How Libertarians Ought To Think About The U.S. Civil War
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I. Introduction

For decades, outspoken libertarians have seen the Civil War not only as a historical calamity, but as a political calamity as well. According to many libertarians, the Union victory in the Civil War, and the presidency of Abraham Lincoln in general, represented a betrayal of American Constitution and of the fundamental principles of American political philosophy.

This interpretation rests on two major arguments as well as a variety of more minor concerns. The more minor concerns include specific critiques of the policies of the Lincoln Administration, or of the conduct of the War by Union forces. For example, many libertarians condemn the Union for instituting a military draft, or for suspending the writ of *habeas corpus*. There are many of these specific criticisms, which deserve detailed discussion which cannot be provided here.[1] Suffice to say that some of these criticisms are well-founded; indeed, libertarians deplore war precisely because it tends to give rise to such evils.

Understanding the Civil War as a matter of political philosophy, however, requires a systematic, two-step analysis: first, does a state have the legal authority under the United States Constitution, to secede unilaterally? If the answer to this question is yes, then the analysis is at an end: if states have the right to secede, the Union was in the wrong to put down the Confederacy. If, however, the answer is no, then we must proceed to a second step: even illegal acts, like the American Revolution, are justified by the right

[1] For example, it ought to be noted that the Confederacy instituted a military draft as well, and did so before the Union did. J. McPherson, *Battle Cry of Freedom* (New York: Ballantine, 1988) p. 427.

of revolution, so even if the Constitution does prohibit secession, the people of the southern states had the right to rebel against the Union, if their act was a legitimate act of revolution. It is essential to keep in mind the distinction between *secession* and *revolution*. As Lincoln wrote, "It might seem, at first thought, to be of little difference whether the present movement at the South be called 'secession' or 'rebellion.' The movers, however, well understand the [*62] difference."[2] Was, then, the Confederate rebellion a legitimate act of *revolution*?

The prevailing libertarian answers to these questions are, first, that states have the constitutional right to secede, and that Abraham Lincoln violated the Constitution by leading the nation into war against the seceding states. This argument is based on the "compact theory" of the Constitution. Second, the prevailing argument holds that the rebellion represented a legitimate act of revolution. This argument is based on the concept of "self-determination."[3] These premises, however, are invalid, as are the prevailing libertarian conclusions. In fact, states have no constitutional authority to secede from the union unilaterally; nor were southern states engaged in a legitimate act of revolution, because they initiated force, rather than acting in defense of individual rights.

II. Do States Have The Legal Right to Secede?

A. Three Interpretations of Union

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[2] R. Basler, ed., *Collected Works of Abraham Lincoln* 8 vols. (New Brunswick: Rutgers University Press, 1953) 4:432.

[3] See, e.g., J. Livingston, "A Moral Accounting of The Union And The Confederacy." *Journal of Libertarian Studies.* 16:2 pp. 57-101 (2002).

There are at least three ways of looking at the nature of the federal union under the Constitution. First, the "compact theory" of the Constitution holds that it is much like a treaty between essentially independent states. This theory found its first major expression in the Kentucky and Virginia Resolutions, drafted by Thomas Jefferson and James Madison, respectively, as a protest to the Alien and Sedition laws in 1798.[4] In the 1830s, South Carolina Senator John C. Calhoun based his theory of nullification on these resolutions—despite Madison's repudiation of nullification—and thereby laid the intellectual foundation for secession thirty years later.[5] According to the compact theory, each state is a sovereign entity which is bound to the other states only by a compact which it may break whenever the compact imposes unbearable burdens on the state—just as a country may decide to break a treaty. Under the compact theory, the federal union contains no inherent element of sovereignty—it is a league of sovereign states. In Calhoun's view, [*63] the Constitution "is the government of States united in a political union, in contradistinction to a government of individuals socially united…the government of a community of States, and not the government of a single State or nation."[6]

Opposed to the compact theory are two theories that we may call the "weak union" and the "strong union" views. According to these views, the federal Constitution is not a treaty, but a law, and the federal union contains at least *some* element of

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[4] D. Mayer, *The Constitutional Thought of Thomas Jefferson*. (Charlottesville: University Press of Virginia, 1994) p. 201.
[5] D. McCoy, *The Last of The Fathers: James Madison And The Republican Legacy* (New York: Cambridge University Press, 1989) pp. 132-62; L. Banning, *The Sacred Fire of Liberty.* (Ithaca: Cornell University Press, 1995) pp. 387-95.
[6] C. Post, ed., *A Disquisition on Government And Selections from The Discourses* by John C. Calhoun. (Indianapolis: Bobbs-Merrill, 1953) p. 86.

sovereignty; the federal union is not seen as a league of sovereigns, but as the government of a single State or nation.

The strong-union view, most famously espoused by Daniel Webster, and later adopted by Abraham Lincoln, Charles Sumner, and even Lysander Spooner,[7] the union of states predates the Constitution itself: it was created by the Declaration of Independence, and the sovereignty of the states was itself a consequence or product of *national* sovereignty. This view has much to commend it; the Declaration of Independence, for instance, was issued in the name of the "thirteen *united* States of America," who, as "*one people*" were breaking their former political bonds, and declaring that "these *united* colonies are free and independent states." It then goes on to describe what "free and independent states may of right do"—things like carrying on foreign policy—none of which were actually done by the states. In fact, at the 1787 Philadelphia Convention, Delegate Rufus King explained that

> The states were not "sovereigns" in the sense contended for by some. They did not possess the peculiar features of sovereignty,—they could not make war, nor peace, nor alliances, nor treaties. Considering them as political beings, they were dumb, for they could not speak to any foreign sovereign whatever. They were deaf, for they could not hear any propositions from such sovereign. They had not even the organs or faculties of defence or offence, for they could not of themselves raise troops, or equip vessels, for war.... If the states, therefore, retained some portion of their sovereignty [after declaring independence], they had certainly divested themselves of essential portions of it.[8]

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[7] L. Spooner, *The Unconstitutionality of Slavery* (Boston: Bela Marsh, 1860) pp. 56, 78-79.

[8] J. Elliott, ed., *Debates in the Several State Conventions on the Adoption of the Federal Constitution*. 5 vols. (Washington: Elliott, 1836) 5:212-213. This argument formed a central point in Justice Sutherland's interpretation of federal foreign policy power in *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304 (1936). See J. Eastman and H. V. Jaffa, "Understanding Justice Sutherland As He Understood Himself," *University of Chicago Law Review* 63:1347. 1352 n. 17 (1996).

[*64] James Wilson (a signer of the Declaration) agreed, saying that he "could not admit the doctrine that when the colonies became independent of Great Britain, they became independent also of each other. He read the Declaration of Independence, observing thereon, that the United Colonies were declared free and independent states, and inferring, that they were independent, not individually, but unitedly, and that they were confederated, as they were independent states."[9] Consequently, the Constitution of 1787 did not purport to *create* the union, only to make it "more perfect." Jefferson and Madison called the Declaration of Independence "the fundamental act of union of these States,"[10] and even at the South Carolina Ratification Convention, when one delegate claimed that "[t]he [1783] treaty of peace expressly agreed to acknowledge us as free, sovereign, and independent states...[b]ut this new Constitution at once swept those privileges away, being sovereign over all," Charles Cotesworth Pinckney answered that "[t]he separate independence and individual sovereignty of the several states were never thought of by the enlightened band of patriots who framed this Declaration; the several states are not even mentioned by name in any part of it,—as if it was intended to impress this maxim on America, that our freedom and independence arose from our union, and that without it we could neither be free nor independent."[11]

There are ambiguities, however, which undermine the strong union view. Section two of the Articles of Confederation, for example, did acknowledge the separate sovereignty of the American states: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." This

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[9] Elliott (1836) 5:213.
[10] M. Peterson, ed., *Jefferson: Writings* (New York: Library of America, 1984) p. 479.
[11] Elliott (1836) 4:287, 301.

seems inconsistent with the view that the union was created by the Declaration. And the fact that the Continental Congress carried out foreign policy only shows that the *federative* power,[12] which is only part of the national [*65] sovereignty, was vested in the national government. The nature of federal sovereignty at the time of the American founding was at least ambiguous[13]—surely one reason that the union needed to be made more perfect eleven years later.

The "weak-union" view was most famously espoused by James Madison. According to it, the Articles of Confederation did indeed acknowledge the separate sovereignty of the American states—and that was exactly the problem. Alexander Hamilton put it well in a sentence which is the theme of the entire *Federalist*: "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of which they consist."[14] The new Constitution would solve this problem by creating a new kind of government—one of "divided sovereignty," partly national and partly federal, in which all of the people of America would vest the national government with a *part*—limited and enumerated—of their sovereignty. The national sovereignty would therefore be *totally separate* from the sovereignty of the states. This is why Madison insisted that the Constitution be ratified, not by state legislatures, but by special ratification conventions: to make clear that the states were not parties to the Constitution—thus it

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[12] In his *Second Treatise*, Locke explains that the "federative power" is that part of the executive power which deals with foreign relations. P. Laslett, ed., *John Locke's Two Treatises of Government* (Oxford: Oxford University Press, rev ed. 1963) pp. 409-412.

[13] Justice Chase pointed out some ambiguities in his opinion in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 224-225, 231-232 (1796).

[14] C. Rossiter, ed., *The Federalist* (New York: Signet, 1961) p. 108; see also J. Rakove, ed., *Madison: Writings* (New York: Library of America, 1999) p. 69.

would "be then a government established by the thirteen States of America, not through the intervention of the Legislatures, but by the people at large...[a] distinction...[which] is very material."[15] Thus, contrary to the strong-union view, the sovereignty of the states did not depend on the creation of the federal authority; they were two wholly independent systems, in which the federal power was supreme within its limited sphere—and nonexistent outside of that sphere. One might analogize divided sovereignty to a homeowner who receives separate bills from the electric company and the gas company. An American citizen is separately a citizen of the state and of the federal union, and neither of these types of citizenship is superior to or inferior to the other.

[*66] Under either the weak-union view or the strong-union view, states have no unilateral power to secede. Thus, in addressing whether the Confederacy had the constitutional authority to secede, it is unnecessary to resolve the question of whether the union was created by the Declaration of Independence or not, because ratification resolved the fundamental point: the federal union was an agreement between the *people*, not the *states*. The Constitution's fundamental premise of divided sovereignty—respected by both the weak-union and strong-union views, means that the people of America are bound together as one people for certain purposes—and therefore a state may not *unilaterally* secede.

B. What Divided Sovereignty Means[16]

[15] B. Bailyn, ed., *Debate On The Constitution* (New York: Library of America, 1993) 2:619.
[16] Obviously, in the following, I refer only to the Constitution as it existed before the Fourteenth Amendment, which changed the nature of state and federal sovereignty.

Because the sovereignty of a state is distinct from that of the union, a state can no more absolve its people of their allegiance to the federal government than the gas company can absolve a customer from paying her electric bill. The people, who adopted the Constitution, may decide to allow the people of a state to leave the union—through Congressional action (according to the weak-union view), or by adopting a Constitutional Amendment (according to the strong-union view). But unilateral secession is unconstitutional.

"In the compound republic of America," said Madison, "the power surrendered by the people is first divided between two distinct governments...."[17] But "[t]he main [fallacy] of nullification," he later explained,

> is the assumption that sovereignty is a unit, at once indivisible and unalienable; that the states therefore individually retain it entire as they originally held it, and, consequently, that no portion of it can belong to the U.S.... [W]here does the sovereignty which makes such a Constitution reside[?] It resides not in a single state but in the people of each of the several states, uniting with those of the others in the express & solemn compact which forms the Constitution. To the *extent* of that compact or Constitution, therefore, the people of the several States must be a sovereign as they are a united people.... That a sovereignty should have even been denied to the States in their united character, may well excite wonder, when it is recollected that the Constitution which now unites them, was announced by the convention which formed it, as dividing sovereignty between the Union & the States; that it was presented under that view, by contemporary expositions recommending it to the ratifying [*66] authorities; that it has proved to have been so understood by the language which has been applied to it constantly….[18]

Divided sovereignty (also called "dual sovereignty"), was the principal innovation of the Constitution. While the strong-union view saw ratification as simply an overhauling of the union, to the weak-union view, ratification reformed the sovereignty

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[17] Rossiter (1961) p. 323.
[18] M. Meyers, ed., *The Mind of The Founder: Sources of the Political Thought of James Madison* (Hanover: University Press of New England, rev. ed. 1981) pp. 436-38.

of the states as well as of the federal government. But according to both views, federal sovereignty is independent of the sovereignty of the states.

Even Anti-Federalists acknowledged that ratifying the Constitution meant redefining American sovereignty. "Cincinnatus," for instance, complained that "[s]uch is the anxiety manifested by the framers of the proposed constitution, for the utter extinction of the state sovereignties, that they were not content with taking from them every attribute of sovereignty, but would not leave them even the name.—Therefore, in the very commencement they prescribe this remarkable declaration—*We the People of the United States*."[19] The "Federal Farmer" wrote that "when the people [of each state] shall adopt the proposed…it will be adopted not by the people of New Hampshire, Massachusetts, &c., but by the people of the United States…."[20] Robert Yates opposed ratification of the Constitution precisely on these grounds: he admitted that "if it is ratified, [it] will not be a compact entered into by the States, in their corporate capacities, but an agreement of the people of the United States as one great body politic.... It is to be observed, it is not a union of states or bodies corporate; had this been the case the existence of the state governments might have been secured. But it is a union of the people of the United States considered as one body, who are to ratify this constitution, if it is adopted."[21] Indeed, at the Virginia Ratification Convention, Patrick Henry challenged James Madison on this point: "Who authorized [the Constitutional Convention] to speak the language of *We the people*, instead of *We, the States*? States are the characteristics, and the soul of a confederation."[22] Madison replied that the authority of the Articles of [*67]

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[19] Bailyn (1993), 1:118-119.
[20] Bailyn (1993) 1: 275
[21] P. Kurland and R. Lerner, eds., *The Founders' Constitution* (Indianapolis: Liberty Fund 1987) 4:237.
[22] Bailyn (1993) 2:596-597.

Confederation had been "derived from the dependent derivative authority of the legislatures of the states; whereas this [Constitution] is derived from the superior power of the people."[23] The Constitution did not consolidate the states entirely, but "[s]hould all the States adopt it, it will be then a government established by the thirteen States of America, not through the intervention of the Legislatures, but by the people at large."[24]

Opponents of the Constitution, therefore, were well aware that the Constitution would create, not a league of essentially independent sovereignties, but a new nation, retaining its own sovereignty for certain limited purposes. The Federalists explicitly defended this fact: for most purposes, they explained, the people of the states would find their state citizenship unchanged, but for a specified list of other purposes, the whole people of America would now agree, as a single political unit, to invest the union with sovereignty directly, *not* through any intermediary step of state authorities. The federal and the state sovereignty travel, as it were, on parallel rails: state sovereignty connecting the sovereignty of the people of a state to their state capitol; federal sovereignty joining all the people through its national network, to arrive at Washington, D.C. James Wilson, signer of both the Constitution and the Declaration, told the Pennsylvania Ratification Convention that

> the sovereignty resides in the people, they have not parted with it; they have only dispensed such portions of power as were conceived necessary for the public welfare…. In order to recognize this leading principle, the proposed system sets out with a declaration, that its existence depends upon the supreme authority of the people alone…. When the principle is once settled, that the people are the source of authority, the consequence

[23] Bailyn (1993) 2:619.
[24] Id.

> is, that they may take from the subordinate governments with which they have hitherto trusted them, and place those powers in the general government, if it is thought that they will be productive of more good…. I have no idea, that a safe system of power, in the government, sufficient to manage the general interest of the United States, could be drawn from any other source, or rested in any other authority than that of the people at large, and I consider this authority as the rock on which this structure will stand.[25]

[*68] So while the states would, for the most part, retain their sovereignty, ratification meant that the whole People of the United States would now agree to vest their inchoate power to engage in, for example, foreign policy, exclusively in the federal government, which would be supreme for the limited, enumerated purposes of the federal union; otherwise, wrote Hamilton, the Constitution would "be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY."[26] For Hamilton, the reason for a new Constitution was precisely to end the notion that the union was a league of sovereigns: one of the "infirmities" of the Articles of Confederation, he wrote, was

> that it never had a ratification by the PEOPLE. Resting on no better foundation than the consent of the several legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers, and has, in some instances, given birth to the enormous doctrine of a right of legislative repeal. Owing its ratification to the law of a State, it has been contended that the same authority might repeal the law by which it was ratified. However gross a heresy it may be to maintain that a *party* to a *compact* has a right to revoke that *compact*, the doctrine itself has had respectable advocates. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.[27]

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[25] Bailyn (1993) 1:820-21.
[26] Rossiter (1961) 204.
[27] Rossiter (1961) 152.

One argument against the principle of divided sovereignty is that the Constitution was adopted by the members of distinct states, rather than by a national referendum. But Chief Justice John Marshall (who had been a delegate to the Virginia Ratification Convention) answered that in *McColloch v. Maryland*:

> [The Constitution] was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States—and where else should they have [*69] assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.[28]

This was not only the opinion of High Federalists like Marshall. As Madison explained (long after his break with the Federalists), the Constitution was formed

> by the people in each of the States, acting in their highest sovereign capacity.... Being thus derived from the same source as the Constitutions of the States, it...is as much a Constitution, in the strict sense of the term, within its prescribed sphere, as the Constitutions of the States are within their respective spheres; but with this obvious & essential difference, that being a compact among the States in their highest sovereign capacity, and constituting the people thereof one people for certain purposes, it cannot be altered or annulled at the will of the States individually, as the Constitution of a State may be at its individual will.[29]

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[28] 17 U.S. (4 Wheat.) 316, 403 (1819). See also *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 435 (1793) ("The powers of the general Government…do for the most part (if not wholly) affect individuals, and not States: They require no aid from any State authority. This is the great leading distinction between the old articles of confederation, and the present constitution"); id. at 470 (Jay, C.J.) ("the people, in their collective and national capacity, established the present Constitution"); *Respublica v. Corbbet*, 3 U.S. (3 Dall.) 467 (1798); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 178 (1796) (per Paterson, J.,); id. at 181 (per Iredell, J.); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236 (1796) (per Chase, J.); *Banks v. Greenleaf*, 10 Va. 271, 277-78 (1799) ("the general government derives its existence and power from the people, and not from the states, yet each state government derives its powers from the people of that particular state. Their forms of government are different, being derived from different sources; and their laws are different.")

[29] Rakove (1999), p. 843.

These sources reveal how well understood was the central fact that the Constitution was a government of *the whole people of the United States*, not a league or treaty of states in their corporate capacities, as the compact theory would have it. Contrary to Calhoun's later claim that "the States, when they formed and ratified the Constitution, were distinct, independent, and [*70] sovereign communities,"[30] the reality is that, in Marshall's words, federal sovereignty

> proceeds directly from the people; is 'ordained and established' in the name of the people.... It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.... The government of the Union, then…is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.... [T]he government of the Union, though limited in its powers, is supreme within its sphere of action.[31]

As Justice Anthony Kennedy recently put it, "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other…with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.... [T]he National Government, the mark of its legitimacy, is that it owes its existence to the act of the whole people who created it."[32] The federal government is *directly* vested with sovereignty of the whole People of the United States. Secession is not, therefore, like a person who chooses to cancel his membership in a club—because the states are not in the "club" to begin with. Only "We the People" are members of the federal club, and only the "people" which created it can

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[30] Post (1953) p. 91.
[31] *M'Colloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 403-405 (1819).
[32] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838-39 (1995).

change it, by altering the contours of that "people" through amendment, or a new Constitutional Convention. So, while the whole people may allow a state out of the union, or may even dissolve the Constitution entirely, a state cannot claim on its own the authority to withdraw from the union. Lincoln put it with dry understatement when he noted that advocates of secession were "not partial to that power which made the Constitution, and speaks from the preamble, calling itself 'We, the People.'"[33]

These sources reveal that in 1787, both the federalists and anti-federalists recognized that the United States Constitution was just that—a constitution [*71] for a nation, not a league of sovereign states. And, if these sources are not enough, as Akhil Reed Amar points out, "no major proponent of the Constitution sought to win over states' rightists by conceding that states could unilaterally nullify or secede in the event of perceived national abuses. The Federalists' silence is especially impressive because such a concession might have dramatically improved the document's ratification prospects in several states."[34] "[I]f a more explicit guard against misconstruction was not provided," wrote Madison in 1831, "it is explained…by the entire absence of apprehension that it could be necessary."[35]

Some of those who defend the constitutionality of secession claim that it was foreseen, and that several states ratified the constitution did so with explicit reservations of the right to secede.[36] This claim, however, is seriously exaggerated. The only state which passed such a "reservation" while ratifying, and which later seceded, was Virginia. That state's "reservation" read: "The powers granted under the Constitution being

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[33] Basler (1953) 4:437.
[34] A. Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96:1425, 1462 n.162.
[35] Rakove (1999) p. 853.
[36] T. DiLorezno, *The Real Lincoln : A New Look at Abraham Lincoln, His Agenda, and an Unnecessary War* (Roseville: Prima Publishing, 2002) p. 91.

derived from *the People of the United States* may be resumed by *them* whenever the same shall be perverted to their injury or oppression."[37] These phrases nowhere mention any right to unilateral secession, nor to any unconditional right to revolt for any reason the state sees fit. Instead, the "reservation" is simply a restatement of the right to revolution, which we will consider below. Moreover, it is made in the name, not of the people of Virginia, but of "the People of the United States," and it makes the unremarkable assertion that *they* have the right to change their government.

It is also frequently argued that another set of Resolutions, the Virginia and Kentucky Resolutions, reveal the true nature of the Constitution as a league of sovereign states, and that Madison's later repudiation of the compact theory was an instance of intellectual dishonesty. The facts, as usual, are more complicated. Jefferson, whose Kentucky Resolutions unequivocally endorsed the compact theory, sent a draft to Madison for his review. Madison was somewhat startled by Jefferson's argument, and he replied, "Have you ever considered thoroughly the distinction between the power of the *State*, & that of *the Legislature*, on questions relating to the federal pact[?] On the supposition that the former is clearly the ultimate Judge of infractions, it does [*72] not follow that the latter is the legitimate organ especially as a convention was the organ by which the Compact was made."[38] Madison's Virginia Resolutions were somewhat more guarded, and, he insisted, never endorsed the compact theory of the Constitution. Decades later, writing furiously to oppose Calhoun's doctrine of nullification, Madison explained, just as he had at the Philadelphia and Richmond conventions, that the

[37] Emphasis added.
[38] Rakove (1999) p. 392.

Constitution was binding on the people, not on the states, and the states had no right to nullify the laws:

> [T]he characteristic peculiarities of the Constitution are 1. The mode of its formation, 2. The division of the supreme powers of Govt between the States in their united capacity and the States in their individual capacities. 1. It was formed, not by the Governments of the component States, as the Federal Govt. for which it was substituted [i.e., the Articles of Confederation] was formed; nor was it formed by a majority of the people of the U.S. as a single community in the manner of a consolidated Government. It was formed by the States—that is by the people in each of the States, acting in their highest sovereign capacity; and formed, consequently, by the same authority which formed the State Constitutions. Being thus derived from the same source as the Constitutions of the States, it has within each State, the same authority as the Constitution of the State, and is as much a Constitution, in the strict sense of the term, within its prescribed sphere, as the Constitutions of the States are within their respective spheres, but with this obvious & essential difference, that being a compact among the States in their highest sovereign capacity, and constituting the people thereof one people for certain purposes, it cannot be altered or annulled at the will of the States individually, as the Constitution of a State may be at its individual will.[39]

In any case, what Jefferson and Madison wrote in 1798, in a series of resolutions adopted by two state legislatures, cannot change the nature of the federal Constitution as adopted in 1787: it is a binding government of the whole people of the United States. No state may unilaterally leave the union.

C. Other Constitutional Provisions Barring Unilateral Secession

We have seen that the nature of federal sovereignty under the Constitution makes unilateral secession illegal. Since the Constitution is a [*73] law binding the People, and

[39] Rakove (1999) pp. 842-843.

not a league of states, states have no authority to intervene between the people and the national government. If the people of a state wish to leave the union, they may not do so unilaterally, but must obtain the agreement of their fellow citizens—or they must rebel in a legitimate act of revolution.

Several other clauses of the Constitution are consistent with this view, and would be inconsistent with any interpretation allowing a state to leave the union unilaterally. The Constitution guarantees to every state a republican form of government (Art. IV § 4), prohibits states from entering into any compact with other states without Congressional permission (Art. I § 10), guarantees the privileges and immunities of citizens when they travel interstate (Art. IV §2), prohibits states from entering into any "Treaty, Alliance, or Confederation," even *with* Congressional approval (Art. I § 10), preserves every state's right to two senators (Art. V), is the supreme law of the land (Art. VI § 2), and requires state officeholders to take an oath to support the Constitution of the United States (Art. VI § 3). These clauses are inconsistent with the theory that secession is a constitutional prerogative of state government. Consider, for example, the republican guarantee clause: if a state could unilaterally secede, then any group of criminals might declare themselves the "rightful" government of a state, issue a proclamation of secession—and then leave the federal government unable to enforce the guarantee. Likewise, if states could leave the union at any time, it would make little sense to require state officials to take an oath to support the United States Constitution, since their allegiance to the federal union would depend wholly on whether their state decided to remain in the union or not.

One common argument is that the Tenth Amendment reserves to the states the power to secede from the union. But this claim begs the question, in two ways. The

Amendment says that "[t]he powers not delegated to the United States by the Constitution*, nor prohibited by it to the States,* are reserved to the States respectively, or to the people."[40] First, since the Constitution does prohibit secession, that power cannot be reserved to the states. And, second, the Amendment refers explicitly to "the people." To what "people" does this refer? Not to the people of each state separately, but to a *single* people: that is, "We the People" who ratified the Constitution.[41] [*74] Under the compact theory, this clause would be surplusage, since no mere league of sovereigns has the authority to reserve nondelegated powers directly to the people of separate sovereignties, any more than the United Nations can "reserve" any rights to the people of the United States.

III. Was The South Engaged In Revolution?

The fact that states have no Constitutional right to unilaterally secede does not end the inquiry, because people retain the right of revolution regardless. If the Confederacy represented a legitimate act of revolution, then the Union was still in the wrong to put down the rebellion. Madison never denied that all people retain the right to revolution. Nor did Abraham Lincoln. Even in his First Inaugural Address, Lincoln

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[40] Emphasis added.

[41] Believers in the "strong-union" view would argue that this is the same "one people" who dissolved their political bands with England. Also, according to one adherent of the strong-union view, one of the more sophisticated manifestations of the pre-constitutional origin of the union is found in the fact that the Constitution itself limits the degree to which the Constitution can be amended. No amendment, for instance, was permitted to change the date of the Importation Clause, and no amendment can deprive a state of its two senators. If the states had *created* the federal union, then these clauses would be self-contradictory, since there could be no higher sovereignty which could institute, let alone enforce, such a restriction on the power to amend. "A sovereign is by definition a source and not a subject of law," so a compact between sovereigns can never be made unamendable. But, according to either the strong- or weak-union views, since the whole people of the union created the Constitution only to make that union more perfect, they could place limits on the degree to which the Constitution itself could be altered. H.V. Jaffa, *The Conditions of Freedom* (Claremont: Claremont Institute Press, 2000 (1975)) pp. 161, 172.

acknowledged that "[i]f, by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution—certainly would, if such right were a vital one. But such is not our case."[42] Even though the Constitution is a compact between the whole people of the United States, and thus is alterable by the whole people only, any individual or group retains an inalienable right to fight against tyranny.

Many libertarians defend the Confederate states' secession on the grounds that it was engaged in a revolution consistent with the principles of the Declaration of Independence. Writing in 1920, H.L. Mencken claimed that "The Union soldiers…actually fought *against* self-determination; it was the Confederates who fought for the right of their people to govern themselves."[43] More recently, Jeffrey Rogers Hummel has written that "as a revolutionary right, the legitimacy of secession is universal and unconditional. That at least is how the Declaration of Independence reads."[44]

The problem with this argument is that this is *not* how the Declaration of Independence reads. In fact, the libertarian principles of [*75] revolution enunciated in the Declaration do not justify the Confederacy's acts at all.

According to libertarianism, as espoused by John Locke, Thomas Jefferson, and others, the individual's right to own himself puts him on a par with all other individuals in a state of nature. Before government exists, each person has the equal right to run his own life as every other person, and this includes the right to self-defense. Since self-defense is difficult in the state of nature, however, people agree to join a social compact

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[42] Basler (1953) 4:267.
[43] H.L. Mencken, *A Mencken Chrestomathy* (New York: Vintage 1982 (1948)) p. 223.
[44] J.R. Hummel, *Emancipating Slaves, Enslaving Free Men* (Peru, Ill.: Open Court, 1996) p. 351.

by delegating part of that right to the government, which is entrusted with the power to protect their lives, liberties, and estates. But government has no authority to violate their rights, because no individual in the state of nature has the right to violate another person's rights, and therefore cannot confer such a right to the government. "[T]he Legislat[ur]e," wrote Locke, "is not, nor can possibly be, absolutely *Arbitrary* over the Lives and Fortunes of the People. For it being but the joynt power of every Member of the Society given up to that Person or Assembly which is Legislator, it can be no more than those persons had in a State of Nature before they enter'd into Society…. For no Body can transfer to another more power than he has in himself; and no Body has an absolute Arbitrary Power...[to] take away the Life or Property of another."[45] Thus, if those appointed to govern "*endeavour to take away and destroy the Property of the People,* or to reduce them to Slavery under Arbitrary Power…and…endeavour to grasp themselves, or *put into the hands of any other an Absolute Power* over the Lives, Liberties, and Estates of the People; By this breach of Trust they *forfeit the Power*, the People had put into their hands, for quite contrary ends, and it devolves to the People, who have a Right to resume their original Liberty…."[46] The right to revolution, therefore, is an expression of the right to self-defense.

The right to self-ownership allows individuals to agree to a social compact, and the right of self-defense gives that compact its legitimacy. Any society which contradicts these fundamental premises—such as a society based on inequality and slavery—is therefore not a legitimate government; it is instead a criminal gang, and it cannot justify its robbery or enslavement by claiming that the people voted for these things, because the

[45] Laslett (1963) p. 402.
[46] Laslett (1963) p. 461.

people no right to enslave others in the first place.[47] Such a "government" lacks legitimacy and may rightly be overthrown. As Lincoln summarized it, "no man is good enough to govern another man, *without that other's consent*. I [*76] say this is the leading principle—the sheet anchor of American republicanism."[48]

The Declaration of Independence enunciates these principles in what is almost a syllogism: "all men are created equal... endowed by their Creator with certain unalienable Rights... among these are Life, Liberty and the pursuit of Happiness... *to secure these rights,* Governments are instituted among Men, deriving their just powers from the consent of the governed... *whenever any Form of Government becomes destructive of these ends*... it is their right, it is their duty, to throw off such Government...." This right and duty, however, may only be exercised after "a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce [the people] under absolute Despotism."

The Declaration of Independence, therefore, far from recognizing any "unconditional" right of people to overthrow their government, places several important limits on rebellion: it is justified only by a collective act of self-defense, and even then, only after "a long train of abuses and usurpations." And a rebellion which institutes a new government based not on securing individual rights, but on violating them (such as a revolution that consists of stealing people's property), is not a legitimate revolution at all in the eyes of the Declaration's libertarian theory; it would be merely a massive criminal act or coup.

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[47] A. Rand, "Man's Rights," *The Virtue of Selfishness,* (New York: Signet, 1964).
[48] Basler (1953) 2:266.

These arguments are all essentially rewordings of libertarianism's famous maxim against the initiation of force. Libertarian theory holds that political institutions are justified only insofar as they protect the freedom of the individuals who make up that society. A political society's "right to self-determination," therefore, is not a *fundamental* principle according to libertarianism, but is a consequence and function of the self-determination of individuals who make up that society.

The non-initiation of force principle means that the distinction between a revolutionary act and a crime is that the former is a kind of self-defense, undertaken to protect individual rights, while the latter is an initiation of force, to violate the rights of others, or protect the proceeds of some robbery. In the former case, libertarianism holds that it is legitimate to commit acts of physical force in retaliation against those who have initiated its use; the American Revolution, for instance, while illegal, was a legitimate act of revolution because Parliament had declared its right to "bind [the American colonies] in all cases whatsoever," and had engaged in "a long train of abuses and usurpations." Americans had the right to defend themselves by throwing off such government, even if doing so cost many lives.

[*77] Analyzing the alleged "revolution" of 1861 also requires understanding the purposes behind the act: *why* did the Confederacy fired on Fort Sumter, and thus violate the supreme law of the land? Although several writers have tried to claim that the Civil War was not fought over slavery, but over issues of domestic economic policy,[49] these

[49] See e.g., Livingston (2002) pp. 72-76.

claims are highly exaggerated.[50] Mississippi's declaration of secession, for example, stated unequivocally:

> In the momentous step which our State has taken…it is but just that we should declare the prominent reasons which have induced our course.
>
> Our position is thoroughly identified with the institution of slavery—the greatest material interest of the world. Its labor supplies the product which constitutes by far the largest and most important portions of commerce of the earth. These products are peculiar to the climate verging on the tropical regions, and by an imperious law of nature, none but the black race can bear exposure to the tropical sun…. [A] blow at slavery is a blow at commerce and civilization…. There was no choice left us but submission to the mandates of abolition, or a dissolution of the Union, whose principles had been subverted to work out our ruin.

Domestic economic policy (other than that relating to slavery) is nowhere mentioned in this document, or in South Carolina's declaration of secession, which focused only on "The right of property in slaves," and complained that other sates "have denied the rights of property established…have denounced as sinful the institution of slavery…[and] have encouraged and assisted thousands of our slaves to leave their homes." Georgia's declaration reiterated its "numerous and serious causes of complaint against [the] non-slave-holding…States with reference to the subject of African slavery," and although it complained of the fact that Northern economic interests had received federal protection ("they have succeeded in throwing the cost of light-houses, buoys, and the maintenance of their seamen upon the Treasury"), it did so only to protest that federal protection of slavery was inadequate. Texas' declaration of secession complained that "In all the non-slave-holding States…the people have formed themselves into a great sectional party…based upon an unnatural feeling of hostility to these [*78] Southern

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[50] E. Volokh, "More on Secession And Slavery." *The Volokh Conspiracy.* http://volokh.com/2002_04_28_volokh_archive.html#76098962 (2002)

States and their beneficent and patriarchal system of African slavery, proclaiming the debasing doctrine of equality of all men, irrespective of race or color—a doctrine at war with nature, in opposition to the experience of mankind, and in violation of the plainest revelations of Divine Law."[51]

These documents could hardly be clearer. The Confederate states, whatever their other reasons for seceding, were primarily moved by the desire to preserve their slave property from interference by the federal government. Or, more accurately, in reaction against the election of a President who had pledged himself to halt the spread of slavery into the western territories.[52] Although the Confederates phrased their arguments in terms of "freedom," it was the "freedom to enslave" that they were defending. Indeed, the Constitution of the Confederate States of America, section IX clause 4, unambiguously declared that "No...law denying or impairing the right of property in negro slaves shall be passed." This clause demonstrates just how off the mark Mencken's criticism of Lincoln really was. It was not true that "the Confederates…fought for the right of their people to govern themselves."[53] The Confederates fought for the (literally absolute) right of *white people* to govern *black people*, without the black people's consent.

Unlike present-day defenders of the South, the leaders of the Southern cause realized that their cause could find no support in the Declaration of Independence. Thus

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[51] These declarations are available at http://www.yale.edu/lawweb/avalon/csa/csapage.htm.
[52] The Constitution, of course, barred the federal government from depriving southerners of their slaves, except possibly through condemnation in exchange for just compensation. But it did permit the Congress to bar slavery from the western territories, which would become states eventually. If admitted as free states, this would mean that southerners would eventually find themselves outvoted in Congress, which could lead to the ultimate extinction of slavery. It was Lincoln's insistence on forbidding slavery in the west—as enunciated in his Cooper Union speech, for example—that served as the proximate cause of the war. McPherson (1988) pp. 51-72.
[53] Mencken (1982) p. 223.

they rarely based their arguments on the Declaration, and in fact explicitly denounced it. "There is not a word of truth in it," said John C. Calhoun.[54] The principle that all men are created equal, he said was "inserted into our Declaration of Independence without any necessity. It made no necessary part of our justification for separating from the parent country, and declaring ourselves independent." Others went [*79] farther. Senator Pettit of Indiana declared it a "self-evident lie."[55] Governor Hammond of South Carolina—who had once said "Slavery is…the greatest of all the great blessings which a kind Providence has ever bestowed upon our glorious region"[56]—denounced the "much-lauded but nowhere accredited dogma of Mr. Jefferson that all men are created equal."[57]

Contrary, then, to the oft-repeated claim that the Civil War was not about slavery, the question of slavery answers the essential question which determines whether secession in 1860 was an act of revolution on one hand, or a criminal conspiracy, in the other. The secession of 1861 was not a legitimate revolution because its "cornerstone" rested on the "the great truth that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition."[58] As Lincoln had said before the war,

> We all declare for liberty; but in using the same word we do not all mean the same thing. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor. Here are two, not only different, but incompatible things, called by the same name—liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatible names—liberty and tyranny. The shepherd

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[54] *Cong. Globe,* 30th Cong. 1st Sess., p. 875 (1848)
[55] *Cong. Globe,* 33rd Cong., 1st Sess. p. 214 (1854)
[56] W. L. Miller, *Arguing About Slavery*. (New York: Knopf, 1988) p. 134.
[57] C. Merriam, *History of American Political Theories* (New York: Kelly 1969 (1903)) p. 230; see further C. Oliver, "Southern Nationalism" *Reason*, Aug.-Sep. 2001.
[58] A. Stephens, "Cornerstone Speech" http://www.pointsouth.com/csanet/greatmen/stephens/stephens-corner.html (1861).

> drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as a liberator, while the wolf denounces him for the same act as the destroyer of liberty, especially as the sheep was a black one. Plainly the sheep and the wolf are not agreed upon a definition of the word liberty.[59]

The Confederacy, built upon the wolf's definition of liberty, was an illegitimate government by the libertarian standards of the Declaration of Independence. When the Confederacy initiated force by firing on Fort [*80] Sumter, therefore, it became the responsibility of the President to "take Care that the Laws [including the supreme law of the land] be faithfully executed,"[60] by putting down the rebellion by force if necessary.

IV. Why Libertarians Defend The South

Among the reasons that so many libertarians argue that the Confederacy was in the right in the Civil War is their perception that Union victory ushered in an era of federal expansion and control over the economy. It is certainly true that in the late nineteenth century, the federal government intervened more and more in national economic policy. But blaming this on Union victory is problematic at best. For one thing, the argument partakes of the *post hoc* fallacy. While it is true that government manipulation of the economy increased in the years following the war, this had many causes, especially the rise of the Populist, and later Progressive, political movements. These can be only distantly connected to the Union cause. Moreover, while there was much to deplore in the culture of Yankee political economy, there was at least as much to deplore about the culture of the antebellum south.

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[59] Basler (1953) 7:301-302.
[60] U.S. Const. Art. II § 3.

More specifically, some libertarians argue that the Union victory caused an expansion of federal authority by destroying the political will of states to resist the expansionism of the federal government.[61] After such a bloody experience, states were less willing to say no when the federal government proposed to step on state prerogatives. Although there is some truth to this argument, there are two mitigating thoughts that must be kept in mind. First, it did not entirely destroy the will of states to resist federal encroachment: as the Civil Rights era of the 1950s and 1960s revealed, southern states were still quite willing to resist what they perceived as federal encroachment, through the policy of "massive resistance" to integregation. But, secondly, that experience shows that state resistance to federal authority is just as likely to be inimical to individual liberty as it is to redound to the benefit of individual liberty. State resistance, after all, is usually predicated not on protecting individuals from oppression, but on protecting the official dignity of state governments. For libertarians to venerate state government is therefore a risky enterprise. As Madison explained in the *Federalist*, the legitimacy of state governments is only valid so long as the states protect the freedom of Americans: "is it not preposterous," he asked,

> to urge as an objection to [the Constitution]…that such a government may derogate from the importance of the governments [*81] of the individual States? Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States…might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the Old World, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the New…? [T]he public good, the real welfare of the great body of the people, is the supreme object to be pursued; and…no form of government whatever has

[61] See e.g., W. Williams, "The Civil War's Tragic Legacy," *Ideas on Liberty,* Jan.1999.

> any other value than as it may be fitted for the attainment of this object. [A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter.[62]

While state resistance to federal expansion may be helpful for protecting individual liberty, it has also often been inimical, and this was never more true than in the case of the Civil War.

Finally, I suspect one reason libertarians are misled into embracing the Confederate cause is because of the formative event in the lives of many libertarians, as well as the Libertarian Political Party: The Vietnam War. The lessons that many Vietnam protestors drew from that experience were that war is *never* justified, and that it is simply "none of our business" what another country's rulers do to the people of that country. If the Vietnamese "choose" to live under communism, other nations must not interfere. Likewise, this argument goes, if southerners in the 1860s chose to enslave blacks, that may have been wrong, but it was none of the Union's business. Seeing the Confederacy through the lens of the Vietnam experience, however, is misleading. First, it ignores the fact that, unlike in foreign policy, where a nation may choose whether or not to intervene in a conflict, the Constitution requires the president to faithfully execute the law, including the Constitution itself. Second, such a view obscures the ultimate values of libertarian political philosophy. Although it is true that Americans do not owe a *duty* to intervene when other nations' rulers oppress their peoples, it is *not* true that other nations have the *right* to oppress their people. To say that another nation's oppression of its people is "none of our business" is similar to what Lincoln described as the perverse

[62] Rossiter (1961) p. 289.

notion "that 'if one man would [*82] enslave another, no third man should object.'"[63] The United States, and every other nation, does have the right, though *not* the duty, to liberate oppressed peoples held captive by dictatorships. The federal government had the right, *and* the duty, to put down the Confederate rebellion.

War is a terrible thing. But libertarianism holds that it is justified at times, when undertaken in defense of individual liberty. As Jefferson said, "all men know that war is a losing game to both parties. But they know also that if they do not resist encroachment at some point, all will be taken from them.... It is the melancholy law of human societies to be compelled sometimes to choose a great evil in order to ward off a greater…."[64] The Civil War was an awful conflict, costing hundreds of thousands of lives. But the right side did prevail in that war, and libertarians should stop doing themselves the great disservice of defending a cruel and oppressive slave society.

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[63] Basler (1953), 3:538.
[64] Peterson (1984) p. 356.