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Michelman*

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LEGAL SCHOLARSHIP SYMPOSIUM: THE SCHOLARSHIP OF FRANK I. MICHELMAN

“PERPETUAL UNION,” “FREE LOVE,” AND SECESSION: ON THE LIMITS TO THE “CONSENT OF THE GOVERNED”

Sanford Levinson*

I.

There are many reasons to honor Frank Michelman, not least because there are so many different topics—central to the enterprise of thinking about law—about which he has been remarkably illuminating. He is truly a giant on whose shoulders many of us are proud to stand as we try to think our way through the dilemmas presented by trying to take the enterprise of American constitutionalism seriously. It is, therefore, a singular pleasure to come to Tulsa to express some small measure of my gratitude to this truly brilliant—and, just as importantly, kind and generous—man.

Given my own interests—many of them shaped by Frank—I was pulled in different directions with regard to choosing a single topic to speak about. I teach about the Constitution and the American welfare state; given the absolute centrality of Frank’s seminal article on the degree to which the Fourteenth Amendment can be read as requiring at least some degree of “protecting the poor,”¹ one obvious choice was to write about what all must agree, alas, is the eclipse of a Michelmanian vision of the Constitution. Our present Constitution, at least as interpreted by the United States Supreme Court, is considerably more

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1. Frank I. Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

Darwinian in its thrust. With some exceptions, the poor appear to have only those affirmative legal rights that the better off choose to give them through positive legislative enactment. Fortunately, my colleague Willy Forbath, who knows far more about the actual history of the American welfare state than I do, will undoubtedly address some of these issues in his own presentation.

I have chosen, instead, to focus on one implication of taking the concept of self-determination with the degree of seriousness that Frank undoubtedly does. In particular, I want to discuss the question of secession as an aspect of American constitutional theory. If his first *Harvard Law Review* foreword focused on the problems of the poor, then his second one, some two decades later, helped to spark the so-called “republican revival” in legal academic circles by addressing the extent to which we can be said freely to choose the political and legal structures that, among other things, coerce us when we violate their commands.² One of the defining characteristics of Frank’s scholarly career, especially if we look at his later work, is the seriousness with which he takes the notion of “consent of the governed.” Like Rousseau, he could well say that “[a] people, since it is subject to laws, ought to be the author of them.”³ Or, to quote a more contemporary figure who has featured prominently in some of Frank’s recent work, Jürgen Habermas has written that “the modern legal order can draw its legitimacy *only* from the idea of self-determination: citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees.”⁴ Needless to say, if one puts perhaps full weight on the word “only,” it is hard to see how any “modern legal order” could possibly be considered legitimate.

In any event, Frank’s 1986 foreword—and he is the only legal academic who has been honored by being asked to write a second such article by the editors of the *Harvard Law Review*—seemed to carry the suggestion that since mass authorship of constitutional norms was only a utopian possibility, we should be (relatively) satisfied to have the Supreme Court mimic a kind of ideal process of civic deliberation and accept their conclusions as, in some sense, our own. I am quite certain that his confidence in the judiciary as a genuinely deliberative body has waned in the ensuing fifteen years; if anything, though, he has only deepened his genuine and deep concern for instantiating that part of the liberal project that emphasizes the importance of self-governance.

My specific choice of topic is explained also by my being privileged to sit in on a reading course that he offered at Harvard in the spring of 2003 on the constitutional thought of Abraham Lincoln. Our sixteenth president is, I believe, the single most important—and challenging—figure in the continuing conversation about what might comprise what I have elsewhere called “constitutional faith” (the topic, not at all coincidentally, of Frank’s contribution

2. Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986); see also Frank Michelman, *Law’s Republic*, 97 Yale L.J. 1493, 1524-26, 1531-32 (1988).

3. Jean-Jacques Rousseau, *The Social Contract* 83 (Maurice Cranston trans., Penguin Bks. 1968).

4. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 449 (William Rehg trans., MIT Press 1996) (emphasis added).

to our gathering last year about my own work⁵). There is a reason that Lincoln dominates the frontispiece to my book of that title⁶ and that he—and the war over which he presided—is, as I tell my students, the emotional center of my introductory course in constitutional law. As everyone knows, the Civil War, at least initially, was a war to maintain the Union and, therefore, a thoroughgoing rejection of the possibility that dissolution was a constitutional possibility.

What explains my continuing fascination with Lincoln, however, is that after many years I remain distinctly unclear about the extent to which Lincoln can truly be described as a "constitutionalist" (as distinguished, perhaps, from the appellation "Unionist"). At the very least, he underlines the extent to which that term is and always will be what political theorists call an "essentially contested concept." I mentioned a moment ago the frontispiece to *Constitutional Faith*, which features a toga-clad Lincoln sternly pointing upward, possibly to the strange and mysterious God who had brought war to the nation as a justified rebuke for the slavery that Lincoln detested. But, at the bottom of the picture, Richard Nixon is peeking out from under Lincoln's cloak, in recognition of the fact that some of Nixon's defenders with regard to his actions against opponents of the Vietnam War borrowed from some of Lincoln's own arguments during the Civil War. Perhaps today, and even more ominously, I would be tempted to substitute Slobodan Milosevic or Vladimir Putin, both of whom were/are more than willing to use force to suppress what they believed were thoroughly illegitimate secessionist movements: one in Kosovo, the other in Chechnya. There is nothing uncomplicated about Lincoln or his legacy.

So I finally come to my specific topic, which is what we can learn about the idea of constitutional fidelity—and, beyond that, about the possible meaning of government by consent of the governed—by looking more closely at Lincoln's decision to go to war rather than accept the peaceful secession of those states joined together (or, if one is a Lincolnian, perhaps one should say "attempting to join together") in the Confederate States of America. At one level, this involves straightforward argument about the meaning of the constitutional text with regard to the legitimacy of secession. Should we accept Lincoln's arguments as to the fundamental *unconstitutionality* of secession and, therefore, the proposition that the decision to go to war was nothing more, legally speaking, than what was required in order to fulfill his presidential oath both to "take care" that the laws of the United States are in fact executed and, at an even higher level, to support, protect, and defend the Constitution of the United States? This, of course, requires that we accept his designation of those with different views on the matter as "treacherous,"⁷ indeed "traitorous"⁸ opponents joined together in not only

5. See Frank I. Michelman, *Faith and Obligation, or What Makes Sandy Sweat?*, 38 *Tulsa L. Rev.* 651 (2003).

6. Sanford Levinson, *Constitutional Faith* ii (Princeton U. Press 1988).

7. *Abraham Lincoln: Speeches and Writings 1859-1865: Speeches, Letters, and Miscellaneous Writings Presidential Messages and Proclamations* 260 (Don E. Fehrenbacher ed., Lib. Am. 1989) [hereinafter *Abraham Lincoln 1859-1865*].

8. *Id.*

unjust, but, more to the point, illegal insurrection against the United States of America. I might add that deciding this point has ramifications not only for the decision to go to war, but also, and just as importantly, for decisions reached at the conclusion of the war, as thought turned to “reconstruction” and the full ramifications of the “regime change” brought about by war.

Beyond the issue of constitutional fidelity, of course, is the normative attractiveness of a reading of the Constitution that legitimizes the suppression of secession *per se*. After all, the United States began as what well might be conceived as a secessionist movement from the British Empire; moving to the present day, it is scarcely the case that the issue of secession has disappeared. More to the point, I doubt that we—i.e., the readers of this text—are necessarily unanimous in opposing every secessionist movement that brings itself to our attention. One should certainly be aware of a lively debate going on among political theorists about the legitimacy of secession, particularly if one is committed, as Frank most definitely is, to notions of self-determination.⁹ Who are, after all, the selves entitled to such a good, and under what circumstances? Is it truly a “universal human good,” or can it properly be limited in the name of preserving political order? That is, was Hobbes ultimately correct in limiting the “consent of the governed” to the one moment—analogous to what physicists might call “singularity”—in which individuals collectively ceded any future rights of authorship, as it were, to a sovereign ruler who would brook no challenge to his authority?

One further aside: I obviously hope that my topic is appropriate to a *festschrift* for the wonderful man and scholar who is Frank Michelman. I also hope, though, that it serves as well to honor our convener, Paul Finkelman, whose probing examination of American slavery and its legal ramifications, including constitutional ones, is unmatched among American historians. Indeed, I was reinforced in my decision to discuss secession when Paul distributed a posting to an ongoing discussion list of constitutional law professors on which both of us spend far too much time.¹⁰ The debate *du jour* concerned the propriety of viewing the Constitution as a “treaty” among the constituent states of the American Union. Among the implications of such a conception is the right of any party to a treaty to withdraw after giving some requisite notice. Paul wrote:

That the Constitution was not a treaty, and therefore presumably one signer could bail out of the treaty,[]was decided quite decisively, by the case of *Grant v. Lee*, argued at Appomattox Courthouse in 1865. Mr. Lee initially contended that his state and others were free to pull out of the “treaty.” Grant countered, as did his co-counsel Sherman, Sheridan, and others, including a very good lawyer named

9. See e.g. Christopher H. Wellman, *A Defense of Secession and Political Self-Determination*, 24 *Phil. & Pub. Affairs* 142 (1995).

10. See E-mail from Paul Finkelman, Chapman Distinguished Prof. L., U. Tulsa College L., to <CONLAWPROF@listserv.ucla.edu>, *Re: Just for Laughs* (Aug. 7, 2003) (copy on file with *Tulsa Law Review*).

Benjamin F. Butler. These were all associates in the firm of Lincoln, Chase and Seward.¹¹

What I found most interesting about this view is that it suggests that constitutional argument can be settled on the battlefield. There is, to be sure, precedent for this view, and not only in Chairman Mao's injunction that "[p]olitical power grows out of the barrel of a gun."¹² Consider the Alabaman Justice Black's reminder, in *Testa v. Katt*,¹³ that although "[e]nforcement of federal laws by state courts did not go unchallenged"¹⁴ prior to 1860, "the fundamental issues over the extent of federal supremacy [were] resolved by war."¹⁵ And Frank's colleague, Laurence Tribe, has recently written of "the ban on a state seceding from the Union[as] a ban etched in the blood of civil war rather than in ink on parchment."¹⁶ What is interesting about Black, Finkelman, and Tribe—and, in turn, what should make them so interesting for someone with Frank's views—is their interweaving of law with armed power and, indeed, with blood sacrifice. For anyone committed to a view of law as in some significant sense the product of civic-republican deliberation, let alone Habermasian unconstrained conversations, this cannot be an easily acceptable vision of how legal disputes are to be deemed "settled."

It is worth noting the importance of the word "settlement" in the "legal process" approach identified with Henry Hart and Albert Sacks that dominated the Harvard Law School when Frank was a student there at the end of the 1950s. It was certainly reasoned argument—emanating primarily, so far as the Constitution was involved, from the Supreme Court—and, most certainly, not armed force that was supposed to be the foundation of social settlement. This was especially true, presumably, of what Ronald Dworkin would later call "hard cases"; secession is, presumably, an exemplary "hard case." To acknowledge the explanatory importance of such force is just to acknowledge the possibility that "might" does indeed make "legal right." This is "law as politics" with a vengeance!

II.

And so we come to the most fundamental constitutional issue presented in Lincoln's presidency—indeed, probably the most fundamental constitutional

11. *Id.*

12. *Mao Tse-Tung's Quotations: The Red Guard's Handbook* 61 (Intl. Ctr. George Peabody College for Teachers 1967) (quoting Mao Tse-Tung, *Problems of War and Strategy*, in *Selected Works* vol. 2, 224 (For. Lang. Press 1961-1965)) (internal quotations omitted).

13. 330 U.S. 386 (1947).

14. *Id.* at 390.

15. *Id.*

16. Laurence H. Tribe, *American Constitutional Law* vol. 1, 1246 n. 48 (3d ed., Found. Press 2000). Tribe goes on to make the rather remarkable suggestion that it would be unconstitutional for Congress to "waive that ban by permitting a state to secede, essentially saying 'Good riddance.'" *Id.* I am not convinced. If Congress has the power to admit states to the Union, why does it not possess an equal power to "deadmit" them so long, of course, as they consent to their "deadmission"? What is the principle that has been "etched in the blood"?

question of our entire history as a country—the legitimacy of secession. In his recent magisterial book on Lincoln and the coming of the Civil War,¹⁷ Professor Harry Jaffa writes that Lincoln's first inaugural address offered "a lucid demonstration that secession could lead only to anarchy and that the rule of a constitutional majority was the only alternative either to anarchy or to tyranny."¹⁸ Given the commitment in the Constitution's Preamble to a "more perfect Union," it follows, almost as a logical matter, that an act—like secession—that necessarily generated either anarchy or tyranny could not conceivably be constitutional. QED. On this point, incidentally, Laurence Tribe appears to be in complete agreement. Thus, he offers, in addition to whatever may be etched in blood, as the "definitive articulation"¹⁹ of the principle that "the Constitution forbids secession from the Union by any state,"²⁰ Lincoln's first inaugural and its ringing statement, that "in contemplation of universal law, and of the Constitution, the Union of these States is perpetual."²¹

It is with some trepidation that I disagree with both Professors Jaffa and Tribe—and, consequently, with Lincoln.²² I simply do not find in the first inaugural, or anywhere else, the kind of logical demonstration that Professor Jaffa insists is there. "Articulation," to use Tribe's language, most certainly yes. But, of course, articulation is only the beginning of genuine argument. I see a series of question-begging, more-than-a-bit tendentious arguments that ultimately persuade only those who wish to be persuaded in the first place. I should state that the same is true of the arguments on behalf of the Confederacy. My point, I should emphasize, is *not* that the Constitution speaks clearly with regard to the legitimacy of secession, so that we can easily decide who the winners and losers are in any debate about the issue. Instead, the opposite is true: The Constitution speaks with notable *lack* of clarity. This means, at the very least, that men and women of good faith can most certainly disagree about its meaning. Indeed, I will make an even stronger statement: It is remarkable, almost bizarre, to believe that "neutral" techniques of constitutional interpretation will generate a Dworkinian "right answer" to this most primal controversy about the nature of the American union. This does not mean, however, that we are not called upon, as constitutional lawyers and American citizens, to figure out some way of responding to secessionist arguments.

We begin with the obvious fact that there is no piece of constitutional text that explicitly gives, or denies, states the right to secede from the United States of

17. Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* (Rowman & Littlefield 2000).

18. *Id.* at 431.

19. Tribe, *supra* n. 16, at vol. 1, 32 n. 3.

20. *Id.* at vol. 1, 32.

21. *Id.* at vol. 1, 32 n. 3 (quoting *First Inaugural Address, March 4, 1861*, in *Abraham Lincoln: Great Speeches* 53, 55 (Stanley Appelbaum ed., Dover Publications 1991)) (internal quotations omitted).

22. And, as well, with Daniel Farber, who accepts Lincoln's arguments in his recently published book. Daniel Farber, *Lincoln's Constitution* 111-12 (U. Chi. Press 2003). For a more skeptical view, however, see Philip Abbott, *The Lincoln Propositions and the Spirit of Secession*, in *Theories of Secession* 182 (Percy B. Lehning ed., Routledge 1998).

America, unless, of course, one views the Preamble as itself establishing not only a constitutional aspiration but also a legal rule.²³ I will return to this presently.

Though evoking the Constitution, Lincoln's (and Tribe's) argument ultimately depends on a decidedly non-textual Constitution, that is, the background set of assumptions and understanding that are necessary to fill in the many great silences of the text itself. Needless to say, I take no issue with the basic methodological point. The idea of a completely self-sufficient text is chimerical. The question, as is so often the case in law, resolves into who has the burden of proof with regard to establishing either a right to secede or a duty *not* to attempt secession. But in fact, one cannot answer *that* question without making certain tacit assumptions that are themselves subject to argument. Consider, for example, the fact that we are not told within the text whether the thirty-five year age requirement for presidential eligibility should be computed by reference to a solar or a lunar calendar. Our confidence that the former is surely correct is derived from what we know about the culture of the time and not from the unadorned text itself. So, there would be a very heavy burden of proof on anyone who claimed that the reference was to lunar years.

Unfortunately, the cultural background is not so clear with regard to the issues posed by secession, especially if one regards the American Revolution, which from the perspective of 1787 had been fought as if yesterday, could itself be altogether plausibly regarded as a secessionist movement within the British Empire presided over by George III and Parliament in London.²⁴ Lincoln asserts, of course, that the Union preceded the Constitution and, even more to the point, if not more astonishingly, the Declaration of Independence itself. Thus, he traces

23. I should note that Akhil Amar strongly disagrees with this assertion. In addition to the Preamble, he emphasizes the importance of the Article VI Supremacy Clause, which clearly subordinates state sovereignty to any constitutional norm. Amar sets out his arguments in a forthcoming book, *America's Constitution: A Guided Tour* (forthcoming Random House 2005).

Unfortunately, I had the opportunity to read the manuscript only after preparing the article, and I did not have the time to present Prof. Amar's arguments in full or to develop my responses (which might, upon further reflection, have included modification of some of my arguments in the text). As is Amar's wont, he closely examines the text, structure, and history of the Constitution's drafting and (especially with regard to history) its ratification, and he argues that there was a clear and unequivocal understanding that the new Union was indissoluble. He argues, for example, that the anti-Federalists in New York presented their Federalist opponents a "deal" whereby the former would support ratification contingent on the ability of New York to withdraw from the Union if a Bill of Rights was not subsequently added to the Constitution. The Federalists rejected any such deal, insisting, even in circumstances when one might reasonably have thought that ratification itself was at stake, that entrance into the union was irrevocable. This and other arguments, some of them referred to below, certainly have to be taken into account by anyone interested in debating the potential constitutional legitimacy of secession.

24. See e.g. Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* 45 (Westview Press 1991). Buchanan noted:

Consider, for example, the secession of the thirteen American colonies from the British Empire in North America Strictly speaking this was secession, not revolution. The aim of the colonists was not to overthrow the government of Britain but only to remove a part of the North American territory from the Empire.

Id.; see Mark E. Brandon, *Free in the World: American Slavery and Constitutional Failure* 196 (Princeton U. Press 1998) ("The Revolution was less a revolution than a constitutionally justified secession that could not be accomplished without the assistance of arms.").

the Union to the Articles of Association in 1774,²⁵ though this claim would be belied, at least to some extent, by the immortal first words of the Gettysburg Address, which relate back, presumably, to the 1776 Declaration; the constitutional text itself also seemingly dates the birth of the United States back to 1776.²⁶

Lincoln notes that the Articles of Confederation pledged its signatories to “perpetual union”²⁷ and suggests, almost as a logical matter, that this *had* to carry over to the Constitution, given its own commitment to an even “more perfect Union.” Again, I am unconvinced. Let us look further at the argument that the Preamble’s statement of purpose—i.e., to form a “more perfect Union”—entails the notion of indissolubility. From this perspective, a ban on secession is, in effect, so implicit in the very idea of the Constitution that it is as if it were explicitly stated in a form similar, say, to the ban on States passing *ex post facto* laws or granting titles of nobility.²⁸

I begin with a narrow lawyer’s point: For better and, undoubtedly, for worse, the Preamble is rarely invoked as part of standard-form legal argument. One reason for the Preamble’s basic irrelevance, as a matter of law, was given by our first attorney general, Edmund Randolph, in responding to George Washington’s request for his view as to the constitutionality of the bill establishing the Bank of the United States. Randolph noted that some of its defenders relied on the Preamble:

To this, it will be here remarked, once for all, that the Preamble if it be operative is a full constitution of itself; and the body of the Constitution is useless; but that it is declarative only of the views of the convention, which they supposed would be best fulfilled by the powers delineated²⁹

That is, we discover what powers are assigned to Congress from a reading of Article I, section 8, not by inferring them from what, say, is conducive to “establishing Justice.” Similarly, we discover the limits on state and national power by reading sections 9 and 10 of Article I (as well, of course, as the later-added Bill of Rights) rather than through inference from, say, what should count as “the blessings of Liberty.”

One might well find Randolph’s verdict to be quite harsh and perhaps even descriptively misleading. Akhil Amar, for example, has suggested that many lawyers and judges of the time, including John Marshall, felt quite comfortable citing the Preamble as support for their arguments.³⁰ The contemporary

25. *Abraham Lincoln 1859-1865*, *supra* n. 7, at 217-18.

26. “Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth.” U.S. Const. art. VII.

27. See *Abraham Lincoln 1859-1865*, *supra* n. 7, at 217-18.

28. See U.S. Const. art. I, § 10.

29. Paul Brest et al., *Processes of Constitutional Decisionmaking: Cases and Materials* 12 (4th ed., Aspen L. & Bus. 2000) (quoting *The Constitutionality of the Bank Bill*, in H. Jefferson Powell, *The Constitution and the Attorneys General* 3, 6 (Carolina Acad. Press 1999)) (internal quotations omitted).

30. See Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 54 n. 85 (2000) (citing Hamilton’s exposition on the first national bank and Marshall Court landmarks such

constitutional lawyer's relative disdain for the majesty of the Preamble does not, I think, represent the finest kind of constitutional analysis or display of legal imagination. As someone who believes, for example, that the Constitution should always be interpreted with regard to the Preamble's insistence that the point of the constitutional enterprise is to "establish Justice," I cannot easily reject Lincoln's (and Jaffa's and Tribe's) reference to the "more perfect Union" that may even be said to capture in one term the aims of the others. I think it far preferable to grant the legal relevance of the Preamble than to conform to the present practice of basically ignoring it. Still, the major point is that there is no reason whatsoever to view the Preamble as definitive *only* with regard to requiring an indissoluble Union.

At the end of the day, though, and granting the full measure of importance to the Preamble's language, I confess that I find Lincoln's derivation from the term "more perfect Union" a bit like St. Anselm's ontological proof for the existence of God. *Why* does "perfection" necessarily entail indissolubility? Begin with a purely textual point: The Articles of Confederation had indeed spoken of "perpetual union." The new Constitution speaks only of a "more perfect Union." For those of us who find it relevant, for example, that the new text proposed in Philadelphia and ratified thereafter—or, even more to the point, the Tenth Amendment proposed and ratified by 1791—did not include the magic word "expressly," why isn't it at least as relevant that the word "perpetual" was dropped in favor of "more perfect"?

In any event, let me suggest the possibility that we should interpret the Preamble as *aspirational*, expressing a hope that it will serve as the underpinning of what will turn out, as history unfolds, to be an *undissolved* (and perfectly just and domestically tranquil) Union; this is, obviously, quite a different matter from proclaiming what might be described as the ontological (and legal) *indissolubility* of the Union. Those joined in the Union are beseeched to preserve the kind of affectionate relationship that would, as a matter of empirical fact, lead everyone to wish to preserve it. But aspirations are not always achieved. Such affections might well come to an end, with attendant dissolution of the Union that had been established.

Consider in this context Jefferson's own reference, in an initial draft of the Declaration of Independence, read now as a secessionist manifesto with regard to membership in the British Empire. There Jefferson wrote of an "agonizing affection"³¹ that "bids us to renounce for ever these unfeeling brethren"³² and to "endeavor to forget our former love for them."³³ King George III, on the other hand, might have echoed Tina Turner and asked, "What's love got to do with it?"

as *Martin v. Hunter's Lessee*, *Marbury v. Madison*, and *McCulloch v. Maryland*). H. Jefferson Powell presents similar arguments in *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985).

31. Jefferson's "Original Rough Draught" of the Declaration of Independence, in *The Papers of Thomas Jefferson, Volume 1 1760-1776*, at 423, 427 (Julian P. Boyd ed., Princeton U. Press 1950).

32. *Id.*

33. *Id.*

Indeed, I draw the relevance of the language of affection and love from Lincoln himself, particularly an address in Indianapolis, on February 11, 1861, during his trip from Springfield to Washington to assume the office to which he had been elected. He offered his auditors the following description of those who defended the legitimacy of secession: "In their view, the Union, as a family relation, would not be anything like a regular marriage at all, but only as a sort of free-love arrangement,—[laughter,]—to be maintained on what that sect calls passionate attraction. [Continued laughter.]"³⁴

Let me suggest, though, that this is not a laughing matter. I believe that our own acceptance of Lincoln's argument in 2004 might well turn on the view that we have of marriage and the importance of "passion," or at least "affection," in maintaining the institution. If, for example, we accept any of the standard Protestant critiques, going back at least to John Milton, of the Catholic view of marriage, which was indeed "indissoluble," or, as is more likely for many of us, if we accept any of the more contemporary secular defenses of the possibility of divorce, then I believe that we cannot easily join in Lincoln's encomium to "regular marriage." To be sure, one can believe that dissolution of marriage ought not be subject to casual decision, but this, obviously, is a very different point from regarding it as indissoluble. Perhaps the key question is how one structures divorce. Does a legitimate divorce, for example, require the same mutual consent that the initial marriage did? Or, on the contrary, do we recognize the legitimacy of what might be termed "unilateral divorce," whereby a Nora-like spouse who rejects constrained life in a "doll house" simply slams the door on what has come to be recognized as an unsatisfactory marriage?³⁵ One's answer to this question might have quite obvious implications for one's theory of secession.

In any event, as if recognizing the limits of his laughter-provoking analogy in Indianapolis, Lincoln concedes, in his inaugural address, that "[a] husband and wife may be divorced, and go out of the presence, and beyond the reach of each other."³⁶ The key point, he now declares, is that "the different parts of our country cannot do this. They cannot but remain face to face; and intercourse, either amicable or hostile, must continue between them."³⁷

In the language of my colleague Philip Bobbitt, I believe that Lincoln has shifted his "modality" of argument.³⁸ Formerly, he appeared to be appealing to a combination of text and history as providing a definitive answer with regard to what I have called the "ontology" of Union. A similarly "ontological" argument with regard to marriage might regard it as a condition of two becoming an indissoluble one. But he now seems to be making a far more prudential argument. Whatever history might show, we should recognize that a true parting, as a practical matter, is impossible. It is like the couple with several small children;

34. *Abraham Lincoln 1859-1865*, *supra* n. 7, at 202.

35. I owe this point to a conversation with Akhil Amar.

36. *Abraham Lincoln 1859-1865*, *supra* n. 7, at 221-22.

37. *Id.* at 222.

38. See Philip Bobbitt, *Constitutional Interpretation* 11-22 (Blackwell 1991).

whatever their feelings about each other, they *will* remain in close contact, and it is a delusion to believe that they can soon, if ever, truly be rid of one another. Even if this is true, one might still ask if we would endorse a notion of compelled permanence on the part of married couples with children instead of attentiveness to how the undoubted interests of the children can be satisfied even while allowing the dissatisfied partner(s) to start new lives. And, of course, we are still faced with the question whether mutual consent is necessary to the parting.

Ultimately, though, Lincoln is not merely making a point about constitutional meaning. Instead, he has moved to what might be called the issue of constitutional design and the criteria by which we distinguish the best from inferior notions of a constitution. He had, after all, insisted "that *in contemplation of universal law*,"³⁹ and not only "of the Constitution, the Union of these States is perpetual."⁴⁰ And "[p]erpetuity,"⁴¹ Lincoln immediately went on to insist, "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."⁴² In some ways, this appears to be a conceptual point sounding in political theory and logic—i.e., an assertion that the very notion of "proper" government entails indissolubility—rather than an ordinary lawyer's argument sounding in standard legal sources.

I have already indicated my problems with any such logic. To return to the marriage analogy for one more moment, it should certainly be noted that *every* marriage in the contemporary United States takes place against a legal background that recognizes the possibility of its termination; indeed, in many states, the termination can come through an effectively unilateral process, though, of course, it still needs state sanction. Even Louisiana, which has recently begun offering the option of "covenant marriage" as an alternative to what has become in the contemporary United States the standard form of marriage,⁴³ accepts the possibility of divorce even between covenanted couples, though the procedures are considerably more difficult than for their "uncovenanted" fellow Louisianans. All of this being conceded, most of us do not deny that something recognizable as "marriage" continues to take place within the United States. And, I dare say, most of us would oppose a return to a legal regime of indissoluble marriage or even the pre-1960s requirement that the dissatisfied spouse prove some severe "fault" on the part of the husband or wife. I am also assuming that most of us would oppose a requirement of mutual consent, which would restore the classic novel or movie plot that turned on the existence of a spouse who would simply not give his or her mate a divorce.

You might well regard most of the arguments so far as lawyerly nit-picking or running the marriage metaphor into the ground. Perhaps you agree with David

39. *Abraham Lincoln 1859-1865*, *supra* n. 7, at 217 (emphasis added).

40. *Id.*

41. *Id.*

42. *Id.* (emphases added).

43. *See* La. Stat. Ann. § 9:272 (2000).

Miller, who is relatively sympathetic to secession at least in theory, that marriage metaphors simply are not helpful in considering the pros and cons of allowing secession.⁴⁴ Let me, then, turn to a far more concrete problem for Lincoln. In his message to Congress, Lincoln notably claimed that “Our States have neither more, nor less power, than that reserved to them, in the Union, by the Constitution—no one of them ever having been a State *out* of the Union.”⁴⁵ But here we come to a truly significant problem, which is what we might call the ontological status of North Carolina and Rhode Island on April 30, 1789, the day that George Washington took his oath of office as the first President of the United States of America. Where were these two states, neither of which had yet ratified the Constitution under the procedures set out by Article VII? Were they *in* the Union or *out* of the Union? How would one determine the correct answer?

In his farewell speech to the Senate, before returning to his home state of Louisiana and ultimate service as Secretary of the Treasury for the Confederacy, Judah Benjamin emphasized the extent to which the 1787 Constitution could itself be viewed as a secessionist act. Like Lincoln, he pointed to the claim of perpetuity for the Confederation established by the Articles of Confederation. Indeed, the Articles provided “that they should never be amended or altered without the consent of all the States.”⁴⁶ Nonetheless, Benjamin argued, “nine States of the Confederation seceded from the Confederation, and formed a new Government,”⁴⁷ the formation being based on Article VII, which simply ignored the Articles’ unanimity rule proclaimed in Article XIII in favor of allowing the ratification by nine state conventions to bring the new Constitution into juridical existence. Two more states quickly ratified, New York’s ratification as the eleventh state at least partly being explained by the degree to which Article VII had affected a *fait accompli*.⁴⁸ But North Carolinians and Rhode Islanders were made of hardier stuff. Thus, says Benjamin, “After this Government had been organized . . . North Carolina and Rhode Island were still foreign nations, and so treated.”⁴⁹

University of Chicago law professor David Currie seems substantially to agree with this last assertion in his magisterial examination of the Constitution in

44. See David Miller, *Secession and the Principle of Nationality*, in *National Self-Determination and Secession* 62 (Margaret Moore ed., Oxford U. Press 1998).

45. *Abraham Lincoln 1859-1865*, *supra* n. 7, at 255.

46. Brest et al., *supra* n. 28, at 216 (quoting Cong. Globe, 36th Cong., 2d Sess. 213 (1860)) (internal quotations omitted).

47. *Id.* (quoting Cong. Globe, 36th Cong., 2d Sess. at 213) (internal quotations omitted).

48. We’ll never know if *The Federalist* would have succeeded in overcoming anti-Federalist opposition had the anti-Federalists been astute enough to schedule an earlier convention and vote prior to the decisive ratification by New Hampshire on June 21, 1788.

49. Brest et al., *supra* n. 29, at 216 (quoting Cong. Globe, 36th Cong., 2d Sess. at 213) (internal quotations omitted). Interestingly enough, Amar agrees that North Carolina and Rhode Island were no part of the Union prior to their ratification of the Constitution. See Amar, *supra* n. 23, at (ms. 33) (copy of cited page on file with *Tulsa Law Review*).

Congress.⁵⁰ "[A] variety of goods produced in North Carolina or Rhode Island were subjected to customs duties when 'brought into the United States'—just like goods 'imported from any foreign state, kingdom, or country.'"⁵¹ Recall that the Constitution explicitly requires uniformity of tariffs and excises in all ports of the Union,⁵² so it was no small matter to declare that Newport or Wilmington was not within the United States. To impose a differential tariff was to answer the question.

Does it help in deciding such questions if we turn to the Constitution's Preamble and emphasize its ordination of the Constitution in the name of "We the People of the United States of America"? Alas, far from resolving the ambiguity, this does nothing more than to illustrate it, for deciding the identity of "We the People" depends importantly on the inflection that one adopts for the United States. We also know that the August 7 draft of the Preamble that was submitted to the Committee of Detail in the Philadelphia Convention listed each of the constituent states of the time,⁵³ and we have no authoritative account of what caused the Committee to eliminate the listing in favor of the majestic—and ambiguous—"We the People of the United States of America." To put it mildly, we have no record of anyone's saying to the Convention in the last days before September 17, "Since we are now one consolidated people, we ought to recognize this fact by eliminating any reference at all to the states in which we happen to live."

Indeed, one standard explanation for the decision of the Committee on Detail is that the omission of the names of the various states involves a recognition, at least as a theoretical possibility, that the people of one or more of these constituent states might in fact refuse to ratify the Constitution and, therefore, fail to accept membership in the polity established by the new Constitution. Article VII did not, after all, require unanimity; only nine states were needed to bring the new Constitution to life, and it would obviously be embarrassing in the extreme if the Preamble named a state—such as Rhode Island and Providence Plantations—that would in fact choose to remain outside the United States of America. One might even view such a state as "seceding" from the perpetual Union created by the Articles of Confederation, though, of course, this might be a highly tendentious description.

50. See David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801*, at 97 (U. Chi. Press 1997) ("When the First Congress met in 1789 there were eleven states in the Union."). Currie's discussion is one of the few to "spot" the issue. Most academic lawyers, obsessed as they are with the Constitution as treated by the courts, completely ignore it inasmuch as there is no Supreme Court case on point. Perhaps this helps to explain why to this day there is no article that discusses in any depth the juridical status of North Carolina and Rhode Island in the period between Washington's inauguration—or, for that matter, between the ratification by the ninth State, New Hampshire—and their own ratifications.

51. *Id.* at 98 (quoting *Act of Sept. 16, 1789*, 1 Stat. 69, 70) (footnote omitted).

52. U.S. Const. art. I, § 9, cl. 6. This arcane clause became the basis for the notable decision in 1901 in the so-called *Insular Cases*, in which the central question was whether Puerto Rico was inside or outside the United States of America. See *Downes v. Bidwell*, 182 U.S. 244, 249 (1901).

53. See Brest et al., *supra* n. 29, at 20.

Professor Jaffa is, of course, aware of such arguments, yet he rejects them and insists that North Carolina and Rhode Island were

in a kind of limbo, suspended between the Union of the Articles and the Union of the Constitution. Notwithstanding any appearances to the contrary, however, these are not two different Unions, but the same Union in the process of growth and transition. And it remains true, as Lincoln said, that no state ever had any legal status outside the Union.⁵⁴

As is obvious, I am not persuaded. At the very least, one can assert the existence of a “same Union” only by knowing how the story comes out and tendentiously disregarding the anomaly presented by the delay in ratification. This is teleological history with a vengeance. To return once more to the marriage analogy, it is as if we chose to describe a couple as “separated” rather than “divorced” even though they had seemingly gone through the procedures requisite for a divorce before deciding, as a matter of fact, to get back together again and remarry.

This is, I believe, just one more example of the complexity of American constitutional development, where one makes assertions as to which constitutional arguments are “true” or “false” at one’s peril.⁵⁵ Or, to put it another way, a lawyer lives in a world where it is *not* necessarily forbidden to say that two contradictory conclusions are both “true” in the sense of being based on altogether legitimate modes of argument and inference. When presented with the great debate between Lincoln and Benjamin (and, of course, other theorists like Calhoun and Jefferson Davis), we should, if we are honest, recognize profound elements of constitutional merit in both of them. A decision as to which one should prevail is as much a “leap of faith” as a submission to the claims of logic or reason.

54. Jaffa, *supra* n. 17, at 386.

55. One of the most interesting constitutional arguments against secession is presented by Akhil Reed Amar in his forthcoming book, *America’s Constitution*, *supra* note 23. Amar supplements his vigorously Unionist and anti-secessionist reading of the Preamble with a fascinating presentation of the Treason Clause of Article III, which states that “Treason against the United States, shall consist . . . in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.” U.S. Const. art. III, § 3, cl. 1. Amar notes that the Anti-Federalist Luther Martin of Maryland, who had been a member of the Philadelphia Convention, informed the Maryland House of Representatives that he had proposed to his fellow conventioners a differently worded version of the Treason Clause that explicitly acknowledged the possibility of “Civil War.” Thus, in any such war between “any State . . . [and] the General Government . . . no Citizen . . . of the said State should be deemed guilty of Treason, for acting against the General Government, in conformity to the Laws of the State of which he was a member.” Amar, *supra* n. 23, at (m.s. 294) (copy of cited page on file with *Tulsa Law Review*). The Convention obviously did not adopt Martin’s proposal. Thus, according to Amar, “the treason clause as finally worded made no exception for unilateral state secession or Civil War. *With evident understanding of these words*, the American people ratified the document as a whole.” *Id.* (emphasis added).

I am disinclined to believe that “the American people” as a whole, even those gathered at the ratifying conventions, had as deeply nuanced an understanding of every jot and tittle of the Constitution as Amar does, but there is no doubt that his argument is an important one. My major point in this essay is not to defend the Southern arguments in behalf of secession as necessarily better than those made by their opponents, but, rather, to suggest that there is no knockdown argument available to either side. Amar’s undoubted brilliance as an advocate of the no-legitimate-secession principle does not persuade me, at the end of the day, that he (and Lincoln) are more persuasive.

I think it relevant in this context to mention a marvelous, under-noticed, book by Sebastian de Grazia, entitled *A Country with No Name*.⁵⁶ Its main point involves what might be called the fatal ambiguity of the very name of our country. Is it the *United States* or the *United States*? A collateral question is whether the correct verb is "is" or "are." De Grazia did not claim to be offering a dazzling new insight, for he noted that some people proposed in 1787 to rename the country—Columbia was apparently one suggestion—but that this proved impossible precisely because it would have resolved the ambiguity, and the country was simply not ready to do that in 1787. We would prefer, however, to forget such uncomfortable aspects of our own past inasmuch as they make it far more difficult to accept Lincoln's arguments, which did, after all, triumph in part through payment of a blood-price of carnage and death.

There is yet a further problem with Lincoln's insistence that no "government proper" could allow for its own dissolution, in part because this would necessarily lead to either anarchy or tyranny. It should be clear that this assertion is ultimately *empirical*, and thus subject to some measure of evidence. To be sure, the evidence is mixed, but the very fact that it *is* mixed is enough to doom the notion that anarchy or tyranny *necessarily* accompanies secession. To be sure, the discussion that follows calls upon contemporary examples from the twentieth and twenty-first centuries, and my friend Akhil Amar has pressed upon me the point that it is unfair to tax Lincoln with such knowledge of the future. According to Amar, his statement about conceptual impossibility of secession in a "proper government" rested on what theorists of his own time believed and, Amar argues, what was accepted by most ratifiers in 1787-88. Even if one concedes this point, which is relevant primarily to intellectual historians and devotees of "original understanding" as a privileged road to constitutional meaning, it is beside the point with regard to an argument like Jaffa's, which seems to claim that Lincoln is stating a logical truth good for all times and places about the definition of "government proper."

Although I hesitate to offer it as a model of "proper government," I believe that it is nonetheless important to look at the generally unlamented final constitution of the Union of Soviet Socialist Republics (USSR), which provided, in Article 72, that "[e]ach Union Republic shall retain the right freely to secede from the USSR."⁵⁷ Article 70 had earlier "defined the USSR as 'an integral, federal, multi-national state formed on the principle of socialist federalism as a result of the free self-determination of nations and the voluntary association of equal Soviet Socialist Republics.'"⁵⁸ Mikhail Gorbachev could thus present himself as acceding to law—and not merely submitting to insurrectionists—when he recognized the legitimacy of withdrawal by the Baltic states and, ultimately, other constituent republics, even if these republics did not scrupulously follow all

56. Sebastian de Grazia, *A Country with No Name: Tales from the Constitution* (Pantheon Bks. 1997).

57. Brest et al., *supra* n. 29, at 218 (quoting Konst. SSSR art. 72) (internal quotations omitted).

58. *Id.* (quoting Konst. SSSR art. 70) (internal quotations omitted).

of the procedures seemingly required for successful secession. And, needless to say, the record following those secessions shows that some semblance of democracy can indeed follow. One might also look at the peaceful dissolution of Czechoslovakia into the Czech Republic and Slovakia, even if, on political grounds, one regrets its occurrence. There are certainly less happy examples, including that presented by the former Yugoslav Republic. But in this last instance, one is entitled to ask if it is entirely irrelevant that Slobodan Milosevic explicitly cited Lincoln in justifying his unwillingness to accept the dissolution of "his" country? (And I have little doubt that Vladimir Putin would offer himself in Lincolnesque robes when defending the brutal suppression of Chechnya.)

One may be, of course, hesitant to credit the Soviet Constitution as a potential model for constitutional design for other "federal, multi-national state[s]." ⁵⁹ In that case, consider the Canadian Constitution. A fascinating decision of the Supreme Court of Canada held that the constitution of that country did not necessarily foreclose secession by Quebec. ⁶⁰ It *did* reject unilateral secession, but it went on to argue that the national government would be under a duty to negotiate seriously with any province that indicated a desire to secede. The court remained silent as to what would be the legal status of an ultimate impasse, and it suggested as well that any successful legal secession would require explicit constitutional amendment, a condition that itself raises important meta-issues. ⁶¹ For now, the major point is that the supreme court endorsed the "thinkability" of secession and, therefore, "dissolubility" as a possibility within the constitutional structure of Canada. Obviously, this question has not received its ultimate test, as a majority of Quebecois has never endorsed the principle of secession.

Moreover, during this very year delegates from the various constituent states of the European Union met to draft the outlines of what is being described as a "constitution" for the Union. Article 59 concerns "Voluntary withdrawal from the Union."⁶² That article reads as follows:

1. Any Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention; the European Council shall examine that notification. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements

59. *Id.* (quoting Konst. SSSR art. 70) (internal quotations omitted).

60. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).

61. Can *anything* successfully become the subject of amendment, or is there room in one's theory for "unconstitutional constitutional amendments," as is suggested, for example, by both the German and Indian constitutions? If the former is the case vis-à-vis the Canadian Constitution, then the Canadian decision becomes almost banal. If, however, there are limits to what counts as "amendment," then the Canadian Supreme Court has indeed made a profound pronouncement in contemplating the legitimacy of a secessionist amendment.

62. See *Draft Treaty Establishing a Constitution for Europe* (draft submitted to the President of the European Council in Rome July 18, 2003), <<http://http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>>.

for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be concluded on behalf of the Union by the Council of Ministers, acting by a qualified majority, after obtaining the consent of the European Parliament.

The representative of the withdrawing Member State shall not participate in Council of Ministers or European Council discussions or decisions concerning it.

3. The Constitution shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, decides to extend this period.⁶³

One can, of course, scoff at the comparison between the United States Constitution and the fledgling European Constitution, just as one could dismiss the possible relevance of the Soviet Constitution. I am not at all sure this is wise, however, not least because the United States in 1787 and, indeed, even in 1861, might be more comparable to the European Union than we might like to think. David Hendrickson has recently published a book on the origins of the Constitution entitled *Peace Pact*,⁶⁴ in which he persuasively points to the extent to which the United States Constitution could indeed be viewed as a treaty-like arrangement among states for which "Union" was most certainly not a foregone conclusion, however much it might be a long-term aspiration. Our commitment to a teleological version of American history has blinded us to the extent to which there were recurrent fears, well before 1860, about the ability of the Union to maintain itself. One need only think of the debates provoked by the Jay Treaty and the general issue of navigation of the Mississippi River and the possibility that the new states and settlements west of the Alleghenies would go off on their own. Preventing such secession was a motivating rationale for the Louisiana Purchase, which assured "western" settlers access to a United States-controlled Mississippi River. Some of these arguments are "merely" practical; but, obviously, they were conducted against a juridical background that included, for some, the possibility of what the draft European Constitution calls voluntary withdrawal.

One might well concede that many—probably in fact *most*—lawyers and political scientists agree with Lincoln that, at the very least, it is prudentially unwise—perhaps an invitation to disaster—to offer explicit permission for a constituent entity to secede. Cass Sunstein⁶⁵ and Donald Horowitz⁶⁶ have recently made such arguments, and it would be foolish to deny their power. I strongly suspect that many, perhaps most, secessionist movements are in fact dominated by frighteningly provincial demagogues who wish to instantiate one or another type of organic nationalism. As Horowitz writes, "[V]irtually all secessionist regions are themselves heterogeneous. . . . In practice, to endorse secession is not so much

63. *Id.* at art. 59(1)-(3).

64. See David C. Hendrickson, *Peace Pact* (U. Press Kan. 2003).

65. Cass R. Sunstein, *Designing Democracy: What Constitutions Do* 96 (Oxford U. Press 2001).

66. Donald L. Horowitz, *Self-Determination: Politics, Philosophy, and Law*, in *NOMOS XXXIV: Ethnicity and Group Rights* 421, 427 (Ian Shapiro & Will Kymlicka eds., N.Y.U. Press 1997).

to fulfill aspirations to self-determination as to allow some groups to determine the future of others.”⁶⁷

I note that Frank has devoted much time and energy in recent years to the study of and teaching about the South African Constitution. It is my understanding of that exceedingly long and complex document that it does not explicitly contemplate the withdrawal of any one of its provinces, however foreseeable it might be that it might come to be desired by one or another group under some future state of affairs. Indeed, I was recently told by two experienced members of the South African judiciary that the question never came up during the long and complex period of negotiating the terms of the new South African Constitution. Both seemed perplexed by my own surprise that this was the case.

But surely there is at least something to be said for the other side, i.e., the acknowledgment, especially in a federal system where state or provincial boundary lines are in part a function of racial, ethnic, or religious identity, that political divorce may at some point in time become a regrettable possibility and that there should be a system in place that would minimize the inevitable disruptions—and, indeed, violence—that might otherwise attend such a breakdown. Indeed, the historical explanation for federalism in the first place may well be the existence of significant differences among regions, just as the practical consequence of federalism is the creation of a structure of governance relatively independent of the national government, with some significant degree of power.⁶⁸ This is, of course, especially true in a culture that takes such concepts as self-determination and consent of the governed seriously, i.e., treats them as something other than ideological slogans that reinforce the power of any government that has elections. But the central point is that the perceived relevance of these abstract concepts depends on concrete historical and political circumstances.

These are, admittedly, quite dangerous ideas, and not only to tyrants, given the fact that it is literally inconceivable that the world could be divided into self-determining nation-states. *All* states today are multi-cultural and increasingly

67. Donald L. Horowitz, *Constitutional Design: An Oxymoron?*, in *NOMOS XLII: Designing Democratic Institutions* 253, 255 (Ian Shapiro & Stephen Macedo eds., N.Y.U. Press 2000) (footnote omitted). See Donald L. Horowitz, *A Right to Secede?*, in *NOMOS XLV: Secession and Self-Determination* 50 (Stephen Macedo & Allen Buchanan eds., N.Y.U. Press 2003). In that essay, Horowitz is responding to an essay by Diane F. Orentlicher. See Diane F. Orentlicher, *International Responses to Separatist Claims: Are Democratic Principles Relevant?*, in *NOMOS XLV: Secession and Self-Determination* 19 (Stephen Macedo & Allen Buchanan eds., N.Y.U. Press 2003). Orentlicher in turn responds to Horowitz. See Diane F. Orentlicher, *Democratic Principles and Separatist Claims: A Response and Further Inquiry*, in *NOMOS XLV: Secession and Self-Determination* 77 (Stephen Macedo & Allen Buchanan eds., N.Y.U. Press 2003).

68. See Will Kymlicka, *Is Federalism a Viable Alternative to Secession?*, in *Theories of Secession* 111 (Percy B. Lehning ed., Routledge 1998). “Since the American system was a federal one, secession, when it finally occurred, put the secessionists into immediate possession of fully organized governments, capable of acting as no *ad hoc* insurrectionary regime could possibly have acted.” Arthur Bestor, *The American Civil War as a Constitutional Crisis*, 69 *Am. Historical Rev.* 327, 329 (1964) (excerpts reprinted in Paul Brest & Sanford Levinson, *Processes of Constitutional Decisionmaking: Cases and Materials* 214-16 (3d ed., Little, Brown, & Co. 1992)).

pluralistic,⁶⁹ as evidenced, perhaps, most dramatically in Europe itself, the origin of ideologies of organic nationalism. And one can easily agree with Lincoln's argument that there may be no logical stopping point if one focuses purely on abstract arguments of rights; thus his claim that any embrace of secession necessarily entails "anarchy."

But at this point, we are forced to confront the limits of "logic." Every lawyer almost invariably finds occasion to quote Justice Holmes's reminder that "[t]he life of the law [is] not . . . logic . . . [but] experience."⁷⁰ In the real world in which we live, we do not generally resolve all arguments of principle by reference to the most extreme conclusions they might lead to, but we instead test them against specific contexts and the inevitable mixture of values that are presented to us. Most of us, I dare say, recognize, with whatever degree of reluctance, the validity of Isaiah Berlin's point that we are constantly weighing incommensurable claims and trying to achieve some balance among them. Even Professor Jaffa, whose book is thoroughly grounded in natural law and natural rights, nonetheless concedes the importance of making a place for "prudential" judgment. Even if one rank orders the values in question, this does not mean the erasure of the secondary ones, which continue to assert their own power. One more point should be made absolutely clear: The more that one accepts prudence or consequentialism into one's ambit of "legal" arguments, the more impossible it becomes to maintain any significant distinction between "law" and "politics."

III.

I should, of course, also treat a second argument on which Lincoln places much reliance, which sounds less in the metaphysics of Union than in the duty of electoral losers to accept their lumps and accept the outcome. "A majority,"⁷¹ said Lincoln in the first inaugural address, "is the only true sovereign of a free people. Whoever rejects it, does, of necessity, fly to anarchy or to despotism."⁷² Actually, I have not quoted the passage in full, for there is an important clause that follows the words "a majority": "held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments."⁷³ But, of course, this is simply to beg the question of what it means to be "held in restraint by constitutional checks." The platform of the Republican Party had been held, in essence, unconstitutional by the Supreme Court of the United States in *Dred Scott v. Sandford*,⁷⁴ and Lincoln, speaking for his party, indicated that he in no way felt bound to accept its conclusion that the national government could not prohibit slavery in the territories. (He affirmed, over and

69. Perhaps Iceland is an exception, but surely there are not many, and, with due respect to Iceland, no truly "unicultural" state could be described as "major."

70. O.W. Holmes, Jr., *The Common Law* 1 (Little, Brown, & Co. 1881).

71. *Abraham Lincoln 1859-1865*, *supra* n. 7, at 220.

72. *Id.*

73. *Id.*

74. 60 U.S. 393 (1856).

over, that he presented no threat to slavery in the existing slave states, but that was not the crux of the debate between North and South.) One of the reasons that Lincoln is so absolutely fascinating a figure is that he indeed challenges us to think in the deepest way possible about what is involved in the enterprise of “constitutional faith” and fidelity to the Constitution’s requirements.

And, of course, the central question in any democratic theory is a majority of whom? As Robert Dahl has well argued, American constitutional theory, at least historically, was fatally deficient in providing an answer as to who constituted the electorate whose views were binding.⁷⁵ What if, for example, a vote had been taken among all denizens of the British Empire as of 1775? One would surely not be surprised if the result had been a handy majority in favor of Union, especially since it is not clear that a majority of the existing American colonists themselves actually supported their hot-headed leaders who rushed toward a Declaration of Independence. So what? If one argues that it would have been irrelevant with regard to determining the legitimacy of the American secession, then what, precisely, is the difference with regard to the Confederates?

One answer, of course, is that the Confederates did not present a (plausible) “long train of abuses,” but, again, one possible response is to ask, “so what?” As I suggested at the outset, someone committed to a strong theory of self-governance ought not require such a bill of particulars in order to honor the claim that one is unable to enjoy the benefits of a genuinely deliberative self-government in what Madison taught us to view as the “extended republic.” To be sure, he rejected Montesquieu’s argument against an extended republic, but one should recall that that republic, in 1788, consisted of approximately three million people; New York City alone now has eight million people, and Chicago, our third-largest city, has more than three million. To accept the possibility of civic republicanism in a country of three million people does not entail, I believe, that one accepts its possibility as anything more than a fantasy in a republic of three hundred million, or even the thirty million who lived spread across the United States in 1860.

It is worth noting that some of the Southern argument was not so “purely” based on theories of self-determination. They *did* point to abuses, some of them in the past, such as less than enthusiastic enforcement of the Fugitive Slave Law that Lincoln himself defended as a constitutional necessity, some of them in the future, such as the willingness to ignore the teaching of *Dred Scott* and to pack the Court by picking new Justices on the basis of an anti-*Dred Scott* litmus test. But the heart of the argument, at the time of secession itself, was firmly rooted in the language of self-determination. Consider the following passages from Jefferson Davis’s inaugural address:

Our present condition, achieved in a manner unprecedented in the history of nations, illustrates the American idea that governments rest upon the consent of the

75. See e.g. Robert A. Dahl, *How Democratic Is the American Constitution?* 79-82 (Yale U. Press 2001); Robert A. Dahl, *A Preface to Democratic Theory* 27-29 (U. Chi. Press 1956).

governed, and that it is the right of the people to alter or abolish governments whenever they become destructive of the ends for which they were established.

The declared purpose of the compact of union from which we have withdrawn, was "to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare;" and when in the judgment of the sovereign States now composing this Confederacy, it had been perverted from the purposes for which it was ordained, and had ceased to answer the ends for which it was established, a peaceful appeal to the ballot-box, declared that so far as they were concerned, the government created by that compact should cease to exist. In this they merely asserted a right which the Declaration of Independence of 1776 had defined to be inalienable. Of the time and occasion for its exercise, they as sovereigns, were the final judges, each for itself . . .⁷⁶

So, let us look more closely at what might be termed the "democratic" reply invoked by Lincoln, in his July 4, 1861 "Special Message to Congress" that ballots, and not bullets, should be the means by which the People settle their differences. It is worth noting, incidentally, that Davis made a similar appeal to the "ballot-box"; the difference between Lincoln and Davis concerns the particular ballots they believed determinative to measure self-government. The most fundamental question of any political system based on "consent of the governed," of course, is deciding who, exactly, should be deemed part of the electorate and for what reason.⁷⁷

Lincoln calls on the American people "to demonstrate to the world, that those who can fairly carry an election, can also suppress a rebellion—that ballots are the rightful, and peaceful, successors of bullets; and that when ballots have fairly, and constitutionally, decided, there can be no successful appeal, back to bullets . . ."⁷⁸ I have no particular problem with the general argument. The devil, as always, is in the details.

One must begin, of course, with the notorious truth that Lincoln was not elected by a majority of the American public. A full sixty percent preferred one of his opponents. Still, as William Lee Miller points out, even if the other three had joined in a fusion ticket, Lincoln would still have won a majority of the electoral vote, though by a reduced margin.⁷⁹ We could, of course, ask whether the Electoral College itself is defensible under democratic theory or is instead, as

76. Jefferson Davis, Address, *Inaugural Address* (Montgomery, Ala., Feb. 18, 1861) (available at <<http://www.pointsouth.com/csnet/greatmen/davis/pres-ad1.htm>>).

77. Not surprisingly, Frank Michelman has illuminatingly wrestled with this issue. One such example is his 1989 Dunwoody Lecture at the University of Florida Law School. See Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 Fla. L. Rev. 443 (1989). My own reflections on his essay can be found in Sanford Levinson, *Suffrage and Community: Who Should Vote?*, 41 Fla. L. Rev. 545 (1989).

78. *Abraham Lincoln 1859-1865*, *supra* n. 7, at 260.

79. William Lee Miller, *Lincoln's Virtues: An Ethical Biography* 404 (Alfred A. Knopf 2002).

Akhil Reed Amar has argued, one of the most “stupid” features of the Constitution, then and now.⁸⁰ That would, however, take us too far afield.

Lincoln won, and he won by the operation of the existing political structure. Is it fair to say, however, that the ballots had given him a mandate to go to war as a means of preventing secession?⁸¹ Or is he adopting a model of democracy that basically gives leaders *carte blanche*, subject to their being judged at the next round of elections?

An embarrassment, far greater, in context, than the Electoral College, is that Lincoln, in keeping with convention, did not in fact campaign actively for the presidency, nor did he say anything particularly cogent in the long hiatus between his election and inauguration with regard to his response to the possibility of secession. The electorate, therefore, had no idea what his position was with regard to the potential actuality of attempted withdrawal from the Union. The Republican platform, obviously, pledged itself to resist any expansion of slavery into the territories. The electorate—or at least the forty percent of it that voted for Lincoln—might be said to have endorsed his firm opposition to the principle of further extension of slavery into the territories. But it is tendentious to read this as also endorsing an absolutist stance of no further compromise if the alternatives were either dissolution of the Union or war. One can, after all, view the run-up to war as a giant game of “chicken,” in which both sides made extreme arguments in the confidence that their adversaries would back down. And was it really so unreasonable to believe that Lincoln might in fact blink if presented with a convincingly obdurate South?

After all, Lincoln had notably declared, in a major and much-publicized speech in Peoria several years before, following the repeal of the Missouri Compromise by the Kansas-Nebraska Act, both that he was deeply opposed to extension of slavery *and* that the only thing that might lead him to change his position was the possibility that it would be necessary in order to save the Union. “Much as I hate slavery,”⁸² Lincoln declared, “I would consent to the extension of it rather than see the Union dissolved, just as I would consent to any GREAT evil, to avoid a GREATER one.”⁸³ To be sure, Lincoln did not formally change his mind, for he did not, of course, accept the dissolution of the Union. War, rather than attempts at compromise, was his answer to the secessionists. But one suspects that relatively few of his listeners in Peoria or elsewhere realized that this

80. See Akhil Reed Amar, *A Constitutional Accident Waiting to Happen*, in *Constitutional Stupidities, Constitutional Tragedies* 15 (William N. Eskridge, Jr. & Sanford Levinson eds., N.Y.U. Press 1998).

81. Akhil Amar has suggested that the reference to a “mandate” is beside the point. If one accepts Lincoln’s (and Amar’s) argument that the Constitution, correctly understood, simply prohibited secession, then it would be part of the president’s duty, under the “take care” clause, to do whatever it took to prevent the secession. There might, of course, still be separation-of-power problems with regard to such issues as suspension of habeas corpus, but this is analytically separable from the basic duty to prevent secession.

82. *Abraham Lincoln, Speeches and Writings 1832-1858: Speeches, Letters, and Miscellaneous Writings The Lincoln-Douglas Debates* 333 (Don E. Fehrenbacher ed., Lib. Am. 1989) [hereinafter *Abraham Lincoln 1832-1858*].

83. *Id.*

is what they were signing on to if they accepted Lincoln's views. They might well have expected him to hold out for the best possible deal (though his hand was considerably constrained by *Dred Scott*), but, nevertheless, to do "what it takes" to keep the South in the Union peacefully.

When Lincoln was inaugurated, only seven states were outside the Union. Fateful decisions were still to be made by what turned out to be the remaining four states, including, of course, Virginia. One might have thought that Abraham Lincoln, a former Whig and thus heir to the Whig understanding of legislative supremacy, might have turned to the newly elected Congress and called them into special session as soon as possible after March 4, especially since the new Senate was in fact meeting following his inauguration in order to confirm his nominees to the Cabinet.⁸⁴ Indeed, he might even have announced, well prior to his inauguration, his intention immediately to summon Congress to meet on, say, March 15, however unconventional this might have been. But, surely, special times called for special leadership.

Members of Congress from the West could therefore have been on notice to make arrangements to come east for the session. If Congress had reconvened prior to Fort Sumter, of course, the representatives and senators from the four non-seceding states, might have shown up, which would have created additional political difficulties for Lincoln. Instead, Lincoln fended off Congress until July 4. In effect, he made sure that he would face no effective oversight by or, what would be worse, opposition from Congress for four months, by which time a number of *faits accompli* would present themselves not for congressional decision, but only for post-facto ratification of a dramatically new status quo decided on unilaterally by Lincoln.⁸⁵

84. This is yet one more illumination provided me by Akhil Amar. The House of Representatives had adjourned *sine die* on March 3, 1860, with the newly elected House not scheduled to meet until December.

85. This is yet one more point on which my friend and co-editor Akhil Reed Amar strongly disagrees with my argument in the text. Thus, he writes:

On April 15, two days after the fall of Fort Sumter, the President summoned Congressmen to assemble in special session on July 4, five months ahead of schedule. Though some have faulted Lincoln for not summoning Congress sooner, until secessionists actually began bombarding Sumter on April 12, Lincoln could hardly be certain that the crisis would ripen into armed conflict. (To avoid provocation, Lincoln had refrained from sending any fresh troops or additional ammunition to the besieged garrison and in early April gave notice to southern officials of his intent merely to resupply the fort with foodstuffs.) See generally David M. Potter, *Lincoln and His Party in the Secession Crisis* 358-75 (1962 rev. ed.). Also, few leaders in early 1861 anticipated that the military conflict begun at Sumter would last as long or cost as much in blood and treasure as it ultimately did. The two-month lag between Lincoln's April 15 call and the July 4 meeting conformed to the general pattern established by the only previous occasions when Presidents had called special sessions. In late March 1797, President John Adams had summoned Congress to meet in mid-May; in May 1837, President Van Buren had triggered a special session to begin in September; and in mid-March 1841, President Harrison had ushered Congress to an emergency session to begin on May 31. (In August 1856, as a sitting Congress rose to adjourn, President Pierce told lawmakers to remain for a special session to commence three days later—a very different situation than gathering Representatives from across the continent for their first meeting.)

I do not wish to argue that Lincoln's decisions made during this period were not all eminently defensible on political and moral grounds, whether or not they were all constitutional. But, to someone who takes democracy and respectful civil deliberation seriously, as Frank Michelman most certainly does, it surely should not suffice to emphasize only outcomes while basically ignoring the procedures that produced those outcomes. Had Congress been in session, Lincoln could have consulted and, more to the point, sought legislative assent for such major actions as initiating the boycott of Southern ports, suspending habeas corpus, and financing the army, all of which, in the absence of prior congressional approval, raise substantial constitutional problems. This he did not do.

In his first days in office, he governed in the spirit of "the family of the lion, or the tribe of the eagle."⁸⁶ The reference, of course, is to his famous Address to the Young Men's Lyceum of Springfield, Illinois on "The Perpetuation of Our Political Institutions" on January 27, 1838.⁸⁷ This speech has drawn the close attention of almost every student of Lincoln's ideas and political development, not least because of the temptation to read into Lincoln's warnings about the dangers of "lions and eagles," such as "an Alexander, a Caesar, or a Napoleon"⁸⁸ a certain measure of self-recognition about his own ambitions. "Towering genius disdains a beaten path. . . . It thirsts and burns for distinction; and, if possible, it will have it, whether *at the expense of emancipating slaves*, or enslaving freemen."⁸⁹ Abraham Lincoln's true distinction for many of us, of course, is precisely his role as emancipator of the slaves, but this required that he prosecute the war.

One can—indeed, *should*—have genuine reservations about the model of democratic leadership that Lincoln passed down to his successors. However politically understandable was Lincoln's decision to stave off any consultation with Congress until July 4, he exhibited what I personally believe to be a disdain for consulting those who can most legitimately claim, assuming that anyone can, to be representatives of the "We the People" in our glorious and troublesome diversity of opinions and viewpoints.

To put it mildly, that attitude is not foreign to us today. So-called "strong presidents" most prefer a rubber-stamping Congress; if that is unavailable, they prefer an absent Congress. One can readily understand this preference; depending on one's short-run political preferences, one can even endorse it on occasion. But woe to the polity that does not adequately treasure the centrality of

E-mail from Akhil Reed Amar, Southmayd Prof. L., Yale L. Sch., to Sanford Levinson, W. St. John Garwood & W. St. John Garwood, Jr. Centennial Chair in L. & Prof. Govt., U. Tex. (Oct. 8, 2003) (copy on file with *Tulsa Law Review*).

One must always take seriously any argument that Amar presents. I confess, though, that I am not persuaded that Lincoln could not, had he wished, call Congress back into session considerably earlier than July 4, even if one concedes that mid-nineteenth century modes of transportation made it impossible for all members of Congress to be gathered together prior to, say, six weeks after the call for a special session.

86. *Abraham Lincoln 1832-1858*, *supra* n. 82, at 34 (emphasis omitted).

87. *See id.* at 28.

88. *Id.* at 34.

89. *Id.* (emphasis added).

Congress to any acceptable conception of "democracy in America." And woe to the democratic-constitutional republic, concerned to maintain at least "traces of self-governance," that accepts Abraham Lincoln as a model president without at least a trace of deep ambivalence.

CONCLUSION

So, what is my own conclusion with regard to Lincoln's argument against secession? It is the classic "Scotch verdict," i.e., "not proven." I must say that I tend to agree with the conclusion of Allen Buchanan, the political theorist who has delved most deeply into the mysteries of secession as a political concept:

Reflection on the origins of the American Civil War have convinced me that the only sound moral justification for resisting Southern secession was the liberation of blacks. . . . [I]t is hard to fathom how just the need to "preserve the Union" could justify the staggering destruction of human life and property that ensued.⁹⁰

That is, the only justification for the War is in fact the only legitimate justification for the recent venture into Iraq, humanitarian intervention to displace an odious regime grounded in tyrannical treatment of those who challenged its basic foundations.⁹¹ An embarrassing problem with regard to this argument, of course, is that we know that the War "freed the slaves" only in retrospect. Lincoln insisted, I believe with complete sincerity, that it was *not* his intention to end slavery in the states in which it already existed. Indeed, he explicitly supported the original Thirteenth Amendment, the so-called Corwin Amendment, that would have guaranteed the legal existence of slavery in those states in perpetuity, precluding the possibility not only of legislation but even of future Article V amendment. Would it have been worth it to preserve the Union at the cost of such an amendment or, indeed, at the cost of conceding to the slaveowners the

90. Buchanan, *supra* n. 24, at x.

91. This is not to say that any such international law of humanitarian intervention that may exist would justify the United States's venture on such grounds. I am not an expert in this law myself, but I was recently informed by someone far more knowledgeable than I that humanitarian intervention is justified only in order to prevent imminent likelihood of genocide. Thus, for example, Ken Roth, the Director of Human Rights Watch, has recently written that

as a threshold matter, humanitarian intervention that occurs without the consent of the relevant government can be justified only in the face of ongoing or imminent genocide, or comparable mass slaughter or loss of life. To state the obvious, war is dangerous. In theory it can be surgical, but the reality is often highly destructive, with a risk of enormous bloodshed. Only large-scale murder, we [i.e., Human Rights Watch] believe, can justify the death, destruction, and disorder that so often are inherent in war and its aftermath. Other forms of tyranny are deplorable and worth working intensively to end, but they do not in our view rise to the level that would justify the extraordinary response of military force. Only mass slaughter might permit the deliberate taking of life involved in using military force for humanitarian purposes.

Ken Roth, *Human Rights Watch, War in Iraq: Not a Humanitarian Intervention* <<http://www.hrw.org/wr2k4/3.htm>> (accessed Mar. 12, 2004).

If the doctrine of humanitarian intervention is indeed as relatively limited as suggested by this analysis, then it seems unlikely that it would justify intervening to overthrow a regime that "merely" recognizes the institution of chattel slavery but does not engage in the "mass slaughter" of those enslaved. It would not surprise me if some readers suggested that any doctrine that does *not* justify such intervention is itself morally bankrupt.

political principle that was central to the war, that the United States territories would be open on an equal basis to slaveowners (and their slaves) and Northern anti-slave settlers alike?

Consider in this context the current hostilities in Iraq. Some might judge its validity in terms of the *ex ante* justifications offered for the initiation of the war. Others will evaluate the ultimate justice or injustice of American actions in Iraq on an *ex post* basis, as we see what kind of “reconstruction” actually takes place in that country. We might indeed be willing to forgive the administration’s excesses with regard to arguments about weapons of mass destruction and the like if some kind of genuine liberal democracy, even of the Japanese type, takes hold in Iraq and serves to inspire other states in the region to adopt less authoritarian polities of their own.

Similarly, the justice of Lincoln’s refusal to let the Confederate States depart in peace, assuming that we support Lincoln at all, has everything to do with the demise of slavery and, I would argue, the fate of our own attempts at “reconstruction” following his death.⁹² It is, of course, more than reasonable to view Reconstruction as a catastrophic failure insofar as it was truly devoted to what we today call “regime change.” The bright hopes of 1868, the heyday of the radical Republican experience as political hegemony, were completely dashed by 1877, when the Ku Klux Klan proved far more successful than the Union armies in sculpting the future of Southern politics for roughly the next ninety years. Perhaps, of course, it is enough that chattel slavery came to an end, which is, basically, to say that Andrew Johnson—and not Thaddeus Stevens—was correct in his reading of what the war was basically about: no secession, no slavery, but, otherwise, a return to rule by Southern whites that would predictably keep African-Americans in their subordinated place.

Perhaps Lincoln was right in the second inaugural. That is, the slaughter of two percent of the total American population and the hegemony over the next ninety years of racist politics that repeatedly crippled efforts at genuine social reform—and not only in the South—might have been a fitting price paid by the United States for the original sin of chattel slavery. But perhaps we should consider more seriously than is our wont the arguments against going to war presented by the otherwise contemptible—because of his rather consistent support of slave interests—James Buchanan. In spite of his general status as an ally of the slavocracy, Buchanan was almost Lincolnian in his rejection of the constitutionality of secession:

[The Constitution’s] framers never intended to implant in its bosom the seeds of its own destruction, nor were they at its creation guilty of the absurdity of providing for its own dissolution. It was not intended by its framers to be the baseless fabric of a

92. The most provocative critique of the self-evident wisdom of Lincoln’s decision to go to war is by John S. Rosenberg. See John S. Rosenberg, *Toward a New Civil War Revisionism*, 38 Am. Scholar 250, 264-65 (1969). Phillip S. Paludan responds in, *The American Civil War: Triumph through Tragedy*, 20 Civ. War Hist. 239 (1974), and Rosenberg responds in turn in, *The American Civil War and the Problem of “Presentism”: A Reply to Phillip S. Paludan*, 21 Civ. War Hist. 242 (1975).

vision, which at the touch of the enchanter would vanish into thin air, but a substantial and mighty fabric, capable of resisting the slow decay of time and of defying the storms of ages. Indeed, well may the jealous patriots of that day have indulged fears that a Government of such high powers might violate the reserved rights of the States, and wisely did they adopt the rule of a strict construction of these powers to prevent the danger. But they did not fear, nor had they any reason to imagine, that the Constitution would ever be so interpreted as to enable any State by her own act, and without the consent of her sister States, to discharge her people from all or any of their federal obligations. . . .

[T]his is revolution against an established government, and not a voluntary secession from it by virtue of an inherent constitutional right.⁹³

For Buchanan, though, this did not justify going to war, however constitutionally illegitimate secession might be.

The fact is that our Union rests upon public opinion, and can never be cemented by the blood of its citizens shed in civil war. If it can not live in the affections of the people, it must one day perish. Congress possesses many means of preserving it by conciliation, but the sword was not placed in their hand to preserve it by force.⁹⁴

One might well think of the imprecations directed by Edmund Burke and others at King George III with regard to the wisdom of letting the American secessionist/revolutionaries depart in peace. Indeed, I am emboldened to raise a further question about that (so-called) Revolution: How important is it that one actually accept the validity of the Declaration's claim as to the "long train of abuses" allegedly visited upon the innocent colonists? What if, for example, one believes them to be little more than the whining of a group that (like their descendants today) was adamantly opposed to paying taxes necessary to pay for the defense (and other) services provided by the central government? In that case, presumably, the *only* real justification for the war would be the Declaration's assertion of the centrality of "consent of the governed," quite independent of the justifications offered for withdrawal of consent.

In any event, it should be clear that my own assessment of the war—and of the justification for the slaughter that it produced—has almost nothing to do with the constitutional arguments and political metaphysics that Lincoln put forth in his inaugural address. However interesting, it cannot, I believe, be pronounced "compelling" unless one has already decided, consciously or not, to find them such. But this is simply to ask, once more, whether *any* constitutional argument about issues of truly deep importance to us can ever "compel" us to go where we do not wish to travel. That is, of course, perhaps the central question of what has come to be called "constitutional theory," including that presented over the years by one of its most distinguished practitioners, Frank Michelman.

93. James Buchanan, *Fourth Annual Message*, in *A Compilation of the Messages and Papers of the Presidents* 3157, 3164-65 (James D. Richardson ed., Bureau Natl. Lit. 1897).

94. *Id.* at 3167.

