Exhibit 180

in the case of:

People of the Republic of Texas
and the
Sovereign Nation of the Republic of Texas

v.

UNITED NATIONS
(and all it's Political Subdivisions)
and
UNITED STATES
(and all it's Political Subdivisions)

Under Pains and Penalties of perjury and the laws of the Almighty, and being sworn under a vow and oath, I attest that the attached pages are true and correct reprints of the:

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AN ANALYSIS OF PRESIDENT LINCOLN'S LEGAL ARGUMENTS AGAINST SECESSION

by James Ostrowski*

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INTRODUCTION

On May 27, 1861, the army of the United States of America (the "Union")--a nation formed by consecutive secessions, first from Great Britain in 1776, and then from itself in 17881--invaded the State of Virginia,2 which had recently seceded from the Union, in an effort to negate that secession by violent force.

The historical result of the effort begun that day is well known and indisputable: after four years of brutal warfare, which killed 620,000 Americans, the United States negated the secession of the Confederate States of America, and forcibly re-enrolled them into the Union. The Civil War ended slavery, left the South in economic ruins, and set the stage for twelve years of military rule there.

Beyond its immediate effects, the Civil War made drastic changes in politics and law that continue to shape our world 130 years later. Arthur Ekirch writes:

> "Along with the terrible destruction of life and property suffered in four long years of fighting went tremendous changes in American life and thought, especially a decline in [classical] liberalism on all questions save that of slavery. * * * Through a policy of arbitrary arrests made possible by Lincoln's suspension of habeas corpus, persons were seized and confined on the suspicion of disloyalty or of sympathy with the southern cause. Thus, in the course of the Civil War, a total of thirteen thousand civilians was estimated to have been held as political prisoners, often without any sort of trial or after only cursory hearings before a military tribunal."3

The Civil War caused and allowed a tremendous expansion of the size and power of the federal government. It gave us our first federal conscription law, first progressive income tax, first enormous standing army; it gave us a higher tariff, and greenbacks. James McPherson writes approvingly: "This astonishing blitz of laws . . . did more to reshape the relation of the government to the economy than any comparable effort except perhaps the first hundred days of the New Deal. This Civil War Legislation . . . created the 'blueprint for modern America."4 Albert Jay Nock was more critical of the war's impact, especially on the Constitution: "Lincoln overruled the opinion of Chief Justice Taney that suspension of habeas corpus was unconstitutional, and in consequence the mode of the State was, until 1865, a monocratic military despotism. . . . The doctrine of 'reserved powers' was knaved up ex post facto as a justification for his acts, but as far as the intent of the constitution is concerned, it was obviously pure

invention. In fact, a very good case could be made out for the assertion that Lincoln's acts resulted in a permanent radical change in the entire system of constitutional 'interpretation'--that since his time 'interpretations' have not been interpretations of the constitution, but merely of public policy. . . . A strict constitutionalist might indeed say that the constitution died in 1861, and one would have to scratch one's head pretty diligently to refute him."5

This paper will attempt to explore Nock's thesis by examining the central constitutional issue of the war: was the Union Army's invasion of the Confederacy a lawful act? This will be done primarily by analyzing the legal arguments made by President Abraham Lincoln in support of the invasion and against the Confederate secession. This method is justified by several facts. First, the invasion of the Confederacy was ordered by President Lincoln. Second, President Lincoln was one of the most brilliant lawyers of his era. It is thus safe to assume that his legal argument in support of the invasion was of the highest quality. Third, it is likely that President Lincoln read, thought, wrote and spoke about the legal issues involving the Civil War more so than any other pro-Union lawyer of his era. He was aware of the pro-Union arguments made by his predecessors and contemporaries.6 Finally, President Lincoln, a superb writer and speaker, had strong incentive to make his views against secession known to the American people to secure their support for the onerous war his opposition to secession made necessary. From the above facts, we can conclude that, if the invasion of the Confederacy was legally justified, that legal justification is to be found primarily in the writings and pronouncements of President Lincoln.

This paper will not address the morality of the Union's invasion of the Confederacy, except indirectly and only to the extent that certain moral principles were undoubtedly reflected in the framework of laws governing the Union in 1861. Thus, whether the Union's invasion of the Confederacy can be morally justified, even if found to be unlawful, will not be answered here.7 It is the case, however, that the officials who launched the invasion, especially President Lincoln, made no such argument in 1861. He had previously indicated his views on that issue by criticizing John Brown's raid on Harper's Ferry.8

The issue of the right of a State to secede is of more than historical interest. Since the end of the Civil War in 1865, though several amendments giving the federal government greater power over the states have been ratified, there have been no textual changes to the Constitution which explicitly prohibit secession.

There was no attempt by either side in the Civil War to resort to federal courts or international arbitrators for a decision on the legality of secession. Nor has any state attempted to secede since the Civil War. As settled as secession may be as a political or historical issue to many, it has never been settled as a legal one. The recent revival of secession talk and practice worldwide makes the present undertaking a valuable one.

WAS THE INVASION JUSTIFIED BY THE SEIZURE OF FORT SUMTER?

In the context of a legal analysis of state secession, it was the Union's invasion of Virginia that is significant, and not the Confederacy's firing on Fort Sumter a month earlier. The Confederacy fired on Fort Sumter to expel what it believed were trespassers on South Carolina soil and territorial waters. By no means can the seizure of the fort be construed as a threat to the security of the states remaining in the Union, the closest of which was 500 miles away. If South Carolina illegally seceded from the Union, then both the Union's initial refusal to surrender Fort Sumter and its subsequent invasion were lawful and constitutional. Conversely, if South Carolina had the right to secede from the Union, then indeed the Union soldiers in the Fort were trespassers and also a potential military threat to South Carolina. Thus, assuming the right of secession existed, the Union had no right to retaliate or initiate war against the

Confederacy. Its subsequent invasion of Virginia then marks the beginning of its illegal war on the Confederacy. The incident at Fort Sumter is largely significant as a political victory for the Union. President Lincoln, while holding a hostile military force on Southern soil, was able to outmaneuver the Confederacy into firing the first shot of the war.9 That such a shot would be fired, however, was guaranteed by President Lincoln when he disingenuously announced in his Inaugural Address that "there shall be [no violence] unless it be forced upon the national authority." He then defined the term "national authority" in such a way as to insure that war would come: "The power confided in me, will be used to hold, occupy, and possess the property, and places belonging to the government, and to collect the duties and imposts; but beyond what may be necessary for these objects, there will be no invasion--no using of force against, or among the people anywhere."

Whatever one's views, legal, political, or moral about the Civil War or President Lincoln, it should be obvious that Lincoln was being dishonest here. He was suggesting that he would not resist secession, but would continue to tax the seceders and hold hostile military installations on their property--an absurdity. Before becoming President, Lincoln had been more honest. He simply said "we won't let you" secede. The truth is, the Southern states wanted to go in peace, but Lincoln "wouldn't let them."10

LINCOLN'S LEGAL ARGUMENTS AGAINST SECESSION

President Lincoln set forth his views on secession mainly in his First Inaugural Address (March 4, 1861), and his Special Message to Congress (July 4, 1861). In the first speech, Lincoln made primarily political arguments against secession, apparently hoping to persuade secessionists with his arguments. However, with secession already accomplished by July 4, 1861, Lincoln's Special Address to Congress focused on the alleged illegality of secession, to establish the legitimacy of his intended military resistance to it. This paper will therefore first consider the Special Message's legal arguments against secession, then the First Inaugural's political arguments against secession.

In his July 4, 1861 address to Congress, President Lincoln called the doctrine of the secessionists "an insidious debauching of the public mind." "They invented," he said, "an ingenious sophism, which, if conceded, was followed by perfectly logical steps, through all the incidents, to the complete destruction of the Union. The sophism itself is, that any state of the Union may, consistently with the national Constitution, and therefore lawfully, and peacefully, withdraw from the Union, without the consent of the Union, or of any other state." Ironically, it was not "fire-eating" Southern rebels who had originated this "sophism," but the man Lincoln called "the most distinguished politician in our history"--Thomas Jefferson.11 Jefferson, who called Virginia his "country," planted the seeds of the secession doctrine with his Kentucky Resolution of 1798, written in protest to the Alien and Sedition laws:

> "[T]he several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of the Constitution of the United States, and of certain amendments thereto, they constituted a general government for general purposes, delegated to that government certain powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void and of no effect."12

Hannis Taylor called Jefferson's compact doctrine the "Pandora's Box" out of which flew the "closely related doctrines of nullification and secession," which he notes, with less than perfect foresight, "were extinguished once and forever by the Civil War."13 Jefferson's biographer, Willard Sterne Randall agrees:

"[Jefferson] forthrightly held that where the national government exercised powers not specifically delegated to it, each state 'has an equal right to judge . . . the mode and measure of redress.' . . . He was, he assured Madison, 'confident in the good sense of the American people,' but if they did not rally round 'the true principles of our federal compact,' he was 'determined . . . to sever ourselves from that union we so much value rather than give up the rights of self-government . . . in which alone we see liberty, safety and happiness.'"14

In reply to this "insidious debauching of the public mind," Lincoln constructs a straw man secessionist argument: "This sophism derives much--perhaps the whole--of its currency, from the assumption, that there is some omnipotent, and sacred supremacy, pertaining to a State--to each State of our Federal Union." No secessionist including Jefferson made such an argument, though it sounds ominously like a description of Lincoln's own feelings about the Union. Since the States created the Union, Lincoln's denigration of the States and glorification of the Union is paradoxical.

Lincoln challenges the claim of reserved state powers by asserting that no state, except Texas, had ever "been a State out of the Union." Lincoln argues that the states "passed into the Union" even before 1776; united to declare their independence in 1776; declared a "perpetual" union in the Articles of Confederation two years later; and finally created the present Union by ratifying the Constitution in 1788. There are many problems with his argument.

Lincoln confuses no fewer than four different concepts of "union". Prior to July 4, 1776, the colonies were united by their increasing concern over the violation of their rights by the British government. Their representatives met in a Continental Congress which ultimately issued the Declaration of Independence and organized the Revolutionary War effort. Prior to 1776, no issue of secession from a union could have arisen because the colonies still considered themselves part of Great Britain. Neither was there any legal document agreed to by the Continental Congress which directly or indirectly addressed the issue of secession. Thus, the "union" that existed prior to 1776 is of no importance at all to the issue of secession.

Next comes the union created by the Declaration of Independence. The most notable fact in this context is that the Declaration announces a lawful secession by the colonies from Great Britain based on the right of the people to alter or abolish their form of government. It is thus apparent that the Declaration of Independence establishes that the right of secession is among the inalienable rights of men. The Declaration is therefore literally the last place on earth one would hope to find legal justification for a war against secession. It was adopted by representatives of the thirteen colonies and declared that those colonies had become "Free and Independent States." The Declaration was not, however, a constitution, establishing a particular type of union among the states, or specifying any duties binding on them other than a moral commitment to mutually defend their newly declared independence.

Ironically, the past "train of abuses" Thomas Jefferson cited in support of secession reads like a checklist of the tactics Lincoln and his successors used against the South to prevent secession:

"He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people. He has refused for a long time, after such dissolutions, to cause others to be elected. . . He has made Judges dependent on his Will alone. . . He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance. He has kept among us, in times of peace, Standing Armies without the consent of our legislatures. He has affected to render the Military independent of and superior to the Civil Power. He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws, giving his Assent to their Acts of pretended Legislation: For

quartering large bodies of armed troops among us. For cutting off our Trade with all parts of the world. For imposing Taxes on us without consent. For depriving us in many cases, of the right of Trial by Jury. For taking away our Charters, abolishing our most valuable Laws and altering fundamentally our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever. He has abdicated Government here, by declaring us out of his Protection and waging War against us. He has plundered our seas, ravaged our Coast, burnt our towns, and destroyed the lives of our people. He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny."

Evidently, the Civil War did indeed "test whether" a nation "conceived in liberty" could "long endure."

The next union cited by Lincoln is the government established by the Articles of Confederation. This document was ratified on March 1, 1781. The most significant fact about the Articles is that they specify, both in the preamble and in the body, that the union thus created is "perpetual." Article XIII states:

> "[T]he Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state."

In contrast, however, Article II states that "Each state retains its sovereignty, freedom and independence and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled (emphasis added)." This sentence is divided into two clauses, the first of which speaks of states retaining their sovereignty, freedom, and independence, and the second of which reserves to the states, powers and rights not delegated to the United States.

Resolving the apparent conflict between Article II and Article XIII as it respects the issue of secession is unnecessary for our purposes. Suffice it to say that the Articles expressed a desire for perpetual union, while recognizing the independence of states, and omitting any clear mandate or enforcement mechanism to prevent state secession. They also established a decentralized federal system without a strong executive power which apparently failed to arouse any secessionist impulses in its short tenure.

The union established by the Articles of Confederation, in spite of its exhortation of perpetuity, was terminated by nothing other than a secession! The proposed Constitution provided that it would take effect upon ratification by nine states. On June 21, 1788, New Hampshire became the ninth state to ratify. On that date, a new union was formed, exclusive of Virginia, New York, North Carolina, and Rhode Island which had not yet ratified. That new union seceded from the union formed by the Articles of Confederation in violation of Article XIII which barred any change in the Articles save by unanimous consent.15

Significantly, the Articles' exhortation of perpetuity--repeated five times--was dropped by the new Constitution. In response to this embarrassing fact, Lincoln argues that the phrase "a more perfect union" in the preamble, implies at least the perpetuity of the Articles. Evidently, the Framers either disagreed or chose to be silent on the matter. (Common sense suggests that perpetual (forced) unions, are less perfect than consensual ones, about which more later.) Their omission is especially significant since the term "perpetuity" was part of the full name of the Articles: "Articles of Confederation and Perpetual Union"16 Thus, the Framers could hardly have missed the term.

More importantly, a comparison of the two texts reveals that, contrary to popular thought, much copying

was done by the Framers of the Constitution. Entire clauses from the Articles were imported virtually word for word into the Constitution. Examples include the following clauses: privileges and immunities, extradition, full faith and credit, congressional immunity while in session, ban on state treaties, and ban on state imposts and duties. The Framers were clearly conversant with the text of the Articles, but no mention of perpetuity appears in the Constitution.

Neither does the Constitution explicitly say anything about state secession. The word "secession" does not appear in the Constitution. The Constitution neither prohibits a state from leaving the union nor explicitly authorizes a state to do so. Nor does it explicitly authorize the federal government to forcibly retain a state that has seceded.

Secession was apparently not discussed at the Constitutional Convention.17 This may have been a deliberate omission:

> "It would have been inexpedient to have forced this issue in 1787, when the fate of any sort of a central government was doubtful. But [this] subject [was] probably not even seriously considered at that time."18

President Buchanan later argued that if states had the right to secede, all that anti-federalist concern about potential federal tyranny was pointless.19 This is a clever, but strange legal argument. It uses circumstantial evidence to establish what certain opponents of the Constitution thought it meant on a point not widely discussed or considered at that time. Such a method of constitutional interpretation is tertiary at best. This article relies primarily on textual analysis and secondarily on consideration of the purposes of the drafters and ratifiers and their historical circumstances. It is not at all clear why what opponents of the Constitution thought it meant should be a criterion of interpretation.

Even if it is considered important, however, there are still problems with the argument since many historians have concluded that most people of the time believed the states retained the right to secede.20 Since the Constitution expanded the powers of the federal government, omission from it of any mention of secession or perpetuity certainly removes a potential source of opposition to ratification.

Another problem with Buchanan's argument is that its initial premise is dubious. That is, it assumes that if a right to secession existed under the proposed Constitution, opposition to it would have been less severe. However, even if the Constitution explicitly allowed states to secede, opponents of a strong federal government nevertheless had strong incentive to oppose it for the simple reason that the new Constitution meant the death of the minimalist Articles of Confederation. Finally, even if anti-federalists believed that the states retained the right to secede under the new Constitution, they could well have thought--with perfect foresight--that the federal government would nevertheless ignore that right, and use military force to prevent such a lawful secession. Thus, Buchanan's clever argument is mere sophistry.

This review of the legal history of the states contradicts Lincoln's claim that the states had always been part of a superior union which impliedly forbade secession. In fact, such a claim is preposterous. At various times, the states had been loosely joined for their common defense without a constitution, and at other times, certain states had been left entirely out of the union. The very birth of the states as independent entities took place when they ratified a Declaration of Independence which enshrined a right of secession as an inalienable right of the people of each state.21

We turn next to Lincoln's discussion of the Constitution as he believes it relates to secession. He argues that while states have reserved powers under the Constitution--presumably referring to, but not

mentioning, the Tenth Amendment--secession cannot be such a power since it is "a power to destroy the government itself." This is of course hyperbole and abuse of language. To depart from is to destroy, according to Lincoln. If the union government was "destroyed"22 by secession, what was the entity that put a million troops in the field to stop it?

Secession does not destroy the federal government; it merely ends its authority over a certain territory and sets up a new government to take its place in that territory. Nevertheless, even if we meet Lincoln halfway and concede that secession involves a partial destruction of the power and scope of the federal government, how does that fact alone prove its unconstitutionality? It still remains for Lincoln to confront the limited and delegated nature of the powers of the federal government and the Ninth and Tenth Amendments which transform those principles into positive law. He dodges:

> "What is now combatted, is the position that secession is consistent with the Constitution--is lawful, and peaceful. It is not contended that there is any express law for it;23 and nothing should ever be implied as law, which leads to unjust, or absurd consequences."

Nowhere does Lincoln mention the Ninth and Tenth Amendments. Since those Amendments carry much of the load of the argument for secession and were frequently cited by secessionists of the day, the failure of the brilliant lawyer to grapple with those clauses is strong evidence of his inability to do so. Lawyers have often treated the weak points in their cases with silence there and much noise elsewhere.

Not only does Lincoln ignore the Ninth and Tenth Amendments, he simply replaces them with an amendment of his own: states have no rights that are not expressly stated in the Constitution. It was precisely the point of those amendments, however, to ensure that no serious lawyer would ever make such an argument.

The Ninth Amendment states:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The precise purpose of the Ninth Amendment was to respond to the argument Alexander Hamilton made against attaching a bill of rights to the Constitution. Hamilton argued that the expression of certain rights such as free speech and the right to bear arms would, by longstanding rules of legal interpretation, be construed to deny other possible rights.24 The Ninth Amendment was added to the Bill of Rights to make clear that rights other than those specified were indeed retained by the people.

The most authoritative source for unenumerated rights is the Declaration of Independence. As Bennett Paterson writes, "The Declaration of Independence was a forerunner of the Ninth Amendment."25 As we have seen, the Declaration explicitly supports the right to alter or abolish government in the context of announcing a secession from Great Britain. The author of the leading constitutional law treatise of the early 19th Century wrote: "To deny this right (secession) would be inconsistent with the principle on which all our political systems are founded, which is, that the people have in all cases, a right to determine how they are governed."26 Thus, the right of a people to secede from a larger polity would appear to among the unenumerated rights protected by the Ninth Amendment. The Tenth Amendment states:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Tenth Amendment compliments the Ninth27 in providing a persuasive textual argument that the right of secession is reserved to the States.28 The right to prevent secession is not "delegated" to the United States. In fact, the Constitutional Convention considered and rejected a provision that would have authorized the use of Union force against a recalcitrant state. On May 31, 1787, the Convention considered adding to the powers of Congress the right: "to call forth the force of the union against any member of the union, failing to fulfil its duty under the articles thereof."29 The clause was rejected after James Madison spoke against it:

> "A Union of the States containing such an ingredient seemed to provide for its own destruction. The use of force against a State, would look more like a declaration of war, than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound."30

Neither is the right to secede expressly "prohibited" to the States. Thus, under the plain meaning of the Tenth Amendment, the States retain or possess the right to secede. This textual reading is buttressed by the historical fact that the States had the right to secede in 1776 and did not expressly give up that right in ratifying the Constitution. To the contrary, several states, including New York, in their acts of ratification, noted that "the powers of government may be reassumed by the people, whensoever it shall become necessary to their happiness."31 The Tenth Amendment also makes clear that a right or power need not be expressly granted to the States by the Constitution. Rather, the States are irrebuttably presumed to have such a power, unless that power is expressly taken from them by the Constitution.32

Since the acts of secession were first approved by state legislatures, then ratified by conventions whose delegates were elected by the people of those states, there is no conflict between the Ninth and Tenth Amendments in authorizing Confederate secessions.33

Lincoln was therefore in error in suggesting that the right of secession had to be spelled out in the Constitution. He did, however, make an argument in the alternative that secession should not be "implied as law [because it] leads to unjust, or absurd consequences." Among the "unjust" consequences of secession Lincoln cites are the financial consequences. The federal government borrowed money to purchase the territory of several seceding states and contracted to pay the debts of Texas when it entered the union. Also, the seceding states would allegedly escape their share of the national debt.

All these issues, however, are collateral to the issue of secession and are therefore to be regarded as red herrings. We know that even if the seceding states had hired an accountant, determined the net amount, if any, owed to the federal government and tendered payment in that amount, that President Lincoln would nonetheless have ordered the invasion. Furthermore, if the war was fought to recover a just debt, then the Union army would only have needed to confiscate sufficient Confederate property to pay that debt, and leave in peace. That image is as absurd as Lincoln's argument. Since Lincoln's argument is not a bona fide argument against secession, we need not consider the complex issue of whether the seceding states actually did owe money to the federal government.34

Yet another part of the Bill of Rights ignored by Lincoln is the Second Amendment. The Second Amendment speaks of "the right of the people to keep and bear arms" and to form a "well regulated Militia" in order to protect the security of a "free State." A reasonable interpretation of this Amendment, based on its historical origins, is that the people of the states have the right to defend themselves against the tyranny of the federal government: "The Second Amendment was designed to guarantee the right of the people to have 'their private arms' to prevent tyranny and to overpower an abusive standing army or

select militia."35

James Madison, writing before the Second Amendment was ratified, wrote:

> "Let a standing army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the State governments, with the people on their side, would be able to repel the danger. . . To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence."36

If states have the right to protect themselves against federal tyranny by force, they would appear to have the right to do so by the peaceful means of secession. Thus, while the right of secession is not derived from the Second Amendment, the denial of such a right renders the Second Amendment incongruous. Lincoln not only ignored the Second Amendment, he perverted its intent--and undercut the premise of Madison's argument--by calling out the militias of the Northern states to fight against the militias of the Confederate States. His agents also violated the Second Amendment rights of citizens in border states by systematically seizing their muskets.37

Lincoln cites only two clauses in the Constitution in arguing against the legality of secession: the supremacy clause and the guarantee clause. Each argument shares the same logical defect. The supremacy clause states:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."38

This clause could arguably be invoked to negate secessionist legislation as violative of federal laws against treason. Reliance on the supremacy clause, however, begs the question. The supremacy clause can be used as an argument against secession only if the Constitution requires a state to remain part of the union;39 it does not apply otherwise nor obviously does it apply to a state that has left the Union. Thus, the argument from the supremacy clause assumes as a premise precisely what is in dispute: that the state is still part of the Union and thus bound by the Constitution's supremacy clause. In light of the arguments previously made that the Constitution allows secession, one can just as easily argue that the supremacy clause barred the Union army's invasion of the South!

Article IV, Section 4, states: "The United States shall guarantee to every State in this Union a Republican Form of Government." This clause was cited by President Lincoln to justify a war to prevent secession:

> "[I]f a State may lawfully go out of the Union, having done so, it may also discard the republican form of government; so that to prevent its going out, is an indispensable means, to the end, of maintaining the guaranty mentioned; and when an end is lawful and obligatory, the indispensable means to it, are also lawful, and obligatory."40

John Adams once complained that "he 'never understood' what the guarantee of republican government meant; 'and I believe no man ever did or will.'"41 Nevertheless, Lincoln's argument again begs the question. The clause itself applies only to a "State in this Union." Thus, to apply the clause, one must first assume that a State may not lawfully secede.42

Those portions of the guarantee clause not cited by Lincoln are instructive: "The Unites States shall . . . protect each of them from Invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence." Lincoln failed to cite the "invasion" clause, of course, since he himself was planning an invasion of the Southern states. Nor could he very well justify that invasion on the grounds of preventing "domestic violence" since he lacked the consent of the Confederate state legislatures, to say the least. A plain reading of the Guarantee Clause as a whole suggests it was written for the benefit of the states, not to provide a pretext for invading them.

Lincoln's evasion of these critical portions of the guarantee clause are symptomatic of the central fallacy of his constitutional view of secession: his belief that the Constitution countenanced a military invasion of the South and resulting extended displacement of its civil authorities by military rule. To the contrary, the Constitution contemplates a structure of state-federal relations in which the states must take an active and voluntary part.43 This contrasts sharply with Lincoln's view of the Union as little more than a prison, from which unhappy states are not allowed to escape:

> "the Union, in any event, won't be dissolved. We don't want to dissolve it, and if you attempt it, 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."44

Lincoln believed the Union is fully preserved if that escape is prevented by force. But is it? The Constitution uses the word "State" over a hundred times. It establishes not a prison-inmate relation, but a complex political structure in which powers, duties, and rights are divided between the federal government and the states. Even the Supreme Court, in two cases critical of secession, admitted this:

> "[T]he States are organisms for the performance of their appropriate functions in the vital system of the larger polity, of which, in this aspect of the subject, they form a part, and which would perish if they . . . ceased to perform their allotted work." 45 "'[W]ithout the States in union, there could be no such political body as the United States.'"46

The states were expected to choose members of the House of Representatives and elect representatives to "The Senate of the Unites States [which] shall be composed of two Senators from each State."47 The states were expected to select electors who would then elect a President. The states were expected to maintain militia, which could be called upon by the President to defend the nation.48 States were required to give full faith and credit to the judicial proceedings of other states, respect the "Privileges and Immunities" of the citizens of other states, and return fugitives from justice to other states.49 The States were expected to actively participate in the process of amending the Constitution. Such amendments require the consent of three-fourths of the states.50 State courts were expected to be bound by the Constitution, treaties, statutes and federal court decisions.51

Some of the state functions listed above are simply not subject to being effectively compelled by the federal government. Sending representatives to Congress and participating in the election of a president fall into this category. It is difficult to conjure an image of a state being forced at gunpoint to elect a Senator. Other functions listed are subject to being compelled. Examples include recognition of the court decisions of other states and of the federal government. Such compulsion, however, in the presence of a recalcitrant state government, requires the establishment of a lasting federal military government in such state.

To an extent, the South's decision to seek secession through military resistance, obscured this fact. After being defeated militarily, the South, exhausted by war, reluctantly accepted federal authority in order to

rid itself of military occupation. In contrast, if a state were to pursue secession by means of non-violent resistance and complete non-involvement with the federal government, an anti-secessionist federal government would be forced to permanently occupy and rule that state in the manner of a colonial power, exercising even greater authority than Great Britain held over the American Colonies prior to 1776!52 That ugly scenario, however, is precisely what anti-secessionist thinkers are obliged to assert was within the intent of the ratifiers of the Constitution of 1788: the thirteen states which had recently fought long and hard to escape colonial status.

While it may be true that some of the Framers intended the Union to be perpetual, it is highly unlikely that even those Framers believed the Constitution authorized the establishment of a military dictatorship to keep it so. Thus, it could be said that while the issue of secession was perhaps not contemplated by the Constitution, neither was forced union at the cost of the military occupation of recalcitrant states.53 Such military occupation flatly contradicts the Guarantee Clause drafted by those same Framers.

From the moment federal troops occupied the South, the governments of those states could no longer be considered "republican". With apologies to John Adams, by "republican", I mean a government exercising limited powers delegated to it by the people, whose officials are answerable to the people in regular, free elections.54 Since the very purpose of invading the South was to destroy the state governments established by the people, in militarily occupying those states, the federal government breached its obligation to guarantee to each state a republican form of government.55 Since the federal government necessarily violated the Constitution's Guarantee Clause by engaging in war on seceding states, it is evident that it had no constitutional authority to prevent such secessions.

The strength of this argument is best seen by noting the absurd linguistic manipulations used to justify the constitutionality of military occupation. Andrew Johnson, who President Lincoln appointed the military governor of Tennessee, and who as President would later appoint other military governors in the South, said in 1862 that his authority to single-handedly rule Tennessee came to him by way of the guarantee clause!56 The "republicanism" thus guaranteed by Johnson apparently consisted of forcing on the people of Tennessee certain forms of government and government policies they evidently did not desire. The rationale? "[The] right of self-government could be temporarily impaired but only for the purpose of assuring its eventual and permanent triumph."57

The other rationale for military occupation is also self-contradictory. In Coleman v. Tennessee, the Supreme Court held military occupation lawful, not on constitutional grounds, but by resorting to international law principles which apply primarily to independent nations.

> "Though the late war was not between independent nations, but between different portions of the same nation, yet having taken the proportions of a territorial war, the insurgents having become formidable enough to be recognized as belligerants, the same doctrine must be held to apply. The right to govern the territory of the enemy during its military occupation is one of the incidents of war. . . and the character and form of the government to be established depend entirely upon the laws of the conquering State or the orders of its military commander."58

Thus, to justify the otherwise unconstitutional military occupation of a state, the Supreme Court treats that state as if it were an independent nation, implicitly recognizing the validity of its secession. What the Court did not cite was any constitutional provision which justified the war in the first place. Since the invocation of international law was based on the fact of war, and the Union's involvement in that war violated the Constitution, it is evident that the Constitution's supremacy clause59 forbade resort to international law to override the Constitution. The unconstitutional and amoral nature of the Court's

reasoning can be seen by assuming, arguendo, that the Confederacy, in violation of the Constitution, had conquered the North and set up a military government there. The Supreme Court, by the same logic they applied in Coleman, would be compelled to endorse the legality of that military dictatorship!

Much ink has been spilled over the ancient debate between those who hold that the Constitution is a compact among the states (Jefferson, Calhoun) and those who deem it "an instrument of perpetual efficacy" created by the people of the nation as a group (Marshall, Webster).60 The outcome of this debate cannot impact on the conclusions reached above, since those conclusions rest primarily on an analysis of the relevant texts and secondarily on the historical context in which those texts were drafted. Nevertheless, because of the historical association between this debate and the issue of secession, a brief evaluation is appropriate.

Ironically, reliance on the compact theory tends to weaken the case for secession by suggesting that it is not justified by the actual text of the Constitution. The main textual problem with the compact theory is that the Constitution does not read like a contract among the states. The main logical problem is that, while it claims that the Constitution is an implied contract among the states, that document creates a separate entity--the federal government--which would not appear to be bound by the contract because it is not a contracting party. Thus, secessionists erred in choosing poor ground on which to do battle with unionists. The compact theory also creates an insoluble procedural difficulty. If the Constitution is a compact, violation of which allows a state to withdraw, who is to judge whether such a violation has occurred? Reliance on the Ninth and Tenth Amendments, under which secession is a reserved state power, eliminates this procedural obstacle to secession.61

Nevertheless, the compact theory contains an essential element of truth. It takes the long way around the barn to arrive at the rather obvious conclusion that the states enacted the Constitution for their mutual benefit. Shifting then, from the quaint, complex, and controversial compact theory to the indisputable proposition that a constitution should be interpreted according to the purposes of its ratifiers, it becomes apparent that the purposes of the Constitution do not envision the use of armed force against a state that has concluded it is no longer benefiting from the Union. The Constitution may not literally be a compact among the states, but neither is it a sentence of perpetual imprisonment.

While unionists assert that the compact theory is "scholastic metaphysics",62 their own contrasting view of the Constitution contains elements which fail to connect with reality at any point. Bryce wrote that the Constitution was "an instrument of perpetual efficacy, emanating from the whole people."63 Yet, as already noted, it contains no such language, and in fact, its Framers deliberately chose not to carry over the use of the term "perpetual union" from the Articles of Confederation to the Constitution.

Neither did the Constitution "emanate from the whole people." Leaving aside the preamble for the moment, the actual language of the text is to the contrary:

> "Article VII. The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same. . . Done in Convention by the Unanimous Consent of the States present. . . " "Article V. [The Constitution may be amended] when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths, thereof. . . "

Since the Constitution was proposed by a convention called by the states, was ratified by the states, and can only be amended by the states, the notion that it "emanates from the whole people" or that "the government proceeds directly from the people,"64 or that it is "of the people" and "by the people"65 can

only be described as "metaphysical" nonsense invented by those who view the states as a mere inconvenience on the path to creating an all-powerful central government.

Much has been made by unionists of the preamble to the Constitution:

> We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution of the United States of America." (emphasis added)

This reliance is understandable. If one lacks support for one's view in the text of the constitution, one seeks it in the preamble. The underscored phrase, however, has no unambiguous meaning. Its meaning depends on whether the word "United", an adjective, or "States", a noun, is given greater emphasis.

There is no need to resolve this issue, however, because the very presence of the phrase, "We, the People of the United States," in the preamble, is an accident! It originally read:

> "That the people of the States of New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia do ordain, declare and establish the following constitution for the government of ourselves and our posterity."66

Judge Eugene Gary explains:

> "[I]t was amended, not for the purpose of submitting the constitution to the people in the aggregate, but because the convention could not tell, in advance, which States would ratify it."67

Though unionists have placed great stock in the preamble, their recitations of it usually extend only to the first fifteen words. Nothing thereafter is particularly helpful to their cause. The Union's creation of martial law in the South can hardly be within the ambit of "establishing justice" or "securing the blessings of liberty." "Domestic tranquility" was not insured by the bloodiest war ever fought in North America. The "general welfare" was not promoted when one section of the nation fought, subdued and ruled the other for sixteen years.68 "Providing for the common defense," does not appear to sanction an attack on eleven states.

Ultimately, one must look beyond mere logic and the four corners of the Constitution to identify the unionist spirit that led to the Civil War:

> "The union was . . . more than a mere compact between separate entities, separate states. It was rather a union of early history and future promise, of generations past and generations still to come, of agriculture and industry, of plains and seaboard, of the vast hosts of mystical and emotional forces which give to man a greater sense of belonging, a greater sense of community."69

Gary Wills denies Lincoln "did not really have arguments for union, just a kind of mystical attachment to it."70 He argues that Lincoln got most of his pro-union legal arguments from Daniel Webster. Wills' discussion of those "arguments", e.g., the Union is older than the states and the Declaration of Independence sanctions war against seceding states71, tends one to the view that Webster was a union mystic as well.

A THOUGHT EXPERIMENT

Those still harboring doubts about the constitutionality of secession in 1861 should attempt a sincere answer to the question: would the Constitution, as construed by President Lincoln and his allies in all eras, have been ratified in 1788? To answer this question, we must first make explicit those provisions Lincoln and his successors thought were implicit in the Constitution. For the sake of realism, these provisions will be organized in the form of an imaginary Eleventh Amendment to the Constitution.72 Such an amendment would read as follows:

(Imaginary) Amendment XI

Section 1. Notwithstanding the Guarantee Clause and the Ninth and Tenth Amendments, no state may ever secede from the Union for any reason, except by an amendment pursuant to Article V.73

Section 2. If any State attempts to secede without authorization, the Federal Government shall invade such State with sufficient military force to suppress the attempted secession.

Section 3. The Federal Government may require the militias of all states to join in the use of force against the seceding State.

Section 4. After suppressing said secession, the Federal Government shall rule said State by martial law until such time as said State shall accept permanent federal supremacy and alter its constitution to forbid future secessions.

Section 5. After suppressing said secession, the Federal Government shall force said State to ratify a constitutional amendment which gives the Federal Government the right to police the states whenever it believes those states are violating the rights of their citizens.

Section 6. The President may, of his own authority, suspend the operation of the Bill of Rights and the writ of habeas corpus, in a seceding or loyal state, if in his sole judgment, such is necessary to preserve the Union.74

This imaginary amendment contains a fair summary of what Lincoln thought the Constitution ratified in 1788 had to say implicitly about state secession. Would the Constitution have been ratified if it contained such an amendment? Would that amendment have been ratified at any time between 1788 and 1861? The answer to both questions, according to any intellectually honest historian or constitutional lawyer, must be a resounding "No!" If that is the case, however, then the dense fog made up of equal parts of Websterian metaphysics and Lincolnesque legalese disintegrates to reveal the truth of Albert Jay Nock's thesis: the Constitution of 1788 did indeed expire in 1861.

Summary. In 1861, the Constitution did not authorize the federal government to use military force to prevent a state from seceding from the Union. The Constitution established a federal government of limited powers delegated to it by the people, acting through their respective states. There is no express grant to the federal government of a power to use armed force to prevent a secession and there is no clause which does so by implication. To the contrary, the notion of the use of armed force against the states and the subsequent military occupation and rule of the states by the federal government does violence to the overall structure and purpose of the Constitution by turning the servant of the states into their master. Any doubts about whether the federal government had such a power must be resolved in favor of the states since the Ninth and Tenth Amendments explicitly reserve the vast residue of powers

and rights to the states and to the people of those states.

LINCOLN'S POLITICAL ARGUMENTS AGAINST SECESSION

While lawyer Lincoln made a variety of legal arguments against secession, politician Lincoln made two main political arguments against secession. He argued that the option of secession violated the principle of majority rule and that it led ultimately to anarchy. A full consideration of the political arguments for and against secession is beyond the scope of this article.75 However, the line between legal and political arguments is not precise. Further, it is undoubtedly true that considerations of policy and consequences do impact on judgments about what the law is and should be. Thus, a brief consideration of Lincoln's views on that issue is in order. It must be emphasized, however, that the distinction between what the law is and what it should be is a real one. Thus, the conclusions about Lincoln's legal arguments remain valid, regardless of the wisdom of his political arguments. In this context, Lincoln's arguments can be seen as points which should have been made at the Constitutional Convention of 1787, and incorporated into the Constitution, but were not.

Lincoln's central political arguments against secession are contained in the following passage from the First Inaugural Address, delivered on March 4, 1861:

> "[W]e divide upon [all our constitutional controversies] into majorities and minorities. If a minority . . . will secede rather than acquiesce [to the majority], they make a precedent which, in turn, will divide and ruin them; for a minority of their own will secede from them, whenever a majority refuses to be controlled by such minority. . . the central idea of secession, is the essence of anarchy."

The argument contains two closely related elements:

(1) secession violates the principle of majority rule; and

(2) secession ultimately leads to anarchy.

Majority rule.76 If anything can be identified as the axiom of Lincoln's thought, it is majoritarianism. His devotion to the principle was in spite of his numerous electoral losses and the rejection of his presidential candidacy by sixty percent of the electorate. Though Lincoln personally opposed slavery, before the war he favored allowing the majority in each Southern state to decide the issue.77 For the sake of the majoritarianism which he believed was undermined by secession, he ordered an invasion of the South. What Lincoln never confronted was the fact that the Civil War was a war between two majorities.78 In 1860, Lincoln did not receive a single vote in North Carolina, South Carolina, Georgia, Tennessee, Louisiana, Mississippi, Alabama, Arkansas, Florida, or Texas.79

The ultimate justification of majority rule is that it is better than minority rule. Its value is purely utilitarian--more people get what they want than if we let the minority rule. By its very nature, the utility of majority rule increases as the political unit is divided into smaller and more homogeneous units. For example, if the largely black Roxbury section of Boston seceded from the city,80 its voters, currently outvoted by the majority white population, could increase their utility by voting for officials and policies they preferred, while the white majority would remain able to enact its own preferred policies.

Secession therefore, far from being hostile to majority rule, allows multiple satisfied majorities to be created out of large political units which can only satisfy one majority bloc at a time. The only difference

of course is that the old majority is no longer able to impose its will on the old minority. It is this loss of power over the escaped minority and its territory, and not any devotion to majority rule, that so irks unionists of all eras, often leading them to start wars to retain power over the seceders. Evidence that such was the case with the Civil War is contained in the following passages from journals published at that time:

> "[The North] fought . . . for all those delicious dreams of national predominance in future ages, which she must relinquish as soon as the union is severed." (The Athenaeum, May 6, 1865)81
>
> "We love the Union because . . . it renders us now the equal of the greatest European Power, and in another half century, will make us the greatest, richest, and most powerful people on the face of the earth." (New York Courier and Enquirer, Dec. 1, 1860)82

It is remarkable that the first journal cited, British, pro-South, and post-War, viewed the War in the same nationalistic and imperialistic terms as the second journal cited, American, pro-North, and pre-War. It should be obvious that wars of this type are not sanctioned by the majority principle; they are condemned by it.

Anarchy. We have seen how the right of secession and the principle of majoritarianism each tends to create pressure for smaller political units. Lincoln argued that the principle of secession led by infinite regress to anarchy, as each minority seceded to become a majority. This is "a beautiful theory killed by an ugly fact." History shows that secessions, like revolutions, will happen only seldom because "mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed."83 It takes a "long train of abuses and usurpations"84 to instigate secessionist activities.

The best example of this is the Civil War itself. Even though there were unionists in the South and secessionists in the North, no further secessions took place after the start of the war, even though those were times of great stress and social conflict. Evidently, the people on both sides used their common sense to put on a brake on Lincoln's infinite regress.

Even in theory, an infinite number of secessions is unlikely because there is unlikely to be an infinite succession of major grievances which are clearly solvable by secession. Ireland, for example, solved its perceived major problem by getting rid of the British in 1922 (except in Northern Ireland). Evidently, no further significant political problem there has been sufficiently connected to the option of further secession to stir any interest in the subject. Norway seceded from Sweden in 1907 by a vote of 368,208 to 272!85 Since then, little has been heard from Norway about further secession.

Lincoln was wrong in believing that the right of secession will invariably lead to the break-up of nations. Rather, the recognition of such a right will tend to discourage the exploitation of states by the central government, which in turn will encourage states to remain in the Union. Applying that principle to 1861, can the possibility be denied that it was the Union's militant rejection, over several decades, of the right to secede that was itself the proximate cause of Confederate secession? That is, the seceding states knew their secession would be violently resisted--Lincoln had told them so--thus they made a strategic decision to make this fight before the North grew any stronger, economically or militarily. Had Lincoln recognized the right of peaceful secession, the Confederate states may well have stayed in the Union and tried to work out their differences, knowing that if such attempt failed, secession remained a viable option. Jefferson himself believed that if the South ever broke off from the North, it would eventually return to the Union, presumably after renegotiating its constitutional arrangement.86

In this sense, secession actually reduces "anarchy" by allowing a peaceful resolution of disputes between large political groups.87 In contrast, Lincoln's policy of forced association led to four years of anarchy and war in the South, followed by decades of sporadic violence and lawlessness.

The most interesting aspect of the topic of secession is how little attention or discussion there is about the obverse of secession: the expulsion of a portion of a nation by the larger and more powerful sector. It is always the case that the people living in a small part of a nation-state desire to secede; never that the larger part wants to kick them out. The very fact that a portion of the nation wants to secede, by the law of demonstrated preference,88 proves that those citizens believe they are being harmed by being subjects of that nation. Similarly, the rarity of historical "expulsions" proves that governments benefit from ruling over and exploiting the various regions that are within their control. This fact is consistent with the view of the nation-state--developed by Oppenhiemer,89 Nock,90 and Rothbard91--as the organization of the political (coercive) means of acquiring wealth:

"There are two methods, or means, and only two, whereby man's needs and desires can be satisfied. One is the production and exchange of wealth; this is the economic means. The other is the uncompensated appropriation of wealth produced by others; this is the political means. . . The State is the organization of the political means.92

Another significant aspect of secession is that, by and large, the parties that urge various legal, political, and moral arguments for the right of secession, do so because they are less powerful than the majority block. If they were more powerful, they would simply secede and be done with it! In sum, a seceding group is generally the weaker and economically exploited junior partner in a nation-state. Thus, in general, we may say that in any given secession dispute, right is on the side of the proponents of secession, while might is on the side of their opponents. That being the case, Lincoln's political arguments against secession must be rejected.

LEGAL DEVELOPMENTS SINCE 1861

If states had the right of secession in 1861, have any subsequent developments removed that right? That is a complex question for which no entirely satisfactory answer exists. This is largely because of the eternal question: who has the final say on interpreting the Constitution?

One fallacy that can be quickly disposed of is that the Civil War answered the question of secession forever. We may call this fallacy the Ulysses S. Grant theory of constitutional law: "the right of a state to secede from the Union [has been] settled forever by the highest tribunal--arms--that man can resort to."93 Questions of constitutional law, however, cannot be settled on a battlefield:

"Throughout history, force appears as the arbiter of the moment. . . Reason, organically slow--reacting against force only when the ill effects of the latter become so general as to be inevitably obvious--finally confirms or annuls its judgement."94 If indeed secession was a state and people's right, all the Union victory proved was that the stronger party in a constitutional conflict may violate the law with impunity.

Neither was the issue of secession settled by various Supreme Court decisions resolving questions tangential to the issue itself.95 First, in none of those cases was the Court asked to deal squarely with the issue of state secession when the outcome of the case impacted on the rights of the seceding states and those states were represented by counsel before the Court. Second, none of those cases contained a detailed and serious analysis of the issues, arguments and constitutional clauses one would expect to see

in a comprehensive treatment of the issue by the highest court in the land. Therefore, these cases carry little moral or legal authority.

Furthermore, if in fact the issue of secession had been taken to the Supreme Court, for instance by the Confederacy seeking an injunction against President Lincoln, the Court would likely have responded by refusing to hear the case on the grounds that it dealt mainly with a so-called "political question," that is, a question which, though a legal one to be sure, is not suitable for resolution by the Court.96 Thus, secession is a question that has never been satisfactorily resolved by the Supreme Court and is unlikely to be addressed by the Court in the future.

Since the Civil War, there have been two main legal developments impacting on the issue of secession: the amendment of state constitutions to prohibit secession and the passage of the Fourteenth Amendment. While under military occupation and control, the states of Arkansas, North Carolina, Florida, South Carolina, Mississippi and Virginia, each enacted new constitutions containing clauses prohibiting secession.97 Soon thereafter, the troops were withdrawn.

Such clauses, however, did not in any way serve to abolish the right of those states to secede from the Union. First, the clauses were added only under duress. It is an ancient principle of law that agreements made under duress are voidable at the option of the aggrieved party. Second, those states remain free at any time to amend their constitutions to delete the ban on secession.98 If they choose not to do so, that merely means they are choosing not to exercise a legal right, which is quite distinct from not possessing that right. Finally, since all states have equal rights in the Union,99 the fact that other states have not relinquished their right to secede means that these Southern states cannot be deemed to have relinquished theirs.100

The Fourteenth Amendment, however, poses more serious problems for a constitutional doctrine of secession. That Amendment reads in relevant part:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Amendment goes on to make apparent reference to the Civil War by prohibiting any military officer, who, having previously sworn to support the Constitution, engaged in "insurrection or rebellion" against it, shall not serve as a federal official.101 It further provides that, while no state shall assume or pay any debt "incurred in aid of insurrection or rebellion against the United States," no debts incurred in "suppressing insurrection or rebellion shall be questioned."102

The Amendment grants the federal government vast new powers over the states in the context of a concern over the post-Civil War welfare of the recently freed slaves. That fact, and the pejorative references to "insurrection and rebellion" quoted above, allow a persuasive argument to be made that the Fourteenth Amendment bars secession. If it did not, states could simply secede and thus avoid federal regulation under Section 1 of the Amendment, thus defeating the purpose of the Amendment. Ironically, if this argument is correct, the pre-war case for secession is strengthened.103 That is, if the Fourteenth Amendment bars secession, then presumably there was such a right before the Amendment was passed.

Is there any room for a secessionist argument to be made in the post-Fourteenth Amendment era? First,

the obvious can be stated: the Fourteenth Amendment does not explicitly prohibit secession. One would have thought that the pro-unionists who controlled American politics after the War would have included such a provision. Their failure to do so, whatever the motive,104 means that resort may still be had to the pro-secession arguments stated above. Unionists might respond by arguing that the Fourteenth Amendment impliedly bans secession and since it was passed after the other portions of the Constitution, it prevails over them in any conflict of meaning. That argument would be perfectly valid if the Amendment explicitly banned secession, however, since it does not, we are left with the need to resolve an apparent implicit conflict between the Fourteenth Amendment and the Ninth and Tenth Amendments. The best that can be said in this context is that any secession movement designed to restore blacks to their pre-Civil War political and economic status would be barred by the Fourteenth Amendment.

Second, the Fourteenth Amendment was ratified by the seceding states under the same type of duress which forced several of them to ban secession in their state constitutions. Ratification of the Fourteenth Amendment was made a condition of re-admission of the states to the Union by the Reconstruction Act of 1867.105 It was only after such ratification that military rule was ended in those states. Thus, as it regards the issue of secession, the Fourteenth Amendment is tainted, having been enacted under the same duress which this article concludes was a violation of the right to secession, i.e, the invasion and occupation of the South by the Union army. Thus, any Fourteenth Amendment-based argument against secession is self-negating since it must implicitly concede a pre-Amendment right to secede, the violation of which directly led to the enactment of the Fourteenth Amendment.

Finally, in resolving a conflict between the Fourteenth and the Ninth and Tenth Amendments, reliance on the doctrine of inalienable rights would be useful. An inalienable right is one possessed by a human being that is so basic to his or her welfare that we do not enforce any contract or agreement in which a person relinquishes such a right.106 As Murray Rothbard writes:

> "[T]here are certain vital things which, in natural fact and in the nature of man, are inalienable, i.e., they cannot in fact be alienated, even voluntarily. Specifically, a person cannot alienate his will, more particularly his control over his own mind and body. Each man has control over his own mind and body. Each man has control over his own will and person, and he is, if you wish, "stuck" with that inherent and inalienable ownership. Since his will and control over his own person are inalienable, then so also are his rights to control that person and will. That is the ground for the famous position of the Declaration of Independence that man's natural rights are inalienable; that is, they cannot be surrendered, even if the person wishes to do so."107

If the right of secession, protected as it is by the Ninth and Tenth Amendments, is inalienable, then that right survives any attempt to relinquish it through the Fourteenth Amendment. The right to "alter or abolish" forms of government does appear to be such a fundamental right that it should be treated as inalienable.108 It is integral to the protection of other rights which Jefferson termed inalienable such as the rights to life and liberty. Thus, it is a right that should survive regardless of its alleged implicit relinquishment under the Fourteenth Amendment.

CONCLUSION

The Union's invasion and subsequent military occupation of the Confederacy were illegal. Today, however, the Fourteenth Amendment arguably prohibits secession by implication. Nevertheless, that Amendment, insofar as it can be interpreted to bar state secession--is tainted. It is the direct result of the illegal invasion and subsequent military domination of the South. Even the Fourteenth Amendment does not explicitly outlaw secession and there remains a conflict between the Fourteenth Amendment and the

Ninth and Tenth Amendments in this regard. This conflict should be resolved by reference to the doctrine of inalienable rights, of which secession is one.

No doubt today's Supreme Court, if it took the case, would rule secession to be treasonous and illegal, not to mention highly politically incorrect. However, the Supreme Court, being an agency of the federal government has, since John Marshall's day, usually given the Constitution that interpretation which increases the power of the federal government over states and persons.109 Its continual abdication of its purported role of guaranteeing constitutionally limited government is in large part responsible for the recent revival of interest in the theory and practice of secession. Far more important than what the Supreme Court would decide, however, is the people's own understanding of the true meaning of the Constitution. They retain the inalienable right to "alter or abolish" a government "destructive" to their liberties.110

The existence of slavery in the Confederate States in 1861 cannot alter this truth. The Constitution did not forbid slavery prior to the passage of the Thirteenth Amendment in 1865, and since chattel slavery no longer exists in the United States, it can no longer be used to legally or morally justify war on a seceding state. That is as it should be, since ultimately, a policy of violent opposition to secession is a policy of forced association. As with all forms of forced association, the stronger party will tend to exploit the weaker. Such is the case with the master-slave relationship. Such is the case when a state is forced to remain in the Union against its will. Both forms of forced association are immoral and both should be and are forbidden by the Constitution.

Had the commander of the Union army, on entering Virginia on May 27, 1861, encountered the ghost of the finest American lawyer who had yet lived, and asked for advice on the legality of his mission, Thomas Jefferson would likely have replied, "Go back to your country Sir."

1 See discussion below.

2 The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies, Series I, Vol. II (Government Printing Office, 1880), pp. 51 et seq.

3 The Decline of American Liberalism (New York: Atheneum, 1980), p. 122, 125.

4 J. McPherson, Abraham Lincoln and the Second American Revolution (New York: Oxford University Press, 1990), p. 40.

5 Our Enemy, The State Caxton Printers: Caldwell, 1950), p. 171, n. 16.

6 G. Wills, Lincoln at Gettysburg (New York: Simon & Schuster, 1992), pp. 124-133.

7 A moral defense of the Civil War as a crusade to end slavery, would have to begin by answering the question: how is it justified to use involuntary servitude (conscription) leading to the deaths of many of the "servants", as a means of ending the involuntary servitude of others? See, E. Murdock, One Million Men: The Civil War Draft in the North (Madison: State Historical Society of Wisconsin, 1971). For a view of the Civil War as an attempt to preserve a vital part of the American Empire, see, C. Adams, "The Second American Revolution: A British View of the War Between the States," Southern Partisan, 1st Quarter 1994, p. 16: "It seems clear that British war correspondents and writers saw the War Between the States as caused by the forces that have caused wars throughout history--economic and imperialist forces behind a rather flimsy facade of freeing the slaves." Id. at 21.

8 Address at Cooper Institute, Feb. 27, 1860.

9 See, S. Foote, The Civil War: Fort Sumter to Perryville (New York: Vintage Books, 1986), pp. 44-51; cf., K. Stampp, And the War Came: The North and the Secession Crisis (Louisiana State University Press, 1950), pp. 284-286.

10 July 23, 1856, Galena, Illinois.

11 G. Wills, supra at 85.

12 Quoted in H. Taylor, The Origin and Growth of the American Constitution (Boston: Houghton Mifflin Company, 1911), p. 306.

13 Id. at 310. The violent tone in which many unionist writers proclaimed the death of secession is perfectly appropriate given their ultimate means of dealing with secessionists: "The inextricable knots which American lawyers and publicists went on tying, down till 1861, were cut by the sword of the North in the Civil War and need concern us no longer." Id. (quoting Bryce).

14 Thomas Jefferson: A Life (New York: Henry Holt, 1993), pp. 534-536.

15 See, J. Randall, Constitutional Problems Under Lincoln, (D. Appleton and Company: New York, 1926), pp. 14-15. The secession of 1788 can probably not be justified by reference to Article VI: "No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the united states in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue." The new Constitution was an "alteration" which had the effect of abolishing the previous government. Thus, such a measure required the procedure set forth in Article XIII: consent of Congress plus the unanimous consent of each state.

16 See, Preamble.

17 M. Farrand, The Framing of the Constitution (New Haven: Yale University Press, 1913), p. 206.

18 Id.

19 "Last Annual Message of President Buchanan," in M. Miller, ed., Great Debates in American History (New York: Current Literature Publishing Company, (1913), Vol. 5, p. 298.

20 See, e.g., Randall, supra at 15-16, n. 18; see also, A. DeTocqueville, Democracy in America (New York: Harper & Row, 1969), p. 369.

21 It should be noted that, while several seceding states had not been part of the original thirteen, under the "equal footing doctrine," states later accepted into the Union share the same legal rights as the original thirteen. H. Morse, "The Foundations and Meaning of Secession," 15 Stetson Law Review 419, 429-431 (1986).

22 For an analysis of precisely what was "destroyed" when the South seceded, see the section on majoritarianism, below.

23 Emphasis added.

24 See, R. Barnett, "James Madison's Ninth Amendment," in R. Barnett, ed., The Rights Retained by the People: The History and Meaning of the Ninth Amendment (Fairfax: George Mason University Press, 1989), pp. 11-12.

25 "The Forgotten Ninth Amendment" in Barnett, supra at 107.

26 W. Rawle, A View of the Constitution of the United States (Philadelphia: H.C. Carey & I. Lea, 1825).

27 The Ninth Amendment "is a companion to and in a measure the complement of the Tenth Amendment." K. Kelsey, "The Ninth Amendment of the Federal Constitution," in Barnett, supra at 93-94.

28 I note in passing the silly argument, advanced by the New York Times on April 12, 1861, that, since the South claimed to be independent of the United States, it was no longer able to claim the protection of the Constitution. See, K. Stampp, supra at 42-43. This is a disingenuous point since the Union's entire justification for the war was that the Constitution remained in effect in the South. Furthermore, the Ninth and Tenth Amendments protected the right of the states to secede, while they remained part of the union. The act of ratifying secession was a constitutionally protected act. Since the states left the Union lawfully, the Union thereafter had no lawful authority over them. Thus, the invasion of the South was unlawful. Having left the union lawfully, the Southern states were then no longer bound by the various constitutional clauses cited above, e.g., the confederacy clause. Would the New York Times likewise argue that a prison must release an inmate at the end of his term, but having done so, it is then free to recapture him the next day?

29 Max Farrand, ed., The Records of the Federal Convention, Vol. I (New Haven: Yale University Press, 1911). p. 47.

30 Id. at 54.

31 Quotation from the New York ratifying convention, cited in Randall, supra at 15, n. 18.

32 For a remarkably similar discussion of the meaning of the Tenth Amendment, published after the initial presentation of this paper, see U.S. Term Limits, Inc. v. Ray Thornton, United States Supreme Court, Nos. 93-1456 and 93-1828, May 22, 1995 (Dissenting opinion of Justice Thomas, joined in by Justices Renquist, O'Connor and Scalia): "the States can exercise all powers that the Constitution does not withhold from them."

33 Morse, supra at 435-436.

34 It has been argued that the North owed the South due to the discriminatory effects of the tariff on imported goods. A. Buchanan, Secession: The Morality of Political Divorce from Fort Sumter to Quebec (Boulder: Westview Press, 1991), pp. 104-105.

35 S. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional right (Albuquerque: University of New Mexico Press, 1984), pp. 76-77.

36 The Federalist, No. 46.

37 Dean Sprague, Freedom Under Lincoln (Houghton Mifflin: Boston, 1965), pp. 55, 80, 90, 203, and 220.

38 Article VI.

39 See, Morse, supra at 425, n. 35 (1986).

40 Special Message to Congress, July 4, 1861.

41 Quoted in, W. Wiecek, The Guarantee Clause of the U.S. Constitution (Ithaca: Cornell University Press, 1972), p. 13.

42 Since the seceding states ultimately formed a confederation, does the constitutional prohibition on states entering into a "confederation" [Article I, Section 10] prohibit secession? Such an argument suffers from the same logical fallacy as resort to the supremacy and guarantee clauses. This clause governs only states which are still part of the United States. Thus, to apply this clause to a state which has previously seceded, one must assume that the secession was invalid, which begs the question. Further, the United States did not invade the Confederacy because its states had formed one; it invaded because of the alleged illegality of the secession of the Confederate States. In fact, each state had seceded prior to joining the Confederacy. For example, by the time the first Confederate Constitution was passed on February 8, 1861, all the member states at that time had already seceded. See, E. Pollard, Southern History of the War (New York: Fairfax Press, 1866), pp. 44-45; Morse, supra at 436.

43 Cf., "Opinion on Secession by Attorney-General Black," in M. Miller, ed., supra at 292-293; "Last Annual Message of President Buchanan," Id. at 293-305.

44 July 23, 1856, Galena, Illinois.

45 White v. Hart, 646, 650 (1871).

46 Texas v. White, 74 U.S. 718, 725 (1868).

47 Article I, Section 3.

48 Article I, Section 8; Article II, Section 2; Amendment II.

49 Article IV, Sections 1 and 2.

50 Article V.

51 Article VI.

52 The colonies, after all, did enjoy limited self-government through colonial legislatures.

53 Gottfried Dietz argues that even Hamilton would not rule out secession under the Constitution. The Federalist: A Classic of Federalism and Free Government (Baltimore: Johns Hopkins Press, 1960), pp. 283-285.

54 Cf.: "A state, in the ordinary sense of the Constitution, is a political community of free citizens,

occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution and established by the consent of the governed." Texas v. White, 74 U.S. 700, 721 (1868).

55 Article IV, Section 4. It is true that the South no longer considered itself governed by the Constitution, including the guarantee clause. The argument in the text does not rest on an assumption that the guarantee clause applies to states after they have successfully seceded. Rather, it merely points out that the federal government cannot constitutionally use military force to prevent secession in the first place.

56 See, W. Wiecek, supra at 183-184.

57 Id. at 243.

58 97 U.S. 509, 517 (1879) (emphasis added).

59 "The Constitution . . . shall be the supreme Law of the Land. . . " Article IV.

60 See, e.g, Taylor, supra at 296-341; D. Tipton, Nullification and Interposition in American Political Thought (University of New Mexico Press, 1969); Randall, supra at 12-24; B. Samuel, Secession and Constitutional Liberty (New York: Neale Publishing Company, 1920); D. Howe, Political History of Secession (New York: G.P. Putnam's Sons, 1914), pp. 15-36; E. Gary, "The Constitutional Right of Secession," 76 Central Law J. 165.

61 While Jefferson clearly held the compact theory of the Constitution, which implies a need to justify a secession, he simultaneously held to the Ninth and Tenth Amendment approach of this article, which treats secession as an unconditional right of each state: "if any State in the Union will declare that it prefers separation. . . I have no hesitation in saying 'let us separate.'" Letter of Jefferson to W. Crawford (June 20, 1816).

62 Taylor, supra at 310.

63 American Commonwealth (New York: MacMillan Co., 1912) Vol. I, p. 322.

64 John Marshall, McCulloch v. Maryland, 4 Wheat 316 (1819).

65 Gettysburg Address, Nov. 19, 1863.

66 E. Gary, supra at 171.

67 Id.

68 The political domination of the South outlived even Reconstruction. "After the Civil War a century passed before another resident of the South was elected president. . . For half a century after the war, none of the speakers or presidents pro tem [of the congress] was from the South." J. McPherson, supra at 13.

69 A. Grimes, American Political Thought (New York: Holt, Rinehart & Winston, 1960), p. 281.

70 Wills, supra at 125, et seq.

71 See discussion above.

72 The real Eleventh Amendment was not ratified until 1795.

73 Which clauses in the Constitution would an amendment allowing secession nullify?

74 For evidence that during the war the federal government violated most, if not all, of the first ten Amendments to the Constitution in the Northern and border states, see generally, D. Sprague, supra.

75 See, L. Buchheit, Secession: The Legitimacy of Self-Determination (New Haven: Yale University Press, 1978); A. Buchanan, Secession: The Morality of Political Divorce from Fort Sumter to Quebec (Boulder: Westview Press, 1991); A. Buchanan, "Self-Determination and the Right to Secede," 45 Journal of International Affairs 347 (1992); A. Buchanan, "Toward a Theory of Secession," 101 Ethics 322 (1991); M. Kampelman, "Secession and Self-Determination," 5 Current 35 (Nov. 1993); R. McGee, "A Third Liberal Theory of Secession," 14 Liverpool Law Review 45 (1992); A. Etzioni, "The Evils of Self-Determination," 89 Foreign Policy 21 (Winter 1992/93); A. Heraclides, "Secession, Self-Determination and Nonintervention: In Quest of a Normative Symbiosis," 5 J. Int'l Aff. 399 (1992); H. Beran, "A Liberal Theory of Secession," 32 Political Studies 21 (1984).

76 The discussion that follows was inspired by Murray Rothbard's analysis of the concept of democracy in Power and Market: Government and the Economy (Kansas City: Sheed Andrews and McMeel, Inc., 1970), pp. 189-199.

77 See generally, First Inaugural Address, March 4, 1861.

78 He had apparently forgotten his speech in Congress in 1848: "Any portion of such people that can, may revolutionize, and make their own of so much of the territory as they inhabit. More than this, a majority of any portion of such people may revolutionize, putting down a minority, intermingled with, or near about them, who may oppose their movements. Quoted in A. Stephens, A Constitutional View of the War Between the States, Vol I. (Philadelphia: National Publishing Company, 1867), p. 520.

79 Howe, supra at 446.

80 As it has tried to do in recent years. See, "Seceding From Boston?," Newsweek, Nov. 3, 1986, p. 30; "The Roxbury Rebellion," Common Cause Magazine, Winter, 1992, p. 25.

81 Quoted in C. Adams, supra at 19 (emphasis added).

82 Quoted in K. Stampp, Ed., The Causes of the Civil War, (Englewood Cliffs, N.J.: Prentice-Hall, Inc., rev. ed. 1974), p. 55 (emphasis added).

83 Declaration of Independence.

84 Id.

85 M. Hechter, "The Dynamics of Secession," 35 Acta Sociologica 267, 278 (1992).

86 Letter to W. Crawford (June 20, 1816).

87 Those who blame secessionist movements for the violence "associated" with them, are blaming the victims. See, Kampelman, supra at 8. The violence invariably is caused by the opponents of secession.

88 "Every action is always in perfect agreement with [a person's] scale of values or wants because these scales are nothing but an instrument for the interpretation of a man's acting." Ludwig von Mises, Human Action (Chicago: Contemporary Books, Inc., 3rd rev ed. 1966), p. 95.

89 F. Oppenheimer, The State: Its History and Development Viewed Sociologically (New York: Vanguard Press, 1926).

90 A. Nock, Our Enemy, The State (Caldwell, Idaho: Caxton Printers, 1950.

91 See, e.g., The Ethics of Liberty (Atlantic Highlands, N.J.: Humanities Press, 1982), pp. 161-172.

92 Nock, supra at 59-60 (emphasis in original). Nock mentioned tariffs as one way the state appropriates the wealth of others. Id. at 61. There is reason to believe that the North gained economically at the South's expense as the result of the disproportionate impact of tariffs. See, Adams, supra at 20-22; Buchanan, Secession, supra at 41.

93 Quoted in Tipton, supra at 50.

94 B. Samuel, supra at 14.

95 See, e.g., The Prize Cases, 67 U.S. 635 (1862), Mississippi v. Johnson, 4 Wall. 475 (1866); Texas v. White, 7 Wall. 724 (1868); and White v. Hart, 13 Wall. 246 (1871).

96 See, Luther v. Borden, 48 U.S. 1 (1849) (a federal court could not competently decide which state government was in power).

97 Morse, supra at 431-432.

98 Relying on the doctrines of duress or equality of states.

99 Morse, supra at 429-431.

100 Id. at 433, n. 64.

101 Section 3.

102 Section 4.

103 Cf., Morse, supra at 433.

104 Not wanting to implicitly admit a pre-Fourteenth Amendment right to secede?

105 153 Statutes 428-429, 39th Cong. 2nd Session (1867). Six Southern states, whose votes were necessary for ratification, ratified the Amendment after first having rejected it. See, The Constitution of

the United States of America: Annotations of Cases Decided by the Supreme Court of the United States (Washington: Government Printing Office, 1973), p. 31.

106 See, M. Rothbard, The Ethics of Liberty, supra at 135-136, citing, W. Evers, "Toward a Reformulation of the Law of Contracts," 1 Journal of Libertarian Studies 3 (1977).

107 Id. at 135.

108 A United Nations resolution on "the Granting of Independence to Colonial Countries and Peoples, states: "all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory. . ." G. A. Res 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960) (emphasis added). While contemporary international law recognizes a vaguely defined right of self-determination of peoples, it does not as of yet recognize an absolute right of secession. See, J. Falkowski, "Secessionary Self-Determination: A Jeffersonian Perspective," 9 Boston Univ. Int. L. J. 209 (1991); L. Brilmayer, "Secession and Self-Determination: A Territorial Interpretation," 16 Yale J. Int. L. 177 (1991); Note, "Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia," 3 Duke J. Comp. & Int'l L. 299 (1993); Note, "The Logic of Secession," 89 Yale L. J. 802 (1980); Note, "The Law of Secession," 14 Houston J. Int'l L. 521 (1992). Neither, however, does it prohibit secession when such secession is lawful under the constitution of a given nation.

109 H. Holzer, Sweet Land of Liberty? (Costa Mesa: Common Sense Press, 1983).

110 The Declaration of Independence. ??