

December 2012

## Inevitable Truths; Why Current International Norms and Policies May Not Have Supported the American Revolution

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### Recommended Citation

Woods, Patrick A. (2012) "Inevitable Truths; Why Current International Norms and Policies May Not Have Supported the American Revolution," *Florida Journal of International Law*. Vol. 24: Iss. 3, Article 5. Available at: <https://scholarship.law.ufl.edu/fjil/vol24/iss3/5>

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## ESSAY

### INEVIDENT TRUTHS: WHY CURRENT INTERNATIONAL NORMS AND POLICIES MAY NOT HAVE SUPPORTED THE AMERICAN REVOLUTION

*Patrick A. Woods\**

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#### I. INTRODUCTION

This Essay is something of a thought experiment. It poses the question whether the American Revolution, its grievances against the English crown embodied in the 1776 U.S. Declaration of

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Independence,<sup>1</sup> would be justified under modern standards of international law. The inquiry is intended to serve as a mirror against which Americans may judge the validity of current international norms regarding modern secessionist movements around the globe.

Americans are taught from a young age that our own revolution was entirely justified by the political and economic oppression of the American colonists. What would it say, then, if the standards which the international community now employs to judge the legitimacy of other secessionist movements would indicate the illegitimacy of our own? What would it say if the question was, as this Essay will argue, too close to call? Simply, it would signal the need to rethink the standards we, as Americans, should consider acceptable when judging the legitimacy of foreign declarations of independence.<sup>2</sup>

Because of the unsettled nature of whether secessionist movements—particularly violent ones—are ever justified by current norms and, if so, when,<sup>3</sup> no definitive answer can be given as to whether the American Revolution would be justified by current norms. The question is a close one, even under an interpretation of current norms that permits secession. And not all interpretations do.

Even the judgment regarding whether or not the American Revolution would be considered legitimate by today's standards is a close call that must be subject to several important historical caveats in order to be profitable. The analysis below will first briefly discuss those historical caveats: dark patches in American colonial history that are so far behind now almost universally accepted principles of human rights and self-determination that discussing them would simply not be useful to evaluating the present norms. Those issues are then excised from the following analysis, narrowing the historical focus of the discussion to only those aspects of American colonial history that are useful to a present day examination of the fairness of the international standards

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1. THE DECLARATION OF INDEPENDENCE (U.S. 1776). It is admitted right off the bat in this Essay that it is the author's view that the American Revolution was a legitimate act of secession suitable for use as a yardstick against which international norms and present U.S. policy may be measured. That fact itself is of course, open to debate in other contexts. However, this Essay does proceed with the underlying assumption of legitimacy. In his defense, the author is an American and cannot help himself.

2. Alternatively, it could call for a fundamental reexamination of American's self-conception as a nation founded on a legitimate revolution. Although several pieces that examine the American Revolution through a more critical lens exist and are worthy of attention, such a discussion goes beyond the scope of this Essay. *See generally, e.g.,* HILLER B. ZOBEL, *THE BOSTON MASSACRE* (1970) (reexamining the events surrounding the Boston Massacre).

3. *See* Matthew Saul, *The Normative Status of Self Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right*, 11 HUM. RIGHTS L. REV. 609, 643 (2011) ("The right to self-determination is one of the most unsettled norms in international law. This is true both of its legal content and its normative status.").

relating to secessionist movements. Next, the Essay will discuss the two competing international law principles which create tension with regard to secessionist movements: a state's right to territorial integrity and a people's right to self-determination. In an attempt to sketch out the murky parameters of what may justify a people in an exercise of external self-determination, or secession, two examples—Bangladesh and Quebec—and their implications for international norms will be discussed. Then the grievances of the American colonists will be analyzed within the loose framework of when a secessionist movement may be justified by current international norms. Finally, the Essay will conclude with some observations regarding the implication of a finding that the American Revolution would either not be justified under current standards or that it is too close to call.

## II. PARAMETERS AND CAVEATS

The purpose of this Essay is to use the circumstances and grievances surrounding the U.S. Declaration of Independence as a way of judging the current international norms on external self-determination and secession. However, the passage of time from 1776 to the present day has seen dramatic evolution in fundamental conceptions of human rights and legitimate forms of government. The examination of the American colonies here, in the context of their claim of a legitimate revolution, must be entirely historically accurate if it is to be useful to the current endeavor. Some aspects of early American history are simply too far out of the present day norms to do anything other than hinder the discussion.<sup>4</sup> Each of these issues would probably be fatal to the American argument under current international norms.<sup>5</sup> These issues are slavery and suffrage, each of which will be treated very briefly now so as to demonstrate why they must be excluded hereafter.

### A. *Slavery*

The first and most glaringly obvious piece of colonial American history that must be excluded from the analysis is the existence of American slavery, not only at the time of the revolutionary war, but for nearly a hundred years thereafter. Without putting too fine a point on it,

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4. See MARGARET MOORE, NATIONAL SELF-DETERMINATION AND SECESSION 2 (Margaret Moore ed., 1998) (“[M]any of the discussions of a right to secession confine themselves to recognizing this right for groups that are prepared to abide by democratic norms, respect liberal rules of justice and equal rights under the law.”).

5. See *id.*

international norms not only expressly condemn the practice of slavery,<sup>6</sup> but the *United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples* also expressly requires that newly independent states be granted self-governance “without any distinction as to race, creed or colour”<sup>7</sup> and the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* requires that same behavior on the part of states in respecting the self-determination of their inhabitants.<sup>8</sup> Although the issue has never been squarely presented—no modern state claiming a right of external self-determination has ever openly wished to simultaneously maintain a fully legal and legitimized practice of human slavery<sup>9</sup>—it is simply not conceivable that such a state’s appeal to principles of self-determination could be, or should be, viewed as anything other than laughably hypocritical.

Even in historical context, the American revolutionary period was rife with the inconsistency of slavery and the principles of rights that underlie the modern conception of external self-determination.<sup>10</sup> Moreover, it was widely believed, particularly in the Americas at the time, that the very nation from which the colonists sought freedom had abolished domestic slavery in 1772.<sup>11</sup> In 1775, after the revolutionary

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6. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) art. 4, available at <http://www.un.org/en/documents/udhr/> (“No one shall be held in slavery or servitude; slavery and the slave trade are prohibited in all their forms.”); see also Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 253, A.T.S. 11 [1927] U.K.T.S. No. 16 (Cmd. 2910), available at [http://treaties.un.org/doc/Treaties/1955/07/19550707%2000-53%20AM/Ch\\_XVIII\\_2p.pdf](http://treaties.un.org/doc/Treaties/1955/07/19550707%2000-53%20AM/Ch_XVIII_2p.pdf) (requiring the contracting parties to eliminate the slave trade). In fact, issues surrounding race relations may have become such an important international norm that even superpowers have bowed to the norm in order to keep international support during the cold war. See Mary L. Didziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 61 (1988) (“[E]fforts to promote civil rights within the United States were consistent with, and important to, the more central U.S. mission of fighting world communism.”).

7. G.A. Res. 1514 (1960).

8. G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 121 (Oct. 24, 1970).

9. This excludes practices of “slavery” that are tantamount to conscription for public works or part of the punishment of criminal offenders. See Slavery Convention, *supra* note 6 (making this caveat).

10. Frederick Douglass’s famous questions when asked to speak at an 1852 Fourth of July Celebration are particularly poignant: “What have I, or those I represent, to do with your national independence? Are the great principles of political freedom and of natural justice, embodied in that Declaration of Independence, extended to us?” Frederick Douglass, “The Meaning of July Fourth for the Negro”, Address at Corinthian Hall (1852), available at <http://www.pbs.org/wgbh/aia/part4/4h2927t.html>.

11. See Jerome Nadelhaft, *The Somersett Case and Slavery: Myth, Reality, and Repercussions*, 51 J. NEGRO HIS. 193, 193-94 (1966).

war had begun as a practical matter but before the U.S. Declaration of Independence was issued, Lord Dunmore—the colonial governor of Virginia—even issued an emancipation proclamation of sorts, “declar[ing] all indented servants, Negroes, or others, (appertaining to Rebels) free, that are able and willing to bear arms, they joining His Majesty’s Troops.”<sup>12</sup> Even so, nothing is perhaps more telling as to the incongruity of what is now termed external self-determination with the slave trade, even at the time of the American Revolution, as that the list of grievances against the king contained in Thomas Jefferson’s original draft of the Declaration of Independence climaxed with a condemnation of slavery.<sup>13</sup> That portion was excised before the Declaration was passed by the Second Continental Congress.<sup>14</sup>

If slavery were to be considered when judging the colonists’ claim for external self-determination, the answer to whether they would have had a legitimate claim of a right to secede under modern norms would be a very easy “no,” probably without the need to look any deeper at the situation. In order to have the analysis in this Essay be useful to evaluate the current norms and practices, the practice of slavery in the colonies must therefore be put aside.

### B. Suffrage in the Colonies and Early States

The second aspect of American colonial independence that will be disregarded for the purposes of this Essay is the limited availability of voting rights in the colonies and the post-revolutionary states. Suffrage in the colonies and the early republic was extremely limited. Only free white men possessing property worth a particular, variable, amount could be guaranteed a right to vote throughout the colonies and early states.<sup>15</sup> For example, the original 1777 New York Constitution limited the right to vote for the State Assembly to males “possessing a freehold

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12. BENJAMIN QUARLES, *SLAVERY, REVOLUTIONARY AMERICA, AND THE NEW NATION* 396 (Finkelman ed., 1989) (quoting Dunmore from the original broadside of the declaration contained in the University of Virginia library). For additional background, see generally WOODY HOLTON, *FORCED FOUNDERS: INDIANS, DEBTORS, SLAVES, & THE MAKING OF THE AMERICAN REVOLUTION IN VIRGINIA* (1999).

13. DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 56-59 (2007).

14. *Id.* In fairness to the colonists, it should be noted that there was already at that time a significant abolitionist movement in place in the colonies and, while England was moving more quickly in the direction of complete abolition than the colonies, that was in part because of efforts by the King to thwart the colonial efforts. See *THE ANNOTATED U.S. CONSTITUTION AND DECLARATION OF INDEPENDENCE* 94 n.27 (Jack N. Rakove ed., 2009) [hereinafter *Rakove*].

15. *A Snapshot of Rights in the Early Republic*, HERB: A SOCIAL HISTORY FOR EVERY CLASSROOM, [http://herb.ashp.cuny.edu/archive/files/votingchart\\_f68ea95b6e.pdf](http://herb.ashp.cuny.edu/archive/files/votingchart_f68ea95b6e.pdf) (last visited Apr. 14, 2012) [hereinafter *Snapshot of Rights*].

of the value of twenty pounds . . . or [who] have rented a tenement [in the county] of the yearly value of forty shillings” and who had paid their taxes.<sup>16</sup> The limitation on suffrage, specifically as it related to women and minorities, was not among the complaints of the colonists. In fact, founding members of the revolution argued *against* expanded voting rights for the young, for women, and for the poor.<sup>17</sup>

The effect of these voting limitations was that as of the 1790 census it was probably the case that less than twenty-one percent of the American population was entitled to vote.<sup>18</sup> In some cases, the availability of voting rights in the early republic actually went backwards, stripping women of the right to vote in New York, New Hampshire, Massachusetts, and New Jersey.<sup>19</sup> In a modern context, such a restricted form of suffrage would pose a hurdle to the legitimacy of a claim to external self-determination. The restrictions based on race, and some would argue now gender, would make it difficult for the people seeking statehood to credibly represent that they plan to govern the whole of their people “without any distinction as to race, creed or colour” as required.<sup>20</sup>

However, given the historical context and purpose of this Essay, it would be best to put aside issues of suffrage in the colonies for two reasons. First, at the time of the Declaration suffrage was extremely limited worldwide and was not present at all in many nation-states. For example, women’s suffrage movements would not begin to proliferate until more than a hundred years after the American Declaration of Independence.<sup>21</sup> Second, the subsequent proliferation of suffrage and the (arguable) coming into being of a norm regarding suffrage and democracy can in many ways be traced back to the Declaration itself. In the words of historian David Armitage, “the American Revolution was

16. N.Y. CONST. art. VII (1777).

17. See, e.g., Letter from John Adams to James Sullivan (May 26, 1776), in 4 PAPERS OF JOHN ADAMS 208-13 (Robert J. Taylor et al. eds., 1977) (arguing against giving the right to vote to women, children, and those who do not own property).

18. SCHEDULE OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES, 1790 CENSUS INFORMATION, U.S. CENSUS BUREAU, available at <http://www.census.gov/prod/www/abs/decennial/1790.html>. The 21% is arrived at by dividing the total number of white men over the age of 16 into the total population. It is not perfectly accurate. It may be slightly high because it includes white men of voting age who may not meet property qualifications. However, because of local laws expanding suffrage in this period, some adjustment up would also be required for an entirely accurate number. See *Snapshot of Rights*, supra note 15.

19. *Voting Rights History, Two Centuries of Struggle*, CIVIL RIGHTS MOVEMENT VETERANS, <http://www.crmvet.org/info/votehist.htm> (last visited Apr. 15, 2012).

20. See *id.*; G.A. Res. 1514, supra note 7, at 67; G.A. Res. 2625, supra note 8, at 121.

21. See *Women’s Suffrage: A World Chronology of the Recognition of Women’s Rights to Vote and Stand for Election*, INTER-PARLIAMENTARY UNION, <http://www.ipu.org/wmn-e/suffrage.htm> (last visited Apr. 15, 2012).

the first outbreak of a contagion of sovereignty that has swept the world in the centuries since 1776.”<sup>22</sup> At the time, the philosophical position espoused by the now immortal phrase “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness” was an extreme one.<sup>23</sup> Jeremy Bentham, the father of utilitarianism referred to this most influential part of the Declaration, as both “absurd and visionary,”<sup>24</sup> declaring that no government could exist but “at the expense of one or another of those rights.”<sup>25</sup> It would be more than a little unfair to judge a movement as wanting because it does not meet the standards of its own philosophical progeny over two hundred years later.<sup>26</sup> Moreover, doing so would tell us nothing about the present norms, which is the purpose of this Essay.

Considering the status of suffrage within the colonies around the time of the declaration would thus be counterproductive to the purpose of this Essay. However, this does not mean that one of the key questions regarding self-determination—who exactly are the people with a right of external self-determination within the geographical area in which they seek to now control government?—will be disregarded.<sup>27</sup> As it relates to North America’s indigenous peoples that concern is very much worthy of discussion and treated in detail in Part IV.

### III. NORMS?

#### A. *When Does a Right to External Self-Determination Accrue?*

The issue of secession and external self-determination is one that highlights the tension between two great principles enshrined in the U.N. Charter: self-determination and territorial integrity. The Charter names the principle of self-determination of peoples as a goal of the

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22. ARMITAGE, *supra* note 13, at 103.

23. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

24. Jeremy Bentham, *Short Review of the Declaration (1776)*, reprinted in ARMITAGE, *supra* note 13, at 173.

25. *Id.* at 174.

26. See DUNOFF, RATNER & WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM ORIENTED APPROACH* 406 (2010) (discussing the impact of the political philosophy animating the Declaration of Independence).

27. This formulation of a key question is adapted from the three questions Moore believes to be begged by the principle of self-determination. See Moore, *supra* note 4, at 2. Those questions are “1. Who are the people? 2. What is the relevant territorial unit in which they should exercise self-determination? [and] 3. Does secession have a demonstration effect?” *Id.*



organization twice.<sup>28</sup> Multiple General Assembly resolutions specifically address the self-determination of peoples in general and broad brush terms. A few key ones are the *Declaration on the Granting of Independence to Colonial Countries and Peoples*,<sup>29</sup> *Principles Which Should Guide Members in Determining Whether or not an Obligation Exists to Transmit Information Called for Under Article 73e of the Charter*,<sup>30</sup> and the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*.<sup>31</sup> The International Court of Justice has opined that—particularly in the context of decolonization—the right of external self-determination, including democratically based systems for determining the consent of the peoples, is a key international norm.<sup>32</sup> There, the court defined the principle of self-determination as “the need to pay regard to the freely expressed will of peoples.”<sup>33</sup> What that means exactly is a different and more complicated question. It is not clear that outside of the decolonization context external self-determination is recognized as a norm at all.<sup>34</sup> If it is, its contours remain unclear.<sup>35</sup>

The second great principle that can conceptually run contrary to self-determination is the prohibition of forcible action and promotion of territorial integrity. Indeed, both the U.N. Charter<sup>36</sup> and the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*<sup>37</sup> expressly address these principles. The latter declaration, after laying out an express right of self-determination for colonized peoples, then qualifies its meaning with the phrase:

Nothing in the foregoing paragraphs shall be construed as

28. U.N. Charter art. 1, para. 2; U.N. Charter art. 55, para 1.

29. G.A. Res. 1514, *supra* note 7, at 66.

30. G.A. Res. 1541 (XV), 29, U.N. Doc. A/4651 (Dec. 15, 1960).

31. G.A. Res. 2625, *supra* note 8, at 121.

32. *See Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, 31-34 (Oct. 16).

33. *Id.* at 33. It is worth noting that in the same breath as coining this definition, the I.C.J. defined one of the situations where “consulting with the inhabitants of a given territory” was unnecessary as a situation where “a certain population did not constitute a ‘people’ entitled to self-determination.” *Id.*

34. *See* LEE C. BUCHHIET, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 20 (1978) (“It is impossible to know how many statements containing the phrase ‘right to self determination’ were assumed by their authors to refer only to the process of decolonization and would be significantly recast under the influence of secessionist proposals.”). For an interesting defense of self-determination based only on democratic principles, see Daniel Philpott, *In Defense of Self-Determination*, in 105 ETHICS 352 (1995).

35. BUCHHIET, *supra* note 34, at 18-20.

36. U.N. Charter art. 1, para. 2.

37. G.A. Res. 2625, *supra* note 8, at 121.

authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.<sup>38</sup>

Various U.N. declarations make it clear that colonized people and those who were subject to foreign invasion enjoy a right to external self-determination, but where, at the edges, self-determination justifies secession or insurrection is, in the words of Captain Benjamin P. Dean, “a continuing source of controversy within the international legal community.”<sup>39</sup>

On an abstract level, any theory of self-determination which encompasses an *absolute* right of secession based solely on democratic principles must by necessity involve a fundamental denial of a right existing within the nation-state to preserve its territorial integrity, at least with respect to “peoples” within its own borders.<sup>40</sup> It seems clear that international norms do not go that far, but it is not clear how many other factors must be present before a claim for secession based on self-determination will be considered legitimate. An examination of two cases where self-determination has been invoked as a justification for a secession movement and their outcomes may help to define the parameters, or at least the ideological floor, of the current norms regarding when the right to external self-determination may trump a state’s right to safeguard its territorial integrity. These cases demonstrate that international norms encompass only, at a maximum, a remedial right to secession after a base level of injustice has been inflicted upon the seceding party. Moreover, because there have been relatively few instances in which the international community has given broad support to a secession movement, and usually even then only post-facto, only a hazy notion of how extreme the violations must be to give rise to a right of self-determination can be discerned.

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38. *Id.*

39. Benjamin P. Dean, *Self-Determination and U.S. Support of Insurgents: A Policy-Analysis Model*, 122 MIL. L. REV. 149, 151 (1988).

40. See DAVID RAIC, STATEHOOD AND THE LAW OF SELF-DETERMINATION 310 (2002) (discussing the shortcomings of such a “choice theory” of self-determination); see also Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 30, 34-41 (1997) (distinguishing and discussing the merits of two broad theories of secession).

## 1. Bangladesh

The case of the independence of Bangladesh is something of a perfect storm of justification and timing for a secession movement. Between 1969 and 1971 the military government that ruled Pakistan was increasingly under threat of losing power. Sheik Mujibur Rahman spearheaded, through entirely peaceful and political means, attempts to bring political parity to what was then East and West Pakistan.<sup>41</sup> The Elections in 1971 gave Rahman's Awami party a majority of seats in what was to be the inaugural session of the National Assembly.<sup>42</sup> When the date for the initial meeting of the National Assembly was postponed indefinitely by the supposedly outgoing powers, the people of East Bengal began to engage in large scale civil disobedience.<sup>43</sup> Within a month, Pakistani troops engaged in a military campaign against East Bengal, resulting in the slaughter of over one million Bengalis and the displacement into India of another ten million people over the course of the military campaign.<sup>44</sup>

On March 26, 1972, shortly after the beginning of the military campaign, Bangladeshi independence was declared.<sup>45</sup> Even there, however, the order declaring independence "made it clear that the proclamation of independence was a last resort measure for safeguarding the Bengali people."<sup>46</sup> After India intervened militarily, the hostilities ceased and the international community quickly began to recognize Bangladesh as an independent nation.<sup>47</sup>

In this situation just about every factor that could be considered a legitimate ground for secession was present. The Bangladeshis represented a minority group that was ethnically distinct, lived in a geographical area that was easily divisible from the whole of Pakistan, engaged in peaceful and democratic means of obtaining their political objectives, and the Pakistani government repressed them by engaging in human rights violations of the highest order.<sup>48</sup> Even so, the *fait accompli* nature of Bangladeshi independence as a result of the Indian military intervention may have played a larger role in the international community's recognition of the secession than the application or

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41. RAIC, *supra* note 40, at 336-37.

42. *Id.* at 337.

43. *Id.* at 338.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 339. Recognition by the U.N. did not come until after 1974 because of political opposition by China, but by May 1972 seventy nations had formally recognized Bangladesh. *Id.* at 339 n.106.

48. *Id.* at 340-41.

adoption of any theory of legitimate secession.<sup>49</sup> At a minimum though, we can at least say that the international community will recognize secession as legitimate when all of these factors, including the political ones, are present.

## 2. Quebec

The situation surrounding the request for an advisory opinion on the contemplated secession of Quebec from Canada can fairly be taken to represent the polar opposite of the situation in Bangladesh. In the wake of the Quebec separatist party, Parti Quebecois, narrowly losing a referendum on the question of whether or not Quebec should begin the process of seceding from Canada, the Canadian Government requested an advisory opinion from the Canadian Supreme Court on three issues.<sup>50</sup> Those issues were: (1) whether under the Constitution of Canada the government of Quebec can secede from Canada unilaterally, (2) whether international law provided Quebec a right to secede from Canada unilaterally, and (3) which rule would trump if a conflict existed between the international and constitutional regimes on the issue.<sup>51</sup> There was no violence surrounding the movement, no human rights violations inflicted upon the inhabitants of Quebec, and the Quebecois were actively represented and engaged in the government of Canada before, during, and after the referendum and opinion.<sup>52</sup> The position of the Quebecois was that the willful, democratic expression of their desire to sever ties with Canada was, standing alone, sufficient to confer upon it a right of secession under either international or Canadian law.<sup>53</sup> The decision issued by the Supreme Court of Canada, denying that Quebec had a right of unilateral secession under either Canadian or international law, thus rendering the third issue moot, has been significantly influential on the international debate over the scope of external self-

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49. See BUCHHEIT, *supra* note 34, at 213 (“It is . . . difficult to know whether the international community simply found it more dignified to accept the secession once Indian intervention had made it inevitable; or whether its reaction really was a comment upon the secession’s intrinsic merits . . . . It may be a sufficient response for international jurists to say that a claim invoking the right of self-determination obviously needs more than a sheer quantum of human suffering for legitimacy.”).

50. L. Kinvin Worth, *Quebec, Canada and the First Nations: The Problem of Secession*, 23 VT. L. REV. 709, 709 (2009). For a more detailed discussion of the Quebec issue and continuing issues surrounding Quebec’s potential secession from Canada see generally Daniel Turp, *Quebec’s Right to Secessionist Self-Determination: The Colliding Paths of Canada’s Clarity Act and Quebec’s Fundamental Rights Act*, in SECESSION AND INTERNATIONAL LAW 167 (Julie Dahlitz ed., 2003).

51. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at 2 (Can.).

52. *See id.* at 75.

53. *Id.* at 40-41.

determination.<sup>54</sup>

In *Reference re Secession of Quebec* the Supreme Court of Canada identified three possible scenarios where a people might have a right to external self-determination, or, in other words, a right to secede.<sup>55</sup> The court identified those instances as where a “people”—as that term is understood in the U.N. Charter and other international law documents—“is governed as part of a colonial empire”; “is subject to alien subjugation, domination, or exploitation; and possibility where a ‘a people’ is denied any meaningful exercise of its right to self-determination within the state of which it forms a part.”<sup>56</sup> The Court found the first two cases to be inapplicable to Quebec<sup>57</sup> and went on to say of the third that it was both unclear whether it was an international law standard and even if established would only be applicable in “exceptional circumstances,” which amount to a “complete blockage” of the oppressed people’s right to participate in government.<sup>58</sup>

Quebec serves as a far edge example of whether a claim for external self-determination is legitimate. There, even assuming such a right could exist outside of the colonial or invasion context, the claim fell before Canada’s right of territorial integrity because no factors other than a democratically expressed will of a “people” to secede were present.

### 3. Synthesis?

From these two cases we can see that a mere democratic impulse is not enough to justify a secession movement under current norms. Either the “people” seeking to secede must be a colonial state under foreign domination, or have been subject to significant hardships, perhaps even genocides, before the right of external self-determination will accrue.

This is, of course, assuming that present norms would hold that any such right can *ever* accrue in a non-colonial state. In the years since the

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54. As an example of the influence of the decision, a Westlaw search for the phrase “2 S.C.R. 217” limited only to law reviews and other journals conducted on April 16, 2012 returned 402 articles, including at least six published within the last four months of the search date.

55. *Reference re Secession of Quebec*, 2 S.C.R. 217, at 7.

56. *Id.*

57. *Id.* at 74.

58. *Id.* at 74-76. Interestingly, some of the *amicus curiae* appear to have tried to argue a Buchheit-like point, attempting to convince the high court that secession would become legitimate post-facto because the international community would accept the facts on the ground. *Id.* at 77. The court rejected this argument, correctly pointing out that the recognition of a state by the international community and whether or not the creation of that state was accomplished by a means sanctioned by international law are distinct questions, neither dictating the result of the other. *Id.* at 77-78.

Quebec and Bangladesh secession attempts, international law developments show that whether such a right is recognized at all is still very much open for debate. A *Report of the International Fact-Finding Commission on the Conflict in Georgia* condemned the South Ossetian and Abkhazian secessionist movements, basing the argument in the report that, other than for “colonial peoples, and peoples subject to foreign occupation,”<sup>59</sup> international law does not permit secession. The commission states:

Outside the colonial context, self-determination is basically limited to internal self-determination. A right to external self-determination in form of a secession is not accepted in state practice. A limited, condition extraordinary allowance to secede as a last resort in extreme cases is debated in international legal scholarship. However, most authors opine that such a remedial “right” or allowance does not form a part of international law as it stands.<sup>60</sup>

This position appears to have been somewhat persuasive, or at least born out in state practice, as neither South Ossetia nor Abkhazia have been recognized by the United Nations or by more than a handful of other countries acting alone.<sup>61</sup> These developments may indicate a movement away from the liberal norms, such as those expressed in the mid-1970s, toward a more stringent view.<sup>62</sup>

### B. *What is a “People”?*

The various U.N. documents acknowledging a right of self-determination do so not to any group, but specifically to “a people.” This distinction is more than academic. In *Western Sahara* the I.C.J. specifically indicated that there were times that groups seeking independence were not entitled to self-determination because they “did

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59. 2 REPORT OF THE INTERNATIONAL FACT-FINDING COMMISSION ON THE CONFLICT IN GEORGIA 136 (2009), available at <http://www.ceiig.ch/Report.html> [hereinafter REPORT].

60. *Id.* at 141.

61. WIKIPEDIA, *International Recognition of Abkhazia and South Ossetia*, [http://en.wikipedia.org/wiki/International\\_recognition\\_of\\_Abkhazia\\_and\\_South\\_Ossetia](http://en.wikipedia.org/wiki/International_recognition_of_Abkhazia_and_South_Ossetia) (as of Apr. 17, 2012, 14:23 p.m. EST).

62. For example, Article VII of The Helsinki Accords states that “all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.” THE FINAL ACT OF THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE art. VII, 14 I.L.M. 1292 (1975), available at <http://www1.umn.edu/humanrts/osce/basics/finact75.htm>. That declaration is high impossible to square with the position presently taken by the United States and most other world powers.

not constitute a people.”<sup>63</sup> The question is therefore an important one in determining the validity under current norms of any secessionist movement.

Although virtually every major human rights document mentions the self determination of “peoples,” for whatever reason none of those texts (not even the *Universal Declaration on the Rights of Peoples*)<sup>64</sup> has explicitly defined the term. Perhaps the closest we can come by way of definition is one by implication from the *Principles Which Should Guide Members in Determining Whether or not an Obligation Exists to Transmit Information Called for Under Article 73e of the Charter*.<sup>65</sup> There, in determining when the Article 73 reporting obligations of colonial states cease, Principle IV laid out that: “*Prima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.”<sup>66</sup> It is these dependent states, whose peoples have a right of external self-determination, to which reporting obligations applied. As such, we can parse out that the “peoples” entitled to self-determination must be in a geographically separate territory from the colonial state and be ethnically or culturally distinct from the “peoples” of the colonial state. That peoples should be defined around ethnic and cultural grounds is not an unusual conclusion and follows from the typical historical understanding of what a “people” meant in the international law context. Pre-World War One, peoples were typically “conceived of in ethnic terms.”<sup>67</sup> Later theories have defined the issue territorially.<sup>68</sup>

No conception on how to define a people is without flaws and some scholars have termed them “virtually insoluble.”<sup>69</sup> The territoriality notion is, conceptually, untenable, and self-collapsing. If the term “peoples” is to be a limiting phrase as to who has a right to self-determination, defining them territorially is simply to say “if you claimed this geographic area, then you are a people.” All secession movements would then legitimately be able to claim that they are a people, something that does not mesh with the I.C.J.’s comment in *Western Sahara* and renders the repeated use of the phrase in international documents as mere surplusage. The ethnic definition,

63. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, 33 (Oct. 16).

64. See UNIVERSAL DECLARATION ON THE RIGHTS OF PEOPLES (ALG. 1976), available at [http://www.algerie-tpp.org/tpp/en/declaration\\_algiers.htm](http://www.algerie-tpp.org/tpp/en/declaration_algiers.htm).

65. G.A. Res. 1541, *supra* note 30.

66. *Id.* Ann. Principle IV.

67. MOORE, *supra* note 4, at 2.

68. *Id.* at 3.

69. Philpott, *supra* note 34, at 364 (discussing the position of Allen Buchanan in SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 49 (1991)).

perhaps like any objective criterion based on the characteristics of the peoples involved, is extremely difficult and perhaps impossible to state conceptually.<sup>70</sup> However, on ethnic or cultural grounds it is possible to use a subjective criterion to good end. Some theorists, like Daniel Philpott, would accept a subjective self-referential definition of what it means to be a people. Doing so, however, would collapse this criterion into what is essentially the notion that if a group says they are a people then they are a people,<sup>71</sup> and I would reject such an approach for the same reasons that a territory-based objective criterion is unhelpful. However, we can subjectively identify that, as a floor, the secessionist group must view themselves as both unified and ethnically or culturally distinct from the rest of the nation from which they seek to secede to qualify as a people.

#### IV. DID THE AMERICAN COLONIES HAVE A RIGHT TO EXTERNAL SELF-DETERMINATION UNDER PREVAILING NORMS?

##### A. Pre- or Post-Colonization Context?

It has probably not passed unnoticed that the foregoing discussion of the possible parameters of international norms has limited itself to cases that are, at least arguably, outside of the decolonization context. That is no accident. There are at least two good reasons why the post-colonization/invasion context is more appropriate for the present investigation. The first is simple: there was no decolonization regime at the time of the American Revolution.

The second reason is more involved, but I believe ultimately makes this examination more useful going forward. Simply put, it is philosophically discordant to grant a unilateral right of secession to a “people” if the ethnic people seeking secession are the descendants of the colonizers themselves. The norm within the international community that gives rise to an automatic right to external self-determination in colonized or subjugated peoples is based on the inappropriateness and injustice of an indigenous people being placed at the will of another group. The *Declaration on the Granting of Independence to Colonial Countries and Peoples* makes this clear.<sup>72</sup> It states in perambulatory language:

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70. *Id.*

71. *Id.* at 365 (“Why need we try [for an objective criterion]? . . . We simply acknowledge, usually without difficulty, that a distinct group wants independence or greater autonomy from a larger state.”).

72. G.A. Res. 1514, *supra* note 7, at 66-67.



*Recognizing* that the peoples of the world ardently desire the end of colonialism in all its manifestations,

*Convinced* that the continued existence of colonialism prevents the development of international economic cooperation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace. . . .

...  
*Solemnly proclaims* the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations.<sup>73</sup>

To grant an automatic remedial right to the colonists would essentially be to pervert this doctrine into one of freedom for satellite states, rather than for colonized peoples.

This would, of course, potentially be different if the American colonists and the indigenous tribes were united in a cause against the British, potentially forming a new culturally mixed people seeking mutual freedom, but that was not the case. The depth and complexity of the relationship between the colonists, British, and the indigenous tribes is beyond the scope of this Essay. It could, and has, filled volumes.<sup>74</sup> It is sufficient to observe that tribes were on all sides of the American Revolution and that the British sometimes sided with the tribes over the colonists' demands to expand westward, particularly where a British-tribal treaty was in place. This policy of the British was among the grievances listed by the colonists as a justification for secession: "He has excited domestic insurrections amongst us,"<sup>75</sup> and "has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions."<sup>76</sup>

To this day, numerous issues of shared sovereignty between the United States and the indigenous peoples of the Americas persist.<sup>77</sup> Accordingly, the most appropriate lens with which to view the American colonists' claims to a right to external self-determination is one which treats them not as a colonized or occupied people, but as a group which falls into the only potentially recognized third category of

73. *Id.*

74. *See, e.g.,* COLIN G. CALLOWAY, *THE AMERICAN REVOLUTION IN INDIAN COUNTRY* (1995); HOLTON, *supra* note 12.

75. This complaint is actually in reference to the offer of freedom for military service made by Lord Dunsmore to slaves discussed *supra*. *Rakove, supra* note 14, at 94 n.27.

76. *Id.* at 95.

77. *See generally* David M. Schraver & David H. Tennant, *Indian Tribal Sovereignty—Current Issues*, 75 ALB. L. REV. 133 (2012).

legitimate secessionists: the oppressed.

### B. *Were the Colonists a “People” Distinct from the British?*

Despite the perambulatory language in the U.S. Constitution<sup>78</sup> and the Declaration of Independence<sup>79</sup> it is far from clear that the American colonists would qualify as a “people” for purposes of establishing a right to external self-determination under present norms. Under a territorial definition of a “people,” the colonists would certainly qualify. The colonies were relatively defined territories and, under that standard, the colonists’ declaration of themselves as a people would be sufficient under the analysis *supra*. However, under cultural or ethnic criteria, subjective or objective, things become significantly less straightforward.

The interpretation of a “people” derived from the *Principles Which Should Guide Members in Determining Whether or not an Obligation Exists to Transmit Information Called for Under Article 73e of the Charter*, calls for a “people” to have a “distinct” ethnic or cultural background from the dominant state and demonstrating such distinction between the colonists and the British is far from easy.<sup>80</sup> Although the Declaration of Independence lays out a substantial list of grievances, it is worth noting that none of them address the kinds of grievances that one would naturally expect from an oppressed people that are socially and culturally distinct from the dominant group. None of the grievances reference the repression of a specific religious persuasion in the colonies. This is partly because the overwhelming majority of the colonists were Christians of one stripe or another and partly because religious freedoms in the colonies were in many cases more protected than in England.<sup>81</sup> None of the grievances identify particular *cultural*, rather than economic or political, practices either. Indeed, perhaps the most telling piece of information about whether the colonists were indeed culturally or ethnically distinct from the British is a line from the *Speech to the Six Nations* which the Continental Congress drafted to send to the Mohawks, Oneidas, Tuscaroras, Onondagas, Cayugas, and Senecas on July 13, 1775: “This is a family quarrel between us and Old England.”<sup>82</sup> I would hardly expect that any of the modern secessionist

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78. U.S. CONST. pmb. (“We the people . . .”).

79. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (“When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another . . .”).

80. G.A. Res. 1541, *supra* note 30, at 30.

81. For example, as early as 1665 the colonial government in New York had made “[p]rovision . . . for religious liberty for those ‘who profess Christianity.’” PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 18 (1996).

82. Speech to the Six Nations, in 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1799, at 177-83 (1905), available at [http://avalon.law.yale.edu/18th\\_century/contcong\\_07-13-](http://avalon.law.yale.edu/18th_century/contcong_07-13-)

movements with indisputably distinct “peoples” would refer to their struggles for independence as “a family quarrel.”

A second concern with identifying the colonists as a “people” is the criterion of self-regarding unity proposed *supra*. The colonists did not consider themselves unified with the indigenous peoples of the colonies, who were not arraigned throughout the colonies along strict and consistent borders.<sup>83</sup> This would trigger the kind of minority protection problem that has concerned some courts<sup>84</sup> and theorists.<sup>85</sup> Moreover, the colonies themselves were only loosely knit at the time of the revolution. For example, Vermont was not even recognized by the other colonies and fledgling states until 1791, ironically on account of settlers in portions of land in New York wishing to be part of Vermont instead but Congress being unwilling to recognize the desires of the Vermonters over the land claims of the New Yorkers.<sup>86</sup>

Because of the murk surrounding exactly what constitutes a “people” it is entirely possible that under the current norms the American colonists would not be considered to be a “people” entitled to rights of external self-determination, regardless of whether the situation was sufficiently extreme to warrant the remedy of secession.

### C. *Were the Colonists’ Grievances Sufficiently Extreme?*

The injuries suffered by the American Colonists fall into a gray area between the bookends of Quebec and Bangladesh. The oppressions of the British were certainly more severe than those faced by the people of Quebec at the hands of Canada, but are a far cry from the atrocities visited upon the people of Bangladesh by Pakistan. However, judging the two as extremes, the problems facing the colonists were much closer to Quebec than Bangladesh in degree, indicating that present state practices may well find the justifications of the colonists lacking in the modern context. A look at the two major areas of the colonists’

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75.asp.

83. In fact, the very next sentences of the *Speech to the Six Nations* are: “You Indians are not concerned in it. We don’t wish you to take up the hatchet against the king’s troops.” *Id.*

84. See *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at 48-50.

85. See Philpott, *supra* note 34, at 378-80.

86. Peter S. Onuf, *State-Making in Revolutionary America: Independent Vermont as a Case Study*, 67 J. AM. HIST. 797, 797 (1981):

Because the United States Congress would not sanction the involuntary division of one of its own members, Vermont was unable to gain recognition from neighboring states or protection from the British in Canada. When Vermont became independent, it became independent of all the world and remained so until 1791 when it was finally admitted to the union.

complaints will make this clear.

### 1. Violence Against the Colonists

Although six out of the twenty-seven paragraphs of the Declaration allege acts of violence committed against the colonies or sought to be protected by the English Crown, the scope of the violence pales when compared to similar instances. The total number of estimated casualties, on all sides including British soldiers and German mercenaries, of the entire American Revolutionary War is under a hundred thousand lives.<sup>87</sup> This is fewer than the contemporaneous smallpox epidemic that was present in the colonies at the time and far fewer than the one million estimated deaths in Bangladesh.<sup>88</sup> Of course, those numbers account for the entire war, which escalated significantly after the French joined in 1778, two years after the Declaration.

In the context of the time, the actions taken by George III prior to the declaration—but after hostilities between the colonists and the British had already broken out—were mild when compared with other sitting European monarchs.<sup>89</sup> The most storied atrocity of the time was the Boston Massacre, an event which cost only five lives and as a result of which the soldiers involved were almost immediately taken into custody and tried for murder.<sup>90</sup> This too pales in comparison to the estimated one thousand deaths within the first twenty-four hours of the violence in Bangladesh.<sup>91</sup> It should also be remembered that not all acts of violence against a people will grant a right of external self-determination. Legitimate peace keeping deaths or civil war casualties may not be considered forms of oppression for purposes of reaching the high hurdle required to give rise to a claim for legitimate secession; only acts of genocide seem to potentially give rise to such a right in the modern context.<sup>92</sup>

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87. *American Revolutionary War*, WIKIPEDIA, [http://en.wikipedia.org/wiki/American\\_Revolutionary\\_War#Casualties](http://en.wikipedia.org/wiki/American_Revolutionary_War#Casualties) (last visited Apr. 18, 2012).

88. *Id.*

89. JOHN BROOKE, *KING GEORGE III 183* (1972). *See also Rakove, supra* note 14, at 92 n.24 (noting that George III was “hardly a tyrant by the brutal standards” of the time period).

90. *See ZOBEL, supra* note 2, at 180-205.

91. RAIC, *supra* note 40, at 339.

92. *See REPORT, supra* note 59, at 145 n.80:

The documentation provided by the Russian side to the IFFMCG reported many cases of maltreatment and killing. Nevertheless, these seem to be incidents of violence typical for civil wars rather than systematic attempts to destroy the South Ossetians as an ethnic group. . . . The situation was therefore not fundamentally different from the situation of the Chechens in the Russian Federation or the Kurds in Iraq where the international community did not support a right to secession.”)

While obviously worse than Quebec, where there was no bloodshed, the violence against the colonists was not close to the level in Bangladesh. The fact that the colonists' grievances regarding violence tow much closer to Quebec indicates that the international community would be unlikely to find the violence sufficiently egregious to trigger a legitimate right to secession.

## 2. Internal Self-Determination Violations

The bulk of the remaining grievances contained in the Declaration can be grouped together under the heading of violations of the right to internal self-determination. Broadly speaking they encompass claims that the colonial legislatures were unequal in rights to the Parliament, that they lacked other adequate democratic representation, that Britain was economically exploiting the colonies, and that the judiciary system and penal laws imposed by the Crown and Parliament were unjust.<sup>93</sup> While these instances are all certainly above the level of Quebec, they are still not a high enough level to justify secession in the modern context.

Obviously, for those theorists that would allow secession on the basis of the democratically expressed will of a people alone, there would be more than enough evidence of the desire to form a separate government by the colonies to justify it. However, that does not appear to be the norm; the Quebec case, for example, requires much more and it is an example of where accrual of the right to unilateral secession is thought to be possible at all.

The near complete thwarting of the right to self-determination required in such instances may not have been reached in the colonies. Although the King repeatedly vetoed or ignored laws passed by the colonial legislatures (a power which he did not possess with respect to Parliament), limited the size and authority of those legislatures, occasionally moved them, and reserved to Parliament the right to legislate over and above those legislatures, it is not clear that even these restrictions would amount to the kind of total denial that would meet even the standard discussed by the Supreme Court of Canada. This is because although restricted, the colonial governments did exercise some, and in some cases significant, control over the laws in their

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93. A grievance by grievance analysis is unnecessary as no one allegation of oppression, except perhaps genocide, would seem to trigger a unilateral right to secession. For a point by point break down of the historical facts behind each grievance listed in the Declaration, see generally *Rakove, supra* note 14 (annotating each grievance listed with a footnote providing historical context); materials located on the Founding.com website (providing, among other primary sources, an annotated version of the Declaration using hyperlinks at [http://www.founding.com/the\\_declaration\\_of\\_i/pageID.2418/default.asp](http://www.founding.com/the_declaration_of_i/pageID.2418/default.asp)).

respective colonies. For example the New York Assembly “[b]y the late 1730s had complete financial control, and was both willing and able to defy governor’s requests or threats as well as royal instructions.”<sup>94</sup> In some cases, like New York, the colonial governing structure present in the decades leading up to the revolution was not significantly different from the ones ultimately adopted by the colonies after the Declaration was issued.<sup>95</sup>

One factor that would weigh in favor of a modern view granting a right to secede to the American colonists is the passage of time itself. Part of the justification for a very high bar to justify secession is that “[t]he international community can react to extreme forms of oppression in other ways than by granting a right to secession, e.g. by adopting sanctions without questioning the territorial integrity of the oppressive state.”<sup>96</sup> That option was not present in the case of the American colonists and if, for some reason a parallel situation should arise under current norms (*i.e.*, one where the international community’s options are to either declare a legitimate right to secession or to do nothing at all), it may well be that international law would permit the act of secession.

Although the American colonists have a better case on the denial of the right to self-determination side of things than on the violence side, they are still very much in a gray area of international norms. A strict reading of when situations are sufficiently extreme, which state actions in the past ten to fifteen years seem to favor, may very well not consider the complaints of the American colonists to have been sufficient.

## VI. CONCLUSION

The foregoing analysis has made it clear that under the prevailing norms, as best we can determine them, it is entirely possible, if not likely, that the American Revolution would not be considered a justified act of secession. Not only might the colonists not have qualified as a “people” for purposes of international law, their grievances may not have been sufficiently severe. For Americans, like this author, that notion coupled with the knowledge that the United States plays an extremely important role in the settling of international legal norms, is disquieting. It indicates that the international norms currently in use along both of those dimensions require a deeper reexamination by Americans. This knowledge in hand, when evaluating whether a secession movement in another part of the world is justified, Americans should look to our own past rather than simply analyzing the current

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94. GAILE, *supra* note 81, at 27.

95. *See id.* at 27-30.

96. REPORT, *supra* note 59, at 138.

norms as evinced by state practice and applying those norms in a manner that best suits the present administration's foreign policy. If, as a nation, we are unwilling to do so, we must instead be willing to accept a level of hypocrisy in our foreign policy behavior that strikes to the very core of what we profess to be our fundamental values as a nation. We would need to admit that our self-evident truths were not so evident after all; Jeremy Bentham was right. Personally, I would choose the former.