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Does the Constitution Permit the Blue States to Secede?

With Permission, Perhaps; Unilaterally, No

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Still smarting from the results of the Presidential and Congressional elections, a number of Democrats and liberal pundits have opined that the "blue states" ought to secede from the Union. The electoral map looks amenable to the plan. By joining with culturally sympathetic Canada, the blue states of the East Coast, the West Coast and the upper Midwest could create a contiguous land mass, with only the islands of the blue state of Hawaii left at a distance.

Talk of secession is not meant to be taken literally. Instead, those who raise the subject wish to underscore the degree to which cultural and political divisions track geographic ones. Appearances can be deceptive, however. Blue states contain many Republicans, just as red states contain many Democrats. Even the rhetorical point of contemporary secessionists is thus subject to question.

But the legality of secession nonetheless warrants serious consideration. Understanding why it is not a realistic option will help us understand the sense in which the United States is--for all its divisions--a Union.

As I will explain below, it is settled law that the Constitution does not permit unilateral secession: A state or group of states cannot simply leave the Union over the objections of the national government. However, the arguments that led to this settled understanding are hardly unassailable, and the Constitution is probably best read as permitting the mutually agreed upon departure of one or more states.

Early Secessionist Movements

Almost immediately upon entering the Union, with the ratification of the Constitution in 1789, states began threatening to secede. In 1790, the House of Representatives received a petition from a group of Pennsylvania abolitionists that included Benjamin Franklin. In response, members of the Georgia and South Carolina Congressional delegations intimated that if Congress attempted to manumit slaves, their states would leave the Union.

The threat was taken seriously. Congress denied the Pennsylvanians the relief they sought, an immediate abolition of the slave trade. Moreover, in response to the petition, a House resolution was passed affirming that Congress lacked any power to abolish slavery.

Secessionist sentiment in the early American Republic was not confined to Southern defenders of slavery. In 1804, members of the declining Federalist Party in New England and New York plotted secession from a country ruled by the Republican Thomas Jefferson. And again in 1815, at the Hartford Convention, New England Federalists considered (though they ultimately rejected) secession as a means of promoting the sectional interests that they thought President James Madison's prosecution of the War of 1812 was harming.

For the rest of the pre-Civil War period, arguments for secession were typically made by Southerners such as John Calhoun whenever it appeared that national action to limit slavery was under contemplation.

The Argument for a Right of Unilateral Secession: A Pact Among the States - Constitution a pact could agree / or leave

The U.S. Constitution does not expressly recognize or deny a right of secession. Accordingly, the argument for a right of unilateral secession begins (and pretty much ends) with a claim about the very nature of the Constitution.

That document, by the terms of its Article VII, only obtained legal force through the ratification by nine states, and then only in the states so ratifying it. Because the Constitution derived its initial force from the voluntary act of consent by the sovereign states, secessionists argued, a state could voluntarily and unilaterally withdraw its consent from the Union. B/C constitution a social contract = S. said could leave

In this view, the Constitution is a kind of multilateral treaty, which derives its legal effect from the consent of the sovereign parties to it. Just as sovereign nations can withdraw from a treaty, so too can the sovereign states withdraw from the Union.

The Arguments Against a Right of Unilateral Secession -

Most of the arguments against a right of unilateral secession can be found in President Abraham Lincoln's First Inaugural Address of March 1861. But as University of Texas Law Professor Sanford Levinson observes in a recent article in the Tulsa Law Review (and in condensed form in an April 2003 column on this site), Lincoln's case against a unilateral right of secession is hardly airtight.

(1) First, Lincoln asserted that the fundamental law in every national government rejects the idea of its own termination. And indeed, as of 1861, no national constitutions expressly provided for their own dissolution. But this argument does not respond to the secessionists' claim that the U.S. Constitution's Article VII impliedly provided for the possibility of dissolution. -No Express right to secede - S. said implied

(2) Second, Lincoln denied that the Union was a mere voluntary association--and claimed that even if it were, ordinary principles of contract law would bar unilateral secession. Lincoln noted that while one party can breach a contract, the consent of all parties is required to rescind a contract. But secessionists analogized the Constitution to a treaty, not a contract--on the ground that each state was more like a sovereign nation than a human being. And under treaty law, unilateral rescission is permissible. -can leave a contract - BUT ALL PARTIES must leave

Third, Lincoln claimed that the Union was older than the Constitution. In his view, it dated as far back as the Articles of Association of 1774, when the signatory parties were all colonies of England. Lincoln's claim, however, does not respond to the secessionist argument rooted in Article VII; on the secessionists' view, the Constitution implicitly affirmed a right to secede from the Union, regardless of the pre-Constitution character of the Union.

Moreover, experience in the very early days of the Constitution belies Lincoln's assertion. Nationalists frequently claim that the states were never sovereign: As colonies, they were under British dominion, and they declared and won their independence as the United States. Thus, the nationalists opine, there was no time during which any of the states exercised full sovereignty. Yet, as Professor Levinson has noted, that is not entirely true: North Carolina and Rhode Island, which did not ratify the Constitution until after President Washington was inaugurated, were treated by the new national government as essentially foreign sovereigns until they formally accepted the Constitution. That treatment, Levinson argues, and I tend to agree, indicates that all the states were in an important sense sovereign when they entered into the Constitution.

Fourth and finally, Lincoln denied that the Constitution was silent with respect to secession. The immediate predecessor to the Constitution, the Articles of Confederation, purported to establish a "perpetual Union." By seeking to create what the Preamble calls "a more perfect Union"--in an echo

of the Articles' language--the Constitution, Lincoln said, simply strengthened the already indissoluble bonds between the States.

But the Constitution itself was established in blatant violation of the terms of the Articles--which required unanimous consent of the states for any amendment. Moreover, how do we know that the "perfection" of the Union required stronger rather than weaker bonds? To infer this point from the fact that, on the whole, the Constitution created a stronger national government than existed under the Articles is to acknowledge that the real work in this argument is not being done by the language of the Preamble.

The Judgment of War and the Supreme Court: No Right of Unilateral Secession

Perhaps the best argument for Lincoln's view is one that he did not make expressly, but that can fairly be inferred from his general approach: Whatever the status of the states when they entered the Union, they perpetually gave up important attributes of sovereignty in doing so. Among these was--and is--a right of unilateral secession.

In this view, it is significant that Article VII sets out the provision for original ratification, and that Article IV empowers Congress to admit new States, but that no provision of the Constitution authorizes a state to leave the Union. The juxtaposition of what the Constitution says about states entering the Union and what it does not say about them leaving, indicates that the door to the Union swings in but not out.

But this inference is only that, and there was considerable uncertainty about the legality of unilateral secession in the first seven decades following the Constitution's adoption. That uncertainty was put to rest not by the superior strength of the anti-secessionist argument, but by Lee's surrender to Grant at Appomattox.

1868 Texas v White - no right to secede

The military resolution of the secession question was then given legal force by the U.S. Supreme Court in the 1868 case of *Texas v. White.* The Court ruled there that even Texas--an independent republic before it joined the Union in 1845--had no right to secede. "The Constitution," the Court said, "in all its provisions, looks to an indestructible Union, composed of indestructible States."

Does the Constitution Permit Secession by Mutual Agreement?

Texas v. White is settled law. It stands for the proposition that the Constitution prohibits unilateral secession. By implication, *Texas v. White* also prohibits expulsion of a state that wishes to remain part of the Union. (Expulsion, satirically advanced recently in a column by Mike Thompson, also would seem to run afoul of Article V of the Constitution, which provides "that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.") What does *Texas v. White* have to say about secession by mutual agreement?

can't expel a STATE

If the Union is truly indestructible, then states cannot secede even if the national government is willing to let them go. Can that be right? Are the states trapped in a permanent marriage that even an amicable divorce cannot end?

There is reason to think that the Supreme Court's "indestructible" formulation in *Texas v. White* was hyperbole. After all, Article IV makes clear that the states are not indestructible. Congress can, with the approval of the state in question, shatter a state into fragments. That is how Massachusetts divided into what we now call Maine and Massachusetts and also how Virginia became present-day Virginia and West Virginia (although in the latter case, the original Virginia did not approve of the division because most of the state was, at the time, part of the Confederacy).

So if the states are not really indestructible, as the Court in *Texas v. White* claimed, perhaps the Union isn't indestructible either.

And indeed, the Supreme Court in *Texas v. White* recognized that secession by mutual agreement

stands on a different footing from unilateral secession. After finding against a state's right of unilateral secession, the Court acknowledged an exception for secession "through revolution, or through consent of the States."

Let us put aside the possibility of revolution, for a revolution is the repudiation of the existing legal regime. Presumably, any change at all could be authorized by a successful revolution--in the sense that after the revolution the legal rules that existed under the prior constitution have no further independent force. What about the reference to "consent of the States?"

By What Mechanism Can States Secede Through Mutual Agreement?

Despite their rhetoric about the permanence and indestructibility of the Union, both Lincoln in his First Inaugural, and the Supreme Court in *Texas v. White,* strongly implied that it would be possible for one or more states to leave the Union with the consent of the Union as a whole.

By what legal mechanism would such secession through mutual agreement be accomplished? The most obvious answer is a statute enacted by Congress. Just as Congress can approve the admission of new states, the argument would go, so it can let old states leave.

Yet lodging the power to approve secession in Congress presents at least two difficulties.

If Congress Alone Approves a Secession Petition, What Counts as Approval?

The first difficulty is a matter of arithmetic.

Suppose that Congress simultaneously received secession petitions from all the blue states, and that the Congressional delegations of these states all supported these petitions. Suppose further that a minority of the Congressional representatives of the red states also supported the petitions. (Their reaction: "Good riddance.") Adding the votes of representatives from the blue states to the votes of representatives from the minority of red states would yield a pro-secession majority in the existing Congress.

But notice what happens if Congress permits secession under these circumstances: Secession will have been allowed even though a majority of the representatives of one of the resulting pieces--the remaining red state rump United States--opposed it. That hardly seems consistent with the notion of secession by mutual agreement.

One might thus conclude that Congress can only approve a secession petition if the controlling bill obtains a majority of the votes of representatives of non-seceding states in both houses of Congress.

But while that solution makes some theoretical sense, it is also, from a constitutional perspective, arbitrary. Why this particular mechanism rather than some other mechanism--such as a national referendum, or a two-thirds (or three-quarters or three-fifths) vote in the existing Congress?

Can Secession Only Be Approved by a Constitutional Amendment?

Once we acknowledge the ad hoc character of any mechanism by which Congress would approve secession petitions, we must confront a deeper conceptual problem: Congress only has the powers enumerated in the Constitution. Yet as we saw in our discussion of unilateral secession, despite granting Congress the power to admit new states, the Constitution says nothing about secession. And under the Tenth Amendment, silence in such matters means there is no federal power: Powers not enumerated "are reserved to the states respectively, or to the people."

How might the states respectively, or the people, act collectively to approve the secession of one or more states? The Constitution sets forth no mechanism to answer this question either, although the process of constitutional amendment would pretty clearly suffice.

Although the Constitution sets forth a number of mechanisms for its own amendment, the same procedure has consistently been used: Proposal of amendments by a two-thirds vote in each house of Congress, followed by ratification by three-fourths of the state legislatures. This formula seems well designed to ensure that any secession petition has the backing of the nation as a whole.

Recent Canadian experience is instructive on this last point. In 1998, in the *Reference re Secession of Quebec,* the Supreme Court of Canada held that neither the Constitution of Canada, nor international law, gives Quebec a right to secede unilaterally. Nevertheless, the Court also said that if a secession referendum were to be adopted by the people of Quebec, the national government of Canada would incur a duty to enter into good-faith negotiations toward a secession agreement that would then be adopted by constitutional amendment.

But the notion that secession by mutual agreement in the United States requires a constitutional amendment itself creates conceptual difficulty. A plain reading of the U.S. Constitution makes clear that of course secession can be approved by amendment: The text of Article V purports to make only two provisions of the rest of the Constitution unamendable, and the absence of authority to approve secession is not one of these unamendable features. So if the Supreme Court in *Texas v. White* thought that secession could only be approved by constitutional amendment, why did the Justices distinguish between unilateral secession and secession by mutual agreement?

In so doing, the Court must have meant to imply that under the existing Constitution, there is some mechanism for secession by mutual agreement. A constitutional amendment, once adopted, could authorize unilateral secession as well secession by mutual agreement. It only made sense for the *White* Court to distinguish between unilateral secession and secession by mutual agreement on the assumption that the Constitution we have already permits the latter--albeit through a wholly unspecified mechanism.

A Political Question: Why No Court May Ever Rule on Secession

With respect to the possibility of secession by mutual agreement, we are left in much the same position that Americans in the first seven decades of the Union occupied with respect to unilateral secession: We must struggle to interpret the sounds of the Constitution's silence.

That conclusion in turn suggests that no court will likely answer the question--except perhaps in the way that the Supreme Court in *Texas v. White* gave its retroactive approval to the verdict of the Civil War battlefield.

Fortunately, the prospect of a twenty-first century civil war that, like the Civil War of the nineteenth century, results in the deaths of over half a million Americans, still seems unthinkable. That should serve as a useful reminder that, whatever the real differences between Americans in blue states and red states are today, they are nothing like the differences that just a few generations ago divided citizens of the blue states and the gray states.

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