

Secession and *Jus Ad Bellum*

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If the ethical dilemmas of traditional warfare remain unsettled there is at least a wide body of literature exploring them. Domestic use of military force, however, is rarely addressed. The subject is almost taboo; too dismal a prospect for public contemplation. The direct use of force within the United States would undoubtedly be accompanied by wrenching emotional responses for both individual service members and the military institution. There are no glorious victories in the homeland. Passions could run deep enough to call into question military cohesion and effectiveness. Prudence dictates considering ethical conduct in advance of a crisis.

The character of war is evolving. Regimes were recently toppled or rendered ineffective through terrorism, subversion, separatism, or even mass civil disobedience. It seems unlikely any state would acquiesce to collapse without calling on its military. The United States certainly used military force during the Whiskey Rebellion, the Civil War, and the Bonus March. The Insurrection Act establishes *legal* procedures for presidentially directed military operations. The ethical dimension is largely unaddressed. Addressing the entirety of ethical domestic military conduct is beyond the scope of this short article. Instead, it focuses on a futuristic *jus ad bellum* scenario. *Is the suppression of secession from the United States just war?* I argue that under conditions of civil impotence, the suppression of secession is an ethical domestic use of military force.

The *jus in bello* use of force to defeat secession is a different question than the *jus ad bellum* employment of the military. This chapter solely addresses the *jus ad bellum* question. It unfolds in three steps. First, I briefly review secession theories. Next, I apply the arguments to the contemporary American context. Finally, I probe the *jus ad bellum* scenario.

Secession Theory

Secession questions concern a number of venerated yet ultimately incommensurable values. First, self-determination, championed by President Woodrow Wilson in his famous Fourteen Points speech, posits all nations and distinct cultures are entitled to sovereignty over their historic territory. The resulting argument concerns who qualifies and what territory? Second, consent of the governed is a bedrock principle of democratic liberalism. Argument centers on exactly whose consent is needed. Third, compensation is expected for property unjustly seized-inevitably the case with secession. Predictably, disputes arise over the value of property, countervailing claims, and the likelihood of payment. Fourth, the rule of law and the peaceful settling of disputes are integral to a just society. Here the struggle is over the justice of law, human rights, and the state processes producing them.

Is the morality of secession universal or contextual? Universalists argue principles are derived rationally, and therefore are general in nature. However, secession from a state is deeply rooted in *existing* social relationships among fellow citizens. The ethics are both individual and contextually societal. While some duties and obligations are universal, in some contexts compatriots merit special consideration.¹ Citizen relationships are mutual, multiplying duties to do good or not do harm to each other.² The ethics of secession and political borders are special cases bounded by the complex conditions of each situation. Secession, therefore, is a contextual, or particularist, not universal question.

Moral rights must be distinguished from legal rights. In *Texas v. White*, the Supreme Court ruled the Constitution created a perpetual and indissoluble union.³ While the rule of law is relevant to *jus ad bellum*, it is not synonymous with ethics. Although there is variation, moral arguments revolve around interlaced consent, qualifying groups, territory, injustice, and successor regime criteria. Typical, but not exclusive, criterion explanations follow.

Consent

Voluntary consent, as evidenced by some form of majoritarian plebiscite, is a necessary condition for just secession. This consent is amongst a *qualifying* group, not the wider national citizenry. Secession theorists argue consent is an elemental value of liberalism but it is not permanent. In other words, the consent of the group's ancestors is not binding on contemporary members. Alternatively, theorists may argue there never was original consent to incorporate into the state. In an American example, Hawaiian separatists argue the consent criterion was not met because the United States used force and subterfuge to remove the Hawaiian monarchy.

Qualifying Groups

Theorists are divided into two broad, but mutually exclusive, categories of legitimate groups. Ascriptive, or identity, groups are formed around hereditary or environmental characteristics usually beyond individual control such as ethnicity, race, gender, religion, nation, language, or culture. In this theory, any "nation," as distinguished from ethnic groups and minorities, may secede.⁴ An ascriptive argument emphasizes how aspects of group history, religion, language, traditions, physical characteristics, economics, and especially culture differ from the common national experience.

For associative or ideological theorists ascriptive characteristics are irrelevant. Voluntary political or ideological agreement is what matters.⁵ Associative theory rejects the requirement for long historical ties to territory and ascriptive commonality. This theory derives from the Kantian ideal of individual, not social, moral autonomy.⁶ In other words, all people are equal citizens of the state and ascriptive characteristics are of minor importance. Legitimacy is a function of majoritarian consent.

Territory

A valid claim to territory of sufficient size to support an independent state is another necessary condition. However, validity is a contested concept. Some argue historical claims are necessary. Either the qualifying group's ancestors lived in the territory or the territory was unjustly taken from the group in the past and annexed to the current national territory. Others reject the validity of historical claims because of their involuntary nature. In this view, territorial claims are solely a function of current population patterns and voluntary political choice.

Injustice, or not

Theorists are divided on whether or not injustice is a necessary condition to justify secession. Primary right theorists argue secession is a general right of groups⁷ even in the absence of injustice. Secession is an unquestioned right provided the criterion of majoritarian consent, territory, and qualifying group are met. Remedial right theorists posit secession is moral only as a result of longstanding and systemic injustices. As a special case, remedial right theorists recognize just secession in the absence of injustice if the state's constitution provides secessionary procedures.⁸

Injustice has standards. First, the injustice must be systemic, prolonged, and have little chance of rectification through other remedies. Examples include physical extinction, cultural extinction, or economic exploitation. State enforced *extinction* is a difficult and unambiguous standard. Alternatively, the state

may simply fail to perform its security function, resulting in outcomes such as ethnic cleansing. Economic exploitation also has a grim standard. The state policies must result in discriminatory redistribution that methodically disadvantages one group to benefit others “in morally arbitrary ways”.⁹ In other words, it is far beyond state redistribution of wealth for the social benefit of all citizens. Moralists recognize the merits of good intent and are tolerant of the reality of flawed execution.

Many argue secession from illiberal regimes is always and completely moral.¹⁰ The injustice of illiberal regimes is simply assumed. Secession from a liberal regime is justified by appeals to consent, an exercise in self-determination, or a lack of political expression and choice. Colonial regimes are another special case where a liberal or illiberal nature does not matter, but simply their foreign origin. For example, the United Nations General Assembly declared self-determination and independence from colonial regimes a *right*.¹¹

Successor Regimes

Both remedial and primary right theorists argue only liberal successor regimes are justifiable. Anything short of liberal democracy causes moral harm to citizens, even if they desire illiberal practices.¹² For example, secessionists may wish to establish a state religion, restrict rights of expression, or limit employment based on gender. In addition, if the successor regime is based on ascriptive characteristics, it may not be unjust to its newly created national minorities be they ascriptive or associative. Successor regimes must be able to protect themselves and perform the security and justice functions of a state.¹³ Lastly, the original state is entitled to compensation for property, a condition rarely met in practice.¹⁴

American Context

A casual observer might reasonably conclude the American secession question was settled in the Civil War - our bloodiest war to date. Even symbolic references to the Confederacy such as the battle flag on the South Carolina state house grounds,¹⁵ Sons of Confederate Veterans on Texas license plates,¹⁶ or the names of former slave owners on university buildings¹⁷ are under rhetorical and physical attack. Nonetheless, the ethics of secession continue to intrude on the public discourse. Whether identity separatism or brinkmanship politics, American secession advocates are multiplying.

A new American secession movement may not use the same methods as the Confederate States of America. In the emerging security environment, subnational groups have successfully used political intimidation in the form of compellence, the use or threat of violence to force action the government would not otherwise take, and deterrence, creating conditions requiring governmental violence to proceed with an intended action. The United States is not immune to illegal political tactics. Widespread use of organized violence or political intimidation tactics could speculatively require military forces to enforce or reinforce the rule of law and federal sovereignty. Before judging military suppression of secession, one must examine the particulars. In the American context, qualifying groups, injustices, autonomy, and rule of law are particularly salient.

Qualifying Groups and Consent

In the American context, common nationality is a poor ascriptive characteristic. With the formation of the United States, the ascriptive relationships of blood ties were jettisoned for the political culture of liberal ideology.¹⁸ After almost 250 years of relatively open immigration policies and “melting pot” culture, the vast majority of ascriptive nationality claims are tenuous.¹⁹ Even among identity supremacists such as the Northwest Front or Black Riders Liberation Party, separatist appeals are along *racial* lines, not nationality. No mainstream secessionist theory even suggests race as a secessionary justification. Even if a racially based national “cultural” grouping as “an indispensable source of self-identification and self-definition”²⁰ existed, inventing a “historical” territory would necessarily involve inflicting significant human misery on innocents bringing it to fruition.

The cases of native Puerto Rican and Hawaiian separatists bear additional scrutiny. Puerto Rico is an unincorporated territory of the United States. As such, there was never a Constitutional ratification process and there are few legal impediments to separation. However, plebiscites in 1967, 1993, 1998, and 2012 clearly indicate there is no *consent* to independence. At its best, independence garnered 5% of the vote in the 2012 plebiscite.²¹ Another federally funded plebiscite is scheduled for June, 2017.

On the other hand, Hawaii did accede to the United States, albeit under questionable circumstances. An ascriptive Hawaiian secession movement with a hypothetical majoritarian mandate, however, would represent a mere 6% of the current residents.²² Even including native Hawaiians mixed with other Pacific Islander nationalities garners only 26% of the population.²³ This illustrates how both the problem of ascriptive characteristics and fluid American residential patterns call into question claims of national identity and historical ties to territory.

Recall associative groups coalesce around political belief and not historical ties to territory or national identity. If one accepts liberal ideology is the founding principle of American “national” identity, associative secession groups are a better ideological fit. Anti-secessionist objections to associative secession are based on grounds such as lack of injustices, autonomy, illiberal outcomes, or the rule of law.

Injustices

No one wants to suffer injustice and no government rules without periodically creating it. The costs accompanying secession are only defensible in order to correct grievous harms. Despite the hyperbolic rhetoric of separatist groups, little evidence exists of current systemic, prolonged governmental physical or cultural extermination efforts. For example, white separatists claim immigration, demographic shifts, and cultural change are evidence of a government conspiracy harm and disenfranchise whites. Nevertheless, change is far short of extermination. Among associative Texan and Californian separatists, alleged injustices primarily concern the results of lost federal elections and the redistribution of tax revenues.

Rectificatory justice theory claims secession is justified if a region was unjustly incorporated.²⁴ In the case of the United States, this could include the state of Hawaii. Many native Hawaiians argue, and Public Law 103-150 agrees, Queen Liliuokalani was forcibly and unjustly removed prior to annexation in 1898.²⁵ Therefore, their ancestors never consented to union with the United States. Although there has been significant movement toward autonomy similar to Indian tribes,²⁶ it appears there is only minority support for secession among native Hawaiians.²⁷ An even bigger roadblock to consent is the question of who gets to vote. If all people must *morally* be treated equally, then a majority of *all* residents regardless of nationality would be necessary for consent. The Supreme Court confirmed this principle *legally* in the 2000 Rice versus Cayetano decision, observing “race is treated as a forbidden classification . . . [because] it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities”.²⁸ The court further observed Hawaiian ancestry was a proxy for race²⁹ and opened Office of Hawaiian Affairs elections, a state established native Hawaiian advocacy agency, to all voters.³⁰ To the extent a Hawaiian secessionary movement exists, it is based on ascriptive rather than associative characteristics.

Territory

Four ascriptive groups, two associative groups, and one individualist ideology have substantive movements advocating secession from the United States. They also make more or less definitive claims to territory. The Puerto Rican Independence Party and underground groups such as *Ejercito Popular Boricua* desire an independent Puerto Rico. The Institute for the Advancement of Hawaiian Affairs and Nation of Hawaii, *Ka Pakaukau*, and The Ohana Council of the Hawaiian Kingdom all desire an independent state or kingdom over part or all of the Hawaiian Islands.³¹ Other ascriptive groups with a debatable claim to “nation” status include white separatist groups such as the Northwest Front. They seek an Aryan homeland in the

Pacific Northwest to include Washington, Oregon, Wyoming, Montana and sometimes adjoining states or provinces of Canada.³² Over time, the Nation of Islam varied the intensity of its advocacy for an African homeland in the United States.³³ The relative newcomers of the Black Riders Liberation Party are strongly, if incoherently, committed to separation.³⁴ In both cases the location of the wished-for national territory is unclear.

The two associative groups laying claims to territory are relatively young, but appear to have a sustained appeal.³⁵ The Yes California Independence Campaign advocates for the independence of California.³⁶ The Republic of Texas organization and the Texas Nationalist Movement similarly argue for an independent Texas. The concept even garnered a reference with unclear intent from former Texas Governor Rick Perry.³⁷ Followers of the Sovereign Citizens and Moorish Nations ideology even advocate *individual* secession.³⁸ Sovereigns and Moors claim their personal property as independent territory but on occasion elect “state” representatives and appoint “judges.”

Successor Regimes

All the aspiring new states are latent. Characterizing their regime type is unavoidably speculative. Nonetheless, judgments may be made based on their rhetoric or past actions. The white separatists and black separatists would establish strongly illiberal regimes. In addition to their racist and chauvinistic ideas and sometimes violent activities, creating racial homelands would necessarily forcibly displace hundreds of thousands or even millions of people. The violent history and Marxist-Leninist orientation of the *Ejercito Popular Boricua* would not bode well for liberal outcomes. Much of the Hawaiian independence movement espouses liberal ideas, but the form of a successor regime is not well mapped out. At least some groups favor reestablishing a monarchy. The associative groups of California and Texas emphasize consent, legal processes, and disavow violence. Assumedly they would desire liberal regimes although it is unclear if their toleration would extend to residents who disagreed with their political positions.

Jus ad Bellum

A future declaration of secession from the United States is a possibility. Some groups have already gone as far as to create shadow national officials albeit with no actual power beyond their small group. Forceful suppression does not necessarily include the use of military. Suppressing extralegal political tactics is usually a civil police function. Arrest, economic sanctions, or argumentative intimidation or persuasion could be sufficient to subdue separatism. However, widespread insurgency tactics could overwhelm the civil security apparatus. Even nonviolent tactics such as ballot initiatives as advocated by Yes, California create the appearance of legality and consent in order to politically intimidate the federal government through compellence or deterrence. Nonviolent beginnings do not guarantee nonviolent endings. After all, the former Confederate states *voted* for secession before war broke out.

The *jus ad bellum* question concerns a future scenario where secession cannot be contained by civil agencies. Would the use of military force to prevent secession from the United States be just? Using a utilitarian approach, I argue it is. Secession and union are *social* dilemmas. The deontological approach informs the conduct of military campaigns, but the future of the United States is a political problem requiring defense of the greater good. In short, potential secessionists have autonomy alternatives. They promise mostly, if not completely, illiberal regime outcomes. Cascading anarchy would result from disrupting the rule of law. Lastly, armed forces cohesion and subordination is a necessary condition for a just society in an anarchic world, particularly in the homeland.

Autonomy

Political autonomy represents an ethical solution granting considerable local control but not the entire scope of sovereignty exercised by a national government. Autonomy avoids the violence of a secession and allows

substantive public policy choices affecting daily life. Although many national issues such as foreign and defense policies are not impacted, autonomy allows better alignment with local and regional circumstances. In the United States, states already exercise a strong version of autonomy. The 10th Amendment specifies “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” For example, states have considerable ability to regulate education, regulate industry, raise funds, create a justice and police system, create a government, pass legislation, and a system of dual state and federal control over Air and Army National Guard forces.³⁹ Given the considerable autonomy granted to states, making a case against an abusive and overreaching national centralization is difficult. In the case of Puerto Rico, a completely legal pathway to independence already exists. Were national policy so morally deficient as to be egregious, in time the errors would be corrected. Should the wrongs prove uncorrectable, then Lockean *revolution* of the whole is justified, not the separation of a portion.⁴⁰

Illiberal Outcomes

Illiberal states limit the human rights of their citizens or those of new minorities created by the secession.⁴¹ Resisting the *emergence* of illiberal states concerns not only people desiring secession, but the opportunities of their descendants as well. Secession based on ascriptive characteristics necessarily divides people unequally. While benefits and duties may morally be unequally distributed between citizens and noncitizens, it cannot be done so *among* citizens.⁴² Ascriptive secession creates new minorities who may be treated unjustly or ethnically cleansed. All the American ascriptive groups are unlikely to achieve consent for independence from either national or local citizenry. Associative groups could plausibly achieve consent within their state, but are unlikely to on a national level. Associative secession unjustly incentivizes the emigration of ideological minorities. Given these potential harms, forcible federal paternalism to preserve human rights is just.

Cascading Anarchy

The number of potential secessionist groups and real or imagined grievances is so large that uncontested secession would atomize the international system⁴³ and the United States. Unchallenged secession incentivizes malign behaviors such as immigration to or forced emigration from economically valuable regions with a view to subsequent secession.⁴⁴ Secession provides fertile ground for additional identity demagoguery. Even primary right theorists differentiate nations, which have a right to secede, from ethnic groups and national minorities, which would not.⁴⁵ But nations, ethnic groups, and national minorities are necessarily protean concepts.⁴⁶ For example, in the United States black and white separatists do not even claim these categories but enflame *racial* divisions. Further decomposition of ascriptive and associate groups would follow. Demagogues do not rely on reasoned rationalizations but rather effective grievance narratives.

Even the threat of secession severely handicaps political bargaining by allowing strident minorities to enforce their will on the majority through the threat of costly separation.⁴⁷ Democratic politics become dysfunctional because a minority has *de facto* veto power even when the national government is acting justly. For example, by agreement contentious issues such as interstate tariffs are removed from the political system to diminish “... the power of highly controversial questions to create factionalism, instability, impulsiveness, chaos, stalemate, collective action problems, myopia, strategic behavior, or hostilities so serious and fundamental as to endanger the governmental process itself.”⁴⁸ In other words, the political system will not work if every aspect of governance is subject to bargaining and the threat of secession. Extralegal secession creates increasingly smaller, and potentially hostile, microstates bickering over territory and economic advantage. Lincoln’s desire “that government of the people, by the people, for the people, shall not perish from the earth”⁴⁹ would, literally, perish.

The rule of law is a just end in itself. While particular laws may be unjust, worse are polities that ignore the rule of law. The United States has political procedures that can and do change law. The most obvious method is through elections and changes in legislators. Courts may invalidate unjust law as well. Even acts of civil disobedience, perhaps illegal but considerably less disruptive and permanent than secession, have resulted in changes to laws or policies. Admittedly, some causes have little hope of achieving their ends through political processes. Nonetheless, secession from a liberal regime causes greater harm to both the whole and the parts secessionists claim to represent.

Secession ignites the worst type of civil rights abuses. Sherman's description of conditions during the prelude to the Confederate secession is instructive. "Our country has become so democratic, that the mere popular opinion of any town or village rises above the law - men have ceased to look to constitutions and law books for their guides, but have studied popular opinion in bar rooms and village newspapers and that was and is law ... and everywhere from California to Maine any man could do murder, robbery or arson if the people's prejudices lay in that direction ...".⁵⁰ The anarchic conditions and misery of failed states reflect the complete breakdown of law and order. Conditions in dictatorial states mirror what happens when the rule of law is replaced by the arbitrary rule of man. Secession from a liberal regime leads to deprivations before, during, and after the fact.

Armed Forces Cohesion and Subordination

As Prisco Hernandez pointed out at the 2015 Army Command and General Staff College Ethics Symposium, the decision to serve and judge the justice of any particular conflict is individual.⁵¹ *Pace* Hernandez, utilitarian concerns must be part of the *jus ad bellum* calculus, particularly when the threat is existential. The military institution has a special responsibility with regard to outcomes. The deontology of ethics has a rightful place informing the *jus in bello* conduct of individual military members. But individual service member calculations must also include the social ethics of political consequences.⁵² In the United States, the social harm of secession outweighs the harms of deviation from traditional military missions.

What are the competing virtues complicating a decision to be an instrument of suppression in the homeland? First, the dilemma of constitutional loyalty versus the protector of the people. Military forces' *raison d'être* and primary, and often only, self-conception is as protector against foreign threats. In this role, they are loved by citizens. While *Army Doctrine Reference Publication 1, The Army Profession* considers the American people a unitary variable, it acknowledges the possibility of domestic enemies as reflected in enlistment and commissioning oaths.⁵³ Domestic suppression will cause the military to be hated by those endeavoring to become erstwhile former Americans. The optics of suppression will earn additional enmity from otherwise sympathetic observers.

The second dilemma is the apolitical professional versus the ultimate arbiter and defender of Constitutional processes. The desire for separation from domestic politics runs deep amongst the professional military.⁵⁴ The military even strenuously resists involvement in foreign governance,⁵⁵ let alone any role in domestic politics. Nonetheless, when domestic tranquility is threatened during national times of distress, the military finds itself drawn or pushed into encroaching on politics, law, and order. For example, during World War I, the Bonus March, and the Vietnam War before 1971, covert military intelligence and overt civil disturbance operations proliferated.⁵⁶ Regardless of the choice, military intervention or nonintervention is a political decision with an ethical outcome.

The third dilemma is between obedience and loyalty versus warrior codes and emotion. All United States military forces swear or affirm obedience to their hierarchical superiors and the Constitution. The hierarchy clearly ends at the president. Interpretation of the Constitution is considerably more difficult. Although the Supreme Court decided the issue in *Texas versus White*, the nuanced logic of Constitutional arguments are not a service member's specialty. In a secession crisis, the public media tumult would be overwhelming.

As Sunstein observed, “technocratic rationality does not characterize deliberations in which the specter of secession is involved”.⁵⁷ Further, *Posse Comitatus* strictures are thoroughly socialized within the active military. However, the many exceptions and caveats of the *Posse Comitatus* Act are generally simplified to “do not enforce law on civilians” among rank and file service members and leadership alike. Secessionists may not look like, or even be, combatants. The military would be pulled between the virtue of obedience, subordination, and warrior codes of not interfering with your fellow citizens.

A fractious armed forces response to secession is perhaps the biggest social harm of all. In the prelude to the Civil War 296 officers (over 25% of the total) resigned from the active Army and 270 took Confederate commissions.⁵⁸ Another 26 enlisted men left the Union army, although it is unclear if they joined the Confederates.⁵⁹ A future secession is certainly not guaranteed to produce the carnage of the Civil War. There is little doubt, however, an incohesive military is less effective at best, and the venue or instrument of political change at worst. Cohesion may return over time, as it did during the Civil War, but the risks to the citizenry and liberalism are high. While the outcomes of a future secession are wildly speculative, as then Major George Patton observed in the aftermath of the Bonus March, “remember that when the Army has done its duty, liberty has flourished and that when it has failed, riot has changed into rebellion.”⁶⁰

Conclusion

American politics are traditionally contentious, but a rising tide of strident demands and extralegal political intimidation emboldens separatism and nascent secessionary movements. A future secession crisis cannot be ruled out. Theories of just secession are bifurcated into two schools of thought. Primary right advocates believe injustice of the parent state is irrelevant. Ascriptive nation characteristics supplemented by historical, cultural, and territorial conditions justify secession. Remedial right advocates justify secession based on injustice and ideological agreement supplemented by the preeminence of political opinion within a territory. While ultimately incommensurable, both schools of thought agree successor regimes must be liberal democracies. Neither of these schools of thought can be convincingly applied to the United States. The harms of secession outweigh the harms of forcible union.

If extralegal secession occurs, civil security operations and political processes are the preferred resolution methods. As always, the military must be ready to perform its ethical duties. The oaths of office wisely acknowledge the perpetual existence of potential domestic enemies. There is *jus ad bellum* in the military suppression of secession from the United States. The far more difficult question is the *jus in bello* conduct of military operations against nontraditional threats and extralegal political agitation. The prospect is gruesome. There are no readily apparent solutions. New research must address that problem because it is likely to emerge, perhaps in the not too distant future.

Endnotes

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