

## SECESSION AND BREACH OF COMPACT: THE LAW OF NATURE MEETS THE UNITED STATES CONSTITUTION

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### I. INTRODUCTION

In the crisis of 1860-61, the architects of Southern secession were determined to justify their drastic action in legal terms. Not for them was a resort to naked power politics, in which brute force would be its own badge of legitimacy. This firmly legalistic outlook on the part of Southern leaders had been building up over the preceding decades. An important early figure was Robert J. Turnbull of South Carolina, who became the principal intellectual mentor of John C. Calhoun. In 1827, in a book called *The Crisis* (assembled from a series of articles written over the previous year), Turnbull pointed to the steady excess of population growth in the free states relative to the slave ones. This of course translated, with the passage of years, into a constant growth of the political strength of the free states over the slave ones in the federal Congress. In addition, there was the continuing fear of a long-term

alliance between the Northeastern and Midwestern states, in the form of Henry Clay's proposed "American System" of protective tariffs and internal improvements. (An enthusiastic supporter of Clay and his American System was an ambitious Illinois lawyer and politician named Abraham Lincoln.) In the face of this growing challenge, the proper strategy for the South, Turnbull contended, was resolute insistence on respect for the sovereign rights of the states.<sup>1</sup> As will be seen, these rights of the states were asserted, in the secession crisis, not against the federal government as such, but rather against the free states. Southerners, in short, held themselves to be on the firmest of legal grounds in referring to the conflict of 1861-65 as the "War between the States."

For the marshalling of the arguments in support of their action, the South possessed two particularly notable legal paladins. One was Alexander Stephens of Georgia, who served as vice-President of the Confederacy and (more notably for present purposes) wrote a detailed constitutional exposition of the Southern position shortly after the Civil War.<sup>2</sup> The other was Judah P. Benjamin of Louisiana, who served as Confederate Attorney-general at the start of the War (and later as Secretary of War and finally Secretary of State). He set out the Southern position with great care in a speech in the Senate on December 31, 1860, which was then published in pamphlet form.<sup>3</sup>

This discussion will briefly outline the legal arguments in favour of the secessionist position. The first section will survey four arguments that could, in theory, have been employed but which, in practice, were used either not at all or only marginally. The second section will survey, in greater detail, the principal argument which was advanced in 1860-61: that secession was a lawful remedy available to the Southern states in the face of material breaches of the Constitutional compact of 1787 by the free states. It will be observed that, in this argument, general considerations of natural law and of the law of nations played a central role.

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1. ROBERT J. TRUNBULL, *THE CRISIS, OR, ESSAYS ON THE USURPATIONS OF THE FEDERAL GOVERNMENT* (1827).

2. See ALEXANDER H. STEPHENS, *A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES* (2 vols, 1868-70) [hereinafter STEPHENS, *CONSTITUTIONAL VIEW*].

3. See Judah P. Benjamin, *The Right of Secession*, in *SOUTHERN PAMPHLETS ON SECESSION, NOVEMBER 1860—APRIL 1861*, at 101-14 (Jon L. Wakelyn ed., 1996) [hereinafter Benjamin, *Right of Secession*; and WAKELYN, *SOUTHERN PAMPHLETS*].

## II. ARGUMENTS THAT MIGHT HAVE BEEN EMPLOYED

There were four basic arguments which might have played important roles in the legal justification of Southern secession but did not. They are worth some brief attention, though, for two reasons. First, because some of them were the subject of public debate, even if those debates did not play a central role in the secession crisis. And second, as a way of highlighting, by contrast, the nature of the breach-of-compact argument which was advanced as the principal justification.

These four alternative or subsidiary arguments for secession do not have standard labels. They will be referred to here as: first, the inherent-right, or voluntary-Union thesis; second, the inherent-power position; third, the absence-of-federal-power argument; and fourth, the revolutionary argument. It will be seen that, strictly speaking, the second and third of these are not arguments in support of an actual right of secession, but are merely assertions of the ability of the Southern states effectually to bring secession about.

### *A. The inherent-right-of-secession (or voluntary-Union) argument*

The basis of the argument for an inherent right of secession on the part of the Southern states (or any other states for that matter) was the belief that the federal Union was a purely voluntary association of states, terminable at will by any party at any time. For this reason, it can be alternatively termed the voluntary-Union thesis. In all events, the basic contention was that, as a matter of their inherent sovereign rights, the states of the Union were entitled at any time, as an act of unilateral will, to withdraw from the federal Union.

This line of reasoning held the United States to be, in effect, an international organisation (in modern terminology) of sovereign nation-states, along the lines of the League of Nations or the United Nations. In the League of Nations Covenant, explicit provision was made (perhaps unadvisedly) for withdrawal of member states on their own unilateral initiative—a right that, in event, was resorted to with disconcerting frequency. The UN Charter contains no analogous provision, nor is there any clear judicial authority on the matter. But the predominant opinion is that states do possess an inherent right of withdrawal from international organisations as an exercise of their normal sovereign rights.<sup>4</sup> The United States, it may be noted, has itself withdrawn from

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4. See N. Feinberg, *Unilateral Withdrawal from an International Organization*, 39 BRIT. Y.B. INT'L L. 189-219 (1963).

two organisations in the UN family: the International Labour Organization and UNESCO (although in due course it rejoined both).<sup>5</sup>

Concerning this inherent-right thesis, it only remains to note a curious development which has yet to be adequately explored or explained: the fact that, while the argument was not employed at the time of the secessions of 1860-61, it came to attract significant support in the course of the conflict. Confederate Attorney-general T. H. Watts, for example, asserted it in an opinion in 1862, holding that a state of the federal Union

might, as a matter of right, secede, according to its will and pleasure, though every constitutional provision remained intact and unbroken, and though every law of the United States was in accordance with its will and pleasure.<sup>6</sup>

The following year, in a similar vein, he maintained that the states of the Union had retained their sovereign rights upon joining the federal Union in 1789—meaning that they were entitled at any time, as a matter of inherent sovereign prerogative, to rescind their membership of that Union.<sup>7</sup>

#### *B. The inherent-power argument*

This argument is similar to the inherent-right argument, except that it focuses on power rather than on right. According to the inherent-right thesis, as just discussed, there is a permanent and standing entitlement on the part of member states of the federal Union to rescind their membership. The corresponding inherent-power argument is to the effect that, even if no such right exists, states nonetheless possess the power to reassert their full range of pre-Union sovereign rights and thereby to revert to the status of a fully independent nation-state. Even if that power is exercised contrary to legal right—i.e., even if it constitutes an unjustified breach of a legally binding compact or treaty—it is nonetheless effectual in bringing about the end sought (withdrawal from the federal Union).

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5. The United States withdrew from the International Labour Organization in 1977 and rejoined in 1980. It withdrew from UNESCO at the end of 1984 and rejoined in 2003.

6. T. H. Watts, Relation of Confederacy to the Former Union (Dec. 27, 1862), in THE OPINIONS OF THE CONFEDERATE ATTORNEYS GENERAL 1861-1865, at 224 (Rembert W. Patrick ed., 1950) [hereinafter PATRICK, OPINIONS].

7. T. H. Watts, Pardon for a Deserter (Mar. 4, 1863), in PATRICK, OPINIONS, *supra* note 6, at 231, 240.

If the power was exercised in circumstances that entailed a breach of a legal obligation, then the parties to whom that obligation was owed thereby became legally entitled to reparation for any loss which they suffered. In principle, this would mean something along the lines of an action for money damages, comparable to damages for the breach of a contract when a remedy of specific performance was not available. In practice, of course, no court existed with jurisdiction to order such a remedy. But even if it did, the Union would nevertheless remained dissolved because no judicial authority could order a state to enter or re-enter a Union with other states against its will (i.e., a remedy of specific performance would not be available against a seceding state to force it back into the Union).

It does not appear that this argument was ever advanced, in any significant way, at the time of the secession crisis of 1860-61. Perhaps the distinction between right and power was not strongly on the collective minds of lawyers and political theorists at that time. It may be noted, though, if only in passing, that, after the War, this argument did win the explicit endorsement of a judge in the Georgia Supreme Court (though only in dissent, with the majority of the Court holding otherwise on this point).<sup>8</sup>

### C. *The absence-of-federal-power argument*

This argument is closely allied to the inherent-power argument just discussed, in being, as it were, the flip side of it. Where the inherent-power thesis was a positive one, focussing on the possession of power by the states to effectuate secession, this argument was a negative one, focussing instead on the absence of any power of the federal government to prevent secession.

This argument had been initially aired by Calhoun, during the nullification crisis of the early 1830s. He conceded that the federal government had the power to act coercively against individuals, e.g., for violation of federal criminal laws, but it had no power, he insisted, to take armed action against a state as such.<sup>9</sup> Calhoun was scornful of the value of a Union that could be held together only by force, invoking

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8. *Chancely v. Bailey*, 37 Ga. 532 (1868).

9. John C. Calhoun, *A Discourse on the Constitution and Government of the United States*, in JOHN C. CALHOUN, *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* 79, 178 (Ross M. Lence ed., 1992) [hereinafter Calhoun, *Discourse*; and *UNION AND LIBERTY*].

instead an alternative vision of a “harmonious aggregate of States, produced by the joint consent of all.”<sup>10</sup>

A position similar to that of Calhoun was also taken officially by Attorney-general Jeremiah S. Black, in an opinion on “The Power of the President in Executing the Laws,” written in November 1860, just after the election of Lincoln to the presidency but before the secession of South Carolina.<sup>11</sup> Normally, Black noted, federal laws are executed by the courts, with marshals acting as the enforcement arm.<sup>12</sup> In unusual cases, though, the efforts of the marshals might need to be supplemented by additional manpower of some kind. But any such additional force, Black contended, must be ancillary to the normal operations of the federal courts. “There must be courts and marshals to be aided,” he cautioned.<sup>13</sup> Otherwise, “to send a military force into any State, with orders to act against the people, would be simply making war upon them”—something that the President had no power to do.<sup>14</sup> The federal government, to be sure, possessed the right of self-defence, so that it was entitled to use force to repel actual attacks against federal installations such as arsenals or forts. But this right could not be extended to allow the federal government to wage offensive war against states as such. Even Congress did not have the power to wage war against a state because the Congress’s Constitutional power to declare war referred, in Black’s view, only to waging war against foreign countries, not against member states of the federal Union.<sup>15</sup>

Outgoing President James Buchanan took this advice to heart. In his final annual message to Congress, in December 1860, with the secession crisis looming, he expressly denied that the federal government possessed the power to exercise coercion against states.<sup>16</sup> He echoed Black’s advice by holding that no branch of the federal government had the right or power to invoke force against a state.<sup>17</sup> “[T]he power to make war against a State,” he asserted, “is at variance with the whole spirit and intent of the Constitution.”<sup>18</sup>

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10. John C. Calhoun, Speech on the Revenue Collection [Force] Bill (Feb. 15-16, 1833), in UNION AND LIBERTY, *supra* note 9, at 401, 436 [hereinafter Calhoun, Speech on the Force Bill].

11. Power of the President in Executing the Laws, 9 Op. Att’y-Gen. 516 (1860).

12. *Id.* at 523.

13. *Id.*

14. *Id.*

15. *Id.* at 524.

16. 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 635-36 (James D. Richardson ed., 1897) [hereinafter RICHARDSON, COMPILATION].

17. *Id.*

18. *Id.*

A similar conclusion was reached by Chief Justice Taney in some unpublished “Thoughts” on the subject of potential federal legislation to institute military conscription. The federal government, thought Taney, “could not exercise forcibly any authority civil or military by its own officers within the territories of a State without its consent.”<sup>19</sup>

*D. The revolutionary argument*

The fourth and final of the arguments that might have played a central role in the secession debate was the revolutionary argument. Given the potential resonance with the patriots of 1776, it might be thought that this argument would have played a starring role in the legal drama of 1860-61. It is interesting to note that President Buchanan candidly conceded at least the potential validity of a revolutionary argument. “The right of resistance on the part of the governed against the oppression of their governments,” he asserted in his final annual message to Congress, “cannot be denied. It exists independently of all constitutions, and has been exercised at all periods of the world’s history.”<sup>20</sup>

Judah Benjamin provided a characteristically more exact analysis of the legal nature of this “right” of revolution. It arose, he explained, in situations in which a government was exercising powers which it lawfully possessed, but was exercising them in an oppressive manner.<sup>21</sup> In such a case, remedies at law would, by the nature of the case, be lacking; so that the only recourse of the suffering people was the “extra-legal” one of overthrowing the government by force.<sup>22</sup> Revolution, in other words, was the appropriate remedy against what would now be called an abuse of right on the part of a government.

The reason that this argument did not play an important part in the secession crisis may be stated briefly here: that the Southern leaders were not alleging oppression of the Southern states by the federal government. They could even be said to have been complaining of the very opposite: that the federal government was insufficiently powerful, that its policies—notably the enforcement of the Fugitive Slave Act<sup>23</sup>—were being thwarted by disruptive persons (and state governments) in

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19. See ROGER B. TANEY, THOUGHTS ON THE CONSCRIPTION LAW OF THE U[NITED] STATES—ROUGH DRAFT REQUIRING REVISION 3 (Philip G. Auchampaugh ed., n.d.).

20. RICHARDSON, COMPILATION, *supra* note 16, at 634.

21. Benjamin, *Right of Secession*, *supra* note 3, at 107-08.

22. *Id.*

23. Act of Sept. 18, 1850, 9 Stat. 462.

the North. This contention will be expanded on presently.<sup>24</sup> Here, it is sufficient simply to note that the true legal grievances of the Southern states were not against the federal government as such, but rather against the Northern states, which (in the Southern view) were undermining the effectiveness of federal policies.

It may be noted that, in the course of the conflict, the South did find occasion to assert a revolutionary argument for secession. This was inspired by an act of the Union government which inspired particular loathing in the South: the arming and employment of ex-slaves as soldiers in the Union cause. One form that the Confederate reaction took was the insistence that black soldiers were (in modern parlance) unlawful combatants and that they would accordingly not be accorded prisoner-of-war treatment if captured. More to the point for present purposes, though, was the text of a Manifesto on the War which was promulgated by the Confederate Congress in June 1864. Now echoing the Declaration of Independence of 1776, the Richmond Congress asserted “the right of a free people, when a government proves destructive of the ends for which it was established, to recur to original principles and to institute new guards to their security.”<sup>25</sup>

### III. THE BREACH-OF-COMPACT THEORY AND ITS IMPLICATION

The legal argument that was actually deployed by the Southern leaders in 1860-61 may be characterised as the breach-of-compact theory. Its essence is simple. The federal Union, properly understood, was an ongoing contractual union between sovereign states—states which retained all aspects of their sovereignty after entry into the Union, save those that they had expressly delegated to the federal government. That original Constitutional contract—or compact—like any other contract, retained its legal validity only so long as the parties continued faithfully to adhere to it. Any breach of the compact by parties to it automatically entitled the innocent parties to withdraw from the arrangement.

Support for this line of argument in the text of the Constitution itself was altogether absent. There was no real question, therefore, of Constitutional interpretation here. Instead, the argument rested on a certain understanding about the general character of the federal Union as

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24. See the text at note 82 *infra*.

25. Joint Res. Declaring the Dispositions, Principles and Purposes of the Confederate States in Relation to the Existing War with the United States, Joint Res. No. 13, June 14, 1864, *reprinted in* STATUTES AT LARGE OF THE CONFEDERATE STATES OF AMERICA, 2d Cong., 1st Sess. 287 (1864).



such, fortified by arguments drawn from writings about general natural law.

More specifically, the breach-of-compact argument for secession relied for its credibility, in essence, on the establishment of four key propositions. The first three are points of law and the fourth of fact. First was that the true nature of the federal Union was as a compact between sovereign states, rather than as a single national government. Second was that a material breach of the covenant gave rise to the lawful remedy of rescission. Third was an assertion of the necessity for self-judgment for the determination of the existence of such a breach. Fourth and finally, there was the application of these three legal principles to the facts of the particular situation of 1860-61, in the form of concrete evidence of actual violation of the federal compact by the Northern states. We shall look more closely at each of these in turn.

*A. The compact theory of the federal Union*

The first and most basic, underlying component of the secessionist case was the thesis that the American federal Union was a Union of sovereign states rather than a single nation-state. This Union was, concededly, the creation of the “people” of the United States, but only in an indirect manner. The American people created the Union not by giving their approval as a single population of individual persons, but rather through the media of the various sovereign states into which they were then divided—and into which they continued to be divided for all purposes save those expressly transferred to the Union government. The case for and against this basic compact theory has been analysed before, so that only its most salient points need be noted here.

The compact theory received its first systematic treatment at the hands of Calhoun.<sup>26</sup> The federal government, in his words, was “the government of a community of States, and not the government of a single State or nation.”<sup>27</sup> The United States, in other words, must be regarded as a union of pre-existing political communities and not as a single society of individuals, as was the case for a true nation-state. Moreover, these pre-existing political communities retained their character as sovereign states even after forming the Union, with the result that they were bound together, as separate entities, in a continuing, ongoing contractual relationship. Calhoun insisted that sovereignty was, by its nature, single and indivisible and that sovereignty remained with

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26. See generally Calhoun, *Discourse*, *supra* note 9.

27. *Id.* at 82.

the states. The federal Union was therefore not a sovereign entity in its own right, but a mere vehicle or tool of the states, created by them for the fulfilment of their purposes.

It must not be thought that Calhoun invented the compact theory out of whole cloth. It had at least a measure of support from the Founding Fathers themselves. James Madison, for example, in the 39th Federalist Paper, expressly described the establishment of the Constitution (though not the day-to-day operation of the federal government) as “not . . . a national, but a federal act.”<sup>28</sup> The founding of the Union, Madison went on to say, was “the act of the people, as forming so many independent States, not as forming one aggregate nation.”<sup>29</sup> The character of the Union as a compact of states was further evident, Madison pointed out, in the fact that, as in the case of contracts generally, adherence was purely voluntary on the part of each party—in sharp contrast to the position in a political society, in which the majority will would bind the minority.

Further support for the compact theory could be adduced from the Kentucky and Virginia Resolutions of 1798, drafted by Thomas Jefferson and James Madison respectively. Madison’s Virginia Resolution expressly described the powers of the federal government as “resulting from [a] compact.”<sup>30</sup> And it went on to lament any tendency “to consolidate the states by degrees, into one sovereignty.”<sup>31</sup> Jefferson’s Kentucky Resolution was similar in tone, proclaiming each state to have acceded “to this compact . . . as a State,” with “its co-States forming as to itself, the other party” to the compact.<sup>32</sup>

The compact theory of the Union, not surprisingly, met with fierce opposition. And no opponent of it was fiercer than the redoubtable Senator Daniel Webster of Massachusetts. He asserted with characteristic force and eloquence, most notably in the famous Senate debate against Robert Hayne in 1830, that the compact theory was fundamentally unsound, asserting instead that the federal Union was “the independent offspring of the popular will” of the American people at

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28. THE FEDERALIST NO. 39 (James Madison).

29. *Id.*

30. *Virginia Resolutions, Dec. 24, 1798*, in DOCUMENTS OF AMERICAN HISTORY 182 (Henry Steele Commager ed., 9th ed. 1975) [hereinafter COMMAGER, DOCUMENTS].

31. *Id.* at 178.

32. *Kentucky Resolutions, Nov. 16, 1798*, in COMMAGER, DOCUMENTS, *supra* note 30, at 178.

large.<sup>33</sup> The Constitution, he insisted, was the creation “of the people of the United States, in the aggregate.”<sup>34</sup>

Even the eloquence of Daniel Webster did not suffice to dislodge the Southerners from their attachment to the compact theory. They maintained it up to the Civil War and even beyond, with Stephens now as their spokesman-in-chief.<sup>35</sup> The compact theory also received official support from the Confederate government. In 1863, Confederate Attorney-general Watts opined that the population of the United States “never constituted one and the same community,” nor did the United States, as such, ever constitute a nation.<sup>36</sup>

*B. The remedy of rescission for breach of compact under natural law*

This second crucial proposition—that the remedy of termination of the compact (i.e., of secession) was available in cases of breach of a compact—lay at the very core of the Southern case for lawful secession. It should be noted that this thesis is not logically entailed by the compact theory as such. It was logically possible to see the Union as a compact of states while holding at the same time that that Union was not terminable for any reason.<sup>37</sup> The issue of terminability of the Union is therefore conceptually distinct from the question of the underlying nature of the Union—a point that was clearly understood by all parties to the debates.

The issue over the terminability of the Union has sometimes been seen as a debate over whether or not the federal Union was, or was intended at its outset to be, a perpetual one.<sup>38</sup> That is a misleading way of putting it, because the word “perpetual” may be understood in either of two quite distinct senses. These could be termed the “strong” and the “weak” senses. Perpetual in the strong sense means that the Union is indissoluble in any circumstance whatsoever—i.e., that, upon joining the federal Union, a state thereby alienated, irrevocably and in perpetuity, all right and power to withdraw from the Union. Perpetual in the weak

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33. THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION: SELECTED DOCUMENTS 136, 153 (Herman Belz ed., 2000).

34. *Id.*

35. See 1 STEPHENS, CONSTITUTIONAL VIEW, *supra* note 2, at 477-522.

36. T. H. Watts, *Pardon for a Deserter (Mar. 4, 1863)*, in PATRICK, OPINIONS, *supra* note 6, at 231, 239-40.

37. See for example, the Georgia Supreme Court case of *Chancely v. Bailey*, 37 Ga. 532 (1868).

38. See for example, Kenneth Stampp, *The Concept of a Perpetual Union*, 65 J. AM. HIST. 5 (1978).

sense means that the Union was perpetual in principle, or that it was intended at the outset to be perpetual—but that this aspiration of perpetuity could only be achieved in reality by the continued adherence of the parties to the original arrangements over time. According to this weak view of perpetuity, then, a state, upon joining the Union, surrenders only its right to withdraw from the Union as a matter of unilateral sovereign will. It is left with the possibility of withdrawal as a lawful remedy for breach of the compact by the other parties to it.<sup>39</sup> The position of the advocates of secession in the 1860-61 crisis was that the Union was a perpetual one in the weak sense, but not in the strong sense.

On this subject too, the views of Benjamin are particularly instructive, as he addressed the question of the perpetual character of the federal Union very explicitly. He candidly conceded that, in principle, the federal Union was a perpetual one—though, crucially, in the weak sense rather than the strong one. “[N]o man pretends,” insisted Benjamin, “that the generation of to-day is not bound by the compacts of the fathers.”<sup>40</sup> But he went on to contend that the real issue at hand was not whether the Union had been envisaged as perpetual in the 1780s. It had been. The issue was whether, since that time, that Union had been irredeemably shattered by the failure of the Northern states to abide by their commitments under the original Constitutional compact. The compact remained binding, Benjamin maintained, only so long as all parties continued to adhere to it.<sup>41</sup>

That it would be wrong to regard the secession advocates as enemies of perpetual unions per se is evident from no less authoritative a source than the Confederate Constitution itself. That document did not include a provision granting the states a right to secede at will. On the contrary, it explicitly stated, in the Preamble, the intention of the Southern states “to form a permanent federal government”<sup>42</sup>—permanent, it is safe to conclude, in the weak rather than the strong sense.

The Southerners’ proposition that the federal Union of 1787-89 was perpetual only in the weak sense (i.e., was terminable in the event of breach) was, however, nowhere to be found in the Constitution, which made no provision for breaches by states. To be sure, there was the

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39. The informative discussion in Stamp, *id.*, is concerned only with perpetuity in the strong sense.

40. Benjamin, *Right of Secession*, *supra* note 3, at 104.

41. *Id.*

42. *Constitution of the Confederate States of America, Mar. 3, 1861*, in COMMAGER, DOCUMENTS, *supra* note 30, at 376.

Supremacy Clause. But that spoke to a different problem: the possibility of a clash between a state law and a federal law. It shed no light whatever on how to resolve a clash between the states over a breach of terms of adherence to the federal Union itself. Authority for the existence of this remedy of rescission would therefore have to be found outside the framework of the Constitution.

The justification for this remedy was duly found in natural law, which was an integral part of the mental universe of American lawyers in the early and mid-nineteenth century. It was one of the most venerable intellectual ornaments of Western civilisation, older than Christianity itself. Its basic thesis was that law, in its most fundamental guise, was a set of statements of principles of universal and permanent validity. Its strictures prevailed in all countries and all civilizations and in all times. It was painfully obvious that its tenets were all too frequently violated in practice, but these violations, however frequent, could have no effect on the essential validity of this body of law. Natural-law thought is therefore in sharp contrast with schools of legal philosophy (most notably the positivist one) which holds law to comprise the expression of the will of a given sovereign, expressed in the form of commands issued to a subject population, and with the prospect of punishment for disobedience of those commands.<sup>43</sup> There were various different theories as to how the contents of natural law were to be discovered. But the one that was most prominent in the eighteenth and nineteenth centuries held natural law to be discoverable through the exercise of human reason. This was a doctrine put forcefully by Thomas Aquinas in the Middle Ages<sup>44</sup> and expounded by a line of writers in the centuries that followed. The most prestigious of these was Hugo Grotius,<sup>45</sup> in the seventeenth century, followed by the

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43. There is, surprisingly, no single treatment of natural law that traces its entire historical trajectory. See, however, CLARENCE J. GLACKEN, *TRACES ON THE RHODIAN SHORE: NATURE AND CULTURE IN WESTERN THOUGHT FROM ANCIENT TIMES TO THE END OF THE EIGHTEENTH CENTURY* (1967), a stimulating book with a wealth of information on key elements of natural-law thought over a large part of its history.

44. For Aquinas's principal writings on natural law, see *THE POLITICAL IDEAS OF ST. THOMAS AQUINAS: REPRESENTATIVE SELECTIONS* 42-54 (Dino Bigongiari ed., 1953). See also A. P. D'ENTREVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 42-49 (2d ed. 1970); D. J. O'CONNOR, *AQUINAS AND NATURAL LAW* (1967); and ANTHONY LISSKA, *AQUINAS'S THEORY OF NATURAL LAW: AN ANALYTIC RECONSTRUCTION* (1996).

45. HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE* (Francis W. Kelsey trans., 1925) (1625) [hereinafter *GROTIUS, WAR AND PEACE*].

German writers Samuel Pufendorf<sup>46</sup> and Christian Wolff,<sup>47</sup> as well as by the Swiss writer Emmerich de Vattel.<sup>48</sup>

Most pertinent of these natural-law writers for the American tradition was John Locke, in the late seventeenth century, whose writings were echoed by Jefferson and others amongst the Founding Fathers of the American Republic in the eighteenth century. In the tradition of his forebears of the rationalist tradition of natural law, Locke insisted that one of the important tenets of natural law was the duty to adhere to contracts.<sup>49</sup> This fundamental principle applies not only to individual persons, but also to political collectives and even to God Himself.<sup>50</sup>

This law of nature was applicable, in its purest form, to persons who were living in what was called a state of nature *vis-à-vis* one another. A state of nature, for this purpose, was, in essence, a condition in which no common sovereign existed over the persons in question—with the inevitable result that relations between them were governed solely by natural law. Once a political society was established (whether peacefully by contract or violently through coercion or conquest), natural law could be overridden or superseded by the commands of the established sovereign. The effect, then, was that natural law operated as a kind of continuous “default law,” which would be applicable in any situation in which there was no holder of sovereign power to promulgate laws or adjudicate disputes.

Locke was also very clear in his exposition of another aspect of this question: what was to be done, under natural law, in the event that a party to a contract violated its duty of obedience. The remedy, Locke explained, was self-enforcement. This was the only possibility because, by definition, no sovereign power existed who could undertake the enforcement. As Locke put it, one of the key powers held by all persons in a state of nature (as defined above) was the power “to judge of, and

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46. SAMUEL PUFENDORF, ON THE LAW OF NATURE AND NATIONS (C. H. & W. A. Oldfather trans., 1934) (1672) [hereinafter PUFENDORF, NATURE AND NATIONS].

47. CHRISTIAN WOLFF, THE LAW OF NATIONS TREATED ACCORDING TO A SCIENTIFIC METHOD (Joseph H. Drake trans., 1934) (1749) [hereinafter WOLFF, LAW OF NATIONS].

48. EMMERICH DE VATTEL, THE LAW OF NATIONS, OR, THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND THE AFFAIRS OF THE NATIONS AND SOVEREIGNS (Charles G. Fenwick trans., 1916) (1758) [hereinafter VATTEL, LAW OF NATIONS].

49. John Locke, *Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT 121-22, 214 (Mark Goldie ed., 1993) [hereinafter Locke, *Second Treatise*]. On the natural-law duty to adhere to contracts, see also THOMAS HOBBS, THE ELEMENT OF LAW NATURAL AND POLITIC 87-88 (J. C. A. Gaskin ed., 1994) (1650).

50. Locke, *Second Treatise*, *supra* note 49, at 214.

punish the breaches of that law in others, as he is persuaded the offence deserves.”<sup>51</sup> This could even go to the point of inflicting capital punishment onto a miscreant (provided that such drastic punishment was duly proportionate to the wrong committed).<sup>52</sup>

In a political society, Locke maintained, this natural-law power of self-judgment and self-execution was transferred from the ordinary citizens to the sovereign (whether by free will or by force, as the case may be). This was, in fact, for all practical purposes the very definition of a political society for writers in the natural-law tradition. The inevitable logical corollary was that, wherever and whenever this transfer of natural-law power had not been effectuated, it remained in force. “[W]herever there are any number of men, however associated,” Locke explained, “that have no such decisive power [i.e., no sovereign] to appeal to, there they are still in the state of nature.”<sup>53</sup> In such a state, each party must remain “judge for himself, and executioner” in the event that a dispute arose.<sup>54</sup>

The question then arose as to just what form this self-help action of enforcement could take. It could be argued that the innocent party, in a breach-of-contract scenario, could resort to force, on a sort of analogy with self-defence—that is, that could exert however much force (and no more) as was necessary under the circumstances to compel obedience from the recalcitrant party. More commonly, though, natural-law writers spoke in terms of a right of rescission of the contract on the part of the innocent party. As Hugo Grotius explained in his treatise On the Law of War and Peace, “the individual terms of an alliance have the force of conditions”—with the effect that a violation by one party enables the other to withdraw.<sup>55</sup> In a similar vein, Pufendorf held:

[W]hen one party does not perform what is agreed upon, the other is not obligated to perform what he agreed to in exchange and in consideration of the other’s performance. For whoever promises another something by a pact, does so not absolutely and gratis, but in consideration of what the other has undertaken to perform; and so the performances of each for the other take on the form of a condition. . . .

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51. *Id.* at 157.

52. *Id.* at 118.

53. *Id.* at 159.

54. *Id.* at 158.

55. GROTIUS, WAR AND PEACE, *supra* note 45, at 405. The fact that the reference was specifically to treaties of alliance is not crucial.

But it is fixed that whatever is built upon a condition falls to the ground when the condition does not appear.<sup>56</sup>

Similar too, as well as more succinct, was Wolff: “If one party shall have violated a treaty,” he pronounced, “the other party . . . can withdraw from it.”<sup>57</sup> He agreed with Pufendorf that, in every treaty which contained mutual promises, the due performance of those promises by either party must be regarded as conditions for the reciprocal performance by the other one. Jean-Jacques Rousseau, the French political philosopher, was also of this view. Each party to a contract, he contended, “would always have a right to renounce the contract, as soon as he found that the other had violated its terms.”<sup>58</sup>

More directly familiar to American lawyers and political writers would have been Vattel, whose treatise *On the Law of Nations* of 1758 was widely known in American legal circles. A breach of a treaty by one party, Vattel asserted, entitled the other to resort to armed force to compel performance (i.e., it was a cause for the waging of a just war, in the parlance of the time). But an alternative, and less drastic, remedy was rescission of the treaty:

[I]t is at times more expedient [Vattel explained] for the [injured innocent] State to revoke its own promises and to break the treaty; it is unquestionably justified in doing so, since its own promises were made only on condition that the other State would carry out on its part the stipulations of the treaty.<sup>59</sup>

“Prudence and policy,” he maintained, would decide which of the available options the injured state would choose on a given occasion.<sup>60</sup>

Closer still to home was the word of the American writer on international law (as well as Supreme Court reporter and diplomat) Henry Wheaton. Speaking in the context of treaties of peace, he echoed Vattel in holding that a violation by one party “abrogates the whole treaty, if the injured party so elects to consider it.”<sup>61</sup> He went on to

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56. PUFENDORF, NATURE AND NATIONS, *supra* note 46, at 788.

57. WOLFF, LAW OF NATIONS, *supra* note 47, at 225-26.

58. JEAN-JACQUES ROUSSEAU, DISCOURSE ON THE ORIGIN OF INEQUALITY AMONG MEN, AND IS IT AUTHORIZED BY NATURAL LAW? 97 (G. D. H. Cole trans., 1973) (1755) [hereinafter ROUSSEAU, DISCOURSE].

59. VATTEL, LAW OF NATIONS, *supra* note 48, at 177.

60. *Id.*

61. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 604 (Richard Henry Dana, Jr. ed., 1936) (1836).



explain that the effect of this principle is that the violated treaty becomes “not absolutely void, but voidable at the election of the injured party.”<sup>62</sup>

The application of this reasoning to the American situation in 1860-61 led to a clear conclusion to adherents of the compact theory of the Union. On the basis of the compact theory, they insisted that the states retained their sovereign status even after entry into the federal union and that, consequently, the federal government was not a sovereign with authority over the states. The federal government was merely a vehicle created by the sovereign states to carry out certain limited functions that had been entrusted to it in the original federal compact of 1787. Consistently with this view, Southern writers tended to insist that there was no such thing as citizenship of the United States as such. There was only citizenship of the individual states.<sup>63</sup>

As a result (went the argument on the compact theory), the states of the American Union must be regarded as being in a state of nature *vis-à-vis* one another. More specifically, the provisions of Article III of the Constitution, outlining the jurisdiction of the federal courts, contained no grant of jurisdiction over issues of the kind presented in the 1850s. It did grant the federal courts jurisdiction over “Controversies between two or more States.”<sup>64</sup> But it appears to have been generally agreed that this referred to the adjudication of competing claims by states to rights of some kind, such as a dispute over a boundary or territory. It did not apply to accusations by one state that another one was impeding enforcement of federal law (i.e., of the Fugitive Slave Act) within its territory.

The states, to be sure, were bound to adhere to agreements which they made. But it was general natural law which so bound them, rather than the commands of a sovereign federal government. By the same token, it was natural law which conferred the remedy of rescission in the event of violation of any such agreement. Alexander Stephens was very explicit on this point. The right of rescission, he explained, “comes not from any thing in the Constitution, but from the great law of Nations, governing all Compacts between Sovereigns.”<sup>65</sup> This right of rescission, he went on to emphasise, finds its source in the general law of nations, which provides for “the right . . . to abrogate a treaty by either or any of

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62. *Id.* at 603-04.

63. See Calhoun, Speech on the Force Bill, *supra* note 10, at 443-44; and 2 STEPHENS, CONSTITUTIONAL VIEW, *supra* note 2, at 426.

64. U.S. CONST. art. III, § 2.

65. 1 STEPHENS, CONSTITUTIONAL VIEW, *supra* note 2, at 500-01.

the parties to it.”<sup>66</sup> He conceded that this right (or rather remedy) “is seldom set forth in the treaty itself, and yet it exists, whether it be set forth or not. . . . [W]here no such provision is made, the right exists by the same laws of Nations which govern in all matters of treaties or conventions between Sovereigns.”<sup>67</sup>

Several points about this remedy of rescission for breach of the federal compact should be noted with care. One was that it was generally agreed, in natural-law writing, that this right of rescission in the event of a breach of a compact was subject to one marginal caveat: that it was open to the makers of a compact, at the time of contracting, expressly to exclude rescission as a remedy for breach. In terms of the federal Union, the effect of such an express arrangement would be to make the Union a perpetual one in the strong sense rather than in merely the weak one. It was therefore necessary to the Southern thesis to insist that, in the case of the American Constitution, no such express provision had been made.

Another point to note is how different the legal quandary of the Southern states was from that of the American colonies in the 1770s, despite a certain amount of emotional appeal to the example of the Founding Fathers. The American colonists in the 1770s had alleged that they were oppressed by their lawful sovereign, the monarch of Great Britain. That is to say, they were reacting against an alleged abuse of powers by a political superior. Their action was therefore revolutionary in the strict sense that Benjamin had explained, in that it was an overthrowing a sovereign power that was prima facie lawful (though oppressive).

The Southern states were making a very different claim in 1860. They were not contending that the federal government was inflicting oppression upon them, in the manner of King George III in days of old. It could even be said that they were making the very opposite claim: that the federal government, far from being an oppressor, was actually, in effect, itself a victim of wrongdoing by the Northern states. It was a victim in the sense that its attempts to enforce the law of the land (i.e., of the Fugitive Slave Act) were being thwarted by lawless elements in the Northern states, with the more or less active collaboration of the state governments.

The legal grievances of the Southern states therefore had remarkably little to do with the federal government per se. This may

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66. *Id.* at 501.

67. *Id.*

appear surprising in light of the fact that the Civil War, as it unfolded, became a gigantic effort by the federal government to bring the rebellious Southern states to terms. Similarly, the post-Civil War period witnessed a long-term (if often rather low-key) struggle between the federal government and the Southern states over issues of “states’ rights” (most outstandingly, of course, concerning the civil and political rights of ex-slaves and their descendants in the Southern states). But it was only with the adoption of the Fourteenth Amendment to the Constitution in 1870, with its grant to the federal government of a degree of supervisory power over the states, that the grand contest between federal rights and states’ rights came to assume its familiar modern form.<sup>68</sup>

On the eve of the Civil War, the Southern leaders were champions of states’ rights in a very different way. They were championing the rights not so much of the states vis-à-vis the federal government, but rather rights of one class of states against another class of states—i.e., the rights of the class of law-abiding states against the class of nullifying states. Far from struggling against a usurpatious federal government—as had been the case in the nullification crisis of the 1830s—the Southern states were now staunchly on the side of that same federal government, seeking to prevent the Northern states from, in effect, following nullification policies of their own against the Fugitive Slave Act.

### C. *The necessity of self-judgment*

The third key conceptual pillar of the Southern argument for the lawfulness of secession lay in the right of parties to a dispute—still under the authority of general natural law—to determine for themselves when their own rights had been infringed. Few legal clichés would win readier consent than the proposition that a person should not be the judge in his or her own cause.<sup>69</sup>

In the natural-law tradition, however, there was venerable authority for holding this proposition to be importantly restricted in scope: to disputes which occur in politically organized society. In those cases, it is the duty of the disputants to submit to the judgment of their sovereign.

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68. For a general historical survey of the Fourteenth Amendment, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (2d ed. 1997).

69. See THOMAS HOBBS, *LEVIATHAN, OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL* 84-85, 93-103 (Michael Oakeshott ed., 1957) (1651). See also THOMAS HOBBS, *DE CIVE, OF THE CITIZEN* 43-59 (Sterling Lamprecht ed., 1949) (1642).

For persons in a state of nature (i.e., in the absence of such a sovereign), however, this principle cannot apply because, by definition, there is no sovereign. In such a situation, there can be no alternative to allowing each party to a dispute to reach its own judgement as to when its rights have been violated. Rousseau expressed a similar view. In the absence of a judge with jurisdiction over a dispute, he posited, “the parties would be sole judges in their own cause.”<sup>70</sup>

In his discussion of this point, Locke was under no illusion that this state of affairs was unsatisfactory, for the obvious reason that each party will naturally insist on the rightness of its own position.<sup>71</sup> It is for just such a reason that a politically organised society is preferable to a state of nature. But so long as the state of nature persists, there simply is no alternative to allowing self-judgment of disputes. The only consolation that Locke could offer was to assure his readers that persons in the state of nature who abused this prerogative would be “answerable for it to the rest of mankind.”<sup>72</sup>

In the 1860-61 crisis, Benjamin articulated this position. Political disputes, he contended, are, in general, not justiciable—not necessarily because they are inherently incapable of being decided by courts, but rather because of the absence of any court possessing the requisite jurisdiction.<sup>73</sup> In this situation, Benjamin contended, “natural law and the law of nations” dictates that the state parties to the Constitutional compact must judge their own injuries themselves.<sup>74</sup>

This characterisation of the dispute between the slave and free states as a political question naturally calls to mind the political-question doctrine in general Constitutional jurisprudence. But there was an important difference. The political-question doctrine in general Constitutional law refers, basically, to issues which, by their nature, are not susceptible of judicial resolution. Such questions must therefore be hammered out by other branches of the government through normal political processes.<sup>75</sup> The dispute between the slave and free states in 1860-61 was not, however, of that character. As a straightforward claim of breach of compact, it would seem eminently suitable for judicial resolution—if, that is, a court were at hand with jurisdiction to hear the

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70. ROUSSEAU, DISCOURSE, *supra* note 58, at 96-97.

71. Locke, *Second Treatise*, *supra* note 49, at 121.

72. *Id.*

73. Benjamin, *Right of Secession*, *supra* note 3, at 107.

74. *Id.*

75. See *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). For the leading modern exposition of the doctrine, see *Baker v. Carr*, 369 U.S. 186 (1963).

case. The general political-question doctrine, in other words, requires an initial finding that a dispute, by its nature, is political, with the consequential effect that courts are then deprived of a jurisdiction which they would otherwise have had. That is to say, courts lack jurisdiction because the issue at hand is political. In the secession crisis, the conceptual arrow of causation pointed in the opposite direction: the question of a breach of compact was a political one, not because of its intrinsic character, but only because of the absence of jurisdiction by courts, so that the issue became political by virtue of that absence of jurisdiction.

In all events, support for self-help action on the part of states that were victims of violations of the Constitution went as far back as the *Federalist Papers*, in which Hamilton had considered the hypothetical case of usurpation of state powers by either the federal government or the states.<sup>76</sup> The solution, he proposed rather vaguely, was that each of these political bodies would naturally “stand ready to check the usurpations” of the other.<sup>77</sup> And the issue between them would be decided, ultimately, by “[t]he people,” who would support one side or the other as they judged best.<sup>78</sup> Moreover, if the rights of “the people” were to be invaded by, say, the federal government, then the remedy (again rather vaguely) would be for the aggrieved “people” to “make use of” their state government to “adopt a regular plan of opposition” against the impending oppression.<sup>79</sup> Conversely, if the offending government was the state, then the “people” would react by lending their support to the federal government. If more than one state was a victim of federal encroachment, then the affected states could combine their efforts and thereby render resistance more effective.

The important point to note about Hamilton’s thesis is that it envisaged political, rather than judicial, action against usurpations of power under the Constitution. He made no attempt to pretend that any court would have jurisdiction to resolve the matter. The basic theory, therefore, was one of countervailing political powers. In such a system, there was simply no alternative to self-judgment on the part of the contending parties. Each was necessarily left to determine for itself when its own rights had been infringed, and in the event of clashing opinions on the matter between different branches or levels of

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76. THE FEDERALIST NO. 28 (Alexander Hamilton).

77. *Id.*

78. *Id.*

79. *Id.*

government, the decision must rest ultimately—somehow or other—with the “people.”

It is true that Hamilton’s immediate concern was with a conflict between the federal government and one or more states (as in the case of the nullification crisis of the 1830s). But at the heart of his argument, if only implicitly, was the thesis that, in the absence of jurisdiction by any court, a clash between governments within a federal system could only be resolved by political means—and this process inevitably and necessarily entailed self-judgment by the contending parties.

*D. Applying the facts of 1860-61 to the law*

As the fourth and final step in the making of the legal case for secession, it only remained to apply the facts of the case to the legal framework just outlined—i.e., to establish that the terms of the federal compact had in fact been violated by the Northern states. In the eyes of the secession advocates, that was the easiest step of all. Foremost amongst the accusations against the Northern states were allegations of violation of the Fugitive Slave Act, that notorious centerpiece of the Compromise of 1850.

The 1850 Act did not, of course, come out of a vacuum. The Constitution itself had made explicit provision on the subject, setting out the general principle that an escaping slave could not thereby be discharged from his “Service or Labour.”<sup>80</sup> In other words, the act of escaping did not alter a slave’s legal status as a slave or deprive the master of his rights incidental to ownership. The Clause also provided that an escaping slave “shall be delivered up” upon claim by the master.<sup>81</sup> Only in 1850, though, did Congress enact legislation setting up a permanent system of commissioners charged specifically with the capture and return of slaves—a system which, crucially, operated in the territory of the free states.

The essence of the Southern case for secession, then, was that the Northern ones were in breach of the Constitutional compact because of their attempts to nullify federal law by interfering with enforcement of the Fugitive Slave Act. With scrupulous exactitude, the Georgia politician Howell Cobb maintained that ten states of the Union “have interposed their strong arm to protect the thief, punish the owner [of

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80. U.S. CONST. art. IV, § 2.

81. *Id.*

slaves], and confiscate the property of a citizen of a sister State.”<sup>82</sup> This amounted, he insisted, to “the plain and palpable violation of the constitutional compact” on the part of these ten “nullifying States” (as he bluntly designated them).<sup>83</sup> Stephens, in a similar vein, contended that thirteen of the Northern states had “openly and avowedly disregarded their obligations” under two key provisions of the Constitution: the Fugitive Slave Clause, and the Extradition Clause.<sup>84</sup> The result was that, “by public law they [the Southern states] had a perfect right to withdraw” from the Union.<sup>85</sup> The Virginians were not to be outdone in this regard. R. M. T. Hunter accused the Northern states of waging “a regular warfare” against the Southern slave system, “the practical effect of which was to nullify the fugitive slave law.”<sup>86</sup>

These same accusations appeared in official form in the declarations issued by several of the Southern states on the causes of secession. The South Carolina Declaration, for example, asserted that fourteen of the free states “have deliberately refused, for years past, to fulfil their constitutional obligations, and as a result, “the laws of the General Government have ceased to effect the objects of the Constitution.”<sup>87</sup> The Declaration went on to state the legal essence of the Southern position with exquisite precision:

We maintain [proclaimed the South Carolina secession convention] that in every compact between two or more parties, the obligation is mutual; that the failure of one of the contracting parties to perform a material part of the agreement, entirely releases the obligation of the other; and that, where no arbiter is provided, each party is remitted to its own judgment to determine the fact of failure, with all its consequences.<sup>88</sup>

The declaration of the causes of secession issued by Georgia was particularly eloquent on this subject. Claimants of fugitive slaves, it proclaimed, “are murdered with impunity; officers of the law are beaten

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82. Cobb, *Letter . . . to the People of Georgia*, in WAKELYN, SOUTHERN PAMPHLETS, *supra* note 3, at 88, 90, 94.

83. *Id.*

84. 1 STEPHENS, CONSTITUTIONAL VIEW, *supra* note 2, at 497.

85. 2 STEPHENS, CONSTITUTIONAL VIEW, *supra* note 2, at 261-62.

86. Hunter, *Speech . . . on the Resolution Proposing to Retrocede the Forts . . . Delivered in the Senate of the United States, Jan 11, 1861*, in WAKELYN, SOUTHERN PAMPHLETS, *supra* note 3, at 262, 264.

87. *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, Dec. 24, 1860, in COMMAGER, DOCUMENTS, *supra* note 30, at 372, 373.

88. *Id.* at 373.

by frantic mobs instigated by inflammatory appeals from persons holding the highest public employment in these States, and supported by legislation in conflict with the clearest provisions of the Constitution, and even the ordinary principles of humanity.”<sup>89</sup> In broadly similar, if slightly more measured terms, Mississippi’s declaration asserted that the hostility of Northern populations “has nullified the Fugitive Slave Law in almost every free State in the Union, and has utterly broken the compact which our fathers pledged their faith to maintain.”<sup>90</sup> The Texas declaration solemnly asserted “that the federal constitution has been violated and virtually abrogated” by the Northern states.<sup>91</sup>

#### IV. CONCLUSION

It only remains to make two final, and related, observations relating to some broader aspects and implications of the secession experience of 1860-61. The first concerns the fate of the compact theory of the federal Union, that essential conceptual foundation-stone of the secessionist case. In 1871, Justice Joseph P. Bradley of the federal Supreme Court pronounced it to have been “definitely and forever overthrown.”<sup>92</sup> What Justice Bradley tactfully left unmentioned was that overthrow had taken place on the fields of battle rather than in the panelled rooms of courts or legislatures. The question of the nature of the federal Union, in event, proved to be neither a judicial nor a political question, but a military one.

The compact theory became, in other words, a sort of specialised juridical version of the Lost Cause of Southern independence in general. But there is a further, and little noted, parallel between the legal situation and the general political fate of the South. Just as Southerners regained much of their political strength after the War and Reconstruction—sufficient to delay the enjoyment of effective civil rights for Southern blacks for nearly a century—so also did at least some of their legal arguments live on for years to come.

In particular, appeals to natural law and related principles in support of existing social and economic arrangements, far from dying

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89. Declaration of the Causes of Secession of Georgia, Jan. 29, 1861, 1 (ser. 4) OR 81-85.

90. *A Declaration of the Immediate Causes which Induce and Justify the Secession of the State of Mississippi from the Federal Union, Jan. 9, 1861*, in JOURNAL OF THE STATE CONVENTION 86-88 (Jackson, State Printer, 1861).

91. *A Declaration of the Causes which Impel the State of Texas to Secede from the Federal Union, Feb. 2, 1861*, in JOURNAL OF THE SECESSION CONVENTION OF TEXAS 61-66 (E.W. Winkler ed., 1912).

92. See, for example, the concurring opinion of Justice Bradley in *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 555 (1871) (Bradley, J., concurring).



out after the Civil War, lived a long and robust life. Not any longer, of course, in support of the specific institution of slavery. But natural-law arguments continued to be regularly invoked as buttresses of the status quo—for example, in support of the principle of unlimited freedom of contract (against social-welfare legislation) and of the rights of property holders (against various forms of wealth redistribution and government regulation). This was in sharp contrast to the appeal to natural law by political liberals and revolutionaries in the seventeenth and eighteenth centuries—including, notably, the American colonies in their quest for independence. How it was that so dramatic a change occurred in so short a period of time is one of the yet-untold stories of the history of jurisprudential thought. The Southern arguments for the lawfulness of secession should therefore be seen, not as mere historical curiosities—interesting though they undoubtedly are in that regard—but also as part of a far more general, and largely successful, effort to enlist the law of nature on the side of the forces of conservatism.