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Secession, Then and Now

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Alison L. LaCroix, *Continuity in Secession: The Case of the Confederate* Constitution (forthcoming), available at SSRN.

Secession has been back in the news of late. Hundreds of thousands of individuals across the country signed petitions seeking permission for their states to leave the United States after President Obama's reelection; Governor Perry riffed on Texas's departure from the Union "if Washington continues to thumb their nose at the American people"; and members of the Second Vermont Republic insist the Green Mountain State would be better off alone. Overseas, a bid for Scottish independence from the United Kingdom nearly prevailed last fall.

A curious feature of many contemporary secessionist movements is their claim to represent the real nation-state from which they seek to depart. The paradigmatic secession case involves a self-consciously distinct national group trying to throw off the yoke of the state encompassing it. But many of today's movements instead embrace the nation-state they would leave behind, insisting they are truer to its founding principles than the current regime. Alison LaCroix's provocative and illuminating essay, *Continuity in Secession: The Case of the Confederate Constitution*, not only sheds light on the most important secessionist movement in American history, but also offers new purchase on this feature of contemporary law and politics.

LaCroix's account of Confederate constitutionalism is valuable in its own right. In a challenge to the prevailing understanding of the Confederacy as a bastion of states' rights, she first builds on recent scholarship exploring the substantial similarity of the United States Constitution and the Confederate Constitution, including with respect to centralization. The Confederate Constitution envisioned a strong Confederate Congress empowered by a Commerce Clause, Necessary and Proper Clause, and Supremacy Clause. There were, to be sure, state-sovereignty-enhancing changes in the document, including the preamble's nod to compact theory, limits on the central government's taxing power, and a restriction on appropriations for internal improvements (perhaps a strange emphasis for twenty-first century readers, but one of the critical questions of nineteenth-century federalism). Overall, however, it is difficult to place the U.S. Constitution of 1861 alongside the Confederate Constitution of 1861 and not wonder, as David Currie once did, whether "Southern statesmen had no objection to a strong central government after all [but] only wanted to run it themselves." Indeed, in making theirs an expressly pro-slavery constitution, Confederate drafters centralized authority over slavery to a much greater degree than the U.S. Constitution had.

Still more interesting than LaCroix's discussion of the Confederate and U.S. Constitutions is her account of Confederate constitutional interpretation. Confederate leaders not only copied provisions from the founding document of the country they sought to leave, but also interpreted their Constitution as a seamless continuation of the U.S. Constitution. They understood themselves to have inherited modes of interpretation, and particular constitutional interpretations, from the United States and cast their project as constitutionally preservative and—insofar as it differed from the extant text—redemptive of the founders' Constitution. "The Confederate mode of constitutionalism," LaCroix writes, was "consciously intertemporal and inter-regime."

An especially intriguing example of such inter-regime constitutionalism concerns the interpretation of the Confederacy's Recess Appointments Clause. Did the "vacancies" it referred to have to come into existence during a recess (a question the Supreme Court answered in the negative just last Term with respect to the U.S. Constitution)? Reasoning that the text of the Clause, a near replica of the U.S. Constitution's Recess Appointments Clause, was best read to apply only to those vacancies that occurred during a recess, Confederate Attorney General Watts nonetheless adopted the contrary interpretation because of U.S. government practice. The construction of the text by U.S. Attorneys

General as extending to vacancies that arose before as well as during a recess had, Watts insisted, become “a part of our Constitution” as well.

LaCroix explores the Confederacy as a case study of constitutionalism in what she has called the “long founding moment.” Her essay also might help constitutional lawyers think more richly about the secession talk that surrounds us today and the ways in which federalism both elicits and tames secessionist impulses. Just as Southern leaders argued that the Confederacy represented the original U.S. Constitution and the true principles of the American Revolution, contemporary secession movements frequently frame their claims in terms of vindication: instead of emphasizing their inherent difference from the nation-state they seek to leave, they argue that they are truer to its foundational principles than the current regime. This, too, is a form of continuity in secession.

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