EMIGRATION, SECESSION, AND THE STRUCTURE OF INTERNATIONAL TAXATION

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ABSTRACT

Global economic inequality is among the most morally urgent, yet unaddressed, issues of our era. This Article documents how (i) inequality among (as well as within) developing and developed nations has been exacerbated by certain patterns of migration, referred to as 'brain drain' and 'harmful fiscal competition'; and how (ii) international law has historically forestalled nations from taking measures that would effectively reduce the adverse distributional impact of such migration. Contra the prevailing regime, I argue that origin nations should sometimes be permitted to tax their emigrants' worldwide income to offset great costs sustained from these migratory patterns; as well as to regulate emigration as a back-up measure in very limited circumstances. However, to avoid losing economically desirable immigrants, this latter authorization would incentivize destination nations to cooperate in administering the origin nation's 'Bhagwati tax' on its emigrants. Having secured this cooperation, origin nations would then be required to employ this tax as the less restrictive compensatory measure. In practice, these reforms would therefore produce a more equitable sharing of international tax revenues among developing origin and developed destination nations, and mitigate global economic inequality. To establish that the right to emigrate should be subject to these modest qualifications, I analogize emigration to secession. As I demonstrate, several strong arguments formulated in the international law and political philosophy literatures against an expansive right of secession apply similarly to emigration. But certain differences do warrant recognizing a right to emigrate that is moderately, though not radically, more expansive than the right to secede.

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I. INTRODUCTION

A. The Status Quo (Re)Examined: A Tale of Two Legal Regimes

It is well settled as a matter of international law that there exist human rights to *physically leave* one's nation of residence, as well as to *renounce one's national citizenship or membership*. The primary textual bases for these rights are the United Nations Universal Declaration on Human Rights' Articles 13(2) and 15(2), which respectively assert that "everyone has the right to leave any country, including his own,"[1] and that "no one shall be . . . denied the right to change his nationality."[2] These pronouncements are further reflected in domestic legal practice, with the vast majority of nations accepting, at least implicitly by their actions and legislation, that citizens in good standing with their government may leave and renounce membership at any time and for any reason. This adherence to Articles 13(2) and 15(2) is not surprising, as the Universal Declaration is widely believed to be binding upon individual nation-states.[3] Indeed, a common argument for the Universal Declaration's force is that it constitutes an "authoritative statement of the rights to which states have committed themselves under Articles 55 and 56 of the UN Charter."[4]

Hereafter, I will refer to the conjunction of the aforementioned (1) right to physically leave a nation and (2) right to renounce one's national citizenship or membership, as (3) the *right to emigrate*.[5] Not only has a very strong right to emigrate been juridically enshrined in international law and reflected in domestic legal practice, but for the most part the academy has concurred with the international law's position. Until very recently, legal scholars, philosophers, and political theorists have all been reluctant to probe the putative moral foundations of this legal right. Rather, they have either taken it for granted that the right enjoys impeccable credentials, or

1. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 13, sec. 2 (Dec. 10, 1948).

2. G.A. Res. 217, *supra* note 1, at Art. 15, sec. 2. ("No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.").

3. *E.g.*, SEAN MURPHY, PRINCIPLES OF INTERNATIONAL LAW 345 (2d ed. 2012).

4. *Id.* Under Article 56, all member nations "pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55," which in turn holds that it is an objective of the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

5. Similarly, when I refer to the *act of emigration*, I will, unless otherwise stated, intend to refer to a case where one physically leaves a country as well as forswears one's national citizenship or membership therein.

While in principle dissociable, rights (1) and (2) are clearly related. And within the legal, political and philosophical literatures, these rights have generally been discussed in the same breath and believed to go hand in hand. In some circumstances, it may be necessary to distinguish between these two component rights of the right to emigrate. But unless otherwise stated, the reader should assume that this Article's exposition, arguments, and analysis apply to these component rights jointly.

they have cautiously avoided the question altogether. Better to let sleeping dogs lie, seems to have been the attitude. It is only in the last few years that things have begun to change on this front, and scholars have started to explore potential moral grounds for this right. But while a variety of defenses of a robust right of emigration have been offered,[6] only a few critiques of the legal status quo have been raised.[7]

One goal of this Article is to challenge this passive consensus. Cutting against the grain of legal and scholarly opinion, it argues that the right to emigrate, in the (*near-)unconditional form* in which it has widely been embraced, ought to be rejected. Although we certainly should not repudiate a right to emigrate entirely—that is, while we surely should affirm a right to emigrate in some form—several modest *qualifications* to this right ought to be accepted. Among other things, these limitations would permit the ongoing *taxation of emigrants* on their worldwide income by their nation of origin in certain circumstances.[8] My strategy for justifying this core claim

6. Defenses of a capacious right of emigration are offered by Fernando Tesón, *Brain Drain*, 45 SAN DIEGO L. REV. 899 (2008) (arguing for a right of emigration on the basis of self-ownership); Gary Clyde Hufbauer, *The State, the Individual, and the Taxation of Economic Migration*, *in* INCOME TAXATION AND INTERNATIONAL MOBILITY, 83–94 (Jagdish Bhagwati & John Douglas Wilson eds., 1989) (also arguing for a right of emigration on grounds of self-ownership); MICHAEL OTSUKA, LIBERTARIANISM WITHOUT INEQUALITY (2003) (arguing that a background right of emigration is required for the state to infer residents' tacit consent to the state's authority); JOSEPH CARENS, THE ETHICS OF IMMIGRATION (2013) (defending symmetrically open borders on grounds of freedom of movement and equality of opportunity, among other reasons); GILLIAN BROCK & MICHAEL BLAKE, DEBATING BRAIN DRAIN: MAY GOVERNMENT RESTRICT EMIGRATION? (2015) (Blake's contribution) (arguing, *inter alia*, that emigration restrictions would require would-be emigrants to shoulder an unfair share of the burden for remedying brain drain); DAVID MILLER, STRANGERS IN OUR MIDST: THE POLITICAL PHILOSOPHY OF IMMIGRATION (2016) (arguing that a right of emigration is a necessary preventative against government tyranny); Christopher Wellman, *Freedom of Movement and the Rights of Entry and Exit*, *in* MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP (Sarah Fine & Leah Ypi eds., 2016) (arguing for a strong right of emigration on grounds of freedom of association); Seyla Benhabib, *The Law of Peoples, Distributive Justice, and Migrations*, 72 FORDHAM L. REV. 1761 (2004) (arguing that the right to emigrate is required to ensure that individuals can effectively pursue their personal conception of the good and is thus a necessary component of Rawlsian liberalism); ILYA SOMIN, FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM (2020) (arguing that "foot voting" is generally a more effective method of political influence than ballot voting, and that open borders maximize political freedom).

7. Recent exceptions include Leah Ypi, *Justice in Migration: A Closed Borders Utopia?*, 16 J. POL. PHIL. 391 (2008) (raising normative consistency objections to asymmetrically open/closed border views, which hold that immigration may be restricted but emigration may not); BROCK & BLAKE, *supra* note 6 (Brock's contribution) (arguing on various grounds that moderate restrictions on emigration can sometimes be a permissible means for legitimate but poor states to remedy the brain drain); Anna Stilz, *Is There an Unqualified Right to Leave?*, *in* MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP (Sarah Fine & Leah Ypi eds., 2016) (arguing that while physical restrictions on emigration are generally impermissible, emigrants may continue to be taxed on worldwide income after their departure in order to prevent them from averting certain distributive obligations to compatriots).

8. Much of the foundational work on this type of tax was undertaken by the Indian-American economist Jagdish Bhagwati beginning in the 1970s. In particular, see his substantive and editorial contributions to TAXING THE BRAIN I: A PROPOSAL (Jagdish Bhagwati & Martin Partington eds., 1976); THE BRAIN DRAIN AND TAXATION II: THEORY AND EMPIRICAL ANALYSIS (Jagdish Bhagwati ed., 1976); INCOME TAXATION AND INTERNATIONAL MOBILITY, *supra* note 6.

will involve:

> 1) First, showing that there are weighty global and domestic distributive justice-based reasons for granting states such authority, which stem from the effects of two international migratory patterns for persons and capital; and
>
> 2) Second, analogizing emigration to secession, in order to establish that the right to emigrate should not be so broad as to always trump these initial distributive considerations.

Let me explain this second step. In spite of clear similarities between emigration and secession, which going forward I will jointly refer to as 'exit,' these two acts have historically been subject to radically disparate legal regimes. Standing in stark contrast to the Universal Declaration of Human Right's treatment of emigration, international legal practice only recognizes a right to secede under the narrowest of circumstances. In particular, unilateral secession—that is, secession which is not consensually agreed to by the seceded-from remainder state—is only permitted in situations where the seceding territory has previously been unjustly colonized by a foreign power. These are often referred to as "saltwater decolonization cases."[9] This divergence in the legal treatment of emigration and secession has also been mirrored in the writing of legal scholars, philosophers, and political theorists. Although scholars have argued for a broader right of secession than that which prevails under international law, very few have defended a right of secession nearly as expansive as the existing legal right to emigrate.[10] In effect, both the international law and the academy have endorsed a highly dualistic legal regime, providing for (i) an extremely broad right of emigration, but (ii) a far narrower right of secession.

The analogical argument to be developed throughout this Article is that this radically disparate legal and scholarly treatment of emigration and secession is incongruous and ultimately indefensible in light of the acts' morally pertinent similarities. Accordingly, if one holds that the international law and scholarly community have been correct in rejecting a capacious right of secession, then one ought to also embrace certain moderate qualifications on the right to emigrate, which would have the effect of bringing these two legal regimes into somewhat closer (though not complete) alignment.

Furthermore, although my focus will be on the personal right of emigration, much of this analysis should also apply (and similar

9. Allen Buchanan, *Secession* §4, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2017 ed.), https://plato.stanford.edu/archives/fall2017/entries/secession/.

10. *See* discussion *infra* at Part III.

qualifications should attach) to norms of capital relocation, which reflect entitlements to transfer capital across borders free of ongoing taxation or other regulations from the home nation. While existing norms of capital relocation do not appear mandated by international law, they nevertheless reflect widely embraced norms of legal practice. This acceptance has plausibly ridden, at least in part, on the coattails of the right to emigrate,[11] as both reflect a common concern for maintaining open borders that allow for the international exchange of persons and capital. However, it is intuitively plausible that one's property rights to relocate capital across borders should be no more capacious than autonomy rights to move one's own body in this way, no matter how expansive we ultimately deem the latter to be. Accordingly, if one accepts those qualifications on the personal right of emigration to be spelled out immediately below, then the propriety of attaching similar provisos to the right to relocate capital would likely follow a fortiori.

B. The View to be Defended

Before developing arguments in favor of modestly circumscribing the right to emigrate, I must now describe my proposed qualifications on the right.

The basic normative view advanced in this Article is that legitimate nations that respect human rights should be permitted to recover great losses unjustly sustained as a result of emigration by taxing their emigrants' worldwide income on an ongoing basis; or if (and only if) such attempts at taxation prove inadequate, by employing the least restrictive regulations on emigration required to forestall such injustices. In addition, economically motivated emigrants should generally be taxed and regulated before emigrants who relocate for other reasons, such as for political, cultural, or other personal reasons.

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11. Might there be another explanation for the widespread acceptance of these norms of capital relocation? Efficiency considerations have clearly also played a role. For the standard reasons laid out in introductory economic textbooks, it seems that many nations have deemed it to be in their own prudential self-interest to maintain reciprocally open borders in the expectation that permitting capital to flow to its highest value uses will ultimately redound to each such nation's benefit over the long run. *E.g.*, PETER DIETSCH, CATCHING CAPITAL: THE ETHICS OF TAX COMPETITION 68 (2015). However, as we will see below at Part II in our discussion of brain drain and harmful fiscal competition, this longstanding promise of globalization has simply not been realized for all, as many (generally developing) nations have suffered severe net losses from the exportation of human and other capital, and from tax avoidance and evasion. *See, e.g.*, REUVEN AVI-YONAH, AN ADVANCED INTRODUCTION TO INTERNATIONAL TAX LAW 67 (2nd ed. 2019). To the extent that such nations have steadfastly declined to regulate or tax the relocation of such capital in the face of mounting losses, it is implausible that their actions can be wholly chalked up to enlightened self-interest and unwavering faith in the standard efficiency narrative. Rather, it is more parsimonious to impute these nations a belief that burdening cross-border movement of persons and capital infringes upon some right, or at least some extra-legal but customarily accepted entitlement, on the part of persons and businesses.

This view is set out more fully in the following ten proposed qualifications, conditions, carveouts, and curtailments on the right to emigrate, which deal with the (i) means by which, (ii) parties for whom, and (iii) circumstances under which emigrants may permissibly be taxed or otherwise regulated by home (or origin) nations.

Our first set of claims and conditions takes a lexical approach to the *means* by which emigration may be regulated. They say that (Condition 1 - C1) a home nation is permitted to *tax* its emigrants in order to offset 'properly compensable losses' sustained as a result of their exit, the nature of which losses shall be described below. In theory, this tax could take the form of a one-time upfront settlement[12] in the event the party owns sufficient assets to adequately indemnify the home nation in one fell swoop. In other cases, however, full compensation may require ongoing taxation of the emigrant on her worldwide income,[13] or some other appropriate tax base.[14] Furthermore, (C2) where and only where this scheme of taxation would: (a) prove administratively infeasible, (b) otherwise fail to adequately indemnify the home nation for its properly compensable losses, or (c) treat the emigrant's destination nation improperly,[15] the home nation may resort to *regulations* on emigration,[16] and only insofar as the other conditions spelled out below are also satisfied. Moreover, such regulations must be the least stringent, both in terms of duration and other relevant parameters, required for the home nation to forestall or recoup its properly compensable losses.

This lexical ordering of regulative means reflects the fact that limiting an emigrant's opportunity to extract full economic returns from her labor and capital through taxation generally constitutes a less serious affront to

12. A one-time departure tax of this sort already exists under U.S. tax law. Under Internal Revenue Code (I.R.C.) § 877A and its accompanying regulations, the assets of certain wealthy or high income expatriates will be deemed to be sold for their present fair market value upon expatriation, and tax will be owed on the difference between the value of these assets and their aggregate tax bases. In this way, the state's coffers are able to reach previously untaxed asset appreciation.

13. Some nations already impose such taxes on firms that relocate their legal residency for tax reasons. Under U.S. tax law, such rules are provided by I.R.C. § 7874 and its accompanying regulations. This regime, and the treatment of business entities more generally, will be considered in future work.

14. One reason why § 877A's one-shot exit tax on previously untaxed asset appreciation may not suffice is that it does not recoup prior state investments in an emigrant's human capital. *See infra* Part III-(B).

15. It is a commonly held view that a host (or source) nation is ascendant in its claim to tax income whose creation requires use of that nation's infrastructure. For defense of this traditional view, see Mitchell Kane, *A Defense of Source Rules in International Taxation*, 32 YALE J. ON REGUL. 311 (2015). However, for a recent provocative critique, see Adam Kern, *Illusions of Justice in International Taxation*, 48 PHIL. AND PUB. AFFS. 151 (2020). If one disagreed with Kern's conclusions, and continued to adhere to the orthodox view stated above, then this would provide another plausible set of grounds for why emigration may sometimes be regulated: viz., in order to avoid a situation where the home nation could exact repayment for properly compensable losses from its emigrants only by concurrently treating the host nation unfairly.

16. *Contra* Bhagwati, whose original proposal did not permit for actual restrictions on emigration, even as a back-up measure to his proposed tax. Jagdish N. Bhagwati & William Dellalfar, *The Brain Drain and Income Taxation: The U.S., in* TAXING THE BRAIN DRAIN I, *supra* note 8, at 35.

her autonomy and other interests than curtailing her physical liberty. If the state is able to recoup its properly compensable losses through taxation alone, it ought to employ this less restrictive instrumentality. The use of physical regulations can still be justified, however, when they serve as a necessary means of remedial enforcement for those taxes that the home nation would have been justified in levying if such taxation were practically feasible, adequate for purposes of compensation, and fair to the destination nation.[17]

It is noteworthy that, under the purview of this lexical principle, taxation would play a theoretically novel role in an open economy. In a closed domestic economy, the functions of taxation are relatively well understood,[18] and have been taken to include raising revenue for public goods, forcing the internalization of externalities, advancing certain macroeconomic objectives,[19] and redistributing income to promote social welfare or bring about a fair allocation of resources. When we transition to an international context, this picture is complicated by countervailing efforts of multiple nations to tax common income streams. Historically, the international taxing rules have largely served to coordinate these competing claims among states. And more recently, some scholars have argued for the revisionary view that these rules should also be employed as an instrument to bring about an equitable distribution of resources among nations.[20]

On the regime endorsed here, taxation would play a different role in an open economy: as the least restrictive means for nations to vindicate claims against individuals[21] who concurrently assert rights of migration. Conditional upon the validity of these claims, this tax can therefore be understood as a liberty-enhancing instrument in this setting.[22] Among the traditional functions of taxation, the proposed scheme most closely resembles a Pigouvian tax,[23] which affords parties the freedom to engage in activities that impose negative externalities on others insofar as these costs are internalized through payment of the tax. Similarly, the proposed regime

17. Compare this claim to the view developed by Stilz, *supra* note 7. A practical problem with Stilz's view, who endorses the use of taxation but generally not regulations on emigration, is that unless paired with a grant of authority for nations to regulate emigration as a back-up measure, the tax will often be inadministrable. The implications of this fact will be discussed in depth at Part II.

18. *E.g.*, HARVEY S. ROSEN & TED GAYER, PUBLIC FINANCE (9th ed. 2010).

19. *E.g.*, YAIR LISTOKIN, LAW AND MACROECONOMICS: LEGAL REMEDIES TO RECESSIONS (2019).

20. *See* Alexander Cappelen, *The Moral Rationale for International Fiscal Law*, 15 ETHICS AND INT'L AFFS. 97 (2001); Ilan Benshalom, *The New Poor at Our Gates: Global Justice Implications for International Trade and Tax Law*, 85 N.Y.U. L. REV. 1 (2010); Ilan Benshalom, *How to Redistribute? A Critical Examination of Mechanisms to Promote Global Wealth Redistribution,* U. TORONTO L. J. (2014); Adam Rosenzweig, *Defining a Country's 'Fair Share' of Taxes*, 42 FLA. ST. U. L. REV. 373 (2015); Kern, *supra* note 15.

21. *See infra*. The grounding of these claims will be explored later in this Article.

22. Thanks to Mitchell Kane for pressing me to emphasize these implications of my view.

23. See, classically, ARTHUR PIGOU, THE ECONOMICS OF WELFARE (1920).

permits individuals to withdraw from their home nation and renounce citizenship therein, on the condition that any valid obligations to that nation are satisfied through taxation.

Now consider a second set of claims and conditions, which concern those *parties* whose emigration may be regulated, either through taxation or physical restrictions in the manner specified above. These principles are cross-cutting, in that they bear on the operation of (C1)-(C2), but also make distinct demands of their own. In general, (C3) more significant regulations, including higher tax rates, may be placed upon non-indigent emigrants who are *economically motivated* than upon those who are either politically or culturally motivated.[24] A special class of economic migrants comprises those who are *tax motivated*: as a rule of thumb, the state should tax and regulate such parties more significantly and before doing so to migrants who relocate for substantive economic reasons. Similarly, (C4) the home nation ought generally to tax and regulate its *more well-off* economic emigrants more significantly and before doing so to its economic emigrants of lesser means. Finally, (C5) it is where and only where the home nation has already exhausted its options to tax and regulate its non-indigent economically motivated emigrants, and these measures have proved insufficient for recovery of its properly compensable losses, that it may regulate the relocation and expatriation of its non-economically motivated emigrants. And even then, the state may only take such measures under particularly exigent circumstances.[25] As a consequence of this principle, one would expect that only the emigration of economically motivated parties could typically be regulated.

The basic distinction between economic versus non-economic migrants

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24. Ideally, a *case-by-case assessment*, which takes into account all the facts and circumstances, would be made for whether a particular emigrant is primarily economically motivated. As inquiries into subjective motivation and intent are frequently made in the law, I see no reason why a facts and circumstances inquiry of this sort should be ruled out in this context. For instance, two similar inquiries involve legal determination of (i) the motivation of self-claimed conscientious objectors to war and (ii) whether a marriage is entered into by one of the parties to acquire permanent residency status (green card).

However, if it were ultimately found too difficult to reliably ascertain an emigrant's subjective motivation, the state might still resort to the use an *objective test*, which shifts the burden of proof and creates a rebuttable presumption of economic motivation when certain conditions are satisfied. This type of strategy appears to be work with the present I.R.C. § 877A, which levies a one-time toll charge on the untaxed asset appreciation of certain expatriates with a high net worth or income.

In his work from the 1970s, Bhagwati advocates for a tax on "professional emigrants," as classified using categories of professional groups employed in US immigration law. Jagdish Bhagwati, *The Brain Drain Tax Proposal and the Issues*, *in* TAXING THE BRAIN DRAIN I, *supra* note 8, at 3-4. In the absence of countervailing evidence, membership in certain high earning professional groups could often serve as a reasonable proxy for economic motivation, particularly in the brain drain context, discussed infra at Part II-(A).

25. And, of course, only insofar it has complied with (C1) and (C2), by first opting to tax these non-economic emigrants to recover its properly compensable losses.

has long been reflected in the international law of *immigration*.[26] Similarly, under the constitutional law of most liberal democracies, economic association may be regulated far more strictly than either political or cultural association. The time has come, I suggest, for this distinction to also be incorporated into the law of emigration.[27] The case for recognizing somewhat stronger rights of politically and culturally motivated emigration is complex and relies upon weighing a host of considerations, such as the different values, functions, and effects of economic, political, and cultural association, some of which will surface at various points through the remainder of this Article.[28] And the grounds for first regulating the exit of more well-off economic migrants are essentially twofold: first, the more well-off a prospective emigrant already is, typically the less weighty of an economic interest that individual has in becoming a member of a different nation; and second, those arguments in favor of recognizing constraints on emigration developed in Parts II and III of this work will tend to apply with greater force the better off an economically motivated migrant is.

We now come to the core of the revisionary normative view that I wish to defend in this work. So far, I've considered the appropriate means by which, and parties for whom, emigration may be regulated. The following five claims and conditions deal with the logically prior question of the *circumstances* under which emigration may be regulated at all. Such circumstances constitute background conditions, the joint satisfaction of which trigger principles (C1)-(C5), which inform the subsequent stage of analysis.

Here is the proposal: when and only when (C6) emigration would impose great costs on either the nation of emigration or the international community,[29] and (C7) this imposition would constitute a significant injustice,[30] including (but not necessarily limited to) those forms of injustice

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26. While refugees fleeing political persecution or other violations of their human rights enjoy a limited right of asylum to enter some country or another, a right of immigration is not generally recognized for economically motivated migrants. *E.g.*, SOMIN, *supra* note 6, at 169-70.

27, *Contra* Somin, who argues that refugees and economic migrants should be subject to similar rules, even with respect to immigration policy. *Id.*

28. *See* discussion *infra* at Part IV-(C).

29. When the interests of the home nation and international community conflict, the origin nation will often have an *agent-relative permission* to regulate emigration, in the ways that I specify below, assuming that the other conditions laid out in this section are satisfied. As a growing mass of moral philosophers have recognized, the most plausible versions of consequentialism incorporate permissions on the part of an agent to forbear from taking actions that would bring about the best consequences overall but which would be very costly for her personally. SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM (1982); MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS (2012). I see no reason why states must not be granted similar prerogatives within the sphere of international relations. For reasons discussed infra at Part II, however, we can expect domestic and global justice to generally cut in the same direction, and so in practice this conflict should not often arise.

30. This is an instance of the more general principle that one's discretion to impose costs on others may not be restricted unless this imposition is significantly *wrongful*. JOEL FEINBERG, HARM TO

that I will catalogue later in this work,[31] (C8) the home nation may employ the least restrictive appropriate means of regulating such emigration required to rectify this injustice and recover its (or the international community's)[32] properly compensable losses, and only insofar as (C9) these means are employed by legitimate nations in good standing with the international community, and (C10) such regulations do not threaten the prospective emigrant's other human rights,[33] as determined by an international governance institution or legal body properly charged with monitoring human rights compliance.

A few important clarifications and elaborations are in order here. First, it is where and only where conditions (C6)-(C7) and (C9)-(C10) are satisfied that the costs sustained by the home nation (or international community) as a result of emigration should be regarded as '*properly compensable losses*,' as that term is used in (C1)-(C5). Second, what counts as the *'least restrictive appropriate means*' of regulating emigration according to (C8) will be determined, at least in part, by (C1)-(C5)'s requirements—perhaps in tandem with other contextually relevant moral and legal principles. Such further principles might, for instance, place additional constraints on the appropriate tax rates, forms of taxation, and duration or other parameters of the physical restrictions. Third and finally, it should be underscored that, as I have articulated in (C8), states may employ these least restrictive appropriate means when (C6)-(C7) and (C9)-(C10) are satisfied: they are, in other words, *permitted* but not, on the view advanced here, required to do so. Although that latter stance might be defensible when the costs are borne by the international community, it becomes less clear when these costs are instead sustained by the home nation itself, and so I will not hereafter seek to defend this more extreme position.

Let me now define a key term. Going forward, I will refer to a right of emigration that prohibits states from employing the least restrictive appropriate means of regulating emigration referred to in (C8), *even when* conditions (C6)-(C7) and (C9)-(C10) are satisfied, as a '*strong right of emigration.'* Roughly put, this is a right that forbids legitimate nations from taking the least restrictive measures required to recover or forestall great losses unjustly sustained from emigration. It is this right that will be my

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OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW (1984).

31. *See infra* Parts II–III. In other words, I do not claim that this list of injustices is exhaustive: while it seems to me that the injustices surveyed herein are among the most serious and important, there are others that I have not had the space to elaborate upon, and others that I may have simply failed to recognize.

32. In which case, compensation must be distributed fairly to the other members of the international community.

33. Conditions similar to my (C9) and (C10) are emphasized by Gillian Brock in BROCK & BLAKE, *supra* note 7, at 85; and by Stilz, *supra* note 7, at 75.

primary target of critique. For as we shall see later, conditions (C6)-(C10) are implications of this Article's analogical argument: because similar provisos on the right to secede have been widely and properly accepted,[34] the same underlying considerations and a respect for consistency require that such limitations be placed on the right to emigrate.

Unlike those conditions laid down in (C6)-(C10), conditions (C1)-(C5) are not as easily derived in one fell swoop from the analogical argument. Rather, as I have noted above, they are, to some extent, the products of a messier process of weighing additional normative and empirical considerations. As a consequence, I recognize that there is somewhat greater room for disagreement on these conditions. Indeed, the view of 'least restrictive appropriate' regulations that is reflected in my (C1)-(C5) diverges in certain important respects from the revisionary proposals offered by the small number of commentators who have taken a skeptical stance towards the international law's absolutist right of emigration.[35] It is therefore important to emphasize that a reader could, in principle, agree with the crux of my analogical argument and accept its main implications in the way of (C6)-(C10), while taking a somewhat different position on those issues raised by (C1)-(C5).

C. A Roadmap

Having now laid out the normative view to be defended herein, we must move to consider the arguments in its favor. My case for this position will unfold as follows.

Part II presents distributive justice-based reasons in favor of granting states the authority to tax and regulate emigrants in the structured manner

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34. *See infra* Part III.

35. Chief among these commentators are Gillian Brock and Anna Stilz. BROCK & BLAKE, *supra* note 7, (Brock's contribution); Stilz, *supra* note 7. Brock and Stilz have importantly different views on what qualify as appropriate regulations on emigration, and neither appear to subscribe those general principles reflected in (C1)–(C5). As I understand them, the differences between these commentators' respective positions and my own are as follows.

First, while Stilz argues that ongoing taxation of emigrants can be justified in some circumstances, she does not appear to sanction the general use of direct regulations on exit should this taxation prove to be administratively infeasible, or treat the destination nation unfairly. Although Stilz does entertain the possibility that limited terms of compulsory service may be required of doctors (specifically), in the narrow circumstances where taxation does not allow a nation to sustain its national health care system, she does not strongly commit to this position. *See id*. at 74–75.

Second, while Brock sanctions the use of both taxation and physical regulations in some circumstances, she does not appear to take the same lexical approach that characterizes my positive view, which permits for physical regulations on emigration when and only when taxation has proved futile, or otherwise inadequate.

Finally, neither Brock nor Stilz distinguish between economically and non-economically motivated emigration. Consequently, they do not hold that the former should generally be taxed and regulated more strictly than the latter, or require that a nation first exercise its prerogative to regulate emigration of the former before doing so for the latter.

laid out above. Such considerations stem from two recent migratory patterns for persons and capital, commonly referred to as 'brain drain' and 'harmful fiscal competition.' These trends have been widely viewed as problematic from the standpoints of both domestic and global distributive justice, as they have contributed to significant intranational inequalities among better-off and worse-off natives of a given nation, as well as to international inequalities among developed and developing nations. As I show, both patterns have been exacerbated by the international law's recognition of a strong right of emigration, as well as widespread acceptance of associated norms of capital relocation.

While weighty, these distributive justice-based considerations in favor of taxing and regulating emigrants, which are basically consequentialist in character, would not be dispositive if there nevertheless ought to be a *strong right* to renounce one's membership and relocate one's person (and capital), come what may. To establish that the right to emigrate should not be so broad as to always trump this consequentialist calculus, I therefore rely on the secession analogy described above. This *analogical argument* itself proceeds in two main stages.

The first stage of analysis, undertaken in Part III, explores several morally pertinent similarities between secession and emigration that have featured in forceful arguments developed by legal scholars and political philosophers in favor of regulating secession. In particular, both acts permit exiters to discretionarily nullify natural duties of justice owed to their home nation compatriots without limit, and to avoid repayment on prior tax-funded investments in their human capital (and other benefits received). Furthermore, both rights create opportunities and incentives for individuals to engage in strategic political behavior that undermines the fairness, efficiency, and institutional stability of democratic governance. Conversely, placing moderate and judiciously crafted qualifications on rights of exit can temper these opportunities and incentives, and perhaps more surprisingly, even create salutary incentives for states to behave in socially desirable ways, such as respecting human rights. These common features, I claim, constitute a compelling *prima facie case* for overall resemblance between secession and emigration, and jointly give rise to a presumption in favor of subjecting both rights to similar qualifications.

The second stage of analysis, taken up in Part IV, completes this analogical argument by considering certain differences between secession and emigration that have been cited by commentators as the acts' *critical differentia*, and showing that none of them are in fact suited to wholly defeat the prima facie case established in Part III. In particular, I consider the fact that secession uniquely involves the appropriation of territory from the original nation, which I refer to as secession's 'territorial dimension'; that only emigration involves cross-border movement; and that emigration implicates freedom of positive association more strongly than secession,

which generally only implicates freedom of disassociation. While the first two of these differences do not justify differential treatment of secession and emigration, the third difference (freedom of positive association) does justify accepting a right to emigrate that is moderately more expansive than the right to secede. This conclusion is consistent with the general view expressed in (C1)-(C10), which only permits modest and narrowly tailored regulations on emigration when the exacting preconditions laid out above have been satisfied.

Finally, in the conclusory Part V, I summarize this Article's argument in broad contour, and review a number of specific institutional and doctrinal implications of the general view embodied in (C1)-(C10).

As a prefatory note, the themes and analysis undertaken in this Article's respective parts are quite varied in content and character. While Part II largely concerns itself with international tax law and policy, and provides an institutional and economic analysis of brain drain and fiscal competition, Parts III and IV address fundamental questions in legal and political philosophy. Because both fields critically bear on the matter at hand, I must draw upon topics, tools, and modes of analysis from each discipline. By establishing a number of important but hitherto unnoticed interconnections between these literatures, this Article further aims to lay the groundwork for future research on the migration of persons and capital that is more interdisciplinary among law, philosophy, and economics than much prior scholarship.

II. DISTRIBUTIVE JUSTICE-BASED CONSIDERATIONS: TWO MIGRATORY PATTERNS FOR PERSONS AND CAPITAL

This Part examines two recent mass migratory patterns for persons and capital, commonly referred to as (i) *brain drain* and (ii) *harmful fiscal competition*. These trends, which represent increasingly dominant modes of globalization,[36] have generated voluminous legal, economic, and tax policy literatures, within which there has been widespread, albeit somewhat undertheorized, acknowledgement that both give rise to outcomes undesirable from standpoints of domestic and global justice alike. Due to scant communication between the literatures on brain drain and harmful fiscal competition, however, there has been little express recognition that both phenomena stem from a common, if partial, cause: viz., that economically motivated actors have increasingly availed themselves of the international law's extremely permissive stance towards emigration, as well as widely embraced norms of capital relocation, to pursue goals quite distinct from those contemplated when the right to emigrate was originally

36. *See e.g.*, TSILLY DAGAN, INTERNATIONAL TAX POLICY: BETWEEN COMPETITION AND COOPERATION, 12–42 (2018).

promulgated in the United Nations Declaration of Human Rights.[37]

Our discussion in this Part will go some way towards connecting the dots between these trends. For as we shall see, the international legal right of emigration restricts the range of policies that states may use to effectively combat both brain drain and harmful fiscal competition. Conversely, if this right were modestly curtailed in the ways I've proposed, and those associated norms of capital location softened, states would enjoy the authority to take certain measures that hitherto have been frowned upon by international law and practice, but which are likely necessary to blunt the adverse distributional impact of these migratory trends.

This section's analysis therefore provides some preliminary distributive-justice-based considerations in favor of granting states the authority to tax and regulate their emigrants in the manner endorsed by (C1)-(C10). However, as noted above, these considerations would not suffice to justify the taxation or regulation of emigrants, all things considered, if there nevertheless ought to be a (near-)unqualified *right* to relocate one's person (and capital).[38] This could be so, for instance, if there were a strong moral right to emigrate that ought to be reflected in legal doctrine and practice, and which always trumps competing considerations of distributive justice.

For this reason, I will not rest my case for (C1)-(C10) on this Part's analysis of brain drain and harmful fiscal competition. Rather, in Parts III and IV, I will argue that there (morally) ought not to be a strong (legal) right to emigrate. My plan will be to recruit a number of forceful arguments advanced by legal scholars and political philosophers in favor of circumscribing the right to secede, and to demonstrate that these arguments are commonly applicable to emigration. As that subsequent analysis will show, it is therefore sensible to regard (1) brain drain and (2) tax and economically motivated emigration that produce harmful fiscal competition, as functionally and morally on par with (3) economically motivated secession, to which there is not and ought not be any strong legal right. While the reader works her way through this Part's exposition and analysis, she should in anticipation of that subsequent discussion keep the following question in mind: if secession were the vehicle used to bring about consequences akin to those of brain drain and harmful fiscal competition, would legitimate states be obliged to abstain from taking appropriate and narrowly tailored interventions?

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37. It appears that the human right to emigrate was largely intended to serve as a prophylactic measure against government tyranny, rather than to permit mobile actors to pursue profit the world over. BROCK & BLAKE, *supra* note 6, at 193 (Blake's contribution). Thus, purely economically motivated uses are what I have heard Amy Sepinwall refer to as an "*off label use*" of the right: use to achieve an aim unrelated to the right's intended purpose.

38. If one adopts a purely rule-consequentialist view of rights, however, the prospects for this line of argument being dispositive are somewhat more auspicious.

A. Brain Drain and Harms to the Globally Worst-Off

1. The Pattern Explained

Brain drain refers to the migratory pattern of individuals with relatively high human capital leaving their *home (or origin) nation* to settle in a more developed *host (or destination) nation*, where they earn higher economic returns on their talents and abilities, both native and cultivated. For many developing home nations, this outward flow of human capital has created dire shortages of critical human services, such as medical care.[39] It has also deprived these home nations of significant tax revenues, innovation, and future leaders for the private and public sectors. Consequently, many such nations have suffered from institutional stagnation and even regression.

To be sure, brain drain sometimes has certain positive consequences for home countries as well. For example, the prospect of emigrating may prompt individuals to acquire more education or professional training than they otherwise would have, in the hopes of one day earning a handsome return on these improvements to their human capital. This is sometimes referred to as "brain gain."[40] Even where emigrants are ultimately lost to more developed host nations, the home nation may enjoy the benefits of this increased human capital in the interim period. In addition, emigrants often send back remittances to family members in their home nation, thereby increasing the country's stock of fiscal capital,[41] or aid in the creation of valuable diaspora networks between the home and host nations.[42] Finally, some emigrants eventually return to their home country, bringing with them refined skills and other capital.[43]

However, while the net negative/positive consequences of brain drain vary from case to case, the empirical literature suggests that the poorest and least developed nations are typically the most adversely affected.[44] For such nations, those salutary byproducts of emigration recorded above are not generally sizeable enough to offset the critical loss of human capital. While the opportunity to relocate to more developed host nations is of course a boon for the emigrants themselves, these individuals tend to be among the

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39. Devesh Kapur & John McHale, *Should a Cosmopolitan Worry about the "Brain Drain"?*, 20 ETHICS & INT'L AFFS. 305, 307 (2006).

40. *Id.* at 310.

41. Mihir A. Desai, Devesh Kapur, & John McHale, *Sharing the Spoils: Taxing International Human Capital Flows*, 11 INT'L TAX & PUB. FIN. 663, 673 (2004).

42. *Id.* at 674–75.

43. Kapur & McHale, *supra* note 39, at 311.

44. *See id.* at 312. Kapur and McHale observe that the Caribbean nations of "Grenada, Jamaica, and Haiti have skilled emigration rates above 80 percent." *Id.* at 306. And in Africa, "exceptionally high rates are observed for Cape Verde (68 percent), Mauritius (56 percent), Sierra Leone (52 percent), and Ghana (47 percent)." *Id.* at 306–07.

more educated and innately talented members of their native societies. Thus, the improvement in their lot is often bought at the expense of severe setbacks to the true globally worst-off: viz., the worst-off members of the worst-off nations. As a consequence of brain drain, two sets of inequalities are thereby exacerbated:

> (i) *Domestic Individual Inequalities*: the gap between worse-off and better-off individuals native to developing home nations; and
>
> (ii) *Global National Inequalities*: the gap between worse-off and better-off nations comprising the global community.[45]

Brain drain therefore appears objectionable from the standpoint of egalitarian theories[46] of domestic distributive justice, due to inequality (i),[47] as well as from the perspective of egalitarian theories of global distributive justice, due to inequality (ii). Furthermore, in light of the declining marginal utility of wealth, it is plausible that brain drain would even be deemed undesirable by domestic and global utilitarian theories,[48] as it seems unlikely that severe harm to the globally worst-off would generally be fully offset in the felicific calculus by increases in wealth accruing to emigrants and other members of developed destination nations.

As the political philosopher Gillian Brock has argued in her own recent defense of moderate emigration regulations, the plight of the globally worst-off demands our earnest attention.[49] And so, in observance of this duty, we are obliged to reexamine the justifications for the international legal human right to emigrate in an appropriately critical and neutral light, as this right circumscribes the range of policy responses that developing home countries may adopt to combat the brain drain. In the next two sections, I explain some of the main obstacles.

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45. Both global and domestic distributive-justice-based reasons to rue the brain drain are gestured at by Bhagwati, *supra* note 24, at 14, 22.

46. Egalitarian theories of distributive justice hold that inequality among individuals is bad in and of itself. *E.g.*, LARRY TEMKIN, INEQUALITY (1993).

47. A formal welfare-economic argument from egalitarian domestic justice is offered by Koichi Hamada, *Efficiency, Equality, Income Taxation and the Brain Drain: A Second-Best Argument*, 2 J. DEV. ECONS. 281 (1975) *in* BHAGWATI, *supra* note 8, at 197–202.

48. And, a fortiori, by domestic and global prioritarian theories of distributive justice, which hold that greater moral weight should be accorded to the claims or welfare improvements of worse-off individuals. *E.g.*, Derek Parfit, *Equality or Priority?* 10 RATIO 202 (1997); MATTHEW D. ADLER, MEASURING SOCIAL WELFARE: AN INTRODUCTION (2019).

49. BROCK & BLAKE, *supra* note 7, at 11.

2. Curbing Brain Drain Through Bhagwati Taxation or Emigration Regulations?

As an initial matter, we might consider whether intervention on the part of home nations really is necessary. Because migration from developing to developed nations often permits emigrants to generate a higher return on their human capital and also increases the aggregate wealth of host nations, it might be suggested that developed host nations could, in principle, make *side payments* to developing home nations in order to blunt the impact of brain drain, or even to make home nations better off.

The main problem with this proposal is that developed host nations simply have not rendered such compensation, nor are they likely to do so of their own accord. In general, the case for adopting wealth maximizing (or Kaldor-Hicks efficient)[50] rules and institutions in place of fair ones is far stronger at the domestic level, where there exists a sovereign capable of requiring those 'winners' from the adoption of the efficient rules to make side payments to the 'losers,' so as to create genuine Pareto improvements.[51] But things are different in the international arena, where there is no top-down authority that can be relied on for this purpose. In that domain, there are, in large measure, only autonomous states independently pursuing their own self-interest. Although international law constrains these actors' dealings to some extent, such constraints are themselves the product of negotiations among independent nation-states, in which developed nations enjoy a tremendous advantage in bargaining power. For this reason, it is unlikely that these nations could be persuaded to make significant economic concessions of the sort presently contemplated, unless given economic incentives to act otherwise.

This means that, if the costs of brain drain are going to be offset, developing home nations likely need to engage in *self-help*. Of course, the most direct means of doing so would be for such nations to employ actual restrictions on the relocation of economically desirable emigrants. However, stopping these outflows outright would clearly violate the international legal right to emigrate. Thus, another option is needed for developing nations.

A less heavy handed and less facially objectionable strategy would be for developing home nations to *tax* their emigrants on their worldwide

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50. A regime R_1 represents a Kaldor-Hicks (or potential-Pareto) improvement with respect to another regime R_2 if and only if those individuals who gain from the adoption of R_1 could, in principle, compensate all individuals who would have been better off under R_2, thereby leaving all parties at least as well off under R_1 as under R_2, and some better off. This will generally be the case when aggregate wealth is maximized. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 14 (9th ed. 2014).

51. A Pareto improvement arises when one or more individuals are made better off, and none are made worse off. *Id.*

income[52] on an ongoing basis, at least for some transitional period.[53] This would include taxing both:

> (i) income that is sourced to the emigrant's home nation after relocation,

which is common under the existing international tax regime,[54] as well as, more importantly,

> (ii) income that is sourced to the host nation, and to other third-party nations.

This regime, the distinctive characteristic of which is the taxation of (ii), has been influentially explored by the Indian-American economist Jagdish Bhagwati;[55] and I will follow the literature in referring to it as '*Bhagwati taxation'*. In his foundational work, Bhagwati held that the appropriate rate of taxation would depend on the precise policy rationale for the tax[56]—for instance, whether it was intended solely to compensate the home nation for losses sustained as a result of emigration, or to advance broader principles of global distributive justice among developed and developing nations.[57]

Notwithstanding the Bhagwati tax's appeal, the ongoing taxation of expatriates[58] and other emigrants on their worldwide income also appears to be in tension with the international legal right to emigrate, since it could lead to *double taxation* that significantly burdens cross-border movement.

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52. That is, income whose legal 'source' is either the home nation, the destination nation, or some third-party nation. Different nations' tax laws contain complex rules for determining the source of different types of income, which in turn dictate how such income is to be taxed. The U.S.'s sourcing rules are set forth in I.R.C. §§ 861–863, 865, 884(f). For a recent defense of the source rules, see Kane, *supra* note 15.

53. For instance, ten years. Bhagwati, *supra* note 24, at 4.

54. Most nations tax non-resident aliens, as well as foreign corporations, on certain domestic source income. For example, under U.S. tax law, non-resident aliens and foreign corporations are subject to taxation: (i) at a gross rate of 30% on certain fixed and determinable annual payments of U.S. source, including dividends, interests, rents, and royalties, I.R.C. §§ 871(a), 881; as well as (ii) at normal rates on income that is deemed effectively connected to a U.S. trade or business. I.R.C. §§ 871(b), 882, 864.

55. See citations at *supra* note 8. Bhagwati also raises the possibilities of (a) a host nation levying the tax on its immigrants and then transmitting the funds to the home nation, as well as (b) the United Nations administering the tax. Bhagwati, *supra* note 24, at 20–21. While the formal legal characterization of the tax would differ under these alternative regimes, they would not materially alter the analysis that follows. In particular, the problem of assuring cooperation in the administration of the tax from self-interested developed nations, which exert outsized influence on the UN and other international governance organizations, would not be averted.

56. Bhagwati, *supra* note 24, at 14–15.

57. *See id.*

58. That is, emigrants who have renounced their citizenship. While Bhagwati largely focuses on non-resident citizen emigrants, he does briefly suggest that upon renunciation of home nation citizenship, the "remaining period of eligible taxation could be converted into a capitalized sum to be paid" by the expatriate. *Id.* at 24. If the individual were unable to pay this capitalized sum in advance, this may deter her change of nationality. *Id.* Whether the home nation adopted this approach, or continued to tax its expatriates on an ongoing basis, it is clear that the logic of Bhagwati's brain drain tax applies to such individuals as well as to emigrants who retain their home nation citizenship.

To appreciate this issue, which arises in many contexts in international taxation, suppose that host nations did not cede primary taxing authority to home nations for income earned by the home nation's expatriates (i.e., the host nation's immigrants) and which is sourced to the host nation or third-party nations. The expatriates would then be taxed on this income both by the host nation, as well as by their home nation. Unless both nations' tax rates on this income were reduced accordingly, or were unusually low to begin with, this could lead to a sizeable aggregate tax burden, which would not only eat away at the premiums the expatriates anticipated earning on their human capital within the host nation, but might even make residence in the host nation financially infeasible. And in so doing, it could discourage the act of emigration in the first place.[59]

It is therefore plausible that home nations that indirectly, yet significantly, burden emigration through Bhagwati taxation would run afoul of the dictates of present international law. As the legal philosopher James Nickel observes in his standard text *Making Sense of Human Rights*,[60] those human rights recognized by the Universal Declaration of Human Rights are generally regarded as high priority Hohfeldian *claim-rights*,[61] which place states under correlative duties to act in ways that promote the rightholder's enjoyment of the object of the right. In some instances, such rights place nations under correlative *positive duties* to take affirmative measures to ensure that the rightholder is well positioned to enjoy the object of the right, such as establishing protections against standard threats to the right's exercise. But even where positive measures are not called for, human rights at least place states under *negative duties* to forbear from taking measures that would constitute undue interference with the right's exercise. In turn, such interference may be of either a direct or indirect variety. With *direct interference*, the state outright prohibits or places inappropriate formal conditions on the right's exercise; while with *indirect interference*, the state does not formally circumscribe the right's scope, but instead takes measures that create undue practical obstacles to exercising the right, and which thereby excessively diminish the value of the formal liberty.[62]

In light of this widely embraced picture of human rights as high priority claim-rights, the human right to emigrate, as it exists under current

59. *See* Oliver Oldman & Richard Pomp, *The Brain Drain: A Tax Analysis of the Bhagwati Proposal*, 3 WORLD DEV. 751 (1975) *in* TAXING THE BRAIN DRAIN I, *supra* note 8, at 174–75.

60. JAMES NICKEL, MAKING SENSE OF HUMAN RIGHTS (2d ed. 2008).

61. WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (1923). For discussion of the now standard Hohfeldian taxonomy of rights, see THEORIES OF RIGHTS (Jeremy Waldron, ed., 1984); Leif Wenar, *Rights*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Feb. 24, 2020), https://plato.stanford.edu/archives/spr2020/entries/rights/.

62. For a similar distinction, see JUDITH JARVIS THOMPSON, THE REALM OF RIGHTS 53–54 (1990); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 122 (1996).

international law, is also best construed as a high priority claim-right, which at least places states under negative duties to forbear from taking measures that constitute direct or undue indirect interference with the right's exercise.[63] Lacking an independent reason for regarding it as an exception to this standard picture, it would appear unwarranted, for instance, to regard this right as (i) a mere Hohfeldian *privilege*, which only grants the right-holder permission to emigrate, but does not place states under any correlative duties of non-interference or positive assistance; or as (ii) the weakest logical variety of claim-right, which merely places states under duties to avoid direct but not undue indirect interference with the object of the right, as rights of this variety are anomalies among those human rights promulgated by the Universal Declaration of Human Rights.

Indeed, this latter possibility becomes particularly implausible when we contemplate a scenario in which a home nation decides to levy a one hundred percent tax on its emigrants' host-nation-and-third-party-nation-sourced income, making it fiscally impossible for a person to subsist in the host nation after relocation. If one accepts that this extreme form of the Bhagwati tax would indeed constitute an impermissible infringement of the international legal right to emigrate, the conclusion becomes ineluctable that this right then places home nations under duties to avoid excessive indirect, in addition to direct, interference. The only residual issue is then the line drawing question of how high rates must be before they are regarded as sufficiently burdensome to constitute such an infringement.

The answer to this question will revolve, in part, around the empirical issue of how large aggregate rates would have to be to significantly deter emigration. As I am, at present, in no position to answer this question, I will remain content with the somewhat vague conclusion that when double taxation indirectly yet unduly burdens emigration, Bhagwati taxation on the part of home nations could reasonably be regarded as transgressing extant international law.[64] By comparison, because international law posits no corresponding human right to *immigrate*, host nations would *not* appear to be under a corresponding duty to alleviate the problem of excessive double taxation by ceding primary taxing authority to home nations, in the event

63. For instance, the state is plausibly under a duty to forbear from: (i) building very high fences around the nation's borders that do not permit for egress; (ii) instructing its border guards to prevent the physical exit of those of its members in good legal standing; and (iii) instructing government employees to refuse to sign operative legal documents required for emigration by such members.

64. Bhagwati does consider the allegation that a "tax on emigration is a violation of . . . the fundamental right to emigrate," but appears to reject this claim on the grounds that (a) the tax is "*consistent* with maintaining open the possibility of emigration," and (b) that in the actual world, immigration restrictions would constitute far greater impediments to "be located where one wishes to be" than his proposed emigration tax. Bhagwati & Dellalfar, *supra* note 16, at 47, 49. The first response, however, does not take seriously the claim that states are under duties to forbear from taking measures that constitute undue indirect interference with a human right's exercise. And the second ignores the point, discussed below, that international law recognizes no human right to immigrate.

that home nations failed to do so.

Given the deterrent effects that double taxation would have upon cross-border movement, one might surmise that the international law's recognition of a human right to emigrate has, in tandem with practical difficulties of administering a Bhagwati tax discussed below, at least contributed to nations' hesitation to tax the worldwide income of their expatriates and non-resident citizens—that is, legal citizens of a nation who reside abroad.[65] For as things stand, no nation presently taxes its expatriates on their worldwide income,[66] and only the United States[67] taxes its non-resident citizens on such income.[68] Even this U.S. "citizenship tax" regime[69] is highly circumscribed, as non-resident citizens enjoy:

> (i) a hefty exemption on tens of thousands of dollars in foreign earned income, referred to as the "foreign earned income exclusion,"[70] and
>
> (ii) a "foreign tax credit," for income taxes paid to foreign governments.[71]

Whereas the former reduces the income of a U.S. non-resident citizen that is taxable by the U.S. government, the latter offsets the non-resident citizen's U.S. tax bill for income taxes paid to foreign governments on foreign-sourced income on a dollar-for-dollar basis. Like the choice to forgo taxing expatriates completely, these major limitations on the taxation of non-resident citizens might reasonably be regarded as necessary safeguards against the specter of excessive double taxation that produces undue indirect interference with cross-border movement.[72] Yet quite predictably, these limitations on the U.S. citizenship tax have also substantially reduced its revenues.[73] Given the U.S.'s (and previously, the Philippines's)

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65. These may either be (i) emigrants who do not renounce their citizenship, or (ii) citizens who were born and continue to reside abroad.

66. However, under I.R.C. § 877A the U.S. levies a more limited one-time toll charge on certain wealthy expatriates' untaxed asset appreciation. The assets are deemed to be sold for their present fair market value on the date of expatriation, and tax is owed on the difference between the value of these assets and their aggregate tax bases.

67. The Philippines previously sought to tax its non-resident citizens' worldwide income, but was largely unsuccessful due to administrative difficulties, some of which are discussed below. *See* Richard D. Pomp, *The Experience of the Philippines in Taxing its Nonresident Citizens*, *in* INCOME TAXATION AND INTERNATIONAL MOBILITY, *supra* note 6.

68. Note, however, that most nations do tax the domestic source income of their non-resident citizens.

69. *See* Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 169 (2016).

70. I.R.C. § 911. The current ceiling is $120,000 of foreign earned income.

71. I.R.C. § 901.

72. But note that, as a historical matter, other policy considerations appear to have contributed to the U.S.'s adopting these limitations. For instance, the foreign earned income exclusion seems to have been intended "to make U.S. businesses more competitive abroad by making the use of U.S. employees abroad less expensive (i.e., lower employer reimbursements for extra tax expenses incurred because of overseas transfers)." MINDY HERZFELD, INTERNATIONAL TAXATION IN A NUTSHELL 224 (2019).

73. *See e.g.*, Daniel Shaviro, *Taxing Potential Community Members' Foreign Source Income*, 70

underwhelming fiscal results on this front, it seems plausible that developing home nations harmed by brain drain have declined to take these two countries' lead in taxing their non-residents citizens in the expectation that the meager revenues to be generated from these taxes would fail to justify their substantial administrative difficulties and costs.

Even if this apparent tension between the international legal human right to emigrate and significant Bhagwati taxation has not actually been appreciated or entered into nations' decisions to forgo taxing their expatriates and non-resident citizens on worldwide income, it is clear that the existence of this right has nevertheless prevented nations from implementing a Bhagwati tax for a second reason. As alluded to above, home nations face formidable obstacles in administering a Bhagwati tax. This is because such nations cannot easily verify their emigrants' host-nation-sourced (or third-party-nation-sourced income), or enforce penalties for those who fail to remit their taxes, and therefore would have little or no recourse against emigrants who underreport income or fail to file tax returns altogether. Depending on the good faith reporting of their emigrants, home nations seeking to levy a Bhagwati tax would therefore be unable to collect from those migrants who were not motivated to pay their taxes by a continued sense of patriotism or connection to their native society.[74] Call this the *Administration Problem*.

The Administration Problem constitutes a formidable practical reason—over and above any apparent legal incompatibility between the international human right to emigrate and the Bhagwati tax—why developing home nations have historically shied away from taxing their expatriates and non-resident citizens. In most instances, the Administration Problem could only be surmounted with the *host nation's cooperation* in collecting and remitting this tax to the home nation.[75] But for the same reasons that developed host nations have not volunteered to render side payments to home nations as compensation for the brain drain, developed nations are unlikely to cede primary taxing authority for income generated within their borders (or within third-party nations) by their immigrants, unless they are given some incentive to do so.[76]

TAX L. REV., 75, 85–88 (2016); Reuven S. Avi-Yonah, *The Case Against Taxing Citizens*, 58 TAX NOTES INT'L 389, 393 (2010). Other recent articles discussing the U.S. citizenship tax include Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117 (2014); Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443 (2007); Mason, *supra* note 69; Bernard Schneider, *The End of Taxation Without End: A New Tax Regime for U.S. Expatriates*, 32 VA. TAX REV. 1 (2012); and Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289 (2011).

74. For an in-depth case study of the Philippines's historical difficulties in administering taxes on their non-resident citizens, see Pomp, *supra* note 67.

75. Oldman & Pomp, *supra* note 59, at 176–78.

76. *See id.* at 178–79, 182.

We come now to a critical insight involving the role that the international legal right to emigrate has played in the administrability of the Bhagwati tax: if home nations had historically enjoyed the prerogative to regulate emigration (or if they were granted such authority going forward) then host nations would have possessed (or prospectively would acquire) such an incentive to cooperate. For, given this alternate background assignment of rights, it would often behoove host nations to administer the home nation's Bhagwati tax, since the host nation would often do better for itself if it taxed its immigrants on income that is not taxed in full by the home nation, then if the home nation were instead to preemptively exercise its prerogative to prevent these migrants' relocation to the host nation altogether.

To illustrate, suppose that a home nation decides to tax its expatriates on their host-nation-sourced income at 20%. Then, if it is known that these emigrants would not be deterred from relocating to the host nation by an aggregate tax rate lower than 35%, the host nation could still levy a 15% tax on this income. However, if the home nation were to prevent these individuals' migration to the host nation because the latter refuses to cooperate in the administration of the former's Bhagwati tax, and thereby forestalls these would-be emigrants from earning the host-nation-sourced income altogether, the host nation would not get its 15% cut. The host nation would then often end up worse off than in the alternate scenario where it cooperates in the administration of the home nation's 20% Bhagwati tax on its expatriates and pockets its own 15%. To put the matter simply: a piece of something, for the host nation, is better than all of nothing. Refer to this as the *Piece-of-Something Principle*.

There is a second and perhaps even more important reason why host nations would often cooperate in the administration of a Bhagwati tax. By failing to do so, and inducing the home nation to proactively restrict emigration, the host nation would also forfeit the economic benefits of the (would-be) immigrants' labor and fiscal, intellectual, and physical capital. So, in addition to the deprivation of valuable tax revenues from these doctors, lawyers, engineers, economists, computer scientists, etc., this intransigence would often result in sizeable losses of increased private sector surplus.

As this analysis indicates, if actual regulations on emigration were permitted by international law, this discretion might be employed by home nations to combat brain drain in either of two ways. Not only could such regulations be used directly to stop or slow outflows of economically desirable members (and their capital), but more importantly, the *mere threat* of imposing such restrictions could be used to coax cooperation from host nations in the collection and remittance of Bhagwati taxes levied on expatriates and non-resident citizens, and in so doing, solve the Administration Problem. Developing nations would then often be able to

engage in self-help without having to resort to actual physical restrictions on emigration. Furthermore, if international law were to adopt this Article's proposed regime, reflected in conditions (C1)-(C10), home nations would be *required* to employ this bargaining tactic in good faith before resorting to direct regulations, since they would be obliged to rely upon the less restrictive compensatory instrument before resorting to more heavy-handed measures.

We might refer to this result as the *Paradox of Restrictionism*: by granting home nations the authority to regulate emigration in dire circumstances, international law would place them in a game theoretic position where they would not often need or even be permitted to do so. For these nations would then enjoy the bargaining leverage required to elicit the functional equivalent of side payments from developed host nations, by taking advantage of the Piece-of-Something Principle. In practice, the expected outcome would be a more equitable sharing of tax revenues among developing home and developed destination nations.[77] Conversely, by historically denying nations the right to regulate emigration, international law has contributed to brain drain by taking this self-help strategy off the table.

B. Harmful Fiscal Competition and the Race(s) to the Bottom

1. The Pattern Explained

Let us now consider a second migratory pattern that has been regarded as objectionable from the standpoints of both domestic and global distributive justice, and which has also been exacerbated by the international law's overly permissive treatment of emigration. This phenomenon is commonly referred to as *harmful fiscal (and other legal) competition*. The basic problem can be set forth as follows.

In recent years, capital has become increasingly mobile for a variety of reasons, at least three of which bear mentioning. First, and most obviously, improvements in transportation continue to permit cheaper and faster shipment of persons and objects across the globe. Second, due to rapid advancements in communication and information technology, geographically disparate business operations can now be run as an integrated enterprise. This capacity for centralized management and coordination has encouraged firms to split up their operations and to scatter

77. Thus, it is no objection to my view that free migration may generate large increases in aggregate global wealth. SOMIN, *supra* note 6, at 25, 68. Because, on my proposal, actual restrictions on emigration would rarely be required or permitted, the bulk of these economic gains could still be reaped (if immigration policy was liberalized). The size of the pie would not be significantly affected, gains would just be divvied up more fairly.

their associates and operations across the globe, both in order to take advantage of foreign markets, as well as to avail themselves of favorable legal environments (including low tax rates). Third, increasingly sophisticated legal techniques have been engineered that permit multinational business enterprises ("MNEs")[78] to nominally shift profits to lower-tax jurisdictions, where they are recognized for tax or other legal purposes.[79] This is commonly referred to as shifting "paper profits."

As these strategies have proliferated, individuals, and businesses have increasingly sought to minimize their global aggregate tax obligations, regulatory compliance costs, and labor wages, inter alia, by systematically relocating their persons, operations, and capital to jurisdictions with lower tax rates, less stringent regulatory regimes, and cheaper inputs, such as labor wages. The decision to optimize in this fashion is not wholly elective. Rather, the logic of capitalism that prevails in an interwoven global economy dictates that businesses must often do so if they are to stay afloat. In many instances, these efforts involve the actual relocation of persons, assets, or business operations to foreign lands. But the objective has also been furthered through creative legal planning and accounting to shift paper profits.

Prompted by jurisdiction shopping of wealthy individuals and MNEs, nations have begun to compete for a *common fiscal and economic base* by offering owners of mobile capital reduced tax rates, lax regulatory standards, and otherwise more favorable legal treatment than the next country down the road.[80] And over time, this rivalry has given rise to internecine *race(s) to the bottom.* As states seek to undercut each other, they incentivize the persistent relocation of persons and capital to whichever jurisdiction happens to be offering the sweetest deal at the moment. This cycle of "offers" (by nations) and "acceptances" (by private owners of capital) ultimately drives down tax rates, regulatory standards, and labor wages across the board.[81]

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78. A MNE is a corporation or other business entity that operates in multiple jurisdictions, i.e., at least one nation in addition to its legal nation of residence.

79. Various techniques employed by multinational enterprises to shift paper profits are described in, for example, THOMAS RIXEN, THE POLITICAL ECONOMY OF INTERNATIONAL TAX GOVERNANCE 77–81 (2008); DAGAN, *supra* note 36, at 29; AVI-YONAH, *supra* note 11. Among the most important techniques are (i) strategic transfer pricing, (ii) earning stripping, and (iii) corporate inversions.

80. *E.g.*, Peter Dietsch & Thomas Rixen, *Tax Competition and Global Background Justice*, 22 J. POL. PHIL. 150 (2014); Miriam Ronzoni, *Global Tax Governance: The Bullets Internationalists Must Bite - And Those They Must Not*, 1 MORAL PHIL. & POL'Y 37 (2014).

81. While such competition could arise among states within a single federation, such as the United States, the problem is much less pronounced for a number of reasons. For one, the federal tax-and-transfer system can be used to redistribute from winner to loser states. Such taxes can increase equity ex post, as well as reduce incentives ex ante for states to engage in this race to the bottom. In addition, nationally applicable regulations can be used to set floors on state regulatory standards, labor wages, etc.

Even setting aside such federally applicable requirements, legal and economic conditions generally vary much less between subnational jurisdictions than between nations. SOMIN, *supra* note 6, at 10, 65.

Structurally, the situation is a *multiplayer prisoner's dilemma*.[82] Although each nation has a rational short-run incentive to undercut the others and to "defect" from cooperating, the international community would do better if coordination could somehow be achieved on global floor tax rates, regulation, minimum wages, etc.[83] At the end of the day, most nations will be made worse off in terms of these variables than if the race had never gotten underway.[84] For instance, given certain idealizing assumptions, economic theory predicts tax rates on capital will ultimately be driven to zero for small open economies.[85] And in recent years, such dire predictions have begun to be borne out by incoming data. For instance, the Organization for Economic Cooperation and Development (OECD) recently estimated, based on a survey of 109 jurisdictions, that from 2000 to 2020 the average national statutory corporate tax rate plummeted from 28% to a 20.6%.[86]

In part, this race to the bottom is to be rued because it produces certain inefficient outcomes, including the underprovision of tax-funded public goods, negative externalities from inadequate regulation, and tax-based distortions in decisions about where to invest and employ capital. But fiscal competition also has very unattractive distributional consequences. For instance, by lowering taxes on typically wealthy owners of mobile capital, the race systematically shifts the burden of taxation to less mobile factors, such as labor and consumption, leading to increased burdens for a nation's less affluent members.[87] Because of the declining marginal utility of wealth, this shift in economic burdens to the worse-off can also be regarded as

(Coincidentally, for this reason, Somin's own reductio ad absurdum claim that arguments for regulating international movement disconcertingly extend to internal movement fails). *Id.* at 116, 148.

82. *See, e.g.*, R. DUNCAN LUCE & HOWARD RAIFFA, GAMES AND DECISIONS: INTRODUCTION AND CRITICAL SURVEY 97 (1957).

83. DIETSCH, *supra* note 11, at 54–62; RIXEN, *supra* note 79, at 44.

84. This claim is disputed by some older models that claim fiscal competition is economically efficient. In one such model, fiscal competition drives down tax rates on capital, thereby reducing distortions on investment decisions and permitting capital to flow to its highest valued uses. In another, unfettered jurisdictional mobility allows individuals to self-select into communities with similar preferences for public good spending, inter alia. It's therefore concluded that open borders maximize individual preference satisfaction. *See* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Still a third model holds that the threat of emigration deters government actors from engaging in self-serving or otherwise wasteful conduct; this is commonly referred to as the Leviathan argument. *See* GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION 200–03 (1980). As Peter Dietsch persuasively argues in his recent book on tax competition, however, all three models rely on very unrealistic assumptions, while more recent and realistic economic models tend to come to the opposite conclusion that unregulated tax competition is inefficient (on several different understandings of efficiency). *See* DIETSCH, *supra* note 11, at 127–65. A further criticism of these older models is that they are insensitive to distributive considerations.

85. *See* Peter A. Diamond & James A. Mirrlees, *Optimal Taxation and Public Production I: Production Efficiency*, 61 AM. ECON. REV. 8 (1971); Peter A. Diamond & James A. Mirrlees, *Optimal Taxation and Public Production II: Tax Rules*, 61 AM. ECON. REV. 261 (1971).

86. OECD, CORPORATE TAX STATISTICS, at 2, 9 (2d ed. 2020).

87. Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1576 (2000).

inefficient from the standpoint of utility maximization.[88] Drawing upon recent economic literature, the tax scholar and political philosopher Peter Dietsch has argued this point, claiming that fiscal competition creates obstacles to establishing tax rates that are optimal from the standpoint of global welfare, and "locks countries into inferior local optima with lower levels of progressivity."[89]

As with brain drain, unmitigated fiscal competition not only exacerbates inequalities among the members of a given nation, but also widens the gap between rich and poor nations.[90] One reason for this is that developing nations enjoy less leeway to lower their tax rates than developed nations, and therefore suffer from greater capital flight. This problem is aggravated by a corresponding inability to protect revenue streams by broadening their tax base. Doing so would require levying different types of taxes to compensate for losses sustained by lowering taxes on mobile capital (or from capital flight when these efforts prove unsuccessful). However, the governments of developing nations often lack the administrative capacity needed to efficiently levy this array of alternate taxational instruments.[91]

Is there any way out of this collective action problem? It might be suggested that because fiscal competition is an *iterated prisoner's dilemma*, it should, in principle, permit a cooperative solution.[92] However, economists and tax law scholars have identified several special features of the situation that make a cooperative solution particularly hard to come by. I will briefly describe three of the main culprits.

First, to bring the race to the bottom to a halt, nations would likely have to *harmonize* their tax rates and mechanisms, regulatory standards, and so forth, in order to eliminate the incentive for wealthy parties and mobile capital to relocate. But because nations hold substantially different preferences for public goods provision, redistribution, and government oversight over industry, this synchrony would be quite difficult to sustain, especially in the long run.[93] Realistically, the best that could probably be hoped for is partial convergence within a range.[94]

Second, fiscal competition is more accurately characterized as an *asymmetric prisoner's dilemma*, in which small nations can actually benefit in the long run from unconstrained rate competition. Roughly, this is

88. DIETSCH, *supra* note 11, at 164.
89. *Id.*
90. *See id.* at 50–51; AVI-YONAH, *supra* note 11, at 67.
91. *See* DIETSCH, *supra* note 11, at 164.
92. *E.g.*, MARTIN PETERSON, AN INTRODUCTION TO DECISION THEORY 251–55 (2009).
93. DAGAN, *supra* note 36, at 131.
94. Recent agreement among G7 nations to work towards the adoption of a global minimum corporate tax rate is encouraging. However, considerations raised below provide reasons to be skeptical that these efforts will attract the necessary support from tax havens and other small nations, or represent a stable solution over the long run.

because for such nations (i) the extra tax revenue generated from luring new residents to the nation by lowering its tax rates (the "*tax base effect"*), is often greater than (ii) the reduction in revenue sustained by dint of lowering rates on existing residents (the "*tax rate effect*"). As the size of a country grows, the tax rate effect grows more significant, and ultimately comes to overshadow the tax base effect for even moderate size countries.[95] At that point, there will be no further marginal gains from lowering rates. But for very small nations, for whom tax base effect outweighs the tax rate effect, there will be little reason to cooperate with efforts at tax harmonization, or the setting of a global tax floor. This economic reasoning explains why tax havens have historically been very small nations.

Third, due to the large number of players (that is, nations) involved, detecting defection—even ex post for the iterated game's "next round"—is far more difficult than in a standard two-player prisoner's dilemma. So, even if some agreement were reached among nations to harmonize rates and legal standards enough to eliminate the incentive for persistent relocation, this arrangement would unlikely remain stable. Given costly and imperfect monitering, there will often be positive expected benefits to intermittent defection.[96] But as the number of nations who avail themselves of this leeway snowballs, the pact can ultimately be expected to dissolve.

2. Curbing Harmful Fiscal Competition Through Bhagwati Taxation or Regulations on Emigrants?

These irksome features of international fiscal competition make solving the collective action problem exceedingly difficult without recourse to taxation and regulations on emigrant persons and firms. But, once again, the right to emigrate and associated norms of capital relocation rear their heads to limit the policy responses that nations may adopt, both unilaterally as well as on a multilateral basis, to protect their fiscal bases and ultimately halt the pernicious race to the bottom.

a. Individuals

Consider wealthy individuals who renounce their home nation citizenship and gain citizenship in another nation to minimize their tax obligations. Apart, quite obviously, from physically restricting their emigration, home nations could also curb this behavior by adopting robust Bhagwati taxes of the sort discussed above in relation to the brain drain. If high-earning expatriates were subject to ongoing taxation by their home nation on their worldwide income at significant rates, competing nations

95. DIETSCH, *supra* note 11, at 54–62; RIXEN, *supra* note 79, at 44.
96. *See* DAGAN, *supra* note 36, at 132.

would quickly lose the incentive to lower their taxes on economically desirable foreigners to lure them to their shores. Where one's tax obligations to one's home country cannot be averted, an emigrant would find her strategy of tax minimization through obtaining citizenship in a low-tax jurisdiction self-defeating. Consequently, if ongoing taxation of emigrants proved administratively feasible for more developed nations, or limited agreements could be reached among nations to help each other administer their respective Bhagwati taxes, the race to the bottom on tax rates could at least be ameliorated. And if the tax rate was set to offset gains obtained from other favorable legal treatment in the host nation, it could even be used to ameliorate other races to the bottoms (e.g., on regulatory standards, labor wages, etc.).

As explained earlier, however, no nation has actually sought to tax its expatriates. And only the U.S. presently dares to tax its non-resident citizens[97]—even then, on a highly attenuated basis. To reprise some of our earlier analysis from the problem of brain drain, it seems plausible that this restraint has at least partially been borne of recognition that undue fiscal obstacles on cross-border movement could infringe upon the international legal right to emigrate. Furthermore, and probably more importantly in this context, by denying home nations the authority to regulate emigration, international law has deprived these nations of a bargaining chip that could be used, as a result of the Piece-of-Something Principle, to induce cooperation from host nations with the administration of a Bhagwati taxation of their emigrants. As with brain drain, the international legal right to emigrate has therefore almost certainly undercut home nations' ability to ameliorate fiscal competition engendered by the relocation of individuals.

b. Firms

What about firms? When we move to consider MNEs and other business entities, we are beset by a host of additional conceptual, normative, and technical complications, including:

> 1) How "firm emigration" is to be understood—that is, which combination of change in legal residency, relocation of operations, and shifting of other capital (or paper profits) should qualify;
>
> 2) The nature of the relation between a firm and its stakeholders (e.g., shareholders, creditors, management), and of their respective rights;

97. The Philippines had also attempted to tax non-resident citizens, albeit rather unsuccessfully. *See* Pomp, *supra* note 67, *in* INCOME TAXATION AND INTERNATIONAL MOBILITY, *supra* note 6, at 43–81.

3) How this Article's arguments for the positive view embodied in (C1)-(C10), some of which will be developed below in Parts III and IV, might be extended to firms or their stakeholders in light of our answers to the preceding questions; and

4) How best to tax or regulate "emigrating firms" to combat harmful fiscal competition in the face of significantly greater technical, economic, and strategic complexities.

As developing satisfactory answers to each of these questions would require a lengthy analysis, I must defer further consideration of business entities to other work. This choice of focus is not without its costs. Because there is more money at stake with relocation of corporate residency, operations, and capital than with the expatriation of billionaires to Monaco and the like, the treatment of firms is more consequential to harmful fiscal competition than the taxation and regulation of individuals (although with brain drain, this order is reserved). By the same token, however, the great importance and complexity of these questions warrants devoting to them a careful and full-length treatment.

In the remainder of this Article, I will therefore continue to concentrate on the base case of personal emigration with the intention of developing and extending its lessons to firms, a project that I have started elsewhere.[98] For the time being, it is valuable to have established (i) that (C1)-(C10)'s tax and regulatory scheme could be used to mitigate both brain drain as well as harmful fiscal competition; and (ii) that contrary to prior belief, a Bhagwati tax on individuals would be administrable, *if* paired with a grant of authority for nations to regulate emigration as a back-up measure, which, because of the Piece-of-Something Principle, they generally would not be required (or permitted) to actually employ.

98. Erick J. Sam, The Right of Exit: Emigration, Secession and the Structure of International Taxation (2021) (Ph.D. Dissertation, Duke University).

III. AN OVERRIDING RIGHT? SHARED ARGUMENTS FOR QUALIFYING RIGHTS OF SECESSION AND EMIGRATION

In Part II, we saw that brain drain and harmful fiscal competition give rise to distributive justice-based reasons for adopting the tax and regulatory scheme embodied in (C1)-(C10). However, these considerations would not constitute decisive reasons for adopting this regime if there nevertheless ought to be a strong legal *right* to emigrate, whose exercise would always trump these competing considerations.[99] This might be so, for instance, if there were a (near-) unconditional moral right to emigrate that ought to be reflected in legal doctrine and practice.

In Part III, the goal is to build a prima facie case for the thesis that there ought not be such a strong legal right to emigration, and that any such right should instead be qualified in the ways spelled out by (C1)-(C10). Picking up from Part I, I take as my starting point in this analysis international law and the academy's appropriately critical attitudes towards a very permissive right of secession. And I show that the similarities between secession and emigration render it arbitrary and unreasonable to embrace these attitudes while concurrently affirming a strong right of emigration. More precisely, if one rejects a right to secede under circumstances parallel to those laid out in conditions (C1)-(C10), then one ought also accept my proposed qualifications on the right to emigrate.

As a first step in developing this *analogical argument*, we might initially observe that rights of secession and emigration both permit individuals to:

(i) forswear one's status as a member of the home or original nation (*Membership*);

(ii) liberate oneself from the legal jurisdiction of such nation's state and other authorities (*Jurisdiction*); and

(iii) alter the composition of such nation (*Composition*).

These three *conspicuous commonalities* give rise to initial worries about the normative consistency of the prevailing dualistic legal regime. To tease out these commonalities' moral pertinence, however, I need to explore a number of their implications. To this end, the plan for Part III will be to examine several arguments for circumscribing the right to unilaterally secede that have been developed in the international law and philosophical

99. For the theory of rights as "*trumps*" on consequentialist considerations, see Ronald Dworkin, *Rights as Trumps*, in WALDRON (ed.), *supra* note 61, at 153–67; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 191 (1977).

literatures, and which draw upon considerations deriving from the three conspicuous commonalities. Perhaps as oversight, or perhaps in some instances to avoid courting greater controversy, it has typically gone unstated that these arguments apply with equal or similar force to emigration.

These *arguments from principle*, as I refer to them, therefore might—and, to be clear, *will,* in part—be directly relied upon to undercut a strong right of emigration. However, when considered in light of their shared applicability to secession, they give rise to the further challenge of justifying the prevailing dualistic legal regime. Consequently, the analogy to secession will serve as a method for forcing objectivity when evaluating the strength of these arguments of principle as applied to emigration. If one finds an argument in favor of regulating exit compelling in the case of secession, and if the circumstances and reasoning really are parallel as between the two cases, then consistency will require that such argument or reason be found similarly forceful for emigration. Abiding by this constraint, we shall see that the uncanny balancing act of the prevailing dualist regime cannot be sustained, and that consistency will require us to reject a strong right of emigration.

Before turning to these arguments from principle, I would like to first make the observation that a right to secede under those circumstances where I favor qualifying the right to emigrate is eschewed by current international legal practice, as well as by all mainstream academic normative treatments of secession. Such normative theories of secession have traditionally been grouped into three categories, referred to as (i) Just-Cause Theories, (ii) Nationalist Theories and (iii) Choice Theories.

Just-Cause Theories hold that the right of secession is a purely remedial right that a group only acquires from suffering severe injustices at the hands of the seceded-from nation. Such injustices include the violation of human rights and significant discrimination, perhaps among other things.[100]

Nationalist Theories hold that "nations" (or "peoples") have a weighty right to self- determination, which entails a subsidiary right for a people, P, to inhabit a nation-state where it constitutes a majority if this is required for P to be adequately self-governing. This, in turn, will often imply a right of secession. In this context, a nation or people is understood to be a cultural or ethnic group that shares a common history, language, and way of life.[101]

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100. ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 152-54 (1991); ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 331–401 (2004); WAYNE NORMAN, NEGOTIATING NATIONALISM: NATION-BUILDING, FEDERALISM, AND SECESSION IN THE MULTINATIONAL STATE 170-216 (2006).

101. David Miller, *Secession and the Principle of Nationality*, *in* NATIONAL SELF-DETERMINATION AND SECESSION 62–78 (Margaret Moore ed., 1988); Margaret Moore, *The Ethics of Secession and*

Choice Theories take the most permissive stance towards secession, and typically permit secession where a majority (or some other suitably large percentage) of residents within a region vote or otherwise express support for it.[102] However, proponents of Choice Theories build certain provisos and exceptions into this general rule, which generally forbid majority-favored secession in circumstances where it would result in some clear injustice to the original nation, such as compromising the functionality of its state or other major institutions, appropriating critical resources (including human capital), or unfairly redistributing substantial resources to the seceding group, inter alia.[103]

Of note, all three of these normative theories permit secession under a broader set of circumstances than those recognized by current international legal practice, which as observed in Part I-(A), generally only permits unilateral secession in cases of past unjust colonialization. But importantly, none of these three views affirm a right to secede under the circumstances where I favor qualifying the right to emigrate, as enumerated by (C1)-(C10)—that is, roughly, *even when* such act of secession:

> (C′1) is not undertaken in response to severe injustices perpetrated by the original nation upon the seceding group, such as the violation of the latter's human rights, nor as a justified defensive measure against the possibility of future injustices;
>
> (C′2) would cause the original nation to incur great costs;
>
> (C′3) would inflict some significant injustice on the original nation, such as substantial unfair redistribution or a weakening of its legitimate governance institutions;
>
> (C′4) involves withdrawing from a nation whose state is legitimate and in good standing with the international community; and
>
> (C′5) is largely motivated by economic considerations.

Taking the three normative views in the order presented above, a right to unilaterally secede in such circumstances would be rejected:

> - By Just Cause Theories, because this right permits a group to secede for reasons unrelated to this group's suffering severe injustices at the

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Normative Theory of Nationalism, 13 CAN. J. L. AND JURISPRUDENCE 225 (2000).

102. CHRISTOPHER WELLMAN, A THEORY OF SECESSION: THE CASE FOR POLITICAL SELF-DETERMINATION 60 (2005); Daniel Philpott, *In Defense of Self-Determination*, 105 ETHICS 352, 379-80 (1995); David Gauthier, *Breaking Up: An Essay on Secession*, 24 CAN. J. PHIL. 357, 360_62 (1994).

103. *See* WELLMAN, *supra* note 102, at 36, 140–41; Philpott, *supra* note 102, at 363, 383; Gauthier, *supra* note 102, at 366–67.

hands of the original nation (see (C′1));

- By Nationalist Theories, because this right permits a group to secede for reasons other than for attaining political self-determination, such as for economic reasons (see (C′5)); and

- By Choice Theories, because this right permits majority favored secessions that are very costly for and which result in significant injustices to the original nation (see (C′2) and (C′3)).

Accordingly, if one subscribes to any one of these three major normative theories of secession, then one should repudiate the right to secede when circumstances (C′1)–(C′5) jointly obtain, which right I will henceforth refer to as a *strong right of secession*.

While I have not yet offered substantive reasons for why these theories properly dismiss a strong right of secession—at least, apart from intrinsic plausibility of these theories' respective criteria governing the permissibility of secession—this analysis does establish that the rejection of a strong right of secession should be a very uncontroversial premise. And moreover, because the contours of this right closely mirror those of the strong right of emigration, as that term was defined in Part I-(C) by my conditions (C1)-(C10), if we ultimately conclude that emigration is sufficiently similar to secession along those dimensions that justify rejecting a strong right of secession, then we ought to also reject a strong right of emigration, on pain of arbitrariness and unreasonableness.

Having sharpened the logic of the analogical argument, and shown it to take an uncontroversial premise, let us move then to consider four arguments from principle for exit regulations that have proven influential in the secession literature, and which apply with equal or similar force to emigration. I will refer to these as the arguments from (i) duties of justice, (ii) obligations of repayment, (iii) strategic bargaining and democratic governance, and (iv) state incentives. These may be grouped into two classes.

First, both strong rights of secession and emigration permit exiters to nullify or otherwise escape the enforcement of certain preexisting duties and obligations owed to their home nation compatriots. These include natural duties of justice, which are discussed in Part III-(A), as well as obligations of repayment for prior state investment in a citizen's human capital and other benefits conferred, which are taken up in Part III-(B).

Second, both strong rights of secession and emigration create opportunities and incentives for individuals as well as states to engage in certain forms of rights-violating political conduct. As I will discuss in Part III-(c), such conduct includes issuing strategically motivated exit threats

that undermine the fairness, efficiency and institutional stability of democratic governance. Conversely, judiciously crafted regulations on secession and emigration can temper these opportunities and incentives; and, perhaps more surprisingly, even create salutary incentives for states to respect human rights and abide by other minimal standards of justice. This latter argument is taken up in Part III-(D).

Finally, to complete the analogical argument, in Part IV I will consider certain differences between secession and emigration that have been cited as the acts' critical differentia. The three most important differences are that (i) secession uniquely involves the appropriation of territory from the original nation, which I refer to as secession's territorial dimension; (ii) that emigration uniquely involves cross-border movement; and (iii) that emigration implicates freedom of positive association more strongly than secession, which generally only implicates freedom of disassociation. As I show, none of these differences wholly defeat the prima facie case for overall resemblance established in Part III. However, the third difference (freedom of positive association) does justify accepting a right to emigrate that is moderately more expansive than the right to secede. This conclusion supports the general view expressed in (C1)-(C10), which only permits for modest and narrowly tailored regulations on emigration when its strict preconditions have been met.[104]

A. Duties of Justice

The first commonly applicable argument for regulating secession and emigration is that, unless conditioned upon an appropriate settlement or ongoing tax scheme, both acts would permit individuals to inappropriately nullify or avoid the enforcement of preexisting duties and obligations owed to their home nation compatriots. With secession, this is achieved by the secessionist group breaking off from the original nation and forming its own nation. And with emigration, it is effectuated by individuals leaving and renouncing citizenship in their home nation to become members of another preexisting nation, thereby removing themselves from the home nation's sphere of jurisdiction.

The sorts of duties and obligations that secessionists and emigrants are able to nullify or avoid are numerous. For purposes of this Article, however, I will focus on two main types, which I refer to as (i) duties of justice and (ii) obligations of repayments. These will be taken up in turn.

The preeminent philosopher of international law Allen Buchanan puts forth the core of the argument from duties of justice in his book *Secession: The Morality of Political Divorce from Sumter to Lithuania and Quebec,*[105]

104. Several of these arguments are developed at significantly greater length in Sam, *supra* note 98.
105. BUCHANAN (1991), *supra* note 100.

which set the agenda for the contemporary philosophical treatment of both secession and territorial rights. There, Buchanan observes that by seceding, a group can discretionarily "convert fellow citizens into strangers" and, in so doing, unilaterally transform what were previously robust duties of justice to home nation compatriots into more attenuated duties owed to foreigners. This may result in the full or partial nullification of the original domestic duties of justice.

The ability to electively convert such duties, Buchanan thinks, has very troubling implications. For an unconditional right to secede, which sanctioned even secessions that were purely economically motivated, would permit those better-off members of a nation (the "Haves") to systematically break off from the worse-off members (the "Have-Nots") and, in so doing, to nullify at least some portion[106] of their duties of justice to the latter. As this *Secession of the Haves* scenario intuitively reeks of injustice,[107] Buchanan concludes that the Haves' withdrawal must, at a bare minimum, be made conditional upon their ongoing observance of limited duties of justice to the Have-Nots, as well as upon compensating the Have-Nots for any prior reliance upon the presumed ongoing inclusion of the Haves in their national cooperative scheme.[108]

In her recent paper, *Is There an Unqualified Right to Leave?*, the political theorist Anna Stilz offers a related argument with respect to emigration, which extends Buchanan's Secession of the Haves scenario one step further.[109] Stilz observes that a very capacious right of emigration, whose exercise was never conditional upon ongoing taxation, would theoretically permit the world's Haves to break off from their home nations and relocate to some unincorporated island in order to form their own rarified community. This thought experiment, which Stilz refers to as *Elite Escape*, takes Buchanan's misgivings about an unqualified right of exit to their logical conclusion. For not only would such a right permit the better off members of a society to nullify preexisting duties of justice to their home nation compatriots, but, in principle, it would permit *all* of the world's Haves to do so in tandem, pursuant to a pre-choreographed plan of action. Surely, however, this outcome would be a travesty from the perspectives of both domestic and global justice. Therefore, in Stilz's estimation, the thought experiment constitutes a compelling reductio ad absurdum of the view that the right of emigration must be wholly unqualified.

While Buchanan's and Stilz's thought experiments are compelling, it is

106. How large portion can be nullified will depend upon the respective magnitudes of one's duties to compatriots and of one's duties to foreigners. In turn, these quantities will be determined by the correct theory of global distributive justice. For elaboration, see Sam, *supra* note 98.

107. *See* BUCHANAN (1991), *supra* note 100, at 114–25.

108. An exception would be where there is a history of discriminatory redistribution or other improper treatment of the Haves by the Have-Nots. *Id.*

109. Stilz, *supra* note 7, at 69.

worthwhile to ask *why* the discretionary nullification of duties of justice is problematic. I believe the answer to this question ultimately stems from the idea, proposed by Stilz[110] and embraced by Buchanan in subsequent work,[111] that duties of justice are *natural duties*. That is, they are moral requirements that do not emanate from some voluntary act on the part of the duty-holder, such as consenting to the state's authority or voluntarily accepting benefits from the nation's cooperative scheme. Rather, such duties simply befall an individual through the realization of other circumstances, such as being born into a particular nation, perhaps insofar as it possesses a certain form of political governance, institutions, or social structure.

On this *non-voluntarist conception of justice,* which probably reflects the considered view of a majority of political philosophers,[112] secession and emigration would therefore function as *normative powers*,[113] which are generally understood as abilities to unilaterally alter a pre-existing distribution of rights and duties by one's voluntary act.[114] Perhaps the most frequently cited and uncontroversial examples of normative powers are promising and consenting.[115] Because the exercise of these powers has the imminent effect of creating rights in others and placing oneself under new obligations, both have generally been regarded as benign in virtue of this *other-favoring* character. By contrast, both emigration[116] and secession have the potential to be *other-disfavoring* in circumstances where a more sizeable mass of duties to one's compatriots is nullified than of rights. Intuitively, the discretion to worsen the prevailing normative position of others cannot be unlimited; and normative powers of this sort must, as a matter of fairness, at least be subject to circumstantially applicable constraints that reflect the legitimate interests of others.

Such provisos have been widely accepted for other normative powers of this variety. Perhaps the most notable instance comes from Lockean property theory, which posits that laboring onto unowned material resources can give rise to new property rights in those resources for the laborer, while placing others under correlative obligations to respect these rights. As John

110. *Id.* at 71.

111. BUCHANAN (2004), *supra* note 100, at 85–97.

112. *E.g.*, JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

113. This argument is developed at greater length in SAM, *supra* note 98. Under a *voluntarist conception of justice*, exit would probably not constitute a normative power. That is because, when one exits, one will subsequently fail to take actions that, on voluntarism, constitute preconditions to one's having obligations of justice to one's home nation compatriots in the first place. In contrast to the analysis under non-voluntarism, exit would not result in the nullification or alteration of any preexisting duties or obligations.

114. HOHFELD, *supra* note 61; THOMPSON, *supra* note 62, at 57.

115. *E.g.*, H.L.A. Hart, *Are There Any Natural Rights?*, *in* THEORIES OF RIGHTS, *supra* note 61; THOMPSON, *supra* note 62, at 59.

116. As stipulated in Part I-(A), when I mention "emigration," I refer to the joint acts of (i) physically leaving and (ii) renouncing one's citizenship in a nation, unless stated otherwise.

Locke famously asserted,[117] and as contemporary philosophers such as Jeremy Waldron have influentially argued,[118] this other-disfavoring normative power must be subject to constraints that reflect the legitimate interests of others, such as the well-known Lockean Proviso that "enough and as good" be left in the commons, as well as a prohibition on waste.

The acceptance of these constraints on Lockean labor-mixing and other other-disfavoring normative powers, together with the apparent incompatibility of a non-voluntarist conception of justice with an unconstrained power to nullify natural duties of justice, provide good grounds for building certain qualifications into the rights of secession and emigration. To that end, our conditions (C1)-(C10) can be viewed as playing a similar functional role in the sphere of migration, as the Lockean Proviso plays in the context of property theory.

Applying these insights to the case at hand, when we turn to the high-level empirics of emigration, we find a situation that closely resembles the paradigmatically alarming scenario Buchanan contemplates in the context of secession. As we saw in Part II's overview of the brain drain and harmful fiscal competition, these patterns of international migration have been *primarily* economically driven, and generally involve members of a society with above-average stock of human, physical, or financial capital relocating to other nations in order to earn higher returns on this capital or to pay less taxes, all to the detriment of their home nation. As these outcomes are functionally akin to Buchanan's Secession of the Haves, if one finds this scenario disturbing enough to countenance regulating exit in the hypothetical circumstances contemplated therein, one should be similarly disposed to place qualifications on the international law's strong right of emigration and associated norms of capital relocation.

B. Obligations of Repayment

A second type of moral requirement that strong rights of secession and emigration would permit individuals to nullify or otherwise avoid are *obligations of repayment*.[119] The following story might be told about the genealogy of these liabilities.

Most societies invest resources in the development of their citizens' human capital. Providing citizens with an education, or other professional training, is the most direct means of doing so. But a bevy of other goods and services funded through public taxation also serve as necessary inputs and

117. JOHN LOCKE, TWO TREATISES ON GOVERNMENT (1689).

118. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 270–71 (1988) (comparing Lockean property acquisition to promising and consenting).

119. This argument and the analysis below developed in significantly greater depth in Sam, *supra* note 98.

background conditions for the development, protection and employment of this capital. State rendered goods of this sort include security from internal and foreign threats, access to public roads and structures, clean air, water and other sanitation services, as well as other private entitlements, such as welfare benefits and health care.

At least as a normative ideal, the state's investment in its citizens should be made with a two-fold purpose. The first is to afford its citizens the opportunity to develop the capacities required to become autonomous members of the community, capable of cooperating with their compatriots to pursue individual and collective goals, and to productively participate in the body politic. But the state should, and in practice nearly always does, invest in its citizens for a second important reason: viz., to steadily expand the overall productive capacities of the community over time, and with it, the nation's standard of living. With this goal in mind, the state's investment in its citizens' human capital is undertaken with an eye to receiving *just compensation,* and ultimately a *fair rate of return on investment*.[120]

A number of plausible normative principles, commonly employed by law as well as morality, might be used to justify the state's claim to later recoup its costs, as well as to collect this fair rate of return, including principles of (i) actual contract, (ii) hypothetical contract, and (iii) restitution (or unjust enrichment). Which of these principles is appropriate to rely on in a particular case will depend on whether the state is able to enter into a sufficiently contract-like agreement with its citizens for compensation in those circumstances.

Consider first the Principle of Actual Contract, which holds that the terms of an actual contract meeting certain criteria of validity are binding,[121] such that if the terms of the agreement are violated by one of its parties, then another party to the agreement who is harmed by this breach will be entitled to appropriate compensation, which generally takes the form of expectation

120. As I discuss *infra*, Allen Buchanan considers a simple version of this argument in his early work on secession. *See* BUCHANAN (1991), *supra* note 100, at 105–06. And although they do not consider the argument's common applicability to secession, Gillian Brock and Anna Stilz have recently offered such reasoning as justification for taxing or regulating emigrants. *See* BROCK & BLAKE, *supra* note 7, at 67–68 (2015); Stilz, *supra* note 7, at 70. Bhagwati briefly raises this rationale for his proposed brain drain tax, but does not appear to accept it (for unclear reasons). *See* Bhagwati & Dellalfar, *supra* note 16, at 46. He does, however, advance the more general compensatory justification that the tax indemnifies the home nation for the "loss inflicted [on it] by the fact of emigration." Bhagwati, *supra* note 24, at 14.

121. At common law, an actual contract arises where (1) one party P_1's *offer* is met with a voluntary and appropriate *acceptance* by another party P_2, and (2) each party's performance is supported by *consideration* from the other party. So construed, a contract constitutes an exchange of conditional promises. *See, e.g.*, Daniel Markovits, *Theories of the Common Law of Contracts* §1, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2019 ed.), https://plato.stanford.edu/archives/win2019/entries/contracts-theories/. Contractual acceptance may be *express*, where communicated verbally or through the use of some widely accepted conventional device, or *tacit*, in which case P_2's consent is reasonably inferred from her behavior and from the surrounding circumstances. *E.g.*, CHARLES FRIED, CONTRACT AS PROMISE 43 (1981).

damages.[122] For some goods, such as higher education and professional training programs, an express agreement among the state and its citizens certainly seems feasible. The idea here is that, in return for this education or training, the state could require its citizens to sign on the dotted line and agree to either (i) remain within the nation for some specified period, where they would be expected to put their cultivated human capital to socially productive use, or (ii) if they secede or emigrate, to continue paying taxes on their worldwide income until the contemplated return on the state's investment is obtained. By the Principle of Actual Contract, such an agreement would be binding.[123]

In his early work on the topic, Allen Buchanan considers a skeletal version of the argument from repayment as applied to secessionists, but does not take a stand on its ultimate decisiveness.[124] His primary worry about the argument's soundness is that individuals "typically have little say over the nature of the investment the state chooses to make in them" and "are frequently not free to refuse them."[125] The idea seems to be that this lack of alternatives might invalidate any contractual arrangement between the state and its citizens requiring repayment by the latter for the state's prior investment in their human capital, by virtue of undermining the force of those citizens' consent to the agreement's terms.[126] But this objection is not decisive, for at least two reasons.

First, it is a widely accepted principle of contract law that a lack of reasonably desirable alternatives will not invalidate an agreement unless an offeror takes advantage of an offeree's vulnerability by proposing terms that are morally unconscionable. Anyone who accepts the moral legitimacy of real-world market economies would appear to be committed to this principle,[127] since if it were false, a great many putatively voluntary contracts entered into by private actors ought to be declared invalid on the grounds that one or more parties to the deal lacked an adequately robust array of alternatives for their consent to be binding. The very possibility of morally legitimate capitalism would have to be called into question. If one is unwilling to accept these radical implications, and subsequently holds that this contractual principle ought to apply to private actors in market

122. The standard remedy for contractual breach is the *expectation measure,* which "requires promisors to put their promisees in positions as good as they would have occupied had the promisors performed." Markovits, *supra* note 121, at §1. This will normally take the form of money damages, except where inadequate (e.g., where the contracted for item is unique), in which case the injured party can sometimes insist upon *specific performance*.

123. Even Somin appears to concede that such an agreement would be valid. SOMIN, *supra* note 6, at 114.

124. BUCHANAN (1991), *supra* note 100, at 105–06.

125. *Id.*

126. *See also* Hufbauer, *supra* note 6.

127. *See* FRIED, *supra* note 121, at 94; JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW, VOL. 3 (1986).

economies, one will then be under rational pressure to explain why it ought not apply to agreements entered into by the state and its citizens.

Second, and perhaps more obviously, citizens *do* enjoy a reasonable range of options with respect to at least *some* state rendered goods. For instance, citizens sometimes have choice among different publicly subsidized programs of higher education—medical school versus engineering training, for example. And in many cases citizens do not even have to attend higher (post-secondary) school at all, or they can choose to attend private schools or home school. With respect to such goods, the "lack of alternatives" objection is simply misplaced, since there is no reason to hold that the requisite educational alternatives (or whatever) must be offered by some *other* state in order for the home nation's claim to compensation to be valid.

Admittedly, however, for a certain range of goods and services, such as public goods whose benefits are diffusely dispersed among the population at large,[128] a valid and express agreement between the state and its citizens may not be possible. This is where the principles of hypothetical contract and restitution might be employed.

The Principle of Hypothetical Contract holds that, in some contexts, such as where it is impracticable for parties to enter into an actual contract,[129] the fact that such parties *would have* entered into a contractual agreement under certain counterfactual circumstances implies that those parties can be bound by this hypothetical agreement's terms.[130] In the present context, citizens would, in almost all cases, end up better off with *some* education during their formative years, *some* health care, access to *some* public roads, utilities, and so forth, *than with none at all*. Therefore, insofar as the sustainability of the state's investment scheme will depend on upholding a scheme of enforceable compensation, it seems likely that under any reasonable specification of the hypothetical choice scenario, citizens would agree to pay a fair level of compensation for such goods and services,[131] rather than suffer the corresponding severe deprivations.

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128. Because of the problems posed by such goods, Locke and subsequent political voluntarists have historically instead relied upon on tacit, rather than express or hypothetical, consent theories of political legitimacy.

129. For similar views regarding the circumstances under which hypothetical contract reasoning gains normative force, see TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 136 (6th ed. 2009) (discussing the view that surrogate decision-makers are obliged make those decisions that an "incompetent person would have made if competent"); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF COPORATE LAW (1991) (arguing that default rules in corporate law should be those that people would have negotiated if transaction costs were not prohibitive).

130. Influential uses of hypothetical contract reasoning with regard to the social contract include RAWLS (1999), *supra* note 112; RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2000).

131. A fair level of compensation would be, perhaps, for instance, the average costs of such goods and services per citizen, or some amount that is based upon one's income and ability to pay, plus a fair

Therefore, the Principle of Hypothetical Contract might plausibly be recruited to justify the state's claim to compensation and fair return in such circumstances.[132]

However, if one is skeptical of the binding force of hypothetical contracts, the Principle of Restitution (or Unjust Enrichment) could potentially be relied on in its place. This normative principle holds that a party who receives a benefit at the expense of another should generally compensate her benefactor, unless the benefit was intended as a gift.[133] When employed as a remedy to breach of (actual) contract, restitution requires a breaching party to return the value of any benefits received from the nonbreaching party's performance.[134] But the restitution principle also seems morally applicable in certain instances where there has been no express contract; and courts have sometimes wielded it in such circumstances to avoid significant injustice.[135] Accordingly, restitution could plausibly serve as a secondary theory for justifying claims to state compensation (if not a fair return) where no actual contract is possible.

Whichever of these principles is ultimately relied upon, a valid state claim to enforcement of obligations of repayment would provide a second justification for its continued taxation of both secessionists and emigrants on worldwide income (at least) until just compensation has been paid, or in the event that such taxation proves infeasible or inadequate, for the use of other regulations as remedial measures.

C. Strategic Bargaining and Democratic Governance

A third morally pertinent similarity between secession and emigration is that strong rights to both acts would create opportunities and incentives for individuals and groups to engage in political behavior that undermines the inherent fairness, instrumental utility, and institutional stability of democratic decision-making procedures. It is only by conditioning exit on an adequate upfront settlement or scheme of ongoing taxation—or, where such measures are either infeasible or inadequate, by placing modest regulations on exit—that these opportunities and incentives can be

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return on investment.

132. A lack of alternatives objection might also be posed to this argument from hypothetical contract, but would fail for related reasons as above. *See* SAM, *supra* note 98.

133. *E.g.*, FRIED, *supra* note 121, at 25.

134. *E.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 373. Here, restitution serves as an alternative remedy to expectation or reliance damages. Because the latter typically provide for larger recoveries, restitution is generally only requested by a nonbreaching party when she would have suffered a loss under the contract. *Id.*

135. *See e.g.*, P.S. ATIYAH, PROMISES, MORALS, AND LAW 130 (1981); BRIAN H. BIX, CONTRACT LAW: RULES, THEORY, AND CONTEXT 42-43 (2012). But for philosophical counterarguments, see A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS (1979).

appropriately mitigated.

The classicus locus for this argument is Cass Sunstein's article, *Constitutionalism and Secession*, which has proven extremely influential within the secession literature. There, Sunstein contends that the inclusion of a constitutional provision establishing a right of unilateral secession would create incentives that systematically

> increase the risks of ethnic and factional struggle; reduce the prospects of compromise and deliberation in government; raise dramatically the stakes of day-to-day political decisions; introduce irrelevant and illegitimate considerations into those decisions; create dangers of blackmail, strategic behavior, and exploitation; and, most generally, endanger the prospects of long-term self-governance.[136]

It is Sunstein's claim that a right of secession would create "dangers of blackmail, strategic behavior, and exploitation" that has received the most scholarly attention, and on which I will concentrate herein. Although Sunstein frames this argument with respect to secession, as I elaborate below, the underlying game-theoretic analysis applies in similar measure to emigration; and so, going forward, I will frame the argument with reference to the more general right of exit.

In elaborating upon this basic idea, Sunstein paints the following ominous portrait of a political environment where an institutionalized right of secession prevails:

> It is not difficult to imagine circumstances in which it will be in a [federal] subunit's interest to issue [a threat to secede]. Rather than working to achieve compromise, or solve common problems, subunits holding a right to secede might well succumb to the temptation of self-dealing, and hold out for whatever they can get . . . . A right to secede will encourage strategic behavior, that is, efforts to seek benefits or diminish burdens by making threats that are strategically useful and based on power over matters technically unrelated to the particular question at issue. Subunits with economic power might well be able to extract large gains in every decision involving the geographic distribution of benefits and burdens . . . . In practice, that threat could operate as a prohibition on any national decision adverse to the subunit's interest.[137]

136. Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. R. 633, 634 (1991).
137. *Id.* at 638–49.

In effect, an institutionalized right of exit would function as a limited *veto right,*[138] affording federal subunits and other groups with large economic bargaining leverage the ability to defeat policies that enjoy widespread democratic support by threatening to wholly withdraw from the cooperative framework if their demands are not acceded to. In the strategic landscape that emerges in the shadow of a permissive institutionalized—and for purposes of idealization, we may presently suppose costlessly exercisable—right of exit*,* prisoner dilemma-like collective action problems would consequently abound. By *holding out* for more than their fair share and refusing to accept equitable compromises that would otherwise serve as focal points[139] for negotiations, strategic actors would add significant frictions and transaction costs to the process of political deliberation, decreasing overall social surplus. In the limit, these frictions could even culminate in legislative deadlock, where not enough agreement is reached among warring factions to move forward with concrete government action.

As Sunstein explains, the "pursuit of rational self-interest by each individual actor" would generate "outcomes that are destructive to all actors considered together," but which "could be avoided if all actors agreed in advance to coercion" forbidding strategic exit threats, thereby "assuring cooperation."[140] In other words, widespread hold-outs may eventuate a governmental *standstill* that is worse for all (or at least most) citizens than the cooperative outcome that might have been achieved where the state enjoys the power to quash strategic exit threats or to rule out such threats ex ante. In the absence of a centralized authority vested with this power, an impasse may sometimes be difficult to avoid. The reason is that, in some instances, many parties can do better—or at least, would do no worse—by holding out, regardless of the behavior of other parties.

Of course, in the real world neither secession nor emigration is perfectly costless. Moreover, it is only particularly large or influential factions for whom exit would function as an effective veto right. And even for such groups, their veto power will typically only be a partial one to rule out certain, rather than all, legislative possibilities. Consequently, rights of exit do not inevitably yield legislative paralysis: if few factions wield credible and full veto threats, enough agreement can often be reached to avoid standstill. However, even where a complete deadlock can be averted, those parties who do enjoy the bargaining power to issue credible (and partial) veto threats may still extract more than their fair share of the gains from social cooperation.

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138. BUCHANAN (1991), *supra* note 100, at 100.

139. That is, salient arrangements that serve to coordinate expectations in bargaining. *See* THOMAS SCHELLING, THE STRATEGY OF CONFLICT 57 (1960). Among the factors that can contribute to salience are uniqueness, simplicity, precedent, conventional priority, and evident fairness. *Id.* at 73.

140. Sunstein, *supra* note 136, at 640.

In that case, an expansive right of exit can lead to a subtler unravelling of the democratic system, which depends for its viability as a collective decision procedure on the capacity of a majority to bind dissenting minorities. When collective decisions are predicated upon relative economic power, rather than upon popular support, democracy gives way to a decision-making protocol far more reminiscent of a *market* in which political outcomes are extremely sensitive to pre-transactional endowments.[141] In these circumstances, the residual benefits of cooperative activity, net of those above-referenced frictional costs and inefficiencies, would end up being distributed not in accordance with democratic support, aggregate utility, or some other pertinent metric of justice, but rather in proportion to the factions' relative bargaining leverage. But it is far from clear that one should not sometimes prefer the death of a nominally democratic union to such a woefully attenuated form of existence.

To forestall breakdowns and imbroglios of this sort, Sunstein urges that a national constitution must contain "*precommitment strategies*" that "take certain issues," such as secession for self-interested economic reasons, "off the ordinary political agenda."[142] Because these precommitment strategies deter strategic behavior and self-interested holdouts, they eliminate frictional inefficiencies, legislative deadlock, and forestall the slide from democratic decision making into a market-based decision procedure predicated on relative economic bargaining power. Such strategies are therefore "indispensable to the [democratic] political process."[143]

Just as this game theoretic analysis militates against recognizing a permissive constitutional right of unilateral secession, it offers a further strand of justification for this Article's proposed regime of emigration taxation and regulations embodied in (C1)-(C10). For if emigrants were subject to ongoing taxation on their worldwide income, and thereby liable to pay for some portion of those policies democratically settled upon during the tenure of their membership, exit threats would cease to function as veto threats over such policies. The authority to strip prospective holdouts of such negotiating leverage, at least when these threats pose great costs, would go a long way towards safeguarding the integrity of the democratic enterprise.[144]

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141. *See* ALBERT HIRSCHMAN, EXIT, VOICE AND LOYALTY 15–20 (1970).

142. Sunstein, *supra* note 136, at 639.

143. *Id.*

144. Although they do not discuss the argument's prominent role the secession literature, the basic problem of strategic bargaining is discussed in the context of fiscal competition by DAGAN, *supra* note 36, at 40, and in the context of emigration, more generally, by Stilz, *supra* note 7, at 67.

In addition, my proposed regime would reduce perverse incentives for mobile parties to favor policies that are overly risky, as well as policies whose benefits accrue in the short run but which possess greater costs that are borne over time. When one enjoys an absolute exit option, one can reap these near

At this point, we ought to consider an objection to this claim of the argument's common applicability to emigration, which Sunstein himself rehearses in a footnote.[145] Because federal subunits are antecedently organized and frequently subject to some sub-national political authority in a way that individual emigrants are not, Sunstein believes that secessionists would wield much greater bargaining power than emigrants. For emigrants to reach the threshold of influence, they would need to organize themselves into a group formidable enough to move the needle in political negotiations. However, this coordination would often be costly and give rise to collective action problems that prevent them from effectively pooling their leverage to extract concessions from the state. Consider two possible replies to this objection.

First, as our earlier overview of harmful fiscal competition indicated, those parties with the largest economic incentives to emigrate are often very wealthy individuals or large business entities. And although Sunstein is reluctant to admit so much, some such parties surely *do* enjoy sufficient bargaining power to issue credible exit threats on their own. Consider, for instance, gargantuan multinational enterprises like Amazon, Google, Walmart, Exxon, Apple, and so on. Furthermore, other wealthy persons and business entities, even if not formidable enough to independently bargain with the state on their own account, still possess the means to coordinate with other similarly influential parties, with whom they share common economic interests in the way of securing preferential tax, regulatory, or legal treatment. As this type of influence-pooling by moderately powerful private actors gives rise to special interest lobbying in a variety of other contexts,[146] it is unwarranted to conclude that an insurmountable collective action problem would arise precisely whenever expatriation is on the table.

Second, even where it is too costly or cumbersome for parties of lesser means to coordinate in this way, if enough of them were in fact to expatriate, a rational state would regard this behavior as a *tacit threat* that other similarly situated members of the nation would also be likely to leave in the future, unless accorded more advantageous tax, legal, economic, etc., treatment than under the status quo. [147] In effect, the earlier-in-time

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term benefits and then flee for greener pastures when the bill is later received in the mail. Similarly, if a risky gamble pays off, one can stay put and cash in on the jackpot; but conversely, if the wager backfires and the bad outcome materializes, one can avoid bearing these costs by cutting ties with one's current nation of membership. In general, where citizens are not required to fully internalize the costs of policies they politically support, they will be more likely to favor laws and institutions that are not socially optimal, since these costs can be passed off to others. *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY Ch. 21 (3rd ed. 1950). These arguments are developed in greater depth in SAM, supra note 98. *See also* Mason, *supra* note 69, at 190.

145. Sunstein, *supra* note 136, at 651 n.88.

146. *E.g.*, JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 289–90 (1962).

147. See SCHELLING, *supra* note 139, for the classic analysis of tacit bargaining, which is "bargaining in which communication is incomplete or impossible." *Id.* at 53.

emigrants "bargain on behalf" of their later-in-time comrades. In light of this dynamic, a version of the argument from strategic bargaining and democratic governance can apply even in the circumstances where the costs of coordination prevent migrants from expressly communicating collective exit threats.

D. State Incentives

Consider now a fourth morally pertinent similarity between secession and emigration, which may initially be more surprising than the preceding three. In addition to mitigating opportunities and incentives for individuals to engage in strategic behavior that undermines the integrity of democratic governance, judiciously tailored regulations on secession and emigration can even serve to better align the *state's incentives* with the interests of its citizenry.

To this end, Allen Buchanan has influentially argued that, by designating the right to secede as a purely *remedial right*, which can only be exercised in response to "serious and persistent injustices," the international law can create salutary incentives for states to (i) respect human rights, (ii) enter into intrastate autonomy agreements offering protections to their minority cultures, and (iii) abide by other minimal standards of justice. This is because states that behave in accordance with these norms are guaranteed "immun[ity] to legally sanctioned unilateral secession and entitled to international support for maintaining the full extent of their territorial integrity."[148] Conversely, Buchanan observes, if a non-remedial right to unilaterally secede were legally recognized, states might seek to preventatively stamp out potential secessionist movements by hindering the efforts of minority cultures to organize, or by refusing to enter into federalist arrangements that provide these groups with intra-state autonomy.[149] The state might reason that the development of a robust sense of ethnic identity, or the cultivation of a taste for self-governance on the part of these groups is but a first step on the road to demanding a full-blown state of their own.[150] As such, the state might seek to take matters into its own hands and prophylactically nip these future pretensions in the bud.[151]

It has not, to my knowledge, previously been noticed that similar considerations lend support for placing certain qualifications on the right to emigrate. Because, on the view advanced by this Article, it is only legitimate nations that respect human rights who can, under the conditions delineated by (C1)-(C10), avail themselves of emigration taxation or regulations, this

148. BUCHANAN (2004), *supra* note 100, at 370.
149. *See id.* at 331, 360, 370, 378.
150. *See id*.
151. *See id*.

legal regime would provide many developing nations that have been harmed by the brain drain or fiscal competition with a powerful fiscal incentive to improve their human rights records over time. On this Article's proposal, permission to offset this critical loss of human and fiscal capital through Bhagwati taxation would serve as a reward for good behavior on the part of these nations.

A prime example is India, which has perhaps lost greater tax revenues to brain drain than any other nation and has also been subject to criticism over the years for its human rights record.[152] Under (C1)-(C10), India would not presently be permitted to tax or regulate its emigrants. However, it could ultimately be allowed to do so if it were to improve its human rights record over time to a satisfactory level, as determined by an international governance institution properly charged with monitoring human rights compliance. The prospect of recourse to Bhagwati taxation as a means of offsetting brain drain could light a fire under India (and similarly situated nations), prompting it to improve its less-than-stellar track record on human rights. We might expect, then, that if incorporated by international law, this work's proposed regime would lead to increased adherence to certain minimal standards of justice among many second and third world nations.

Furthermore, because rights to political participation and democratic governance are commonly held to be human rights,[153] nations that have failed to ensure their citizens sufficient opportunity to exercise voice in the nation's political processes would also be barred by international law from availing themselves of Bhagwati taxation and emigration regulations. For the same reasons as above, states that have a shoddy record of democratic governance would therefore be given reason to progressively improve their performance over time. And states that do presently assure and protect such political rights would recognize that they would subsequently be prohibited from utilizing these measures if they were to backslide below a satisfactory level. Contrary to the claim put forth by some public choice theorists,[154] that regulations on exit would permit states to get away with a greater amount of wasteful activity and self-serving mischief, an appropriately structured regime of emigration taxation and regulations, which was competently enforced by international governance institutions, would actually serve to advance the normative aim of encouraging state receptivity to the nation's interests.

152. For analysis of the Indian case study, see Desai, et al., *supra* note 41, at 675–77.

153. *See* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 109–10, 137–38 (1995).

154. *See* BRENNAN & BUCHANAN, *supra* note 84, at 200–03.

IV. DEFEATING DIFFERENTIA?

Let me briefly review the discussion so far. In Part I, I offered powerful distributive justice-based considerations, stemming from brain drain and fiscal competition, for granting states the authority to tax and regulate emigrants in the structured manner recommended by conditions (C1)-(C10). As I noted there, these distributive considerations would not be dispositive, however, if there nevertheless ought to be a (near-)unconditional legal *right* to emigrate. To establish that the right to emigrate should be subject to my proposed qualifications, my strategy has been to analogize emigration to secession. That is, I have argued that the two acts are sufficiently similar that if one rejects a right to secede under circumstances parallel to those delineated by (C1)-(C10), then one should affirm such qualifications on the right to emigrate. This analogical argument was to proceed in two stages.

Part III undertook the first stage of analysis by laying out relevant similarities between these two acts. There, I first noted secession's and emigration's conspicuous commonalities: viz., that both acts involve:

(i) Renunciation of membership in the home or original nation,

(ii) Liberation from the jurisdiction of that nation's government, and

(iii) Alteration of that nation's composition.

And in turn, these conspicuous commonalities give rise to a number of morally pertinent similarities that generate reasons for attaching qualifications to both rights. In particular, very permissive rights to secede and emigrate, whose exercise was not conditioned on an appropriate settlement or ongoing scheme of taxation, would:

(i) Permit a secessionist or emigrant to nullify natural duties of justice owed to her compatriots, and thereby function as a unilateral and unconstrained other-disfavoring normative power;

(ii) Permit an exiter to avoid obligations of repayment to the home nation for prior investment in the exiter's human capital (and other benefits);

(iii) Create opportunities and incentives for groups to engage in express and tacit bargaining with the state in a way that undermines democratic governance;

(iv) Lead to a worse incentive scheme for states to respect human rights than that scheme which would arise under a legal regime where secession and emigration were subject to judiciously crafted regulations.

Each of these features has been regarded as a weighty moral consideration in favor of regulating secession; and most legal theorists and political philosophers who have considered the matter have concluded that significant qualifications on the right to secede are all-things-considered, justified. Indeed, all three of the major normative theories of secession, referred to as Just Cause, Nationalist, and Choice Theories, would reject a right to secede under those circumstances where I have proposed granting states the authority to regulate emigration in the manner prescribed by (C1)-(C10). Because these arguments apply to emigration in equal or similar measure, consistency requires that they be taken to constitute similarly good reasons for subjecting the right to emigrate to certain qualifications.

Nevertheless, it is still possible that these arguments would not prove decisive if it turned out that there were important differences between secession and emigration that outweighed or otherwise obviated these morally pertinent similarities to upset our analogical reasoning. The task of Part IV is to examine several features that have been offered in the legal and philosophical literatures as secession's and emigration's *critical differentia*, and to determine whether the prima facie case laid out in the prior part survives in their wake. Specifically, I will consider the facts that:

1) Secession uniquely involves the appropriation of territory from the original nation (Part IV-(A));

2) Emigration uniquely involves cross-border movement (Part IV-(B));

3) Emigration more strongly implicates freedom of positive association than secession, which typically only involves freedom of negative association (or freedom of dissociation) (Part IV-(C)).

While there are a number of other differences between the two acts, I cannot deal with all such possibilities here, and instead must focus attention on the above distinctions, which are the most critical (and which have generally been regarded as such in the literature). As I will show, these differences are neither individually nor jointly weighty enough to inflict the type of damage to the prima facie case required to wholly defeat the analogical argument.

But neither are they all wholly inconsequential. For while these differences do not justify *extremely* discrepant treatment of the sort that prevails at current international law—viz., a dualistic regime providing for a near-unconditional right of emigration but only a very narrow right of secession—the third such difference (positive freedom of association) does justify a *moderately* stronger right of emigration than right of secession.

This *Moderate View* is wholly consistent with (and, indeed, provides

direct support for) this Article's normative view embodied in (C1)-(C10). As the reader might recall, those conditions recommend a modest and structured approach to the taxation and regulation of emigrants when certain exacting preconditions are satisfied;[155] and do not reject a right of emigration wholesale, or recommend accepting a right as narrow as the prevailing right of secession. Having forecast this ultimate conclusion, let us turn to the three alleged differentia.

A. Secession's Territorial Dimension

Perhaps the feature most frequently relied upon to distinguish secession from emigration is the fact that secession uniquely involves the appropriation of land from the original nation, which I'll refer to as secession's *territorial dimension*.

For example, it is a central contention of the international legal scholar Lea Brilmayer's influential article *Secession and Self-Determination: A Territorial Interpretation*[156] that secession involves "first and foremost, disputed claims to territory."[157] Whereas emigrants "withdraw consent [to the state's governance] by simply leaving the territory,"[158] secessionists "seek to take a tangible asset–territory–with them."[159] For this reason, she claims, by "choosing secession rather than emigration" as their preferred means of exit, secessionists come to "assume a duty of justification that [emigrants][160] need not bear. Secessionists must . . . establish a claim to the territory on which they would found their new state."[161]

Echoing Brilmayer's thesis, Allen Buchanan also highlights secession's territorial dimension[162] in asserting that "every attempt to justify secession must include a territorial claim—a justification not only for severing the secessionist's obligation to the state, for concluding that those *persons* are no longer subject to the state's authority, but also for taking a part of what the state considers to be *its territory*."[163] At another point, Buchanan claims that "emigration, unlike secession, involves not the state's territorial claims but only its authority to control exit from the territory over which it claims

155. For example, emigration of persons or capital gives rise to great costs and significant injustice for the home nation or international community.

156. *See* Lea Brilmayer, *Secession and Self-Determination*: *A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991).

157. *Id.* at 178.

158. *Id.* at 186.

159. *Id.* at 187.

160. Brilmayer refers to "refugees" here; but the point seems to apply more broadly to emigrants in general.

161. Brilmayer, *supra* note 156, at 188.

162. *See* BUCHANAN (1991), *supra* note 100, at 31–32, 106–14.

163. *Id.* at 107.

sovereignty."[164]

To evaluate these claims, it will be helpful to consider two different interpretations of the moral import of secession's territorial dimension, which I'll refer to as (a) the Cost-Based View and (b) the Qualitative View.

1. The Cost-Based View

According to the Cost-Based View, a nation should have greater authority to regulate secession than emigration because secession's territorial dimension renders it more costly to the nation than emigration. However, the immediate objection to this view is that, while emigrants do not appropriate territory from the home nation, they often take with them valuable (i) physical, (ii) fiscal, (iii) intellectual, and (iv) human capital.[165] And in the contemporary global economic landscape, these forms of capital tend to be even more important for a nation's wealth and prosperity than land and natural resources. Indeed, it is not difficult to enumerate many countries that are quite territorially limited, or which have otherwise pulled the short end of the stick for resource endowments, but which boast extremely formidable economies. Germany, Israel and Japan come to mind as the most oft-cited examples.[166] Case studies of this sort suggest that the Cost-Based View rests upon a dubious empirical presupposition: viz., an obviated agrarian/resourcist macroeconomic model, which enjoyed its heyday in times long past.

This critique of the Cost-Based View might be resisted on the grounds that secessionists also take moveable and other legally recognized forms of capital with them. Indeed, Allen Buchanan gestures at a Cost-Dominance Argument of this sort, when he suggests that the charge of distributive injustice is "potentially more serious in the case of secession [than with emigration] given the loss of territory and fixed capital *in addition to* that of human capital and moveable goods."[167] The thought seems to be that, because secession involves all the same collateral costs as emigration and then some, it is immaterial whether land/resources, on the one hand, or moveable/fiscal/intellectual/human capital plays the relatively larger role in

164. *Id.* at 11.

165. Brilmayer focuses on cases of the destitute refugee who, seeking relief from persecution in her home nation, absconds to a foreign land with perhaps nothing more than a briefcase and hopes for a new life. But while the experiences of such refugees are certainly not to be discounted, as our earlier survey of brain drain and fiscal competition illustrated, they are unlikely to represent the base case of emigration in the current global landscape.

166. John Rawls argues that such cases support the view that a nation's wealth is determined primarily by the quality of its institutions, and not by its resource endowments. *See* JOHN RAWLS, THE LAW OF PEOPLES (1993). My point here does not commit me to the Rawlsian view that good institutions are *sufficient* for economic prosperity; on the contrary, robust holdings in other types of capital may be also be required.

167. BUCHANAN (1991), *supra* note 100, at 12 (emphasis added).

economic prosperity.

However, such reasoning is blind to other important factors that determine the two acts' net aggregate costliness to a nation, including their respective frequencies, magnitudes, and the normal capital profiles of secessionists and emigrants. If large scale emigrations:

- were much more prevalent than secessions;

- tended to result in greater number of exiters than secession, when they occurred; or

- typically resulted in the loss of more valuable non-land capital per exiter than secession;

then emigration could easily overtake secession as the graver economic injury to a nation, measured in terms of overall loss of productive capital. At the very least, then, the Cost-Dominance Argument will be held hostage to a number of significant contingent empirical assumptions.

Assumptions, I might add, that generally appear to be controverted by the state of the world as we presently observe it. In light of the scope of the brain drain, fiscal competition and global tax avoidance, it seems clear that the emigration of persons, businesses, and capital is far costlier to a great many nations at present than the threat posed by internal secessionist movements. And in face of the ensuing races to the bottom, which drive down tax rates, regulatory standards, labor wages, etc., for all nations, the former set of phenomena also plausibly represent the more severe cost to the international community, taken as a whole.

2. The Qualitative View

Consider then a second interpretation of the moral pertinence of secession's territorial dimension. According to the *Qualitative View*, the state possesses a qualitatively different sort of claim to exercise jurisdiction over the nation's territory than over other forms of capital. Moreover, this different category of claim yields a commensurately stronger right to regulate secession than emigration, even where the latter represents a greater overall cost to the nation than the former. As I read them, Lea Brilmayer and Allen Buchanan seem to mostly be working with this second account (although, as the above discussion suggests, Buchanan also seems to dabble with the Cost-Based View at points). A variety of strategies might be employed to try to substantiate the Qualitative View. Due to space limitations, I cannot consider the full array of such possibilities here,[168] and

168. For book-length surveys of different theories of territorial rights, see TAMAR MESISELS, TERRITORIAL RIGHTS (2009); CARA NINE, GLOBAL JUSTICE AND TERRITORY (2012).

instead, I must confine myself to examining the argument I take to be the most commonsensical and critical possibility.

The argument here is that a nation's claim to land is special because its territory determines the boundaries of the nation's *sovereignty*. Because this territory fixes the contours of the domain within which the nation is permitted to define legal rules, govern transactions, and coercively subject individuals to its political authority, the loss of territory reduces a nation's sovereignty. By comparison, the loss of other forms of capital, via emigration or otherwise, does not reduce a nation's sovereignty in this way. Furthermore, because legitimate states have the right to maintain their nation's sovereignty, this difference explains why the state enjoys a qualitatively different and stronger claim to preventing the appropriation of its land than to preventing the outflow of residents and other forms of capital. Call this the Argument from Diminished Sovereignty.

As an initial step in responding to this argument, we might distinguish between two importantly different conceptions of national sovereignty.

The first conception, which I refer to as *formal sovereignty*, can be understood as the breadth of the principles or criteria that determine which persons, objects, transactions and other events that a nation's state possesses legal jurisdiction over. One, though not the only, such type of principle is a territorial one: e.g., nation N's state S has legal authority over all those persons, things, events, and transactions that are located within its territory T. Accordingly, the more expansive a particular nation's territory, the broader the scope will be of the operative sovereignty-determining criteria, in a quite literal and spatial sense. And as an immediate corollary, when a nation loses territory through secession, its formal sovereignty will be proportionately diminished.

The second conception, which I refer to as *de facto sovereignty*, can be measured by the actual number of persons, objects, transactions, and events, perhaps weighted by some measure for value or importance, that the nation or its state exercises legal jurisdiction over. It is easy to see that although emigration does not diminish a nation's formal sovereignty, it does reduce its de facto sovereignty by virtue of removing persons, things, and transactions from the sphere of its territorial jurisdiction.

Consequently, we might question why even a very minor reduction in formal sovereignty, the sort brought about by the loss of a very small amount of land through secession, should always reflect a stronger interest or claim on the part of a nation than even a very great reduction in de facto sovereignty, such as that brought about by the emigration of a large number or particularly important segment of persons and their capital. Because the maintenance of formal sovereignty would seem to largely be important to a nation insofar as this contributes to and safeguards its de facto sovereignty, to care about formal sovereignty to the exclusion of de facto sovereignty would amount to a fetishism that misses the underlying point of caring about

formal sovereignty in the first place.

B. Freedom of Movement: Liberty and Equality of Opportunity

A second dissimilarity between the secession and emigration, sometimes adduced as the critical differentia, is that emigration uniquely involves *cross-border* (and generally *long-distance*) *movement* of persons.[169] By comparison, when individuals secede, they tend to remain on the very same land that they occupied beforehand. Given this difference, it is tempting to argue that a strong right to emigrate is entailed by (or perhaps part of) a more general right to freedom of movement, which protects a fundamental human interest in such movement. Because no similar derivation can be offered on behalf of a right of secession, a dualist legal regime is vindicated.

To cast doubt on this Argument from Movement's prospects for success, consider the following hypothetical:

> SWAPPING SECESSION: Group 1 and Group 2 each secede from Original Nation. However, rather than each group remaining on that territory on which it presently resides, the members of Group 1 and Group 2 agree to swap land as the part of an integrated transaction, so that upon secession from Original Nation, the members of Group 1 move to and occupy Territory 2, and the members of Group 2 move to and occupy Territory 1.

Now, if movement were the critical factor distinguishing emigration from secession, we would have to conclude that this complex transaction should be permissible even if a garden variety act of secession, in which the two groups secede from Original Nation but then remain on their respective territories, would not be allowed in otherwise identical circumstances. However, this conclusion is very implausible.

The best explanation for this intuition, I believe, is that cross-border and long-distance[170] movement are simply not weighty intrinsic goods or fundamental interests in their own right which directly ground or justify a human right. Rather, they are more plausibly regarded as *instrumentally valuable* insofar as they provide the means to seek out various persons, items, and opportunities that contribute to the formation and fulfillment of one's life plans. On this reductive and instrumentalist view of the value of cross-border and long-distance movement, one's interest in freedom of

169. *See* Tesón, *supra* note 6, at 922.

170. While *short distance movement*, of the sort required for exercise, play, love making, and the like, is quite likely a weighty intrinsic good that should be protected by a human right, this does not undermine my analysis, since it is the only the status of cross-border and long-distance movement of that is relevant to the question of whether there ought to be a strong right to emigrate.

movement is best seen as a proxy for an interest in something else that the former promotes. In particular, the following three possibilities come to mind as contenders: (i) general liberty, (ii) equality of opportunity, and (iii) freedom of association.

Observe how this instrumentalist view is lent support by Swapping Secession, where the two groups' game of territorial musical chairs does not impact any of these three variables. Rather, both groups' respective liberty, levels of opportunity, and personal associations remain constant from before to after the territorial switch. It is for this reason that we do not deem the two groups' movement to be of great moral significance in gauging the permissibility of the act. In this rather peculiar case, the proxy of cross-border movement fails to track any changes in its underlying desiderata.

If we embrace an instrumentalist view of the value of cross-border and long-distance movement, what we need to do now is cut out the middleman and determine whether a tendency to promote general liberty, equality of opportunity, or freedom of association can be used to justify a strong right of emigration, and thereby to distinguish emigration from secession. I will argue that the first two efforts fail, while the third succeeds in justifying a moderately broader right of emigration than of secession, though not a fully or nearly unconditional right.

The first suggestion will not do. If one asserts that freedom of cross-border movement is a proxy for a *right to general liberty*, one says something quite tendentious:[171] for while there is a *presumption* in favor of liberty, there is generally not taken to be any such (*claim-*)*right*, let alone a (near)unconditional one that cannot be overridden by great collateral costs or attendant injustice.[172] Indeed, liberties that do not correspond to specific fundamental rights are routinely restricted to advance government aims that are so much as legitimate. For instance, the liberty to move about within a wholly domestic context may be regulated by the state for aims as quotidian as regulating traffic, or preventing trespass onto another's property. Furthermore, even if there were such a (claim-)right to general liberty, secession would equally implicate its exercise as emigration, since movement does not uniquely implicate liberty, after all. For these reasons, general liberty (by way of free movement) cannot be the critical differentia.

What about the second suggestion that a right of cross-border movement is justified on the grounds that it promotes *global equality of opportunity*? In *The Ethics of Immigration*, perhaps the most comprehensive work on its topic to date, the political philosopher Joseph Carens argues that open

171. *See* FREDERICK SCHAUER & WALTER SINNOTT-ARMSTRONG, THE PHILOSOPHY OF LAW: CLASSIC AND CONTEMPORARY READINGS 309–10 (1996).

172. *E.g.*, DWORKIN (1977), *supra* note 99, at Ch. 12.

borders are morally required for just this reason. Here is how he puts the matter:

> Within democratic states we all recognize, at least in principle, that access to social positions should be determined by an individual's actual talents and effort and not limited on the basis of birth-related characteristics such as class, race, or gender that are not relevant to the capacity to perform well in the position. This ideal of equal opportunity is intimately linked to the view that all human beings are of equal moral worth, that there are no natural hierarchies of birth that entitle people to advantageous social positions. But you have to be able to move to where the opportunities are in order to take advantage of them . . . . In the modern world, we have created a social order in which there is commitment to equality of opportunity for people *within* democratic states (at least to some extent) but no pretense of, or even aspiration to, equality of opportunity for people *across* states. Because of the state's discretionary control over immigration, the opportunities for people in one state are simply closed to those from another (for the most part). Since the range of opportunities varies so greatly among states, this means that in our world, as in feudalism, the social circumstances of one's birth largely determine one's opportunities.[173]

Although Carens's primary ambition is to establish that states should permit extensive *immigration*, his open borders arguments from global equality of opportunity would, if successful, equally serve to justify a universal right to emigrate. On the other hand, it would not provide as substantial support for a right of secession, since secession does not accord one the means by which to take advantage of opportunities offered by other nations in the international community, and therefore does not implicate global equality of opportunity, at least as strongly as emigration does.

The correct response to Carens's argument is anticipated by David Miller in his book *Strangers in Our Midst: The Political Philosophy of Immigration*.[174] There, Miller observes in his discussion of brain drain that, while open borders increase emigrants' opportunities, they concurrently tend to reduce the opportunities of their home nation compatriots, for reasons explored earlier in Part II-(A).[175] Since the latter tend to be worse-off than the former, who are typically among the more educated and able members of developing nations, open borders that facilitate brain drain migration tend to *increase the gap in opportunity levels* between emigrants and their former home nation compatriots, as well as between better-off and

173. CARENS, *supra* note 6, at 227–28.
174. MILLER, *supra* note 6, at 48.
175. *Id.* at 48.

worse-off nations.[176]

A similar objection based on the dynamics of fiscal competition might also be leveled at Carens's argument. As we saw in Part II-(B), nations are under competitive pressure to offer more favorable tax and legal treatment to owners of mobile capital in order to induce them to remain or relocate to their shores. The result is that economic burdens are shifted to immobile factors and less wealthy individuals. The end result here will again be an augmented gap in opportunity levels between the better-off and worse-off. Therefore, if equality of opportunity is one's guiding aim, open borders will not always be a good way to achieve it. By his own lights, Carens ought to reject a (near-)unconditional right of emigration (as well as of immigration), at least under background conditions where it gives rise to brain drain and harmful fiscal competition.

C. Emigration and Freedom of (Positive) Freedom of Association

Finally, rights to cross-border and long-distance movement might be regarded as important insofar as they promote *freedom of association*. In a recent essay, the political philosopher Christopher Wellman develops such an argument in support of a human right to emigrate.[177] As Wellman there observes, freedom of association has both negative and positive components.[178] The *negative component* is the freedom to refuse to enter into associations with others; while the *positive component* is the freedom to enter into associations with other individuals whom (i) you choose to associate with and (ii) who consensually agree to reciprocate and associate with you.

Having made this cut, we see that a right to emigrate is necessary for individuals to enjoy both aspects of freedom of association. Regarding the negative component: to effectively opt out of political association with one's present compatriots, one needs the ability to leave one's nation of membership and renounce citizenship therein. And as to positive component: for one to enter into political, cultural, religious, or economic associations with individuals in foreign countries who reciprocally agree to associate with one, one first requires the ability to leave one's home nation before immigrating.

Now in contrast to emigration, secession generally only implicates the negative component to freedom of association. That is, it generally only involves a group opting out of political association with some subset of their present compatriots, but it does not involve entering new associations with

176. *Id.*
177. Wellman, *supra* note 6.
178. *Id.* at 85.

other individuals.[179] Therefore, for those who place a high premium on freedom of association, the pull of a capacious right of emigration will be a fair bit stronger than the allure of a similarly expansive right of secession. In this way, it might be argued, emigration and secession can ultimately be distinguished.

Clearly, this argument from positive association's prospects for success will turn on the grounds and extent to which freedom of association itself is regarded as valuable. What is the source of its value? One possibility, defended by Wellman, is that both the negative and positive components to freedom of association are required for self-determination.[180] Another complimentary suggestion is that the ability to freely leave and enter into associations with others is often necessary for self-realization.

Developing an argument of this sort, Selya Benhabib contends that positive freedom of association, as assured via a right to cross-border movement, permits cultural and political malcontents to seek out and join other societies more amenable to their own deeply felt sensibilities.[181] There will be many instances, she observes, in which relocation to a more hospitable cultural environment is necessary for one to live in accordance with one's personal conception of the good.[182] Similarly, the right permits political discontents to join foreign societies structured in a manner consistent with their own sense of justice,[183] which may be just as important to self-realization as cultural congruity.[184] For these reasons, Benhabib concludes that regulations on emigration are inconsistent with *liberalism*[185]—that political tradition which exalts the individual's aims over conformance to the locally dominant ideology, and which demands that due measures, which generally take the form of individual rights, be established to protect the pursuit of these aims. Taking John Rawls's articulation of liberalism as her launching point, Benhabib frames the matter thus:

> Rawls understands persons to be endowed with two moral powers: a capacity to formulate and pursue an independent conception of the good, and a capacity for a sense of justice and to engage in mutual cooperative ventures with others. Each of these capacities could

179. An unusual exception would involve a case where secession is followed by a *merger* with some third nation.

180. In his earlier book, Wellman takes essentially the same approach to secession, holding that a capacious right to secede can be grounded in a still more general right to freedom of association. WELLMAN, *supra* note 103. For the reasons offered above, however, this argument from association is substantially stronger with respect to emigration than secession.

181. *See* Benhabib, *supra* note 6, at 1769–70.

182. *Id.*

183. *Id.*

184. *See id.*

185. *Id.* at 1774.

> potentially bring the individual into conflict with the vision of a democratic society as a "closed and complete system."[186] Individuals may feel that their understanding of the good, be it for moral, political, religious, artistic or scientific reasons, obliges them to leave the society into which they were born and to join another society. This implies then that individuals, in pursuit of their sense of the good, ought to have a right to leave their societies. Emigration must be a fundamental liberty in a Rawlsian scheme, for otherwise his conception of the person becomes incoherent. The language of a "closed and complete society" is incompatible with the liberal vision of persons and their liberties.[187]

I believe that this set of considerations, which involve the interconnections among freedom of positive association, self-determination, self-realization, and political liberalism, give rise to the strongest argument against the *monist view*, which says that emigration ought to be regulated as stringently as secession. The reprised version of that argument runs as follows: because (1) secession only implicates negative freedom of association, while (2) emigration implicates both the negative and positive components of freedom of association, and (3) the positive aspect of freedom of association is often required for self-determination and self-realization, which are important liberal values, it is (4) inappropriate to subject emigration and secession to equally restrictive legal regimes; rather, the right to emigrate should be more capacious than the right to secede.

However, these considerations do not establish the much stronger conclusion that the *dualist view* is correct: that is, the view that there should be a (near)unconditional right of emigration but only a very narrow right of secession, as present international law prescribes. Rather, this argument only establishes the intermediate conclusions that the right to emigrate should be *moderately more expansive* than the right to secede, and that rights of culturally and politically motivated emigration should be more capacious than rights to economic emigration. Furthermore, it does not provide robust support for accepting norms of capital relocation that are broader than those required to support protected acts of emigration.

This *moderate view* reflects those proposals embodied in (C1)-(C10),

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186. Rawls's position on emigration is complex, and arguably rife with internal tensions. At points, he forthrightly endorses a right of emigration, albeit one subject to qualifications that he does not fully enumerate. RAWLS, THE LAW OF PEOPLES, *supra* note 166, at 74 n.15; JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 94 n.14 (2001). But elsewhere he holds, at least a first approximation, that a society governed by his principles of justice is to be conceived as a "complete and closed system," which individuals enter into at birth and only leave at death. JOHN RAWLS, POLITICAL LIBERALISM 40–41 (expanded ed. 1993); *see also* RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra*, at 186.

187. Benhabib, *supra* note 6, at 1769–70. For a similar argument, see also Stilz, *supra* note 7. While Stilz favors taxing emigrants in some circumstances, she believes that this argument militates against the general use of physical restrictions.

which only permit for moderate and narrowly tailored regulations on emigration when certain exacting preconditions are satisfied, and which provide for stricter regulations on economic migration (and pure capital relocation) than either political or cultural emigration. To substantiate my claim that the argument from positive association only supports the moderate (and not the dualist) view, I will sketch two distinct lines of response to Wellman's and Benhabib's brand of argument.

1. First Response: Regulation of Unjust and Economic (Dis)association

First, the argument's appeal to freedom of association is too blunt of an instrument, as one must distinguish between different forms of association based upon their respective tendencies to promote self-determination, self-realization or other values, as well as to give rise to certain harms, on the other side of the scale. Historically, two forms of association have been regulated more strictly by liberal constitutional democracies than others: (i) unjust association and (ii) economic association.

Unjust Association and Dissociation. Instances of unjust association fall into two broad classes. The first class involves unjust associations, typically criminal in nature, that have the aim or actual effect of inflicting rights-violating harms on other members of society. The case for regulating these forms of association is straightforward: the harms incurred by these other individuals either outweigh the benefits that accrue to the association's members, or render those benefits morally irrelevant by virtue of the fact that rights are violated.

The second class, more pertinent to our present inquiry, is more precisely characterized as unjust *dissociation*: that is, refusal to associate with others that constitutes or results in injustice. As an example, consider discrimination cases where certain individuals are excluded from an association on the basis of immutable or otherwise morally impertinent characteristics, such as race.[188] Other actionable cases from this second class include divorcing one's spouse on improper grounds, or doing so without an appropriate settlement of assets, or without ongoing payment of alimony or child support obligations. Similar actions can arise in a business context where parties to some legally recognized association or venture, such as a partnership or employment arrangement, seek to withdraw from the enterprise under improper conditions, such as violation of contractual terms

188, The U.S. Supreme Court has held that the constitutional right to freedom of association is not absolute, and that such even non-economic association can be restricted in order to advance the compelling state interest in combatting morally invidious discrimination. Minor exceptions to this anti-discrimination rule are made for particularly intimate association, as well circumstances where the discrimination is integral to the association's expressive activity. *E.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1160–63 (3d ed. 2006).

that arise either by virtue of consent or by background operation of law. Clearly, there are close ethical parallels between these latter forms of unjust disassociation and the cases that I have characterized as objectionable instances of emigration. In Part II, I showed that emigration can give rise to analogous injustices, such as reneging on obligations of repayment or forward-looking duties of justice.

Economic Association. A second form of association that has historically been subject to more stringent regulations is economic association. The case for permitting greater regulations on economic association than on cultural or political association is complex and could be the subject of a treatise of its own. However, three of the most important strands of argument are worth briefly considering.

The first strand is that the status of natural (or pre-institutional) property rights theory is quite unsettled, with probably a majority of historical and contemporary philosophers taking a skeptical view towards the existence of such rights.[189] Insofar as economic association often integrally involves arrangements for the use and exchange of property, it is therefore at least unclear whether natural property rights can be relied upon to trump regulations on such associations that are justified by the lights of consequentialist, justice-based, or other normative criteria.

The second strand is that economic association is often less intrinsically valuable than cultural and other forms of association,[190] and instead tends to derive the bulk of its value instrumentally from the wealth that it produces.[191] And in turn, this wealth is generally subject to declining marginal value for possessors, meaning that (at least static) consequentialist considerations will tend to favor redistributive taxation or regulations.[192] A related point, which employs the language of liberalism, is that as one's level of wealth progressively increases, there will be fewer conceptions of the good whose effective pursuit requires that level of income. Similar observations do not as obviously apply to the intrinsic value of cultural association, among other forms.

The third strand is that, unlike cultural and other forms of association, unregulated economic association has the potential to generate domestic and

189. For recent discussion and references, see Liam Murphy *The Artificial Morality of Private Law: the Persistence of an Illusion*, 70 U. TORONTO L. J. 453, 462–65 (2020).

190. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 137, 140 (1980). As Finnis notes, the distinction between the intrinsic and instrumental value of association goes back to Aristotle, who referred to associations whose value is primarily instrumental as "relationships of utility." ARISTOTLE, NICHOMACHEAN ETHICS VIII.3.

191. This intuition is supported by reflecting on the fact that if, Marx's Techno-Communist Utopia were suddenly brought to fruition, it seems likely that fewer people would continue to work at their present jobs than would remain engaged in their preexisting cultural associations (although there certainly would be exceptions). For counterarguments, which I do not believe are ultimately successful, see JOHN TOMASI, FREE MARKET FAIRNESS (2012).

192. *See, e.g.*, ROSEN & GAYER, *supra* note 18, at 262.

global inequalities that give rise to various social harms, and which can undermine the background conditions required for the effective exercise of other rights.[193] For instance, disproportionate wealth can often be leveraged to obtain undue influence over a society's political processes. Furthermore, in the presence of extreme disparities in natural or social endowments, providing well-endowed individuals with rights to extract the full economic rents from their labor and capital can lead to circumstances where less well-endowed individuals are unable to meet their basic needs, whose satisfaction is required to exercise any other rights. In some instances, harms stemming from economic inequalities can be viewed as market failures that arise as the result of market participants lacking perfect knowledge of the cumulative social effects of each other's transactions.[194] In the present context, unregulated economic migration can generate the intranational and international inequalities, and associated harms, that were surveyed in Part II's discussion of brain drain and fiscal competition.

2. Second Response: Foreign Tastes as Expensive Tastes

I now offer a second response to the Argument from Positive Association. In doing so, I employ some conceptual machinery from a well-known objection to '*welfare egalitarianism'*—a normative political theory that identifies justice with the equalization of preference satisfaction among the population of concern. In a classic article,[195] the legal philosopher Ronald Dworkin observes that welfare egalitarianism dubiously places all preferences on equal footing for this purpose, even those that require a disproportionate amount of resources for their satisfaction. Providing holders of these *expensive tastes* with the resources needed to assure them an equal amount of welfare would be (i) very inefficient, since much greater overall levels of well-being could be brought about by deploying such resources towards the fulfillment of non-expensive tastes, as well as (ii) intuitively unfair to those whose tastes are more temperate and who could therefore benefit more from use of the same resources.

There are at least two ways in which preferences might qualify as expensive tastes from the point of view of a nation.[196] First, the tastes might require that the preference-holder make a greater upfront outlay of resources

193. *See* MICHAEL WALZER, SPHERES OF JUSTICE (1983); Thomas Scanlon, *The Diversity of Objections to Inequality,* THE LINDLEY LECTURE (1996).

194. *See* G.A. COHEN, SELF-OWNERSHIP, FREEDOM AND EQUALITY 23-27, 45-53 (1995). As with other market failures, social welfare can often be improved upon by judicious government intervention—which here would take the form of redistributive taxation or other regulations on economic association. See, classically PIGOU, *supra* note 23.

195. Ronald Dworkin, *What is Equality? Part I: Equality of Welfare*, 10 PHIL. & PUB. AFFS. 185 (1981).

196. Note, however, that only the first is discussed by Dworkin in this article.

for their satisfaction. Take, for example, a preference for fine champagne rather than beer. Or second, satisfaction of the preferences might lead to the imposition of greater social costs or deprivations on the "backend," which others must pay for. For instance, consider a preference for smoking in indoor public settings. Although the initial resources required to satisfy this preference may be no greater than those required to satisfy a preference for smelling roses, the former will impose greater costs on others than the latter. If the state must later use public tax revenues to offset these costs (e.g., by providing air purification systems, cancer treatment, etc.) in order to assure an equal or otherwise fair distribution of welfare for others, then the indoor smoker's preferences, which here impose negative externalities, would end up more expensive for the nation to accommodate in terms of ultimate net outlays than the rose-smeller's preferences.

We are now in position to respond to the Argument from Positive Association in a second way. Even if emigration is required for an individual to satisfy preferences for foreign cultural goods or comrades ('*foreign tastes*'), and access to these goods is necessary for the individual's self-determination or self-realization, the state still need not accommodate these preferences *at any cost*. From the perspective of the home nation, *foreign tastes are (sometimes) but one species of expensive tastes*. While foreign tastes may not require a greater initial outlay of resources by the emigrant for their satisfaction than domestic tastes, their satisfaction can have the effect of depriving the home nation of tax revenues and other tangible benefits that would have derived from the emigrant's ongoing participation in the nation's cooperative scheme. Therefore, to the extent that the state is under no general obligation to accommodate expensive tastes regardless of cost—even though satisfaction of such preferences may be required for an individual's self-determination or self-realization—nor is it obliged to accommodate foreign tastes irrespective of their overall cost to the nation.

This argument might be resisted on the grounds that, in the migration case, the state is merely *releasing* an emigrant with foreign tastes from the ongoing obligation to contribute to the home nation, whereas with the champagne drinker and the indoor smoker, the state is providing the holder of the expensive tastes with positive compensation or accommodation, either by providing her with the initial resources required to undertake the activity or permitting her to undertake the activity in spite of its social costs to others.

But this distinction cannot be sustained. To see why, consider an individual who earns a very high income, but has very expensive champagne tastes, such that she requires extravagant consumption to obtain the same level of welfare as others with more temperate preferences. If the state were to provide accommodation for these champagne tastes, this would often take the form of reducing the individual's tax burden, i.e.,

taxing her less on her high income than the state otherwise would if she did not have such expensive tastes. As this case demonstrates, any categorical distinction between (i) providing positive compensation or accommodation for expensive tastes, and (ii) merely releasing a holder of such tastes from the obligation to contribute, is of dubious tenability.

To consolidate the point, let's go one step further and imagine a high-earner whose champagne tastes are sufficiently expensive that, to assure her some fair level of personal welfare, the state must reduce her tax obligations enough that she owes *no* taxes on her income. What is the difference between this case and that of the prospective emigrant with foreign tastes who requires access to foreign cultural goods and comrades for similar purposes, and who is released from all domestic tax obligations upon relocation? At least insofar as both the connoisseur and the would-be emigrant have access to an adequate range of goods, opportunities, and so forth in the home nation,[197] their circumstances would appear relevantly identical, and so no principled distinction can be made.

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Summarizing our two responses to the Argument from Positive Association: while a moderately more expansive right of emigration is justified on the grounds that emigration more strongly implicates positive freedom of association than secession, this fact cannot justify a (near-) unconditional right of emigration, for at least two reasons. First, there is, in general, no such right to unjust (dis)association or economic association. And second, because foreign tastes that motivate culturally, politically, or personally motivated emigration are often, from the perspective of the home nation, but one form of expensive taste, the state is not obliged to accommodate these preferences at any cost. However, the fact that satisfaction of such foreign tastes may be required for self-determination or self-realization does provide grounds for recognizing a somewhat stronger right of culturally or politically motivated emigration than economic emigration or pure capital relocation. This is consistent with this Article's normative view embodied in (C1)-(C10).

197. David Miller makes this point in arguing against an unqualified right to immigrate. MILLER, *supra* note 6.

V. CONCLUSION

To conclude, I will summarize the general line of argument pursued in this Article and then review some of its institutional and doctrinal implications.

Throughout, I have critiqued the prevailing international law and dominant scholarly treatment of the right to emigrate, which I have stipulated to mean the conjunction of the rights (i) to physically leave one's nation of membership and (ii) to renounce one's citizenship therein, both of which are recognized by the Universal Declaration of Human Rights. Although I have focused on the personal right of emigration, much of my analysis should also apply a fortiori to norms of capital relocation, which permit individuals to transfer capital across borders.

Under the legal status quo, and according to the dominant scholarly view, the legal right to emigrate is, and ought to be, at least nearly unqualified. By comparison, I have defended the revisionary normative view, more fully reflected in my claims and conditions (C1)-(C10), that legitimate nations who are in good standing with the international community and respect human rights ought to be permitted to recover great losses unjustly sustained from emigration by taxing their emigrants' worldwide income on an ongoing basis. If such attempts at taxation prove infeasible, inadequate, or otherwise inappropriate, such nations should also be permitted to employ (as back-up measures) the least restrictive appropriate regulations on emigration required to forestall such injustices. Under the purview of this lexical principle, taxation plays the theoretically novel role of the least restrictive means by which states vindicate claims against individuals who assert concurrent rights of migration; and, like a Pigouvian tax, is therefore a liberty-enhancing instrument in the circumstances. Furthermore, on this Article's normative view, economically (and in particular tax) motivated emigrants, as well as better-off economic emigrants, should generally be taxed and regulated before emigrants who relocate for cultural, political, or other reasons.

In broad contour, my case for (C1)-(C10) proceeded in two main stages. Initially, I showed that there are weighty distributive justice-based reasons, stemming from inequalities and harms to the globally worst-off produced by brain drain and harmful fiscal competition, to grant states the authority to tax and regulate emigrants in the structured manner I recommend. Then, in the remainder of the Article, I argued that there morally ought not be a (near-)unconditional legal right to emigrate, which could always override these distributive considerations.

My high-level strategy on this front was to analogize emigration to secession. To begin, I showed that all major normative theories of secession would reject a right to secede in circumstances parallel to those where I

favor granting states the authority to tax and regulate emigrants. To this end, I demonstrated that a number of strong arguments influentially developed against a permissive right of secession apply in equal or similar measure to emigration, including arguments from (i) duties of justice, (ii) obligations of repayment, (iii) strategic bargaining and democratic governance, and (iv) state incentives. Furthermore, those differences between secession and emigration most commonly offered to justify disparate legal treatment, such as secession's territorial dimension and emigration's involvement of cross-border movement, do not actually justify the international law's prevailing dualist regime. However, the fact that emigration more strongly implicates positive freedom of association than secession warrants recognizing a right to emigrate that is moderately more expansive than the right to secede. This ultimate conclusion is consistent with the view embodied in (C1)-(C10).

This line of argument yielded a number of institutional and doctrinal implications.

Recall that, according to (C1)-(C10), the costs of emigration must be "great" and reflect a significant injustice, inter alia, before the taxation or regulation of emigrants will be permissible. I have not attempted to provide a specific number of dollars, utils, etc., for this threshold, which will likely vary by context. It seems clear, however, that on any reasonable specification of this "great costs" criterion, the test will be satisfied where brain drain has severely retarded the development of the world's worst-off nations. It follows that international law ought to permit such nations (which are in good standing with the international community, respect human rights, etc.) to adopt a scheme of Bhagwati taxation on their emigrants' worldwide income, at least for some transitional period. And if this tax is not administrable, such nations ought to be permitted to regulate emigration as a back-up measure.

However, due to the Piece-of-Something Principle, once the background assignment of rights has been altered in this way, destination nations will have an incentive to enter into agreements with developing home nations to aid in the administration of the latter's Bhagwati taxes, in order to forestall actual restrictions on the relocation of home nations' economically desirable emigrants. Therefore, in practice, the use of physical restrictions on emigration would not often be required—or, in so far as (C1)-(C10) requires home nations to utilize the least restrictive compensatory instrument, even be permitted. Rather, the expected result of this proposed change to the international law would be a more equitable sharing of tax revenues from emigrants' worldwide income among developed destination nations and developing home nations. This would serve to offset the costs of brain drain for the latter, and to permit these nations to recoup prior investment in their ex-members' human capital.

What about harmful fiscal competition? Although less clear than with

brain drain, a case can be made that the various races to the bottom on tax rates, regulatory standards, labor wages, etc., and related costs of global tax avoidance, have also been sufficiently severe to warrant adopting the least restrictive appropriate measures sanctioned by (C1)-(C10). Even if one disagreed with this assessment, the situation could easily become grave enough to trigger the "great costs" threshold in the not-too-distant future. Let me therefore recapitulate this Article's proposed legal interventions in terms of U.S. tax law.

First, as noted earlier, I.R.C. § 877A currently levies a one-shot exit tax on the unrealized appreciation of assets owned by certain well-off expatriates who meet either an income or wealth test. If, as seems to be the case, this toll charge was unable to adequately curb harmful fiscal competition precipitated by individual expatriation, or was found deficient for other compensatory purposes explored in this Article,[198] then this rule might be supplemented by an ongoing Bhagwati tax on certain wealthy U.S. expatriates' worldwide income, at least for some transitional period. Furthermore, various limitations on the U.S.'s citizenship tax regime for non-resident citizens might be curtailed or eliminated. In particular, this would involve lowering or scrapping (i) the foreign earned income exclusion provided for by I.R.C. § 911,[199] as well as (ii) I.R.C. § 901's foreign tax credit for non-resident citizens, which reduces such individuals' U.S. tax liability by the amount of income taxes paid to foreign governments on their foreign-sourced income.

Because, under the proposed regime, covered emigrants would not be able to escape their home nation's tax obligations, the incentive to relocate to low-tax jurisdictions would be eliminated. To provide destination nations with an economic reason to aid in the administration and remittance of a Bhagwati tax to the home nation, however, the applicable rates would likely have to be set a good deal below the normal rates for U.S. resident citizens, so that destination nations could tax the residual.

Since fiscal competition is harmful in the long run for many (though not all) nations, pledges of reciprocal aid in the administration of each other's Bhagwati taxes might provide adequate incentives for cooperation across a broad range of cases. Nevertheless, because small nations do benefit from fiscal competition over the long run, the U.S. and other nations may require the authority to regulate the relocation of persons (and capital) to such tax haven nations. Once again, though, application of the Piece-of-Something Principle yields the expectation that, having been granted this authority, home nations generally would hardly ever be required (or permitted) to

198. *E.g.*, to exact repayment on prior investment in the emigrant's human capital, which a tax on other assets fails to reach in full.

199. Which presently excludes up to $120,000. *See Foreign Earned Income Exclusion*, IRS (Feb. 17, 2023), https://www.irs.gov/individuals/international-taxpayers/foreign-earned-income-exclusion.

actually exercise it.

Measures similar to these would be regarded as permissible and eminently appropriate if secession were the vehicle by which the various injustices surveyed in Parts II and III of this Article were brought about. Because, as has been one of my central contentions, we ought to view these migratory movements as functionally and morally on par with economically motivated, redistributive, or otherwise unjust secession, such regulatory measures should be deemed similarly appropriate in the context of emigration.