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SAVING THE CONSTITUTION: LINCOLN, SECESSION, AND THE PRICE OF UNION

Craig S. Lerner*

LINCOLN'S CONSTITUTION. By *Daniel Farber*. Chicago: University of Chicago Press. 2003. Pp. ix, 240. \$27.50.

The year is 1860. After failing to obtain, as he had expected, the Democratic Party nomination for President at its Charleston convention, Stephen Douglas abandons his candidacy. In the ensuing election, Democrat John C. Breckinridge of Kentucky edges Republican Abraham Lincoln.¹ The official platform of the Democratic Party includes endorsement of the *Dred Scott* decision, slavery's expansion in the federal territories, rigorous enforcement of the Fugitive Slave Act, and elimination of the tariff. Abolitionists in New England are inconsolable. For several years, Henry Lloyd Garrison had advocated Northern secession, denouncing the Constitution as a "union with slaveholders," and "a covenant with death and an agreement with Hell."² Funded by industrialists who see

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1. Douglas had been expected to receive the Democratic Party's nomination for president in 1860, but at the convention in Charleston southerners revolted and eventually rallied around Breckinridge instead. See Peter Knupfer, *James Buchanan, the Election of 1860, and the Demise of Jacksonian Politics*, in JAMES BUCHANAN AND THE POLITICAL CRISIS OF THE 1850s (Michael J. Birkner ed., 1996). Douglas's decision to run as a "Northern Democrat" splintered the anti-Lincoln vote. See Dep't of the Interior, Map of the Presidential Election of 1860, http://teachpol.tcnj.edu/amer_pol_hist/thumbnaill189.html (last visited June 30, 2004). In the actual tally, Lincoln won 180 electoral votes (40% of popular vote), Breckinridge 72 (18%), Constitutional Union candidate John Bell 39 (12%), and Douglas 12 (30%). Had Douglas not run, Breckinridge would likely have won Virginia (15 electoral votes), Kentucky (12) and Tennessee (12), all of which were taken by John Bell. He would also have won the two states taken by Douglas, Missouri (9) and Delaware (3), and two of the states claimed by Lincoln, California (4) and Oregon (3). The most far-fetched aspect of this hypothetical world is that Breckinridge wins Pennsylvania. In the actual results, Lincoln won 268,030 votes to Breckinridge's 178,871. Even if we give all of Douglas's votes (16,765) to Breckinridge, he would still trail by a substantial margin. But assuming that New Yorker William Seward, who had been the original front-runner for the Republican nomination, had declined to throw his zealous support behind Lincoln (which he did after being promised a cabinet position), then Lincoln's showing in the mid-Atlantic region would have been considerably impaired. Voila: Breckinridge pulls out a razor-thin victory in Pennsylvania, claiming its 27 votes. The final electoral tally: Breckinridge 157, Lincoln 153.

2. For a sample of Garrison's incendiary rhetoric, see WILLIAM LLOYD GARRISON, *DISUNION* (1855), <http://teachingamericanhistory.org/library/index.asp?document=567>.

no advantage in remaining in a tariff-free Union, Garrison rallies abolitionists in Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, and New York, and the seven states formally secede from the Union. President Breckinridge convenes a Special Session of Congress on July 4, 1861, and proclaims: "The States have their status in the Union, and they have no other legal status. If they break from us, they can only do so against law and by revolution."³ Before receiving authorization from Congress, Breckinridge calls up 75,000 troops and promises an invasion of New England. Also without congressional approval, Breckinridge suspends habeas corpus in "border states" like Pennsylvania and Delaware, summarily dispatching hundreds of citizens to prison.

In this hypothetical world, who would we say is in the right — the seceding states or the President? Would preserving the Union justify the slaughter of over 600,000 men, an assault on civil liberties, the devastation of the national economy, and the subjugation of one region of America to rule by the other for over a decade? If President Breckinridge had, on a blood-soaked battlefield, touted the war as a struggle to ensure "that government of the people, by the people, for the people shall not perish from the earth," would we be persuaded, or would we construe in such words a poetic inversion of the truth?

It is difficult for Americans today to take seriously the legal claims in favor of a right of secession. The cause of secession in 1860 became commingled with a defense of slavery, and our repugnance for that institution carries over into our rejection of secession. Furthermore, there is a sense among many Americans that our country has, on balance, had a salutary influence on global affairs. Any suggestion that we might have been better off as separate nations prompts a lecture on the United States' role in the twentieth century as an agent of freedom and the inevitable lament that, had America not been united, Germany would have won World War II. The argument, however flawed,⁴ often suffices to cut short any argument over the merits of secession and Union.

As Daniel Farber⁵ writes in *Lincoln's Constitution*, "we must . . . put aside our revulsion against the Confederacy's proslavery aims. Whether the Constitution provides states with an exit option does not

3. President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), <http://www.founding.com/library/1body.cfm?id=547&parent=63> [hereinafter Lincoln, Message to Congress].

4. A divided America might not have entered, or perhaps would have only partially entered, World War I. Absent American intervention, the warring parties might have sought a negotiated truce. And without the punitive Treaty of Versailles, perhaps one could say: no Nazism, no World War II, no Holocaust, etc.

5. Sho Sato Professor of Law, University of California-Berkely and Henry J. Fletcher Professor of Law, University of Minnesota.

depend on the state's motivation[.]” (p. 81). Farber's book (and this Review) are framed around two broad issues: First, did the South have the right — either under the Constitution or some higher law — to secede; or, as Lincoln argued, is “perpetuity . . . implied . . . in the fundamental law of all national governments”?⁶ Second, were Lincoln's actions to preserve the Union consistent with the Constitution; or did he exceed the powers delegated to him as the chief executive? From a reviewer's point of view, *Lincoln's Constitution* is a frustrating book: Farber is generally balanced in his presentation of conflicting views, and measured and fair in his conclusions. How much easier my task would be if Farber had chosen sides, and declared himself in the camp of those who venerate Lincoln⁷ or abhor him.⁸

Farber's book is, nonetheless, unmistakably the work of a law professor and not a historian. Farber is less interested in resolving historical disputes than in analyzing the legal questions that confronted Lincoln — principally of secession and civil liberties. Often, however, the legal questions are enmeshed in historical disputes, and in these instances Farber typically supplies citations to secondary literature for his controversial historical claims. And even this much is sometimes missing. Farber mentions in passing that “[General] Sherman's reputation [for brutality] is exaggerated” (p. 23), but he supplies no footnote to support a claim that would be received in certain quarters in Atlanta with astonishment.⁹ Yet whatever fascination the Civil War may hold for us as citizens and historians, as lawyers there is a nagging sense of: so what? It has long since been decided that the states do not have a right to secede;¹⁰ and

6. See First Inaugural Address (Mar. 4 1861), <http://www.founding.com/library/lbody.cfm?id=327&parent=63> [hereinafter, Lincoln First Inaugural].

7. See, e.g., HARRY V. JAFFA, *A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR* (2000).

8. See, e.g., THOMAS J. DILORENZO, *THE REAL LINCOLN: A NEW LOOK AT ABRAHAM LINCOLN, HIS AGENDA AND AN UNNECESSARY WAR* (2002).

9. Sherman himself might have been surprised by Farber's judgment: In his official report on the March to the Sea, Sherman calculated the total damage as \$100,000,000, an astronomical sum for 1864, and of which, by Sherman's own estimate, only 20% achieved any military advantage for the Union; the remainder was “simple waste and destruction.” RICHARD WHEELER, *SHERMAN'S MARCH* 131 (1978) (quoting Sherman's official report on the march). Farber also contends that, with respect to Lincoln, “charges [of dictatorship] were exaggerated,” p. 20, and that “[r]oughly five percent of the military trials [he approved] took place in uncontested territory” in the North, p. 164. In reaching these conclusions, Farber seems to rely upon Mark Neely's fascinating work on the subject. MARK E. NEELY JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991).

10. See, e.g., *Texas v. White*, 74 U.S. 700, 726 (1868) (“When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And

whatever Lincoln's excesses as President, what's done is done. Farber's sensible response is that the issue of secession, while in one sense of antiquarian interest, still compels us to reflect upon the nature of executive power in times of crisis and to consider whether there are legitimate grounds to compel state participation in our federal government.

Lincoln's Constitution is an admirable summary of many of the constitutional arguments associated with Lincoln's name. Whether, under the Constitution, the states have a right to secede, or, correlatively, whether the National Government has the right to use force to prevent the dissolution of the Union are interesting questions. More provocative, however, are the moral and philosophical issues that lie behind the legal debate: when one people should be free to set up a new government, even at the expense of an existing one; and when, conversely, a nation should acquiesce in its dismemberment rather than compel a segment of the population to remain against its wishes. In other words, even if the Constitution ratified in 1789 was intended to foreclose a right of secession, might there be circumstances in which a President should allow a section of the nation, no longer linked by interest and opinion to the rest, to simply leave in peace? In the early days of the American republic, this question was bandied about constantly in American political discourse; since the Civil War, however, it has utterly disappeared. This fact testifies to the extent to which the regime that has emerged from Lincoln's presidency is not quite the one that entered it; and shows how an almost-mystic devotion to the nation's territorial integrity has numbed critical reflections on the moral and philosophical premises that underlie the modern American regime's refusal to countenance a right of secession.

I. A RIGHT OF SECESSION?

From the earliest days of the republic, Americans debated whether the states had the right to nullify federal laws or, more dramatically, secede from the Union.¹¹ Although Farber's account suggests that

it was final.”).

11. One commentator has noted:

In the first half of the nineteenth century, Northerners and Southerners alike manipulated state sovereignty principles to serve their immediate political objectives. When the War of 1812 threatened New England's shipping and commercial interests, New England Federalists called the Hartford Convention to consider seriously the wisdom of secession. Twenty years later, when the “Abominable Tariff” of 1832 was enacted, South Carolinians preached John C. Calhoun's doctrine of nullification. In another twenty years, radical northern abolitionists embraced nullification principles in order to defeat the operation of the Fugitive Slave Act of 1850.

Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 91 n.160 (1989). For a sketch of secession and nullification movements in American

secessionism was a southern phenomenon,¹² the rallying cry was at various times sounded throughout the nation. A biographer of John Calhoun suggests a delicious irony — that the young Calhoun, destined to become the leader of southern nullification movements, first heard secessionist arguments from the Reverend Timothy Dwight, the arch-Federalist president of Yale College, during Jefferson's presidency.¹³ With Virginians claiming the Presidency in the early nineteenth century, an embittered New England seized upon various causes to threaten secession, culminating in the Hartford Convention of 1815.¹⁴ Soon the southerners would raise the banner of secession, first over tariffs designed to protect northern manufacturers at the expense of southern consumers, and eventually over the congeries of issues that clustered around slavery (e.g., the enforcement of the Fugitive Slave Act, the use of the mails to spread abolitionist literature, and the expansion of slavery into the territories).¹⁵

In his analysis of secession, Farber follows a roughly chronological approach. He first considers whether the states were sovereign political entities prior to the ratification of the Constitution (pp. 26-44), then turns to the development, in the early years of the republic, of the doctrine of state nullification. This doctrine prefigured the full-blown secession movements of the mid-nineteenth century (pp. 45-69). Farber concludes with the question of secession proper, considering it first as a constitutional right (pp. 70-91), and then as a right of rebellion (pp. 92-114).

history, including Northern movements, see Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229, 1242-54.

12. Farber begins his history of secession movements, pp. 8-25, with the Wilmot Proviso debate in 1849, thus glossing over earlier New England secession movements. Although Farber acknowledges in a footnote that northern secession movements arose “[a]t various times in the nineteenth century,” p. 215 n.27, in the text he treats secession as an exclusively southern phenomenon, see, e.g., p. 21 (“Since 1800, Southerners had been arguing that the states had the ultimate sovereign right to interpret the Constitution.”). Others have noted New England's flirtations with secession:

Never mind that New England's law-abiding statesmen retreated into states' rights theorization after losing to Jefferson in 1800 or that they defied national law on a massive scale during the War of 1812, and took their section to the brink of secession in the Hartford Convention. New England rediscovered nationalism again in the 1820s when it suited its economic interests.

R. Kent Newmyer, *John Marshall, McCulloch v. Maryland, and the Southern States' Rights Tradition*, 33 J. MARSHALL L. REV. 875, 932 (2000).

13. See MARGARET L. COIT, JOHN C. CALHOUN 28 (1950).

14. See generally JAMES M. BANNER JR., TO THE HARTFORD CONVENTION: THE FEDERALISTS AND THE ORIGINS OF PARTY POLITICS IN MASSACHUSETTS 1780-1815 (1970).

15. See generally DAVID M. POTTER, THE IMPENDING CRISIS: 1848-1861 (Henry Steele Commager & Richard B. Morris eds., 1976).

A. *The States as Sovereigns*

The secession argument hinges in part on the claim that the states were independent sovereigns prior to ratifying the Constitution and that they should therefore be able to reclaim their political independence. If, however, the states were never sovereign entities, then the case for the right to secede loses one of its fundamental premises. Thus did Lincoln argue in his Special Address to Congress on July 4, 1861:

Having never been States, either in substance or in name, outside of the Union, whence this magical omnipotence of "state rights," asserting a claim of power to lawfully destroy the Union itself? Much is said about the "sovereignty" of the States, but the word even is not in the national Constitution, nor, as is believed, in any of the State constitutions. What is a "sovereignty" in the political sense of the term? Would it be far wrong to define it "a political community without a political superior?" Tested by this, no one of our States, except Texas, ever was a sovereignty; and even Texas gave up the character on coming into the Union, by which act she acknowledged the Constitution of the United States and the laws and treaties of the United States made in pursuance of the Constitution to be for her the supreme law of the land.¹⁶

The argument in Lincoln's speech turns on a legal/political definition of sovereignty and a historical account of the nature of the states prior to the Constitution's adoption.

In assessing this definitional issue, Farber sifts through various ideas of sovereignty, concluding that "[s]ince the Constitution never expressly invokes the concept of sovereignty, it is only indirectly relevant to constitutional interpretation" (p. 44). Although it is true that the Constitution never uses the word, the idea is embedded in Article VII: "The Ratification of the Conventions of nine States, shall be sufficient for the establishment of this Constitution *between the States so ratifying the Same*."¹⁷ The Constitution thus contemplates the possibility that one, two, or three states would exist outside the Union. If so, would not each of those states be "a political community without a political superior"?¹⁸

In his assessment of Lincoln's historical account, Farber marshals only a sampling of the evidence for and against before dismissing it as "ambiguous" (p. 44). He notes that on the one hand, the Declaration of Independence speaks of the colonies as "Free and Independent States" (p. 35) and, in this vein, Luther Martin argued at the

16. Lincoln, Message to Congress, *supra* note 3.

17. U.S. CONST. art. VII (emphasis added).

18. In fact, the Constitution went into effect in March 1789, but North Carolina and Rhode Island did not ratify the Constitution until November 1789 and May 1790. For about a year, the United States treated these two states as separate sovereigns.

Constitutional Convention that the colonies were, after severing ties with England, “in a state of nature towards each other,” each to be regarded as “separate sovereignties” (p. 33). On the other hand, in support of Lincoln’s view, James Wilson argued at the Convention that the colonies, having separated from the Crown, “were independent, not *Individually* but *Unitedly*” (p. 35).

Wilson’s view, embraced later by Lincoln, is hardly a frivolous position. After all, the former colonies that would later constitute the United States did not have a long history of independent existence as, for example, Norway did, when it seceded from Sweden in 1905. Yet each of the colonies could trace its origins back to separate grants from the Crown; each had evolved with relatively distinctive indigenous political and cultural institutions; and there is considerable evidence that, at least for some Americans, allegiance to their local government trumped allegiance to the fledgling union.¹⁹

In the historical debate on the status of the states, Farber ultimately positions himself in the middle — with Lincoln at the one extreme (denying that the states were ever sovereign entities) and John Calhoun at the other extreme (insisting that the states were and remained sovereign entities. Farber aligns himself with the “transformational view” that the states once possessed sovereignty but the Constitution created a “new sovereign . . . a new social compact among the American people as a whole” (p. 30). Stated in these terms, the middle position is so uncontroversial that it is uncertain who could quibble with it. Indeed, one question is whether Lincoln genuinely believed the position set forth in the July 4, 1861, Special Address to Congress, in which he so intransigently denied any independent status to the states prior to the ratification of the Constitution. One possibility is that Lincoln’s speeches are best understood in the

19. Some states had more meaningful claims to an independent status than others. The state of Virginia, for example, declared its independence from the Crown in June 1776, and even enacted its own Bill of Rights and Constitution. Jefferson, in his *Notes on Virginia*, is generally dismissive of Virginia’s 1776 Constitution. See Thomas Jefferson, *Note on the State of Virginia*, in *THE PORTABLE THOMAS JEFFERSON* 153-76 (Merrill D. Peterson ed., 1986), but his view was likely a minority one at the time. See K.R. CONSTANTINE GUTZMAN, *OLD DOMINION, NEW REPUBLIC: MAKING VIRGINIA REPUBLICAN, 1776-1840*, at 10-13 (University of Virginia Doctoral Dissertation, 1999). The view that Virginia, as well as the other colonies, were independent sovereigns prior to the formation of the Union, was adopted by Supreme Court Justice Samuel Chase thirty years later:

In June, 1776, the convention of Virginia formally declared Virginia was a free, sovereign, and independent state; and on the 4th of July, 1776, following, the United States, in Congress assembled, declared the Thirteen United Colonies free and independent states; and that as such, they had full power to levy war, conclude peace, etc. I consider this as a declaration, not that the United Colonies jointly, in a collective capacity, were independent states, etc. but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power upon earth.

Ware v. Hylton, 3 U.S. 199, 224 (1796).

context in which they were delivered — that is, as political speeches, not law-review articles. His imperative need in the spring of 1861 was to rally the Union to war; and in such endeavors political leaders need to make the most persuasive arguments, which may not be the intellectually soundest.

Another possibility, suggested by Akhil Amar, is that Lincoln's background as a man of the frontier, a mongrel descendant of men and women of assorted states and federal territories, clouded his judgment and rendered him disposed to conclude that the "Union did indeed come first logically and chronologically" to the states.²⁰ What at first glance seems problematic about Amar's suggestion is that persons with self-awareness eventually cast aside, to some extent, their own heritage in grasping at ultimate truths; and Lincoln was, in terms of self-awareness, off the charts.²¹ Then again, perhaps towering geniuses have blind spots that we lesser mortals are spared. As Alexander Stephens, Vice-President of the Confederacy and one-time friend of Lincoln, said of him: "The Union, with him, in sentiment rose to the sublimity of a religious mysticism."²²

B. *From the Kentucky and Virginia Resolutions to the Nullification Crisis*

In Chapter Three, Lincoln recedes from the scene, and Farber bustles the reader through a collection of debates in the early republic over the relative status of the states and the federal government. Farber here casts Madison, Hamilton, John Marshall, and Joseph Story on one side, defending the federal government; John Calhoun on the other side, asserting the prerogatives of the states; and Jefferson flitting here and there with no discernible compass to guide him.²³

20. Akhil Reed Amar, *The David C. Baum Lecture: Abraham Lincoln and the American Union*, 2001 U. ILL. L. REV. 1109, 1126. Amar elaborates:

[Lincoln's] forbears came from several states — Kentucky, Virginia, Pennsylvania, and possibly New England as well, though Lincoln was not quite sure. He himself had lived in three states — born in Kentucky, moving to Indiana at age seven, and then on to Illinois as a young man. . . . When we remember where Lincoln was quite literally coming from, it is easier to understand (whether or not we ultimately endorse) his repeated insistence that "[t]he Union is much older than the Constitution."

Id.

21. Consider his Lyceum Address of 1838, delivered when he was only 28 years old, on the amorality of ambition. Lincoln's speech is almost surely an oblique critique of the potential dangers men such as himself, men of "towering ambition," may pose to the established social order.

22. ALEXANDER STEPHENS, *A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES* (1868).

23. As Madison delicately noted of his good friend, "Allowances also ought to be made for a habit in Mr. Jefferson as in others of great genius of expressing in strong and round

The Chapter opens with a discussion of the Kentucky and Virginia Resolutions, drafted in protest to the Alien and Sedition Acts of 1798 by Jefferson and Madison respectively (pp. 45-50). Although both resolutions argued that states can evaluate for themselves the constitutionality of federal laws, Farber argues that they fell short of asserting a right by an individual state to annul a federal law. The power asserted by the states in those Resolutions nonetheless proved irksome to federal courts, as Farber then shows (pp. 50-57). Led by John Marshall²⁴ and Joseph Story,²⁵ courts asserted jurisdiction over the states whenever issues of federal law were raised, establishing a power that was probably implicit in the text of the Constitution²⁶ and avowed by Alexander Hamilton in *The Federalist*.²⁷ In this respect, the Supreme Court fulfilled the fears of the Anti-Federalists who argued that the Court would promote the growth of the national government by giving a sweeping interpretation to its enumerated powers.²⁸

Farber then turns to the nullification crisis of 1832, in which Calhoun renewed and extended the logic of the Kentucky and Virginia Resolutions (pp. 57-62). In quarrels with President Jackson, John Calhoun argued that an individual state should be authorized to nullify a federal law. Calhoun's nullification theory was self-consciously offered as an improvement upon the Constitution, rather than the realization of its original understanding, by providing additional assurances against the tyranny of the majority.²⁹ Jackson's colorful response was to threaten to hang Calhoun from the nearest tree. Elder-statesman Madison supplied counterarguments of a more intellectually satisfying nature (pp. 62-69). Dismayed by the use Calhoun had made of his Virginia Resolutions, a repentant Madison

terms, impressions of the moment." P. 68 (quoting a letter from James Madison to Nicholas Trist (May 1832)).

24. *Cohens v. Virginia*, 19 U.S. 264, 285 (1821) (arguing that the Union "would be a mere shadow, that must disappoint all [the peoples'] hopes, unless invested with large portions of that sovereignty which belongs to independent States").

25. *Martin v. Hunter's Lessee*, 14 U.S. 304, 343 (1816) (arguing that the under the Constitution "the states are stripped of some of the highest attributes of sovereignty").

26. See U.S. CONST. art. III, § 2.

27. See THE FEDERALIST NO. 79 (Alexander Hamilton).

28. See *Essays of Brutus*, in THE ANTI-FEDERALIST 163 (Herbert J. Storing ed., 1985) ("[T]he judicial power of the United States will lean strongly in favor of the general government and will give such an explanation [of] the constitution, as will favor an extension of its jurisdiction."); cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

29. Farber suggests a lineage for the states-rights views of Justice Thomas in the thought of antebellum states-rights thinkers such as Calhoun. Pp. 26-27. Calhoun's influence on modern legal thought can perhaps be more vividly seen among those thinkers and jurists who espouse a "living constitution," and specifically those who have argued that the original constitutional scheme insufficiently protects minority rights. See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1140 & n.303 (drawing upon Calhoun's theory of concurrent majorities).

clarified that nothing in them was intended to support a “constitutional right in an individual State to arrest by force the operation of a law of the U.S.” (pp. 69). Whatever the merits of nullification as a check against majority tyranny, one can reject it as not contemplated by the Constitution: to permit any state to refuse to enforce a federal law and yet to remain in the Union and draw all the usual benefits of statehood would transfigure the constitutional order, effectively trumping the amendment process.

Farber’s account of the nullification debates is elucidating, but the significance of this Chapter within the book’s larger argument is unclear. Of course, what Madison and Hamilton thought at the time they participated in drafting the Constitution, as well as afterwards, is important. But insofar as we seek to recover the original understanding of the Constitution, their views need not be dispositive. One should consult the writings of Madison and Hamilton, Justice Scalia has argued, “not because they were Framers . . . but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.”³⁰

Yet one might wonder just how typical their views in fact were in 1787. Indeed, Madison and Hamilton were relative outliers in their day insofar as they wished to dismantle the states and exalt the federal government. Madison, we should recall, proposed that Congress have the power to veto all state laws; and the Philadelphia Convention’s rejection of this constitutional provision led Madison to despair at the final product in a somewhat mournful letter to Jefferson written immediately after the Convention. We law professors tend to indulge the habit of citing the writings of Madison and Hamilton (especially *The Federalist*) as if it were a conclusive interpretative source, when in reality the median voter in 1787 might well have diverged significantly from the Constitution’s nominal “fathers” as regards its meaning and intent.³¹

Indeed, it is striking that, whatever Madison’s views on the issues, significant elements have clamored for nullification and even secession virtually from the republic’s inception. In 1803, several representatives from New England declared that they wanted out, appalled by the Louisiana Purchase and fearful that it portended a reduction of their power in the Union. The most significant New England secession movement — in 1815 — resulted in a convention and a list of demands

30. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997).

31. This point is suggested in Kevin Gutzman’s review of Farber’s book. See Kevin R.C. Gutzman, Book Review, L. & POL. BOOK REV., Jan. 2004, at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Farber104.htm>.

on President Madison.³² Some modern-day observers, such as Farber, follow Lincoln³³ and tend to suggest that Calhoun was the nefarious popularizer of the secession hoax, when the fact is that secessionists are as old as the republic itself.

Furthermore, there is a common assumption that secessionists were on the margins, whereas the mainstream was reflected in the thought of people like Joseph Story, whose 1830 *Commentaries on the Constitution* downplayed the status of the states and foreclosed a right of secession.³⁴ But this may simply be a case of winners writing the histories, for a once-respected, but now largely forgotten, constitutional treatise in 1825 asserted that the states had the right to secede.³⁵ Furthermore, our nation's most renowned foreign observer, Alexis de Tocqueville, who visited America in 1825, seemed to lend credence to the secessionist argument: "If today one of these same states wanted to withdraw its name from the contract, it would be quite difficult to prove that it could not do so. To combat it, the federal government would have no evident support in either force or right."³⁶

32. *Report of the Hartford Convention* (1815), in *THE AMERICAN REPUBLIC: PRIMARY SOURCES* 447-57 (Bruce Frohnen ed., 2002).

33. Lincoln clearly had Calhoun in mind when he launched into an attack on architects of secession theory in his Message to Congress in Special Session (July 4, 1861). Secessionists, Lincoln wrote, "invented an ingenious sophism, which, if conceded, was followed by perfectly logical steps, through all the incidents, to the complete destruction of the Union." *Id.*

34. Story argued:

Whatever, then, may be the theories of ingenious men on the subject, it is historically true, that before the declaration of independence these colonies were not, in any absolute sense, sovereign states; that that event did not find them or make them such; but that at the moment of their separation they were under the dominion of a superior controlling national government, whose powers were vested in and exercised by the general congress with the consent of the people of all the states.

JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 202 (1830); see also H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 *YALE L.J.* 1285, 1303-06 (1985) (summarizing Story's criticisms of nullification and secession arguments).

35. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 211-17 (1825), available at http://www.constitution.org/wr/rawle_32.htm (arguing that if "the people of a state should determine to retire from the Union," the national government could not prevent them).

36. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 354 (Harvey C. Mansfield & Delba Winthrop trans., 2000). The famous English lawyer Lord Brougham similarly wrote:

There is not, as with us, a government only and its subjects to be regarded; but a number of Governments, of States having a separate and substantive, and even independent existence. . . . It is plainly impossible to consider the Constitution which professes to govern this Union, this Federacy of States, as anything other than a treaty.

HENRY LORD BROUGHAM, *POLITICAL PHILOSOPHY* 336 (2d ed. 1849), quoted in Donald W. Livingston, *The Secession Tradition in America*, in *SECESSION, STATE & LIBERTY* 13 (David Gordon ed., 2002).

C. *Secession as a Constitutional Right*

In Chapter Four, Farber turns to the question of secession proper, which he notes “is actually a tougher legal issue than nullification Compared with nullification, secessionism requires less distortion of the constitutional structure — it merely adds an exit option” (p. 70). Various constitutions have affirmed, some disingenuously, the propriety of secession. The Constitution of the U.S.S.R., for example, provided that “[e]ach Union Republic shall retain the right freely to secede from the USSR.”³⁷ The proposed Constitution of the European Union likewise provides that “[a]ny Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements.”³⁸ A comment on this section notes that “many [drafters] consider that it is possible to withdraw even in the absence of a specific provision to that effect.”³⁹ Indeed, the drafters of the Confederate Constitution deliberately omitted any reference to a right of secession because its inclusion might suggest that the right was not implicit in the United States Constitution.⁴⁰

Although the text of the U.S. Constitution is silent on the question of a state’s right to secede, Farber argues that it “looks much more like an organic document . . . than a treaty” (p. 81). Although true, the question remains: which textual provisions so thoroughly eviscerate the sovereignty of the states that they are no longer entitled to reclaim their sovereignty? Farber notes that the Constitution’s preamble speaks of a “‘more perfect Union.’ . . . [Additionally, t]he Articles of Confederation claimed ‘to be perpetual,’ and a more temporary union could hardly be considered more perfect than a permanent one” (p. 86). One could counter by noting that the authors of the Constitution declined to include the word “perpetual,” which, in contrast, appears several times in the Articles of Confederation. Perhaps this deliberate omission reflected sheepishness at the fact that less than a decade after entering into a “perpetual” union, Americans dismantled that government to form another, more perfectly designed to promote the public good. Furthermore, Farber’s claim that a perpetual political union is necessarily “more perfect” seems deeply

37. KONST. SSSR [Constitution (Fundamental Law)] art. 72 (U.S.S.R. 1977), available at <http://www.departments.bucknell.edu/russian/const/77cons03.html>.

38. Draft Treaty Establishing a Constitution for Europe, July 18, 2003, art. I-59.

39. *Id.* Comment on Article I-59. It should be noted that some members of the body drafting the Constitution have opposed this provision. See, e.g., Ernani Lopes & Manuel Lobo Antunes, Suggestion for amendment of Article I-59, at http://european-convention.eu.int/Docs/Treaty/pdf/46/46_ArtI%2059%20Lopes%20EN.pdf (“[W]e propose that this article be deleted. In our view, the nature of the Union is not compatible with such an exit clause.”).

40. See CONFEDERATE CONST. (1861), available at <http://www.usconstitution.com/ConfederateConstitution.htm>.

Hobbesian in its preference for order — any political order — to the instability that may arise when people seek to improve their political condition.

Farber also suggests that the Constitution's Supremacy Clause⁴¹ weighs against a right of secession. As he persuasively notes, those defending the right of secession must read this clause with the proviso, "except an ordinance of secession" (p. 87). Yet one could argue, as in fact Farber does earlier, that "[s]ecessionist theory... is not inconsistent with a qualified form of federal supremacy. Under this view, a state must fully comply with federal law so long as it remains in the Union, just as a citizen must comply with federal law or emigrate elsewhere" (p. 70). Similarly, with respect to the Republican Guarantee Clause⁴² one could argue that the most natural reading of the clause is that the states, as long as they are part of the Union, must maintain a "republican" form. It is, moreover, doubtful that the Republican Guarantee Clause supplied any ammunition for an invasion of the South, given that the states that comprised the Confederacy were "republican" in form, at least as the framers of the Constitution understood the term. To be sure, slavery existed in the southern states, but it also existed in most of the states in 1787, which apparently did not disrupt the framers' belief — however jarring to the modern observer — that slavery and republicanism can co-exist. For that matter, Delaware was a slave state that remained in the Union, and Lincoln never abolished slavery there.⁴³ Indeed, the Republican Guarantee Clause might well cut in favor of a right of secession, for it suggests that the federal government does not have the authority to impose an undemocratic government on a state when the majority of its citizens have voted to secede.⁴⁴

41. U.S. CONST. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

42. U.S. CONST. art. IV, § 4, cl. 1. Lincoln stated:

The Constitution provides, and all the States have accepted the provision, that "The United States shall guarantee to every State in this Union a republican form of government." But, if a State may lawfully go out of the Union, having done so, it may also discard the republican form of government; so that to prevent its going out is an indispensable means, to the end, of maintaining the guaranty mentioned; and when an end is lawful and obligatory, the indispensable means to it, are also lawful and obligatory.

Lincoln, Message to Congress, *supra* note 3.

43. The Emancipation Proclamation freed slaves only in the "States and parts of States . . . in rebellion against the United States." See President Abraham Lincoln, Emancipation Proclamation (Jan. 1, 1863), available at <http://www.founding.com/library/lbody.cfm?id=328&parent=63>. Thus it did not emancipate slaves in the Union states or in those portions of Confederate states that were by 1863 under Union control.

44. One could question, as Lincoln did, whether a majority of voters in each of the Southern states really were in favor of secession. See Lincoln, Message to Congress, *supra* note 3 ("The border States, so called, were not uniform in their action; some of them being almost for the Union, while in others — as Virginia, North Carolina, Tennessee, and

Farber also draws upon Article IV, section 3,⁴⁵ which prohibits a state from carving out a new state within its borders, as a rejection of the “right of self-determination for localities” (p. 86). Indeed, if the secession argument rests at bottom on the principle of self-determination, it is hard to see how a government founded on the consent of the governed can long endure; and it was in this respect that Lincoln was apt to equate the principle of secession with anarchy. If South Carolina can withdraw from the Union, can Charleston secede from South Carolina, and a neighborhood from Charleston, and a block from the neighborhood, until each individual sets himself up as his own sovereign? But this argument is not entirely true to the secessionist position, which emphasizes the special status of the states as independently sovereign prior to the Union. As Jefferson Davis argued, secession “is . . . justified upon the basis that the States are sovereign. . . . [E]ach State is sovereign, and thus may reclaim the grants that it has made to any agent whomsoever.”⁴⁶ South Carolina thus stands in a different relation vis-à-vis the United States than Charleston to South Carolina.

Having scoured the constitutional text for evidence against a right of secession, Farber then takes a peek at the ratification debates. There too the striking fact is the almost-total silence on the question. Farber unearths an interesting morsel to buttress the argument that the ratifiers of the Constitution assumed there was no right of secession reserved in the states (p. 88). In the ratification debate in New York, outnumbered Federalists were tempted to ratify the Constitution, contingent on Congress’s holding another constitutional convention to consider amendments. Hamilton sought guidance from Madison, who responded that a “conditional ratification” was unacceptable: “The Constitution requires an adoption *in toto*, and *for ever*” (p. 88). Significantly, Hamilton read Madison’s letter aloud at the convention, so there is some basis for imputing Madison’s view — “*The Constitution requires an adoption in toto, and for ever*” — to the narrow majority in New York that ratified the Constitution.

This is just one incident, however, so it is unclear how much weight it should be accorded. Furthermore, Farber fails to note that three states included a proviso when ratifying the Constitution specifically reserving a power to terminate the constitutional project. Virginia’s reservation, for example, provided: “The powers granted under the

Arkansas — the Union sentiment was nearly repressed and silenced.”). And, of course, one could further note that a proper tabulation of the relevant voting pool in each of the seceding states should have included women and slaves.

45. U.S. CONST. art. IV, § 3, cl. 1 (“[N]o new States shall be formed or erected within the Jurisdiction of any other State . . .”).

46. MARSHALL L. DEROSA, *THE CONFEDERATE CONSTITUTION OF 1861: AN INQUIRY INTO AMERICAN CONSTITUTIONALISM* 16-17 (1991) (quoting Jefferson Davis).

Constitution being derived from the people of the United States may be resumed by them whensoever the same shall be perverted to injury and oppression.”⁴⁷ To be sure, this “reservation” clause is best understood as an affirmation not of Virginia’s right to secede, but of a right of rebellion retained by all Americans, consistent with basic Lockean theory and the Declaration of Independence. A right of rebellion means that one is prepared to put oneself at war with the sovereign, with all the attendant consequences, if he threatens your life or property. Secession theory posits, to the contrary, a peaceful exit option in which a majority in one region can withdraw from the Union, and the rest of the Union must submit to its dissolution without resort to violence. Though the two are distinct, modern-day neo-secessionists and Lincoln detractors sometimes conflate them.⁴⁸ That said, it remains noteworthy that three states saw fit to emphasize the right of rebellion when ratifying the Constitution; and it is at least possible, especially when one recalls just how narrow the votes in favor of ratification were in several states, that the median voter at the time had a confused sense that individual states retained something like a right of withdrawal or secession.

In this vein, a provocative essay by James Ostrowski poses the following thought experiment. Imagine that the Constitution included an Article VIII, which provided:

Section 1. No State may ever secede from the Union for any reason, except by an amendment pursuant to Article V.

Section 2. If any State attempts to secede without authorization, the Federal Government shall invade such State with sufficient military force to suppress the attempted secession.

Section 3. The Federal Government may require the militias of all states to join in the use of force against the seceding State.

Section 4. After suppressing said secession, the Federal Government shall rule said State by martial law until such time as said State shall accept permanent federal supremacy and alter its constitution to forbid future secessions.⁴⁹

47. Ratification of the Constitution by the State of Virginia (June 26, 1788), <http://www.yale.edu/lawweb/avalon/const/ratva.htm>.

48. Harry Jaffa made this point strenuously in a debate with Thomas DiLorenzo. Harry V. Jaffa & Thomas J. DiLorenzo, *The Real Abraham Lincoln: A Debate*, Debate before the Independent Institute (May 7, 2002), at <http://www.independent.org/tii/forums/020507ipfTrans.html>.

49. James Ostrowski, *Was the Union Army’s Invasion of the Confederate States a Lawful Act?: An Analysis of President Lincoln’s Legal Arguments Against Secession*, in *SECESSION, STATE & LIBERTY* 178-79 (David Gordon ed., 2002).

For Lincoln, such an article was implicit in the U.S. Constitution. And yet, had such an article been explicit in 1787, one might wonder whether the Constitution would have been ratified. Would the marginal voter have been deterred by the presence of such an article explicitly foreclosing secession and laying out the consequences to a state that asserted such a right?

On the other hand, as Farber notes, Lincoln's predecessor, James Buchanan, coined an almost equally persuasive thought experiment in rejecting a constitutional right of secession. Assume, Buchanan argued, that the Constitution *had* included an implicit right of secession. If so, surely the defenders of the Constitution, in the midst of heated ratification debates, would have noted this to defuse criticism: "What a crushing argument," Buchanan argued, "this [would] have proved against those who dreaded that the rights of the States would be endangered by the Constitution" (p. 88). Although Buchanan's argument has been seconded enthusiastically by Akhil Amar,⁵⁰ one could easily turn the tables on Buchanan and Amar and ask: why did the Federalists not state clearly that there was no such right of secession, especially if, as Amar argues, "[o]ne of the Federalists' paramount goals was to constitute their new system in a way that would give no color to later state claims of a right to secede?"⁵¹ The answer may be that the Federalists assumed that they would lose critical support were they to insistently spell out their intention — an intention that was likely obvious to sensible observers — that the ratification was indeed "*in toto* and *for ever*." As Thomas Macaulay has written of the English constitutional settlement of 1689: the statesmen responsible for the settlement "cared little whether their major [premise] agreed with their conclusion if their major secured two hundred votes, and the conclusion two hundred more."⁵²

D. *Secession as Rebellion and the Power of Coercion*

In Chapter Six, Farber turns to the question of whether, apart from legal considerations, the South could assert what Locke called a "right of rebellion." Even if we conclude that the Constitution does not authorize secession, one could argue that any nation "conceived," as Lincoln would say, by the Declaration of Independence, could not

50. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1462 n.162 (1987) ("The strongest historical evidence against secession, however, was not what the Federalists said but what they did not say. To my knowledge, no major proponent of the Constitution sought to win over states' rightists by conceding that states could unilaterally nullify or secede.").

51. *Id.*

52. THOMAS BABINGTON MACAULAY, *HISTORY OF ENGLAND* Vol. II, 438 (N.Y.: Am. News Co.).

permanently foreclose withdrawal.⁵³ Yet Lincoln announced in his July 4 special address: “I hold that, in contemplation of *universal law* and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments.” Whenever a politician, even one as justly celebrated as Lincoln, references a “universal law,” one is advised — at a minimum — to clutch one’s wallet: Precisely what universal law did Lincoln have in mind that justifies subservience to a government that a segment of the population no longer deems legitimate? What makes Lincoln’s invocation of a “universal law” in 1861 initially puzzling is not only his famous and oft-repeated admiration for the Declaration of Independence, but also Lincoln’s own words as a member of Congress during the Mexican-American War. Then, as Farber notes, Lincoln said:

Any people anywhere . . . being inclined and having the power, have the *right* to rise up, and shake off the existing government, and form a new one that suits them better. . . . Any portion of such people that *can, may* revolutionize, and make their *own*, of so much of the territory as they inhabit. (p. 106)

According to Jefferson Davis, the southern states “merely asserted the right which the Declaration of Independence of July 4, 1776, defined to be ‘inalienable’ ” (p. 101).

Farber considers “the Southern grievances that might justify a right to revolution” (p. 102), and finds them wanting. After dismissing the tariff controversy as a mere “irritant,” Farber concludes that slavery was the central issue separating South and North (pp. 102-05). In the words of a leading historian on the Civil War, “What were these rights and liberties for which Confederates contended? The right to own slaves; the liberty to take this property into the territories; freedom from the coercive powers of a centralized government.”⁵⁴ Judged by the standards of contemporary international law, the South’s claims of “self-determination,” would, Farber argues, not fare well. He considers a recent opinion of the Canadian Supreme Court assessing Quebec’s right to secede, and identifies three principal criteria to be used when evaluating any peoples’ claim to sever ties with an existing government: is the people seeking self-determination a colony subject to foreign subjugation; has the people unambiguously asserted its will to secede; and will the people protect the “rights of minorities.”⁵⁵ As Farber notes, the South cannot be seriously viewed

53. As Farber notes, “Southerners who were skeptical of the constitutionality of secession frequently invoked the right of revolution instead.” P. 101.

54. JAMES MCPHERSON, *BATTLE CRY OF FREEDOM* 241 (1988).

55. Pp. 110-12 (quoting Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, 264, 267-73).

as a “colony,” and even assuming its will to secede was unambiguous, it fails under the final criteria: “[whereas] the Canadian Supreme Court stressed that a seceding region must respect the rights of others . . . a major purpose of Southern secession was to ensure that white Southerners could freely deprive blacks of fundamental human rights” (p. 111).

But one should recall that the Revolutionaries of 1776 did not have clean hands as far as slavery is concerned. They rebelled and promptly established a political union, one purpose of which was “to ensure that white southerners could freely deprive blacks of fundamental human rights.” Should we say that the Revolution of 1776 was illegitimate? The first emancipation proclamation on American soil was issued not by Abraham Lincoln in 1863, but by the English governor of Virginia, Lord Dunmore, in 1775, who promised slaves their freedom if they joined the royalist cause. As a recent historian has tartly noted, “[i]t is not sufficient to say . . . that slaves and Indians were denied the fruits of Independence. To a large extent, in 1776 and 1861, slaves and Indians — or more precisely, the Indians’ land and the slaves’ labor — were the fruits of Independence.”⁵⁶ I do not want to press this thesis too far. The fact remains that although the Constitution permits slavery, it nonetheless avoids mention of the word, perhaps suggesting an element of shame; by contrast, the Confederate Constitution enthusiastically uses the word “slave” or some variant.⁵⁷

Again, it is difficult to view sympathetically the South’s rebellion against the Union, entangled as its claims were with the cause of slavery. But what if the institution of slavery had not existed in the South, and the tariff to protect Northern manufactures had been the South’s principal grievance? If the Revolutionaries of 1776 rebelled in part because of ill-gotten taxes, why couldn’t the Confederacy in 1861? Or to return to the hypothetical introducing this review: Had Breckinridge won the election of 1860 and had seven states seceded, with the *Boston Globe* announcing that New England was “acting over again the history of the American Revolution of 1776,”⁵⁸ would we be sympathetic to the cause of secession?

56. WOODY HOLTON, *FORCED FOUNDERS: INDIANS, DEBTORS, SLAVES AND THE MAKING OF THE REVOLUTION IN VIRGINIA* (1999).

57. See Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 *YALE J.L. & HUMAN.* 413, 425-26 (2001) (noting that in drafting the Articles of Confederation, and subsequently the Constitution, the authors “used euphemistic language referring to slaves as ‘other Persons,’ ” in part because Northern delegates, in the words of William Patterson of New Jersey, “had been ashamed to use the term ‘Slaves’ & had substituted a description”). Compare U.S. CONST. art. I, § 2, cl. 3 (stating that representation and taxes for each state shall be based on the addition to the number of free persons “three-fifths of all *other Persons*”) (emphasis added), with CONFEDERATE CONST. art. I, § 2, cl. 3 (1861) (using verbatim language, except in the last phrase, where it states “three-fifths of all *slaves*”) (emphasis added).

58. P. 102 (quoting an editorial in the *New Orleans Picayune*).

To answer questions of this sort, Farber might have found it productive to consider the Lockean underpinnings of the Declaration of Independence. For Locke, whenever the political authorities “endeavor to take away, and destroy the Property of the People, or to reduce them to Slavery under Arbitrary Power, they put themselves into a state of War with the People, who are thereupon absolved from any farther Obedience.”⁵⁹ Locke considers the objection that his teaching “lays a foundation for Rebellion,”⁶⁰ because “no Government will be able long to subsist, if the People may set up a new Legislative, whenever they take offense at the old one.”⁶¹ But according to Locke, men are more cautious than that, often preferring to bear present ills than cast their fortunes on uncertain enterprises, and are inclined to resort to revolution only as a last resort.⁶² Locke then considers who shall judge whether the prince is using his prerogative properly in furtherance of the common good, or is transgressing the laws and imperiling the lives and property of the subjects. Locke’s terse answer to this question is, “The People shall be Judge.”⁶³ And to the objection that this is to say that there is no judge at all, Locke persists: “[E]very Man is Judge for himself . . . whether another hath put himself into a State of War with him.”⁶⁴

What guidance does this provide? First, Locke apparently disagrees with Lincoln’s claims that “the central idea of secession is the essence of anarchy.”⁶⁵ Locke seems to think that perpetuity is not implied in the fundamental law of all national governments,” nor is there necessarily any danger in teaching men that revolution is always an option; for the fact remains that men are not promiscuously inclined to exercise such a right. Lincoln’s emphasis on perpetuity is consistent with Madison’s hope that the Constitution remain unchallenged, and thereby come to enjoy the “veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability.”⁶⁶ There is a value, at least in terms of stability, in enshrouding any regime’s founding principles in a sacredness that numbs critical thought, and it

59. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, *in* TWO TREATISES OF GOVERNMENT 305, § 228, at 460-62 (rev. ed. 1963).

60. *Id.* § 228.

61. *Id.* § 223.

62. *Id.* § 225 (“Great mistakes in the ruling part, many wrong and inconvenient Laws, and all the slips of human frailty will be born by the People, without mutiny or murmur.”).

63. *Id.* § 240.

64. *Id.* § 241.

65. Lincoln, First Inaugural, *supra* note 16; see also Lincoln, Message to Congress, *supra* note 3 (“The principle itself is one of disintegration.”).

66. THE FEDERALIST NO. 49 (James Madison).

is possible that Locke, and to a greater extent Jefferson, who spoke glowingly of a constitutional convention every twenty years, understated this fact. Second, Locke seems to suggest that, contra Farber, we cannot evaluate the claimed justifications for revolution. Fundamentally, it is not for another to second-guess whether one man thinks his life or property is threatened: he is the only judge.

And yet it is unclear what, in the end, is achieved by an appeal to a right of revolution. One might consider the possibility that the South had a “right” to “rebel” and form its own government under some higher law, but the North was also perfectly within its constitutional rights to seek to preserve the Union, if it deemed it to be advantageous. To this possibility, one might respond that it makes no sense to speak of a “right” to secede unless a correlative duty is imposed on the remaining states to respect that right — that is, to acquiesce in the dismemberment of the Union. Yet where would such a duty come from, and what power would exist to punish those who disregard it? The revolutionaries of 1776 may well have had a “right” to form a new government, but George III was surely entitled to dispatch armies to preserve the Empire. Likewise, even assuming that the Confederate states had a “right” to rebel, can one fault Lincoln for seeking to preserve the country as it existed prior to his inauguration?

The hard question is perhaps not whether George III and Abraham Lincoln had a legal right to suppress a rebellion; the question is whether, as a prudential matter, they should have done so, even if we assume they possessed the requisite legal authority. Edmund Burke famously argued that George III would have been better advised to conciliate with the American revolutionaries than fight them; and Burke’s name, not to mention the course of events, lends retrospective luster to this argument. Unfortunately, the man most closely associated with a prudential argument against suppressing the southern rebellion was Lincoln’s predecessor, James Buchanan, widely dismissed by historians as among our nation’s worst chief executives. Farber considers Buchanan’s argument that, on the one hand, the South did not have a right to secede, but, on the other, the federal government did not have the legal authority to invade those states (pp. 94-101). He concludes that Buchanan’s argument falls flat.⁶⁷

67. Farber relies principally upon Article I, section 8, clause 15, which authorizes Congress to “call[] forth the Militia to . . . suppress Insurrections.” President Buchanan’s Attorney General Black argued that this clause must be read in tandem with Article IV, section 4, which provides that the federal government “shall protect each of [the states] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.” Black concluded that absent some request from the state, the federal government could not call forth the militia. Farber counters that Black’s argument erroneously assumed that “insurrection” in Article I and “domestic violence” in Article IV have identical meanings. Pp. 98-99.

But the prudential argument against an invasion should not be lightly dismissed. Given what Farber calls the “human price of coercion” (p. 93), one might wonder whether it would be better if a president confronted by a substantial secession movement simply let the states go in peace. Farber considers this important issue in a few paragraphs (pp. 112-14), but statements of two former presidents provide additional guidance. In a letter in 1816, Thomas Jefferson mused that “[i]f any State in the Union will declare that it prefers separation [to a continuance in union] . . . I have no hesitation in saying, ‘Let us separate.’”⁶⁸ John Quincy Adams elaborated on this view at a celebration for the fiftieth anniversary of Washington’s inaugural in 1839:

But the indissoluble link of union between the people of the several States of this confederated nation, is after all, not in the *right*, but in the *heart*. If the day should ever come, (may Heaven avert it,) when the affections of the people of these states shall be alienated from each other; when the fraternal spirit shall give way to cold indifference, or collision of interest shall fester into hatred, the bands of political association will not long hold together parties no longer attracted by the magnetism of conciliated interests and kindly sympathies; and far better will it be for the people of the disunited states, to part in friendship from each other, than to be held together by constraint.⁶⁹

Neither Jefferson nor Adams suggested that states had a right, grounded in the Constitution or in the Declaration of Independence, to secede. Indeed, Adams specifically disclaimed a right of secession later in his inaugural speech: “In the calm hours of self-possession, the right of a state to nullify an act of Congress, is too absurd for argument, and too odious for discussion. The right of a state to secede from the union is equally disowned by the principles of the Declaration of Independence.”⁷⁰ His point was simply that if the states should ever cease to be united by interest and opinion, the best outcome would be to split apart. Furthermore, there is evidence that this was precisely the view held by Framers such as James Madison, who at the Philadelphia Convention argued against a provision “authorizing an exertion of the force of the whole [against] a delinquent state.” In his notes, Madison “observed that the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually.”⁷¹

68. Letter from Jefferson to W. Crawford (June 20, 1816), *quoted in Ostrowski, supra* note 49, at 175 n.60.

69. President John Adams, *The Jubilee of the Constitution: A Discourse* (Apr. 30, 1839), <http://www.lonang.com/exlibris/misc/1839-jub.htm>.

70. *Id.*

71. JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787*

Why, then, questions of right and law aside, did Lincoln not simply let the South go in peace? According to Lincoln, the peaceful coexistence of North and South was not a realistic option. By 1861, the assets of North and South were so interspersed that one party could not, as in a unilateral and no-fault divorce, simply opt out. Lincoln explained in the First Inaugural:

Physically speaking, we cannot separate. We cannot remove our respective sections from each other, nor build an impassable wall between them. A husband and wife may be divorced, and go out of the presence, and beyond the reach of each other; but the different parts of our country cannot do this. They cannot but remain face to face; and intercourse, either amicable or hostile, must continue between them.

Lincoln is correct that the North and South would remain face to face, but so what? Norway and Sweden remained face to face after the former seceded from the latter in 1905, and the two Scandinavian countries, stranded on the same peninsula, each with rich and belligerent histories, have yet to come to blows. Nor has it been deemed necessary to erect an “impassable wall between them.” It has been, as the modern expression goes, an amicable divorce — they get along better separately than they did together.

One difference between Norway’s secession in 1905 and the South’s in 1861 is that Norway peacefully negotiated its independence, whereas the South initiated its assertion of self-rule with a flurry of cannon balls. Really, what do you expect when you shell a nation’s fort — that it would lightly dismiss the incident and wish you bon voyage? It may not satisfy the legal casuists, but Farber’s conclusion has a certain plausibility: “[O]ne fact is crucial. It was the Confederacy that fired the first shot. After that happened, war was inevitable, just as it would have been if the French or Russian military had sacked a U.S. fort” (p. 114). Yet we cannot quite leave it at that. The war fervor that erupted in the North after the firing on Fort Sumter surely made it likely that a war between the states would ensue, but whether it was inevitable, as Farber suggests, is another story. Tocqueville applauded President Washington for resisting the popular enthusiasm for war with England in the late eighteenth century,⁷² and it is at least conceivable that an energetic president, such as Lincoln, could have restrained the dogs of war. His decision not to do so must have been based not only on his legal judgment about secession,⁹ but also on his prudential view that, despite the great costs of war, the Union was worth preserving.

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72. See Tocqueville, *supra* note 36, at 218.

II. CIVIL LIBERTIES DURING CIVIL WAR

One must include among the costs of the war the damage arguably inflicted upon the Constitution itself. In order to defend the Constitution Lincoln often took actions that skirted the outermost boundaries, and possibly exceeded, his constitutional authority. Farber divides his analysis of Lincoln's respect for civil liberties into three parts: to what extent Lincoln exceeded his Article II powers and encroached on legislative authority (pp. 115-43); to what extent Lincoln unjustifiably violated "individual rights" (pp. 144-75); and to what extent Lincoln flouted "the rule of law," which Farber generally understands to mean judicial decisions (pp. 176-95). Farber's tripartite division, like that of the Roman Empire, has a grandeur to it but fails to achieve perfect harmony. For example, Farber omits any discussion of Lincoln's unilateral executive decision to suspend habeas corpus in the first section of his discussion (executive power), yet the issue arises in both the second (individual rights) and third (rule of law) sections (pp. 157-63, 188-92). I depart below from Farber's thematic plan of attack and adopt a chronological one, focusing first on Lincoln's actions at the outbreak of hostilities and then on the fate of civil liberties in the course of the war.

A. *July 4, 1861 Speech*

On April 12, 1861, Confederate forces laid siege to Fort Sumter. Three days later, Lincoln issued a proclamation summoning the militia, as well as calling for 75,000 additional troops "to re-possess the forts, places, and property which have been seized from the Union" (p. 117). On April 19, a mob in Baltimore attacked a Massachusetts regiment on the way to Washington, D.C. (p. 117). Lincoln suspended habeas corpus on the route between Philadelphia and Washington, ordered a blockade of the South, and authorized the Treasury to advance \$2 million to New York financiers, who were to make payments to support the incipient war effort (p. 118).

Given that the Constitution, directly or indirectly, vests Congress with the power to appropriate funds,⁷³ call up troops,⁷⁴ declare war,⁷⁵ and, in times of "rebellion and invasion," suspend habeas corpus,⁷⁶

73. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in consequence of Appropriations made by Law.").

74. U.S. CONST. art. I, § 8, cl. 15 ("Congress shall have Power . . . To provide for calling forth the Militia to execute the laws of the Union.").

75. U.S. CONST. art. I, § 8, cl. 11 ("Congress shall have Power . . . To declare War.").

76. U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.").

many of Lincoln's unilateral actions in 1861 have given rise to accusations that he exceeded the powers allocated to the executive by Article II. In his July 4, 1861, special address to Congress, Lincoln divided his actions into three groups in terms of their legality. First, with respect to his decisions to call forth the militia and order a blockade, Lincoln announced, "So far, all was believed to be strictly legal."⁷⁷ He provided no argument, apparently regarding these actions as self-evidently constitutional. Farber diligently fills in the details, and notes that in calling forth the militia, Lincoln could have found support in the Militia Acts of 1798 and 1802, which authorized the President to call forth the militia in times of insurrection (p. 132). The blockade proclamation arguably encroached upon the legislative power to declare war, but Lincoln apparently assumed that, as Commander-in-Chief, he could take defensive action in the event of actual hostilities prior to congressional authorization. Congress mooted the issue on July 13, 1861, by formally approving Lincoln's blockade order, but the owners of three ships seized prior to July 13 took their case to the Supreme Court, which eventually sided with Lincoln 5-4.⁷⁸ Farber likewise exonerates Lincoln on this count, noting that the Constitution, as originally drafted, authorized Congress to "make war." According to Madison's notes on the Convention, the language was amended to "declare war" to leave "to the Executive the power to repel sudden attacks" (p. 142).

Lincoln's second category of actions consisted of "calls . . . for volunteers, to serve three years, unless sooner discharged; and also for large additions to the regular Army and Navy."⁷⁹ Of these, Lincoln said, "These measures, *whether strictly legal or not*, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress."⁸⁰ Lincoln thus conceded that he was on somewhat more doubtful legal grounds here, and it is significant that he deemed it necessary to seek congressional approval for the decision to enlarge the army and navy. Although acknowledging that such actions may have exceeded his Article II authority, Lincoln downplayed such violations as merely technical separation-of-powers matters. Lincoln invoked "popular demand" and "necessity" to justify an assumption not of dictatorial powers — that is, powers not entrusted to any branch of the federal government — but rather of powers ordinarily wielded by the legislature.

77. Lincoln, Message to Congress, *supra* note 3.

78. Pp. 138-43; Prize Cases, 67 U.S. 635 (1863).

79. Lincoln, Message to Congress, *supra* note 3.

80. *Id.*

Farber judges Lincoln's unauthorized expansion of the regular army and the diversion of federal funds to the New York financiers to be "unconstitutional" (pp. 137, 149, 192). In reaching this conclusion, Farber finds that these actions fall within what Justice Jackson in his *Steel Seizure* concurrence called "presidential actions contrary to the expressed will of Congress."⁸¹ Yet Congress had never expressly or impliedly prohibited Lincoln from taking such action. In his *Steel Seizure* concurrence, Jackson emphasized that Congress had extensively regulated the law of condemnation and seizure, so it was against that backdrop that he could conclude that Truman had acted contrary to Congress's will. Farber does not point to any congressional actions⁸² that indicated a congressional will to foreclose the disbursement of funds or expansion of the regular army.⁸³ Indeed, Congress validated such actions on July 13, 1861, or almost immediately upon being called back into session.

Although Farber finds Lincoln's diversion of funds and expansion of the army to be "unconstitutional," he adds that "it is difficult to condemn these actions too harshly" (p. 138). But this simply raises the question: Why would you necessarily want to condemn Lincoln for these deeds, regardless of their legality? As Farber notes, the situation in April 1861 could not be more dire; and unlike the internment of Japanese Americans in 1942, it is difficult to question the military necessity of each of Lincoln's actions when hostilities erupted.⁸⁴ If we assume that the Union was worth preserving, Lincoln's audacious actions in April 1861 seem more worthy of praise than condemnation. One could respond, however, that the Union was worth preserving, but only at a certain price. There are marginally desirable objects one would decline to pay more than a pittance for; and even if we assume

81. P. 136. Jackson distinguished among three kinds of presidential actions: first, those "pursuant to an express or implied authorization to Congress," which are presumptively constitutional; second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority"; and third those directly contrary to a congressional directive, such as Truman's seizure of the steel mills, which are presumptively unconstitutional. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

82. For example, the Boland Amendments, enacted between 1982 and 1986, tried to prevent the President from funding the Nicaraguan Contras. See Edwin B. Firmage & Joseph E. Wrona, *The War Power*, 59 GEO. WASH. L. REV. 1684, 1702 n.124 (1991) (book review).

83. With respect to the appropriation of \$2 million to New York financiers in April to support the war effort, Farber has seized upon a peccadillo that even the most vehement Lincoln critics, such as Thomas DiLorenzo, do not bother to include in his list of sins.

84. For example, Farber notes with respect to the diversion of funds, "Lincoln bypassed normal government channels and used private citizens for these payments because he feared that much of the bureaucracy was disloyal, Washington being much more of a Southern town than it is today." P. 118.

that the Union is inestimably good, perhaps there is a price (in lives, liberty, and property) that would make its preservation undesirable.⁸⁵

Finally, we come to Lincoln's suspension of habeas corpus. When the President suspended the writ on April 19, his immediate concern was to prevent Maryland from seceding, for he did not savor the prospect of a capital stranded in enemy territory. On May 25, troops imprisoned John Merryman, a lieutenant in a secessionist cavalry believed to be responsible for the destruction of bridges and telegraph wires. The following day, and again on May 28, Chief Justice Taney issued writs ordering General George Cadwalader at Fort McHenry to release Merryman. Taney directed that both writs be sent to Lincoln, in order that he might "fulfill his constitutional obligation, to take care that the laws be faithfully executed; to determine what measures he will take to cause the civil process of the United States to be respected and enforced."⁸⁶ Lincoln refused to comply with Taney's orders.

In his July 4, 1861 address to Congress, Lincoln presented a two-fold defense of these actions. First, he emphasized that, given the exigencies he confronted, he was forced to choose between his overarching constitutional duty to "take care that the laws be enforced" and other narrower duties, such as according respect for habeas corpus protections. Simply put, the greater trumps the smaller:

To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?⁸⁷

Yet after apparently conceding that he had violated one constitutional provision, albeit to fulfill another, Lincoln retracted the concession: "But it was not believed that this question [of whether to break one law or another] was presented. It was not believed that any law was violated."⁸⁸ Lincoln noted that the Constitution authorizes the suspension of the writ, and it is "silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency."⁸⁹ At this point, rather than making tiresome legal arguments (this was a war speech after all), he added, "No more

85. *But cf.* Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865) ("Fondly do we hope — fervently do we pray — that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said 'the judgments of the Lord, are true and righteous altogether.'").

86. *Ex Parte Merryman*, 17 F. Cas. 144, 153 (C.C.D. Md. 1861) (No. 9487).

87. Lincoln, Message to Congress, *supra* note 3.

88. *Id.*

89. *Id.*

extended argument is now offered; as an opinion, at some length, will probably be presented by the Attorney General.”⁹⁰

Farber judges Lincoln’s suspension of habeas corpus “on balance . . . constitutionally appropriate” (p. 163), but he relies on an argument ignored by Lincoln, at least in the July 4 address. Farber writes that Congress had enacted Militia Acts authorizing the president to call forth the militia in areas of insurrection, albeit decades ago in 1798 and 1802; assuming Maryland was an area of insurrection, “Lincoln clearly would have been empowered [by the Militia Acts] to use deadly force to suppress the insurrection [and] the power to detain dangerous individuals goes along with the power to use deadly military force against them” (p. 162). Farber also offers a few words in defense of Lincoln’s technical argument that the Constitution does not directly state that Congress, rather than the President, has the power to suspend habeas corpus (pp. 160-62). The stumbling block here, of course, is that the power to suspend habeas corpus is located in Article I, not Article II. If one takes the structure of the Constitution seriously, it is hard to see how the President can claim this power, and it is revealing that after a sentence or two on this argument, Lincoln pawned it off on his Attorney General, Edward Bates.

Lincoln, great lawyer that he was, also left to Bates the thorny question of whether he had shirked his constitutional duty by flouting a judicial order to release Merryman. Bates soon emerged from the library with an opinion that, not surprisingly, gave a sweeping interpretation to executive power. Bates drew upon the sort of arguments made first in *Federalist No. 49*, and thereafter by Jefferson (pardoning those convicted under the Alien and Sedition Acts) and Jackson (vetoing the Bank), that the three co-ordinate federal branches each reserve the right to interpret the Constitution.⁹¹ In this respect, Professor Michael Paulsen has coined the phrase “*Merryman power*” to refer to a purported executive power to independently interpret the Constitution and, if necessary, nullify an unconstitutional judicial decision.⁹² Yet Paulsen notes that Lincoln did not directly assert such a power in the July 4, 1861, speech.⁹³

90. *Id.*

91. 10 Op. Att’y Gen. 74, 85 (1861). Bates wrote:

If it be true, as I have assumed, that the President and the judiciary are co-ordinate departments of government, and the one not subordinate to the other, I do not understand how it can be legally possible for a judge to issue a command to the President to come before him ad subjiendum — that is, to submit implicitly to his judgment — and, in case of disobedience, treat him as a criminal, in contempt of a superior authority, and punish him as for a misdemeanor, by fine and imprisonment.

Id.

92. Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993). *But see* John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and*

Lincoln's silence in the July speech contrasts with his explicit consideration of the binding effect of the *Dred Scott* decision in the First Inaugural in April. Then, Lincoln emphasized that he regarded *Dred Scott* as wrongly decided, but nonetheless stated,

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all parallel cases, by all other departments of the Government.⁹⁴

Lincoln contrasted the views of "some," who think "constitutional questions are to be decided by the Supreme Court," with his own view that "such decisions must be binding in any case upon the parties to a suit as to the object of that suit." Even under Lincoln's view, therefore, he would seem to be bound by Chief Justice Taney's order in the particular case of John Merryman, although remaining free to challenge Taney's argument in other cases. Lincoln's refusal to give effect to Taney's order in *Ex Parte Merryman* points to a broader understanding of executive power.

B. *Individual Rights During the War*

Turning to the war, Farber begins by considering the legality of Lincoln's declaration of military rule in the actual theater of war (the South and border areas) (pp. 146-52). When he turns to the issue of military trials in the North (pp. 163-70), Farber emphasizes that only a tiny minority of these trials were conducted far from the scene of war; and to the extent that generals violated civil liberties, Lincoln frequently interposed himself on behalf of the victims. Farber explores the military trial of one Confederate sympathizer, Lambdin Milligan, in 1864, but Lincoln's role here was tangential and, as Farber notes, he was poised to issue a pardon when John Wilkes Booth deprived him of the opportunity (p. 164).

The episode that best captures Lincoln's approach towards civil liberties in wartime is the 1864 trial of the Ohio pacifist Clement Vallandigham, who was charged with making speeches that undermined the war effort (pp. 170-75). After briefly sketching Lincoln's argument (including the famous rhetorical question "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley agitator who induces him to desert?"), Farber

Historical Prolegomenon, 15 CARDOZO L. REV. 375, 391-96 (1993) (criticizing Paulsen's argument).

93. Paulsen, *supra* note 92, at 95.

94. Lincoln, First Inaugural, *supra* note 16.

critiques Lincoln's actions by the standards of twentieth-century First Amendment jurisprudence. Farber ultimately casts doubt on the value of this retrospective enterprise.⁹⁵ Indeed, it might have been more interesting to delve into the complicated facts of the Vallandigham case and lay out Lincoln's own understanding of the applicability of the First Amendment in wartime.⁹⁶

Protesting various civil rights violations, a group of New York Democrats wrote to Lincoln in 1863, and alleged that Vallandigham had been arrested for "no other reason than words addressed to a public meeting." Lincoln's response acknowledged that, had Vallandigham been arrested simply for "words addressed to a public meeting," then "I [would] concede that the arrest was wrong."⁹⁷ Turning to the broader question of civil liberties in wartime, Lincoln argued that the Constitution is not "the same, in cases of rebellion or invasion, involving the public safety, as it is in times of profound peace and public security."⁹⁸ The Constitution itself draws a "distinction," Lincoln added, apparently referring to the clause authorizing the suspension of habeas corpus in times of "rebellion." He wrote,

I can no more be persuaded that the Government can *constitutionally* take no strong measures in time of rebellion, because it can be shown that the same could not lawfully be taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown not to be good for a well one.⁹⁹

Then Lincoln scoffed at the objection that, if stretched in times of crisis, the government will not revert to its original dimensions. Of course, Lincoln's optimism on this score is not universal; and it is the received wisdom dating back at least to Locke,¹⁰⁰ and doubtless further, that a government once distended by a strong executive in time of emergency, never returns to its proper size.¹⁰¹

95. "If the question is whether Lincoln acted in knowing violation of constitutional standards, it is hard to hold him responsible for failing to anticipate the views that the Supreme Court itself would not develop until many decades later." P. 173.

96. A recent article thoughtfully explores the issue. Geoffrey R. Stone, *Abraham Lincoln's First Amendment*, 78 N.Y.U. L. REV. 1, 21-22 (2003).

97. Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), in ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1859-1865, at 266 (Don E. Fehrenbacher ed., 1989).

98. *Id.* at 267.

99. *Id.*

100. LOCKE, *supra* note 59, § 166 ("[T]he reigns of good princes have been always most dangerous to the liberties of their people.").

101. *But see* Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 625 (2003) ("There just are no systematic trends in the history of civil liberties, no important ratchet-like mechanisms that cause repeated wars or emergencies to push civil liberties in one direction or another in any sustained fashion.").

One of the most interesting features of Lincoln's argument in his letter to the New York Democrats and in other writings is his insistence that all of his emergency acts were in a sense constitutional — that is, his claim that the “Government can *constitutionally*” take emergency measures. As Geoffrey Stone has argued in an article on the Vallandigham affair, Lincoln repeatedly claimed to find authorization for his actions in particular clauses of the Constitution, from the “Take Care” Clause to the Habeas Clause to the Commander-in-Chief Clause.¹⁰² One might counter that this is a mere formality, for these clauses could be construed to authorize nearly any action in the event of an emergency. Indeed, in practice one might wonder how different Lincoln's understanding of executive power was from that of Hamilton, who maintained that the Vesting Clause of Article II entrusts the executive with discretionary powers to meet any emergency.¹⁰³ Or, for that matter, in practice, is Lincoln's argument different from Jefferson's defenses of executive power, in which he asserted the President need not obey the Constitution in exceptional circumstances, but can seek justification in “[t]he laws of necessity”?¹⁰⁴

Farber sorts through the various arguments concerning executive power, but as he aptly notes, theoretical differences seem to have a way of converging in practice (p. 129). A cynic might wonder whether the essential truth of the matter is that strong presidents do what they do and post hoc find rationalizations for their actions. The rationalizations may differ, but the actions all bespeak obedience to a higher law than the Constitution, that is, as Locke would say, the “*fundamental law of nature and government, viz. that as much as may be all members of society are to be preserved.*”¹⁰⁵ The different

102. Stone, *supra* note 96, at 29 (“What impresses most about his handling of the Vallandigham affair was his persisting concern for harmonizing liberty and power through constitutional discourse and his unflinching insistence that ‘the Constitution mattered.’”). Farber offers a somewhat different take: “Lincoln was not arguing for the *legal* power to take emergency actions contrary to statutory or constitutional mandates. Instead, his argument fit well within the classic liberal view of emergency power. While unlawful, his actions could be ratified by Congress if it chose to do so” P. 194.

103. For a discussion of Hamilton's writings, as the pseudonymous Pacificus, in defense of President Washington's Neutrality Proclamation, see Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 791-96.

104. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in THOMAS JEFFERSON, WRITINGS 1231 (1984). Jefferson wrote:

A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of a higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.

Id.

105. LOCKE, *supra* note 59, § 159.

articulated understandings of executive power of Washington, Hamilton, Jefferson, and Lincoln provide fodder for law professors to parse and puzzle over, but — bracing thought — is this largely an exercise in pointless semantics? Chief Justice Rehnquist apparently thinks so, for he has concluded that the study of “occasional presidential excesses and judicial restraint in wartime” is “very largely academic. There is no reason to think that future wartime presidents will act differently from Lincoln, Wilson, or Roosevelt.”¹⁰⁶ Lincoln ignored Taney’s order to release John Merryman, and did not even bother to supply an argument justifying this action. Yes, he ordered Attorney General Bates to manufacture something to appease the populace, like a Cesare Borgia dispatching a lieutenant to take the heat,¹⁰⁷ but it is Lincoln’s silence here that speaks volumes. He did what he perceived necessary.

American presidents, before and after Lincoln, seem to have exercised what John Locke called “prerogative” — “[the] power [of the executive] to act according to discretion for the public good, *without the prescription of the law and sometimes even against it.*”¹⁰⁸ Farber quite correctly notes that Lockean prerogative seems inconsistent with written constitutionalism (p. 128), but this inconsistency may well be embedded in the Constitution nonetheless. The American regime perhaps “constitutionalizes” a power to act outside the law, which calls to mind what Machiavelli called “virtu,” or farther back still, what Aristotle terms “prudence,” the ultimate virtue of a statesman that is not reducible to general laws.¹⁰⁹

Farber glimpses this fact in his conclusion, which emphasizes Lincoln’s personal qualities. He writes, “It was Lincoln’s character — his ability, judgment, courage, and humanity — that brought the Union through the war with the Constitution intact” (p. 200). Of course, this assumes that Lincoln saved the Constitution, rather than destroyed it. If the Constitution was originally a voluntary association of separate sovereigns, then he illegally engrossed the nation in a war that claimed over six hundred thousand lives and destroyed the economy of much of the nation. We may add violations of civil liberties to his sins, although at that point it would be hard to plunge his reputation any farther into disgrace. On the other hand, if Lincoln was right that the Constitution foreclosed secession and authorized the use of force to suppress any such movement, the entire problem of

106. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 224 (1998).

107. See, e.g., Machiavelli, *The Prince*, reprinted in *THREE RENAISSANCE CLASSICS* 1, 31-36 (1953) (describing Ceasare Borgia’s use of Remirro de Orco).

108. LOCKE, *supra* note 59, § 160.

109. The argument is laid out with great subtlety in HARVEY C. MANSFIELD JR., *TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER* (1989).

civil liberties needs to be re-gauged. As Richard Posner writes, “If the Constitution is not to be treated as a suicide pact, why should military exigencies not influence the scope of the constitutional rights that the Supreme Court has manufactured from the Constitution’s vague provisions?”¹¹⁰

My own view is that the founders did not think secession was a constitutional right, but also could not have imagined that the federal government under the Constitution they had created would be so strong and so motivated as to prevent one-third of the states from withdrawing and reconstituting a government.¹¹¹ I thus think it fair to say that Lincoln, through the Civil War, effected a shift in the nature of the regime. Lincoln himself anticipated that a Union victory in the Civil War would give rise to a “*new* birth of freedom,”¹¹² and he essentially cast himself in the role of a founder. The principles on which the Lincolnian regime were to be founded were not quite identical to those of the original regime, for most importantly the scourge of slavery would be eliminated. In this respect, as well as in laying the framework for a decisive shift in the relative power of the state and Federal Governments, it is perhaps not quite correct to say, as Farber does, that Lincoln “saved” the Constitution: he transformed it.

110. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 294 (2003).

111. See *supra* text accompanying notes 69-71.

112. President Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863), available at <http://www.founding.com/library/lbody.cfm?id=329&parent=63> (emphasis added).