In November 1860, Abraham Lincoln was elected as President of the United States. His election sparked the secession of seven southern states prior to his inauguration on 4 March 1861. Lincoln’s call for troops to suppress the rebellion of these states prompted four more southern states to secede in April and May of 1861. Why these eleven states seceded has been a much debated issue in American history ever since. Undoubtedly the issue of slavery lies at the heart of the matter. Lincoln’s election raised fears in the South that, sooner or later, the economy and way of life that was underpinned by ‘the peculiar institution’ risked being dismantled if the southern slave states remained part of the United States. Whatever the causes of the American Civil War may have been, the fact remains that the eleven seceding states claimed that they had a right to secede, whilst Lincoln’s administration believed that no such right existed and further, that it was its duty to preserve the Union by all means necessary, including the use of force.

On 15 April 1869, in the case of Texas v White, the Supreme Court of the United States, in a majority decision, declared that the United States was ‘an indestructible Union, composed of indestructible States’. The majority opinion, written by Chase

---

* BA, LLB, PhD (Syd), Associate Professor in Law, Centre for Comparative Law, History & Governance, Macquarie University. The author thanks Professors Paul Kens and Mark Brandon and an anonymous reviewer for their valuable comments and suggestions on an earlier draft of this article.

1 For an account of the secession conventions in the eleven states that seceded and the four states that voted not to secede, see Ralph A Wooster, The Secession Conventions of the South (1962).

2 In this respect the Lincoln administration differed from that of its predecessor in that President James Buchanan took the view that, although the secession of southern states was illegal and unconstitutional, the federal government had no power to use force to prevent these states from leaving the Union: James Buchanan, ‘Fourth Annual Message’, 3 December 1860, in John Bassett Moore (ed), The Works of James Buchanan, Volume XI, 1860-1868 (1960) 7, 10-19.

3 Texas v White, 74 US 700 (1869).

4 Ibid 725. The decision in Texas v White was preceded by Chase CJ’s circuit duty decision in 1867, in which he ruled that North Carolina’s secession declaration and ordinance ‘did not effect, even for a moment, the separation of North Carolina from the Union’: Shortridge v Macon, 22 F Cas 20, 21 (1867).
CJ, with its emphatic denial of the right of secession claimed by the seceding states, has been widely accepted as being the final word on the issue of the legality of secession from the perspective of American constitutional law. Thus, on the basis of *Texas v White*, Professor Cass Sunstein has asserted that ‘no serious scholar or politician now argues that a right to secede exists under American constitutional law’.6

This article will critically analyse the decision in *Texas v White*. The analysis will suggest that the question of secession and American constitutional law is more complex than Sunstein’s comment suggests.

**THE DECISION IN *TEXAS V WHITE***

In February 1867 the reconstruction administration in Texas initiated proceedings in the United States Supreme Court for the recovery of bonds that had been sold during the course of the Civil War to White and Chiles by the secessionist administration in Texas, on the ground that the sale was illegal. The sale had been effected pursuant to legislation passed by the secessionist Texan legislature in 1862.7 For Texas to succeed, it had to first establish that the Supreme Court had jurisdiction to hear the dispute. Pursuant to Article III Section 2, Clause 1 of the Constitution of the United States (the Constitution), the Court only had jurisdiction if the case was one ‘between a State and Citizens of another State’. The critical question confronting the Court was whether, for the purposes of this constitutional provision, Texas was a state at the time the case was initiated and heard. If it was not, then the Court was bound to dismiss the case for lack of jurisdiction. If it was, the Court had jurisdiction to deal with the merits of the dispute.

In resolving the jurisdictional issue the Court had to deal with the legal effect of secession. In particular, did the secession of Texas in 1861 and the passing of political power in that state to persons who no longer recognised the authority of the

---

5 The majority opinion, which Chase CJ regarded as ‘the greatest case in which he figured while on the bench, and, likewise, the opinion as the greatest he ever wrote’: William Whatley Pierson, Jr, *Texas versus White, A Study in Legal History* (1916) 40, was subsequently reiterated by the Supreme Court in *White v Hart*, 80 US 646, 650-1 (1871); *Keith v Clark*, 97 US 454, 461-2 (1878); *Poindexter v Greenhow*, 114 US 270, 290-1 (1885).


United States, its Constitution and the federal government elected pursuant to it, mean that Texas had ceased to be a state of the United States?

In answering this question, Chase CJ asserted that, following its admission to the United States in 1845, Texas became part of ‘an indestructible Union, composed of indestructible States’, and that ‘the union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States’. In practical terms this meant that Texas had never seceded from the United States. Thus, notwithstanding the acts of secession ‘Texas continued to be a State, and a State of the Union’.

Although Texas had never left the United States as a matter of law, this did not, however, mean that her rights with respect to the United States remained unaltered during the time she was controlled by a secessionist government. Being hostile to the government of the United States meant that Texas was not entitled to representation in Congress. Nor was she entitled to bring an action before the Supreme Court. According to Chase CJ, such ‘rights of the State [of Texas] as a member [of the Union], and of her people as citizens of the State, were suspended’.

However, the case before the Court was one in which the proceedings were initiated and prosecuted by the reconstruction governments of Texas. According to Chase CJ, following the collapse of the secessionist government in Texas in 1865, it was the ‘duty of the United States to provide for the restoration of … a government [in Texas]’. The authority to do this was to be found in Article IV, Section 4 of the Constitution (the Guarantee Clause) which stipulates that ‘The United States shall guarantee to every State in this Union a Republican Form of Government’. Chase CJ noted that the Presidential Proclamation of 1865 and the subsequent Congressional Reconstruction Acts of 1867 were the means by which the Guarantee Clause was implemented in the relation to Texas. The various governors exercising power in Texas during this period ‘exercised executive functions and actually represented the State in the executive department’. Because these governors had agreed to the initiation and continuation of the proceedings before the Court, this was, according to Chase CJ, sufficient to conclude that ‘the suit was instituted and prosecuted by competent authority’.

Having thus resolved the jurisdictional issue in favour of the reconstruction government of Texas, the majority opinion turned to the merits of the case. This

---

8 Texas v White, above n 3, 725.
9 Ibid 726.
10 Ibid.
11 Ibid.
12 Ibid 729.
13 Ibid 732.
14 Ibid.
15 The dissenting minority opinion of three judges was given by Grier J, who ruled that the question of whether Texas was a state was ‘to be decided as a political fact, not a legal
led Chase CJ to consider the effect of legislation passed by the secessionist administration in Texas. He noted that any such legislation that addressed issues relating to the ‘peace and good order among citizens’ was valid. This included legislation relating to things such as marriage, conveyancing and property transfer, and remedies for the victims of personal injuries. However, legislation whose purpose it was to provide for, and support, the war effort against the United States was invalid.\textsuperscript{16} The 1862 Texas legislation was found to be in the latter category, with the consequence that ‘the title of the State [to the bonds] was not divested by the act of the insurgent government in entering into [the] contract [with White and Chiles]’.\textsuperscript{17} Thus, Texas was entitled to the recovery of the bonds.

The critical part of Chase CJ’s opinion for present purposes is that dealing with the illegality of the secession of Texas, and in particular, the basis upon which he reached that conclusion. In a passage described by one scholar as ‘the most eloquent passage in the opinion’ and ‘an adornment to legal literature’,\textsuperscript{18} Chase CJ said:

\begin{quote}
It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to ‘be perpetual.’ And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained ‘to form a more perfect Union.’ It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that ‘the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,’ and that ‘without the States in union, there
\end{quote}

\textsuperscript{16} Ibid 733.
\textsuperscript{17} Ibid 734.
\textsuperscript{18} Pierson, above n 5, 45.
could be no such political body as the United States.\textsuperscript{19} Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. 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 guaranties 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 consent of the States.\textsuperscript{20}

This passage clearly rules that the \textit{unilateral} secession of a state from the United States is illegal and unconstitutional. This is clear from the first sentence of the passage which situates the rulings in the following paragraphs as to the indissoluble and indestructible nature of the Union in the context of an attempt by a state to secede ‘for any cause, regarded by herself as sufficient’. Furthermore, Chase CJ’s statement in the final sentence of the quoted passage recognizing that secession can occur as the result of ‘revolution’ or ‘the consent of the states’, clearly implies that the preceding paragraphs are confined to unilateral secession.\textsuperscript{21}

\textbf{SECESSION AS A REVOLUTIONARY ACT}

The recognition of revolution by Chase CJ was not novel. The Declaration of Independence of 4 July 1776, which announced the secession of thirteen British colonies in America from Great Britain,\textsuperscript{22} had asserted the right of people to ‘abolish or alter their governments as to them shall seem most likely to effect their safety and happiness’.

\textsuperscript{19} \textit{Lane County v Oregon}, 74 US 71, 76 (1869).
\textsuperscript{20} \textit{Texas v White}, above n 3, 724-6.
\textsuperscript{21} In relation to this sentence, William Pierson has written: ‘There was in this sentence a curious inconsistency of reasoning which destroyed the logical finality of the conclusions which Chief Justice Chase had drawn from the preambles of the Articles of Confederation and the Constitution respecting the perpetuity and indissolubility of the Union. There was after all a way by which the Union could be broken up’: Pierson, above n 5, 58. This comment is perhaps somewhat harsh, given that Chase CJ had prefaced his remarks by placing them in the context of a state seeking to unilaterally secede from the United States.
\textsuperscript{22} Although not often discussed in terms of secession, Buchanan is correct when he writes that, in essence, ‘the American Revolution was a successful attempt by a part of the British Empire ... to secede from that empire’: Allen Buchanan, \textit{Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec} (1991) 69.
It has been suggested by scholars that there exists a revolutionary right of secession, although one that is circumscribed by the requirement that the revolution be pursuant to a morally just cause or grievance. They have argued that the secession of the eleven southern states in 1860-1861 did not meet this requirement because the secessionist cause was the perpetuation of the institution of slavery.23

In the context of the Civil War, Lincoln and the radical abolitionist William Lloyd Garrison also supported the view that the secession of southern states could not be justified pursuant to a revolutionary right to secession because the southern states had no moral justification for secession.

For Lincoln the lack of a moral justification for secession was based upon his belief that secession amounted to an attack on a system of constitutional democracy that would, if not thwarted, ‘put an end to free government upon the earth’.24 Lincoln did not articulate the issue of morality by reference to its absence from the cause of the Confederate states, but rather by asserting the moral right of the Northern states to suppress the secession of the eleven southern states.25 Unlike Garrison, Lincoln could not make slavery the basis of a moral argument against secession. Although Lincoln made it clear that he thought slavery was morally wrong, he was elected to the presidency on a platform whose policy on slavery was confined to opposing its extension into the territories.26 Lincoln conceded that his administration had neither the power nor the intention to abolish slavery in states where it existed.27 Indeed, he declared that he had no objections to a constitutional amendment that would have

---

25 Lincoln’s pre-requisite of a morally justifiable cause was set out in the manuscript version of this message to Congress, but was not included in its final form: Thomas J Pressly, ‘Bullets and Ballots: Lincoln and the ‘Right of Revolution’ (1962) 67 *American Historical Review* 647, 659.
26 See for example ‘Address to Cooper Institute, New York City’, 27 February 1860, in Lincoln, above n 24, 241, 251; ‘Speech at New Haven, Connecticut’, 6 March 1860, in Lincoln, above n 24, 256-7, 260; ‘Letter to Alexander H Stephens’, 22 December 1860, in Lincoln, above n 24, 275. Cullen has argued that ‘Lincoln was not opposed to slavery because he cared very much about slaves. He was opposed because he cared very, very deeply about whites (and unlike some of his fellow Republicans, he cared about all whites). Slavery was bad for them. And it was bad because it contaminated and, if left unchecked, would eventually destroy the American Dream [of upward mobility] in which he believed so deeply’: Jim Cullen, *The American Dream, A Short History of an Idea That Shaped a Nation* (2003) 84. Cullen supports this interpretation by reference to Lincoln’s July 1861 ‘Message to Congress in Special Session’, where Lincoln observed: ‘This is essentially a people's contest. On the side of the Union it is a struggle for maintaining in the world that form and substance of government whose leading object is to elevate the condition of men; to lift artificial weights from all shoulders; to clear the paths of laudable pursuit for all; to afford all an unfettered start and a fair chance in the race of life. Yielding to partial and temporary departures, from necessity, this is the leading object of the Government for whose existence we contend’: ‘Message to Congress in Special Session’, 4 July 1861, in Lincoln, above n 24, 313.
27 ‘First Inaugural Address’, 4 March 1861, in Lincoln, above n 24, 284.
explicitly protected slavery in states where it existed. Lincoln’s view on slavery in the context of the Civil War was aptly expressed in his letter to Horace Greeley in August 1862 where he wrote:

My paramount object in this struggle is to save the Union, and it is not either to save or to destroy slavery. If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do not believe it would help to save the Union.

Although the existence of slavery did not provide Lincoln with a moral basis for rejecting a revolutionary right of secession by the southern states, it did for Garrison. During the ante-bellum period, the issue of slavery provided the moral foundation for Garrison’s argument in favour of secession from the Union by non-slave states. In the inaugural issue of The Liberator, the principal vehicle for dissemination of his abolitionist program, Garrison invoked the Declaration of Independence and its assertion that ‘all men are created equal’. In 1843 he referred to the Constitution as ‘a covenant with death, and an agreement with hell’ that ‘should be immediately annulled’. Garrison’s consistent call for the secession of the northern, non-slave states is reflected in a speech he made on 5 March 1858 in which he said:

We shall be told that [disunion] is equivalent to a dissolution of the Union. Be it so! Give us Disunion with liberty and a good conscience, rather than Union with slavery and moral degradation.
The problems with the views of Lincoln and Garrison are two-fold. The first is with characterising revolution in this context as a right. The second is to then qualify that right. A revolution is fundamentally a question of fact. To characterise what is fundamentally a question of fact as a right is to misrepresent the essence of revolution. The misrepresentation is compounded by imposing restrictions upon the exercise of this alleged right based upon notions of morality. It is difficult to see why the exercise of that right is conditional upon there being a morally justifiable cause. A revolution either succeeds or fails. No other factors are relevant.

The brief reference to revolution by Chase CJ in *Texas v White* does not err by referring to revolution as a right. In asserting that Texas could secede ‘through revolution’, Chase CJ was not asserting the existence of any right to revolution. Rather, he was seeing revolution for what it is, namely, a process, which either succeeds or fails, irrespective of considerations of morality.

Chase CJ’s approach to revolution was endorsed eight years later in the case of *Williams v Bruffy*, where the Supreme Court discussed the validity of acts ‘where a portion of the inhabitants of a country have separated themselves from the parent State and established an independent government’. Speaking for a unanimous Court, Field J said:

> The validity of its acts, both against the parent State and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed, and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation.

### Secession by Consent of the States

Chase CJ recognised that secession of a state could occur ‘through consent of the States’. By this he meant consent of all of the states of the United States. However, such a requirement would be virtually impossible to achieve as was recognised at the Constitutional Convention of 1787 in relation to the requirement of unanimity in relation to the amendment of the Articles of Confederation and Perpetual Union (Articles of Confederation). Such a requirement would only encourage the revolutionary means of achieving secession. Because revolutions have a tendency towards violence the requirement of consent from all of the states has little appeal.

---

34 *Williams v Bruffy*, 96 US 176 (1877).
36 Ibid.
37 In the earlier decision of *Lane County v Oregon*, above n 19, 76, Chase CJ had said that ‘The States disunited might continue to exists’, which clearly meant that the United States was not indissoluble.
38 The Articles of Confederation were approved by the delegates of the thirteen former colonies on 15 November 1777, and come into effect when ratified by the last of them on 1 March 1781. The amendment provision was set out in Article XIII.
The ‘consent of the States’ requirement could, however, be taken to mean the consent to a constitutional amendment approved by three-quarters of the states as set out in Article V of the Constitution.\(^{39}\) This approach is the one suggested by Lincoln in his First Inaugural Address.\(^{40}\) Given the seriousness of the act of secession, there is much to be said in favour of processing it through a constitutional amendment. However, Article V stipulates that a constitutional amendment needs to be proposed by a resolution passed by a two-thirds majority of both houses of Congress or by the legislatures of two-thirds of the number of states. This represents an almost impossible political hurdle for any state wishing to secede.

It is suggested that in this context there is much to be gained from adopting the approach of the Canadian Supreme Court set out in its 1998 decision in Reference re: Secession of Quebec.\(^{41}\) In that case it was held that, following a referendum in which a clear majority of a Canadian province’s voters voted in favour of a clearly worded question on secession, there would arise an obligation for negotiations to be entered into with a view to reaching agreement on a proposed constitutional amendment to facilitate the secession of the relevant province. In the context of the United States, if such negotiations were successful, the proposed amendment would require the approval of three-quarters of the states for the secession to be legal.

On the question of whether, in the American context, a referendum on secession could trigger a lawful secession, Akhil Reed Amar has suggested that Lincoln may well have had no alternative but to accept the legality of secession supported by the people as evidenced by a (legally non-binding) national referendum. This was because, ‘in a regime based upon the people’s ultimate sovereignty’ such a referendum would have carried ‘great moral weight with those government actors … ordinarily involved in the amendment process’.\(^{42}\) According to Amar, ‘[c]onceivably, both Article V amendments and national referenda might have aimed to authorize a wholly lawful and peaceful secession’.\(^{43}\) However, Amar’s speculation does not countenance any possible legitimacy flowing from a referendum within a single state in favour of secession.

\(^{39}\) Louise Weinberg takes the view that Texas v White established the proposition that ‘a state could no more unilaterally leave the Union than it could unilaterally amend the Constitution for any other purpose’: Louise Weinberg, ‘Fear and Federalism’ (1997) 23 Ohio Northern University Law Review 1295, 1309.

\(^{40}\) ‘This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government they can exercise their constitutional right of amending it’: ‘First Inaugural Address’, 4 March 1861, in Lincoln, above n 24, 291.


\(^{43}\) Ibid.
AN INDESTRUCTIBLE UNION: AN EVALUATION OF CHASE CJ’S REASONING

In his opinion in *Texas v White*, it is clear that Chase CJ, in variously describing the United States as an ‘indestructible’ or ‘perpetual’ or ‘indissoluble’ union, is using those adjectives interchangeably. If, as has been suggested above, these words stand for the proposition that a unilateral secession by a state from the United States is illegal and unconstitutional, it is necessary to evaluate the reasons Chase CJ offered to underpin that proposition.

According to Chase CJ, the nature of the United States as ‘an indestructible Union’ is established by reference to Article XIII of the Articles of Confederation, which declared that the United States union was to be ‘perpetual’, and the Preamble to the Constitution, which states that the Constitution was proclaimed in order to ‘form a more perfect union’.

In evaluating Chase CJ’s reasoning in *Texas v White* two matters need to be addressed. First, there is the question of whether the provisions of the Articles of Confederation and the Constitution do support the proposition that the United States is ‘an indestructible Union’. Second, if these provisions do not support the proposition, it must be asked whether there was any alternative argument in support of the proposition and, if so, why Chase CJ did not make use of such an argument.

The notion of the United States being a perpetual or indestructible union was one of the arguments used by American nationalists against the right of secession, especially after 1830. Prior to then there was widespread acceptance across the American political spectrum of the right of unilateral secession and secession was often threatened by various states over a variety of issues.44 Thus, various New England states threatened secession during the presidencies of Thomas Jefferson and James Madison over issues such as the Louisiana Purchase and the war with Great Britain that broke out in 1812.45 On the other hand, the imposition of taxes by the federal government in 1800 in relation to a threatened war with France saw Virginia and North Carolina seriously contemplating secession.46

In his First Inaugural Address on 4 March 1801, President Thomas Jefferson said:

---

44 It can be observed that three states, Virginia, New York and Rhode Island, in their ratifications of the Constitution asserted the right to leave the Union if the central government became oppressive. Malone has written that in the late 1790s that ‘there was nothing particularly startling in the idea that the Union was dissoluble, and threats against it were common’: Dumas Malone, *Jefferson and the Ordeal of Liberty* (1962) 421.


46 McDonald, above n 45, 39-40.
If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed.47

In the first extended and systematic analysis of the United States Constitution, published in 1803, in relation to the American states, St George Tucker wrote:

Their obligation ... to preserve the present constitution, is not greater than their former obligations were, to adhere to the articles of confederation; each state possessing the same right of withdrawing itself from the confederacy without the consent of the rest, as any number of them do, or ever did, possess. ... To deny this, would be to deny to sovereign and independent states, the power which, as colonies, and dependent territories, they have mutually agreed they had a right to exercise, and did actually exercise, when they shook off the government of England, first, and adopted the present constitution of the United States, in the second instance.48

In 1829, in the first published college or law school textbook on American constitutional law, William Rawle recognised the right of a state to secede from the Union.49

In his observations on America of the early 1830s, Alexis de Tocqueville wrote:

If one of the states chose to withdraw its name from the contract, it would be difficult to disprove its right of doing so, and the federal government would have no means of maintaining its claims directly, either by force or by right.50

In early 1830 Daniel Webster provided an important boost for the notion of a perpetual union during the celebrated Webster-Hayne debate in the United States Senate.51 In his first speech of the debate Webster said:

51 Stampp, above n 50, 28-9. For an argument that the idea of perpetuity was prominently voiced well before the 1830s by the early Federalists see Andrew C Lenner, The Federal Principle in American Politics, 1790-1833 (2001) 22-3.
I confess I rejoice in whatever tends to strengthen the bond that unites us, and encourages the hope that our Union may be perpetual.52

Webster’s thinking on the issue of secession was significantly influenced by the writings of his friend, Supreme Court Justice and Harvard Law Professor, Joseph Story. Story, who strongly disagreed with the views of Tucker and Rawle, rejected the idea that a state could secede from the Union.53

Webster’s view was warmly greeted by President Andrew Jackson. In his Proclamation on Nullification addressed the people of South Carolina of 10 December 1832,54 Jackson adopted the position of a perpetual union in his assertion that secession was illegal and treasonous, thereby becoming ‘the first and only statesman of the early national period to deny publicly the right of secession’.55 Webster’s views during the Webster-Hayne debate were also very influential for Lincoln,56 who, in his First Inaugural Address on 4 March 1861, declared ‘the Union of these States is perpetual’.57 Lincoln too, referred to Article XIII of the Articles of Association and the Preamble to the Constitution in coming to this conclusion. In Lincoln’s view there never was a legal secession of the Confederate states. Indeed, in Texas v White Chase CJ, who had served as Lincoln’s Secretary of the Treasury before being appointed Chief Justice of the Supreme Court, significantly echoed the words of Lincoln’s First Inaugural Address.58

However, it is difficult to see why the references to Article XIII of the Articles of Confederation and the Preamble to the Constitution made the United States an ‘indestructible Union’. In raising this difficulty it must be kept in mind that in Texas v White Chase CJ expressed the view that the ‘indestructible Union’ that he was dealing with was one that arose before the adoption of the Articles of Confederation, was given ‘definite form, and character, and sanction’ by the Articles of Confederation, and had an unbroken and continuous existence though to, and beyond, the adoption of the Constitution.59

53  Bauer, above n 49, 28, 284-5.
54  ‘Jackson’s Proclamation to the People of South Carolina’ 10 December 1832’ in Commandr, above n 31, 262.
57  ‘First Inaugural Address’, 4 March 1861, in Lincoln, above n 24, 286-7.
59  Texas v White, above n 3, 725. Chase CJ had made similar comments on behalf of a unanimous Supreme Court in the earlier case of Lane County v Oregon, above n 22, 76. Similar views were also expressed by the Supreme Court in United States v Curtiss-Wright Export Corp., 299 US 305, 316-7 (1936). It was also a view that was shared by President Lincoln: ‘First Inaugural Address’, 4 March 1861, in Lincoln, above n 24, 286-7 and ‘Message to Congress in Special Session’, in Lincoln, above n 24, 310. For a recent argument in support of this proposition see Carlton F W Larson, ‘The Declaration of Independence: A 225th Anniversary Re-interpretation’ (2001) 76 Washington Law Review 701, 721-62.
The specific reference to a ‘perpetual’ union in the Articles of Confederation cannot be said to be of any great relevance or weight. This is so because the union declared by the Articles of Confederation proved not to be perpetual and indissoluble. The argument here is that the union of the Articles of Confederation was terminated by the ratification of the Constitution and replaced by a new union created by that Constitution. If this argument is correct, the reference to a ‘perpetual’ union in the Articles of Confederation cannot be of any relevance in determining the nature of the union established by the Constitution.

In support of this argument it must be recalled that Article XIII of the Articles of Confederation, apart from referring to a ‘perpetual’ union, also stipulated that changes to the Articles of Confederation required the unanimous consent of all of the states of that union. However, in making a ‘more perfect union’, the Constitutional Convention of 1787 felt it necessary to violate Article XIII. Article VII of the Constitution stipulated that ratification by nine of the thirteen states would be ‘sufficient for the establishment of this Constitution between the States so ratifying the same’. Article VII made it clear that the new union was not necessarily going to be constituted by the same states as the old union,60 and this in fact was a reality during the period of time during which states expressly declined to ratify the Constitution.

On 21 June 1788, New Hampshire became the ninth state to ratify the Constitution, although Virginia and New York also ratified it five days later. Thus, when, the new federal government was constituted in March 1789,61 only 11 states were bound by the Constitution. The remaining two states of the union established by the Articles of Confederation, North Carolina and Rhode Island, remained outside the new union. Both of these states initially rejected the Constitution. North Carolina subsequently ratified the Constitution on 21 November 1789, nearly nine months after it came into effect.62 Rhode Island eventually ratified the Constitution on 29 May 1790, nearly fifteen months after it came into effect.63 However, during these

60 ‘Article VII of the Constitution, for example, certainly contemplates that individual states might go their own way, and several of The Federalist Papers address the fear that the union might split into three or four confederacies’: Larson, above n 59, 723. See also Stampp, above n 50, 8.
63 For a comprehensive account of Rhode Island’s ratification of the Constitution see Frank Greene Bates, Rhode Island and the Formation of the Union, AMS Press, Inc, New York, 1967 (originally published, 1898). On the process of ratification in relation to each of the 13
periods of time there was no denial of the right of these states to not ratify the
Constitution and no attempt was made to forcibly coerce them to do so.

From the perspective of the Articles of Confederation, the adoption of the
Constitution was an illegal and revolutionary act.⁶⁴ In effect, the eleven states that
ratified the Constitution before the new federal structures were established in March
1789 had seceded from the union established by the Articles of Confederation, and
formed a new union governed by the Constitution.⁶⁵ Of course, this is not to deny
the validity of the Constitution. As is seen from the principles already referred to in
Williams v Bruffy, the successful creation of the union created by the Constitution
rendered the Constitution valid.

That the ratification of the Constitution resulted in one union being replaced by
another is also made clear by the Preamble to the Constitution which states that the
Constitution was adopted to ‘form a more perfect union’ (emphasis added), or as
Kenneth Stampp has observed, ‘to create a new and better one’.⁶⁶ William Pierson,
in the context of an analysis of the opinion of Chase CJ in Texas v White, has written:

The Union of the Constitution was not the union of the Confederation; the one
destroyed the other absolutely. ... Despite the fact that the congress of the
Confederation acquiesced in the call for the constitutional convention, the framing,
adoption, and ratification of the Constitution were revolutionary. The old union
existed, it is true, while the means of its destruction were being forged, but it
ceased to exist so far as public law is concerned at the moment the ninth State
ratified the Constitution.⁶⁷

On the basis that the union established by the Constitution replaced the union
established by the Articles of Confederation, and, in particular, in violation of the
latter’s constitutional provision as to ‘perpetuity’, it cannot be asserted that this
constitutional provision as to ‘perpetuity’ facilitates an interpretation of the
Constitution as establishing an ‘indestructible’ union. In this respect Kenneth
Stampp has written:

states see Michael Allen Gillespie and Michael Lienesch (eds), Ratifying the Constitution
(1989).

This was conceded by James Madison who, in Federalist No 40, justified the abandonment of
the confederation of 1781 and the adoption of the Constitution drafted in Philadelphia in 1787
on the basis of the right of revolution articulated in the Declaration of Independence: Terence
See also Francis Wharton, Commentaries on Law (1884) 427, 435; Gary Rosen, American

Currie notes that ‘the supersession [of the Articles of Confederation], as well as the arguments
that accompanied it, furnished an embarrassing argument in favour of secession’, that Chase
CJ in Texas v White failed to address: David P Currie, ‘The Constitution in the Supreme
Court: Civil War and Reconstruction, 1865-1873’ (1984) 51 University of Chicago Law
Review 131, 164.

Stampp, above n 50, 8. See also Brandon, above n 28, 180.

⁶⁶ Stampp, above n 50, 8. See also Brandon, above n 28, 180.

Pierson, above n 5, 51.
The break in historical continuity undermines the case for a perpetual union based upon the country’s political condition before 1787. … Therefore, a valid case for perpetuity cannot lean on the terms of the Articles [of Confederation] but must demonstrate that it is clearly articulated in the Constitution itself.68

It now remains to be seen if the words ‘more perfect union’ in the Preamble to the Constitution can justify the assertion by Chase CJ in Texas v White that the United States is an ‘indestructible’ or ‘perpetual’ or ‘indissoluble’ Union.69 The historical record is clear to the effect that difficulties in the operation of the union under the Articles of Confederation were the motivation for the Constitutional Convention that met in Philadelphia in 1787.70 The ‘more perfect union’ expression in the Preamble to the Constitution referred to making the union more workable from the perspective of government and administration, rather than making it perpetual or indissoluble. Had the framers of the Constitution intended the new union to be ‘indestructible’ or ‘perpetual’ or ‘indissoluble’, it is reasonable to assume that explicit words to that effect would have been used, especially given that the word ‘perpetual’ was used in the title and in a number of provisions of the Articles of Confederation.71

Thus, on the basis of the above analysis, it is suggested that Article XIII of the Articles of Confederation and the Preamble to the Constitution do not provide any basis upon which to assert that the United States is an ‘indestructible’ or ‘perpetual’ or ‘indissoluble’ union which precludes the right of one of its states to unilaterally secede.

If the reasoning in the majority’s opinion in Texas v White does not support the proposition that unilateral secession from the United States is illegal and unconstitutional, it can fairly be asked whether there were other arguments that could have been used to support the proposition, and if so, why were they not relied upon by Chase CJ.

As to the first of these questions, there is another argument that could have been used to support the decision in Texas v White. The so-called nationalist interpretation of the Constitution could have been relied upon. It is based upon the Preamble to the Constitution and its words:

68 Stampp, above n 50, 9-10. See also McDonald, above n 45, 9-11; Amar, above n 65, 26-29.
69 Brandon has observed that ‘the idea that perpetuity is a necessary adjunct to perfection would seem silly except that so many intelligent people have cited it’: Brandon, above n 28, 180-1.
70 Andrew C McLaughlin, A Constitutional History of the United States (1935) 137-47.
71 In relation to the absence of the word ‘perpetual’ from the Constitution, Amar has observed that ‘the Preamble did not expressly proclaim that its new, more perfect union would be ‘perpetual’ – and for good reason: Why borrow a word from the Articles of Confederation that did not quite mean what it said in that document. A word that was being thrust aside by the very act of constitution itself?’: Amar, above n 65, 33.
We the People of the United States … do ordain and establish this Constitution for
the United States of America.

On the basis of this provision it was argued that the populations of the eleven states
that had ratified the Constitution before it came into operation in March 1789, acted
as a collective whole, with the consequence that sovereignty rested in them as a
whole rather than the 11 peoples in 11 different states. Thus, in *Luther v Hunter’s
Lease*, Story J asserted:

The constitution of the United States was ordained and established, not by the
states in their sovereign capacities, but emphatically, as the preamble of
constitution declares, by ‘the people of the United States’.

The most famous judicial pronouncement allegedly supporting the nationalist
interpretation is that of Marshall CJ in *McCulloch v Maryland*. In that case he
said:

The government proceeds directly from the people; it is ‘ordained and established’
in the name of the people; and it is declared to be ordained, ‘in order to form a
more perfect union’ …The government of the Union … is, emphatically, and truly,
a government of the people. In form and substance it emanates from them. Its
powers are granted by them, and are to be exercised directly on them, and for their
benefit.

The nationalist interpretation of the Constitution denied the existence of sovereignty
in the states of the Union. The states were seen as creations of the Constitution,

---

72 This matter has been, and continues to be, controversial. At the heart of the debate is the
question of whether the American Revolution was the act of one people or thirteen peoples?
Depending upon the answer to that question, it was either one people or the peoples of the
independent states that ratified the Constitution. Recent contributions to this debate include
Nation, The Rediscovery of American Federalism* (1993); McDonald, above n 48, 21-2;
Larson, above n 59; David Armitage, ‘The Declaration of Independence and International

73 *Luther v Hunter’s Lease* 14 US 304 (1816).

74 Ibid 324. Story J more fully set his views on the nature of the Union in his *Commentaries on
the Constitution* (1833). For an account of his views see James McClellan, *Joseph Story and
the American Constitution* (1971) 238-273; Bauer, above n 49, 309-31; H Jefferson Powell,
Journal* 1285.

75 *McCulloch v Maryland* 17 US 316 (1819). Whether Marshall J’s opinion in this case does in
fact support the nationalist interpretation is questioned in Martin S Flaherty, ‘John Marshall,
McCulloch v. Maryland, and “We the People”’ (2001-2002) 43 *William and Mary Law Review*
1339.

76 *McCulloch v Maryland*, above n 75, 403-4. Other judicial statements in the pre-Civil War era
supporting the nationalist interpretation include *Chisholm v Georgia* 2 US 419, 454 (1793);
*Ware v Hylton* 3 US 199, 236 (1796); *Craig v Missouri* 29 US 410, 415 (1830). On Marshall
CJ’s views on the Union see R Kent Newmyer, ‘John Marshall, McCulloch v Maryland, and the
Hatcher, ‘John Marshall and States’ Rights’ (1965) 3 *Southern Quarterly* 207; Jean Edward
which in turn was a creation of the people. Without any attributes of sovereignty a state could not secede, except with the consent of the people.

Whatever view one takes of the nationalist interpretation of the Constitution, it must be recognized that it had considerable support from lawyers and politicians in the United States. What is of concern here is why Chase CJ in *Texas v White* did not rely upon it to support his proposition that the unilateral secession of a state was illegal and unconstitutional.

The answer to this question is found in the fact that Chase CJ did not subscribe to the nationalist school of constitutional interpretation. Nor was he a member of the rival classic states’ rights school which asserted that the ultimate expression, and indeed protection, of states’ rights was the right of unilateral secession. Rather, Chase CJ adhered to a theory of dual federalism in which sovereignty was divided between the national and state governments. Such a theory was inconsistent with the nationalist interpretation of the Constitution with its clear assertion of federal supremacy over the states.

Dual federalism theory adherents relied heavily on the Tenth Amendment to the Constitution to underpin the importance of the states in the federal system. This amendment reserves all powers that are not delegated to the federal government to the states. Thus, in *Texas v White*, Chase CJ made reference to the provisions of the Tenth Amendment as the basis for the ‘distinct and individual existence … [and] right of self-government by the States’ which meant that ‘the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government’. He also cited with approval the decision of the Supreme Court in *Lane County v Oregon*, where, in the unanimous opinion which he wrote, he said:

---

77 States’ rights theory held that the people of individual states were sovereign and that it was the individual states that created and ratified the Constitution. This ratification was seen as an act by which state sovereignty was, in part only, delegated to the federal government. Sovereignty was never surrendered to the federal government and the delegation could be rescinded unilaterally by any state by means of a constitutional convention. The major theorist of state sovereignty was John C Calhoun whose views were most significantly expressed in *A Discourse on the Constitution and Government of the United States* completed just before his death in 1850, in which he wrote that ‘the government is a federal, in contradistinction to a national government – a government formed by the States; ordained and established by the States, and for the States – without any participation or agency whatever, on the part of the people, regarded in the aggregate as forming a nation. … In all its parts – including the federal as well as the separate State governments, [our system of government] emanated from the same source – the people of the several States. The whole, taken together, form a federal community – a community composed of States united by a political compact – and not a nation composed of individuals united by, what is called, a social compact’: John C Calhoun, *A Discourse on the Constitution and Government of the United States* in Ross M Lence (ed), *Union and Liberty, The Political Philosophy of John C Calhoun* (1992) 81, 116.

78 *Texas v White*, above n 3, 725.

79 Ibid.

80 *Lane County v Oregon*, above n 19.
Without the States in Union, there could be no such political body as the United States.  

The ruling in *Texas v White* relating to the validity of secessionist Texan legislation that was unconnected with the war effort dramatically reinforced the theory of dual federalism. It was thus, hardly surprising that in *Texas v White* he declared both the Union and the states to be ‘indestructible’. Both the nationalist and classic states’ rights interpretations of sovereignty are rejected. Rather, there is a form of states’ rights which asserts that ‘the rights claimed by the South for the individual State are possessed by all the States acting as a collective unit’. In the words of Herman Belz, for Chase CJ, the secession of the Confederate States of America was ‘unconstitutional because its proponents wrongly claimed for individual states a power rightly possessed by the states in union or collectively’. To have based his decision against unilateral secession upon the nationalist interpretation of the Constitution would have meant rejecting his adherence to the theory of dual federalism.

In the pre-Civil War debate on the nature of American federalism, Chase CJ’s theory of dual federalism was an attempt to find a compromise between the competing nationalist and states’ rights theories relating sovereignty under the Constitution. As Farber observes this debate was about ‘the ultimate locus of political authority’. With its assertion of the, albeit limited, sovereignty of the states, Chase CJ sought to restrain the centralisation of power in the hands of federal authorities that had occurred in the immediate post-Civil War years. Recent Supreme Court decisions indicate that the debate on sovereignty is far from over. Indeed, some cases have explicitly endorsed Chase CJ’s views as set out in *Texas v White*, whilst others exhibit sentiments clearly consistent with them.

---

81 Ibid 76.
82 That Chase CJ’s assertion as to the indestructibility of the states is manifestly wrong, is most tellingly illustrated by the separation of West Virginia from Virginia in 1863. Furthermore, in the case of Texas, a condition of its admission to the United States was that that Texas could, in the future, be broken up into five separate states. On West Virginia’s creation see Vasan Kesavan and Michael Stokes Paulsen, ‘Is West Virginia Unconstitutional?’ (2002) 90 California Law Review 291.
83 Pierson, above n 5, 48.
85 Farber, above n 23, 27.
CONCLUSION

In conclusion, it can fairly be asserted that the opinion of Chase CJ in *Texas v White* amounts to an unsubstantiated proposition\(^8\) that the United States is ‘an indestructible Union’ in which the unilateral secession of a state is illegal and unconstitutional. This is not to deny that other arguments can be, and have been, put forward in support of this proposition. Given the paucity of reasoning in *Texas v White* it is hardly surprising that the case is, at best, only mentioned in passing, and rarely extracted, in the leading casebooks used by students of American constitutional law.\(^9\) Notwithstanding the fundamental importance of the issue dealt with by the case,\(^9\) it appears that the community of law teachers in the United States has generally followed the approach adopted by Thomas M Cooley in the last decade of the nineteenth century when dealing with the issue of secession. Cooley eschewed the theoretical issues involved with secession and chose to accept that the United States was ‘an indestructible Union’ simply because the Supreme Court said so in *Texas v White*.\(^9\) On this basis *Texas v White* is thus only worth mentioning in a footnote, which is exactly where Cass Sunstein cites it as authority for his assertion that ‘no serious scholar or politician now argues that a right to secede exists under American constitutional law’.\(^9\)

---


\(^9\) *Texas v White* has, however, been extracted in a prominent collection of documents on American history. See Commanger, above n 31, 509.

\(^9\) In a recent article, Sanford Levinson wrote that, ‘the legitimacy of secession’ is ‘the most fundamental constitutional question of our entire history as a country’: Sanford Levinson ‘“Perpetual Union,” “Free Love,” and Secession: On the Limits of the “Consent of the Governed”’ (2004) 39 *Tulsa Law Review* 457, 461-2.
