

Constitutional Corner – Secession (Redux)¹

In *Gulf, C. & S. F. R. CO. v. Ellis*, 165 U.S. 150 (1897), the Supreme Court declared:

“the [Constitution] is but the body and the letter of [our law] which the [Declaration of Independence] is the thought and the spirit, and it is always safe to read the letter of the constitution in the spirit of the Declaration of Independence.”

So the Declaration and the Constitution are joined at the hip; you should not try to understand one without the other.

If that be the case, what are we to make of this:

“But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.”

Do the American people, or any portion thereof, retain a fundamental, unalienable right to throw off a former government in favor of something new? When asked this question within the context of the American Revolution, most Americans would admit that such a right certainly exists; to suggest otherwise would be to undermine our very existence as a nation and directly contradict our third President. Jefferson affirmed this right again in 1799 when, sitting as Vice President under John Adams, he wrote concerning the nefarious Alien and Sedition Acts, that if the American people did not rally around:

“the true principles of our federal compact”, [we should be determined to] “sever ourselves from that union we so much value, rather than give up the rights of self government which we have reserved, and in which alone we see liberty, safety and happiness.”²

James Madison agreed:

“If there be a principle that ought not to be questioned within the United States, it is, that every nation has a right to abolish an old government and establish a new one. This principle is not only recorded in every public archive, written in every American heart, and sealed with the blood of a host of American martyrs;

¹ Constitutional Corner first discussed secession in Volume 1, No 30, published 26 September 2013.

² *Smith, James Morton, ed. (1995). “Chapter 25. The Resolutions Renewed, 1799”. The Republic of Letters: The Correspondence between Jefferson and Madison 1776-1826. Vol. 2. New York: W. W. Norton & Co. p. 1119.*

but is the only lawful tenure by which the United States hold their existence as a nation.”³

Hamilton in Federalist 70, wrote: "*But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, EXCLUSIVELY delegated to the United States.*" (emphasis added)

On June 21, 1788, as Virginia prepared to announce their ratification of the proposed Constitution, they approved the following preamble:

“WE the Delegates of the people of Virginia, duly elected in pursuance of a recommendation from the General Assembly, and now met in Convention, having fully and freely investigated and discussed the proceedings of the Federal Convention, and being prepared as well as the most mature deliberation hath enabled us, to decide thereon, DO in the name and in behalf of the people of Virginia, declare and make known that the powers granted under the Constitution, being derived from the people of the United States may be resumed by them whensoever the same shall be perverted to their injury or oppression.”(emphasis added)

If the people have a right to throw off a former system of government, sever themselves from another people even, accompanied by a reserved right to take back political power that has been used to oppress them, how can there not be a right of secession available to the citizens of a state? Whether or not the Constitution supports secession is a separate matter altogether; secession, in the view of the Founders, was a natural right which lay outside the purview of civil law, including constitutions. This natural right was used to justify the English Civil War and both the American and French Revolutions. Perhaps the recognition of secession as a natural right accounts for the fact that the Framers choose not to address the issue in the Constitution.

“But the Civil War proved you couldn’t secede” say some. Really? In my view, as I tell all my Constitution classes: all the Civil War proved to me was that a state would not be allowed to peacefully secede when the President’s name was “Lincoln.” Lincoln didn’t wage war against the South to end slavery, he did it to prevent secession:

"My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it; and if I

³ Helvidius No. 3, September 7, 1793.

could save it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union;..”⁴

A parallel issue involves sovereignty. Did the states give up their full sovereignty in ratifying the Constitution? Hamilton didn't think so! So how much sovereignty did they give up, how much do they retain (called “residual sovereignty”) and to what actions or “objects” (as Madison would say) does that sovereignty extend? In the 1787/8 ratifying conventions, Federalist argued that the states were surrendering their “national sovereignty,” i.e. their right to be the sovereign nations they had been prior to the Articles of Confederation. This national sovereignty would be “transferred by the new Constitution to the whole of the American people.”⁵ This would suggest that the American people hold the key to secession; if they permit it, it should be allowed to proceed; if not....

The Supreme Court has taken a dim view of the topic. In *Texas v. White* (1869 - note, this is after the Civil War and during the Reconstruction Period), Chief Justice Salmon P. Chase wrote for the majority:

“The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these, the Union was solemnly declared to 'be perpetual.' And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?”

Chase's view seems to overlook that the Constitution was not a revision to the Articles, as he seems to suggest, but a replacement in toto. Furthermore, he ignores the historical fact that the “perpetual” union was on the verge of disintegrating by 1787, as John Jay confirms in Federalist 2:

“It has until lately been a received and uncontradicted opinion that the prosperity of the people of America depended on their continuing firmly united, and the wishes, prayers, and efforts of our best and wisest citizens have been constantly

⁴ Letter to Horace Greeley," August 22, 1862.

⁵ https://en.wikipedia.org/wiki/Secession_in_the_United_States.

directed to that object. But politicians now appear, who insist that this opinion is erroneous, and that instead of looking for safety and happiness in union, we ought to seek it in a division of the States into distinct confederacies or sovereignties."

Three separate Justices wrote dissents of Chase's majority opinion; Justice Robert Grier disagreed "on all points raised and decided" by the majority. After the opinion was announced, Senator Lyman Trumbull, introduced a proposed Constitutional Amendment in Congress that would have essentially overturned the Court's decision by placing the issue back into the exclusive domain of Congress. His bill stated:

*"under the Constitution, the judicial power of the United States does not embrace political power, or give to judicial tribunals any authority to question the political departments of the Government on political questions."*⁶

Trumbull's proposed amendment failed to garner sufficient support to pass the Congress and be sent to the states for ratification.

Multiple headlines show us that many Americans side with Madison and Jefferson over Chief Justice Chase: "Siskiyou County [California] supervisors vote to pursue seceding from state." Another reads: "Group calls for western Md. counties to secede." Yet another: "Northern Colorado Secession: Most In Favor Of 51st State At First Public Meeting."

Finally, there's Texas.

Unlike any other of the 50 states, Texas was an independent republic before deciding to join the union. Texas left the union to join the confederacy and like the others was forced back into the union at the point of a bayonet. There is a lively secessionist movement in the state, much to the chagrin of liberals, and a great FAQ website can be found [here](https://texassecede.com/faq.php#txconst)⁷ (which critiques the Texas v. White decision as well). For an interesting view of how such a movement might proceed, there's [this series of answers](https://www.quora.com/What-would-be-the-likely-outcome-if-Texas-announced-secession-from-the-United-States)⁸ on Quora.

A 2008 Zogby International poll found that 22% of Americans believed that "any state or region has the right to peaceably secede and become an independent republic."⁹

⁶ A "political question" is one in that the Constitution makes the sole responsibility of some other branch of government.

⁷ <https://texassecede.com/faq.php#txconst>

⁸ <https://www.quora.com/What-would-be-the-likely-outcome-if-Texas-announced-secession-from-the-United-States>

⁹ <https://kirkpatrickale.wordpress.com/zogby-secession-poll/>.

While all the foregoing was focused on a whole state seceding from the remaining 49, we should also consider the possibility of a portion of a state seceding from the remainder, i.e. becoming its own state. How does that work?

Article 4, Section 3, Clause 1 of the Constitution states:

“New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”

West Virginia was created by allowing it to essentially secede from the rest of Virginia and return to the Union. Actually, the story is a bit more complicated. Enough Virginians in the northern part of the state were miffed at the secession announcement by the Richmond government that they formed a “reconstituted government of Virginia,” situated in Fredericksburg, by explaining that the Richmond government had vacated their seats. The “reconstituted” government then gave permission for the western counties to form their own state thereby becoming West Virginia. Lincoln desperately needed the new representatives in Congress, so all approvals were expedited. Secession, as it seems, will be allowed when it works in favor of the Union.

In summary, while experience suggests that unilateral secession can and will be opposed, the mutually agreed upon departure of one or more states from the union may be permissible. Go Texas!

A parting note: in 1967, the village of Winneconne officially seceded from Wisconsin for one day to protest its omission from the new state highway map.

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