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Sanford Levinson

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## ARE (AMERICAN) SECESSIONISTS NECESSARILY REVOLUTIONARIES?

SANFORD LEVINSON\*

I begin with a difference of opinion and nomenclature with my very close friend and pervasive intellectual influence, Mark Graber. We were teaching a course together by Zoom during the spring semester of 2021 at the University of Texas Law School on constitutional issues related to the great events of 1860–18\_\_?, i.e., Secession, Civil War, and Reconstruction.<sup>1</sup> The question I want to address is how exactly we describe secession in terms of the overall topic of this year’s schmooze: constitutional revolutions. Our answer may also have implications for exactly how we respond to statues of Robert E. Lee or even, perhaps, exactly how we respond to the image of the Confederate Battle Flag being brought into the United States Capitol. To put it mildly, the topic could easily support a full-fledged book; instead, my contribution here will be little more than a slightly long op-ed, designed far more to raise the issue than to come close to providing a fully-argued resolution.

Before turning to the events of 1860–61, though, I want to specify the argument that Mark and I are having concerning an earlier event in American history. Most people refer to the period of 1776–83 as “the American Revolution.” Inspired by Harvard historian David Armitage, who has written an authoritative study of the Declaration of Independence as a world-historical document,<sup>2</sup> I increasingly refer to the actions justified by the Declaration as “the American secession from the British Empire.”<sup>3</sup> Unlike, say, the political theorist Danielle Allen, who emphasizes the Declaration’s theme of “equality” (which surely is there),<sup>4</sup> I read it primarily as setting out

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\* W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School; Professor, Department of Government, University of Texas at Austin.

1. The question mark, which is *not* the topic of this paper, simply acknowledges the fact that there is a fascinating and important debate about the ending of the “First Reconstruction.”

2. DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* (2007). See also DAVID ARMITAGE, *CIVIL WARS: A HISTORY IN IDEAS* (2017) [hereinafter ARMITAGE, *CIVIL WARS*]; David Armitage, *Secession and Civil War*, in *SECESSION AS AN INTERNATIONAL PHENOMENON: FROM AMERICA’S CIVIL WAR TO CONTEMPORARY SEPARATIST MOVEMENTS* 37 (Don H. Doyle ed., 2010) [hereinafter Armitage, *Secession and Civil War*].

3. See Armitage, *Secession and Civil War*, *supra* note 2; ARMITAGE, *CIVIL WARS*, *supra* note 2.

4. DANIELLE ALLEN, *OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY* (2014).

the argument that “one people” can, when dissatisfied, simply “alter [and] . . . abolish” their terms of governance,<sup>5</sup> which includes withdrawal from an existing polity. That is the meaning of government by “consent of the governed.”<sup>6</sup> That announcement of a desire for what might be called a political divorce is certainly disappointing to the existing political regime; it will, no doubt, castigate the would-be seceders as “traitors,” “terrorists,” or “revolutionaries.” Supporters of the secessionists will certainly have a different perspective. One issue, therefore, is whether these terms have any genuine analytic meaning or are instead merely terms of political invective that should not, perhaps for that reason, be taken entirely seriously by academics.

The Declaration can be read in two quite distinct ways. One is simply to emphasize the “Right of the People to alter or to abolish” any existing form of government whenever they believe that a new form would be “most likely to effect their Safety and Happiness.”<sup>7</sup> To put it mildly, this seems to give a great deal of latitude to would be transformationists, whatever we choose to call them. But, of course, that paragraph concludes with the assertion that Great Britain, and its King, have been guilty of “a long train of abuses,” and the rest of the Declaration—the bulk of the document—sets out the bill of particulars justifying withdrawal from the Empire.<sup>8</sup> That being said, surprisingly little turns on this, unless one believes, as do many contemporary political theorists, that secession is legitimate if and only if one is being oppressed.<sup>9</sup> Whatever the rhetorical (and political) importance of setting out the purported “abuses” visited upon the colonists, the heart of the “American” argument, I would argue, is its emphasis on popular assent to any given government. “Prudence” has dictated waiting until the colonists couldn’t stand it anymore, but, presumably, one has the right to “alter [and] . . . abolish”<sup>10</sup> whenever that is thought conducive to public happiness.

One might well treat this as a “revolutionary doctrine.” No constitutional order can truly tolerate it as a legitimate possibility in terms of the instability it would necessarily produce if significant elements of the population took the Declaration’s arguments seriously. It is not surprising that successful leaders of national liberation struggles, whether defined as

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

6. *Id.*

7. *Id.*

8. *Id.*

9. See, e.g., Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFFS. 31, 34–35 (1997). For a distinctly contrasting view, see TIMOTHY WILLIAM WATERS, *BOXING PANDORA: RETHINKING BORDERS, STATES, AND SECESSION IN A DEMOCRATIC WORLD* (2020).

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

revolutionaries or secessionists, try almost immediately to tamp down any such impulses among their population.

But, and here is the basis of the argument between Mark and myself, the American “patriots” were not trying to overthrow the existing British government in London. We can meaningfully refer to the English “revolutionaries” of the 1640s inasmuch as they indeed were devoted to the violent overthrow of the existing system of government—manifested most memorably in the regicide of King Charles I—and its replacement by a brand new system. That was also true of the French revolutionaries, who similarly executed King Louis XVI. Ditto for the Russian revolutionaries of 1917, who also killed the Czar and his family along the way of completely overthrowing the existing framework of government.

The Americans, however, were content to leave the British Empire as it was; what remained after the American secession would continue to be governed by the King and Parliament. The American insurgents *did* destroy a statue of King George III that had graced what is now downtown Manhattan, but he was otherwise not the target of actual attempts on his life or well-being.

Nor, whatever the world-historical importance of the actions by the Americans, were they presenting themselves as the vanguard of a movement aspiring to take over the world. To be sure, attempts were made to enlist Quebec in the secessionist enterprise—though, interestingly enough, not the British “upper Canada”—to no avail even though Benedict Arnold led an army of American troops into Quebec to press the case. The French revolutionaries were far more ambitious, especially after the revolution was taken over by Napoleon, who invaded all of Europe and even Egypt.

Of course, 1776 was not the only secessionist episode in early American history. Vermont had seceded from New York and New Hampshire, a development that neither of the states was willing to recognize even as both endorsed the Declaration of Independence and the importance of “consent of the governed.”<sup>11</sup> Vermont would gladly have joined the new “United States of America” announced in the Declaration, but their 1777 application for membership in effect was vetoed. New York and New Hampshire finally accepted the situation, and Vermont did enter the Union in 1791.<sup>12</sup> But, obviously, the most important secession movement following 1787 occurred in 1860–61.

Did *that* constitute a “revolution,” either in terms of a professed aim to take over the American government in general or, more to the point, even

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11. *Id.*

12. See, e.g., Peter S. Onuf, *State-Making in Revolutionary America: Independent Vermont as a Case Study*, 67 J. AM. HIST. 797, 797 (1981).

self-consciously disaffirming the strictures of the United States Constitution? Both are important, the first especially to Armitage, but the second as well to anyone grappling with the topic of the schmooze, constitutional revolution, as a lawyer (and not only an historian or political scientist). Consider this excerpt from Jefferson Davis's inaugural address upon assuming the presidency of the provisional government of the Confederate States of America on February 18, 1861:

The right solemnly proclaimed at the birth of the United States, and which has been solemnly affirmed and reaffirmed in the Bill of Rights of the States subsequently admitted into the Union of 1789, undeniably recognizes in the people the power to resume the authority delegated for the purposes of government. Thus the sovereign States here represented have proceeded to form this Confederacy; and *it is by abuse of language that their act has been denominated a revolution.*<sup>13</sup>

Consider as well the inscription carved into the side of the monument to the Confederate war dead that is literally the first thing one sees when approaching the Texas State Capitol from the South:

DIED FOR STATE RIGHTS GUARANTEED UNDER THE CONSTITUTION.

THE PEOPLE OF THE SOUTH, ANIMATED BY THE SPIRIT OF 1776, TO PRESERVE THEIR RIGHTS, WITHDREW FROM THE FEDERAL COMPACT IN 1861. THE NORTH RESORTED TO COERCION. THE SOUTH, AGAINST OVERWHELMING NUMBERS AND RESOURCES, FOUGHT UNTIL EXHAUSTED.<sup>14</sup>

It was, presumably, important to Davis that he *not* be considered a “revolutionary” or, even more so, a “traitor” to the oath that he had taken as a graduate of West Point, a United States Senator, and Secretary of War of the United States of America. One might say the same, of course, about the equally distinguished Robert E. Lee. They, presumably, considered themselves to be principled devotees of the United States Constitution and the Declaration of Independence, resisting adversaries who in fact did not have a correct understanding of these foundational documents.

After all, both Madison and Jefferson endorsed in 1798 the “compact” theory of the Union by which its creators were not a national “people,” but, rather, the “sovereign states” that retained important aspects of their

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13. Jefferson Davis, President of the Confederate States, Inaugural Address of the President of the Provisional Government, *reprinted in* 5 THE COMPLETE AMERICAN CONSTITUTIONALISM pt. 1, at 156–57 (Mark A. Graber and Howard Gillman eds., 2018) (emphasis added).

14. *See, e.g.*, the top image on the page in SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 49 (2d ed. 2018).

sovereignty. Its adherents argued that the ultimate implication was not only “nullification,” as argued by John C. Calhoun, but more importantly, secession if the terms of the compact were flagrantly violated. It was this theory that the Texas statue is evoking when defending its “withdr[awal] from the federal compact.”<sup>15</sup> As argued explicitly in the South Carolina “Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union” on December 24, 1860, a number of South Carolina’s sister states had behaved in a decidedly nonfamilial manner by “enact[ing] laws which either nullify the Acts of Congress [regarding fugitive slaves] or render useless any attempt to execute them.”<sup>16</sup> The question is not whether one believes that Madison and Jefferson—and their later, more hotheaded followers—were “correct” and that they successfully defeated all competing theories. And, most certainly, one does not have to agree that this failure to enforce the justifiably hated Fugitive Slave laws is analogous to the “long train of abuses”<sup>17</sup> charged against the “tyrannical” George III and his government. Instead, it is whether one credits the Confederates as having a “thinkable” theory of the Constitution that would, for example, survive a Rule Eleven motion under the Federal Rules of Civil Procedure which bans “frivolous” arguments.

The Constitution of 1787 is silent with regard to the possibility of states doing to the United States what the colonies did to the British Empire in 1776: withdraw from the Union in the name of the existing constitutional order itself. The Declaration must be read together with a variety of arguments, plausible or not,<sup>18</sup> made by “Patriot” lawyers that the British Parliament did not have the authority to impose taxes on the American settlers. As political theorist and historian Eric Nelson has demonstrated, some of these “Patriots,” including Alexander Hamilton, were disappointed that George III did not exercise his theoretical power to veto “unconstitutional” legislation by Parliament.<sup>19</sup> They had, apparently, not received the memo that the nature of the British constitution had irrevocably been changed in what we often call the “Glorious Revolution” of 1688. This meant, among other things, that Parliament had indeed become sovereign, as a practical matter, and that the

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15. *See id.* On Calhoun’s theories, see the interesting letter published in the July 23, 1861 edition of the *New York Times*. Letter from a Granddaughter of Charles Carroll to the Hon. Edward Everett, reprinted in *John C. Calhoun a Secessionist*, N.Y. TIMES (July 23, 1861), <https://www.nytimes.com/1861/07/23/archives/john-c-calhoun-a-secessionist.html>.

16. *See* 5 THE COMPLETE AMERICAN CONSTITUTIONALISM, pt. 1, *supra* note 13, at 70–72.

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

18. Or perhaps we should realize that the right term is “plausible to whom.”

19. As for the critique of parliamentary power, see, for example, THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774), [https://avalon.law.yale.edu/18th\\_century/jeffsumm.asp](https://avalon.law.yale.edu/18th_century/jeffsumm.asp).

powers exercised by Stuart monarchs were simply no longer available, even though Queen Anne did veto a bill involving the Scottish Militia in 1708. But, of course, that was almost seventy years prior to the colonists' complaints about the reticence of George III in the face of purported Parliamentary overreach, and the British constitution had in fact changed irrevocably toward a far more Whig understanding of an empowered legislature and a diminished monarch, even if George III remained on the throne with more power, say, than Queen Elizabeth II now has. Perhaps one can understand why so many lawyers and, most certainly, Crown-appointed judges retained their loyalty to Great Britain, for they viewed the "American" arguments as legally fallacious, if not, indeed, preposterous. "We," presumably, as loyal Americans who wish to valorize the heroes of 1776, have a different view!

So, doing a fast forward to the America of 1860, are we really prepared to say that the secessionist arguments presented by Davis and other adherents of the Confederacy, many of them careful lawyers, were necessarily "anti-constitutional" and therefore "revolutionary" (or, at least, insurrectionist)? If one looks at this only through the blinkered eyes of the lawyer, were Davis's arguments necessarily worse than those of Jefferson and other great "patriots" of American independence? Or is it possible that reflection would force us to concede that they were thoroughly plausible, even if not (to us) convincing, arguments that were well within the American constitutional tradition, whether dated from 1775–76 or even 1787? Might we not concede the validity of the premise that the Civil War was fought between adherents of two plausibly contending theories of the Constitution itself and not, therefore, between one side upholding the "true Constitution" and the other that was its enemy.

What would it mean truly to accept this view of the matter? One possibility is that it is a mistake to describe Davis and Lee simply as "traitors" and to advocate, say, taking down their monuments because they committed "treason." Instead, one might support removing their monuments, as I do, because of the substantive values to which they were committed—doing "whatever it took" to maintain a vicious and indefensible system of chattel slavery, symbolized, among other ways, by the truly vicious fugitive slave laws. The Texas statue may evoke the anodyne theory of state compact, but the February 2, 1861 "declaration of the causes which impel the State of Texas to secede from the Federal Union" speaks with a ruthlessly admirable clarity that secession was provoked by an absolute commitment to white

supremacy and maintaining chattel slavery.<sup>20</sup> To be sure, the more we focus on the substantive values underlying secession—and base our views of Davis and Lee on the fact that they were committed to an evil regime—the more we must in fact confront the grim possibility that the 1787 Constitution itself was, as William Lloyd Garrison suggested, “a covenant with death, and an agreement with hell.”<sup>21</sup> And recall that Garrison preceded Davis in calling for secession and “No Union with Slaveholders.”<sup>22</sup>

So, what exactly would we think if, contrary to fact, Garrison had been successful and, say, New England had attempted to secede in the aftermath of the “Compromise of 1850” and then the repeal of the Missouri Compromise in the Kansas-Nebraska Act in 1854? Would we view him and his supporters as “traitors”? Would we join Lincoln in proclaiming the necessity, as loyal American constitutionalists, of remaining within a Union that required, among other things, complying with the Fugitive Slave Act of 1850 and, in effect, being political quietists with regard to abolishing slavery in the states where it already existed? And, of course, lurking behind the curtain in any such discussion is John Brown, who repudiated Garrison’s own commitment to non-violence.<sup>23</sup> Is he a hero, a villain, or simply a madman in believing that his foolhardy action at Harper’s Ferry might in fact bring about abolition (as one might even suggest it did, though in a very different way from what he imagined)?

I have no particular brief for the Texas statue, which I would gladly remove from the Capitol grounds inasmuch as its placement there might mislead impressionable viewers into believing that it expresses the one “true” theory of secession and war. But I do suggest that it is much too facile to say simply that it bespeaks a necessarily “wrong” view of the constitutional order “ordained” in 1787 and, for Lincoln and others, founded in the great ideals of the Declaration of Independence, which included political self-determination. To be sure, it is hard, perhaps impossible, to read the Declaration as endorsing or even protecting chattel slavery. But it is equally

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20. *Declaration of Causes: February 2, 1861, A Declaration of the Causes Which Impel the State of Texas to Secede from the Federal Union.*, TEX. ST. LIBR. & ARCHIVES COMM’N, <https://www.tsl.texas.gov/ref/abouttx/secession/2feb1861.html> (last modified Aug. 25, 2011).

21. See Donald Yacovone, “A Covenant with Death and an Agreement with Hell,” MASS. HIST. SOC’Y (July 2005), <https://www.masshist.org/object-of-the-month/objects/a-covenant-with-death-and-an-agreement-with-hell-2005-07-01>.

22. Paul Finkelman, *Garrison’s Constitution: The Covenant with Death and How It Was Made*, PROLOGUE MAG. (Winter 2000), <https://www.archives.gov/publications/prologue/2000/winter/garrisons-constitution-1.html>.

23. There is, of course, copious literature on John Brown. The latest entrant is H.W. Brands, *THE ZEALOT AND THE EMANCIPATOR* (2020). One of the classic biographies that captures the essence of Brown in its title is STEPHEN B. OATES, *TO PURGE THIS LAND WITH BLOOD: A BIOGRAPHY OF JOHN BROWN* (2d ed. 1984).



hard, if not impossible, to read the secession that it was defending, and then far more certainly the Constitution that followed, as not fundamentally preservative of slavery and thus creating what Don Fehrenbacher called the “slaveholding republic.”<sup>24</sup> Just as it is far more satisfying, ideologically, to denounce Roger Taney and his opinion in *Dred Scott* as the work product of what Jack Balkin and I have termed a “judge[] on a rampage”<sup>25</sup> than to address the possibility that it was a thoroughly “respectable” piece of legal craft<sup>26</sup> whatever its iniquitous holdings, so is it more satisfying to assert without further argument that Davis and his secessionist colleagues were “traitors” than honest and sincere “constitutionalists” holding views that we profoundly (and correctly) disagree with and regard as abhorrent.

American academics are engaged these days in a great civil war themselves, between adherents of the 1619 Project<sup>27</sup> and critics like Princeton Professor Sean Wilentz and others,<sup>28</sup> not to mention, of course, the right-wing ideologues appointed by President Trump who crafted the “1776 Report”<sup>29</sup> in the waning days of the preceding Administration. Proponents of the 1619 Project root American history, including its constitutional history, in an unrelenting past (and present) of maintaining white supremacy. Wilentz and James Oakes correctly point to the existence of a strain of “anti-slavery” constitutionalism. Wilentz, in particular, builds his entire argument around a comment by James Madison that the Constitution did not in its text recognize “property in men.”<sup>30</sup> They are scarcely Panglosses about American history, but they certainly want to present a more optimistic reading than does Nicole Hannah-Jones, the principal author behind the 1619 Project. But the

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24. DON FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY* (Ward M. McAfee ed., 2001).

25. See Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 *CHI.-KENT L. REV.* 49, 78 (2007).

26. See generally MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

27. *The 1619 Project*, *N.Y. TIMES MAG.* (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html>.

28. For a good overview of the controversy, see Adam Serwer, *The Fight Over the 1619 Project Is Not About the Facts*, *ATLANTIC* (Dec. 23, 2019), <https://www.theatlantic.com/ideas/archive/2019/12/historians-clash-1619-project/604093/>.

29. PRESIDENT’S ADVISORY 1776 COMM’N, *THE 1776 REPORT* (2021), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf>. The “advisors” were uniformly right wing and presented what almost all professional historians believe to be a distinctly distorted (and unduly optimistic) view of American history with regard to slavery. The language of the Declaration, for example, is taken to be truly constitutive of American political identity and the grim reality of chattel slavery treated basically as epiphenomenal, doomed to extinction. It should be noted that this report was almost instantly repudiated by the incoming Biden Administration.

30. SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING* 3 (2018).

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existence of an “anti-slavery” reading of the Constitution does not in the least gainsay the proposition that there is also, and perhaps more easily, a “pro-slavery” interpretation of the document and the ensuing “tradition.” The authors of the 1776 Report basically deny the possibility that a reasonable person might read the Constitution as did Davis, Lee, and the Sons of the Confederacy who put up the Texas monument in 1901, with the avid support of the then-governor of Texas who threatened to thrash anyone who denied the validity of what has been labeled the “lost cause” theory of the War. That seems to me a mistake.

William Faulkner’s statement—“The past is never dead. It’s not even past”—has, for better or worse, become a cliché.<sup>31</sup> But that does not make it wrong. We have never genuinely come to terms with the events of 1860–61 (or, perhaps, even of 1776), in terms either of the social realities underlying them or, more importantly for our particular and perhaps parochial purposes, of the deep constitutional issues presented by the arguments made by proponents of secession. To continue to dismiss Davis and Lee simply as “traitors” instead of as men who were both deeply devoted to their understanding of the United States Constitution *and*, more importantly, to a truly evil political cause, will not, I am afraid, further our understanding of the complexities underlying a commitment to the Constitution of 1787 or, perhaps, to its maintenance today. It is not simply that one person’s terrorist is another person’s freedom fighter. Rather, it may be the case that one person’s “revolutionary” is another person’s “faithful adherent to the Constitution.” Are we truly confident that we possess an adequate theory of the Constitution, separable from our raw political views, that can tell us with confidence exactly who is which?

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31. WILLIAM FAULKNER, REQUIEM FOR A NUN (1951).