Secession: A Constitutional Remedy that Protects Fundamental Liberties

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We live in interesting times. Texas governor Rick Perry asserted in April 2009 that Texas always retains the right to secede from the Union. A Rasmussen poll indicated that nearly one in three Texas voters believes that the State has that right.[1] In a hotly contested race for the Republican nomination for governor of Tennessee, Rep. Zach Wamp of Chattanooga suggested in July 2010 that Tennessee and other States may have to consider seceding from the Union if the federal government does not change its ways regarding mandates.[2]

Indeed, States are confronting the federal government these days. Much of it has come about because of the enactment of a federal health-reform bill in excess of two thousand pages that, among other things, mandates the purchase of health insurance. Nearly 60 percent of the American public has consistently opposed the health-reform bill before and since its enactment in March 2010.[3] Nearly every State has introduced or enacted resolutions fundamentally "nullifying" the health-insurance mandate.[4] Missouri voters approved a constitutional referendum nullifying the mandate with a whopping 71 percent of the vote.[5]

The federal government is totally out of control. The nation is $13 trillion in debt, paying $600 billion in interest each year. The debt burdens every citizen and is a security threat to the nation.[6] It is a small wonder that efforts are under way to nullify federal enactments and that there are even discussions about secession.

The federal government appears absolutely unwilling to rein in its voracious appetite for power and control. Health-insurance mandates, controls over what we eat, and regulations about how much we weigh and how we live our

lives are now a reality, even in the face of overwhelming majorities who oppose it all. When asked about the power of the federal government in a town-hall meeting in August 2010, Rep. Pete Stark (D-CA) responded, "The federal government can do most anything in this country."[7] Unfortunately, he echoed the beliefs of most of the current members of Congress and the executive branch even though the federal government was created by a Constitution that gave to Congress "certain limited and enumerated powers."[8]

The remarks by Governor Perry and Congressman Wamp reminding people of the right of secession are in direct response to the federal government's relentless drive for power and control. Secession was—and is—a remedy that has evolved over the centuries and has been understood in the Constitution itself, to address just that problem.

Although many of the framers and ratifiers of the Constitution expressed distrust of the English common law, they, as lawyers, judges, and businessmen, were part of that ancient tradition. From the reign of Edward I in England (1272-1307), the phrase *jus commune* began being applied to the un-enacted, non-statutory law common to all Englishmen. The "common law" came to refer to the law as applied by the three then-developing courts in England: King's Bench, the Common Bench (or Court of Common Pleas), and the Exchequer.[9]

Within the Exchequer, the king's fiscal office, evolved the Chancery, the secretarial department. At its head was the chancellor, whose duty, among other things, was to issue writs over the great seal of the king to begin actions in the courts of law.[10] The department came to be known as the Court of Chancery. By the fourteenth century, the Court of Chancery developed two sides, a "common law" side and an "equity" side.[11] The common-law side evolved into a court system that heard cases involving all sorts of damage claims.[12]

Often, however, a petitioner would seek a remedy that, in the ordinary course of justice, could not be obtained. The king was literally asked by the petitioner to find a remedy. Many of the cases involved the poor or dispossessed, who petitioned the crown for help against those who were more wealthy and powerful and who were threatening harm or harming the petitioner. Petitioners in these cases went to the chancellor, not directly to the king. The chancellor, without the use of a jury, would order the defendant to appear before him and be examined to determine whether some extraordinary relief ought to be granted. By the sixteenth century, the chancellor's powers were defined by "the rules of equity and good conscience."[13] As the "law" courts entertained claims for money damages, the "equity" courts entertained claims for extraordinary relief.

The two great pillars of civil justice, law and equity, denote the bodies of law—and the specific courts that enforce same—that provide the means by which citizens may seek redress for the whole panoply of civil wrongs committed, or being committed, against them. They have evolved over 700 years and are applied in all American courts to this day. If a party is injured in property or person by another, and such injury can be quantified by an amount of money (damages), the action would be one "at law" and brought in a law court presided over by a judge, who would often empanel a jury to decide questions of disputed fact. If, on the other hand, a party is about to be injured, or is in the process of being injured by another—and no monetary relief would be adequate to redress the wrong, and the offending party can be restrained by some extraordinary action by a court—the action would be one "in equity" and brought in a court of equity. The judge would sit as a "chancellor," deciding all questions of law and fact.[14]

The law-equity division of the courts was planted in the American colonies upon settlement. English settlers established their English jurisprudential system. Courts of

Chancery existed in one form or another in every one of the thirteen colonies prior to the American Revolution. After the Revolution, most of the new States established Courts of Chancery, although there was little or no American equity jurisprudence. Nevertheless, the English tradition of the division of law and equity was well known and understood by the framers and ratifiers of the Constitution. No greater evidence of such knowledge may be found than the words the framers chose for Article III, Section 2, of the Constitution of the United States: "The judicial power [of United States courts] shall extend to all cases, in Law and Equity."[15]

How the two great pillars of civil justice are actually used is understood when one examines the law of contracts, a body of law as old as the Anglo-American division of law and equity. A contract is a promise, or set of promises, for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.[16] Synonyms for the term "contract" are "agreement" and "compact." When asked to define the term contract, courts have stressed the classic concept of an agreement resulting from mutuality of assent between two or more parties having capacity to contract, and an obligation based on consideration in the form of an agreement.[17]

If two parties enter into a contract whereby each promises to perform a particular task, and one of the parties fails to perform as promised—or breaches the contract—the other party may seek certain remedies that Anglo-American law has historically provided. A "breach" of a contract is simply a failure on the part of one or more of the contracting parties, without legal excuse, to perform any promise that forms the whole or part of the contract.[18]

Throughout Anglo-American judicial history, to remedy a breach of a contract, an aggrieved party was given certain choices by the law. First, he could choose to proceed to a law court and seek damages for the loss of money in reliance upon

the contract being fulfilled. In the law court, he would seek from the party in breach such sums as would place him in as good a position as he would have been had the contract been fully performed.[19] Alternately, a court of equity could enforce the contract for an aggrieved party by making the defaulting party "specifically perform" his contractual obligations.[20] If the defaulting party failed to comply with the court order, the court would exercise its contempt powers against him.[21]

Finally, Anglo-American equity jurisprudence provided for another remedy for breach of contract—"rescission," or, the annulment of the contract.[22] Since the end of the eighteenth century in England, rescission has often been used as a remedy in conjunction with "restitution."[23] The aggrieved party would ask the court to annul the contract and, at the same time, ask that he be made whole for his own performance, thereby placing him in the same position he occupied before he entered into the contract.

For a State to secede from the Union, the Constitution must be construed to be an agreement created by the States as parties. There is simply no other legal construct known to the English-speaking people that would entitle a State to withdraw from the Union. If the Constitution is an agreement—a compact—and the States are parties to it, then the States have the equitable right of rescission in the event of a breach of the agreement. If the States are not parties to an agreement, they would be fundamentally powerless to do anything to protect themselves or their citizens; they would be considered nothing more than federal precincts. To establish the Constitution as an agreement—a compact, if you will—and the States as parties thereto, is essential to the protection of the States and of the liberties of the citizens of the States.

The evolution of remedies in equity and, particularly, the equitable remedy of rescission in the law of contracts was one of the most important concepts applied by the framers and ratifiers of the Constitution to their understanding of that

document. To illustrate the application of that concept, one must delve into the history of the call of a Federal Convention and the drafting and ratification of the Constitution.

During the waning years of the Revolution, the thirteen sovereign States entered into a "firm league of friendship" by the Articles of Confederation.[24] The Articles, however, did not create a sovereign national government; rather, they created a government wholly dependent upon the several States. Nevertheless, the Articles were entitled "Articles of Confederation and Perpetual Union," and the framers inserted at the conclusion thereof that the Articles "shall be inviolably observed by the States we respectively represent, and that the union shall be perpetual."[25] Any alteration of the Articles required the agreement of Congress and confirmation by the legislatures of every State. With national postwar finances in crisis, however, most people lost faith in the Confederation government. Trade was chaotic and the "nation" was unable to pay its debts. Stability in foreign relations had never been achieved.[26]

The crisis created by the impotence of the Confederation government brought about a conference in March 1785 at Alexandria, Virginia and at Mount Vernon, George Washington's nearby estate. Representatives of the legislatures of Maryland and Virginia convened for the purpose of discussing mutual navigation problems along the lower Potomac River and the Chesapeake Bay. The conference ended without substantive resolution, but the germ of a broader conference among the States was planted.[27]

In January 1786 the Virginia legislature, acting on a resolution drafted by James Madison, invited all the States to another conference to deal with domestic and foreign trade and to make recommendations to the States and the Confederation government for the improvement thereof. Meeting at Annapolis, Maryland from September 11 to 14, 1786, were twelve representatives from five States: Delaware,

New Jersey, New York, Pennsylvania, and Virginia. Alexander Hamilton and James Madison convinced the commissioners that they should exceed their limited mandate and recommend a national meeting to consider the adequacy of the Articles of Confederation.[28]

After recounting the "defects in the system of the Federal Government," the report of the commissioners at Annapolis, Maryland, penned by Alexander Hamilton, recommended to the Confederation Congress that the States appoint commissioners to meet in Philadelphia in May 1787 for the purpose of "considering the situation of the United States [and] to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union" and to report same to Congress.[29]

After receiving the report, Congress called upon the States to send delegates to a convention. Dated February 21, 1787, the call "recommended to the States composing the Union that a convention of representatives from the States respectively be held . . . for the purpose of revising the Articles of Confederation."[30] Clearly, if anything was to be accomplished to amend the Articles of Confederation, it had to be done by the States. The States agreed to formulate the Articles of Confederation, and the States had to be called upon to revise them. The Articles of Confederation formed a classic "compact," and the States were the parties to it.

All State legislatures, except that of Rhode Island, appointed delegates to attend the convention in Philadelphia. In every instance, the respective States paid the expenses of their delegates. Some States actually compensated their delegates. The States, not individual delegates, cast the votes in the convention, and the journal of the convention records only the votes of the States. Each State specified what portion of its delegation needed to be present to act and cast the State's vote.[31]

The Federal Convention

The convention began in Philadelphia on May 25, 1787. Fifty-five delegates attended some or all of the proceedings. By the end of the convention on September 17, 1787, only thirty-eight delegates would cast votes for their respective States on the proposed Constitution of the United States.[32]

After meeting, debating, drafting, and redrafting the document through an intensely hot Philadelphia summer, the convention agreed to a constitution that did, in fact, create a more powerful federal government than had the Articles of Confederation. Article I of the proposed Constitution created the Congress, with a Senate and House of Representatives. Each State would have two senators, and the makeup of the House would reflect the population of each of the States.[33] Article I, Section 8, set forth the powers of Congress. They were "enumerated" powers and included, among other things, the power to coin money, regulate interstate commerce, and declare war. The section even included a "necessary and proper" clause, giving Congress the power to do those things necessary and proper to carry out its enumerated powers.[34] The Constitution withheld from Congress the power to pass bills of attainder and ex post facto laws and further limited Congress's power to lay direct and indirect taxes or suspend the writ of habeas corpus.[35]

Article II created the offices of president and vice president of the United States and defined the limits of their authority.[36] Article III created the Supreme Court of the United States and defined the jurisdiction thereof.[37] Finally, subsequent Articles, among other things, provided that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, granted to all citizens of each State all privileges and immunities of citizens in the several States, and guaranteed a republican form of government to every State.[38] Importantly, Article VI provided that the laws

and treaties of the United States would be the "supreme law of the land," a provision not without significant controversy.[39]

Finally, the Constitution made crystal clear the role of the States as the parties thereto by setting forth the terms whereby it could be amended and was to be ratified. Article V required all amendments to be "ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof."[40] And if there was any doubt about the fact that the Constitution was an agreement entered into by and between the States, Article VII proclaimed, "The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution *between the States so ratifying the same."*[41] Plainly and simply, the Constitution agreed to by the delegates in Philadelphia and, ultimately, the ratifiers in each of the States, was a "constitution between the States so ratifying the same." It was not a constitution among the people.

During the session, the delegates considered, and favorably voted on, a preamble to the Constitution, which read, "We the people of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our posterity." The preamble reflected the role of the States in the creation of the instrument; it was identical to the preamble found in the Articles of Confederation.[42]

In the end, the Committee of Style and Arrangement, not knowing if every one of the enumerated States would actually ratify the document, replaced the list of the States with the now-famous words "We the People of the United States." Much would be made of those words by ardent nationalists in the years ahead, but their insertion was never the result of any vote on the floor of the convention; rather, it was an effort by the Committee of Style and Arrangement to avoid embarrassment. No meaning was ascribed to the rewritten

preamble by any of the framers that was different from the original preamble. The delegates finally signed the formally drafted document for and on behalf of their respective States on September 17, 1787, sending it to the Congress of the Confederation and, ultimately, the States for ratification.[43]

The ratification of the Constitution followed a somewhat difficult path. Although its proponents wanted it quickly ratified, that did not happen. Proponents, known as Federalists, received initial momentum in December 1787 and January 1788 when the conventions of five States promptly ratified the Constitution: Delaware (December 7, 1787), New Jersey (December 18, 1787), and Georgia (January 2, 1788)—all unanimous—and Pennsylvania (December 12, 1787) and Connecticut (January 9, 1788) by narrower margins.[44] Between February 6 and June 2, 1788, the conventions of four more States ratified the Constitution: Massachusetts (February 6, 1788) by a vote of 187 to 168 after recommending nine amendments, Maryland (April 28, 1788), South Carolina (May 23, 1788) after recommending multiple amendments, and finally New Hampshire (June 2, 1788).[45] Although New Hampshire's ratification gave the Federalists the nine States necessary to approve the Constitution, Virginia and New York had not ratified the document. They were the largest States, and without their support the new Federal Union would never be fully realized.

Virginia proved to be a battleground. At the Virginia convention in Richmond, such eminent statesmen as George Mason, Patrick Henry, and James Monroe argued *against* ratification, while James Madison, John Marshall, George Wythe, and Edmund Pendleton urged ratification. From June 2 to June 26, 1788, heated debates continued until a vote was taken and the Constitution was ratified by the narrow margin of eighty-nine to seventy-nine. Identifying multiple rights that should forthwith be added as amendments to the Constitution in the Virginia resolution made ratification more palatable to

the delegates. But ratification was made possible only so long as the people of Virginia expressly retained the right of rescission. The Virginia resolution of ratification of June 26, 1788, read, in part, "We, the delegates of the people of Virginia . . . do, in the name and in behalf of the people of Virginia, declare and make known, *that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whensoever the same shall be perverted to their injury or oppression.*"[46] Virginia ratified the Constitution expressly subject to its people's right of rescission.

In New York the battle was as fierce as in Virginia. Held in Poughkeepsie, the New York convention was bitterly divided. New Yorkers Alexander Hamilton and John Jay and Virginian James Madison were compelled to publish arguments in the New York press reassuring the delegates about the proposed Constitution and advocating ratification. Those arguments became known collectively as *The Federalist Papers.* Finally, on July 26, 1788, New York narrowly ratified the Constitution by a vote of thirty to twenty-seven. In New York, like in Virginia, the resolution of ratification was made expressly subject to the State's people's right to rescind. It read, in pertinent part:

> We, the delegates of the people of the State of New York . . . do declare and make known—
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> *That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness.*

The delegates then presented a veritable catalogue of rights that they believed should be added to the Constitution by way of amendment.[47]

Interestingly, North Carolina and Rhode Island did not ratify the Constitution until after George Washington was sworn in as president of the United States. North Carolina, on August 2, 1788, voted to defer any action on the Constitution until a

second federal convention considered a declaration of rights and other amendments. Only on November 21, 1789, did North Carolina finally ratify the document.[48] Rhode Island, likewise, expressed deep misgivings. In fact, its legislature defeated resolutions calling for a convention to consider ratification seven times! Finally, on May 29, 1790, Rhode Island ratified the Constitution after the federal government threatened it with economic sanctions. Like Virginia and New York, Rhode Island ratified the Constitution, or, what it deemed to be a "social compact," subject to its people's right of rescission. The Rhode Island resolution of ratification—a virtual copy of New York's resolution—read, in pertinent part:

> We the delegates of the people of the state of Rhode Island and Providence Plantations, duly elected and met in Convention . . . do declare and make known—
>
> I. That there are certain natural rights of which men, when they form a *social compact,* cannot deprive or divest their posterity—among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety. . . .
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> III. *That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness.*[49]

The Constitution is an agreement "between the States so ratifying the same." It has parties—the States. Each of those parties agreed to surrender some powers in exchange for receiving a "common defense" and some regulation of commerce between the States where it was necessary. The Constitution is an "at will" agreement; it has no definite term and is, by no means, perpetual. Each party retains the right to rescind its ratification of the Constitution if there is a material breach by other States or by the federal government created by the Constitution. That right to rescind is retained by the

operation of law; the State need not have expressly reserved it in writing.

The Constitution clearly was created after the States agreed to send delegates to the Federal Convention to draft revisions to the Articles of Confederation. The States paid their own delegates, and the delegates voted on the final draft for and in the name of their respective States. Each of the twelve States that sent delegates to the convention were identified by the name of the State on the signatory page of the Constitution as agreeing to the terms thereof. To ratify the Constitution required the favorable vote of the conventions of nine States. To amend the Constitution required the ratification of three-fourths of the State legislatures. The document was sent to the Congress of the Confederation and, in turn, to the States for ratification. And although State legislatures did not vote to ratify the document but rather voted to turn over to their respective citizens the decision to elect delegates to State ratifying conventions, the States nevertheless provided the machinery and funding for the elections and conventions, and those conventions ratified the Constitution in the name of the people of their respective States.

Textually, the Constitution read that it was a "Constitution between the States so ratifying the same." No matter whether the States ratified the Constitution by conventions of delegates (as they, in fact, were called upon to do and did) or by the votes of the State legislatures, the Constitution they ratified was a "constitution between the States." Notably, at least three States, including the two largest States, Virginia and New York, ratified the Constitution expressly subject to their citizens' right to rescind or annul it if necessary.

The framers and ratifiers of the Constitution unquestionably understood it to be a "compact." Not only did the document, in form, contain all the elements of a contract, but the prevailing political thought of revolutionary America underscored the fact that written constitutions were "compacts."

Probably no political writer had more influence on American thought during and immediately after the Revolution than John Locke. In his *Second Treatise on Civil Government,* he developed a theory that government was the creature of a "social compact" between individuals in a state of nature to combine in society.[50] As the war progressed, Americans used Locke's theory to develop and understand the relationships established between themselves and their States. Wrote Prof. Gordon S. Wood, "Only a social agreement among the people, only such a Lockean contract, seemed to make sense of their rapidly developing idea of a constitution as a fundamental law designed by the people to be separate from and controlling of all institutions of government."[51] Wood echoes what Thomas Paine wrote in 1776 about the Pennsylvania Constitution: "That Charter should be the act of all and not of one man," Paine wrote. "[It should be] the charter or compact of the whole people, and the limitation of all legislative and executive powers."[52]

The Massachusetts Constitution of 1780 actually declared itself to be a "social compact by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good."[53] Massachusetts was not alone in the 1780s. "From South Carolina to New Jersey," Professor Wood has noted, "the constitution [the written, organic documents of the States] had become [known as] a social compact entered into by express consent of the people."[54] And there was historical precedent for such a conclusion. The first written constitution on the North American continent was called the "Mayflower Compact" for the very same reasons.

So embedded was the concept that a State constitution was a social compact that many of the framers and ratifiers of the Constitution used the term to describe the Articles of Confederation and the United States Constitution. The only difference was that the Articles of Confederation and the

Constitution were considered by them to be compacts among and between the States, as sovereigns, not among the people.

On the floor of the Federal Convention, James Madison eloquently argued that the document the delegates were drafting was a compact. On June 19, 1787, he argued the classic theory of contract law as applied to the possible rescission or annulment of the Constitution: "If we consider the federal union as analogous to the fundamental compact by which individuals compose our society, and which must in its theoretic origin at least, have been the unanimous act of the component members, it cannot be said that no dissolution of the compact can be affected without unanimous consent. A breach of the fundamental principles of the compact by a part of the Society would certainly absolve the other part from their obligations to it."[55]

Madison then argued that the Federal Union was not analogous to social compacts among individual men but "to the conventions among individual states." Then, again drawing upon the ancient law of contracts, he concluded, "Clearly, according to the Expositors of the law of Nations, that a breach of any one article, by any one party, leaves all other parties at liberty to consider the whole convention to be dissolved, unless they choose rather to compel the delinquent party to repair the breach."[56] Other delegates referred to the document they were creating as a "compact." For instance, Gouverneur Morris of New York, who would author the final preamble, was recorded to have argued on July 12, 1787:

> It has been said that it is a high crime to speak out. As one member, he [Morris] would candidly do so. He came here to form a compact for the good of America. He was ready to do so with all the states: He hoped and believed that all would enter into such a Compact. If they would not he was ready to join with any states that would. But as the Compact was to be voluntary, it is vain for the Eastern states to insist on what the Southern states will never agree to.[57]

Notably, both James Madison and Gouverneur Morris not only used the term "compact" to describe the Constitution, they also invoked the idea that the States were "parties" to the compact, as one would reference parties in the context of contract law.

The Constitution as a Compact

In the ratification conventions in the States, the Constitution was repeatedly referred to as a "compact." In those proceedings, unlike the proceedings in the Federal Convention, delegates freely resorted to the invocation of political theory. New Hampshire, when formally ratifying the new Constitution, considered itself and other States as "entering into an explicit and solemn compact with each other." Rhode Island referred to the Constitution as "a social compact" in its resolution of ratification.[58]

Although it is not good form to assert what the framers and ratifiers understood the Constitution to mean (because no one can assert that they all had one understanding), it is unquestionably correct to state that virtually all of them understood the Constitution to be a compact in some form and that they understood that one of the remedies for its breach was rescission. Manifestly, few, if any, of the framers or ratifiers would have understood the Constitution to be an instrument from which a State could not extricate itself if necessary. The idea that the Constitution that they had drafted and ratified was entered into "by the people," as opposed to the States, and was irrevocable once ratified was absolutely unknown to the framers and ratifiers. They left no record of such an idea in their voluminous debates in the Federal Convention or the State ratifying conventions.

The Constitution, as drafted and ratified, was a "Constitution between the States so ratifying the same" because it says so.

The only legal construction for the Constitution that any of the framers and ratifiers understood was that it was a compact between the States, and, like all compacts, it was subject to the equitable remedy of rescission or annulment upon a breach, whether that right was explicitly reserved in writing or not.

In the years after the ratification of the Constitution, the document was often referred to as a compact. Chief Justice John Jay referred to it as a compact in his opinion in the famous case of *Chisholm v. Georgia* in 1793.[59] Notably, the legislatures of both Kentucky and Virginia referred to the Constitution as a compact in their famous resolutions of 1798-99, adopted in response to the enactment by Congress, and the enforcement thereof by John Adams' administration, of the hated Alien and Sedition Acts.[60] Written largely by Thomas Jefferson and James Madison, the Virginia and Kentucky resolutions are virtual lessons in the compact theory. Reads the Kentucky Resolution of November 10, 1798, a document penned by Jefferson and refined by John Breckinridge of Kentucky, "Resolved, that the several States composing the United States of America are not united on the principles of unlimited submission to their General Government; but that by compact under the style and title of a Constitution for the United States . . . and that whensoever the General Government assumed undelegated powers, its acts are un-authoritative, void, and of no force. That to this compact each State acceded as a State, and is an integral party, its co-States forming as to itself, the other party."[61]

Kentucky did not seek secession but, rather, the "nullification" of the despised federal laws. Through the pen of James Madison, Virginia sought to "interpose" itself between the challenged laws and those against whom they were enacted to operate, Virginia's citizens. States, claimed the Virginia Resolution, were "duty-bound to interpose for purposes of arresting the evil."[62] The issue resolved itself short of actual nullification, but the compact theory and the related doctrines

of "nullification" and "interposition" were firmly enunciated in a crisis only eleven years after the ratification of the Constitution by two of the nation's foremost "founding fathers."

James Madison declared long after the ratification of the Constitution, "Our governmental system is established by a *compact,* not between the Government of the United States and the State governments, but *between the States as sovereign communities, stipulating each with the other a surrender of certain portions of their respective authorities to be exercised by a common government,* and a reservation, for their own exercise, of all their other authorities."[63]

Then in 1814, the shipping embargo imposed by the James Madison administration during the War of 1812 led the New England States to openly speak of secession. Relying upon the compact theory, and speaking of the Constitution as an association of States, one Boston newspaper, the *Columbian Centinel,* wrote, "Whenever [the Constitution's] principles are violated, or its original principles departed from by a majority of the States or of their people, it is no longer an effective instrument, but that any state is at liberty by the spirit of that contract to withdraw itself from the union."[64] Again, the issue passed without a confrontation, although the 1814 Hartford Convention came close to actually embracing secession as a remedy.

These arguments would be repeated over and over in the first half of the nineteenth century. In the 1830s, John C. Calhoun would echo the compact theory and the Virginia and Kentucky "Resolutions of '98" in the great "nullification" crisis over the 1828 Tariff of Abominations. And in the end, the compact theory would form the basis for the secession of South Carolina and her ten sister Southern States in 1860 and 1861.[65]

The theory was absolutely sound. Unquestionably, the Constitution was a compact. It had all the requisites of a contract. There were parties: thirteen States, to which were

added those that similarly ratified the document in the years after 1789. There was mutuality: each State promised to give up some of its sovereignty in exchange for what the Union promised to deliver. The Constitution was created by the States and ratified by the States. It could only be amended by the States. And the Constitution reads that it is a "Constitution between the States so ratifying the same." If, then, the Constitution is a compact, what is the remedy for a State or a group of States harmed by a breach of the Constitution by the federal government or other States? The only remedy, short of persuading the party or parties in breach to conform, is the equitable remedy of rescission.

If the Constitution is a compact, and it could be rescinded or annulled upon a breach, what would be sufficient to constitute a breach? Whatever would constitute a breach is left wholly to the State seeking the extraordinary remedy of rescission. Obviously, in the words of the 1800 Report on the Virginia Resolution of 1798, the offensive act would have to be "a deliberate, palpable and dangerous exercise of power not granted by the compact."[66]

It has been argued that the Constitution was meant to be perpetual, and, because of same, States cannot withdraw from it. Importantly, the Constitution does not include the word "perpetual" in any of its provisions. The Articles of Confederation, on the other hand, were entitled "Articles of Confederation and Perpetual Union," and the Articles were textually meant to be perpetual. That did not occur. Instead, the Articles of Confederation were completely replaced without one mention of them in the text of the Constitution that replaced them. The Articles were replaced without the States even conforming to the requirement in the Articles that its amendment be unanimous.

The English-speaking people have never, at any time in their long and storied history, subscribed to a rule of law that recognized any agreement as being perpetual. Parties

to an agreement were always protected in their right to rescind the agreement, even an agreement for a specific term of years. That rule of law was true whether the right to rescind was explicitly provided in writing or not. That rule of law was true even if the contract was, by its terms, "perpetual." No matter what a contract provided, parties were always provided with a right to rescind if another party or other parties breached the contract. If that was not the case, a party could be kept in a contract to his economic destruction while the other party or parties willfully and wantonly breached the terms thereof. Reads the ancient rule of law: *Perpetua Lex Est Nullam Legem Humanom Ac Positivam Perpetuam Esse, Et Clausula Quae Abrogationem Excludit Ab Initio Non Valet* ("It is perpetual law that no human and positive law can be perpetual, and a clause in law which precludes the power of abrogation is void *ab initio*").[67] No party can be forced to remain in an agreement while other parties are in breach of its terms.

The framers and ratifiers understood the Constitution not to be perpetual because they ascribed to it no such term. They understood it could never be perpetual even if they incorporated that very term in the text of the Constitution. Like the Articles of Confederation, it would remain in effect so long as all of the parties to it prospered and no party or parties breached its terms and, importantly, the federal government created thereby did not breach its terms.[68]

That the Constitution is a compact subject to the equitable remedy of rescission has been refuted by many notable individuals. Ardent nationalists objected to the compact theory because it diminished federal power and it provided the single most critical mechanism allowing the States to control the growth and actions of the federal government by exercising that right to rescind. Nationalists argued that the people ratified the Constitution, not the States. Not being parties to the Constitution, they claimed, the ancient

remedies in contract law such as rescission were not available to the States.

The most famous early refutation of the theory that the Constitution is a compact may be found in the opinion of Chief Justice John Marshall in *McCulloch v. Maryland*.[69] That case was brought by the cashier of the Baltimore branch of the Bank of the United States, a corporation created by Congress, challenging the constitutionality of a tax imposed upon it by the State of Maryland.

Apart from arguing the power of Congress to create a bank through its power to "coin money" and "regulate the value thereof," "regulate commerce between the States," and do all of those things "necessary and proper for carrying into execution such power," as well as the "supremacy clause," Marshall embarked on a line of reasoning triggered by the argument of counsel for the State of Maryland. According to the latter, it was important to construe the Constitution as an "instrument not emanating from the people, but as the act of sovereign and independent States" in order to advance his argument. The counsel's argument was absolutely correct textually and historically. To Marshall, an ardent nationalist, such a construction could not stand no matter what the text or history of the Constitution indicated.[70]

Wrote Marshall in response:

> It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress, and by the state legislatures, the instrument

> 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 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.
>
> From these conventions the Constitution derives its whole authority. The Government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty, to themselves and our posterity." The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. 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, (whatever may be the influence of this fact on the case), 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.[71]

For all the invented history and tortured logic of Marshall, the Constitution resolves the question textually. Article VII reads that it is a "Constitution between the States so ratifying the same." It is not a Constitution among the people, as Marshall proclaims. No matter what the preamble might proclaim, the text of the Constitution makes it absolutely clear

that it is a "Constitution between the States" regardless of the ratification process. Marshall totally ignored the text of the Constitution and invented his own history. It would not be the last time the Supreme Court would do that.

The Webster Argument

Probably no single exponent of an "indissoluble Union" was greater than Daniel Webster, the senator from Massachusetts. He was an imposing figure, indeed. Tall and powerfully built, he had a barrel chest. His head was large, and his "deep-socketed, black eyes peered out from a 'precipice of brows' and glowed like coals in a furnace" when he spoke.[72] If anyone could articulate how the Constitution makes the Union indissoluble, it was Webster.

On February 16, 1833, Webster rose in the Senate to argue against three resolutions introduced by John C. Calhoun of South Carolina in opposition to a bill extending the hated Tariff of 1828. Calhoun's resolutions read, in part, "Resolved, that the people of the several states composing these United States are united as parties to a constitutional compact, to which the people of each state acceded as a separate sovereign community, each binding itself by its own particular ratification; and that the union, of which the said compact is the bond, is a union between the States ratifying the same."[73] Note that Calhoun's resolution actually quoted Article VII of the Constitution.

Webster took the floor and began by fundamentally arguing against himself: "I do not agree, that, in strictness of language, [the Constitution] is a compact at all. But I do agree that it is founded on consent or agreement, or on compact, if the gentleman [John C. Calhoun] prefers that word, and means no more by it than voluntary consent or agreement." He then argued against himself again:

> The Constitution, Sir, is not a contract, but the result of a contract; meaning by contract no more than assent. Founded upon consent, it is a government proper. Adopted by the agreement of the people of the United States, when adopted, it has become a constitution. The people have agreed to make a Constitution; but when made, that Constitution becomes what its name imports. It is no longer a mere agreement.[74]

What on earth was Webster arguing? He paraphrased Chief Justice John Marshall's words in *McCulloch v. Maryland.* The Constitution, Webster argued, is the "result of an agreement between the people," not the States. But according to Webster, the Constitution somehow ceased to be an agreement at all when it was ratified; with ratification it became a constitution.

Article VII of the Constitution answers Webster's tortured logic. It is a "Constitution between the States so ratifying the same." That parties can enter into a contract and then, somehow, the contract can change its form after it is signed is utterly nonsensical. Under Webster's understanding of history, the framers and ratifiers were duped. Without knowing it, they entered into an agreement that was designed to cease being what they thought it was when they signed it; it became something else after ratification.

Webster's argument, like Marshall's, cannot stand the tests of logic or history, although it has been the accepted line of reasoning by the courts—and by most Americans—ever since. It is contrary to the very text of the Constitution, and it is hardly supported by the history of its drafting and ratification. The Constitution was never, at any time during the Federal Convention, or during the ratifying conventions in any of the States, represented to be irrevocable. If the Constitution was designed to create a government from which the States could never escape, no matter how that government abused its power and authority, it would have never been reported out of the Federal Convention. It certainly would have never been

ratified by the States, particularly given the tenor and language of the Virginia, New York, and Rhode Island resolutions of ratifications reserving their right to rescind their ratifications.

Abraham Lincoln provided no clearer guidance as to whether the Constitution created an indissoluble Union. On March 4, 1861, he delivered his first inaugural address. By that time, six States had already seceded from the Union.[75] Lincoln chose to direct his address at that matter, saying:

> 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 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 expressly declared and pledged, to 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, which contradicts the Constitution, and therefore is absurd.

> 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 nothing; and that the acts of violence, within any state or states, are insurrectionary or treasonable, according to circumstances.
>
> I therefore consider that the union is unbroken; and, to the extent of my ability, I shall take care 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, unless my rightful masters, the American people, shall withhold the requisite means, or, in some tangible way, direct the contrary.[76]

Lincoln rests his argument that the Union is perpetual upon the "contemplation of universal law" and the "law of all national governments." He could point to nothing in the Constitution that provided that it was perpetual. He could point to no utterances on the floor of the Federal Convention or any of the ratifying conventions. The "universal law" of which he spoke was a law that governments are not created by instruments that provide a mechanism for their own dissolution. That may be true for the governments of monarchs and dictators that ravaged Europe for centuries, but it was not true for the government created by the Constitution. The Constitution is a revolutionary instrument created by a revolutionary people at the end of a successful revolution fought to end the rule of a monarch and to guarantee fundamental liberty to all citizens. The government created by the Constitution was worth keeping only so long as it served that end. That fundamental understanding of the formation of the Union was utterly lost on Lincoln. It is sheer folly to argue that the Constitution is perpetual because other governments claim their constitutions are perpetual. Monarchs always claim the monarchy is perpetual. On the basis of this argument, nevertheless, Lincoln led the Union to war in 1861.

As the Constitution established "a more perfect Union," as set forth in the preamble, and the Articles of Confederation established a "perpetual Union," it followed to Lincoln that the Constitution must have established a Union more "perfectly perpetual" than the Articles of Confederation. The fact is the Constitution, unlike the Articles of Confederation, does not incorporate the term "perpetual" anywhere. In fact, no term is expressed at all. Likewise, the Constitution does not explicitly or implicitly incorporate any of the terms of the Articles of Confederation in its text. The Constitution does not use the term "perpetual" because the framers and ratifiers knew that no compact could ever be perpetual; all compacts are subject to the equitable remedy of rescission.

Finally, the Supreme Court considered the legality of secession in *Texas v. White* in 1869.[77] The case was brought by the Reconstruction State government of Texas to recover payment in United States currency on bonds that a military board of Texas had, during the Civil War, ordered delivered to agents for purposes of sale in order to raise money for the war effort.[78]

Chief Justice Salmon P. Chase wrote the opinion for the Court. That opinion was little more than the plagiarizing of Lincoln's first inaugural address. Wrote Chief Justice Chase:

> 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. . . . 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 as 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.
>
> It began among the Colonies, and grew out of common origins, 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?[79]

Chase admits that the States formed the Union. Without them, there would be no "United States." Once the States formed the Union, however, that was it! Like Webster, Chase argued that the compact became something else upon ratification. When a State was admitted to the Union, Chase claimed, it was the "incorporation of a new member into the political body," and "it was final." It goes without saying that not one member of the Federal Convention nor one member of any of the ratification conventions ever argued that once the Constitution was ratified by a State, that ratification was irrevocable. Virginia, New York, and Rhode Island *explicitly* reserved the right to rescind their ratification if they were not "happy." Either Chase was ignorant of that fact or he chose to ignore it. It would not be the last time the Supreme Court followed such a course.[80]

To argue whether a breach occurred in 1860 and 1861 is, of course, beyond the scope of this discussion. Volumes have been written about it. A few words about the issue are appropriate, however. The threat of the abolition or limitation of slavery, in the eyes of the citizens of slaveholding States,

was viewed as an act constituting a breach. There is no question that slavery is absolutely antithetical to the principles of liberty upon which the Constitution was based. Many Southerners abhorred slavery; most wished it had never been introduced into the region. But whether slavery was good or evil was not the question that haunted Southerners. The question they asked was who should initiate and oversee slavery's eradication?

To understand why the abolition of slavery, as advocated for many years by many representatives from the Northern States, was viewed as a constitutional breach by Southerners, one must place oneself in the position of those living in the slave States in 1860 and 1861. Although no major political party actually advocated abolition as part of its platform, the agitation for abolition had grown to such an extent that large voting blocs in Congress were able to limit slavery's extension into the territories. Southerners feared that federal policy would embrace abolition and that it was only a matter of time before that would become a reality. With nearly four million African-American slaves in the Southern States by 1860, the sudden release of them was unthinkable.[81] As a practical matter, there was no place for the freed slaves to go; they had no means by which they could provide for themselves and live. There was no public housing or public assistance then. If the slaves were suddenly freed, the region would be torn apart. There also had been threats of slave uprisings, and John Brown's Harpers Ferry raid in 1859 added fuel to the fear of the abolition movement. Southerners believed then that if slavery was to be abolished, only the States where slavery existed should be responsible for the method and timing. The States had to find mechanisms to address the myriad issues created by the abolition of slavery.

The abolition or limitation of slavery, short of a constitutional amendment, was unconstitutional. Slavery was actually recognized then by the Constitution.[82] That was never

questioned. The abolition or limitation of slavery was unquestionably contrary to the Constitution. After years of intense argument and bitterness over the issue of slavery and its extension into the new territories, the election to the presidency of Abraham Lincoln, a candidate who did not even run in the Southern States and who was openly supported by abolitionists in the Northern States, was, to many Southerners then, sufficient cause for secession. Secession may well have been the result of a "crisis of fear," but the fear of those living in the South then was very real nevertheless.[83]

South Carolina rescinded its ratification of the Constitution on December 20, 1860.[84] Ten of her sister Southern States followed.

Few figures on the national scene were more erudite than Judah P. Benjamin, then a United States senator from Louisiana. A lawyer of significant distinction, Benjamin delivered a speech on the right of secession before the Senate on December 31, 1860. Relying upon the ancient law of contracts, Benjamin said, "I say, therefore, that I distinguish the rights of the States under the Constitution into two classes; one resulting from the nature of their bargain; if the bargain is broken by the sister states, to consider themselves freed from it on the ground of breach of compact; if the bargain be not broken, but the powers be perverted to their wrong and their oppression, then, whenever that wrong and oppression shall become sufficiently aggravated, the revolutionary right—the last inherent right of man to preserve freedom, property, and safety—arises, and must be exercised, for none other will meet the cause."[85]

Only a Civil War—the use of brute force—crushed the attempt by slave States to secede. The Constitution has been understood by many people since the Civil War as an instrument that was created by the "People of the United States" in order to form an "indissoluble Union" and that granted to the federal government plenary powers over virtually all aspects of the lives of its citizens. That meaning is

not one understood by any of the framers or ratifiers. Rather, it is the result of the use of force against the States by the very government the States agreed to create in 1789. Justice Oliver Wendell Holmes, a thrice-wounded Union veteran of the Civil War, may have said it best when, in the landmark case of *Missouri v. Holland,* he wrote that the Constitution he was interpreting was one that "has taken a century and has cost [the] successors [of the framers and ratifiers] much sweat and blood to prove that they created a nation."[86]

Although Holmes' *dicta* may have the ring of truth, the Constitution's text and history before the Civil War did not change as a result of Appomattox. Contracts do not textually change by the use of brute force; contracts change only by the agreement of the parties. The Constitution was still a "constitution between the States" after the war as it was before. It remains so now.

That it is considered to be a "constitution between the States" is absolutely necessary to preserve the liberties of the people of the several States. Without the States being able to exercise their powers as parties to the Constitution, the people are totally subject to the dictates of the federal government. They have no power save through their respective States. In fact, the Supreme Court has consistently denied citizens standing, as citizens and taxpayers, to even challenge the constitutionality of revenue-spending acts of Congress.[87]

Secession is not only constitutional, it was understood by all the States to be available when they ratified the Constitution; three States explicitly reserved the right to rescind when they ratified the Constitution. Manifestly, the Constitution would not have been ratified if it had been understood to be otherwise. More than that, however, the Constitution is a revolutionary document created by a people who had prevailed in a revolution against the most powerful monarch on earth. The revolution had been fought to guarantee liberty. If what the framers and ratifiers created failed to protect the

liberty of the people, the States were free to rescind their ratification of it.

If the government created by the Constitution ceases to guarantee liberty, there must be a remedy available to those oppressed by it. It is not the courts; the citizens may not even have standing to challenge the actions of the federal government, and, moreover, the courts are creatures of the very government that would be the oppressor. To be sure, courts are really not competent to even address constitutional challenges to acts of Congress that allege that those acts undermine the liberties of citizens and invade the powers reserved to the States.[88] Resorting to the ballot may be ineffectual; the votes of a few metropolitan areas may negate the votes of all other regions. More than that, fundamental liberties should never be subject to a majority vote.

What remains to protect individual liberties are the States as parties to the Constitution. As parties, they must exercise their "duty" to protect their citizens from a federal government that has grown too powerful, too intrusive, too dictatorial. They do that by exercising the right that parties to agreements have exercised for literally hundreds of years: to stand up to actions that invade the liberties of citizens and the reserved powers of the States by, first, nullifying the unconstitutional acts and then, if the federal government persists, seceding. The framers and ratifiers would not have thought any differently. After all, although they were revolutionaries who created a revolutionary form of government, they were also the inheritors of an Anglo-American legal tradition that had been developed over hundreds of years, which defined contracts and the remedies available to those injured by the breach thereof.