CHAPTER 1

THE PREAMBLE

[Assignment 6]

> **We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.**

I. THE GLOBAL SIGNIFICANCE OF THE PREAMBLE

The Preamble is hugely important in U.S. constitutional law, as we shall see, but it is also important because its principal of popular sovereignty has been copied so widely all over the world. Constitutional preambles are commonplace, though most such preambles are much longer than the single sentence that appears in the U.S. Constitution, and some reflect fundamentally different principles of government and human relations. Consider below a sampling of excerpts from a few preambles from countries all over the world and compare them to the Framers' terse but dense eighteenth-century statement.

A. GERMANY

Preamble to the Basic Law for the Federal Republic of Germany

(Approved 8 May 1949, took effect 23 May 1949)

Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law. Germans in the Länder of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Basic Law thus applies to the entire German people.

B. JAPAN

Preamble to the Constitution of Japan

(Promulgated on Nov. 3, 1946, took effect on May 3, 1947)

We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war

through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded. We reject and revoke all constitutions, laws, ordinances, and rescripts in conflict herewith.

C. INDIA

Preamble to the Constitution of the Republic of India

(Adopted on 26 Nov. 1949, took effect on 26 Jan. 1950)

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY, of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, DO HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

D. CANADA

The Canadian Constitution Act of 1867

30–31 Vict., c. 3 (1867) (U.K.). Amended by the U.K. Parliament in 1982

An Act of Queen Victoria in Parliament with the Lords Spiritual and Temporal and with the Commons of the Kingdom of Great Britain and Ireland for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith. *[29th March 1867]*

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America: * * *

It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the Name of Canada; and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly.

E. AUSTRALIA

Preamble to the Commonwealth of Australia Constitution Act 1900

(Became law on 9 July 1900, took effect on 1 Jan. 1901)
(Achieved full independence in 1986)

Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons of the Kingdom of Great Britain and Ireland, in this present Parliament assembled, and by the authority of the same, as follows: * * *

F. THE REPUBLIC OF KOREA

Preamble to the Constitution of the Republic of Korea

(Promulgated on July 17, 1948, revised Oct. 29, 1987)

We, the people of Korea, proud of a resplendent history and traditions dating from time immemorial, upholding the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919 and the democratic ideals of the April Nineteenth Uprising of 1960 against injustice, having assumed the mission of democratic reform and peaceful unification of our homeland * * * Do hereby amend, through national referendum following a resolution by the National Assembly, the Constitution, ordained and established on the Twelfth Day of July anno Domini Nineteen hundred and forty-eight, and amended eight times subsequently.

G. THE FEDERATIVE REPUBLIC OF BRAZIL

Preamble to the Constitution of the Federal Republic of Brazil

(Ratified on Oct. 5, 1988)

We, the representatives of the Brazilian People, convened in the national constituent assembly to institute a democratic state for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes, promulgate, under the protection of God, this Constitution of the Federative Republic of Brazil.

H. THE REPUBLIC OF SOUTH AFRICA

Preamble to the Constitution of South Africa

(Approved on 4 Dec. 1996, took effect on 4 Feb. 1997)

We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to

- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- Improve the quality of life of all citizens and free the potential of each person; and
- Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika

I. THE CONSTITUTION OF SAUDI ARABIA

Basic Law of the Kingdom of Saudi Arabia

(Adopted on 1 Mar. 1992)

CHAPTER ONE: GENERAL PRINCIPLES

Article 1: The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam. Its constitution is Almighty God's Book, The Holy Qur'an, and the Sunna (Traditions) of the Prophet. Arabic is the language of the Kingdom. The City of Riyadh is the capital.

Article 2: The State public holidays are Eid Al Fitr (the Feast of Ramadan) and Eid Al Adha (The Feast of the Sacrifice). Its calendar follows the Hijri year (the lunar year).

Article 3: The flag of the State is as follows:

(a) Its color is green

(b) Its width equals two thirds of its length

The words: "There is no god but God and Mohammed is His Messenger" are inscribed in the center, with a drawn sword underneath. The flag should never be inverted. The Law will specify the rules pertaining to the flag.

Article 4: The State's Emblem represents two crossed swords with a palm tree in the middle of the upper space between them. The Law will define the State's Anthem and medals. * * *

Article 39 [Expression]:

Information, publication, and all other media shall employ courteous language and the state's regulations, and they shall contribute to the education of the nation and the bolstering of its unity. All acts that foster sedition or division or harm the state's security and its public relations or detract from man's dignity and rights shall be prohibited. The statutes shall define all that.

J. THE CONSTITUTION OF THE EUROPEAN UNION

The Treaty of Lisbon

(Signed on 13 Dec. 2007, entered into force on 1 Dec. 2009)

PREAMBLE

HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE CZECH REPUBLIC, HER MAJESTY THE QUEEN OF DENMARK, THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY, THE PRESIDENT OF THE REPUBLIC OF ESTONIA, THE PRESIDENT OF THE HELLENIC REPUBLIC, HIS MAJESTY THE KING OF SPAIN, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF IRELAND, THE PRESIDENT OF THE ITALIAN REPUBLIC, THE PRESIDENT OF THE REPUBLIC OF CYPRUS, THE PRESIDENT OF THE REPUBLIC OF LATVIA, THE PRESIDENT OF THE REPUBLIC OF LITHUANIA, HIS ROYAL HIGHNESS THE GRAND DUKE OF LUXEMBOURG, THE PRESIDENT OF THE REPUBLIC OF HUNGARY, THE

PRESIDENT OF MALTA, HER MAJESTY THE QUEEN OF THE NETHERLANDS, THE FEDERAL PRESIDENT OF THE REPUBLIC OF AUSTRIA, THE PRESIDENT OF THE REPUBLIC OF POLAND, THE PRESIDENT OF THE PORTUGUESE REPUBLIC, THE PRESIDENT OF THE REPUBLIC OF SLOVENIA, THE PRESIDENT OF THE SLOVAK REPUBLIC, THE PRESIDENT OF THE REPUBLIC OF FINLAND, THE GOVERNMENT OF THE KINGDOM OF SWEDEN, HER MAJESTY THE QUEEN OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law,

BELIEVING that Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world, * * *

GRATEFUL to the members of the European Convention for having prepared the draft of this Constitution on behalf of the citizens and States of Europe,

HAVE DESIGNATED AS THEIR PLENIPOTENTIARIES: * * *

K. THE UNITED NATIONS

Charter of the United Nations

(Signed on 26 June 1945, took effect on 24 Oct. 1945)

WE THE PEOPLE OF THE UNITED NATIONS DETERMINED

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

- to practice tolerance and live together in peace with one another as good neighbours, and
- to unite our strength to maintain international peace and security, and
- to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

- to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS * * *

NOTES AND QUESTIONS

1. It is striking and inspiring to see how the Framers' words "We the People of the United States" have echoed down now for more than two centuries in constitution-writing.

2. Consider the Preamble of the German Constitution, which, unlike the eighteenth-century American Constitution, explicitly invokes God. (There are also explicit references to God in the Australian, Brazilian, South African, Argentinian, and Saudi Arabian preambles.) What explains this, and what do you think of the German Preamble. Why do you think there is the reference to all the German states? Why do you think the Preamble says it applies to "the entire German people"? The German Basic Law, as its Constitution is called, was ratified by all the elected parliaments of the German states, which were elected with women having the right to vote for the first time in German history. There were no special constitutional ratifying conventions like those held in each of the thirteen original United States.

3. The Preamble of the Japanese Constitution is ironic because Americans forced Japan to adopt its Constitution, and the Japanese government in recent years has been desperate to rewrite it, especially to get rid of freedom of speech and to place the Emperor above the law. Japanese elites have been foiled, however, by the amending rules of Japan's Constitution, which require majority popular approval in a referendum of any constitutional changes. Public opinion polls have showed for decades that the people of Japan oppose making any changes to General Douglas MacArthur's Constitution. The Japanese Constitution was published in outline form before a bicameral legislature was elected in an election in which women were allowed to vote in Japan for the first time. The new Constitution was adopted in the form prescribed for amending Japan's previous Meiji Constitution. The Emperor Hirohito submitted the draft to both Houses of the legislature. Revisions were made, and an identical draft was passed by a two-thirds vote of both Houses of the legislature and signed by the Emperor. There was no special ratifying convention as there had been in the thirteen United States.

4. The Preamble of the Indian Constitution was written by Mr. B.R. Ambedkar, an untouchable, who received graduate degrees in both the United Kingdom and from Columbia University in the United States. Ambedkar was a big admirer of the U.S. Constitution and its preamble, and he single-handedly introduced both a written Bill of Rights and judicial review of the constitutionality of federal and state legislation into the Constitution of India. Note that India's constituent assembly *gave* the Constitution to India. It was never submitted for ratification by the people of India in any way, either by referendum or by elected ratifying conventions. The Indian Preamble contrasts with the German Preamble in that India establishes a "secular republic" while the German Preamble refers to "God." The U.S. Preamble, unlike the opening lines of the Declaration of Independence, is silent on the subject of religion.

5. Consider the Constitutions of Canada and Australia, which were enacted as statutes of the U.K. Parliament in 1867 and 1901. Those two countries became at that time "Dominions" of the British Empire and acquired full self-governing status with the adoption of the Statute of Westminster in 1931. From 1867 to 1949, decisions of the highest courts in Canada could be and were often appealed to His Majesty's Judicial

Committee of the Privy Council, which decided Canadian cases using British judges in London who had never been to Canada. From 1901 to 1986, decisions of some of the highest courts in Australia were also appealable to the Judicial Committee of the Privy Council in London. Canada and Australia evolved toward democracy and independence and never rebelled against the British Empire the way the U.S. did. This evolution is reflected today in their constitutional preambles. It is also reflected in the fact that Queen Elizabeth II is not only the Queen of the United Kingdom but is also the Queen of Canada and of Australia. No ratifying conventions of either the Canadian or the Australian Constitutions were ever held in any of the Canadian provinces or the Australian states, although there was substantial informal popular input in both cases. Quebec Province, in particular, has never ratified *any* Canadian constitutional document.

6. Consider the Preamble of South Africa's Constitution, which peacefully and bloodlessly ended decades of racist apartheid government by the white Afrikaner minority. The fact that *all* of "We the People of South Africa" made the new constitution is poignant and significant as a milestone. South Africans did freely elect a constitutional convention, which ratified its Constitution.

7. Brazil, also begins its Constitution with the magic words from Philadelphia: "We the People." This is striking because Brazil, the fifth most populous and fifth largest country on the earth, is a complex multi-racial society. The Brazilian Constitution was ratified by both a special constitutional convention elected to write Brazil's Constitution and by voters in a national referendum who voted for a presidential separation of power system and against either a parliamentary system or a constitutional monarchy.

8. Saudi Arabia's Constitution has no formal Preamble, but the "General Principles" of its "Basic Law" serve many of the functions of a preamble. There is no separation of God's law and man's law in Saudi Arabia. Not only is there no protection of freedom of expression, but there is actually a clause in the Saudi Arabian Constitution denying any right to freedom of expression. The Constitution was adopted by royal decree and presumably could be repealed the same way.

9. The Preamble to the European Union Constitution proclaims that the document issues, not from "We the People of the European Union," but from the ceremonial heads of states of the contracting parties. It is similar in this respect to the Preamble of the U.S. Articles of Confederation, which, of course, proved to be a failure.

10. Finally, consider the "We the People" Preamble to the treaty setting up the United Nations. It, too, is inspired by the U.S. example. More than two centuries after its adoption, the U.S. Constitution, which was ratified by special ratifying conventions in all of the States, stands out as a beacon of liberty and equality. It is now time to give that Preamble a closer look.

II. "A MORE PERFECT UNION": THE CONSTITUTIONALITY OF SECESSION AND THE CIVIL WAR

Justice Joseph Story, A Familiar Exposition of the Constitution of the United States, Chapter VII: Exposition of the Constitution—The Preamble

* * * [W]e are now prepared to enter upon an examination of the actual structure and organization of that Constitution, and the powers belonging to it. We shall treat it, not as a mere compact, or league, or confederacy, existing at the mere will of any

one or more of the States, during their good pleasure; but, (as it purports on its face to be,) as a Constitution of Government, framed and adopted by the people, in the manner pointed out in the instrument itself. It is to be interpreted, as all solemn instruments are, by endeavoring to ascertain the true sense and meaning of all its terms; and we are neither to narrow them, nor to enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged of according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men. The people have established it and spoken their will; and their will, thus promulgated, is to be obeyed as the supreme law. Every department of the Government must, of course, in the first instance, in the exercise of its own powers and duties, necessarily construe the instrument. But, if the case admits of judicial cognizance, every citizen has a right to contest the validity of that construction before the proper judicial tribunal; and to bring it to the test of the Constitution. And, if the case is not capable of judicial redress, still the people may, through the acknowledged means of new elections, or proposed amendments, check any usurpation of authority, whether wanton, or unintentional, and thus relieve themselves from any grievances of a political nature.

NOTES AND QUESTIONS

1. In this excerpt, Justice Story says that the Constitution is written in "the language of the people, to be judged of according to common sense * * *." In other words, the Constitution means what a reasonable person versed in its language would understand it to mean. Does that interpretative principle follow from the Preamble's declaration that the Constitution is the product of "We the People"? *See* Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century,* 59 ALBANY L. REV. 671 (1995). Are other principles of interpretation therefore "unconstitutional"?

2. Perhaps surprisingly, the Preamble was not much discussed or employed in the Founding Era. Indeed, James Wilson "is the only one of the Founders to treat the Preamble as a statement of the principles underlying the Constitution." William Ewald, *James Wilson and the American Founding,* 17 GEO. J.L. & PUB. POL'Y 1, 21 (2019). (For a more optimistic view of the influence of the Preamble in early America, see John W. Welch & James A. Heilpern, *Recovering Our Forgotten Preamble,* 91 SO. CAL. L. REV. 1021 (2018).) On the other hand, Abraham Lincoln, three quarters of a century after the founding, made extensive use of the Preamble—and of the Declaration of Independence that anticipated it. Perhaps that is because the events faced by President Lincoln, when eleven of the Southern slave States attempted to secede from the Union, called up the principles of the Preamble and Declaration in a fashion that the country had never before faced.

3. The roots of secession lay in the idea that the Constitution was a "contract among the States" rather than a national government founded by "We the People of the United States." According to the first view, sovereignty laid in the States. According to the second view, sovereignty laid in a majority of the people in nine of the thirteen States (and thereafter in a majority in three quarters of the States).

4. The "contract among the States" idea was first publicly discussed in 1798 after the Federalist Congress and President Adams passed the Sedition Act of 1798, which made it a federal crime to criticize President Adams or either House of Congress but not

Vice President Jefferson. The Adams Administration brought numerous prosecutions under the Sedition Act, the federal courts upheld the constitutionality of the Act, and a number of people were jailed and fined accordingly. James Madison and Thomas Jefferson responded to Sedition Act prosecutions in the only way they could by getting the state legislatures of Virginia and Kentucky, respectively, to pass resolutions condemning the Sedition Act as unconstitutional and mobilizing public opinion against it. Jefferson and Madison were right on the merits, but they chose an unfortunate framework for expressing their ideas. Mobilizing public opinion against federal action is clearly a proper state function; one might call this approach "interposition," as it interposes the State between the people and the national government but without challenging the legal authority of the United States. This risk is that interposition can morph into *nullification,* in which a State claims the right to declare federal laws unconstitutional and unenforceable. That latter idea depends on the view that the U.S. Constitution was "a contract among the States" and that the States were the final judges of whether the contract had been broken. Interposition might also, but need not, depend on that "contract among the States" idea. Examine Madison's Virginia Resolution and Jefferson's Kentucky Resolution to see what assumptions they make about the nature of the Union and its origins in "We the People."

A. VIRGINIA RESOLUTION OF 1798 IN RE THE SEDITION ACT (MADISON)

RESOLVED,

* * *

That this Assembly doth explicitly and peremptorily declare, that it views the powers of the federal government, as resulting from the compact, to which the states are parties; as limited by the plain sense and intention of the instrument constituting the compact; as no further valid that they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.

* * *

That the good people of this commonwealth, having ever felt, and continuing to feel, the most sincere affection for their brethren of the other states; the truest anxiety for establishing and perpetuating the union of all; and the most scrupulous fidelity to that constitution, which is the pledge of mutual friendship, and the instrument of mutual happiness; the General Assembly doth solemnly appeal to the like dispositions of the other states, in confidence that they will concur with this commonwealth in declaring, as it does hereby declare, that the acts aforesaid, are unconstitutional; and that the necessary and proper measures will be taken by each, for co-operating with this state, in maintaining the Authorities, Rights, and Liberties, referred to the States respectively, or to the people.

B. KENTUCKY RESOLUTION OF 1798 IN RE THE SEDITION ACT (JEFFERSON)

1. *Resolved*, That the several States composing, the United States of America, are not united on the principle of unlimited submission to their general government; but that, by a compact under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes—delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force: that to this compact each State acceded as a State, and is an integral part, its co-States forming, as to itself, the other party: that the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among powers having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.

C. JOHN C. CALHOUN

Note that Madison's Virginia Resolution described the Constitution as a compact "to which the states are parties," and Jefferson's Kentucky Resolution said that "they"—meaning "the States", and not "We the People"—"constituted a general government." While that characterization of the relationship between the national government, the States, and We the People may have served to mobilize opposition to the Sedition Act, which was eventually repealed, it laid the groundwork for something much more consequential.

The father of Southern secession was John C. Calhoun of South Carolina, who wrote the document below while serving as Vice President to Andrew Jackson. Calhoun was also Vice President under John Quincy Adams, served as Secretary of War and Secretary of State, and for many years was a Representative and Senator from South Carolina, where he tirelessly advanced the cause of slavery. He died on March 31, 1850, but he is for all practical purposes the key theorist of the subsequent Southern secession. Does Calhoun's theory of "nullification" follow logically from the premises of Madison and Jefferson's 1798 Resolves? Does a right of secession follow from those premises as well?

Mr. Calhoun's Letter to [South Carolina Governor] General Hamilton on the Subject of State Interposition *IN* John C. Calhoun, Speeches of John C. Calhoun Delivered in the Congress of the United States from 1811 to the Present Time

44–46, 55 (1843)

* * * [T]he first and most important point is to ascertain distinctly who are the real authors of the Constitution of the United States—whose powers created it—whose voice clothed it with authority; and whose agent the government it formed in reality is * * *.

* * * [I]f it be true, indeed, that the Constitution is the work of the American people collectively; if it originated with them, and derives its authority from their will, then there is an end of the argument. The right claimed for a state of defending her reserved powers against the General Government would be an absurdity. Viewing the American people collectively as the source of political power, the rights of the states would be mere concessions—concessions from the common majority, and to be revoked by them with the same facility that they were granted * * *. But, fortunately, the supposition is entirely destitute of truth. So far from the Constitution being the work of the American people collectively, no such political body either now, or ever did, exist. In that character the people of this country never performed a single political act, nor, indeed, can, without an entire revolution in all our political relations.

* * * [I]t is declared in the preamble of the Constitution to be ordained **by** the people of the *United States,* and in the article of ratification, when ratified, it is declared *"to be binding between the states so ratifying."* The conclusion is inevitable, that the Constitution is the work of the people of the states, considered as separate and independent political communities; that they are its authors—their power created it, their voice clothed it with authority—that the government formed is, in reality, their agent; and that the Union, of which the Constitution is the bond, is a union of states, and not of individuals * * *.

* * *

* * * [I]t was only by the ratification of the state that its citizens became subject to the control of the General Government. The ratification of any other, or all the other states, without its own, could create no connexion between them and the General Government, nor impose on them the slightest obligation * * *. It follows * * * that, on a question whether a particular power exercised **by** the General Government be granted by the Constitution, it belongs to the state as a member of the Union, in her sovereign capacity in convention, to determine definitively, as far as her citizens are concerned, the extent of the obligation which she contracted; and if. in her opinion, the act exercising the power be unconstitutional, to declare it null and void * * *. In coming to this conclusion, it may be proper to remark, to prevent misrepresentation, that I do not claim for a state the right to abrogate an act of the General Government. It is the Constitution that annuls an unconstitutional act. Such an act is of itself void and of no effect * * *.

* * *

D. THE IMMEDIATE CAUSES OF SOUTHERN SECESSION

In order to understand the immediate causes of Southern secession from the Union in 1860 and 1861, it is necessary to review briefly the relevant history of the United States from 1787 to 1860.

In 1787, the Continental Congress, acting under the Articles of Confederation, banned slavery in the Northwest Territories, which became the free States of Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota. No one in the South or elsewhere questioned the Continental Congress's power to ban slavery in the Northwest Territory. Moreover, in 1787, Article IV of the Articles of Confederation provided that "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, *the free*

inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States." (emphasis added). This provision makes it crystal clear that, in 1787, free African-Americans were citizens of the United States, and nothing in the new federal Constitution deprived them of that status. In the 1780s, slavery was widely regarded as a dying institution repugnant to the principle of the American Revolution that "All men are created Equal." The Northwest Ordinance banning slavery in the territories was thus uncontroversial, and the leading Framer, President George Washington, freed all his slaves upon the death of his wife Martha. Participation in the international slave trade by U.S. citizens was made a federal crime by Congress and President Washington in 1794. The international slave trade itself was outlawed in 1808, at the earliest possible date allowed by the Constitution. Slavery was abolished in all of the New England States in the 1780s and in all the Northern States by 1820. The development of the cotton gin, however, in the 1790s made growing cotton on Southern plantations with slave labor highly profitable, and so slavery in the South became entrenched.

In 1820, the slave State of Missouri sought admission to the Union. At the time, there was an even number of slave and free State senators, and the admission of a new slave State would have tipped the balance. An uproar occurred, but the problem was solved by what came to be known as the Missouri Compromise. Maine was carved out of Massachusetts and admitted as a free State and Missouri was admitted as a slave State. The even balance of free and slave State senators was preserved. The question remained, however, what ought to be the status of slavery in the vast Western territories acquired by President Thomas Jefferson in 1803 through the Louisiana Purchase, encompassing essentially all the lands between the Rocky Mountains and the Mississippi River and from Canada to the Mexican border, plus territory acquired by treaty from England that eventually became the States of Oregon and Washington. A compromise was adopted whereby all remaining lands from the Louisiana Purchase north of the 36 degrees, 30 minutes parallel would be free territories, while all lands south of that line would be slave territories. This bitterly-arrived-at Missouri Compromise lasted for thirty-seven years until the Supreme Court, absurdly and incautiously, held it unconstitutional in the case of *Dred Scott v. Sandford,* 60 U.S. 393 (1857). *See infra* pages 932–954.

By the 1850s, the slavery issue had become all consuming. The slave State of Texas had been added to the Union, while the Mexican War added to the Union territories including the present States of New Mexico, Arizona, California, Nevada, and Utah. Southerners were desperate to maintain their parity in the Senate with free State senators, and so they worked actively, but with limited success, to spread slavery to the newly acquired Southern and Southwestern territories. In the meantime, the Northern States made their abolition of slavery absolute, so that if a slave-owner voluntarily brought a slave with him into a free State, while he was in route to another slave State, that slave became instantly free upon setting foot on free state soil. Moreover, the Northern States were increasingly lax and grudging in enforcing the Fugitive Slave Clause, which obligated them to return fugitive slaves to the South. Mobs often formed around federal courthouses adjudicating whether a particular African-American was a free man or a runaway slave. The mobs demanded that such men be freed at once. (Was this a form of Calhounian nullification?)

In the Compromise of 1850, the South agreed to admit California as a free State; the territories of New Mexico, Arizona, and Utah were to be allowed to decide in a popular referendum, when they became States, whether they wished to be slave States or free States; and the slave trade was banned in the District of Columbia. The slave states of the South thus lost their equality in the Senate. The South gained, in return, a new and more stringent fugitive slave law in the Compromise of 1850, under which federal commissioners deciding whether an African-American, apprehended in the North, was a slave or a free person received $10 if they ruled the person was a slave and only $5 if they ruled the person was free. (This feature of the statute was a plain violation of the Due Process of Law Clause of the Fifth Amendment.) To an even greater degree than before 1850, huge mobs gathered outside of federal courthouses in the North every time an alleged fugitive slave's status was adjudicated. Many Northerners defied federal law by nobly running an under-ground railroad, transporting fugitive slaves from the South to Canada, where they were beyond the reach of the new fugitive slave law.

In 1857, the U.S. Supreme Court issued its opinion in *Dred Scott v. Sandford*, 60 U.S. 393 (1857). The case, which we will read later in this casebook, is by most accounts (including ours) the worst opinion the Supreme Court ever issued, not only because it was a direct cause of the Civil War, but also because it was so badly and duplicitously reasoned. The Court held: 1) that Congress lacked the power under the Territories Clause of Article IV to ban slavery in any of the federal territories, even though the far weaker Continental Congress had banned slavery in the Northwest Territories in 1787; and 2) that even free African-Americans in the North were not citizens of the United States because the Framers of the Constitution were so racist that they could not have imagined free African-Americans being a part of "We the People of the United States" who made the Constitution. This argument overlooks, inter alia, the fact that Article IV of the Articles of Confederation expressly made "all the free inhabitants" of the thirteen original States citizens. We will say much more about *Dred Scott* later.

The *Dred Scott* opinion declared that the platform of the newly created Republican Party, which pledged to abolish slavery in all of the federal Territories, both North and South, was unconstitutional. The *Dred Scott* opinion was extremely controversial, and it engulfed in flames the four-year presidency of the feckless and weak President James Buchanan. In the 1858 midterm elections, the Republican Party won control of the House of Representative but not the Senate. In 1860, Abraham Lincoln, a Republican, was elected President, ending the Slave Power's seventy-one-year long, Three-Fifths-Clause-generated lock on the presidency. The Republican Party in 1860 also won a majority in both the Senate and the House of Representatives. Lincoln pledged loudly that he had no intention of interfering with slavery in the States where it existed—and that he thought the federal government had no power to do that in any event. He also pledged to support a constitutional amendment that would be unamendable which would allow slavery in the slave States.

The South was unmoved by Lincoln's pledges and was terrified that he had been elected President at all. The South saw the ban on slavery in all the federal territories and the ban on Southerners travelling with their slaves through Northern States as the forming of a noose around slavery, which would be gradually tightened until the South's "peculiar" institution was abolished. The Slave Power was

especially terrified by the loss of its strangle-hold on the Electoral College. (For a fuller description of what was meant by "The Slave Power" see LEONARD L. RICHARDS, THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION 1780–1860 (2000).) Southerners appealed to the "Spirit of 1798" and the Virginia and Kentucky Resolutions as support for what they were about to do. As a result, beginning in December of 1860 and continuing through April of 1861, eleven of the fifteen slave States, out of thirty-four States then in the Union, seceded unilaterally without seeking Congress's permission. They purported to accomplish this by electing constitutional conventions in the same way as had been done in 1787 and 1788 to ratify the Constitution, and those elected conventions rescinded their ratifications of the Constitution. The eleven slave States then formed a federal government, which they called the Confederate States of America, or the Confederacy, with its capitol in Richmond, Virginia. They adopted their own Constitution, modeled, with some important modifications, on the U.S. Constitution.

Four slave States remained in the Union: Maryland, Delaware, Kentucky, and Missouri. Given how closely fought the Civil War was, it is quite possible that if all four of these loyal Unionist slave States had seceded, the South might have beaten the North.

Consider below one argument, building on Jefferson's, Madison's, and Calhoun's idea that the Constitution was a compact among the sovereign States which any State could repeal. Please then read President Abraham Lincoln's First Inaugural Address, which responds to the South's arguments.

E. SENATOR JUDAH BENJAMIN'S SPEECH TO THE U.S. SENATE

December 31, 1860, *in* 5 GREAT DEBATES IN AMERICAN HISTORY, 384–387 (1913)

The wrongs under which the South is now suffering, and for which she seeks redress, seem chiefly to arise from a difference in our construction of the Constitution. You, Senators of the Republican Party, assert and your people whom you represent assert, that, under a just and fair interpretation of the Federal Constitution, it is right that you deny our slaves, which directly and indirectly involve a value of more than four thousand million dollars, are property at all, or entitled to protection in Territories owned by the common Government. You assume the interpretation that it is right to encourage, by all possible means, directly and indirectly, the robbery of this property and to legislate so as to render its recovery as difficult and dangerous as possible; that it is right and proper and justifiable, under the Constitution, to provide a mere transit across a sister State, to embark with our property on a lawful voyage, without openly being despoiled of it. You assert, and practice upon the assertion, that it is right to hold us up to the ban of mankind in speech, writing, and print with every possible appliance of publicity, as thieves, robbers, murderers, villains, and criminals of the blackest dye, because we continue to own property which we owned at the time that we all signed the compact; that it is right that we should be exposed to spend our treasure in the purchase, or shed our blood in the conquest, of foreign territory, with no right to enter it for settlement without leaving behind our most valuable property, under penalty of its confiscation. You practically interpret the instrument to be that it is eminently in accordance with the assurance that our tranquility and welfare were to be preserved and promoted;

that our sister States should combine to prevent our growth and development; that they should surround us with a cordon of hostile communities for the express and avowed purpose of accumulating in dense masses, and within restricted limits, a population which you believe to be dangerous, and thereby force the sacrifice of property nearly sufficient to pay the public debt of every nation in Europe.

This is the construction of the instrument that was to preserve our safety, promote our welfare, and which we signed on your assurance that that was its object. You tell us that this is a fair construction—not all, some say one thing, some say another; but you act, or your people do, upon this principle. You do not propose to enter into our States, you say, and what do we complain of? You do not pretend to enter into our States to kill or destroy our institutions by force. Oh no. You imitate the faith of Rhadamistus, who according to Tacitus's account, having sworn to Mithradites that he would not employ either poison or steel against him, caused him to be smothered under a heap of clothes. You propose simply to close us in an embrace that will suffocate us. You do not propose to fell the tree; you promised not. You merely propose to girdle it, that it dies. And then, when we tell you that we did not understand this bargain this way, that your acting upon it in this spirit releases us from the obligations that accompany it; that under no circumstances can we consent to live together under that interpretation and say: "we will go from you; let us go in peace"; we are answered by your leading spokesmen: "Oh, no; you cannot do that; we have no objection to it personally, but we are bound by our oaths; if you attempt it, your people will be hanged for treason. We have examined this Constitution thoroughly; we have searched it out with a fair spirit, and we can find warrant in it for releasing ourselves from the obligation of giving you any of its benefits, but our oaths force us to tax you; we can dispense with everything else; but our consciences, we protest upon our souls, will be sorely worried if we do not take your money." That is the proposition of the Senator from Ohio, in plain language. He can avoid everything else under the Constitution, in the way of secession; but how is he to get rid of the duty of taking our money he cannot see,

Now, Senators, this picture is not placed before you with any idea that it will act upon any one of you, or change your plans, or alter your conduct. All hope of that is gone. Our committee has reported this morning that no possible scheme of adjustment can be devised by them all combined. The day for the adjustment has passed. If you would give it now, you are too late.

And now, Senators, within a few weeks we part to meet as Senators in one common council chamber of the nation no more forever. We desire, we beseech you, let this parting be in peace. I conjure you to indulge in no vain delusion that duty or conscience, interest or honor, imposes upon you the necessity of invading our States or shedding the blood of our people. You have no possible justification for it. I trust it is in no craven spirit, and with no sacrifice of the honor or dignity of my own State, that I make this last appeal, but from far higher and holier motives. If, however, it shall prove vain, if you are resolved to pervert the Constitution framed by the fathers for the protection of our rights into an instrument for subjugating and enslaving us, then appealing to the Supreme Judge of the universe for the rectitude of our intentions, we must meet the issue that you force upon us as best becomes freemen defending all that is dear to man.

What may be the fate of this horrible contest, no man can tell, none pretend to foresee; but this much I will say: the fortunes of war may be adverse to our arms; you

may carry desolation into our peaceful land, and with torch and fire you may set all our cities in flames; you may even emulate the atrocities of those who, in the war of the Revolution, hounded on the blood thirsty savage to attack upon the defenceless frontier; you may under the protection of your advancing armies, give shelter to the furious fanatics who desire, and profess to desire, nothing more than to add all the horrors of a servile insurrection to the calamaties of a civil war; you may do all this—and more, too, if there be—but you can never subjugate us; you can never convert the free sons of the soil into vassals, paying tribute to your power; and you can never, never can degrade them to the level of an inferior and servile race. Never! Never!

F. PRESIDENT ABRAHAM LINCOLN'S FIRST INAUGURAL ADDRESS

Monday, March 4th, 1861

Fellow citizens of the United States:

In compliance with a custom as old as the Government itself, I appear before you to address you briefly, and to take, in your presence, the oath prescribed by the Constitution of the United States to be taken by the President "before he enters on the execution of this office."

I do not consider it necessary, at present, for me to discuss those matters of administration about which there is no special anxiety or excitement.

Apprehension seems to exist among the people of the Southern States, that by the accession of a Republican Administration, their property, and their peace, and personal security, are to be endangered. There has never been any reasonable cause for such apprehension. Indeed, the most ample evidence to the contrary has all the while existed, and been open to their inspection. It is found in nearly all the published speeches of him who now addresses you. I do but quote from one of those speeches when I declare that "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so." Those who nominated and elected me did so with full knowledge that I had made this, and many similar declarations, and had never recanted them. And more than this, they placed in the platform for my acceptance, and as a law to themselves and to me, the clear and emphatic resolution which I now read:

"*Resolved*, That the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend; and we denounce the lawless invasion by armed force of the soil of any State or Territory, no matter what pretext, as among the gravest of crimes."

I now reiterate these sentiments, and in doing so I only press upon the public attention the most conclusive evidence of which the case is susceptible, that the property, peace, and security of no section are to be in anywise endangered by the now incoming Administration. I add too, that all the protection which, consistently with the Constitution and the laws, can be given will be cheerfully given to all the States when lawfully demanded, for whatever cause—as cheerfully to one section, as to another.

There is much controversy about the delivering up of fugitives from service or labor. The clause I now read is as plainly written in the Constitution as any other of its provisions:

"No person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

It is scarcely questioned that this provision was intended by those who made it, for the reclaiming of what we call fugitive slaves; and the intention of the law-giver is the law. All members of Congress swear their support to the whole Constitution—to this provision as much as to any other. To the proposition, then, that slaves whose cases come within the terms of this clause "shall be delivered up," their oaths are unanimous. Now, if they would make the effort in good temper, could they not, with nearly equal unanimity, frame and pass a law by means of which to keep good that unanimous oath?

There is some difference of opinion whether this clause should be enforced by national or by state authority; but surely that difference is not a very material one. If the slave is to be surrendered, it can be of but little consequence to him, or to others, by which authority it is done. And should anyone, in any case, be content that his oath shall go unkept, on a merely unsubstantial controversy as to how it shall be kept?

Again, in any law upon this subject, ought not all the safeguards of liberty known in civilized and humane jurisprudence to be introduced, so that a free man be not, in any case, surrendered as a slave? And might it not be well at the same time to provide by law for the enforcement of that clause in the Constitution which guarantees that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States"?

I take the official oath to-day with no mental reservations, and with no purpose to construe the Constitution or laws, by any hypercritical rules. And while I do not choose now to specify particular acts of Congress as proper to be enforced, I do suggest, that it will be much safer for all, both in official and private stations, to conform to, and abide by, all those acts which stand unrepealed, than to violate any of them, trusting to find impunity in having them held to be unconstitutional.

It is seventy-two years since the first inauguration of a President under our national Constitution. During that period fifteen different and greatly distinguished citizens, have, in succession, administered the executive branch of the government. They have conducted it through many perils, and generally with great success. Yet, with all this scope of precedent, I now enter upon the same task for the brief constitutional term of four years under great and peculiar difficulty. A disruption of the Federal Union, heretofore only menaced, is now formidably attempted.

I hold, that in contemplation of universal law, and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper, ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our national Constitution, and the Union will endure forever—it being impossible to destroy it, except by some action not provided for in the instrument itself.

Again, if the United States be not a government proper, but an association of States in the nature of contract merely, can it, as a contract, be peaceably unmade, by less than all the parties who made it? One party to a contract may violate it—break it, so to speak; but does it not require all to lawfully rescind it?

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

But if destruction of the Union, by one, or by a part only, of the States, be lawfully possible, the Union is *less* perfect than before the Constitution, having lost the vital element of perpetuity.

It follows from these views that no State, upon its own mere motion, can lawfully get out of the Union,—that *resolves* and *ordinances* to that effect are legally void; and that acts of violence, within any State or States, against the authority of the United States, are insurrectionary or revolutionary, according to circumstances.

I therefore consider, that in view of the Constitution and the laws, the Union is unbroken; and to the extent of my ability, I shall take care, as the constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States. Doing this I deem to be only a simple duty on my part, and I shall perform it so far as practicable, unless my rightful masters, the American people, shall withhold the requisite means, or in some authoritative manner direct the contrary. I trust this will not be regarded as a menace, but only as the declared purpose of the Union that it will constitutionally defend, and maintain itself.

In doing this there needs to be no bloodshed or violence; and there shall be none unless it be forced upon the national authority. The power confided to me, will be used to hold, occupy, and possess the property and places belonging to the government, and to collect the duties and imposts; but beyond what may be necessary for these objects, there will be no invasion—no using of force against, or among the people anywhere. Where hostility to the United States, in any interior locality, shall be so great and universal, as to prevent competent resident citizens from holding the Federal offices, there will be no attempt to force obnoxious strangers among the people for that object. While the strict legal right may exist in the government to enforce the exercise of these offices, the attempt to do so would be so irritating, and so nearly impracticable with all, that I deem it better to forego, for the time, the uses of such offices.

The mails, unless repelled, will continue to be furnished in all parts of the Union. So far as possible, the people everywhere shall have that sense of perfect security which is most favorable to calm thought and reflection. The course here indicated will be followed, unless current events and experience, shall show a modification or change to be proper; and in every case and exigency my best discretion will be exercised, according to circumstances actually existing, and with a view and a hope of a peaceful solution of the national troubles and the restoration of fraternal sympathies and affections.

That there are persons in one section or another who seek to destroy the Union at all events, and are glad of any pretext to do it, I will neither affirm nor deny; but if there be such, I need address no word to them. To those, however, who really love the Union, may I not speak?

Before entering upon so grave a matter as the destruction of our national fabric, with all its benefits, its memories, and its hopes, would it not be wise to ascertain precisely why we do it? Will you hazard so desperate a step, while there is any possibility that any portion of the ills you fly from, have no real existence? Will you, while the certain ills you fly to are greater than all the real ones you fly from? Will you risk the commission of so fearful a mistake?

All profess to be content in the Union if all constitutional rights can be maintained. Is it true, then, that any right, plainly written in the Constitution, has been denied? I think not. Happily the human mind is so constituted that no party can reach to the audacity of doing this. Think, if you can, of a single instance in which a plainly written provision of the Constitution has ever been denied. If, 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. All the vital rights of minorities, and of individuals, are so plainly assured to them, by affirmations and negations, guaranties and prohibitions, in the Constitution, that controversies never arise concerning them. But no organic law can ever be framed with a provision specifically applicable to every question which may occur in practical administration. No foresight can anticipate, nor any document of reasonable length contain express provisions for all possible questions. Shall fugitives from labor be surrendered by national or by State authority? The Constitution does not expressly say. *May* Congress prohibit slavery in the Territories? The Constitution does not expressly say. *Must* Congress protect slavery in the Territories? The Constitution does not expressly say.

From questions of this class spring all our constitutional controversies, and we divide upon them into majorities and minorities. If the minority will not acquiesce, the majority must, or the government must cease. There is no other alternative; for continuing the government, is acquiescence on one side or the other. If a minority, in such case, will secede rather than acquiesce, they make a precedent which, in turn, will divide and ruin them; for a minority of their own will secede from them whenever a majority refuses to be controlled by such minority. For instance, why may not any portion of a new confederacy, a year or two hence, arbitrarily secede again, precisely as portions of the present Union now claim to secede from it. All who cherish disunion sentiments are now being educated to the exact temper of doing this.

Is there such perfect identity of interests among the States to compose a new Union, as to produce harmony only, and prevent renewed secession?

Plainly, the central idea of secession is the essence of anarchy. A majority held in restraint by constitutional checks and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it, does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy, or despotism in some form, is all that is left.

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. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there, in this view, any assault upon the Court, or the judges. It is a duty, from which they may not shrink, to decide cases properly brought before them; and it is no fault of theirs if others seek to turn their decisions to political purposes.

One section of our country believes slavery is *right* and ought to be extended, while the other believes it is *wrong* and ought not to be extended. This is the only substantial dispute. The fugitive slave clause of the Constitution, and the law for the suppression of the foreign slave trade, are each as well enforced, perhaps, as any law can ever be in a community where the moral sense of the people imperfectly supports the law itself. The great body of the people abide by the dry legal obligation in both cases, and a few break over in each. This, I think, cannot be perfectly cured; and it would be worse in both cases *after* the separation of the sections than before. The foreign slave trade, now imperfectly suppressed, would be ultimately revived without restriction, in one section; while fugitive slaves, now only partially surrendered, would not be surrendered at all, by the other.

Physically speaking, we can not separate. We can not 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 can not do this. They cannot but remain face to face; and intercourse, either amicable or hostile, must continue between them. Is it possible, then, to make that intercourse more advantageous, or more satisfactory, *after* separation than *before*? Can aliens make treaties easier than friends can make laws? Can treaties be more faithfully enforced between aliens, than laws can among friends? Suppose you go to war, you can not fight always; and when, after much loss on both sides and no gain on either, you cease fighting, the identical old questions, as to terms of intercourse, are again upon you.

This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their *constitutional* right of amending it, or their *revolutionary* right to dismember, or overthrow it. I can not be ignorant of the fact that many worthy and patriotic citizens are desirous of having the national constitution amended. While I make no recommendation of amendments, I fully recognize the rightful authority of the people over the whole subject, to be exercised in either of the modes prescribed in the instrument itself; and I should, under existing circumstances, favor, rather than oppose, a fair opportunity being afforded the people to act upon it. I will venture to

add that, to me, the convention mode seems preferable, in that it allows amendments to originate with the people themselves, instead of only permitting them to take, or reject, propositions originated by others, not especially chosen for the purpose, and which might not be precisely such, as they would wish to either accept or refuse. I understand a proposed amendment to the Constitution, which amendment, however, I have not seen, has passed Congress, to the effect that the federal government, shall never interfere with the domestic institutions of the States, including that of persons held to service. To avoid misconstruction of what I have said, I depart from my purpose not to speak of particular amendments, so far as to say that, holding such a provision to now be implied constitutional law, I have no objection to its being made express and irrevocable.

The Chief Magistrate derives all his authority from the people, and they have referred none upon him to fix terms for the separation of the States. The people themselves can do this if also they choose; but the executive, as such, has nothing to do with it. His duty is to administer the present government, as it came to his hands, and to transmit it, unimpaired by him, to his successor.

Why should there not be a patient confidence in the ultimate justice of the people? Is there any better or equal hope, in the world? In our present differences, is either party without faith of being in the right? If the Almighty Ruler of nations, with his eternal truth and justice, be on your side of the North, or on yours of the South, that truth, and that justice, will surely prevail, by the judgment of this great tribunal of the American people.

By the frame of the government under which we live, this same people have wisely given their public servants but little power for mischief; and have, with equal wisdom, provided for the return of that little to their own hands at very short intervals.

While the people retain their virtue and vigilance, no administration, by any extreme of wickedness or folly, can very seriously injure the government in the short space of four years.

My countrymen, one and all, think calmly and well upon this whole subject. Nothing valuable can be lost by taking time. If there be an object to hurry any of you, in hot haste, to a step which you would never take deliberately, that object will be frustrated by taking time; but no good object can be frustrated by it. Such of you as are now dissatisfied still have the old Constitution unimpaired, and, on the sensitive point, the laws of your own framing under it; while the new administration will have no immediate power, if it would, to change either. If it were admitted that you who are dissatisfied, hold the right side in the dispute, there still is no single good reason for precipitate action. Intelligence, patriotism, Christianity, and a firm reliance on Him, who has never yet forsaken this favored land, are still competent to adjust, in the best way, all our present difficulty.

In your hands, my dissatisfied fellow countrymen, and not in mine, is the momentous issue of civil war. The government will not assail you. You can have no conflict without being yourselves the aggressors. *You* have no oath registered in Heaven to destroy the government, while *I* shall have the most solemn one to "preserve, protect, and defend it."

I am loath to close. We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The

mystic chords of memory, stretching from every battlefield and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.

NOTES AND QUESTIONS ON LINCOLN'S FIRST INAUGURAL ADDRESS

1. Lincoln's First Inaugural Address lays out a legal argument as to why the unilateral secession of the Southern States was unconstitutional. He builds on Justice Story's arguments, which you read above, and he rejects the idea that the Constitution is a mere "compact among the States." Senator Benjamin could counter that, even if the Southern States lacked a formal constitutional right to secede, the Constitution no longer enjoyed the consent of the governed in the Confederacy and that, pursuant to the Declaration of Independence, the Confederacy had a right "to alter and abolish their forms of government." Why was the secession of the thirteen original States legitimate in the Revolutionary War but the secession of the eleven Confederate states in the Civil War illegitimate? It is true, of course, that there was a large disenfranchised minority of enslaved African-Americans in the South who opposed slavery and secession, but one-third of the colonists in the thirteen original United States were Tories who opposed the American Revolution. Who do you think gets the better of the argument and why?

2. Lincoln's theory was that secession was illegal—unconstitutional—and thus of no effect. Accordingly, the Civil War was not a "war" in the constitutional sense but was instead an "insurrection" or a "rebellion. Accordingly, Lincoln did not think that Congress needed to declare war in 1861. He referred to the conflict as the War of the Rebellion, and Northern troops referred to their Southern adversaries as rebels. The well-known phrase "Johnny Rebel" refers to Confederate troops. The Civil War in Lincoln's eyes was a massive domestic insurrection, subject to the Guarantee Clause power of the national government to assure republican government (presumably, republican government under the Constitution and the Union created thereby) and to the duty of the national government to protect each state from "domestic violence."

3. Consider Lincoln's statement that geographically the North and the South cannot split. They are unlike a divorced couple where the ex-husband can live in one city and the ex-wife in another, and they will not run into each other. Lincoln knows, as a citizen of Illinois, that all of his home State's crops, and all the crops from other nearby States, are shipped to market via the Mississippi River, at the mouth of which lies the Southern port city of New Orleans. The South would be able to strangle the Midwest in 1861 if it were a separate country.

4. Lincoln holds in his First Inaugural Address that the Supreme Court's 1857 decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857) was wrongly decided and that it did not bind him in his actions as President, except that he had to execute the judgment as to Dred Scott. Note that Lincoln says "I hold" that secession and *Dred Scott v. Sandford* are unconstitutional, thus issuing a "holding" like a court of law. The Supreme Court, in *Dred Scott*, had held that free African-Americans could not be citizens of the United States nor could Southerners be prohibited from bringing slaves into the federal territories. President Lincoln ordered that passports be issued to free African-Americans, and he forbade slavery in the federal territories, although slavery continued in the four slave States that remained loyal to the Union during the Civil War: Maryland; Delaware; Kentucky; and Missouri. Lincoln did not believe that he, or any other national institution, had the constitutional power to end slavery in Union States before 1865.

5. Several years after the War, a (somewhat) reconstituted Supreme Court considered a case in which the outcome turned in part on whether Texas had or had not left the Union—and ceased to be a State of the United States—during the period of the Civil War when Texas purported to secede. Prior to the Civil War, Texas had obtained some United States bonds, which under Texas state law could not be sold without the endorsement (signature) of the governor. Once Texas seceded, the rebel government repealed the state statute requiring the governor's endorsement and sold the bonds to acquire war supplies. After the war, the Reconstruction government imposed by Congress tried to recover the bonds on the ground that the rebel government was unlawful, its purported repeal of the law regarding bond sales was ineffective, and the absence of the governor's endorsement therefore voided the sale. In *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868), in an opinion by Chief Justice Salmon P. Chase (who had been Lincoln's Secretary of Treasury and at one time a rival for the presidency), the Court held that Texas was a "State" for purposes of the clauses in Article III extending federal jurisdiction to "controversies * * * between a State and citizens of another State" and giving the Supreme Court original jurisdiction over cases "in which a State shall be a Party," even though Texas at that time had no representation in Congress or in the electoral college (and was being administered by federal officials). The Court held, in other words, that the Reconstruction government was valid enough to make Texas after the Civil War a constitutional "State," even though it would not at that time be entitled to all of the rights that go along with being a constitutional State, such as representation in Congress. The case sets forth, in a Supreme Court decision, the essential legal theory of the Lincoln Administration on secession, national authority to combat secession, and reconstruction.

G. TEXAS V. WHITE

74 U.S. (7 Wall.) 700 (1868)

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The Republic of Texas was admitted into the Union, as a State, on the 27th of December, 1845. By this act the new State, and the people of the new State, were invested with all the rights, and became subject to all the responsibilities and duties of the original States under the Constitution.

From the date of admission, until 1861, the State was represented in the Congress of the United States by her senators and representatives, and her relations as a member of the Union remained unimpaired. In that year, acting upon the theory that the rights of a State under the Constitution might be renounced, and her obligations thrown off at pleasure, Texas undertook to sever the bond thus formed, and to break up her constitutional relations with the United States.

On the 1st of February, a convention, called without authority, but subsequently sanctioned by the legislature regularly elected, adopted an ordinance to dissolve the union between the State of Texas and the other States under the Constitution of the United States, whereby Texas was declared to be "a separate and sovereign State," and "her people and citizens" to be "absolved from all allegiance to the United States, or the government thereof."

It was ordered by a vote of the convention and by an act of the legislature, that this ordinance should be submitted to the people, for approval or disapproval, on the 23d of February, 1861.

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* * * [T]he vote upon the ratification or rejection of the ordinance of secession was taken on the 23d of February. It was ratified by a majority of the voters of the State.

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In all respects, so far as the object could be accomplished by ordinances of the convention, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them.

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Did Texas, in consequence of these acts, cease to be a State? Or, if not, did the State cease to be a member of the Union?

It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States nor prohibited to the States, are reserved to the States respectively, or to the people * * *. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

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 it was final. The union between Texas and the other States was as complete, as perpetual and indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the States did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.

Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred * * *.

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* * * [I]t is by no means a logical conclusion * * * that the governmental relations of Texas to the Union remained unaltered. Obligations often remained unimpaired, while relations are greatly changed * * *. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the National government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a State * * * seems to be a necessary complement to the former.

Of this, the case of Texas furnishes a striking illustration * * *.

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There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State.

In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is * * *

allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

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What has thus been said generally describes, with sufficient accuracy, the situation of Texas. A provisional governor of the State was appointed by the President in 1865; in 1866 a governor was elected by the people under the constitution of that year; at a subsequent date a governor was appointed by the commander of the district. Each of the three exercised executive functions and actually represented the State in the executive department.

In the case before us each has given his sanction to the prosecution of the suit, and we find no difficulty, without investigating the legal title of either to the executive office, in holding that the sanction thus given sufficiently warranted the action of the solicitor and counsel in behalf of the State. The necessary conclusion is that the suit was instituted and is prosecuted by competent authority.

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NOTES AND QUESTIONS

1. Three justices dissented, on the ground that if Texas was not a "State" for purposes of representation in Congress (and everyone agreed that it was not), it was also not a "State" for purposes of the jurisdictional provisions in Article III. If Texas was really a "State" in 1865, why wasn't it immediately entitled to two senators and representation in Congress? For what constitutional purposes was Texas under Reconstruction not a State? Could the Reconstruction government impair the obligation of contracts or enter into foreign treaties or alliances?

2. It was of course, the "adjudication" of the Civil War itself, not the decision in *Texas v. White*, that authoritatively "held" the Union under the Constitution to be indestructible. Still, *Texas v. White* is interesting for its judicial discussion of the unlawfulness of secession and the indestructibility of both the Union and the States. The case stands for the proposition that the Constitution creates "An indestructible Union of indestructible States."

3. If the rebel "government" from 1861–65 was not really a government, and its repeal of the State's law concerning bonds was invalid, as the Court went on to hold after finding that it had jurisdiction over the case, does that mean that all acts sanctioned by that "government" were invalid? That all private contracts made under its authority were invalid? That all marriages performed under its authority were invalid? The Court in *Texas v. White* had this to say:

> It is not necessary to attempt any exact definitions, within which the acts of such a State government must be treated as valid, or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid

> when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.

74 U.S. (7 Wall.) at 733. On this reasoning, were taxes levied by the rebel government to fund the war effort invalid?

4. Article IV, Clause 3 provides a way for new States to join the Union, but it does not provide for any mechanism for States to leave, whether unilaterally or with Congress's consent. Does this mean that before a State—say Alaska or Hawaii—could leave the Union, the Constitution would first have to be amended to provide a way out? *Expressio unius, exclusion alterius*: the specification of way to enter without the specification of a way to leave implies that leaving has not been authorized. *See* Gary Lawson, *One(?) Nation Overextended,* 94 B.U. L. REV. 1109, 1120–24 (2014).

5. The Canadian Supreme Court was asked by the government in the 1990s to render an advisory opinion on whether Quebec could unilaterally secede from Canada if the people of that province voted for secession in a popular referendum (as they almost did). The Court concluded, in *Reference re Secession of Quebec,* 2 S.C.R. 217 (Supreme Court of Canada 1998), that if the people of Quebec voted for secession the central government would be obligated to enter into negotiations with it on the terms of secession, including how to apportion the national debt and where to draw the new nation's boundary lines as well as how effectively to protect the rights of English speakers in Quebec. The opinion makes for fascinating reading for anyone interested in constitutionalism or secession. It also shows what it might be like to live under a constitutional regime where courts can issue advisory opinions. On the topic of constitutionalism and secession generally, see Andrei Kreptul, *The Constitutional Right of Secession in Political Theory and History,* 17 J. LIBERTARIAN STUD. 39 (2003); Glenn Harlan Reynolds, *Splitsylvania: State Secession and What to Do About It,* 94 NOTRE DAME L. REV. ONLINE 90 (2019); Cass R. Sunstein, *Constitutionalism and Secession,* 58 U. CHI. L. REV. 633 (1991).