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Institutionalize Secession

Dating back to antiquity, groups of people feeling disillusioned by their governments have birthed secession movements all over the globe. Secession is the process by which a group of people disrupts the territorial sovereignty of their country to establish a nation of their own. Since secession fractures countries both physically and ethnically, the process by which people are should be allowed to secede (or prevented from seceding) is immensely controversial. On one side of the debate, scholars argue that constitutional democracies should build in a right of secession for its people, essentially creating a protocol by which a significant amount of the population can decide whether or not they want to secede. On the other side of the debate, scholars say that including a constitutional right to secession is anarchical and would degrade the political system immensely. Despite concerns regarding the potentialities of institutionalizing secession, doing so would save lives while allowing individuals to exercise their UN-granted right to self-determination.

Before one can formulate an opinion on whether or not individuals should be allowed to secede, one must understand the political theory behind secession. For the most part, there are two modes of thinking regarding what secession means: libertarian and liberal. Libertarians believe that the goal of secession is “to break the compulsory ties between the secessionists and a government which they no longer accept” (Hülsman 40). They are much more concerned with the actions, decisions, and beliefs of individuals and their ability to govern themselves. Libertarian views are rooted in the idea of Thomas Hobbes’ social contract theory. Fundamentally, Hobbes believes that by allowing oneself to be governed, one agrees to a social contract whereby they will follow the rules of the land in exchange for protection and services from the state. On the contrary, liberals are more concerned with the dynamics of groups, ethnicities, and cultures and how they interact with other peoples within their country. Specifically, liberal philosophers are more interested in the conditions that must be met for secession to be morally justified (Kreptul 40).

For the sake of determining a fair protocol of secession, it is necessary to focus on the liberal philosophies because they are a better illustration of reality. For example, while it is admirable and logical to say that every individual should have the right to decide what country they would like to live in, it is unrealistic. If that were the case, then there would be nothing stopping an individual from breaking off the Hobbesian social contract with whatever government country they are living in and deciding to agree to a social contract in another country. If people were allowed to adjust their contract constantly[[1]](#footnote-1), then no country would be able to craft any semblance of public policy because once a policy is voted into existence, a significant amount of the population could leave to avoid having to follow new laws. Of course, having a world in constant flux is an unrealistic hypothetical, but it shows that the Hobbesian Libertarian view on separatism is not pragmatic to developing a policy device to regulate secession.

As stated earlier, liberal philosophy regarding secession primarily focuses on the role of groups. The Remedial Rights Theory, popularized by noted liberal scholar Alan Buchanan, focuses on the morality of secessions where a population of people is consistently harmed by their government. The theory states that a group of people can on only secede from a country if it has experienced injustices at the hands of the country if secession is the last resort. The exception to the Remedial Rights Theory is situations where countries build protocols into their constitutions for secessions, in which case the separatists are justified in pursuing legal avenues as well (Kreptul 46). More intense liberal scholars believe in the Primary Rights Theory, which is mostly a generalized version of the Remedial Rights Theory. The Primary Rights Theory is based on the principle that a group has a general right to secede even if it suffers no injustices. The Primary Rights Theory takes the Hobbesian-libertarian right of people to choose their government and applies it to groups. A third relevant theory is the Associative Rights Theory, which states that the individuals who comprise a group do not necessarily have to have anything in common besides the will to secede to be morally justified in their secession (Buchanan 2). Many scholars claim that for a people to secede, they need to share certain characteristics like ethnicity, heritage, culture, or language, but the Associative Rights Theory eliminates such requirements. The Associative Rights Theory is immensely important for crafting a secession protocol that is fair because it allows for more diverse states. One can make a compelling argument that a separatist movement backed by people of different backgrounds has a greater chance of people successful because it would emphasize the importance for those people of being independent, regardless of who they are.

The Associative Rights Theory raises important questions about who should and shouldn’t be eligible for secession. Professor Lea Brilmayer asserts that it is not ethnic ties that drive people to secede, but instead ties to the land. For Brilmayer, it is a connection to the land that is valid justification for secession. Ethnicity, she claims, informs the territorial claims through continued ties to the land but itself is not sufficient justification (Brilmayer 193). To illustrate her claim, she mentions that a group of refugees of the same ethnicity cannot attempt secession in their new country simply because there are a lot of people of the same ethnicity. Brilmayer’s argument is particularly compelling because rather than considering ethnicity, a poorly defined and largely vague term, as the chief qualification for secession eligibility, she contends that larger, more general groups or people are preferable. It is very easy to say that every ethnic group should be eligible to self-determine, but such logic raises a multitude of questions. For one, what is to prevent every “ethnically” different tribe in many parts of Africa from claiming secession? A less liberal philosopher like Buchanan may counter the hypothetical by saying that each tribe would have to provide evidence that there were injustices committed against its members. Even so, there remain concerns about territorial sovereignty. A state can only function if it can maintain territorial sovereignty. Specifically, constitutional democracies rely on territorial sovereignty to ensure that it can govern equitably within its borders. If every ethnic group is granted the ability to secede and self-determine, then there would be no territorial sovereignty whatsoever. Consider the hypothetical country Ethnostan. There are two major ethnic groups in Ethnostan: People A and People B. Even if there were injustices committed by Ethnostan on People A, if People A seceded, there is nothing to say that in the new country, Astan, two ethnic subdivisions may rise to prevalence and demand the same secession privileges. In theory, the cycle repeats forever, and there is no end to when secession stops.

The case of Ethnostan is the primary defense for why secession should not be a constitutional right in constitutional democracies. According to Murray N. Rothbard, constitutional secession is by definition anarchical in that when one political subunit secedes from the greater political unit, there is no “logical stopping point” (Kreptul 61). Rothbard’s analysis is brilliant in theory but falls short in practice. While it is possible that if given the constitutional ability to secede, groups will take advantage of the right, there is also a natural point at which political subunits begin to recombine because it is in the best interest of the parties involved. Consider that government is formed in the first place to maintain order, prevent anarchy, and establish a basic set of services for a given constituency. Government would not exist if it were not beneficial to the most basic political subunit, the individual, to participate in and contribute to it. The implication of the basic theory of government on Rothbard’s claim is that while political units may fracture, they will also be built up again if it is in the best interest of the people. Due to the possible cyclic nature of government with constitutional secession, it would be more accurate to say that constitution-based secession has anarchical *elements*, but is not anarchical itself. More convincing is scholar Cass Sunstein’s claim that constitutional secession “promotes strategic behavior by political subunits” (Kreptul 50). Sunstein’s claim is that by always having the threat of secession looming over subunits, it would be very difficult to create public policy. Since the more economically powerful subunits could threaten the other, weaker subunits with secession if they don’t bend to the will of the powerful subunits, crafting policy would be a challenge. The upshot of Sunstein’s claim is that a constitutionally guaranteed right to secession holds the potential to paralyze the democratic process and ruin the checks and balances provided by federalism.

While Sunstein and Rothbard provide convincing arguments for why secession shouldn’t be constitutionally guaranteed, other liberal scholars like Wayne Norman and Daniel Weinstock disagree. In principle, Norman and Weinstock agree with many facets of Sunstein’s claims, notably that secession should be avoided, but their reasoning stems from their belief that western democracy is already “reasonably just” (Kreptul 51). Essentially, they feel that if liberal democracies are operating how they should be operating, there would never be a need for secession. In general, though, they agree that secession is objectively bad for liberal, constitutional democracies. However, Norman believes in a constitutional right to secession because by engineering the right into constitutions, it can remove incentives for minority leaders to participate in separatist movements. Continuing on his pragmatic approach, Norman suggests that the design of a constitutional right to secession would be a “choking mechanism.” A choking mechanism is a policy-based procedure for a right to be exercised that requires certain unlikely conditions to be met. For example, if there was a right to secession in the United States constitution that required a significant majority of Congress to agree, it is unlikely that any individual state would be able to secede. The practical effect of a choking mechanism would be that separatist movements without a great deal of support would likely not even get to Congress, and would, therefore, accomplish the goal of preventing secession from occurring. Beyond the practical effects, there are also powerful symbolic effects related to ensuring a constitutional right to secede. Since one of the main grievances of separatists is that their voice is not heard by the government, providing a legal channel that separatists can activate is a way to demonstrate the country’s commitment to serving its minority. Weinstock takes a different pragmatic approach. Citing the common legalization of drug use method, Weinstock believes that since people will always naturally want to secede, it is better to legalize it so that the government can control it more effectively. The logic behind Weinstock’s argument is that by authorizing secession, separatist movements would be faced with an extreme amount of legal procedures that they would have to undertake. With such an enormous legal burden, it might be easier and more beneficial for the separatists to remain in the government (Kreptul 54). His strategy depends on the fair assumption that it would be easier for separatists to engage in violence to obtain their independence than participate in the legal system, but providing them with a legal alternative to violence gives country’s the moral high ground.

Beyond support within one’s territory, scholars argue that a significant obstacle to secession is international support. After all, even if a country grants the constitutional right to secede, if the seceding people is deemed illegitimate by the international community, the country would likely fail to build up institutions and would be in danger to evolve into a failed state. A few reasons exist for why a domestically legal secession could be ruled illegitimate by the international community. One possible situation would be if the seceding state uses illegal intimidation tactics to achieve the legal secession. Imagine a situation where every member of a hypothetical country’s legislative body received death threats on the morning of the vote to legalize and acknowledge a secession movement within the country. The secession might be legal by a de jure vote, but the international community might not recognize the secession in the same way that governments may choose not to recognize the leader of a country if they are elected through disputed means. Another reason states may not recognize a legal secession is if it would cause international instability. Scholar Brian Mund notes that secessions are more likely to be recognized if they do not drastically effect the stability of the region or the greater international community (Mund 14). Moreover, Mund lists out conditions that, when followed, are most likely to result in an internationally recognized separatist state. First, as previously stated, a secession movement must not jeopardize the state of international affairs. Second, Mund contends, the secession movement must not set a precedent for other secession movements unless it is a special case. In Mund’s opinion, it is dangerous for secession movements to establish a precedent because of the political theory that secession is anarchical. He is worried that if allowed to happen consistently, states would not be able to maintain territorial integrity. Third, secessions are more likely to be successful if they are backed by states with great power. Mund’s tertiary point is rather intuitive; if a secessionist movement is backed only by a collection of weak states, then the separatist movement is unlikely to be successful because there is nothing to prevent outside forces from interfering with its sovereignty. Fourth, Mund contends that a secession movement is more likely to be successful if it has ties to an ethnicity or nearby diaspora. Similar to Brilmayer, Mund likely believes that ethnic groups are not the most convincing argument for secession because he considers ethnic groups to be what reinforces and perpetuates territorial claims, but should not be the claims themselves. Fifth, Mund asserts that separatist movements are more likely to be internationally recognized if they avoid violence. While some violent secessions have been successful, in the modern era, sympathy for those attempting to secede is lost when violence is introduced as a tactic. Lastly, secession movements are more likely to be internationally recognized if they are ethnically homogenous (Mund 24). While Mund may agree with the Associative Rights Theory (i.e., different ethnic groups of people may secede together so long as they all believe in secession) in principle, he contests it in practice. He claims that secession with a single ethnic group is more effective because they avoid forming a new minority group out of the preceding majority group. In essence, states are more likely to recognize an international secession if it does not lead to more secessions (Mund 29).

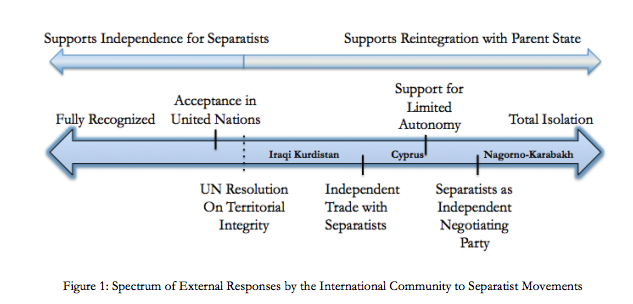
Mund’s theories on whether or not states are likely to recognize a secession movement relies on his belief in a recognition spectrum. He asserts that recognition is not limited to either a “yes” or a “no” and that there are various levels of how recognized a country is. He cites Taiwan as an example of a state that would fall near the midpoint of the spectrum. While Taiwan is recognized as a state by only 23 member-states of the United Nations, it still holds key memberships in international organizations like the International Monetary Fund and the World Trade Organization (Mund 7). He also states that the spectrum applies to traditional countries that may be full members of the United Nations. For example, North Korea, South Korea, Israel, Armenia, Cyprus, and others are not universally accepted by the entirety of the United Nations, but they are recognized by the vast majority of United Nations States. As a result, they would not be considered on the 100% recognized end of the spectrum, but somewhere close.

Figure 1.0: Scale of International Recognition (From Mund, 2013)

While a separatist movement might have the strength and ability to secede from a state with force, the Effectivity Principle states that it will almost always fail if it is not backed by the international community. Along the same vein, secession movements are more likely to be recognized by the international community if they are pursued via a legal, constitutional route. Therefore, separatist movements are more likely to succeed if they are pursued via legal means (Kreptul 93). With that in mind, and noting that legal secessions save countless lives by avoiding bloodshed from combat, the solution to the issue of secession would be to institutionalize it via constitutional rights in liberal democracies. According to Kreptul, institutionalized de jure secession would have to be governed by ex ante constitutional amendments. He argues that “having such a rule would create certainty in the law on the issue of secession, and would pave the way for legal and peaceful transformation of government.” On the one hand, constitutional secession would be extremely difficult to implement within federal systems (Kreptul 87). On the other hand, however, constitutional secession would undoubtedly save countless lives. That said, any constitutional right would have to be guided by a range of features. First, the right would have to clarify who can secede, when they can secede, and how they can secede. Deciding who can secede is extremely important. A possible solution would be to take a vote by region within the supposed separatist territory to ensure there are any parts that do not want to secede. For example, an entire region seeking to secede might vote to secede with 70% in favor, but there may also be a sub-region within the greater region that only voted to secede with 40% in favor. In that case, it can be argued that they should not be considered as part of the territory to become its own country. Beyond just the protocols for secession, the Effectivity Principle must be stressed and featured prominently in any right of secession. The Effectivity Principle states that the actual success of a secession is governed by whether or not it is capable of a de facto unilateral separation. Essentially, for a secession to succeed, the new country must be capable of existing on its own and executing the secession unilaterally (Kreptul 87). If the aforementioned elements are incorporated, the world’s liberal democracies would be better equipped to handle separatists by passing an amendment to establish secession protocols.

Bibliography

Kreptul, Andrei. "The Constitutional Right of Secession in Political Theory and

History." *Journal of Libertarian Studies* 17, No. 4 (2003): 39–100.

Brilmayer, Lea. "Secession and Self-Determination: A Territorial Interpretation," *Yale Journal of*

*International Law* vol. 16, no. 1 (Winter 1991): p. 177-202.

BUCHANAN, A. (1997), Theories of Secession. Philosophy & Public Affairs, 26: 31–61.

doi:10.1111/j.1088-4963.1997.tb00049.x

Hülsmann, Jörg Guido. “Secession and the Production of Defense.” In The Myth of National

Defense, edited by Hans-Hermann Hoppe. Auburn, Ala.: Ludwig von Mises Institute,

2003.

Mund, Brian Zachary, "Breakaway States: Understanding When The International Community

Recognizes The Legitimacy of Separatist States" 01 December 2013. CUREJ: College

Undergraduate Research Electronic Journal, University of Pennsylvania, http://repository.upenn.edu/curej/183.

1. Contract in this context is akin to leaving and joining countries at will. [↑](#footnote-ref-1)