State Recognition, Unilateral Secession, and Anarchy

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"It's a big club … and you ain't in it."—George Carlin

Since the beginning of the state's rise as a political organ, state recognition has been a perplexing issue, subjected to differing and changing interpretations within the disciplines of international law and relations. A facial glance at the concept might appear to raise a "chicken or egg" problem. What comes first? Does a state, as a matter of fact or as an international actor, arise only after other states recognize it as a state? If so, how did preceding states, not least of which the first state, become states or established international actors? These are fundamental questions, and thus it is clear that state recognition goes to the heart of the notions of statehood, international law, and international relations. This

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chapter presents a clarified theory of state recognition, and then argues that this theory bears implications which support the view that radical political decentralization and secession, rather than centralization or a federation of states, is the logical and practical means to achieve a more libertarian legal order around the world.

Part I first provides a brief history of the concept of state recognition in international law and relations, and then argues that a formulation of the constitutive theory of recognition which clearly distinguishes between de facto statehood and membership in the international community better describes the nature of state recognition than the more widely espoused declaratory theory. Part II explains the highly influential role that great powers play in the politics of state recognition, and the legal and practical implications that this has for secession and political decentralization. Part III makes the case that greater acceptance of secession and political decentralization would change recognition from being an exploitative tool used by great powers into a "natural" and less co-opted mechanism of state relations, rejecting the popular view that the use of politically exploitative recognition can be cured through the "constitutionalization" of recognition in a single centralized institution. Because decentralization of state recognition will create more libertarian relations between states, greater decentralization and secession in general, beyond the narrow scope of state recognition practices, will create a more libertarian international order as compared to calls for centralization or federation, first by increasing competition between states and then ultimately by decomposing the notion of state sovereignty entirely. The politics of recognition highlight the inherently unlibertarian nature of the state, and this supports the position that libertarians skeptical of nationalism, globalism, or both, should reject the Westphalian notion of inviolate state sovereignty and replace it with decentralized private law rather than a supranational "libertarian" federation.

State Recognition: History and Theory

A Brief History of Recognition

Recognition is when established member states of the international community, alone or in concert, choose to accept new states into the international system.[1] It is often claimed that the Peace of Westphalia in 1648 marked the inception of recognition as a concept, on the premise that the Westphalian Congress extended collective recognition of independent sovereignty to Switzerland and the Netherlands,[2] but this interpretation has been challenged as a post-hoc rationalization that injects notions of state sovereignty into the past when they in fact arose many years later.[3] In any event, recognition remained generally unimportant until the late 18th century when political liberalism rose to challenge monarchy, typified by the American and French Revolutions.[4] For this Chapter's purposes, whether recognition and the modern conception of state sovereignty truly began in 1648 or 1776 is immaterial, as under either telling of history, recognition's pertinent complexities are evident. Under the Westphalian story, the Peace was a victory for Swiss and Dutch independence, as well as for political decentralization within the Holy Roman Empire,[5] while establishing the notion that "accession to the family of nations was granted only through approval of the family of nations."[6] Under the liberal story, in the wake of politically liberal revolutions against monarchs "[t]here was a common understanding among states that recognition of a new state can only happen when the parent state renounces its sovereignty over that territory," as shown by the fact that "all nations but France extended recognition to the US

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[1] *See generally* Nikoloz Samkharadze, *Recognition of States in International Law*, 3 J. of Young Researchers 17 (2016).

[2] *See, e.g., id.* at 19.

[3] *See* Andrea Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 Int'l Org. 251 (2001).

[4] Samkharadze, *supra* note 2, at 19-20.

[5] Steven Patton, *The Peace of Westphalia and it Affects on International Relations, Diplomacy and Foreign Policy*, The Histories, Vol. 10, Art. 5 (2019).

[6] Samkharadze, *supra* note 2, at 19.

only after it was clear that the parent state Great Britain let the US into independence in 1782."[7] In either case, by the early 19th century, recognition as a concept within international relations had become established, arising from a geopolitical system that had to contend with the growth of the liberalism and nation-state sovereignty that began to steadily displace established monarchies and empires[8]; in short, it was a necessary correlate to the now pervasive contemporary notions of statehood and sovereignty.[9]

The position that recognition was based upon parent state consent was challenged in the early 19th century in the wake of secessionist movements in Central and South America, where Spanish-American territories such as Venezuela sought independence from the Spanish Crown.[10] Although certain great powers, assembled as the "Holy Alliance," continued to assert dynastic legitimism, the liberal powers of the United States and Great Britain stood in opposition,[11] espousing the position that peoples have a natural right to renounce the sovereignty under which they live and that no third party is entitled to interfere.[12] As a result, the liberal powers held that when an entity achieves independence and exerts effective control over its territory, the entity is entitled to recognition.[13] The liberal recognition standard was gradually accepted by other powers throughout the 19th century, ultimately becoming the undisputed standard of recognition in both the Americas and Europe as modern nation-states continued to displace traditional monarchical dynasties.[14]

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[7] *Id.* at 20.

[8] Mikulas Fabry, *The Evolution of State Recognition*, Routledge Handbook of State Recognition 37 (ed. Gëzim Visoka, John Doyle, Edward Newman 2019) (in the late 18th and early nineteenth century, "existing European-based states began to face proliferating new claims of statehood from within and therefore needed to ascertain whether the claimants qualified as 'states' for the purposes of international relations and law. The responses to this imperative developed into the distinct and recurrent activity of 'recognition of states'").

[9] *See* Bridget Coggins, *International Politics and the Emergence of States from Secessionism*, 65 Int'l Org. 433, 436 n. 16 (2011).

[10] Fabry, *supra* note 8, at 39.

[11] *Id.*

[12] *Id.* at 39-40.

[13] *Id.* at 40.

[14] *Id.* at 41.

However, the situation changed during the era of decolonization following World War II, wherein, as Mikulas Fabry puts it, "international society essentially abandoned the criteria of de facto statehood as the basis for recognizing indigenously founded new states."[15] Decolonization had become politically inevitable in the immediate post-war years,[16] and there was fear among states regarding the possibility that the precedent set by decolonization and the concomitantly emerging international legal principle of "self-determination of peoples" would lead to unfettered secession and violent conflict.[17] In response, self-determination was limited to the decolonization context,[18] was "conscious[ly] and deliberate[ly] subordinat[ed]... to the principle of territorial integrity" of existing states (called "*uti possidetis juris*"),[19] and the paradigm guiding recognition of new states shifted to be based upon "whether an entity has been considered to have a positive right of self-determination in international law"[20] – i.e., self determination became a "legal and positive entitlement to independence allotted by international society to particular entities."[21] The geopolitics of decolonization led to a compromise whereby colonial territories gained independence from the West, with both sides agreeing to close the door behind them through two crucial restrictions to the concept of self-determination of peoples. First, its applicability was limited to the decolonization context. Second, it was subordinated to the principle of state territorial integrity by defining "peoples" entitled to self-determination to mean the respective populations of independent states and non-self-governing territories

[15] *Id.*

[16] *See generally* Trevor Getz, *Political Decolonization, c.1945-1997*, Khan Academy, https://www.khanacademy.org/humanities/whp-origins/era-7-the-great-convergence-and-divergence-1880-ce-to-the-future/x23c41635548726c4:other-materials-origins-era-7/a/political-decolonization-c-19451997 (last visited April 3, 2023).

[17] Fabry, *supra* note 8, at 42; *see also* David J. Hoffa, *Statism's Catch-22: An Austro-Libertarian Analysis of "Self Determination of Peoples" Under International Law*, at 7-8 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3821745.

[18] Fabry, *supra* note 8, at 41-42; Hoffa, *supra* note 17, at 5-8.

[19] Fabry, *supra* note 8, at 42; Hoffa, *supra* note 17, at 8.

[20] Fabry, *supra* note 8, at 41.

[21] *Id.*

as determined by the existing international community.[22] For recognition, these limitations marked a return to the pre-liberal era, leading to a recognition paradigm explicitly based upon the premise that whether a group constitutes a "people," and is therefore entitled to an independent state that is worthy of recognition, was something to be determined by other states, especially the relevant parent state, whose territorial integrity held priority over all unilateral claims for independence.[23] This formulation of "self-determination" was no more than a transparent and abominable political appropriation of the term in order to accommodate decolonist pressures while maintaining and legitimizing the West and new Third World states' respective sovereignties under the guise of ensuring "international stability"—i.e., allowing colonial independence while preventing this development from leading to the international legalization of unilateral secession. Unfortunately, this paradigm ultimately expanded beyond decolonization to apply to all United Nations member states,[24] and as a result, even though unilateral secession has never been explicitly precluded by international law,[25] the recognition of new states that arise by unilateral secession from a parent state was, in effect, precluded under international law, as shown by the fact that "[n]o postcolonial substate entity has been able to establish an internationally legitimate state without [parent state] consent except Bangladesh."[26]

Notably, the proliferation of independent states under the banner of self-determination during this time was at the exclusion of other possible roads for decolonization, such as the creation of federations between

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[22] Hoffa, *supra* note 17, at 10.

[23] Fabry, *supra* note 8, at 42 ("After 1960 the legitimate candidates for recognition became restricted to non-self governing and trust territories whose positive right to self-determination and independence was blocked, violated or not yet realized, to constituent units of consensually dissolved states (e.g., Senegal and Mali emerging from the Mali Federation), and to units arising out of consensual mergers (e.g., Yemen) and secessions (e.g., Singapore)").

[24] *Id.* ("That an ex-colony cannot lose territory against its will – not just from outside, by way of external aggression... but also from inside, by way of internal secession – was later broadened to encompass all UN member states in... UN General Assembly Resolution 2625 (1970)").

[25] Milena Sterio, *Self-Determination and Secession Under International Law: The New Framework*, 21 ILSA J. Int'l & Compar. L. 293, 299, 302 (2015).

[26] Fabry, *supra* note 8, at 42. For more on the case of Bangladesh independence, *see* Sabina Nargis Lepe, *Britain's Recognition of Bangladesh as a State in 1972*, 3 J. Soc. Sci. & Human. Stud. 1 (2017).

former colonies and perhaps their former colonizers. The fervor for independence simply outweighed other paths that would have required greater international political integration. For example, the West Indies Federation was a failed four year project that broke apart in the face of the desire to retain newfound independence.[27]

Although the post-colonial era has seen self-determination transform from a legal principle governing decolonization to a universally applicable human right (called a "peremptory norm" or *jus cogens*),[28] it has nevertheless remained cabined within the post-colonial recognition paradigm. What changed was not the substance of the paradigm, but the scope of its applicability and acceptance. Indeed, "the post-Cold War period [saw] international society . . . solidif[y] the" post-colonial recognition paradigm, "extend[ing it] into new geographical areas. The breakups of the Soviet Union in 1991 and Czechoslovakia in 1992 . . . [saw] foreign recognition of the successor states c[o]me only once the respective central governments had agreed to the dissolution of the unions. Western countries waited for prior agreement of the central government even in the case of the Baltic republics, . . . [and u]nilateral separatist drives from the newly independent states, whether it was the 'Nagorno-Karabakh Republic' (Azerbaijan), the 'Republic of Abkhazia,' the 'Republic of South Ossetia' (both Georgia), the 'Transdniestrian Moldavian Republic' (Moldova) or the 'Chechen Republic of Ichkeria' (Russia), [were] met with foreign nonrecognition in the 1990s. . . . [Moreover, t]he foreign response to the claims arising out of the breakup of the Socialist Federal Republic of Yugoslavia (SFRY) was consistent with th[e]' neo-decolonization territorial approach' . . . . During the initial phase of the Yugoslav collapse . . . foreign authorities endorsed the territorial integrity of the SFRY. That position changed only after a majority of Yugoslav republics had ceased to be represented in the highest federal institution, the presidency, under highly contentious circumstances in early October 1991. The withdrawal of the majority of the

[27] Sharon C. Sewell, *British Decolonization in the Caribbean: The West Indies Federation*, https://shareok.org/handle/11244/12378 (1997).

[28] Hoffa, *supra* note 17, at 3, 8-9.

population and territory from a federal state was a historically unprecedented occurrence, but one to which third states as well as relevant international organizations found a speedy solution . . . : they came to regard what was occurring in the SFRY as a case of dissolution legally equivalent to the consensual dissolution of the USSR or Czechoslovakia . . . . Only after this judgment did the individual republics become eligible for recognition."[29] In the above examples, whenever there were secessionist pressures, recognition was withheld until consensual dissolution was certain or, in the case of the SFRY, could be regarded to have happened,[30] so as to not set a precedent in favor of the recognition of states born from unilateral secession, which would have contradicted the preeminence of state territorial integrity under the post-colonial recognition paradigm. The aversion to unilateral secession during this time of geopolitical flux was so pervasive that it led to the interim international administration of areas in order to prevent secession from entities that had not established themselves as effective governments but were nevertheless the international community's chosen successors to their parent states.[31]

The post-colonial recognition paradigm remains largely intact,[32] as shown by "negative global responses to Catalonia's unilateral declaration of independence and Iraqi Kurdistan's unilateral independence referendum in 2017."[33] However, events in recent years have presented it with at least two serious challenges to its enduring applicability.[34] First, in spite of the attempt to ensure "international stability" by circumscribing self-determination, and in the face of "global opposition, unilateral claims to independence continue to arise in nearly all regions of the world and across a full spectrum of domestic political systems. With rare exceptions such as Czechoslovakia and Great Britain these claimants,

[29] Fabry, *supra* note 8, at 43.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 39 ("Overall, recognition today still reflects the practice set by decolonization, though it has manifested more turbulence and uncertainty since 2009 than at any other moment after 1945").

[33] *Id.* at 44.

[34] *Id.* at 44-45.

even in liberal democracies like Spain, cannot agree with their parent governments, just as was the case in the 19th century, on who qualifies as a people entitled to independence and by what procedure can that entitlement be exercised. Nevertheless, substate groups that feel dissatisfied with the postcolonial and noncolonial states they find themselves in keep invoking the right of self-determination and demand independence regardless of actual recognition practice. . . . Despite more than half a century of effort, international society cannot tame claims of statehood that stand outside of the postcolonial consensus. Given that a key justification behind that consensus was that privileging territorial integrity of states over unilateral claims would foster peace and stability around the world, this is a sobering conclusion."[35]

Second, "external actors, most importantly major powers, have, for one reason or another, proved unable to maintain perfect consistency in their approach to unilateral claims" for independence.[36] In the case of Bangladesh's secession and the breakup of Yugoslavia, key powers agreed to act contrary to the post-colonial recognition paradigm by recognizing new states that, in the case of Bangladesh, were clearly formed by unilateral secession and, in the case of the former Yugoslavia, could reasonably be characterized as a series of unilateral secessions.[37] But more recently, inconsistent approaches to specific cases have arisen even between these powers, spearheaded by disagreements regarding the recognition of Kosovo after its unilateral secession from Serbia.[38] "In February 2008, the US-led coalition did not wish to abandon the postcolonial consensus by recognizing the unilateral secession of Kosovo. Indeed, having opposed the Balkan territory's first unilateral declaration of independence in 1991, the coalition insisted that Kosovo merited recognition only as a 'special' case in light of its unique post-1991 history and that it constituted an 'exception' that created no precedent for any other situation around the world. However, Russia strenuously opposed this argument and in August 2008, in line with its earlier public warnings

[35] *Id.* at 44.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 44-45.

that it would consider a unilateral recognition of Kosovo a precedent, invoked the February 2008 decision to recognize the unilateral secessions of South Ossetia and Abkhazia . . . . In 2014, Russia again referenced the Kosovo precedent as it recognized the unilateral secession of the 'Republic of Crimea' . . . . While considerable opposition to Kosovo's recognition and overwhelming opposition to the unilateral secession of South Ossetia, Abkhazia and Crimea, along with more recent international antipathy to Catalonia's unilateral declaration of independence and Iraqi Kurdistan's unilateral independence referendum, point to the continuing persistence of that global consensus, state recognition is today at its most unsettled moment since 1945."[39]

Given the continued prevalence of secessionist movements and increased international discord as to how recognition practices should address these movements, it is crucially important to reappraise the debate between the major theories of state recognition.

The Declaratory vs. Constitutive Theories of Recognition: In Defense of a Clarified Constitutive Theory

Within the scholarship of international law and relations, there are two major recognition theories – the declaratory theory and the constitutive theory.[40] The declaratory theory holds that a state becomes a member of the international community when it becomes a state – i.e., when certain objective criteria of statehood are met. This means that when other members of the international community recognize the new state, they are merely declaring the fact that the new state exists. This theory is often exemplified by the Montevideo Convention of the Rights and Duties of States. Article I states: "The state as a person of international

[39] *Id.*

[40] *See* Shruti Venkatraman, *Can the Contrasting Standards for Statehood Put Forth by the Declaratory and Constitutive Theories of Recognition be Reconciled? An Examination of Kosovo's Disputed Statehood*, 3 Edinburgh Student L. Rev. 36, 36 (2018).

law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."[41]

In contrast, the constitutive theory holds that admittance to the international community is contingent upon the choice of existing member states to recognize the new state as a member.[42] Under this view, which was the view at the inception of recognition as a concept and has been the view during the post-colonial era,[43] "recognition resides at the complete discretion of the existing state."[44] It "is not a principled and mandatory response to certain developments within a foreign community," but rather "a deliberate measure taken unilaterally" and with "a heavy political agenda behind it;" it "is solely a matter between the state recognising and the entity being recognised."[45]

Which of these two theories better describes the legal reality of international law? As the reader may have already begun to see, the theories appear largely, if not entirely, irreconcilable.[46] But if we analyze the logic of both theories, as well as historical examples of state recognition practices, it becomes clear that the constitutive theory is stronger.

The declaratory theory is a fiction. Although understandably appealing to international law scholars who wish to elevate their field above what might be viewed as base power politics,[47] the declaratory view has at least two critical flaws. First, it rests upon a fundamental misunderstanding of the nature of law as such, and international law in particular. Law is inherently political, ideological, and subjective, from

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[41] Montevideo Convention of the Rights and Duties of States, 1933, Art. I, https://en.wikisource.org/wiki/Montevideo_Convention.

[42] Samkharadze, *supra* note 2, at 21-22.

[43] *See supra*, Part I.A.

[44] Samkharadze, *supra* note 2, at 21.

[45] *Id.* at 22.

[46] *See* Venkatraman, *supra* note 40, at 36-39.

[47] *See, e.g.*, Cedric Ryngaert & Sven Sobrie, *Recognition of States: International Law or Realpolitik: The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia*, 24 Leiden J. Int'l L. 467, 468 (2011) (calling on legal scholars to "prevent the demotion of international law to a reservoir of arguments used to back up decisions based on purely political considerations").

its creation, to its interpretation, to its application.[48] This is undoubtedly so with international law, given its anarchic nature with no single world state to act as final arbiter of the creation, interpretation, and application of standards for recognition. This first error is exemplified by Cedric Ryngaert and Sven Sobrie, when they admonish the "international community's reactions to the dismemberment of Yugoslavia in the early 1990s and the ensuing creation of new states" as being "characterized by inconsistency, obscurity, and an apparently declining role for international law."[49] This position rests upon a false dichotomy between politics and law, disregarding the primacy of politics for the setting and changing of legal standards.

Second, it equivocates a sociological notion of statehood with the narrower notion of statehood under international law. Put differently, the declaratory theory fails to distinguish between the existence of a state based on the facts on the ground (what is called a "*de facto* state"),[50] and the extra step of the admission of such a state as a member of the international community, subject to the rights, privileges, and responsibilities under international law.[51] Put another way still, the declaratory theory fails to recognize that the question recognition attempts to answer is not whether a state exists, but whether this state is an accepted member of the international community that constitute the operative units of international law. What is constituted by recognition is not de facto statehood, but rather formal diplomatic relations between states, which is the basis of international membership and is the primary subject matter of international law.

The declaratory theory's second failure here is revealed by historical state practices regarding recognition. For example, Professor Christian Hillgruber, writing in the wake of the Soviet Union's fall and dissolution,

48 See generally John Hasnas, The Myth of the Rule of Law, 1995 U. Wis. L. Rev. 199 (1995).

49 Ryngaert & Sobrie, *supra* note 47, at 467-68.

50 *See* James Ker-Lindsay, *Secession and Recognition in Foreign Policy*, Oxford Research Encyclopedia of Politics 1, 4, 10-11 (2017).

51 *See* Janis Grzybowski, *The Paradox of State Identification:* De Facto *States, Recognition, and the (Re-) Production of the International*, 11 Int'l Theory 241, 241 (2019) ("Studies of de facto..., unrecognized..., or contested... states – that is, states in fact but not recognized as such – suggest that the conventional focus on state recognition misrepresents actual states by confusing what is a matter of fact with formally recognized status").

recounts that "[t]he constitutive, legally operative effect of the recognition of new states is clearly illustrated by state practice with regard to Bosnia Herzegovina."[52] Although Bosnia-Herzegovina did not meet the Montevideo Convention's definition of statehood, failing to "constitute a functioning national body [while] its recognized government only controlled a very small part of the national territory, international recognition . . . conferred on it the status of a state *under international law* by way of a legal fiction. Recognition did not function merely as a refutable assumption that the criteria of statehood were met: it actually served as a substitute for these features . . . . [D]espite its defects, in particular its lack of effective power to rule throughout its territory, Bosnia-Herzegovina thus came into existence *in the sense of international law*. Numerous Security Council resolutions emphasizing the sovereignty, territorial integrity[,] and political independence of Bosnia-Herzegovina[,] and calling for their universal acceptance[,] bear witness to the fact that, after it had been admitted as a member of the United Nations, Bosnia-Herzegovina was regarded *by the international community* as a state protected by . . . international law."[53]

The situation was similar for other states that succeeded from the dissolution of the SFRY, such as Croatia and the Federal Republic of Yugoslavia, as well as for the states that arose from decolonization.[54] And examples abound of the converse to these cases, where an

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[52] Christian Hillgruber, *The Admission of New States to the International Community*, 9 EJIL 491, 493 (1998).

[53] *Id.* at 493-94 (emphasis added).

[54] Fabry, *supra* note 8, at 43 ("As during post-1945 decolonization, the successor republics to the SFRY garnered recognition irrespective of whether they met the criteria of de facto statehood. They all became safeguarded, as a matter of international right, against external territorial designs as well as against unilateral secession. This was made evident in the consistent refusals to consider recognition of the entities challenging the territorial integrity of Croatia, Bosnia and Herzegovina and later the Federal Republic of Yugoslavia. The 1991–92 unilateral independence claims of the 'Republic of Serbian Krajina,' the 'Croat Community of Herzeg-Bosna,' the 'Bosnian Serb Republic' and the 'Republic of Kosova' were rebuffed internationally. As in the case of ex-colonial and ex Soviet entities falling outside the ambit of the postcolonial right of self-determination, the formation of entities actually independent from their parent state within the territory of the former SFRY added to the global number of unrecognized communities. In the wake of the North Atlantic Treaty Organization humanitarian interventions in Bosnia and Herzegovina in 1994–95 and the FRY in 1999, the principal external actors went so far as to opt for interim international administration within their territories rather than to accede to the separation of their respective secessionist entities. There can be little doubt that in the

entity established effective governmental control as a de facto state but was denied recognition because its establishment contravened the post-colonial recognition paradigm that emphasizes parent state consent, such as the Republic of Eritrea, the Republic of South Sudan, the Republic of Bougainville, and the Republic of Somaliland.[55] Other examples abound of state practice explicitly exemplifying or endorsing the constitutive theory.[56] And indeed, historically, recognition from its earliest days as a concept was understood under the constitutive theory, such as at the Vienna Congress convened in the wake of the French Revolution and Napoleonic Wars, where "[a]ccession of any new state to the family of states depended on great powers,"[57] buttressed by the fact that this view found redoubled strength in the post-colonial era. As explained above, the constitutive theory traces its origins from at latest the turn of the 19th century, and when the postcolonial paradigm was put in place the theory had been completely co-opted to come under the control of modern nation-states after they overtook the traditional monarchical dynasties that had originally sought to unilaterally determine which governments in which forms could partake as members of the international community.

Doubtless, there has over time arisen certain norms or criteria for recognition.[58] But in the final analysis, and as clearly established by the norms undergirding the prevailing post colonialism recognition paradigm, recognition by a critical mass of existing states is the dispositive element for international legal personhood, because any objective criteria for statehood must be subjectively viewed and evaluated by human beings acting under color of statehood (in light of their own legal

post–Cold War period the right of self-determination of peoples continued to be circumscribed by the principle of territorial integrity of states, which protected them normatively against involuntary territorial changes from inside as well as outside").

[55] Fabry, *supra* note 8, at 42-43.

[56] *See e.g.* Samkharadze, *supra* note 2, at 21-22 (providing quotes from Bernard Burrows (Head of Eastern Department of UK Foreign Office), Warren Austin (US Ambassaor to the UN), and John Foster Dulles (US Secretary of State)).

[57] *Id.* at 22.

[58] Fabry, *supra* note 8, at 38 ("Although frequently highly political, recognition has not been a matter of unfettered discretion. As in the case of other institutionalized practices, it has been informed by a set of criteria or norms").

and political ideologies),[59] and, as Bosnia-Herzegovina's admission into the international community shows, these objective criteria can be disregarded without community membership being legally forestalled under international law.[60]

In light of the above arguments, it is no rebuttal to the constitutive theory to point to the liberal recognition paradigm of the nineteenth century, which appears to have been declaratory in nature. Whether an effective state has been established which can be declared as such by other existing states must be evaluated based on a set of politically chosen criteria, and the decision to liberally recognize effective governments when they are established, regardless of how they were established, is itself a politico-ideological threshold decision before recognition occurs, a political position that can be changed, as happened with the forging of the post-colonial recognition paradigm. No matter how "declaratory" a recognition paradigm appears or operates in effect, there must still be a preceding political decision to make recognition decisions in a certain "declaratory" way. What is constituted by recognition is formal diplomatic relations as respective members of the international community, and the standards for recognition and recognition decisions, even if "declaratory" in effect, must be set by a preceding political choice that effectiveness is sufficient for the establishment of official diplomatic relations, thereby welcoming new states into the international community.

None of the foregoing is to assert that the declaratory and constitutive theories cannot in a sense be reconciled. But the reconciliation can occur only when we accept the inherently political nature of international law and properly separate sociological notions of statehood from the narrower notion of international personhood. As Nikoloz Samkharadze puts it, "recognition in fact is a two-step process: (1) declaration of recognising states of the fact that a new entity is created with sustainable

[59] *Id.* ("as with other international practices carried out by the executive branch, recognition decisions have been neither *pro forma* nor fixed: They entail an inescapable discretionary element as general norms have to be interpreted when applied to specific cases").

[60] *See also* Coggins, *supra* note 9, at 463 ("the Great Powers, in the service of their own parochial purposes, welcome many more members into the international community than are demonstrably sovereign at home").

government and (2) establishment of official relations with the new state. The first of these acts is declaratory and the second – constitutive."[61] The first step is the acceptance that, objectively, a territorial monopoly of violence—a de facto state—has been established. The second step is the choice to bring this de facto state into the international legal fold as a full-fledged member of the international community through the establishment of formal diplomatic relations. Only second-step recognition confers full international legal personhood upon a state. The logic of international law and established state practice regarding recognition demands acceptance of this conceptual dichotomy.

Secession, State Recognition, and the Influence of Great Powers

Because admittance to full membership in the international community is fundamentally dependent upon recognition, and recognition is fundamentally a political action to establish diplomatic relations with a new state, state membership in the international community is fundamentally dependent upon the political decisions of established member states. Unsurprisingly then, politically, economically, and militarily dominant states exert much influence on the recognition of new states.[62] Accordingly, the success of secession is almost always dependent upon support from a great power.[63] For example, Siroky et al.'s empirical work suggests

[61] Samkharadze, *supra* note 2, at 23. This was the position taken by L.F.L. Oppenheim, the most influential jurist on this topic at the time, when he wrote that "[t]here is no doubt that statehood itself is independent of recognition. International Law does not say that a State is not in existence as long as it is not recognised, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law." L. Oppenheim, International Law: A Treatise, Vol. I, Peace 117 (Longmans, Green & Co., 2d ed. 1912).

[62] Coggins, *supra* note 9, at 461-62.

[63] Sterio, *supra* note 25, at 302 ("Almost all secessionist entities which have been successful in their separatist quests have been supported by at least one world super-power, typically the United States or the Soviet Union/Russia"). *See also* Coggins, *supra* note 9, at 463 ("the Great Powers' political jockeying over the fates of Kosovo, South Ossetia, and Abkhazia is pivotal to whether they will ultimately become members of the international community. Friends in high places could consecrate these actors' membership in the international system").

an association between United States and British arms sales and the amount and speed of importing countries' recognition of Kosovo after its secession.[64] They find the same association regarding large amounts of foreign direct investment from the United States and Russia,[65] and the same regarding membership in the EU and NATO.[66] Bridget Coggins's work similarly finds support for the position that successful state emergence is heavily contingent upon recognition by external great powers.[67]

The Kosovo example shows how recognition, and the political influence great powers exert over it, is of especial importance for secessionist movements that are attempting to establish a new state. Recognition, and the ability to engage as a member of the international community that it affords, can be a crucial practical hurdle that a new state needs in order to solidify and consolidate its effectiveness as a state,[68] as acknowledged by even scholars that accept the declaratory theory.[69] Accordingly, the prospect of being recognized would tend to make attempts at secession more likely,[70] but at risk of such movements being instigated or co-opted by great powers for their own ends.[71]

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[64] David S. Siroky, Milos Popovic, & Nikola Mirilovic, *Unilateral Secession, International Recognition, and Great Power Contestation*, 58 J. Peace Res. 1049, 1060 (2021).

[65] *Id.* at 1061, 1063.

[66] *Id.* at 1062.

[67] Coggins, *supra* note 9, at 433-36, 461-64.

[68] *Id.* at 435.

[69] *See, e.g.,* Anne Peters, *Statehood after 1989: 'Effectivités' between Legality and Virtuality*, Proceedings of the Eur. Soc'y Int'l L., Vol. 3 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1720904.

[70] Coggins, *supra* note 9, at 462.

[71] *See, e.g.*, Roger E. Kanet, *The Superpower Quest for Empire: The Cold War and Soviet Support for 'Wars of National Liberation'*, 6 Cold War Hist. 331 (2006).

The importance of recognition politics increases with increased instability within the international system.[72] Recognition was hardly even an issue in international law until times of instability and change, such as the rise of liberalism, decolonization, and the fall of traditional empires.[73] Today, recognition politics are more indeterminate and politically contentious than ever as the international order is in the midst of serious flux and change in the balance of power,[74] allowing and causing great powers to co-opt secession and recognition for their own ends.[75] This Chapter agrees that it would be desirable to have recognition shift from being an ill defined tool for great powers into an organically developed standard of international law based upon more objective and mutually agreed upon criteria. Specifically, this Chapter's author would heartily endorse a return to the liberal recognition paradigm that was based upon effective governance, non-intervention, and self-determination properly conceived. This is not *per se* impossible, even under acceptance of this Chapter's formulation of the constitutive theory, as it is possible that the politics of state practice and relations can convalesce into identifiable standards, even if imperfectly determinative. Indeed, this is what international law has always been the result of. But the key issue is how such a result is to be achieved. Contrary to common themes in the international literature, this Chapter advocates for radical political decentralization as the means of putting a systematic check on exploitative recognition.

[72] *See* Edward Newman & Gëzim Visoka, *The Geopolitics of State Recognition in a Transitional International Order*, Geopolitics, at 1 (2021), https://doi.org/10.1080/14650045.2021.1912018 ("the transitional international order, and the friction this generates, has further fragmented the norms and practices of state recognition").

[73] Samkharadze, *supra* note 2, at 19.

[74] Fabry, *supra* note 8, at 44-45; Newman and Visoka, *supra* note 72, at 4-10.

[75] Newman and Visoka, *supra* note 72, at 11-20.

In Defense of Secession, the Political Decentralization of Recognition, and Libertarian Anarchy

International law scholars often call for the formalization of legal standards for recognition,[76] usually through the establishment of centralized institutional mechanisms to govern recognition practice in world politics.[77] This has already happened to a certain degree through the United Nation's Charter, Article 4(1) of which "explicitly mentions the ability and willingness 'in the judgment of the Organization' to carry out international obligations as a criterion for admission of new members to the United Nations."[78] But taking such centralization to the next level so as to abrogate individual states' authority to make independent recognition decisions is an unlikely development.[79] And even if it were to occur, it could not change the political nature of recognition. Rather, it would allow for greater exploitation of recognition for power by international actors with influence within this centralized institution. In the face of no opposition, centrally controlled recognition will entrench the dominant political and ideological premises of the existing statist world

[76] *See, e.g.*, Kenn Nwogu & Chibike Amucheazi, *Formation of State by Secession and the Import of Recognition in International Law*, 2 L. & Soc. Just. Rev. 25, 34 (2021) ("It is easy to see how important a process of determining the subject of international law is, and the need for an effective method for conclusive determinations"). *See also* Fabry, *supra* note 8, at 45 ("the Balkan case... revealed the critical importance of a principled, as opposed to unilateral ad hoc, approach to recognition of unilateral secession and other categories of statehood claims").

[77] *See, e.g.*, Newman & Visoka, *supra* note 72, at 22–23 (concluding that modern "controversies and conflicts" regarding recognition "are... a by-product of the unregulated nature of state recognition in the international system, namely the absence of normative and institutional mechanisms to govern this practice in world politics. So far, there has not been sufficient interest among states to constitutionalize state recognition in world politics. Clearly defined and widely acceptable norms, rules, and principles for state recognition, administered by established institutions, would provide predictability and consistency, as well as avoid ad hoc and arbitrary decisions based on self-interest and untamed power politics. In the ongoing re-balancing of international order, and the geopolitical friction which arises from this, the agreement of such norms would promote peace and stability and serve reciprocal great power interests. Until international recognition is constitutionalized at the global level, the use and abuse of state recognition by powerful states will continue to occur and to reflect broader geopolitical rivalries, to the cost of those people living in disputed and ambiguous territorial entities").

[78] Hillgruber, *supra* note 52, at 499.

[79] Newman and Visoka, *supra* note 72, at 4.

order. Indeed, this impetus can already be seen in the United Nations, where under "Article 4(2) of the UN Charter, the final decision as to whether an applicant fulfils the substantive requirements for admission . . . is made by the Security Council and the General Assembly. . . . [T]he United Nations consciously decided against a system of accession by which all states can join the world organization by way of a unilateral declaration. The admission procedure enshrined in the Charter ensures that the relevant organs of the United Nations retain absolute authority in the procedure."[80]

Further centralization of recognition will mean that admission into the entire international community will be under one institution's control, rather than just admission into the United Nations proper (which of course itself is the dominant modern proxy for the international community). With a centralized institution governing recognition, decisions to recognize and accept new members into the international community will fall in line with the institution's own interests, as set by its own members, especially the most dominant members. At a certain point, calls for the centralized institutionalization of recognition may become indistinguishable from calls for a single world state, at which point the endeavor for centralized recognition swallows itself as recognition becomes meaningless when there is only one world state. But even without going so far as a world state, calls for centralization of recognition are at least calls for a single institution to enforce its own ideological standard for what it means to be a "responsible" member of the international community. Thus, counter to claims that the lack of "legally" constituted standards for recognition will doom secession efforts,[81] this centralization would spell a serious blow to the viability of secession, as a centralized recognizer would likely be fundamentally opposed to secession for at least two reasons. First, if the seceding entity disagrees with the centralized recognizer's ideology, its only avenue to gain recognition and garner formalized relations with other states is precluded. And second, such ideological disagreement is very likely because secession

[80] Hillgruber, *supra* note 52, at 503-04.

[81] *See* Nwogu & Amucheazi, *supra* note 76, at 34 ("The problems" politicized recognition "presents can be immediately seen in the case of an entity that secedes and depends on the will of states to recognize it in order to survive").

is fundamentally a decentralizing force, so it inherently challenges the ideology supporting the establishment of a centralized recognizer. The cure to the use of recognition as a tool of exploitation is not the "constitutionalization" of centralized recognition governance, but precisely the opposite—i.e., radical political decentralization.

In the words of Hans-Hermann Hoppe, "[p]olitical competition . . . is a far more effective device for limiting [the] government[al] natural desire to expand . . . exploitative powers than are internal constitutional limitations."[82] Radical decentralization would return recognition to what international law originally and naturally is—principles derived in a decentralized fashion through the political and diplomatic relations of independent states. In the face of radical political decentralization, recognition will by necessity become more based upon objective, mutually agreeable criteria, because no world powers would be able to force their will regarding recognition or nonrecognition of new states, or at least less powerful powers will have a harder time of doing so. As Bridgett Coggins states, "all other things being equal, it may be more difficult for the Great Powers to collude when there are more states whose preferences must coincide."[83] Moreover, political decentralization will incentivize recognition decisions to return to a more liberal paradigm. Smaller states must engage in less exploitation of their populations, and must have a policy of greater free trade with economic and monetary integration between nations.[84] This is because of their relative inability to maintain economic viability under conditions of autarky, as well as the fact that subjects of smaller states have a relatively greater ability to exercise an option of exiting the polity, incentivizing the smaller state to maintain its population through less exploitative policies vis-à-vis its competitor states.[85] Thus, smaller states have a greater need to peacefully

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[82] Hans-Hermann Hoppe, Democracy: The God that Failed, Ch. 5 On Centralization and Secession 110 n. 7 (Routledge 2017) (Transaction Publishers 2001). *See also* Ryan McMaken, Breaking Away: The Case for Secession, Radical Decentralization, and Smaller Polities 20-21, 27-34 (The Ludwig von Mises Inst. 2022).

[83] Coggins, *supra* note 9, at 462.

[84] Hoppe, *supra* note 82, at 110-11, 113-19. *See also* Murray N. Rothbard, *Nations by Consent: Decomposing the Nation-State*, 11 J. Libertarian Stud. 1, 6 (1994); McMaken, *supra* note 82, at 35-42.

[85] Hoppe, *supra* note 82, at 110-11, 113-19.

diplomatically engage and trade with other nations, and will therefore have less luxury to refuse to engage with de facto states that effectively control their respective territories.[86] This will incentivize states to opt for a recognition standard based upon the effectiveness of the foreign states.

In short, decentralization in state recognition will tend to lead to more liberal relations between states (liberal being used here in the classical sense of the term). This conclusion, with regard to not only recognition practices but also to broader matters of international import, offers an angle of rebuttal against authoritarian and technocratic calls for centralization, as well as against liberal and libertarian calls for international federation as a means to foster free trade and peace.[87]

First, at the most basic level, the basis of international law is the relations between states, and these relations, as already explained, are established by the act of recognition. Thus, if decentralization fosters liberal international relations with regard to recognition, then the same is true with regard to the host of other political and legal matters that arise only after states have established formal diplomatic relations through mutual recognition.

But there is yet a deeper problem that the nature of state recognition sheds light upon. As already explained, recognition is closely linked to states' desire to exert political and ideological dominance over others. This highlights the inherently exploitative, expansionist, and thus unlibertarian nature of states as such. If the establishment of relations between states is unlibertarian, then this permeates all subsequent facets of international relations within a statist world order. The core problem with the federation model is that it remains within the statist paradigm.[88] A federation is composed of states – i.e. territorial monopolists on violence – and thus remains inherently confiscatory and expansionist in power.[89] Even the United States Constitution, which is often lauded as the albeit

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[86] *Id.*

[87] *See, e.g.*, Brandon L. Christensen, *Reviving the Libertarian Interstate Federalist Tradition: The American Proposal*, 26 Indep. Rev. 429 (2021); Martin van Staden & Nicholas Woode-Smith, *To Tyrants, the Answer is "No": Conceptualizing a Confident, Muscular, and Cosmopolitan Libertarianism*, 10 Cosmos + Taxis 1 (2022).

[88] *See generally* Hoppe, *supra* note 82, at 221-38.

[89] *Id.* at 107-08.

imperfect template for a successful libertarian federation,[90] was itself a counter-revolutionary means for cronyism through an expanded state.[91]

A federation is a natural step of state expansion down the path to the logical conclusion of statism—a single world state. Some might not balk at, or may even support, the notion of a at least some type of worldwide libertarian state, be it a federation or some other form. Libertarian proponents of federation often cite Ludwig von Mises's and F. A. Hayek's writings on this topic to support the idea that federation is the logical libertarian foreign policy position,[92] although this interpretation of Mises's and Hayek's writings has been credibly challenged.[93] But in any event, implicit in the federation model is an immutably unlibertarian premise—that a single body politic, a federal government over a union of states, can determine proper contours of what the libertarian law *should* be, and thus determine whether any (potential) state or group of people in question are worthy of independence or admission in the federation. This is shown in no uncertain terms by Martin van Staden and Nicholas Woode-Smith, when they advocate for what they term "libertarian imperialism," embracing Thomas Hobbes's classic error[94] and admitting that "[w]ith what we have proposed – a single interstate federation to replace the more or less 200 sovereign states around the world – some might say we wish to impose a single ideal upon all seven billion people that

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[90] *See* Christensen, *supra* note 87, at 436 ("For all its faults, the United States possesses the blueprint for interstate federalism in its constitutional DNA"); Van Staden & Woode-Smith, *supra* note 87, at 9.

[91] *See* Murray N. Rothbard, Conceived in Liberty: Volume V, The New Republic, 1784–1791 (The Ludwig von Mises Inst. 2019) (ed. Patrick Newman); Sheldon Richman, America's Counter-Revolution: The Constitution Revisited (Griffin & Lash 2016); Jeffrey Rogers Hummel, *Did the Constitution Betray the Revolution? Yes! The Constitution as counterrevolution: A tribute to the Anti-Federalists*, THE INDEPENDENT INSTITUTE (Jan. 1, 1981) https://www.independent.org/news/article.asp?id=1400 (last visited April 3, 2023).

[92] Christensen, *supra* note 87, at 430-33; Van Staden & Woode-Smith, *supra* note 87, at 5-9 (2022).

[93] Edwin Van de Haar, *Ludwig von Mises and Friedrich Hayek: Federation as Last Resort*, 10 Cosmos + Taxis 104 (2022).

[94] Van Staden & Woode-Smith, *supra* note 87, at 11. For a rebuttal of Hobbes's statist contradiction, *see* Hobbes' Contradiction: The State of Nature [H.H. Hoppe] (Jan. 7, 2018), https://www.youtube.com/watch?v=hx4Z3tICcM&abchannel = eor%C3%ADaPol%C3%ADticaLibertariaComparada (last visited April 3, 2023).

inhabit the globe."[95] But even among less forceful advocates of libertarian federation,[96] the same statist flaw applies. Federation requires that a state's view of the libertarian ideal be enforced by statist means, and this Chapter urges the rejection of such a project.

Being a state, a federation's federal government would have some sphere of monopoly power, within which it has final say as to all disputes arising under its jurisdiction. This creates a situation where, even in a federation with limited state powers, there will be legal issues determined under this federal institution's view. A world constitutional order based upon libertarian principles is not more likely when there is one institution enforcing its view of what libertarianism means, but rather through a process of decentralizing political authority until states vanish and are replaced with a system of private law.[97] Some view this as an unrealistic goal for utopia,[98] but historical evidence has shown the successful operation of such private law principles,[99] and it is hardly less utopian to think that an institution with monopoly legal power will satisfactorily apply libertarian principles for large swaths of people, let alone not be naturally impelled by the corrupting influence of power.

Even when undergirded by libertarian principles, law and justice are not things that can be derived *a priori* or from a single source. There

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[95] *Id.* at 16.

[96] *See* Christensen, *supra* note 87.

[97] *See* Hans-Hermann Hoppe, *The Idea of a Private Law Society*, The Ludwig Von Mises Institute (July 28, 2006), https://mises.org/library/idea-private-law-society (last visited April 3, 2023); Robert P. Murphy, *Libertarian Law and Military Defense*, 9 Libertarian Papers 213, 216-19 (2017).

[98] Van Staden & Woode-Smith, *supra* note 87, at 11 ("In an ideal world, communities would be purely voluntary endeavors. Sovereign individuals collaborating in organic groups to work towards mutual prosperity. The form of this would probably come to reflect a form of city-state, with free trade and open borders between all of them. This is however not the human nature we are faced with. To paraphrase Hobbes, life can be rather brutish, violent, and short. The art of politics and the construction of policy, therefore, should not be a mindless attempt to achieve utopia, but a compromise between principle and reality"); Christensen, *supra* note 87, at 434 ("radically decentralized orders are untested utopias").

[99] *See, e.g.*, Terry L. Anderson & P.J. Hill, A*n American Experiment in Anarcho-Capitalism: The Not So Wild, Wild West*, 3 J. Libertarian Stud. 9 (1979); Andrew T. Young, *The Political Economy of Feudalism in Medieval Europe*, 32 Const. Pol. Econ. 127 (2021); Bruce L. Benson, The Enterprise of Law: Justice Without the State (The Independent Inst. 2011) (1990).

is simply no single libertarian legal code that can be derived from libertarian principles, so a libertarian unitary or federal state enforcing some view, no matter the internal political processes that were used to establish the view that is to be enforced, contradicts the lessons Austrian School law and economics teaches about the structural requirements for the development of just, rational, libertarian law. Answers to the difficult questions of law that arise as human disputes inevitably occur must be derived through adjudicatory experience across many different sources of law in order to craft adequate (but necessarily imperfect) rules that reasonably balance finality and flexibility in light of general libertarian principles.[100] The federation model undercuts this discovery process through its implication that there can and must be a single libertarian sovereign that would be able to enforce *the* libertarian code.

Take, for instance, a situation, as van Staden and Woode-Smith advocate, where the libertarian federal state has a law that boils down to "tyranny will not be tolerated." What, then, constitutes "tyranny?" Like so many issues in law, this is the type of question that can be reasonably answered in multiple ways, based on the factual circumstances and ideological lens through which these fats are evaluated.[101] The fact that political philosophy has not yet reached a satisfactory answer to this question after thousands of years, even among a group of ideological peers such as "libertarians," should give all political and legal theorists, especially libertarians, swift pause to reconsider whether there should be one sovereign available to answer this question and determine how to justifiably respond in the face of the myriad complexities of human life. In many circumstances, what constitutes "tyranny" so as to constitute a violation of law deserving of responsive force is not easily determined. The development and enforcement of law in order to avoid and resolve disputes is simply too important and too difficult to leave in the hands of a single, fallible, corruptible state, even a federation with cleverly crafted constitutional checks, balances, and separations of power.

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[100] *See* Gregory B. Christainsen, *Law as a Discovery Procedure*, 9 Cato J. 497 (1990); N. Stephan Kinsella, *Legislation and the Discovery of Law in a Free Society*, 11 J. Libertarian Stud. 132 (1995).

[101] *See* Hasnas, *supra* note 48.

States are inherently expansionist, and a written constitution could never be constructed in explicit language so as to block a state from enforcing an ideologically-derived interpretation of the law that will expand its power.[102] What is needed more than an ideal written constitution is for people to agree with the principles of liberty. No matter the written constitution, a culture that does not interpret its laws or create new laws in line with libertarian principles will not embody libertarian ideals. And the very existence of a federal state tends to push a populace away from adopting a libertarian culture. Americans can well attest to the ability of federal politics to crowd out individuals' focus on more local affairs within the consciousness of the citizenry, incentivizing a culture where an ever increasing sphere of issues are engulfed within the national political battleground,[103] an inherently unlibertarian state of affairs. Even with a federation, if humanity is to achieve a worldwide libertarian legal order, it can only occur when the people – not least of which society's legal elite (lawyers, judges, etc.) – accept libertarian principles.[104] And if this is achieved, a federal state to enforce a libertarian legal superstructure over subordinate regional states is no longer necessary.

Proponents of libertarian federation are correct to reject the Westphalian notion of sacrosanct nation-state sovereignty and territorial integrity, and to seek a means to curtail the excesses of democracy.[105] But the answer is not to advocate for a more centralized governing power. A "state for states" is still a state, and a federation is still composed of subordinate states, and is thus still incompatible with the libertarian ethic[106] while being fundamentally unable to allocate resources for the provision of law and government services in a manner that coincides with the

[102] *See* Hoppe, *supra* note 82; Hasnas, *supra* note 48.

[103] Porter Burkett, Too Much Centralization Is Turning Everything into a Political Crisis, The Ludwig Von Mises Institute (Sept. 19, 2020), https://mises.org/wire/too-much-centralization-turning-everything-political-crisis (last visited April 3, 2023).

[104] William H. Peterson, Mises: The Impact of Ideas, The Foundation for Economic Education (Jan. 1, 1991), https://fee.org/articles/mises-the-impact-of-ideas/ (last visited April 3, 2023).

[105] Christensen, *supra* note 87, at 430-34.

[106] *See* Murray N. Rothbard, The Ethics of Liberty 160-97 (2d ed.) (NYU Press 1998) (1982); Murray N. Rothbard, Anatomy of the State (The Ludwig von Mises Inst. 2009).

subjective values of the people.[107] State sovereignty is inherently unlibertarian, so it is contradictory to battle sovereignty with sovereignty. While a federation may address certain issues under particular circumstances, such as reducing economic barriers between members of the federation, it does not address the fundamental problems of statism as such, and increased regional economic integration within the context of a federation might even reduce progress towards further globalized economic integration, as the federation will be more able to operate under a policy of autarky vis-à -vis the rest of the world than would smaller, independent, unfederalized states.[108] What is needed for liberty, peace, and the extension of economic integration and the division of labor across the world under a libertarian constitutional legal order is not merely international anarchy, but full anarchy—i.e., the abolition of the nation-state entirely and its replacement with a system of radically decentralized private law.

But how are we to reach radical political decentralization? One major way, if not a necessary way, is through the political and legal acceptance of unilateral secession as a human right that is part in parcel with the right to self-determination. Historically speaking, secession is not a radically novel thing to advocate. Indeed, "the number of states born following independence demands far exceeds those born in other ways. Nearly two-thirds of states entered the system after demanding independence. Secessionism . . . underlies most twentieth century births" of states,[109] even though the international community has always done what it can to avoid characterizing successful independence movements as secessions.[110] Because of this fact, secession has never been strictly forbidden by international law,[111] but because states, once they exist, are naturally expansionist and do not want to have populations, territory, and resources taken away from their control via secession, it has never attained established standards under international law, let alone

[107] *See* Benson, *supra* note 99.
[108] *See* Hoppe, *supra* note 85.
[109] Coggins, *supra* note 9, at 439.
[110] Fabry, *supra* note 8, at 44.
[111] Sterio, *supra* note 25, at 299.

become something that has become an established right of peoples,[112] even in the face of modern doctrines such as self-determination of peoples.[113] Indeed, it was these very factors that played into the formation of the post-colonial recognition paradigm, in order to preclude unilateral secession, under the guise of "international stability."[114] But it has increasingly become obvious that this has not squelched revolutionary spirits in many places. Indeed, it may have even fueled them over time, as more and more people feel as though they are being exploited and unrepresented by their states, but cannot legally form a new one because their oppressive parent state's territorial integrity takes priority over true self-determination.[115] Granted, "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."[116] In any event, secession has become increasingly important in the international landscape, and it is this Chapter's contention that conditions are swiftly moving towards a breaking point where international law's historical nominal ambivalence to secession and its practical hostility to it can no longer remain tenable. Without an explicit acceptance of secession which would open the possibility for international legal standards for it to develop, secessionist forces will be incentivized towards violent revolt rather than peaceful political disassociation. Counter to the selfish "international stability" rationalization for precluding unilateral secession that existing powers have pushed for years, the preclusion of unilateral secession has actually incentivized violent revolt by taking peaceful unilateral exit off the table. Of course, secession brings with it many practical problems, largely tied up in specific time and place circumstances. These practical considerations will have to be resolved over time through thoughtful

[112] *Id.* at 299–303.

[113] Hoffa, *supra* note 17, at 7-9.

[114] Fabry, *supra* note 8, at 41-44.

[115] Robert W. McGee, *The Theory of Secession and Emerging Democracies: A Constitutional Solution*, 28 Stan. J. Int'l L. 451, 466 (1992) (even a "limited but nonetheless expansive right of secession [that] does not include individual secession [] would help deter a majority's oppression of minorities and defuse tensions that otherwise could lead to revolution").

[116] *Id.* at 454.

scholarship and the handling of specific cases of secession, and are largely beyond the scope of this Chapter.[117] Nevertheless, this Chapter accepts the arguments regarding the benefits of secession and political decentralization broadly conceived, and agrees that it is high time for international politics and law to capture these benefits and forestall protracted conflict by establishing greater acceptance of unilateral secession.

But the desirability of the political decentralization of recognition goes beyond merely making recognition less exploitative. Indeed, any chance for a legal system that moves beyond the archaic and destructive primacy of sovereign nation-states, therewith dispensing of state recognition and its political problems entirely and putting in place a private law society based on peaceful resolution of disputes and the extension of the division of labor, requires international law in the present to accept secession as a means to foster radical political decentralization. As it stands, the international system is at an important fork in the road. While in the midst of serious flux, with shifts in power and a greater interest in the importance of secession,[118] modern international law doctrines, such as self-determination of peoples, are in conflict with established norms, such as sovereign territorial integrity.[119] Because the international community is stuck between a rock and a hard place of either openly admitting the centrality of power politics by outright rejecting notions such as self-determination, or accepting the logical conclusion that sovereign territorial integrity must be rejected if full self-determination is to be realized,[120] the international system is primed for the acceptance of secession as a normalized notion of international law that does not warrant the withholding of recognition. Hopefully, there will be greater acceptance of the clarified constitutive theory of recognition put forth by this Chapter, engendering greater acceptance of state recognition's inherently political nature, because once this is accepted, it becomes clear that radical political decentralization is the only way to avoid exploitative recognition and to have recognition standards develop

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[117] For an excellent treatment of these practical concerns, *see* McGee, *supra* note 115, at 464-73. *See also* Rothbard, *supra* note 84, at 6-10.

[118] Newman and Visoka, *supra* note 72, at 1–3; Ker-Lindsay, *supra* note 50, at 2.

[119] *See* Hoffa, *supra* note 17, at 11–12, 14–17.

[120] *Id.* at 17.

more naturally through the relations of states with greater political parity, rather than used as a tool by great powers.

Conclusion

State recognition is a foundational concept of international law and relations. A critical look at recognition reveals its constitutive nature and its exploitative utilization by geopolitically dominant states, thereby highlighting the fundamentally unlibertarian nature of states as such. Supporters of human liberty must fervently oppose all efforts by the world's established states to centralize authority, especially with regard to the recognition of new member states into the international community, whether this community be composed of independent states or a federation of states. The insidiousness of calls for the centralization of recognition must be decried in no uncertain terms—calls for the centralization of recognition in order to "fix" the "problems" of decentralized recognition are no more than a Trojan Horse containing the world elites' transparent desire for entrenched centralized political power, if not a single world government. Liberal and libertarian calls for a federation or world state to enforce libertarian political principles are self-defeating and in the long run, if actualized, would only serve to increase unlibertarian centralized state power. Rather than seeking to federalize libertarian principles, a proper understanding of state recognition reveals that the proper libertarian position is to advocate for radical political decentralization, through an internationally legally recognized right to unilateral secession, in order to ultimately abolish states entirely and replace the prevailing statist paradigm with a private law society.

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