

STILL TOO CLOSE TO CALL? RETHINKING STAMPP'S "THE CONCEPT OF A PERPETUAL UNION"

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In a classic article in the *Journal of American History*, which was based on his presidential address to the Organization of American Historians in 1978, the great Civil War historian Kenneth Stampp made the claim that the arguments in favor of the constitutionality of secession made by the Southern states were as strong, if not stronger than the constitutional arguments made, then and now, in opposition to secession.¹ Stampp is to my mind the greatest Civil War historian of the 20th century and his views on secession remain required reading and are cited routinely today.

This is not to say Stampp was correct, only to use his classic article on the 150th anniversary of secession as a jumping off point for reconsidering the legality and constitutionality of secession and also, I think, to go to first principles to consider whether it is possible or useful to definitively try and answer the question: was secession legal?

This is a thought piece, a historiographical meditation, or more accurately something of a polemic, with very little of archival heavy lifting, but still asking questions that bedevil Civil War historians about the perhaps irresistible presentism in the field of Civil War legal history.²

Stampp presented secession as "the fundamental issue of the [Civil War]" and framed secession as a constitutional crisis that turned on questions surrounding "the locus of sovereignty in the political structure that the Constitution of 1787 had formed."³ In particular, Stampp asked: did the Constitution "create a union of sovereign states, each of which retained the right to secede at its own discretion? Or did it create a

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1. Kenneth M. Stampp, *The Concept of a Perpetual Union*, J. AM. HIST., June 1978, at 5.

2. Some of the following argument is based on claims I made in *Getting Right Without Lincoln*, 45 TULSA L. REV. (SYMPOSIUM ISSUE) 715 (2010).

3. Stampp, *supra* note 1, at 5.

union from which no state, once having joined, could escape except by an extra-constitutional act of revolution?”⁴ The Constitution, Stamppp concluded, was “silen[t] on this crucial question.”⁵ Indeed, he argues that “the unionist case was sufficiently flawed to make it uncertain whether in 1865 reason and logic were on the side of the victors.”⁶ This is not to say the union was wrong, and Stamppp is quick to add that “in the tangled web of claim[] and counterclaim[]” it was unclear whether reason and logic were “indisputably on either side.”⁷

In this way, Stamppp lays the groundwork for the argument that the Confederate constitutional argument for secession was as reasonable and logical as the Union’s, and in particular, Lincoln’s constitutional argument for a perpetual union. This was novel then and now—even heretical, in so far as it challenges Lincoln’s arguments in the First Inaugural and elsewhere that secession was manifestly unconstitutional and illegal, a position later adopted by the Supreme Court in 1869 in *Texas v. White*.⁸

To do this, Stamppp deploys a kind of historically nuanced originalism, not in the service of answering a modern constitutional question, but in the service of demonstrating an essential ambiguity in Philadelphia in 1787 on the question of whether the Constitution created a perpetual union, concluding “[i]n truth, the wording of the Constitution gives neither the believers in the right of secession nor the advocates of a perpetual union a case so decisive that all reasonable persons are bound to accept it.”⁹

Turning from the text to the debates in Philadelphia, Stamppp found similar “baffling inconsistencies and obscurities.”¹⁰ Moreover, the ratification debates did not provide greater clarity so that “in 1789, when the present Union came into existence, the question of whether a member state could secede at will remained unresolved.”¹¹ The question of the legality of secession was of course continually debated in the antebellum era, in the debates over the Kentucky and Virginia Resolutions, over the admission of slave and free states to the Union, and most dramatically in the Nullification Crisis in the 1830s. It was then that for Stamppp an American president offered, in Andrew

4. *Id.*

5. *Id.*

6. *Id.* at 6.

7. *Id.*

8. *Texas v. White*, 74 U.S. 700 (1869).

9. Stamppp, *supra* note 1, at 12.

10. *Id.* at 13.

11. *Id.* at 19.

Jackson's Proclamation on Nullification in 1832¹² that "the concept of a perpetual union had achieved its full development, and a President of the United States had pledged himself to use all the power of the federal government to uphold it."¹³ Lincoln and the Supreme Court relied upon Jackson's proclamation in making their arguments for a perpetual union decades later.

Even then, though, Stamppp argues that by the time of the Nullification Crisis, "the case for state sovereignty and the constitutional right of secession had flourished for forty years before a comparable case for perpetual union had been devised."¹⁴ Thus, "because that case came so late, because the logic behind it was far from perfect, because the Constitution and the debates over ratification were fraught with ambiguity," it remained the case that the question could ultimately only be settled by war.¹⁵ And there Stamppp ends the article.

This is to my mind a radical endpoint, one that embraces historical uncertainty on a crucial constitutional question, perhaps the central constitutional question of the Civil War. Stamppp poses the question: "was secession unconstitutional?" And answers with, to my mind, a salutary and even correct answer: "we don't know." Both sides had compelling arguments made over decades and both sides could draw on history in making their claims, and each claim was as logical and reasonable as the other.

This is a radical endpoint for two reasons. First because it refuses to answer the question: "was secession constitutional?" Stamppp refuses to answer this question because it is, he shows, essentially unanswerable, or at least too close to call, and unresolved as a legal and constitutional matter at the time of secession. If Stamppp is correct, this raises the question whether we, 150 years later, can stand uncertainty on such a fundamental constitutional question of the Civil War. What if we cannot definitively answer the question: "did Lincoln have the legal authority to war to suppress secession?" Second, Stamppp's argument is radical for the simple fact that it suggests that the Confederacy's legal claim for secession was as valid as the Union's claim for perpetual union. It is here that Stamppp, to my mind, may have mischaracterized secession by

12. Andrew Jackson, *Proclamation*, in COMMITTEE ON THE LIBRARY, GEN. COURT OF MASS., STATE PAPERS ON NULLIFICATION: INCLUDING THE PUBLIC ACTS OF THE CONVENTION OF THE PEOPLE OF SOUTH CAROLINA, ASSEMBLED AT COLUMBIA, NOVEMBER 19, 1932, AND MARCH 11, 1833, THE PROCLAMATION OF THE PRESIDENT OF THE UNITED STATES, AND THE PROCEEDINGS OF THE SEVERAL STATE LEGISLATURES WHICH HAVE ACTED ON THE SUBJECT 75 (1834).

13. Stamppp, *supra* note 1, at 32.

14. *Id.* at 33.

15. *Id.*

making the claim that secession can be considered as a legal question standing alone.

Let me turn to each point in turn. More than sixty years ago, David Donald wrote his landmark essay *Getting Right With Lincoln*.¹⁶ Donald wrote mostly about politicians' use of Abraham Lincoln since his assassination, and in particular how Lincoln was transformed from a deeply divisive symbol, into, by the end of World War II, "everybody's grandfather" or a "nonpartisan, nonsectional hero." It thus became increasingly necessary to seek Lincoln's imagined blessing for a given political position or candidate or party, and by the middle of the 20th century, "no reputable political organization could omit a reference to the Great Emancipator, nor could the disreputable ones." What Donald brought to light most vividly was the blatantly opportunistic use of Lincoln in political discourse. Yet in the end, Donald is careful not to mock or condemn this practice outright, which remains a staple of our politics. The symbolism of Lincoln remains potent and has a history of its own.¹⁷ Donald is also careful not to try and get right, or get wrong, with Lincoln, and if anything, his treatment is admiring but wary—concluding that "perhaps the secret of Lincoln's continuing vogue is his essential ambiguity."¹⁸

What Donald brought to light most vividly was the drive to get right with Lincoln in American politics. Yet the drive to get right with Lincoln is also at the heart of most of the legal and Constitutional history of the Civil War. The academic manifestation of this drive is twofold. First, Lincoln is most often at the center of the story, making the Congress and the courts and other legal actors bit players, relevant only in so far as they interact with Lincoln. Second, Lincoln is forced, in varying degrees, into the present. This presentism takes the form of different versions of the same basic question: was Lincoln right, was he justified in doing what he did during the Civil War?¹⁹ Was he right to meet secession with military force? To suspend the writ of habeas corpus? Or to declare a blockade or to call up the army or to exile political prisoners to the Confederacy? Was he right to issue the Emancipation Proclamation? These questions are central in much of the

16. David Donald, *Getting Right With Lincoln*, reprinted in *LINCOLN RECONSIDERED: ESSAYS ON THE CIVIL WAR ERA* (1st ed. 1961).

17. Matthew Pinsker, *Lincoln Theme 2.0*, *J. AM. HIST.*, Sept. 2009, at 417.

18. Hamilton, *supra* note 2, at 715.

19. JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (1926). It remains central in leading accounts of Civil War legal history. See 2 MICHAEL BURLINGAME, *ABRAHAM LINCOLN: A LIFE* (2008); MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991).

academic writing on Civil War and it is here that the popular and academic drive to get right with Lincoln merge. The popular and cultural force of Lincoln remains so strong, he remains such a talisman for our time, that even we historians cannot consign him to the past. Not only do we need him to make rulings on our actions in the present—what would Lincoln think of Guantanamo—but we also need to make rulings on his actions as president as part of our ongoing debates on presidential power and the Constitution in wartime.²⁰

This is not to say that legal historians of the Civil War are predominantly presentist, or that they are only interested in whether Lincoln was right. This is to say that there is in much Civil War history a central presentist preoccupation that does not loom as large in any other era, namely, whether particular legal and constitutional actions were justified in some absolute sense. We historians do not generally ask whether Lord Grenville was right to issue the Stamp Act, or whether Jackson was right to crush the Bank of the United States or whether Wilson was right to sign the Treaty of Versailles. We do not, in other words, usually ask whether a historical actor was right or wrong by our lights. Yet we cannot resist asking this about legal actors during the Civil War, particularly Lincoln. I simply do not know if Lincoln was right to suspend the writ of habeas corpus, and I maintain we cannot answer this question historically. We might be able to explain why he suspended the writ, or the effects of its suspension then and afterwards. We can also bring to light the competing legal arguments made at the time, and explain why some won and others lost. But we cannot survey the sources and come to a definitive ruling on the merits on these central legal questions any more than we can come to definitive understanding of the original meaning of the due process clause. We will never know if Lincoln was right or justified in his legal actions any more than we will know whether Cromwell and his supporters were right to execute Charles I.

This is also not to say that historians need to put on a white coat and simply make scientific judgments about the weight of the facts. Of course, our values infuse our writing of history; we only care about history in large part because of its meaning in the present. We always and at all times bring our values into our work, yet these values are best left at the service of the history we tell. We may present the Declaration of Independence as radical and egalitarian or as conservative and hierarchical or somewhere in between. The sources are open to either

20. Hamilton, *supra* note 2, at 715.

interpretation. We do not, however, ask historians of the era to come to a definitive conclusion as to whether Jefferson was right to assert the Revolution was justified by international and natural law at the time and so justifies revolution today.

The question that comes to mind in considering the legality of secession, as Stamp did thirty years ago, is whether we are willing to accept Stamp's answer of indeterminacy. That is, whether we might have a legal history that of the Civil War that does not ultimately attempt to answer these kinds of questions. Can we have a legal history of the Civil War that does not evaluate constitutional and legal actions on the merits, treating them as resolvable if only we get the law right? More importantly perhaps, do we want one? If we lose Lincoln as the centerpiece, do we lose a galvanizing figure that has given the field coherence over decades? If we resist making rulings on legal actions, and not providing answers to questions that people want answered by historians, do we risk obscurity and familiar charges of relativism? If there are no definitive answers to the question, then are there other essential issues revolving around the Civil War that are equally indeterminate?

It is almost customary that in books on the legal and constitutional history of the Civil War there is an explicit move to seek out lessons we might draw in the present. This concern for lessons is a red flag for Lincoln and Civil War presentism, and is a part of many rich and important histories. Lincoln's actions and that of the Congress and the courts are parsed and declared either as legally and constitutionally sound or unsound. To be sure, this makes the work more timely and immediate and allows historians to take part in a decades-long conversation assessing Lincoln's wartime actions. Yet to go into the Civil War looking to answer our modern questions is, to my mind, to distort the inquiry and is in the end too high a price to pay. Legal arguments invite counter-arguments, but this temptation itself reveals the mostly fruitless nature of this kind of historical debate. Legal arguments are made back and forth with no winner because there can be no winner in a ruling on the past. What if we walk away with a much richer understanding of the relationship of President and Supreme Court in the Civil War and nothing else? This is enough for almost any other era, but it seems on the great constitutional questions of the Civil War, that we are largely unwilling to leave them indeterminate.

This is not to say that legal actors in the Union and the Confederacy did not themselves reach legal and constitutional conclusions. But we in the present remain open to arguments from all sides and remain rooted in

uncertainty and argumentation. Was secession legal? Was the confiscation of enemy property constitutional? Was the blockade within presidential power? All of these questions rested on the status of the Union and the Confederacy during the Civil War, which was contested during the Civil War and for decades afterwards.

It is of course the case that there were winners and losers in the Civil War and that this colors the way we understand the legal questions we pose about the war. It is not enough to say that these questions about the nature of the Civil War cannot be definitively answered. Even as we reconstruct the arguments made on both sides on secession, we must recall at all times this was not a debating society but a contest over power during war. If today we cannot make a definitive ruling on the ultimate legality of secession, it is folly to reconstruct the legal arguments made during the War without attention to who won and who lost the argument and why. At points it is surely a case of might making right, or a legal argument settled at the point of a gun. Whatever the legality of secession, it was surely settled as a practical matter at Appomattox. But that is only the ending.

It is the contingent and uncertain path to that point that is historically compelling. If our task is to definitively determine the legality of secession, then once that is done we know who is right and who is wrong and how the Civil War ought to turn out. If by contrast we do not ourselves settle the question, then we see this argument played out over years of warfare, and we see the relative power of these ideas inside northern and southern society. It surely matters that the legality of secession was ultimately rejected, and this is in no small part a story of the relative power of competing ideologies inside societies at war.

The Stamp piece, to my mind, has stood the test of time and remains essential reading, indeed remains the model for how the legal inquiry on secession ought to be pursued. It remains the model not because he arrives at the right answer but instead for his embrace of historical uncertainty.

Any of us who write on the Civil War are asked the questions Stamp raises, and others: Was secession justified? Who was right in the debate over habeas corpus, Taney or Lincoln? Who was right and who was wrong across a number of great constitutional questions? The answer I am calling for—"I do not know"—distances the past from the present in a way we almost cannot stand when it comes to the Civil War. It is here that the academic quality of academic writing, for good and for ill, might most contrast with the dominant narrative of the Civil War. It is an open question for the field: "is the history sufficient and can it

stand alone, with values embedded in the story we tell, and not the definitive legal answers we provide?”

Yet this answer to the question of who was right on secession, I do not know, runs the risk of mischaracterizing the meaning of secession both at the time of the Civil War and today, and this brings me briefly to my second point. It may be that secession may ultimately be most fundamentally not a close legal question, but rather a vessel for our questions about the meaning of slavery and emancipation. This is a historical question: “was secession essentially a referendum on slavery?” This is the essential Stampp neglects in his constitutional inquiry. If the answer is yes, then Stampp, in his emphasis on constitutional thought standing alone, both sheds light on secession and also omits the centrality of slavery in the secession crisis.

Secession may be most important, then and now, as a symbol, a symbol of the legitimacy of the Confederacy and the fight to preserve slavery. Interestingly, it may be that the symbolic meaning of secession was embraced by both sides, an embrace of secession as essentially driven by states’ rights, and an embrace of states’ rights that turned in both North and South, as Paul shows, largely on the question of the preservation and expansion of slavery. It is here that Stampp’s legal focus leads us astray and presents us with an analytical frame we ought now to reject—namely treating secession as primarily a legal question. This does not mean that the legal argument is irrelevant or that it was infinitely malleable at the time. This means only that a legal question turning on states’ rights and the right to secede was at all times embedded in the debate over slavery and cannot be considered first as a legal question and then as a political or social question.

This is even more apparent when one examines the staying power of the symbolic meaning of secession. The legitimacy of secession was at the heart of the Lost Cause and remains a potent symbol today for those seeking to deny the centrality of slavery to secession. In this way, Stampp’s frame, in its presentation of a contained legal question, seems to me to miss a defining aspect of secession. Stampp might well admit this of course, but to my mind, cannot make the claim that his only concern for purposes of this piece was the law and the Constitution. This is, I think, an untenable dichotomy and one that has largely, thankfully collapsed. It is here that the presentist obsession with determining the ultimate legality of secession actually aids the history because it forces upon us the realization that our present concern for the place of slavery with secession was very much a concern of the Civil

War era. It is a powerful reason why we still care so much about secession and why actors at the time did as well.

We do not have to choose, indeed, between the abstract question of the legality of secession and its contrast with the lived experience of secession. We can examine contemporaries' competing assessments of legal and constitutional doctrine even as we take the realities of race and slavery into account.