WAS SECESSION LEGAL?

By Kent Wright

INTRODUCTION

In this essay I will explore the question of whether the secession of American states in 1860 and 1861 was Constitutionally legal. Of course, asking the question in the past tense refers directly to the separation movement prior to the American Civil War. Yet the issue still resonates today so the natural follow-up question is this: If secession ever was legal, is it legal now?

Before we continue, I must make one thing clear: this is not a debate forum. The legality of secession has never been publicly debated and I do not intend to start now. My purpose in writing this article is not to prove or disprove anything. I only want to present a more complete discussion of a complex and controversial issue. I will further say that no proof of an issue of this complexity can be guaranteed to be correct anyway.

I make but few assumptions; one is that most adult readers have heard sometime in their lives that our Constitution allows for states to secede at will. I am further assuming that most of the people who are interested in the question have never heard anything to the contrary.

That being said, I will explain why I chose to write on this topic. In a recent Little Round Table meeting we discussed the legality question along with several other topics pertaining to the so-called "Lost Cause Narratives." On the matter of secession, the group discussed whether it was constitutional or if it was just not unconstitutional—where "not unconstitutional" means "extralegal" or something "not regulated or sanctioned by law." Either way secession was widely believed by antebellum separatists to be completely legal and today we still have believers.

During our discussion it became clear, to me anyway, that our learned members had never given much thought toward secession actually being *illegal*. So now we have three possibilities to consider: legal, extralegal, and illegal, which I will address throughout the main text.

At the heart of the controversy is the 10th amendment to the United States Constitution. It says this:

> *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.*

Some proponents of the right to secede say it is an irrefutable right under the Constitution and they insist that the burden of proof to show that secession is unconstitutional is upon those who say it is. Well, "irrefutable" is a pretty strong assertion so I decided to look into it—without taking sides, of course.

Just to make one more thing clear, I am not a lawyer so I will leave legal proofs up to them to argue in court… someday… maybe. However, I am a critical thinker and I just wanted to see how the question might stack up to a critical analysis.

The first thing I noticed is that the 10th Amendment does not say that states can secede. Nor does it say it anywhere else in the Constitution so there is room to doubt that the legality of secession is "irrefutable."

So now the challenging question is this: how can someone go about proving that secession is not legal under the constitution? That is a tall order because, as everyone knows, you cannot prove a negative. However, there is also a well-known principle in logic that allows for what is called "proof by contradiction." What that means is we can falsify a premise that is only assumed to be true but is not. The method is well-known in mathematics and science as well as in law.

Whether we are aware of it or not, proof by contradiction is something that we have all used all our lives. We constantly test new information against what we already know to be true, or what we think is true anyway. We call these "accepted truths," which stand as our premises upon which we construct our logical conclusions. If we find contradictions to our premises either the new information is wrong or our premises are wrong. Either way our conclusions can be wrong.

At this point the reader might be thinking what could be wrong or contradictory about the US Constitution that we all know and love. Well, nothing… maybe, except that much of the wording in the Constitution is vague and open to interpretation. And when we are free to interpret, we tend to believe only what we want to believe. Fortunately, we can test for fallacies in arguments by looking for contradictions to what is assumed to be true, which is the method I will use.

FINDING CONTRADICTIONS

Some contradictions are rather open and obvious while others are more subtle and require a more disciplined approach. Let us start in the extralegal realm with perhaps the most glaring contradictions. The first of which is the act of refuting the Constitution and being protected by it in the same breath. We will explore that more as we go along.

Not all extralegal possibilities are contradictions. One is that a breakup might be acceptable in a democracy if a majority of the people would agree to a peaceful separation, say, by a special referendum—which did not happen.

Still another extralegal possibility is resolving irreconcilable issues by force of arms, which I will deal with later in this work. However, I will give no serious discussion to pre-war forceful separation attempts and rebellions simply because they failed. Nevertheless, the failed movements did affirm the supremacy of the US government and they stand as prior contradictions to the presumed legitimacy of the 11 secessions in 1860 and '61.

The separation movement that precipitated all-out war was fueled by persons acting upon the premise that the "right to secede" is allowed by the Constitution. So, let us revisit that claim and read the 10th amendment again to make sure that it is clear:

> *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.*

Here, we will focus on the powers of government. First, in order of occurrence, the powers of all levels of our government started with the people. The *people* delegated power to the states and then to the United States (meaning the US central government) by way of their elected representatives. That is why we call it a "republican form of government."

A careful reading of the Constitution reveals that the power to dissolve the Union is not delegated to the United States. Nor is dissolution expressly delegated to the states or the people. On that point we can find, if not a direct contradiction, at least the first major conflict in the Constitution—the power to *preserve* the Union *was* delegated to the United States—which we will see shortly.

Of course, we will also find that dissolution is not expressly prohibited to the states nor to the people. Therefore, the interpretation of the right to secede under the 10th is only by our own inference, in other words, by what *we the people* make of it. Our inferred interpretation is widely broadened extralegally to mean that whatever the Constitution does not expressly prohibit is permitted. In more totalitarian societies it is the opposite—what is not expressly permitted is prohibited. Nevertheless, the former is a generally accepted truth in a free society that respects the rule of domestic law.

But, does that really include the right of states to break away? Some theorists say yes. Others say no. Who is right? Please remember the question is controversial. Why? Mostly because the contestants locked themselves into irreconcilable interpretations of the 10th that had never been resolved in a court of law.

However, it was settled out of court by war, which is known historically as "trial by battle." War is a time-honored means of settling differences and establishing political boundaries under the laws set by the winner. Many of our present-day partisans do not accept that outcome so they seek a solution by way of popular legal arguments—not in a court of law, but in the court of public opinion. On that basis the 10th Amendment survives as the most fundamental premise of legal secession.

CONTRADICTIONS TO PRECEDENTS

A rich field from which to harvest contradictions lies in preexisting legal rulings, so let us start there. If an issue has already been ruled upon, any contradictory new interpretation or theory must either be resolved or rejected.

In searching for precedents, we find that no country in the world ever wrote a dissolution clause in its own charter. Furthermore, what country's founders in their right minds would make a future breakup of their own country *legal*—especially one that they had so recently paid for in blood. But inasmuch as the Constitution assumes that the normal condition of states is unity and peace between them, secession *itself is* a contradiction.

Besides, why was it necessary to claim Constitutional legality anyway? The rebelling states were determined to break away regardless of any contradictions so why should they care if it was legal? At this point we may properly ask: "What were they thinking?" This is a legitimate question that we can explore impartially.

Maybe they were thinking that a future court case would settle the issue. If that was it why put it off on future generations? To resolve any doubts about legality they could have petitioned the Supreme Court first to get an interpretation at the highest level—but they did not. In having a great sense of urgency to break away after Abraham Lincoln's election they were not about to wait for a court ruling to drag out. But really, there was no great need for urgency. Time was on their side because Democrats still controlled the Legislature and the Supreme Court.

Here we expose a false premise directly: under the Constitution Lincoln could not have upset the balance of power—not quickly anyway. (It took a state of war to let him do that.) After secession, should the movement have prevailed, a future court case would have been out of the question anyway because neither side recognized the laws and courts of the other.

Perhaps they thought that a unilateral interpretation of the Constitution would salvage some honor if future generations condemned their action? That is a distinct possibility. After all, we have plenty of present-day adherents who defend it as point of honor.

Be that as it may, the idea was to break away immediately and permanently, preferably by peaceful negotiations but by force if necessary. Perhaps in believing they had Constitutional permission to quit they assumed there would not be a war. According to popular antebellum theories, the Federal government would be powerless to do anything about it—and we all know that turned out.

Or, did they really think that the US government would just give up and say good-bye? (*and* good-bye to its own national security). That brings up more contradictions, which we will explore next.

PERMANENCE AND NATIONAL SECURITY

A major contradiction to legal dissolution is founded exactly upon the premise of permanence and national security upon which the Constitution itself was framed. If that sounds like two things they are not. They are really one and the same, that is, you cannot have one without the other.

Here again we can look for legal precedents. For this we can turn to the Constitution's predecessor document, the US Articles of Confederation, which starts out like this:

> *To all to whom these Presents shall come, we, the undersigned Delegates of the States … agree to certain articles of Confederation and* perpetual Union *between the States of [the 13 named].* [https://www.archives.gov/milestone-documents/articles-of-confederation]

The Articles (as they came to be called) established a single country with a national identity so-named "the *United* States of America." Under the war-time conditions in which the Articles were written national security was of supreme importance. That was primarily because European colonialism in the Americas was still going strong.

Assaults upon the sovereignty of the United States were ongoing and potentially never-ending. In order to preserve a secure existence indefinitely the framers of the Articles solemnly declared that the union of the states was perpetual.

But the Articles were inadequate to meet the national security needs of the new country. There was no executive branch and no high court. All it had was a

congress of state delegates with no power to provide for the common defense, that is, to raise a national army and navy, nor to levy taxes, nor to influence foreign policy, nor to regulate fair trade (even among themselves), nor to… nor to…, etc.

Even before the Revolutionary War was over the individual states were already behaving like it was "every-man-for-himself," including imposing retaliatory taxes and tariffs upon each other. Moreover, some states could not, or would not, pay their fair share of Revolutionary War debts and the existing US government could do nothing about it. As a result, there was wide agreement within the states that the Articles needed revising to strengthen the bond between them and to make the country stand stronger against other countries. We call that a *federalist* movement.

However, a major stumbling block was that revisions required 100% of the states to agree to any changes. Furthermore, the perpetuity clause rankled a lot of the people. We can call them *anti-federalists* or even the earliest States' Rights faction. They worried that if the central government became too oppressive, they would be stuck with it unless they were willing to fight another war.

Nevertheless, the revealed weaknesses throughout their first decade of existence under the Articles, as well as the local tax revolts in the 1780s, raised the pressure to change the rules governing domestic law. The states came to realize that their loosely bound government was dysfunctional anyway so the Confederation Congress authorized a convention to frame a new charter.

That movement met with stiff opposition from the anti-federalists largely because of distrust of central authority and the fear of losing the autonomy of individual states. In addition, many felt that the federal government would be too large and too far removed from its citizens to treat them fairly. Given that federalism was the prime mover of the convention in the first place many compromises had to be made to appease the anti-federalists. Without the compromises the convention would have collapsed and, presumably in time, the Confederation itself.

Despite the compromises the first draft of the Constitution did not contain explicit protection of the rights of citizens against oppressive government, which most states already adhered to in one form or another. They *all* wanted guaranteed protection for such basic liberties as freedom of speech and religion, right to bear arms, trial by jury, etc. Their concerns were answered by the insertion of the First Ten Amendments, also known as "the Bill of Rights." The tenth is the one that gives the states and the people a degree of autonomy to control their individual affairs.

In overcoming the polarity between federalists and antifederalists, state conventions ratified it unanimously in 1791. The following table shows the results: [https://csac.history.wisc.edu/states-and-ratification/]

State	Convention	Vote on Ratification	Vote	Map	Introduction
Delaware	3–7 December 1787	7 December 1787	30-0	Map	Essay
Pennsylvania	20 November–15 December 1787	12 December 1787	46-23	Map	Essay
New Jersey	11–20 December 1787	18 December 1787	38-0	Map	Essay
Georgia	25 December 1787–5 January 1788	31 December 1787	26-0	Map	Essay
Connecticut	3–9 January 1788	9 January 1788	128-40	Map	Essay
Massachusetts	9 January–7 February 1788	6 February 1788	187-168	Map	Essay
Maryland	21–29 April 1788	26 April 1788	63-11	Map	Essay
South Carolina	12–24 May 1788	23 May 1788	149-73	Map	Essay
New Hampshire	13–22 February 1788 (1st session) 18–21 June 1788 (2nd session)	21 June 1788	57-47	Map	Essay
Virginia	2–27 June 1788	25 June 1788	89-79	Map	Essay
New York	17 June–26 July 1788	26 July 1788	30-27	Map	Essay
North Carolina	21 July–4 August 1788 (1st convention) 16–23 November 1789 (2nd convention)	2 August 1788 21 November 1789	75-193 194-77	Maps	Essay
Rhode Island	1–6 March 1790 (1st session) 24–29 May 1790 (2nd session)	29 May 1790	34-32	Map	Essay
Vermont	6-10 January 1791	10 January 1791	105-4	Map	Essay

We can see by this summary that many delegates opposed it even in the Northern states of Massachusetts, New Hampshire, New York, and Rhode Island. Rhode Island was the last of the original 13 states to ratify (barely), but her reluctance had little to do with anti-federalism. It was more about wanting to pay her war debts with devalued currency. Under pressure from the other states Rhode Island finally agreed to ratify.

In the final tally delegates voted 1176 in favor and 585 against—and so it was that the Constitution replaced the original Articles.

[https://avalon.law.yale.edu/18th_century/preamble.asp]

As stated in the preamble they did it "in order to form *a more perfect* Union." That was a simple statement to convey the ideal of perfection in the new charter. In the way of thinking of its proponents nothing could be more perfect than an indestructible Union composed of indestructible States under the best national charter the world had ever seen. The Preamble goes on to further express its ideals, which are these:

> *"… to establish justice, insure* [sic] *domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, …"*

Although the Constitution superseded the Articles it did not negate them completely. In fact, many of the original clauses were transposed into the Constitution almost word-for-word. It sought only to improve upon the original Articles for the purpose of strengthening the bond between the states and protecting all equally against foreign and domestic enemies.

On that matter, the Constitution provides for the long-term security (implying perpetuity) of the Union by the guarantee of a republican form of government for all the states. As Article IV, Section 4 says:

"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

This is the clause that specifically delegates authority to the Federal government to protect every state in the United States against threats to their long-term security. It also provides a shared responsibility between the President and the Legislature to do so.

The clause is intrinsically linked to perpetuity because, by definition, a guarantee is a promise for the future. In other words, the United States government cannot guarantee anything if it does not expect to exist for a long time. If the framers meant for the Constitution to only be "tentative" or "provisional," the guarantee would be meaningless.

The framers also recognized that threats to national security can happen too quickly for Congress to meet and find a solution in formal debate. For that very reason Article IV, Section 4 delegates power to the president to act when Congress cannot be convened. Accordingly, Lincoln did indeed have the Constitutional authority to act swiftly against domestic threats to life and property.

Nevertheless, secessionists back then denied, as do our present-day defenders of secession, that the Constitution was intended to be permanent. They cite as evidence that the word "perpetual" was dropped in transitioning from the Articles to the Constitution.

As the defenders say, the Constitution was adopted only after giving the 10th Amendment loose enough language to appease those who were distrustful of a powerful central government. The truth of *that* statement is irrefutable. We see it all throughout the Constitution—which is exactly why it contains so many vague clauses. Incidentally, that is exactly what keeps the Supreme Court busy even today.

As shown, distrust of government ran deep and not just in the South. The states had grown accustomed to governing themselves by their own supreme power for a number of years. Nevertheless, they came to realize that they needed

more protection under a stronger and supreme central government. States' Rights advocates may have been reluctant to accept the supremacy of the Federal government, but in the face of an obvious contradiction they should have realized that they could not have it both ways. In other words, there is no such thing as "two supremes," let alone several of them.

Despite the contradiction, the 10th Amendment was, and still is, taken by some as ironclad permission for states to assert their own supremacy and refute the Constitution. However, Article VI, Clause 2, poses a strong contradiction to state supremacy in saying this:

> *This constitution, and the laws of the United States … and all treaties made … under the authority of the United States … shall be the supreme law of the land; … any thing* [sic] *in the constitution or laws of any state to the contrary notwithstanding."*

This clause, known by legal scholars as "the supremacy clause," stipulates that Federal laws and treaties have supremacy over all state laws and if ever they are in conflict the Fed shall prevail. Thus, it negates any theories that states can overrule Federal laws, much less to assume a higher authority of their own to nullify the entire Constitutional pact.

The State of South Carolina put Federal supremacy to the test in 1832 and again in 1860 and lost both times. Other examples include Shay's Rebellion in Massachusetts in 1786, the Whiskey Rebellion in Pennsylvania in 1794, and ultimately, the Civil War itself.

Furthermore, Federal supremacy has been backed by the Supreme Court twice in the following cases:

> Prize Cases, 67 U.S. 635 (1862),
> [https://supreme.justia.com/cases/federal/us/67/635/#top]; and
> Texas v. White, 74 U.S. 700 (1868),
> [https://supreme.justia.com/cases/federal/us/74/700/]

In the prize cases the 1862 Supreme Court upheld US sovereignty over the rebelling states and the coastal waters and also the broader legal right to prosecute a war against its own states. Furthermore, it upheld executive war

powers including the power to engage in wars by presidential proclamations—which is still in effect today.

Incidentally, Jefferson Davis assumed exactly the same war powers under which both presidents became veritable dictators. Ultimately for both presidents it was all about the greater need to preserve their respective unions.

Texas v. White in 1868 was a post-war case defined by the war itself. In that litigation White and others were holders of US bonds purchased from Texas during the war. When the war was over the plaintiffs tried to collect the money owed to them by Texas but Texas refused, saying that Texas was not a state of the United States when the bonds were sold. In their refusal they effectively said [paraphrasing], "Sorry, that was a different government; this government owes you nothing." The case hung on the issue of whether Texas had ever legally seceded.

In a 5-3 decision the Supreme Court ruled in favor of White holding that Texas had never legally seceded from the United States and thus had remained a state of the Union, albeit in rebellion, and ordered Texas to pay up.

In reality, the ruling could not have been any different. Otherwise, the US would have to accede to the legitimacy of the entire separation movement and overturn the ruling of the Trial by Battle and then what (?) … the loser becomes the winner? Given that the United States steadfastly refused recognition of the CSA for the entire duration of the war—a war in which hundreds of thousands of young men were killed or maimed for their respective causes—it is absurd to think that the USA would recognize the defeated CSA when it was over. Yes, of course the court was packed with Unionists. What else could one expect(?) …a court with a majority of ex-Confederates on board?

The post-war ruling aside, a Confederate victory or even a negotiated secession at any time during the war would have created a national security nightmare for the United States. First of all, the CSA would have immediately made an alliance with France to support its own trade and national defense. This a safe assumption because French Emperor Napolean III made no secret of his desire to do so. Even the British government was straddling the fence on recognition of the CSA while waiting for a strong indicator of the outcome—which the US regarded as the single greatest threat to its national security.

Furthermore, CSA sovereignty would have meant the turning over to a hostile government the entire Southern US coastline from Chesapeake Bay to the Rio Grande. In turn, the US would be impotent to enforce the Monroe Doctrine (as it was anyway during the war, to wit: the French invasion of Mexico). America's growing prestige as a powerful nation would virtually evaporate and thereby cripple its influence on foreign policy. Other jealous colonial powers eager to get their hooks deeper into the Western Hemisphere could not have been deterred.

Moreover, the safety of US shipping could not have been assured, in particular, the shipments of some $42M in California gold per year crossing the Isthmus of Panama and passing through hostile waters all the way to the Jersey shores. In addition, three major ship-building facilities would be lost as would the tax revenue from more than half of the nation's exports out of Southern ports valued at somewhere near $250M per year. For want of revenue, internal improvements would have become stalled, in particular, the building of the transcontinental railroad. US bankers and merchants would face the default of $2B in Southern debt. The Mississippi River would have come under control of the same hostile government and outraged Westerners might have started a secession movement of their own (as they threatened to do in 1862).

In the face of having so much to lose, a likely reverse outcome of Texas v. White would have been a renewal of war with an empowered South and, very likely, with France also. It is perhaps needless to mention that if states could bail out at any time over any misgivings whatsoever, the US could not guarantee a republican form of government for any of them. Without the assurance of mutual defense through the US government there would be little holding the remaining states together. The Constitution would then be reduced to little more than empty words on an obsolete script.

Significantly, both cases, Prizes and White, upheld the right of the United States to preserve the union of all the states of America. In addition, at least three Articles in the Constitution collectively affirm the joint responsibility of the Congress and the President to preserve and protect the republic. They are*:*

Article IV, Section 4, Executive powers (already covered*);*

Article I, Section 8, Clause 11, Congressional war powers*;*

and

Article II, Section 2, President as C-in-C of regular armed services and militia when activated.

In further regard to the preservation of the United States we can add:

Article II, Section 1, Clause 7, the presidential oath to preserve, protect and defend the Constitution of the *United* States.

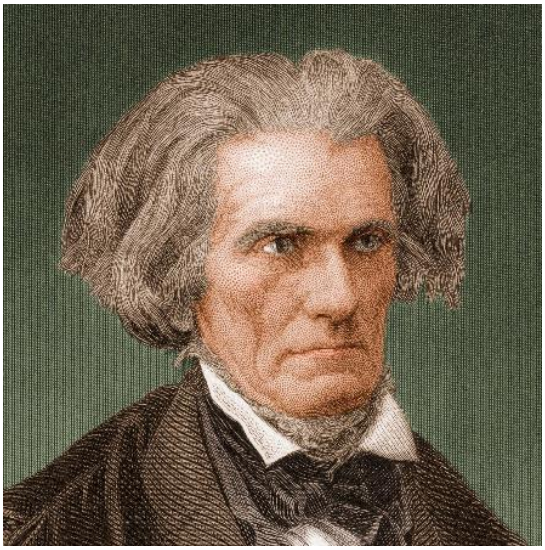
Likewise, we have:

Article VI, Section 3, which requires the preservation oath for all elected State and Federal officials and the Judiciary.

Despite what has been (or should have been) clearly established in laws and principles under the Constitution, the issue of Federal supremacy was widely contested by States' Rights advocates who believed that each and every state had supreme power over the United States. The underlying premise behind that is known as the "State Compact Theory." That theory held that the Constitution is a compact, or contract, between the states.
[https://www.goodreads.com/en/book/show/27427112]

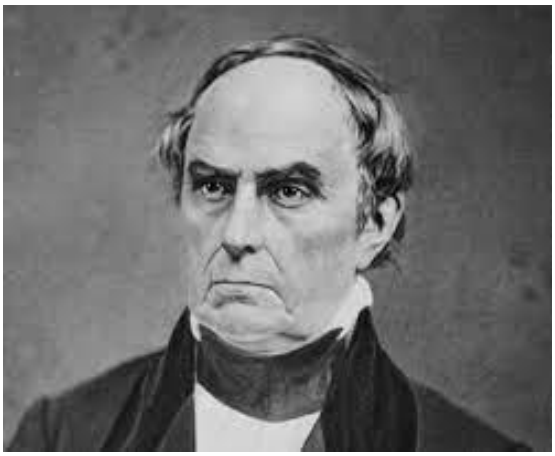
According to that interpretation the Federal government is a creation of the states and the reverse is also true—the power to dissolve the Federal government is also in the hands of the states. Furthermore, the theory held that each *individual* state had the power to determine whether the national government had violated the constitutional bargain. Its proponents claim that the concept was passed down through the Constitution's predecessor documents going back to the Mayflower Compact of 1620.

According to prominent States Rights proponents, such as John C.



Calhoun, State Compact Theory was at the very heart of nullification of Federal supremacy. South Carolinians stood on state supremacy to justify declaring federal tariffs unconstitutional in 1832 and later in 1860 to try to leave the union.

The State Compact Theory also had its learned opponents. The most prominent among them was Daniel Webster, a leading Constitutional attorney



and scholar in the 1820's through the '50s. In rejecting the state compact theory, he denied that states had the sovereign right to nullify federal law.

The Constitution, Webster asserted, was not a compact between the states but an agreement between the sovereign people of the United States—a national people who pre-existed the creation of state governments. Thus, he said, whether a federal law violated the people's Constitution was a matter left to the federal courts and not to the individual states.

Webster's nationalist understanding of the Federal Constitution deeply influenced the constitutional theories of Abraham Lincoln. Lincoln stood for a strong, indivisible central government and national security.

> NOTE: The US Supreme Court has repeatedly rejected the idea that the Constitution is a compact among the states. See *Chisholm v. Georgia* (1793), *Martin v. Hunter's Lessee* (1816), *McCulloch v. Maryland* (1819), and *Texas v. White* (1869).

At this point we can move on with a more formal "proof-by-contradiction" technique.

PROOF BY CONTRADICTION

Here we will assume that legal secession is true and then follow the logical consequences to root out contradictions. Again, we will start with the predecessor document, the Articles of Confederation. The Articles covered many now familiar things that are part of our Constitution such as mutual defense, property rights, civil rights, and several prohibitions against individual states acting as if they had supreme authority.

As we continue, in order to make sure we understand the 10th Amendment with all of its nuances, here it is again:

> *"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."*

It is quite clear that proponents of secession saw permission to dissolve only in the first, third and fourth parts of this single sentence. Conveniently ignored, however, is the part that says *"nor prohibited by it to the states."*

The power of a state to secede not only contradicts the Supremacy Clause but also several other clauses that subordinate states to the central government and prohibit them from exercising powers that states were never intended to have. For instance, three parts of Article I, Section 10 stipulate several actions that states cannot take without the consent of Congress. First among them is Clause 1, which says:

"No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money, … [etc.]"

Most noteworthy is that it forbids confederacies and alliances. Furthermore, if a state or states cannot do all the things prohibited by this clause alone, they are not supreme. So that is another contradiction.

We can find still another contradiction to state supremacy immediately following in Clause 2:

"… any imposts or duties by the states on imports and exports shall be for the use of the treasury of the United States."

The next clause, Clause 3, further restricts state autonomy with this prohibition:

"No state shall … keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in a war, unless actually invaded, or in such imminent danger as will not admit of delay."

Clause 3, in forbidding compacts with other states or nations, is somewhat repetitious to Clause 1 but it also forbids states to engage in war unless invaded or in imminent danger. Herein lies yet another contradiction: if states cannot keep troops or ships of war in time of peace, how could they engage in war if suddenly endangered? Simple answer: they can't—but that is really not the point anyway. The real meaning is that the burden of protection of the states is upon the Federal government, which is to say, the Fed is the *only* delegated guarantor of a republican form of government.

Now what about that invasion or imminent danger clause? Was South Carolina invaded or in imminent danger when she fired upon ships attempting to give relief to US troops in a US fort on US property? Not really. It was the other way around—US troops at Fort Sumter were under siege by South Carolina and the United States had not only the right but the obligation to protect them.

The United States was not invading the sovereign soil of South Carolina; it was acting to preserve its legal occupation and ownership of Ft. Sumter. On that point, we find that South Carolina had officially ceded all "right, title and, claim" to the site of Fort Sumter over to the United States on December 17, 1836.

[United States Military Reservations, National Cemeteries, and Military Parks; Title, Jurisdiction, etc; Revised edition 1907 (page 313-314)], [https://www.google.com/books/edition/United_States_Military_Reservations_Nati/EhIvAAAAYAAJ?hl=en&gbpv=1]

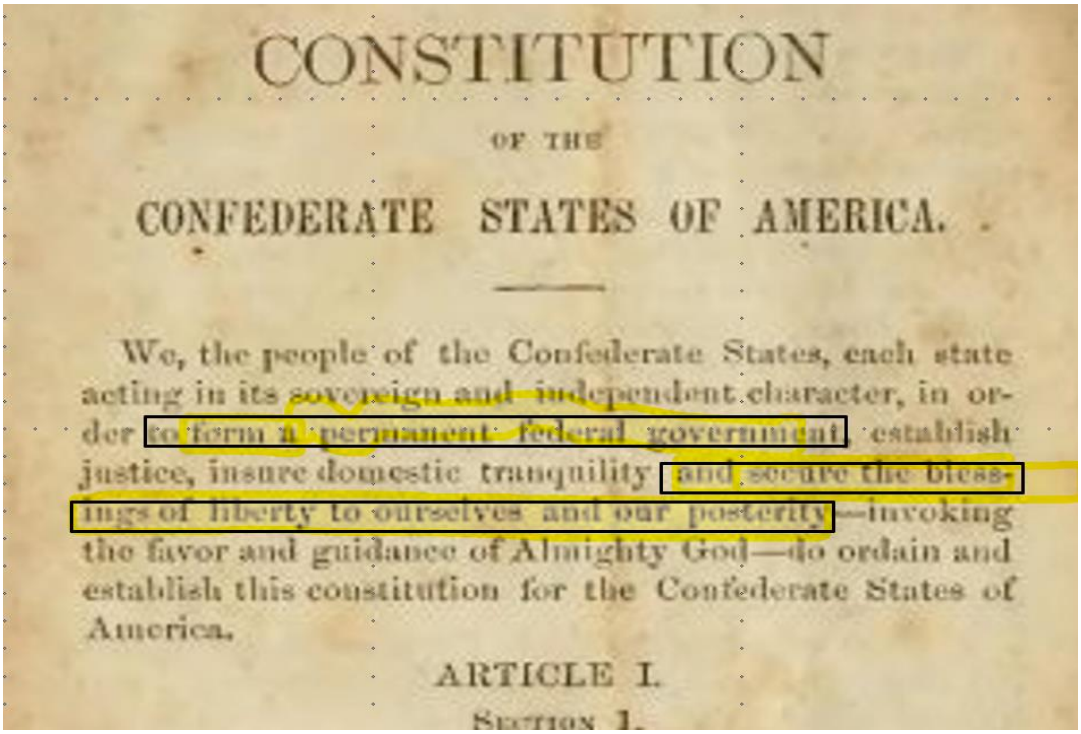
The confrontation between South Carolina and the United States in December 1860 was a completely unilateral action. She was attempting to prove a point—and the point was the rejection of US supremacy, or rather more to the point, the assertion of total *state* supremacy.

Nor was it an act of the so-called "war between the states" because no other state was involved. Nor was it an act of a civil war in the sense of a war between separate factions of Americans.

The war that most readers are probably thinking of by whatever name they prefer came later and it was officially a war between the central governments of the USA and the CSA—both of whom claimed supremacy over the same 11 states. In fact, when South Carolina acted alone there was no compact with other states at all and, in fact, there was not yet a new government organized under the name of the "Confederate States of America."

As for the founding of the CSA under its own constitution we can challenge its principles as well as its legality. If we accept the CSA founders' prewar premises, that is, their wanting of a weak central government with an escape clause (in other words, allowing for states to legally secede), we find contradictions at once.

For one thing the CSA Constitution, like its predecessor, did not say that states could secede. For another thing the CSA founders expressed exactly the same concerns for permanence and national security that the US had done but in plainer language.



CONSTITUTION

OF THE

CONFEDERATE STATES OF AMERICA.

We, the people of the Confederate States, each state acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquility and secure the blessings of liberty to ourselves and our posterity—invoking the favor and guidance of Almighty God—do ordain and establish this constitution for the Confederate States of America.

ARTICLE I.

Section 1.

[https://avalon.law.yale.edu/19th_century/csa_csa.asp]

For instance, the CSA's preamble to their Constitution stated their goals, one which was "to form a *permanent federal* government." The key words here are permanent and federal, where "permanent" means a long time in the future and "federal" means a central government. It is useful to point out also that in both Constitutions a stated goal was to "*insure* [sic] *domestic tranquility*," which is consistent with the presumed normal condition between the states—peace and unity.

The CS preamble went on to say that their constitution would *"secure the blessings of liberty to ourselves and our posterity."* The key word here is posterity. It means future generations, which implies "perpetual." We can also find contradiction, if not irony, in that they did not intend to "secure the blessings of liberty" to one-third of their people—those in the forced-labor class.

We further see concern for long-term security under CSA Article IV, Section 3 (part 4), which, but for the name and numbering changes, was a carbon copy of the same Article in the US Constitution. It said:

> *"The Confederate States* [meaning the CS federal government] *shall guarantee to every State … a republican form of government; and*

shall protect each of them against invasion; and on application of the Legislature or of the Executive (when the Legislature is not in session) against domestic violence."

Just as in the US Constitution, it delegated to the Legislature and the Executive the shared responsibility to protect the entire Confederacy against invasions and domestic violence. Ironically, both presidents invoked the power delegated by their respective guarantees to send armed forces into battle without a formal declaration of war from Congress (their Congresses were not in session).

The CS Constitution even included a virtually identical supremacy clause, Article VI, Section 3, for the CS national government. It said:

This Constitution, and the laws of the Confederate States … shall be the supreme law of the land; … anything in the constitution or laws of any State to the contrary notwithstanding.

As for individual state sovereignty, or "States' Rights," the CS states gained no more rights than they already had under the US Constitution, including the right to own other people.

The CSA Constitution, like its USA counterpart, was only the framework of all domestic laws, state and federal, under the normal condition of peace and unity, presumably *in perpetuity*. But just as in the USA it left the extralegal matter of secession in the blurry realm of speculation.

That brings up this challenging question: did the CSA Constitution provide an escape clause? Apparently not. If so, it was only in the identical wording of the US 10th Amendment except it was written directly into the body of the CSA Constitution as Article VI, Section 6; and exactly the same challenges to "the right to secede" could have been applied that we have already heard for the USA. If the CSA really condoned the supreme right of states to secede from the central government, they had the opportunity to come right out and say it—but they did not.

Otherwise, the CSA Constitution did in fact achieve one goal: a weak federal government through tight control of spending, but only under the presumed normal condition, which, to say again, was peace not war. However, the war itself put the same test to CS federal power over state power and the CS "Fed" won.

If we take a broader view and look beyond the CSA Constitution for more legal contradictions, we find them in the policies and decisions made by the greater family of nation-states in Europe. In the 19th Century *they* are who ultimately ruled on a new country's legitimacy.

Neither the United States nor even one outside power in the world granted formal recognition to the CSA as a legitimate country. Why not? Because the loosely bonded Confederacy failed to rise to the status of a country with the ability to defend its defined borders and its Constitution. Official recognition requires, at the very least, formal declarations from heads of state and the exchange of diplomats, usually followed by the opening of trade relations—none of which happened.

In contrast, other countries maintained normal diplomatic relations and trade with the United States all throughout the war. Furthermore, they recognized continued legal sovereignty of the United States over the Southern states and the surrounding waters. In other words, the European powers only regarded our Civil War as an internal insurrection, not a war between two countries, which was exactly the position upheld by the US government.

So now, let us see if I answered the original two questions: was secession legal prior to the war and, if so, is it still legal today.

At this point I have presented numerous contradictions to the premise of legal separation of states while under the protection of the Constitution. Did I prove or disprove anything? Well, certainly not formally. Like I said at the beginning, that job is up to lawyers to debate in a court of law.

On the one hand I have offered a good deal of evidence to cast doubt upon the Constitutional legality of secession. On the other hand, the case for legal separation gets no further than a loose and unofficial interpretation of the 10th Amendment.

Nevertheless, proponents of secession say that the rebelling states seceded before they refuted the Constitution so, of course, it was legal. But on that premise, I have shown at least two major contradictions—the main one being that the states assumed a superiority that they did not have in order to secede. The second is that the act of secession *was* an act of refuting the Constitution—they are not two acts but one inseparable act. As shown, the very refutation of

the Constitution placed the rebelling states outside of domestic law and into the extralegal realm where there is no Constitutional protection. In the face of these and several other contradictions we should properly conclude that the legality of dissolution under domestic law does not exist.

And now for the big surprise: in the grander view of the issues regarding secession, domestic US laws simply did not matter. The two sides decided to settle outside of domestic law in a "trial by battle" in which the *winner* was legal by definition. By its outcome, the war did indeed answer the 2nd part of the question "is secession legal *today*?" The verdict came in and the answer is NO. Secession failed and the Confederacy was officially illegal. We may not like to hear that might makes right but without question *might makes rights.*

However, the question of legal secession *before* the war was never resolved in a high court and probably never will be—and why should it? The United States won the trial by battle so there was simply no reason to relitigate anything. Nor would it have been wise. For one thing, it is possible that a court trial could have come out in favor of secession. Supreme Court Justices are not always swayed in the same direction by the same evidence. Just like everyone else in a free society they are famous for believing what they want to believe. Even the wartime Supreme Court was split 5-4 in the Prize Cases and in post-war Texas v. White it was 5-3.

After the war was over any claims of state sovereignty prior to the war were purely academic. Be that as it may, pre-war secessionists had clung to an ambiguous and untested loophole that had a hint of honor that might spare them from the gallows if they lost. After all, Article III, Section 3 does say:

> *Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort …*

Secessionists did levy war against the United States and the way they tried to avoid the smear of treason was using the same model undertaken by the colonists against Britain — first, declare independence. Some states wrote the equivalent of a declaration of independence with individual ordinances of secession. Doing so was presumed to be necessary so they could not be charged with violating the prohibitions of Article 1, Section 10 (to the disregard of all else refuting their supreme right to secede).

The second step was to form a new government declaring itself to be the head of a new country. According to this construction citizens of the seceded states would be citizens of a new country and thereby would be exempt from prosecution for treason.

The next step was to try to gain recognition of their legitimacy as a country under *one* government in order to make foreign alliances for protection and trade for the benefit of all of the Confederate states. The reality was that it had to be *only* one government because the great European powers were not inclined to make treaties with 11 different little republics, each claiming individual sovereignty.

So, just as it was for the colonies, it meant organizing an independent central government with rights defined under a new constitution. Just like the colonies, the first six states to secede organized the CSA government in January 1861.

The next step for the colonies was raising a national army and navy to defend their claimed rights and boundaries. Likewise, the CSA organized its national army and navy in February 1861.

So, what was different? For one thing the colonists knew aforehand that the Declaration itself was treason under British law and in signing it they had passed the point of no return. They would have to either win their rights by battle or be hanged. But unlike British law, treason in the US consists *only* in making war against the United States or aiding and abetting its enemies. Of course, that is speaking only of US citizens and the United States claimed that citizens of the rebelling states were still US citizens.

In knowing that war was highly likely and with Article I, Section 10 hanging over them the breakaway states had to distance themselves from charges of treason should the war come out wrong. Quite logically each state declared independence first *and then* they merged under one government.

So far so good. The mere act of secession, or even forming a new government, was neither an act of war or of treason and war does not necessarily follow a secession. As for charges of treason against the millions of Americans who did make war against the United States or aided its enemies, it would have been impossible to prosecute them all and unwise to try.

All legal argument aside, it is proper to say that the 11 Confederate States had a perfect right to secede—just don't expect to find it in the Constitution. In fact, the Constitution is completely silent on secession either as a power remaining to the states or denied to them and mentions no federal government role in any such thing. No law permitting secession has ever been passed by Congress nor have any courts ruled in favor of it.

The model for secession is extralegal, but it is not a mere abstraction. The proper model is the Declaration of Independence, which affirms the human right to self-rule and about which the Constitution says absolutely nothing. Invoking the more universal laws of God and nature the Declaration said:

> *"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed …"*

In other words, the premises for revolution are irrefutably true according to more universal laws whether written or unwritten. Both the colonies and the Confederate States, like all organized populations in the world, had the human right to have their own form of government as long as they were willing to fight for it—which they did, and lost.

So, to those who still think American states can legally secede, I say to them look to the Declaration of Independence for inspiration—not to the Constitution for permission.