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States of Confusion: Solidifying Federalism by Recognizing Secession As a Legitimate Last Resort

Andy Buss

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*States of Confusion: Solidifying Federalism by Recognizing Secession
As a Legitimate Last Resort*

By
Andy Buss

Submitted in partial fulfillment of the requirements of the
King Scholar Program
Michigan State University College of Law
under the direction of
Professor Brian Kalt
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**STATES OF CONFUSION: SOLIDIFYING FEDERALISM BY RECOGNIZING
SECESSION AS A LEGITIMATE LAST RESORT**

Andy Buss

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INTRODUCTION

“A house divided against itself cannot stand.” – Abraham Lincoln.¹

It is an oft-quoted saying: A singular entity with warring among its unified members will fail to prosper. Jesus offered this wisdom during his ministry,² and, nearly 1900 years later, soon-to-be President Lincoln echoed the same understanding as the United States stood on the brink of civil war.³ In the 1860s, the nation’s response to this proverb was waging war to hold together the singular house. In the future, however, the nation’s response may very well be to construct a second house.⁴ If there again comes such a dire circumstance that it forces a choice between the two solutions, the latter should be threshed out thoroughly and given a serious look. The Civil War took 618,000 lives—more than every other American war through the Korean War combined—and claimed 2% of the entire U.S. population.⁵

Though the U.S. may not be as close to a brother-against-brother entanglement as it was in 1858, neither may it be as far from one as many would like to think.⁶ After the most recent presidential election, which witnessed “a divided nation vote[] to give [Barack Obama] more time,” the unified collection of states is quite clearly on shaky ground.⁷ It is a “deeply divided country”⁸ in which, following the 2012 election results, residents in each of the 50 states filed petitions to secede from the Union.⁹ “More than 675,000 digital signatures appeared on 69

¹ Abraham Lincoln, Address at the Republican State Convention in Springfield, Ill. (June 16, 1858).

² Matthew 12:25.

³ Lincoln, *supra* note 1.

⁴ David Caller, *WH 'Secede' Petitions Reach 675,000 Signatures, 50-State Participation*, DAILYCALLER.COM (Nov. 14, 2012, 2:01 AM), <http://nation.foxnews.com/2012-presidential-election/2012/11/14/wh-secede-petitions-reach-675000-signatures-50-state-participation#ixzz2OZsQ2ELq>.

⁵ Craig Lambert, *The Deadliest War*, HARVARDMAGAZINE.COM, May-June 2001, <http://harvardmagazine.com/2001/05/the-deadliest-war-html>.

⁶ *Id.*

⁷ Jeff Zeleny & Jim Rutenberg, *Divided U.S. Gives Obama More Time*, NY TIMES (Nov. 6, 2012), http://www.nytimes.com/2012/11/07/us/politics/obama-romney-presidential-election-2012.html?pagewanted=all&_r=0.

⁸ *Id.*

⁹ Caller, *supra* note 4.

separate secession petitions covering all 50 states” in less than seven days following the election.¹⁰ Seven of the states’ petitions—including those from Florida and Texas—received more than the 25,000 signatures required to illicit an official response from the White House.¹¹ The basic sentiment within those petitions was that the federal government is abusing its power and violating citizens’ rights.¹² Combine those beliefs with certain beliefs of state leaders, such as those of Wyoming State Representative Alan Jaggi, claiming that the federal government is also infringing upon state sovereignty, and the secession pot begins to boil.¹³

That the pot is boiling is one thing; whether that pot has the potential to boil over is quite another. Unlike other recent scholarly articles on the topic,¹⁴ this Note is neither limited to solely analyzing the Constitutional arguments surrounding secession nor armed to thoroughly untangle the intricate web of practical hypotheticals that may arise with secession. Instead it focuses on several of the most compelling arguments surrounding secession in arriving at the concept’s

¹⁰ *Id.*

¹¹ *Id.*

¹² The sentiment reflected in these petitions is proffered well by Micah H. of Arlington, Texas, in the petition he filed:

The U.S. continues to suffer economic difficulties stemming from the federal government’s neglect to reform domestic and foreign spending . . . [and] to [withdraw from the union] would protect [Texas’] citizens standard of living and re-secure their rights and liberties in accordance with the original ideas and beliefs of our founding fathers which are no longer being reflected by the federal government.

Residents in More Than 30 States File Secession Petitions, HUFFINGTONPOST.COM (Nov. 13, 2012, 7:44 PM), http://www.huffingtonpost.com/2012/11/13/petition-to-secede-states_n_2120410.html.

¹³ Jeremy Pelzer, *This Does Draw a Line in the Sand*, TRIB.COM (Mar. 12, 2010, 12:00 AM), http://trib.com/news/state-and-regional/govt-and-politics/this-does-draw-a-line-in-the-sand/article_06b41f54-b4cb-566b-8ac2-c61ecf272d04.html. Jaggi, in referring to recent firearm legislation passed in Wyoming, stated, “This does draw a line in the sand in saying our state sovereignty means something – please let us have it.” *Id.*

¹⁴ See e.g. Andrei Kreptul, *The Constitutional Right of Secession in Political Theory and History*, 17 J. OF LIBERTARIAN STUD. 39 (2003), available at http://mises.org/journals/jls/17_4/17_4_3.pdf (focusing on only the constitutionality of secession); see also Stephen Neff, *Secession and Breach of Compact: The Law of Nature Meets the United States Constitution*, 45 AKRON L. REV. 405 (2012) (focusing on constitutional ratification and understanding throughout the history of the United States in discussing secession’s legitimacy); see also Thomas Ulen, *Secession: The New Palgrave Dictionary of Economics and the Law*, U. OF ILL. INST. OF GOVT. & PUB. AFFAIRS 7-12 (1997) (delving into intricacies of optimal secession regarding economics).

legitimacy necessitating its allowance as a last resort.¹⁵ Even if one might disagree with the legitimacy of withdrawal, secession ought to be codified if not for any other reason but that the alternative for a successful departure from the Union by a determined populace is violence—see: the Civil War. Therefore, a procedure is set forth below to allow for controlled secession while resulting in a peaceable withdrawal and protecting the concerns of *both* parties.

Part I highlights the mounting political and regional polarization taking place within the United States and looks at both current and past actions of states refusing federal domination. Part II explains the legal legitimacy of secession from the Union in light of the historical and Constitutional framework under which the nation was formed. Part III then puts forth the most convincing arguments that oppose secession while Part IV responds to those arguments. Finally Part V, while acknowledging very real concerns, concludes that secession has a very real claim of legitimacy behind it and ought be used as an absolute last resort. It also offers, assembled from both American and international influences, a fittingly legitimate provision that allows any secession be done in the most amicable and least damaging way possible.

I. STATES' SWELLING REFUSAL OF FEDERAL DOMINATION AMIDST NATIONAL POLARIZATION

This entire topic of secession is, granted, a bit farfetched as of this moment in 2013 in the U.S. Or is it? If it is, will it be so in 2020? In 2030? Based on growing partisan division marked by individuals entrenching and surrounding themselves with like-minded Americans¹⁶ and the recent swell in state legislation defying federal regulation,¹⁷ the answer is no. As both prominent

¹⁵ See *infra* Section II (highlighting constitutional, moral, and practical reasons to recognize secession's legitimacy under certain circumstances).

¹⁶ Gerald F. Seib, *Election Sharpens the Partisan Divide*, WALL ST. J. (Dec. 11, 2012, 3:45 PM), <http://online.wsj.com/article/SB10001424127887324339204578171180887571110.html>.

¹⁷ See *infra* Section I.B (listing and explaining recent state legislative efforts to retain state sovereignty in various areas).

periodicals and the most recent presidential election results make clear, the U.S. is deeply divided both politically and geographically.¹⁸

A. The Divided States of America

After the November 2012 election, electoral maps everywhere revealed the same landscape: “Republican areas appeared to be growing darker red, while Democratic regions seemed to be growing darker blue.”¹⁹ The Wall Street Journal referred to the information gathered from that election as “leading indicators of polarization.”²⁰ In addition to the hundreds of thousands of citizens who signed secession petitions immediately following the election,²¹ statistics from that first Tuesday in November were equally as jarring.²² Only fifteen Republicans elected to the House came from districts that Barack Obama carried, and only nine elected House Democrats came from district carried by Republican Mitt Romney.²³ And these representatives not only won, but won in “landslides”—with 125 elected House members garnering 70% or more of the district’s vote.²⁴

It would be easy to dismiss this as dispersed political quarreling sprinkled around the nation among those diminutive political subunits known as districts—but not once other statistics are revealed. The division is national: between partisan states and partisan areas of the country.²⁵ “The number of states that are so clearly red or so clearly blue that they aren't seriously contested

¹⁸ See Seib, *supra* note 16 (explaining the way in which 2012 election results portray growing division between parties and between regions within the U.S.).

¹⁹ Seib, *supra* note 16.

²⁰ *Id.*

²¹ See Caller, *supra* note 4 (reporting that secession petition signatures numbered well above 600,000 within one week of the election).

²² See Seib, *supra* note 16. “Of the 234 Republicans elected to the House, just 15 come from districts that the Democratic president carried, according to a running tally compiled by David Wasserman of the Cook Political Report. Of 201 Democrats elected, just nine come from districts Republican Mitt Romney carried.” *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Sue Sturgis, *Institute Index: The Deepening Partisan Divide in U.S. Politics*, SOUTHERNSTUDIES.ORG (Nov. 30, 2012, 11:30 AM), <http://www.southernstudies.org/2012/11/institute-index-the-deepening-partisan-divide-in-us-politics.html> (pointing out partisan domination state-by-state and lack of regional, partisan turnover in the 2012 election).

in presidential races is climbing, while the number of swing states in the middle is falling.”²⁶ In 1960, twenty states “were decided by margins of less than 5%,” in 2012, “the number was four.”²⁷ Because states “remain[] firmly entrenched in one column or the other,” the race for the presidency simply passes by most of the nation’s voters.²⁸ The landscape that emerges is one in which “Democrats talk[] to Democrats and Republicans to Republicans, but fewer people try[] to talk to one another across that partisan divide.”²⁹

Backing up this sentiment are the facts: After the 2012 election, only three of the fifty state legislatures have different parties controlling the two chambers—meaning forty-seven states are either “under single-party control or have a unicameral legislature.”³⁰ As for where these partisan states are located, an analysis of the recent electoral maps is quite indicative of a regional schism.³¹ The pervasive idea that the Republican Party is tied to the South is accurate. As one study reports, “Commentators have argued that the Republican Party is increasingly keyed to the American South, and in particular to the old Confederacy. The map analysis...indicates a tendency in this direction.”³² The map also shows “Democratic support in the interior portion of the Upper South continu[ing] to plummet, with most of the region’s few remaining blue counties turning red.”³³

²⁶ Seib, *supra* note 16.

²⁷ *Id.* Seib notes that

In this year’s contest, there really were only nine true swing states that were seriously contested. By contrast, as National Journal has noted, in the 1960 presidential election, 20 states were so closely contested that they were decided by margins of less than 5%. By 2000, the number of similarly competitive states had dropped to 12. This year, the number was four.

Id.

²⁸ *Id.*

²⁹ *Id.* (adding that in the nation’s capital, “the political middle is barren the partisan divide remains stark”).

³⁰ Sturgis, *supra* note 25.

³¹ Martin W. Lewis, *Changes in U.S. Electoral Geography from 2000 to 2012: A Renewed North/South Divide?*, GEOCURRENTS, <http://geocurrents.info/geopolitics/elections/changes-in-u-s-electoral-geography-from-2000-to-2012-a-renewed-northsouth-divide#ixzz2PbrJJpNC>.

³² *Id.*

³³ *Id.* (reporting that “At the national level, one sees a slight intensification of macro-regional patterns, with the South trending a bit more Republican and the North trending a bit more Democratic”).

B. Recent State Legislative Efforts to Retain State Sovereignty

With the partisan gatherings growing both state-by-state and in identifiable regions,³⁴ it is no surprise that there has been a recent and growing trend among various state legislatures discontent with the action of the federal government to reassert their sovereignty in certain areas.³⁵ While there are countless examples of this phenomenon, such as the state-by-state legalization of medical marijuana and the refusal by dozens of states to implement federal standards regarding state IDs,³⁶ a few are worth examining in depth: treatment of the Affordable Care Act (a.k.a. Obamacare), reaction to federal gun control actions, and states' consideration and passage of general sovereignty measures.³⁷

1. *States' Refusal of Federal Health Insurance Control*

At least twenty-six, more than half, of the fifty states allowed the federally mandated mid-February 2013 deadline for a state health-insurance-exchange-plan slip right by without lifting a finger.³⁸ Actually, only seventeen states and Washington D.C. filed their plans because seven others intend to build exchanges in cohesion with the federal government.³⁹ While a portion of these twenty-six states not filing plans may simply be opting for federal intervention, a

³⁴ See *supra* Section I.A (highlighting the trend toward partisan division within the U.S. in recent years and, more specifically, months).

³⁵ See J.D. Tuccille, *State Secession Petitions: Ticked-off Americans Want Out*, REASON.COM (Nov. 12, 2012, 11:45 AM), <http://reason.com/blog/2012/11/12/state-secession-petitions-give-us-libert> (pointing out many American's displeasure with the actions and growth of the federal government and pointing to state legislation as a result of that displeasure).

³⁶ See Suzanne Weiss, *Sovereignty Measures and Other Steps May Indicate an Upsurge in Anti-federal Sentiment in Legislatures*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Feb. 2010), <http://www.ncsl.org/legislatures-elections/legislatures/facing-off-with-the-feds.aspx> (listing and explaining the several main manifestations of state frustration with recent federal governance).

³⁷ See *infra* Subsections I.B.1, I.B.2, I.B.3 (highlighting and analyzing these sovereignty reactions by state legislatures).

³⁸ Sahil Kapur, *GOP States Invite Washington to Run Their Healthcare*, TALKINGPOINTSMEMO.COM (Feb. 19, 2013, 2:00 PM), <http://tpmdc.talkingpointsmemo.com/2013/02/which-states-are-building-obamacare-exchanges.php>.

³⁹ *Id.*

good number of them are abstaining as a matter of principle.⁴⁰ That principle is states' rights, and it is trumpeted by the fact that, after the passage of the Affordable Care Act, states did not stop at merely ignoring the aforementioned deadline. So as to protect its citizens' religious liberty, Virginia recently passed an amendment that "prohibits health insurance plans that are part of federal health insurance exchanges required by Obamacare from covering abortion services except in cases of rape, incest and life of the mother."⁴¹ Furthermore, thirteen states introduced bills to nullify Obamacare in the months following the Act's passage.⁴² And at least a fourteenth, South Carolina, has since joined the fray and may be close to passing its bill.⁴³ In late March 2013, the Constitutional Law Subcommittee of the state's House passed the Freedom of Healthcare Protection Act aimed at "Render[ing] Null And Void Certain Unconstitutional Laws Enacted By The Congress Of The United States Taking Control Over The Health Insurance Industry."⁴⁴

2. States' Refusal of Expansive Federal Gun Control

Healthcare is not the only arena in which state and federal leaders are facing off. Eight states have already passed the Firearm Freedom Act, and the Act has been proposed in twenty-

⁴⁰ John Davidson, *States' Refusal To Establish Exchanges Could Undo Obamacare*, THE DAILY CALLER (Jan. 17, 2013, 3:11 PM), <http://dailycaller.com/2013/01/17/states-refusal-to-establish-exchanges-could-undo-obamacare/> (indicating that a good number of states are refusing to set up exchanges so as to stand their ground against the federal control of health care and protect their citizens from federal taxes and penalties in the long run).

⁴¹ *Miraculous Success: Life and Conscience Protected*, FAMILYFOUNDATION.ORG (April 4, 2013), <http://familyfoundation.org/2013/04/miraculous-success-life-and-conscience-protected/>.

⁴² Matthew Spalding, *Rejecting Nullification: Idaho Draws the Constitutional Line*, HERITAGE.ORG (Mar. 2, 2011, 10:00 AM), <http://blog.heritage.org/2011/03/02/rejecting-nullification-idaho-draws-the-constitutional-line/>.

⁴³ Joe Wolverton, *South Carolina One Step Closer to Nullifying Obamacare*, THE NEW AMERICAN (April 1, 2013, 4:29 PM), <http://www.thenewamerican.com/usnews/constitution/item/14966-south-carolina-one-step-closer-to-nullifying-obamacare>.

⁴⁴ *Id.* The bill's purpose, as stated in its preamble, is to Render Null And Void Certain Unconstitutional Laws Enacted By The Congress Of The United States Taking Control Over The Health Insurance Industry And Mandating That Individuals Purchase Health Insurance Under Threat Of Penalty; To Prohibit Certain Individuals From Enforcing Or Attempting To Enforce Such Unconstitutional Laws; And To Establish Criminal Penalties And Civil Liability For Violating This Article.

Id.

five others.⁴⁵ The Act is “cleverly designed to challenge expansive federal claims of regulatory authority under the Commerce Clause.”⁴⁶ Seen by many as “draw[ing] a line in the sand in saying [a] state[’s] sovereignty means something,” the law bases its legitimacy on the argument that “since the federal government justifies its ability to regulate firearms on a section of the U.S. Constitution allowing Congress to regulate interstate commerce, any guns that never leave a state are exempt from federal control.”

Thus Wyoming, for example, a state having passed the Firearms Freedom Act, now provides within its statutory code that a “personal firearm, a firearm action or receiver, a firearm accessory, or ammunition that is manufactured commercially or privately in the state to be used or sold within the state is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce.”⁴⁷ Provisions such as these place state government squarely at odds with the federal government in that they “not only reject federal power over the intrastate regulation of firearms, [they] also place[] [a state] as a shield between the federal government and [a state’s] citizens who comply with the Act but violate countervailing federal law.”⁴⁸

3. States’ Refusal to Surrender Sovereignty

All of these individual confrontations mentioned above, such as healthcare, federal ID regulations for states, and an expanding Commerce Clause, have one common characteristic—

⁴⁵ *State by State*, FIREARMSFREEDOMACT.COM (Mar. 17, 2013), <http://firearmsfreedomact.com/state-by-state/> (displaying a color-coded map of the act’s status in each state).

⁴⁶ Spalding, *supra* note 42.

⁴⁷ WY. STAT. 1977 § 6-8-404 (2011).

⁴⁸ O. Shane Balloun, *The Disarming Nature of the Wyoming Firearms Freedom Act: A Constitutional Analysis of Wyoming’s Interposition between its Citizens and the Federal Government*, 11 WYO. L. REV. 201, 201 (2011).

inflating the size and influence of the federal government.⁴⁹ And because, from the pool of governmental powers generally, *both* the powers under the federal government’s supremacy *and* the powers presumably “reserved” to the states or the people by the Tenth Amendment cannot simultaneously grow in number, the federal government’s expansion necessarily means that those powers “reserved” to the states by the Tenth Amendment must dwindle.⁵⁰ Add this reduction in sovereignty to the list of matters states have begun to address head-on.

Five states have passed and signed into law something known as “state sovereignty” resolutions—also referred to as a “Tenth Amendment resolutions”—since 2009.⁵¹ Another ten states passed such a resolution in both legislative houses since that time.⁵² Eleven others saw the sovereignty resolutions pass in one of the state’s law making bodies.⁵³ The resolutions, similar to Thomas Jefferson’s Kentucky Resolution and James Madison’s Virginia Resolution declaring a state’s right to disregard unconstitutional acts of Congress,⁵⁴ were drafted as “formal protests against federal encroachment on states’ authority and prerogatives under the 10th Amendment.”⁵⁵ “The wording and tone of sovereignty resolutions vary, but typically they begin by asserting states’ authority and prerogatives under the 10th Amendment and go on to denounce and call for an end to the federal government’s usurpation of states’ constitutionally delegated powers.”⁵⁶

⁴⁹ See *supra* Subsections IV.B.1, IV.B.2 (listing several legislated areas in what the state and federal governments are going head-to-head and explaining healthcare and the Commerce Clause’s influence on gun rights in depth).

⁵⁰ U.S. CONST. amend. X (stating, “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”).

⁵¹ *Tenth Amendment Resolutions*, TENTH AMENDMENT CENTER (2013), <http://tenthamendmentcenter.com/nullification/10th-amendment-resolutions/> (showing a map of resolutions proposed, passed by one house, passed by both houses, and signed into law by state governors).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ James Madison, *Virginia Resolutions, Dec. 24, 1798*, in DOCUMENTS OF AMERICAN HISTORY 182 (Henry Steele Commager ed., 9th ed. 1975); Thomas Jefferson, *Kentucky Resolutions of 1798*, CONSTITUTION.ORG, <http://www.constitution.org/cons/kent1798.htm> (last visited May 5, 2013) (stating “that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force”).

⁵⁵ Weiss, *supra* note 36.

⁵⁶ *Id.* Weiss reports that

The state’s ability to protect fundamental liberties from federal encroachment is also a focus.⁵⁷

These measures are “non-binding” and do not carry the force of law;⁵⁸ they instead, following the Court’s decision in *New York v. United States*, serve as “notice” by each resolving state to the federal government that the state will choose which federal mandates it chooses to accept and which mandates it claims exemption to under the Tenth Amendment.⁵⁹ While a state obviously need not have passed a resolution to refuse to follow an unconstitutional mandate, the passage of these resolutions, as mentioned above, is more about protest and the serving of notice to the federal government that states are aware of decreasing sovereignty—a trend they will fight to withstand.⁶⁰ Working under the presumption that the Constitution is, in fact, a compact between states and the federal government, consider this a claim for “breach.”⁶¹

II. SOURCES OF LEGITIMACY IN ALLOWING SECESSION AS A LAST RESORT

Oklahoma’s resolution, for example, declares that ‘many federal laws are in direct violation of the 10th Amendment,’ effectively ‘commandeering the legislative and regulatory processes of the states.’ It demands prohibition or repeal of mandates that come without adequate federal funding and/or require states to comply under threat of penalties or sanctions.

Id.

⁵⁷ S. Res. 632 (Ga. 2009) (passed), *available at* <http://www.legis.ga.gov/Legislation/en-US/display/20092010/SR/632>. On April 1, 2009, the Georgia State Senate passed the resolution 43-1. It asserted the right of states to nullify federal laws under some circumstances. The resolution also asserted that if Congress, the president, or the federal judiciary took certain steps, such as establishing martial law without state consent, requiring some types of involuntary servitude, taking any action regarding religion or restricting freedom of political speech, or establishing further prohibitions of types or quantities of firearms or ammunition, the Constitution establishing the United States government would be considered nullified and the Union would be dissolved. *Id.*

⁵⁸ See TENTH AMENDMENT CENTER, *supra*, note 51.

If you owned an apartment building and had a tenant not paying rent, you wouldn’t show up with an empty truck to kick them out without first serving notice. That’s how we view these Resolutions – as serving “notice and demand” to the Federal Government to “cease and desist any and all activities outside the scope of their constitutionally-delegated powers.” Follow-up, of course, is a must.

Id.

⁵⁹ Charles Duke, *Implementing the Tenth Amendment: State Sovereignty Resolution*, SWEETLIBERTY.ORG, <http://www.sweetliberty.org/tenthamend.htm> (citing to *New York v. United States*, 112 S. Ct. 2408 (1992)). “The federal government was attempting to mandate that the State of New York accept radioactive waste for disposal.” *Id.* But “New York pleaded they were exempt from the mandate under the Tenth Amendment and the court affirmed the Tenth Amendment protection. Thus, by having proclaimed sovereignty, a state is in the position to select those mandates they will follow, now by choice, not by edict.” *Id.*

⁶⁰ *Id.*

⁶¹ See *infra* Section II.A (arguing that the Constitution is a compact between and among the states and that a breach by the federal government, also a party to the contract, of the provisions of that compact entitles the states, individually as parties, to rescind the contract and return to an individual, sovereign state—as before the Union).

While secession may sound radical and extreme to many Americans,⁶² this has not always been the case.⁶³ “The case for state sovereignty and the constitutional right of secession had flourished for forty years before a comparable case for perpetual union had been devised.”⁶⁴ Not only does the nation’s history show support for the legitimacy of secession, but the structure of American government as evidenced by the Constitution and compelling moral arguments also bolster the idea that secession may not only be acceptable, but preferable under certain circumstances.⁶⁵ Ultimately, when weighing the pro’s and con’s of secession, avoiding a war of the magnitude seen on U.S. soil in the 1860’s is a heavy factor.

A. Support for Permitting Secession in Light of the Union’s Historical Development

The constitutional crisis of secession hinged on the balance of sovereignty in the political framework that the U.S. Constitution of 1787 had formed.⁶⁶ The crucial question, specifically, was whether the Constitution created “a union of sovereign states, each of which retained the right to secede at its own discretion?” or whether it created “a union from which no state, once having joined, could escape except by an extra-constitutional act of revolution?”⁶⁷ In looking at both the ratification of the Constitution and the overriding breach-of-compact argument, in which the process that formed the Union plays a significant role, one can justify the conclusion that history stands behind permitting secession.

1. *Constitutional Ratification as Support for States’ Sovereignty*

It may not be surprising that a leading nineteenth-century nullification advocate, Vice President John C. Calhoun from South Carolina, supported the former assertion above—that the

⁶² See Caller, *supra* note 4 (indicating that some citizens called for those who signed the secession petitions to be relieved of their U.S. citizenship).

⁶³ Kenneth Stampp, *The Concept of a Perpetual Union*, 65 J. AM. HIST. 5, 33 (1978).

⁶⁴ *Id.*

⁶⁵ See *infra* Section II.A (explaining the various justifications for allowing secession in some form).

⁶⁶ Stampp, *supra* note 63, at 5.

⁶⁷ *Id.*

federal government is “the government of a community of States, and not the government of a single State or nation.”⁶⁸ However, it might resonate more with the average American citizen that a prominent founding father, James Madison, agreed. He wrote in the compelling Federalist Papers that creation of the Union was “the act of the people, as forming so many independent States, not as forming one aggregate nation.”⁶⁹ Referenced above, Madison’s Virginia Resolution of 1798 furthers this idea by making clear that the powers of the national government “result[ed] from [a] compact.”⁷⁰ In support of this concept of the Constitution as a voluntarily agreed-upon compact among the states is the fact that the American people formed the Union through the media of the different *sovereign* states into which they were divided at that time, not by giving approval as a unified population of individual persons.⁷¹

Assuming these states were indeed sovereign prior to the unification brought about by the Constitution, then they, as pre-existing political entities, maintained their character as sovereign states even after creating the Union.⁷² The result of that creation was that they were tied together as separate but committed political communities in a continuing, ongoing contractual relationship.⁷³ Additionally, as Madison pointed out, the “compact” nature of the Union is seen in the fact that each state entered into it on a purely voluntary basis—as opposed to a “majority will” binding the minority, as would be the case in a singular, political society.⁷⁴

Still, presuming acceptance of the Constitution as a compact among sovereign states, one is left pondering: Does that mean it is inherently terminable at will by any party to the

⁶⁸ See Neff, *supra* note 14, at 413, *citing to* John C. Calhoun, *A Discourse on the Constitution and Government of the United States*, in JOHN C. CALHOUN, UNION AND LIBERTY: THE POLITICAL PHILOSOPH OF JOHN C. CALHOUN 79 (Ross M. Lence ed., 1992).

⁶⁹ THE FEDERALIST NO. 39 (James Madison).

⁷⁰ *Virginia Resolutions*, *supra* note 54.

⁷¹ Neff, *supra* note 14, at 413.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 414.

agreement? Because one can agree that the Constitution is a compact but still believe that the Union is perpetual in nature and not terminable for any reason.⁷⁵

2. *Rescission (Secession) As Lawful Remedy for Breach of Compact*

Merriam Webster defines “rescind[ing]” as “abrogat[ing] (a contract) and restor[ing] the parties to the positions they would have occupied had there been no contract.”⁷⁶ In the remedial context, “[o]ne party to a contract can rescind it because of substantial nonperformance or breach by the other party.⁷⁷ However, not just any breach gives rise to rescission; the breach must be “so substantial and fundamental that it defeats the objective of the parties in making the agreement.” In fact, Webster’s example provided under “rescission” reads, “the judge ruled that the town’s *rescission* of the contract was justified due the contractor’s *repeated failures to meet its obligations*.”⁷⁸

Rescission comes into play within the secession discussion under the assumption that while the Union is “perpetual,” it is only so in the “weak” sense of the word as opposed to the strong interpretation, which would completely bar dissolution regardless of circumstances.⁷⁹ This weak definition is the more common sense of the two, given the unpredictability of circumstances generally,⁸⁰ and is the one with which the Civil War era secessionists equipped themselves.⁸¹ It means “that the Union was perpetual in principle, or that it was intended at the outset to be perpetual—but that this aspiration of perpetuity could only be achieved in reality by

⁷⁵ *Id.* at 415.

⁷⁶ MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/rescission> (last visited Mar. 27, 2013).

⁷⁷ *Legal Dictionary*, FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Rescission+of+contract> (last visited Mar. 27, 2013).

⁷⁸ MERRIAM WEBSTER, *supra* note 76 (last emphasis added).

⁷⁹ Neff, *supra* note 14, at 416.

⁸⁰ *See generally* Section II.C (discussing circumstances such as revolution, moral crises, and imminent war as extreme circumstances calling for dissolution regardless of documentary provisions).

⁸¹ Neff, *supra* note 14, at 416.

the continued adherence of the parties to the original arrangements over time.”⁸² The Supreme Court grappled with this idea in the Reconstruction case of *Texas v. White*.⁸³ The Court seemed to reluctantly arrive at a conclusion of weak perpetuity as well in acknowledging that, at least “through [the circumstance of] revolution, or through consent of the States,” a state may revoke its status within the Union.⁸⁴ The Confederacy reinforced its grasp of perpetuity in its own constitution that, like the U.S. binding document, neglected a prohibition of secession but stated it was intended to form a “*permanent* federal government”—also presumably in the weak sense.⁸⁵

Working with the understanding, then, that the Constitution and the Union were created as a collective compact among sovereign states and that rescission would be an appropriate contractual remedy in the case of one party’s substantial breach, one must next discern when and by what authority a party may declare cause for rescission.

When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.⁸⁶

The Declaration directly answers what one can devote pages upon pages to sorting out. The simple answer is “natural law.”⁸⁷ The right to rescission of a contract between two sovereigns rests in adherence to natural law—a power outside and above either of the two parties—that

⁸² *Id.*

⁸³ 74 U.S. 700, 725-26 (1868). The Court split the difference on this issue in a way: It asked, “What can be indissoluble if a perpetual Union, made more perfect [under the Constitution], is not?” *Id.* at 725. At the same time, the Court proceeded to quote the Tenth Amendment’s reservation of rights to the states or the American people generally and noted that “the people of each State compose a State, having its own government, and endowed with all the functions essential to *separate* and *independent* existence.” *Id.*

⁸⁴ *Id.* at 726.

⁸⁵ Neff, *supra* note 14, at 416 (emphasis added).

⁸⁶ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

⁸⁷ Neff, *supra* note 14, at 415-22 (discussing in depth natural law and the understanding of natural law within the U.S. during the nineteenth century as the authority by which a state could rescind the contract between it and the federal government known as the Constitution).

requires the fulfillment of contractual obligations.⁸⁸ It was natural law that was the authoritative glue binding state to state, not the commands of a sovereign, central government.⁸⁹ Therefore, in that same vein, it was and is natural law that points to rescission as the proper remedy in the event that there be a violation of the agreement.⁹⁰ Early Americans were clearly familiar with this reasoning as evidenced by the Declaration of Independence, and that reasoning is not of the sort that expires with time: Unlike the role and balance of governments, God and Nature do not vary with the ebbs and flows of society. That remarkable founding document is filled with reference to natural law and the concept of a right of rescission is derived from violation of such law.

B. Constitutional Grounds for Entertaining the Possibility of Secession

In addition to historical evidence for the permissibility of secession under extreme conditions, the very system of government employed by the United States screams for secession as a last resort. 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.”⁹¹ The fact that “powers” are “reserved” for the states indicates that, at some level and at some point, the federal government must stop short of acquiring *all* powers of governance.⁹² But if it does not, what is the consequence? Where is a state’s “out”?

One argument is that the only answer, ultimately, is withdrawal from the Union. Though the danger of that ongoing threat of secession will be addressed below,⁹³ that threat may be necessary in some degree to elicit respect from the federal government for a state’s rights. Steve

⁸⁸ *Id.*

⁸⁹ *Id.* at 421.

⁹⁰ *Id.*

⁹¹ U.S. CONST. amend. X.

⁹² *Id.*

⁹³ See *infra* note 167 and accompanying text (explaining the benefit of there being some level of constant threat of secession as it relates to politics).

Eichler, the chief executive officer of TeaParty.org, was asked about the citizen secession petitions.⁹⁴ He responded with a realistic understanding of the situation: “I’m glad people can vent their frustrations, but what if it’s more than that? What can we do to stop this encroachment into states’ rights? What are the tools? Well, there aren’t too many of them.”⁹⁵ But, as State Representative Jaggi put it, “If it comes to push and shove, I hope we’re willing to stand up for our rights rather than just be pushed around.”⁹⁶

There is another argument that states can “stand up for [their] rights” while adhering to Constitutional boundaries, and it too is rooted in the Tenth Amendment.⁹⁷ The thought process goes this way: To the extent that the Constitution does speak to the issue of powers, it resolves the issue in favor of the states or “the people”⁹⁸ unless a power is expressly granted to the federal government or denied to the states elsewhere in the text.⁹⁹ This part is, in effect, the Tenth Amendment reworded. And combining the fact that the Constitution gives no power to prevent or reverse secession to the federal government, with the fact that the power to secede is not specifically denied to the states or the American people, it follows that the Tenth Amendment guarantees retention of that power by the states and the nation’s citizens generally.¹⁰⁰

Examining the bicameral nature of the nation’s Congress also enhances the constitutional argument for secession. The two-house system implies that a state’s independent standing as a

⁹⁴ Valerie Richardson, *Petitions to Secede Are Filed for 23 States Since Election*, WASH. TIMES, Nov. 12, 2012, available at <http://www.washingtontimes.com/news/2012/nov/12/petitions-to-secede-are-filed-for-23-states-since-/?page=all>.

⁹⁵ *Id.*

⁹⁶ Pelzer, *supra* note 13.

⁹⁷ *Id.*

⁹⁸ U.S. CONST. amend. X.

⁹⁹ *Texas Secession Facts*, TEXASSECEDE.ORG, <http://www.texassecede.com/Texas%20Secession%20Facts.pdf> (last visited Mar. 28, 2013).

¹⁰⁰ *Id.*

political entity is vital.¹⁰¹ Rather than merely organizing representatives sent to Washington D.C. based on the population generally, the Constitution arranged for the Senate to equally represent each state—regardless of population.¹⁰² If the framers intended the states to be wholly and perpetually (in the “strong” sense)¹⁰³ dissolved into the Union, the plethora of individual, equally weighted state voices would be unnecessary.¹⁰⁴ In fact, the entire debate regarding the weight granted to each state’s congressional participation that nearly stalled the Constitutional Convention would never have taken place; states would have forfeited their identities into one mass.¹⁰⁵ Clearly there is *some* benefit in recognizing the ability of a state to exist and operate separate and distinct from the forty-nine others.

C. Moral Argument for Secession Amidst Oppression

Probably the most persuasive, overriding arguments for allowing secession in some manner arise from moral concerns. While adhering to form and procedure is ideal and creates order, circumstances change and can create the necessity of action. For example, the Articles of Confederation stated that any alteration or amendment to the provisions had to be “confirmed by the legislatures of *every* State.”¹⁰⁶ The necessity for change was obvious, however. So Congress, still sitting under the Articles in 1788—after only eleven of the thirteen states had ratified the changes—put the Constitution in place.¹⁰⁷ For nearly two years, until May of 1790 when Rhode

¹⁰¹ JOINT COMM. ON THE ORG. OF CONGRESS., 103D CONG., FINAL REP. ON THE ORGANIZATION OF CONG. (Comm. Print 1993), available at <http://democrats.rules.house.gov/archives/jcoc2.htm>.

¹⁰² *Id.*

¹⁰³ Neff, *supra* note 14, at 416.

¹⁰⁴ See JOINT COMM. ON THE ORG. OF CONGRESS, *supra* note 101

¹⁰⁵ See *id.* (describing the heated debate among state representatives at the convention surrounding whether small states or large states would gain more control in the newly created Congress and the compromise reached).

¹⁰⁶ THE ARTICLES OF CONFEDERATION art. XIII (1781) (emphasis added).

¹⁰⁷ PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 429-30 (2010). Though it is worth noting that the Constitution *itself* declared it would go into effect when merely nine of the thirteen states ratified.

Island finally ratified the Constitution, the change was in place due to legitimacy and necessity trumping formalism.¹⁰⁸

1. *Secession As the Preservation of Liberty*

One context in which the call for legitimacy to trump formalism may sound loudest is when a state's grip on certain freedoms begins to slip. "The principal argument for recognition of a right to secede is that it would operate as a powerful deterrent to oppressive and discriminatory practices" and as an effective remedy for these injustices.¹⁰⁹ James Madison recognized that the real crux of the secession discussion boiled down to this moral consideration.¹¹⁰ In acknowledging the strength of Daniel Webster's argument opposing nullification and secession, Madison still lamented that Webster "dodge[d] the blow by confounding the claim to secede at will, with the right of seceding from intolerable oppression. The former answers itself, being a violation, without cause, of a faith solemnly pledged. The latter is another name only for revolution, about which there is no theoretic controversy."¹¹¹

Of course there was no controversy regarding the right of the people to revolt in Madison's mind—he lived through the American Revolution that resulted, eventually, in his serving as the fourth President of the United States.¹¹² But his view of a revolutionary right is well founded. Aside from the origins of the Union, which Madison struggled to define throughout his life,¹¹³ he understood the federal government organized under the Constitution as

¹⁰⁸ *Ratification Dates and Votes*, U.S. CONSTITUTION, <http://www.usconstitution.net/ratifications.html> (last visited Mar. 28, 2013).

¹⁰⁹ Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 635 (1991).

¹¹⁰ Letter from James Madison to Daniel Webster, in 1 THE FOUNDERS' CONSTITUTION ch. 3, document 14 (Philip B. Kurland & Ralph Lerner eds, 2000).

¹¹¹ *Id.*

¹¹² *James Madison*, BIOGRAPHY.COM, <http://www.biography.com/people/james-madison-9394965> (last visited Mar. 28, 2013).

¹¹³ Madison wavered with his interpretation of the ratification of the Constitution and what the meant for the sovereignty of the states and the people, writing the following to Webster:

ultimately subject to that right: “[T]he powers of the [federal] Government being exercised, as in other elective & responsible Governments, under the controul [sic] of its Constituents, the people & legislatures of the States, and subject to the Revolutionary *Rights* of the people in extreme cases.”¹¹⁴

Extreme cases ought to be just that of course—extreme. As was briefly mentioned above, the United States was born out of precisely such a circumstance.¹¹⁵ The founding fathers realized that securing the rights of “Life, Liberty, and the pursuit of Happiness” were essential to a legitimate government and

[t]hat whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Therefore, any American would be hard-pressed to refute the right of people—whether as individuals or collectively as a political body—to secede and “institute new Government” should there ever be excessive oppression coming from the federal government.

2. *Secession As the Prevention of War*

Ultimately, formalities and political debates aside, history has proven that, when a group of individuals possesses total conviction in the truth of its duty to secede from a larger political entity, resistance to that desire brings about war.¹¹⁶ “If the state you want to leave does not want

[I]f formed by [the states] as imbodyed into separate communities, as in the case of the Constitution of the U.S. a dissolution of the Constitutional Compact would replace them in the condition of separate communities, that being the Condition in which they entered into the compact; whereas if formed by the people as one community, acting as such by a numerical majority, a dissolution of the compact would reduce them to a state of nature, as so many individual persons.

THE FOUNDERS’ CONSTITUTION, *supra* note 110.

¹¹⁴ *Id.*

¹¹⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹¹⁶ JAMES L. ERWIN, DECLARATIONS OF INDEPENDENCE: ENCYCLOPEDIA OF AMERICAN AUTONOMOUS AND SECESSIONIST MOVEMENTS xvi (2007) (noting that after the Civil War “[t]he federal government was stronger than ever, and had forcefully demonstrated its will to fight those who would secede”).

you to go, the results can be bloody.”¹¹⁷ And as the St. Louis University periodical reasoned quite simply: “[T]he previous secession of 1774 sparked a war with Britain as an effort to wrest control of the original 13 colonies...; and the secession of 1864 led to the Civil War. Therefore, if a third secession were to occur, it would certainly result in a second civil war.”¹¹⁸ This dynamic of political withdrawal is not exclusive to Northern America either.¹¹⁹ The loss of life and property accompanies secession resistance around the world.¹²⁰ Furthermore, not only have the secession efforts of a group of states or colonies resulted in war, but the War for Texan Independence demonstrates that even the attempt at secession by a lone jurisdiction can warrant a violent confrontation in the eyes of the remaining majority.¹²¹ The presumed weakness of that sole, rebel body in capably waging war certainly plays a role in this response.¹²²

While the federal government’s armed response to the Confederacy resulted in the preservation of the Union, it also resulted in the loss of more than 600,000 American lives.¹²³ Perhaps war could have been avoided and an alternative solution hammered out in time had Lincoln and his administration heeded the words of President John Quincy Adams noting the importance of a people’s will:

The indissoluble link of union between the people of the several states of this confederated nation is, after all, *not in the right but in the heart*. If the day should ever come (may Heaven avert it!) when the affections of the people of these States shall be alienated from each other; when the fraternal spirit shall give way to cold indifference, or collision of interests shall fester into hatred, the bands of political associations will not long hold together parties no longer attracted by the

¹¹⁷ Robert W. McGee, *Secession Reconsidered*, 1 J. OF LIBERTARIAN STUD. 11, 26 (1994).

¹¹⁸ Andrew Sova, *Constitutional Amendment an Alternative to Secession*, U. NEWS (Nov. 29, 2012, 12:59 PM), <http://unewsonline.com/2012/11/29/constitutional-amendment-an-alternative-to-secession/>.

¹¹⁹ See McGee, *supra* note 117 (noting that “Thousands were killed during the partitioning of India and Pakistan, and the secession of Croatia and Slovenia from the former Yugoslavia [] also prov[ed] costly in loss of life and destruction of property”).

¹²⁰ *Id.*

¹²¹ STEPHEN L. HARDIN, *TEXIAN ILIAD – A MILITARY HISTORY OF THE TEXAS REVOLUTION* 98 (1994).

¹²² *Id.* T Mexican Secretary of War stated, “The superiority of the Mexican soldier over the mountaineers of Kentucky and the hunters of Missouri is well known. Veterans seasoned by 20 years of wars can't be intimidated by the presence of an army ignorant of the art of war, incapable of discipline, and renowned for insubordination.” *Id.*

¹²³ See Lambert, *supra* note 5 and accompanying text (explaining the toll the Civil War took on the nation).

magnetism of conciliated interests and kindly sympathies; and *far better will it be for the people of the disunited states to part in friendship from each other, than to be held together by constraint.*¹²⁴

But perhaps the circumstances of Lincoln’s time made war inevitable. Either way, the prevention of bloodshed is a—and perhaps *the*—most weighty consideration in favor of allowing for secession.

III. THE MOST COMPELLING ARGUMENTS AGAINST THE NATIONAL RECOGNITION OF LEGITIMATE SECESSION

While maintaining the successful existence of any newly derived nation or nations would certainly be a difficult task, the brunt of that difficulty would fall to the people and government of such a jurisdiction once formed.¹²⁵ So, though that issue is worth much discussion, what is exceedingly pressing to the United States as a whole right now are the ideological and logistical concerns that refute a state’s ability to reach the point of independence in the first place.¹²⁶

The place to start, of course, is the Constitution and issues that the nation’s founding document presents to secessionists.¹²⁷ But on top of constitutional arguments against secession are very real contentions rooted in both democracy and logic.¹²⁸

A. Constitutional Reasons to Contest the Idea of Secession

As Charles Cooke of the National Review notes, “We have at our disposal the most wonderful Constitution and nation that the world has ever seen. Let’s not hear any more foolish

¹²⁴ John Quincy Adams, Speech Celebrating the Jubilee of the Constitution (1839), in DAVID GORDON, SECESSION, STATE & LIBERTY 14 (David Gordon ed., 2002).

¹²⁵ See generally *Columnist: Texas Economy Could Not Survive Secession*, THE SHORT HORN (Nov. 20, 2012, 10:39 PM), http://www.theshorthorn.com/opinion/columnists/columnist-texas-economy-could-not-survive-secession/article_833cfe76-3395-11e2-ba04-001a4bcf6878.html (listing practical concerns that would prevent a state such as Texas from successfully functioning as an independent nation).

¹²⁶ The Collegian, *Secession Petitions Ridiculous, Counterproductive*, K-STATE COLLEGIAN (Nov. 28, 2012), <http://www.kstatecollegian.com/2012/11/28/secession-petitions-ridiculous-counterproductive/> (calling the requests to secede “economically unrealistic” and moving past an economic argument to more immediate preventative reasoning).

¹²⁷ See *infra* Section III.A (discussing constitutional concerns with secession).

¹²⁸ See *infra* Section III.B (explaining logical and practical concerns of beginning a new nation from a secession action).

talk of dismantling them.”¹²⁹ That “most wonderful Constitution—which is silent as to the issue of secession directly—is utilized by both sides of the secession debate in forming arguments.¹³⁰ Whether from President Lincoln or from the Fourteenth Amendment passed immediately following his presidency, there exist constitutional interpretations to counter those discussed above.¹³¹

1. *Lincoln’s Rebuttal to the Secessionist Tenth Amendment Argument*

Abraham Lincoln’s primary argument that secession was unconstitutional was really quite simple. Though he acknowledged that the Constitution failed to expressly prohibit secession, he stated that trumping this acknowledgement was the understanding that the Constitution could not be interpreted to contain a provision for the destruction of the Union.¹³² He argued that, whatever rights are reserved to the states by the Constitution, surely, [in those] are not included all conceivable powers, however mischievous or destructive.”¹³³ And surely there is no state “power to lawfully destroy the Union itself,” he wrote.¹³⁴

Furthermore, Lincoln was dumbfounded by the seemingly overriding notion of “states’ rights” via which the Confederacy claimed legitimacy under the Constitution.¹³⁵ He pointed out

¹²⁹ Charles C. W. Cooke, *Against Secession*, NATIONAL REVIEW ONLINE (Nov. 13, 2012, 2:29 PM), <http://www.nationalreview.com/corner/333307/against-secession-charles-c-w-cooke>.

¹³⁰ *Id.*

¹³¹ See *infra* Section III.A (explaining constitutional arguments in opposition to secession); see also *supra* Sections I.A, I.B (discussing constitutional arguments in support of secession).

¹³² Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *available at*, <http://teachingamericanhistory.org/library/index.asp?document=1063>. Lincoln noted the following:

Unquestionably the States have the power and rights reserved to them in and by the National Constitution; but among these, surely, are not included all conceivable powers, however mischievous or destructive; but, at most, such only as were known in the world, at the time, as governmental powers; and certainly a power to destroy the Government itself had never been known as a governmental—as a merely administrative power.

Id.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* Lincoln stated that

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. Our States have neither more nor less power than that reserved to them in the Union by the

that “[t]he express plighting of faith by each and all of the original thirteen in the Articles of Confederation, two years later, that the Union shall be perpetual, is most conclusive” of the falsity of that secessionist idea.¹³⁶ Lincoln continued basing his thought upon the puzzling nature of this quandary: “Having never been States, either in substance or in name, *outside* of the Union, whence this magical omnipotence [put forth by states] of ‘State rights’ claiming the lawful ability to secede?”¹³⁷

2. Fourteenth Amendment Erases State Sovereignty

A second argument that finds footing in the nation’s Constitution played no role in the debate prior to the Civil War because it was conceived with the passage of the Fourteenth Amendment in 1866.¹³⁸ To many, the puzzling inquiry that arguably remained unanswered until this point was indubitably settled with this Congressional reinforcement of the Union victory.¹³⁹

The relevant portion of the amendment reads

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.¹⁴⁰

Constitution—no one of them ever having been a State *out* of the Union. The original ones passed into the Union even *before* they cast off their British colonial dependence; and the new ones each came into the Union directly from a condition of dependence, excepting Texas. And even Texas, in its temporary independence, was never designated a State. The new ones only took the designation of States on coming into the Union, while that name was first adopted for the old ones in and by the Declaration of Independence.

Id.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Library of Congress, *Primary Documents in American History*, WEB GUIDES, <http://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html> (last visited April 1, 2013).

¹³⁹ Daniel A. Farber, *The Fourteenth Amendment and the Unconstitutionality of Secession* 45 AKRON L. REV. 2, 498 (2012), available at, https://docs.google.com/viewer?a=v&q=cache:DHPFBvhLEZsJ:www.uakron.edu/dotAsset/f162e248-7e4c-490f-98a0-cc1c152ce05f.pdf+&hl=en&gl=us&pid=bl&srcid=ADGEESgJWecWiJXISOSnVnjumzodw5noLhW0SsJld9EOma m9Su2P7UqeQ4VQF5s0dAu5W2azly1Z7AYd8eV7kuCQO_4WpgTZgZrShaPn3AjqocRUT0hmg-ELLrLwvdAG9VqASKCpWcJw&sig=AHIEtbTZwd1jN6GvUyeHtVkpQ0rg0KMYgw

¹⁴⁰ U.S. CONST. amend. XIV.

This language indicates that the Constitution and its guarantees form a compact—separate from any state action or document—directly between the American *people* and the federal government.¹⁴¹ It seems to further indicate that Americans owe their foremost allegiance to the United States, a nation rather than a confederation.¹⁴² What implication does this have then for state citizenship? The argument is that “correspondingly, states, as building blocks of the nation, have only second place in our allegiance with state citizenship being defined by the Fourteenth Amendment as only a geographic marker depending on where an American citizen happens to reside at any given time.”¹⁴³

The impact of this understanding on the secession discussion is that “the United States involves a direct relationship between the federal government and citizens that is beyond any form of interference by the states.”¹⁴⁴ Secession would have, by definition, interfered with that “direct relationship” and therefore would have deprived each citizen of a seceding state of the Constitution’s guarantees.¹⁴⁵

B. Logical, Democratic Opposition to Secession

In much the same way that those supporting secession are able to look outside the Constitution to morality or revolution for backing,¹⁴⁶ those opposing secession can branch out from founding documents and claim logic and operative democracy as their allies.¹⁴⁷ Ultimately, Cooke may have summed up the common-sense rhetoric for this side of the debate quite well in

¹⁴¹ Jonathan Turley, *Un-Civil Action: Was Lincoln Wrong on Secession?*, AMERICA’S CIVIL WAR (Nov. 2010), available at, <http://sonoftheoccupiedsouth.blogspot.com/2010/09/un-civil-action-was-lincoln-wrong-on.html> (last visited April 1, 2013).

¹⁴² Farber, *supra* note 139, at 512.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 498.

¹⁴⁵ *Id.* at 498, 509 (stating that a “state’s secession would have deprived each of its citizens of every right [guaranteed by the federal government] except to the extent that some later treaty might allow foreigners from the seceded state to exercise these rights.”).

¹⁴⁶ See *supra* Section II (explaining several arguments, some from the Constitution and its history and some from other sources, for permitting secession).

¹⁴⁷ See *infra* Subsections III.B.1, III.B.2 (explaining the way in which logical and democratic arguments are made by those opposing secession).

writing those who agree “the United States is the greatest force for good in the history of the world should not be even contemplating its dissolution. Conservatives, remember, are worried about American decline, and there is no more sure way to hasten that than to break the country up into pieces.”¹⁴⁸ In reality, a single element of secession creates both a logical and democratic concern.

1. *Founding a Nation on Concept of Legal Secession Creates Fragility*

This argument is short but sweet: If a state secedes, the precedent is set for that new nation.¹⁴⁹ New arguments are sure to arise within that new nation resulting in a new majority and a new minority. The minority will secede and the cycle will start over: new disagreement, new majority, new minority.¹⁵⁰ The bottom line of the argument is that a seceding state will not be able to stand on its own logic and acquiescence.¹⁵¹ As President Lincoln stated in his first inaugural address: “If a minority in such case will secede rather than acquiesce, they make a precedent which in turn will divide and ruin them; for a minority of their own secede from them whenever a majority refuses to be controlled by such minority.”¹⁵²

2. *Allowing for Secession Can Snowball into Anarchy*

The anarchy argument is, for all intents and purposes, a continuation of the fragility claim immediately above. Basically, the result of the secession cycle being repeated over and over within a seceded state is complete anarchy.¹⁵³ The minority may always leave the majority until

¹⁴⁸ Cooke, *supra* note 129.

¹⁴⁹ Abraham Lincoln, First Inaugural Address (March 1, 1861), *available at* <http://www.bartleby.com/124/pres31.html>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ George Desnoyers, *Lincoln’s Four Main Arguments Against Secession*, ENDUSMILITARISM.ORG, http://www.endusmilitarism.org/secession_condensed-with_notes.html#Note_four (last visited Apr. 2, 2013).

there is no majority—each individual does what he sees fit adhering to no oversight.¹⁵⁴ Lincoln, again in that same inaugural address, explained the inevitable result of secessionist behavior in the following manner: “Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.”¹⁵⁵ He understood this principle not as naming the majority infallible, but as representing a more acceptable way to order society than anarchy.¹⁵⁶ A majority,” he explained, “held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people.”¹⁵⁷

IV. RESPONSES TO OPPOSITION ARGUMENTS

While the arguments opposing the legitimacy of secession are not without merit, there are rather simple responses to these several claims which demonstrate that cautiously allowing for secession may be preferable to taking a hard-line stance against it.¹⁵⁸ Both the Constitutional and philosophical issues secession presents have persuasive, proposed rebuttals.¹⁵⁹

A. Addressing Constitutional Concerns of Secession

As for the debate surrounding the Tenth Amendment’s implications for secession both sides of the debate have been threshed out above; but it is worth pointing out that “[i]n this

¹⁵⁴ *Id.* “There would be a series of secessions until there was no longer any government worthy of the name. The end result, thought Lincoln, of relying on secessions to resolve disputes is anarchy.” *Id.*

¹⁵⁵ First Inaugural Address, *supra*, note 149 (stating his belief that “Plainly, the central idea of secession is the essence of anarchy”).

¹⁵⁶ *See id.* (stating that “rejecting the majority principle, anarchy or despotism in some form is all that is left”); Desnoyers characterized Lincoln’s argument this way: “There would be a series of secessions until there was no longer any government worthy of the name. The end result, thought Lincoln, of relying on secessions to resolve disputes is anarchy.” Desnoyers, *supra* note 153.

¹⁵⁷ First Inaugural Address, *supra* note 149.

¹⁵⁸ *See infra* Section IV (addressing the arguments made in Section III opposing the legitimacy of secession).

¹⁵⁹ *Id.*

argument, Lincoln was on defense.”¹⁶⁰ Secessionist thinking had, for many years prior to Lincoln’s presidency, held sway in arguing that the amendment reserved the right of secession to states.¹⁶¹ Conventional wisdom prior to the Civil War within the United States was that the Constitution, in fact, did *not* prohibit secession, and the Tenth Amendment only served to strengthen that understanding. Obviously the war and its results turned the popular trend heavily in the opposite direction.¹⁶²

With regard to the Fourteenth Amendment and what that addition to the Constitution means for states’ rights, there is an argument that seems to defeat, or at least neutralize, secessionists’ opposition. Building upon the Tenth Amendment discussion in a way, the Fourteenth Amendment fails to address either a federal right to prohibit or a state’s right to carry out secession.¹⁶³ That being the case, the claim that the 1866 amendment language prohibits secession by creating a primary, direct relationship between each U.S. citizen and the federal government seems tenuous at best; the Constitution still remains silent as to the issue, and that is the main secessionist focus.¹⁶⁴ That primary, national citizenship can simply exist *so long as* a state does not exercise the right of secession presumably previously reserved to the state by the Tenth Amendment. Therefore, one cannot argue the Fourteenth Amendment Constitutional claim

¹⁶⁰ See Desnoyers, *supra* note 153. Desnoyers explains that To secessionists, nothing could be clearer: the Constitution did not prohibit states from seceding. Therefore, the right to secede was reserved to the states. Such had been the thinking all across the nation ever since the Constitution had been ratified in 1788. In fact, several secessions had been proposed in the first 70 years after the Constitution was ratified, in different sections of the country, and nobody ever said that secession would be illegal.

Id.

¹⁶¹ *Id.*

¹⁶² See Turley, *supra* note 141 (stating that “[u]ltimately, the War Between the States resolved the Constitution’s meaning for any states that entered the Union after 1865, with no delusions about the contractual understanding of the parties”).

¹⁶³ U.S. CONST. amend. XIV (lacking any mention of secession).

¹⁶⁴ See *supra* Subsection III.A.2 (making the argument that the Fourteenth Amendment prioritizes federal citizenship above state citizenship thereby destroying a state’s ability to secede from the union and deprive a U.S. citizen of Constitutional guarantees).

without addressing the issue more broadly—specifically in a way that encompasses the Tenth Amendment as well.

B. Responses to Philosophical Obstacles to Secession

Lincoln argued that the principle of secession sets a precedent by which a seceding state would eventually secede itself into oblivion.¹⁶⁵ Secessionists agree—to a point. Instead of looking at separation as a minority destroying majority governance, however, the Confederacy, for example, merely created *two* majorities—one that remained in the North and one that took shape in the South.¹⁶⁶ That is far from rapid repetition of division. Additionally they argue that yes, the precedent of secession within the new state would be set. But “if politicians know that a portion of their constituency can leave, they will be less likely to neglect their needs. More importantly, citizens will have a choice.”¹⁶⁷ There is no disagreement in secession’s implications, only in its perception: Those opposed to secession view the option to withdraw as a negative, chaotic characteristic while those in support view it as a positive, liberating enhancement.

The secessionist response to the anarchy concern is similar in form: There is no disagreement as to the possibility that apparent anarchy could occur because “[t]heoretically... the smallest unit that can secede is an individual.”¹⁶⁸ However, the variance from Lincoln comes in the secessionist outlook on this possible occurrence: An individual of course may secede; because to bar that as an option results in injustice to anyone forced to be part of a political affiliation he does not wish to be a part of.¹⁶⁹ Of course rather than secede an individual may simply move to another jurisdiction and avoid having to take that political action; but moving is

¹⁶⁵ See *supra* Subsection III.B.1 (articulating Lincoln’s argument that the precedent set by secession would cause a state to crumble); see also First Inaugural Address, *supra*, note 149 (in which Lincoln sets forth this argument).

¹⁶⁶ Desnoyers, *supra* note 153.

¹⁶⁷ McGee, *supra* note 117, at 31.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

not easy. Uprooting oneself—and likely all of one’s family and belongings—can be both complicated and costly. Therefore, theoretically, for an individual with limited resources and a lack of opportunity elsewhere, secession could be the more plausible answer.

V. WHY AND HOW SECESSION OUGHT TO BE ACCEPTED AS A VIABLE ALTERNATIVE TO ARMED CONFLICT

The arguments for and against secession are endless and often circular depending on one’s interpretation of Constitutional history and language. Its legal legitimacy, while existent, is far from crystal clear. At the end of the day, however, there is one factor at work in any severe division within a nation that calls for the United States to carefully consider and craft a procedure by which a state or collection of states may secede from Union.¹⁷⁰ Despite relevant concerns regarding the practicality and feasibility of a state’s survival outside of the Union, much of that debate is conjecture, and, ultimately, the state itself must deal with those issues more so than the U.S.¹⁷¹ The procedure permitting secession must balance the interests of the seceding state with those of the remaining Union and allow for the peaceful coexistence of the two entities.¹⁷²

A. Tipping the Scale: Secession Is Preferable to War

The Tenth and Fourteenth Amendments can be argued round-and-round within the secession discussion until both sides are blue in the face. Still, when it comes right down to it, neither amendment—nor any other portion of the Constitution—directly maps out a power or prohibition of secession.¹⁷³ Even the Declaration of Independence, while impliedly referencing a natural right of secession, does not expressly settle the debate because it was drafted *before* the

¹⁷⁰ See *supra* Section II (highlighting the avoidance of war as the strongest argument in favor of permitting secession).

¹⁷¹ See *infra* Section V.B (addressing concerns that may arise should a state secede and how that state might cope with its independence).

¹⁷² See *infra* Section V.C (reasoning out a proper procedure for state secession from the Union).

¹⁷³ See U.S. CONST. (lacking any mention of secession); see also *supra* Sections I, II (listing and explaining arguments arguing for and against the allowance of secession but notably lacking any express provision from the U.S. Constitution).

Union among the states was formed.¹⁷⁴ Those questioning the legality of secession can certainly point to these apparent gaps as reason to doubt the wisdom of allowing secession.

Therefore, the facts on the ground dictate the nation's attitude toward this topic moving forward. The facts are simple: There is great frustration among many states and countless American citizens with the actions of the federal government.¹⁷⁵ History demonstrates and the Supreme Court has acknowledged that war is "inevitable" when, as with the times leading up to the Civil War, a sizeable group of individuals is involuntarily forced to submit to a government it views as unjust.¹⁷⁶ The country has not come to the edge of a second civil war... yet. But rather than turn a blind eye to that possibility, any and all alternatives ought to be plausibly presented so as to avoid a conflict of the sort that took the lives of 2% of the U.S. population roughly 150 years ago.¹⁷⁷

B. Okay, Secession May Be a Viable Alternative Under Rare Circumstances, But...

If it is accepted that secession is permissible when entered into out of necessity and through a carefully crafted procedure, that consent is only half the battle. An entirely new crop of issues would arise: Which states may secede? If the nation overall signs on to the Constitutional compact idea discussed above,¹⁷⁸ does that mean *only* the original parties to that "contract" can rescind the agreement? Additionally, the existence and long-term survival of any newly independent state or group of states would be a delicate proposition itself.

¹⁷⁴ THE DECLARATION OF INDEPENDENCE (U.S. 1776) (referencing a divine law allowing an oppressed people to shed the unjust government and form a new one).

¹⁷⁵ See *supra* Section I (highlighting various examples of states demonstrating dissatisfaction with the growth and operation of the federal government).

¹⁷⁶ See *supra* Subsection II.C.2 (citing instances, both within the U.S. and internationally, in which societal unrest with a bar on secession led to costly wars); see also *Texas v. White*, 74 U.S. 700, 724 (1868) (recognizing the position taken by the Confederate States, such as Texas, "thus assumed could only be maintained by arms, and Texas accordingly took part, with the other Confederate States, in the war of the rebellion, which these events made inevitable").

¹⁷⁷ Lambert, *supra* note 5.

¹⁷⁸ See *supra* Section II.A (explaining and arguing the 'breach of compact' theory for legitimate secession from the Union).

1. *All for One and One for All?*

Only thirteen of the now fifty United States existed as sovereign prior to the formation of the compact among the states and between the states and the federal government.¹⁷⁹ Therefore, if, in fact, there is a breach of that agreement by the federal government so substantial as to warrant rescission, a legitimate question is posed asking whether *only* those thirteen states are able to entertain such rescission. Tangential to this complication another idea: Even if one is willing to admit the constitutionality of secession was questionable until the time of the Civil War so that states that joined the Union prior to the conflict can claim lack of mutual understanding upon execution of the contract, surely “the War Between the States resolved the Constitution’s meaning for any states that entered the Union *after* 1865, with no delusions about the contractual understanding of the parties,” right?¹⁸⁰

Wrong. First of all, in addressing the Civil War status of Texas, a state added to the Union *after* the ratification of the Constitution, the Supreme Court made clear that “the union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original states.”¹⁸¹ At first read this may sound like a case against secession not by added states but by *any* state. However, the way the Court continued negates this understanding: “There was no place for reconsideration or revocation, except through revolution or through consent of the States.”¹⁸² The Court actually expressly acknowledged a state’s—any state’s—right to revoke its participation in the Union “through consent of the States.”¹⁸³ That idea of secession with consent will be utilized below in establishing a legitimate secession

¹⁷⁹ Martin Kelly, *American History*, ABOUT.COM, <http://americanhistory.about.com/od/colonialamerica/a/colonylist.htm>.

¹⁸⁰ Turley, *supra* note 141 (emphasis added).

¹⁸¹ *White*, 74 U.S. at 703.

¹⁸² *Id.*

¹⁸³ *Id.*

procedure.¹⁸⁴ But that acknowledgment is not all that this language accomplishes. It further implies complete equality among the states, equating Texas' relationship with the states with the relationships among the original states. Equality mandates a lack of disparities. Therefore, just as Texas may secede with permission, so may any state.¹⁸⁵

Additionally, reservation of the right to repossess governmental duties from the federal government was an integral part of multiple states' constitutional ratification motions.¹⁸⁶ The language used in these ratifications indicates an understanding that this right belongs to any state that was or would become a part of the Union.¹⁸⁷ For example, Virginia's motion stated,

WE the Delegates of the people of Virginia...DO in the name and in behalf of the people of Virginia, declare and make known that the powers granted under the Constitution, *being derived from the people of the United States* may be resumed by *them* whensoever the same shall be perverted to their injury or oppression.¹⁸⁸

First, these ratifications, in addition to serving as votes, were expressions of a state's understanding of what the nation would look like moving forward after accepting the Constitution. Therefore, Virginia's grasp of implications was Virginia's grasp of implications as they related not only to that state but to all states (and "people")¹⁸⁹ under the Constitution. And this ratification was accepted by all states in existence at the time—indicating a unanimous agreement to those implications.¹⁹⁰ Second, as pointed out above, individual "people" did not ratify the Constitution; instead sovereign states did so. Consequently, the "people of the United

¹⁸⁴ See *infra* Subsection V.C.3 (developing a legitimate procedure, incorporating consent of the states collectively, via which a state or group of states may secede from the Union).

¹⁸⁵ *White*, 74 U.S. at 722. The Court unequivocally stated that Texas, by being admitted to the Union, was "invested with all the rights, and became subject to all the responsibilities and duties of the original States under the Constitution." *Id.*

¹⁸⁶ See Desnoyers, *supra* note 153 (explaining that Rhode Island, New York, and Virginia all included similar language in their motions making clear the right of the people to dismiss oppressive government).

¹⁸⁷ *Id.* (arguing that, "[i]n asserting their retention of the right to secede, Virginia, New York, and Rhode Island were simply putting into the text of their ratification motions a right they believed naturally belonged to *all* the states").

¹⁸⁸ VIRGINIA CONSTITUTIONAL CONVENTION, RATIFICATION OF THE U.S. CONSTITUTION (June 26, 1788) (emphasis added), available at http://www.usconstitution.net/rat_va.html (last visited April 20, 2013).

¹⁸⁹ *Id.*

¹⁹⁰ Desnoyers, *supra* note 153.

States,” referred to by Virginia as having the ability to “resume” control, are implicitly *not* restricted to citizens in their individual capacities.¹⁹¹ The reference logically includes gatherings of the people, such as the sovereign states that consented to the “deriv[ation]” of powers from the people in the first place, as well.¹⁹²

2. They Think They Can? They Think They Can.

Probably the easiest counter to secession to make is that a state could not survive on its own even if managed to secede. For example, after listing a military, a healthcare system, disaster relief, welfare, a FBI, and other governmental agencies or programs that would presumably be needed in a newly independent state, one columnist wanted people to “remember how impossible it would be to successfully secede from the U.S.”¹⁹³ Certainly starting off on its own after being so critically attached to a union of fifty states would be a challenging endeavor for any sect of the country that would secede. But would it, in fact, be impossible?

The first response to this concern, whether looking at Texas or any state for that matter, attacks the premise that many, including the columnist mentioned above, employ in viewing secession as not feasible. The premise, built upon the understanding that a government must be of proper size in order to provide the services that a government *ought to* supply, is that governments should provide an array of services, such as education and welfare programs, which would be above and beyond the bare necessities of an effective administration.¹⁹⁴ Those challenging secession’s practicality habitually factor in the costs of these additional services in calculating “impossible” start-up costs for a newly independent state.¹⁹⁵ And it is true: “A

¹⁹¹ VIRGINIA CONSTITUTIONAL CONVENTION, *supra* note 188.

¹⁹² *Id.*

¹⁹³ *Columnist: Texas Economy Could Not Survive Secession*, *supra* note 125.

¹⁹⁴ See McGee, *supra* note 117, at 28 (noting that “[s]ome people want government to provide a comprehensive set of services, including cradle-to-grave welfare, free education for all, old age pensions, health care, and so forth.”).

¹⁹⁵ See *Columnist: Texas Economy Could Survive Secession*, *supra* note 125 (writing that the new state

government that provides comprehensive services such as these must be fairly large” and amply funded.¹⁹⁶ However, the government could be much smaller if those wishing to secede do not desire to carry the weight of an expansive administrative state.¹⁹⁷ If they are satisfied with a “minimal state that protects only life, liberty, and property, the unit could be very small indeed.”¹⁹⁸

Still, no matter the requisite size of the government, very real practical concerns would need to be answered. Because Texas has been the focus of much of the recent secession discussion in the news,¹⁹⁹ had more than 125,000 signatures on its 2012 secession petition,²⁰⁰ and has experience standing alone as a sovereign nation—not to mention its geographic enormity—the Lonestar State is a logical place to begin a practical analysis of any single or collective secession effort within the United States. Furthermore, based on the aforementioned factors, any secession from the U.S. in coming years would likely begin with or at least include Texas.

Additional reasons that any seceding entity would be wise to include Texas double as reasons why any such secession could be successful and rebut the claim that secession would inevitably fail.²⁰¹ First of all, as for defense, Texas has quite a force at its disposal: the Texas State Guard, which reports solely to the governor; the Texas National Guard and Air Guard; and

would need to “arm a military . . . [It] would also need some form of health care, some sort of disaster relief, a postal service, welfare, social security, FDA, CIA, FBI — the list goes on. Theoretically adding up all these starting costs would be well over a trillion dollars, and that’s just start-up costs”).

¹⁹⁶ McGee, *supra* note 117, at 28.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Gov. Rick Perry: Texas Could Secede, Leave the Union, HUFFINGTON POST (May 16, 2009, 6:12 AM), http://www.huffingtonpost.com/2009/04/15/gov-rick-perry-texas-coul_n_187490.html.

²⁰⁰ Texas Petition to Secede from the Union, WHITE HOUSE, <https://petitions.whitehouse.gov/petition/peacefully-grant-state-texas-withdraw-united-states-america-and-create-its-own-new-government/BmdWCP8B> (last visited Apr. 21, 2013).

²⁰¹ Bob Smiley, *Secession Y'all: Why Texas Can Pull It Off*, DAILYCALLER.COM (Nov. 13, 2012, 12:12 PM), <http://dailycaller.com/2012/11/13/secession-yall-why-texas-can-pull-it-off/> (arguing that, based on Texas’ characteristics, secession by Texas would succeed).

the “legendary Texas Rangers”—not to mention a very amply armed citizenry.²⁰² Regarding resources and utilities, Texas is the only state with its own power grid, which is controlled entirely by the state and covers the vast majority of the state.²⁰³ It also is home to one quarter of the nation’s oil and one-third of the country’s natural gas.²⁰⁴ Finally, economic concerns are at least alleviated by the fact that Texas, if it were an independent nation right now, would have the thirteenth highest GDP in the world.²⁰⁵ Not only that, but more jobs have been created in Texas in the last decade than in the other forty-nine states combined.²⁰⁶ There is a reason it seems that everybody knows somebody moving to Texas.

A final, far less academic, albeit historical, reason to believe in successful secession is history itself.²⁰⁷ The American colonies seceded from the British empire of the day and, more than 230 years later, are doing just fine “on their own.” This thriving nation was conceived from a “secession” of sorts, and its founding circumstances were certainly as dire—if not far *more* dire—than what would confront a seceding state, such as Texas, today.²⁰⁸ At the least, hundreds of years of witnessing and partaking in a successful democracy alone would seem to give today’s states an edge. Yes, the room for geographic expansion is far more limited for a state today than it would have been for an eighteenth-century colony, but, in a way, that fact would only alleviate a state’s burden by taking a plethora of expansion issues off of the table and would allow the administration to focus attention *within* the jurisdiction’s borders.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* (noting that Texas has expanded by over one million jobs in the last decade despite the massive recession encountered by our national economy).

²⁰⁷ *Id.* (pointing out the fact that Texas successfully both from Mexico and the U.S. in the nineteenth century in that it became an independent nation the first time and, despite losing the Civil War, prevented “one square foot of Texas soil” from being conquered by the North).

²⁰⁸ S. Mintz & S. McNeil, *Challenges Facing the Nation*, DIGITAL HIST. (2013), http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=2&psid=2971 (explaining that “the United States faced the challenge of building a sound economy, preserving national independence, and creating a stable political system which provided a legitimate place for opposition” after it won its independence).

C. Developing a Legitimate Secession Procedure

Clearly there is no “correct way” to institute a route to secession, and there is no “uniform method” that is accepted globally as the norm.²⁰⁹ Still, by scanning the surface of the secession landscape around the world, one can collect helpful insight to assist in the development of a procedure within the United States. Within the U.S. itself are also instructive processes that can be analyzed and altered to craft a legitimate secession procedure.²¹⁰ A vital aspect of the final product is that it ought to require majorities at both the state and national level before permitting the secession of state from the Union.²¹¹

1. *International Examples of Secession Processes*

There are three concrete aspects of permitted secession that stand out internationally. The first is the fact that provisions expressly addressing secession within a nation’s constitution are rare.²¹² One comprehensive survey of these provisions merely highlighted a handful of countries, such as St. Kitts and Nevis, as exemplifying jurisdictions that prefer to use this route.²¹³ Couple this with the difficulty of altering the U.S. Constitution, and a constitutional secession provision seems like both a challenging and unpopular proposition.

The second international characteristic to keep in mind is that, “from the various constitutional provisions for secession in existence, almost none of them allow for unilateral secession.”²¹⁴ This is common sense. Any place that installs a legal, unilateral right of secession is asking for chaos and conflict because of the constant, looming threat of secession any one political body could hold over the majority. Additionally, such a provision would fail to satisfy

²⁰⁹ Kreptul, *supra* note 14, at 79.

²¹⁰ *See infra* Subsection V.C.2 (highlighting the constitutional amendment process and the way by which territories became states as important, domestic factors).

²¹¹ *See infra* Subsection V.C.3 (describing the proposed procedure in detail).

²¹² *See* Kreptul, *supra* note 14, at 79 (only noting a few instances of constitutional secession provisions including Ethiopia, St. Kitts, and Nevis).

²¹³ *Id.*

²¹⁴ *Id.* at 80.

even the “weak” perpetuity described above because a state could then theoretically leave the Union whether a substantial breach of compact existed or not.²¹⁵ Not only that, but allowing an action to be conducted unilaterally that would affect the Union in as dramatic a way as secession would run contrary to the “majoritarian and popular sovereignty principles” so intricately intertwined throughout this nation’s constitutional structure.²¹⁶

Finally, looking at places outside of the U.S. that have “constitutionalized” secession in one form or the other, the processes entail “not just a referendum vote, but also a negotiated settlement.”²¹⁷ Taking into consideration the countless legal, economic, and governmental complexities that would arise with a state’s secession from the Union, allowing for flexibility both in the final terms and the permitted timeframe of any such secession would be a necessity.

2. Influence of Domestic Processes in the Development of a Legitimate Procedure

There are two processes within the structure of the United States that should be considered in the drafting of a secession procedure: the way in which states entered the Union—other than the original thirteen—and the Constitutional amendment processes. As for the first, it only makes sense to look at how a state got *into* the Union if one is proposing a way for that state to get *out*. To the extent that the Constitution dictated that initial process, the pertinent language reads “New States may be admitted by the Congress into this Union”²¹⁸ and, additionally, “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”²¹⁹ This vast flexibility granted to

²¹⁵ See *supra* Subsection II.A.2 (differentiating “weak” perpetuity, perpetuity so long as both sides to an agreement adhere to the compact’s terms, from the strong sense of the term).

²¹⁶ Akhil Reed Amar, *The Consent of the Governed: Constitutional Consent Outside Article V*, 94 COLUM. L. REV. 457, 457-58 (1994). Amar explains that “[w]e the People of the United States have a legal right to alter our Government—to change our Constitution—via a majoritarian and populist mechanism akin to a national referendum” and that “majoritarian popular sovereignty principles are clearly a part of the U.S. Constitution.” *Id.*

²¹⁷ Kreptul, *supra* note 14, at 80.

²¹⁸ U.S. CONST. art. IV, § 3.

²¹⁹ *Id.*

Congress historically translated into a state being admitted, after applying to Congress for statehood, with a simple majority vote of both houses and the President's signature.²²⁰

Regarding an amendment to the nation's Constitution, it would seem that secession, in a way, would be just that: In much the same way that an amendment would alter the substance and operation of the Union, secession, by *any* number of states, would do the same. Therefore, the processes of the two alterations should at least resemble one another. An amendment can pass via two routes, both of which require ratification by three-fourths of the states—either the states' legislatures or their conventions depending on what Congress proscribes: Two-thirds of both houses of Congress can propose an amendment as can a convention called by two-thirds of state legislatures.²²¹ Again, the majoritarian principles tied to national change are evident in both of these domestic processes and ought not to be disregarded.²²²

3. *A Legitimate Procedure Allowing for Secession*

Taking into account the lessons learned from secession provisions abroad and the procedures instituted within the U.S. allowing for significant modifications to the Union,²²³ a procedure ought to be installed via a congressional act to allow for secession should circumstances, such as impending armed conflict, warrant permitting a state to leave the Union. The first step of this new procedure must come at the state level. A simple majority vote in a state's legislature to bring the issue of secession to the people will suffice. But since there must be a *strong* majority sentiment within the state favoring secession to ensure solidarity and dedication to the success of the potential independence, the popular vote must result in at least

²²⁰ Robert Longley, *US Government Info: The US Statehood Process*, ABOUT.COM, <http://usgovinfo.about.com/od/uscongress/a/statehoodproc.htm> (last visited Apr. 23, 2013).

²²¹ U.S. CONST. art. V.

²²² See generally Amar, *supra* note 216 (highlighting the significance of having a majority in making changes within the Union under the Constitutional framework in place).

²²³ See *supra* Subsections V.C.1, V.C.2 (explaining the insight that can be gathered from both provisions abroad and here within the U.S. when crafting a secession provision).

two-thirds of voters in support of seceding from the Union. Ideally a state would not reach the point of secession without incredibly valid complaints with the status of its place in the Union allegedly justifying “rescission” of its constitutional compact with the federal government; therefore, as with the original Declaration of Independence, any state(s) must, within the secession proposal, “declare the causes which impel them to the separation.”²²⁴

At that point the proposal will be sent to Congress for both houses to review. Just as Congress had the final say, minus the President’s approval, in bringing a state *into* the Union,²²⁵ Congress will handle this decision as well. However, in contrast to the acceptance of a state into the Union and the amendment process,²²⁶ a simple majority will be required in *one* house and two-thirds in favor will be required in the other house. This would, while still posing quite a hurdle for any secession effort, allow for a bit of flexibility in the process: Hypothetically, if a large number of states supported a certain secession proposal but those states did not have large populations, two-thirds could be reached in the Senate, and the requisite of a mere simple majority in the House would allow the proposal to pass. The President need not sign a passing proposal and may not veto it since, as both history and current events demonstrate, the actions of any given president can be the very polarizing cause of a desire to secede in the first place.

The last piece of the procedural puzzle would be, by far, the most complex and would require certainly more than one article worth of explanation to thresh out thoroughly. It is the untangling of the many ties between both the seceding state the U.S. and the state’s citizens and nation as a whole. Because of its relative ease, the latter will be addressed first: After any secession proposal is passed, there ought to be a twenty-four month transition period during

²²⁴ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776); *see supra* notes 86-90 and accompanying text (explaining circumstances and authority allowing, or even compelling, a party to rescind a compact).

²²⁵ U.S. CONST. art IV, § 3.

²²⁶ *See supra* Subsection V.C.2 (explaining the way in which states have traditionally been admitted to the Union and the ways that amendments may be added to the Constitution).

which time citizens of the seceding state may freely decide citizenship between the two nations and make appropriate arrangements to reside in one or the other. As for the state's ties to the United States, the transition period would allow for certain financial, military, and economic connections between the two entities to either deteriorate slowly and deliberately as necessary or, in the case of any prospectively negotiated alliances or treaties, solidify gradually. At the end of the twenty-four months, the new nation would be entirely on its own, standing on the strength of however many members it possesses.

CONCLUSION

The United States is not very “united” as of 2013.²²⁷ Could that change? Sure—toward unity *or* division. If the divide deepens and a state or group of states stand on the brink of withdrawal from the Union, compromises and various bipartisan efforts ought to be utilized to avoid secession, of course.²²⁸ However, as evidenced by the Civil War and other secession attempts around the globe, such efforts do not have a perfect success rate.²²⁹ In realizing the legitimacy of secession grounded both in our nation's construction and principles of morality,²³⁰ allowing states to secede is preferable to armed conflict—especially one that would take place wholly on U.S. soil.²³¹

Despite issues and concerns worthy of consideration and discussion in challenging

²²⁷ See *supra* Section I (listing and explaining the various ways in which schisms both between the state and federal governments and among states are widening via both legislation and popular politics).

²²⁸ See *supra* Section V.A (highlighting the fact that secession ought only to be viewed as a last resort in order to avoid armed conflict).

²²⁹ See *supra* Subsection II.C.2 (citing instances, both within the U.S. and internationally, in which societal unrest with a bar on secession led to costly wars).

²³⁰ See *supra* Section II (explaining the most compelling historical and moral arguments in support of permitting secession in some fashion).

²³¹ See *supra* Section V.A (reinforcing the opinion that secession ought, at the least, to be viewed as a last resort in order to avoid armed conflict).

secession's legitimacy,²³² if revolution is inevitable a procedure must be in place to allow alternatively for peaceable withdrawal. Blending traditional American and international influences regarding significant national alterations results in a legitimate process that requires strong support at both the state and federal levels while making the possibility of secession a reality.²³³ That reality would not come without practical complications that must be given time to untangle and deteriorate.²³⁴ Given the strength and resolve of the United States and its people throughout history, secession seems unlikely. However, should the circumstances present themselves, the nation must be prepared.

²³² *See supra* Section III (raising opposing arguments to the idea of permitting secession based both on logistical and democratic concerns).

²³³ *See supra* Section V.C (creating a legitimate procedure for secession from the Union utilizing both American processes in place and international provisions regarding secession elsewhere in the world).

²³⁴ *See supra* Subsection V.C.3 (allowing for a twenty-four month transition period during which time practical complications—such as citizenship and economic agreements—may be threshed out).