Written by **Joe Wolverton, II, J.D.** on March 13, 2019

Sure States Can Secede, but Should They?

From California to Vermont, there are American citizens working to leave the United States, to have states or parts of states secede from the union.

Anytime such secession efforts attract the attention of the media, "constitutional experts" come out of the woodwork, most of whom insist that even if secession is philosophically possible, it is practically impossible, as, they claim, the Civil War settled the issue forever.

These academics, whether coming from the Left or the Right, cling to the belief that while secession may have been an accepted principle of constitutional interpretation before the War Between the States, the victory of the Union over the Confederacy settled that question once and for all, forcing states to forever forfeit the ability to remove themselves from the union, regardless of the will of the people within them.

The Civil War made one thing clear: The federal government believes (and the Confederacy was forced to concede) that might makes right. The Union armies defeated the armies of the Confederacy, therefore, so the thinking goes, secession is no longer a constitutional remedy available to states. Might makes right.

Only it doesn't. Think of it this way. Assume my neighbor and I disagree over the exact location of the boundary line between our properties. One day, while I'm out building a shed that my neighbor believes encroaches on his property, we start arguing and the argument escalates to a full-fledged fist fight and I knock out my neighbor. Does that mean that the location of our mutual property line has been settled? Does the pummeling of my neighbor make my opinion of the location of that line the legal boundary? Of course not. Might, it seems, does not make right, neither in boundary disputes regarding land nor in similar conflicts over state sovereignty.

In an article published on March 7, Dave Benner, a friend and frequent contributor to the Tenth Amendment Center, wrote the following about the Founding Fathers and their understanding of union:

> Truly, the founding generation was a generation of secessionists. The American colonies first became states when they withdrew from the government under the British crown, practicing secession for the first time. After a new constitutional system was proposed in 1787, the states proceeded to depart from their current union under the Articles of Confederation, the second governmental arrangement they seceded from in a generation.

Benner's recitation of the historical record is spot on.

In 1776, our ancestors seceded from the tyrannical central authority of the British Empire, and in 1788, they seceded from the union formed by the Articles of Confederation (regardless of the fact that the Articles explicitly created a "perpetual union").

The basis of the inherent right of people, acting in their corporate capacity as states, to create and abrogate unions and constitutions is known in history as the compact theory.

In order to help friends of liberty tightly grasp the compact theory that informs the Constitution, I'll make a couple of legal analogies that will be more familiar to 21st-century Americans.

First, it is a well-settled principle of Anglo-American law that parties to a contract may rightfully seek remedies if another party is in breach of the agreed upon terms. One such remedy available to an aggrieved party is to require that the party in breach amend his behavior to conform to the terms of the contract. The aggrieved party may point to the violated provisions of the contract and remind the offending party of the obligations undertaken in the contract.

This reasonable approach is analogous to nullification. As the aggrieved parties, the states (or a single state) may remind the federal government of its repeated violations of key terms of the original agreement and demand that it cease such excesses and that it restrain itself according to the mutually approved contractual rights and responsibilities.

Despite the reasonableness of this recourse, states have been reluctant to take this intermediate step toward forcing the feds back within their proper boundaries of power.

There is, of course, another more aggressive contractual remedy available in the corpus of contract law. If one party to the contract suffers consistent breaches of a contract, he may seek rescission of the entire agreement. Rescission is defined as the cancellation of a contract and is customarily followed by restitution. Restitution is the return of the parties to their pre-contractual position, the position they were in prior to entering into the contract relationship.

Whereas the first remedy is analogous to nullification, rescission is comparable to secession. States, as aggrieved parties, are safely within their long-established rights in common law to abandon the union and reassume the full panoply of powers and privileges it earlier ceded to the general government in the contract (the Constitution). The newly separated states would be once again free to remain independent republics or to enter into another contractual relationship (confederacy) with one or more states similarly separated from the union they once formed a part of.

While this path is open to the states, it isn't always necessary. Truthfully, no one who has witnessed the repeated violations of the original compact by the federal government would blame the states for severing the ties that bind them to that inveterate tyrant. That said, there are yet millions of Americans who recognize the genius of the Constitution and earnestly want it to succeed, not only just for the sake of political stability, but for the sake of demonstrating the deference to the founding generation, which took the time to distill the wisdom of ages into that unique document.

To sum up, should a state or states decide not to continue silently suffering constant breaches of that agreement by one of the other parties or by the agents of the general government created by it, they may lawfully demand a halt to the offending behavior and a performance by the breaching party of its contractual obligations.

Next, although the "experts" who suggest states cannot secede since the Constitution contains no procedure for any such dissolution.

There is no requirement that the states expressly retain this right of rescission in the agreement — it is available as an independent operation of law. James Madison was no lawyer, but he knew and understood this legal principle. In fact, he summed it up perfectly in a speech he made at the

Philadelphia convention in 1787: “Clearly, according to the expositors of the law of nations, that a breach of any one article, by any one party, leaves all other parties at liberty to consider the whole convention to be dissolved, unless they choose rather to compel the delinquent party to repair the breach.”

It was also James Madison who, in the Virginia Resolution, described the proper constitutional relationship between the states and the federal government:

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

Finally, while secession is about as American an act as there is, there is a way we can preserve the union, while at the same time preserving the limits on federal power and the power of states to refuse to enforce unconstitutional acts of the federal government. The Constitution created this union, therefore any act upholding and strengthening that document strengthens the union. Nullification strengthens the union by reminding the agents of the federal government of the boundaries of its constitutional authority.

If done right, nullification is a surgical, sparing way to remove malignant tumors of tyranny, preferable to secession, which would be like operating with a chainsaw, brutally butchering healthy and diseased tissue indiscriminately.

Image: Wapcaplet via wikipedia