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Secession, Constitutionalism, and American Experience

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SECESSION, CONSTITUTIONALISM, AND AMERICAN EXPERIENCE

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I.

Is secession ever justified in constitutional terms? To ask this question incites conceptual dissonance. For to say that secession might be constitutionally permissible seems inconsistent with conventional wisdom about what a constitution or constitutional order is supposed to do—to hold a political world together, not to permit it to fall apart. As Robert Post has put it, the point of a constitution is to establish a "unity of agency" in a constitutional state. Secession, he argues, "fracture[s] the pre-existing collective agency of a democratic state."[1]

We may add to that conceptual intuition an empirical observation: any society of almost any degree of complexity will display differences among the people who constitute it. Typically, for reasons of interest, morality, or a sense of common enterprise, people simply live with diversity. In fact, if sufficiently numerous and cross-cutting, differences can promote a kind of stability and balance that make secession unnecessary, perhaps undesirable.[2]

Sometimes, however, societies cannot rely on complexity and differentiation for stability. Sometimes people who are joined in political society find that they are divided by something they consider important, that the division is of long standing and appears to be enduring, that the division aggregates along geographic

lines, and that the people do not want to live together anymore. When those conditions hold, secession is a practical option, not least because, in extreme cases, it can avert the annihilation of large numbers of people. But practicality is not equivalent to constitutionality. Again, then: Is secession ever constitutionally justified? If so, how and why?

To address those questions, I pursue a case study of the breakdown of the American order in 1860–61. This is a hard case in several respects. First, the Constitution of the United States did not expressly permit or provide for secession. Second, the method for pursuing secession was unilateral. Third, some of the seceding states refused to offer reasons for their separation, relying instead on presumptively authoritative formal acts. Fourth, the order being dissolved was a kind of liberal democracy, though there were ticklish problems concerning the status of slaves, women, and the native tribes. Fifth, and most powerfully, the American secessions aimed to continue a regime whose dominant mode of production was immoral, by our lights.

For these and other reasons, American scholars have a genuine aversion to taking secession seriously as a constitutional matter. Cass Sunstein, for example, has proclaimed that "no serious scholar or politician now argues that a right to secede exists under American constitutional law."[3] At the very least, American scholars have had difficulty talking coherently about the matter in the face of secessionist movements in the Soviet Union, eastern Europe, the Middle East, South Asia, Africa, and even Canada.

Reinforcing the scholastic aversion to or confusion about secession is the figure of Abraham Lincoln. Even today he casts a long shadow across the American constitutional stage. In fact, with respect to secession, he casts shadows in two directions. With respect to the first, consider Sunstein's position, which is essentially a version of Lincoln's theory of perpetuity. Secession is unconstitutional, says Sunstein, for two reasons. First, we (in the United States) have judicial precedent on point, specifically the Supreme Court's pronouncement in *Texas v. White*,[4] which held that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." Second, and more important for understanding Lincoln, Sunstein says

that secession is barred by principles of constitutionalism. Thus, "whether or not secession might be justified as a matter of politics or morality, constitutions ought not to include a right to secede," and "courts should not find such a right to be implicit in constitutions." In the American case, Sunstein says, this position arises out of the "spirit of the original document, one that encourages the development of constitutional provisions that prevent the defeat of the basic enterprise."

But the argument from perpetuity was not Lincoln's only position. In our own time, Akhil Amar has staked out ground that falls within Lincoln's second shadow. Amar's constitutional strategy is strongly textual but ultimately rests upon a nationalist theory of the Constitution. Amar borrows a prop from John Marshall to support Lincoln's insistence that "the People" of the Constitution were the people of the nation as a whole. Consequently, he says, secession could not be accomplished simply on the motion of the seceding states but had to rest on a decision of the nation as a whole.[5]

I shall argue that both of these positions are wrong. Perpetuity is wrong in principle. And the weaker claim is wrong in the context of the Southern secessions from the United States in the mid-nineteenth century. Constitutionalism supplies the ground for my argument.

Constitutionalism is a political theory that is concerned with a kind of enterprise in which people (or a people) self-consciously attempt to conceive, articulate, and implement the design for a new political world.[6] In functional terms, then, constitutionalism is concerned—must be concerned—not only with creating and maintaining but also with dissolving political orders. In terms of both method and substance, it takes its baseline from Alexander Hamilton, who posited that the proposed Constitution of the United States was an experiment in whether it was possible to establish government through "reflection and choice" instead of through "accident and force."[7] This baseline suggests that political power should be authoritative, purposeful, and bounded; that the operation of power should be principled and traceable to a constitutional text; and that the regime should be capable of generating voluntary attachment among citizens, even if they have not formally consented to it. The institutions, norms, and proce-

dures of the regime should reflect these considerations. There are many ways to arrange institutions, norms, and procedures that are compatible with constitutionalism; some may even be illiberal or disagreeable. To be clear, slavery is inconsistent with constitutionalism; secession, however, is not only consistent but logically required.

This logical requirement follows from accounts that constitutional regimes supply about their own origins. That is, the most powerful arguments for secession derive from the character of the founding of the regime from which secession is sought. This claim trades on the tendency of constitutional orders to rationalize themselves and to justify their existence by referring to the manner in which they were created. The ostensible manner of entering into constitutional union becomes the means also for leaving.

In the lore of the United States, not to mention the Preamble and Tenth Amendment to the Constitution, the authors of constitutional text were "the people." But much depends on how the people are configured for constitutional purposes. From the beginning, there were at least two accounts of who the people were (and on whose behalf they acted in creating the new constitutional order). Both accounts were visible in the dispute between federalists and antifederalists over the ratification of the Constitution. Of course, ratification did not end the dispute but merely transplanted it and revised the concrete issues over which it would be conducted. With respect to secession, the foundational myths presupposed by the federalist and antifederalist accounts of constitutional authority pointed in different directions. But under either account, I argue, secession is permissible. At stake in the difference between the two accounts is simply the institutional method by which secession may be authorized.

I should distinguish this conception of constitutionalist justification from three alternative modes that scholars have used to argue for (or against) secession. The first is geopolitical, or what Akhil Amar calls "geostrategic."[8] Geopolitical argument gives primacy to considerations of national defense (paying attention to both military and geographic concerns) and the strategic balance of power within the nation. No one can doubt that such considerations are of constitutional significance in the

Aristotelian sense of the word. Nor can one deny that the founders of the American constitutional order were exquisitely sensitive to their role in sustaining security from without and stability within. And considerations of geopolitics bear directly on strategic calculations of both the conservators of a regime and would-be secessionists.[9] But those considerations do not speak directly to the principles that must undergird the authority and maintenance of a constitutionalist enterprise.

The second mode is moral. It justifies or criticizes acts of secession by resorting (1) to principles of moral philosophy or (2) to moral standards that transcend the Constitution or the logic of a particular constitutional order. Allen Buchanan supplies a perceptive and wide-ranging example of a moralist mode of the first type, justifying secession through liberal political theory.[10] Arguments for self-determination as a human right—grounded, for example, in international law—are transcendental in the second sense.[11] Clearly, any constitutional argument for secession is, in some form or fashion, moral in character. Nevertheless, I resist the inclination to rely on transcendental moral arguments. First, the moral justifications cut more than one way in the American case. Second, such arguments are usually insufficiently tied to constitutional text, the logic of the order, or the basic principles of constitutionalism to permit them to qualify as potent constitutional arguments. Third, thickly textured moral arguments tend to be weak in times of social, economic, or political crisis, which are precisely the times in which we typically find secessionist movements.

The third mode is fundamentally economic. James Buchanan argues that the right to secede was originally implied in the Constitution of the United States as a hedge against excessive taxation, incursions on free trade, and restrictions on the movement of capital.[12] Apart from his general and largely unsupported invocation of original intent, however, his ultimate justification for secession is a form of theory whose rationality is exclusively economic, and a narrow version of economic rationality at that.[13] Consequently, it leaves precious little room for politics or, as Charles McIlwain called it, "gubernaculum."[14] Thus James Buchanan's is not an autonomously constitutional theory.

II.

When a group of people finds that it no longer wants to belong to a particular polity, that its members insufficiently sense the "mystic chords of memory" that bind a nation both institutionally and culturally, there are several options open to it.[15] It may persevere within the system, hoping for (or despairing of) a change in the political character of the nation through a change either in constituency or of ethos. In the nineteenth-century United States, radical Southerners believed that the South had already suffered too long as an oppressed minority, and they were beginning to find converts among moderates as well.[16]

If the disaffected group is small in number or widely dispersed geographically, its members might consider simply leaving. In his critique of tacit consent as a justification for political regimes, David Hume recognized some of the profound practical impediments to expatriation—the cost of travel and resettlement and the difficulty of learning a new language and manners—which are especially burdensome for people who often have the most reason to leave.[17] Hume did not mention the deterrents to procuring employment that provides a decent wage (including the difficulty of securing permission even to enter another country and to work there) or the risks of statelessness in a world in which citizenship has been described as "the right to have rights."[18] And there are the psychic costs of uprooting self and family from one's home, which is especially traumatic for people possessing a strong sense of place, as did many in the South. For some Southerners expatriation would have been a rejection not only of their nation but also of their country, their home.

If the group is especially large, is convinced of its moral or technological superiority, or believes its mission divinely sanctioned, it might opt for revolution. Revolution might take on more than one meaning in this context. It might take the form of a *radical alteration* in the government's structure or purposes, most radically by dismantling entirely the nation's government and erecting a new one in place of the old. Alternatively or even additionally, it might imply the willingness of opponents of the existing regime to use *systematic violence* to achieve their aims.

John Brown's attempt to seize the U.S. military garrison at Harper's Ferry was revolutionary in both senses. Both geographically and politically, however, his aims were not necessarily to take on the nation but simply to bring down the slave government of the state of Virginia and to incite insurrections by slaves throughout the South.

Certainly, secession can be revolutionary in either sense. In the end, however, the South's attempt to secede was revolutionary only in the second sense, not in the first. For one thing, most Southern secessionists, despite fanciful pretensions to a national slave empire before 1860, were content to leave be the national government and the rest of the nation. They were content, that is, simply to leave. For another, the Southern aim, at least in several respects, was hardly a radical alteration of existing relations, even within the seceding states. The aim instead was to preserve what many saw as the extant order and hence was conservative in many respects.

Even so, by 1860 there was some authority for considering such a move revolutionary, even if it were conducted peacefully. Kenneth Stampp argues that the conceptual foundations for the constitutional illegitimacy of secession were laid between 1830 and 1833—not surprisingly, in response to the crisis over nullification. Daniel Webster, he notes, considered secession an act of treason. Edward Livingston, senator from Louisiana, said it was "extralegal," as the states had transferred their "attributes of sovereignty . . . to the General Government . . . ; the States have abandoned and can never reclaim them." Under the Constitution, he argued, the national government was "sovereign and supreme." Secession was revolution.[19]

John Quincy Adams derived from a theory of consent the notion that consent could not be withdrawn. He traced the origin of the Union to the Declaration of Independence. That "primitive social compact of union, freedom and independence" committed all the "States whose people were parties to it" to membership in the Union forever. Adams's doctrine would have covered the infidelity of South Carolina in the early 1830s; however, it would not have reached Alabama, Mississippi, Louisiana, Texas, Arkansas, Florida, or Tennessee, as none of them had been a "party" to the Declaration of Independence.[20]

In his *Commentaries*, published in 1833, Joseph Story joined Livingston in explicitly linking arguments against secession to a theory of the Constitution. He argued that the Constitution had been intended to serve "as a permanent form of government, as a fundamental law, as a supreme rule, which no State was at liberty to disregard, suspend, or annul." It was "designed for perpetuity." In his later years, James Madison seemed to agree. Secession, he said, was never permissible merely as an act of political will but was justified only for "intolerable oppression" under accepted theories of revolution.[21]

In the context of the crisis over nullification, the most important argument against secession was President Andrew Jackson's. He pressed a nationalist theory of the historical origin and theoretical foundation of the Union that even his sometimes enemy John Marshall would have embraced. Union, Jackson said, antedated the existence of the states. Departing from Adams's theory that the Declaration of Independence was binding on the states because they consented through their predecessors, the colonies, Jackson argued that the Declaration was binding on the states precisely because they were *not* present (in fact or by proxy) when the Declaration created the Union. Because the Union was *historically* prior to the states, he said, it was *theoretically* preeminent as well. Thus the Constitution did not alter the relative primacy of the Union and the states. It reinforced the primacy of the Union by establishing the nation as supreme. National supremacy was a function of the manner in which the Constitution was ratified: by the people. The Constitution was not simply a treaty or compact among the states. It was a national charter creating a national government that bound the people directly because it owed its existence to them. Secession, then, at least in the case of the United States, would "not break a league, but destroy[] the unity of a nation."[22]

Adams, Story, Madison, and Jackson were inclined to conflate secession with nullification. The conflation was partly a function of American experience: talk of secession had almost invariably accompanied talk of nullification. From a psychological standpoint, the two were undoubtedly motivated by the same interests or impulses. For example, in debates during the crisis over nullification, some Southern radicals, though not John C. Calhoun,

had sometimes seemed to argue that nullification and secession were kindred theories. Indeed, some modern scholars have suggested that secession is a logical extension of the doctrine of nullification.[23]

In fact, however, the two are almost mutually exclusive in that each tends to ameliorate the impulse that generates the necessity of the other. Under almost all conceivable circumstances, nullification would have provided such security for local self-determination that it would have practically nullified the need for an exit. Especially in Calhoun's hands, nullification was an attempt to reconstruct the notion of a national majority so as to render secession unnecessary and to defuse it as an explosive constitutional issue.

III.

Just as a discontent or alienated minority has certain options, a nation trying to hold itself together has two general strategies short of permitting secession (or, of course, dissolution altogether): (1) It might permit some sort of nullification or local control on matters of constitutional import; or (2) it might employ the coercive power of the nation to preserve union. Both solutions seek long-term cohesion. The first achieves cohesion in exchange for a short-term sacrifice of national supremacy in the national application of constitutional standards. The second achieves cohesion by putting at risk one of the basic tenets of constitutionalism: choice. Both risk further disintegration over time, but the second may well remove evidence of that disintegration from sight. In the United States in 1861, the most extreme version of the first solution, nullification, had been rejected so often for so long that it was widely considered politically untenable.[24] The more moderate version, rooted in antifederalist localism, had been rendered inaccessible, at least with respect to the status of slavery in the nation and the territories, by the increasing tendency of both sides of the debate to seek out national solutions, especially after *Dred Scott.* Lincoln opted for a pragmatic combination of the two strategies, invoking localism on the question of slavery, while emphasizing the supremacy of national authority generally.

But nationalism is a double-edged sword, for secession is ironically most plausible as a strategy in the context of a strongly nationalist constitutionalism. This irony may begin to explain why some Southern radicals were inclined to resort to secession in 1860–61. *Dred Scott* stood partly for the proposition that the only logical or practical solution to the cleavages that slavery was exacerbating was a national one. Certainly Taney's opinion displayed a strongly nationalist rhetoric, and its rationale threatened to obliterate geographical limits to the institution of slavery within the nation. Such nationalism might have satisfied Southerners, even the most committed firebrands, as long as *Dred Scott* was law.[25]

But when Abraham Lincoln was elected president in 1860—having argued two years earlier both that "a house divided against itself cannot stand" and that he opposed the extension of the Supreme Court's decision in *Dred Scott* as precedent binding the Court or the polity—the substantive content (or consequence) of nationalist constitutionalism seemed ready to turn on its head. Some Southerners perceived Lincoln as committed to the adoption and enforcement of a national antislavery policy. His election, they erroneously believed, demonstrated that a majority in the nation was now committed to the same thing.[26]

Fear, necessity, and hope can motivate radically different interpretations of the same text or event. Many Southerners, and certainly most secessionists in the South, were disposed to read Lincoln's positions on nationalism and abolition through the lens of fear rather than hope. So they also chose to read him, but with more justification, when he spoke on secession. In his First Inaugural Address, the same speech in which he pledged to support a constitutional amendment explicitly protecting slavery, he said that "in contemplation of universal law, and of the Constitution, the Union of these States is perpetual."[27] He cited no specific tenet of universal law but did offer three other reasons, one concerning the logic underlying the creation of nations, one concerning the history of the Union and the definition of "perfection," and one grounded in specific presidential obligations under the Constitution. Four months later, in his "Message to Congress in Special Session," he would add two more arguments of substance, one from a theory of democracy and one implicating the right of self-preservation.[28]

First, said Lincoln, every nation ever created presupposed perpetuity. "It is safe to assert that no government proper, ever had a provision in its organic law for its own termination. Perpetuity is implied, if not expressed, in the fundamental law of all national governments." In other words, the proposition of perpetuity went without saying. Because the Constitution did not speak explicitly to the legality of secession, perhaps even if it had, the nationalist presumption prohibited secession, according to Lincoln. At one point in his First Inaugural, Lincoln subtly suggested that there might be a constitutional mode for accomplishing secession, but only by "all the parties who made it." He derived this mode from his assumption that the Constitution's ratification procedures required unanimity. But he did not say who the parties were or how their will might be represented. Nor did he indicate the slightest willingness to engage the mode as a practical possibility.[29]

Second, "[t]he Union is much older than the Constitution." Lincoln traced its origin unbroken to the Articles of Association of 1774, through the Declaration of Independence and Articles of Confederation, to the Constitution, whose Preamble stated its object to be "to form a more perfect Union." "But if destruction of the Union, by one, or by a part only, of the States, be lawfully possible, the Union is *less* perfect than before the Constitution, having lost the vital element of perpetuity."[30]

Third, he insisted that the Constitution did not confer on the president the authority "to fix terms for the separation of the States." Moreover, it imposed on him an oath, to "preserve, protect and defend," as he put it, "the government" of the nation. Consistent with his reading of the oath, he would defend the government against the dissolution that secession threatened.[31]

Fourth, the United States, he said, was engaged in "an experiment" in "popular government." Popular government is democratic government. Democratic government requires that a majority govern and that the minority acquiesce in majoritarian decisions. The only permissible response to policies with which a minority disagrees is to try to change policy at the next election. "[T]here can be no successful appeal, except for ballots themselves."[32]

Fifth, and following from the fourth, is this oft-quoted series of questions, which I can frame no better than Lincoln:

> [T]his issue embraces more than the fate of these United States. It presents to the whole family of man, the question, whether a constitutional republic, or a democracy—a government of the people, by the same people—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. 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?"[33]

Although at the time of his inauguration Lincoln foreswore "bloodshed or violence . . . unless it be forced upon the national authority," there was no question that he considered secession illegal, "that no State, upon its mere motion, can lawfully get out of the Union,—that *resolves* and *ordinances* to that effect are legally void." More than simply illegal, though, secession was on his terms a "dissolution," an act of revolution "against the authority of the United States." "I therefore consider that, in view of the Constitution and the laws, the Union is unbroken."[34] He would continue to hold that view throughout the Civil War.

His principal claim, moreover, was not simply that the Union was unbroken in this case. It was that Union could not be broken in *any* case, at least not constitutionally. The weaker version of Lincoln's position might have left room for a constitutionally justified theory of secession. But when he implied that there might be a constitutional way out of the Union, his vehicle—the consent of "all the parties"—was more stringent than a fair reading of Article VII might allow. And even if his reading of Article VII were supportable, Lincoln's public position consistently undermined and finally rejected the notion that secession might be constitutional. His ultimate position—the one he held to most firmly and the one he relied upon in prosecuting the War—was that union was perpetual.

IV.

For more than a century, Lincoln's doctrine, reinforced by Union military victory and the Supreme Court's confused blessing after the War, has made national perpetuity and the illegitimacy of secession appear to be brute constitutional facts. The emphatic character of the military solution, the ascent of the myth that the forces of Union had all along fought the Civil War to free the slaves, and the martyrdom of Father Abraham tended to obscure the constitutional weakness of Lincoln's claims. I shall address his claims seriatim in this section. Beginning in this section and continuing in the next, I shall explain why the logic of constitutionalism requires a theory of secession.

First, constitutionalism and (ironically) written constitutions themselves attest to the notion that some things go without saying. One function of constitutional theory is to articulate and justify those unsaid things. Lincoln was correct, then, that the creation of a nation, whether by written constitution or not, might presuppose one or more principles that are fundamental to the enterprise of state building or constitution making. But he was wrong in assuming that perpetuity is logically necessary or experientially universal in the creation of nations generally or in the formation of American Union.[35] Even his weaker claim, that the dissolution of the Union requires the consent of "all the parties," is a dubious account of what Article VII requires, and it begs for a description of who must consent to secession and how they may do so. Lincoln's assumption that secession was equivalent to dissolution was at best only partially accurate, for nonviolent or "constitutionalist" secession accomplishes merely the withdrawal of a geographic part of the nation and leaves the old national government intact over the rest.

Second, Lincoln's account of the unbroken pedigree of national union was historically and theoretically suspect. As Stampp points out, apart from the question whether the states or the Union was older, the Constitution itself undermined the notion that the Union's existence was unbroken from 1774 (or 1776 or 1781). The very process and product of the Philadelphia Convention were illegal from the standpoint of both the Articles of Confederation and the Convention's charter granted by Congress

under the Articles. Moreover, the procedures for ratifying the proposed Constitution did not require that all the states consent to the new plan of government before it became effective. Under Article VII, the Constitution was "valid" after only nine states had ratified it, although only within those states that had ratified it. Nonunanimous ratification would have meant that there were at least two "national" governments (and hence two unions)—one under the aegis of the Constitution and the other under the Articles of Confederation—controlling two separate territories where once there had been one. If, on the other hand, the Constitution's nonunanimous ratification operated to dissolve the Confederation, as a secession or revolution would under Lincoln's theory, then there may have been as many as five governments (and arguably five unions) where once there was one. Each of the four nonratifying states, bound neither to the Constitution nor to the Articles, would have exercised its own sovereign authority.

And as Stampp and others have noted, the Constitution's self-described purpose of forming "a more perfect Union" does little to acknowledge continuity of the Union if one emphasizes the word *form*.[36] Besides, the idea that perpetuity is a necessary adjunct to perfection would seem silly but for the fact that so many intelligent people have recited it. Why might perfection not permit the *abandonment* of old, imperfect forms of association in favor of new and better ones? At the very least, the congruence of perfection and perpetuity needs more than simple assertion to support it.

Third, while Lincoln's contention that he was bound by his oath to protect the national government was probably deep-felt, it was nonetheless incompatible with the text and theory of the Constitution. The oath set out in Article II, Section 1, requires that the president "preserve, protect and defend the *Constitution*" (italics added), not the national government. Lincoln would shortly convert his conflation of national government and Constitution into a hierarchy in which the former was superior to the latter. For example, in justifying his suspending the writ of habeas corpus, he suggested that the preservation of government was the end of constitutionalism, the Constitution itself only a means; thus the Constitution could be suspended in the interest

of the latter. This hierarchy, of course, ran counter to the constitutionalist notion, framed poignantly by Frederick Douglass, that the Constitution and its processes and values were distinct from government, in part because they were designed to serve as standards against which to measure the actions of government.[37] The Constitution may well be an instrument or means, but not in the way that Lincoln suggested.

Fourth, Lincoln's argument from democracy assumed too much in two ways. On the one hand, it assumed that the Constitution had institutionalized a radical form of democratic politics in which majority ruled and minorities must submit. If Lincoln were correct in this regard, then Calhoun's fears of a "national consolidated democracy" were justified. In fact, however, notwithstanding the polity's pretensions to democracy and the South's constant carping about its status in the Union, the Constitution supplied a large number of institutional constraints on majoritarianism. Whatever else it did, the Constitution did not institute radical democracy. In fact, it could not have done so and still been true to either of its prevailing foundational myths.

On the other hand, Lincoln's democratic theory, standing alone, cannot account for a deeply alienated, potentially permanent minority. It is one thing for a democracy to say that the majority's will must govern in most circumstances. It is another for it to insist that on a range of issues going to the heart of a people's constitutive political identities, the people must nonetheless submit. At that point, democracy takes on an authoritarian, totalizing character that may be incompatible with constitutionalism's principle of limits and that radically undermines the conditions under which constitutional attachment can occur. Constitutional politics rests upon authority but is not authoritarian in the sense suggested by Lincoln's claim.

Fifth, then, Lincoln's argument from self-preservation touches one of the deepest, most vexing problems of constitutionalism: Must constitutional government be too weak to preserve itself? I cannot provide a comprehensive answer to such a difficult question in this context, but I might venture two observations that cut against the answer that Lincoln proposes. First, in every iteration of the question, Lincoln presupposed that the issue was fundamentally one involving a challenge to national authority *by violent*

means. It may be that the firebrands of South Carolina dug their own graves on this issue by provoking Lincoln to resist force with force. But had the South Carolinians resisted resorting to violence, they would not have triggered Lincoln's argument from self-preservation, at least not in the form in which he offered it.

The other observation about self-preservation is this: violence to one side, the answer to Lincoln's question is Yes. Plainly, government may coerce obedience when it acts authoritatively and when those upon whom it acts are citizens, denizens, or wards of the polity. But when the people presume to act, not as mere citizens, but as constitutional sovereigns, then government must respect and submit to those people, even to the point of its own dissolution. Otherwise, at least according to the foundational myths that have underwritten the Constitution of the United States, constitution making itself is a theoretical and practical impossibility. There are times when government must permit its authority to be destroyed. Perpetuity is at odds with these notions.

But the profound success of perpetual union has effectively buried part of the American constitutional tradition. Throughout the nineteenth century, secession was a recurrent theme of constitutional arguments, especially in New England. Unhappy over Jefferson's election as president in 1800 and incensed over his purchase of Louisiana from the French three years later (arguing that the nation would soon be overrun with what they termed "negro boroughs"), Federalists in the Northeast began to talk of disunion as early as 1803. The talk intensified after the adoption of the Embargo of 1807, which Federalists considered a threat to Northern capital.[38]

The War of 1812 provoked an especially strong reaction in New England. Some states refused to the United States the use of their militias and discouraged capitalists from lending money to the nation to support the war effort. In December 1814, atop a wave of secessionist sentiment, delegates from Massachusetts, Connecticut, Rhode Island, two counties in New Hampshire, and one in Vermont met in what became known as the Hartford Convention. One month later, they produced a "Report" that detailed the conditions under which they would remain in the Union. These conditions included the adoption of seven constitutional amendments that, ironically for the Federalists, would

have excluded slaves from computations for the apportionment of representation, required a supermajority for the admission of new states, and radically reduced national governmental authority. The Convention's report concluded with a thinly veiled threat to reconvene and proceed with secession if the proposed amendments were not adopted and the War not ended.[39]

Between 1819 and 1821, the admission of Missouri provoked another crisis of faith, both North and South.[40] So did the Mexican War, which invigorated debates over the disposition of the Western territories. These debates in turn provoked threats of secession by the South. And when it appeared in 1850 that California would be admitted as a free state, some Southern radicals, some bent on disunion, called a convention of Southern states for June 1850, though unionist sentiment held sway.

But the most persistent talk of secession, both before and after the Mexican War, came from the Garrisonian wing of the antislavery movement. As early as 1837 Wendell Phillips had anticipated Lincoln's "house divided" speech, warning that the North as well as the South was corrupted by slavery, that the two systems could not coexist, that unless slavery were eradicated "there must grow up a mighty slaveholding State to overshadow and mildew our free institutions." Disunion must follow from Southern supremacy.[41]

Secession was a natural corollary to Garrisonian nonresistance. But though Garrison had repudiated the Constitution in the earliest days of *The Liberator* as "the most bloody and heaven-daring arrangement ever made for the continuance and protection of a system of the most atrocious villainy ever exhibited on earth," disunion did not become an official tenet of Garrisonianism until 1843. Then the Massachusetts Anti-Slavery Society adopted a resolution, championed by Garrison himself, "[t]hat the compact which exists between the North and the South is 'a covenant with death, and an agreement with hell'—involving both parties in atrocious criminality; and should be immediately annulled." At its annual meeting the following year, the American Anti-Slavery Society ratified resolutions encouraging abolitionists "to withdraw from this compact . . . and by a moral and peaceful revolution to effect its overthrow." The Society said the constitutional order was so corrupted by slavery that the only way

for the North to avoid responsibility was to secede. "NO UNION WITH SLAVEHOLDERS!" became the Garrisonian battle cry. As the Mexican War wound down, Garrison intensified his disunionist position in the most impassioned terms.[42]

Garrisonian incitement to secession continued throughout the 1850s. Garrison himself publicly burned a copy of the Constitution in 1854 and proposed a National Disunion Convention in 1857.[43] In 1857 and 1858, there was even more talk of disunion among Garrisonians and among other Northerners outside the Garrisonian camp.[44]

Henry David Thoreau had his own peculiarly individualistic brand of secession. Drawing on transcendentalist moral philosophy rooted in Protestant Christianity, he raised the ultimate question of civic duty: What should be an individual citizen's obligation toward a government that participates in, perpetuates, and promotes the expansion of slavery? Thoreau supplied an answer in his essay on "Resistance to Government." The scope of a citizen's allegiance to government followed from his moral duty as a human being.

> It is not a man's duty, as a matter of course, to devote himself to the eradication of any, even the most enormous wrong; he may still properly have other concerns to engage him; but it is his duty, at least, to wash his hands of it, and, if he gives it no thought longer, not to give it practically his support. If I devote myself to other pursuits and contemplations, I must first see, at least, that I do not pursue them sitting upon another man's shoulders. I must get off him first, that he may pursue his contemplations too.[45]

Here he parted company with Garrison. For to argue, as the Garrisonians did, that Northern states should dissolve the Union was to ignore one's individual moral responsibility. "Why do they [the Garrisonians] not dissolve it themselves,—the union between themselves and the state . . . ? Do they not stand in the same relation to the state that the state does to the Union?" Abolitionists, he said, should not wait for a majority in Massachusetts to secede from the Union. "[A]ny man more right than his neighbors constitutes a majority of one already."[46]

Nor did antislavery secessionism stop at mere talk. The City of Lawrence, Kansas, declared itself independent from the state in

1857. And at least four localities attempted to secede from the South after the start of the Civil War, although they were motivated more by fidelity to the Union than by opposition to slavery. With the help of Union troops, the region we now call West Virginia seceded from Virginia in 1861.[47] In 1861, a unionist meeting in eastern Tennessee called for the secession of that region from the state of Tennessee. The call came to naught.[48] In 1862, citizens in Winston County, Alabama, met to consider declaring the county the "Free State of Winston" but never formally ratified the proposal.[49] And there is a legend that Jones County, Mississippi, seceded from the Confederacy in 1863, declaring itself the "Republic of Jones." In truth, from the beginning of Southern secessions, the people of Jones County displayed a mixture of unionist sentiment and populist opposition to virtually all forms of political authority. And after the War began, the county became a home to anti-Confederate guerrillas. But although it did not formally secede, had it done so, it would have concretely demonstrated a philosophical heritage of sustained lineage.[50]

V.

Political regimes form, they fall apart. Nations are born, they die or break apart. The sun also rises. The very fact of birth or of founding would seem to rebut any pretense of eternal existence. Why should we hold, then, that a union born as recently as 1774 or 1776 or 1781 or 1789 is perpetual? Never mind the arrogance or presumptuousness of the belief. What of its incompatibility with what we see in the world?[51] Impossibility is a substantial problem for any norm or theory that claims to be practical. Moreover, if an impossible norm is essentially a pretext for forcibly maintaining a regime, it threatens to violate Alexander Hamilton's constitutionalist principle of reflection and choice. It is also potentially incompatible with constitutionalism's concern with creating new political orders, for creating new orders requires dissolving old ones. But how?

Political regimes—even constitutional ones, including the United States—arise to some degree from illegality. (That is not to say that they must arise from coercion or violence, although almost all do to some extent.) Their illegality is one characteristic

that distinguishes them, that makes them recognizable as distinct from their predecessors. Were they legal, they would continue to seem part of the existing regime. But as Robert Cover noticed, if the way of founding a new regime resides in illegality (from the standpoint of an existing regime), in acts incoherent or incompatible with the logic of the old regime, it supplies a potential way out of the new regime as well.[52] The illegality for getting in becomes the legality for getting out. That illegality has this capacity lies partly in its authority as precedent.

Precedent is not intrinsically binding. It has no intrinsic moral value, although it may make claims on morality because of its congruence with (or its eventual acceptance as part of) people's felt sense of what is right.[53] To the extent that people rely on that congruence or acceptance to justify a regime, the mode of founding becomes a measure of the regime's legitimacy. In a constitutionalist order, the founding is not simply a brute fact of the matter; it is an event that begs for explanation by any political order that tries to justify itself. This is one reason for the appearance and power of mythical stories of political foundings. The founding, or its story, becomes a means for self-justification. It becomes a part of the logic (or phenomenologic) of the new regime that estops it from denying the constitutional authority of the mode by which it was founded and by which it justifies itself.

In the American context, the need to justify the new constitutional regime fueled debates throughout the antebellum period over the authority of the Constitution, the status of states in relation to the nation, and the role of the people both as authorizers and as participants. The debates were important and persistent, not as academic exercises in the creation of myth and not merely because the character of the American myth was such that the content of the debates revealed (and disguised) what was at stake in justifying the creation and maintenance of the constituted order, but also because the chosen myth was perceived to bind the order itself even when the issue was the very survival of the order. More simply, myth helped describe a logic for exit.

To argue, though, that a myth of the order's creation supplied a logic for getting out only begins the inquiry, for from the beginning there were at least two such accounts competing for primacy.[54] They differed from each other over two fundamental

elements of the story: Who was the creator, and how was the creation accomplished?

VI.

By our present lights, the story that might have seemed most mythically plausible was the familiar federalist account of the founding, which was perfected by John Marshall and extended by Lincoln. Marshall held that the Constitution was a document of special, national significance. Although he conceded that states possessed attributes of sovereignty, the Constitution authorized the nation to supersede the authority of states within certain domains of action. Consequently, the Constitution required a special mode of ratification. It required ratification by the people of the whole nation. Making a nation was an act of sovereignty superior (but not entirely oblivious) to the sovereignty of the people of a state.

Lincoln expanded and intensified the nationalist implication of Marshall's federalism in two ways. First, Lincoln pushed the creation of the nation backward, past the ratification of the Constitution to the adoption of the Declaration of Independence. This permitted him to make a second, crucial move concerning the sovereignty of states. This move resembled Andrew Jackson's claim in the crisis over nullification. Put briefly, in the beginning in North America, there were no states, only dependent colonies. At a critical moment in history, there arose from those colonies a unitary people—a Union—who threw off their bonds of dependence through a Declaration of Independence and forged new collective bonds of independence in the Revolution. The states did not exist until after the formation of the Union. The Constitution reinforced the antecedent bonds of the Union, and states continued to exercise authority under the Constitution, which was basically an instrument of national union.

As Lincoln put it: "The Union is older than any of the States; and in fact it created them as States." Thus "[o]ur States have neither more, nor less power, than that reserved to them, in the Union, by the Constitution—no one of them having been a State *out* of the Union." "Tested by this, no one of our States, except

Texas, ever was a sovereignty. And even Texas gave up the character on coming into the Union."[55]

The logical implication of either version of the federalist myth was that secession could not be accomplished by a mere state, for secession was not a matter of simple separation. It was instead a dissolution of the bonds of nationhood that could not be accomplished authoritatively except by the national people as a whole.[56] But how might the will of the national people be expressed? The institutional possibilities were numerous: the vote of at least a majority of the people in every state,[57] the approval of a majority of the people or of the delegates to conventions in nine-thirteenths of the states,[58] the vote of a majority in conventions or in legislatures of three-fourths of the states,[59] the vote of majorities in both houses of Congress,[60] or most simply the vote of a majority of people in the nation regardless of residence.[61]

As an added protection against precipitous action, one might convert majoritarian decisions in any of the preceding modes into supermajoritarian decisions. Some combination of modes might also have been conceivable. For example, if the *admission* of states to the Union required concurrent ratification of the national legislature and of some representative body of the states to be admitted, perhaps the *withdrawal* of states required some similar expression of concurrent majorities (or supermajorities). Under the most stringent version of concurrent majorities, a majority in Congress would have had to combine with a representative majority in *all* of the states, since all were conceivably affected by any state's withdrawal.

Some version of the federalist myth might well be intuitively appealing to many of us today. But we should remember this about the manner in which myth binds: myths rely for their authority (and therefore their power) on the extent to which they comport with perceived reality, which in turn relies partly on the reality that people *want* to see or believe in. For a variety of reasons, much of the country during the period preceding the Civil War was either unprepared to believe in the federalist myth of the popular founding or unwilling to commit to its nationalist implications.

Despite the nationalist dimensions of proslavery constitutional doctrine after *Dred Scott*, many Southerners and others sympathetic to slavery would have been suspicious of extending nationalist constitutionalism to other arenas. Some may have suspected that a national power strong enough to protect slavery would have also been strong enough to destroy it. For other proslavers, quite happy to indulge in nationalism where slavery was concerned, the impulse for a weak central government persisted for reasons including an inherited Jeffersonian constitutional tradition, a continuing antagonism to Northern capital and its own consistent demand for the assistance of a strong national government, and an intensifying regional identity. The growth of Southern identity cut two ways, depending on context. From within the constitutional union, it supported a distinctly localist constitutionalism, consistent with a tradition traceable to Calhoun and other Southerners; but from an external perspective—external to the Constitution, though internal to the Southern region—it became the foundation for an emergent "Southern nationalism."

Abolitionists and other opponents of slavery also were wary of the implications of nationalism, but for different reasons. First, Marshall's antiseptic myth of the popular founding was largely incompatible with the Garrisonians' pessimistic account of the Constitution as "a covenant with death." Second, and related to the first, lawyers, judges, and even members of Congress who helped enact fugitive slave laws had converted—antislavery constitutionalists would have said "perverted"—nationalism into a tool of "the slave interest." Third, and a consequence of the first two points, opponents of slavery had their own localist constitutional tradition. They wanted a vehicle for mitigating the harsh effects of Taney's nationalist constitutionalism on the issue of slavery, when they did not want a way out of the Union entirely.

Other people, neither proponents nor opponents of slavery, might also have understandably resisted the myth of the popular founding and its implications. As if to emphasize the point, people regularly treated the term used to denominate the nation—the United States—as if it were plural rather than singular.[62] Hence "We the People of the United States" were not necessarily the people of a single union or nascent nation. They were the people of *states*, then united, but perhaps not always so. And

some, including Lincoln, referred to the United States as a "confederacy."[63] Secessionism to one side, the United States was not yet a nation, as late as 1861.[64]

These considerations lent force to the antifederalist story that the founding was an act of sovereign states, or, if popular, an act of the *people* of those states. If the Union had been continuous over time, so this account went, it was not the Union that Lincoln invoked as a device for preventing secession. It was something more closely akin to a Swiss-style confederation of states. And if states (or the people of states) could get into the Union, they could get out as well. But how?

VII.

There were two possible constitutional ways out, both riding atop the antifederalist account of the constitutional founding. The first and most directly constitutional mode of exit was for a convention in each state to adopt an ordinance of secession, just as state conventions over the years had ratified the Constitution as a condition of the admission of states to the Union. South Carolina had employed a convention for proposing its Ordinance of Nullification thirty years earlier, as it had in an abortive attempt to secede in 1852. The state activated the device once more to adopt, on December 20, 1860, its "Ordinance of Secession" "dissolv[ing] the Union between the State of South Carolina and other States united with her under the compact entitled 'The Constitution of the United States of America.'"[65]

As this self-description made clear, South Carolina's account of the origins of constitutional Union rejected any notion that the Constitution was a covenant of a national people. The Constitution was instead a compact, resembling a treaty, among the states and could be rescinded for cause on the motion of one of the states. This account assumed a great deal concerning conventional legal distinctions between a compact or contract (which could be dissolved on the motion of one party in the event of a breach by another) and a national constitution or covenant (which, presumably, could not so easily be dissolved).

In rapid succession during the first two months of 1861, Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas followed

South Carolina's lead. Conventions in each state adopted ordinances of secession dissolving ties between the state and the Union. Eventually, after hostilities erupted, Arkansas, North Carolina, and Virginia followed suit, largely out of a sense of loyalty to the region. Most of the ordinances also included provisions specifically rescinding or repealing prior ratifications of the Constitution and its amendments as well as declarations that the state "resumed" the exercise of what Virginia called "all the rights of sovereignity which belong and appertain to a free and independent State." Some absolved their citizens and public officials of responsibility to abide by their oaths or allegiances to the Constitution of the United States. In an apparent but notoriously vague reference to constitutional rights to own slaves, Mississippi, Louisiana, and Arkansas cautiously ensured that rights acquired and vested under the U.S. Constitution would continue in force despite the repeal of the Constitution within the states' territories. The ordinances of Texas and Virginia were ratified by popular votes. In Texas's case, the referendum was an attempt to cure a defect in the selection of the convention. In Virginia's, it was an expression of the location of sovereign authority.

Within a few days after adopting its ordinance, South Carolina's convention approved a Declaration of Causes justifying the state's secession from the Union. The Declaration provided a list of abuses that were unified by twin themes. First, the states of the North had violated the "compact between the States," thus justifying its rescision. Almost every example of the breach of the compact pertained to slavery. Second, the national government, which was now in the hands of a political party beholden solely to the Northern states, had "become[] destructive of the ends for which it was instituted," thus justifying its "abolition" within the territory of South Carolina and its replacement with a government compatible with principles of self-government. So the two bases for of Southern insecurity, previously distinct, were now joined: self-government (the battle for which on the national level had been virtually lost in the 1830s with the demise of nullification as a plausible constitutional theory) and the protection of slavery (the battle for which seemed about to be lost on the heels of Lincoln's election). Had it been ratified, the proposed Corwin Amendment—which purported to provide perpetual

constitutional protection for slavery—might have partially assuaged fears concerning the latter; but it would not have addressed worries about the loss of self-government, unless slavery had been the sole constitutive characteristic of Southern political identity.[66]

Four of the nine other states that resorted to conventions as vehicles for seceding also recited reasons for their separation. But unlike South Carolina's Declaration, the reasons these other states offered were brief, underdeveloped, and sometimes little more than afterthoughts. Two of the four states, Louisiana and Arkansas, did not directly mention threats to slavery as a justification for secession. Self-government and solidarity with the rest of the region were the most prominent themes, even of the two states, Texas and Alabama, that did recite threats to "property" or to "domestic institutions."

The five other states that seceded by convention did not give any reasons for their action. Perhaps some things, including slavery, had simply ceased to need saying. But why would that have been so? Part of the answer may lie in the character of the device by which secession was accomplished. South Carolina's ambivalent approach to secession—adopting first an ordinance that recited no reasons and then a declaration listing causes—indicated the confusion that some felt over the character of the act. The form of the Declaration of Causes, even some of its language, looked back to the Declaration of Independence, ostensibly an act of *revolution.* Without exception, however, the ordinances of secession appeared in the form of *legal* enactments. They were ratified by the same constitutional, now legal, process defined in the basic law.

Perhaps the "real" impulse for secession was the protection of slavery. Or perhaps it was nothing more than a selfish and petty preoccupation with national political processes: if we cannot nullify your laws, we shall nullify your Constitution. It was the strategy of one who was either dissatisfied with substantive outcomes, which in the Southern case would have been unwarranted, or unwilling to continue to play by basic rules that he perceived to systematically disadvantage him, which had been Calhoun's claim all along. Even so, it was part of a search for a "constitutional" way out of the Constitution. Some might argue that if that were the

character of the act, constitutional *reasons* were required. But it may be the peculiar characteristic of secession as a constitutional device that it needs no substantive justification. It is justified constitutionally if it is compatible with the process by which the Constitution was ratified. If it is the constitutionally defined sovereign act of a sovereign, it is justified by that fact. It needs no further justification.[67]

VIII.

The second way out relied on a different account of the founding. It combined Lincoln's claim that the Union antedated the Constitution with an antifederalist account of the character of that Union. In February 1861, the legislature of Tennessee submitted a proposition to the citizens of the state that would have authorized calling a convention to decide whether Tennessee should secede from the Union. The proposition lost by a vote of 69,675 (55 percent) to 57,798 (45 percent), a fairly substantial margin. The unionists had held the day. But after South Carolinians fired on federal troops at Fort Sumter in April, Lincoln called up a militia of seventy-five thousand troops and declared his commitment to use force to suppress the "combinations" of the states of the Deep South. In Tennessee, unionist moderation succumbed to regional solidarity. In special session in May 1861, Tennessee's legislature ratified a "league" with the Confederacy—whose Congress had approved a new constitution on March 11 and submitted it to the seceded states for their ratification—and adopted a "Declaration of Independence" by which it "dissolv[ed] the Federal relations between the State of Tennessee and the United States of America."[68]

The legislature adopted its Declaration rather than an ordinance of secession out of a quixotic desire to avoid being drawn into debates over "the abstract doctrine of secession." Instead, it chose simply to assert its "right as a free and independent people to alter, reform, or abolish our form of Government in such manner as we think proper." The notion clearly drew part of its force from its association with Thomas Jefferson's Declaration of Independence eighty-five years before. If that association made it appear that Tennessee's Declaration, like South Carolina's Declara-

tion of Causes, was revolutionary instead of constitutional, the appearance rested partly on assumptions about the character of the American Revolution itself. It is tempting to imbibe the myth that the Revolution was part of a new creation, that its aims and principles were universalist innovations made possible because the political world was being reinvented on the North American continent.

In important (perhaps crucial) ways, however, the American Revolution was not so radical at all. For Locke's principles for justifying revolution, which were an unmistakable part of Jefferson's Declaration of Independence, were actually quite conservative. They demanded that acts of resistance would occur not for "every little mismanagement of public affairs" but only after "a long train of abuses."[69] And if Locke's *Second Treatise* was an anticipatory justification for the Glorious Revolution, that event was hardly revolutionary and was "glorious" only in that it efficiently replaced one monarchical house with another without the spilling of blood.

Second, notwithstanding Jefferson's maxim prohibiting revolution for "light and transient causes," it is striking just how insubstantial some of the causes for the Revolution now seem and how conservatively most of the revolutionaries framed their demands. The claims of the colonists were primarily claims about self-government and the proper nature of representation under the British Constitution. They were demands that the colonists be accorded the rights of British subjects.[70] The Revolution was less a revolution than a constitutionally justified secession that could not be accomplished without the assistance of arms. Edmund Burke may have been right: the colonists in separating were being truer to principles of the British Constitution than were the British themselves.[71] In drawing on that aspect of the American Revolution, Tennessee's Declaration of Independence may have been similarly true to principles of the Constitution and of constitutionalism.

Nevertheless, there was one aspect of Tennessee's Declaration that distinguished it from Jefferson's and emphasized its constitutional character. Like most of the ordinances of secession, Tennessee's Declaration offered no reasons to the world, candid or otherwise. It was not a justification to (or from the perspective

of) the outside. It was a simple statement, as if for consumption from the inside. It contained no argument. It opened with a terse statement of the source of its authority ("We, the people of the State of Tennessee"); it "abrogated and annulled" all prior "laws and ordinances by which the State of Tennessee became a member of the Federal Union of the United States of America"; and it "resume[d] all the rights, functions, and powers which . . . were conveyed to the Government of the United States." It did not say so, but it might have traced its constitutional pedigree to the principle textually embodied in the Constitution's Tenth Amendment.[72] It was, or purported to be, an authoritative statement of the political rights of the people and state of Tennessee. As confirmation of its self-stated authority, the citizens of Tennessee ratified it in a popular referendum by a margin of 104,913 (69 percent) to 47,238 (31 percent). Like the ordinances, it required no further justification.[73]

These secessions were constitutional not simply because of their method, by which an ostensible sovereign was acting in a manner consistent with constitutional precedent (consistent, that is, with the logic of the existing order). Nor were they constitutional simply because of their subject matter, which pertained to the deconstitution and reconstitution of a people. They were also constitutional in their aims. Many in the South argued that their purpose in seceding was either to recapture or to secure rights that they thought had been lost or were in jeopardy under the Constitution of the United States, just as one aim of the Revolution had been to secure for Americans the rights of British subjects. Secession was their way of recovering *their* constitution.

In their ordinances of secession, the conventions of Alabama and Mississippi authorized their states to become part of a new "Federal Union," formed "upon the principles of the Constitution of the United States."[74] Perhaps not surprisingly, the Constitution of the Confederacy was almost identical to the Constitution of the United States, except for a couple of items that the Confederate framers would not permit to go without saying. First, the sovereign authority for the Confederate Constitution was expressly acknowledged to derive from "the people of the Confederate States, *each State acting in its sovereign and independent*

character"[75] (italics added). Second, "the institution of negro slavery" was guaranteed national constitutional protection without euphemistic evasion.[76] Third, and ironically, the Confederate Constitution took as its explicit purpose "to form a permanent government."[77]

IX.

There would seem no stronger example of the failure of a constitution than that one or more ostensibly constituent parts of the regime that it formed and regulated would separate from the whole by dissolving the political ties that once bound it. Even if carried out peacefully, such a separation clearly evinces a failure of the constitutional order. But the failure of the order is not necessarily a failure of the Constitution or of constitutionalism (the principles that undergird the constitutional enterprise). On the contrary, secession may well signal the *success* of constitutionalism and of the Constitution itself. It does so if, drawing on Alexander Hamilton's maxim in *Federalist*, No. 1, it permits the *de*constitution of politics through "reflection and choice" rather than through "accident and force."

To press the point to conclusion, let me return to the five characteristics that make the Southern secessions such hard cases, at least for one who would defend the constitutionality of secession. The first problem is that the text of the Constitution did not explicitly authorize separation. As I have indicated, however, the "right" to secede does not depend upon text for its authority. Text may supply evidence of such a right, but it is not a prerequisite.[78] In some respects this claim is parallel to the notion that certain rights and principles may be binding despite their absence from explicit constitutional text.[79] But secession can cut more deeply than some such rights or principles because its justification arises directly from the authority of a constitution itself. This authority is pretextual, not in the sense that it is insincere (though it might be), but because it is theoretically (perhaps temporally) prior to the constitution. I have tried to show in this essay how that logic works generally and how it worked specifically in the American case.

Second, if my account is apt, secession is permissible if the order is constitutionalist in the sense of its being an autochthonous principled order, if it is democratic with respect to political process, or if it is liberal in respecting particular rights of individuals.[80] Similarly, secession is permissible even if the regime sees itself as the last best hope on earth for limited self-government or imagines itself to be an expression of divine will or a manifestation of moral righteousness.

We might consider, for example, other self-governing (though not necessarily constitutionalist) institutions that have been able to persist and flourish despite the success of secessionist movements. The Christian schism from Judaism did not spell the end of the latter, though it is true that many Christians through the ages have sought to eradicate Jews. Nor did the Protestant Reformation destroy Roman Catholicism. Nor, to press the point homeward, did the eighteenth-century American secession incite the demise of Great Britain. The point, however, is not whether constitutionalism (whether democratic, liberal, or other) is desirable but whether any particular order is entitled to a presumption of permanence strictly because it happens to be constitutionalist (whether democratic, liberal, or other). It is not. Constitutionalist orders are entitled to defend themselves against certain sorts of challenges—violent, for example, or lacking authority—to their existence. But they are required to respect other challenges that are consistent with constitutionalist process and with the authority on which the orders themselves rest.

The third characteristic that makes the Southern secessions hard cases is that they were unilateral. As I have argued, however, unilateral secession is permissible on at least one understanding of the authority of the Constitution of the United States. That understanding was dominant in the country in the nineteenth century. This claim of dominance does not rest on a philosophical commitment to antifederalism; for purposes of this study, I am agnostic as between the federalist and antifederalist accounts of the Constitution's authority. The claim rests instead on a reading of nineteenth-century American political culture, a culture in which two myths, each of which was logically possible, vied with each other for primacy. On the antifederalist account, the Constitution's authority derived from a compact among antecedent

sovereigns whose sovereignty was not dissolved (though it was limited in certain domains) by ratification of the Constitution; consequently, those sovereign entities could withdraw from the compact on their own motion. Again, this was not the only theory in play; but, on my reading, it was the dominant one; and it was the one that the regime itself relied upon generally (though, history being messy, there were exceptions to this reliance). This, to paraphrase Robert Post, does shatter a collective national agency, an agency established for important purposes. But the dominant understanding of the character and authority of the constitutional founding leads me to conclude that the collective national agency, whose authority derived from that founding, was constitutionally obliged to accede to these unilateral secessions, precisely because they were consistent with the agency's own authority.

The fourth difficulty the secessions present is that some of them were perpetrated without the decency of reasons. I confess admiration for the giving of reasons generally and worry about consequences of not doing so. I also confess, however, that as long as the authority of an order is framed in terms of sovereignty, as it usefully has been in the American case, I see no logical requirement for giving reasons *when the sovereign speaks as sovereign.* This is the authority of God with respect to the creation of the cosmos; it is also the authority of the "mortal God" with respect to the constitution of politics. There may be, lurking in shadows that point toward the future, a brave new world in which the people who are governed are not—theoretically or practically—the sovereign authors of their government, but I am not confident that it is a constitutionalist world.

The final difficulty is the most uncomfortable one. It is that the secessions of the Southern states aimed at protecting slavery, which is wrong by our lights. That fact makes the Southern secession appear not only perverse but morally bankrupt. There are several things to say about this. The first is that slavery is inconsistent with constitutionalism. It is so, not because slavery denies human dignity nor because it is incompatible with the metaphysic that posits a property in one's person and labor, but because it denies slaves the means to attach to the constitution that presumes to bind them. It denies them these means as a political

matter, as a matter of material economy, and as a psychological matter.

Second, however, the Constitution and constitutional order of the United States violated this principle of constitutionalism. They did so through explicit but euphemistic support in the constitutional text, through policies of the nation and states, and through decisions of the Supreme Court of the United States. If the Southern secessions were impermissible because they aimed to perpetuate slavery, so too was the colonial secession from Britain, and so was the Constitution itself.

Third, until the end of the Civil War, Abraham Lincoln's constitutionalism reinforced this violation. He was, of course, no abolitionist, despite Southern paranoia on the point. The thrust of his position on the territories was that they might elect to protect slavery after they were admitted to the Union.[81] He plainly supported the Corwin Amendment—proposed by Congress and ratified by three states that would soon fight on the side of the Union—which would have perpetually prohibited Congress from interfering with slavery. In his First Inaugural Address, Lincoln said the proposed amendment was already "implied constitutional law" but that he had "no objection to its being made express, and irrevocable."[82] And his Emancipation Proclamation, if legal, freed slaves everywhere in North America except in the Union.[83] Lincoln, like most white Northerners of his time, loved the Union more than constitutionalism.

Thus, but for the Civil War, slavery likely would have persisted, protected in the South without or within the Union, although many Southerners feared things would be otherwise. Slavery might not have survived in perpetuity, as its proponents imagined in 1860–61. It might have lasted "only" one hundred years, which Lincoln said he was willing to tolerate.[84] But it would have persisted had secession never been dreamed or attempted.

That secession in the United States was ultimately used to attempt to support and perpetuate a system of slave labor, however, was not predestined. It was historically contingent on a number of factors, including patterns of immigration and settlement, the remarkable success of Northern capital, and political and cultural developments both planned and unexpected. There were times in the country's history that the movement for secession

was every bit as strongly and conscientiously pursued in New England as it was in the South.[85] Had New England seceded to form a slaveless commercial republic, or had the Garrisonians persuaded the North and West to secede and establish a new republic of free citizens, we might well now view secession as an institution of liberty and righteousness. In American constitutional thought, it might have become a sword against tyranny and oppression, as John Brown certainly intended his foray at Harper's Ferry.

We should frankly acknowledge, however, that constitutions can help form us without making us good (or liberal). Some constitutions might well help make people better, even good, and perhaps not solely by accident or force. But they do not *have* to do so. Similarly, as a constitutional institution, secession might make a people better, but there is no guarantee. Given people's temptations to violence and destruction, not to mention their propensity for short-sightedness and miscalculation, the constitutional possibility of secession may be valuable if it makes the disintegration of politics somewhat safer for human beings. Some have argued that one aim of liberalism is to lower the stakes of politics in order to make it safer for human habitation. Secession may serve a similar function in reverse. Instead of lowering the stakes of politics and political and constitutional debate per se, the constitutional possibility of secession might ironically help to raise them. It might do so because it can lower the stakes of political disintegration, so that nations break apart without disaster. But if the possibility of secession does not raise the stakes of politics, even if it does debase them, that does not make it any less constitutional.[86]

NOTES

1. Quotations come from Professor Post's comments at the annual meeting of the American Society for Political and Legal Philosophy, January 3, 2001, San Francisco. In general terms, his position derives from the confluence of democracy and community as constitutional domains. See Robert C. Post, *Constitutional Domains: Democracy, Community, Managemeni* (Cambridge, Mass.: Harvard University Press, 1995), 3–10. More

specifically, see Post, "Democratic Constitutionalism and Cultural Heterogeneity," *Australian Journal of Legal Philosophy* 25 (2000): 185.

2. In American constitutional thought, James Madison noted the virtues of social diversity. See, for example, Madison, *The Federalist,* No. 10 (1787). See also Walt Whitman's paean to disharmony: "Do I contradict myself? / Very well then I contradict myself." Whitman, *Song of Myself* (1858). On the value of cross-cutting cleavages, see E. E. Schattschneider, *The Semi-Sovereign People: A Realist's View of Democracy in America* (New York: Holt, Rinehart and Winston, 1960).

3. Cass Sunstein, "Constitutionalism and Secession," *University of Chicago Law Review* 58 (1991): 633.

4. *Texas v. White,* 74 U.S. 700 (1869). This decision was an attempt to harmonize Lincoln's theory of the Union with the radical Congress's policy of Reconstruction. Because the two were irreconcilable, however, the opinion is fundamentally incoherent and—putting aside questions about the bindingness of judicial pronouncements of constitutional principles—of little value.

5. Akhil Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96 (1987): 1455–62. For reasons set out more fully below, while Amar's claim is constitutionally defensible, it is in important respects a twentieth-century imposition on nineteenth-century constitutional thought.

6. See Mark E. Brandon, *Free in the World: American Slavery and Constitutional Failure* (Princeton, N.J.: Princeton University Press, 1998), 10–11.

7. Alexander Hamilton, *The Federalist,* No. 1 (1787).

8. Akhil Amar, "Some New World Lessons for the Old World," *University of Chicago Law Review* 58 (1991): 486.

9. Amar seems to treat Lincoln's observations in his First Inaugural Address as dispositive of the geopolitical feasibility of the secession of the Southern states. Ibid., 490–91. While such a conclusion is sustainable only by supplying substantially more evidence and argument than Amar or Lincoln supplies, it is beyond my purpose to address the issue in greater detail here.

10. Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, Colo.: Westview Press, 1991).

11. See S. James Anaya, "Self-Determination as a Collective Human Right under Contemporary International Law," and Diane F. Orentlicher, "International Responses to Separatist Claims," both presented at the annual meeting of the American Society for Political and Legal Philosophy, January 3, 2001, San Francisco. See also Jonathan I. Charney and J. R. V. Prescott, "Resolving Cross-Strait Relations between China and Taiwan," *American Journal of International Law* 94 (2000): 453. The challenge for international law, as I see it, is fourfold: (1) it lacks an

established mechanism for generating authoritative norms; (2) it is conflicted over where sovereignty resides (i.e., whether in people or in the state); (3) it is conflicted over the criteria for establishing sovereignty (i.e., whether sovereignty is a function of power or of authority); and (4) it lacks an adequate institutional means for enforcing norms. These deficiencies may be remediable at some future time; for now, however, they weaken international law's claims to effective authority.

12. James M. Buchanan, "Europe's Constitutional Opportunity," in *Europe's Constitutional Future,* ed. Graham Mather (London: Institute for Economic Affairs, 1990), 4–7.

13. Ibid., 7–9. To confirm the essentially economic foundation for Buchanan's position, see James M. Buchanan and Roger L. Faith, "Secession and the Limits of Taxation: Toward a Theory of Internal Exit," *American Economic Review* 77 (1987): 1023.

14. Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, N.Y.: Cornell University Press, 1947), 67–92.

15. A word of caution: in much of the theoretical and comparative literature on secession, *national* refers to separatist movements, which are sometimes impelled by ethnic, national identities against an established "state." To flirt with confusion, I shall follow here American constitutional usage, in which *national* connotes interests, values, or government of the United States; its antonym refers to local or sectional interests or values, which are often embodied, institutionally, in "states."

16. Jesse T. Carpenter, *The South as a Conscious Minority, 1789–1861* (1930; reprint, Columbia: University of South Carolina Press, 1990), esp. 181–84, 190–94.

17. David Hume, "Of the Original Contract" (1748), Essay 12, in *Social Contract: Essays by Locke, Hume, and Rousseau,* ed. Ernest Barker (Westport, Conn.: Greenwood Press, 1948), 155–56.

18. As to the latter, see Chief Justice Warren's plurality opinion in *Trop v. Dulles,* 356 U.S. 86 (1958), 101–3.

19. Kenneth Stampp, "The Concept of a Perpetual Union," *Journal of American History* 65 (1978): 28–29.

20. Ibid.

21. Cited in ibid., 30–31.

22. Andrew Jackson, "Proclamation by Andrew Jackson, President" (December 10, 1832), in *A Compilation of the Messages and Papers of the Presidents, 1789–1897,* vol. 2, ed. James D. Richardson (New York: Bureau of National Literature, 1896), 640–56.

23. Arthur Bestor, "State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine," *Journal of the Illinois State Historical Society* 54 (1961): 119; Stampp, "The Concept."

24. The rejections, for the most part, were justified. Although constitutionalism may permit nullification or concurrent majorities, it does not require them. Moreover, with limited exceptions, neither institution is supported by the text of the Constitution or the logic of the American order. (Among the exceptions are the amending process of Article V, the election of the president in Article II and the Twelfth Amendment, and the institution of judicial review.)

25. Madison and Livingston had argued almost thirty years earlier that states were obliged to respect decisions of the United States Supreme Court, while the Southern nullifiers were attacking the Court. By 1860, ironically, the South was fully committed to upholding *Dred Scott* while Northern abolitionists were talking of flouting the decision.

26. This belief was not necessarily inconsistent with the fear that appeasement by the nation on the question of slavery would derail secession. For example, secessionists might have worried that the motives for appeasement were weak, insincere, or short-lived, or that parchment guarantees would henceforth be so weak that as soon as the movement for secession was stopped, pressures on Southern institutions would revive.

27. Abraham Lincoln, "First Inaugural Address—Final Text," in Abraham Lincoln, *The Collected Works of Abraham Lincoln,* vol. 4, ed. Roy P. Basler (New Brunswick, N.J.: Rutgers University Press, 1953), 264.

28. Abraham Lincoln, "Message to Congress in Special Session" (July 4, 1861), in Lincoln, *Collected Works,* vol. 4, 421. Lincoln offered two additional claims in his "Message to Congress." The first was an invocation of the slippery slope: if one state can secede, then all might secede; where will it end and who will pay the bills? (436). The second raised the improbable specter of the destruction of republican government: the national government is obliged to guarantee to the states a republican form of government; however, if the states secede, they might adopt nonrepublican institutions at some time in the future; therefore, the nation is obliged to prevent the possibility (440). Because these claims are exceedingly weak, I shall not answer them in this essay.

29. Lincoln, "First Inaugural Address," 264–65.

30. Ibid., 264–65.

31. Ibid., 270, 271.

32. Lincoln, "Message to Congress," 439.

33. Ibid., 426.

34. Lincoln, "First Inaugural Address," 265–67. At one point in his final text, he inserted the word *revolutionary* in place of *treasonable,* which he had used in his first draft (cf. 253 and 265). It is not entirely clear whether he considered secession carried out without violence to be revo-

lutionary. There are intimations in his First Inaugural that he did and that the secession of the states of the Deep South was simply unjustified revolution (267). He reiterated these intimations in Lincoln, "Message to Congress," 432–34.

35. Compare the Federal Republic of Germany's Basic Law, which explicitly provided for its own death upon reunification but did not die, with the Articles of Confederation of the United States, which proclaimed a "perpetual" Union but did die.

36. See the helpful discussion on some of these questions in Stampp, "The Concept," 8–9. Stampp notes that some of the Constitution's framers, attempting to avoid responsibility for dissolving the Union, argued that the Union had already been "destroyed by the failure of certain states to respect their obligations under the Articles of Confederation."

37. Lincoln, "Message to Congress," 429–30; Frederick Douglass, "Comments on Gerrit Smith's Address" (March 30, 1849), in *The Life and Writings of Frederick Douglass,* ed. Philip S. Foner (New York: International Publishers, 1950), 374–79. Lincoln's nationalist hierarchy has been repeated by others over the years. See, for example, Herbert D. Croly, *The Promise of American Life* (New York: Macmillan, 1909), 75, 77. Croly's devotion to nation stemmed partly from what he considered the intrinsic value of the Union, partly from his contention that devotion to the Union was also devotion to another good—democracy. Both notions, for different reasons, are problematic. See also Nevins's claim that whatever else the Civil War might have accomplished, it was justified because it saved the Union. Willard L. King and Allan Nevins, "The Constitution and Declaration of Independence as Issues in the Lincoln-Douglas Debates," *Journal of the Illinois State Historical Society* 52 (1959): 7. But see David Donald, "Died of Democracy," in *Why the North Won the Civil War,* ed. David Donald (Baton Rouge: Louisiana State University Press, 1960), 79.

38. William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848* (Ithaca, N.Y.: Cornell University Press, 1977), 107–8; Stampp, "The Concept," 23–25.

39. "Report of the Hartford Convention" (1815), in *American History Leaflets, Colonial and Constitutional,* ed. Albert Bushnell Hart and Edward Channing (1906), no. 35, 1–2, 25–27.

40. Stampp, "The Concept," 25–26.

41. Wendell Phillips, "The Right of Petition," speech at Quarterly Meeting of the Massachusetts Anti-Slavery Society (March 28, 1837), in Wendell Phillips, *Speeches, Lectures and Letters* (Boston: Lothrop, Lee and Shepard, 1891), 4–5.

42. Walter M. Merrill, *Against Wind and Tide: A Biography of William Lloyd Garrison* (Cambridge, Mass.: Harvard University Press, 1963), 204–14. See also Truman Nelson, ed., *Documents of Upheaval: Selections from William Lloyd Garrison's "The Liberator," 1831–1865* (New York: Hill and Wong, 1966), 202–7; Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, Conn.: Yale University Press, 1975), 170; Louis Filler, *The Crusade against Slavery, 1830–1860* (New York: Harper and Brothers, 1960), 178; David M. Potter, *The Impending Crisis, 1848–1861* (New York: Harper and Row, 1976), 48.

43. See Filler, *Crusade against Slavery*, 205–6, 216.

44. Ibid., 258–59, 303. Filler's assertion that by 1857 disunion was a "popular northern view" is overstated but rightly emphasizes that secessionism was not simply a Southern phenomenon.

45. Henry David Thoreau, "Civil Disobedience" (1849), in *Walden and Other Writings by Henry David Thoreau,* ed. Brooks Atkinson (New York: Random House, 1950), 642.

46. Ibid., 643, 645, 651.

47. James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (New York: Oxford University Press, 1988), 297–99.

48. Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper and Row, 1988), 13.

49. Samuel A. Rumore, "Building Alabama's Courthouses: Winston County," *Alabama Lawyer,* November 1989, 320.

50. Richard Aubrey McLemore, ed., *A History of Mississippi,* vol. 1 (Hattiesburg: University and College Press of Mississippi, 1973), 518–25; Rudy H. Leverett, *Legend of the Free State of Jones* (Jackson: University Press of Mississippi, 1984).

51. Rousseau put it this way: "If we would set up a long-lived form of government, let us not even dream of making it eternal. If we are to succeed, we must not attempt the impossible, or flatter ourselves that we are endowing the work of man with a stability of which human conditions do not permit." Jean-Jacques Rousseau, *Social Contract,* book 3, chap. 11.

52. Robert M. Cover, "Foreword: NOMOS and Narrative," *Harvard Law Review* 97 (1983): 15–16. Although Cover refers to secession as "revolutionary" (23–24), secession sometimes also derives from the same "jurisgenerative" properties that he associates with acts of interpretation (albeit extrainstitutional acts). At the very least, the impulse to secession derives from the same impulse that produces jurisgenerative interpretations.

53. In this context, *precedent* might refer either to the process of relying on previously established outcomes or to the substantive outcomes themselves. Or it might refer to some combination of the two.

54. A myth is in one sense partly a fiction or an illusion. Nevertheless, it is a story that people take to be true about themselves or their origins. In this latter sense, myth becomes, in Mircea Eliade's words, an "exemplary model." See Wendell C. Beane and William G. Doty, eds., *Myths, Rites, Symbols: A Mircea Eliade Reader,* vol. 1 (New York: Harper and Row, 1975), 2–3. It becomes a story that, while perhaps not literally true, is to be made true in people's actions, including people's attempts to (re-)create themselves.

55. Lincoln, "Message to Congress," 433–35.

56. *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264 (1821), 413–14.

57. This was consistent with Lincoln's conclusion that Article VII required unanimity.

58. This mode would have been consistent with Article VII.

59. This mode would have been consistent with the procedures set out in Article V.

60. Hortensius (1814), in Stampp, "The Concept," 24.

61. No one suggested this as a mode for authorizing secession, and it would have had little foundation in the constitutional text.

62. Concededly, such usage could simply be a holdover from British usage or could be explained in other ways. It is possible, after all, for language to explain too much. But the usage is suggestive. See James M. McPherson, *Abraham Lincoln and the Second American Revolution* (New York: Oxford University Press, 1990), viii.

63. Abraham Lincoln, "Reply to the Illinois Delegation" (March 5, 1861), in Lincoln, *Collected Works,* vol. 4, 275.

64. McPherson, *Abraham Lincoln,* viii.

65. "An Ordinance to dissolve the Union between the State of South Carolina and other States united with her under the compact entitled 'The Constitution of the United States of America,'" in Albert Bushnell Hart and Edward Channing, eds., *Ordinances of Secession and Other Documents, 1860–1861,* American History Leaflets, no. 12 (New York: A. Lovell, 1897), 3.

66. On the Corwin Amendment, see Mark E. Brandon, "The 'Original' Thirteenth Amendment and the Limits to Formal Constitutional Change," in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment,* ed. Sanford Levinson (Princeton, N.J.: Princeton University Press, 1995).

67. See Exodus 3:13–14: Then Moses said to God, "If I come to the people of Israel and say to them, 'The God of your fathers has sent me to you,' and they ask me, 'What is his name?' What shall I say to them?" God said to Moses, "I AM WHO I AM." And he said, "Say this to the people of Israel, 'I AM has sent me to you.'"

68. Hart and Channing, *Ordinances of Secession,* 1–2, 16, 19; Ralph A. Wooster, *The Secession Conventions of the South* (Princeton, N.J.: Princeton University Press, 1962), 179–80.

69. John Locke, *Second Treatise of Government,* ed. C. B. Macpherson (1690; reprint, Indianapolis: Hackett, 1980), sec. 225.

70. Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969), 3–17.

71. Edmund Burke, "Speech for Conciliation with the Colonies" (March 22, 1775), in *Burke's Speech on Conciliation with America,* ed. Hammond Lamont (1897), 19–20. David A. J. Richards argues that the Revolution was basically a dispute over interpretation of the English "constitution." See his *Foundations of American Constitutionalism* (New York: Oxford University Press, 1989).

72. Louisiana's declaration was explicit on this point.

73. Hart and Channing, *Ordinances of Secession*; Wooster, *Secession Conventions,* 188.

74. Compare Marshall L. DeRosa's account of the "American" origins of the Confederate Constitution. He argues that the political theory of the secessionists was essentially antifederalist and that "the fundamental constitutional principle that distinguishes the C.S.A. Constitution from the U.S. Constitution is the locus of sovereignty." DeRosa, *The Confederate Constitution of 1861: An Inquiry into American Constitutionalism* (Columbia: University of Missouri Press, 1991), 5, 120, et seq. My differences with DeRosa are subtle but significant. First, the Southern romance with the antifederalists was deeply ambivalent, especially after *Dred Scott,* as Southerners came increasingly to a nationalist stance on questions pertaining to slavery. Second, although a conception of sovereignty was important to Southern constitutional identity, it was not the sole principle distinguishing it from Northern identity. The division between the constitutions of the United States and the Confederacy occurred along two axes. One was sovereignty. The other was slavery. (And within the orbit of these two issues were constitutional questions concerning congressional authority and the character of citizenship.) While the Constitution of the United States was not opposed to slavery, even by prevailing Northern interpretations, its proslavery elements tended to be interpreted as localist, not nationalist. It was precisely on this point that Taney's opinion in Dred Scott drove a wedge between Northern and Southern constitutional cultures. The eventual nationalist stance of some Southerners on slavery was ratified in the Confederate Constitution. Third, therefore, the secession of the Southern states and the formation of a new Confederate nation can be understood not merely as antifederalist but also as compatible on some fronts with federalist philosophy.

75. Constitution of the Confederate States of America, Preamble.

76. Ibid., Article IV.

77. Ibid., Preamble.

78. I am tempted to the position that an explicit textual provision denying a right to secede would be of no effect. This is only a temptation, however, and in any event the justification for the position would take me beyond the confines of this essay, so I shall not pursue it here.

79. A complete account of this position would require a theory of constitutional interpretation, which I shall refrain from offering here. Suffice it to say that some rights or principles may be binding, despite their absence from constitutional text, because they are necessary to, presupposed by, or logically entailed in other (explicit) rights or principles.

80. With respect to liberalism, one contrary position I have heard is that the appearance of the Bill of Rights renders illegitimate any antifederalist account of the origins of the American order. The point of this position, if I understand it correctly, is that the antifederalist myth makes it too easy to leave a liberal order and therefore to forsake rights. I believe this position is misguided in several respects. First, as an historical matter, it overlooks the fact that antifederalists were instigators and authors of the proposals that became the Bill of Rights. That fact, of course, does not make the Bill of Rights the property of antifederalists; but it does suggest that the Bill of Rights was not the exclusive property of the federalists. Second, in the years before the Civil War, the first eight (or ten) amendments to the Constitution were consistently interpreted to be limits on the national government, not the states. This reading, by federalists and antifederalists alike, not only did not bar but positively reinforced an antifederalist gloss on a significant part of the Constitution. Third, the Bill of Rights was a quirky quilt of provisions, some significant and others less so. Thus, even if one is committed to the ontological primacy of liberal rights, the Bill of Rights is not the only or even the most sensible or powerful expression of those rights. It is possible to imagine, then, a secession that could produce a new order improving on the Bill of Rights from a liberal perspective. It is possible to imagine, moreover, that an antifederalist approach to secession could protect (or disregard) rights of individuals just as well as a federalist approach. Fourth, if the response to the preceding point is that liberalism entails (or follows from) the primacy of nation-statism, then liberalism, to that extent, is anticonstitutionalist. Fifth, the liberal position I have described seems to presuppose either a metaphysic in which the point of any political order must be to protect individual rights or a "ratchet" theory in which political change that might abjure extant rights is prohibited. There are several

things to say about this position. First, as I have already suggested, there might be many ways to protect liberal rights, including ways that abandon parts of the Bill of Rights. Second, and regardless, we cannot assume anything about the character or status of rights in a new regime from the mere fact that its existence is traceable to a secession or from the fact that the secession is achieved by a particular mode. Finally, and more fundamentally, once a secession occurs, there follows an opportunity for reconstitution. Constitutionalism imposes some limits on what the new order may embrace if it is to be a constitutionalist order, but the limits are not those of liberalism; the opportunity for reconstitution is autochthonous and radical. These facts suggest that the constitution of a new order is a fearsome undertaking, fraught with danger and possibility.

81. For a general discussion of Lincoln's position, see Brandon, *Free in the World,* 116–34.

82. Lincoln, "First Inaugural Address," 270.

83. Lincoln, "Preliminary Emancipation Proclamation" (September 22, 1862), in Lincoln, *Collected Works,* vol. 5, 433–36; "Emancipation Proclamation" (January 1, 1863), *U.S. Statutes at Large,* vol. 12, 1268–69.

84. Lincoln, "First Joint Debate (Ottawa) and Fourth Joint Debate (Charleston)," in *Political Debates between Abraham Lincoln and Stephen A. Douglas* (Cleveland, Ohio: Burrows Brothers, 1894), 94, 188–89. One hundred years roughly corresponds to the period after which most forms of legal racial segregation were abolished and sharecropping declined as a form of economic organization.

85. Filler, *Crusade against Slavery,* 303.

86. This chapter draws substantially from Mark E. Brandon, *Free in the World: American Slavery and Constitutional Failure,* (Princeton: Princeton University Press, 1998). Thanks to Princeton University Press for permission to use portions of that argument.