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## THE SECESSION TRADITION IN AMERICA

*Donald W. Livingston*

The United Nations Charter asserts the self-determination of peoples as a fundamental human right. From this, there has developed a lively debate among international jurists about whether the right of self-determination includes a right of legitimate secession.<sup>1</sup> But while the concept of legitimate secession is being explored in the world at large, it forms no part of contemporary American political discourse. There was a time, however, when talk about secession was a part of American politics. Indeed, the very concept of secession and self-determination of peoples, in the form being discussed today, is largely an American invention. It is no exaggeration to say that the unique contribution of the eighteenth-century American Enlightenment to political thought is not federalism but the principle that a people, under certain conditions, have a moral right to secede from an established political authority and to govern themselves. In what follows I would like to sketch out this all-but-forgotten American political tradition.

The English verb "to secede" comes from the Latin "sece-dere," meaning any act of withdrawal. The exclusively political connotations that govern the term today are peculiarly American, and do not appear in English until the early nineteenth century.<sup>2</sup> Prior to then, one could speak of the soul seceding from the body; or of seceding from one room of a building to another; or of seceding from any sort of human fellowship. The latter is how "secession" was defined in Samuel Johnson's Dictionary in the mid-eighteenth century. But Johnson did not capture the Scottish use of the term.

The Church of Scotland split in 1733. Those who left called themselves "seceders" and the resulting Church the "Secession Church." The Church went by this name for more than a century, during which time it split again, but was reunited in 1829 under the disarming name of the "United Secession Church." The seceding self-governing religious community paved the way for the seceding self-governing political community and the term as we understand it today. One of the first to use the term in this new and exclusively political way was Thomas Jefferson, who, in 1825, retrospectively described the colonies as having seceded from the British Union.<sup>3</sup>

The word "secession," for us, not only has exclusively political connotations, it is a term that marks out a peculiarly modern political act. But this is not obvious, for it might be thought that as long as there have been large-scale political regimes, peoples have sought to withdraw from them. It could be said that the Israelites seceded from Egypt, or that Melos unsuccessfully sought to secede from the Athenian League. We can, of course, speak in this way, but the concept of secession, as understood in contemporary political discourse, is more specific in its meaning. Secession, for us, presupposes the background of the modern state, and this sort of state is only about two centuries old. So secession is not just any kind of political action; it is the withdrawal of a people from a modern state under the moral principle of the right of self-government, and such that the separation requires the territorial dismemberment of that state. The Israelites and Melos were not separating from a modern state, and their withdrawal would not have resulted in the territorial dismemberment of such a state.

The modern state has been theorized in such a way as to entail a strong presumption against secession. It has been said that the sovereignty of a modern state cannot be divided, and that sovereignty is co-extensive with

territory. There has been no difficulty in allowing that a modern state can expand its territory and sovereignty, but it cannot allow itself to be dismembered by a supposed right of a people to self-government. Anyone who takes secession seriously as a possibility is necessarily throwing into question the legitimacy of the modern state.

At the time of William the Conqueror, Europe was composed of thousands of independent political units; today there are only a few dozen. This massive centralization and consolidation was accomplished mainly by conquest. The result was that dukedoms, margraviates, small republics, principalities, free cities, and baronies, (not to mention peoples speaking different languages, having different cultures and religions, and pursuing different visions of the human good) were crushed together into the modern state. This state was inherently unstable. A solution was theorized by Hobbes, who postulated a sovereign office whose task was to establish a rule of law which allowed individuals to pursue their own power and glory in that domain in which the law is silent. In time, a modern state came to be seen as an association to protect the rights of individuals, and this added a stronger presumption against secession, because any right of a people to secede could only be the aggregate right of a set of individuals. But if one set could secede, any other set or subset -- down to one individual -- could secede. An acknowledged right of secession would mean the unravelling of the modern state.

But to affirm a right of secession is not to say that secession is morally justified under any conditions, but only that there can be conditions under which it is justified, and even then there might be reasons for not exercising the right. But those philosophers who first theorized the modern state (Hobbes, Locke, Rousseau, and Hegel) do not so much as raise the question of whether such conditions are possible. Their main task is to understand and legitimate the modern state; the problem of secession simply never occurs to them. And political philosophers since have followed in their steps. John Rawls, for instance, dismisses the possibility of secession without argument.<sup>4</sup> Secessionist discontent, though a pressing fact of contemporary political life, is the most under-theorized concept in political philosophy. Political scientists and international jurisprudence have taken up the question, but philosophers have not. There is only one book length study by a philosopher on the question of whether secession is ever morally legitimate.<sup>5</sup>

One indication of this under-theorized character of secession is its being confused with revolution. Three conceptions of revolution have dominated in modern political speech. The first derives from the Glorious Revolution of 1688. This is revolution as restoration, and its image is the revolution of a wheel. According to eighteenth-century English Whiggism, the Glorious Revolution was a bloodless restoration of a liberty-loving Protestant regime from the attempted usurpations of the Catholic James II. The second form is Lockean revolution. Here a sovereign people recall the powers they have delegated to a government that has violated its trust in protecting life, liberty, and property. The government is overthrown and a new government instituted. The third form is Jacobin revolution. This is not Lockean revolution for the sake of preserving property but an attempt to subvert and to totally transform an entire *social* and *political* order in accord with an egalitarian philosophical theory. A Lockean revolution leaves the social order intact, whereas Jacobin revolution aims at a root-and-branch transformation. Marxian revolution is Jacobin, as are many other forms of contemporary political criticism. Gloria Steinem once said that to talk about reforms for women is one thing, to talk about the total transformation of society is feminism. So conceived, feminism is a species of Jacobin revolution.

Secession is quite distinct from these dominant conceptions of revolution. All presuppose the theory of sovereignty internal to the modern state and the prohibition against dismembering its territory. Secession is not revolution in the sense of eighteenth-century Whiggism because it is not the restoration of anything. It is the dismemberment of a modern state in the name of self-government. Nor is it Lockean revolution. A seceding people does not necessarily claim that a government has violated its trust. And even if the claim is made, there is no attempt to overthrow the government and replace it with a better one. Indeed, a seceding people may even think that the government is not especially unjust. What they seek, however, is to be left alone to govern

themselves as they see fit. Finally, secession is not Jacobin revolution because it does not seek to totally transform the social and political order. Indeed, it seeks to preserve its social order through secession and self-government.

We may, of course, continue to call secession "revolution" if we like, but the danger is that there will be a tendency to confuse it with the dominant meanings of revolution. A seceding people may indeed be said to be in a state of revolt in so far as they resist being coerced back into an established modern state, but this sort of revolt is quite different from revolution. And the moral considerations that would legitimate such resistance are categorically different from that which would legitimate revolution in the above senses, all of which seek, for different reasons, to overthrow an established regime. A seceding people is happy leaving the existing regime exactly as it is. It seeks only to limit its territorial jurisdiction. This, of course, is a serious matter, but it is not revolution in any of the traditional senses. Its name is secession.

Nowhere is the under-theorized character of secession and the confusion that results from failure to distinguish it from revolution more evident than in the habit of describing the conflict with Britain and the North American colonies as the "American Revolution." It is true that there were whiggish themes from the ideology of 1688 about restoring the rights of Englishmen, and there were Lockean themes about self-government. But the act of the British colonists in America was an act of secession. It was neither whiggish, nor Lockean, nor Jacobin revolution. The colonists did not seek to overthrow the British government. Commons, Lords, and Crown were to remain exactly as before. Indeed, many of the colonial leaders, such as Adams and Hamilton, admired the British constitution and government, and sought to imitate its best features. They wished simply to limit its jurisdiction over the territory they occupied. They wished to be let alone.

Much has been made of the influence the Lockean idiom of self-government had on the Founders. But it is important to realize that, though Locke allows the overthrow of a corrupt regime, he does not allow secession in the form of dismembering the territory of a modern state. And for citizens of a regime who have given their express consent, he does not even allow the right to exit, much less the right to carry territory with them.<sup>6</sup> There is every reason to believe that Locke, like the "friends of America" (Burke, Pitt, Shelburne, Barre), would have supported reforms on behalf of the Americans, but would have stopped short of secession.

The case is quite otherwise with David Hume, who supported "complete independence for the colonies as early as 1768, before the idea had occurred to most Americans. In this he stood virtually alone among major British thinkers. The Edinburgh literati were overwhelming in their support for strong measures against the Americans. Hume, however, staunchly defended secession of the colonies from 1768 until his death on 25 August 1776, five days after the Declaration of Independence was published in Edinburgh's *Caledonian Mercury*. To the disappointment of his "oldest and dearest friend," Baron Mure, who had asked him to write a letter on behalf of the county of Renfrewshire advocating military measures against the Americans, Hume wrote: "I am an American in my Principles, and wish we would let them alone to govern or misgovern themselves as they think proper."<sup>7</sup>

In this statement, Hume put into words, for the first time, an ideology of "Americanism," the thought that there are political principles specifically American. What were those principles? They were free trade and the corporate liberty of a people to govern themselves. Hume argued that if the ports of America were open to free trade, it would result in only a trifling temporary loss of revenue, and would, in the long run, benefit British commerce.

Let us, therefore, lay aside all Anger; shake hands, and part Friends. Or if we retain any anger, let it only be against ourselves for our past Folly; and against that wicked Madman Pitt; who has reduced us to our present Condition.<sup>8</sup>

This Humean notion of Americanism that acknowledges the right of a self-governing people to secede is framed in the Declaration of Independence. The Declaration is primarily a document justifying secession, but it has been thoroughly corrupted by Lincoln's reading of it and the ritualistic repetition and expansion of that reading. The Lincoln tradition reads the Declaration as affirming a metaphysical doctrine of individual rights (all men are created equal) and takes this to be the fundamental symbol of the American regime, trumping all other symbols, including the symbol of moral excellence internal to those inherited moral communities protected by the reserved powers of the states under the Tenth Amendment. Indeed, this tradition holds that the Declaration of Independence is superior to the Constitution itself, for being mere positive law, the Constitution can always be trumped by the "higher" metaphysical law of equality.

The Constitution of the United States was founded as a federative compact between the states, marking out the authority of a central government, having enumerated powers delegated to it by sovereign states which reserved for themselves the vast domain of unenumerated powers. By an act of philosophical alchemy, the Lincoln tradition has transmuted this essentially federative document into a consolidated nationalist regime having as its telos the instantiation of an abstract metaphysical proposition about equality. Such a proposition, in so far as it is taken seriously, must give rise to endless antinomic interpretations, and being metaphysical, these interpretations must stand in ultimate and implacable opposition. In this vision, the reserved powers of the states vanish, and the states themselves are transformed into resources for and administrative units of a nationalist political project "dedicated to the proposition that all men are created equal." So well established has this inversion become that Mortimer Adler could write a book on the Constitution using for the title not the words of the Constitution, but those of the Lincolnian Declaration: "We Hold These Truths. . . ."<sup>9</sup>

Lincoln's vision of a consolidated nationalism in pursuit of an antinomic doctrine of equality had its roots in the French Revolution, which sought to unify the decentralized traditional order of France into a consolidated nationalism in pursuit of the rights of man. But Lincoln's vision was also forward looking. By the 1830s, the forces of nationalism and industrialism were sweeping Europe, and had begun to have an impact on an industrial North all too eager to compete on the world stage with the empires of Europe. For this project, centralization and consolidation were necessary. Lincoln's vision of consolidating the states into a nationalist regime was of a piece with that of Garibaldi in Italy, Bismarck in Germany, Lenin in Russia, and the general consolidating, industrializing, and imperializing forces on the move in the nineteenth and twentieth centuries.

But the Declaration was published before the forces of industrialism and nationalism had appeared. Rhetorically, the document is a lawyer's brief designed to justify breaking the "bands" that had tied one people politically to another. And the people in question were not (as Story, Webster, and Lincoln would claim) the American people in the mass, but the peoples of the former colonies now declared to be separate and independent states but united in their resolve to resist coercion back into the British empire. Overall, the Declaration is an argument designed to justify the secession of the new self-proclaimed American states from the British state. The rights asserted are not the rights of individuals in a continental nationalist political society, but the corporate right of the "people" of the several states to govern themselves. And the equality mentioned is the equality of the people of the separate states, now grown to maturity, to take their place among the nations of the world; in a word, that the people of Virginia, Massachusetts, New York, etc., are equal to the people of Holland or France or Britain, and are to be recognized as such.

The Declaration, then, is a document justifying the territorial dismemberment of a modern state in the name of the moral right of a people to self-government. It is not primarily an argument for individual rights, but rather

an argument for the corporate rights of distinct moral and political societies. This theme of corporate liberty shaped the first constitution Americans made for themselves, the Articles of Confederation, which styled itself a "league of friendship" between sovereign states. No mention was made of individual rights, as the Articles had no authority to enforce them. Individual rights, of course, were very important to Americans, but what those rights were and how they were to be protected were the prerogatives of the states and were clearly specified in their respective Constitutions.

The new Constitution, ratified in 1789, delegated enumerated powers to a central government whose laws would be supreme on matters of foreign treaties, defense, and regulation of foreign and interstate commerce. The Bill of Rights was added not as a massive grant of power to the central government to enable it to police supposed violations of individuals' rights by the states (as it is corruptly interpreted today), but primarily to protect the moral and political societies of the states from the inevitable tendency of the central government to engross more power than had been granted to it. The capstone and meaning of the Bill of Rights is the Tenth Amendment, which affirms the sovereignty of the states in declaring the powers of the central government to be enumerated and "delegated."

The *Oxford English Dictionary* identifies the first political meaning of "secession" in the secession of the southern states from the American Union. The Australian Constitution was formed with the American experience of federation and secession in mind.<sup>10</sup> And contemporary attempts to frame a theory of secession often return to the secession of the southern states as the primal scene in which the modern concept first appears and from which theorizing takes its bearings. But the term secession in this exclusively political and modern sense is used much earlier. Throughout the antebellum period secession was used, North and South, to describe a moral and legal action available to an American state. In this American speech, the modern concept of the right of a people to self-determination and the right of secession is theorized for the first time and publicly explored. This act, as we have seen, was spiritualized by Hume into what he called an American principle, namely the right of a people "to govern or misgovern themselves as they think proper." Neither Hume nor the Americans, at this time, used the term secession in its exclusively political and modern sense. But by the early nineteenth century, Americans were describing the break with Britain as secession, and they began to raise the question of the conditions under which an American state could legally secede. But speech and theorizing about secession as the last moral and legal right available to an American state and the vibrant federal life it made possible abruptly ended with the defeat of the Confederacy and the triumph of a consolidated nationalist Union that began the adventure of empire building in competition with the European empires. During this period of "manifest destiny," "the big stick," and empire building, few in America, or Europe, would be interested in thinking about the self-determination of peoples or the right of secession.

Thought about secession and self-determination did not occur again until Woodrow Wilson brought the issue before the League of Nations. The results were not always happy, but the agenda stuck. It was revived after World War II in the United Nations, and is the primary form under which the self-determination of peoples is discussed in the world today. The concept of legitimate secession, first framed and explored by Americans, is very much alive and is throwing into question the modern consolidated Leviathan. United States government policy, however, unhappily has been on the side of the *status quo*. The government of the United States has resisted every secession movement in the world since World War II, and was among the last to recognize the seceding states of the Soviet Union.

One reason why Americans have difficulty even thinking about secession is that since 1865, they have been taught and have come to believe the triumphant Unionist theory of their own constitutional order. According to that theory, the break with England threw the colonists into a state of nature from which they spontaneously formed the political society of the American people in the aggregate. This body was sovereign and created a central government. This government, in turn, authorized the formation of thirteen state governments as

administrative units through which the sovereign will could be best expressed. In this view, an American state never possessed the attributes of sovereignty and so could not legally secede from the Union any more than a county could legally secede from a state. The classic formulation of the nationalist theory was given by Justice Story in the 1830s; it was eloquently defended by Webster and was established in the world with a writ of fire and sword by Lincoln.<sup>11</sup> Despite this distinguished pedigree, however, the theory is not only false, but spectacularly so.

The main error of the Unionist theory is the claim that the states were never sovereign. Each state, however, declared its sovereignty and independence from Britain on its own, and during the war each engaged in acts of sovereignty. After the war, each state was recognized by name as sovereign by the British government. These sovereign states formed the Articles of Confederation in which, again, the sovereignty of each was asserted and mutually recognized. Although the Articles of Confederation were supposed to be perpetual and could not be changed without unanimous consent, a number of states nonetheless sought to dissolve the Union. It was agreed (though not unanimously, since Rhode Island vetoed the Convention) that if nine states seceded and ratified the proposed constitution, a new Union would obtain between the nine seceding states. This was done, and by an act of secession the Union was dissolved leaving North Carolina, Virginia, Rhode Island, and New York to form a new union or to remain separate and independent states. Eventually, though reluctantly, all four entered. But Virginia, New York, and Rhode Island declared in their ordinances of ratification that, being sovereign states, they individually reserved the right to secede, and they asserted this right for the other states. This did not have to be asserted, since everyone knew that secession was an action available to an American state.<sup>12</sup> If, at the time of ratification, Lincoln's theory had been stated that the states were not and had never been sovereign, and that once in the Union a state could not leave, there would have been no Union.

It has been said that the constitution of the Soviet Union was the first to recognize explicitly the legal right of secession in a modern state. Strictly speaking this is true. Article 17 of the Soviet Constitution declares that "the right freely to secede from the U.S.S.R. is reserved to every Union republic." A right of secession was not written into the U.S. Constitution, but the authority of the Constitution consists solely in acts of ratification by sovereign states. In writing into their ordinances of ratification the right to withdraw those powers delegated to the central government, Virginia, New York, and Rhode Island may be said to have framed a right of secession in the constitutional compact. Marxist jurists from the former Soviet Union and the Warsaw Pact nations took the lead in the international forum in arguing for secession as a moral and legal right.<sup>13</sup> Much of this was hypocrisy at the service of Soviet policy, but it was no more hypocritical than Lincoln's Gettysburg Address that presents the conflict of 1861-65 as an earth-shaking war to make the world safe for self-government, when he was engaged in a total war aimed at the civilian population of the South, and designed to suppress their efforts at self-government. The irony is complete when we consider that the Soviets eventually did allow the secession of states (something that caused nervous tremors in the Bush administration). Perhaps over time, as sometimes happens, the Soviets were partially converted by their own hypocrisy.

From the very first, secession was conceived as the last check an American state had to an abuse of those enumerated powers that had been delegated out of its sovereignty to the central government. From its beginning until 1865, secession was invoked by every section of the Union. And the section that first and most often raised the threat of secession was not the South but New England. Secession was threatened over the Louisiana Purchase in 1803, the embargo of 1807-09, the War of 1812, and the Mexican War. New Englanders refused to send troops in the second war with England, and seriously considered forming a New England Confederacy at the Hartford Convention in 1815.<sup>14</sup> From the 1830s until 1861, New England abolitionists argued strongly for secession of the northern states from the Union. The following resolutions were passed by the American Anti-Slavery Society: "Resolved, that secession from the United States Government is the duty of every Abolitionist. . . ." And Resolved, "That the Abolitionists of this country should make it one of the primary objects of this agitation to dissolve the American Union."<sup>15</sup>

One of the early studies of the Constitution was *A View of the Constitution*, published in 1825 by William Rawle, a Federalist who was a leader of the Pennsylvania bar and had twice been offered the position of district attorney by George Washington, but had refused for personal reasons. Rawle raised the issue of whether a state could form a hereditary monarchy. He answered that since the people of a state are sovereign, they could, but the state would have to secede from the Union, since the Constitution guarantees to each state a republican form of government. He then laid out the formal conditions under which a state could unilaterally and legally secede from the Union.<sup>16</sup> Rawle's work on the Constitution was widely respected, and was used as a textbook at West Point from 1825-1840.

In 1840, Abel Upshur, a distinguished Virginia jurist and Secretary of State under Tyler, published *A Brief Enquiry into the True Nature and Character of our Federal Government*. This was an unanswerable criticism of Judge Joseph Story's theory of federalism in *Commentaries on the Constitution of the United States* (1833). Story systematically inverted the received opinion that the Constitution is a compact between sovereign states creating a central government and delegating to it only enumerated powers. Story argued that sovereignty is vested in the American people in aggregate, that the states had never been sovereign, and that in fact it was the central government that had created the states. The inversion was breathtaking, and it was this aggressive nationalist theory that Webster (who began his career as a compact theorist and as a New England secessionist) would popularize by his eloquence, and that Lincoln would seek to establish by war. Upshur has no difficulty in demolishing it as a historical theory of the Constitution. He sees clearly where a centralized and consolidated regime in the vast territory of America, with its heterogeneous interests and cultures, must eventually lead; namely, to the destruction of the states as the only constitutional protection for those substantial moral communities, local attachments, and particularities in which virtue has its source and where alone it can be tested and lived out. In subverting Story's inversion and by re-establishing the traditional theory that the Constitution is a compact between the states, Upshur had occasion to argue that an American state could legally secede from the Union.

Foreign writers who had studied the Constitution concluded that a state could secede from the compact. Tocqueville wrote:

The Union was formed by the voluntary agreement of the States; and in uniting together they have not forfeited their nationality, nor have they been reduced to the condition of one and the same people. If one of the States chooses to withdraw from the compact, it would be difficult to disprove its right of doing so, and the Federal Government would have no means of maintaining its claims directly either by force or right.<sup>17</sup>

Lord Brougham, in his magisterial, multi-volume study of constitutions published in 1849, considered the Constitution as a compact from which a state could secede:

There is not, as with us, a government only and its subjects to be regarded; but a number of Governments, of States having each a separate and substantive, and even independent existence originally thirteen, now six and twenty and each having a legislature of its own, with laws differing from those of the other States. It is plainly impossible to consider the Constitution which professes to govern this Union, this Federacy of States, as any thing other than a treaty.<sup>18</sup>

He accordingly refers to the Union as the "Great League." And Dr. Mackay, another English scholar of the Constitution, writing in the mid-nineteenth century, observed that

The Federal Government exists on sufferance only. Any state may at any time constitutionally withdraw from the Union and thus virtually dissolve it. It was not certainly created with the idea that the states, or several of them, would desire a separation; but whenever they choose to do it, they have no obstacle in the Constitution.<sup>19</sup>

During the 1850s, this Great League was coming apart, and a movement arose among prominent national and state leaders in the mid-Atlantic states to form what was called a "Central Confederacy." This new Union would be composed of such states as Virginia, Maryland, Delaware, New Jersey, New York, Ohio, Indiana, Pennsylvania, Kentucky, Tennessee, and Arkansas. This section constituted the conservative core of the Union, it was argued, and had interests different from the radicals of New England and the Gulf states. The formation of a Central Confederacy could prevent war and could serve as a rallying point around which the disaffected states of the deep South could one day return should they secede.<sup>20</sup> It is interesting that the proponents of the new Union showed little interest in including the New England states. Perhaps part of the reason was disgust over the long history of secession movements that had arisen in that region.

The mayor of New York, Fernando Wood, and others argued that if New York state seceded, the city should secede from the state and declare itself a free city. The mayor declared,

As a free city, with but nominal duty on imports, the local Government could be supported without taxation upon her people. Thus we could live free from taxes, and have cheap goods nearly duty free.<sup>21</sup>

Right up to the firing on Fort Sumter, many abolitionists in the North, having long argued for northern secession, were prepared to allow the South peacefully to secede. This was the position in New York of the *Douglass Monthly*,<sup>22</sup> printed by Frederick Douglass, and of Horace Greeley, editor of the Republican *New York Tribune*, who declared 23 February 1861, after the Confederacy was formed,

We have repeatedly said ... that the great principle embodied by Jefferson in the Declaration of Independence, that governments derive their powers from the consent of the governed, is sound and just; and that if the slave States, the cotton States, or the gulf States only, choose to form an independent nation, They have a clear moral right to do so. Whenever it shall be clear that the great body of Southern people have become conclusively alienated from the Union, and anxious to escape from it, we will do our best to forward their views.<sup>23</sup>

And John Quincy Adams, though a staunch unionist, declared in 1839, in a speech celebrating the Jubilee of the Constitution,

The indissoluble link of union between the people of the several states of this confederated nation is, after all, not in the right but in the heart. If the day should ever come (may Heaven avert it!) when the affections of the people of these States shall be alienated from each other; when the fraternal spirit shall give way to cold indifference, or collision of interests shall fester into hatred, the bands of political associations will not long hold together parties no longer attracted by the magnetism of conciliated interests and kindly sympathies; and far better will it be for the people of the disunited states to part in friendship from each other, than to be held together by constraint. Then will be the time for reverting to the precedents which occurred at the formation and adoption of the Constitution, to form again a more perfect Union by dissolving that which could no longer bind, and to leave the separated parts to be reunited by the law of political gravitation to the center.<sup>24</sup>

Four years after this speech, the former President would sign a document with other New England leaders declaring that annexation of Texas would mean the dissolution of the Union.

Pondering the secessionist movements in New England, Thomas Jefferson wrote in 1816 with characteristic liberality: "If any state in the Union will declare that it prefers separation . . . to a continuance in union ... I have no hesitation in saying, 'let us separate.'"<sup>25</sup> On the eve of the War Between the States, the majority of northerners appeared to have believed *either* that a state could legally secede or that one should acquiesce in peaceful *de facto* secession. How northern opinion quickly changed sufficiently to support invasion is a complicated story that cannot be told here, but it would contain the following themes.

First and most crucial was Lincoln's early decision to make war against the southern states should they secede. In 1856, he had told southerners who asserted their right to secede:

*We won't let you. With the purse and sword, the army and navy and treasury in our hands and at our command, you couldn't do it.*<sup>26</sup>

President James Buchanan, who preceded Lincoln, had declared that the central government had no authority to coerce a seceding state, but Lincoln stated privately that he would retake the forts Buchanan had allowed to pass back to state control. In the first draft of his first inaugural address, Lincoln was prepared to make this intention public: "All the power at my disposal will be used to reclaim the public property and places that have fallen."<sup>27</sup> Lincoln refused to negotiate with Confederate commissioners to pay for federal property and to establish a trade treaty, and he, thus, encouraged the public impression that the Confederates were lawless aggressors who had stolen federal property and threatened invasion of the North.

Second, the ineptitude of southern leaders, and their bellicose speech and policies (such as allowing themselves to be lured into firing on Ft. Sumter), played into Lincoln's hands by inflaming northern nationalism.

Third was the venality of northern commercial classes, who were happy to have the South to fund some three-quarters of the federal revenue, but were unwilling to allow a low-tariff zone on their southern border. The economic differences between North and South were stark. By 1860, agriculture still accounted for some seventy-five percent of American exports and most all of it came from the South. Trading on an unprotected world market, the South required a policy of free trade. The North, having just industrialized, was guided by a vision of a vast continental market for manufacturing, which required a policy of prohibitive tariffs. For three decades, southerners had complained about the injustice of tariffs protecting northern manufactures, because the tariffs resulted not only in a drain of wealth from the South to the North but also because southern trading partners, whose manufactures became prohibitively high for exchange for southern staples, were forced to find staples elsewhere. Once the northern industrial section got control of Congress, the average rate on goods subject to duties rose from the 1860 rate of 18.84 percent to a spectacular high of 46.56 percent in 1865. The tariff did not drop below 40 percent until World War I, except for two years when it was 38 percent. After the war, it rose again under Harding, Coolidge, and Hoover.<sup>28</sup> This brutal and unjust policy dealt a crippling blow to the southern agricultural export trade, which was vastly greater than what northern markets could absorb.

Interstate commerce regulations passed late in the nineteenth century discriminated against southern manufacturing by, among other things, fixing rail rates and steel prices so that goods manufactured in the South would not be able to undercut northern manufactures.<sup>29</sup> These were not abolished until the 1940s when the Supreme Court declared them unconstitutional. The National Banking Acts of 1863, 1864, and 1865 created a new national currency, secured by the public debt, and drove state bank notes out of circulation. Once the central government and its national banks had the authority to control the money supply, the financial destruction of American federalism was complete. This revolution in finance discouraged the formation of banks in farming communities and worked to transfer bank funds from agriculture to industry. As historian Robert Sharkey wrote,

Human ingenuity would have had difficulty in contriving a more perfect engine for class and sectional exploitation: creditors finally obtaining the upper hand as opposed to debtors, and the developed East holding the whip over the undeveloped West and South.<sup>30</sup>

All of this turned out to be much worse than what John C. Calhoun predicted would happen if the American federation of republics was transmuted into a consolidated nationalism dominated by a northern industrial class.

The brief constitutional history I have sketched that views secession as part of the checks and balances system of American federalism is unknown to most Americans. The reason is that we have come to believe the absurd nationalist theory of the Constitution propounded by Story and Webster and used by Lincoln to legitimate invasion of the South. Lincoln said he had taken an oath to preserve the Union, but he was mistaken. He had taken not an oath to preserve the Union, but rather an oath to preserve the Constitution, and the Constitution did not in 1861, and does not now, prohibit the secession of an American state.

The consolidated nationalism that Story, Webster, and Lincoln put forth as the Constitution was not the Constitution they had *inherited*. That instrument was a compact between sovereign states creating a central government having only enumerated powers. The instrument they put forth was an imagined and constitution at the service of an emerging industrial class. In this view, the states were reduced to little more than counties in a nationalist regime, and the central government emerged as unlimited in power if supported by a majority. Such a government could not only interfere with slavery by taxing it out of existence, it could do much else besides. Tariffs to protect northern industry had drained the South of wealth for over than thirty years. Further, the South was the source of most of the federal revenue, and this was exploited by a northern majority for improving its infrastructure. The South had generally been opposed to internal improvements, claiming that such powers had never been granted to the central government, and it was thought that if such powers were assumed, a scene of endless patronage and corruption would ensue without parallel in history.

Southern colonies had seceded from Britain because they refused to be a source of revenue for a consolidated British empire centered in London. That act was still vivid in the historical memory of southerners (for example, "Lighthorse" Harry Lee, the father of Robert E. Lee, was a Revolutionary War hero and a friend of George Washington). As such, southerners in 1861 were not prepared to be a source of revenue for a northern industrial version of a consolidated empire centered in Washington. Indeed, the very idea of Washington as the "capital" came after the failure of the war for southern independence. In the antebellum period, Washington was generally thought of as the "seat" of the central government, as when one speaks of a town being the seat of the county government, or of Strasbourg and New York as the seats, respectively, of the European Union, and the United Nations. Washington was the seat of a central government having only enumerated powers; it was not the *capital* of anything.

Likewise it is wrong to describe the conflict of 1861-1865 as the "Civil War." The exemplar of a civil war is the English Civil War. That war was a struggle, within a modern state, by two factions (Crown and Parliament) for control of the same government. But the federation of American states was not itself a modern state any more than the European Union is a modern state. Its central government had only enumerated powers delegated to it by the sovereign states. But Virginia, New York, etc., were modern states, each of which contained the presumption against the secession of its parts. And the struggle that occurred was not between two factions seeking control of the same government. Rather, it was between one group of states exercising their federative power to withdraw from the federation and govern themselves, and another group of states seeking to conquer and govern them. The Great Seal of the Confederacy bears an equestrian statue of George Washington, the symbol of secession from the British empire. Just as the break with Britain was not a revolution but an act of secession, so the break with the North was not an act of treason issuing in civil war, but an act of secession issuing in conquest by the North. That both conflicts are frequently misdescribed points again to the under-theorized character of secession.

But there is another difference between the conflicts. During the American Revolution, the American colonies could appeal only to a moral argument to legitimate secession. Having more or less governed themselves for more than a century, and having acquired the character of a people, they claimed that they had acquired a title to full self-government. But the colonies were not and never had been recognized as sovereign states, either by others or even by themselves. At the time of the Civil War, however, the southern states had been and still were

sovereign states, and so they could mount not only a moral argument but a legal one as well. And it was the legal argument they primarily insisted upon. Each state used the same legal form to secede from the Union that it had used to enter, namely, ratification in a convention of the people. In some cases, the decisions of these conventions were put to referenda. Of those southerners who were opposed to secession, including Robert E. Lee, the great majority of them recognized the legitimacy of the conventions and supported their states, to which, under the compact theory of the Constitution, they owed their primary allegiance.

With the orderly, legal secession of the southern states, the American genius for self-government reached its highest moral expression. Here was something unprecedented in history; a vast continental empire of republics torn by sectional, economic, and moral conflicts seeking to settle its differences not by war, but by peaceful secession of eleven contiguous republics, legitimated by the consent of the people. This was the very thing that, in 1840, John Quincy Adams said might be necessary in the future, and which the American commitment to self-government of peoples would legitimate, rather than a Union held together by bayonets. It was this also that President Buchanan had in mind when, although opposed to secession, he declared that the central government had no authority to coerce a seceding state. The same doctrine was asserted by Madison and Hamilton in the *Federalist*. Lincoln, however, like George III, was determined on coercion, but unlike the latter, he was also prepared to launch total war against the civilian population of the South to achieve the goal of a consolidated nationalism.

With Lincoln, then, a radical break occurs between the older Americanism that was grounded in the natural rights of substantial moral communities to govern themselves and a new Americanism grounded in the centralization and consolidation of power, and like the French Revolution, dedicated to an egalitarian doctrine of individualism. This doctrine, wherever it has been applied in the world, has required the destruction of independent social authorities and moral communities and the massive consolidation of power needed to achieve such destruction. Lincoln was a man of his age, and it was an age of unashamed empire building and of the coercion of independent political societies into consolidated unions. What Bismarck was accomplishing in Germany with a policy of "blood and iron," and what Lenin would accomplish in Russia, Lincoln had accomplished in America. Lincoln did not preserve an organic indivisible union from destruction because he did not inherit one; rather, like Bismarck, he created one.

Why did the southern states secede? This is a question best answered by examining closely the Constitution of the Confederacy, which bears not only the imprint of the southern conception of self-government but also their grievances against the North. Though there is no space to do that here, a few points are worth making. Southerners were loyal to the Constitution of the Founders. What they objected to was the northern interpretation of it which sought, by an act of philosophical alchemy, to transmute it from a compact between sovereign states creating a central government with enumerated powers to a consolidated nationalism with a central government having unlimited powers.

The Confederate Preamble makes clear that the parties to the compact are the people of the states and not the people of the confederacy in the aggregate. And each state is said to retain "its sovereign and independent character." In the Federal Constitution, the initiative to amend can come from either Congress or the states. The Confederate Constitution vests this power only in the states. Southerners considered secession a legal right available to a state under the Federal Constitution conceived as a compact between sovereign states. But they purposely did not put a right to secession in their own constitution because to do so would imply a change and would play into the hands of those northerners who held that secession was treason. However, the right of a confederate state to secede was thought to be self-evidently contained in the declaration that the states retain their sovereignty and independence.

A central government in a federative system cannot be unduly oppressive if its revenue is carefully restricted by consensus of the states, or by something approaching consensus. One of the main grievances against the northern conception of the consolidated Union was that the central government would become an uncontrollable center of patronage and corruption that would subvert the independent moral and political life of the states. The hated protective tariffs on imports were prohibited. Export tariffs, however, were allowed if passed by a two-thirds majority. Funding for internal improvements was severely restricted. With few exceptions, Congress could appropriate money only by a two-thirds majority or by a majority upon a request by the President.

As in the Federal Constitution, slavery was recognized. The Confederate Constitution outlawed the slave trade, but, unlike the Federal policy, required Congress to pass legislation that would enforce the law. Current American policy refused to cooperate with the British and French in allowing American ships to be boarded, and so the slave trade continued into South America under American flags up to the conflict of 1861-65. Jefferson Davis's first veto was over a bill that would allow the sale of slaves captured by the Confederate Navy. The Confederate Constitution allowed non-slaveholding states to join the Confederation, and left it up to the individual states whether they would abolish slavery. Many nations in the Indian Territory had treaties with the Confederates, and fought for it on the promise of creating a sovereign Indian state.

The central reforms enacted by the Confederate Constitution, which Lord Acton greatly admired, were designed to protect and strengthen the substantial moral and political communities of the states, and to limit the power of the central government by reducing its revenue, restricting its power to spend, and making it difficult to pass legislation for special interest groups.<sup>31</sup>

Just as their ancestors two generations earlier, acting as citizens of sovereign states, had seceded from the Articles of Confederation (even though the Articles were styled as "a perpetual union" and could not be legally changed without unanimous consent) in order to form a "more perfect union" (a union requiring only nine states), so eleven contiguous southern states sought to form a more perfect union, one grounded in the preservation of independent moral and political communities, their union by consent, and the right of secession.

From a philosophical point of view, the Confederate Constitution may be viewed as the highest expression of the adventure in self-government begun by the American colonists in 1776. That adventure began with an assertion of the right of substantial moral and political societies to self-government, and this right was secured by an act of secession. The Americans, in their most speculative moments, imagined a legal world, a rule of law, in which this right would be recognized.

The sort of consolidationism which the British had sought to impose on their North American possessions had been going on in Europe for centuries and is still going on. Of the thousands of independent territorial units that existed in Europe at the dawn of the modern era, only a few dozen remain, and there is an attempt to consolidate most of these into a European Union. The ideologies that have sought to legitimate these consolidations have usually been in the name of the individual. Liberals favor consolidation of power to secure the liberty of the individual, and Marxists have favored it in order to secure the equality of the individual and to build an egalitarian society. But both of these forms of consolidationism have been at the expense of substantial moral communities and traditional forms of life. Indeed, Enlightenment Liberalism and Marxism, in their different ways, have been the most destructive forces in history in respect to traditional moral communities. Some of this change has brought benefits with it and has been accepted, but much of it has been oppressive. In that case, a constitutional right of secession of one of the recognized political units in the union would provide a check against oppression, and an exit should the check fail. Although intimated in early American experience and strongly implied in the Constitution of 1787, the first constitution in history to recognize both the advantages of large political unions and to provide a remedy for their abuse in secession was the Constitution of the Confederate States of America.

With the collapse of European imperialism and the revival in the United Nations of the Wilsonian doctrine of the self-determination of peoples (which is itself merely a later expression of the secessionist doctrine of the Declaration of Independence), the consolidated leviathans of the modern world no longer have the legitimacy they once had. Secession movements are strong where identifiable political units remain, such as Quebec in Canada, the Scots in Britain, and the Basques in Spain. Experience has shown that secession does not lead to anarchy, as Lincoln insisted it would. Norway peacefully seceded from Sweden (1905), as did Singapore from Malaysia (1965). Likewise, the secession of Quebec from Canada should not lead to chaos or war.

Secession can no longer be dismissed *a priori* as proponents of the modern state have done. And it certainly cannot be dismissed out of hand in the case of federal unions such as Canada, the U.S., Britain, Brazil, and Germany, all of which have political units with the administrative machinery and skills for self-government. The recognition of a legal right of such units to secede, established at the formation of a union of vast scale (such as the Confederate Constitution recognized), would tend to preserve distinct cultures and ways of life, make the operation of such unions more just, and, if necessary, their dissolution more orderly and humane.

The debate over the European Union today resembles the debate of 1787-89 between the Federalists and Antifederalists, the latter of which feared that the Constitution would end in a consolidated nationalism, and the former who assured them that such could never happen. One hopes that this will not degenerate into something like the shouting match between southerners who claimed that the Constitution was not a consolidated regime and northern unionists who declared that it was and always had been. But it could. One already hears from the left the claim that the European Union is an instrument for achieving human rights and that the powers surrendered to the Union cannot be recalled. This was exactly Lincoln's doctrine. Unless the right of secession is thought through and faced squarely, one can imagine Europe re-enacting the melancholy history of the United States with a minority of states seeking to secede from a Union that has become oppressive in a way they could not have imagined, and a powerful majority prepared to coerce them back into the Union in the name of the "last best hope on earth" for protecting human rights.

The moral grandeur of Lincoln is rooted in the myth that he made a war on the South to abolish slavery. This is, at most, a Platonic noble lie designed to legitimate the Unionist regime. Lincoln thought that slavery was immoral, but so did Robert E. Lee. And Lee, at his own expense, freed the slaves he had inherited, through marriage, from the family of George Washington. Only around fifteen percent of southerners even owned slaves, and the great majority of these had holdings of one to six. Jefferson Davis was an enlightened slave holder who said that once the Confederacy gained its independence, it would mean the end of slavery. The Confederate Cabinet agreed to abolish slavery within five years after the cessation of hostilities in exchange for recognition by Britain and France. Southerners were not fighting to preserve slavery, but simply and solely because they were being invaded. And the North certainly did not invade to abolish slavery.

Nor should this be surprising considering the Negrophobia that prevailed everywhere in the North. It was assumed by the vast majority of Americans, North and South, that America was a white European polity, and that the Indian and African populations were not -- and were never to be -- full participants in that polity. For example, blacks were excluded from the western territories. Oregon became a state in 1859, and its constitution, which was passed by a vote of eight to one, declared that

No free negro, or mulatto, not residing in this state at the time of the adoption of this constitution, shall ever come, reside, or be within this state, or hold any real estate, or make any contract, or maintain any suit therein; and the legislative assembly shall provide by penal laws for the removal by public officers of all such free negroes and mulattoes, and for their effectual exclusion from the state, and for the punishment of persons who shall bring them into the state, or employ or harbour them therein.<sup>32</sup>

The constitution of Indiana contained the same prohibition. Lincoln's state of Illinois prohibited the entrance of Africans unless they could post a bond of \$1,000. Free Africans in northern states were severely regulated. The following regulation is from the Illinois revised statutes of 1833:

If any person or persons shall permit or suffer any . . . servant or servants of colour, to the number of three or more, to assemble in his, her, or their out-house, yard, or shed, for the purpose of dancing or revelling, either by night or by day, the person or persons so offending shall forfeit and pay a fine of twenty dollars.

And it was the duty of all "coroners, sheriffs, judges, and justices of the peace" who learned of such assemblages to commit the "servants-to the jail of the county, and on view of proof thereof, order each and every such . . . servant to be whipped, not exceeding thirty-nine stripes on his or her back."<sup>33</sup>

Emancipation laws in the antebellum North were designed to rid the North of its African population. They typically declared that the children of slaves born after a certain date would, upon reaching a certain age, be emancipated. This meant that adult slaves were not freed and that families could be sold South before children reached the age of emancipation. Emancipation led to a reduction of the African population in the North, not to an increase, as it did in the South. Lincoln's own solution to the race problem was mass colonization of Africans, and he proposed securing land in Africa and elsewhere for the purpose. Even abolitionists were careful to point out that it was not the slave they loved but the slaveholder they hated, and that emancipation did not at all mean social and political equality with whites.

Slavery was more secure in 1860 than it had ever been. The Supreme Court, in the Dred Scott decision, had declared that Africans were not citizens; and Congress approved a constitutional amendment that would take the regulation of slavery forever out of the hands of the central government. Lincoln said that he had no authority and no inclination to interfere with slavery in the states where it was legal. He could tolerate slavery as a means of controlling what nearly everyone saw to be an exotic and alien population. What he could not tolerate was a dissolution of the Union, loss of revenue from the South, and a low-tariff zone on his southern border. This was the consistent thread running through Lincoln's policy from 1860-1865. He would not recognize the conventions of the people of the southern states, and he would not negotiate with their commissioners. He would go to war immediately to coerce the states of the deep South back into the Union. And it was this act that Virginia, North Carolina, Tennessee, and Arkansas could not tolerate. They had been opposed to the radicalism of the deep South, and their legislatures had voted firmly to stay within the Union. But they would not answer Lincoln's call for troops to coerce a state into the Union; this they considered not only unconstitutional, but immoral. And in this they were correct. But so strong is the Lincoln myth and so interwoven with American self-identity that Americans have never been able to confront the stark immorality and barbarism of Lincoln's decision to invade the South and to pursue total war against its civilian population.

To this we may add that the modern prejudice against secession has also served to occlude the immorality of the invasion. Here was a union of sovereign states only seventy years old. These states had originally asserted their sovereignty in acts of secession from the British empire, and the Union itself had been formed by an act of secession from the Articles of Confederation. Virginia, New York, and Rhode Island reserved the right to secede in their ordinances ratifying the Constitution, and secession was a part of public discourse in all sections throughout the antebellum period. This union, through conquest, purchase, and annexation, had, in fifty years, swollen to some ten times its original size. The Republic of Texas, having seceded from Mexico, had been in the Union only fifteen years. Secession is destabilizing in that it suddenly produces new majorities and new minorities. But annexation is destabilizing in exactly the same way. Rapid expansion led to rapidly shifting majorities and minorities and to conflicts of great and important interests.

By 1860, a choice lay open between either re-negotiating the compact between the states in order to form more perfect unions, as John Quincy Adams counseled should happen, or a powerful section would have to conquer

the whole and reconstruct it into its own image, subordinating all else to its own interests. Everything in the older American tradition of the self-government of peoples points to the former path. Lincoln chose the latter path, and in doing so was in step with the nineteenth- and twentieth-century trend of industrial society to consolidationism. Southerners, at great sacrifice, sought to defend that older American notion of self-government, a notion which was pushed to the margins of American consciousness after the Army of Northern Virginia surrendered at Appomattox. But it has not been extinguished, and has greater purchase in the world today than ever before as the consolidated leviathans of the nineteenth and twentieth centuries are being called into question. The Russian invasion of Chechnya is widely regarded as barbarous, but the Russians have a better title to rule Chechnya than Lincoln had to coerce eleven contiguous American states into the Union.

This broader experience enables us to take a fresh look at the morality of Lincoln's decision. It has been said that, although the Union was originally conceived as a compact between sovereign states entailing a right to secession, it evolved into the notion of an indivisible, organic Union from which secession was impossible. This notion, however, was late in arriving, and was not universally received by 1860. Southerners obviously did not believe it, nor did many northerners. There was tremendous opposition to Lincoln's invasion of the South. To maintain power, he was forced to suspend the writ of *habeas corpus* throughout the North for the duration of the war, netting tens of thousands of political prisoners. Some 300 opposition newspapers were closed down. Democratic candidates, critical of the war, were arrested by the military, and the military was used to secure Republican victories at the polls, including Lincoln's election in 1864.<sup>34</sup>

But the barbarism of suppressing eleven contiguous American states in 1861 can best be brought out by a thought experiment. Today, unlike 1861, everyone has taken the pledge of allegiance affirming an organic union. (It is significant that the origin of the pledge is to be found in the loyalty oaths Confederates were required to take to regain citizenship.) Suppose that California, over a dispute with the central government about immigration, affirmative action, abortion, or some other issue, should, in a legally held convention of the people of the state, claim sovereignty under the Tenth Amendment and withdraw those powers it had delegated to the central government and withdraw from the Union. California is an economic giant. Its population is larger than that of twenty-two American states. Suppose, then, that other states, originally pro-Union, should see it in their interest to enter into a confederacy with California, and that eventually eleven contiguous states should form a western confederacy and send commissioners to Washington to negotiate payment for federal property and to establish a treaty. Would the eastern states be justified in launching an aggressive war to "save the Union"? Perhaps it would be thought that a show of force would cause people to rethink. But if it became clear that the people, at great sacrifice, were determined to gain their independence, could a policy of war aimed now at the civilian population be morally justified merely to preserve the Union?

Or, to vary the thought experiment, northern abolitionists had argued since the 1830s that the northern states should secede from the Union. Secession movements had arisen off and on in New England since 1803. Suppose now that a few New England states seceded over slavery, the tariff issue, and national expenditures for internal improvements. Other states, reluctantly, might find it in their interest to join this union so that by the time Lincoln entered Washington in 1861 he would find himself confronted with the secession of northern states and President of a southern-dominated United States, a Union that would include the eleven states of the Confederacy and most certainly Kentucky, Missouri, Maryland, Delaware, and perhaps others. Would we expect Lincoln to ignore the commissioners of this Northern Confederacy and launch a war to "save the Union?" Would we be celebrating, under his leadership, Stonewall Jackson's scorched-earth march to the sea, the burning of Boston, and the surrender of Grant to Lee at Scranton, Pennsylvania?

None of this, of course, would have happened. First, it is unlikely that southerners, who had long argued that the Constitution is a compact between sovereign states entailing a right to secede, would have perceived northern secession as treason. Second, the Republican party was a purely sectional party openly hostile to southern

interests. And Lincoln, as its leader, was the first and only sectional president in American history. He had received only thirty-nine percent of the popular vote, and had no support outside the North. His goal from first to last was to advance the political agenda of the Republican party, which could be called the New York-Chicago industrial axis. The sectional goal of the Republican party was openly asserted by its most eloquent leaders. Wendell Phillips declared:

It is just what we have attempted to bring about. It is the first sectional party ever organized in this country. It does not know its own face, and calls itself national; but it is not national -- it is sectional. The Republican Party is a Party of the North pledged against the South.<sup>35</sup>

Charles Adams has shown that the Republican agenda could not tolerate a low-tariff zone to the south, and that the North had become accustomed to the South's funding the bulk of the federal revenue through its export trade.<sup>36</sup> And it was just this horror of what an economically independent South would mean to northern industrial interests that Charles Bancroft, writing in 1874, presented as the justification for invading the South:

While so gigantic a war was an immense evil; to allow the right of peaceable secession would have been ruin to the enterprise and thrift of the industrious laborer, and keen eyed business man of the North. It would have been the greatest calamity of the age. War was less to be feared.<sup>37</sup>

A million-and-a-half people were killed, wounded, or missing in the war. The defense of protective tariffs has seldom been so ferocious, or so crude.

Lincoln's conservative statesmanlike posture about preserving an indivisible union cannot be taken seriously. Not only did he not inherit such a union, the only union he was interested in preserving was a union which was dominated by northern industrial ambition. And it was exactly this that Lincoln, and the Republican party, after his death, accomplished.

But Lincoln also had a philosophical argument for making war on the southern states that brings out the prejudice against secession that is internal to the idea of a modern state. In a message to Congress on 4 July 1861, Lincoln justified his choice of war over a negotiated settlement that allowed the southern states to form their own union:

This 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 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?"<sup>38</sup>

Here we have the familiar argument that a modern state cannot allow territorial dismemberment by secession. This was, of course, the same argument that was used by George III to coerce the American colonies. But Lincoln had in mind not just any sort of modern state (which could include monarchy) but a modern republican state. Being founded in liberty, such states are more liable to dissolution. Thus, the war that is beginning is a dramatic struggle to see whether a modern republican state is really possible. The same theme would be sounded in the Gettysburg Address. If secession is allowed, anarchy follows. As Lincoln put it elsewhere, if a state can secede, then the county of a state can secede, and a part of that county can secede, etc. And, if the American experiment in self-government fails, the world must revert back to monarchy.

There are a number of confusions here. First, the government of the United States in 1861 was not the government of a modern state. Rather, it was a central government of a federative union of states. It was

endowed with only enumerated powers and these were delegated to it by sovereign states. The central government was the agent of those states, and the states were the principals in the federative compact. The states themselves were modern states; they had asserted this status in the Declaration of Independence, and had been recognized by the world as such. As modern states, they contained the usual legal prohibition against secession. A county cannot legally secede from an American state, but there is no such prohibition against a state exercising its federative power and withdrawing from the Union.

To describe, as Lincoln did, Virginia and the other southern states as "domestic foes" threatening self-government and to be suppressed by war is not only a spectacular absurdity, it also reveals a hubristic impiety and moral blindness. The first self-governing assembly in the western hemisphere was founded in Virginia. More great statesmen and jurists had come from Virginia than any other state. The leadership of Virginia was crucial in winning the war with Britain, during the period of the Articles of Confederation, and in forming the Union. In her ordinance of ratification, Virginia as a sovereign state, asserted the right to secede, and affirmed this right for every other state. The man often called the "father of the Constitution," James Madison, always described the Constitution as being a compact between sovereign states. In 1830, Madison could say that it was still not certain that the Union would work. By 1861, it was clear that the Union, as a voluntary association of independent political societies, had failed.

What would the great Virginians, George Washington, Thomas Jefferson, James Madison, Patrick Henry, George Mason, John Randolph, John Taylor, and "Lighthouse" Harry Lee have done? They all supported the Union, believed the Constitution was a compact between the states, and were Virginians first. So when the states of the deep South discussed secession, Virginia called a convention of the people to decide the question, and the convention voted firmly to stay in the Union. It was only after Lincoln had decided on war and called for troops that the convention reconvened and voted to secede. Madison had said in the *Federalist* that the central government could not coerce a state. To be sure that the will of the people was expressed, the judgment of the convention was put to the people of Virginia, who supported secession by a margin of five to one. Tennessee was also pro-Union, but, in a referendum of the voters, decided to secede by a margin of two to one after Lincoln's decision to wage war. The pro-Union states of North Carolina and Arkansas seceded for the same reason.

To treat, as Lincoln did, the peoples of entire states who had engaged in deliberate and legal acts of self-government as common criminals and as "domestic foes" aroused deep emotions of resentment and injustice that could be felt only by an American who had received with his mother's milk the principle, framed in the Declaration of Independence, of the self-government of independent moral and political societies. As the case of Robert E. Lee makes clear, this feeling of resentment had nothing to do with slavery, an institution he thought was on its way to oblivion. It was this deeply felt American resentment that enabled the entire South, 85 percent of whom did not own slaves, to mobilize and to make spectacular sacrifices to keep out an invading army, the government of which was intent on destroying, and did destroy, the corporate liberty of their political societies. It was this sense of state honor that Hamilton had in mind when he said in the *Federalist* that the central government could never make war against an American state, and which he again asserted again before the New York State convention: "To coerce a state would be one of the maddest projects ever devised. No state would ever suffer itself to be used as the instrument of coercing another." One cannot imagine the great Virginians of his time disagreeing.

Herman Melville, who had a good eye for the hypocrisy of northern industrial unionism, wrote:

Who looks at Lee must think of Washington  
In pain must think and hide the thought  
So deep with grievous meaning is it fraught.<sup>39</sup>

To this conservative and backward-looking image, we should add the forward-looking and "progressive" image: he who looks at Lincoln has seen the consolidationists Bismarck and Lenin.

So Lincoln's inversion of the original American conception of self-government must itself be inverted. As H.L. Mencken cynically observed of the Gettysburg Address, it was not the Union forces that were fighting for government of the people, by the people, and for the people (a phrase Lincoln borrowed from Webster), but the people of the southern states. And the war was not a dramatic contest to see whether a modern republican state was possible. Virginia and the rest of the southern states were stable, self-governing modern republics whose citizens were loyal and well skilled in the art of self-government. If not conquered, there is every reason to think they would have lasted indefinitely.

All of them were, in fact, conquered, and self-government was destroyed. Virginia was divided and her western counties made into the new state of West Virginia. What Lincoln had presented as the absurdity of allowing a state to secede, namely that counties of that state could also secede, was legitimate after all, provided that it served northern industrial interests. After Lee had surrendered, and unionist governments had been formed in each southern state, and the Thirteenth Amendment outlawing slavery had been ratified by the southern states, they suddenly found themselves, by an arbitrary and unconstitutional act of Congress, expelled from the union and declared "conquered provinces."

The argument of Lincoln and the Republican party that secession was unthinkable because the Union was indivisible now appeared as the self-serving hypocrisy it was. States could not secede from the Union, but they could be expelled, or more precisely, obliterated. It was during this period of "Reconstruction" that the Fourteenth Amendment was floated. This amendment, since the 1950s, has been manipulated by the Supreme Court to affect a vast transfer of power from the states to the central government, making it virtually impossible for the states to maintain those independent substantial moral communities protected by the powers reserved in the Tenth Amendment. It is fitting that this amendment, which had a corrupt and illegal origin in Congress, was never ratified by the states, and is, thus, not a part of the Constitution! It was simply declared by Congress to have been enacted, something Congress had no authority to do.<sup>40</sup> This shows just how far some Americans had wandered from the original conception of self-government.

The conflict of 1861-1865 was not, as Lincoln said it was, a struggle to see if a modern republican state could survive, but a struggle to see if a vast union of federative republics could survive without the consolidation and consequent destruction of independent moral life that a dominant faction will inevitably seek to impose on the rest. The American experience suggests that it is unlikely, but it must be admitted that our experience with such vast-scale federations is limited, so the question is still open. Since there are obvious advantages to federative unions, the only remedy is to acknowledge a legal right of secession for republics joining the federation. The American failure to achieve a genuine federalism of self-governing moral communities must stand as a challenge to the European Union. It was in recognition of this challenge that Nobel laureate James Buchanan has urged that a right of secession be written into the constitution of the European Union. With the benefit of over a century of experience, the Constitution of the Confederate States of America as an instrument of federalism appears well ahead of its time.

The brief constitutional history I have sketched that views secession as part of the checks and balance system of American federalism is completely unknown to most Americans. The reason is that we have come to believe the nationalist theory of the origin of the Constitution that Lincoln used to legitimate coercing the southern states back into the Union. Plato taught that the guardians of the republic may have to tell a noble lie about its origins.

Whether the nationalist theory is a noble lie or an ignoble lie I shall not say. My point is that it is false. It has been said that the War of 1861-1865 decided once and for all the question of whether an American state could secede. But this is only another way of saying that might makes right, a principle that cannot sit well with the American doctrine of government by consent. The great Scottish philosopher David Hume taught a deeper truth; namely, that political authority is founded not on power but on opinion. A change in opinion at a strategic point can transform, in time, an entire political order.

To give an example, America began as a highly decentralized regime of independent moral and political communities jealous of their liberty. These political societies created a central government as their agent and endowed it with enumerated powers. This government was only a speck on the political landscape and its presence was scarcely felt in everyday life. From 1865 to 1965 it underwent a transformation, emerging as the most consolidated and centralized military and financial power in history. Moral and political societies with a life of their own independent of regulation and control by the central government (especially the Supreme Court) are today virtually impossible. By contrast, Canada began as a highly centralized regime under monarchy and has developed into a decentralized regime in which secession as a means of protecting independent moral and political life is part of public debate. There is a tradition in Canada that this change was due in part to Judah Benjamin, the former Secretary of State of the Confederate States of America who, after the war, fled to England and became a distinguished barrister. In a number of cases before the Imperial Parliament, he argued successfully for measures that gave the Provinces more autonomy, thereby setting Canadian federalism on the path to decentralization.<sup>41</sup> Asserting the right to secede, Quebec has already secured rights making it virtually an independent country, thereby making secession perhaps unnecessary.

Let me close with this question. If Hume is right that the authority of government is founded on opinion, and if acceptance of the absurd nationalist theory of the origin of the Constitution advanced by Story, Webster, and Lincoln could serve to legitimate the spectacular change from a decentralized federalism to a consolidated imperial nationalism, what would happen if Americans were taught and came to believe the truth about their own constitutional history?

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#### Notes

1 Lee Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven, Conn.: Yale University Press, 1978). This book is an excellent discussion of the debate over whether a right of secession can be recognized in international law.

2 *The Compact Edition of the Oxford English Dictionary* (New York: Oxford University Press, 1971), the articles on "secede" and "secession."

3 Ibid.

4 Allen Buchanan discusses Rawls on secession in *Secession: The Morality of Political Divorce: From Fort Sumter to Lithuania and Quebec* (Boulder, Colo.: Westview Press, 1991), pp. 5-6.

5 Ibid.

- 6 John Locke, *Two Treatises of Government*, Peter Laslett, ed. (London: Cambridge University Press, 1988), p. 349.
- 7 David Hume, *The Letters of David Hume*, John Y.T. Greig, ed. (Oxford: Clarendon Press, 1969), vol. 2, pp. 302-3.
- 8 Ibid., pp. 300-1. Pitt had sought to establish a mercantile empire of managed trade which Hume thought required constant war for its maintenance and an increase in the public debt. For an in-depth study of Hume on secession and America, see my *Philosophical Melancholy and Delirium* (Chicago: University of Chicago Press, 1998).
- 9 Mortimer Adler, *We Hold These Truths: Understanding the Ideas and Ideals of the Constitution* (New York: MacMillan, 1987).
- 10 Gregory Craven, *Secession: The Ultimate States Right* (Carlton, Vic: Melbourne University Press, 1986).
- 11 Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Little, Brown, 1851), vol. 1, bk. 3, chap. 3. Also, *The Writings and Speeches of Daniel Webster* (Boston: Little, Brown, 1903), vol. 6, pp. 196-221.
- 12 The best defense of the thesis that the states were sovereign and that secession was a right available to an American state is to be found in Albert Taylor Bledsoe's *Is Davis a Traitor, or Was Secession a Constitutional Right Previous to the War of 1861?* (Charleston, S.C: Fletcher and Fletcher, [1866] 1995). This was reprinted by Fletcher and Fletcher, Charleston, S.C, 1995. The first systematic refutation of Story's thesis that the states were never sovereign was given by Abel Upshur, a distinguished Virginia jurist and Secretary of State under Tyler, in *A Brief Enquiry into the True Nature and Character of our Federal Government, Being a Review of judge Story's Commentaries* (Petersburg, Va.: E. and J.C. Ruffin, 1840). On the sovereignty of the states, see also C.H. Van Tyne, "Sovereignty in the American Revolution: An Historical Study," *American Historical Review* 12 (April, 1907): 529-45.
- 13 Buchheit, *Secession, The Legitimacy of Self-Determination*, pp. 100ff.
- 14 See *Documents Relating to New-England Federalism, 1800-1815*, Henry Adams, ed. (New York: B. Franklin, 1905). This contains John Quincy Adams's narrative of the Hartford Convention and other New England secession movements.
- 15 Quoted in Bledsoe, *Is Davis a Traitor?* p. 149.
- 16 William Rawle, *A View of the Constitution* (Philadelphia: H.C. Carey and I. Lea, 1825), see especially the last chapter, "Of the Union."
- 17 Alexis de Tocqueville, *Democracy in America*, Henry Reeve, trans. (New Rochelle, N.Y.: Arlington House), vol. 1, chap. 18, p. 381.

18 Henry Lord Brougham, *Political Philosophy*, 2nd ed. (London, 1849), vol. 3, p. 336.

19 Quoted in Bledsoe, *Is Davis a Traitor?* p. 155.

20 William C. Wright, *The Secession Movement in the Middle Atlantic States* (Rutherford, N.J.: Fairleigh Dickinson University Press, 1973).

21 Quoted in *ibid.*, pp. 177-78.

22 *Ibid.*, p. 199.

23 Quoted in Bledsoe, *Is Davis a Traitor?* p. 146.

24 John Quincy Adams, *The Jubilee of the Constitution* (New York: Samuel Coleman, 1839), pp. 66-69.

25 Thomas Jefferson, letter to W. Crawford, 20 June 1816, in *The Writings of Thomas Jefferson*, Albert Bergh, ed. (Washington, D.C.: Thomas Jefferson Memorial Association of the United States, 1905), vol. 15, p. 27.

26 Quoted in Ludwell Johnson, *Division and Reunion: America 1848-1877* (New York: John Wiley and Sons, 1978), pp. 76-77, emphasis added.

27 *Ibid.*, p. 77.

28 *Ibid.*, pp. 109-10.

29 C Vann Woodward, *Origins of the New South 1877-1913* (Baton Rouge: Louisiana State University Press, 1971), chap. 11, "The Colonial Economy."

30 Johnson, *Division and Reunion*, pp. 113-15, and quotation from p. 115.

31 *Ibid.*, pp. 72-73; see also *Selected Writings of Lord Acton*, J. Rufus Fears, ed. (Indianapolis, Ind.: Liberty Classics, 1985), pp. 216-79 and 361-67.

32 Quoted in Tol. P. Shaffner, *The War in America* (London: Hamilton, Adams, 1862), pp. 337-38.

33 *Ibid.*, pp. 339-40.

34 Johnson, *Division and Reunion*, pp. 123-28. See also Ann Norton's excellent book *Alternative Americas* (Chicago: University of Chicago Press, 1986). For studies of Lincoln as a gnostic figure, see M. E. Bradford, "Dividing the House: The Gnosticism of Lincoln's Rhetoric," *Modern Age* 23 (1979): 10-24; *ibid.*, "The Lincoln Legacy: A Long View," *Modern Age* 24 (1980): 355-63; *ibid.*, *A Better Guide than Reason: Studies in the*

*American Revolution* (LaSalle, Ill.: Sherwood Sugden, 1979), pp. 29-57 and pp. 185-203; and *ibid.*, *The Reactionary Imperative* (Peru, Ill.: Sherwood Sugden, 1990), pp. 219-27.

35 Quoted in Bledsoe, *Is Davis a Traitor?* p. 250.

36 Charles Adams, *For Good and Evil: The Impact of Taxes on the Course of Civilization* (New York: Madison Books, 1993), pp. 323-37.

37 Charles Bancroft, *The Footprints of Time: A Complete Analysis of Our American System of Government* (Burlington, Iowa: R.T. Root, 1877), p. 646.

38 Abraham Lincoln, *Speeches and Writings*, Don E. Fehrenbacher, ed., 2 vols. (New York: Literary Classics of the United States, 1989), p. 250.

39 Herman Melville, "Lee in the Capitol," in *Battle-Pieces* (Amherst: University of Massachusetts Press, 1972), p. 232.

40 Forrest McDonald, "Was the Fourteenth Amendment Constitutionally Adopted?" *The Georgia Journal of Southern Legal History* 1, no. 1 (Spring-Summer 1991): 1-20.

41 Claudius O. Johnson, "Did Judah P. Benjamin Plant the States Rights Doctrine in the Interpretation of the British North America Act?" *The Canadian Bar Review* 15, no. 3 (September 1967): 454-77.