The Volokh Conspiracy

Debating the Moral and Legal Status of Secession

Ilya Somin • March 12, 2012 4:35 pm

Jason Kuznicki and Timothy Sandefur have written responses to my post critiquing kuznicki's earlier statement that the idea of legal secession is a "category error."

Kuznicki writes:

> Of course, it's indisputably true that *some* secessions are authorized by some countries' constitutions. Others, however, are not. Within these two types of cases, authorized and unauthorized, we can also imagine specific acts of secession that we find ethically justified or ethically unjustified.
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> That a given constitution forbids secession does not in my view mean that all secessions from it are necessarily unjustified. It means only that we have to justify them through extraconstitutional means, and these means must in themselves be weighty enough to also justify overthrowing the existing legal order.
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> Similarly, that a given constitution allows secession does not in my view automatically justify all secessions carried out under it. We may still find some of them ill-advised or even unjustified. There's nothing about constitutional law that says that where the law permits a thing, the conscience has to be silent.

I agree with all of the above. But I think it is in some tension with Kuznicki's previous comment on the subject, which claimed that "[s]ecession is the decision to step out of an existing political order, so it's a category error to try to justify it legally." Kuznicki's most recent post, by contrast, suggests that such justifications are not category errors at all, though sometimes they may be wrong for other reasons. However, we all sometimes make off-the-cuff statements (or, in this, case twitter posts) that don't fully reflect our considered views. I know I have done it, so I can hardly blame Kuznicki for doing so.

I have more disagreements with Sandefur's post:

> Jason Kuznicki and Ilya Somin make the critical error of mistaking "secession" for "revolution." Revolution means to overthrow a political and legal order, while secession is a legal theory—it is the theory that for a state to leave the union is itself within the legal order. It is therefore literally incorrect to say that secession is the "attempt to step outside the legal order." That's revolution. The American Revolution was not an attempt at secession—note that the word was virtually never used by the Revolutionary leaders. On the contrary, the term secession came into use in the decades before the Civil War as an attempt to justify a (pseudo-)revolutionary act within the legal order.

As I explained in this post, secession and revolution are not mutually exclusive categories. At least as used in contemporary English, secession is used to denote any effort to split off part of a state's territory and form a new nation, whether legally or not. Some secessions also qualify as revolutions, in the sense that they seek to establish a political regime very different from that which existed before. The American Revolution was an example of revolutionary secession. By contrast, some secession movements are not revolutionary in this sense (e.g. – today's secession movements in Scotland and Quebec, which seek to establish parliamentary democracies only modestly different from those that presently exist in Canada and the UK). It is true that the American Founders did not use the term "secession" in the 1770s. But that's because it had not been invented yet, not because it isn't an accurate description of (part of) their agenda.

Sandefur is also far more certain than I am that secession was illegal under the US Constitution as of 1861, arguing that "many of [the Constitution's] pre-1865 provisions—from the Guarantee Clause to the Privileges And Immunities Clause—were absolutely incompatible with secession, and the subsequent amendments are even moreso." This may be true, but I am not so sure. The Guarantee Clause and Privileges and Immunities Clause impose various obligations on "states" that the federal government can enforce. However, if states have a right to secede, they would no longer be "states" of the American Union after such as secession has occurred. At that point, the Constitution – and the federal government's power to enforce its provisions – would no longer apply to it. The clauses Sandefur mentions are plausibly interpreted as applying to all states in the Union, for so

long as they remain part of it, but not if they secede. Imagine an Alcoholics Anonymous chapter that has a clause in its charter giving the organization the authority to guarantee that the members never drink alcoholic beverages. Does such a clause necessarily mean that members are forbidden to leave AA (and therefore no longer be subject to this clause)?

I don't think any of the above proves that secession is constitutionally permissible. It only demonstrates that the issue is a closer call than many suppose.

Sandefur also suggests that, if secession is legal, it requires no additional justification:

[I]f the law allows secession, then *no more justification is required*—just as a person wanting to sell his car requires no further justification than that he wants to and it belongs to him. If secession is a legal right, no further rationale is required (at least, vis-a-vis the federal union). But if secession is not legal—that is when further justification is required (and in the case of 1861, is lacking). Only if it is a law-breaking act do we get to the question of whether it is nevertheless justified in some moral sense.

I think this is wrong. Many legal activities might also be immoral or unjust. Slavery was legal in many states until 1865, but it was still an evil, and people still had a moral obligation not to become slaveowners. Similarly, secession for the purpose of protecting slavery was evil even if it was legal under the Constitution.