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THE THEORY OF SECESSION AND EMERGING DEMOCRACIES: A
CONSTITUTIONAL

SOLUTION

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"No people and no part of a people shall be held against its will in a political association
that it does not want." [FN1]

I. INTRODUCTION

Most schools of modern western political thought recognize the right of people to choose
their own government. [FN2] A corollary to this right is that a government must derive its
legitimacy from the consent of the governed. But what can an individual or group within a polity
do if they do not consent to the form or composition of their government and the opportunity
to change that government is limited or non-existent? Dissatisfied groups or individuals can
either choose to accept their situation, move to a jurisdiction more to their liking, or join other
people in seceding from the state. Secession may be accomplished by forming a new state or by
joining an existing state. [FN3]

This paper addresses the third possibility--secession. Part II advances an expansive
theoretical view of the right of secession and critiques various narrower interpretations. Part III
addresses the mechanics of secession and examines the practical limits to its application. Part
IV concludes that secession is a workable option for minority groups, although practical
obstacles exist. It further concludes that any government ruling over a religiously, ethnically,
linguistically, or culturally diverse population should consider adopting the highly-decentralized
government model proposed by two South African political theorists, Louw and Kendall,
described later in this article.

II. THE THEORY OF SECESSION

A. Theoretical Underpinnings

Many political scientists ask the question: "When is secession justified?" [FN4] But this
question is not the correct one. The question should be: "Does a group of individuals who
dislike their present government ever not have the right to reject that government and form one
that is more to the group's liking?"

The United States Declaration of Independence adopts the principle that whenever any form of government destroys the "unalienable Rights" of "Life, Liberty, and the Pursuit of Happiness":

[I]t is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness. . . . [W]hen a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security. [FN5] These sections of the Declaration of Independence can be read to imply that governments without the consent of the governed are illegitimate, and that severely oppressed people have the right to abolish them and form a government they prefer. [FN6]

The basis for this view is my belief in the liberal principle that all acts and relationships between individuals should be voluntary. [FN7] Thus, to the extent that a government uses force, or the threat of force, to compel individuals to associate with one another, that government is illegitimate. [FN8]

Some commentators have suggested that the United States Constitution permits secession. [FN9] This argument is based on the language of the Tenth Amendment which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [FN10] In other words, the powers of the federal government are limited to those enumerated in the Constitution. All other powers are held by the states, or retained by the people. Further, since the Constitution does not prohibit secession or give the federal government the authority to prevent states from seceding, they--the states or individuals-- have this right. [FN11]

Jefferson Davis, President of the Confederacy, relied on the Tenth Amendment in arguing for the South's right to secede from the Union. He wrote:

The Right of Secession . . . is not something . . . outside of and antagonistic to the Constitution So far from being against the Constitution or incompatible with it, we contend that, if the right to secede is not prohibited to the States, and no power to prevent it expressly delegated to the United States, it remains as reserved to the States or the people, from whom all the powers of the General Government were derived. [FN12]

Alexis De Tocqueville, relying on federalist principles, also believed that the language of the United States Constitution permitted secession. As he wrote:

The Union was formed by the voluntary agreement of the states; and these, in uniting together, have not forfeited their sovereignty, nor have they been reduced to the conditions of one and the same people. If one of the states chose to withdraw its name from the contract, it would be difficult to disprove its right of doing so. [FN13]

The Declaration acknowledges that it may be unwise for a group of individuals to exercise the right of secession when governmental abuses have not reached extreme proportions.

Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes; and accordingly all Experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed. [FN14]

In other words, stability has value. It may indeed be wiser to improve a government through internal reform than to abolish it. But it can be argued that the weight assigned to the value of stability is for the people to determine. Some commentators believe that individuals and

groups possess a unilateral right to secede, regardless of the nature of the government. [FN15] The Declaration states that when a government's despotism becomes absolute, the people have a right, even a duty, "to throw off such Government and to provide new guards for their future Security." [FN16] But this paper argues that the right of secession is not limited to such circumstances; a government does not have to be totally despotic before the people can replace it. I believe the Declaration does not require such an extremity.

B. Arguments Against the Right of Secession

Philosophers and political scientists have made various arguments against the right to secede. Harry Beran, of the University of Wollongong, Australia, sets forth six conditions that may justify a state's refusal to allow a group to secede. [FN17] After briefly listing each of Beran's points, this paper shall argue against his position, using the ideal "liberal" society as its model. [FN18]

(1) The group that wants to secede is not large enough to assume the basic responsibilities of an independent state. [FN19]

The question here is who decides whether the group in question is large enough. In a "liberal" society, the group considering secession should decide.

Generally, the attributes of nationhood do not generally correspond with either geographic size or population. [FN20] Liechtenstein is an independent nation, yet in terms of physical size it is less than twenty percent the size of New York City. [FN21] Monaco is smaller than New York City's Central Park. [FN22] These nations also have small populations. A sovereign country need not be large enough to possess economies of scale as long as persons and goods can move freely, because then its citizens can trade for what they need. [FN23]

(2) The group seeking to secede is not prepared to permit sub-groups within the group to secede although such secession is morally and practically possible. [FN24]

For purposes of analysis, one can imagine a situation in which Western Ruritania wants to secede from Ruritania but will not permit the province of Southwest Ruritania, [FN25] which is wholly within the borders of Western Ruritania, to secede from it. While Western Ruritania has no right to prohibit Southwest Ruritania from seceding, this does not constitute a valid reason for preventing Western Ruritania from seceding from Ruritania. The secession rights of Western Ruritania and Southwest Ruritania are both absolute and independent of each other.

Beran's requirement that secession be "morally and practically" possible can be problematic. Who should decide what is possible? According to Beran, the entity that stands to lose a portion of its territory should decide. However, this does not follow liberal principles. Rather, under liberal principles, this determination should be left to the subjugated group. The fact that a group strongly wishes to secede from a parent entity may indicate that the group and the parent entity do not share the same morality. To allow the parent entity to determine whether the group may secede could require the imposition of a different morality on the subjugated group.

(3) The prospective group wishes to exploit or oppress a sub-group within itself that cannot secede in turn because of territorial dispersal or other reasons. [FN26]

To return to the earlier example, what should happen if Western Ruritania wants to secede, but there is evidence that soon thereafter it plans to persecute a certain religious minority

within its borders? [FN27] At present, the Ruritanian Government protects the religious minority from oppression. Should Western Ruritania be allowed to secede anyway? Allowing Western Ruritania to secede would probably result in injustice to the religious minority. But preventing it from seceding would also result in injustice, because Western Ruritania would be forcibly prevented from having the government of its choice. The fact that allowing Western Ruritania to secede would result in the oppression of a religious minority is unfortunate, but that does not change the right of a people to form a government of its choice. The people of Western Ruritania have the right to be "wrong" in their choice of government. In turn, one can hope that members of the persecuted minority will be able to vote with their feet and move to Ruritania or elsewhere. But even if they cannot, that does not alter the right of the majority to select the government of their choice, no matter how unpleasant that choice might be. [FN28] This is a balancing dilemma whose solution remains difficult to discover.

The only possible solution might be to recognize the right of individuals to secede, but almost no one recognizes this right at present. From the liberal society perspective, individual secession might be a valid option, but it is one that might be difficult to administer. [FN29]

(4) The group wishing to secede occupies an area not on the borders of the existing state, so that an enclave would be formed by secession. [FN30]

Beran himself recognizes that the possibility of an enclave need not always present an insurmountable problem. [FN31] The Vatican City State, located in the middle of Rome, is an example of a nation completely surrounded by another nation. Another example is Lesotho, a nation run by a black majority, surrounded by South Africa. Granted, the viability of a state that is surrounded by another state depends on the cooperation of the surrounding state in permitting free movement of people and goods across borders. Only a universally acknowledged right of transit across the surrounding state would completely remove this consideration. The group choosing to secede will have to consider this potential difficulty when making its decision. But it should not be a criterion for blocking secessions generally.

(5) The group occupies an area that is culturally, economically, or militarily essential to the existing state. [FN32]

The secession of economically vital areas should not present a problem in a world of free trade. It is not necessary that every nation have its own industrial base. Even if the region of the nation that wants to secede possesses most of that nation's mineral wealth, that should not operate as a barrier to secession. Moreover, in a liberal state, individuals, not governments, own most property, so theoretically the parent state is not losing state-owned mineral deposits or steel plants. [FN33]

It is difficult to imagine how culture would be harmed if a sub-unit of a state seceded. While secession might decrease the cultural diversity and traditions of the parent state, it would not affect overall cultural diversity in the region. Indeed, preservation of a group's culture may provide the primary motive for secession. At any rate, culture belongs to individuals, not to the state, so the parent state has no legitimate reason to prevent secession even if it believes cultural diversity would decrease. The group is probably more likely to strengthen its culture if it forms a separate state. [FN34]

Military necessity is another reason given for prohibiting secession. For example, may a state maintain some territories as buffer zones in order to increase its own security or that of another political entity? Should Israel be able to retain the Gaza Strip or the West Bank to

protect it from its neighbors? [FN35] May Germany or the Commonwealth of Independent States use Poland as a buffer zone? Could France invade Belgium to protect itself from Germany? Once the question is put in such concrete terms, the injustice inherent in an affirmative answer becomes apparent. [FN36]

(6) The secessionary group occupies an area that has a disproportionately high share of the economic resources of the existing state. [FN37]

As mentioned earlier, in a liberal society individuals, not the state, own most assets. Should the government require owners of the property in question to remain under a government they despise so that the majority--or a powerful minority that controls the government--may exploit their wealth? In an ideal liberal state property rights are absolute, and individual property owners may use their property in practically any manner without fear of having it confiscated or regulated by the state. Any other position would amount to exploitation.

Some commentators, Beran among them, have suggested that one could solve the economic resource question by making the secessionists compensate the parent state for any disproportionately large share of economic resources they take with them. [FN38] Such a position is unsatisfactory. A dissatisfied group should not have to pay the parent state for the privilege of seceding. Secession is a right, not a privilege.

Further, as a practical matter, measuring the amount of necessary compensation would be difficult. For example, what compensation should the Commonwealth of Independent States receive for the factories and other infrastructure built in Lithuania during the era of the Soviet Union? [FN39] Lithuania might just as easily claim compensation from the Soviet Union for years of political, economic, and cultural oppression. Forcing people currently living in the Commonwealth of Independent States today to pay compensation to Lithuania would also be unfair because the annexation took place over fifty years ago. A present generation should not be forced to pay debts incurred in the past. [FN40]

C. Reasons To Permit Secession

The work of Anthony H. Birch of the University of Victoria [FN41] details a narrow view of when secession should occur. Birch begins with the premise that secession from a liberal democratic state is only justified in special circumstances. He goes on to discuss four circumstances that would warrant secession.

(1) The region was originally included in the state through force, and its people have continually refused to consent to this arrangement. [FN42]

Birch argues that regions should only secede if there has been a history of opposition to the union, if not active protest. As examples, he cites the Roman Catholic counties of Ireland (seceding from the United Kingdom) and Algeria (seceding from France). Other examples could also be given, such as Lithuania, Latvia, and Estonia, as well as portions of Eastern and Central Europe. [FN43]

(2) The national government has failed in a serious way to protect the basic rights and security of the citizens of the region. [FN44]

Birch maintains that the government's failure must either be continuing or so drastic that reasonable persons would fear for their continued security and freedom.

(3) The democratic system has failed to safeguard the legitimate political and economic interests of the region, either because the representative process is biased against the region or because the executive authorities ignore the results of that process. [FN45]

Birch states that it probably would be necessary to show that this failure had persisted for many years and was likely to continue; that this failure resulted in some kind of relative deprivation in the region; and that the government was responsible for the adverse consequences. Merely showing that the region was economically backward would not be enough to merit secession.

(4) The national government has ignored or rejected an explicit or implicit bargain between sections that was entered into as a way of preserving the essential interests of a section that might find itself outvoted by a national majority. [FN46]

As examples, Birch cites Quebec, [FN47] Northern Ireland, [FN48] and pre- Civil War United States. [FN49]

Birch begins with a presumption against secession. A basic weakness of his overall approach is that he would allow secession only under certain conditions. But secession should not be a privilege. *It should be a right. If a group does not want to be governed by its present government, it should be able to secede and form a new government or merge with another existing government, regardless of whether the present government approves.* [FN50] The four circumstances in which Birch would permit secession leave out a number of cases considered justifiable even by political theorists who treat the right of secession as less than absolute. [FN51] One example would be a region not included originally in the state by force, but in which a later generation of inhabitants wants to secede from the state. One generation should not bind all future generations in their choice of government. Or consider a region annexed by force, in which only a concentrated minority want to secede. The Birch criteria would also block secession if a national government had failed to protect some basic rights, if the failure were not considered drastic by Birch's standards. How dissatisfied must people be before they can secede?

The problem with democracy is that the majority rules. The only internal protection against the tyranny of the majority is the conscience of the majority. Secession provides an escape valve and serves as a check on majoritarian tyranny.

The nation is a soul, a moral principle. . . . A nation . . . daily confirms its existence by manifesting its will to political cooperation within the same state; a daily repeated plebiscite, as it were. A nation, therefore, has no right to say to a province: You belong to me, I want to take you. A province consists of its inhabitants. If anybody has a right to be heard in this case it is these inhabitants. Boundary disputes should be settled by plebiscite.

It is important to realize how this interpretation of the right of self- determination differs from the principle of nationality. The right of self- determination . . . is not a right of linguistic groups but of individual men. It is derived from the rights of man.' Man belongs neither to his language nor to his race; he belongs to himself.' [FN52]

On the other hand, in support of Birch's qualified right to secession, some scholars have argued that an absolute right to secede could lead to the collapse of democracy within a state. "[A] democracy can function only as long as a further remedy, like secession, is not available to those failing to persuade the majority on a course of conduct." [FN53]

III. SOME MECHANICS OF SECESSION

A. Application of the Theory

Secession may occur in two ways. One way is to form a new state; another is to decide to live under the rule of a different, pre-existing government. [FN54]

Divorcing one country and marrying another would certainly be easier for a region if the two were contiguous political entities, such as Canada and the United States. But being unconnected does not present an insurmountable difficulty. For example, even though Alaska lies hundreds of miles from the United States border, it became the forty-ninth state with no disruptions. And Hawaii became the fiftieth state regardless of its location thousands of miles west of the continental United States. Problems are more likely to arise when one political entity surrounds the nation which seceded from it. For instance, imagine Kansas, in the midwestern United States, seceding to join Mexico, or southern Italy seceding to join Denmark. Nonetheless, if both nations possess the requisite political will, these considerations should not alter the notion that any groups may choose to live under the same government.

Once one accepts an absolute right to secede, there is no logical stopping point. A state or a portion of a state may decide to secede and form a new state, as West Virginia did from Virginia after the American Civil War. A portion of a city might choose to secede if its residents believe they are paying too much for the services they receive; Staten Island, one of New York City's five boroughs, is an example. [FN55] The political unit can further subdivide. West 4th Street in New York City may decide to secede from New York City; the 300 block on West 4th Street may want to secede from the rest of West 4th Street; the residents of the building at 312 West 4th Street may want to secede from the 300 block; the inhabitants of Apartment 104 may want to secede from the rest of the building. Clearly these are radical proposals, but they follow from a belief that a person has an absolute right to choose his own government. If just one individual or a small group of individuals chooses not to be part of a certain political unit, they should be able to form their own political unit. [FN56] Murray Rothbard also is prepared to go this far:

Is it legitimate for West Ruritania to secede from Ruritania? If not, why not? And if so, then how can there be a logical stopping-point to the secession? May not a small district secede, and then a city, then a borough of that city, and then a block, and then finally a particular individual? Once admit any right of secession whatever, and there is no logical stopping-point short of the right of individual secession, which logically entails anarchism, since then individuals may secede and patronize their own defense agencies, and the State has crumbled. [FN57]

Only for technical reasons does Ludwig von Mises stop short of recognizing the right of every individual to secede.

[T]he right of self-determination of which we speak is not the right of self-determination of nations, but rather the right of self-determination of the inhabitants of every territory large enough to form an independent administrative unit. If it were in any way possible to grant this right of self-determination to every individual person, it would have to be done. This is impracticable only because of compelling technical considerations, which make it necessary that a region be governed as a single administrative unit and that the right of self-determination be restricted to the will of the majority of the inhabitants of areas large enough to count as territorial units in the administration of the country. [FN58]

Von Mises, unlike Rothbard, stops at the fine line that separates minarchism from anarchism. [FN59] No region is likely to adopt Rothbard's anarchist view in the near future, although this view is logically consistent and does not violate individual rights. Therefore, in

spite of the fact that the right to secede may extend in theory to every individual, people may have to be content with a right to group secession, until the right of individual secession is recognized. That does not negate the possibility that a right to secession is absolute.

This paper discusses the possibility of a more limited but nonetheless expansive right of secession. [FN60] This right does not include individual secession, but would help deter a majority's oppression of minorities and defuse tensions that otherwise could lead to revolution.

One possible form this right could take is that advocated by the South African research team of Louw and Kendall. [FN61] Their model does not separate an unlimited right to secession. They suggest a Swiss cantonal system for South Africa that would guarantee the rights of all groups. Their proposals could apply to a nation that exhibits ethnic, religious, economic, or political diversity, or to any nation in which one group feels another group is not treating it fairly. Louw and Kendall's approach rests on the following belief:

[T]hough the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable, [and] the minority [must] possess their equal rights, which equal laws must protect, and to violate which would be oppression. [FN62]

South Africa is subdivided into 306 magisterial districts which have an average population of 80,000. Each district has a judicial and administrative infrastructure. Some districts contain homogeneous populations while some are quite heterogeneous. Under the Swiss cantonal system, the functions of government are highly decentralized. The central government performs only a few functions. The cantonal and lower level governments perform most functions. Curiously, many Swiss do not even know who their president is, which indicates the perceived importance of the president in Switzerland. Louw and Kendall advocate that, as a first step, South Africa convert its districts into cantons, as in the Swiss model. [FN63] Then, if a large number of residents of one canton do not like their governments, they may secede and either form their own canton or join an already existing one.

This right would provide the majority in each canton an incentive to consider the minority's rights and wishes and to improve conditions within its borders. Otherwise the canton could lose a substantial percentage of its population as a result of secession. The desire to attract neighboring communities would engender a competition among cantons. [FN64] Those that best meet the needs of their populations would benefit through an increase in size, although some of the canton's residents would not see a size increase as a reward. Those that did not meet the needs of their citizens would shrink in size or disappear. [FN65]

Some commentators might argue that under economic monopoly theory cantons might compete to the point of driving weaker cantons out of existence. This result would merely reflect the will of the people. A canton would only cease to exist through the choice of its citizens. If the 306 cantons in South Africa were eventually reduced to a single canton--an extremely unlikely possibility, given the diversity of the population--it would be because that canton best served the needs of a very large majority of the people. And even then, geographically concentrated minorities would remain free to secede if they ever felt the need to do so.

Louw and Kendall cite the Swiss example of Basle-Town and Basle-Country to illustrate competition between cantons. [FN66] Basle-Town increased its taxes and Basle-Country decreased taxes. In the decade between 1970 and 1980, more than thirteen percent of Basle-Town's residents ended up moving to Basle-Country. Eventually, Basle-Town had to reduce its taxes in order to maintain its population. [FN67]

The Louw and Kendall solution would be less disruptive than the Basle example given above. In the Basle example, high taxes compelled Basle-Town citizens to sell their homes and

perhaps change jobs if they decided to move. In the Louw and Kendall approach, dissatisfied people would not have to move. A group of citizens could simply vote to become part of another canton. If a group of citizens in one canton wanted to form its own canton, it would not need the permission of the other citizens of that canton to do so. But if the group wanted to join an already existing canton, it would need the permission of the existing canton's citizens, who could refuse to admit new members. As an alternative, the canton could use the Swiss system of selling citizenship to those who wish to become a part of the canton. This system has the added advantage of raising revenue and reducing a canton's need to tax its existing citizens. [FN68]

Another aspect of the system may be illustrated by Louw and Kendall's Article VI: "Any landowner or group of landowners whose land is on a boundary between cantons may opt at any time for the boundary to be adjusted so as to place such land under the jurisdiction of a neighbouring canton subject to the agreement of that canton." [FN69]

This possibility shows that Louw and Kendall's system is more extensive than that advocated by von Mises, since von Mises did not advocate secession at the individual level. [FN70] However, it is not quite the completely atomistic system of Rothbard, because it allows only citizens living on the border to change cantons.

Yugoslavia, with four major languages (Serbo-Croatian, Macedonian, Slovenian, and Albanian), two alphabets (Latin and Cyrillic), and three major religions (Eastern Orthodox, Roman Catholic, and Islamic), would seem to be a good candidate for a decentralized Swiss system. The ethnic diversity of Yugoslavia further strengthens its candidacy. The major ethnic groups are Croats, Serbians, Macedonians, Slovenes, Montenegrins, Bosnians, Hercegovinans, and residents of the two autonomous regions of Kosovo and Vojvodina. Moreover, Slovaks, Bulgarians, Ruthenians, Czechs, Romanians, Italians, Albanians, Hungarians, Turks, Germans, and Gypsies also reside within the confines of a united Yugoslavia. [FN71] Considering the current political unrest, the Swiss system might be Yugoslavia's only hope for peace, short of a totalitarian regime similar to that of Tito, the former Communist dictator. That is not to say that some of the more homogeneous political units within Yugoslavia should not be able to form independent nations, as an alternative to a Swiss system.

B. Practical Concerns

This paper advances the position that individuals have the unilateral right to secede whenever they wish for any reason they choose. But it also recognizes that a number of pragmatic and logistical problems inhibit the free exercise of this right.

People may not always peacefully exercise the right to secede. The attempted exercise of this right in the United States in 1861 led to the deaths of more than a half-million people during the Civil War. Thousands of people died during the partition of India and Pakistan. And the current situations of Croatia, Slovenia, and Bosnia dramatically demonstrate the costs of secession in terms of loss of life and destruction of property. [FN72]

The problem of the costs incurred when a parent state opposes secession has no easy solution. The United Nations can apply diplomatic, economic, or even military pressure. [FN73] Individual nations or groups of nations can also exert political and economic pressure, imposing boycotts and embargoes. [FN74]

Measures such as these, however, serve only to punish all sides to the dispute without resolving the problem. Furthermore, nations frequently align themselves on both sides of the dispute, prolonging the strife as well as expanding it into a regional conflict.

A major aspect of the practical problem with applying the theory of secession is that most states are not "liberal," in the sense that they do not subscribe to the view that those who are dissatisfied with the present regime have the right to abandon it. Indeed, many governments feel threatened when a group secedes from any country, because they fear that the pro-autonomy sentiment may spread to a portion of their own population.

Another problem in applying the theory of secession is the question of how to protect the rights of minorities who remain within the borders of either the former parent state or the new independent state. Many identifiable groups have faced or currently face this problem. [FN75] A group that has been a majority or substantial minority before the secession can suddenly find itself a much smaller and weaker minority after secession. In this case the minority becomes much easier to oppress.

Oppression, however, is not a consequence of secession as much as it is a consequence of human rights violation. The oppression of a minority generally predates the secession and, in fact, may furnish the impetus for secession in the first place. Secession, then, does not generally cause the oppression of a minority. Nonetheless, it may exacerbate the situation for people remaining in the original state, by leaving them with fewer allies. The remedy for such situations lies not in restricting the right to secede, but in regulating human rights abuses. This latter solution would ensure that both the rights of those wishing to secede and those left behind would be respected.

This human rights problem has proven intractable to both political scientists and political philosophers. Pragmatically, even where a constitution guarantees the right to secede and other human rights, the government often systematically violates those rights. Guaranteeing rights in writing and protecting them in practice are not the same. [FN76]

Constitutional safeguards that superficially guarantee minority rights have meaning only if the state enforces them. For example, under Soviet rule before Gorbachev, most ethnic minorities, with the notable exception of Soviet Jews, did not have to worry about oppression from another group. This provided them little comfort because the Central Government frequently violated the constitutionally guaranteed rights of all citizens.

Another problem with allowing secession is determining how to accomplish it. Establishing ground rules in a constitution, as in the Louw and Kendall example, minimizes these problems. But most countries do not have this right enumerated in their constitutions. The logical solution to this problem would be to amend the constitution to provide for secession. It is difficult, however, to amend a constitution, especially where the minority does not possess sufficient support to ensure the amendment's adoption.

Any right to secession should provide enough detail to answer questions such as those concerning the size of the seceding group. Von Mises suggested that the group should be large enough to form an independent administrative unit. [FN77] This less-than-absolutist view necessarily implies that a group too small to secede should remain under a regime it abhors. But who should decide how small is too small? The only answer that supports individual rights is "the people who want to secede."

The size of the administrative unit required depends on the extent of services the group wishes its government to provide. Higher level services might include public welfare, education for all, old age pensions, and health care. If a group wants its government to provide comprehensive services, it should be fairly large, so it can spread the cost over a large population, or fairly wealthy. If, for instance, the group wishing to secede mostly consists of senior citizens who want to live in a welfare state, they will probably need to convince a large

part of the younger generation to secede with them so that revenues are available to pay for such items as health care and social security pensions.

The administrative unit can be much smaller if those wishing to secede do not desire a large administrative state. If they are content with a night-watchman type of state that is only concerned with the basic protections of life, liberty, and property, the unit can be very small. The small size of some independent nations demonstrates that the administrative unit does not have to be large. [FN78]

Even if one can define the administrative unit precisely, it is unlikely that everyone within that unit will want to secede. Although large majorities of some of the former Soviet republics voted to secede, the votes were not unanimous. Some individuals wanted to remain part of the Soviet Union. These individuals will therefore be worse off, in their subjective view, after secession. Unfortunately, there is no way to satisfactorily resolve this problem. While some of those who voted in the minority can move out, some cannot. And even those who move must give up something by doing so, since moving is costly. This is not to say that the majority within a region may be prevented from exercising its wish to secede because it constitutes less than one-hundred percent of the population of the new unit. This problem is inherent in any democracy. [FN79] The right to secession cannot be practically reconciled with a democratic form of government unless the population is perfectly homogeneous. Otherwise, minorities will exist, and minorities frequently do not get everything they desire in a democratic society. In an ideal liberal state, minorities will have their rights sufficiently protected from the will of the majority. If the state is not liberal, problems will arise that may lead to further secession.

IV. CONCLUSION

The breakup of the Soviet Union and the war in Yugoslavia have stirred considerable interest in the theory of secession. Secession frequently can serve as a useful--and hopefully non-violent--release-valve to relieve political pressure. But it is not a perfect solution to all situations in which one group dislikes its present system of government and cannot change that system through the ballot box.

The Louw and Kendall solution makes secession possible for even small groups, but this approach works only when the group wishing to secede lives in a distinct region. It does nothing to resolve the problem of groups dispersed within the country. These groups must either remain with the present regime or vote with their feet, if they can. Therefore, under this model, secession is an option only for groups on the periphery of a state who can threaten the size or existence of the larger administrative unit.

New York State may be used as a hypothetical example of the possible dynamics of the application of secession theory. The residents of upstate New York significantly resent New York City. They believe their taxes support New York City's transportation, welfare, and health care systems. Further, they believe they are not receiving their fair share of the state's budget expenditures. Some of these people have left New York State to escape the high taxation. Other individuals and corporations have left New York City because of high taxes, the high cost of living, or the high crime rate. [FN80]

New York State is bordered by New Jersey, Pennsylvania, Connecticut, Vermont, Massachusetts, and Canada. If residents living along the borders of New York State were to have the option of joining one of these jurisdictions, some of them might. If these people joined the neighboring political jurisdictions, their neighbors would then be living on the border, and

could then exercise their right to secede. If there was major dissatisfaction with the government of New York State, it might not be too long before New York City was all that was left of the State. [FN81]

Realistically, the shrinkage probably would stop before reaching the borders of New York City if the right of secession were to exist. The mere fact that border residents had the option to join another political unit would act as a restraint against excesses by the New York State government. Perhaps a Louw and Kendall-type system in New York State would cause the government to pay more attention to its residents, who might otherwise exercise their option to leave, taking part of the tax base with them.

The Louw and Kendall solution is an approach that can be used by any regime with a diverse population. Applying the Louw and Kendall solution to Yugoslavia, the regions of Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Macedonia, Vojvodina, Kosovo, and Montenegro would all start as separate cantons. [FN82] Any citizen living on the border could then decide to join a neighboring canton. This would go a long way toward solving the problem of the disputed territory that Serbia took from Croatia when the federal troops were sent into Croatia.

The Louw and Kendall solution could expand to include the right of individuals on the border of a foreign country [FN83] to elect to secede from their canton and join the adjacent foreign country.

My theory goes further than the Louw and Kendall analysis. Yugoslavia has many pockets of concentrated minorities who would not benefit from the Louw and Kendall border option because they are enclaves within one of the former Yugoslavian republics. Why should they not be able to become part of another Yugoslavian republic, or even part of a foreign country bordering Yugoslavia? As discussed earlier, it should make no difference that they are not on a border. If Hawaii and Alaska can join the United States, despite their separation from the contiguous states by many miles, it should be possible for an enclave of Albanians, not living in Albania, to become part of Albania, or an enclave of Bulgarians, not living in Bulgaria, to become part of Bulgaria. The only difference between the United States example and the Yugoslavian example is that Hawaii is separated from the mainland by water, whereas the Albanian enclave would be separated by part of Yugoslavia. But that should make no difference. Assuming that people and goods can move freely, the fact that the different parts of Albania might be separated by a few miles of Yugoslavia should cause few problems. Such a result would at least be better than being separated by hundreds of miles of India, which was the case when East and West Pakistan split from India.

Obviously, practicalities exist that mitigate the successful implementation of my secession theory. I do not believe, however, that these practicalities diminish the value of my view. As the world struggles toward the ideal of "liberal" society, the view of secession as an unalienable right guaranteed to all will be instrumental in ensuring future respect for the rights of majority as well as minority groups.

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FN1. LUDWIG VON MISES, NATION, STATE, AND ECONOMY 34 (1983). This book first appeared in German as NATION, STAAT, UND WIRTSCHAFT (1919).

FN2. While most schools of political thought recognize the right of secession, they do not agree as to reasons for recognizing that right. Some view the right as a collective or group right, while others view it as an individual right. Libertarians would argue that there is no such thing as a group's rights; all rights are individual rights, and groups do not possess any rights that individuals do not possess individually. Some political philosophers would base their recognition of the right to secede on public opinion or some majoritarian reason. Libertarians would recognize it as a fundamental right that has nothing to do with majorities or public opinion. Totalitarians disagree that people have the right to choose their own governments. But the Western political tradition of the last few years supports this concept. See, e.g., THE DECLARATION OF INDEPENDENCE (U.S. 1776); HISTORY OF POLITICAL PHILOSOPHY (Leo Strauss & Joseph Cropsey eds., 2d. ed. 1972); 3 DICTIONARY OF THE HISTORY OF IDEAS 43-47 (Philip P. Wiener ed., 1973).

FN3. The terms "state" and "government" are not the same. Webster's dictionary defines "government" as "the exercise of authority over an organization, institution, state, district, etc. . . . an established system of political administration by which a state, district, etc. is governed . . . all the people who administer or control the affairs of a state" WEBSTER'S DICTIONARY OF THE AMERICAN LANGUAGE UNABRIDGED 789 (1979).

FN4. See, e.g., ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 27-125 (1991). Buchanan gives twelve reasons for and eight reasons against allowing secession. Buchanan concludes that it is a "highly qualified" moral right. Id. at 151. See also Harry Beran, A Liberal Theory of Secession, 32 POL. STUD. 21 (1984) (outlining six cases that justify secession); cf. Anthony H. Birch, Another Liberal Theory of Secession, 32 POL. STUD. 596 (1984) (responding to Beran's article by noting four cases that merit secession); see generally LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978).

FN5. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

FN6. Id.

FN7. For a libertarian view on the right of association and nonassociation, see MURRAY N. ROTHBARD, FOR A NEW LIBERTY 23-26 (1978); MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY (1982) [hereinafter ETHICS OF LIBERTY]; Robert W. McGee, The Right to Not Associate: The Case for an Absolute Freedom of Negative Association, U. WEST L.A.L.REV. (forthcoming 1992).

FN8. Taken to its extreme, this principle would render various government actions illegitimate. Under one stream of libertarian thought no function of government is legitimate. The other stream of libertarian thought holds that the only legitimate functions of government are the protection of life, liberty, and property. Certain laws and court decisions in the United States require restaurant owners to serve anyone who walks through the door; social clubs of substantial size with business-related activities cannot limit their membership to men. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Board of Directors v. Rotary Club*, 481 U.S. 537 (1987). Further, individuals can be severely punished for certain sexual practices. See, e.g., *Bowers v.*

Hardwick 478 U.S. 186 (1986) (upholding a law forbidding homosexual sodomy). Under liberal principles, government should have no right to interfere with voluntary acts between consenting adults.

FN9. See 1 JEFFERSON DAVIS, *THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT* 168 (Thomas Yoseloff ed., 1958), cited in H. Newcomb Morse, *The Foundations and Meaning of Secession*, 15 *STETSON L.REV.* 419, 424 (1986); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 387 (1946), cited in Morse, *supra*, at 427.)))

FN10. U.S. CONST. amend. X.

FN11. Unfortunately (from a libertarian or classical liberal perspective), the Tenth Amendment is practically dead. Much of the law that has been passed in the last century would not hold up to a strict reading of the Tenth Amendment (or the Ninth Amendment, for that matter). Where, for example, does the federal government get its authority to regulate or require handicapped parking spaces? For discussions of the Ninth and Tenth Amendments, see *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (Randy E. Barnett ed., 1989); 64 *CHI.-KENT L.REV.* 37 (presenting a symposium on interpreting the Ninth Amendment) (1988); Ruth A. Crowley, *Comment, Rights Retained by the People: An Empty Set?*, 25 *WILLAMETTE L.REV.* 351 (1989); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 *CORNELL L.REV.* 1 (1988); William T. Barrante, *States' Rights and Personal Freedom: Breathing Life Into the Tenth Amendment*, 63 *CONN. B.J.* 262 (1989); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 52, 183-85 (1990).

FN12. MORSE, *supra* note 9, at 424.

FN13. *Id.* at 427.

FN14. *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

FN15. Some commentators have likened secession to divorce. See BUCHANAN, *supra* note 4, at 7, 92, 98, 106, 120, 133, 134, 136, 161-62. The government-polity relationship may be seen as a contractual arrangement similar to marriage. As part of this analogy, these commentators have argued that both parties must agree to the split before going their separate ways. See BUCHANAN, *supra* note 4. This analogy is weak for several reasons. For one thing, divorces in many jurisdictions require the consent of only one party. To force two parties to stay together when at least one of them desires otherwise may be compared to involuntary servitude or slavery.

Furthermore, while most marriages may be treated as an arms-length contract, except in cultures which have arranged marriages, a group's political affiliation with a particular sovereign country may not. The "social contract" between people and their government is a fiction created by political philosophers such as Locke, Hobbes, Rousseau, and Pufendorf. For more on the theory of the social contract, see 7 *THE ENCYCLOPEDIA OF PHILOSOPHY* 465-67 (1967); 4 *DICTIONARY OF THE HISTORY OF IDEAS* 251-63 (1973). Individuals do not contract with the state to obey the laws; they obey out of necessity. An individual's choice to remain

within the state does not imply that the laws of that state are optimal or even satisfactory to him. It merely means that the individual cannot leave the state or that the laws of the state are less oppressive than those available elsewhere.

Lysander Spooner (1808-87) was a Massachusetts attorney known for his strong libertarian views. His operation of an illegal postal business caused the postal monopoly to reduce postal rates and better serve consumers. He was one of the strongest critics of the social contract theory as a whole and, more specifically, of the hypothesis that a constitution binds anyone who has not signed it. In 1869, he wrote:

The Constitution has no inherent authority or obligation. It has no authority or obligation at all, unless as a contract between man and man. And it does not so much as even purport to be a contract between persons now existing. It purports, at most, to be only a contract between persons living eighty years ago. And it can be supposed to have been a contract then only between persons who had already come to years of discretion, so as to be competent to make reasonable and obligatory contracts. Furthermore, we know, historically, that only a small portion even of the people then existing were consulted on the subject, or asked, or permitted to express either their consent or dissent in any formal manner. Those persons, if any, who did give their consent formally, are all dead now. Most of them have been dead forty, fifty, sixty, or seventy years. And the Constitution, so far as it was their contract, died with them. They had no natural power or right to make it obligatory upon their children. It is not only plainly impossible, in the nature of things, that they could bind their posterity, but they did not even attempt to bind them. That is to say, the instrument does not purport to be an agreement between any body but 'the people' then existing; nor does it, either expressly or impliedly, assert any right, power, or disposition, on their part, to bind anybody but themselves.

LYSANDER SPOONER, NO TREASON: THE CONSTITUTION OF NO AUTHORITY 11 (1973).

FN16. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

FN17. Beran, *supra* note 4, at 30-31.

FN18. The term "liberal" has held different meanings in different eras. I use the term here to refer to 18th-century English liberalism whose basic philosophy is the protection of the freedom of the individual from the constraints of the state. See 4 THE ENCYCLOPEDIA OF PHILOSOPHY 458 (1967). This view differs from modern American liberal philosophy, which seeks to use the state to protect the individual. In my view, the latter brand of liberalism constrains the individual, rather than the state.

FN19. Beran, *supra* note 4, at 30.

FN20. Admittedly, Beran speaks of size in terms of population, whereas I speak in terms of square miles. However, I will address population size in more detail later. In determining what constitutes a state, four factors are considered: the existence of (1) a permanent population, (2) a defined territory, (3) a government, and (4) the capacity to enter into relations with other states. For more on statehood, see J.D. van der Vyver, Statehood in International Law, 5 EMORY INT'L L.REV. 9 (1991).

FN21. New York City, including water surface, is 365 square miles in size. *NEW COLUMBIA ENCYCLOPEDIA* 1932 (1975). On the other hand, Liechtenstein is 61 square miles in size. *Id.* at 1578. In fact, a number of other sovereign nations are also smaller than New York City. An abbreviated list of other small sovereign nations includes Andorra, Tonga, Kiribati, Seychelles, and Barbados.

FN22. Monaco is 370 acres in size. *Id.* at 1809. Central Park is 840 acres, or 1.3 square miles. *Id.* at 493.

FN23. The free trade literature going back to Adam Smith's *WEALTH OF NATIONS* (1776) points out the benefits of free trade and the division of labor. This literature claims that it is in everyone's best interest to make what they can best produce and trade for everything else. Doing so results in the most efficient allocation of resources and maximizes the general standard of living. A corollary of this view is that free trade and economic incentives, not abundant natural resources, are the keys to economic development. The economic success of Japan and Hong Kong, nations with no natural resources, is evidence of that belief. The Commonwealth of Independent States and Brazil, on the other hand, have abundant natural resources and yet are in great economic turmoil with no immediate prospects of improvement. The reason for the difference is that Japan and Hong Kong have relatively free trade policies, whereas the various former Soviet Republics and Brazil try to produce everything themselves. See generally Robert W. McGee, *The Trade Policy of a Free Society*, 19 *CAP. U. L.REV.* 301 (1990); see also ALVIN RABUSHKA, *HONG KONG: A STUDY IN ECONOMIC FREEDOM* (1979).

FN24. Beran, *supra* note 4, at 30.

FN25. See *ETHICS OF LIBERTY*, *supra* note 7, at 181 (1982).

FN26. Beran, *supra* note 4, at 30.

FN27. American slavery is an example of this situation in the context of a racial minority, as opposed to a religious minority. The distinction does not affect my analysis. See Joseph R. Stromberg, *The War for Southern Independence: A Radical Libertarian Perspective*, 3 *J. LIBERTARIAN STUD.* 31 (1979). The fact that slavery was immoral and inhumane does not change my opinion that Southern citizens had the right to elect the government of their choice. To prevent Southern citizens from choosing the government of their choice would have resulted in a violation of their civil rights. One could argue that slaves experienced just as much oppression before the secession as after it--meaning secession did not actually worsen their fate.

FN28. See *BUCHHEIT*, *supra* note 4, at 29-30. Buchheit discusses this problem in the section of his book subtitled "The Fear of 'Trapped' Minorities." For example, after the partition of India and Pakistan, the Hindus remaining in Pakistan and the Moslems remaining in India--both 'trapped' minorities--had a greater risk of having their rights violated than before the partition. This problem has no perfect solution. Moving to a friendlier jurisdiction may prove costly, burdensome, or even impossible, especially if the persecuting state does not permit exit. The former Soviet Union and Cuba are relevant examples.

FN29. See, e.g., LUDWIG VON MISES, LIBERALISM IN THE CLASSICAL TRADITION 109- 10 (3d. ed. 1985).

FN30. Beran, *supra* note 4, at 30.

FN31. *Id.* at 31.

FN32. *Id.* at 30.

FN33. In the liberal view, no economic justification exists for government ownership of any property, with the possible exception of armaments. Government ownership of steel mills or other productive assets is not economically efficient. The theory is that private owners can manage virtually any productive asset better and more efficiently than public owners. See e.g., JAMES T. BENNETT AND MANUEL H. JOHNSON, BETTER GOVERNMENT AT HALF THE PRICE: PRIVATE PRODUCTION OF PUBLIC SERVICES (1981); PUBLIC SECTOR PRIVATIZATION: ALTERNATIVE APPROACHES TO SERVICE DELIVERY (Lawrence K. Finley ed., 1989); RANDALL FITZGERALD, WHEN GOVERNMENT GOES PRIVATE: SUCCESSFUL ALTERNATIVES TO PUBLIC SERVICES (1988); PRIVATIZATION & DEVELOPMENT (Steve H. Hanke ed., 1987); OLIVER LETWIN, PRIVATISING THE WORLD: A STUDY OF INTERNATIONAL PRIVATISATION IN THEORY AND PRACTICE (1988); MADSEN PIRIE, PRIVATIZATION: THEORY, PRACTICE AND CHOICE (1988); ROBERT W. POOLE, JR., CUTTING BACK CITY HALL (1980); E.S. SAVAS, PRIVATIZING THE PUBLIC SECTOR: HOW TO SHRINK GOVERNMENT (1982). While the empirical evidence strongly suggests that private ownership results in more economic efficiency, the special interest groups who stand to lose by privatization continue to oppose any effort to privatize their business. One of the largest groups that opposes privatization is unions, whose members may lose their jobs as a result of privatization.

FN34. BUCHANAN, *supra* note 4, at 52-64.

FN35. For discussions of the Palestinian homeland issue, see James D. Howley, Measuring Up: Do the Palestinian Homelands Constitute a Valid State Under International Law?, 8 DICK. J. INT'L L. 339 (1990); John Quigley, Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood, 7 B.U. INT'L LJ. 1 (1989).

FN36. Beran, *supra* note 4, at 29-30.

FN37. *Id.* at 31.

FN38. See Gorbachev's Bolshie Republics, ECONOMIST, Jan. 13, 1990, at 13.

FN39. To say that Lithuania, Latvia, or Estonia can secede from the former Soviet Union concedes that they were once a legitimate part of it. Many residents of these nations would disagree with that premise. Stalin seized these Baltic nations in the early days of World War II and did not free them after the war. Further, the United States and several other nations never recognized this annexation into the Soviet Union. Recently, all three Baltic republics declared

their independence from the former Soviet Union. See Lithuania on Brink of Leaving U.S.S.R., BERGEN COUNTY N.J. RECORD, Feb. 23, 1990, at A20; Bill Keller, Can Gorbachev Stay On if Lithuania Chooses to Leave?, N. Y. TIMES, Jan. 14, 1990, at E3; Latvia is an Independent, Democratic Republic, WALL ST. J., May 7, 1990, at A14 [hereinafter Latvia]. Now that the Soviet Union has dissolved, this example is of historical significance only.

FN40. See DUMAS MALONE, JEFFERSON AND THE RIGHTS OF MAN 291 (1951).

FN41. Birch, supra note 4.

FN42. Id. at 599.

FN43. See, e.g., Latvia, supra note 39 (giving in brief the historical background of Latvia's case and outlining the specifics of its declaration of independence).

FN44. Birch, supra note 4, at 599.

FN45. Id.

FN46. Id. at 600.

FN47. For a discussion of the secession issue as applied to Quebec, see F. Murray Greenwood, Note, The Legal Secession of Quebec, 12 U. BRIT. COLUM.L.REV. 71 (1978); David Matas, Can Quebec Separate?, 21 MCGILL L.J. 387 (1973); R.A. Mayer, Legal Aspects of Secession, 3 MANITOBA L.J. 61 (1968).

FN48. For a discussion of the self-determination issue as applied to Ireland, see Richard J. Harvey, The Right of the People of the Whole of Ireland to Self-Determination, Unity, Sovereignty and Independence, 11 N.Y.L. SCH. J. INT'L & COMP. L. 167 (1990).

FN49. Using the term "Civil War" immediately distorts the discussion because it refers to a war between factions within the same nation. "War between the states" is more appropriate, because when the Southern states seceded, they became a separate nation. See Morse, supra note 9, at 419 n.1.

FN50. DECLARATION OF INDEPENDENCE Para. 2 (U.S. 1776).

FN51. LYSANDER SPOONER, LET'S ABOLISH GOVERNMENT (1972). 

FN52. LUDWIG VON MISES, OMNIPOTENT GOVERNMENT: THE RISE OF THE TOTAL STATE AND TOTAL WAR 90 (1969).

FN53. BUCHHEIT, supra note 4, at 29.

FN54. There is another possibility. A group could secede and not form a new government to replace the old one. One could argue that government is not always necessary. In a

night-watchman state, the only legitimate functions of government are national defense, police protection, and the enforcement of contracts, including judicial administration. If one is willing to forego government-provided national defense and allow the market to take care of police services and contract enforcement there would be no need for a state, because any other services a state might provide could be provided privately or not at all.

FN55. Residents of Staten Island, one of New York City's five boroughs, recently initiated a movement to secede. Many residents asserted that the city was not providing Staten Island residents their fair share of services and energy. Residents introduced bills unsuccessfully in the New York State Legislature to allow Staten Island to secede. See Elizabeth Kolbert, Staten Island Is Voting, but It's Only a Sitcom Secession, N.Y. TIMES, Mar. 11, 1990, at E22. The Legislature had earlier published a feasibility study of changes to the existing structure of New York. NEW YORK STATE SENATE FINANCE COMMITTEE STAFF, REMEDIES OF A PROUD OUTCAST: THE LEGAL PROBABILITY AND IMPLICATIONS OF RESTRUCTURING THE GOVERNMENT AND BOUNDARIES OF THE CITY OF NEW YORK (1983).

FN56. See generally HENRY DAVID THOREAU, WALDEN (1854).

FN57. ETHICS OF LIBERTY, supra note 7, at 181.

FN58. VON MISES, supra note 29, at 109-10.

FN59. Living under anarchism--the absence of government--does not necessarily mean living under chaos. Society could conceivably function without government. See generally Terry L. Anderson & P.J. Hill, An American Experiment in Anarcho- Capitalism: The Not So Wild, Wild West, 3 J. LIBERTARIAN STUD. 9 (1979); DAVID FRIEDMAN, THE MACHINERY OF FREEDOM (1978); BRUCE L. BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE (1990); GEORGE WOODCOCK, ANARCHISM: A HISTORY OF LIBERTARIAN IDEAS AND MOVEMENTS (1962).

Anarchism is the total absence of government. Minarchism is the existence of a minimal state--one that protects life, liberty, and property, and does nothing else. Frederic Bastiat, the nineteenth century French political philosopher, determined whether a state has gone beyond the minimalist state by looking at its legal system. "See if the law takes from some persons what belongs to them, and gives it to other persons to whom it does not belong. See if the law benefits one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime." FREDERIC BASTIAT, THE LAW 21 (1950). Thus, the welfare state goes beyond the minimalist state because it takes from some and gives to others.

FN60. I make this argument not because the anarchist position contains philosophical flaws, but because people looking to secede do not prefer anarchy. If the idea of secession becomes more readily acceptable, the anarchist solution may be tried. If secession is not permitted, anarchy also is not an option. But if secession is allowed, secession at the individual level-- anarchy--becomes a possibility.

FN61. See FRANCES KENDALL & LEON LOUW, AFTER APARTHEID: THE SOLUTION

FOR SOUTH AFRICA (Institute for Contemp. Studies 1987) (1986).

FN62. *Id.* at 116 (quoting Thomas Jefferson).

FN63. Any nation that has a diverse population can apply the Swiss model. Switzerland itself has several "cleavages"--four languages and two religions-- and often considerable animosity and resentment has existed among the cantons. Yet the Swiss political system is one of the most stable and peaceful in the world. For more information on the Swiss system, see Jonathan Steinberg, *Imitation of Switzerland: Historical Reflections*, 23 *GOV'T & OPPOSITION* 13 (1988); David E. Bohn, *Consociational Democracy and the Case of Switzerland*, 42 *J. POL.* 165 (1980); James A. Dunn, Jr., "Consociational Democracy" and Language Conflict: A Comparison of the Belgian and Swiss Experiences, 5 *COMP. POL. STUD.* 3 (1972); Kurt B. Mayer, *The Jura Problem: Ethnic Conflict in Switzerland*, 35 *SOC. RES.* 707 (1968); Jurg Steiner, *Nonviolent Conflict Resolution in Democratic Systems: Switzerland*, 13 *J. CONFLICT RESOL.* 295 (1969); James A. Dunn, *Social Cleavage, Party Systems and Political Integration: A Comparison of the Belgian and Swiss Experiences* (1970) (unpublished Ph.D. dissertation, University of Pennsylvania); Harold E. Glass, *Subcultural Segmentation and Consensual Politics: The Swiss Experience* (1975) (unpublished Ph.D. dissertation, University of North Carolina (Chapel Hill)); see generally J. MURRAY LUCK, *A HISTORY OF SWITZERLAND* (1985); KENNETH D. MCRAE, *SWITZERLAND: EXAMPLE OF CULTURAL COEXISTENCE* (1964); CAROL L. SCHMID, *CONFLICT AND CONSENSUS IN SWITZERLAND* (1981); JONATHAN STEINBERG, *WHY SWITZERLAND?* (1976); JURG STEINER, *AMICABLE AGREEMENT VERSUS MAJORITY RULE: CONFLICT RESOLUTION IN SWITZERLAND* (Asgar Braendgaard & Barbara Braendgaard trans., 1974).

FN64. James Buchanan and Roger Faith suggest that secession, or the threat thereof, might sometimes be used as a competitive tool. In theory, this right under certain conditions could limit the ability of political units to engage in spending and taxation policies that do not accord with the wishes of their citizens. See James M. Buchanan & Roger L. Faith, *Secession and the Limits of Taxation: Toward a Theory of Internal Exit*, 77 *AM. ECON. REV.* 1023 (1987).

FN65. KENDALL & LOUW, *supra* note 61, at 137.

FN66. *Id.*

FN67. *Id.*

FN68. *Id.* at 136. The sale of citizenship may be analogized to the right of landlords in a free society to rent to whomever they want. The same analysis can be used for the sellers of real property. This presents philosophical problems because immigration should be free and open as long as the individuals coming into the country do not trespass.

FN69. For Kendall and Louw, the right to secede and form a new government is not an option. Their option is to secede and join with an existing government. I am not advocating that position as the "best" solution, but I admit that it would be an improvement over the current situation and would go a long way toward solving many secession problems. Also, practically speaking,

it may be as far as the theory of secession could be extended. *Id.* at 159.

FN70. I am basing this conclusion on the fact that von Mises advocated secession by administrative unit. However, he died in 1973, before Louw and Kendall's work was published. Von Mises based his apparent opposition to secession at lower levels mainly on technical problems rather than philosophy. Louw and Kendall's model may have overcome some of these technical difficulties, and conceivably could have met von Mises' objections.

FN71. Yugoslavia, in 19 *MACROPAEDIA, ENCYCLOPAEDIA BRITANNICA* 1098, 1103 (15th ed. 1975).

FN72. See generally Roger Thurow, Yugoslav Army Cracks Down on Rebels, *WALL ST. J.*, June 28, 1991, at A10; Yugoslavia on the Brink, *WALL ST. J.*, June 28, 1991, at A12; Pandora's Bosnia, *ECONOMIST*, July 20, 1991, at 49. For more recent information on Yugoslavia, see Serbia: Alias Newgoslavia, *ECONOMIST*, May 2, 1992, at 59 (reporting that only two of the former six Yugoslav republics remain a part of Yugoslavia--Serbia and Montenegro); Bosnia & Hercegovina: Yellow Card, *ECONOMIST*, Apr. 25, 1992, at 56 (reporting that even as the United States is recognizing Bosnia and Hercegovina, Serbia and Croatia are conspiring to divide those areas); Bosnia & Hercegovina: All mixed up, *ECONOMIST*, Apr. 4, 1992, at 62 (reporting Serbian fear that Bosnia will become a militant Islamic Republic and the Muslim fear that Bosnia will be partitioned between Croatia and Serbia).

FN73. Historically, actions by the United Nations have been ineffective. See, e.g., *BUCHHEIT*, supra note 4, at 209 (concerning the Bangladesh secession). Furthermore, the United Nations would not necessarily support the secessionists in every case.

FN74. For example, the United States and the European Community wanted to keep Yugoslavia together and threatened the country with economic sanctions if the country split up. Thurow, supra note 72. The United States, France, and the United Kingdom indicated that they would not recognize the Slovenian and Croatian secessions, while Germany and Austria were less adamant. Yugoslavia on the Brink, supra note 72, at A12. The United States was also slow to support the right of the various Soviet republics to self-determination. See Linas J. Kojelis, Now, Recognize the Baltic States, *WALL ST. J.*, Aug. 22, 1991, at A14.

FN75. Examples include the Hindus in Pakistan or Bangladesh, Moslems in India, the Russian minority in Lithuania, Latvia, Estonia, and other former Soviet republics, Croatians in Serbia, and Serbs in Croatia. One reason Serbia has fought Croatia's attempt to secede is because of the fear that the Croatian Government will mistreat the 600,000 Serbs living in Croatia (11% of Croatia's population). Serbia also did not want to lose the economic resources located in Slovenia and Croatia. As a response to this, Slovenia and Croatia wanted to secede because they perceived the Serb-dominated bureaucracy to be eroding their finances. See Thurow, supra note 72.

FN76. The First Amendment to the United States Constitution, providing that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . .," is a case in point. U.S.

CONST. amend. I. Although some of the Founding Fathers may have intended the First Amendment to be absolute, the courts and the Government have often placed limits on the right of free speech. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Near v. Minnesota*, 283 U.S. 697 (1931). Justice Harlan expressed the Court's approach to these rights:

[A]t the outset we reject the view that freedom of speech and association, as protected by the First and Fourteenth Amendments, are "absolutes," not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. *Konigsberg v. State Bar of California*, 366 U.S. 36 at 49 (1961).

FN77. VON MISES, *supra* note 29, at 109-10.

FN78. See *supra* notes 20-22 and accompanying text.

FN79. The problem with democracy is that the majority rules. Thus, minorities must live by the rules that majorities make, even if the minority does not agree with the rules. Liberal states respect minority rights. When the state is not liberal, minorities experience problems. The definition of a liberal state includes the concept of equal protection under the law.

FN80. According to an April 15, 1992, press release by the Tax Foundation, New York State residents have to work more days each year to pay their federal, state and local taxes than residents of any other state in the nation.

FN81. The Louw and Kendall solution might cause other interesting things to happen to New York City. For example, the Broadway district of New York City is on the West Side, just a few blocks from the Hudson River, which separates New York from New Jersey. If some businesses bordering the river decided to become part of New Jersey, the New Jersey border would start approaching the Broadway district. Wall Street might also decide to join New Jersey. Many companies in that area already have moved some operations across the river to avoid high taxes.

FN82. Ignore, for a moment, the fact that some of these regions prefer to become independent nations, since the Louw and Kendall solution does not allow for that. This example assumes that the residents of Yugoslavia want to adopt a confederation form of government. Under a right of secession, Slovenia and Croatia may become independent nations instead.

FN83. Yugoslavia is bordered by Italy, Austria, Hungary, Romania, Bulgaria, Greece, and Albania.

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