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*The Civil War was as much over constitutional principle as economics, slavery, and differences in northern and southern ways of life. Secessionists frankly denied what earlier Anti-Federalists, even if reluctantly, conceded; namely, state sovereignty has no place within the framework of the Constitution. Alas, the nation's sovereignty had to be redeemed on the battlefield.<sup>1</sup>*

**States' Rights and National Sovereignty:  
Case Law Precedents Sub Silentio for the New Millennium**

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## I

The twists and turns of US jurisprudence regarding the constitutional development of the Union resemble that of a lazy river. From the shore, all appears to be relatively calm. But with the timeless forcefulness sub-surface movement, the river effectively cuts its way through the landscape. An occasional flood may make more drastic changes to the river and the landscape, but change to the casual observer is mostly indiscernible. Similarly, the US Supreme Court's juridical articulation about the nature of the union of States superficially appears to be consistent. Due to the reliance on selective precedent and politically astute incrementalism, the Court presents an apparent case law continuity regarding the growth of national power that is calm and reassuring, i.e., *prima facie* legitimate. But behind the scenes—*sub silentio*—are the forces of ongoing change. Specifically, the flow of American case law has substantially altered the landscape of the union of States; and it is a landscape increasingly inhospitable to the Jeffersonian tree of liberty.<sup>2</sup>

Since the Union's origins (1789) the fundamental challenge of American case law dealt<sup>3</sup> with the balance of power between national and state authorities.<sup>4</sup> This challenge was somewhat more complex than Publius' *imperium in imperio*. When Publius charged that the Antifederalists aimed at "things repugnant

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<sup>1</sup> David M. O'Brien, *Constitutional Law and Politics: Struggles for Power and Governmental Accountability*, 2<sup>nd</sup> ed., vol. 1 (New York: W.W. Norton & Company, Inc., 1995), 586.

<sup>2</sup> Jefferson's admonition that every twenty years the tree of liberty must be nourished with the blood of patriots and tyrants comes to mind.

<sup>3</sup> I use the past tense here because, as I will proceed to adumbrate in the course of this paper, the issue has been resolved to the detriment of the States.

<sup>4</sup> "The first difficulty which the Americans had to face was how to divide sovereignty so that the various states of the Union continued to govern themselves in everything to do with internal prosperity but so that the whole nation, represented by the Union, should still be a unit and should provide for all general needs. That was a complicated question and hard to resolve. . . . The duties and rights of the federal government were simple and easy to define because the Union had been formed with the object of providing for certain great general needs. But the rights and the duties of the governments of the states were many and complicated, for such a government was involved in all the details of social life. Therefore the attributes of the federal government were carefully defined, and it was declared that everything not contained within that definition returned to the jurisdiction of state governments. Hence state authority remained the rule and the federal government the exception"(Alexis de Tocqueville, *Democracy In America*, George Lawrence, translator and J. P. Mayer, editor [New York, NY: Harper & Row, 1969], 114-115.

and irreconcilable; at an augmentation of federal [i.e., national] authority without a diminution of State authority; a sovereignty in the Union and complete independence in the members,” he was being somewhat disingenuous. The use of a canard to place one’s political opponents on the defensive may be an effective rhetorical trick, but it is plain that the States did not seek to retain “complete independence” within the Union, as is amply evidenced by the delegation of certain powers to national authority [e.g., Article 1, section 8] and limitations to state authority [Article 1, section 10]. The States were not concerned with *imperium in imperio* per se, but with the constitutional ambiguity surrounding *imperium*. In other words, how were the States [the principals] to keep the central government [their respective agent] from usurping their sovereignties?

This concern may not have been constitutionally articulated for a variety of reasons, but there is no evidence that the States relinquished their sovereignty to the central authority. Significantly, according to common law as understood at the time of the Constitution’s ratification process, such a relinquishment was untenable. St. George Tucker<sup>5</sup> stated the obvious:

The powers delegated to the federal government being all positive, and enumerated according to the ordinary rules of construction, whatever is not enumerated is retained; for *expressum facit tacere tacitum* [that which is expressed makes that which is implied to cease] is a maxim in all cases of construction: it is likewise a maxim of political law, that sovereign states cannot be deprived of any of their rights by implication; nor in any manner whatever by their own voluntary consent, or by submission to a conqueror.<sup>6</sup>

There is ample evidence that the States retained ultimate sovereignty in the event of an irreconcilable conflict with the other States. As evidenced by Article V of the U.S. Constitution [the amendment article], among other constitutional provisions, the States are the constituent parts of the constitutional national compact; the States are the principals and the national government their agent. For example, three States conditionally acceded to the Union via their respective ratifications,<sup>7</sup> reserving to themselves the constitutional option to secede. Exercising such an option is the prerogative of sovereign authority, a prerogative acknowledged by the other States when they accepted conditional ratification. Conditional ratification and its acceptance by the other States stemmed from the political culture of the late 18<sup>th</sup> century was predominantly anti-centralization. The written national Constitution, checks and balances, separation of powers, the bill of rights, the amendment process, the absence of explicit national judicial supremacy are all stem from a political culture distrustful of central authority.

This raises an axiomatic question for the American constitutional order: In what manner and to what extent has the locus of sovereignty been modified in the American constitutional order?

## II

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<sup>5</sup> The credentials of St. George Tucker as an authority on the meaning of the Constitution are impeccable. In 1803 he published an expanded and annotated edition of William Blackstone’s *Commentaries on the Laws of England*. Tucker became known as the American Blackstone. Recent editors note that “For lawyers and scholars alike, *Tucker’s Blackstone* remains a key source for understanding how Americans viewed English common law in the years following the adoption of the Constitution and the Bill of Rights. Moreover, his work offers significant insights into the understanding of the meaning of the Constitution and the Bill of Rights at the time of their adoption. In *The Founders’ Constitution*, for example, Professors Philip Kurland and Ralph Lerner use passages from volumes one and two of Tucker to help explain the meaning of free speech, freedom of the press, and the right to petition. They also quote portions of Tucker to illustrate the contemporary meaning of the Second, Third, Fourth, and Tenth Amendments. In other volumes they cite Tucker to elucidate much of the rest of the Constitution” (*St. George Tucker’s Blackstone’s Commentaries*, Paul Finkelman and David Cobin, editors, [Union, NJ: The Lawbook Exchange, Ltd., 1996], i-ii).

<sup>6</sup> St. George Tucker, *View of the Constitution of the United States, With Selected Writings*, Clyde N. Wilson, ed. (Indianapolis, IN: Liberty Fund Inc., 1999), 94.

<sup>7</sup> The three States are Virginia, New York, and Rhode Island. See H. Newcomb Morse, “The Foundations and Meaning of Secession,” *Stetson Law Review*, vol. xv, (1986), 429.

It is not a zero-sum process, in which augmenting the national power necessarily results in a contraction of liberty. For example, individual liberty may be enhanced by a corresponding contraction of states' rights.<sup>8</sup> But it is a zero-sum process when states' rights are juxtaposed to national power. This does not mean that some States do not experience a boon to their liberty when national power is augmented. Nevertheless, when the US Supreme Court bestows its imprimatur of approval on national power it constitutionally<sup>9</sup> curtails states' rights. Whether the growth of national power is exclusive of or concurrent with that of the States, the States have correspondingly less power vis-à-vis the national government.<sup>10</sup> This is especially true if the national government determines the extent of its powers, the consent of the States notwithstanding. In other words, the agent becomes the principal.

How did this reversal of roles occur? When the constitutional tie that ultimately binds the union of States together was switched from consent to coercion, the nature of the Union was fundamentally altered. The individual States had to be constitutionally stripped of sovereignty and its locus shifted to the central authority.<sup>11</sup> The watershed development in this shift is the postbellum US Supreme Court case *Texas v. White*. It was this 1869 case that constitutionalized coercion as the epoxy of the Union, in contradistinction to the consent of the States.

At issue in *Texas v. White* was Texas's relationship to the Union. Or, more specifically, is the locus of sovereignty state or nation based? This issue is as old as the Constitution, but dissimilar from previous constitutional questions about national supremacy, judicial review, state nullification and interposition, all which were in the context of the States' continued memberships in the Union. The States acknowledged that membership in the Union curtailed a good portion of their sovereignty, but the curtailment was consensual insofar as membership in the Union was consensual. This is a significant qualification. National tyranny, soft and hard, that is contingent upon voluntary state membership in the Union is, peculiarly, consensual. Seceding from the Union would effectively arrest the national tyranny within the jurisdiction of the seceding State.<sup>12</sup> However, if membership in the Union is coercively maintained, then the bases of the US Government within the jurisdiction of the tyrannized State are accident and force and not reflection and choice.<sup>13</sup>

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<sup>8</sup> Supreme Court cases regarding religion (e.g., *Barnett v. WV*), speech (e.g., *Texas v. Johnson*), and travel (*Shapiro v. Thompson*) come to mind.

<sup>9</sup> I reluctantly use the adverb "constitutionally" due to confusing it with "legitimately". The Court may indeed determine what the law is, but its determination may be erroneous. Thus, if one agrees with C. J. Marshall that "[I]t is, emphatically, the province and duty of the judicial department, to say what the law is" (*Marbury v. Madison*), then compliance with an erroneous determination by the court is a non-issue. The court by definition cannot make erroneous decisions, unless the court concedes as much.

<sup>10</sup> Consider the *Cooley Doctrine*. The national and state governments may increase their respective involvements in regulating commerce, but any national involvement in regulating commerce is exclusive of state regulation, not to mention that the States must have the approval of national authority. See *Cooley v. The Board of Wardens, 1850* . . .

<sup>11</sup> Which model is most descriptive of central authority, e.g., elitism versus pluralism, is an important issue, but beyond the scope of this inquiry. Whether pluralistic or elitist does not change the fact that a State, or States, may be subjected to central authority its consent notwithstanding. The absence of consent by definition, if not result, implies the presence of coercion to either do or refrain from doing something one would otherwise not do or do.

<sup>12</sup> I do not mean to imply that for secession to be legitimate, it must be in response to tyrannical national policies. Perhaps such a step should not be taken for "light and transient causes," as the Declaration of Independence admonishes; nevertheless, as a state prerogative a State is not constitutionally precluded from seceding for less weighty reasons.

<sup>13</sup> As posited by Hamilton, "It has frequently been remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force" (*The Federalist Papers*, no. 1).

In the court's opinion C. J. Chase maintains that "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."<sup>14</sup> Chase's cliché hinges on a theory that potentially destroys not only the States, but also the Union of reflection and choice, i.e., consent. The "indestructible Union" is a substantial deviation from the feeble Union that predated the policies of the Lincoln Administration and subsequently incorporated into American case law. More than a matter of constitutional law, it was a product of American culture. As noted by Tocqueville,

The federal government therefore, in spite of the efforts of its founders, is, as I have said before, one of such naturally feeble sort that it requires, more than any other, the free support of the governed in order to survive. . . . If today the sovereignty of the Union was to come into conflict with one of the states, one can readily foresee that it would not succumb; I even doubt whether such a struggle would ever be seriously undertaken. Each time that determined resistance has been offered to the federal government, it has yielded. Experience has proven that up till now, when a state has been obstinately determined on anything and demanded it resolutely, it has never failed to get it; and when it has flatly refused to act, it has been allowed to refuse.<sup>15</sup>

Obviously the Union emerged from the civil war transformed. Tocqueville's antebellum portrayal of a feeble Union vis-à-vis the States is nondescript in postbellum America. This is not to say that states' rights were finished circa 1865. But it is to say that the groundwork, with constitutional sanction, had been laid for a dominant national government presiding over a union of subservient States. Chase's jurisprudence makes this quite evident.

In order to grasp its long-term significance, attention must be refocused in an area of American jurisprudence that the court did its best to transcend in 1869 and thereby *ipso facto* jettison from the American constitutional order. The area is that of political obligation as manifested in a redefinition of what constitutes a treasonable offense. Southern secession from the Union is in a class by itself and should not be equated with the reams of sedition statutes that clutter the US and state codes. First of all, sedition may be treasonable because it is essentially insurrection relying on unlawful (i.e., criminal) means to reach a political objective. And secondly, southern secession was predicated on the constitutional grounds that a State may constitutionally withdraw its political obligation from the union of States as organized under the United States Government. A State's withdrawal from the Union was, in the minds of the southern leadership, constitutional if certain procedural guidelines were adhered to. The intent of the guidelines was to ensure that secession was compatible with the republican principle of grounding government in the consent of the governed.

Was State secession treasonable? The court answered with a qualified yes. Its answer had to be qualified because of the constitutional safeguards against politically motivated convictions for treason.<sup>16</sup> The Constitution explicitly stipulates that "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."<sup>17</sup> If the court were to jurisprudentially equate secession with treason, then the state leaders, acting in their respective official state capacities, would have to be charged accordingly and afforded their constitutional rights. Moreover, not only would the trials be numerous, but many of the venues would have been in the old Confederacy. To surmount this difficulty, C. J. Chase devised a jurisprudence that sanctioned the Republican Party's war policies and a United States Government grounded in coercion in contradistinction to consent. To accomplish these results Chase had to revive the American common law definition of treason capable of sustaining such a government and its policies. Chase establish as case law precedence which all but precludes the ameliorating affects of voluntary association when the U.S.

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<sup>14</sup> Texas v. White, 725.

<sup>15</sup> Tocqueville, 368.

<sup>16</sup> These safeguards found their way into the US Constitution due, in large measure, to the abuses the colonists endured under the English system.

<sup>17</sup> Article III, section 3.

Government is seriously (i.e., not light and transient causes) confronted with regional and/or state challenges to its authority.

Texas v. White manifests an unprecedented disdain for popular control within the context of American federalism. In order to criminalize secession, the court had to convert state legislatures and conventions into *locus criminis* [the place where a crime was committed]. Consider Texas's actions on February 1, 1861. Consistent with the actions of her sister seceding States, the Texas convention approved the following ordinance:

To dissolve the Union between the State of Texas and the other States united under the Compact styled "The Constitution of the United States of America."

WHEREAS, the Federal Government has failed to accomplish the purposes of the compact of the union between these States, in giving protection either to the persons of our people upon an exposed frontier, or to the property of our citizens, and

WHEREAS, the action of the Northern States of the Union is violative of the compact between the States and the guarantees of the Constitution; and,

WHEREAS, The recent developments in Federal affairs make it evident that the power of the Federal Government is sought to be made a weapon with which to strike down the interests and property of the people of Texas, and her sister slave-holding States instead of permitting it to be, as was intended, our shield against outrage and aggression; THEREFORE,

SECTION 1.—We, the people of the State of Texas, by delegates in convention assembled, do declare and ordain that the ordinance adopted by our convention of delegates on the 4<sup>th</sup> day of July, A. D. 1845, and afterwards ratified by us, under which the Republic of Texas was admitted into the Union with other States, and became a party to the compact styled "The Constitution of the United States of America, be, and his hereby, repealed and annulled; . . .<sup>18</sup>

The court maintained that the steps taken by Texas on the path to secession and membership in the Confederate States of America were the actions of an insurgent legislature engaged in rebellion.<sup>19</sup> The axioms of insurgency and rebellion are mostly assertions that the reader must accept these axioms as articles of faith in contradistinction to fundamental principles of American constitutionalism arrived at through thoughtful and reasoned legal argumentation. Albeit, C. J. Chase does recount the chronology of events and concedes that "acting upon the theory that the rights of a State under the Constitution might be renounced, and her obligations thrown off at pleasure, Texas undertook to sever the bond thus formed [when Texas was admitted into the Union as a State on 27 December 1845], and to break up her constitutional relations with the United States. . . . In all respects, so far as the object could be accomplished by ordinances of the conventions, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them."<sup>20</sup> Nevertheless, Texas's secession and subsequent membership in the CSA were constitutionally impermissible because the "perfect Union" is indissoluble.<sup>21</sup>

### III

On what grounds were Texas's actions unconstitutional and the Lincoln Administration's constitutional? Throughout Chase's court reasoning the constitutional grounds shift to the point where the

<sup>18</sup> The ordinance was ratified on 23 February 1861 by a vote of 46,153 to 14,747.

<sup>19</sup> Texas v. White, 718.

<sup>20</sup> Texas v. White, 722, 724.

<sup>21</sup> Texas v. White, 725.

foundation of original federalism crumbles into a heap from which unitary nationalism will be subsequently constructed.

First and foremost, there is no jurisprudential precedent for state secession. In other words, the court never had to adjudicate the constitutionality of it. This is not to say that there was a paucity of ideological and theoretical ruminations that addressed the issue. The closest the court came to the issue was in the 1849 *Luther v. Borden*<sup>22</sup> case, which Chase relies on for “guaranty clause” precedent. However, his reliance on the “guaranty clause” as articulated in that case is disingenuous. Nevertheless, Chase had to find a constitutional rationale for (a) Reconstruction policies as presidential and congressional prerogatives, (b) denoting the actions of state secessionists as treasonable and their official acts non-enforceable, and (c) the displacement of consent by coercion as the glue of the Union. Section 4 of Article IV was his most practical hook, even though it breaks under the weight of unbiased scrutiny.

(a) First, Article IV, section 4 stipulated “The United States shall guarantee to every State **in this Union** a Republican form of government.” But Chase ignored the obvious, that Texas ceased to be in the Union and therefore the guaranty clause ceased to be operative in Texas. Second, section 4 stipulates “and shall protect each of them against Invasion.” The only “invading forces were those of the Union Army. And third, section 4 stipulates “and on the Application of the Legislature, or of the Executive . . . against domestic violence.” No such application was forthcoming from Texas, because from the Texan perspective there was no domestic violence that necessitated national intervention.

Nevertheless, Chase ruled that “In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.”<sup>23</sup> According to Chase, presidential and congressional policies in Texas (and the rest of the subjugated Confederacy) were constitutional because legitimate republican government had been displaced by non-republican government.

(b) Relying on *Luther v. Borden*, Chase maintained that it is the responsibility of the Congress to determine whether or not a state government is republican.<sup>24</sup> The fact that Texas failed to apply for the assistance of the national government in securing a republican form of government is of greater significance than if it had. This failure on the part of Texas is of greater weight vis-à-vis the guaranty clause, because it is evidence that she had been “deprived of all rightful government, by revolutionary violence.”<sup>25</sup>

But according to C. J. Taney, seceding Texas did have a republican form of government. Taney ruled that under Article IV, section 4, “it rests with Congress to decide what government is the established one in a State. . . . and whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as

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<sup>22</sup> *Luther v. Borden* concerns the constitutional meaning of Article IV, section 4’s “guaranty clause” [“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on the Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence) in light of the 1842 Dorr Rebellion in Rhode Island. Dorr and his supporters (primarily from growing urban centers) held a convention, elections, and established a state government in protest against the recalcitrant incumbent government (dominated by rural interests) governing under the Charter of Charles II, albeit occasionally modified by the state legislature. Martial law was declared by the incumbent governor and hence the litigation [*Luther v. Borden* a Dorr partisan and *Borden v. Dorr* a state militiaman enforcing martial law].

<sup>23</sup> *Texas v. White*, 729.

<sup>24</sup> *Texas v. White*, 730.

<sup>25</sup> *Texas v. White*, 730.

well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.”<sup>26</sup>

Significantly, senators and congressmen voluntarily resigned from their respective seats in the US Senate and House, in contradistinction to being disqualified because the “authority of the government under which they [were] appointed” was determined to be non-republican by the Congress. US Senator Wigfall (TX) adumbrated the same to his Senate colleagues on March 7, 1861, several weeks after Texas officially seceded. After acknowledging that South Carolina, Georgia, Florida, Alabama, Texas, and Louisiana had revoked the powers delegated to the US Government,<sup>27</sup>

You must withdraw your troops; take your flag out of our country; allows us the right of self-government; enter into treaties with us afterwards or not, as you see fit; but you must do that or make up your minds to have war—war in its sternest aspect, and with all its consequences. You must make no attempt to levy tribute upon us . . . . Mr. President, I have tried to explain, several times, the position which I occupy. I am not officially informed that the State which I represent has abolished the office of United States Senator. When I am so advised officially, I shall file at your desk that information; and then if, after being so informed, you shall continue to call my name, I will answer, probably if it suits my convenience...<sup>28</sup>

By the US Supreme Court’s own legal standard, Texas was led out of the Union and into the Confederacy by a republican government, otherwise Senator Wigfall would have been disqualified from office. Furthermore, as evidenced by Wigfall’s remarks on the floor of the US Senate, his continued participation in Senate business was at the discretion of Texas.

In its exposition of the proceedings, the Texas Convention maintained that “[a]s a remedy against Executive dictation in our State (ala Governor Sam Houston) and against a ruinous administration of the Federal government (ala the Lincoln Administration), the people had but one mode of action; that was prescribed by, and for themselves, in the declaration of rights in our State Constitution, as follows: Section 1. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have, at all times, the inalienable right to alter, reform or abolish their form of government, in such manner as they may think expedient.”<sup>29</sup>

All the procedural safeguards taken by Texas notwithstanding, C. J. Chase asserted that the purposes of Texas’s secession and subsequent defensive posture towards the Union was to avoid its obligations to the national government and to wage war against the United States to achieve that end.<sup>30</sup> Accordingly, these actions were treasonable and left Texas without a legitimate government. Hence, under the guaranty clause the national government could do whatever it deemed to be necessary and proper to restore Texas to its constitutional relations to the United States.<sup>31</sup> The underlying premise of Chase’s reasoning is that whether or not a State has a republican form of government is contingent upon its membership in the Union.

However, many of Texas’s official acts were declared by the court to be valid, such as those “necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyances and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government.” Those which are invalid

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<sup>26</sup> *Luther v. Borden*, 42.

<sup>27</sup> *The Congressional Globe*, March 15, 1861, p. 1441. On March 2, 1861, The C.S.A. Congress admitted Texas into the C.S.A. (*Acts And Resolutions of the First Session of the Provisional Congress of the Confederate States, Held at Montgomery, Ala.* [Richmond: Enquirer Book and Job Press], p. 67).

<sup>28</sup> *The Congressional Globe*, March 15, 1861, p. 1442.

<sup>29</sup> The Constitution of the State of Texas As Amended in 1861: Address to the People, Austin, March 30, 1861, p. 4.

<sup>30</sup> *Texas v. White*, 727-728.

<sup>31</sup> *Texas v. White*, 729.

include all “acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature.” The latter type is constitutionally invalid because it is “within the express definition of the Constitution, treasonable.”<sup>32</sup> Not, however, according to St. George Tucker’s commentary. Chase’s assertion that Texas engaged in treason is unsupported by precedent. According to Tucker,

Were an armed multitude, arrayed in order of battle, to enter and burn the city of Richmond, destroy all the public records of the state, and commit every other possible outrage, aggravated with every atrocious circumstance imaginable, if their intention in so doing, should neither be to subvert the constitution of the United States, nor effect any object in relation to the authority of the federal government, such conduct, though, though in the strictest sense it might amount to actual levying war, would only amount to treason against the *state of Virginia*, but could never be treason against the United States. For treason against the *latter*, shall consist only in levying war against THEM, &c. Nor can it be pretended that the levying war against the authority of any individual state, within the same, would be levying war against the United States in any case; except in case of insurrection or rebellion, such state should make application to the United States for such aid as the constitution guarantees to them in such cases: after which if the opposition should extend to the authority of the *United States*, it seems that the treason would also extend to *them*.<sup>33</sup>

The extreme scenario used by Tucker to exemplify what constitutes treason against the United States is in stark contrast to the relatively orderly procedures used by Texas to withdraw from the Union and align itself with the Confederacy. If Tucker’s hypothetical does not constitute treason against the United States, how could the 1861 actions by Texas constitute treason?

(c) Declaring Texas’ secession and its “rebellion against the United States” to be the act of an “insurgent government,”<sup>34</sup> the United States government was authorized to suppress the rebellion and restore to Texas a state government with “peaceful” [i.e., subservient] relations to the United States. Elevating to constitutional status nationalist ideology, he posited “What can be indissoluble if a perpetual Union, made more perfect, is not?”<sup>35</sup>

From this premise, Chase leads American jurisprudence away from its historical roots of popular control and consent within the context of traditional federalism, and into the implacable realm of empire:

The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States. When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guarantees of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the **incorporation** of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through the consent of the States.<sup>36</sup>

By the stroke of his pen, the original thirteen and all the subsequently admitted States are, for all intents and purposes, merged into one consolidated domain. [In civil law, “incorporation” is the union of one domain to another (Black’s Law Dictionary, Fourth Edition).]

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<sup>32</sup> Texas v. White, 733.

<sup>33</sup> St. George Tucker, 22.

<sup>34</sup> Texas v. White, 734.

<sup>35</sup> Texas v. White, 725.

<sup>36</sup> Texas v. White, 725-726 (emphasis not in original).

Moreover, by redefining the term “state”, Chase makes consolidation inevitable: “A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country.”<sup>37</sup>

Hence, because Texas was incorporated into the Union, secession was the criminal action of rebels, having no legal legitimacy. “If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.”<sup>38</sup>

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<sup>37</sup> *Texas v. White*, 721. Contrast this definition with C. J. Marshall’s (as cited by J. Grier, 737-738): “[T]he word state is used in the constitution as designating a member in the union, and excludes from the term the signification attached to it by writers on the law of nations.” C. J. Marshall concluded that the word state in the US Constitution cannot be used in the enlarged sense, not even to allow citizens in the District of Columbia access to US Courts, which is limited to aliens and citizens of every state (*Hepburn and Dundas v. Ellzey*, 1805, pp. 452-453).

<sup>38</sup> *Texas v. White*, 726. In his dissent, Justice Grier implies as much: “The ordinance of secession was adopted by the convention on the 18<sup>th</sup> of February, 1861; submitted to a vote of the people, and ratified by an overwhelming majority. I admit that this was a very ill-advised measure. Still it was the sovereign act of a sovereign State, and the verdict on the trial of this question, “by battle,” as to her right to secede, has been against her”(*Texas v. White*, 740).