"Les souverains seuls ont le droit de changer quelque chose aux moeurs." (Gustave Flaubert, *Sottisier*, ostensibly quoting Descartes*' Discours de la Méthode*, Section 6).[1]

"*Il y a donc différents ordres de lois; et la sublimité de la raison humaine consiste à savoir bien auquel de ces ordres se rapportent principalement les choses sur lesquelles on doit statuer, et à ne point mettre de confusion dans les principes qui doivent gouverner les hommes…."* (Charles Secondat, Baron de Montesquieu, *L'Esprit des lois,* LIVRE XXVI, Chapitre 1).[2]

"*Comme les hommes ont renoncé à leur indépendance naturelle pour vivre sous des lois politiques, ils ont renoncé à la communauté naturelle des biens pour vivre sous des lois civiles. Ces premières lois leur acquièrent la liberté, qui, comme nous avons dit, n'est que l'empire de la cité, ce qui ne doit être décidé que par les lois qui concernent la propriété.*" (Charles Secondat, Baron de Montesquieu, *L'Esprit des lois,* LIVRE XXVI, Chapitre 15).[3]

[Mais] Qu'il ne faut point décider par les règles du droit civil quand il s'agit de décider par celles du droit politique…. Il est ridicule de prétendre décider des droits des royaumes, des nations et de l'univers, par les mêmes maximes sur lesquelles on décide entre particuliers d'un droit pour une gouttière, pour me servir de l'expression de Cicéron", (Charles Secondat, Baron de Montesquieu, *L'Esprit des lois,* LIVRE XXVI Chapitre 16).[4]

"Territorial Justice" and Self-Determination

Introduction

Robert Nozick commented that the term "distributive justice" was biased toward the global patterned conception that he opposed. The expression "territorial justice" also carries a bias. To be sure, every good including territory can be viewed as falling under principles determining the way it ought to be distributed, including by relations to people or actions

[1] "Only sovereigns have a right to change something in morals", slightly misquoting Descartes' *Discours de la Méthode*, Section 6.

[2] "There are therefore different orders of laws, and the sublimity of human reason consists in perfectly knowing to which of these orders the things that are to be determined ought to have a principal relation, and not to throw into confusion those principles which should govern mankind."

[3] "As men have given up their natural independence to live under political laws, they have given up the natural community of goods to live under civil laws. By the first, they acquired liberty; by the second, property. We should not decide by the laws of liberty, which, as we have already said, is only the government of the community, what ought to be decided by the laws concerning property."

[4] "One must not decide by the rules of civil law what ought to be decided by the rules of public law.... It is ridiculous to claim to decide the rights of kingdoms, nations, and the whole globe by the same maxims by which we should determine the right of a gutter between individuals, to borrow an expression of Cicero." The reference to Cicero is to Book I of "Of Laws".

independently of global patterns. Here "justice" would be used in the broadest sense to include any view at all about what normative principles should apply. But if the appropriate principle determining the justice of "distribution" of a particular good is radically at odds with the notion that considerations of global pattern apply, or that relative quantities *per se* of the good are relevant, or that unnatural redistributions might be called for, then application of the term "justice" to the good in question might be very misleading.

Here is an example. Many people think that body organs of the living should neither be voluntarily exchanged for compensation nor coercively redistributed, say by a government health program. So on this view "justice" in the widest sense applied to body parts of the living just means leaving people's body parts as they are (that is, naturally distributed). Some people – amputees, the blind, those in need of an organ transplant – will be disadvantaged thereby. Compensation might be a demand of justice, but if so, then the entire welfare of the compensatee *and* the would-be compensator – as opposed to the sole disadvantage or advantage in body parts – would be relevant.[5] To speak here of "justice in body parts" would still be misleading, albeit not perhaps inaccurate in a wide sense.

The same is true of "territorial justice". The principle that should apply to this good is that distinct territorially concentrated peoples opting to exercise political self-determination of their group should be able to exercise sovereignty on the territory in question. Thus the only principles that should apply with regard to the relation between sovereignty and territory are the principles that should apply to self-determination and secession. I mean the latter in a

[5] Why, for instance, should an impoverished single mother compensate through taxes a blind person, even if she is sighted?

non-circular sense, whereby the latter principles exclude consideration of quantities of territory or global distributive patterns *per se*. I mean, as well, that a group attempting to exercise self-determination through secession need not have some independent claim to the territory on which their majority resides in order to have a "right to the territory", (*pace* numerous writers on secession). So the view I take of this question is no doubt one of "territorial justice" in a wide sense, but would construe the concept as nevertheless misleading, since it implies that considerations of quantity *per se*, global pattern, and even entitlement conceived along lines equivalent or analogous to property, are relevant (all of which I reject).

Over two decades before the publication of Michael Walzer's *Spheres of Justice*, Bernard Williams wrote in an influential article that medical treatment should be distributed according to need, unlike higher education where a kind of equality of opportunity should apply.[6] Walzer generalized the notion that the nature of a good determines the principle of distribution that should apply. Unfortunately he tied his view to a "communitarianism" then coming into vogue, such that the relevant nature of the good was neither universal nor objective, but rather culturally determined and therefore relative. I think the nature of a good can determine the just distribution of the good despite what a culture thinks. For instance, a culture that distributes medicine according to wealth, status, or political influence would be plain wrong.

[6] Bernard Williams, "The Idea of Equality", reprinted in his *Problems of the Self*, Cambridge University Press, 1973.

The nature of territory too should determine how it is distributed. The relevant aspect of its nature is its value to human beings. The value of a good to be considered should be construed in a wide sense as including moral not merely economic value. An immediate *caveat*, to be emphasised below, is that the "distribution" of territory in question is neither identical nor similar to a distribution of property. The relation of the territory to the people in question will be one of sovereignty or state governance, not ownership. Strictly speaking, sovereign governance is exercised by people over people, with territory being a means to this exercise. Only in an extended sense or *façon de parler* can one speak of "sovereignty over a territory"; inattention to this fact causes no end of confusion in the philosophical literature on so-called "territorial justice".

The chief value of territory to human beings is its instrumental one of being a means to self-governance. This is not to deny that territories have other significance: economic, military, geo-political, and affective. But the value of these is far outweighed regarding sovereignty by the instrumental value just mentioned. Moreover, to the extent that these other values ever need be considered, they will be relatively minor components in a much wider range of goods comprising the overall welfare of a state. Discussions of so-called territorial justice systematically neglect the instrumental value of territory, while also committing the related mistake of construing the relation of people to the good in question as one of (or akin to) property ownership.

In theory of secession it has become almost a commonplace that an adequate theory must account for the right of a seceding group to the seceding territory it claims. I shall concentrate on

criticising this idea below, in an effort to defend the broader conception outlined above. If I can make a case that distinct national groups have rights of secession and therefore rights to their territory as means of self-governance, the case for applying other principles to "territorial distribution" will have been crucially undermined. While I cannot present an entire theory of self-determination here, I hope that the outlines of such a theory will be sufficient to make a *prima facie* case for the accompanying conception of territorial rights.

Theories of secession and territory

Much is made in theory of secession of this alleged requirement that secessionists prove an independent claim to a territory, independent, that is, of their wish to be self-determining on the territory on which they are a majority. This is especially true of conservative theorists of secession[7] (Brilmayer, Buchanan, Horowitz, Gilbert), for whom it is a pivotal major premise in their principal arguments. For these writers, advocates of a more permissive secessionary right are blithely oblivious of the need to justify territorial claims *independently*. Horowitz, for instance, puzzles rhetorically how a group right to self-government ultimately grounded in individual autonomy "quickly gives rise to territorial claims on behalf of such collectivities".[8] In an influential paper Brilmayer is more explicit: "The plausibility of a separatist claim does not depend primarily on the degree to which the group in question constitutes a distinct people in accordance with relevant international norms. The normative force behind secessionist arguments derives instead from a different source, namely the right to territory that many ethnic

[7] I use the term "conservative" in this paper in only one sense: for the view that distinct national or cultural-identity groups do not normally have a right of secession just in virtue of being nationally distinct and wanting independence, but need to be facing systematic oppression or genocide, or have a "claim to the territory" based on prior historical sovereignty that has been confiscated through colonisation or forcible annexation.
[8] Donald Horowitz, "Self-Determination: Politics, Philosophy, and Law", in M. Moore (ed.), *National Self-Determination and Secession* (Oxford: OUP, 1998), p. 198.

groups claim to possess.… The currently accepted interpretation of self-determination claims poses the wrong questions in evaluating the merits of particular secessionist claims. It overlooks an important normative ingredient of the arguments that secessionists make, and for this reason understates their claims."[9] Or again, "When a group seeks to secede, it is claiming a right to a particular piece of land, and one must necessarily inquire into why it is entitled to that particular piece of land, as opposed to some other piece of land – or no land at all".[10] Brilmayer's reply, to be examined in greater detail below, is that the sole ground for such an entitlement is prior sovereignty over the land by the group in question recent enough not to be annulled by prescription.

Buchanan too thinks there is a special problem about a seceding group's claim to the seceding territory. Since secession involves removing territory from a state, it can be justified only if the state has in some way forfeited its agency/trusteeship function, which Buchanan considers implicit in the concept of territorial sovereignty. Buchanan thus derives his "Remedial Right Only Theory" of secession (discussed in the previous chapter) from a presumed original right of a state to its territory (so long as it is executing its agency function).[11] (This view is also discussed in a later section). In a similar vein Paul Gilbert holds that there are three "nationalist" claims to territory, based on sentimental attachment, property right, or economic grounds. He finds all these severally deficient (and does not consider the possibility that their aggregate weight could establish a right), yet jointly

[9] Lea Brilmayer, "Secession and Self-Determination: A Territorial Interpretation", in *Yale Journal of International Law*, Vol. 16:177, 1991, p. 178-9.
[10] Brilmayer 1991, op.cit., p. 201.
[11] Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991), p. 113. Cf. esp. pp. 108-114.

exhaustive of "nationalist claims", and appears to believe the onus is on secessionists, not the current state, to justify their territorial claims. He too thus derives conservative conclusions regarding secession from territorial rights, or at any rate an allegedly critical lack of territorial rights on the part of would-be "nationalist" secessionists.[12] Wayne Norman also thinks that a key point of the 'just-cause' theory he advocates is that a secessionist group be able to demonstrate "a valid claim to the territory it wants to withdraw from the state".[13]

I shall contend that much discussion of territorial rights has been afflicted with two shortcomings: a tendency to conflate sovereignty and property rights (or the rationale for each) occasionally even among those making some distinction between them, and a virtually universal tendency to overlook what I contend is the chief value of territory, namely its instrumental value as a means of self-government. The two problems are in fact related. Property rights are particularly suited to resources bearing primarily economic value,[14] while

[12] Paul Gilbert, *The Philosophy of Nationalism* (Boulder: Westview Press, 1998), pp. 91-114. I do not discuss this view further. The approach to rights defended in the first two chapters of this work, the discussion of self-determination in Chapter 4, and the view of territorial rights elaborated in this chapter, indicate my rejection of Gilbert's views across several fronts.

[13] Wayne Norman, "The Ethics of Secession as the Regulation of Secessionist Politics", in M. Moore (ed.*), National Self-Determination and Secession* (Oxford: OUP 1998), p. 41.

[14] By things bearing primarily economic value I mean goods to which it is both feasible and permissible to assign an exchange value in relation to other commodities in a market, and that thus can and may be bought and sold according to the rules of supply and demand. Some things like genuine friendship or more proverbially love, are not amenable to such exchange; that is, it is not *feasible* that they be treated as commodities . Love is a sentiment, and friendship has sentiment as an essential constituent. Sentiments are not marketable for two conjoined reasons: they cannot normally be produced at will, but only in spontaneous response to what might be called their natural stimulants, and those stimulants are inseparable features of the object of sentiment and cannot be removed from it. Other goods, such as political office, freedom, self-government, arguably organs for transplant, *can* be bought and sold, but *ought* not to be because the principles of distribution appropriate to each are (in all likelihood) incongruent with unpatterned market distribution. Both sorts of good are discussed in Walzer's *Spheres of Justice* but not distinguished. Self-government, like human freedom in general, morally belongs outside the sphere of the market because while unlike friendship it *could* be marketed, it is too important for each individual and group to be exchanged according to the laws of supply and demand. But I don't wish for a moment to deny that territories have economic value; the point I will attempt to defend below is that their value to self-government is so important that at least for questions of basic self-determination their economic value is not their primary value. A crude analogy would be the economic value that Nazi Germany found for the parts of corpses mass produced in its death factories; one need not deny that human bodies can have economic value to deny it is their main value.

sovereignty rights are most appropriate for the necessities of self-government (a good which I take normatively to belong outside the sphere of the market). Failure to assign appropriate weight to the instrumental value of territory therefore goes hand in hand with a construal of sovereignty rights as akin to property rights.

Cara 6/10/09 19:33
Comment: 'necessities' seems to strict here. Certainly, then, our common concept of territorial rights would be truncated under this view—only those resource rights/immigration rights that are necessary for self-government?

Territories of course do have economic, as well as geopolitical, military, and sociocultural significance. For various sorts of conflict these other values are particularly important. The problem is not that these values have received attention, but that the attention they have received has tended to crowd out the instrumental value virtually entirely. In discussions of so-called territorial justice the economic value appears to dominate almost to the exclusion of anything else, often due to a presumption that it is the primary or most significant normative value of territory. Such valuation can be discerned, I believe, in comments by a wide range of philosophers, including some not committed to an implacably conservative view of secession, such as John Rawls, David Miller, and Hillel Steiner. When another value of territory is acknowledged at all, this is nearly always what is variously called the sociocultural, affective or sentimental significance to the nation of a territory.[15] I agree below that this significance

Cara 6/10/09 19:35
Comment: Hillel separates the economic value from the political value. Are you proposing that there's a way to unify the value, or are you agreeing with the separation?

[15] Rawls argues that states have rights to territories deriving from the advantages of giving them the responsibility for maintaining and developing exclusive parcels of land. This justification is the same as that for the institution of property: "Unless a definite agent is given responsibility for maintaining an asset and bears the loss for not doing so, that asset tends to deteriorate. In this case the asset is the people's territory and its capacity to sustain them in perpetuity; the agent is the people themselves as politically organized." (Rawls, "The Law of Peoples", p. 57, in Stephen Shute and Susan Hurley (eds.), *On Human Rights*, Basic Books, 1993, pp. 41-82.)

Hillel Steiner treats state territories as aggregated out of the individual landed estates of their citizenries in "Persons and Places", pp. 262-5 of his *An Essay on Rights* (Oxford: Blackwell 1994). This is elaborated upon in his "Territorial Justice", in S. Caney, D. George and P. Jones (eds.), *National Rights, International Obligations* (Boulder, Colorado, Westview Press, 1996).

David Miller accepts that sometimes the "principle of nationality" can establish good claims to secede; therefore he is no conservative on secession (though more conservative than voluntarists). But his second criterion that a group must meet for a good claim to secede is an ability "to validate its claim to exercise authority over the territory it wishes to occupy". The phrase "to exercise authority over the territory" is ambiguous; it could be understood as 'to exercise authority over the people residing on the territory', a claim which follows simply from the "principle of nationality", rendering the second criterion redundant. However Miller makes clear that he intends by it that the group have an independently valid claim to the territory based

might serve to justify certain limited rights (not to be forcibly moved from one's area of settlement, access of pilgrimage, possibly some environmental or other jurisdictional autonomy) but is by itself normally insufficient to justify anything like full sovereignty; to think otherwise is again to overlook the primary value of territorial sovereignty as a means of self-government.

All the writers cited so far believe that in a successful secessionist claim, a right to a territory must be established independently of a right of self-determination. Let us call that *the independent claim requirement*, which is implicitly the rejection of the view that a right of self-determination is by itself sufficient to establish a right of a group to independence on a territory. Now it is interesting to note that authors such as Buchanan do seem implicitly to allow a new claim to territory to have been established by secessionists in "remedial" cases. (Not that they ever say this – they actually just forget about the independent claim requirement in these cases – but implicitly they accept that a territorial claim has been made valid by need). Remedial cases involve the severe oppression of a minority. One could thus regard the need for self-government in such cases as establishing a *dependent* right to the territory, i.e. a right to the territory as a means of exercising the right of self-government. After all, these seceding groups have no better *in*dependent territorial claim than secessionist groups in non-remedial cases. So the question is why the dependent claim cannot likewise be established in non-remedial cases, that is, in cases that don't fall into the category of "remedial right" accepted by Buchanan and those who follow him. There must be some

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on its attachment to the territory established through occupation and transformation of it. This too is a requirement for independent validation criticised in a later section below.

consideration - some reason or claim - sufficient to bear the normative weight of denying full self-determination to certain distinct national groups. In other words, it cannot be just a lack of an independent territorial claim *per se* that results in the failure of the Territorial Cultural Identity Group (TCIG) to enjoy a right of secession; it would be question-begging simply to assume that a sufficient *dependent* justification cannot follow from the right of self-determination of TCIGs. Or put another way, if the theory holds that a new territorial claim can arise only when the existing state has ceased to perform certain functions (as Buchanan argues) there must be some powerful normative consideration for limiting these functions to the set of traditional liberal ones; that is, which exclude the expression and reinforcement of the national identity of its members that I have argued elsewhere[16] to be grounds for secession. Surprisingly, however, what allegedly does the actual normative work tends not to be made very explicit by these writers, arousing the suspicion that for some of them there may be a mistaken assumption that demonstrating a lack of an independent territorial claim is enough to deny a territorial secessionary right. (Again, such an assumption would beg the question of whether a sufficient *dependent* territorial claim could be established on the basis simply of the right of a TCIG to self-determination).

It will be necessary, therefore, to speculate what could constitute such a reason, and then to weigh its significance against the reasons for holding that there is a dependent (means-end justified) territorial right. It will be argued that the interest of TCIGs in having the option of independent self-government sufficiently outweighs countervailing considerations to

[16] The text here refers to other chapters in a forthcoming book, but a couple of other places where I have argued this are: "Rights of Secession", *Society* Vol. 35, No. 5, July/August 1998 ; and "Secession, Law, and Rights: The Case of the Former Yugoslavia", *Human Rights Review* 1/ 2, 2,000.

establish a right to territory and therefore secession in what I have called elsewhere the Standard Case. [17]

Territoriality, Sovereignty and Property

Territoriality defined

I begin with a discussion of conceptual issues at a very general level. Geographer Robert Sack has coined the term "territoriality" to describe "the attempt by an individual or group to affect, influence, or control people, phenomena, and relationships, by delimiting and asserting control over a geographic area" (Sack, 19)[18]. Territorial strategies, in this sense, can range from the posting of non-smoking signs in a room or building, to the disallowing of small children into a part of the house with breakable or dangerous objects or a room to be kept clean for guests (or into the deep end of the swimming pool), the defense by criminal or youth gangs of their 'turf', zoning laws within a city or country, the erection of borders between two countries, or the declaration of supra-state zones, whether of free trade, military alliance, or environmental treaty. All these exhibit territoriality as defined above.

Although Sack speaks above of "a geographic area", possibly implying a two-dimensional land or marine surface, the previously defined "territoriality" could in principle be applied to three-dimensional spaces lacking land or other planar surfaces. Even if future people lived in private spaceships, not unlike the permanent inhabitants of longboats in the canals of Oxford but circulating freely in the three dimensions of outer space, it is conceivable that future

[17] I mean by this simply that a group, say Quebecers or Chechens, have a distinct cultural identity, constitute a majority on their territory – usually demarcated by a sub-state administrative unit – and have expressed a majority (or special majority) wish to secede, say in a referendum.
[18] Sack, Robert David, *Human Territoriality: Its Theory and History* (Cambridge: CUP, 1986) p. 19.

governments might still impose laws on delimited spatial territories to regulate behaviour. (Reasons for this will be discussed shortly). Thus the economic value of a territory may have little or nothing to do with the reason for imposing laws territorially; the section of outer space can be assuemed to be economically valueless.[19] Even at present there are laws regulating atmospheric as well as outer space, thereby employing territoriality in space as a strategy for controlling behaviour. For obvious reasons not least of which is gravity, humans live their lives nearly always about the surface of earth; hence territorial strategies need be employed principally on land.

Cara 6/10/09 19:40
Comment: I don't get who says that it is the only reason for imposing laws territorially.

Why might the society of spaceships be regulated by territorio-spatial laws, and why in fact has the territorial sovereign state become the norm in the modern world? The latter question is too broad to be given extensive treatment here, but at least part of the answer to it is not merely historical, and can be provided in reply to the former question. Sack has suggested that generally there are several distinct advantages to pursuing territorial strategies, and that the advantages of organising modern government territorially is just a special case of this.[20] First, the enforcement of authority is enhanced, as enforcement agents can be permanently stationed throughout the territory, adapting tactics to local conditions, and

Cara 6/10/09 19:41
Comment: Good stuff. This reminds me that I should read Sack again.

[19] Space can have economic value, however, despite being nothing but space. Suppose this society wanted to build space-station factories or shopping malls near population concentrations or popular travel routes. As with land on Earth, space can be appropriated and its prices fluctuate in proportion to demand. One can stipulate in the example that such values are not a factor.

[20] The remarks in the text that follow draw generally but not in detail (which I have elaborated) on Robert Sack, *Human Territoriality: Its Theory and History* (Cambridge: CUP 1986); Sack, *Conceptions of Space in Social Thought* (Minneapolis: University of Minnesota Press 1980); and Alexander Murphy, "The Sovereign State as Political-Territorial Ideal", in Weber, Cynthia and Biersteker, Thomas (eds.), *State Sovereignty as Social Construct*, (Cambridge: CUP, 1996). See also John Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations", *International Organization* 47; Jean Gottmann, *The Significance of Territory* (Charlottesville: University of Virginia Press 1973); and Edward Soja, *The Political Organization of Space* (Commission on College Geography Resource Paper No. 8, Washington D.C.: Association of American Geographers 1971).

controlling the entire space physically surrounding any violations of authority. It is of course much easier to hunt a violator in a permanently controlled area; one also seeks to prevent violators from leaving such an area by controlling its borders. Controlling territorial borders is also critical in preventing unwanted external influence on those one seeks to control, in forms such as propaganda or organisation aimed at subversion of one's authority, and contraband. Secondly, authority can be communicated more efficiently to those the authority seeks to control. Again, this is partly a result of the possibility of having permanent networks and channels of communication throughout the territory of those one seeks to control, partly and concomitantly of increased familiarity with those within the territory (of knowing where and how to locate and reach those under one's authority), and of being able to consolidate resources in conveying the authority's message. In the case of the sovereign state this has also gone hand in hand with the reduction of differences among those in the territory, enhancing bureaucratic control. To these Sack adds a third advantage: the reification of power. Rather than authority being abstract, the power that it wields is permanently visible in its local representatives and fixed symbols, and its scope can be conceptualised geographically as opposed to abstractly. All these offer distinct advantages for authorities, whether or not they enjoy any legitimacy, which can be summed up as the advantages of enhanced efficiency of bureaucratic control and enforcement. (We shall return to the society of spaceships in a later section).

Property and sovereignty: their nature

With this appreciation of territoriality in mind we can return to the distinction between property and sovereignty. Before attempting precise definitions we can rely on intuitive understandings of the concepts to make some preliminary observations and comparisons, which will also enable us to address one objection to the very distinction. Both property laws as applied to territorial entities (with territory again construed three-dimensionally, and including land, buildings, subterranean and potentially air and submarine property) and sovereignty exhibit territoriality as defined above. Moreover, it is also true that property laws have historically served as effective means of controlling people in at least two other ways. First, in many societies including pre-modern Europe property laws have been extended to people themselves. But secondly, in almost every society having anything akin to property laws property has come to include the means to people's livelihood. Property laws too have thus served as "attempt[s] by an individual or group to affect, influence, or control people, phenomena, and relationships" *not* only through territoriality *per se* but through *ownership* of both movable (hence non-territorial) as well as immovable goods, the latter including various factors of production of which land is just one. To sum up, both property and sovereignty have functioned as means of controlling people, property both via territoriality as applied to certain fixed goods but more importantly non-territorially as applied to movable or immovable goods, and sovereignty - the assertion of legal authority and control over particular people and goods – virtually always via territoriality (although non-territorial sovereignty is conceivable and was common in pre-modern Europe).

For this reason it has seemed to some observers that the conceptual distinction is at best blurred. Morris Raphael Cohen, for instance, has urged that despite the long tradition from the Romans onward of distinguishing between property and sovereignty - *dominium* pertaining to the control over things and *imperium* to the control over people, corresponding roughly to the distinction between political or public and civil or private law – in fact the distinction is far from clear. Not only did the pre-modern period in Europe and elsewhere witness the instituted sovereignty by the landlord over the tenant, but the state in modern capitalism fosters the control of employees by employers (disguised by the illusion of a free contract) which is tantamount to a transfer of sovereignty from the state to the private owner of capital.

In making this argument Cohen appears to be operating with something akin to the Roman distinction. Implicitly he believes that if he can show that property ownership is used to control people then he has blurred the distinction between sovereignty and property; and he means this in a sense beyond the trivial one that every law is a means of controlling people. He fulfills the implicit condition by drawing attention to the way modern property law, even while prohibiting direct ownership of humans, gives employers vast control over their employees.[21] For Cohen this means "the passing of a certain domain of sovereignty from the state to the private employer".[22] If the law gives me the right to certain things which are necessary for someone else's livelihood – food or shelter (Cohen's examples), heating in a

[21]He illustrates this with the 1923 U.S. Supreme Court decision allowing employers to pay less than subsistence wages and to fire employees thought wishing to join a trade union, though these decisions have been superseded; M.R. Cohen "Property and Sovereignty", in C.B. Macpherson (ed.) *Property : Mainstream and Critical Positions* (Oxford : Basil Blackwell, 1978).
[22] M.R. Cohen, *op. cit.* , p. 158.

cold climate – "the law thus confers on me a power, limited but real, to make him do what I want. If Laban has the sole disposal of his daughters and his cattle, Jacob must serve him if he desires to possess them. In a regime where land is the principal source of obtaining a livelihood, he who has the legal right over the land receives homage and service from those who wish to live on it." Like his namesake in our own time (G.A. Cohen), M.R. Cohen follows a long socialist tradition in arguing that "the primary effect of property on a large scale is to limit freedom, since the one thing that private property law does not do is to guarantee a minimum of subsistence or the necessary tools of freedom to every one. So far as a regime of private property fails to do the latter it rather compels people to part with their freedom."[23]

Cohen might be right that the boundary between the concepts as *he* defines them is blurred. But one can make his point that regimes of ownership can serve as effective means of controlling people or limiting their freedom while defining property and sovereignty as conceptually distinct, and one has reason to do so. While an extensive discussion of property cannot be undertaken here, for current purposes a relatively brief definition should suffice. First, it will be convenient to intend by 'property' the entire institutionalised relation between people and things designated by legal ownership, as opposed merely to the objects that are owned. Objects owned are paradigmatically material resources but by extension include such abstract items as patents, copyrights, and other intellectual property. Scarcity of resources is a basic presumption underlying any system of property ownership,[24] and for current purposes private

[23]M. R. Cohen, *op. cit*., p. 165.
[24] As Waldron observes, this presumption has been acknowledged by many philosophers including Hume, *Treatise*, Bk. III, Pt. II, section 2, Hart, *Concept of Law*, pp. 192 ff., and Rawls, *A Theory of Justice*, pp. 126 ff..

property can be taken as the prototype of all property relations.[25] Legal ownership, then, or 'ownership' for short, designates a cluster of legally sanctioned rights on the part of an owner with respect to a thing owned, which revolve around a general claim-right to use and dispose of the thing as the owner pleases within the constraints of other legal duties.[26] Traditional legal texts speak of *usus*, the right to use, *fructus*, the right to enjoy the fruits of, and *abusus*, the right to abuse, as three basic components of the right of property. Antony Honoré provides a more elaborate list of standard "incidents" of ownership common to Western legal systems: *claim rights to possess, use, manage, and receive income from, liberties to consume or destroy, powers to transfer, waive, exclude, or abandon; immunity from expropriation; the duty not to use harmfully; and liability for execution to satisfy a court judgement.*[27]

See Waldron, *The Right to Private Property* (Oxford : Clarendon Press, 1988), pp. 31-2 including his note 11 for these and other references. An assumption of lack of scarcity plays a famous role in Locke's theory of original acquisition in his *Second Treatise*. For the moral significance of scarcity or its lack in theories of original acquisition, see Allan Gibbard, "Natural Property Rights", *Nous*, 10 (1976) and Antony Honoré, "Property, Title and Redistribution" in Virginia Held (ed.), *Property, Profits, and Economic Justice* (Wadsworth: 1980), pp. 84-92.

[25] We need not enter here into the issue of whether collective or state ownership falls within the concept of property relations, which on some restrictive definitions of property is denied. The focus of this chapter is whether *justifications* of sovereign rights to territory bear significant resemblances or analogies to those of property rights, but this question can be examined independently of whether states and collectives can strictly speaking own property. Waldron holds that collective forms of ownership can be examples of property because "[t]he concept of property is the concept of rules governing access to and control of material resources, and such a system of rules may assign to several people rights in the same resource." (Waldron 1988, op. cit., p. 35).

[26] As observed in Chapter 2, claim-rights are usually 'encumbered' by other duties (the mirror image of Bentham's 'vestedness' of liberties). A similar point is made by Waldron, *The Right To Private Property*, who urges *pace* Honoré that duties not to cause harm with one's property *not* be incorporated into the definition or list of standard "incidents" of private property but rather be regarded as general background constraints on action; Waldron 1988, op. cit.) p. 32 and 49. (See below in text for Honoré's modified list). My use of "general" in the text refers not to the domain of rightholders but simply to the level of abstraction as opposed to specificity of the right. A general right to own some property can be broken down into specific components, each with correlatives, usually negative duties correlated with specific claim-rights.

[27] A. M. Honoré, "Ownership", in A.G. Guest (ed.), *Oxford Essays in Jurisprudence (First Series)* (Oxford: Clarendon Press, 1961), pp. 107-47, esp. pp. 112-128. The italicised words in the text are nearly identical to Steve Munzer's slightly modified summary of Honoré in *A Theory of Property* (Cambridge: CUP: 1990), p. 22, which I find convenient to borrow. Munzer develops this conception of property as "a constellation of Hohfeldian elements, correlatives, and opposites". I note again Waldron's reservation (see previous note) regarding the incorporation of duties not to use harmfully within the definitional list. As Honoré points out, the list provides jointly sufficient but not individually necessary conditions for ownership. On this point, see Munzer, ibid., and Waldron, who regards the list as serving a family resemblance model, not a list of jointly necessary and sufficient conditions (Waldron 1988, op. cit., p. 49-50).

It is worth noting that each of these "incidents" can in principle be legally removed for some owned things, say, by a prohibition on the right to destroy artwork deemed part of the national heritage, or by capital gains tax or through eminent domain. Whether the removal at any time by sovereign power of one or more of these incidents renders the remaining relationship no longer private property *per se* is not relevant here; the essential point is that governments normally do have the authority to limit property rights in this way. This raises two further points about immunities. First, even immunities from expropriation, when they exist, will themselves fall under sovereign authority, sometimes constitutionally, in which cases there is usually a prescribed amendment procedure, however unlikely to be used, with which the immunities can be modified or removed. (Immunity in the Hohfeldian analysis correlates with a lack of power on the part of others to alter a first-order right, but as the term is commonly used it can refer to a relative though not absolute protection; that is, the correlative power does not lack entirely but is restricted). Secondly, if, hypothetically, there were no constitutional provision for removing such an immunity, it would at least be arguable that this too would be a legal condition deriving its ultimate authority from – and requiring enforcement by – the sovereign authority. Thus in normal cases property law is at least formally and to various extents also in practice derivative of and subject to sovereign authority, such that at least *de jure* sovereignty in a sense is superior to and encompasses (i.e. governs) property relations.[28]

[28] From a Lockean perspective, the people are "sovereign" and government holds merely fiduciary power entrusted to it by the people. On that view, the property owners are themselves sovereign (on the original Lockean view "the people" or citizenry are indeed restricted to owners of estates), and have created government for the purpose of defending property rights (which include on Locke's view rights to life and liberty, since people's bodies are their own property). It seems here that while legal property rights derive from legal government, the government's authority itself derives from property owners who are sovereign. Perhaps one could argue that while natural law enjoins one to respect property rights, legal authority to defend such rights still resides in "the people" *qua* citizens, such that *legal* property rights are still subordinate to sovereign authority, that being the citizenry. Nothing in what follows depends for its validity on how one views these

Sovereignty implies ultimate political authority over citizens through the framing and enforcement of laws, and by extension through the creation of regulatory bodies and agencies invested with legal authority. Property laws are mere components, however important, of this authority. That is, they are themselves at least formally and usually in various ways in practice dependent on the sovereign power that enacted and enforces them and that in principle could annul them; on the other hand this is itself but one component of the vast purview of sovereign government over its citizens. A sovereign government can fix the legal age of consent for sexual activity, drinking, driving, and voting (and decide what sexual activity is permissible), determine what constitutes a legal contract and what are the legal duties of a contractor (which can differ significantly even among Western states such as Britain and France), and indeed, rule over the entire range of jurisdictions of a modern state: the vast array of criminal and civil law, including property law itself and eminent domain, as well as defense, health and welfare, unemployment insurance, public construction from roads rails and bridges to monuments museums parks and gardens, labour relations, gender relations, monetary fiscal and income policies, tariffs, taxation, industrial incentives, education, internal and external security, agriculture, fishing, forestry, mining, environment, development, and tourism policy, external relations, and the budgetary allocation not only between each of these but between regions, levels of government, and so forth. We can now modify the statement of contrast between the way property and sovereignty effect control over people. In any modern legal system - where people may not themselves be owned by others - the ownership of property regulates the behaviour of people in a single general way: by imposing the cluster of largely negative duties with respect to the things owned

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issues.

on everyone who is not the relevant property owner. This form of control, to be sure, is not trivial when ownership (sometimes by a relative few) encompasses most means of livelihood, subsistence, and production in a society; it can then become a secondary *indirect* control by one group over another. The nature of this control is quite different from that of sovereignty, since sovereign government can and typically does control people *directly* by imposing duties in virtually any area of life deemed worthy of regulation, encompassing but far surpassing those pertaining to property itself. Regulating behaviour is a necessary feature and purpose of government, and therefore central to the justification of both the institution and the scope of particular governments; property ownership, while it may have secondary effects of creating dependence relations between groups of people, is rarely if ever justified by those effects. That is, such effects are not part of the purpose for the sake of which it is publicly justified, as is conceded by critics of private property who denounce standard justifications of it as "ideological".

Property and sovereignty: their justifications

Given the colossal chasm between the nature and extent of sovereign government, on the one hand, and the institution of private property on the other, it would be surprising if the normative justification of the institution and distribution of the one significantly resembled that of the other. Moreover, even if the laws pertaining to my property derive from the same sovereign authority under which I properly belong (which, though the norm, need not always be the case: I might own property in a different state than my own), the normative reasons to which that authority ought to respond in determining property law would very likely be rather different

from the normative reasons (say, invoked by a philosopher) appropriate for justifying the right of that government to determine the vast array of laws (including property laws) on the territory under its jurisdiction.

This is not to deny that there might be very general principles – autonomy, equality, utility – which play a role in the justifications of both. But that is true of many important rights: to an independent media, to use public parks, to be informed of government plans or to vote. The question is rather how those general principles connect with the specific rights, and how this connection is mediated.

The Justification of Property

While there are many analogies and disanalogies between justifications of sovereign government and justifications of the institution of private property, the principal disanalogy for current purposes is the following. The justification of private property is a justification of an ownership relation between people and the things owned. It follows that, whatever the reasons invoked in the justification, whether freedom, welfare, efficiency, or justice itself, the justification of the institution will normally also be a justification of how the good should be distributed. Indeed, when the justification is what Waldron calls a rights-based one, that is, a justification based on the value of having property to property-owners themselves, as opposed to a more general beneficiary, the justification will normally constitute a direct answer to the central question of distributive justice: How should resources be distributed? This is true for

both the Lockean-Nozickean tradition and egalitarian views that are right-based. The former replies directly to the distributive question by asserting that individuals have rights to keep the property they have justly acquired (whether by legitimately appropriating commonly held resources or by receiving private consensual transfers). Since rights of acquisition and transfer are inviolable and are not restricted by any other distributive principle, the answer to the question of distributive justice, or what Waldron calls the allocation problem, is in Nozickean terms an unpatterned one justifying private property: any pattern that emerges is a just distribution so long as the rules of acquisition and private transference have been followed. Thus the question of how resources should be distributed is answered by the proposal that the institution of private property should distribute them according to the choices and actions of individual property owners. The institution is itself justified as an answer to the question of just distribution.

Others views – Lockean welfarist, prioritarian, and egalitarian of different varieties – so long as they defend private property do so at least in part as a direct answer to how resources should be distributed. Those who emphasise Locke's proviso that "enough and as good" be left for others when appropriating from the commons believe that distributive results from individual choices must be constrained; still they think those individual choices must give some input into the emerging distribution, and justify private property accordingly, while the proviso further influences allocation, perhaps by guaranteeing some minimum to all. Private property egalitarians who think Wilt Chamberlain's earnings, *pace* Nozick, should be regularly redistributed, still think that the regular redistributions should grant some of the basic incidents

of Honoré's list of ownership criteria to individual property holders, even if egalitarian principles constrain how much one may accumulate for oneself or transfer to others. So here the defense of private property will mainly answer what sort of control individuals should have over resources, and that again simultaneously replies to the distributive question.

A slightly different case is the Hegelian justification of private property due to its significance to the ethical development of the individual. This follows an Aristotelian tradition relating property ownership to the development of the virtue of the owner, and ought to be interpreted, according to Waldron, as grounding a *general* right of individuals to some (sufficient amount of) private property. In other words, not any unpatterned distribution, but one leaving some sufficient private property to each, or perhaps, modifying Waldron's conclusion, at least sufficient *opportunity* to acquire sufficient property for each,[29] is justified by the argument from ethical development. So while the value of property to the property owner is now its contribution to her ethical development, a distributive criterion – each must have some – is directly implied as well.

Justifications of sovereignty

Now consider the justification of the institution of state sovereignty. Here there are really several questions that are theoretically separable. The first question is whether there should be government as opposed to anarchy. A second question is whether that government should take the form roughly of a modern state, that is, whether it should be territorial with clusters of identically bounded jurisdictions. The third question is how these geographic boundaries should be delimited, that is, what the distribution of state government and territory should be. Unlike in

[29] A Hegelian need not endorse constant reallocation of resources to the incorrigibly profligate.

the property case, the distributive question regarding territory is unlikely to play any central role in the justification of the institution of sovereign government itself. Whereas with property the value of the institution in at least the rights-based theories has something to do with the value of ownable things themselves to whoever owns them, with sovereign government the value of the institution (versus a condition of anarchy) seems entirely independent of the intrinsic value of territory to those who have sovereignty over it. In fact, it would be rather odd to justify the very institution of sovereign government simply as a way of distributing the Earth's territory, whereas there is nothing peculiar about justifying the institution of private property as a way of distributing the Earth's ownable resources. Sovereign government, as we noted, implies regulating everything from the age at which one can have sex to whether army service is obligatory. It would be a very bizarre theory that allocated this sort of control simply as a byproduct of allocating control over land. Rather, normatively speaking things are much more likely the other way around: we first seek some relevant principle of allocating control over people by governments, and territorial divisions fall out as a byproduct of these; that is, we allocate governance by principles appropriate to *that* distribution, i.e. principles based on the intrinsic relations between governors and governed, and subsequently, recognising that there are strong reasons of bureaucratic and technocratic efficiency for governance to be arranged territorially, allow the distribution of territory to sovereign governments to track the first distribution of governance.

In fact, as several writers have pointed out, liberal philosophy, though much concerned from the start with justifying the authority of states, has had little if anything to say in the way of

justifying the *territorial* nature of states at all,[30] far less has it sought to justify the authority of states by some territorial *distributive* principle. (Although a world divided into territorial states was a still emerging phenomenon at the dawn of liberalism, that sovereignty should be organised territorially seems not to have been for early liberal thinkers an issue meriting much attention,[31] let alone a system in need of justification.[32])

Quite understandably, political philosophers in the liberal tradition defend the authority of states, to the extent that they do, by reference to the necessary role of coercive power in securing basic rights. Traditionally this has meant preserving maximum compossible liberty along with the basic security of each. They then assume, for possibly good reason, that this coercive power should be applied territorially. None of this, however, is at all helpful in answering the further

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[30] "[T]he notion of territorial dominion as a major ingredient in the concept of statehood ... is a feature given only passing notice by philosophers. The focus of orthodox political philosophy has been the connections between citizen and government, a relationship which would appear to have no geographical component whatever." (Haskell Fain, "The Idea of the State", *Nous* 6, 1972, p. 18). Thomas Baldwin, after surveying the common acknowledgement by political and legal theorists that territoriality is an essential component of states, observes: "What none of this justifies, however, is the assumption that the territorial conception of the state has legitimate application." (Baldwin, "The Territorial State", in Hyman Gross and Ross Harrison (eds.), *Jurisprudence: Cambridge Essays*, (Oxford: Clarendon Press, 1992). The point is implicit in Onora O'Neill's observation: "Boundaries creep into political philosophy without us noticing. For example, within the liberal tradition of political discourse a theory of justice is typically employed to give some account of universal rights and of the limits of legitimate state powers, yet before we know it we are talking about the powers not of the state but of *states*." Though one alternative to a plurality of states is a global state, O'Neill is primarily thinking of the possibility of breaking up sovereignty into jurisdictions of varying territory. O'Neill, "Justice and boundaries", in Chris Brown, ed., *Political Restructuring in Europe: Ethical Perspectives*, (London: Routledge 1994.)

[31] John Locke might seem an exception, as he appears absorbed with the role of landed estates in the constitution of state authority. It is arguable however that contrary to standard commentary Locke did not think the territorial boundaries of states derived jigsaw-like merely from the private estates of citizens who comprised them. He held that a person's body was also his property, that the commons were under the authority of the state, and that individuals could leave a state but not take their property with them. The last two of these propositions are inconsistent with the jigsaw view, but consistent with an alternative interpretation: that the state's authority derived from the sovereign citizens who comprised it (the first proposition explains why Locke nevertheless held that the purpose of the state was to protect property), and that its territorial boundaries were roughly those necessary to govern those who tacitly consented to its authority. That is, the territorial aspect of the state's authority derived simply from its instrumental service to governance, not strictly from the consent of landed estate owners to incorporate their land into the state.

[32] Similar inattention characterises modern classics of philosophy, from Hart's *Concept of Law* to Rawls' *Theory of Justice*, although Rawls' last work included some passing remarks about it.

question of what the optimal boundaries of a state's territory should be. Let us separate the three questions formally:

A. Should there be government and what should its general nature be (representative, minimal, perfectionist, etc.)?

(An affirmative reply to the first part implies a rejection of anarchy or remaining in the state of nature.)

B. Should government be territorial?

(While liberal philosophers have historically ignored this question until recently, they presumably would agree that requirements of bureaucratic, technocratic, and policing efficiency as discussed earlier in this chapter imply an affirmative answer to this question.)

C. How geopolitically should the government's authority be bounded?

Now it will be noticed that the answer to A is independent of the answer to C, even if the reply to B is affirmative. In fact there is nothing in the usual liberal answers to A which help to answer C. For even if liberal governments are justified by and to the extent that they fulfill certain *functions*, this by itself *provides no basis for an answer to C.* It in no way follows without additional premises that one liberal government carrying out these functions on a given territory is superior to two or four or seven such governments carrying out the same functions on the same territory. Nor does it follow that moving from a situation of one such (well-functioning) state to that of more than one is illegitimate, unjust, or undesirable, far less because the original government, or whoever it represents, has some sort of quasi-property-like entitlement to the land mass or territory on which it happens to govern.

Conservative Views and the Independent Claim Requirement*: Buchanan*

Let us consider Buchanan's territorial argument against permissive secession mentioned at the beginning of this chapter. Buchanan believes that there is a special difficulty in justifying a right of a group to secede, because of two basic claims:

> Premise One: "territorial sovereignty is an agency/trusteeship function carried out by the state on behalf of the people as a multigenerational community".
>
> Premise Two: a "sound justification for secession has two territorial components: an argument to show that the state either never had or had but has lost territorial sovereignty over the seceding land, and an argument to show that the seceding group either has had or ought now to have territorial sovereignty."[33]

Putting these two claims together, Buchanan arrives at the result that the "two territorial components" of a sound justification of secession can be met in only three ways: where rectificatory territorial justice requires the restoration of a territory lost by conquest), when (here departing from Brilmayer's account) the state oppresses the secessionary group such that the state's "agency/trusteeship function" has been breached, or else when the group faces assault (in his example a genocidal one) by a third party and can't be protected by the current state. In other words, since secession involves removing territory from a state, it can be justified only if the state has in some way forfeited its agency/trusteeship function, which Buchanan considers implicit in the concept of territorial sovereignty. Buchanan thus derives his "Remedial Right Only Theory" (discussed in the previous chapter) from a presumed original right of a state to its territory (so long as it is executing its agency function).

But the argument is unsound. Let us begin by examining the first premise. It certainly does not follow from the claim that states are justified only by and to the extent of their carrying out

[33]Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991), p. 113. Cf. esp. pp. 108-114.

certain functions (the answer to question A of the previous section) that they *ought* to be bounded, let alone have *rights* to be bounded, exactly as they *happen* to be bounded while carrying out these functions (the answer to C). (Nor does the conclusion follow when one adds an affirmative answer to B, assumed by Buchanan). At most that premise alone can establish (along with a relatively uncontroversial general principle, reasonably interpreted, that one ought to maintain or promote a situation in which the public goods resulting from these state functions continue to be produced) that no state or states should arise - on the territory of an already existing state fulfilling its vital functions - that themselves fail to fulfill these functions. Perhaps one might add: fulfill these functions at least as well.

But when one adds Buchanan's second premise, the argument is no better off. That second premise asserts that there must be a conjunction of two "territorial components" in a sound justification of secession. The first conjunct is that the original state has never had or has lost territorial sovereignty over the seceding land. Either the phrase "has lost territorial sovereignty" refers to a *de jure* or to a *de facto* loss ("has lost the right of territorial sovereignty" or "has lost actual territorial sovereignty"). If the first, then the claim would contribute nothing to the argument, since the argument is itself purporting to determine when one has or has lost a right of territorial sovereignty. If the second interpretation is meant, the claim is question-begging, since it assumes without argument precisely what the first premise failed to entail, namely that states have rights to the territories they have so long as they fulfill their vital functions. (Why else should secessionists have to show that the majority state has lost de facto territorial sovereignty?) But we are still in need of an argument to show that an answer to A entails an

answer to C; that is, that a justification of having states versus anarchy (i.e. that the functions states perform are vital) tells you how they should be bounded (the burden then falling on secessionists to show that the state has lost *de facto* territorial sovereignty).

The second "territorial component" is that the secessionists allegedly must show that they have had or ought now to have territorial sovereignty. That they have had such in the past is not obviously relevant; we will discuss this further in comment on Brilmayer. That they ought now to have territorial sovereignty is again an empty premise, since whether they ought to or not is precisely what the overall argument – of which this is supposed to be a premise – is purporting to prove. (The fact that a permissive theory can just as easily meet the conditions demonstrates their emptiness).

Another Conservative View and the Independent Claim Requirement*: Brilmayer*

We will return below to the question of what premises could be added to make the argument sound. But first let us turn to Brilmayer, whose influence on the conservative view appears to have been substantial. Brilmayer denies that either consent of the governed or national identity has any necessary connection to the right of states to have legal jurisdiction over their territories; if they did, that would sanction secessions based on the wishes to secede of any territorial group or on a group's status as an ethnic minority. Only a title to a territory could give a group a right to secede, any such title derives from the prior sovereignty of that group, and these in turn are conceived along Nozickean lines of title and transfer. Like Nozick, Brilmayer is hazy about questions of justifying original entitlement, but in her case (unlike his) perhaps for the not unreasonable assumption that international stability requires considerable use

of prescription: all territorial possession is either entitled by prescription or illegal because of a competing title, itself valid by prescription.

There are three particular difficulties with Brilmayer's conclusions, however, which I think are fatal both for her territorial view, and by implication, for *the independent claim requirement* in general. The first problem arises when one asks who the holder is of a legitimate title to a territory, say in a remedial claim against an illegal annexation. Brilmayer is forced to concede that it appears that ethnicity is necessary to establish who the valid title-holder is. In the case of the annexed Baltic states, for instance, if no one had been left who spoke Estonian, Latvian, or Lithuanian, or who at least identified with the conquered national group, there would be no one to claim legal title to the territory, and therefore no title-holder to whom the territory could be returned. But why, we are then bound to ask, is ethnicity a determinant of *continuous* entitlement but impotent to create *original* entitlement? The question opens precisely the can of worms that the "territorial view" was meant to foreclose, namely whether the special value of sovereign statehood to national groups - acknowledged as normatively significant in the continuous case - can create entitlements.

One might think Brilmayer has available the following reply. The objection was that if ethnicity is necessary to identify the titleholder and thereby to establish continuous entitlement, it should also be able to establish original entitlement. But perhaps ethnic group identity is a necessary but insufficient condition of a possible title holder, just as individual personhood is merely the identity marker of a possible owner of property, say a bicycle. Just as being a person is nevertheless insufficient to generate a claim to own a bicycle (owning a

bicycle is not a human right) ethnicity is insufficient to generate a claim to exercise sovereignty over a territory: there is no ethnic group right to a territory. Thus there is no contradiction, and possibly not even tension, between holding that ethnicity is necessary for establishing continuous identity but not for creating original identity.

The problem with this reply is that it fails to explain why ethnic or at any rate national as opposed to some other criterion of identity is the relevant marker of potential titleholder in virtually any long-term remedial claim. After all, bicycles can be owned by groups and corporations as well as individuals. When the identity marker of a rightholder is a restriction to a unique type, the unique identifying features would seem to be playing a grounding role in the right - why else have such a restriction? If something ought to be owned only by unique individuals and not groups or corporations – one's body and its parts is an obvious example – then whatever is generating the normative force to restrict each body's *possible* ownership to a unique individual is likely to go farther and make it the case that being a unique individual person is sufficient to generate a claim to self-ownership, that is, to make it a human right. And similarly, if some particular sort of group identity (in contradistinction to others) is necessary for demarcating legitimate continuous entitlement to sovereignty, it would seem likely that the relevant features also bear the normative force to create entitlement in suitably qualified circumstances. To be sure, there are legitimate states whose populations are not ethnically homogeneous. Yet why is it the case that there must be some shared cultural identity when a population legitimately reclaims a lost territory? It seems difficult to avoid the reply that states have particular significance for the welfare of such groups in enabling

them to collectively determine their future and reaffirm their connection to their past in ways that retain, deepen, or develop their common identity. But it is equally hard to see why that should matter normatively only when remedying a past injustice of loss of sovereignty through conquest. Indeed, it is likely that this will appear to be the case for only two reasons, which take us respectively to each of the two subsequent difficulties.

The second difficulty is the point we have been making at length in previous sections. There seems to be an assumed analogy by Brilmayer (and her followers) between sovereign rights and property rights; only thus would sovereign rights of governments to rule over peoples operate like historical titles to territory. A purely territorial approach of this kind is inadequate to explain the rights of rulers to govern over their territories, that is, over the people of those territories. To cite Montesquieu again, by political laws men acquire liberty, by civil laws property, and "we should not regulate by the Principles" of the one those things which depend on the principles of the other. "It is ridiculous to pretend to decide the rights of kingdoms, of nations, and of the whole globe by the same maxims on which we should determine the right of a gutter between individuals."[34] Indeed, it seems that if one accepts that ethnicity is a critical condition for establishing a remedial claim of territorial sovereignty, the same normative factors that make it so ought to play some role in determining the "maxims" by which we generally "decide the rights of kingdoms, of nations, and of the whole globe".

Thirdly, Brilmayer's territorial approach, like some International Relations realism with which it bears affinity, seems tacitly to rely on the value of stability in the international order at the expense of every other value. This reliance is never altogether explicit in her work, but

[34] Montesquieu, Oeuvres Complètes. *L'Esprit des lois*, LIVRE XXVI, Chapitre 16.

seems at the heart of her antipathy to any secession not based on a prior territorial claim. Moreover, it is likely that this is an important assumption in Buchanan's work as well. After all, he is quite explicit about it elsewhere,[35] and it would be one way of supplying precisely the premise that was lacking in his argument before. The problem for both Brilmayer and Buchanan is that while a premise linking a conservative view with international stability would render their arguments for the conservative view valid, it would not make them sound.[36]

There is another possible assumption that might render Buchanan's and Brilmayer's arguments valid. That would be an assumption from contract theory that there is an obligation to obey states so long as they perform certain functions. Brilmayer, we have seen, explicitly rejects consent as the basis of political obligation, and certainly belief in actual consent, if it was every really held by anyone, has virtually no partisans today.[37] Tacit consent has also come into disrepute, while hypothetical consent – first made explicit by Hume and then Kant – has been criticised for being impotent to ground obligation.[38] For current purposes, however, it is worth pointing out that even if one granted that either tacit or hypothetical consent could ground obligations to extant states, there is no basis for thinking that the state's side of the contract is

[35] Buchanan, "Self-Determination, Secession, and the Rule of Law", in McKim and McMahan (eds.), *The Morality of Nationalism* (Oxford: OUP, 1997); see the discussion of this in Chapter 2 above.
[36] I have argued this elsewhere, op. cit., but for reasons of space cannot include the arguments here. The crux is that a more permissive international right would lead to greater stability, not less, by protecting vulnerable secessionists from unionist violence (think of Biafra, Bangladesh, Bosnia, Eritrea, Chechnya, Tamilnadu, etc.)
[37] There are good reasons for this. Those who are not philosophical anarchists think it reasonable that there is some duty to obey laws insofar as they are laws. And many do not think citizens have actually consented to this in a way that would be binding. So if there is a duty it must derive elsewhere. Harry Beran takes the rare view that there is currently no obligation to obey the law because of a lack of actual consent, but that one should institutionalise actual consent, in a way resembling a requirement on immigrants to swear allegiance, thereby creating obligation. I presume this view has few advocates because those who consider duties to obey the law important are unlikely to think a little formality can carry all that weight, while those who reject Locke's notion of tacit consent via residence are unlikely to think forcing a formality upon residents is much better. See Beran, *The Consent Theory of Political Obligation* (Beckenham: Croom Helm, 1987).
[38] A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979).

confined to the narrow range of functions that Buchanan, in line with liberal tradition, assigns it. As far as tacit consent is concerned, the last century seems to provide at least as much evidence for as against the proposition that citizens take expression of their national identity in public space as one of the vital functions of state. Considerable numbers take the failure of such states to express the identity of their group as sufficient reason to withdraw allegiance from it. On the basis of what people actually believe, therefore, it seems difficult to make a case for the view that "implicit" in "the idea of territorial sovereignty" are only the functions of state associated with basic security and welfare. I have argued elsewhere, but cannot elaborate here, that if TCIGs stand to gain control over their identity by having an option of secession, it is rational and fair that they enjoy a right to this option in the absence of countervailing considerations of sufficient weight.

Other Independent Claim Arguments: Cosmopolitan Justice; Cultural Attachment

Egalitarian territorial justice

There are other possible claims, however, that still need to be considered. One might ask, for instance, whether 'territorial justice' might require a wholly different approach, beginning the way egalitarian theorists of distributive justice approach property. Perhaps considerations of equality require a radical redistribution of territorial sovereignty, so that groups get territories in proportion to their populations, perhaps with modifications for climatic and natural resource advantages, and with inequalities that benefit only the worst off. That would still allocate means to self-government to each appropriate group, thereby deflecting my objection against theories that conflate property and sovereignty, but would distribute equitably the property-like element

of territory that is conceded by me. Plenty of complications do come to mind: for instance, if the motivation is welfare-egalitarian, perhaps poor nations should get more than an equal proportion of land, and rich nations less, but then this would need adjusting every now and then as relative wealth changes. But we need not venture far into this morass. Territorial sovereignty is not the sort of commodity that can be distributed in this way. To shrink a country requires either the forcible displacement of those who wish to remain under the original sovereignty, or their forcible removal from that sovereignty in violation of their rights of self-determination. No such burdens are justified by a dubious right to proportional territory, especially if compensatory alternatives are available. This seems to be so even without consideration of the general destabilising effects of such redistribution of territory for the international political order, which consideration, once entering the picture, pushes the conclusion even farther beyond doubt. In any case, to the extent that global redistribution of resources is at all a defensible goal, the obvious way to go about it would be to redistribute other capital than territory. Thus if this goal included a need to compensate nations disadvantaged by the historical territorial lottery, this could be done with compensation in capital, not in kind. (Whether global egalitarianism is defensible is beyond the scope of this work; I reject it in a forthcoming paper.)

To recapitulate thus far, conservatives such as Buchanan, Brilmayer, Norman and Horowitz deny that TCIGs have rights of secession because they lack a valid claim to a territory. We examined two likely interpretations of this as a normative claim: that existing states had presumptive titles akin to land deeds, and that the stability of an international order required that states not be broken up by reason merely of national self-determination of a minority. These

were both found wanting: the first conflates rationales for sovereignty with those of property, or else relies surreptitiously on the second reason, which I have challenged elsewhere. And we now considered a third possible argument that *nobody* has any claim to their territory except within the bounds of a cosmopolitan just distribution of territory to national groups in proportion to their populations and possibly wealth and other welfare-affecting factors. But this idea was rejected as implausible, given that its implementation would cause violations of rights more important than the claim to proportional territory itself, because it would be highly destabilising, and because there are much better alternatives.

Cultural attachment

If we can show that there is no weightier plausible rival claim against seceding TCIGs requirement of territory as a means of self-governance, we will be in a better position to articulate *the dependent claim argument*: that the right of self-determination of TCIGs grounds an instrumental right to the territorial means to this self-determination, and that the self-determination we are speaking of includes the right to full independence if desired by a strong majority of the TCIG. We have to consider one more argument, however, before we can safely venture a positive conclusion.

Sociologists of nationalism have explored the way a nation becomes attached to the topography of its land. Its rivers and streams, hills and dales, mountains and valleys, littorals, harbours, lakes, forests, towns, pastures, farms, flora, and fauna, and the sites of battles, truces, uprisings, migrations, legends, myths, miracles, massacres, and homes of heroes, villains, saints, peasants, workers, monarchs, and aristocrats, become integral elements in the culture of the

nation, as expressed in song, literature, art, folklore, speeches, monuments, palaces, cathedrals, on coins and stamps, and in rites, celebrations, and commemorations. Even more, the very character of the nation forms in harmony with its geographical environment. "Messieurs, l'Angleterre est une île", the historian Jules Michelet was reported to have begun his lectures on English history with. Whether nations become sea-faring, outward-looking, reserved, bellicose, passive, industrious, patriarchal, and on some views prone to democracy or tyranny, has at least something to do, if not directly with physical geography (including climate and demographic factors related to geography) than with traditions and practices that themselves have origins in and have been shaped by physical geography.

Political philosophers have noticed that nations have strong sociocultural connections to their lands, including sentimental or affective attachments. What precise normative effect on claims of secession this has is not altogether clear: the secessionist minority has a particular attachment to its land, the majority of the state to its. But of course, the majority may have an affective attachment to the minority's land, and what is arguably more normatively significant, may have achieved this attachment through its members' investment of emotion and resources in developing, shaping, and transforming the territory they inhabit.

Miller makes this point and draws normative conclusions from it:

> The people who inhabit a certain territory form a political community. Through custom and practice as well as by explicit political decision they create laws, establish individual or collective property rights, engage in public works, shape the physical appearance of the territory. Over time this takes on symbolic significance as they bury their dead in certain places, establish shrines or secular monuments, and so forth. All of these activities give them an attachment to the land that cannot be matched by any rival claimants. This in turn justifies their claim to exercise

> continuing political authority over that territory. It trumps the purely historical claim of a rival group who argue that their ancestors once ruled the land in question.[39]

Miller amplifies this with the claim that "it is the occupation and transformation of territory which gives a people its title to that territory".[40] This is a very different argument from Buchanan's or Brilmayer's; like Brilmayer and unlike Buchanan, it explicitly attributes a 'title' to the people of the whole state territory, but unlike Brilmayer, a plausible normative reason is offered: the people have done something to and with the territory to give them a claim to it.

But I think that this argument too is misconceived, partly for reasons similar to those considered previously. In fact, this argument, while successful (unlike the others) in establishing *some* claim(s) (to be specified shortly) is just as remiss in ignoring the instrumental value of territory to governance, and in construing sovereignty, despite explicit denials, too much like property (as the notion of "title" suggests). The key claim is reminiscent of Locke's argument that one acquires property by "mixing one's labour" with the thing appropriated. But whether or not one can acquire a moral right to a thing in this way (and doubts have been raised),[41] it is difficult to see why an analogous relation to land should establish a right to govern *people* who happen to live on parts of that land (or to trump their wish to govern themselves independently).

Once again, there is the combined fault outlined at the beginning of this chapter. Sovereignty rights are regarded like property rights, while the instrumental value of territory as a means of self-governance is not taken into account. For consider what the various attachments to the

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[39] Miller, "Secession and the Principle of Nationality", in *Citizenship and National Identity* (London: Polity Press, 2000) pp. 116-7.
[40] Miller 2000, op. cit., p. 196, n. 14.
[41] Nozick provided a striking example: Does someone by pouring his tomato juice into the sea thereby acquire a good claim on the sea, or has he not more likely just lost his tomato juice? But Miller's views could be thought to resemble Locke's other argument: that value added to the land by his work gives the labourer a claim on it. And perhaps this can be combined with the fact that the particular transformations wrought to the landscape by a labouring nation have emotive significance for it. Nevertheless all these claims, and any combination of them, are susceptible to the criticism that follows in the text.

territory outlined above could possibly ground as rights. At most, it should establish rights, say for the majority in question, to maintain certain connections with the territory. Which connections? Only those which their original connections can justify. The original connections are emotive attachment, and that would seem capable, first of all, of establishing rights of visitation or pilgrimage. Importantly as well, it should ground rights of majority members not to be removed against their will from the territory in which they are now a minority, if they wish to stay on as a minority next to their kin state. In other words, it establishes a right of continuing residence, a right not to be 'cleansed', to borrow the term recently made notorious by Serb nationalists. Furthermore, recent investments in the territory might well establish a right that those investments be redeemed or compensated for. One could debate how recent those investments need be; do the secessionists owe for long past investment as well? Usually such claims will fast become nebulous as one goes backward in time, and there will likely be counterclaims by the secessionists for the resources extracted from the territory, for labour of their own that was insufficiently compensated for, and so forth. Often there will be a national debt that needs to be fairly divided. But these issues, I believe, need not be pursued in detail here, in order to make the essential point that whatever the balance of claims, it cannot by itself establish any right of one people to rule over another. A strong rival claim to the means to some postulated end-right could nullify that end-right. The corollary is that that rival claim must be able to tip backward the balance of reasons that had weighed in favour of (including the special interest protected by) the end-right. The end-right in question is the right of a TCIG to self-determination, the means is the territory they seek in order to be self-governing for their national

group, and the rival claim is the investment by and emotive attachment of the majority group in and to the territory. But this fails the corollary test just outlined, because the investments can be compensated for if they really need to be, and the attachments can be to a large degree accommodated (by means such as facilitating visitation rights, say without requirement of visa, as was arranged between Slovaks and Czechs) without denying secessionists their (much weightier, it would seem) right of self-governance.

Possibly, some situations might arise in which the rump-state requires certain shared jurisdictions with the newly seceding state, say tourism or environmental administration, or joint control of historically significant sites or sites regarded as holy. (One might not expect Israeli-Palestinian relations to offer any positive examples, but the highly sensitive Dome of the Rock and Temple Mount in the Old City of Jerusalem is suggestive of how this could work. Currently, though under Israeli sovereignty, the area is administered by the local Palestinian Waqf or religious authority, which could, in the event of the emergence of a Palestinian state, be based in that state.) In extreme cases, where the hostility of the seceding group might be grounds of strong doubt that these limited rights will be granted to the rump-state, that might well be a consideration against granting the secession, even in what otherwise resembles the Standard Case. As always, one would again have to examine the balance of reasons, since in situations of general hostility there might be much weightier interests to consider. But none of this shows that the relation of a group to land alone justifies the right of any members of that group to rule over the majority in a territory of that land against their will. Nor could it, it would seem, if one bears in mind the leitmotif of this chapter: that sovereignty is a vastly different phenomenon than that

of property. As the object of a right, it is a right of rule over people, not things, however much it employs the strategy of territoriality in the modern era.

Territorial Justice: The Positive Case

The chief value of territory, to recapitulate, is its use in territorial governance. This value is nearly universally overlooked in political philosophy; it took the discipline of geography to find explicit discussion of it. Once it comes into view, and once the most plausible rival considerations have been rejected, it becomes easy to state the case for distributing territory according to how we decide (independently) to distribute government, and not vice versa. Saying that considerations of the distribution of government need to come first implies only that a certain *kind* of consideration about territory must yield pride of place, namely, the kind that considers sovereign territorial rights akin to the deeds of landlords. To borrow the thought experiment of the first section of this chapter, we might approach the question of how to distribute government by imagining current nations and groups living in the same concentrations and mixtures in a society of spaceships in outer space. It would be clear in that world that territorial space was valuable almost exclusively because of its service to controlling people, and it would be much more obvious there that control over space should be allotted according to who ought (independently) to govern whom.

There is a presumptive right of states to keep the territories that they have, as in current international law, but this will be overridden in the Standard Case when TCIGs, because of their fundamental interest in controlling the development of their most pervasive identities, opt for independent statehood on their traditional territory.

Thus the right to a territory much ballyhooed by conservatives on secession turns out, on the view argued for here, not to be a very important issue. Once the national right of secession is shown not to be more destabilising, and once attachments to the land by the majority turn out not to ground rights of the majority to govern the minority (which is what the 'territorial' claim always comes down to), then the demand for an *independent* justification of the secessionists' territorial claim collapses, and the instrumental value of the secessionists' territory for their self-governance proves sufficient to make good their territorial claim. Philpott dismissed the demand for an independent territorial justification with the remark that the secessionists' claim is at least as good as the original state's (or its majority). This is true, but not because both have equal historical rights, or have equally invested in the land, or have equally transformed it in their respective images, or anything of the sort. Those facts might be relevant to settling much narrower claims regarding aspects of the territory. But for the central question of territorial sovereignty, the decisive consideration ought to be whether a self-determining national group requires the territory it inhabits in order to be independently self-governing.

Conclusion

In previous chapters it was argued that having the option of independent statehood significantly enhances the autonomy of territorially concentrated national groups. It was further argued that such groups have frequently sought independence without international protection, leading to considerable international instability and violations of human rights. For these reasons it was thought that such groups should have a suitably qualified right to secede.

Conservatives, however, have asserted that a right to secede, because it removes territory from an existing state, has a critical component, namely a right to the territory upon which it seeks independence. That the right of secession has this component is beyond controversy, but conservatives don't intend this point as allowing the trivial following of the territorial right as a means to realising the independently justifiable national right of secession. Rather, they insist that the right to the territory be itself established independently. But that is to assume that the existing state has a prior entitlement to the territory that cannot be defeated by the mere means-end relation between the instrumental value of territory for governance, and consequent need of that territory by the would-be secessionists to be self-governing. But this is a massive assumption that does not have an obvious defense. The one which comes most readily to mind, and is discussed by Buchanan, Horowitz, and Norman in different contexts quite explicitly, is that any stable international order requires that states be seen as being entitled to have sovereignty over their territory unless strongly remedial counterclaims can be established. But this defense falls in the face of the considerations of the first chapter, where it was argued that if anything the more permissive view advocated here promises more stability not less. Other postulated grounds of a rival claim, such as the investment, involvement, or attachment by or of the state majority in or to the territory, are insufficient to ground rights of sovereignty, though relevant to justifying certain more limited claims. More radical views that propose a massive redrawing of national boundaries due to abstract considerations of justice cannot be seriously entertained if only because of the consequences of implementing them.

Let us conclude by returning to Horowitz' rhetorical surprise, cited at the beginning, that a group right to self-government "quickly gives rise to territorial claims on behalf of such collectivities". Once the instrumental value of territory as a means to self-government is made explicit, and rival claims based on less important values of territory neutralised, there seems little reason for astonishment. On the contrary, what now seems rather baffling is how an alleged claim by a state to a piece of land quickly gives rise, in the views we have considered and rejected, to claims on behalf of such states to rule over other, independence-yearning peoples.[42]

[42]In all of this the sovereign state system has been taken for granted. However, it has recently come under considerable critical scrutiny, and had space permitted, it would have been worth examining the normative arguments on this theme. I argue in "The Normative Limits to the Dispersal of Sovereignty", *The Monist*, January 2007, that contrary to the thrust of much of this literature, there are good reasons for territorial states to remain clusters of identically-bounded jurisdictions. The clustering of jurisdictions, I argue, is a public good that (a) enables a common budget to shift resources between jurisdictions according to varying need; (b) enhances democracy by consolidating government so that citizens, including *qua* voters, take an interest in the election and scrutiny of governors; and (c) creates a community with the degree of integration requisite for the functioning of other public goods such as a legal system, desirably matching the territory and population forming the tax base with the legal jurisdiction over them.

The literature advocating what I call the declustering of states includes Elkins, David J., *Beyond Sovereignty: Territory and Political Economy in the Twenty-First Century* (Toronto: University of Toronto Press, 1995); Pogge, Thomas, "Cosmopolitanism and Sovereignty", *Ethics* 103 (Oct 1992): 48-75; O'Neill, Onora, "Justice and Boundaries" in Brown, Chris (ed.) *Political Restructuring In Europe: Ethical Perspectives* (London and New York: Routledge 1994), and Buchanan, Allen, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: OUP 2004).