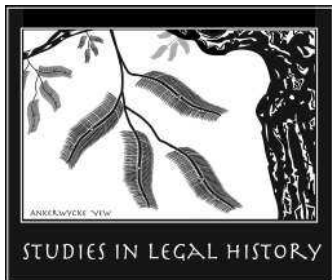


Secession on Trial

The post–Civil War treason prosecution of Confederate president Jefferson Davis (1865–1869) was seen as a test case on the major constitutional question that animated the Civil War: the constitutionality of secession. The case never went to trial, however, because it threatened to undercut the meaning and significance of Union victory. This book describes the interactions of the lawyers working on both sides of the Davis case, who saw its potential to disrupt the battlefield’s verdict against secession. In the aftermath of the Civil War, America was engaged in a wide-ranging debate over the legitimacy and effectiveness of war as a method of legal adjudication. Instead of risking the “wrong” outcome in the highly volatile Davis case, the Supreme Court took the opportunity to pronounce secession unconstitutional in another case, *Texas v. White* (1869), in a single, perfunctory paragraph.

Cynthia Nicoletti is an associate professor of law at the University of Virginia. She holds a BA, an MA, and a PhD from the University of Virginia and a JD from Harvard Law School. She is a member of the American Society for Legal History and the Society of Civil War Historians. Her dissertation, on which this book is based, won the William Nelson Cromwell Prize and the Hay-Nicolay Dissertation Award.



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Secession on Trial

*The Treason Prosecution of
Jefferson Davis*

CYNTHIA NICOLETTI
University of Virginia Law School



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To my mother and the memory of my father

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Acknowledgments

This is probably not the book one should write before tenure. It was, and is, something of a controversial project, although I have lost some perspective on this fact over time. Secession, in any of its guises, is fraught, and I live with the worry that the reader will assume I wrote this book as a kind of advocacy piece for the secessionists' cause. That was not my motive.

I wrote this book because I think it has an important story to tell, and it is one that hasn't been told before. Most of the histories of the Civil War and Reconstruction that have been written in my lifetime tend to focus on the "heroes" of the story: those whose views accord the most with our own. Such a lens is necessarily distorting. In reading this history, especially in the aggregate, it's hard to understand why the beliefs of the Radical Republicans – so smart, so familiar, so *modern* – did not immediately prevail over contrary ideology. Without studying the ideas and actions of those who espoused the opposite points of view – views that we now find distasteful – it is almost impossible to answer the question of why history looks the way it does. History is often a give-and-take between people with radically different ideas, and telling it well requires the historian to engage seriously with those on both sides of an issue. That is why this book spends so much time exploring – and, frankly, humanizing – people whom we might say were on the "wrong side" of history. The secessionists were smart, passionate, and devoted to their cause – and that made a difference in the world. It was a world populated by Charles O'Connor as well

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as Thaddeus Stevens, and if we want to understand more about that world, we need to pay attention to both of them.

Clearly, prudence was not my primary guiding principle in writing this book. *Secession on Trial* is the product of (a) my own stubbornness, and (b) my inability to sustain a long-term interest in anything that doesn't make me feel hopelessly morally conflicted. So be it. I don't know how I feel about O'Connor; I both admire and fear him. I also don't know how I feel about law's tortured relationship with war as explored in this book. Americans certainly stretched the law beyond what it should bear in the 1860s, but in the end I don't think we could live with any other outcome. To paraphrase the decidedly mediocre legal thinker B. J. Sage, "Perhaps what was, was right."

Secession on Trial has been a long time in the making, and I have accumulated many debts. I benefited from a great deal of help and encouragement as I was writing this book. Three law school deans, Jim Rosenblatt of the Mississippi College School of Law, Paul Mahoney, and Risa Goluboff of the University of Virginia Law School gave me institutional support while I worked on this project, for which I am grateful.

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It is truly a joy to work among a group of such talented legal historians as the ones at UVA. I am proud – and a little awed – that my colleagues include Ted White, Paul Halliday, Gordon Hylton, Molly Brady, Jessica Lowe, and Risa Goluboff. Jessica Lowe has proven to be a great friend and colleague, particularly during the year I visited at UVA. I don't think I have ever learned more (or had more fun) than when we taught the American Legal History course together. When I started teaching, the legal history circle at UVA also included Chuck McCurdy. As one of my advisers, Chuck nurtured this project

when it was nothing more than the germ of a wacky idea. I am certain that Chuck didn't know quite what to make of me, a student who insisted on writing about secession and state sovereignty ideology at every turn. Chuck advised my undergraduate thesis long before he was saddled – a second time – with Jefferson Davis and secessionist theory, this time in extended dissertation form. But I would not be moved, and Chuck always encouraged me. He believed in my ability to say something new and interesting, however provocative. Chuck's only benchmark was the quality of the work, and for that I am more thankful than I can say.

Beyond the inner circle of legal historians, my colleagues at UVA Law School proved to be no less helpful. George Rutherglen read the entire manuscript and offered invaluable advice about how to make the prose more literary. If the reader encounters a felicitous phrase in the book, it is likely due either to pure happenstance or to George. Ruth Mason helped me to find a title, a task with which I had been struggling for years. I had quite despaired of finding one I could live with, until her intervention. Kerry Abrams, Barb Armacost, Charles Barzun, Michael Collins, Anne Coughlin, Ashley Deeks, John Duffy, Kim Ferzan, Kim Forde-Mazrui, Brandon Garrett, Rachel Harmon, Andrew Hayashi, Debbie Hellman, Toby Heytens, Julia Mahoney, Dan Ortiz, Mildred Robinson, Rich Schragger, John Setear, Mila Versteeg, Annie Woolhandler, and George Yin offered invaluable support and advice along the way.

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Acknowledgments

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talented and this book would never have happened if not for his help. My thanks to all.

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Risa Goluboff read the manuscript – in its entirety – several times: once when it was an unwieldy dissertation, and again (and then again) when it was a slightly-more-wieldy book manuscript. Risa's comments were always astute, and the answers to her insightful queries revealed themselves in stages. Risa's comments are the kind you cannot absorb all at once, because she understands your project better than you do yourself. I owe her an immense debt; a number of the hard-won revelations I achieved in rewriting the manuscript are due to her input. She is, quite simply, the best reader I have ever had, which doesn't bode well for her ability to avoid my manuscripts in the future.

Sally Gordon is also this kind of reader. Completing the manuscript under Sally's editorship at Cambridge University Press was a challenge (in the best sense) and a joy. She was both patient and encouraging. When we started working together, I did not see the potential good book lurking in the dissertation. Let's just say I was resigned to the idea that the book would be a mess – I thought I was destined to be vaguely unhappy with it. Sally helped me to see its potential, and to deepen the book's insights at times when I thought that I had wrested everything I could from the material. Sally helped me to uncover hidden layers.

My largest debt is owed to my adviser (and now colleague), Gary Gallagher. I am sure that when I was student, I was unable to appreciate how rare it is to have someone like him in my corner. He insisted that I challenge the established wisdom. He taught me to trust what I saw in the archives rather than in the historiography, and to ignore the trendy and listen instead to my own voice. What he valued was boldness, accuracy, and diligent research. These have been my touchstones. Whatever else one can say about *Secession on Trial*, it is not derivative, and that is due to Gary's influence.

This book is dedicated to my parents, Robert and Eleanor Nicoletti. My interest in the constitutional history of the Civil War – and in secessionist thought – took hold when I was in high school. This was decidedly weird, since I was a New Yorker whose first American relatives arrived in the United States in the decade after the Civil War's conclusion. I was also a girl. The interest took hold nonetheless, and my parents encouraged it even when they did not fully understand it. They were the first ones who believed in me, and their belief persisted even when circumstances probably did not warrant it. But that's the way it is with parents, and I am grateful for their love and support.