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Three Arguments of the “Right to Secession” in the Civil War: International Perspectives

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Three Arguments of “Right to Secession” in the Civil War: International Perspectives

BY HAN LIU*

Abstract

Secession becomes a source of controversies again both within and outside the United States. In both political discourse and public imagination, the image of secession of the South in the mid-nineteenth century, as well as the Civil War it triggered, occupies an important position. Conducted in blood, the end of the Civil War is usually thought to establish a constitutional rule that no state shall secede from the Union. Challenging the conventional understanding, recent legal scholarship has shown that the legality/constitutionality of secession did not receive a definitive, legal answer at Appomattox. But the question remains: Why so? Explaining the puzzle, this article traces out the debate over the “rights of secession” before and during the Civil War, putting it into contemporaneous international horizons. It argues that, the Civil War cannot resolve the legality of secession because Southern secessionism actually resorted to not only legal/constitutional arguments, but also revolutionary and nationalistic justifications, both of which were extralegal. The dispute eventually went to a violent solution, because secessionists, with these arguments, had already moved beyond the law. In the contemporaneous legal imagination, secession belongs in the domain of sovereignty that involves war and violence, not the arena of law and the court.

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Keywords

Secession, Constitutional Right, Revolution, National Self-determination, Nationalism, the American Civil War, Federalism, Sovereignty

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In reality, if North and South formed two autonomous countries, like, for example, England and Hanover, their separation would be no more difficult than was the separation of England and Hanover. “*The South*,” however, is neither a territory closely sealed off from the North geographically, nor a moral unity. It is not a country at all, but a *battle slogan*.

—Karl Marx¹

INTRODUCTION

Secession becomes a source of political and legal controversies again. As the specter of separatism continues to haunt the world in places like Scotland in the twenty-first century, the topic of secession has been rediscovered in American political discourse in recent years, across the political spectrum. In 2010, in response to the Democratic administration, the former Governor of Texas Rick Perry mentioned the possibility of the secession of Texas from the United States.** After Barack Obama’s reelection in 2012, Southern secessionism began to surge.² In wake of the victory of Donald Trump in 2016, voices of seceding from the Union arose in several blue states, too.³

As the issue has become increasingly serious in American politics, legal and academic discussions over the constitutionality of secession also rose.⁴ In the literature, as well as in American political discourse and public imagination, the image of secession of the South in the mid-nineteenth century, as well as the Civil War it triggered, occupies an important position.⁵ The Southern

1. KARL MARX & FREDRICK ENGELS, *THE CIVIL WAR IN THE UNITED STATES*, 75 (2003) (ebook).

**Reid Wilson, *In Texas, Ted Cruz Has Allies*, WASH. POST (Oct. 22, 2013, 6:00 AM), <http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/22/in-texas-ted-cruz-has-allies>.

2. Elizabeth Dias, *Obama’s Re-Election Inspires Southern Secessionists*, TIME (Nov. 14, 2012), <http://swampland.time.com/2012/11/14/obamas-re-election-inspires-southern-secessionists/>.

3. Cristina Silva, *Will California and Oregon Leave the Union? Facts about CalExit and Democrats’ ‘Secession Movement’*, RAWSTORY (Nov. 12, 2016, 22:09), <http://www.rawstory.com/2016/11/will-california-and-oregon-leave-the-union-facts-about-calexit-and-democrats-secession-movement/>.

4. See, e.g., NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT (Sanford Levinson ed., 2016).

5. See, e.g., GARY W. GALLAGHER, JUBAL A. EARLY, THE LOST CAUSE, AND CIVIL WAR

secessionist movement and its historical failure in the 1860s still haunts the American people today, especially those who oppose the federal government for various reasons. Conducted in blood,⁶ the end of the Civil War is usually thought to establish a constitutional rule that no state shall secede from the Union.⁷ As the former Justice Antonin Scalia said, “[i]f there was any constitutional issue resolved by the Civil War, it is that there is no right to secede.”⁸

Recent scholarship, however, has begun to challenge the conventional wisdom.⁹ Under the new understanding, the question of the constitutionality of secession did not receive a definitive, legal answer at Appomattox.¹⁰ The result of the Civil War merely answered the constitutional question by force, not by law.¹¹ Legal answer requires more than brutal violence. But the question remains - why so? Why did the Civil War not settle the normative question of the right to secession?

This article sets out to approach the question by tracing out the debate over the legitimacy of secession and putting them into contemporaneous international horizons. It argues that the Civil War cannot resolve the question of the right to secession because Southern secessionism actually resorted to more than just legal/constitutional

HISTORY: A PERSISTENT LEGACY (1995); DAVID GOLDFIELD, STILL FIGHTING THE CIVIL WAR (2002).

6. See, e.g., DANIEL FARBER, LINCOLN’S CONSTITUTION 92 (2003) (“The Civil War was by far the bloodiest conflict in our history, with a death toll of six hundred thousand men. This nearly equals the total from all other wars combined. The statistics are appalling. One out of fifty Americans died in the Civil War, including a quarter of Southern white males of military age.”).

7. See, e.g., LAURENCE TRIBE, THE INVISIBLE CONSTITUTION (2008); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1512 n.341 (1987) (the “final military judgment [against the legality of secession] was entered at the Appomattox Courthouse”); Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 691 (2004).

8. See Ben Smith, *Scalia: No to Secession*, POLITICO: BEN SMITH BLOG, (Feb. 16, 2010), <http://www.politico.com/blogs/ben-smith/2010/02/scalia-no-to-secession-025119>.

9. See, e.g., Cynthia Nicoletti, *Did Secession Really Die at Appomattox?: The Strange Case of U.S. v. Jefferson Davis*, 41 U. TOL. L. REV. 587, 588 (2010) (“the civil war did not fully resolve the constitutionality of secession...”); Mark E. Brandon, *Secession and Nullification in the Twenty-First Century*, 67 ARK. L. REV. 91, 98–99 (2014) (“The Civil War did decide the secessions of 1861 as a matter of raw force; but it did not-it *could not* decide secession as a matter of constitutional authority.”).

10. See Cynthia Nicoletti, *Did Secession Really Die at Appomattox?: The Strange Case of U.S. v. Jefferson Davis*, 41 U. TOL. L. REV. 587, 588 (2010).

11. See Mark E. Brandon, *Secession and Nullification in the Twenty-First Century*, 67 ARK. L. REV. 91, 98–99 (2014).

arguments. Rather, the normative, rights-based discourse of secession many Southern statesmen and theorists put forward comprised two more dimensions: the right to revolution and the right to national self-determination. The dispute was eventually resolved by war because secessionists had already moved beyond purely legal arguments and actions. Hence the “right to secede” met the violent resistance of the democratic state. In the legal theory of the day, secession belongs at the domain of sovereignty that involves war and violence, not the arena of law and the court.

This article proceeds as follows. Part I describes territorial aggregation and disaggregation in the post-revolutionary republican states – America and France. Both countries followed the old-fashioned ways of accomplishing and justifying territorial acquisition. Both, however, encountered problems of territorial unity after the principle of popular sovereignty was enshrined by revolution. This was especially so in the United States, which faced secessionist instability after the Revolution. Part II deals with the normative debates – constitutional, revolutionary, and nationalistic – over secession around the Civil War. Southern theorists claimed that secession is constitutional because of the compact nature of the Union, while the North countered that secession is unlawful because of the perpetuity and indivisibility of the Union. The South also argued that even if secession is unlawful, it can be justified by the right of revolution; the North held that the right of revolution must have a just cause and is only vindicated by victory. Finally, the South employed a national self-determination argument. That argument was marred by ethnic indistinctiveness and slavocratic politics in the South. Part III shows that theory gave place to battle on the question of secession. Post-Civil War Americans can only re-invoke the trial by battle and the right of conquest to make sense of the war and its answer to the question of secession.

I. Territorial Aggregation and Disaggregation Attempts in the Popular-Sovereign States

The American experiment of republican constitutionalism can be put into the context of nineteenth-century world history. Although the American and French Revolutions had introduced the principle of popular sovereignty to the world, the nineteenth century was emphatically an age of empires – a time in which imperial states reached their zenith. Maximilian became emperor of Mexico, Queen

Victoria was proclaimed empress of India, the Meiji Restoration set out to create a Japanese empire, and European imperial powers claimed the African Continent, to name a few.¹² Remarkably, even the new republican states of America and France followed the rules and employed the titles used by old, dynastic/colonial states. The Confederate States of America's dream of a Caribbean empire, as well as the American territorial expansion before and after the Civil War, cannot be understood fully and properly without this backdrop.¹³ The French Republic, too, maintained a large colonial empire.

At the same time, within these new republics based on the principle of popular sovereignty, territorial unity became a problem. Post-revolutionary instability threatened the territorial unity of the popular-sovereign states. This was especially so for the United States, a country founded upon the aggregation of formerly independent colonies. The fledging republican state faced secessionist challenges even before the Civil War.

A. *E Pluribus Unum*: The Birth and Growth of the American Union

Before the American Revolution, a relatively big country was usually monarchical. Republican forms of government had only appeared in city-states like Venice and Florence. Thinking about republican regimes, Montesquieu argued that they must be small.¹⁴ Either empire without liberty or liberty without empire; it was hard to have an empire of liberty. Similarly, unity without equality or equality without unity; it was hard to have a unified state based on equality.

The United States created something new. The American Revolution transformed thirteen colonies into what the Declaration of Independence called "Free and Independent States." After the Revolution, these republican states first united under the Article of Confederation. That Confederacy was less than satisfying, leading to

12. See FREDERICK COOPER, COLONIALISM IN QUESTION: THEORY, KNOWLEDGE, HISTORY 182 (2005).

13. See ROBERT E. MAY, THE SOUTHERN DREAM OF A CARIBBEAN EMPIRE 1854–1861 (1973).

14. See CHARLES-LOUIS MONTESQUIEU, THE SPIRIT OF LAWS VOL. I 150 (Thomas Nugent trans., 1766) [1902] ("It is natural to a republic to have only a small territory, otherwise it cannot long subsist.").

the adoption of a constitution designed to create a “more perfect Union.” Contrary to the conventional wisdom that a republic must be small, the founders endeavored to establish democratic self-government in a large country.¹⁵ The constitutional framers took into consideration even the possibility of further territorial expansion. Thus, Article IV declares that: “New States may be admitted by the Congress into the Union.” Strikingly, they made no similar provision for territorial disaggregation.

The Union soon expanded its territory. From its founding until the eve of the Civil War, several territorial acquisitions occurred. In 1803, the Louisiana Purchase was completed. In 1819, Spain ceded Florida to the United States. In 1845, Texas joined the Union. In 1848, the United States conquered the present-day southwestern United States in the Mexico-American War. One should also not forget the annexation of the land of the Indians throughout the growth of the new republic.

American territorial expansion carried various legal titles recognized by the international law of the day. A prominent one was conquest. This was especially notable in the acquisition of the land of the Indians. Before the War of Independence, the settlers recognized the sovereignty and property rights of the Indians over their land – they usually purchased land from the Indians. After the War, the federal government acquired their land by coercion, since “the Indians largely sided with the British in the war, and this fed opposition to Indian land rights of any kind. Indeed, the newly independent American colonies tried to claim that the Indians had lost all rights to their land as a result of the war.”¹⁶ In 1783, an emissary of the Continental Congress to the major Indian nations announced that: “As we are the conquerors, we claim the lands and property of all the white people as well as the Indians who have left and fought against us.”¹⁷ In appealing to a

15. See THE FEDERALIST NO. 10, 63 (James Madison). See also GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 2 (2004) (“The founding generation was intensely interested in the geographic extent of the American polity.”); ROBERT KAGAN, DANGEROUS NATION: AMERICA’S PLACE IN THE WORLD FROM ITS EARLIEST DAYS TO THE DAWN OF THE TWENTIETH CENTURY 76 (2006) (“inducement to expansionism were embedded in the new republic’s legal and institutional structure.”).

16. KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 39 (2009).

17. STUART BANNER, HOW THE INDIANS LOST THEIR LAND 112 (2005) (ebook).

right of conquest, the newly born United States was following its European elder brothers. Another notable example of conquest was the result of the United States-Mexico War. In 1848, the Treaty of Guadalupe Hidalgo transferred a large tract of territory, which included California, Nevada, Utah, and portions of Wyoming, Colorado, Arizona, and New Mexico, from the defeated Mexico to the United States as spoils of the war.¹⁸

Purchase was another way to acquire territory. Louisiana (1803), Florida (1819), and Alaska (1867) were exemplary cases. Expansion through purchases comported with the dominant international order of that time. These purchases were conducted with European powers—the French, Spanish, and Russian Empires, respectively. They were possible because the Europe-centered international society still treated territory as the property of the sovereign. If an empire saw a part of its territory or possessions as useless or difficult to control, it tended to sell it.¹⁹ Territorial transference was commonly framed as a proprietary transaction.

Apart from conquest and treaty/purchase, the traditional title of discovery was also invoked. When the United States acquired the Oregon Territory, which included the present-day states of Oregon, Washington, Idaho, and parts of Montana and Wyoming, the American claim chiefly relied on the doctrine of discovery. That legal claim was supposed to settle the boundary dispute with Great Britain over where to draw the line between the United States and Canada. According to the international law of discovery of the day, the title of discovery, enjoyed by Christian/civilized nations, had two components: the act of discovery and the act of possession. The United States claimed that, although the British were the first to reach the coast in 1778, the United States was the first to reach the Columbia River in 1792, which grounded its claim to the basin drained by the river, under accepted principles of discovery in the eighteenth century.²⁰ This

18. Treaty of Guadalupe Hidalgo, U.S.-Mex., Feb. 2, 1848, art. V, 9 Stat. 922.

19. In 1803, for example, when Napoleon Bonaparte thought it was difficult and unworthy to sustain France's control in Louisiana, he decided to sell it to the United States. See GEORGE HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776 106 (2008).

20. See GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 2, 97 (2004).

“discovery” of the Oregon Territory was coupled with actual occupation by exploration and settlement during the early nineteenth century.²¹ Great Britain accepted the United States’ claim based on the doctrine of discovery.²²

Despite the absence of international legal problems, American territorial expansion triggered questions of constitutionality. The Louisiana Purchase, the largest addition to territory of the United States throughout its history, was the earliest and most typical example. Thomas Jefferson, under whose presidency the Purchase was completed, was unsure of the constitutionality of such a purchase. He thought that it went beyond the constitutional powers of the government and required a constitutional amendment.²³ He drafted two proposed amendments to clarify the constitutionality of the Purchase, but ultimately recognized that constitutional amendment was too difficult a task for such an important and urgent political decision.²⁴ Accordingly, he fell back on political necessity to dispel his constitutional worries: “It will be desirable for Congress to do what is necessary in silence.”²⁵

Jefferson was perhaps the last prominent statesman who had constitutional qualms about territorial expansion. “To be sure, the debate over the constitutionality of territorial acquisition faded quickly after 1804.”²⁶ Shortly after the acquisition of Florida, Chief Justice Marshall emphatically affirmed the constitutionality of territorial expansion: “the Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by *conquest* or *treaty*.”²⁷ “By the 1850s Congress even authorized the acquisition of uninhabited high seas

21. *Id.*

22. *Id.*

23. LAWSON, *supra* note 21. (“The general [federal] government has no powers but such as the constitution has given it; and it has not given it a power of holding foreign territory, and still less of incorporating it in the Union. An amendment of the constitution seems necessary for this.”).

24. See RAUSTIALA, *supra* note 17, at 37.

25. Sanford Levinson, *Installing the Insular Cases into the Canon*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* (Christina Burnett & Burke Marshall eds., 2001).

26. RAUSTIALA, *supra* note 17, at 38.

27. *American Ins. Co. v. 365 Bales of Cotton*, 26 U.S. 511, 542 (1828) (emphasis added).

‘guano’ islands . . . Amazingly, some seventy such far-flung islands were acquired by the United States under this act.”²⁸

In both ways, conquest and purchase/treaty, the United States did not ask for the consent of the population in incorporated territories. The principle of popular sovereignty that guided the new republic’s domestic politics did not yet apply to territorial change among sovereign states. The new republic, it turns out, was as interested in territorial aggrandizement as traditional European empires. Neither international law nor constitutional law of the day hindered the expansionist ambition of the new republic. Instead, they facilitated it.

B. A Secessionist Nation: Revolutionary Beginning and Antebellum Attempts

The political experiment of the United States began with a republican revolution. The American Revolution rejected both a monarch and the idea of a monarchical regime. It not only terminated the British imperial rule in the territories that later became America. It also repudiated the divine right of kings. Famously, it proclaimed “All men are created equal.” The event of 1776 differed from previous revolts against monarchs in the Old World (e.g., the Dutch Revolt in 1580) in that it denied kingship per se, not just the abuse of that position.

In fact, the American Revolution was an act of secession, or a colonial revolution.²⁹ A revolution, in the ordinary sense, overthrows the past government and establishes a new one, but does not alter the territorial extent of the state. Secession does not aim to overthrow the current government but rather to leave it. Revolutionaries aspire to control the whole territory of a state;³⁰ secessionists only want to have part of the territory. The Declaration of Independence was first and foremost both an act of and a justification for secession: Political authority must be based

28. RAUSTIALA, *supra* note 17, at 38.

29. Some historians even take the American Revolution as a civil war within the British Empire. See e.g., David Armitage, *Secession and Civil War*, in SECESSION AS AN INTERNATIONAL PHENOMENON (Don Doyle ed., 2011).

30. I suspend the question of transnational revolution as in the South American Revolutions in the early nineteenth century or world revolution as anticipated by Lenin or Mao in the twentieth century.

on the consent of the governed; if the people or part of the people find the ruler insufferable, they can step out of the government, by emigration or secession. When the South invoked the Declaration of Independence to justify its withdrawal from the Union, it was resorting to the founding principle of America.³¹

A country created by a revolution always faces the possibility of a subsequent revolution.³² A political community resulting from an act of secession always faces the threat of a subsequent secession.³³ Such revolutionary/secessionary instability permeates the constitutional history of America.³⁴ In the early republic, when the memory of the Revolution was still fresh, people tended to think that if a group of people were unsatisfied with the political authority, they could withdraw from the political community.³⁵ “The principles of our Revolution [in 1776] point to the remedy – a separation,” wrote Pickering, the chief promoter of the secession of New England in the next few years.³⁶ Both the North and the South were heirs of the American secessionist revolutionaries.

Secession was therefore far from a taboo during the post-Revolutionary period. Thomas Jefferson said in his First Inaugural Address in 1801: “If there be any among us who wish to dissolve the Union or to change its republican form, let them stand undisturbed . . .”³⁷ Thinking about the secessionist movements in New England (which will be discussed below), Jefferson wrote in 1816: “If any state

31. See *infra*, Part II.B.

32. China, for example, had the Second Revolution in 1913 after the Xinhai Revolution in 1911, which ended monarchical regime of thousands of years. See YONGLE ZHANG, *JIU BANG XIN ZAO, 1911-1917 [THE REMAKING OF AN OLD COUNTRY]* (2011).

33. See BUCKNER F. MELTON, AARON BURR: CONSPIRACY TO TREASON 45 (2002) (“Throughout much of American history, from the very beginning, in fact, when geographical minorities had problems with federal laws, they often talked of secession.”).

34. See PAUL KAHN, SACRED VIOLENCE: TORTURE, TERROR AND SOVEREIGNTY 123–26 (2008) (on the rhythm of American political life); BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY (2005).

35. Think of the extension of the frontier before the Civil War, which shows that unsatisfied people could literally leave. Many Americans went to the Oregon Territory and established a provisional government there before it was incorporated into the United States. See *Oregon History: The “Oregon Question” and Provisional Government*, Oregon Bluebook, <http://bluebook.state.or.us/cultural/history/history10.htm>.

36. Letter from Pickering to Cabot, (Jan. 29, 1804), *IN DOCUMENTS RELATING TO NEW ENGLAND FEDERALISM 1800-1815* 339 (Henry Adams ed., 1877) (ebook).

37. Thomas Jefferson, Inaugural Address (March 4, 1801), *in THE INAUGURAL ADDRESSES OF PRESIDENT THOMAS JEFFERSON, 1801 AND 1805*, 5 (Cunningham ed., 2001).

in the Union will declare that it prefers separation . . . to a continuance in union . . . I have no hesitation in saying, 'let us separate.'"³⁸ William Rawle, once the United States district attorney for Pennsylvania under the Washington administration, wrote in 1825 that the people of a state retain the sovereign power to change the federal Constitution, including the right to secede from the Union. He discussed the question whether a state could erect a hereditary monarchy and answered with a yes: To do that, however, the state should secede from the Union for the Constitution of the Union required every state to be republican.³⁹ Foreign observers also found that the principles of the American federal government supported the legitimacy of secession. The French political philosopher Alexis de Tocqueville, for example, wrote in the 1830s:

The Union was formed by the voluntary agreement of the States; and in uniting together they have not forfeited their nationality, nor have they been reduced to the condition of one and the same people. If one of the States chooses to withdraw from the compact, it would be difficult to disprove its right of doing so, and the Federal Government would have no means of maintaining its claims directly either by force or right.⁴⁰

While the Constitution touched upon the issue of territorial acquisition, it said nothing explicitly about secession. The Founding Fathers did not even take up this issue at the Philadelphia Convention.⁴¹ That may be because in the process of centralization through a new constitution, discussing secession was practically unnecessary or politically unsuitable.⁴² The constitutional silence on the issue of secession, for many, meant that at least constitutional

38. Letter from Thomas Jefferson to W. Crawford, (Jun. 20, 1816), *in* THE WRITINGS OF THOMAS JEFFERSON Vol. 15, 29 (Albert Ellery Bergh ed., 1905) (ebook).

39. *See* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 295–96 (1825).

40. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA VOL. I 387 (Henry Reeve trans., 1900).

41. *See* FRANK DONOVAN, MR. MADISON'S CONSTITUTION — THE STORY BEHIND THE CONSTITUTIONAL CONVENTION 123 (1965) ("As a glaring instance, the question of whether a state might dissolve its connection with the Union was not even mentioned in all the debate in Philadelphia.").

42. *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 206 (1913) ("It would have been inexpedient to have forced [the issue of state's rights in the forms of nullification and secession] in 1787, when the fate of any sort of a central government was doubtful.").

norm does not forbid secession.

Thus it is little wonder that the problem of secession did not arise only in the South. It arose in the North well before the Civil War. In the early 1800s, the New England Federalists attempted to step out of the federal constitutional order and found a separate confederacy. The Northern people, who lost their political ascendancy in national politics in 1800, wanted to employ secession as a remedy. Nearly thirty years before the South Carolina nullification crisis, which relied upon John Calhoun's theory, "the New England Federalists were out-Calhouning Calhoun."⁴³ To go into some details about the New England secessionism will help us understand the dynamics of disunion in a republican, constitutional order birthed by secessionist movements and based on free election.

The presidential election of 1800 changed the political blueprint the Constitution of 1787 had sketched. For the Federalists, the rise of Jeffersonian, plebscibitarian democracy ran against their ideal of Anglo representative aristocracy.⁴⁴ The two parties, the Federalists and the Democratic-Republicans, represented two conflicting political ideologies. In Jefferson's eyes, "the Federalists were a body of Anglo-Monarchic-Aristocrats, and himself and his friends were Republicans."⁴⁵ To the New England Federalists, "the great governing principle of Mr. Jefferson's political conduct . . . was friendship for France and enmity to Great Britain."⁴⁶ New England Federalists declared that the Democratic-Republican administrations betrayed the spirit of the American Revolution and the Constitution.⁴⁷ In their eyes, the Louisiana Purchase in 1803 changed the balance between the North and the South.⁴⁸ The

43. Thomas J. DiLorenzo, *Yankee Confederates: New England Secession Movements Prior to the War Between the States*, in SECESSION, STATE & LIBERTY 142 (David Gordon ed., 1998) (ebook).

44. See BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 3–6 (2005).

45. THEODORE DWIGHT, HISTORY OF THE HARTFORD CONVENTION 25 (1833) (ebook).

46. ACKERMAN, *supra* note 45.

47. See CHARLES R. BROWN, THE NORTHERN CONFEDERACY 38 (Oct. 1915) (unpublished Ph.D. dissertation, Princeton University) (on file with the Library of Congress) (describing that Timothy Pickering, the chief projector of the Northern Confederacy, accused Jefferson of betrayal of the Revolution).

48. See 13 ANNALS OF CONG. 465 (Gales and Seaton ed., 1832) (Griswold, Representative from Connecticut, said in the House of Representatives, October, 1803: "The vast and unmanageable extent which the accession of Louisiana will give the United States; the consequent dispersion of our population, and the destruction of that balance of power which is so important to maintain between the Eastern and Western States, threatens, at no distant day, the

embargo declared by Jefferson in 1807 and James Madison's Non-Intercourse Act of 1809 made New England uncomfortable.⁴⁹ In the War of 1812 against the old enemy – the British Empire – the Federalists claimed that they suffered from the calling up of the State's militias and the collection of taxes used for the War.

Some Federalist politicians of New England decided that their states should take New England out of the Union. Timothy Pickering expressed this attempt and its justification:

I will . . . anticipate a new confederacy, exempt from the corrupt and corrupting influence and oppression of the aristocratic Democrats of the South. There will be . . . a separation. . . . The British Provinces, even with the assent of Britain, will become members of the Northern confederacy. . . . *The principles of our Revolution point to the remedy, – a separation.* . . . The people of the East cannot reconcile their habits, views, and interests with those of the South and West.⁵⁰

Pickering gained support from other New England Federalists.⁵¹

subversion of our Union.” Plumer of New Hampshire, declared in the Senate: “[a]dmit this Western World into the Union and you destroy, at once the weight and importance of the Eastern States, and compel them to establish a separate and independent empire.”); BROWN, *supra* note 39, at 32 (“The advocates . . . argued their position that Massachusetts was in danger; that her sovereignty and her independence were swiftly and surely being taken away; that the power of the South over the North was due to slaves and that a crisis was at hand. Thus the sons of Massachusetts argued that separation was the only means of preserving their independence.”).

49. DOCUMENTS RELATING TO NEW ENGLAND FEDERALISM 1800-1815 25 (Henry Adams ed., 1877) (ebook) (Jefferson recollected Adams: “He urged that a continuance of the embargo much longer would certainly be met by forcible resistance, supported by the legislature, and probably by the judiciary, of the State; that, to quell that resistance, if force should be resorted to by the government, it would produce a civil war . . .”).

50. Letter from Timothy Pickering to George Cabot (Dec. 24, 1803), *in* DOCUMENTS RELATING TO NEW ENGLAND FEDERALISM 1800-1815 339 (Henry Adams ed., 1877) (ebook) (emphasis added).

51. *See*, LEONARD BACON, SKETCH OF THE LIFE AND PUBLIC SERVICES OF HON. JAMES HILLHOUSE OF NEW HAVEN (1860) (quoting Senator James Hillhouse: “The Eastern states must and will dissolve the Union and form a separate government.”); EDWARD P. POWELL, NULLIFICATION AND SECESSION IN THE UNITED STATES 128 (2004), (Judge Reeve of Connecticut wrote to Tracy in Congress, “I have seen many of our friends; and all that I have seen, and most that I have heard from, believe that we must separate. . .”). WILLIAM PLUMER JR., LIFE OF WILLIAM PLUMER 298 (1857) (“I recollect and am certain,” says Plumer, “that on returning early one evening from dining with Aaron Burr, Mr. Hillhouse, after saying to me that New England had no influence in the Government added that, ‘The Eastern States must

New England secessionism culminated in the Hartford Convention in 1815.⁵² “The Convention was not a mere product of the war of 1812, because we recognize in these grievances the very earliest, as well the latest, grounds of the [Federalist] conspiracies.”⁵³ Most of the delegates to the Convention intended to cause New England to separate from the Union.⁵⁴ Public opinion of New England at the time also cried for secession.⁵⁵ Some New Englanders even attempted to keep neutral between the United States and the British Empire during the War of 1812.⁵⁶

The Hartford Convention was a striking example of a secessionist attempt in the early American Republic. Yet it was not the only one. There were two other examples, one before, the other after. The first was from the West, and known as the “Burr Conspiracy.” From 1804 to 1806, former Vice President Aaron Burr tried to separate the Southwest from the United States. Losing opportunities in the East, Burr turned to the West. His plan eventually failed and he was tried for treason.⁵⁷ A second one was from the North again. In the 1840s, Garrisonian abolitionists tried to preserve the purity of the American polity by

and will dissolve the Union, and form a separate government, and the sooner the better.”).

52. WILLIAM PLUMER JR., *LIFE OF WILLIAM PLUMER* 404 (1857) (The first mention of such a convention was in 1808-09).

53. BROWN, *supra* note 48, at 113.

54. See Documents Relating to New England Federalism 56, 221, 238, 245, 265 (ebook); PLUMER JR., *supra* note 53, at 420 (Plumer told his friend about the Hartford Convention: “The prime object is to effect a revolution, a dismemberment of the Union. Some of the members for more than ten years, have considered such a measure necessary. Of this I have conclusive evidence.”).

55. See *Boston Centinel*, May 26, 1813, quoted from JAMES BANNER, TO THE HARTFORD CONVENTION 313(1970) (“The determination that was necessary in 1776 is necessary now.”); THE BALTIMORE FEDERAL REPUBLICAN., Nov. 17, 1814, quoted from BROWN, *supra* note 48, at 110.

56. Letter from William B. Giles to the “*Richmond Enquirer*” (Oct. 24, 1828) in DOCUMENTS RELATING TO NEW ENGLAND FEDERALISM 29, 30 (Adams once told Jefferson “that he had information of the most unquestionable certainty, that certain citizens of the Eastern States (I think he named Massachusetts particularly) were in negotiation with agents of the British government, the object of which was an agreement that the New England States should take no further part in the war then going on; that, without formally declaring their separation from the Union of the States, they should withdraw from all aid and obedience to them ...” (emphasis original)) (ebook).

57. See BUCKNER F. MELTON, AARON BURR: CONSPIRACY TO TREASON (2002); WALTER F. MCCAULEY, AARON BURR CONSPIRACY: A HISTORY LARGELY FROM ORIGINAL AND HITHERTO UNUSED SOURCES (1903); THOMAS P. ABERNETHY, THE BURR CONSPIRACY (1968).

urging northern free states to leave southern slavery states.⁵⁸ William L. Garrison, joined by a number of abolitionists, declared that, “we ought to have laid before the slaveholders, long ago, this alternative. *You must abolish slavery, or we shall dissolve the Union.*”⁵⁹ The Garrisonian abolitionists gave more weight to liberty than to unity.⁶⁰

All three cases demonstrate the secessionist tradition of America: political leaders who lost power in the democratic, majoritarian political process resort to secession to create new opportunities. The constitutional silence on secession and the secessionist attempts in the North provided the historical and ideological background for the disunionist efforts of the South decades later. In 1860, when the South perceived the threat of Northern dominance, they followed the secessionist precedents of the first half of the nineteenth century. After Lincoln was elected, seven southern states – South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas – seceded from the Union and formed the Confederate States of America. And Lincoln worried that eight remaining states – Maryland, Delaware, Virginia, North Carolina, Tennessee, Kentucky, Arkansas, and Missouri – would follow them. But unlike the precedents, a devastating civil war followed the secessionist attempt of the Southern states.

C. A Comparison: Territorial Unity in the French Republic(s)

France also experienced a republican revolution at the end of the eighteenth century. But unlike the United States, post-Revolutionary French republican regimes were discontinuous and unstable during the nineteenth century. In that century, France experienced several nonrepublican phases, i.e., Empires and Restorations. Republican regimes seemed an exception to the old regime not only in terms of number but also in terms of temporality. The French Republic had three short lives during the nineteenth century: the First from 1792-1804, the Second from

58. See Betram Wyatt-Brown, *William Lloyd Garrison and Antislavery Unity: A Reappraisal*, 13 CIVIL WAR HIST. 1, 5–24 (1967); LEWISH PERRY, RADICAL ABOLITIONISM: ANARCHY AND THE GOVERNMENT OF GOD IN ANTISLAVERY THOUGHT 159–66 (1978).

59. W. Caleb McDaniel, *Repealing Unions: American Abolitionists, Irish Repeal, and the Origins of Garrisonian Disunion*, 28 J. EARLY REPUBLIC, n.1 (2008).

60. See *id.* at 243–69.

1848-1852, and the Third from 1870 on.

In terms of territoriality, France was already quite centralized before the French Revolution.⁶¹ Unlike the United States, it was an old state established by territorial aggregation through dynastic means.⁶² A little before the Revolution, France’s political map became quite the same as we know today. Yet the feudal heritage, local differentiation, plural administrative boundaries, and ecclesiastical regions coexisted with the central government. Again, the divine body of the King linked these subdivisions into a single whole.

The French Revolution threatened national unity. The Revolution replaced the King with the popular sovereign. The will of people was to reign. Yet it was hard for statesmen to agree upon what exactly was the people’s will: Did popular sovereignty mean the people of France as a whole or the aggregation of the peoples at provincial levels? Could the majority of Parisians represent the popular sovereign? The ambiguity of the locus of popular sovereignty had the capacity to break the state into multiple small republics. Indeed, from Lyon to Caen, some remarkable local rebellions against Paris occurred in 1792-1793 after King Louis XIV’s execution, which contemporaries and historians called the “Federalist Revolt.”⁶³ The Reign of Terror, after the Revolution, finally repressed these revolts and consolidated the unitary structure of the French state.

The French established territorial unity under a new principle – nationality.⁶⁴ Political communities within the territory of

61. See David Armitage et al., *Interchange: Nationalism and Internationalism in the Era of the Civil War*, 98 J. AME. HIST. 2, 474 (2011) (Jay Sexton) (“The establishment of central state power and its continuous consolidation proceeded quite differently in Europe than in the United States. Whereas in the United States the relatively early establishment of a participatory democracy prevented a centralized and powerful state, in Europe central state power was established before participatory elements were incorporated into the nation-state.”).

62. Brittany, for example, was annexed to France through the marriage between Charles VIII, the King of France, and Anne, the heiress of Brittany, in 1491. See SAMUEL CLARK, *STATE AND STATUS: THE RISE OF THE STATE AND ARISTOCRATIC POWER IN WESTERN EUROPE* 124 (1995).

63. See PAUL R. HANSON, *THE JACOBIN REPUBLIC UNDER FIRE: THE FEDERALIST REVOLT IN THE FRENCH REVOLUTION* (2003).

64. See FRANS SCHRIJVER, *REGIONALISM AFTER REGIONALISATION: SPAIN, FRANCE, AND THE UNITED KINGDOM* 172 (2006) (“Based on the thoughts of Rousseau, the French Revolution transferred the monarch to the people, that is the nation. This established the

France were now united into a single concept of “the nation.” The nation bracketed all historical traditions and local cultures; it transcended both the sum of members and their representation by government. The general will of the whole people made “the Republic One and Indivisible.”⁶⁵ “This was in strong contrast with the practice of dynastic acquirements and losses of state territory, as illustrated by the provision in the 1793 Constitution not to agree to peace with enemy states occupying any areas of the Republic’s territory.”⁶⁶ French civic nationalism implied both the unity of the state and resistance to foreign rule.⁶⁷ The sacred nation replaced the King’s body.⁶⁸ Constitutionally, sovereignty lay in the people as a whole nation, not in the peoples at the local level.⁶⁹

Policies followed ideas. Uniform institutions like a national calendar, the civil law system (*Code Civil*), and administrative dominance followed the idea of a unitary nation. The *Code Civil* based the power of the state on the liberty of individuals, not on intermediate political organizations (e.g., the states in America). New, uniform, territorial administrative divisions replaced the local privileges and identities of the old provinces and thereby diminished the centrifugal force of local politics.⁷⁰ Enclaves were intentionally reduced.⁷¹ The

idea of a nation as a popular political entity possessing a state, and created an explicit link between nation and territory.”).

65. See 1793 CONST. (Fr.), available at <http://chnm.gmu.edu/revolution/d/430/>.

66. SCHRIJVER, *supra* note 65, at 172 (2006).

67. See LORD ACTON, *Nationality*, in *THE HISTORY OF FREEDOM AND OTHER ESSAYS* 287–88 (John N. Figgis & Reginald V. Laurence eds., 1907) (“The theory of nationality is involved in the democratic theory of the sovereignty of the general will. ... To have a collective will, unity is necessary, and independence is requisite in order to assert it. Unity and nationality are still more essential to the notion of the sovereignty of the people than the cashiering of monarchs, or the revocation of laws.”).

68. See LIAH GREENFELD, *NATIONALISM: FIVE ROADS TO MODERNITY* 155 (1992) (“The effect of the idea of the nation was analogous to that of the doctrine of Divine Right: like the latter, it both caused and signified a dramatic alteration in the meaning of French identity and soon changed the reality of the French polity”).

69. THE DECLARATION OF THE RIGHTS OF MAN AND CITIZEN, art. 3, Aug. 26, 1793 (“All sovereignty resides essentially in the Nation. No body, no individual can exercise authority which does not explicitly emanate from it.”).

70. See SCHRIJVER, *supra* note 65, at 173 (“A new ‘equal’ and strictly functional division of France was meant to achieve a more united single French nation.”).

71. See J. H. W. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: STATE TERRITORY* 445 (1970) (“[I]n the days of the French Revolution the foreign enclaves were ... incorporated into the new unitary state ...”).

professional civil service system, created by Napoleon in the 1800s and free from local political influence, greatly helped maintain territorial unity and stability.⁷² In contrast, the United States didn’t establish such a system until 1871 and it didn’t become professionalized until 1883.⁷³

Republican France not only preserved but also augmented its territorial extent. For many prominent French leaders of the First Republic such as Napoleon, a republican empire was not a contradiction in terms. With the success of the Revolutionary Wars against coalitions of European monarchs, France gained new territories from the old dynastic states, such as Avignon (1791), Savoy (1792), Nice (1793), the Austrian Netherlands (1795), the Prince-Bishopric of Liege (1795), the German states on the left bank of the Rhine (1797), and Geneva (1798). Of course, it only held them for little more than a blink of the eye – most of the acquired territories were lost at the Congress of Vienna in 1815.

To be sure, French leaders proclaimed the high-minded principle of self-determination, as a corollary to popular sovereignty.⁷⁴ Yet, practice hardly followed that principle. First, that principle was employed only to “justify the annexation of lands belonging to other sovereigns.”⁷⁵ “Plebiscites were held and the territories were annexed in accordance with the populations’ express desire to unite with France.”⁷⁶ When the vote did not favor France, plebiscites were denied as invalid.⁷⁷ Second, political expediency and military necessity soon took the place of the idea of popular self-determination in the wars of expansion. “The way was paved for Napoleon, and by the time of his advent and his triumph the campaign of forcing other people to be free had begun in earnest. Except for the treaties of union of the little republics of Mulhausen

72. See SCHRIJVER, *supra* note 65, at 173.

73. The Pendleton Civil Service Reform Act, ch. 27, 22, Stat. 403 (1883).

74. See SARAH WAMBAUGH, A MONOGRAPH ON PLEBISCITES 5–6 (1920) (The “renunciation of conquest is the key to the history of the doctrine during the Revolution. Convinced of the ethical and practical value of the renunciation, the Constituent Assembly made every effort to act in consistency with it, and when later events had led the French Armies far beyond the borders of the Republics, the Convention in Paris still made vain efforts to keep its faith with principle by asserting that the wars were not for conquest, and that all peoples should be free to choose their own sovereignty.”).

75. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 12 (1996).

76. *Id.*

77. *Id.*

and of Geneva with France, in which the annexations are based on the votes of the inhabitants, we hear no further echo of the right of self-determination.”⁷⁸ The old-fashioned idea of conquest was revived.

One should not forget that France was also a colonial empire. The republican transition did not change its imperial nature in terms of overseas territories. Outside of the metropolitan area, both secession and aggregation transpired. With the Revolution, France lost its richest and most important colony – Saint-Domingue. Inspired by the revolutionary idea of equal rights of man, the Haitian Revolution in 1791 overthrew French colonial rule and founded the Haiti Republic in 1804.⁷⁹ Territorial aggregation also continued. During the First Republic, France tried to establish a colony in Egypt without success.⁸⁰ The Third Republic carried on the republican imperial project with a mission to civilize the uncivilized world.⁸¹ Actually, during the Third Republic, the French Colonial Empire reached its zenith: from Indochina to Congo, the French flag fluttered over Asia and Africa. The principles of self-determination and consent did not apply to uncivilized, colonial peoples.

Similarities between the French and American Republics are clear. First, both republics followed the practice and observed the rules of territorial aggregation shared by dynastic, imperial powers. France carried on a project of republican empire, both continental and colonial. The United States did that too: territorial expansion in North America and overseas acquisition in the Caribbean and the Pacific, especially during the second half of the nineteenth century. Principles of popular sovereignty guided only their internal politics, not their international practice of territorial change. Consent played little role in territorial acquisition and transference. Second, both states encountered the problem of territorial unity in their internal, republican politics. While

78. See WAMBAUGH, *supra* note 66, at 9.

79. See THEOPHILUS G. STEWARD, *THE HAITIAN REVOLUTION, 1791-1804: OR, SIDE LIGHTS OF THE FRENCH REVOLUTION* (1914).

80. See JUAN COLE, *NAPOLEON'S EGYPT: INVADING THE MIDDLE EAST* (2008).

81. See ALICE L. CONKLIN, *A MISSION TO CIVILIZE: THE REPUBLICAN IDEA OF EMPIRE IN FRANCE AND WEST AFRICA, 1895-1930* (1997) (arguing that ideas of civilization encouraged colonial policy makers and governors to obscure the fundamental contradictions between universal “the rights of man” guaranteed in a republican democracy and the coercive acquisition of an empire that violates those rights).

territorial aggregation was not problematic to the two new republican states, the possibility of disintegration was a huge problem.

France differed from the United State in several aspects. First, France had largely completed its territorial aggregation before the French Revolution; the Revolution merely replaced the King with the People/Nation. Second, in contrast to the American idea of a constitutional compact, France arrived at the notion of social contract that generated a unitary nation. A constitutional compact is agreed upon by states, while a social contract is based on individuals. Third, French nationalism, birthed by popular sovereignty, overpowered federalism and grounded the unitary structure of state. It took a much longer time for the United States to achieve a certain extent of national unity. The American Civil War occupied a central place in that historical transformation. By contrast, France resolved the question of territorial sovereignty/unity before the republican revolution and therefore did not have to subject the question to principled examination and debate.

II. “The Right to Secession”: Debating the Legitimacy of Secession

A. Constitutional Arguments and Narratives of the Union

The disunion attempt of the South in 1860 generated a constitutional crisis in America. It tested the endurance of the American republican, constitutional experiment in a world of empires.⁸² Can a constitutional, republican polity preserve itself?⁸³ Can a republic of law

82. The question, in Lincoln’s words, was “whether that nation, or any nation so conceived [in liberty] and so dedicated [to the proposition that all men are created equal], can long endure.” See Abraham Lincoln, *The Gettysburg Address*, available at, https://www.ourdocuments.gov/document_data/pdf/doc_036.pdf.

83. Abraham Lincoln, Message to Congress in Special Session, July 4, 1861, in 4 COLLECTED WORKS 421, 426 (Roy P. Basler ed., 1953) (“It presents to the whole family of man, the question, whether a constitutional republic, or a democracy...can, or cannot, maintain its territorial integrity, against its own domestic foes. ... It forces us to ask: ‘Is there, in all republics, this inherent, and fatal weakness?’ ‘Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?’”).

employ violent means to maintain its existence?⁸⁴ Slavery was an important factor in the cause and perhaps in the end of the war, yet it was an issue separate from secession. The slavery problem could have led to other scenarios: for example, to formal legal abolition, as in the British West Indies, or a slave revolution, as in Haiti. In America, it generated an existential crisis of the Union, the possibility of collapse. This path of course makes sense in light of the structural place of secession in the American project as I described above.

The “house” was not only “divided” on the issue of slavery, but also on the constitutionality of secession. On secession, perhaps the most important issue in American constitutional law, the Constitution was silent.⁸⁵ Americans had been engaged in a civil war of constitutional arguments long before the Civil War. The debate over the legitimacy of secession reflected the relocation of sovereignty in America. In the English tradition, sovereignty lay in the government—parliamentary sovereignty.⁸⁶ But in America, sovereignty was located in the people, a collective, intergenerational entity, prior to and separate from the government.⁸⁷ Thus, the question arose: Was the United States based on the people as a whole or on the several peoples of the states? The North held that the American Union constituted a true, indivisible nation; the South held that it was but a league of sovereign states.⁸⁸

84. The Civil War, for Lincoln, was first and foremost a war over the endurance of the Union. See Abraham Lincoln, Letter to Horace Greeley, August 22, 1862, in SPEECHES AND WRITINGS 1859-1865 358 (Don E. Fehrenbacher ed., 1989) (“My paramount object in this struggle is to save the Union, and is *not* either to save or to destroy slavery. If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do *not* believe it would help to save the Union.”).

85. See Akhil Amar, *An Open Letter to Professors Paulsen and Powell*, 115 YALE L.J. 8, 2105–06 (2005-6) (“[T]he legality or illegality of secession was probably the most serious constitutional question ever to arise in America.”); Susan-Mary Grant, “*How a Free People Conduct a Long War*”: *Sustaining Opposition to Secession in the American Civil War*, in SECESSION AS AN INTERNATIONAL PHENOMENON 134 (Don Doyle ed., 2010) (“The Constitution offered no help, being as it was silent on this most crucial point.”).

86. See e.g., ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1915).

87. See Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1432–37 (1987).

88. See STEPHEN NEFF, JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR 7–15 (2010).

Secession, for the Southern disunionists and their theorists, was a constitutional right. It was, for them, a matter of law. Jefferson Davis said: “The right of secession is not something . . . outside of and antagonistic to the Constitution. . . . if the right to secede is not prohibited to the States, and no power to prevent it expressly delegated to the United States, it remains as reserved to the States or the people, from whom all the powers of the General Government were derived.”⁸⁹ For Davis, the view that the Constitution created a national government rather than a compact of sovereign states was simply false.⁹⁰ Alexander Stephens, the Vice President of the Confederate States of America during the Civil War, expressed similar arguments.⁹¹

The purported constitutional right of secession relied on a compact theory of the Union.⁹² The Constitution, under this theory, was both a compact among independent states to create a federal government and a charter to specify and limit the powers of that government.⁹³ If a party or several parties violated the compact, other parties had the *legal* right to dissolve or terminate that compact and therewith disunite the Union. Since the Northern states were regarded by the Southerners as violating the Constitution in their refusal to enforce the Fugitive Slave Act of 1850,⁹⁴ the Southern states could leave the Union.⁹⁵ Several Southern states highlighted the Northern states’ constitutional violations in their

89. JEFFERSON DAVIS, *THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT* 168 (1958)[1881].

90. See Jefferson Davis, *Message of April 29, 1861 to the Provisional Congress*, in *THE MESSAGES AND PAPERS OF JEFFERSON DAVIS AND THE CONFEDERACY, INCLUDING DIPLOMATIC CORRESPONDENCE, 1861-1865* 1: 63–65 (James D. Richardson ed., 1966).

91. See ALEXANDER H. STEPHENS, *A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES: ITS CAUSES, CHARACTER, CONDUCT AND RESULTS* (2 Vols., 1868-70).

92. See STEPHEN NEFF, *JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR* 7 (2010) (“The supporters of the Confederacy adamantly maintained that the secession of the Southern states in 1860-1861 was a lawful act. This insistence was rooted in a particular view of the legal nature of the federal union—specifically, on the position that the Union was, in essence, an ongoing contractual arrangement between the states. Flowing logically from this core belief was the conclusion that each state possessed a legal right to dissolve the contract if it was breached by other states parties”).

93. See STEPHEN NEFF, *JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR* 10 (2010).

94. See MARK GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 177 (2006) (the “unwillingness to share power ... ‘frustrated’ the constitutional contract, providing legal grounds for Southern secession.”).

95. See STEPHEN NEFF, *JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR* 10–11.

secession ordinances.⁹⁶ Moreover, Declarations of secession were constructed as but de-ratifications of the compact of 1787, undertaken by special state conventions in the same form those that ratified that Constitution.⁹⁷ Secession, on this view, was a remedy for violation of the compact. Aggregation and secession were thought of as mirror images of each other.

The compact theory of the Union prevailed in the antebellum South. No theorist articulated it better than John Calhoun. Under Calhoun's theory, the Union was an aggregation of sovereign states formed by a mutual compact; the central government had no independent sources of power, but was solely a creation of the states. The states had both the right of nullification (repealing *particular laws* that were inconsistent with the compact) and that of secession (rejecting *all the laws* and institutions of the central government formed by the compact).

Calhoun's theory was based on a historical narrative of the Union. The states, under Calhoun's narrative, became sovereign upon declaring independence from the British Empire.⁹⁸ The Constitution created "the government of a community of States, and not the government of a single State or nation."⁹⁹ Correspondingly, the territory of the United States was that of the individual states, not that of the central government.¹⁰⁰ No essential difference existed between the Articles of

96. See South Carolina Declaration of the Causes of Secession, Dec. 24, 1860 (the Northern states "have deliberately refused, for years past, to fulfill their constitutional obligations"); Georgia Ordinance, Res. Of Jan. 29, 1861, (ser. 4) OR 81–85, at 84 (the Fugitive Slave Act "stands today a dead letter for all practicable purposes in every non-slave-holding State in the Union").

97. See STEPHEN NEFF, *JUSTICE IN BLUE AND GRAY* 13 (2010); *Mims v. Wimberly*, 33 Ga. 587 (1863), at 592 (The people in the convention act "in a capacity, higher than, and superior to any government, State or Federal, theretofore created, or adopted by them".); ROBERT BURT, *CONSTITUTION IN CONFLICT* 203 (1992) ("Forty-two years earlier, in *McCulloch v. Maryland*, Marshall had ruled against the compact theory of state sovereignty on which the 1861 secessionists relied. But the seceding states purported to avoid this ruling by acting not through their regularly constituted legislatures but through the same format of specially convened, popularly elected conventions that had originally ratified the Constitution.").

98. See John Calhoun, *A Discourse on the Constitution and Government of the United States*, in *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* (Ross M. Lence ed., 1992).

99. *Id.*

100. The first article of Calhoun's resolutions on the question of slavery in the territories, introduced in the Senate on February 19, 1847, read: "Resolved, That the territories of the United States belong to the several States composing this Union, and are held by them as

Confederation and the Constitution: The constitution was but “a different ‘organization’ of the government, without making any allusion whatever to any change in the relations of the States towards each other, or the basis of the system.”¹⁰¹ The Articles of Confederation and the Constitution, accordingly, were both *compacts* among independent sovereigns.¹⁰² American history, on this view, was a story of continuous secessions: The thirteen States seceded from the British Empire and then entered into the Confederation; unsatisfied with the Confederacy, nine States seceded from the Confederation and established a new Union by the Constitution.¹⁰³ “So it had always been, affirmed secessionists. Therefore, so it must always be.”¹⁰⁴ The states, thus, have the legal right to secede unilaterally from the Union.¹⁰⁵

Before Lincoln took office as president, the North’s constitutional arguments against secession were voiced by his predecessor, James Buchanan. The federal government established by the Constitution was not “a mere voluntary association of States, to be dissolved at pleasure by any one of the contracting parties.”¹⁰⁶ Rather, “the Union was designed to be perpetual” and the powers of the federal government “embrace the very highest attributes of national sovereignty.”¹⁰⁷ No

their joint and common property.” Quoted from HARRY JAFFA, *A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR* 404. Calhoun, however, did not consider the *territories* that had not been incorporated as states.

101. JOHN C. CALHOUN, *A DISQUISITION ON GOVERNMENT* 117 (1851).

102. *See id.*, at 116 (“the political relation between these States, under their present constitution and government, is substantially the same as under the confederacy and revolutionary government; and what that relation was, we are not left to doubt; as they declared expressly to be ‘free, independent and sovereign states’”).

103. *See* Judah Benjamin, *Farewell Speech to the Senate*, Dec. 31, 1860, CONG. GLOBE, 36th Cong., 2nd Sess. 213 (1860) (“Nine states of the Confederation seceded from the Confederation, and formed a new Government. ... After this Government had been organized ... North Carolina and Rhode Island were still foreign nations, and so treated...”).

104. WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS TRIUMPHANT 1854-1861* 347 (2007).

105. *See* CALHOUN, *supra* note 90, at 116 (Ross Lence ed., 1992) (“The government is a federal, in contradistinction to a national government — a government formed by the States; ordained and established by the States, and for the States — without any participation or agency whatever, on the part of the people, regarded in the aggregate as forming a nation. ... In all its parts ... [our system of government] emanated from the same source — the people of the several States. The whole, taken together, from a federal community — a community composed of States united by a political compact — and not a nation composed of individuals united by, what is called, a social compact.”).

106. James Buchanan, *Fourth Annual Message to Congress on the State of the Union* (Dec. 4, 1860), <http://www.presidency.ucsb.edu/ws/index.php?pid=29501>.

107. *Id.* at 263.

state, it follows, has the legal right to unilaterally secede from the Union, which is a single nation.

Buchanan's view generally followed that of the Federalists. For the Federalists, the Revolution cast off the political authority of the British Empire and left the thirteen States free and independent.¹⁰⁸ The Articles of Confederation united them imperfectly; the Constitution succeeded in making the United States a single nation.¹⁰⁹ The Marshall Court famously expressed a similar opinion in *Gibbons v. Ogden*.¹¹⁰

Lincoln went much further than Buchanan and the Federalists. His legal argument against secession was two-fold. A legal secession, he argued, requires consent of both the seceding state(s) and the whole Union. A state cannot "withdraw from the union, without the consent of the Union or of any other State."¹¹¹ This argument derived from the idea of contract. All the states should agree to the secession of any state: "one party to a contract may violate it – break it, so to speak; but does it not require all to lawfully rescind it?"¹¹² The seceding states lacked the consent of the United States as a whole.¹¹³ Although Lincoln did not express what he meant by "consent," presumably he believed that a majority of the whole people or a majority of the states constitute of consent.¹¹⁴

108. See DAVID HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 259 (2003) (the Philadelphia Convention in 1787 was "an international conference, conducted ... among diplomatic plenipotentiaries of the states").

109. See THE FEDERALIST NO. 22 (Alexander Hamilton), NO. 46 (James Madison), in THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961).

110. See *Gibbons v. Ogden*, 22 US (9 Wheat.) 1, 187(1824) ("Reference has been made to the political situation of States, anterior to formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change.").

111. Abraham Lincoln, Message to Congress in Special Session, in 4 THE COLLECTED WORKS 421, at 433 (Roy. P. Basler ed., 1953) [hereinafter Message to Congress].

112. Abraham Lincoln, First Inaugural Address, in 4 COLLECTED WORKS, at 262, at 265 (Roy P. Basler ed., 1953) [hereinafter First Inaugural Address].

113. See Abraham Lincoln, Message to Congress, at 437 ("It may well be questioned whether there is, to-day, a majority of the legally-qualified voters of any State, except perhaps South Carolina, in favor of disunion. There is much reason to believe that the Union men are the majority in many, if not every other one, of the so-called seceded States.").

114. See Lincoln, First Inaugural Address, at 267–68 ("If the minority will not acquiesce, the majority must, or the Government must cease. There is no other alternative, for continuing the Government is acquiescence on one side or the other. ... A majority held

Responding to the South, Lincoln employed a historical argument too – the Union preceded the States:

Our States have neither more nor less power than that reserved to them in the Union by the Constitution, no one of them ever having been a State out of the Union. The original ones passed into the Union even before they cast off their British colonial dependence, and the new ones . . . only took the designation of States on coming into the Union. . . The Union, and not themselves separately, procured their independence and their liberty. . . . The Union is older than any of the State, and, in fact, it created them as States.¹¹⁵

For Lincoln, the Union made the states, not the other way around. The Union began with the Articles of Association in 1774 and then “matured and continued by the Declaration of Independence in 1776.”¹¹⁶ Disagreeing with the Court’s view in *Gibbons*, Lincoln claimed that the states never had independent sovereignty: the “states have their status in the Union, and they have no other legal status. If they break from this, they can only do so against law, and by revolution.”¹¹⁷ In the Declaration, “the ‘united Colonies’ were declared to be ‘Free and Independent States’; but, even then, the object plainly was not to declare their independence of One Another, or of the Union; but directly contrary, as their mutual pledge, and their mutual action, before, at the time, and afterwards, abundantly show.”¹¹⁸ The Union was further strengthened by the Articles of Confederation and the Constitution. Secession was

in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people.”) Douglass Smith, *An Analysis of Two Federal Structures: The Article of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 1, 337-38 (1997); Akhil Amar, *Abraham Lincoln and the American Union*, U. ILL. L. REV. 5, 1115 (2001).

115. Lincoln, Message to Congress, at 433–34.

116. Lincoln, First Inaugural Address, at 265. Many scholars agreed with Lincoln’s argument. See e.g., JOEL PARKER, *THE RIGHT OF SECESSION: A REVIEW OF THE MESSAGE OF JEFFERSON DAVIS TO THE CONGRESS OF THE CONFEDERATE STATES* (1861) (It was “preposterous to contend that this more perfect Union, established for posterity . . . and thus substituted for the perpetual, indissoluble union under the Articles, is one which was to exist only at the pleasure of each and every State, and to be dissolved when any State shall assert that it is aggrieved . . . The Union could not be made ‘more perfect’ in relation to its endurance . . . It certainly was not intended to be made less perfect in that particular.”).

117. Lincoln, Message to Congress, at 434.

118. *Id.* at 433.

unconstitutional under his vision of “a more perfect union” as called forth in the Constitution.

B. The Right of Secession as the Right of Revolution

The American civil war of arguments operated on another front as well. In 1860, the South also resorted to the right of revolution to justify its secession from the Union.¹¹⁹ Senator Alfred Iverson of Georgia, for example, denied the lawfulness of secession but declared that: “each state had the right of revolution. . . . The secession of a State is an act of revolution.”¹²⁰ “Secession is pretty hard to comprehend,” wrote a young Virginian decades later, “[b]ut we all know the meaning of Revolution.”¹²¹

To invoke the revolutionary right of secession was to appeal to 1776. The Tennessee secession convention, for instance, called their secession ordinance a “Declaration of Independence” and claimed the “right as free and independent people to alter, reform, or abolish our form of Government in such a manner as we think proper.”¹²² The Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union even used the passage in the Declaration, verbatim: “whenever any form of government becomes destructive of these ends [natural rights], it is the right of the people to alter or to abolish it, and to institute new government.”¹²³ Like the New England Federalists in the 1810s, the South thought they were following the revolutionary tradition of America in responding to a Union that had degenerated into an

119. See WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS TRIUMPHANT 1854-1861* 346-47 (2007) (“Disunionists needed . . . an inspiring justification of a right to secede, one that aroused cheers even among anti-secessionists. In the tradition of 1776 — in the (white) people of any single state’s natural right to withdraw consent to be governed — disunionists found their stirring state’s rights dogma.”); JAMES M. MCPHERSON, *BATTLE CRY FOR FREEDOM: THE CIVIL WAR ERA* 240 (2003) (“Those southerners (mostly conditional unionists) who found [the theory of lawful secession] a bit hard to swallow could fall back on the right of revolution.”).

120. CG, 36 Cong., 10–11, quoted from JAMES M. MCPHERSON, *BATTLE CRY FOR FREEDOM: THE CIVIL WAR ERA* 240 (2003).

121. FREEHLING, *supra* note 120, at 346.

122. *THE REBELLION RECORD: A DIARY OF AMERICAN EVENTS I*: 203 (Frank Moore ed., 1861).

123. The Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union, *available at* https://www.civilwar.org/learn/primary-sources/declaration-causes-seceding-states#South_Carolina.

oppressive government led by the North. Both the North and the South recognized this revolutionary principle.¹²⁴ As Robert Cover put it, “[s]ecession is the revolutionary response to an order founded on consent or social contract.”¹²⁵

The difference between the constitutional right of secession and the revolutionary right of secession is important. “A revolutionary justification . . . is concerned with *unlawful* action by subjects against a sovereign. . . . Revolutionary action . . . always involves a violation of the law in force *at the time at which the revolt takes place*. It becomes lawful only in retrospect . . . Legality follows in the footsteps of power. But power comes first, and legality second.”¹²⁶ Furthermore, even if the North did not break the constitutional compact, the South still had a political right to secede on the revolutionary basis.¹²⁷

To be sure, Lincoln did not deny the right of revolution.¹²⁸ The right of revolution, however, was a limited right in Lincoln’s eyes. “The right of revolution, is never a legal right. The very term implies the breaking, and not the abiding by, organic law. At most, it is but a moral right, when exercised for a morally justifiable cause. When exercised without such a cause revolution is no right, but simply a wicked exercise of physical power.”¹²⁹ Clearly, for Lincoln, revolution is a right outside of law and constitutionality. As such, it depends upon a prior violation of a compelling moral norm.¹³⁰ The

124. See JAMES M. MCPHERSON, *BATTLE CRY FOR FREEDOM: THE CIVIL WAR ERA* 247 (2003) (“Neither Lincoln nor any other northerner denied the right of revolution. After all, Yankees shared the legacy of 1776.”).

125. Robert Cover, *The Supreme Court, 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, at 23–24 (1983).

126. STEPHEN NEFF, *JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR* 8 (2010).

127. See WILLIAM W. FREEHLING, *ROAD TO DISUNION 1854-61* 346 (Quoting Judah Benjamin: “The rights of the states under the Constitution” resulted “from the nature of their bargain.” If “sister states” break “the bargain,” the “breach of compact” invites injured states to “consider themselves freed” from the original contract. Yet even “if the bargain be not broken,” if “wrong and oppression shall become sufficiently aggravated, the revolutionary right — the last inherent right of man to preserve freedom, property, and safety . . . must be exercised.”).

128. See Thomas J. Pressly, *Bullets and Ballots: Lincoln and the “Right of Revolution”*, 67 AME. HIST. REV. 3, 647–62 (1962).

129. *Supra* note 84, at 434.

130. Lincoln, First Inaugural Address, at 267, 269 (“If, by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution — certainly would, if such right were a vital one. . . .

South, Lincoln thought, lacked such a just cause because their fundamental constitutional and moral rights had not been infringed upon.

For Lincoln, secession without a just cause attacks constitutional democracy. Without a just cause, revolutionary actions are but the revolt of the minority. Apart from a moral claim, revolution is just a declaration of war. Secession, as a minority revolt,

Presents to the whole family of man, the question, whether a constitutional republic, or a democracy . . . can, or cannot, maintain its territorial integrity, against its own domestic foes. It presents the question, whether discontented individuals, too few in numbers to control administration, . . . [can] break up their Government, and thus practically put an end to free government upon the earth.¹³¹

Lincoln was speaking of “the right of opposing unjustified revolution.”¹³² The majority in this democratic government must prove “that those who can fairly carry an election, can also suppress a rebellion – that ballots are the rightful, and peaceful, successors of bullets; and that when ballots have fairly and constitutionally, decided, there can be no successful appeal, except to ballots themselves, at succeeding elections.”¹³³

What Lincoln did was at least equally important as what he said. To protect the constitutional government, Lincoln even acted beyond legality and constitutionality: He suspended habeas corpus and took on the power of declaring war.¹³⁴ Lincoln’s desperate efforts to save the union make a final point in response to the right of revolution. To vindicate the right of secession as a right of revolution, the seceding states had to gain victory on the battlefield. To fully imitate the revolutionaries of 1776, secessionists of 1861 must win. Robert Cover observed that in the Jewish legal tradition: “To be an

This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their *constitutional* right of amending it, or their *revolutionary* right to dismember, or overthrow it.”).

131. Lincoln, Message to Congress, at 426.

132. See Thomas J. Pressly, *Bullets and Ballots: Lincoln and the “Right of Revolution”*, 67 AME. HIST. REV. 3, 660 (1962).

133. Lincoln, Message to Congress, at 439.

134. See GIORGIO AGAMBEN, STATE OF EXCEPTION 20 (K. Attell trans., 2005).

inhabitant of the biblical normative world is to understand, first, that the rule of succession can be overturned; second, that it takes a conviction of divine destiny to overturn it; and third, that divine destiny is likely to manifest itself precisely in overturning this specific rule.”¹³⁵ The rationale of the right of revolution in American constitutional order was similar. As the Supreme Court held in *Williams v. Bruffey* (1877), the validity of secession as a right of revolution depends on its success.¹³⁶ To invoke the revolutionary right of secession was to prepare for war. And the result of the war decided whether the act of the South was a revolution or a revolt.

Turning to the right of revolution, the disagreement between the North and the South proceeded from interpretation of the Constitution to invocation of the Declaration of Independence.¹³⁷ Lincoln focused on the “self-evident” truth of equality; he put natural right before the claims to independent statehood.¹³⁸ Disunionists, in contrast, highlighted the self-government of the people and interpreted that inalienable right as leading to independence. What deserves special attention here is Lincoln’s interpretation of the Declaration as not merely a statement, but as a moment of sacrificial action. As the founding document of the United States, the Declaration was not written in ink, but in blood; it involved struggle and sacrifice.¹³⁹ The Declaration ends with a mutual pledge of “our lives, our fortunes, and our sacred honor.” Lincoln himself was even prepared to sacrifice: “I was about to

135. Cover, *supra* note 117, at 22.

136. See *Williams v. Bruffey*, 96 U.S. 176, 186 (1877) (“The validity of its acts [separation], both against the parent State and its citizens or subjects, depends entirely upon its ultimate success. If it fails to establish itself permanently, all such acts perish with it. If it succeed, and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation.”).

137. See David Armitage, *Contagion of Sovereignty*, 52 SOUTH AFRICAN HIST. J., 14 (2005) (“The American Civil War can be seen, among many other things, as a battle over the structural interpretation of the Declaration of Independence.”).

138. See MERRILL D. PETERSON, ‘THIS GRAND PERTINACITY’: ABRAHAM LINCOLN AND THE DECLARATION OF INDEPENDENCE (1991).

139. Abraham Lincoln, Speech in Independence Hall (Feb. 22 1861), in 4 COLLECTED WORKS, at 240, 240 (“I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence. I have often pondered over the dangers which were incurred by the men who assembled here and adopted that Declaration of Independence — I have pondered over the toils that were endured by the officers and soldiers of the army, who achieved that Independence.”).

say I would rather be assassinated on this spot than to surrender it.”¹⁴⁰

To dissolve that union united on revolutionary sacrifice, disunionists could not merely speak as the revolutionaries of 1776. They had to act like them. The right to revolution takes the form of fighting, not simply of arguing. The Union’s sovereignty had been tested by the sacrificial action against external enemies at the time of the Declaration; it had to be retested by a subsequent sacrificial action against internal enemies. Both the Union and the Confederacy claimed to be the heirs of the American revolutionaries. The Civil War was to determine the true heir. The Union won.¹⁴¹ The claim to a revolutionary right of secession became invalid at Appomattox.

C. Nationalism, Self-Determination, and Nation-Building

The American Civil War happened at a moment in *world* history characterized by the rise of nationalism. As a political conception, nationalism generally holds that the political and the national units should be congruent.¹⁴² Nationalism is usually distinguished as being civic and ethnic.¹⁴³ Civic nationalism means a belief in common citizenship of a state with defined territory and common allegiance to the law and institutions of that state.¹⁴⁴ Historically, it generally came from Western Europe, and was especially brought forth by the French Revolution. The idea of the people, which was put forth to challenge the old regime, was easily translated to the image of the nation in post-Revolutionary France. Taking the place of the king, nationality became the sacred.

Ethnic nationalism, on the other hand, tends to put at the center

140. *Id.*

141. See FRANK L. OWSLEY, *STATE RIGHTS AND THE CONFEDERACY* (1925) (arguing that the Confederacy “died of states’ rights”: strong-willed governors and state legislatures in the South refused to give the Confederacy the soldiers and money it needed because they feared that the Confederacy was encroaching on the rights of the states).

142. See ERNST GALLNER, *NATIONS AND NATIONALISM* 1 (1983).

143. See, e.g., Anthony Smith, *Civic and Ethnic Nationalism*, in *NATIONS AND NATIONALISM: A READER* 177–83 (Philip Spence & Howard Vollman eds., 2005).

144. See MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* 7 (1993) (“According to the civic nationalist creed, what holds a society together is not common roots but law.”).

of national identity a myth of common biological origins, language, and folklore.¹⁴⁵ Historically, ethnic nationalism began with ethnography in the second half of the nineteenth century; it built nations, rather than the other way around.¹⁴⁶ Ethnic nationalism was greatly reinforced by the development of romantic political theory put forth by figures like German philosophers Herder and Fichte. For them, pre-political, authentic, communal identity – based on ethnicity and language – defines a nation that exists before, beyond, and beneath the state.¹⁴⁷ In the second half of the nineteenth century, as the historian Eric Hobsbawm observed,

Ethnic nationalism received enormous reinforcement, in practice from increasingly massive geographical migrations of peoples, and in theory by the transformation of that central concept of nineteenth-century social science, ‘race’. On the one hand the old-established division of mankind into a few ‘races’ distinguished by skin [color] was now elaborated into a set of ‘racial’ distinctions separating peoples of approximately the same pale skin. . . . On the other hand Darwinian evolutionism, supplemented later by what came to be known as genetics, provided racism with what looked like a powerful set of ‘scientific’ reasons for keeping out or even . . . expelling and murdering strangers.¹⁴⁸

145. See AVIEL ROSHWALD, *ETHNIC NATIONALISM AND THE FALL OF EMPIRES* 5 (2001) (“Modern ethnic nationalism originated among intellectual elites in nineteenth-century Central and Eastern Europe, who were alienated from imperial states that lagged behind the West European pace of political and economic modernization, and that could not or would not accommodate new elites’ aspiration to political empowerment. In the multiethnic empires, populations were culturally and linguistically so diverse that any assertion of the modern notion of popular (as opposed to dynastic) sovereignty was likely to unleash centrifugal rather than integrative forces.”).

146. See ERNST GELLNER, *CONDITIONS OF LIBERTY* 116 (1994) (“Nationalism began with ethnography, half descriptive half normative, a kind of salvage operation and cultural engineering combined. If the eventual units were to be compact and reasonably homogeneous, more had to be done: many, many people had to be assimilated, or expelled or killed. All these methods were eventually employed in the course of implementing the nationalist political principle, and they continued to be in use.”).

147. See JOHANN G. FICHTE, *ADDRESSES TO THE GERMAN NATION* (R. F. Jones & G. H. Turnbull trans., 1979); VICKI A. SPENCER, *HERDER’S POLITICAL THOUGHT* (2012).

148. ERIC HOBSBAWM, *NATIONS AND NATIONALISM SINCE 1780* 108 (1990).

Civic or ethnic, modern nationalism is political in nature.¹⁴⁹ Nineteenth-century nationalism could be either centrifugal or centripetal; it could take the form of either aggregation or disaggregation. Often, civic nationalism promoted unifications while ethnic nationalism fueled separations. Examples of separation nationalism were Greece (from the Ottoman Empire), Ireland (from the British Empire), and Hungary (from the Habsburg Empire) in the first half of the nineteenth century. In the later nineteenth century, nationalism generally shifted from an emancipatory, centrifugal force to a centralizing, nation-building force, from separatist nationalism to unification nationalism.¹⁵⁰ The world witnessed the unification movements of German and Italy, among others, during that period.

The Confederacy once thought history was on their side. In the eyes of its supporters, the Confederacy was joining the world-historical tide of ethno-national independence movements based on the principle of national self-determination. Southern leaders and theorists thought of themselves as a distinctive ethnicity, characterized by a separate culture of racial purity and white supremacy – a culture hugely different from that of the “Yankees.”¹⁵¹ Some Confederate supporters compared their secessionist actions to the independence movements of the Greeks and the Hungarians.¹⁵² Reciprocally, some statesmen in Europe found the South admirable because it advocated the principle of national self-determination. William Gladstone, for example, once said that Jefferson Davis had made a nation.¹⁵³ Responding to this claim of self-determination, the Union found itself actually

149. See JOHN BREUILLY, NATIONALISM AND THE STATE (1982).

150. See Armitage et al., *supra* note 62, at 465 (on the former, the U.S. South, the Qing Empire; the latter, the unification of Germany and Italy etc.).

151. See Paul Quigley, *Secessionists in an Age of Secession: The Slave South in Transatlantic Perspective*, in SECESSION AS AN INTERNATIONAL PHENOMENON 163-164 (Don H. Doyle ed., 2010); Benning speech, in SECESSION DEBATED: GEORGIA'S SHOWDOWN IN 1860 119–20 (W. Freehling and C. Simpson eds., 1992); James M. McPherson, *Was Blood Thicker than Water? Ethnic and Civic Nationalism in the American Civil War*, 143 PROCEEDINGS OF THE AMERICAN PHILOSOPHY SOCIETY 1, 105–06 (Mar. 1999) (The Southerners thought that “Southern whites, ... were descended from the Norman conquerors by way of the English Cavaliers of the seventeenth century, while Yankees were descended from the conquered Anglo-Saxons by way of the seventeenth-century Puritans who migrated to New England when the Cavaliers migrated to Virginia.”).

152. See, e.g., T. W. MACMAHON, CAUSE AND CONTRACT 153 (1862); BERNARD J. SAGE, DAVIS AND LEE 10–11 (1866).

153. See Armitage et al., *supra* note 62, at 467 (Thomas Bender).

relying on the old right of the sovereign to put down rebellions within its territory. In this, it followed the practice of European empires.¹⁵⁴

The Confederacy's national self-determination justification, however, was troubled by two facts. First, although Southerners emphasized the Cavalier/Yankee distinction, they were not a separate ethnic group within the United States. Southerners spoke the same language as Northerners. They had joined the founding and sustaining project of the United States. For a long time, they even played a leading role in that project. It was, accordingly, difficult for European countries to recognize Southerners as a genuine nation on ethnic basis. They were not like the Irish people in the British Empire.

Second, and more importantly, the South's claim of national self-determination was greatly discredited by slavery and the slavocratic regime. Nineteenth-century nationalism was emphatically liberal. Consider the words of the famous Italian nationalist theorist Mazzini:

Inasmuch as we believe in Liberty, Equality, Fraternity, and Association, for the individuals composing the State, we believe also in Liberty, Equality, Fraternity, and Association of Nations. Peoples are the individuals of Humanity. Nationality is the sign of their individuality and the guarantee of their liberty. . ."¹⁵⁵ In part, this liberalism reflected the fact that the rising middle class used the weapon of nationalism against oppression of transnational monarchs and aristocrats.¹⁵⁶

European nationalist sympathy was affected not by the Southern disunionists but by the Northern abolitionists.¹⁵⁷ The Southern secessionists might have been nationalistic, yet they were not liberal in the sense of nineteenth-century liberalisms that fought against inequality.

154. *See id.*, at 472 (2011) (Don Doyle).

155. GIUSEPPE MAZZINI, *A Basis of Central European Organization*, in *SELECTED WRITINGS* 149 (Nagendranath Gangulee ed., 2006).

156. Otto Pflanze, *Nationalism in Europe, 1848-1871*, 28 *REV. POL.* 129, 142 (1966).

157. *See* W. Caleb McDaniel, *Repealing Unions: American Abolitionists, Irish Repeal, and the Origins of Garrisonian Disunionism*, 28 *J. EARLY REPUBLIC* 2, 244 (2008).

From the Union's point of view, the American Civil War was a matter of forging and sustaining civic nationalism.¹⁵⁸ Surely, it protected the territorial unity of the United States. It represented the triumph of a unification trend over separatist movements.¹⁵⁹ More than that, the North's victory helped build a more united nation. It consolidated the independence of the United States against foreign powers like Britain, and it laid the groundwork for the imperial expansion of the United States in the years to come.¹⁶⁰ The North seemed to follow the juggernaut of national unification in world history. Bismarck, for example, supported the Union because secession was not credible in the process of nation-state building.¹⁶¹

If modern nationalism would come to place nations before states, America was a state before nations or a state-nation.¹⁶²

158. See THOMAS BENDER, *A NATION AMONG NATIONS: AMERICA'S PLACE IN WORLD HISTORY* (2006) (arguing that the effort of the Union fits into the trajectory of nation-state building in the nineteenth century: a centralized state based on individual freedom and national ideology); Armitage et al., *supra* note 62, at 473 (Leslie Butler) (arguing that war birthed nationalism, not the other way around: "the events of the state-making war helped consolidated nationalism in cultural terms as well... The startling casualties on both sides made the war a crucible in which a shared sense of national suffering and purpose was forged."); Grant, *supra* note 86, at 133 (Don Doyle ed., 2010) ("The American Civil War was a war of state formation...").

159. See Paul Quigley, *Secessionists in an Age of Secession: The Slave South in Transatlantic Perspective*, in *SECESSION AS AN INTERNATIONAL PHENOMENON* 151–73 (Don H. Doyle ed., 2010); Frank Towers, *The Origins of the Antimodern South: Romantic Nationalism and the Secession Movement in the American South*, *Id.* at 174–90.; On separatist nationalism in Europe, see TIMOTHY BAYCROFT AND MARK HEWITSON, eds., *WHAT IS A NATION? EUROPE 1789–1914* (2006).

160. See Armitage et al., *supra* note 62, at 479–80 (Jay Sexton) (The Civil War was "pivotal not only to the rising American imperialism of the nineteenth century but also to its anti-imperial consolidation. Both sides of the Civil War saw themselves as carrying on the torch of 1776 and, revealingly, came to view the other in relation to the persistent British threat. ... [T]he Civil War was a culmination of sorts of the Revolution. ... [T]he North's triumph both consolidated the independence of the new nation and sowed the seeds of the American empire that emerged in the coming decades. The result of 1865 cemented the bonds of union between the states, thus foreclosing the possible reintroduction of European balance-of-power politics into the American union. ... [T]he Civil War was a final phase of America's liberation from the British Empire, as well as a central event in the emergence of its own empire.").

161. See Dieter Langewiesche, *The Nation as a Developing Resource Community: A Generalizing Comparison*, in *COMPARATIVE AND TRANSNATIONAL HISTORY* 133–48 (Haupt and Kocka eds.).

162. See Armitage et al., *supra* note 62, at 478 (David Armitage) ("It's vital to have been reminded that what we mean by nationalism is the desire of nations (however defined) to possess states to create the peculiar hybrid we call the nation-state, and likewise, to recall that there's also a beast we might call the state-nation, which arises when the state is formed

Neither the North nor the South was a nation-state in the classic nationalist sense, let alone the United States as a whole. After all, the United States was a federal union, the nature of which was still subject to hot debate. Emphatically, it was the Civil War that produced American nationalist imaginations, rather than the other way around. Although, before the Civil War, both the North and the South asserted distinct economic modes (industrialization/agriculture), culture (popular/chivalric), and even ways of life, it was the War that transformed both into a single political project of American nationalism.

For the North, the unification-nationalist vision was born of and consolidated by military mobilization to defend the Union. Considering the federal structure of the Union and the localism that flowed from it, sustaining the war effort to preserve the Union was quite remarkable. The Union had to be worthy of fighting and sacrifice.¹⁶³ Many Northern intellectuals regarded the secession crisis as an opportunity for strengthening American nationalism, for it aroused a patriotic sense of the unity of America as an indivisible nation.¹⁶⁴ After the Revolution, according to one account, Americans "sank rapidly into a condition of utter impotence, imbecility, anarchy. [They] had achieved our independence, but [they] had not constructed a nation."¹⁶⁵ Nationalistic sentiments, aroused by the war, characterized a redefinition of the American polity and political culture.¹⁶⁶ "[S]ecession was opposed in America not only by the

before the development of any sense of national consciousness. The United States might be seen as a, perhaps the only, spectacular example of the latter.").

163. See Grant, *supra* note 86, at 133 ("The Civil War was ... a 'people's contest', as Abraham Lincoln famously called it, but for the Union this meant persuading the people to keep fighting; it meant convincing them that the nation as a single nation was worth the sacrifice and that secession was, as Lincoln saw it, not a constitutional right but 'the essence of anarchy.'").

164. See James Russell Lowell, *E Pluribus Unum*, ATLANTIC MONTHLY, Feb. 1861, 235, 236, 238, 237 ("Rebellion smells no sweeter because it is called secession," for it gave rise to "a sense of national unity, and make them [Americans] feel that patriotism was anything more than a pleasing sentiment, ... a feeble reminiscence, rather than a living fact with a direct bearing on the national well-being"; America "is a unitary and indivisible nation, with a national life to protect, a national power to maintain, and national rights to defend... Our national existence is all that gives value to American citizenship" that should not be dismissed "by a mere quibble of Constitutional interpretation.").

165. JOHN L. MOTLEY, THE CAUSES OF THE AMERICAN CIVIL WAR: A LETTER TO THE LONDON TIMES 7 (1861).

166. See Grant, *supra* note 86, at 137 ("[T]he North's version of the nation moved

executive, nor just by constitutional theorists, but by the mass volunteer armies of the Union, who were supported in their sentiments by their home communities.”¹⁶⁷ The War enhanced local traditions of violent vigilantism to defend law, self-governing institutions, and order, moving those efforts to the national level.¹⁶⁸

Central to the Northern nationalism, which later became American nationalism, was a version of American exceptionalism. Abraham Lincoln took the political project of America as the last best hope of mankind in his Gettysburg Address when he said that “the government of the people, by the people, for the people, shall never perish from the earth.” The Civil War both reflected and facilitated the political theology of America.¹⁶⁹ The theologian Horace Bushnell made this point in his Yale alumni address shortly after the Civil War: “The sacrifice in the fields of the Revolution united us but imperfectly. We had not bled enough to merge our colonial distinctions . . . and make us a proper nation. And so, what argument could not accomplish, sacrifice has achieved . . . now a new and stupendous chapter of national history” came; blood shedding has “cemented and sanctified” national unity.¹⁷⁰ James Russell Lovell, too, said that the “man who ever doubted that the first gun fired by the insurgents would instantly unite the nation against them knew as little of the American people as if he were editor of the *London Times*. There is no chemical solvent like gunpowder.”¹⁷¹ For the author and educator Julian M. Sturtevant,

A government of limited powers can exert those powers in presence of and in opposition to those states from which it originally received them by voluntary cession, till it has been

beyond the notion that the Constitution was the binding document of the Union and beyond the them of law and order to construct a more robust version of nationalism that established the grounds for what Lincoln would famously describe at Gettysburg as ‘a new birth of freedom’ for the nation.”); GEORGE FLETCHER, *THE SECRET CONSTITUTION*.

167. *Id.* at 141.

168. See Philip S. Paludan, *The American Civil War Considered as a Crisis in Law and Order*, 77 *AMERICAN HIST. REV.* 4, 1013–1034 (1972).

169. On the concept of the political theology of America, see PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (2011).

170. HORACE BUSHNELL, *Our Obligations to the Dead* (1865), in *LIFE AND LETTERS OF HORACE BUSHNELL* 485–86 (Mary Bushnell Cheney ed., 1905); see also Susan-Mary Grant, “How a Free People Conduct a Long War”: *Sustaining Opposition to Secession in the American Civil War*, in *SECESSION AS AN INTERNATIONAL PHENOMENON* 145 (Don Doyle ed., 2010) (“[T]he sacrifice, the suffering, and the loss of life were both necessary and divinely ordained” and “war was a test of American faith, a path to American nationality.”).

171. James Russell Lowell, *The Ordeal by Battle*, *ATLANTIC MONTHLY*, July 1861, 89.

proved by fierce and bloody conflict. Till our general government has asserted those powers in the face of opposition, and shown its strength by overcoming resistance and trampling out rebellion, it will . . . almost necessarily be regarded as weak and helpless, dependent on the capricious will of thirty-four sovereign states. . .¹⁷²

This American exceptionalism based on republican political institutions can be better appreciated if put into an international context. English aristocrats joyfully regarded the Secession Crisis as the failure of the American, republican, political experiment. Lord Ramsden, for example, said that the “great republican bubble has burst.” Many thought America would return to monarchy.¹⁷³ Lincoln’s fear that republican government was in danger of perishing from the earth was correct if seen in this a larger perspective.¹⁷⁴ Consider that in the nineteenth century, republican regimes or experiments faced a low tide: Latin America’s *caudillos* began to rise; France invaded republican Mexico; Spain reannexed Saint Domingo; and even the American South had a tincture of aristocracy.¹⁷⁵

The South also thought it was pursuing a sacred course. Apart from their problematic litany of a right of national self-determination, they believed they were following the sacred tradition of the American Revolution. A Confederate army officer, for example, said: “I took up the arms, sir, upon a broader ground – the right of revolution. We were wronged. Our properties and liberties were about to be taken from us. It was a *sacred duty to rebel*.”¹⁷⁶ Jefferson Davis, too, declared that: “the high and solemn motive of defending the rights . . . which our fathers bequeathed to us” drove the South to “renew such *sacrifices* as our fathers made to the *holy cause of constitutional liberty*.”¹⁷⁷ It was in their real revolutionary actions, not only in their discourse about the revolutionary tradition, that Southerners transformed the dialectic of

172. JULIAN STURTEVANT, *THE LESSONS OF OUR NATIONAL CONFLICT* 16 (1861).

173. See Armitage et al., *supra* note 62, at 463 (Don Doyle).

174. See Abraham Lincoln, *The Gettysburg Address* (“. . . the government of the people, by the people, for the people shall never perish from the earth.”), available at http://avalon.law.yale.edu/nineteenth_century/gettyb.asp.

175. See Armitage et al., *supra* note 62, at 480.

176. GEORGE W. NICHOLS, *THE STORY OF THE GREAT MARCH* 302 (1865) (emphasis added).

177. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 241 (2003).

constitutionalism and revolution into a nationalistic imagination. “The Civil War did far more to produce southern nationalism . . . than southern nationalism did to produce the war.”¹⁷⁸

Both the North and the South thought they were engaging in a sacred project that deserved sacrifice. In this way, the American Civil War actually resembled a war of civil religions, even a religious war, within the same political community—one sharing a common historical tradition. It was a contest to define the national political identity of America. Both sides regarded their marches as crusades.¹⁷⁹ Both spared no effort in advancing the holy mission of the American political experiment.¹⁸⁰ Both believed that God was not neutral between them. Both submitted the dispute to the court of God (the battlefield) rather than the court of humans (e.g., the Supreme Court of the United States). The whole process and its end make better sense in the language of medieval law, which appeals to trial by battle and conquest.¹⁸¹

III. The Failure of Arguments: The “Trial of Battle” and the Idea of Conquest

Interestingly, under a union governed by the law, neither side turned to the Supreme Court to resolve the crucial political debate over secession. This was so even though many notable contemporaries thought the war was both unnecessary and undesirable.¹⁸² In 1859, the Taney Court, speaking of its final power of constitutional review, claimed itself to be a “calm and deliberate arbiter” to avoid “force and violence” and “revolutions by force of arms.”¹⁸³ Yet in 1861, “revolutionary ‘force and

178. DAVID M. POTTER, *THE IMPENDING CRISIS, 1848-1861* 469 (1976).

179. See MCPHERSON, *supra* note 178, at 241–42.

180. See DREW G. FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* (2008).

181. See Cynthia Nicoletti, *The American Civil War as a Trial by Battle*, 28 L. HIST. REV. 1, 71–110 (2010).

182. Chief Justice Taney, for example, hoped that both sides would come to see that “a peaceful separation, with free institutions in each section, is far better than the union of all the present states under a military government, and a reign of terror preceded too by a civil war with all its horrors.” See Roger Taney, *Letter of June 12, 1861*, quoted from C. G. HAINES & F. H. SHERWOOD, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS* 465 (1957).

183. See *Ableman v. Booth*, 62 U.S. 506, 520–21 (1859) (“And as the final appellate

violence’ between federal and state governments did erupt in the Civil War. . . . And in this ultimate conflict, neither the federal government nor the seceding states appealed to the ‘calm and deliberate’ arbitration proffered for such disputes by the Supreme Court.”¹⁸⁴ Lincoln denied a role to the Court in resolving the conflict over slavery; neither would he refer the question of secession to the Court.¹⁸⁵ Rather, he himself interpreted the Constitution, arguing against the legality of secession. His constitutional interpretation became that for which Northerners fought during the War.¹⁸⁶ The South did not turn to the Court either, since such an appeal would implicitly recognize the authority of the Federal government from which they wanted to separate, even were the South to win the case.¹⁸⁷ According to Robert Burt, “in this central constitutional crisis, none of the adversaries sought judicial review, and the Supreme Court stood at the sidelines of the conflicts.”¹⁸⁸ Only after the Civil War did the Supreme Court take up the issue of secession and affirm the indivisibility of the Union.¹⁸⁹ Instead, both sides turned to war and physical force.¹⁹⁰ The final “judgment” over the legitimacy of

power in all such questions is given to this court, controversies as to the respective powers of the United States and the States, instead of being determined by military and physical force, are heard, investigated, and finally settled with the calmness and deliberation of judicial inquiry. And no one can fail to see that, if such an arbiter had not been provided in our complicated system of government, internal tranquility could not have been preserved, and if such controversies were left to arbitrament of physical force, our Government, State and National, would soon cease to be Governments of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions.”)

184. ROBERT BURT, *THE CONSTITUTION IN CONFLICT* 202 (1992).

185. *See, Id.* at 204 (1992) (“[F]rom Lincoln’s perspective, there were enormous risks in entrusting his cherished ideal of perpetual union to a Supreme Court dominated by proslavery Southerners, notwithstanding the apparently favorable auguries of the Court’s recent jurisprudence.”).

186. ROBERT BURT, *THE CONSTITUTION IN CONFLICT* 202–03 (1992).

187. *See* FARBER, *supra* note 2, at 22 (2003) (“The South’s constitutional theory was that ultimate authority over constitutional issues did not reside in the Supreme Court or in the process for constitutional amendments, but in the sovereign people in each state.”).

188. BURT, *supra* note 175, at 204 (1992).

189. *See Texas v. White*, 74 U.S. 700, at 724-25 (1869) (“Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origins, mutual sympathies, kindred principles, similar interests, and geographical relations.”).

190. *See* Cynthia Nicoletti, *supra* note 172, at 76 (2010) (“Rather than turning to the legal process to determine the legitimacy of the ultimate expression of state sovereignty

secession was made at the Appomattox *Courthouse* rather than in the Washington D.C. *courthouse*.¹⁹¹ The robust discussion of the right of secession before the Civil War vanished from public dialogue with the victory of the Union Army.

Reflecting on the Civil War, many fell back on the metaphor of trial by battle and the idea of conquest to make sense of this bloody conflict and its result.¹⁹² For ex-Confederates, the metaphor was to console. For Unionists, it was to vindicate. Both recognized that the deliberation of the rule of law, in which they had taken pride, gave way to the premodern idea of conquest, which they had tended to cast aside. As Nicoletti writes,

Although Civil War-era Americans prided themselves on their commitment to reasoned argument as the only acceptable method of settling legal disputes, they recognized that their civil war deviated monstrously from this ideal. The experience of armed conflict on such a massive scale forced Americans to confront the harsh realization that they had resorted to the irrationality of violence in order to settle the most contentious legal issue of their time.¹⁹³

Even Supreme Court justices invoked the ideas of trial by battle and conquest in cases related to the constitutionality of secession. In an 1863 decision, the Supreme Court validated President Lincoln's blockade of Confederate ports.¹⁹⁴ Justice Robert Grier, who wrote the majority opinion, likened the Civil War to a trial by battle: The Seceded States "combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign state. Their right to do so is now being decided by *wager of battle*."¹⁹⁵ The constitutionality of secession, in his opinion, could not be decided by the court of law, but only by the result of war.

— the right of secession — Americans had instead engaged in an armed conflict on a massive scale that had ultimately resulted in the deaths of 620,000 men.”).

191. See Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, at 1512, n. 341 (1987).

192. See Cynthia Nicoletti, *supra* note 172, at 72 (“Many American intellectuals, both northern and southern, Republican and Democrat, reconstructed and unreconstructed, employed [the] metaphor [of trial by battle] as a way of making sense of the demise of the principle of state secession through the convulsion of the Civil War.”).

193. *Id.* at 110.

194. *Prize Cases*, 67 U.S. 635 (1862).

195. *Id.* at 673.

Six years later, the Court addressed the constitutionality of secession again in *Texas v. White*.¹⁹⁶ In that case, the Reconstruction government of Texas claimed that United States bonds owned by Texas since 1850 had been illegally sold by the Confederate state legislature during the Civil War. It filed suit directly with the Supreme Court, invoking the original jurisdiction of the Court. The Court held that Texas had remained in the Union during the War in spite of its secession. In wake of the Union victory, Chief Justice Salmon Chase, writing for the majority, pronounced the unconstitutionality of secession from its first exercise by the Southern states, speaking of “an indestructible Union, composed of indestructible states” created by the Constitution.¹⁹⁷ Justice Grier dissented. Texas, he argued, was not within the United States during the War, and therefore could not file suit in the Court. Rather, Texas was a “conquered province by military force,” as treated by Congress.¹⁹⁸ His point was that secession was not illegal from the beginning of the secessionist movement. The triumph of the Union army denied the right of secession. During the War, Texas had seceded. After the War, it was conquered.

The idea of conquest, surprisingly or not, emerged in Grier’s pondering over the Civil War. Some statesmen and theorists, taking up that idea, articulated a conquest theory of reunion. For example, Thaddeus Stevens, a Radical Republican, hoped to realize racial equality in the South through the exercise of virtually limitless federal power, justified by the conquest of Southern states.¹⁹⁹ The title of conquest, which was formerly invoked by Americans in acquiring the lands of the Indian barbarians, now applied to the retaking of the territories of their fellow Christians.

Although the language of rights proliferated in multiple forms in the debates over the legitimacy of secession, all failed to lead to a peaceful resolution. A constitutional right of secession was put forth. Yet it met a counterargument of the illegality of secession in the American constitutional system. Constitutional arguments could persuade neither side. As the Supreme Court was set aside,

196. *Texas v. White*, 74 U.S. 700 (1869).

197. *Id.* at 725.

198. *Id.* at 737 (Grier, J., dissenting).

199. See Thaddeus Stevens, *Speech of December 18, 1865*, <http://www.let.rug.nl/usa/D/1851-1875/reconstruction/steven.htm>.

there was no judge to decide on the dispute, let alone to enforce that decision. The South also resorted to the right of revolution. Yet that right depends on factual success, not just reasoned arguments or political polemics. The Union disapproved the Southern claim of revolutionary right by defeating the Southern army. A nationalistic justification of secession on an ethnic basis – the equivalent of the twentieth-century right of national self-determination – was also invoked. But it was marred by an insufficient ethnic distinction and the illiberal nature of slavocracy. More importantly, the Southern ethnic, separationist nationalism encountered the Union's civic, unificationist nationalism.

Looking back, the American Civil War was both a typical and an atypical case of the modern politics of secession as it took form in the twentieth century. As a typical case, it shows that the disunion of states operates in a domain beyond legality in an age of popular sovereignty. War and sacrifice, rather than legal arguments and judicial opinions, define secessionist movements and anti-secession acts in democracies. The American case was atypical, however, because national self-determination played a minor role. The problem of secession in the American Civil War was largely a problem of democratic self-government in a post-revolutionary state. The Civil War remained rooted in the revolutionary republicanism of the eighteenth century, even as it pointed toward the coming violence of the twentieth century.

During the Civil War, the Southern secessionists resorted to both legal and extralegal arguments to justify secession. Despite these normative arguments, Americans fought desperately to settle the issue. Normative thinking gave way to existential fighting.²⁰⁰ This strange way of settling normative debate made sense under the old-fashioned right of conquest. Yet the right of conquest among civilized peoples was denied by the idea of consent. Secession and reunion, then, have to be seen as operating extralegally. The exceptional act of secession was met by Lincoln's exceptional acts in defense of the Union.

Secession cannot be juridicalized because it touches upon constituent power, not just constituted power. The constituent power operates pursuant to the logic of the political, not the legal, for they make and legitimize law. In the nineteenth-century international legal theory, law cannot regulate sovereignty. Secession can only become a

200. *Id.* at 3 (“The American secession crisis, along with many others around the world over the next century and a half, would be decided not by debate or law but by forces of arms.”).

right when sovereignty is canceled and the autonomy of the political is erased. It can be so when the state becomes a system of pure law without sovereign exceptions. Secession appears in a domain between law and sovereignty. It raises the question of the relationship of law to its underlying political legitimacy, putting into question the sovereignty that makes law.

CONCLUSION

Secession relied upon the very principle that inspired modern revolutions and justified republican governments – popular sovereignty. The world waited to see whether the new state would give a free pass to secession, which seemed legitimate according to its own founding principles. Before the War, the question whether the new democratic state could preserve its territorial unity was open. The answer was a bit surprising: it turned out that the new state was as concerned with its territorial unity as the old states, and even more sensitive to threats. As Doyle put it, “America’s Civil War gave the world an alarming preview of both the possibility for national disintegration and the astonishing compulsion of modern nations to resist fragmentation.”²⁰¹

In 1998, Canada subjected the secession controversy into the judicial process. The Canadian Supreme Court took up the issue, ruling that the Canadian government must negotiate with Quebec if the majority in Quebec supported separation in a referendum.²⁰² Secession, for both the government and the court, is a matter of law, not that of sovereignty. It is a matter for negotiation, deliberation, and argument, not for revolution, sacrifice, and war. Behind the scene, we can get a sense of the transformation of the relationship of law to sovereignty in the past two centuries: sovereignty, which involves secession and violence, is no longer separate from law; it is now regulated by law. Yet the image of the American Civil War constantly reminds the world of the possibility of sovereign politics beyond law.

201. Don H. Doyle, *Introduction to SECESSION AS AN INTERNATIONAL PHENOMENON* 6 (Don H. Doyle ed., 2010).

202. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 220 (Can.).