

“Of the People, By the People, For the People”
The Implications of Covenantal Union for the Legitimacy of
Secession in the United States

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I. Introduction

In response to the General Election in November of 2012, sixty-nine petitions from various groups in all fifty states were filed on The White House’s new website *We the People*, an interface designed to allow Americans to transmit their grievances directly to the White House. The petition of one Texan group on the site complained of economic decline and abuses of personal rights by the federal government. It claimed Texas was capable of running itself, and that this was necessary “to protect its citizens’ standard of living and re-secure their rights and liberties in accordance with the original ideas and beliefs of [the] founding fathers which are no longer being reflected by the federal government.”¹ This petition alone has been signed by 125,746 people up to the time of the writing of this paper.² This activity incited many responses: outrage, mockery, and curiosity. But in the aftermath, there was no real dialogue about the source of the grievances, the factors that truly binds Americans, or what a possible secession could even look like.

Many contemporary political science scholars have asked: Is the United States still a viable Union, a republic under limited governance?³ This is an incredibly important question—it gets at the heart of the very foundations of American governance, and the quality of American life today. If this is an important question to ask, there is another challenging question that arises from it: What would the dissolution of the United States look like, and how would it ensue? When thinking about the union of the United States and the democratic republic structure it has, one must think about two key concepts: covenant and secession.

¹ “Peacefully grant the State of Texas to withdraw from the United States of America and create its own NEW government.”

² This is 0.5% of the population of Texas, according to the 2012 U.S. Census.

³ For some examples see: Putnam, *Bowling Alone* and *Better Together*; Skocpol, *Diminishing Democracy*; Fiorina, *Culture War?*; and Wolfe, *Does American Democracy Still Work?*

One cannot think of secession from the Union without thinking of the covenantal bond between Americans. Political and social order in the United States was initially based on the concept of a covenant between all the people, under God, to govern themselves in accordance with moral, just principles. Such agreements between the early Americans allowed them to live in such a way that they were always called to think of the greater good of the community and perform actions that benefitted each other, and yet they were given freedom to be individuals and live their lives otherwise the way they wanted to. Abraham Lincoln, in the face of Southern secession and the Civil War (the ultimate failure of the American covenantal bond) attempted to reclaim this covenant in the Gettysburg Address: “[T]his nation, under God, shall have a new birth of freedom— and... government of the people, by the people, for the people, shall not perish from the earth.”⁴ Yet today, the covenant, the foundational bond between Americans, is a rarely discussed concept. Does the covenant still bind the American people? Further, what does this covenant or lack thereof mean for the enduring perpetuity of the Union?

Although many authors have struggled with state legitimacy and many authors have discussed the covenant and its crucial role in governance, none have explored in depth (particularly outside of the Secession Crisis prior to the American Civil War) the specific role of secession in concept of covenant. This is a particularly relevant exercise, because one could claim that those who sought to secede from the United States in 2012 were looking to form a new covenant among a people they believed shared their values of governance. The following paper will examine in greater depth the idea of the “covenant” and how it applies to the endurance of a political union. This paper will argue that the only sustainable base of union for a self-governing society is a covenantal agreement made committing its members to mutual aid in conjunction with the protection of individual freedom. When Americans no longer maintain this

⁴ Lincoln, “The Gettysburg Address.”

commitment, nor agree on what it means to provide mutual aid and what it means to be free, the foundational basis of the political union no longer exists. When this basis of union no longer exists, there is the potential for a community to justly secede from the Union in pursuit of those governing values. In Part II, the paper will discuss what a covenant is and the role it has played in shaping American history and values. Part II will examine the sources of legitimacy for a union based on a covenant. Part IV will explore the political act of secession, particularly from a covenantal union. Part V will explore the only instance in American history where questions of covenant and secession were brought together: the Secession Crisis of 1860. Finally, the paper will conclude with some thoughts for further research. Only through critical thinking and productive discourse can life, liberty, and the pursuit of happiness be maintained in the United States.

II. The Covenant

Many scholars, in particular Alexis de Tocqueville, Daniel Elazar, Barbara Allen, and Vincent Ostrom, have described in-depth the nature of the political “covenant” and its role during the seventeenth and eighteenth centuries as the foundation for American government and society. Its roots lie in the Biblical tradition, the covenant between God and the Jewish people, which was reinterpreted by philosophers such as Hobbes, Locke, Spinoza, Montesquieu, and the writers of *The Federalist Papers* to have secular implications. The American experience was birthed out of a synthesis of these religious and secular interpretations, and woven into federalism, at once a framework of government and a “way of life” through which the American people sought to “impose social virtues upon their conception of self-interest.”⁵

A. What is a covenant?

⁵ Ostrom, *The Meaning of American Federalism*, 247, 217.

In his book *Covenant and Constitutionalism*, the political scientist and federalism specialist Daniel Elazar defines “covenant” as “a morally-informed agreement or pact based on voluntary consent and mutual oaths or promises, witnessed by the relevant higher authority, between people or parties having independent though not necessarily equal status, that provides for joint action or obligation to achieve defined ends (limited or comprehensive) under conditions of mutual respect which protect the individual integrities of all the parties to it.”⁶ In simpler words, a covenant is a perpetual agreement, political in nature, between equal and independent individuals that relies on a higher moral basis to enforce mutual-aid behavior, as well as preserve individual freedom, in order to accomplish a certain common goal. To further clarify its components, a covenantal agreement generally has the following characteristics:

- a. Temporally unlimited, or “perpetual.”⁷
- b. Any number of partners, all considered equals, each potentially possessing a variety of purposes for agreeing to the covenant.⁸
- c. Primarily for the creation of social and political associations.
- d. Based on voluntary consent and a promise to mutual aid, which create the central mechanism for obligation.⁹
- e. Relies on internal, moral enforcement to uphold obligations rather than external, legal enforcement.¹⁰
- f. A “transcendent moral force” (such as God) typically serves a role as guarantor.¹¹

⁶ Elazar, *Covenant and Constitutionalism*, 7.

⁷ Allen, *Tocqueville, Covenant, and the Democratic Revolution*, 16.

⁸ Allen, *Tocqueville, Covenant, and the Democratic Revolution*, 44, 16.

⁹ Allen, *Tocqueville, Covenant, and the Democratic Revolution*, 17.

¹⁰ Allen, *Tocqueville, Covenant, and the Democratic Revolution*, 16-7.

¹¹ Elazar, *Covenant and Constitutionalism*, 7.

Essential to the concept of covenant is Vincent Ostrom's term "shared community of understanding," meaning a group of people who share the same normative conceptualization of their interactions with each other. A covenant is essentially a foundational idea upon which a shared community of understanding can be built. It provides the principles and guidelines by which to formulate a society's set of rules, establishing the trajectory of a society on a moral path but allowing for flexibility on how that aim is achieved.¹² From this idea, the institutions of society must be built. A constitution, therefore, is the written, "operational" form of a covenant, and the governing system it designs creates the mechanism through which to enforce the covenant, even long after the initial community of understanding has evaporated. Elazar conceptualizes this institutional framework as a "matrix" made up of "a group of equal cells" ("equal individuals or individual entities") "framed by... common governing institutions" which the individuals have collectively decided upon and created.¹³ This type of agreement tends to produce governing institutions that are polycentric (containing several centers of authority), non-hierarchical, and based on a decision-making process of "disputation and collective inquiry." The perfect version of this, discussed below, is realized in a federal system.¹⁴

B. The Covenant in American History

The covenant formed by the first Americans aimed to create a "lasting but limited government," combining into a common set of ideas the way of life of the Reformed Protestant colonists, whose moral beliefs led them to desire a "federal democratic republic under God," with the ideas of the Scottish Enlightenment philosophers who sought the same type of

¹² Allen, *Tocqueville, Covenant, and the Democratic Revolution*, 16.

¹³ Elazar, *Covenant and Constitutionalism*, 2-3.

¹⁴ Ostrom, *The Meaning of American Federalism*; Elazar, *Covenant and Civil Society*, 332; Allen, *Tocqueville, Covenant, and the Democratic Revolution*, 23-4.

government as a way to create a true civil society.¹⁵ Covenant was meant to provide its citizens with a sustainable form of self-government. It “was designed to mediate between self-interest and conscience, material means and transcendental ends, and personal and collective destinies in the commonwealth.”¹⁶

American covenantalism has its roots in the Calvinist-derived Congregational church. Congregational churches are Protestant, Calvinist churches that reject hierarchies, autonomously govern themselves, and establish governing rules by covenant within each independent community.¹⁷ The Puritan Pilgrims who first came to Plymouth Rock, Massachusetts in 1620 decided to organize their society in the New World in the same way they had always organized their church congregation: by covenant. They became the first in colonial America to do so in their governing document, the Mayflower Compact:

Having undertaken, for the glory of God, and advancement of the Christian faith and honor of our King and Country, a voyage to plant the first colony in the northern parts of Virginia, do by these presents solemnly and mutually in the presence of God, and one of another, **covenant** and combine ourselves together into a civil body politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute and frame such just and equal laws, ordinances, acts, constitutions and offices, from time to time as shall be thought most meet and convenient for the general good of the Colony: unto which we promise all due submission and obedience.¹⁸
(Emphasis added).

This “Compact” was, in fact, a covenant between the Pilgrims and underneath God to the effect of founding a virtuous, self-governing society. Its primary priority and ultimate authority was the “good of the Colony.” Throughout New England, the idea of church and society founded on covenantal bonds spread until it could be found in “townships, colonial charters, state constitutions, continental congresses, the Articles of Confederation, and the United States

¹⁵ Elazar, *Covenant and Civil Society*, 332; Elazar, *Covenant and Constitutionalism*, 10.

¹⁶ Elazar, *Covenant and Constitutionalism*, 22.

¹⁷ This structure is also known as a congregationalist polity.

¹⁸ “The Mayflower Compact.”

Constitution.”¹⁹ Many foundational documents in early colonial history are based upon this idea. The Fundamental Orders of Connecticut, written in 1639, was the first full American colonial constitution to be covenantal. Seeking a “more egalitarian Puritan commonwealth,” its founder Thomas Hooker used the law of Moses (the theological historical reference point for covenant) as the basis for the new colony’s constitution.²⁰

From its inception, inherent in the concept of a covenant was a federal system: Allen notes that the Latin word *foedus* originally referred to a religious covenantal relationship and later took on meaning relating to secular governance.²¹ The Puritans called their form of governance “federal theology,” and it “defined individual and national covenants, delineated a congregational system for linking covenanted churches in a federal association, and established processes for creating and uniting secular associations, including the civil governments of colonial settlements.”²² The “covenantal matrix” put forth by Elazar took shape in the American colonies, particularly New England, among church congregations, families, and individuals; it also existed in civil society—voluntary associations for economic, social, civic, and religious purposes. These communities were united as colonies, and later as states.²³

John Winthrop, an early American author on the covenant, believed the benefit of the covenantal arrangement lay in the concept of “federal liberty,” also known as moral or bounded liberty—individual liberty constrained by the Golden Rule: “Do unto others as you would have them do unto you.” As opposed to natural liberty in which a person was totally free as long as he was not hurting others (known as “the harm principle”), Winthrop advocated a covenantal

¹⁹ Ostrom, “Some Ontological and Epistemological Puzzles in Policy Analysis,” 6.

²⁰ Elazar, *Covenant and Constitutionalism*, 26.

²¹ Allen, *Tocqueville, Covenant, and the Democratic Revolution*, 14.

²² Allen, *Tocqueville, Covenant, and the Democratic Revolution*, 14.

²³ Elazar, *Covenant and Constitutionalism*, 29.

agreement among the people, under God, to do just and honest actions to the *benefit* of others.²⁴

Whether or not religion itself is essential to this conception, the Golden Rule nevertheless provides a mechanism by which to guide actions based on the assumptions of equality and the value of learning from one another.²⁵

The covenantal principles and formulation of self-government that had been most perfectly realized in New England had spread to the entirety of colonial America by 1776.²⁶ During the time of the American Revolution, however, there was a change in the theory of political science that increased the importance of the secular conception of covenant, including ideas of compact and constitution. Ethan Hatch writes in his book *The Democratization of American Christianity* that the American Revolution was not simply a battle for democracy, but was a real crisis and eventual transformation of the social and cultural basis of American life towards egalitarianism. This crisis shaped American church institutions as well as political ones. The ensuing period between 1780 and 1830 saw a struggle amongst Americans coming to terms with the nature and role of power and authority in society and produced a social transformation that had a drastic impact.²⁷ The democratization of Christianity produced a church-wide rejection of the clergy as a separate class and theologians as an authority; encouraged people's spiritual experiences without subjecting them to analysis for orthodoxy by clergy; and fostered a sense of hope for the democratic future of religious structures.²⁸ A similar trend, this time secularized by the intellectual tradition of thinkers such as Locke, Hobbes, and Montesquieu, emerged in the

²⁴ Elazar, *Covenant and Constitutionalism*, 26-7.

²⁵ Ostrom, *The Meaning of American Federalism*, 63, 66.

²⁶ Allen, *Tocqueville, Covenant, and the Democratic Revolution*, 32.

²⁷ Hatch, *The Democratization of American Christianity*, 6, 14.

²⁸ Hatch, *The Democratization of American Christianity*, 16.

political sphere. Eventually, the idea of covenant thus secularized became more similar to a compact, a legal but still ethically based foundational agreement.²⁹

This culture, which emphasized self-government and the virtues of federal liberty, fostered the writing of the Declaration of Independence. The Declaration is the most clearly-written statement of the American covenant—“the underlying political and social philosophy of the American people... that transformed the disparate colonies into an organized people, the American people.”³⁰ Abraham Lincoln himself elevated the Declaration of Independence to its position as the “foundational national document” which created the American national identity.³¹ It is the single philosophy of a shared community of understanding committed to living together:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed...³²

The Declaration of Independence is, in itself, a reflection of man’s constant struggle in a self-governed polity between his “selfish passions,” as described by Locke, and his social nature from which morality and the desire to benefit others arises. In the Declaration, Thomas Jefferson put forth a vision of society in which man at once seeks his natural desire for self-preservation as well as for happiness, which he believed could come only through virtue— obeying the natural duty to promote the good of others. Jefferson hoped that these tensions could be aligned such that satisfying one’s self-interest was also satisfying one’s virtue: “The order of nature is that

²⁹ According to Daniel Elazar, the terms “covenant,” “compact,” and “contract” are all related but distinct terms which are often mistakenly used interchangeably. “Covenant” and “compact” refer to agreements which are public, require reciprocal action, and ask those who are party to them to expand their actions beyond the mere words of the law. Contracts, on the other hand, are private, entirely legal agreements between individuals. A covenant is mostly moral in nature, a compact is mostly legal, but ethical in nature, and a contract is secular with no explicit moral importance. Elazar, *Covenant and Constitutionalism*, 7-8.

³⁰ Elazar, *Covenant and Constitutionalism*, 48.

³¹ Farber, *Lincoln’s Constitution*, 485-6.

³² “Declaration of Independence.”

individual happiness shall be inseparable from the practice of virtue.”³³ The covenant alone, although necessary for the foundations of a federal system, was not enough to perpetuate the system. Elazar argues that “[c]onstitutions of government were needed to translate those covenants into real institutions that would be both effective and be true to the principles of the covenants that underlay them.”³⁴ The Constitution operationalized Jefferson’s philosophy by establishing a federal system as way to check these despotic tendencies and preserve the cooperation and operation of the federal and state governments.³⁵ As will be discussed, however, it is not clear that a constitution on its own can uphold a covenant.

III. Covenantal Legitimacy

Given that a covenant is a commitment between individuals to govern themselves according to the principles of freedom and benefit to each other, it is worth exploring further the source from which the covenant derives its legitimacy. Sources of state authority fall into two major types: either coercion of their subjects into loyalty or derivation of loyalty from a fundamental consensual governing body.³⁶ The United States falls into the latter category. John Adams summarized the essential basis for the legitimacy of the United States government when he said, “It is certain, in theory, that the only moral foundation of government is, the consent of the people.”³⁷ Therefore, the implications for its legitimate sources of authority are unique to a consensual society. The following section will show that the source of consensus that gives covenant its legitimacy is mutual trust, and that there exist three scenarios in which this trust could no longer exist: if the covenant is forgotten, if the covenant is broken, or if the covenant did not include a certain group of people living on the territory in the first place.

³³ Yarbrough, *American Virtues*, 14.

³⁴ Elazar, *Covenant and Civil Society*, 211.

³⁵ Elazar, *Covenant and Constitutionalism*, 85.

³⁶ Skocpol, *States and Social Revolutions*, 25.

³⁷ Hatch, *The Democratization of American Christianity*, 22.

Returning to the central components of a covenantal bond, remember that it is both free, individual consent and the mechanism of beneficial mutual aid that oblige persons to a covenantal agreement. The element that makes a covenant different from a compact or contract is that a person who chooses to freely enter into the covenant is changed within himself by the agreement and must therefore enforce the covenant from within himself. In the Old Testament, God's law transformed the Chosen People eternally: "I will put my law in their inward parts, and write it in their hearts; and will be their God, and they shall be my people."³⁸ The nature of the covenantal bonds is so morally transformational that they are meant to endure without end. Only by mutual agreement can a covenant be dissolved or a certain party allowed to leave. In fact, Barbara Allen writes that a covenant can never be broken; even if one turns its back on that covenant, he is still bound by it in the core of his soul.³⁹

Thus, one of the great benefits of the American covenant as established in the Constitution was that it was meant to be flexible enough to endure forever. Due to the ambiguous language that can be reinterpreted in each contemporary era, as well as the provision allowing for amendments to be added to it, the "living Constitution" was intended to allow for American society to reform and improve itself through constant dialogue.⁴⁰ This improvement could only come with difficulty: the members of a covenantal society "must be willing to struggle with each other... to increase understanding of what it means to live in a covenantal relationship," Ostrom writes.⁴¹ This is the intent of the Constitution's design: to facilitate a continual discussion about issues that can lead the individuals within it to a better life. This type of discussion also fosters

³⁸ Jeremiah 31:33.

³⁹ Allen, *Tocqueville, Covenant, and the Democratic Revolution*, 16-18.

⁴⁰ Allen, *Tocqueville, Covenant, and the Democratic Revolution*, 147.

⁴¹ Ostrom, *The Meaning of American Federalism*, 68.

relationships and builds trust between individuals, essential to building shared communities of understanding..

Yet the problem with the enduring nature of the covenant, even with these provisions for preservation, is that it is nevertheless constructed by and subject to human will. Two particular issues arise: one, covenants are meant to bind successive generations, but it cannot be ensured that they will do so; and two, proper pathways are needed for remediation if the principles they sought to uphold have been neglected or rejected in order for the flexibility of a covenant. With respect to the first issue, the self-enforcing mechanism of covenants makes agreement particularly challenging to maintain. The covenant, therefore, brings upon persons a collective action problem. According to the research of political scientist Mark Lichbach, there are four solutions to the collective action problem: markets, contracts, hierarchies, and communities; none of these solutions, he concludes, can alone solve the collective action problem, but one solution in conjunction with others can do so.⁴² Although the covenant theoretically binds people, there realistically is no force to compel obedience; hence the need for institutions. Community is intended to be the primary enforcement mechanism in covenantal governance, supported by freedom in economic markets and contracts on particular issues of justice and law enforcement. Yet it is not clear that in the case of self-government, markets and contracts are enough to truly enforce the spirit necessary to uphold the virtues which produce a true democratic ethos. With regard to the second issue, given the doubts on the first, it is not always clear that the debate and discussion over issues of governance will occur when the aspect of covenant has been lost. Even still, it is not assured that such debate will always lead to results, depending on how polarized individuals are on the issues at hand and how central the issues at

⁴² Lichbach, "Rethinking Rationality and Rebellion."

hand are to governance. The more polarized and the more fundamental the issue, the less likely that debate and discussion will result in productive solutions for the continuation of the republic.

Despite these initial troublesome limitations, the picture, so far, of a legitimate covenantal society then rests on the commitment to its values of self-government, freedom, and mutual aid perpetuated by continual discussion between the people it binds on how best to achieve those goals. The question that flows from this conclusion is: where is the source of virtue, the defining component of covenant in society? Frank Meyer, an American philosopher who wrote in the 1960s, provides a critically Tocquevillean and American standpoint on this very question. The central idea of his work *In Defense of Freedom* is that “freedom is the basis of virtue,” and that the “locus” of this virtue is not within any institution (in the community, the state, associations, the family, the economic order, or the educational system), but within individuals who are free to choose both good and evil.⁴³ “Unless men are free to be vicious,” he writes, “they cannot be virtuous. No community can make them virtuous.”⁴⁴ According to Meyer’s theory of government, consistent with the covenant, the benefit of both society and state institutions is not that they have moral quality inherent in them, but that their usefulness “depends on the degree to which they facilitate individuals in pursuit of their own purposes.”⁴⁵ Members of a state should never forget, he cautions, that the government and society were established for the purpose of man, and that they are not only beneficial to men, but also necessary to provide men this freedom to be virtuous. “The state— that is, an institution recognized as the repository of legitimate violence to inhibit one man in his freedom from

⁴³ Meyer, *In Defense of Freedom and Related Essays*, xx.

⁴⁴ Meyer, *In Defense of Freedom and Related Essays*, 148.

⁴⁵ Meyer, *In Defense of Freedom and Related Essays*, xviii.

destroying another man's freedom... is a necessary and natural institution— so long as it fulfills its function and does not use its power for purposes extraneous to that function.”⁴⁶

On a theoretical basis, it can thus be said that a self-governing society can exist only through a covenantal bond which derives its legitimacy from trust. Trust must lie between all individuals—citizens must trust that their fellow citizens will continue to uphold the virtues of the covenant and that each citizen is committed to improving society through discussion. Citizens must also trust that the government will protect the freedom that allows shared communities of understanding continued self-governance and the opportunity to live virtuously. The only sustainable base of union for a self-governing society is a covenantal agreement made committing its members to mutual aid in conjunction with the protection of individual freedom.

There are three scenarios by which the legitimacy of this foundation can fail to bind a people located within its territory. The first is if the covenant is forgotten. The second case is if one or both parties break the covenant. The third is if a group is excluded from the covenant. These three scenarios, described below, will show that the legitimacy of self-governance flowing from the covenant is in danger in the face of such severe and fundamental weaknesses.

Case 1: The Covenant is Forgotten

If the covenant no longer exists in the thought and memory of a people, does it continue to bind them? Elazar argues that today the covenant *has* been forgotten, but that nevertheless the idea of the covenant lives on in American institutions. He writes that with the secularization of the covenantal idea, and particularly with the implementation of the Constitution itself as the basis of governing institutions charged with upholding the values of the covenant, the term covenant disappeared from popular thought, discussion, and importance. “Constitutionalism

⁴⁶ Meyer, *In Defense of Freedom and Related Essays*, 99.

replaced covenantalism.”⁴⁷ Elazar believes that the trajectory of this foundational concept of the covenant receded and disappeared, with some historical revivals but never a full one. Because of this, contemporary Americans no longer look to moral law or some higher source to guide their actions, but only to the Constitution, merely a “neutral vehicle for service delivery” in the absence of a covenantal tradition.⁴⁸ Interest, thus, rather than virtue, has become the primary operating mechanism for the federation.⁴⁹

Ostrom agrees with this position, writing, “Federalism is a sham if covenants become mere words on paper.”⁵⁰ Yet he argues that the normative values that exist in today’s society are fundamentally opposed to the idea of the covenant. According to Ostrom, there has occurred a “paradigmatic shift” in American public administration. This shift has occurred in the American people’s conception of the role of governance, changing from the covenant and the self-governance ideals showcased in Tocqueville’s *Democracy in America* to the Wilsonian ideal of bureaucratic, centralized power and maximized efficiency.⁵¹ Thus, the conception of governance in America today looks more like a Hobbesian contract between people and government than a Tocquevillian covenant between equal individuals. If, as these two authors suggest, the Constitution is merely a hollow framework absent the morals used to establish it, it begs the question: If there exists no moral basis underlying the institutional one, what purchase does the institutional basis have on the loyalty of the people? Due to the nature of self-governance, it stands to reason that absent a normative basis which puts a primacy on the values necessary for its maintenance, it is impossible to uphold its institutional basis without violating those initial values. Without the fundamental trust cultivated between communities through the perpetuation

⁴⁷ Elazar, *Covenant and Constitutionalism*, 94.

⁴⁸ Elazar, *Covenant and Civil Society*, 284.

⁴⁹ Elazar, *Covenant and Constitutionalism*, 94-6.

⁵⁰ Ostrom, *The Meaning of American Federalism*, 272.

⁵¹ Ostrom, “Some Ontological and Epistemological Puzzles in Policy Analysis,” 7-8.

of freedom and the commitment to living so to benefit one another, the institutional basis of a government is in danger.

Case 2: The Covenant is Broken

The “breaking” of a covenant could occur if one shared community of understanding removed itself from the larger shared community of understanding of which it was once a part, or if two shared communities of understanding decided mutually to break their bonds to each other. As discussed previously, the case for one party to leave a covenant unilaterally is controversial. Breaking a covenant by mutual understanding, however, is generally accepted as consistent with the theory of covenant. As opposed to “fading from memory,” this scenario implies an active, conscious decision by the parties to break the covenant. This would mean that one party rejected self-governance, freedom, or mutual aid—or that both parties disagreed fundamentally and irreparably on the way these were being implemented. Such a situation would produce the lowest level crisis if there was mutual consensus on breaking the covenant or if both parties agreed that the covenant had, in fact, been broken. Although not guaranteed to produce consensus on how to *resolve* the problem, mutual agreement would less likely involve collapse or violence. As will be mentioned later, one example of this broken covenant was the institution of slavery in the colonial and antebellum American South.

Case 3: Those the Covenant Never Applied To

The third case brings up the situations of two groups of Americans: African Americans descended from slaves and immigrants. Because slaves were not considered citizens when the American covenant was first made, they were not historically included as parties to the covenant. It could be argued that the post-Civil War status of African Americans in the United States, particularly before the Civil Rights movement, was an extension of actual exclusion from the

covenant. Such denial of rights violates the very precepts of covenant, and yet because slaves were not originally bound by the covenant it could be justified, that they did not deserve the same benefits that members of the covenant did. Only with the aid of the government institutions could human rights be protected. Following their exclusion, theoretically, free African Americans could choose to enter the covenant, but they were not *a priori* bound by it. Some of the effects of such a condition can be seen in the world of the urban black poor described by prominent sociologist William Julius Wilson in his books, among them *More than Just Race*, *The Truly Disadvantaged*, and *There Goes the Neighborhood*. The plight which these communities face—poverty, violence, and social strife in scales more or less unknown or not experienced by the rest of America— certainly shows a lack of covenantal commitment to the value of mutual aid and self-enforcement, and it must be wondered whether they have not chosen to enter the covenant, are not allowed to do so, or if the covenant is a fallacy. Immigrants, also not part of the founding covenantal people, must also choose to enter the covenant. The process of obtaining citizenship is intended to teach immigrants about American values and the American way of life, but many argue that it cannot be certain that an immigrant would transform himself from within as the covenant would necessitate, thus placing the entire foundational bond of the Union in danger.

These concerns, however, rest on shaky foundations. First of all, it is possible that, given the questions raised in previous two scenarios, there no longer exists a covenant to enter into. This would not allow new Americans and the most disadvantaged members of society to benefit from or contribute to the democratic ethos of the covenant. In addition, specifically with respect to immigrants, it is important to note that a high percentage of Americans today are not descendants of colonial Americans who emigrated from England. Thus, the concerns regarding

applying to immigrants should apply to those Americans as well, and it could even be argued (though difficult to substantiate) that each successive generation of immigrants has weakened the prevalence of the covenant by not choosing to enter into it or not understanding fully its meaning. Each individual, even those born into a covenantal society, must at some point make the choice to actually be bound by it or not.

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Given the three ways above in which a covenant could fail to bind Americans, some words on the implications of these potential crises of covenantal legitimacy are necessary. Dialogue and discussion, in the face of any of these scenarios, is the first recourse according to the American tradition. Only after this can other actions be considered legitimate. The American values thus far discussed are an incredible and beneficial way of organizing society, worth preserving. But any of these crises could occur and discourse could fail to be an adequate mechanism to resolve them, due to the foundational nature of the issues. They require action. Determinations about what exactly these mean for the preservation of the Union cannot be made without considering secession theory and how it interacts with these three crises of covenant.

Returning to the story which opened this paper, the secession petitions filed on the *We the People* website showcase an ostensible divide between Americans on covenantal legitimacy. The Texans who signed the one example of such a petition sought “to protect... citizens’ standard of living and re-secure their rights and liberties in accordance with the original ideas and beliefs of our founding fathers which are no longer being reflected by the federal government.”⁵²

According to them and their counterparts in other states, the American shared community of

⁵² “Peacefully grant the State of Texas to withdraw from the United States of America and create its own NEW government.”

understanding is no longer. Their declaration sparks the relevant question of whether the covenant today is forgotten, broken, or alive and well.

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There are many actions that could be taken in an attempt to remedy the loss of covenantal legitimacy as described in the three cases above. The response to the loss of covenantal legitimacy that would best preserve the status quo would be a renewed discussion of the covenant and a conscious revival of civic life in America. Yet there also exist responses in the form of varying degrees of political unrest: protests and other demonstrations (perhaps violent), calls for impeachment, demands for constitutional amendment, emigration, movements towards secession, and threats of violence or war. Different groups could take any of these strategies when they perceive the covenant has lost its legitimacy.⁵³ For many analysts, some of these actions fall within the bounds of just actions and others do not. Specifically, the right to secede or the justness of secession is a controversial form of remedy. On one hand, some scholars argue that the enduring and human rights-protecting nature of the covenant can never allow for secession. On the other, the disappeared covenantal bonds cannot be the binding foundation of a union, and they can even be a just impetus for secession. The following part will examine what secession is and under what circumstances it would be justified in the case of a covenant.

IV. Secession: Its Role in a Covenantal Society

The political act of secession, here defined as “an instance of political disintegration, wherein political actors in one or more sub-systems withdraw their loyalties from the jurisdictional center to focus them on a center of their own,” necessitates a conversation about its

⁵³ From a political science perspective, it is interesting to consider which specific political conditions surrounding this loss of legitimacy lead to which types of dissatisfactory responses and why. Although this paper will not discuss all of the possible considerations in depth, they are worth exploring in future research

consequences for covenant when considered in the American context.⁵⁴ Unlike other states' governmental structures, demographic issues, and group relations, the composition of the United States through history, foundational values, and institutional structures has unique implications for the legitimacy of secession. This section will explore common theories of secession and their relation to the covenant. Ultimately, this section will conclude that although there are several instances in which secession is an illegitimate action, when the covenantal basis of union no longer exists, there is the potential for a community to justly secede from the Union in pursuit of those governing values.

A Word on Definition

Among scholars, there is some debate regarding the definition of "secession." The definition above, taken from Viva Ona Bartkus's book *The Dynamic of Secession*, has been chosen due to its simultaneously broad and specific scope: it neither requires that the new political entity form a new state or gain total political independence, nor that force be used to do so, and yet it is applicable to a covenantal understanding of secession through the use of the words "jurisdictional center" (which deemphasizes a state-citizen allegiance) and "loyalty" (which concerns itself with the nature of the relationship between individuals within the jurisdictional center). Allen Buchanan has a similar definition: he writes that secession is a process by which a group "restrict[s] the jurisdiction of the state in question so as not to include her own group and the territory it occupies." Buchanan's definition highlights the serious territorial aspect of a secession movement, which has serious implications for any attempt at secession due to the issue of property rights. He further notes that secession from a government is not the same thing as the *overthrow* of that government-- those who secede do not "deny the state's political authority as such, but only its authority over her and the other members of her

⁵⁴ Bartkus, *The Dynamic of Secession*, 8-9.

group and the territory they occupy.”⁵⁵ Both definitions convey that secession is a *process*, not an outcome in and of itself, by which a shared community of understanding gains self-governance.

With respect to definition, this paper will further posit a covenantal definition of secession: when one shared community of understanding within the larger shared community of understanding leaves the larger shared community of understanding and its institutional structure to organize its own institutional governing structure. This definition and the way that secession from a covenant theoretically operates will be the topic of exploration in the ensuing section.

Theory

As Bartkus points out, “moral questions lie at the very core of any secession, and thus provide the foundation from which a discussion of the secession decision must proceed.”⁵⁶ This review will focus on two aspects of secession theory: one, the moral justifications for and against secession, and two, the dynamics that lead a group to the decision to secede. A crucial component of secession scholarship argues that the right to secession needs to be determined on a case-by-case basis, depending on the situational factors and context. Therefore, the particular dynamics and situational factors specific to the United States are crucial and distinguish this case from other cases of secession.

First, this paper turns to the causes of a just secession. In existing academic research, there are three types of explanations for just secession movements: “national self-determination theories,” “choice theories,” and “just cause theories.”⁵⁷ The first type of argument for the legitimacy of secession is national self-determination theories, which argue that “nations” have

⁵⁵ Buchanan, *Secession*, 10.

⁵⁶ Bartkus, *The Dynamic of Secession*, 15.

⁵⁷ Moore, *National Self-Determination and Secession*.

an inherent right to self-determination and statehood as achieved through secession.⁵⁸ Nations are a complex concept here defined as a “cultural group of people who identify with one another and who either have or seek to have some degree of political self-determination.”⁵⁹ Woodrow Wilson promoted this view in his “Fourteen Points” and other writings. He held peace, and therefore justice, to be the most primary concerns in the world and believed self-determination was an important way to eliminate violent conflicts as a result of two incompatible nations located within one state.⁶⁰

The second type of theory, choice theory, arises from the liberal and democratic belief in freedom of association: people have the *a priori*, universal right to determine their state and its governance.⁶¹ It purports that if a majority in a territory simply chooses to secede, they are sufficiently justified in their right to do so. This has several components: the majority must choose to secede; this majority group need not be distinct in any way (such as a single nation or ethnicity) nor suffering from state-perpetrated injustices; physical occupation of the territory by the secessionist group is sufficient for allowing it to take control of the territory; and the group’s right to secede creates a duty for the state to allow the act.⁶² Daniel Philpott is one of the primary contemporary proponents of this type of theory.⁶³ The idea, however, goes back to John Stuart Mill, whose theory of secession was in actuality somewhat of a hybrid between national self-determination and choice theories. He wrote that if a state is an “artificial agglomeration of two

⁵⁸ Norman, “The Ethics of Secession as the Regulation of Secessionist Politics,” 35.

⁵⁹ Wellman, *A Theory of Secession*, 98.

⁶⁰ Moore, *National Self-Determination and Secession*, xx. Interestingly, Woodrow Wilson was one of the greatest implementers of nationalization and bureaucratic theory in the United States federal government, a grand shift in the conception of the role of government, a theory of government incompatible with the concept of covenant.

⁶¹ Coppieters and Sakwa, *Contextualizing Secession*, 6.

⁶² Norman, “The Ethics of Secession as the Regulation of Secessionist Politics,” 37.

⁶³ Philpott, “Self-Determination in Practice,” 80.

or more distinct communities,” then it is likely to have a difficult time retaining liberty. This necessitates a personal struggle for freedom, which could result in secession or revolution.⁶⁴

On the other hand, just cause theorists argue that the right to secede is a remedial right that must have a just cause. There is no universal right to secession, but only one based on “experiences and consequences.”⁶⁵ Allen Buchanan is one of the leading authors who advocates the just cause, “remedial right only” theory of secession. In his seminal book entitled *Secession*, Buchanan analyzes the number of different moral cases against secession and for secession to find that there does exist a limited, contextual moral right to secession and a for government to refrain from preventing such an action. Buchanan argues that democracy is against granting an inherent right to secede because secession discourages political participation and cooperation between disparate groups within a state. In contrast:

The remedial right only theory holds that the right to secede, as a general right, rather than a special right established by negotiation or by explicit constitutional provisions, arises only in response to serious and persisting grievances... More specifically, a group has the right to secede (in the absence of any negotiations or constitutional provisions that establish a right) only as a remedy of last resort to escape serious injustices.⁶⁶

Buchanan notes that these injustices include only a limited number of abuses: “persistent violations of human rights, including the right to participate in democratic governance”; “the unjust taking of the territory in question, if that territory previously was a legitimate state or a portion of one (in which case secession is simply the taking back of what was unjustly taken)”;

“discriminatory redistribution”— “the state’s exploitation of one group to benefit others”; the preservation of a distinct culture; and the mortal survival of a group in the case that the state has failed to protect that group. In all cases, however, Buchanan cautions that the secessionist group’s right to the physical territory on which they exist must be a serious consideration for the

⁶⁴ Bartkus, *The Dynamic of Secession*, 16; Mill, *Collected Works*, 549.

⁶⁵ Coppieters and Sakwa, *Contextualizing Secession*, 6.

⁶⁶ Buchanan, “Democracy and Secession,” 25.

justness of their secession.⁶⁷ Buchanan argues that this is a relatively flexible theory: it allows for secessions reached through negotiation and mutual consent as well as for a constitutional right to secession.⁶⁸ Most of the research has concluded that just cause theories provide the most legitimate explanations for just secession movements.⁶⁹ Arguments for this include the institutional effects of implementing the theories: if secession were allowed on the grounds of national self-determination theories and choice theories, it could produce negative institutional effects, such as state oppression on minorities and lack of internal cooperation in the political process. Furthermore, secessions allowed on these grounds would eliminate the benefits that secession based on the just cause theory could have.⁷⁰

Secession from a covenant, therefore, would most likely and most effectively be justified due to just cause theories. This right would be a last resort option, only taken after extensive debate and other methods were exhausted. It would necessarily be based on the experienced of a shared community of understanding within the larger society, and this experience would necessarily involve some sort of human rights violation. This would most likely occur if one party violated the covenant in their actions to another party and no adequate living situation which preserved democratic values between the groups was possible. Such parties would, due to the nature of the American covenant, likely lie along ideological lines with enough power and purpose concentrated in self-governing units such as states or associations. The territorial component is the most difficult to address. It is a significant caveat to any just cause explanation of secession. It is difficult to say who owns territory, if this ownership matters, and when it matters. It is further difficult to deal with the inevitability that a territory which wants to secede

⁶⁷ Buchanan, *Secession*, 152-3.

⁶⁸ Buchanan, "Democracy and Secession," 25.

⁶⁹ For a more in-depth explanation as to why this is, see Moore, *National Self-Determination and Secession*.

⁷⁰ Norman, "The Ethics of Secession as the Regulation of Secessionist Politics," 44.

will not contain one hundred percent secessionists. Though tempting, the question of ownership and the problem of displacement are serious concerns that cannot be ignored.⁷¹

Another justification for secession from a covenant can be found in the work of Christopher Wellman, a just cause theorist who provides the strongest linguistic connection to the theory of covenant in this book *A Theory of Secession: The Case for Political Self-Determination*. Wellman argues that freedom of association, the keystone of choice theory justifications, is an unjust reason to secede unless there are boundaries; these boundaries, he argues, are defined by the “Samaritan principle,” or the “benefit-to-others principle,” by which humans have the duty to not only not harm their fellow humans, but to benefit them, in order to live in enduring peace. He uses the covenant to explain why secession would not be allowed: “The reason that *I* have no right to be free from political coercion (i.e., to secede) is that, even if *I* would rather forgo the benefits of political society, my state may permissibly coerce me in order to secure political stability for *my fellow citizens*.”⁷² For this reason, Wellman rejects the choice theory as a justification for secession; yet he does not wholly reject the just cause theory. His definition of just cause, however, hinges on political legitimacy through the adequate performance of political functions. Wellman turns this covenantal reasoning *against* secession on its head *in favor* of secession. If a “separatist group” is “viable,” capable of performing political functions in place of the state, he argues that the state “is not necessary to create a politically secure environment” and cannot be justified in rejecting that group’s appeals.⁷³ “Secession can never be denied when it leaves neither the original state nor the newly formed state incapable of

⁷¹ Because this paper is less intent on the real, practical feasibility of secession, and also because this is a complicated issue to address in this brief paper, this author will leave its comments on this issue for further exploration.

⁷² Wellman, *A Theory of Secession*, 17-16.

⁷³ Wellman, *A Theory of Secession*, 37.

fulfilling its political capacity,” he argues.⁷⁴ This is because in certain circumstances, the group stands for the rights of the individuals within it, and it is those individuals, not the group as a whole, whose rights are being violated when they are not allowed to secede.⁷⁵ The original state must *allow* the secession that the group demands if these conditions are fulfilled. Inherent in this theory is the idea that such a secession would, to some degree, be an act of mutuality. This explanation of secession, however, does not examine the reason a group might want to secede, nor the struggle a secessionist group might go through that would bring it to declare it.

Next, this section turns to examine the dynamic theories of secession that explore the mechanisms by which secession occurs. Viva Ona Bartkus is one influential author on this topic who posits that groups choose to secede based on the relative costs and benefits of either remaining in a state or seceding from it.⁷⁶ Bartkus explains that membership in a state provides security, economic, and social benefits that often prevent secession; secession from a state has costs, including various types of opposition from the state and “hostility” from the international community, which deter groups from secession. These two forces in conjunction provide impetus to remain in a state. On the other hand, remaining in the state can have significant costs, such as state-perpetrated destruction either physical or cultural, which would motivate secession. Leaving the state can also have motivating benefits, such as power benefits for the elite members, or national self-determination. A rise in the costs to remaining in the state increases the relative benefits of seceding. Bartkus, like Buchanan, concludes that the decision to secede as a result of the cost-benefit calculus is one of last resort that occurs in the case that the costs of remaining a member of a state rise too much. Additionally, when the costs of seceding are low enough, in an “opportune moment,” secession is also likely to happen. Decreases and increases

⁷⁴ Wellman, *A Theory of Secession*, 96.

⁷⁵ Wellman, *A Theory of Secession*, 56.

⁷⁶ Bartkus, *The Dynamic of Secession* 18.

in the benefit of remaining within a state also have an effect.⁷⁷ Similarly unilateral secession is theoretically equivalent to a declaration of war (and it has generally led to war), Philpott argues that *jus in bello* proportionality is a good measure for the justification of secession: “if the morally evil consequences of an otherwise just war (in this case, self-determination movement) outweigh the good achieved, then the action should be avoided.”⁷⁸ This view is corroborated on a smaller scale by the political economy theorist Albert Hirschman in his book *Exit, Voice, and Loyalty*. He claims that when consumers in a society view the quality of goods and services available to them as declining, they can choose to either exit the situation or voice protest against the situation.⁷⁹

Another theory of this kind is put forth by Jason Sorens. He models the decision process of secessionist groups based on the credible commitment problem: states produce policies that generate mistrust among minority groups, who then call for either secession or self-government. If the groups have a low cost of collective action and high group capabilities, this will likely motivate political mobilization for secession. If the group has a high cost of collective action and low capabilities, this motivation will not exist. Finally, the “severity” of the credible commitment problem—whether secession is allowed and whether there are many constraints on it—determines whether the group will use the political system or rebel to accomplish their goal.⁸⁰

With respect to the theory of covenant, the dynamics of secession provide a framework within which just causes for covenantal secession would actually result in secession. This is an important topic that should be considered in much greater depth in future research, but which merits attention here. It is apparent that a cost-benefit analysis would lead a group to secede, but

⁷⁷ Bartkus, *The Dynamic of Secession*.

⁷⁸ Coppieters and Sakwa, *Contextualizing Secession*, 254; **Moore/Philpott 43**.

⁷⁹ Hirschman, *Exit, Voice, and Loyalty*.

⁸⁰ Sorens, *Secession and Democracy*, 17.

the question of exactly which costs and which benefits would do so is contextually-dependent. In the case of a covenantal or post-covenantal society, it is possible to theorize what some of these might generally be: the costs of reclaiming a covenantal society are too high; the costs of living without self-governance are too high; the benefits of self-governance in a new society are high and the costs of organizing themselves to do so is low; the expected resistance of the state is low; and an instigating action occurs which provides the political capital and momentum to proceed.⁸¹

In summary, just causes, including the violation of the right to self-governance, can be viewed as providing the just impetus to secede.⁸² The specific cost-benefit analysis or relational process with the government or other citizens that a particular community makes lead to their ultimate decision to act. The covenant intersects with secession here. The desire to build a new covenant where one has disappeared or to break a covenant that is not being upheld can be viewed essentially as a mechanism to protect human rights. A people that claims, but fails, to uphold the values of mutual aid and freedom is violating the rights of its fellow citizens. Should avenues towards obtaining those rights fail to be agreed upon or impossible, a shared community of understanding that can objectively govern itself should be allowed to secede in pursuit of those rights. Whether or not it actually does so is another matter, addressed by the framework of cost-benefit analysis.

From this research, the most compelling preliminary assessment for a future just secession from the United States is Ostrom's "paradigmatic shift" in public administration and conceptions of government. With respect to the American story, a society once conceived covenantally could become, through history and experience, geography, or ideology, two distinct communities. The flexibility of the American democratic federal system was meant to preserve

⁸¹ One important consideration to be left for further research is what specific conditions and contextual factors lead to the specific acts of secession or its declaration *as opposed to other actions*, and why?

⁸² Buchanan, *Secession*, 152-3.

the Union despite and even because of these distinct communities. As mentioned previously, however, John Stuart Mill wrote that a state that is an “artificial agglomeration of two or more distinct communities” is likely to have a difficult time retaining liberty.⁸³ Tocqueville cautioned in his famous book *Democracy in America* that the excesses of democracy could threaten the institution itself in a way that could not be corrected by the system. The American government could become despotic if the government puts primacy on the relationship between the people and the government as opposed to the people and each other. This type of a government would foster “parental authority” and a state of “soft despotism,” in which the government is seen as the source of all rights and liberty. That government would be a corrupt state in violation of the principles of covenant. In this case, when citizens feel their right to the values cherished by Americans is eliminated, secession is viable.⁸⁴ It would make sense that only when the community was divided as to whether this state was legitimately in pursuit of the covenantal goals or not would there be sufficient basis for a community to secede as opposed to overthrow the government.

V. The United States Secession Crisis

Secession has already been considered and rejected by the covenant once: during the Secession Crisis of 1860-1861, in the era leading up to the Civil War. It is a commonly held opinion that the resolution of the Civil War was also resolved the unconstitutionality of secession. Yet if this debate were “resolved,” it would render the conclusions made in the previous section, namely that secession from the United States is under some circumstances a legitimate political action, void and useless. The following section will analyze the specific arguments made on the nature of the Union in the face of the Secession Crisis to conclude that

⁸³ Bartkus, *The Dynamic of Secession* 16; Mill, *Collected Works*, 549.

⁸⁴ Tocqueville, “What Sort of Despotism Democratic Nations Have to Fear.”

the debate may have resolved the particular Crisis of 1860, but that it did not necessarily decide all future crises of secession.

Following the General Election of 1860, which elected Abraham Lincoln president, several states utilized the opportunity provided by the shift in power to pass resolutions in order to secede from the United States. For some time leading up to the crisis, the country had been divided, roughly between the North and the South, on the issue of the nature of the union and the institution of slavery. Elazar argues that the issue of slavery had “fractured the original American covenant”:

Southern whites, in order to maintain what they considered their right to preserve slavery in their states, increasingly defined the Constitution as a compact among sovereign states that could be renounced by any part to it if it felt the terms of the covenant were being violated. On the other hand, radical slavery antiferces responded by defining the covenant as what their leader, William Lloyd Garrison, termed “a covenant with hell” because it allowed slavery to continue.⁸⁵

As the South fought to keep slavery in place, they maintained a long-held belief in the “compact theory,” initially put forth in the Virginia and Kentucky Resolutions of 1798 and 1799, then espoused by John C. Calhoun, and once again taken up by Confederate President Jefferson Davis. This theory conceives the nature of the union as an agreement between independent and ultimately sovereign states; the states retained the primary allegiance of their citizens, because only within the states could true civil society be cultivated, and thus the Union retained legitimacy only due to the limited purposes given to it by compact with the states.⁸⁶ The relationship was purely between the states and the national government; individuals had no role in the forming of the larger national union.⁸⁷

⁸⁵ Elazar, *Covenant and Constitutionalism*, 124.

⁸⁶ Farber, *Lincoln's Constitution*, 47-9; Elazar, *Covenant and Constitutionalism*, 125.

⁸⁷ Farber, *Lincoln's Constitution*, 31.

As a result of a complex series of events, including the Fugitive Slave Act, the Kansas-Nebraska Act, and the *Dred Scott v. Sanford* court case, Southerners perceived the actions of the national government as threatening their freedom and way of life. The election of Lincoln, a member of the nascent Republican Party (which had never been in presidential office before) as well as a vocal antislavery proponent, was the final straw.⁸⁸ South Carolina was the first to proclaim the dissolution of the Union and resolve to secede. It was shortly followed by the eleven states (as well as two partisan groups from Missouri and Kentucky, and some western territories) that would eventually make up the Confederate States of America.

At the time, there was enormous controversy as to whether a state had the right to secede from the Union, and on what grounds. Southerners, particularly Confederate President Davis, had two types of arguments for secession. The first was that secession was constitutional, according to their interpretation of the Union under the compact theory as well as through the act of reversing the ratification of the document. The second was that secession was “extraconstitutional,” “a justified act of revolution or... an exercise of the inherent right of self-determination.”⁸⁹ This included the implication that the use of coercion to keep the South in the Union was unconstitutional, the idea that a constitutional right to secession was not the same thing as a moral one, and that such a moral right to secede existed on the basis that the government had violated the South’s basic rights to liberty.⁹⁰ Although Calhoun’s compact theory was sophisticated and compelling, it was inconsistent with the history of the United States and the intent of the Constitution.⁹¹ It has since died without hope of being renewed in the future. With respect to the other Southern arguments, there is no conclusive evidence that the Framers

⁸⁸ Farber, *Lincoln’s Constitution*, 9-11. For a more detailed discussion of this, see Farber’s book.

⁸⁹ Farber, *Lincoln’s Constitution*, 70-1.

⁹⁰ Farber, *Lincoln’s Constitution*, 92-114.

⁹¹ Farber, *Lincoln’s Constitution*, 81-3.

intended reversal of Constitutional ratification, nor that the use of force to maintain the Union was unjust. It is the final argument for secession, that of the moral right to secede external to the Constitutional right, which this paper proved existed in the previous section regarding the covenant. The extensions of this argument will be explored below.

In sharp contrast to the compact theory, Lincoln was a great proponent of the covenant theory of government. Whereas in a compact, one party can withdraw in the case that the compact was breached, a covenant can only be abolished by mutual decision, Lincoln believed.⁹² First, he argued that secession was a slippery slope: “If a minority... will secede rather than submit, they make a precedent, which, in turn, will divide and ruin them; for a minority of their own number will secede from them whenever a majority refuses to be controlled by such minority.”⁹³ Second, he argued that any problems within a federal democratic republic could be adequately addressed through its own processes: “elections, constitutional amendments, and even provisions for revolution (as well as ‘intelligence, patriotism, Christianity, and a firm reliance on Him’).”⁹⁴ His other arguments against secession were narrower than these two: ratification of the Constitution was intended to be permanent; the movement had been taken charge of by the elites rather than the common people; that the ultimate outcome of the crisis would be unjust; that the states are subordinate to the Union (the Union “created” the states); that secession would cause economic damage; that the redistribution of wealth would be negatively affected as a result; and that secession from the United States meant the failure of the democratic experiment.⁹⁵

Lincoln rhetorically wove his arguments within the narrative of the American covenant. Elazar calls him “the greatest American exponent of covenantalism in the sense that he

⁹² Farber, “The Fourteenth Amendment and the Unconstitutionality of Secession,” 488.

⁹³ Wellman, *A Theory of Secession*, 67.

⁹⁴ Wellman, *A Theory of Secession*, 68.

⁹⁵ Wellman, *A Theory of Secession*.

integrated both the religious and secular liberal strands of covenantalism, covenant, and political compact into one unified whole on the basis of his understanding of the meaning of the American founding.”⁹⁶ As mentioned earlier, Lincoln strongly believed that the Declaration of Independence most perfectly embodied the covenant and was the source of American values and national identity. Lincoln embraced the covenantal theory by stressing his commitment to the founding values, as well as the religious nature of the covenantal relationship:

I am exceedingly anxious that this Union, the Constitution, and the liberties of the people shall be perpetuated in accordance with the original idea for which that struggle was made, and I shall be most happy indeed if I shall be a humble instrument in the hands of the Almighty, and of this His almost chosen people, for perpetuating the object of that great struggle.⁹⁷

Lincoln further understood the tradition of the citizenship that had been present in New England at the founding: that of freedom limited by commitments to mutual benefit. For Lincoln, preserving the Union was the best way to at once improve oneself and the American community.⁹⁸ Some of Lincoln’s most famous words, in the Gettysburg Address, use covenantal language: “...that this nation, under God, shall have a new birth of freedom- and that government of the people, by the people, for the people, shall not perish from the earth.”⁹⁹ Finally, he intimated at a talk in Indiana in 1861 that the covenant lay between the people, and not between them and government:

It is your business to rise up and preserve the Union and liberty, for yourselves, and not for me... I... am but an accidental instrument, temporary, and to serve but for a limited time... with you, and not with politicians, not with presidents, not with office-seekers, but with you, is the question, ‘Shall the Union and shall the liberties of this country be prepared to serve to the latest generation?’¹⁰⁰

⁹⁶ Elazar, *Covenant and Constitutionalism*, 126.

⁹⁷ Elazar, *Covenant and Constitutionalism*, 128. Address to the New Jersey State Senate at Trenton, Feb 21, 1861.

⁹⁸ Elazar, *Covenant and Constitutionalism*, 132-3.

⁹⁹ Elazar, *Covenant and Constitutionalism*, 129.

¹⁰⁰ Elazar, *Covenant and Constitutionalism*, 128. Reply to Gov. Oliver P. Morton at Indianapolis, Indiana, Feb 11, 1861.

Lincoln firmly believed that the Union, the North in particular, had not broken its covenantal promises to the South. In fighting against the institution of slavery, they sought to uphold the very important human rights values that were so deeply embedded in the covenant, not to break the covenant with the South over their human rights violations and covenantal transgressions. Lincoln's speech used language that harkened back to the values of covenant on which the United States was founded.

Lincoln's most compelling arguments were that the structure of American government held the key to its own solution— debate, elections, and amendments—and that the outcome of the South's secession would be unjust. In these arguments, one can see reflections of the belief that secession should only be undertaken as a last resort, and the idea that covenant can provide justifications for secession. The South corroborated this opinion, albeit with a different conclusion, by putting forth the idea that the moral right to secede existed external to the Constitutional right. Yet the South did not possess the moral right to secede, for they would not have produced a just society. Harkening back to the covenantal theory of secession of Wellman, who argues that as long as a group is able to fulfill their political capacity, they can never be denied the right to secede. Under this analysis, the South did not have a moral right to secede, because they would have been incapable of fulfilling their political capacity in concert with the human rights values that the United States held so central. The South wished to secede with one of their aims being the continuation of an institution that violated human rights—slavery. Thus, they were incapable of fulfilling their political capacity from the perspective of the United States, and had no moral right to secede. Further, although it cannot be retroactively predicted what might have happened, it is likely that coexistence with a neighbor who perpetuated this

institution would not have been peaceful for the United States. These two criteria are key when determining whether an act of secession is consistent with the covenant that bound it.¹⁰¹

The commonly proposed argument against secession today maintains that Americans fought each other in the Civil War and resolved the issue of secession. The 14th Amendment, resolved the relationship between the citizens and the government: they owe their loyalty to the national government, and secession is unconstitutional. The Fourteenth Amendment, ratified in the post-Civil War era, contains two clauses that provide the basis for this interpretation of secession as unconstitutional. The first is the Privileges and Immunities Clause, which says that states cannot deprive a citizen of their federal rights. The second is the Citizenship Clause, which says that citizens are primarily and “indissolubly” citizens of the United States; they are “only derivatively or contingently” citizens of a state.¹⁰² Together, these clauses imply that citizens are first and foremost Americans, and only secondarily Californians (for example) and that a state could not take away the rights of its citizens to be national citizens through the act of secession. Yet this argument as the sole reason secession is not an option is unsatisfactory. It does not get to what the heart of what binds Americans to these governments, to what the covenant is. Further, it misses the point. America was not founded on a relationship between *people* and *government*, but on a bond between *individuals*. Interestingly, Lincoln himself believed this to be the case, as is shown in his deep belief in and thorough knowledge of the covenant discussed above. The true

¹⁰¹ Lincoln’s other arguments are not nearly as compelling. Many of them are specific to the unique situation in 1860-1, and others do not stand up when tested. For example, although the idea of a “slippery slope” of secession is a valid fear, it is not a foregone conclusion that such would occur. In fact, the world has had many secessions since that time which have not produced this condition. Further, secession made on the basis of forming a new covenant would inherently solve this problem.

¹⁰² Farber, “The Fourteenth Amendment and the Unconstitutionality of Secession.” The 1869 court case *Texas v. White* affirmed this interpretation of the 14th Amendment. It ruled that even though Texas had joined the Confederacy, they had never stopped being a part of the Union; secession was unconstitutional and not permitted by the Constitution and thus all acts of secession and their supporting legislation were “null.”

bond that must be present for an enduring union lies between the people as equals, not between a sovereign protector and provider and his subjects.

Looking into the future, the condemnation of the South's secession in 1860 and 1861 was justified, but this justification needs to be reexamined in light of today's new world. Although slavery broke the covenant, the immorality of the institution compelled the use of force to attempt to renew it. The real lessons learned from the case of the Secession Crisis are that secession from a covenant must truly be a last resort, considered only when the covenant has been broken, when the costs of remaining in the Union are high and the benefits are also high. Secession from a covenant must be a mutual agreement by both parties to respect human rights and uphold capable institutions. Thus, this paper has arrived at a historically accurate picture of what might lead to a just and viable secession movement within a covenantally based society.

VI. Conclusion

Through this examination of theories of both covenant and secession, this paper has sought to link the two in order to prove the covenantal bases upon which secession from the United States of America could or could not be justified. Ultimately, this paper has concluded that when this covenantal basis of American unity necessary for self-governance no longer exists, there is the potential for a community to justly secede from the Union in pursuit of those governing values. Despite American historical and legal claims that secession is unjustified, there is a covenantal justification based on the American values and the right to self-governance. That which is promised to the American people, namely self-governance, needs to be upheld for the covenant to provide the legitimate physical Union that is the United States today. Of course, this paper has affirmed that ultimately, American values are equivalent with good governance, and that in order to uphold such good governance, debate and non-radical movements should

first be attempted. The American system is perhaps the most perfectly-realized political system created in human history towards achieving those ends, and it should be preserved with utmost care. Nevertheless, should the costs and benefits of seceding lean in favor of secession, secession movements could become more than threats or petitions.

The idea of the covenant has been lost from contemporary thought today. Yet according to preliminary glances at the health of the covenant, the evidence is inconclusive that a given state or community would analyze their situation to conclude that secession is the most beneficial action for them to take.¹⁰³ Yet it is clear that Americans perceive trends developing in the system, trends of the sort of despotism Tocqueville warned of, and Ostrom would posit that these trends are actually occurring. Fear of such government paternalism likely drives the motivations for secession showcased in the *We the People* petitions of 2012. Ultimately, the first steps that should be taken in American life and culture is the instigation of a real conversation about what it means to be an American and what the nature of the federalism is and normatively should be. As Ostrom discusses in his influential article “Artisanship and Artifact,” political theory and policy is crafted with the values of society imbued within it.¹⁰⁴ Therefore, a conversation about American values and how to preserve them is a necessary recommendation of this paper.

This paper is limited in the scope of what it aims to describe. Yet there are many avenues for further research that are logical extensions of this initial work and are essential to its ultimate relevance to contemporary American society. Thinking about the issues of covenant and secession raises many questions in political science. The first avenue for further research stemming from this theoretical work is determining whether or not the covenant exists today and how its health can be measured; as well as what a just covenantal secession would look like in

¹⁰³ Again, see: Putnam, *Bowling Alone and Better Together*; Skocpol, *Diminishing Democracy*; Fiorina, *Culture War?*; and Wolfe, *Does American Democracy Still Work?*

¹⁰⁴ Ostrom, “Artisanship and Artifact.”

accordance with these theories. It is also worth giving further consideration to whether the new “paradigm” of American public administration, centralized and paternalistic, has a place for covenant in it; in other words, whether the normative implications of a Hobbesian world are compatible with a Tocquevillean world. A third line of research would follow the idea of costs and benefits: why would a certain set of factors lead to calls for secession as opposed to impeachment, or revolution? Is there something specific about the Election of 2012 and the condition of American society and governance at that time that led to calls for secession? These, and certainly other, puzzles for political science stemming from the theoretical question addressed in this paper are worth pursuing further. The question of the true the foundation of America and its source of its self-sustainability is a vital question for Americans today, and citizens everywhere must be willing to take up the struggle to maintain government “of the people, by the people, for the people.”

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