Introduction

> The inherent inconsistency of a double allegiance has always shown itself as soon as stern and testing cases have presented themselves.
>
> – Francis Lieber, "Amendments to the Constitution," 1865

A scant three months after the conclusion of the Civil War, New York legal scholar John Codman Hurd wrote his friend Francis Lieber, a prominent law and political science professor at Columbia University, to complain that the "defeated" principle of states' rights continued to stalk national politics. Hurd warned, "It looks as if the question of State Rights in our practical politics [is] about to make new trouble."[1] Three years later, the two correspondents still feared that the specter of state sovereignty would rise to plague the nation again.[2] Lieber had recently given a number of talks extolling the virtues of a powerful national government but feared that his speeches had fallen

[1] John C. Hurd to Francis Lieber, July 23, 1865, Box 12, Francis Lieber Papers, Huntington Library, San Marino, CA (repository hereafter cited as HEHL). Originally from Boston, Hurd had moved to New York, where he authored a famous treatise on the law of slavery, published in 1858. *Dictionary of American Biography* (New York: Scribner's, 1928).

[2] The terminology about federalism in the nineteenth century is often frustratingly vague. Michael Les Benedict equates the term "state sovereignty" with the compact theory of the Union, but a belief in state sovereignty is not incompatible with the idea that the national government is also sovereign. See Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," *Supreme Court Review*, 1978: 39, 41.

on deaf ears.[3] He told Hurd frankly, "I wholly agree with you that we have to go through that whole struggle and plague of that abominable state-rights fudge again. Every one must do his part. My son writes to me from New Orleans that literally people who are not for worshipping state sovereignty are looked upon as benighted fools." Given this state of affairs, Lieber urged Hurd to publish works that promoted the national government, believing that such public discourse was necessary to convince the American people to embrace a vigorous nationalism. Most white Southerners, and even many Northerners, according to Lieber, still needed to be convinced to abandon their belief in state sovereignty.[4]

New York attorney and diarist George Templeton Strong agreed with Lieber. He set forth in his diary his worry that ex-Confederates had not yielded in their adherence to state sovereignty and secession. Strong even feared the possibility of another Southern secession and attendant war. Strong wrote, "The First Southern War may prove not the last," and he predicted that "there may well be another sectional war within three years." To combat this tendency toward disintegration, Strong recommended a harsh program of Reconstruction, one that would not be constrained by constitutional niceties. "We must not be too nice and scrupulous about the Constitution in dealing with these barbaric, half-subdued rebel communities," he wrote, "or we shall soon find that there is no Constitution left."[5] As Lieber, Hurd, and Strong feared in the uncertain aftermath of the Civil War, the war itself had not entirely routed the spirit of secessionism in the United States.

Historians have debated the extent to which the Civil War transformed the antebellum federal system, but they have universally assumed that the war led inexorably to the demise of secession as a constitutional argument. While most historians have acknowledged that a robust debate about the nature of the Union and the ultimate locus of sovereignty flourished in American political discourse until

[3] See Frank Friedel, *Francis Lieber: Nineteenth-Century Liberal* (Baton Rouge: Louisiana State University Press, 1947), 387–417.
[4] Francis Lieber to John C. Hurd, August 10, 1868, John Codman Hurd Papers, Boston Athenaeum, Boston.
[5] George Templeton Strong, *Diary of George Templeton Strong*, ed. Allan Nevins and Milton Halsey Thomas, 4 vols. (New York: Macmillan, 1952), 4: 92, 99, 75.

1861, historians and legal scholars have long asserted that the doctrine of state secession immediately vanished from public dialogue with the triumph of the Union army at Appomattox.[6] James McPherson, for example, wrote that although historians debate the larger meaning of the war, "certain large consequences of the war seem clear. Secession and slavery were killed, never to be revived during the century and a quarter since Appomattox." Beginning with the first professional histories of the Civil War, historians have contended that the Civil War foreclosed any future debate about secession's constitutionality.[7] The death of secession at Appomattox has become something of an adage in historical writing, often baldly declared in a throwaway line or

[6] There is some disagreement among scholars on the pre-war status of secession arguments. See, e.g., Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* (Cambridge, MA: Belknap Press of Harvard University Press, 1993).

[7] James M. McPherson, *Battle Cry of Freedom* (New York: Oxford University Press, 1988), 859. Further examples are essentially everywhere. See, e.g., William A. Dunning, *Essays on the Civil War and Reconstruction* (New York: Macmillan, 1898), 304; John W. Burgess, *Reconstruction and the Constitution, 1866–1876* (New York: Scribner's, 1905), 54; James G. Randall, *Constitutional Problems under Lincoln* (1926; repr., Urbana: University of Illinois Press, 1964), 522; Andrew C. McLaughlin, *A Constitutional History of the United States* (New York: Appleton-Century, 1936), vii; Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (Boston: Houghton Mifflin, 1975), 284–85, 368; Kenneth Stampp, "The Concept of a Perpetual Union," *Journal of American History* 65 (June 1978): 5, 6; Brooks D. Simpson, *America's Civil War* (Wheeling, IL: Harlan Davidson, 1996), 4, 217; Phillip S. Paludan, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era* (Urbana: University of Illinois Press, 1975), 98, 225; Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development* (New York: W. W. Norton, 1991), 317; Arthur J. Jacobson, Bernhard Schlink, and Virginia Cooper, *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000), 217; Bernard Schwartz, *From Confederation to Nation: The American Constitution, 1835–1877* (Baltimore: Johns Hopkins University Press, 1973), 133; Bernard Schwartz, *A History of the Supreme Court* (Oxford: Oxford University Press, 1993), 134; Bernard Schwartz, *A Commentary on the Constitution of the United States*, 5 vols. (New York: Macmillan, 1963), 1: 41; Bruce Ackerman, *We the People: Transformations*, 2 vols. (Cambridge, MA: Belknap Press of Harvard University Press, 1998), 2: 22; Daniel Farber, *Lincoln's Constitution* (Chicago: University of Chicago Press, 2003), 78; Michael Stokes Paulsen, "The Civil War as Constitutional Interpretation," *University of Chicago Law Review* 71 (Spring 2004): 716; Akhil Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96 (June 1987): 1512 n. 341 and accompanying text. See also Norman W. Spaulding, "Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory," *Columbia Law Review* 103 (December 2003): 2019; Daniel Elazar, "Civil War and the Preservation of American Federalism," *Publius* 1 (1971): 47, 56.

treated as an unspoken assumption that nonetheless undergirds the analysis but never thoroughly examined.

Scholars of the period have wrangled over the degree of change occasioned by the Civil War, primarily focusing their attention on the formal transfer of governmental authority from the states to the nation that occurred with the ratification of the postwar constitutional amendments.[8] If debate about the extent to which the Civil War altered the antebellum federal system has flourished, scholars have taken it as given that, at the very least, the war unequivocally established the unconstitutionality of the extreme state sovereignty position espoused by the defeated Confederates. In their account, the nation that emerged out of the Civil War was at least assured of its basic integrity.

Drawing on the insights of constitutional scholars, other historians have argued that the Civil War established a united, fully grown, and powerfully aggressive American nation, one that "emerged from the war with a confirmed sense of destiny."[9] Robert Wiebe's classic Progressive Era synthesis, *The Search for Order*, tellingly described the "true legacy of the war" as a "new United States, stretched from ocean to ocean, filled out, and bound together [that] had miraculously appeared" as a result of the war.[10] Under this interpretation, the Civil

[8] Most of these battles are about change and continuity and the degree to which the postbellum constitutional amendments were "radical" or "conservative." See Hyman, *A More Perfect Union*; Michael Les Benedict, *Preserving the Constitution: Essays on Politics and the Constitution in the Reconstruction Era* (New York: Fordham University Press, 2006); Michael Les Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction, 1863–1869* (New York: W. W. Norton, 1974); Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (Cambridge: Cambridge University Press, 2001), 109–10, 132–35; Ackerman, *We the People*; Herman Belz, *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era* (New York: W. W. Norton, 1978); Paludan, *A Covenant with Death*; Robert Kaczorowski, "To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War," and Robert Kaczorowski, "Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction," *New York University Law Review* 61 (1986): 863. Historian G. Edward White noted recently that this debate still dominates the field. G. Edward White, *Law in American History, Volume II: From Reconstruction through the 1920s* (New York: Oxford University Press, 2016), 7.

[9] Robert Penn Warren, *The Legacy of the Civil War* (New York: Random House, 1961), 46.

[10] Robert H. Wiebe, *The Search for Order, 1877–1920* (New York: Hill and Wang, 1967), 11. This is a dominant theme in scholarship about the legacy of the Civil War. See Charles Royster, *The Destructive War: William Tecumseh Sherman, Stonewall Jackson, and the Americans* (New York: Knopf, 1991), 371; Richard

War created a new America, one empowered by its triumph over the forces of disintegration.

This book has a different story to tell. The Civil War did not definitively resolve the question of secession's constitutionality. The validity of secession remained at base a *legal* question, and in the war's immediate aftermath, Americans engaged in a national dialogue about whether they could permit the blunt instrument of military victory to substitute for the judgment of a court of law in resolving the issue. As Christopher Tomlins has argued, nineteenth-century Americans looked to the law as their source of stability and national purpose. By the beginning of the century, "law [had become] *the* paradigmatic discourse explaining life in America, the principal source of life's 'facts.' "[11] The Civil War shook Americans' belief in the primacy of the rule of law to its foundations.[12] In the months following the war's conclusion, the U.S. government sought to mitigate the war's disruption of the regular legal process by selecting a test case that would provide a final determination of secession's constitutionality and the war's legitimacy.

The case selected was a high-profile one that would capture the attention of the nation: Confederate president Jefferson Davis's treason prosecution. The government could easily make out a prima facie case that Davis had committed treason by levying war against the United States. It was widely anticipated that Davis would defend his suit by arguing that the secession of his home state of Mississippi had

Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859–1877* (Cambridge: Cambridge University Press, 1990), 2; Heather Cox Richardson, *West from Appomattox: The Reconstruction of America after the Civil War* (New Haven: Yale University Press, 2007), 31, 37, 39; George Frederickson, *The Inner Civil War: Northern Intellectuals and the Crisis of the Union* (New York: Harper Torchbooks, 1965); Louis Menand, *The Metaphysical Club* (New York: Farrar, Straus and Giroux, 2001), x; McPherson, *Battle Cry of Freedom*, 859.

[11] Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge: Cambridge University Press, 1993), 21. See also Perry Miller, *The Life of the Mind in America: From the Revolution to the Civil War* (New York: Harcourt, Brace & World, 1965); Laura F. Edwards, *The People and Their Peace* (Chapel Hill: University of North Carolina Press, 2009), 66–67, particularly n. 4, noting the dominance of legal thought in the South.

[12] See William Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937* (New York: Oxford University Press, 1998), 79; Phillip S. Paludan, "The American Civil War Considered as a Crisis in Law and Order," *American Historical Review* 77 (October 1972): 1013.

removed his U.S. citizenship and his duty of loyalty to the Union, thus rendering him incapable of committing treason against the United States. His conviction would definitively resolve the secession issue in the Union's favor.

And yet Davis was never tried. Neither Davis nor any other Confederate was punished for treason following the Civil War. Davis's fate was constantly discussed in the newspapers, and the American public – and indeed the wider world – saw his case as the forum in which secession, the "great question of the war," would receive a legal hearing.[13] The government and the other actors in Davis's case operated against a backdrop of intense public scrutiny. Because of the high profile of the case, the United States government proceeded cautiously, wanting to ensure that the verdict would be seen as a legitimate legal pronouncement on treason and the right of secession. Over the angry objections of many in Congress, the Johnson administration – on the advice of Attorney General James Speed – refused to relax any of the procedural rules governing the conduct of federal criminal trials. Speed worried about the disruptive effect of the war and would not tinker with the rule of law. In his opinion, altering the legal system during this vulnerable period merely to ensure the proper outcome in the Davis case would unmoor the United States from its foundations. For this reason, Speed rejected the possibility of conducting Davis's trial before a military commission and instead determined to hold trial before a federal jury in the place where Davis had committed his crimes: the former Confederate capital of Richmond, Virginia.[14]

Once it was decided that Davis's trial was to take place in Richmond, it became increasingly clear that the government would face considerable trouble convicting Davis on a treason charge. Trusting Davis's fate to a Virginia jury was an invitation to jury nullification. Federal jurors were required to swear unbroken loyalty to the United States, and Davis's federal jury pool was the first in American history to include African Americans. Still, there could be no guarantee that Confederate sympathizers would not find their way onto the jury and refuse to convict their former president. Instead of supplying a legal endorsement of the Union's victory, Davis's case could provide a backdoor vindication

[13] Quotation is from the *New York Times*, February 9, 1867.
[14] This was constitutionally required. U.S. Const. art. III, § 2; amend. VI.

of the right of secession and thus undercut the results of the war. As the possibility of ensuring the proper outcome in Davis's case seemed more remote, the government's attorneys groped for a way to avoid the issue of secession in Davis's case without signaling to the country that they feared putting him on trial. They opted for delay, hoping that a solution would somehow present itself.

Davis's attorneys were equally hesitant about forcing the case to come to trial, knowing that not only the principle of secession but also their client's life would be at stake.[15] At the same time, they sought to turn the government's concerns about secession's possible vindication to their own advantage. To induce the government to drop the prosecution, they overstated their own confidence in winning an acquittal. Chief Justice Salmon P. Chase, who presided over the federal circuit court in Richmond, along with District Judge John C. Underwood, seemed similarly reluctant to entrust Davis's fate to a jury. With all parties equally determined not to proceed to trial, the case dragged on without resolution for almost four years, until Davis's attorneys moved to quash the indictment in December 1868 on the grounds that the newly ratified Fourteenth Amendment barred the prosecution of Confederate officials for treason. When the two judges split on the merits of the defense's argument, the question was certified to the Supreme Court for resolution. Later that month, however, President Andrew Johnson issued a universal amnesty proclamation, relieving all former Confederates from prosecution. Accordingly, the momentous issues of Davis's treason and the legitimacy of the Confederate war effort were left unsettled precisely because their resolution might prove so explosive. Just a few months later, the Supreme Court

[15] In advancing this argument, I depart from most writing about Davis's case. In a true "Lost Cause" vein, many writers have emphasized that Davis himself wanted to see his case go to trial to vindicate the principle of secession. See Lloyd T. Everett, "The 'Case of Jefferson Davis': Why No Trial," *Tyler's Quarterly Magazine and Genealogical Magazine* 29 (1947): 94, 110–14; Horace Henry Hagan, "United States vs. Jefferson Davis," *Sewanee Review Quarterly* 25 (1917): 220; Eberhard P. Deutsch, "*United States v. Jefferson Davis*: Constitutional Issues in the Trial for Treason," *American Bar Association Journal* 52 (February 1966): 139, and *American Bar Association Journal* 52 (March 1966): 263, 264 [two parts]; Charles Adams, *When in the Course of Human Events: Arguing the Case for Southern Secession* (Lanham, MO: Rowman & Littlefield, 2000); Charles M. Blackford, *The Trial and Trials of Jefferson Davis: Paper Read to the Virginia Bar Association* (Richmond, VA: John T. West, 1900), 39.

delivered a perfunctory pronouncement against the constitutionality of secession in a far less volatile context, quietly declaring the nation to be "an indestructible Union composed of indestructible states" in *Texas v. White*, a case involving the repayment of government bonds.[16]

As the public, both North and South, regarded Davis as a symbol of the defeated Confederacy, Davis's guilt or innocence would have stood as a pronouncement on the legality of secession and the worthiness of the Confederate cause.[17] His case had the potential to undercut the moral weight of Union victory. It could have disturbed the verdict of the war.

My analysis of the Davis case focuses not on Davis himself but on the lawyers who participated in it, both on the side of the prosecution and on the defense. The eventual determination of Davis's fate owed much to the wrangling of the primary attorneys who labored on his case: William Evarts and Richard Henry Dana for the prosecution, and Charles O'Conor for the defense. Distracted by other, more promising career opportunities and unnerved by the possibility of secession's vindication, which only seemed to increase with the passage of time, lead prosecutor William Evarts failed to take charge of the prosecution and instead tried to extricate himself from the miserable business of serving as counsel of record in a potentially catastrophic case. O'Conor, by contrast, feigned confidence in secession's vindication in order to increase the pressure on the prosecution. As these lawyers shaped and reacted against developments in the trial to ensure the best possible outcome for their clients, their interaction and maneuvering provides a window onto the operations of high-level attorneys in nineteenth-century America. By focusing on Evarts's and O'Conor's litigation strategy and its day-to-day unfolding and progression, this book demonstrates how smart and aggressive lawyering outside the courtroom worked to Davis's advantage. Embedded in my analysis is an argument for the centrality of the strengths and foibles of individual

[16] Texas v. White, 74 U.S. 700 (1868).

[17] See Anne Sarah Rubin, *A Shattered Nation: The Rise and Fall of the Confederacy, 1861–1868* (Chapel Hill: University of North Carolina Press, 2005), 201–7, discussing Davis's image as a martyr for the defeated Confederacy; Carl Schurz, *Reminiscences of Carl Schurz*, ed. Frederic Bancroft and William A. Dunning, 3 vols. (Garden City, NY: Doubleday, Page, 1907), 3: 143; Nina Silber, *Romance of Reunion* (Chapel Hill: University of North Carolina Press, 1993), 29.

lawyers, as well as that of larger social and legal forces, in resolving the constitutionality of secession.

As much as this book focuses on secession and the legal significance of the Civil War, it takes place during Reconstruction and explains how secession's murky legal status became intimately bound up with the shaky theoretical foundations of Reconstruction policy.[18] Maintaining a federal military presence in order to protect the rights of freedpeople in the former Confederate states seemingly transgressed the constitutional limits on federal authority over state affairs. Military Reconstruction was premised on the idea that the rebellion had disrupted the normal constitutional status of the Southern states within the Union. As some legal theorists argued, Union victory entitled the federal government to treat the states of the former Confederacy like conquered provinces. Conquest could be effected only if the Southern states had managed to remove themselves from the federal Union and had constituted a separate nation during the war. Such a theory seemed tacitly to endorse secession, and many Americans believed that the U.S. government would have to abandon its military Reconstruction policy if it hoped to establish the illegality of secession. Indeed, the leading proponent of "Radical Reconstruction" and the conquest theory of Reconstruction, Congressman Thaddeus Stevens, lent credence to this argument.[19] He offered to represent Davis in his treason trial

[18] For more on the different theories on which Reconstruction was premised, see Eric L. McKitrick, *Andrew Johnson and Reconstruction* (Chicago: University of Chicago Press, 1960); Burgess, *Reconstruction and the Constitution*; Benedict, *Preserving the Constitution*; Gregory Downs, *After Appomattox* (Cambridge, MA: Harvard University Press, 2015).

[19] Radical Reconstruction, implemented by the "Radical" wing of the Republican Party after it wrested power from the president, was the most far-reaching and racially egalitarian program of Reconstruction put forth in the post–Civil War period. Unlike President Johnson's far more limited plan to readmit the states of the former Confederacy to the Union without fundamentally overhauling their social structure, the Radical Republicans intended to dismantle white supremacy and possibly redistribute property from former masters to former slaves through the Reconstruction process. Owing to its ambitious scope, Radical Reconstruction also disrupted the ordinary operation of the federal system in the United States by placing the states of the former Confederacy under the direct military supervision of the federal government. This aspect of the Radicals' plan was known as "military Reconstruction" – the product of four Military Reconstruction Acts passed over President Johnson's veto beginning in March 1867. These topics will be explored in greater depth in Chapter 8.

in the hope that a vindication of secession would, ironically, act to strengthen the theoretical basis of Radical Reconstruction.

In the aftermath of the American Civil War, Americans engaged in an ongoing public debate about the validity of permitting the outcome of a war to substitute for a legal judgment on the constitutionality of secession. For many Americans, both Northern and Southern, the Civil War exposed the troubling thinness of the nation's commitment to the rule of law and revealed that Americans were willing to betray their most deeply held beliefs in order to guard against the disintegration of the Union. The war seemed to demonstrate that the ordinary legal process was too narrow to provide a definitive resolution of the most deeply divisive and most important legal disputes in American society. The most difficult questions were simply too volatile to be contained in a court of law. For others, the war served as the most active – and therefore the most legitimate – means of constitution making in a democratic society, as the people of the United States had put their very lives on the line for the vindication of Unionist or secessionist principles. If the judgment of a court of law could be permitted to overturn the victory sealed by the death of 700,000 men, they had no way to make sense of the suffering occasioned by the war.[20]

Although the Civil War had surely substituted violence for the calm and deliberative processes of law, it had also involved the people in the lawmaking process in an immediate and tangible way.[21] Nineteenth-century Americans remained despondent about the implications of war as law, even though they recognized that the Civil War had functioned as a form of lawmaking, the ultimate method of "popular constitutionalism." The national conversation about the meaning of the Civil War and its resolution of the secession issue forced Americans

[20] On efforts to make sense of the suffering and death brought on by the war, see Drew G. Faust, *This Republic of Suffering: Death and the American Civil War* (New York: Knopf, 2008); Royster, *The Destructive War*; and, in a roundabout way, James Q. Whitman, *The Verdict of Battle: The Law of Victory and the Making of Modern War* (Cambridge, MA: Harvard University Press, 2012).

[21] For more on popular constitutionalism, see Ackerman, *We the People*; Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004); Daniel Hamilton, "Popular Constitutionalism in the Civil War: A Trial Run," *Chicago-Kent Law Review* 81 (2006): 979. My assessment of popular constitutionalism through the mechanism of civil war is far less sanguine than these treatments.