On the Legality of Secession by the States that then Formed the Confederacy

By John Scales

Background

Secession: “the action of withdrawing formally from membership of a federation or body, especially a political state.” (Oxford Languages)

Between December 1860 and June 1861, eleven states seceded from the United States of America and various other entities (Missouri legislature, Arizona territory) proclaimed their secession but are not generally recognized as having done so. The technique used to declare secession was essentially that of Article VII of the US Constitution which specified that conventions in each state were the method used to ratify the Constitution. The soon-to-be-Confederate states essentially reversed their ratification of the Constitution by means of popularly elected conventions convened to consider the matter. Several of the states also held popular votes on the results of their conventions.

But the question of whether this procedure was legal at the time became one that was highly debated. The Constitution made no mention of secession, either as a power remaining to the states or denied to them, and mentioned no federal government role in any such thing. There had been no laws passed by Congress, nor had there been any court cases addressing secession. There were two constitutional law texts in general use at the time:

https://archive.org/details/commentariesonl02storgoog by Justice Joseph Story

https://archive.org/details/viewofconstituti00rawl by William Rawle

> The first does not address secession, the second holds it to be legal for the people of a state.
>
> “It depends on the state itself to retain or abolish the principle of representation, because it depends on itself whether it will continue a member of the Union. To deny this right would be inconsistent with the principle on which all our political systems are founded, which is, that the people have in all cases, a right to determine how they will be governed.” (p. 296)

Argument for Legality

The argument for its legality comes from Amendment X of the US Constitution:

“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.”

Because, as stated above, the Constitution does not mention secession, specifically it does not give a role to the federal government nor does it deny any such power to states, from this there is a presumption of legality. Also as stated above, there had been no laws or court cases addressing the matter.

This would appear to answer the question, but many arguments were made against the legality of secession.

Constitutional Arguments against Secession

There have been arguments that the seceded states violated the Constitution because they violated provisions in Article I, Section 10 (e.g., No State shall enter into any Treaty, Alliance, or Confederation). Others have argued that secession violated the Supremacy clause in Article VI. The rebuttal for these is fairly obvious – none of the states did so until they had seceded, after which they were independent states and no longer bound by such provisions.

Lincoln's Arguments against the Legality of Secession

To start with, President Lincoln made several comments to that effect in his first inaugural address, given on 4 March 1861. Note that in this address, Mr. Lincoln was acting as an advocate against secession, in accord with his training as a lawyer, and not as a judge that must consider all sides.

https://avalon.law.yale.edu/19th_century/lincoln1.asp

His first argument is:

"I hold that in contemplation of universal law and of the Constitution the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our National Constitution, and the Union will endure forever, it being impossible to destroy it except by some action not provided for in the instrument itself. Again: If the United States be not a government proper, but an association of States in the nature of contract merely, can it, as a contract, be peaceably unmade by less than all the parties who made it? One party to a contract may violate it--break it, so to speak--but does it not require all to lawfully rescind it?"

What is "universal law"? Mr. Lincoln assumes there is such a thing, but where is it articulated? The absence of a prior act of secession (there have been several since worldwide) does not mean there is some law against it. He also cites "perpetuity", a phrase found nowhere in the Constitution. He then asserts that "instrument" cannot be destroyed without there being some provision allowing that within. Again, this is an assertion, but he points to no reasoning behind it. Finally, he allows a party to break the instrument, but maintains all must agree to rescind it. This is certainly arguable as there is no provision for the Constitution to be "severable" such that if some states break it (as some Northern states already had), everyone else is still stuck with the terms. Plus, the Constitution was not rescinded as a body of law at all, it was still fully applicable to those who had not withdrawn.

Mr. Lincoln then goes on to say:

"Descending from these general principles, we find the proposition that in legal contemplation the Union is perpetual confirmed by the history of the Union itself. The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured, and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And finally, in 1787, one of the declared objects for ordaining and establishing the Constitution was "to form a more perfect Union. But if destruction of the Union by one or by a part

only of the States be lawfully possible, the Union is less perfect than before the Constitution, having lost the vital element of perpetuity."

First, the Articles of Association of 1774 were adopted by delegates of twelve colonies (Georgia was not represented), called the First Continental Congress. It can be found at:

https://avalon.law.yale.edu/18th_century/contcong_10-20-74.asp

Amid professions of loyalty to the King, it proposed a trade boycott to call attention to the grievances of the colonies. The delegates pledged themselves to advocate for this in their colonies, but there was no mechanism (except such as might be invoked locally) to enforce the boycott. No government organization was established other than the congress itself, which predated the document by a month. This occurred 14 years prior to the adoption of the Constitution. There was no talk of Union, merely of unity in confronting certain issues.

https://avalon.law.yale.edu/18th_century/artconf.asp

The Articles did indeed set up a government and declare it perpetual, even as the same Articles (Article II) stated: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."

So, this might be considered an argument for perpetuity. But is it? Did the Articles still bind after the adoption of the Constitution? Well, the Articles were never formally rescinded. Does that mean they are still in effect? I would argue no, for several reasons:

(1) There is no reference to the Articles anywhere in the Constitution except for a reference to "the Confederation" (the government established by the Articles) in Art. VI, yet in the first paragraph of that same article there is explicit mention of debts contracted and engagements entered into as being still valid. In the second paragraph there is explicit mention of laws and treaties, already made or to be made, but no mention of the Articles.

(2) Article XIII states: "And the Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state." Yet the full Congress did not approve the Constitution, nor did the state legislatures. Rather, the procedures of Article VII of the Constitution were adhered to. That is, the Constitution and its approval process were explicitly contrary to the Articles, in violation of them.

(3) I have been unable to find any reference to the Articles in terms of laws, court findings, etc. that occurred after the Constitution was adopted, with the singular exception of when people wished to use those Articles (i.e., perpetuity) as an argument against secession. Not one.

(4) Only 13 states ever agreed to the Articles – the rest did not. How can the Articles apply to them?

Mr. Lincoln's final shot is to quote the Preamble, "a more perfect Union." His argument is that if a state leaves, it will destroy the Union and thus the Union would be less perfect than it was under the Articles (no perpetuity). There are two counterarguments:

(1) The Union would not be destroyed but rather changed by the secession of one or several states, just as it was changed by the addition of newer states. Those who wished to remain under the Constitution would still constitute the Union.

(2) The idea that something is more perfect if it is perpetual is not established anywhere. The Founders had every opportunity to include the word perpetual in the Constitution. They did not. One has to assume this was a deliberate choice, particularly as three states (Virginia, New York, Rhode Island) in their ratifications of the Constitution reserved the right to reclaim the powers they had agreed to delegate should they so desire, in effect, to secede.

Texas v. White (1869)

This is the Supreme Court case that directly addresses the issue of secession in the majority opinion. Note that this case came up after the war and was decided by a court, all of whose members had supported the Union and whose opinion writer, Chief Justice Salmon Chase, had been President Lincoln's Secretary of the Treasury. Note also, as a circuit judge (at the time this role was assumed by Supreme Court justices), he had been the judge that the Johnson administration had hoped to use to inaugurate a treason trial against President Davis. He had repeatedly delayed doing so, reportedly because he feared a jury could be convinced that secession was legal and thus leading to the conclusion that the Union had pursued a war of aggression. Possibly these factors influenced the opinion.

But let's look at the details of the decision (44 pages), at https://tile.loc.gov/storage-services/service/ll/usrep/usrep074/usrep074700/usrep074700.pdf

Much of it concerns the issue of certain bonds, but the court chose to rule on secession overall.

Paragraph 4 of the decision cites the Articles as being perpetual and the Constitution being more perfect – without addressing the issue of the viability of the Articles after the adoption of the Constitution or whether more perfect somehow meant more perpetual. Paragraph 5 then uses the preceding paragraph to state baldly that the Union is perpetual and indissoluble, and Paragraph 6 specifically applies that to Texas. Chase uses this conclusion to state in Paragraph 7 that secession was null and void, and its citizens were still US citizens.

Paragraph 10 is of particular interest:

"Authority to suppress rebellion is found in the power to suppress insurrection and carry on war; and authority to provide for the restoration of State governments, under the Constitution, when subverted and overthrown, is derived, from the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a State, and, for the time, excludes the National authority from its limits, seems to be a necessary complement to the other."

The statement that the government of Texas was subverted and overthrown (and the implication it had not a republican form of government) is manifestly false. Texas had a republican form of government which was neither subverted nor overthrown (although the Governor, who had signed the secession document but who opposed joining the Confederacy, was removed from office by the legislature), and in fact the decision of the secession convention was ratified by popular vote.

Paragraph 13 reiterates that Texas was "subverted by revolutionary violence", again a false statement.

The balance of the case is concerned with the particulars of the testimony about the bond issue and thus is irrelevant to the question of the legality of secession.

In essence, Chase paraphrased Lincoln's advocacy without any deep scrutiny or examination of possible dissenting ideas.

Legal or Not?

It is inarguable that, at the moment, secession of any state would be illegal as a matter of constitutional case law. The question was also settled, four years earlier, by force of arms. Does this mean it is settled in perpetuity? Not really, elements of Supreme Court decisions are often overturned, and, in the future sometime, a rebellion could succeed much as the American Revolution did – something I hope for which the necessity never arises. But, I trust it is easy to see why the states that seceded in 1860-61 thought they were on firm legal grounds, if not exactly following the wisest path.

Treason?

It is a commonplace for people to dismiss the Confederates as traitors, even though not a single person was tried for treason, much less convicted. Why do people then say they were traitors? Well, there's Article III, Section 3 of the Constitution:

"Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

That's why we tried the British, the Mexicans, the Indians, the Spanish, the Germans, the Japanese, the Italians, the North Koreans, the North Vietnamese, the Taliban, etc., for treason against the US. Wait, we didn't? But the Constitution is clear, right? Well, our legal system has a Constitution, but it also requires specific laws to put the Constitutional provisions into effect. Let's examine the appropriate law.

18 U.S.C. § 2381 says, "Whoever, **owing allegiance to the United States**, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or imprisoned and fined, and incapable of holding any U.S. office." [My emphasis}

Aha! Those foreigners did not owe allegiance to the US, so they could not be convicted of treason. So, if secession was legal at the time, the Confederates could not be guilty of treason because they could be reasonably argued not to be subject to the law. An attempt to apply *Texas v. White* retroactively would be an *ex post facto* law, invalid under Article I, Section 9 of the Constitution.