now the Occupied Territories, and Palestinians are its current Arab, but not Jewish, residents.⁷⁰ To the Israeli government, Jordan is the Palestinian Arab state, and the Arab residents of the West Bank and perhaps Gaza remain Jordanian, but their land does not.⁷¹

Who should have a hand in the future of a territory depends not on who resides there but on who should reside there. Yet there can never be any satisfactory answer to this question. Thus, demographic contingency arises ultimately from the fact that international law forbids the acquisition of territory by conquest, the colonization of territory by occupiers, and the expulsion of the occupied.⁷² Once conceding that territories can be wrongfully populated by their governments, the Wilsonian principle slides into an infinite regress. The true residents of any territory are those who would now reside there had its true residents always ruled there. The question remains, "Who are these true residents?" Making matters worse, "wrongful" residence is the rule rather than the exception. Almost every popu-

⁶⁸ See M.C. Bassiouni, 'Self-determination' and the Palestinians, 65 AM. J. INT'L L. PAPERS & PROC. 31 (1971); Julius Stone, *Peace and the Palestinians*, 3 N.Y.U. J. INT'L L. & POL. 247 (1970).

⁶⁹ PALESTINE NATIONAL CHARTER arts. 2, 6, 20, in THE ARAB-ISRAELI CONFLICT: READINGS AND DOCUMENTS 1086, 1086, 1089 (John N. Moore ed., 1977).

⁷⁰ See Richard Falk, *Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank*, 2 J. REFUGEE STUD. 40 (1989); Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 76-79 (1990). Most international lawyers would exclude the Jewish settlers from the self-determination formula because the fourth Geneva Convention forbids the transfer by an occupying power of "parts of its own civilian population into the territory it occupies." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49, 75 U.N.T.S. 287, 318. See Roberts, *supra*, at 84-85.

⁷¹ See Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968) for the original expression of the view that Gaza and the West Bank were never legally held by Egypt and Jordan, respectively. For a more contemporary variant of this view, see Malvina Halberstam, *Self-Determination in the Arab-Israeli Conflict: Meaning, Myth, and Politics*, 21 N.Y.U. J. INT'L L. & POL. 465 (1989).

⁷² See U.N. CHARTER art. 2 (acquisition of territory by conquest); G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1966) (non-intervention in the "domestic affairs" of states); *supra* note 70 (regarding colonization and expulsion).

lated spot on the earth has been conquered, and we will find colonists and refugees wherever we look.

Finally, even presuming that we can identify the residents of a particular territory, we will have trouble assigning them a nationality because of the problem of *cultural contingency*. By cultural contingency I mean the dependence of cultural identity on political boundaries and governing institutions. We have seen that national identity is an artifact—the deliberate creation of political activists bent on mobilizing popular support. Because nationalist movements are typically directed toward seizing an existing state apparatus, the boundaries of nationality tend to be coextensive with political boundaries. Accordingly, as Ernest Gellner writes, “nations are not inscribed into the nature of things, they do not constitute a political version of the doctrine of natural kinds.”⁷³ The nation, concludes Benedict Anderson, is “an imagined political community,”⁷⁴ and “nationalism,” quips Gellner, “invents nations where they do not exist.”⁷⁵

If, as these observers claim, national identity is invented and imposed by states, nationality depends on political boundaries. If nationality depends on political boundaries, however, we can't justify those boundaries by reference to the geographic distribution of nationality.

But can we accept the premise of cultural contingency—that cultural identification with a nation depends upon political boundaries? How, if the boundaries of nationality and state are generally coextensive, do secession disputes arise? I think we can account for secessionist movements if we remember two points. First, states are internally articulated. “Political boundaries” include the boundaries of the innumerable administrative units within states as well as the boundaries between states. Second, while national identity is a product of the modern state, culture in the broader sense of language, religion, and custom is not. By conditioning opportunity on participation in an official culture, however, the modern state politicizes culture. If the brutal process of inculcating a national identity provokes resistance, that resistance will almost inevitably take the form of inventing

⁷³ GELLNER, *supra* note 35, at 49. Breuille similarly concludes, “There is no ‘natural’ basis to politics. There is no cultural or any other non-political unit of humanity which can be regarded as the true basis of legitimate politics.” BREUILLY, *supra* note 40, at 383-84.

⁷⁴ ANDERSON, *supra* note 44, at 6.

⁷⁵ ERNEST GELLNER, *THOUGHT AND CHANGE* 168 (1964).

rival national identities. To say that national identity depends on political boundaries, then, is not to say that the building of a state will engender only one national identity within its boundaries.⁷⁶ Given that multiple national identities may be engendered by any state-building process, the effort to conform boundaries to existing nationalities may prove a Sisyphean task.

The contingency of cultural identity on politics in the modern world is not just a matter of boundaries, however. Cultural identity may depend not only on the *boundaries*, but also on the *forms* of government. Thus, the close historical association between nationality and the modern administrative state suggests an even deeper difficulty with the Wilsonian conception of self-determination. If nationality implies a claim to competence in administering a modern state, it may not represent "self-determination" for all "peoples." As we have observed, separatist movements successfully resist the imposition of a particular nationality only by adopting a competing one. Yet nationality, with its language of instruction, its national gallery, its commemorative postage, its balance of payments, is not the fate every non-Western society, left to "itself," would choose.⁷⁷ Moreover, if nationality threatens pre-modern cultures, some will worry that it may also forestall the development of the postmodern cultures that might accompany forms of governance yet undreamt of.

G. *The Indeterminacy of Decolonization*

The three indeterminacies of nationality seem to demand the complete abandonment of the Wilsonian principle.

Did the General Assembly abandon Wilsonianism in the Declaration on Friendly Relations? At first blush, so it appears. By guaranteeing the territorial integrity of existing states and colonies, while allowing the latter independence, the General Assembly appeared to eliminate the Wilsonian problem of boundary drawing. But in reality, the General Assembly simply displaced Wilsonian indeterminacy onto the problem of identifying colonies.

⁷⁶ POMERANCE, *supra* note 54, at 3; Pleadings of Bedjaoui (Western Sahara) CR 75/31, 1975 I.C.J. Pleadings 29-30 (July 29, 1975) (self-determination disputes involve the territorial claims of competing national identities).

⁷⁷ See ALLEN E. BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 50 (1991) (indigenous rights claims need not take the form of statehood); HANNUM, *supra* note 19, at 95-96; S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 13 HUM. RTS. Q. 403 (1991).

While the Declaration identifies non-self-governing territories as colonies, the Charter never defines non-self-governing territories. Members are only honor-bound to identify and report on the status of any such territory they hold. Thus, we are only able to identify as non-self-governing those territories allowed by their rulers to gain independence under UN supervision.⁷⁸ But colonial empires cannot be thus trusted to define the scope of decolonization. Algeria, for example, won independence without ever winning admission from the French government that it was not an integral part of the land of liberty, equality, and fraternity. The Algerian right of self-determination conceded by De Gaulle in 1959 was a right of "secession," not decolonization.⁷⁹

The problem is that distinguishing between obligatory decolonization and discretionary secession requires the same distinction between foreign and indigenous rule that got us into trouble in the first place: As Michla Pomerance observed:

[E]very demand for self-determination is . . . based on a subjective conviction that present rule is "alien" or "colonial" . . . Little wonder, then, that all the valiant attempts to define the term so as to . . . rule out that undesirable, but inescapable . . . synonym . . . of "self-determination"—"secession"—have landed in hopeless tautological bogs.⁸⁰

To confirm this charge of circularity, let's consider some of the criteria suggested for identifying colonial territories.

Perhaps the most obvious criterion is prior *conquest* by a state.⁸¹ As we have seen, however, we can't categorize colonies as conquered territory without embracing most of the globe.⁸² Furthermore, the boundaries of most post-colonial states reflect the patterns of European conquest, rather than any pre-colonial boundaries.

A second possible index of colonial status is *minority rule*.⁸³ Until very recently, however, equating colonialism with minority rule would have been almost as encompassing, including many

⁷⁸ See Franck, *supra* note 3, at 70-71.

⁷⁹ See Keith Panter-Brick, *Independence, French Style*, in *DECOLONIZATION AND AFRICAN INDEPENDENCE: THE TRANSFERS OF POWER, 1960-1980*, *supra* note 45, at 73, 74-75, 95.

⁸⁰ POMERANCE, *supra* note 54, at 14.

⁸¹ See BUCHANAN, *supra* note 77, at 67-70 (discussing prior conquest as justification); Avishai Margalit & Joseph Raz, *National Self-determination*, 87 J. PHIL. 439, 442 (1990).

⁸² See *supra* text accompanying note 72.

⁸³ See, e.g., G.A. Res. 1760, U.N. GAOR, 17th Sess., Supp. No. 17, at 38, U.N. Doc. A/5100 (1962) (Southern Rhodesia); S.C. Res. 216, U.N. SCOR, 20th Sess., U.N. Doc. S/6921/Rev.1 (1965); see also POMERANCE, *supra* note 54, at 40; WILSON, *supra* note 1, at 81.

states themselves considered "colonial" powers.⁸⁴

Geographic separation of a territory from the remainder of a state is no more adequate a criterion of foreignness.⁸⁵ Many states (the United States for example) fully represent the residents of extra-continental or noncontiguous territory in political decisionmaking.⁸⁶

Ethnic or cultural distinctiveness of a territory's population also cannot provide a reliable metric.⁸⁷ Most post-colonial states contain multiple ethnicities and cultures. Some of these states—Sudan and Indonesia come to mind—have brutally subordinated discrete racial groups.⁸⁸

Some have suggested that *relative poverty* of a territory or region indicates colonial status.⁸⁹ But since development typically exacerbates regional disparities of wealth within a country,⁹⁰ such disparities are found throughout the developing world.⁹¹ From

⁸⁴ See *U.N. Sanctions Against Rhodesia: Hearings on S. 1404 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 1 (1971) (statement of Senator Byrd); POMERANCE, *supra* note 54, at 40-41.

⁸⁵ Cf. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961) (discussing geographic separation as a criterion); POMERANCE, *supra* note 54, at 15 (discussing a "salt-water test").

⁸⁶ Examples of the first category are the United States, Russia, Turkey, Greece, Denmark, Spain, and possibly Egypt. Any country with island territory falls into the second category.

⁸⁷ See G.A. Res. 1514, *supra* note 85; POMERANCE, *supra* note 54, at 16.

⁸⁸ See ASIA WATCH, HUMAN RIGHTS IN INDONESIA AND EAST TIMOR 203-04, 247-70 (1989) (concerning Indonesia); INTERNATIONAL COMMISSION OF JURISTS, THE RETURN TO DEMOCRACY IN SUDAN 55-63, 68 (1986) (concerning Sudan). See generally GEORGE MONBIOT, POISONED ARROWS: AN INVESTIGATIVE JOURNEY THROUGH INDONESIA (1989) (discussing suppression of Melanesians of Irian Jaya).

⁸⁹ See *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 3, U.N. Doc. A/11963 (1974).

⁹⁰ What is commonly meant by "development" is the movement from a decentralized and insular agricultural economy to an urban, industrialized, and trade-oriented economy. During the early stages of industrialization, wealth is typically concentrated in the cities and ports. Even in South Korea, a nation that has achieved unusually equitable economic growth through rural land reform, the disparity between rural and urban wealth is large. See JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 172-76, 191-94 (1989); see also Asbjorn Eide, *Maldevelopment and "The Right to Development": A Critical Note With a Constructive Intent*, in HAGUE ACADEMY OF INTERNATIONAL LAW AND UNITED NATIONS UNIVERSITY WORKSHOP, THE RIGHT TO DEVELOPMENT AT THE INTERNATIONAL LEVEL 397 (René-Jean Dupuy ed., 1980) (national development towards self-determination does not ensure uniformity of internal development); cf. Roland Y. Rich, *The Right to Development as an Emerging Human Right*, 23 VA. J. INT'L. L. 287, 320 (1983) ("The right to development . . . would go further than the right of self-determination.").

⁹¹ See UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 26-27 (1991) (urban-rural wealth disparities throughout developing world). According to the report, of the countries ranking between 50th and 100th on the human development index, 11 of 14 for which statistics were available showed more rural than urban poverty.

the standpoint of wealth distribution, post-colonial regimes resemble colonial regimes.

Finally, we might be tempted to conclude that while no single criterion of colonial status suffices, some *combination of these factors* reliably identifies those territorial units we have traditionally viewed as colonies. The difficulty is that such combinations will also be found in post-colonial states. East Pakistan, for example, was noncontiguous, linguistically distinct, relatively impoverished, unrepresented, and joined with West Pakistan only by virtue of Britain's common conquest of both regions. Nevertheless, the transformation of East Pakistan into Bangladesh is universally treated as secession rather than decolonization.⁹²

Each of these factors informs our ascriptions of colonial status because each informs our concepts of national identity and difference. If we are prepared to concede that the concept of decolonization is parasitic on the concept of nationality, then we cannot endorse secession by colonies without also endorsing a general right of secession for nationalities. Conversely, if we reject any such general right of national liberation as fatally indeterminate, we must reject the right of decolonization on the same grounds.

H. *The Reduction of Self-Determination to Individual Human Rights*

In fact, nearly every contemporary English-speaking political philosopher who has reflected upon self-determination has arrived at this position.⁹³

These philosophers begin with a contractarian view of the

In 6 of 9 for which statistics were available, the top quintile received more than ten times as much income as the bottom quintile. But for those countries ranking below the top 100 (that is, those countries not undergoing significant economic development), in 5 of the 7 for which data was available, the top quintile earned less than ten times as much income as the bottom quintile. *Id.* at 152-53.

⁹² See LILLICH, *supra* note 59, at 566-72. Other examples abound. The Northern and Southern provinces of Iraq are primarily populated by distinct ethnic and religious groups subject to discriminatory repression, who claim economic exploitation and inadequate representation by the government, and are included in the Iraqi state by agreement of the colonial powers, without their consent. Concerning the Kurds of northern Iraq, see HANNUM, *supra* note 19, at 178-81, 190-94; MIDDLE EAST WATCH, HUMAN RIGHTS IN IRAQ, at ix-xi, 25-26, 31-36, 53-64, 69-96 (1990). Concerning the Shiites of the South, see *id.* at 34, 49-53, 63, 64; AMNESTY INTERNATIONAL REPORT 149 (1992). Tibet is another example meeting multiple criteria. See HANNUM, *supra* note 19, at 423-26.

⁹³ But see MICHAEL WALZER, SPHERES OF JUSTICE 31-63 (1983); Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, in INTERNATIONAL ETHICS 217 (Charles R. Beitz et al. eds., 1985); Michael Walzer, *The Rights of Political Communities*, in INTERNATIONAL ETHICS, *supra*, at 165.

state as an instrument for protection of pre-political entitlements. Fernando Tesón's premise, that "the ultimate justification of the existence of states is the protection and enforcement of the natural rights of the citizens," is typical.⁹⁴ From the same premise, Jack Donnelly concludes that "the right to self-determination . . . involves respecting the other human rights If these rights are fully respected, it is difficult to see how the right to self-determination could be denied."⁹⁵

If the self-determination of peoples is synonymous with the human rights of individuals, then secession is only a remedy of last resort for the violation of individual rights, especially rights against discrimination. Allen Buchanan, for example, regrets that "[u]nder certain conditions" secession "may be the only practical way for a group to protect itself from . . . literal genocide, or . . . ethnic discrimination."⁹⁶

Charles Beitz forthrightly follows out the implications of this view for decolonization. Beitz asks us to imagine that

Country A is an imperial country, and area B, a territorially distinct area with generally accepted boundaries, is A's colony. Since A is the most benevolent of all possible imperial countries, there is no reason to think that granting independence to B will decrease the amount of social injustice in B; indeed, the opposite seems more likely Nonetheless, the residents of B, in a fair and free election, overwhelmingly indicate their preference for national independence. On my view of self-determination, A should resist⁹⁷

All states, Beitz assumes, have the same duties to their residents; as long as these duties are met, no residents are entitled to view their government as foreign and to establish a separate state.

⁹⁴ FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 15 (1988).

⁹⁵ DONNELLY, *supra* note 90, at 148. A more complex (some might say contradictory) position is taken by Margalit and Raz. They acknowledge that individual "goals . . . are . . . the creatures of society, the products of culture," and that "[g]roup interests cannot be reduced to individual interests." Margalit & Raz, *supra* note 81, at 448-49. They also concede that the prosperity of encompassing groups is intrinsically valuable. *Id.* at 456 n.8. Nevertheless, they insist that the moral importance of the group's interest depends on its value to individuals. *Id.* at 451.

⁹⁶ BUCHANAN, *supra* note 77, at 50; see also Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1557 (1991) ("Separation of ethnic communities through power-sharing arrangements, regional governments, and personal laws may . . . [sometimes] constitute a practical necessity, a 'least worst' solution that is surely preferable to ongoing violence and systemic oppression.').

⁹⁷ CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 103 (1979).

Realizing that his hypothetical will likely raise the hackles of his readers, Beitz hastens to add that he cannot imagine any empire so benevolently protecting the human rights of its colonial subjects.⁹⁸ Unfortunately, however, empires have all too often imagined themselves benevolent. Few colonial powers have failed to congratulate themselves for spreading civilization and the rule of law, whether by enslaving the locals or stopping the locals from enslaving one another.⁹⁹ That some measure of human rights violation is probably inevitable in the early stages of development¹⁰⁰ makes this "white man's burden" easy to assume. To the extent that the human rights records of developing societies prove imperfect, Beitz's conception of self-determination invites foreign rulers to do better. And when they inevitably fail, Beitz's standard leaves them little for which to apologize. From the standpoint of human rights, Europeans arguably ruled the peoples of the developing world no less justly than indigenous rulers would have during the same era. However, to support independence only as a last resort remedy for injustice is to deny that foreign rule is intrinsically unjust.

International lawyers and philosophers *claim* to support self-determination of peoples. But once we read the fine print, the qualifications and conditions, that support turns out to be surprisingly weak. International lawyers recognize a right of independence only for colonies. Philosophers, rigorously observing that decolonization is indistinguishable from secession, reject the right of any people to independence. Hence, the group self-determination endorsed by both international lawyers and philosophers is reducible to the political and civil rights of individuals. Thus reduced, the self-determination of peoples retains no nationalist element at all.

III. A DEFENSE OF SELF-DETERMINATION

I will defend what I have called the nationalist component of self-determination—the right of groups to some form of auton-

⁹⁸ *Id.*

⁹⁹ See, e.g., DAVID B. DAVIS, *SLAVERY AND HUMAN PROGRESS* (1984); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990). Even the U.N. Charter authorized colonial rule in the interest of preparing developing societies for self-government. U.N. CHARTER arts. 73(b), 76(b). In fairness to Beitz, he is aware of this problem. BEITZ, *supra* note 97, at 99.

¹⁰⁰ DONNELLY, *supra* note 90, at 187-94 (inevitability of political and civil rights violations in first stage of modernization).

omy—by attacking the reduction of self-determination to the rights of individuals.

This reductive view of self-determination, I will contend, is a form of moral myopia, involving a sociologically naive reduction of morality to justice. Proponents of the reductive view have embraced a variant of John Rawls' influential definition of liberalism as "the priority of the right over the good."¹⁰¹ In their view, our moral obligations to one another are pretty much exhausted once we have each have got our rights, our share of "manna," as one liberal political theorist puts it.¹⁰² This leaves us free autonomously to choose and pursue our own ends.

Yet it is a mistake to suppose that people either choose or pursue their vision of the good autonomously. They do not so much choose ends as choose cultural identities through which they can participate in collective decision and action. Thus, they forgo the autonomy celebrated by philosophers in order to gain access to one another's powers and judgment. They do this because the pursuit of genuinely private ends would be emotionally meaningless and politically ineffectual.

Rather than reduce morality to justice, we should view morality as a form of politics in which each person's ability to identify and pursue worthy goals depends on the cooperation of others. From this view it follows that only when we act together can we be the self-determining moral agents philosophers describe.

My argument against reducing group self-determination claims to instruments for the protection of individual autonomy will proceed in three steps. First, I will show that one important benefit of group autonomy, the protection of distinctive cultures, must be seen as a *collective* good, not just a benefit to individuals. Second, I will argue that devotion to any moral end gives us reason to create a distinctive culture and embody it in an autonomous political institution. It follows that respecting the moral autonomy of individuals entails respecting the autonomy of the groups through which they pursue their moral ends. Third, I will show how this argument for group autonomy integrates the universalist and nationalist components of self-determination. On the one hand, building and sustaining democracy requires the

¹⁰¹ JOHN RAWLS, *A THEORY OF JUSTICE* 31 (1971).

¹⁰² BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 31 (1980). Note, however, that (1) for Ackerman the distribution of manna is not exhaustive of all distributive questions, *id.* at 67-68, and (2) Ackerman acknowledges reasons to distribute manna to groups, though to achieve justice for individuals. *Id.* at 64-66.

nurturing of a distinctive culture. On the other hand, groups best realize the moral autonomy of individuals if they are democratically governed.

I conclude that the original romantic ideal of self-determination rightly fused democracy with group autonomy. Democracy depends upon group autonomy, while the autonomy rights of groups depend upon their democracy. These two aspirations are not, in the end, separable components of the principle of self-determination, but inextricable skeins of a single fabric.

A. *Cultural Preservation as a Collective Good*

My first claim is that the reductive view cannot adequately account for the *cultural* claims stressed by some separatist movements. Indigenous separatists, for example, want to shield shared cultures from homogenization, not just to shield individuals against discrimination. Nor can we explain such demands for cultural preservation as indirect means to the pursuit of individual ends. Cultures are not reducible to the shared backgrounds or experience of individuals; cultures also commit individuals to shared conceptions of the good. Since we cannot distinguish individual ends from the cultures that constitute them, we cannot explain the value of cultures to their members by describing them as shared resources permitting the pursuit of individual ends. Instead we must admit that in choosing to preserve a culture, we are thereby shaping the identities and the ends of future individuals.

How does the reductive view account for the autonomy claims of aboriginal groups? Reductionism would lead us to expect such separatist demands only in response to discrimination. Underlying this expectation is the belief that not just group *separatism*, but also group *identity*, are marks of oppression.

The emergence of this scorn for group identity is discernible in international law's changing understanding of minority rights. In the wake of World War I, the Allies constructed an elaborate system of treaties for the protection of minorities in the new states of Eastern Europe and the Near East. According to the Permanent Court of International Justice, the purposes of this Wilsonian regime included "the grant to minorities of suitable means for the preservation of their racial peculiarities, their traditions and their characteristics."¹⁰³

¹⁰³ Advisory Opinion on Minority Schools in Albania, 1935 P.C.I.J. (ser. E) No. 11, at 136, 140 (April 6).

A generation later, however, the United Nations Subcommission on Minority Rights put a very different spin on the function of such rights. Rejecting the suggestion that minority groups were characterized by "a sense of solidarity, directed towards preserving their culture,"¹⁰⁴ one Subcommission member instead proposed that minority groups be defined as ethnic, religious, or linguistic minorities, having a sense of solidarity "motivated . . . by a collective will to survive and [an] aim . . . to achieve equality with the majority."¹⁰⁵ On this view, majority discrimination imposes identities on groups, while freedom for any group means the freedom of individual members *from* identification with that group.

Let us consider this reductive view of group identity as it applies to the rights of indigenous groups. In 1969, the progressive Canadian administration of Pierre Trudeau attempted to dismantle Canada's Indian reservation system in the name of equal opportunity. Reservation lands would be individually held and freely alienable on a nondiscriminatory basis while local government would be elected by all residents regardless of origin. The Canadian government deemed "the granting of permanent political rights to a special class of citizens"¹⁰⁶ incompatible with "the fundamental right of the Indian people to full and equal participation" in Canadian public life.¹⁰⁷ But this commitment to an "Indian-blind" Constitution reflected blindness to the aspirations of actual Indians, whose protests succeeded in blocking Trudeau's plan.¹⁰⁸

Can the reductive view account for the determination of in-

¹⁰⁴ FRANCESCO CAPOTORTI, *STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES* 96, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.78.XIV.1 (1979).

¹⁰⁵ Jules Deschenes, *Proposal Concerning a Definition of the Term "Minority,"* in UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, PROMOTION, PROTECTION, AND RESTORATION OF HUMAN RIGHTS AT THE NATIONAL, REGIONAL AND INTERNATIONAL LEVELS, REPORT OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES 30, U.N. Doc. E/CN.4/Sub.2/1985/31 & Corr. 1 (1985). Deschenes' definition was forwarded to the Commission on Human Rights, although without formal approval. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, REPORT OF THE SUBCOMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES ON ITS THIRTY-EIGHTH SESSION, Res. 1985/6, at 85-86, U.N. Doc. E/CN.4/1986/5 (1985). The Commission's Working Group on Minority Rights avoided the problem of definition. See HANNUM, *supra* note 19, at 61.

¹⁰⁶ MICHAEL ASCH, *HOME AND NATIVE LAND: ABORIGINAL RIGHTS AND THE CANADIAN CONSTITUTION* 76 (1984).

¹⁰⁷ *The Statement of the Government of Canada on Indian Policy*, in RICHARD P. BOWLES ET AL., *THE INDIAN: ASSIMILATION, INTEGRATION OR SEPARATION?* 201 (1972).

¹⁰⁸ KYMLICKA, *supra* note 23, at 143-44.

digenous peoples to share a common culture? Will Kymlicka, an unusually sophisticated exponent of the reductive view, has recently acknowledged that group autonomy claims can be motivated by the desire to preserve a culture rather than avoid discrimination. But he insists that a culture's value to a group is exhausted by its ability to enhance the autonomy of the group's members by informing individual choice.

For Kymlicka, "language and history are the media through which we come to an awareness of the options available to us, and their significance; and this is a precondition of making intelligent judgments of how to lead our lives."¹⁰⁹ Because we need a past history to make future choices, concludes Kymlicka, "cultural community . . . provid[es] a context . . . within which to choose and pursue our conception of the good life."¹¹⁰

Yet despite his talk of *community*, the choices that Kymlicka thinks cultures enable are *individual* choices. Individuals have a right to have a cultural past, so that they can make informed choices of ends. But having a culture in this sense imposes no future obligations: it enables individual choice without constraining it. Thus Kymlicka rigorously distinguishes the shared history which *constitutes* a culture from the "shared ends which *characterize* the culture at any given moment."¹¹¹

By limiting his definition of culture to common history rather than common ends, Kymlicka hopes to explain cultural preservation as a means to individual rather than group autonomy. By thus defining all cultures as neutral with respect to ends, Kymlicka hopes to square cultural preservation with value-neutral liberalism. But three difficulties frustrate this effort.

First, Kymlicka's conception of culture as a sort of labor-saving software for individual end-choosers explains why all individ-

¹⁰⁹ *Id.* at 165.

¹¹⁰ *Id.* at 172.

¹¹¹ *Id.* (emphasis added). Margalit and Raz take two steps beyond Kymlicka. First, they acknowledge that cultures don't simply provide contexts for individual choices of ends, but actually supply the ends chosen. Second, they recognize that each individual's sense of self-esteem and well-being may rise or fall with the treatment of her "encompassing group." In these senses, they argue, their approach is "opposed in spirit to contractarian-individualistic approaches to politics or to individual well-being." Margalit & Raz, *supra* note 81, at 456-57. For them, groups have "intrinsic value." But by this they mean that groups have intrinsic value to individuals, that the interests of individuals depend on the well-being of the group. With the latter point I agree, but I would add that groups also have an intrinsic value that transcends their utility to individuals. Individuals have not just instrumental but also moral reasons for preserving their cultural communities: Such communities are the indispensable vehicles for the fulfillment of whatever they conceive their moral obligations to be.

uals need membership in some culture, but it doesn't explain why they need to be members of any *particular* culture.¹¹² Accepting Kymlicka's account of the value of cultures, Allen Buchanan concludes that

[b]ecause the value of cultural membership is not limited to membership in one particular culture, and because individuals whose culture is damaged will in some cases be able to affiliate successfully with another culture . . . if they are given the resources to do so . . . there is, strictly speaking, no right to the perpetual existence of any one particular culture.¹¹³

By offering a *functional* defense of culture, Kymlicka makes cultures *fungible*. Such a view has particularly ominous implications for indigenous cultures. If cultures are simply decisionmaking tools, we want to know which one will best facilitate choice for the greatest number at the least cost. And if modern consumer culture does so more efficiently than traditional Native American culture, Kymlicka offers us no compelling reason for protecting enclaves of Native American culture against markets and majorities. The sooner modernity consumes the Indians' moribund world, the sooner all can enjoy a future in which modern technology will cheaply broadcast the same choice-informing culture into every home on the globe. Treating all cultures as fungible, Kymlicka's instrumental account of cultures justifies the assimilation, not the preservation, of distinctive cultures.

Second, Kymlicka's instrumental conception of culture does not just discourage us from preserving distinctive cultures—it implies that there are no distinctive cultures to preserve. If any choice I make is informed by my cultural history, and no response to my cultural history can be inconsistent with my culture, I perpetuate my culture no matter what choices I make. But if, bored by the idiocy of rural life, I sell off my tribe's ancestral lands; if, weary of religious discrimination, I raise my children in ignorance of the faith into which I was born; if, in shame of my heritage, I join an organization devoted to its oppression and extinction, do I thereby preserve my culture? Does every reaction to my culture, no matter how hostile, perpetuate it?

No doubt between orthodoxy and apostasy there is a continuum of adaptation which the concept of cultural preservation somewhere arbitrarily severs. But to avoid this line-drawing

¹¹² See BUCHANAN, *supra* note 77, at 54.

¹¹³ *Id.* at 55.

problem by defining all cultures as value-neutral is to prevent the drawing of lines between cultures. If cultures are indistinguishable, the right of cultural preservation is reduced to nonsense.

Third, Kymlicka's value-neutral notion of culture relies on an unrealistic distinction between past traditions and future goals. Many traditions teach us to evaluate future consequences in terms of the preferences of ancestry rather than posterity. Moreover, as David Luban argues, even when we act consequentially, "the consequences we seek are in large measure to be sought in the past."¹¹⁴

I understand Luban to be making two points. On one hand, as Kymlicka himself acknowledges, we choose among goals defined and made meaningful by tradition.¹¹⁵ Even in assessing the consequences of our actions for posterity, we populate the future with people committed to the same traditions to which we are committed. On the other hand, in choosing a future, we also interpret tradition and so choose a past. Just as we make the future meaningful by linking it to the past, we make the past meaningful by imagining it as the portal to a better future.

This mutual entailment of past traditions and future goals is exemplified by a legal dispute between Cape Cod's Mashpee Indians and the State of Massachusetts that came to trial in 1978.¹¹⁶ The main issue at trial was the tribal status of the Mashpee, on which turned their claim to tribal lands. At trial, the attorneys and witnesses for the State of Massachusetts pointed out that the Town of Mashpee was settled by refugees from various tribes; that they were organized as tenants in common by a Baptist missionary; that this common land tenure, far from reflecting Indian tradition, was characteristic of most colonial Massachusetts settlements; that the Massachusetts legislature later disentailed the Indians' common land at their own behest; that the Indians then voluntarily and profitably sold their allotments; that there was no record of formal tribal governance between 1870 and 1920, at which point Indian rituals were temporarily revived for the entertainment of tourists; that current plaintiffs neither looked nor dressed like Indians; and that they had to learn about Indian traditions by traveling to western reservations or taking Native American Studies courses in college.

¹¹⁴ David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2221 (1989).

¹¹⁵ KYMLICKA, *supra* note 23, at 172.

¹¹⁶ Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978).

Did the Mashpee abandon their culture, or did they merely adapt it to oppressive conditions? Attorneys and witnesses for the Mashpee claimed the latter. According to their version of history, there was nothing inauthentic about their forming a new community out of the remnants of other tribes. On first contact with Europeans, America's natives had a variety of flexible political institutions. Only the need to treat and fight with the Europeans gradually formalized these institutions into sovereign tribes. Mashpee's original settlers had seen their communities wiped out by European disease. Only a minority of the town's residents acceded to the disentailment of their land, and then only because the state legislature insisted upon it as a condition for enfranchising town residents. The disappearance of their tribal council coincided with the period of greatest Bureau of Indian Affairs hostility toward the tribes. In addition, the Council may have continued to exist without leaving formal records. In any case, Indians retained control of the town government until the 1960's, while their church remained a locus of political organizing and a haven for some aspects of traditional Indian worship. Finally, with the loss of control of local government in the 1970's, tribal governance reemerged.¹¹⁷

So had the Mashpee any common culture left to preserve? James Clifford shrewdly comments:

Interpreting the direction or meaning of the historical "record" always depends on present possibilities. When the future is open, so is the meaning of the past. Did Indian religion or tribal institutions disappear in the late nineteenth century? Or did they go underground? In a present context of serious revival they went underground; otherwise they disappeared.¹¹⁸

Whether the Mashpee are now a tribe depends on their history, to be sure. But the content of that history depends in turn on their present purposes.

In reducing tradition to a value-neutral, decision-making technology, Kymlicka imagines a temporal gap between the bonds of common culture and the contingency of individual choice. He thereby forgets that culture, although common, is itself an arena of contingency. The choices that culture informs are never merely private, because they affect the identity of every participant in the culture. Why do participants in a culture so

¹¹⁷ CLIFFORD, *supra* note 38, at 277-346.

¹¹⁸ *Id.* at 343.

often contest the meaning of its constitutive traditions instead of politely agreeing to disagree about future goals? The answer lies in the fact that by contesting a common past they are asserting political claims over one another's powers. They refuse to separate their individual ends from their shared history because they refuse to separate from one another—they refuse to treat the collective determination of their selves as a matter of individual choice.

Any argument for group autonomy based on a right of cultural preservation must acknowledge that cultural traditions are not simply inherited by individuals. They are common property that we can make use of only by invoking—or inventing—a common purpose. Cultures cannot be disentailed.

B. *Morality as a Reason for Creating and Preserving Culture*

My second claim is that we have the best of reasons to create and sustain culturally bounded communities: Moral action requires it. My point is not that some particularly attractive moral view requires embodiment in a culturally bounded community; my point is that any moral view demands this. We can only effectively advance any conception of the good in a social world by making a *cause* of it—that is, by consulting and cooperating with like-motivated others. Such causes exclude the uncommitted and entail the collective governance of some of the powers of their members. Thus, any seriously entertained moral end is a reason for bounding and empowering a group.

Common sense tells us that identification with others encourages us to act morally. As vain as we are selfish, we are most likely to behave morally if our obligations to others are incorporated into our sense of identity. And so we are more likely to be motivated to act morally by internal critique, critique of our actions as unworthy of our group identity, than by critique of our group identity as an impediment to some neutral and universal value that has no particular claim on us.¹¹⁹ People are clannish, and moral argument ignores this truth at its peril.

Nor is this clannishness an unfortunate tendency that morality

¹¹⁹ See WALZER, SPHERES OF JUSTICE, *supra* note 93, at 313-14 (all moral reasoning is culturally and historically embedded); Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 1 (Adamantia Pollis & Peter Schwab eds., 1979) (lack of enforcement of human rights in third world stems from illegitimacy based on discontinuity with traditional values of rural sectors and incompatibility with interests of modern elite sectors).

must work its way around. Morality is inherently a collective enterprise, and inherently intolerant.

Why is morality inherently collective? Suppose you think yourself obliged to bring about a certain state of affairs. While you are concerned about the consequences of your actions, those consequences are going to depend on the actions of others. If you can get others to commit to your moral view, and to cooperate with you in planning action, you can plan more effectively because you have more information. You can also act more effectively because more people will be trying to achieve the results you desire. Therefore, no consequentialist moral view can leave you indifferent to the beliefs and actions of others; indeed, any such moral view gives you compelling reasons to cooperate with others committed to the same view.¹²⁰

Why is morality not just inherently collective, but also inherently intolerant? Because the collective pursuit of a moral end is open only to believers. Cooperators in the pursuit of a moral end will have obligations to one another to share information and fulfill expectations, and perhaps to accede to the majority will about how best to pursue the mutually desired consequences. These are obligations that cooperators don't have towards outsiders and that outsiders don't have towards them.

Now before proceeding to the political implications of morality's inherent clannishness, I want to fend off a likely objection. All that I have said so far applies only to consequentialist moralities, those that seek to maximize some good in the world. But proponents of the reductive view will claim to reject all such moralities as incompatible with the priority of the right over the good. Instead, they will insist, all right-thinking people embrace deontological moralities, which guarantee individual rights, damn the consequences.¹²¹

The reductionists are mistaken. Their devotion to individual rights does not and cannot make them morally indifferent to the

¹²⁰ For a rigorous formulation and development of this position, see DONALD REGAN, *UTILITARIANISM AND CO-OPERATION* 124-89, 207-10 (1980).

¹²¹ "Deontology," the Greek for "science of duty," currently refers to ethical theories holding that "at least some acts are morally obligatory regardless of their consequences for human weal or woe." ROBERT G. OLSON, *Deontological Ethics*, 2 *ENCYCLOPEDIA OF PHILOSOPHY* 343 (Paul Edwards ed., 1967); cf. SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* (1982) (describing an ethic that under some circumstances permits but does not require acting without regard to consequences). Important works in the deontological tradition include KANT, *supra* note 5; W.D. ROSS, *THE RIGHT AND THE GOOD* (1930).

consequences of their actions. Suppose your putatively deontological moral theory consists of the simple injunction, "Never punish the innocent, no matter what the consequences." If you mean this literally, lacking certain knowledge of guilt, you will never punish anyone. If you think punishment is ever justified, you mean, "Never punish anyone with less than a particular probability of guilt, because punishing is likely to result in less justice than not punishing."¹²² For right-thinkers, then, punishment is justified by its consequences in maximizing the good of justice.¹²³

The point of thus contending that right-thinkers are closet consequentialists is not to confute them—it is to portray them as political actors, obliged to cooperate in maximizing the good of justice in the world.¹²⁴ On this view, if our right-thinker is opposed to punishing the innocent, she is obliged to do more than avoid false witness and blame-by-association in her personal conduct. She is obliged to cooperate with others of like motivation in creating and preserving fair institutions.¹²⁵

If you're persuaded that right-thinking is a collective project,

¹²² "[S]ince any actual criminal justice system is inherently fallible, any such system will inevitably inflict punishment on some people who are actually innocent and thus do not deserve it." David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1632 (1992). For further development of this argument, see Guyora Binder, *Punishing the Innocent Utilitarian* (1992) (unpublished manuscript, on file with the *Stanford Journal of International Law*).

¹²³ See, e.g., Jeremy Waldron, *What May Philosophy Contribute to the Study of Law and Society* 22 (1992) (unpublished manuscript, on file with the *Stanford Journal of International Law*):

Even if we set ourselves against the utilitarian logic of aggregated consequences or the maximization of wealth, even if we hold that no-one is to be treated disrespectfully merely for the sake of greater prosperity or comfort for others, we will still need consequential information to determine whether or not any of these things are happening.

The paradox that deontology calls for rights-respect even when it leads to more rights violation is explored in SCHEFFLER, *supra* note 121, at 80-114. Scheffler argues forcefully that indifference to the consequences for rights of "right action" is *prima facie* irrational and inadequately explained by deontologists. He does not argue, as I do, that such indifference is impossible—that is, that beliefs about consequences are implicit in any description of an action, so that any moral maxim prescribing action is consequentialist.

¹²⁴ Such an interpretation of liberal rights theory as a substantive vision of the good, rather than a neutral framework for the pursuit of contending visions of the good, has been persuasively advanced in Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350 (1991).

¹²⁵ This argument is meta-ethical in the sense that it is a claim about moral language. Reasoning from pragmatic notions of linguistic meaning, I am arguing first that if acceptance of a moral claim such as "the innocent have a right against punishment" has no consequences for action, the claim has no meaning. I am arguing, second, that while no description of the actions thus obligated can include all of their consequences, neither can any description of action exclude all of its consequences.

you'll probably agree that it's also an exclusive one. Concerning the good of justice, "deontologists" are notoriously counter-majoritarian: they want to restrict decision-making to the righteous.¹²⁶

So I'd be prepared to argue that every moral view is consequentialist, and thus that any moral view obligates us to form or join an exclusive community devoted to its pursuit. But I now want to argue that any such community must be embodied in a *political institution*. By this I mean that communities effectively pursuing moral ends must share two features we associate with states.

First, such communities confer on their members *special duties of allegiance* and *rights to protection* like those we ascribe to the citizens of a state. Participating in such a community, we are obligated to preserve it as the indispensable vehicle to the pursuit, and perhaps the definition of our moral goals. This entails preserving the conditions of cooperative planning and action, including the continued existence and power of the members. Thus our devotion to any moral end creates a duty of loyalty towards others devoted to the same end—a reason to care more about their welfare and to expect such special solicitude in return. This special duty of loyalty to community members in no way implies moral indifference to the welfare of others. To the contrary, fulfillment of the members' moral duties to others may be the community's reason for existence.

Second, devotion to a common moral end creates a *common jurisdiction* conferring special governmental responsibilities. In order to act effectively, a moral community will need to acquire resources. At the very least, these resources will include claims on the powers of the members. Yet the members may also agree to donate their possessions to the group, as well as their labor. Alternatively, their labor may generate resources for the commu-

¹²⁶ See, e.g., *Regina v. Dudley and Stephens*, 14 Q.B.D. 273, 283, 285 (1884) (Coleridge, J.):

If therefore, Lord Hale is clear . . . that extreme necessity of hunger does not justify larceny, what would he have said to the doctrine that it justified murder? . . . The American case, . . . in which it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves, but on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly . . . be an authority satisfactory to a court in this country.

For examples of rights-based justification for counter-majoritarian judicial review, see Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063 (1981).

nity. In any case, the community will have resources to collectively dispose of, or govern. And members will have reason to maintain and defend those resources from disposition by others who are not committed to cooperating in the pursuit of the community's desired ends. In short, they will have reason to defend the community's autonomy.

Although autonomous, such a community may be altruistic: its moral view may entail putting some of its resources at the disposal of deserving non-members. But this is compatible with an obligation to maintain the existence and efficacy of the community by collectively maintaining, governing and defending some of its resources.

Summarizing, if you have a moral view—*any* moral view—you have reason to be concerned about the consequences of your actions and so the behavior of other people. You have an obligation to cooperate with those who share your moral view that does not extend to others. You have an obligation to maintain collective control of some resources and some of the powers of the cooperators. This is nothing less than an argument for collective self-governance by an exclusive community.

We can give this argument a narrower or a broader import. Its narrow implication is that your own moral views commit you to associate and share sovereignty with some particular others and to defend that sovereignty. So any moral view commits you to the conclusion that at least one boundary is not arbitrary.

A broader implication follows if you think that, other things equal, individuals should subordinate their desires to their moral beliefs. If you agree that most individuals' morals, however inferior to your own, are still better than no morals at all, then you may think it a good thing for people to act on their moral beliefs. But acting on one's moral beliefs requires that one associate and share sovereignty with others of like morality. Accordingly, if you think individuals ought to pursue what they believe to be moral ends, you cannot be indifferent to whom they share sovereignty with. In short, if you wish to respect the autonomy of others as moral agents, you must respect the autonomy of the groups through which they inevitably act. Accordingly, you must reject the principle of arbitrary borders for everyone committed to the pursuit of some moral end.¹²⁷

¹²⁷ Critics of group self-determination are not much impressed with arguments from freedom of association, pointing out that we often share fellowship with unchosen associates such as parents, children, comrades-at-arms, and schoolmates, and that we often

Now I want to emphasize at this point that I don't imagine that we choose our moral beliefs in a social vacuum and contract with others to pursue them. We choose among those group identities we can induce others to ascribe to us, and those normative interpretations of our group identities other members are willing to cooperate in pursuing. In this sense, we do not so much choose our moral communities as we are chosen by them. Thus moral choice is best conceived as collective choice and moral argument best conceived as political argument, addressed to a historically contingent community rather than an idealized individual.¹²⁸

There is a final difficulty confronting this view of moral choice as communal rather than individual: That we are often committed to multiple moral ends suggests that we can remain independent of any single community or cause. Does this potential for divided loyalty mean that moral agents are ultimately individuals autonomously choosing between competing collective claims? To the contrary, one reason we so often find ourselves committed to incompatible moral views is because we find ourselves chosen by overlapping moral communities. The fact remains that to act morally, we need others to act with, and to choose morally, we need others to choose with. Moral action therefore requires membership in polities, multiple though those polities may be.¹²⁹

treat governments to which we have not consented as legitimate. See BEITZ, *supra* note 97, at 77-80; William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1409-10 (1991). I argue, however, that by cooperating in a common cause, those of like morality generate a good distinct from freedom of association, namely, the good of conforming conduct to conscience.

¹²⁸ There are two points here: First, any individual action is dependent upon social support or tolerance, so that a moral decision is never an individual's alone. Second, outside of any social context, we would have no way to identify our own preferences or value commitments. See S.L. HURLEY, *NATURAL REASONS: PERSONALITY AND POLITY* 314-56 (1989); Guyora Binder, *What's Left?*, 69 TEX. L. REV. 1985, 2002-07 (1991). In both of these senses we never address our moral arguments to individual decisionmakers, since to succeed a moral argument must appear intelligible and persuasive to a larger community with which we hope that individual will identify. Even when we urge non-conformity with the norms of a dominant community, we call our interlocutor to account before some other dissident community with which we expect her to identify.

¹²⁹ Several value theorists have suggested that normative choice implicates a number of incompatible value commitments, and that these commitments are contingent social commitments, that is, commitments to particular communities. See DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* (1989); MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE* (1990), reviewed by Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 MICH. L. REV. 1520 (1992). See also HURLEY, *supra* note 128, at 317 ("[Without] formal and substantive distinctions within agents, among the various values and circumstances that inform their desires and beliefs . . . the element of *determination* is

Membership in multiple polities is possible because, as the legal realists revealed, sovereignty is divisible. No brooding omnipotence, sovereignty in this sense is just any legally enforceable disposition over the powers of others.¹³⁰ Thus sovereignty includes the statehood claimed by Croatians, but also the local autonomy demanded by the Canadian Indians, and the power-sharing achieved by the native minority in Fiji. Universalists who argue that minority cultures can be legally protected by autonomy measures short of sovereignty salvage nothing from the wreck of reductive universalism but a flag. *Every legal recognition of group authority distributes sovereignty to an exclusive group.*¹³¹ While this sovereign power is only partial, all sovereignty is partial, even that of the nation-state, hedged and defined by international law and politics in countless ways.¹³² This divisibility of sovereignty implies that we can exercise sovereignty as members of more than one community. And so our commitment to multiple moral ends in no way undercuts our obligation to embody each of those ends in a self-determining polity.¹³³

missing from self-determination.”). Herzog, in particular, sees value commitments as arising out of potentially discontinuous roles and sees the availability of discontinuous roles—spheres of privacy, separations between church and state, forum and bazaar—as liberalism’s modest demand.

On this revisionist view, liberalism may not require individualism. Perhaps in the postmodern world, we are all citizens of diverse and competing communities, members of more than one culture, loci for more than one cultural identity. Certainly the critical tradition from Kant forward treats internal contradiction as endemic to modern life—but it also treats internal contradiction as the occasion for the criticism that dialectically drives forward individual self-definition and collective history.

Indeed, we can go so far as to say that the subjectivity so vilified by poststructuralist and postmodernist criticism is the interior experience of confronting and critically re-evaluating one’s own competing commitments. For these latter day critical movements, conflicting commitments must simply reverberate. There is no self and no history through which they can be narratively resolved.

One pragmatist response is that we are each composed of a myriad of commitments, not just two, and we can always call upon these other commitments to adjudicate any conflict. The critical subject or self or moral agent is simply whatever moral commitments are not currently before the court of criticism.

¹³⁰ See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

¹³¹ “[E]very time persons act through an association—whether agency or partnership, company or trust—they exercise a portion of sovereignty.” Arthur J. Jacobson, *The Private Use of Public Authority: Sovereignty and Associations in the Common Law*, 29 BUFF. L. REV. 599, 665 (1980).

¹³² See ANTHONY D’AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 16-25 (1987); LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 29-30 (2d ed. 1979).

¹³³ If those polities cannot peaceably coexist, we may find ourselves the site of a boundary dispute. I doubt that most of us, faced with conflicting obligations, feel a sense of freedom and independence.

C. *The Mutual Dependence of Democracy and Group Autonomy*

That the serious pursuit of any moral end requires the creation and empowerment of a bounded community is another way of saying that moral action is a form of politics. Moral action is a collective project only because the political pursuit of any end is a collective project. That group autonomy enables political action brings us back to our original problem: What was the link glimpsed by romantic political theorists between democracy and community, between the universalist and nationalist elements of self-determination?

Does democracy require community? Does community require democracy? My argument that moral action requires group autonomy has something to say about each of these questions.

The dependence of democracy on community is implicit in my argument for group autonomy. My characterization of moral action as a kind of politics rests on a conception of politics as collective action, coordinated by such communicative practices as deliberation, persuasion, and negotiation. On this view, politics is more than a matter of opinion privately held. A right to participate in politics therefore means more than the right to answer an opinion poll; it entails a right to coordinate action with others. Accordingly, democracy is more than a mere assemblage of individual rights. It requires a society mobilized for political action—organized, that is, into movements.

We can see this most vividly in states that seek to democratize without a mobilized society. Almost invariably, they fashion nationalist ideologies.¹³⁴ Granted, in the developing world, such nationalism rarely penetrates much below the level of the elites, but then neither does political participation. I think the cynical societies of the post-communist world confront their leaders with a similar deficit of mobilization. What explains the conjunction of democratization and national separatism in Eastern Europe and the former Soviet Union? Not the history of ethnic discrimi-

¹³⁴ See RUPERT EMERSON, *FROM EMPIRE TO NATION: THE RISE TO SELF-ASSERTION OF ASIAN AND AFRICAN PEOPLES* (1960); Lucian W. Pye, *Identity and the Political Culture*, in LEONARD BINDER ET AL., *CRISES AND SEQUENCES IN POLITICAL DEVELOPMENT* 101 (1971) (importance of national identity for political participation); Sidney Verba, *Sequences and Development*, in *CRISES AND SEQUENCES IN POLITICAL DEVELOPMENT*, *supra*, at 283, 311 (national identity is often a prerequisite to mass participation and legitimacy); Myron Weiner, *Political Participation: Crisis of the Political Process*, in *CRISES AND SEQUENCES IN POLITICAL DEVELOPMENT*, *supra*, at 159, 166-67, 170-72 (nationalism can substitute for mobilization as a catalyst for political participation), 181 (high levels of political participation may preclude nationalist ideologies).

nation that reductionists would expect. For all their faults, the communist regimes did a relatively decent job of holding ethnic conflict in check.¹³⁵

So why has nationalism, suppressed for fifty years, reemerged? I submit that it has come back for want of any other vehicle for organizing political participation and legitimating government.¹³⁶ For fifty years, communist regimes by and large shut politics down. Who, in the former Soviet republics, has any basis in their own experience for trusting elected officials to obey law, or for trusting their newly rights-bearing fellow citizens to obey elected officials? The primary threat facing these societies is not discrimination, but the Hobbesian war of all against all. I submit that it is chaos which is provoking ethnic conflict, and not the other way around.¹³⁷ Nor do I think we should overestimate national feeling in such turbulent circumstances.¹³⁸ Just because

¹³⁵ The Communist regimes in polyethnic states juggled their competing rhetorical commitments to revolutionary internationalism and national self-determination, but managed to keep a lid on ethnic strife. In the Soviet Union, Yugoslavia, and Czechoslovakia power was concentrated in the hands of ethnic Russians, Serbs, and Czechs respectively—but this power was defended by internationalist rhetoric while nationalist rhetoric typically connoted deference to minority rights. CONNOR, *supra* note 31, at 430-44 (Yugoslavia), 392-407 (Soviet Union), 444-47 (Czechoslovakia); GEOFFREY HOSKING, *THE AWAKENING OF THE SOVIET UNION* 76-88 (1990) (Soviet Union). In East Germany, the internationalist strand of Marxism always received more emphasis than elsewhere because of the East German Communists' self-identification as anti-Nazis. CONNOR, *supra* note 31, at 452-54; PETER SCHNEIDER, *THE GERMAN COMEDY: SCENES OF LIFE AFTER THE WALL* 154-56 (1991).

¹³⁶ To the extent that democratic politics are getting off the ground in Russia and the Ukraine without resort to nationalism, it is because of the reconstruction of an incipient civil society permitted under Gorbachev's Perestroika. See generally HOSKING, *supra* note 135. Similarly, the survival of nationalist politics in all of the polyethnic communist states probably results less from the suppression of nationalism by central governments than from its accommodation and adaptation. See generally *id.* at 76-111; CONNOR, *supra* note 31.

¹³⁷ See Eric Hobsbawm, *The Perils of the New Nationalism*, *THE NATION*, Nov. 4, 1991, at 537, 556:

Baltic and Caucasian separatism, and conflicts between Serbs and Croats, and Czechs and Slovaks, were not serious problems in 1917, or could not have existed before the establishment of Yugoslavia and Czechoslovakia. What has made those problems acute is not the strength of national feeling, which was no greater than in countries like Britain and Spain, but the disintegration of central power, for this forced even Soviet or Yugoslav republics that did not dream of separation, like Kazakhstan and Macedonia, to assert independence as a means of self-preservation.

To quote . . . Czech historian [Miroslav Hroch]: "Where an old regime disintegrates, where old social relations have become unstable, amid the rise of general insecurity, belonging to a common language and culture may become the only certainty in society, the only value beyond ambiguity and doubt."

¹³⁸ "In both Ukraine and Russia, the largest and most important Soviet successor

federal governments have fallen is no reason to assume ethnically identified regional governments will stand.

Post-communist Russia's almost continuous state of constitutional crisis reiterates that democratic legitimacy is not a naturally occurring phenomenon, achieved simply by toppling totalitarians and invoking the rights of man. Democratic legitimacy is a cooperative achievement, obstructed by the passivity and venality repression leaves in its wake,¹³⁹ and further hampered by communism's near complete suppression of private associations.¹⁴⁰ After the wall there remain few institutions capable of credibly vouching for the legitimacy of new governments.

One solution to this dilemma is to turn outside of the country—to the Conference on Security and Cooperation in Europe, the International Monetary Fund and so on, for not just economic, but political credit.¹⁴¹ Another solution, however, is to revive political identities and passionate causes that have lain dormant for decades. Thus the appeal of rewarmed nationalism.

Pan-German nationalism enabled East Germany to combine both strategies. Reunification not only gave East Germany a sudden transfusion of Euro-prosperity, it preempted any legitimation crisis by integrating it into an up-and-running democratic polity. For East Germans, then, reunification may have simply meant reintegration into cosmopolitan Europe,¹⁴² but for West Germans, reunification provided an irresistible opportunity to

states, nationalism has taken an extraordinarily moderate form." Francis Fukuyama, *Rest Easy. It's Not 1914 Anymore*, N.Y. TIMES, Feb. 9, 1992 (Final Edition), Sec. 4, at 17.

¹³⁹ See András Sajó, *Democratization in Hungary*, Public Lecture at S.U.N.Y. at Buffalo Law School (Oct. 22, 1989) (describing the cynicism and passivity of the Hungarian citizenry in the face of Communism's collapse).

¹⁴⁰ The exact extent of that suppression and its timing in various countries are much in controversy. For further discussion and sources, see Guyora Binder, *Post-Totalitarian Politics*, 91 MICH. L. REV. (forthcoming 1993).

¹⁴¹ "Increasingly . . . governments whose legitimacy is questioned are turning to the international system for that validation which their national *polis* is as yet unable to give." Franck, *supra* note 3, at 50-51. In Czechoslovakia, for example, Vaclav Havel has hoped to secure Czech democracy by turning the CSCE's human rights principles into binding treaty obligations backed up by the sanction of intervention. Article 2 of the Czech bill of rights prescribes that "International Agreements on Human Rights and Basic Freedoms [once] ratified . . . are generally binding on its territory and take precedence over law." Czechoslovak Constitutional Law of January 1991, art. 2, available in LEXIS, Europe Library, Law File. Boris Yeltsin's successful efforts to win IMF backing may be understood similarly as an effort to ensure the stability of his regime rather than his country's economy. For various other ways in which external forces can support or encourage new democratic regimes, see GIUSEPPE DI PALMA, *TO CRAFT DEMOCRACIES: AN ESSAY ON DEMOCRATIC TRANSITIONS* 183-99 (1990).

¹⁴² SCHNEIDER, *supra* note 135, at 49, 148 (materialistic motives of East Germans for supporting reunification).

sanitize German nationalism by putting it in the service of democracy, capitalism, and European union.¹⁴³

The Croatian and Lithuanian nationalisms that catalyzed the dissolution of the Yugoslav and Soviet states were similarly ambiguous. In each case, Roman Catholicism provided the fulcrum for a critique of the secular, universalist ideology of socialism as a foreign imposition. But at the same time, political identification with Roman Catholicism implied claims by the richest and westernmost regions of the Yugoslav and Soviet states to inclusion in a new European polity. Indeed, Samuel Huntington has suggested that the wave of democratization that has swept across the world from the Philippines through Latin America to Eastern Europe is best understood as a redefinition of the Roman Catholic political community beginning in Iberia in the 1970's.¹⁴⁴ The global reinterpretation of Catholicism as compatible with democracy made Catholic nationalism more appealing at home and more legitimate abroad. In Eastern Europe, then, as in the third world, nationalist ideology articulates simultaneous appeals for domestic mobilization and foreign recognition.

That democracy requires solidarity does not, of course, mean that it requires nationalist chauvinism. Nevertheless, the realization that democracy requires solidarity is a genuine contribution of nationalist political theory. For Rousseau, the democratic state was itself a community. Democratic deliberation could get nowhere unless citizens were sufficiently identified with the entire polity to think only of the public interest.¹⁴⁵ More pluralistic, Hegel reasoned that identification with and participation in the democratic state must be mediated through the diverse associations and interest groups that make up civil society.¹⁴⁶ Romantics both, these nationalists saw solidarity as an achievement of artifice, not a natural inheritance. Consistent with the romantic

¹⁴³ *Id.* at 50-52 (example of resurgent nationalism), 189-90 (German resentment over having to express shame over Nazi past), 63 (German renunciation of claims to Polish Silesia reassures West), 31, 178 (European support for German reunification).

¹⁴⁴ See Samuel P. Huntington, *Religion and the Third Wave*, THE NATIONAL INTEREST, Summer 1991, at 29.

¹⁴⁵ JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 63-74 (Maurice Cranston trans., 1968).

¹⁴⁶ HEGEL, *supra* note 34, ¶¶ 157, 170-173, 253-255, 301-309; see also SHLOMO AVINERI, HEGEL'S THEORY OF THE MODERN STATE 104-05, 161-67 (1972); GIERKE, *supra* note 4; BARRINGTON MOORE, JR., SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY (1966). For applications of Hegel's view to the predicament of Eastern Europe, see JEAN L. COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY (1992); HOSKING, *supra* note 135; Janina Frentzel-Zagorska, *Civil Society in Poland and Hungary*, 42 SOVIET STUD. 759 (1990).

tradition, then, the communities mediating political action may be diverse and they may be of recent origin. They are nonetheless an indispensable condition to the achievement of democracy.

What of the second possible link between democracy and community: Must communities be democratic? Surely not, unless devoted to a particular morality that so dictates. But must communities be democratic in order to claim a right to autonomy? Quite possibly.

Recall that my broader argument against the principle of arbitrary boundaries depended on the idea that other things equal, people ought to be able to pursue their moral values. I suggested that the right of individuals to conform conduct to conscience gave moral communities a claim to autonomy. Recall also that I based this right of individuals to conform conduct to conscience on respect for their autonomy as moral agents.

But if respecting the autonomy of moral communities is necessary for respecting the moral autonomy of individuals, it may not be sufficient. What if the individual members of a moral community simply serve as foot-soldiers subject to the command of a charismatic leader? Can we really say that members are committed to a community's moral ends if they do not themselves reflect on the meaning of those ends and evaluate the community's conduct in light of them? Wouldn't we say that these community members were motivated only by loyalty to the leader rather than by their own moral beliefs? Suppose that other members privately reflect on the community's best course, but keep their own counsel: can they really said to be cooperating in the pursuit of the community's moral ends, if they withhold their own judgment as to what those ends require? If individuals unquestioningly follow orders, don't they act as mere agents rather than as members of the community? We will feel strongly tempted to say that to exercise moral autonomy an individual must participate in the *decisions* as well as the *actions* of her community.¹⁴⁷ Only if a moral community is democratic in this sense, we might conclude, can it claim a right to autonomy.

In basing group autonomy on individual autonomy, do we revert back to the reductive view that derives the collective right of self-determination from the human rights of individuals? Not if we conceive individual autonomy in the romantic spirit.

¹⁴⁷ For an argument that individual moral autonomy does indeed require participation in collective deliberation, see HURLEY, *supra* note 128, at 322-33.

It is in this romantic conception of individual freedom that we will find the association of democracy with community that contemporary philosophers find so puzzling. The modern philosopher sees freedom in each individual's pursuit of her own conception of the good. But for the philosophical tradition from Rousseau to the young Hegelians, *expressing* oneself in this way was nothing more than a surrender to impulse, an index of necessity rather than freedom.¹⁴⁸ True freedom was to be found in the onerous but creative task of *realizing* one's self. Rather than accepting herself as determined by circumstance, the romantic was driven to determine herself by seeking education and recognition from worthy others. Thus her conception of the good was never simply her own—it was always mediated by some community.¹⁴⁹

Many latter-day romantics continue to see freedom as a collective pursuit, requiring embodiment in an enduring political community. Carol Gould argues that courses of action maximize freedom only if they are self-developmental, by which she means they must meet three conditions: they must "express the agents' own purposes," "involve the growth of capacities," and "serve to realize long-range projects."¹⁵⁰

Jon Elster has pointed out the dependence of each of these three indices of self-development on community. Our ability to express ourselves depends on developing skill in handling some socially constructed medium of expression. Thus, it depends upon social contexts in which we can receive training, encouragement, and recognition from competent others. The laborious acquisition of skill, Elster hypothesizes, is neither as intrinsically rewarding nor as socially recognized as its exercise. Accordingly, we are unlikely to skill ourselves without advance assurance that the social context for acquiring and exercising the skill will endure. Conceived as a long-term project of self-realization, the exercise of freedom depends on communities that have the

¹⁴⁸ See TAYLOR, *supra* note 6, at 1-23.

¹⁴⁹ The classic argument that individual identity is necessarily socially mediated is found in GEORG W.F. HEGEL, PHENOMENOLOGY OF MIND 218-40 (J.B. Baillie trans., 1967). The most influential examples of the mediation of individual preferences by larger collectivities in romantic political thought are Hegel's idea of the "corporation" and Rousseau's idea of the "general will." HEGEL, *supra* note 34, ¶¶ 252-253, 290, 303, 308; ROUSSEAU, *supra* note 145, at 69-78, 149-54; see also AVINERI, *supra* note 146, at 161-75; TAYLOR, *supra* note 4, at 437, 443.

¹⁵⁰ CAROL C. GOULD, RETHINKING DEMOCRACY: FREEDOM AND SOCIAL COOPERATION IN POLITICS, ECONOMY, AND SOCIETY 51 (1988).

power to preserve themselves.¹⁵¹

While latter-day romantics acknowledge that any skilled endeavor can foster self-realization, they have particularly insisted that politics is such an art. Empirical studies of democratic participation suggest that the deliberative process informs its participants, skills them in rhetoric and conflict-resolution, may involve mutual recognition, and may inform compliance with majority will with meaning.¹⁵² What differentiates political deliberation from war and commerce is that it is less about the *pursuit* of interests than their *definition*. It requires the mobilizing of communities, the evocation of group identities, and the interpretation of traditions. Democratic politics is a work of the imagination in which, together, we identify our interests, and ourselves.¹⁵³

If, with these latter day romantics, we see our own best selves as contingent on the existence of a certain sort of community, we won't see the right to pursue our chosen ends as an adequate vision of freedom; we won't see merely respecting this right as an adequate standard of morality; and we won't see the right to approve or disapprove our leaders as an adequate conception of self-rule. We will see our own ability to define ourselves, to act on our moral beliefs and to govern ourselves as requiring the creation and protection of a particular culture.

IV. CONCLUSION

Self-determination claims have traditionally combined demands for popular sovereignty and national independence. Despite its formal endorsement of a right to self-determination, however, international law has restricted secession to a decolonization context it cannot define. International lawyers have implicitly, and political philosophers have explicitly reduced self-determination to majority rule within arbitrary boundaries, permitting secession only as a remedy of last resort for discrimination. This reductive view of self-determination effaces its nationalist component altogether.

I have tried to partially resuscitate self-determination's nationalist component by attacking two important tenets of the reductive view: the principle of arbitrary boundaries and its

¹⁵¹ Jon Elster, *Self-realization in Work and Politics: The Marxist Conception of the Good Life*, 3 *SOC. PHIL. & POL'Y* 97 (1986).

¹⁵² See Binder, *supra* note 128, at 2020-21, 2028-29 (1991) (discussing several such studies).

¹⁵³ GOULD, *supra* note 150; Elster, *supra* note 151.

corollary that particular boundaries are justifiable only as means to securing individual rights. In attacking the principle of arbitrary boundaries and the reduction of group to individual rights, I have left several aspects of the reductive view standing. I agree that national identity is neither a natural fact nor one by itself deserving of protection. I agree that the separatist preferences of most of a territory's residents are not by themselves enough to justify independence. I agree that self-determination can sometimes be secured by privileges short of statehood. But I also insist that any special privileges are political boundaries, that political boundaries can be justified, and that such justifications are not always reducible to the rights of individuals.

In so insisting, I have offered eight claims. First, I have taken it as conceded that particular political boundaries may be necessary for securing particular cultures. Second, I have shown that cultures are not fungible instruments to the achievement of individual aims, but that they are constitutive of such aims. Third, I have shown that moral action requires participation in and perpetuation of a culture. From this it followed, fourth, that moral action is a form of political action—that is, that the pursuit of any moral end commits us to erect and defend particular political boundaries. I have suggested, fifth, that respect for the moral autonomy of others entails respect for these boundaries. Sixth, generalizing to all political action the narrower claim that moral action requires group autonomy, I have concluded that democratic politics requires group autonomy. Seventh, reasoning that moral autonomy requires active participation in the decisionmaking of a moral community, I have suggested that the autonomy rights of groups should depend upon their democratic governance. Finally, I have argued that the individual moral autonomy enabled by democracy cannot exist apart from the democratically governed groups within which it is exercised. Based on these eight claims, I conclude that political boundaries can be justified by a right of autonomy for democratically governed groups devoted to moral ends—a right not reducible to the rights of individuals.

“Self-determination of peoples” is more than a misleading euphemism for the political and civil rights of individuals. It rightly asserts the connections among solidarity, self-government, and self-realization.

And that's “The Case for Self-Determination.”