The American Civil War as a Trial by Battle

CYNTHIA NICOLETTI

Confined alone in a cell in New York's Fort Lafayette in the heat of the summer of 1865, former Confederate naval secretary Stephen R. Mallory had little to do but reflect on the fate of the defeated Confederacy.[1] Convinced that his life might be forfeit if the United States government made good on its threat to try him for treason, Mallory composed a lengthy letter to President Andrew Johnson petitioning for a pardon and seeking to explain his views on the demise of the Confederacy and the fate of the states' right to secede from the Union. While Mallory stressed his opposition to disunion in 1861, on the grounds of its inexpediency, he admitted that he had placed loyalty to his state above his duty as a citizen of the United States. He had "regarded the commands of my state as decisive of my path of duty; and I followed where she led." Nonetheless,

1. Mallory's biographer describes his life in prison as time spent writing in his diary and composing long letters to his wife, staring out the window, and playing chess against himself. See Joseph T. Durkin, *Confederate Navy Chief: Stephen R. Mallory* (Tuscaloosa: University of Alabama Press, 1954), 344–79. Rodman L. Underwood's recent Mallory biography, *Stephen Russell Mallory: A Biography of the Confederate Navy Secretary and United States Senator* (Jefferson, N.C.: McFarland, 2005), 174–78, gives a less full description of his imprisonment.

Cynthia Nicoletti is a Ph.D. candidate in history at the University of Virginia and a graduate of Harvard Law School <cln4x@virginia.edu>. The author wishes to thank Gary Gallagher, Charles McCurdy, Jed Shugerman, Scott Nesbit, Stephanie Hunter McMahon, David Seipp, Owen Williams, the members of the Harvard legal history colloquium (particularly the students, who provided invaluable written feedback), participants in the Law and Society and the American Society for Legal History conferences, and David Tanenhaus and the anonymous reviewers of the *Law and History Review* for their helpful and thought-provoking suggestions and comments. This article has been made immeasurably stronger as a result of their input.

Law and History Review February 2010, Vol. 28, No. 1

doi:10.1017/S0738248009990046

Mallory went on to disclaim his belief in the principle of secession in very striking terms, describing the death of secession in the crucible of the Civil War as the result of a trial by battle. Mallory never specifically denied secession's constitutionality; instead, he told Johnson that because he "recognize[ed] the death [of the Confederacy] as the will of Almighty God, I regard and accept His dispensation as decisive of the questions of slavery and secession."[2]

Mallory's description of the Civil War as a trial by battle, in which the legality of the principle of secession had been tried, was not unique. Many American intellectuals, both northern and southern, Republican and Democrat, reconstructed and unreconstructed, employed this metaphor as a way of making sense of the demise of the principle of state secession through the convulsion of the Civil War.[3] Indeed, the United States Supreme Court invoked trial by battle in the two most important cases that addressed the constitutionality of secession: the *Prize Cases* and *Texas v. White*.[4] While most historians have acknowledged that a robust debate about the nature of the Union and the ultimate locus of sovereignty flourished in American political discourse until 1861, they have tended to assume that the doctrine of state secession immediately vanished from public dialogue with the triumph of the Union army at Appomattox. As Kenneth Stampp detailed in his landmark article "The Concept of a Perpetual Union," the constitutionality of secession remained an open question throughout the antebellum period. In Stampp's view, secessionist thinking dominated American political discourse until the Nullification Crisis of 1832, which marked the beginning of the serious development of nationalist theory. The Constitution's ambiguity about the permanency

2. Stephen R. Mallory to Andrew Johnson, June 21, 1865, *The Papers of Andrew Johnson*, 16 vols., ed. Paul Bergeron (Knoxville: University of Tennessee Press, 1967–69), 8:268. Mallory did not claim to acquiesce in the results of the war merely for the purpose of wheedling a pardon out of President Johnson. He wrote privately in his diary while he was still imprisoned that "the South acquiesces in the results of the battle field; acquiesces in good faith and will conform in good faith to the theory of the 'National Government' instead of the 'Federal Government,' and never again attempt secession" (Stephen Mallory diary entry, December 6, 1865, quoted in Durkin, *Confederate Navy Chief*, 374).

3. A similar argument to the one made throughout this article with respect to the right of secession could, I suspect, be applied to the destruction of slavery in the Confederate states during and after the Civil War. Comparing northerners' and southerners' thoughts about the end of slavery and that of secession might also prove a fruitful topic of inquiry, but it is not one that will be explored here. This is not to say that the death of slavery after the Civil War is somehow of less moment than the eradication of secession arguments. Rather, my choice arises because this piece is part of a larger work that focuses on the intractability of secession arguments after the Civil War in the context of Jefferson Davis's treason trial.

4. 67 U.S. 635 (1862); 74 U.S. 700 (1869). These cases will be discussed below.

of the federal arrangement, Stampp maintained, quoting John Quincy Adams, unfortunately became so contentious "that it [could] only be settled at the cannon's mouth."[5]

Many constitutional scholars of the Civil War period have focused their attention on the changes wrought in American federalism as a result of the war. The war caused a profound alteration in the delicate balance of federal and state authority, and scholars of the period have sought to discover just how revolutionary the Civil War was in terms of shaping the contours of American federalism. Highlighting the importance of the Reconstruction amendments, as well as the exigencies of the war, Harold Hyman, in his seminal work *A More Perfect Union*, argued that the Civil War caused a great expansion of government authority, particularly on the federal level. Qualifying Hyman's insights by focusing on the caution exercised by Republican statesmen in increasing the power of the national government vis-à-vis the states in the aftermath of the Civil War, historians such as Phillip Paludan, Herman Belz, Michael Les Benedict, and Michael Vorenberg have underscored the essentially conservative outlook of many politicians in terms of preserving state sovereignty in the reconstructed Union. In a similar vein, Bruce Ackerman has explored the logical difficulties that arose during the Reconstruction era as a result of congressional Republicans' commitment to expanding national power while retaining the fundamental attributes of state sovereignty.[6]

If debate about the extent to which the Civil War altered the antebellum federal system has flourished, scholars have taken it as given that the war, at the very least, unequivocally established the unconstitutionality of the extreme state sovereignty position espoused by the defeated Confederates.[7] Historians and constitutional scholars have largely

5. Kenneth Stampp, "The Concept of a Perpetual Union," *Journal of American History* 65 (June 1978): 33.

6. Harold Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (Boston: Houghton Mifflin, 1975); Phillip S. Paludan, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era* (Urbana: University of Illinois Press, 1975); Herman Belz, *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era* (New York: W. W. Norton, 1978); Michael Les Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction, 1863-1869* (New York: W. W. Norton, 1974), *Preserving the Constitution: Essays on Politics and the Constitution in the Reconstruction Era* (New York: Fordham University Press, 2006); Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (Cambridge: Cambridge University Press, 2001), 109–10, 132–35; Bruce Ackerman, *We the People: Transformations* (Cambridge, Mass.: Belknap, 1998).

7. This is not to say that no one has undertaken to defend the constitutionality of secession since the Civil War, but rather that scholars who have presented a logical case for secession

neglected to investigate whether the Civil War did in fact lead inexorably to the demise of secession as a constitutional argument. The death of secession at Appomattox has become something of an adage in historical writing, often baldly declared in a throwaway line or treated as an unspoken assumption that nonetheless undergirds the analysis, but never thoroughly examined.

This tradition began in the late nineteenth century with the first professional histories of the Civil War. In 1897, historian William Archibald Dunning stated that the Civil War had foreclosed any future debate about secession's constitutionality. Americans still wrangled over the proper distribution of authority between the states and the federal government, he maintained, but "in respect to the question of ultimate political supremacy under the constitution of the United States, the result of the Civil War gave an answer that was decisive. No argument based in any particular upon the principle of state-sovereignty can ever again be tolerated in the arena of constitutional debate." Writing in 1905, historian John Burgess agreed, noting that the Civil War had secured a definitive "triumph over secession and slavery," while James G. Randall's highly influential *Constitutional Problems Under Lincoln* mentioned in passing that "constitutionally and otherwise, secession has been a dead issue since the Civil War." Similarly, historian Andrew McLaughlin began his constitutional history of the United States with a bold assertion that "the most significant and conclusive constitutional decision was not rendered by a court of law but delivered at the famous meeting of General Grant and General Lee at Appomattox."[8]

Modern scholars (both historians and legal scholars) have reached the same conclusions in a correspondingly cursory fashion. Harold Hyman

---

have nevertheless viewed the Civil War as a decisive blow against the vindication of their viewpoint. For instance, political scientist Mark Brandon presents a pro-secession argument, based on constitutional logic and the history of the Constitution's adoption and the various sectional crises of the antebellum period, but he ultimately acknowledges that such an argument has had no practical force since the "emphatic . . . military solution" of the Civil War. Brandon accordingly maintains: "For more than a century Lincoln's doctrine, reinforced by Union military victory and the Supreme Court's confused benediction after the war, has made national perpetuity and the illegitimacy of secession appear to be brute constitutional facts." See Mark E. Brandon, *Free in the World: American Slavery and Constitutional Failure* (Princeton, N.J.: Princeton University Press, 1998), chap. 7, esp. 179, xiv–xv.

8. William A. Dunning, *Essays on the Civil War and Reconstruction* (New York: Macmillan, 1898), 304; John W. Burgess, *Reconstruction and the Constitution, 1866–1876* (New York: Charles Scribner's Sons, 1905), 54; James G. Randall, *Constitutional Problems Under Lincoln* (1926; reprint, Urbana: University of Illinois Press, 1964), 522; Andrew C. McLaughlin, *A Constitutional History of the United States* (New York: D. Appleton-Century, 1936), vii.

thus wrote that "the primary immediate impact of the Civil War was to be the abandonment of secession as a state's right." In his opinion, the military defeat of the Confederacy had ensured that "slavery and secession were excised from states' rights." Kenneth Stampp found that "the Union's perpetuity was rather firmly established at Appomattox," while Brooks Simpson agreed that "Union victory settled several issues. The viability of secession had been tested and crushed. The threat of disunion had faded away from American political discourse."[9] Legal scholars have offered similar conclusions, and several have described the death of secession at Appomattox using appropriately legal terminology. Bruce Ackerman stated simply that "all that the Union army established was the failure of secession," and Daniel Farber concluded that "history is written by the victors, and the idea of secession has been dead since Appomattox." Michael Stokes Paulsen and Akhil Amar strikingly analogized Union victory to a court case. Paulsen wrote that "the outcome of Grant v. Lee resolved the most important issue of antebellum constitutional dispute—the nature of the Union—in favor of the nationalist view of sovereignty and against the South's state-sovereignty view. It was a great Civil War, not a judicial opinion, that settled this issue," and Amar characterized the Civil War as tantamount to a legal action ("captioned *United States v. Lee*"), wherein "the final military judgment [against interposition, nullification, and secession] was entered at the Appomattox *Courthouse*."[10]

Despite the current literature's rather perfunctory treatment of secession's demise, accepting the fact that a violent conflict had decided the question of secession's constitutionality proved neither an uncomplicated

9. Hyman, *More Perfect Union*, 284–85, 368; Stampp, "Concept of a Perpetual Union," 6; Brooks D. Simpson, *America's Civil War* (Wheeling, Ill.: Harlan Davidson, 1996), 4, 217. For other similar statements, see also Paludan, *Covenant with Death*, 98, 225; Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development* (New York: Norton, 1991), 317; Arthur J. Jacobson, Bernhard Schlink, and Virginia Cooper, *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000), 217; Bernard Schwartz, *From Confederation to Nation: The American Constitution, 1835–1877* (Baltimore: Johns Hopkins University Press, 1973), 133; Schwartz, *A History of the Supreme Court*, (Oxford: Oxford University Press, 1993), 134; Schwartz, *A Commentary on the Constitution of the United States*, 5 vols. (New York: Macmillan, 1963), 1:41.

10. Ackerman, *We the People*, 2:22; Daniel Farber, *Lincoln's Constitution* (Chicago: University of Chicago Press, 2003), 78; Michael Stokes Paulsen, "The Civil War as Constitutional Interpretation," *University of Chicago Law Review* 71 (Spring 2004): 716; Akhil Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96 (June 1987): 1512n341 and accompanying text. See also Norman W. Spaulding, "Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory," *Columbia Law Review* 103 (December 2003): 2019; Daniel Elazar, "Civil War and the Preservation of American Federalism," *Publius* 1 (1971): 47, 56.

nor an automatic process for many nineteenth-century American thinkers. Because the validity of secession remained at base a legal question, both northern Unionists and ex-Confederates struggled mightily to come to terms with the realization that a war could in fact obliterate a logical assertion that had ignited such furious controversy throughout the antebellum period. By exploring how nineteenth-century legal theorists sought to confront the deeply troubling fact that secession had died in the crucible of war, I seek to broaden our understanding of how Americans negotiated the contours of federalism in the aftermath of the Civil War.

For nineteenth-century Americans, who took their society's adherence to the rule of law very seriously, the Civil War presented a profound crisis.[11] Rather than turning to the legal process to determine the legitimacy of the ultimate expression of state sovereignty—the right of secession—Americans had instead engaged in an armed conflict on a massive scale that had ultimately resulted in the deaths of 620,000 men. In order to make sense of this basic discord between the rationalism of the law and the turbulence of war, American jurists and other intellectuals adopted the language of the medieval legal custom of trial by battle as a way of describing how a violent conflict could decide a fundamental question of constitutional interpretation. In so doing, they articulated an idea that would have had profound resonance throughout American society. Employing this metaphor made it possible for defeated ex-Confederates to console themselves with the knowledge that the logical rationale for the right of secession had not been repudiated, even though the war had made exercise of the right impossible. At the same time, triumphant Unionists likened the Civil War to a trial by battle in order to lend the imprimatur of a legal action to the violent turmoil of war. But Americans who analogized the war to a trial by battle also faced the uncomfortable realization that their society, which prided itself on its enlightened rationalism and adherence to the rule of law, had invoked a repudiated medieval superstition in confronting the most contentious legal issue of their time. Using the language of trial by battle thus forced introspective Civil War-era Americans to ask themselves whether they had become barbarians in the course of the upheaval of the war. Any truthful answer to this query would have demanded a qualified "maybe."

11. See Arthur Bestor, "The American Civil War as a Constitutional Crisis," *American Historical Review* 49 (1963): 327–52; Phillip Paludan, "The American Civil War Considered as a Crisis in Law and Order," *American Historical Review* 77 (October 1972): 1013. On the conflict between law and war in a modern context, see David Kennedy, *Of War and Law* (Princeton, N.J.: Princeton University Press, 2006).

Trial by Battle and the American Civil War

In using the term "trial by battle" to describe their recent Civil War, nineteenth-century American intellectuals harkened back to an ancient method of settling legal disputes. The trial by battle, in which two combatants engaged in a physical contest to decide the outcome of a legal dispute, had been common prior to the advent of jury trial in medieval Europe.[12] By employing this particular method of proof, litigants placed their fate in God's hands, trusting that God would deliver victory to the righteous party. Trial by battle was thus a form of judicial ordeal, much like being burned with a hot poker or being submerged in a pool of water, designed to prove the truth of a litigant's assertions through reliance on divine intervention.

Trial by battle—otherwise known as wager of battle or judicial combat—almost certainly arrived in England along with the Normans in 1066, as there exists no historical record of the wager of battle in Anglo-Saxon times. At common law, trial by battle could be used as a method of proof in both real actions (commenced by writ of right) and criminal cases initiated by private parties (appeals of felony). In such cases, a battle ensued when the criminal defendant or the tenant in a real action invoked his right to prove the truth of his assertions by wager of battle and did not opt for a jury trial instead.[13] While other forms of the ordeal fell into disuse after the Fourth Lateran Council of 1215, when Pope Innocent III condemned the participation of clergy in judicial ordeals, trial by battle survived, probably because it did not necessarily require

12. Although trial by battle was used as a method of proof in cases between individual litigants, there is some indication that nations did use trial by battle, in a certain sense, to settle international disputes in European history. For instance, in 1340, during the Hundred Years' War, King Edward III of England challenged King Philip VI of France to single combat or to a staged battle between 100 champions to settle their disputed claim to the throne of France. The French king declined. See Jonathan Sumption, *The Hundred Years War: Trial by Battle* (Philadelphia: University of Pennsylvania Press, 1999), 348–49. See also "Judicial Combats and the Wars of Nations," *Chambers' Edinburgh Journal* 190 (1847): 126, comparing trial by battle to international wars.

13. The history of trial by battle in English common law and the gradual advent of trial by jury is a much more complex and fascinating story than this very brief summary would indicate. For more information, see Frederick Pollock and Frederic William Maitland, *History of English Law Before the Time of Edward I*, 2 vols. (Washington, D.C.: Lawyers' Literary Club, 1959), 2:600; Theodore F. T. Plucknett, *Concise History of the Common Law* (Boston: Little, Brown, 1956), 116–21; Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford: Clarendon, 1986), 103–26; John W. Baldwin, "The Intellectual Preparation for the Canon of 1215 against Ordeals," *Speculum* 36 (1961): 613–36. Henry Charles Lea's *Superstition and Force* (1870; reprint, New York: Greenwood Press, 1968), will be discussed below.

the sanction of the clergy in order to take place. Over time, trial by battle faded into disuse, as jury trial became the preferred method of discerning the truthfulness of litigants and witnesses. Although its exercise became increasingly infrequent, trial by battle remained a technically valid form of proof in England until 1819, when Parliament abolished it after a defendant, who had already been acquitted by a jury, threatened to wage battle against his accuser in a subsequent appeal of felony.[14]

Why would nineteenth-century Americans repeatedly invoke a medieval legal concept in coming to terms with their civil war? Nineteenth-century American lawyers would probably have been vaguely familiar with the historical practice of trial by battle but not with its particulars. William Blackstone's *Commentaries* devoted a scant three pages to a discussion of wager of battle, and characterized the practice as one "of great antiquity, but much disused." Blackstone's treatise described trial by battle as an ancient practice, notable only as a relic of the distant past, which served to remind the modern reader of his ancestors' folly in relying upon it. Blackstone described trial by battle as resulting from "the military spirit of our ancestors, joined to a superstitious frame of mind: it being in the nature of an appeal to Providence, under an apprehension and hope (however presumptuous and unwarrantable) that heaven would give victory to him who had the right."[15] Blackstone's dismissive treatment of wager of battle was echoed by many nineteenth-century legal treatise writers, whose cursory attention to the practice was designed to prove only that trial by battle was "absurd and barbarous," and therefore "inconsistent with our advanced civilization."[16] One writer briefly commented that because wager of battle did "not prevail in this country, I will not waste

14. This case was *Ashford v. Thornton*, 106 Eng. Rep. 149 (1818). As late as 1774, on the eve of the American Revolution, several members of Parliament protested vehemently against a proposal that would have abolished the appeal of felony and the right to defend one's innocence through trial by battle in Massachusetts as a way to crack down on the unruly colonists. MP John Dunning, later Lord Ashburton, insisted that even surly Americans could not be denied "that great pillar of the Constitution, the Appeal for Murder," for fear that such a statute would create a dangerous precedent and eventually cause Englishmen to lose this right as well. See Lea, *Superstition and Force*, 197–98; William Renwick Riddell, "Appeal of Death and its Abolition," *Michigan Law Review* 24 (1925–1926): 804.

15. William Blackstone, *Commentaries on the Laws of England*, 4 vols., ed. Edward Christian (Philadelphia: R. H. Small, 1825), 3:335–38.

16. Thomas L. Smith, *Elements of the Law, or, Outlines of the System of Civil and Criminal Laws in Force in the United States, and in the several states of the Union* (Philadelphia: Lippincott, Grambo, 1853), 194; Henry Nicoll, *An Address Delivered Before the Graduating Class of the Law School at Columbia College* (New York: Trow & Smith, 1869), 8.

time describing [it]."[17] Accordingly, nineteenth-century American lawyers would have enjoyed only a passing acquaintance with trial by battle, and members of the general public would have had an even hazier understanding of the practice.

Still, referring to the war as a trial by battle called to mind a particular idea that held great resonance for nineteenth-century Americans, even though the analogy remained only a loose one. American intellectuals thus gave voice to a way of conceptualizing the war that proved very powerful and probably reflected the thought processes of more average people. The prevailing understanding of the particularities of trial by battle was extremely vague even among the elite, and they invoked the concept for its rhetorical value rather than as a specific point of reference that entailed the technical procedures of wager of battle as it had been practiced in medieval England. Nineteenth-century Americans adopted this language because it was uniquely useful for explaining their predicament in the postwar world. Like their own war, the medieval trial by battle intertwined three seemingly incompatible elements: divine Providence,[18] the violence and irrationality of physical combat, and the

17. Timothy Walker, *Introduction to American Law: Designed as a First Book for Students* (Cincinnati: Derby, Bradley, 1846), 525.

18. While the concept of trial by battle was undeniably a legal one, it also had deep resonance as a religious idea. Many nineteenth-century Americans clearly believed that God had a hand in the war, and that He had ordained the suffering occasioned by the war. This sentiment was perhaps most famously expressed by Abraham Lincoln in his Second Inaugural Address, in which he spoke of American slavery as "one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South this terrible war as the woe due to those by whom the offense came, shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him?" Abraham Lincoln, "Second Inaugural Address," March 4, 1865, http://www.bartleby.com/124/pres32.html. If Lincoln invoked the idea of divine providence in reference to the Civil War, the topic was a favorite one with nineteenth-century theologians. Religious leaders as well as political ones analogized the war to a trial by battle. For example, in late 1865, southern Presbyterian theologian John Adger referred to the Confederate war effort as "the cause [southerners] were maintaining against a radical infidelity in humble prayer to [God's] wise, and sovereign, and merciful arbitrament." John Adger, "Northern and Southern Views of the Province of the Church," *Southern Presbyterian Review* 16 (March 1866): 397–98. See Mark A. Noll, "'Both … Pray to the Same God': The Singularity of Lincoln's Faith in the Era of the Civil War," *Journal of the Abraham Lincoln Association* 18 (Winter 1997): 1–26; Mark A. Noll, *The Civil War as a Theological Crisis* (Chapel Hill: University of North Carolina Press, 2006), 75–94; Eugene Genovese, *A Consuming Fire: The Fall of the Confederacy in the Mind of the White Christian South* (Athens: University of Georgia Press, 1998), esp. 62–71; David Chesebrough, ed., *"God Ordained This War": Sermons on the Sectional Crisis, 1830–1865* (Columbia: University of South Carolina Press, 1991); James H. Moorhead, *American Apocalypse: Yankee Protestants and the Civil War, 1860–1869* (New Haven, Conn.: Yale University Press, 1978).

reasonable and deliberative processes of law. The very oddness of the combination actually contributed to functionality of the comparison for American theorists, who were engaged in the difficult process of making sense of the convulsion of their own war and its impact on the rule of law.

The concept of trial by battle also proved remarkably malleable. Its frequent invocation betrayed Americans' profound ambivalence about the legitimacy of using violent means to dispose of the question of secession's constitutionality. Northerners who celebrated Union victory analogized the late war to a medieval trial by battle as a way of conferring the legitimacy of a type of *legal* proceeding—however obsolete—upon the chaotic process of the war. While these northerners signaled their devotion to the rule of law through their insistence on viewing the war as a binding and quasi-legal mode of adjudication, they also at times betrayed their uneasiness with the very idea of using violence to achieve legal resolution, displaying intense discomfort with the concept of trial by battle as applied to the Civil War. The analogy of trial by battle proved similarly pliable in the hands of ex-Confederate thinkers, who revealed their deep confusion about whether they could and would accept that the war had obliterated secession through their ruminations on the topic. Many ex-Confederates, particularly those who sought to make peace with the realization that the secessionist cause had failed on the field of battle, likened the war to a trial by battle as a means of acknowledging the triumph of the nationalist conception of the Union while still clinging to the constitutional logic undergirding secession. But others who exhibited more defiance also likened the war to trial by battle, playing down its legal overtones and highlighting its violent and irrational connotations as a way of critiquing the claim that the war could render a verdict on the legitimacy of secession.

Moreover, trial by battle inevitably conjured up images of the medieval past, with both its negative and positive but not necessarily factually grounded associations. Ex-Confederates frequently characterized the notion of using war to settle human disputes as "medieval," as a way of criticizing the "barbarism" of triumphant northerners who blithely accepted the results of the trial by battle. But viewing trial by battle as a relic of barbarism and a repudiated superstition did not, however, prevent nineteenth-century Americans from simultaneously romanticizing the idea of medieval judicial combat and consequently envisioning themselves as honorable participants in a chivalric and noble struggle.[19] Despite being

19. This romanticization applied with particular force to ex-Confederates, both because of the prevalence of the culture of honor in the American South and because their defeat made them more prone than northerners to a maudlin and sentimental view of the war. See Bertram Wyatt Brown, *Southern Honor: Ethics and Behavior in the Old South* (New York: Oxford University Press, 1982); Edward L. Ayers, *Vengeance and Justice: Crime and Punishment in the 19th-Century American South* (New York: Oxford University Press, 1984), 30–33;

poorly understood and inconsistently employed, the metaphor of trial by battle proved to be so compelling to so many in post–Civil War America precisely because it remained remarkably supple. Its contradictions mirrored American theorists' own uneasy confusion about the meaning of the war. By analogizing the Civil War to the medieval trial by battle, the war's survivors sought to harmonize, albeit imperfectly, the seemingly incompatible imperatives of law and violence.

Amnesty and Acquiescence?: Ex-Confederates' Use of the Language of Trial by Battle

As part of his notoriously lenient Reconstruction policy, President Johnson determined not to seek retribution against the vast majority of ex-Confederates but instead to welcome them back into the national fold as quickly as possible. Issued on May 29, 1865, Johnson's Amnesty Proclamation accordingly offered free and full pardon to anyone who had participated in the rebellion upon swearing an oath to "defend the Constitution of the United States and the union of the States thereunder."[20] The proclamation exempted fourteen classes of persons from its largesse, including those who had held high civil or military office in the Confederacy and those who owned more than $20,000 worth of property. Anyone who fell within an exemption could file a special application for pardon with the president. Johnson received at least 15,000 such applications in the two years following the Civil War and eventually granted more than 13,500 individual pardons.[21]

Drafting a petition for amnesty offered ex-Confederates an opportunity to set down their thoughts regarding the extinction of the right of secession and their rediscovered loyalty to the United States. While Johnson's proclamation did not specifically require ex-Confederates to renounce a belief in secession beyond swearing themselves loyal to the Union, many amnesty applicants took it upon themselves to explain their willingness to take such an oath in light of their prior adherence to the doctrine of secession. In so doing, many ex-Confederates seized on the language and terminology of

Richard Hamm, *Murder, Honor, and Law: Four Virginia Homicides from Reconstruction to the Great Depression* (Charlottesville: University of Virginia Press, 2003).

20. For a discussion of how pardoning formed the basis of Johnson's lenient Reconstruction policy, see Eric L. McKitrick, *Andrew Johnson and Reconstruction* (Chicago: University of Chicago Press, 1960), 142–52.

21. Amnesty Proclamation, May 29, 1865, *Papers of Andrew Johnson*, 8:128–30; Jonathan T. Dorris, *Pardon and Amnesty Under Lincoln and Johnson* (Chapel Hill: University of North Carolina, 1953), 135.

trial by battle, explaining that their genuinely held belief in the legality of secession would have to yield to the result of the trial by battle.

Likening the war to a trial by battle thus provided ex-Confederates with a unique and even somewhat satisfying way of thinking about the right of secession in the aftermath of the war. By emphasizing that secession had suffered defeat on a bloody battlefield rather than through a rational and deliberative legal process, they could acknowledge that the war had annihilated the practical assertion of a right of secession without undermining the logical force of the pro-secession argument. While appearing to signal their acceptance of the war's outcome, ex-Confederates' invocation of trial by battle thus offered a subtle critique of the fruits of northern victory, suggesting they had been obtained in a less than civilized manner.

Despite the fact that the concept of trial by battle thus served several intellectual purposes for ex-Confederates who employed the language, they dared not probe the metaphor too deeply. Had they done so, they would have discovered that adhering too closely to the analogy between the Civil War and medieval trial by battle could potentially prove hazardous to the Lost Cause worldview. The metaphor of trial by battle was attractive to many ex-Confederates precisely because it permitted them to come to terms with the results of the war while still maintaining that their advocacy of secession had been without fault. But because the trial by battle was designed to fathom God's will, and not simply favor the stronger combatant, receiving a trouncing in a trial by battle would necessarily mean that God had deemed the losing cause to be sinful. Defeated Confederates who likened the Civil War to a trial by battle did not, however, exhibit a sense of contrition rather than anger and sorrow in the aftermath of the Civil War for their advocacy of secession. The outcome of the war may have caused them, in their introspective moments, to wonder how their actions had incurred God's wrath, but they did not number advocacy of secession among their sins.

The trial by battle metaphor pervaded amnesty petitions from ex-Confederates. The phrasing of the allusion also differed markedly from petition to petition, demonstrating that the persistence of the language was a reflection of each petitioner's distinct thought process, rather than the product of a few pardon brokers' boilerplate insertions.[22] Former Confederate soldier Alpheus Baker of Eufaula, Alabama, freely admitted that he "had been taught from my youth upwards to believe . . . that the Union was a revocable compact, & Secession a constitutional right." Baker explicitly compared the war to a legal trial, and now that the contest had resulted in Union victory, he maintained: "I submit with resignation to

22. See Dorris, *Pardon and Amnesty*, 144–51, on the business of pardon brokering.

the inevitable result. I regard the issue as having been fully tried, & finally determined, and I would oppose all effort to disturb the verdict, which has been rendered in the tremendous, world watched Trial." Former Confederate commissary general Lucius B. Northrop agreed, emphasizing that he had always "believed that the state was sovereign and that in the last extremity a man must sustain her." Still, he had recently taken the loyalty oath to the United States because he believed that "state rights and slavery—the two points involved [in the war] had finally been settled by a resort to arms." Former Confederate general P. G. T. Beauregard's amnesty petition indicated much the same sentiment. Beauregard defended his actions during the war by professing that "I was defending the constitutional rights of the South." The war had, however, established the illegitimacy of secession through a trial by battle. "Having appealed to the arbitration of the Sword, which has gone against us," Beauregard maintained, "I accept the decision as settling finally the questions of secession and slavery."[23]

In his amnesty petition to Johnson, Clement C. Clay, former Canadian commissioner for the Confederacy, candidly admitted that Union triumph had *not* caused him to alter his opinion about the constitutionality of secession. He wrote: "I still think the States did not surrender that right [to withdraw from the Union] in adopting the U.S. Constitution & I know that the power of coercing them is not granted in that instrument & was refused when asked." In a letter to his wife Virginia from his prison cell at Fort Monroe, where he was confined for a year following the Civil War on suspicion of his involvement in President Lincoln's assassination, Clay maintained that the experience of war and imprisonment had only served to strengthen his state sovereignty convictions: "I have not changed my opinion as to the sovereignty of the States and the right of a state to secede; & I am more confirmed by my reflections and our bitter experience." Still, Clay's own unshaken conviction that the states constitutionally possessed the right to secede from the Union did not preclude him from acknowledging that the bloody trial of the Civil War had inflicted a crushing blow on the doctrine of secession. Accordingly, he grudgingly admitted to President Johnson that "the subordination of the States & supremacy of the General Government has been established in the Court of last resort—the field of battle—& its judgment is conclusive and final. The established theory

23. Alpheus Baker Petition, Case Files of Applications from Former Confederates for Presidential Pardons, "Amnesty Papers," 1865–1867, National Archives, Washington D.C., Alabama Petitions, Reel 1; Lucius Northrop to Andrew Johnson, July 11, 1865, *Papers of Andrew Johnson*, 8:388–89; P. G. T. Beauregard to Andrew Johnson, September 16, 1865, *Papers of Andrew Johnson*, 9:83.

now is, that the citizen owes his highest & first allegiance to the Genl. Govt. Such is the fact & none should dispute it."[24]

Such defiance as Clay exhibited was not conducive to continuing a public career after the war. Accordingly, former Confederate postmaster John H. Reagan, who remained involved in national politics rather than retiring into private life during Reconstruction, publicly urged the people of his home state of Texas to move past controversy over secession and accept that the outcome of the war had rendered further debate over secession pointless. Reagan composed a long public letter to the people of Texas from his prison cell in Boston's Fort Warren, in which he urged his fellow southerners "to recognize the supreme authority of the Government of the United States . . . and its right to protect itself against disintegration by the secession of the states."

In Reagan's view, Americans had chosen war as the ultimate legal tribunal to decide the rightfulness of secession precisely because no other forum could possibly have settled the momentous issues diving North and South.[25] Confederates had freely entered into the wager of battle and could no longer appeal to some "law" outside of the contest of the war or even to the Constitution itself to relieve them from their duty to accept

24. Clement C. Clay Jr. to Andrew Johnson, November 23, 1865, *Papers of Andrew Johnson*, 9:421; Clement C. Clay Jr. to Virginia Clay, August 11, 1865, Box 7, Clay Papers, Duke University Library, Durham, North Carolina.

25. Although after the Civil War, many Americans believed that no civil court's disposition of the question of secession's constitutionality would have been considered definitive, it is worthwhile to explore whether this question could have received adequate treatment in a court of law prior to the war. Jefferson Davis's wife, Varina, reported in her postwar memoir that after resigning his Senate seat after Mississippi's secession in January 1861, her husband remained in Washington for a week, hoping to be arrested in order to create a test case about the legality of secession. See Varina H. Davis, *Jefferson Davis: Ex-President of the Confederate States*, 2 vols. (New York: Belford, 1890), 2:3. It is highly doubtful that the government could have proven that Davis or his state had committed treason based on the bare fact of the southern states' secession from the Union, without a war to enforce the purported right, because of the requirement of actual force or violence to prove that a defendant had "levied war" within the constitutional definition of treason. See *Ex Parte Bollman*, 4 Cranch 75 (1807), 128. Still, even if a treason charge would have been difficult to sustain during the secession winter, it is possible that the right of secession could have been tested in another type of case—such as nonpayment of federal tariffs in the "seceded" states. The larger question of whether a regularly constituted court's—even the Supreme Court's—pronouncement on the legality of secession would have been considered legitimate remains. Given the controversy that erupted after the Supreme Court's 1857 decision in *Dred Scott*, it seems highly unlikely that any decision on the topic of secession rendered by a "mere" court would have been considered authoritative by the losing party. See Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978).

the rules laid down by the victorious North. For Reagan, the arbitrament of arms was final and binding:

> The questions as to which party to the contest was right or wrong, or as to whether both were partly right and partly wrong, and as to whether we did right or wrong in staking all on the fate of battle, were discussed before the war was commenced, and were decided by each party for itself, and, failing to agree, they made their appeal to the dread arbitrament of arms. It was precisely because the parties could not agree as to the issues between them that they went to war, to settle them in that way. Why should we now think of reopening the discussion of these questions? What good would come of doing so. Wisdom requires us to accept the decision of battle upon the issues involved, and to be thankful that no more has been demanded by the conquerors.[26]

Other ex-Confederates who hoped to get beyond the old issues that had animated the Civil War and to accept the conditions of Reconstruction echoed Reagan's language. In a public letter to the editor of the *New Orleans Times* in 1867, former general James Longstreet, who became a social outcast in the South following the war because he joined the Republican Party, bluntly insisted that "the surrender of the Confederate armies in 1865 involved [first and foremost] … the surrender of *the claim* to the right of secession." No sincere efforts at Reconstruction could begin, Longstreet argued, unless and until ex-Confederates acknowledged in a real way what the defeat of the Confederate army had truly meant: annihilation of their insistence on the logic of secession as well as the repudiation of the right to exercise it. Ex-Confederates would not be able to move on with their lives, let alone become reintegrated into the United States, until they acknowledged these realities. The only solution, according to Longstreet, was to let go of the old secessionist ideology: "These issues expired upon the fields last occupied by the Confederate armies. There they should have been buried … If the last funeral rites of the Southern Confederacy have not been performed, let us, with due solemnity, proceed to the discharge of that painful duty, and let us deposit in that same grave the agony of our grief."

For Longstreet, clinging to the legalism of secession could prove just as destructive as attempting to exercise the right to secede. The claim to the

26. John H. Reagan to "The People of Texas," August 11, 1865, reprinted in John H. Reagan, *Memoirs: With Special Reference to Secession and the Civil War*, ed. Walter F. McCaleb (New York: Neale, 1906), 287, 289. The editor of Reagan's memoir noted that the advice of his Fort Warren letter proved "distasteful" to the people of Texas. Reagan, *Memoirs*, 19. See also Ben H. Procter, *Not Without Honor: The Life of John H. Reagan* (Austin: University of Texas Press, 1962), 171–73.

right of secession had been extinguished through an emphatically *nonlegal* process and could not now be vindicated in any court of law. Longstreet maintained that, in the postwar South, "it is too late to go back to look after our rights under the law and the Constitution. It is of no practical importance for us to know whether we have been deprived of these rights by lawful or unlawful process." What was more, Longstreet recognized, Confederates could no longer look to the law as a bulwark against naked aggression. In the post–Civil War South, it made no sense to continue to revere the legal process as the only way to settle thorny questions. The constitutional right to secede from the Union and the legal right to hold slaves "are gone, and the only available law is martial law, and the only right, power. The more we seek for law, when there is no law, the greater will be our confusion." Might had substituted for right; now that naked power was the law of the land, ex-Confederates had no choice but to accept this state of things.[27]

Can Might Make Right?

Comparing the Civil War to a trial by battle led many American intellectuals to ponder whether the war had transformed their society into a quasi-military state, where force of arms would triumph over the rule of law. Some ex-Confederates accordingly voiced their disgust with the degeneracy of the American legal system in the aftermath of the war. Reflecting in his diary on the extinguishment of the right of secession in the crucible of the Civil War, Missouri supreme court judge and die-hard secessionist

27. James Longstreet to the Editor, *New Orleans Times*, April 6, 1867, and *New York Times*, April 13, 1867. Former U.S. Supreme Court Justice John A. Campbell also agreed with Longstreet's dismal assessment of the utility of the law in the Reconstruction-era South. Campbell insisted that the experience of war had subjected the southern states to "an ordeal of fire," and that the law and the Constitution itself could no longer protect southerners from the illegal encroachments of the Reconstruction Congress upon their rights (John A. Campbell to James Longstreet, April 5, 1867, and *New York Times*, April 13, 1867). Campbell had been imprisoned for several months following the war and after his release, according to his biographer, revitalized his law practice by advocating for expanded national authority. See Robert Saunders Jr., *John Archibald Campbell* (Tuscaloosa: University of Alabama Press, 1997), 210–14. Longstreet and Campbell's correspondence was reproduced (and praised) by many northern papers, while southerners and northern Democrats branded Longstreet as a traitor. See *Daily National Intelligencer* [Washington, D.C.], April 13, 1867; *Boston Daily Advertiser*, April 15, 1867; *Milwaukee Daily Sentinel*, April 17, 1867. See also William Garrett Piston, *Lee's Tarnished Lieutenant: James Longstreet and His Place in Southern History* (Athens: University of Georgia Press, 1987), 105, for a discussion of reaction to Longstreet's letter.

William B. Napton angrily denounced the notion that the supremely important question of the constitutionality of secession had been settled in the heat of battle rather than in the calm of a court of a law. Napton furiously insisted that such a resolution of the momentous issue of the permanence of the federal Union was illegitimate. "A Union such as we had under the old Constitution could never be created or preserved or restored by force," he wrote. "There might be territorial unity—there might be conquest—but there could be no Union, in the old sense of the term." Determining the legality of secession through military might struck Napton as a terrible state of affairs that could not rightfully exist in a free republic dedicated to the rule of law. Napton opined: "The right to [exercise the right of secession] was disputed and the rebellion was put down by force. So much for paper assertions and declarations. The right is settled by the might."[28] Charles O'Conor, a secession-sympathizing northern lawyer, expressed sorrow and resignation over what he saw as the war's triumph over the rule of law. O'Conor mournfully told two friends that his old "ideas on this subject [of state sovereignty and the benefits of slavery] have been put down by the sword amidst a civil war and cannot be regarded as worth preserving," adding that "bayonets have of late made such sad work with principles that it seems idle to appeal to them."[29]

Others expressed profound disillusionment with the ability of courts of law to intervene in political and military affairs in the aftermath of Union victory. After the Supreme Court denied jurisdiction on the grounds of the political question doctrine in *Georgia v. Stanton*, in which the state challenged the constitutionality of the occupation of ex-Confederate states under the Military Reconstruction Act, Georgia governor Charles Jenkins complained to his attorney Jeremiah Black about the Court's refusal to weigh in on highly volatile constitutional controversies. In Jenkins's opinion, the Court's decision to deny any possible relief to his state only highlighted the justices' willingness to allow illegal policies to persist, and signaled that the Court would continue to permit political and military power to override the rule of law. "The sword has decided against the right of secession," he wrote, "and it is not to be supposed that [it] will again be asserted." The last six years had taught him that no court

28. William B. Napton, *The Union on Trial: The Political Journals of Judge William Barclay Napton, 1829–1883*, ed. Christopher Phillips and Jason L. Pendleton (Columbia: University of Missouri Press, 2005), March 11, 1868, September 15, 1879, 312–13, 530.

29. Charles O'Conor to Fr. Joseph M. Finotti, March 16, 1876, Box 2, Folder 10, Joseph Maria Finotti Papers, Georgetown University Special Collections Library, Washington, D.C.; Charles O'Conor to Robert McKinley Ormsby, October 7, 1867, Charles O'Conor Papers, Houghton Library, Harvard University, Cambridge, Massachusetts.

decision could possibly contend with the "law" as declared by a triumphant army.[30]

Northern thinkers unsurprisingly cast the triumph of their army in a different light, insisting that victory on the field of battle constituted a valid—if not the most valid—form of adjudication and represented no threat to the rule of law. During an inspection tour of southern states in the months immediately following Appomattox, Lt. Gen. Ulysses S. Grant optimistically informed President Johnson that the majority of white southerners recognized that the war had effected a permanent settlement of the question of state secession and accepted that force had resolved the question in favor of the perpetuity of the federal Union. Grant wrote that "the questions which have heretofore divided the sentiment of the people of the two sections, Slavery and States Rights, or the right of a State to secede from the Union they regard as having been settled forever, by the highest tribunal, arms, that man can resort to."[31] General William T. Sherman agreed with Grant that Union military victory had definitely secured the extinction of the principle of secession, but he demonstrated far less concern about whether the white South had really "accepted" this reality. In the post–Civil War world, according to Sherman, it did not really matter whether the white South acknowledged that it was bound by Union military triumph; ex-Confederates were so bound because they had implicitly consented to abide by the decree of battle by waging war in 1861. The Confederates had *themselves* resorted to force to resolve the constitutionality of secession and the "government accepted their wager of battle." Having suffered conquest, Sherman insisted, Confederate southerners "lost their slaves, their mules, their horses, their cotton, their all, and even their lives and personal liberty, thrown *by them* into the issue, were theirs only by our forbearance and clemency." It was therefore too late for ex-Confederates to claim that battle was an illegitimate means by which to settle the question of secession's constitutionality.[32]

The Radical Republican *Chicago Tribune* agreed with Sherman on this point, insisting that ex-Confederates should be bound by the "decision" of the tribunal of war because they had shunned political means and selected this forum in which to test the doctrine of secession. "The oligarchy protested against the sway of democracy and offered the wager of battle," the paper editorialized. "The cause of the people has triumphed." In other

30. Charles Jenkins to Jeremiah Black, May 8, 1867, Jeremiah Black Papers, Manuscript Division, Library of Congress, Washington, D.C., Reel 23.

31. Ulysses S. Grant to Andrew Johnson, December 18, 1865, *The Papers of Ulysses S. Grant*, 28 vols., ed. John Y. Simon (Carbondale: Southern Illinois University Press, 1967), 15:434.

32. "The Right of Conquest," *New Hampshire Statesman*, September 15, 1865.

words, Confederates had brought the harshness of war and the pain of accepting its outcome on themselves. On another occasion, the paper argued that no court case should determine the legality of secession after the fact of the war, because no mere court of law could "settle a question which has been sealed by the blood of half a million men."[33] According to the *Tribune*, the massive loss of life in the Civil War leant the decision rendered against secession in the trial by battle a profundity that could never be overridden by the mundane practices of an ordinary court of law.

As he related in his amnesty petition, Confederate vice president Alexander H. Stephens toyed briefly with the possibility of daring the federal government to try him for treason and thereby test the legality of secession in a court of law. Ultimately, he thought better of this plan and proffered his petition to President Johnson. In his petition, Stephens halfheartedly admitted that the principle of state secession from the Union had not "been maintained," due to the results of the war.[34] Emboldened upon his release, Stephens waxed more defiant and soon commenced writing a book designed to defend the constitutionality of secession. In his massive tome, *A Constitutional View of the Late War between the States*, Stephens maintained that secession still lived, even if the trouncing it had received on the battlefield made exercise of the right impossible. The only "issue decided by the sword," Stephens insisted, "was the attempt on the part of Confederates to maintain this principle by right, by physical force . . . to this extent alone was the great cause affected by the arbitrament of arms." The right of secession still survived outside of the field of battle, according to Stephens, in "other arenas—[in] those of Thought, of Public Discussions, Council Chambers, and Courts of Justice." The right of secession could not die in the crucible of the Civil War simply because "it involves questions that cannot be settled by arms." Reason and logic could not be set aside merely because the Union army had "proved" the principle wrong in the trial by battle.[35]

33. "What Shall be Done with Him?" *Chicago Tribune*, May 19, 1865; "Object of Jeff Davis' Trial," *Chicago Tribune*, November 14, 1865.

34. Alexander Stephens, *Recollections of Alexander H. Stephens*, ed. Myrta Lockett Avary (New York: Doubleday, Page, 1910), 201.

35. Alexander Stephens, *A Constitutional View of the Late War between the States*, 2 vols. (Philadelphia: National, 1868), 2:658–59. Stephens believed that the right of secession might have a fair hearing in "judicial tribunals" when ex-Confederates were tried for treason. By submitting his own amnesty petition, Stephens ensured that his own case would not be among these. Stephens intimated that he believed the federal government shied away from trying Jefferson Davis for treason because his secessionist principles would thereby achieve vindication in a court of law. (Ibid., 2:664.)

Virginia attorney and Lost Cause enthusiast Jubal A. Early concurred with Stephens's assessment of the invincibility of secession. While northerners may have believed that "having been overcome, the question of right has been decided against us . . . but though the gordian knot was cut with the sword, constitutional questions cannot be solved in the same way, such a view would but prove the wrong of the whole doctrine of coercion." Early refused to admit that the Union's victory amounted to anything more than an unwarranted triumph of force. For Early, all the war proved was that "truth does not always prevail and that might is often more powerful than right." In no way, Early argued, could the war settle any principle of states' rights, "any more than the traveller on the highway submits his money to the arbitrament of arms between himself and the robber."[36] No war could refute the logic of the secessionist position; military might simply could not overcome the force of reason, logic, and law.

The illegitimacy of settling the legal issue of secession through the "verdict" rendered by the Union army was a very frequent topic of discussion in the Copperhead New York monthly the *Old Guard*. Edited by notorious New Jersey Copperhead C. Chauncey Burr, the paper specialized in spirited defenses of slavery and secession and ringing criticisms of the Lincoln government. After the war, the paper insisted that law, by its very nature, could not yield to the exercise of force: "In the nature of things, wars 'settle' nothing beyond physical results. They are an exercise of force, and do not, and cannot, hold reason and conscience, and just law and righteous government, amenable to the tribunal of blood and violence." Burr thus expressed a highly formalistic interpretation of "the law," asserting that the war could not change its immutable principles, which remained firmly in place despite the convulsions of society. The war, for Burr, "did not repeal the laws of nature, nor change the position of the poles; nor blot out the stars; but the foundations of the earth and fixtures of the firmament remained."[37]

The *Old Guard* recommended that true believers in state sovereignty, while waiting for the South to rise again, should turn to the law for their salvation. "Your great, your sure remedy," the paper intoned, "is law.

36. Jubal A. Early, *The Heritage of the South* (Lynchburg, Va.: Press of Brown-Morrison Co., 1915), 116–18. Early's book was published in 1915, by his niece, but it was written by Early immediately after the Civil War, probably some time in 1865. See Early, *Heritage of the South*, 1.

37. "What the War Settled," *Old Guard* (New York, N.Y.), August, 1869, 628–30. For information about Burr and his newspaper, see Frank Luther Mott, *A History of American Magazines, 1850–1865* (Cambridge, Mass: Belknap Press of Harvard University Press, 1957), 544–46; Wood Gray, *The Hidden Civil War: The Story of the Copperheads* (New York, Viking, 1964), 214, referring to Burr as a "specialist in extremism."

Law and justice are not always very swift, but with a brave and virtuous people, they are sure to break the power of the sword, and to whip the licentious force of arms at last." Even though the war purported to alter the American political system and indeed, the Constitution itself, the "law" would somehow prevail: "All that the war has done to violate that Constitution is null and void in law." These orderly and rational legal principles that had reigned supreme before the Civil War would inevitably demolish even formal amendments to the Constitution, because that document had only been altered in order to comport with "sordid" principles forged in the chaos of civil war.[38]

Other secessionist writers, while equally appalled by the notion that war could extinguish the right of secession, proved less sanguine than Chauncey Burr about the prospect of overturning the results of a massive military conflict through the use of the legal process. Georgia lawyer and ex-Confederate congressman Jabez L. M. Curry expressed doubt that the war could ever, to his satisfaction, settle the question of secession's legality: "How far the *ratio regium* [*sic*], the wager of battle, the avoir-dupois of numbers, can determine a question of conscience or law, need not now be discussed. Secession is now as dead as slavery." While it seemed impossible to Curry that secession would ever be *legally* vindicated, he expressed hope that when "the historic muse shall record an impartial verdict," southern secessionists would receive equal veneration with the American founders.[39]

Albert Bledsoe, a lawyer and former mathematics professor who had published a treatise in 1865 detailing the constitutional and historical argument for secession,[40] began publishing the *Southern Review* following the war. In the *Review*, Bledsoe expressed no confidence "the law" would eventually triumph over the forces of brutality and unreason and reassert its authority in time. Because the law was implemented by *men*, who had themselves lived through the tumult of the Civil War and were no more capable of ignoring its outcome than anyone else, the rationality of the law would never be permitted to overrule any of the conflict's blunt results. Bledsoe maintained that "the Supreme Court would [never] dare to pronounce in favor of that right [of secession], even if the opinion of every judge on the bench was conscientiously and deliberately upon that

38. "State Sovereignty Not Dead," *The Old Guard* 4 (May 1866): 257–66.

39. J. L. M. Curry, "Did General Lee Violate his Oath in Siding with the Confederacy?" *Southern Historical Society Papers* 6 (August 1878): 54–59. See also J. L. M. Curry, *The Southern States of the American Union: Considered in their Relations to the Constitution of the United States and to the Resulting Union* (Richmond, Va.: B. F. Johnson, 1895), 226.

40. Albert Bledsoe, *Is Davis a Traitor, or Was Secession a Constitutional Right Prior to the War of 1861?* (Baltimore: Innes, 1866).

side. The people of the North would not tolerate such a decision, nor abide by it if it were given, for, as we have said, the question is claimed, upon all hands, to have been settled forever by the result of war." Although he found the war's resolution of the secession question to be repugnant, Bledsoe acknowledged that "the wager [of battle] has long since been won, and the Supreme Court, with the rest of the winners, has possession of the bloody stakes. To imagine that the judges of that tribunal could now hold otherwise than that the 'right' in dispute had been 'decided,' would be sheer fatuity."[41]

Grier's *Prize Cases* Opinion: Trial by Battle and the Conquest Theory of the Union

Probably the most prominent use of the trial by battle analogy occurred in the *Prize Cases*, an 1863 Supreme Court decision validating President Lincoln's blockade of Confederate ports. In the case, the Supreme Court decided that the United States government could treat the Confederacy as a belligerent power—a status customarily given only to nations—without conceding the Confederacy's claim that the southern states had legally seceded from the Union and legitimately formed an independent nation.[42] In the course of explaining that the United States government could treat the Confederacy as a sovereign nation (with full belligerent rights) for purposes of international law and still regard the "seceded" states as remaining within the Union for purposes of domestic law, Justice Robert Grier, writing for the majority, compared the Civil War to a trial by battle. Grier insisted that a court of law could not ultimately decide whether the secession of the southern states was unconstitutional; this issue could only be settled in the crucible of war. Grier acknowledged that the seceded states had "combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by wager of battle."[43]

The implications of Justice Grier's formulation of the Civil War as a trial by battle that would decide the legality of secession became clear in his

41. Albert Bledsoe, *Prison Life of Jefferson Davis*, *Southern Review* (January 1867): 244–45 (book review).

42. See, for example, Henry Wheaton, *Elements of International Law*, ed. Richard Henry Dana (Boston: Little Brown, 1866), §16, 19. Granting the Confederacy the status of a belligerent allowed the United States to blockade its ports and to initiate prisoner exchange with its officials, among other things.

43. *Prize Cases*, 67 U.S. 635, 673 (1862).

dissent in the 1869 case of *Texas v. White*. In this case, Texas had invoked the original jurisdiction of the Supreme Court to sue bondholders whom the state claimed had never provided payment for the bonds.[44] In deciding that Texas, despite its purported secession from the Union in 1861, still constituted a state and could thus invoke the Supreme Court's jurisdiction, Chief Justice Salmon P. Chase, writing for the majority, took the opportunity to set forth a definitive pronouncement on the unconstitutionality of secession. Chase found the issue of secession's legality an easy one to dispose from the vantage point of 1869, so much so that he found it "needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause … is consistent with the Constitution." According to Chase, secession had been illegal from the moment of its supposed exercise; the ordinances of secession on the part of the eleven Confederate states "were utterly without operation in law" and had effected no change in the status of these states. For Chase, the "more perfect Union" created by the ratification of the Constitution had created "an indestructible Union, composed of indestructible states."[45]

Drawing on the "trial by battle" language of his *Prize Cases* opinion, Grier authored a forceful dissent in which he argued that Texas was *not* one of the United States and thus could not file suit in the Supreme Court. Grier insisted that the court should view the question of whether or not Texas was a state "as a *political fact*, not as a *legal fiction*." In other words, the court should defer to Congress's determination of the political status of the former Confederate states. Congress had chosen to "h[old] and govern [Texas] as a conquered province by military force," and Grier declared himself "not disposed to join in any essay to prove Texas to be a State of the Union, when Congress have decided she is not … Politically, Texas is not *a State in this Union*. Whether rightfully

44. Article III, section 2 of the Constitution grants original jurisdiction to the Supreme Court in any suit in "which a state shall be a party." At issue in the suit was the ability of certain bondholders to receive payment on United States bonds given to Texas as part of the Compromise of 1850. Texas had sold some of the bonds to the defendants in the midst of the Civil War pursuant to a state act to "provide funds for military purposes," in exchange for supplies. Because the supplies had never materialized, Texas sued the defendants after the war for recovery of the bonds, arguing both that the state, while in rebellion, was unauthorized to sell bonds for the "purpose of aiding the overthrow of the Federal government," and that the state had never received payment for the bonds. White defended the suit on the grounds that, among other things, Texas was not currently one of the United States and could not therefore file suits invoking the original jurisdiction of the Supreme Court. The Court ultimately decided that Texas was entitled to restitution from the defendants who had purchased the bonds directly from the state, but not from subsequent bona fide holders of the notes.

45. *Texas v. White*, 74 U.S. 700, 725 (1869).

out of it or not is a question not before the court." Grier maintained that the political branches of government could treat the defeated Confederate states in any manner they deemed proper because the Union army had conquered the Confederacy in the Civil War and the "seceded" states had taken on the character of conquered territory. Upon seceding and entering into war with the United States, Texas had put the right of secession into contention in the trial by battle, Grier insisted, and the war had established that "the verdict on the trial of this question, 'by battle,' as to her right to secede, has been against her." Thus, the Confederate states' defeat had established the illegality of secession and reduced Texas to a conquered province.[46]

The logic of Grier's argument would suggest that, unlike Chase, he did not believe the "right" of secession to have been illegitimate from the moment of its exercise. For Grier, rather, the legitimacy of secession had remained an open question for the duration of the Civil War. While the action in the trial by battle was pending—that is, during the war—secession had enjoyed a shadowy kind of viability. Secession therefore had only *become* definitively unconstitutional with the triumph of the Union army in 1865.

Grier's opinions in the *Prize Cases* and in *Texas v. White* make clear the logical correlation between "trial by battle" and the "conquered provinces" theory of Reconstruction, as famously articulated by Pennsylvania congressman Thaddeus Stevens. Stevens, a Radical Republican who believed strongly in racial egalitarianism, hoped to use the power of the federal government to effect massive social and political changes in the former Confederate states in order to ensure that southern freedmen were not "[left] to the legislation of their late masters."[47] This newfound exercise of virtually limitless federal power, Stevens insisted, was justified by the fact that southern states were no longer part of the Union and had, in fact, been conquered by United States forces, in precisely the same way as a foreign nation might.[48] Stevens protested against the more mainstream

46. Ibid., at 737, 739–40 (Grier, J., dissenting).

47. Thaddeus Stevens, Speech of December 18, 1865, http://www.let.rug.nl/usa/D/1851-1875/reconstruction/steven.htm.

48. Massachusetts senator Charles Sumner, often linked with Stevens as two of the most radical Republicans, endorsed the "state suicide" theory of the Union, which postulated that the states, in attempting to secede, had essentially self-destructed and reverted to territorial status, by attempting an illegal act. Although Sumner's theory of "state suicide" is often mentioned in the same breath as Stevens's conquered province theory, the two differed mightily with respect to the view of secession implicit in each theory. While the conquered province theory tacitly endorsed the legitimacy of secession while it was tested during the war, the state suicide theory was premised upon the notion that secession had been illegal in 1861, so that the states who attempted it immediately ceased to exist as states.

idea—which Chase later championed in *Texas v. White*—that the southern states had always remained in the Union simply because they possessed no legal right to secede. Stevens castigated this theory as "a good deal less ingenious and respectable than the metaphysics of [George] Berkeley, which proved that neither the world nor any human being was in existence." To prove that the southern states had not legally been present in the Union for the duration of the war, Stevens relied on Grier's opinion in the *Prize Cases*. Not only did he quote Grier's "wager of battle" language, but Stevens also argued vehemently that the two sides had had "recourse to arms" precisely because of their inability to come to terms over the issues of slavery and secession. Therefore, the logic of Stevens's conquered province theory would dictate that secession's illegitimacy, having been tested in the crucible of war, only became settled law upon the triumph of the Union forces.[49]

Trial by Battle in the Courts and the Possibility of Secession's Vindication

Justice Grier's description of the Civil War as a trial by battle was hardly the only instance of this language being used in a court of law. Some courts simply quoted Grier's *Prize Cases* "wager of battle" language verbatim, but others expanded on Grier's formulation in attempting to wrestle with the legal problems that grew out of the Civil War.[50] Many attorneys and judges invoked the language of trial by battle in order to lend the

---

Nonetheless, Sumner, who had taught international law at Harvard for a number of years before being elected to the Senate, often referred to international contests between nations as "duels" or "trial[s] by battle," or "arbitrament[s] of arms." Sumner did, however, condemn "as barbarous and unchristian, the resort to external Force" to settle international disputes. See Charles Sumner, *The True Grandeur of Nations: An Oration Delivered Before the Authorities of the City of Boston, July 4, 1845* (Boston: William D. Ticknor, 1845), preface; and "Sumner on the War," *New York Times*, October 27, 1870. Sumner, interestingly, never discussed the American Civil War in the context of international contests of force.

49. Thaddeus Stevens, "Reconstruction," Stevens to the people of Lancaster, September 6, 1865; "Reconstruction," December 18, 1865, speech to the U.S. House of Representatives, in *Selected Papers of Thaddeus Stevens*, 2 vols., ed. Beverly Wilson Palmer (Pittsburgh, Pa.: University of Pittsburgh Press, 1997), 2:24, 46. For a discussion of Stevens's conquest theory, see Eric McKitrick, *Andrew Johnson and Reconstruction*, 99–101; Hans L. Trefousse, *Thaddeus Stevens: Nineteenth Century Egalitarian* (Chapel Hill: University of North Carolina Press, 1997), 217–18. Stevens died in 1868 and thus did not weigh in on Grier's *Texas v. White* dissent.

50. See *Pennywit v. Kellogg*, 13 Ohio Dec. Reprint 389, 391 (1870), *Smith v. Brazelton*, 48 Tenn. 44, 47 (1870), *Hall v. Keese*, 31 Tex. 504, 529 (1868), *Scheible v. Bacho*, 41 Ala. 423, 431 (1868), *Mayer v. Reed* 37 Ga. 482, 486 (1867) *Hill v. Boyland*, 40 Miss. 618, 626 (1866), all quoting Grier. For a discussion of some of the legal problems that came out of the

imprimatur of a legal action to the war's violent method of settling the secession question. In 1870, the West Virginia supreme court characterized trial by battle as the only possible and acceptable means by which two nations could settle a legal dispute. As respected two nations, the court insisted, "the right to enforce their supposed demands or grievances against each other by the wager of battle, is as clear as the right of the citizen to enforce by suit his demands against individuals."[51] Not only did the West Virginia court thus sanction trial by battle as a valid legal proceeding, it also strongly implied that trial by battle was the *only* legitimate method of mediating the constitutional and political dispute between North and South.

If the determination of the trial by battle held *more* weight for determining the legality of secession than rational argument in a court of law, then it would follow that a Confederate victory in the Civil War would have definitively established the validity of secession. By this logic, had the Confederacy managed to wrest its independence from the Union army, northern courts could not have continued to deny that the states possessed no legal right to exit the Union. Such an admission of the possible legal consequences of Confederate victory was far easier to secure from the vantage point of Reconstruction than it would have been in the midst of the war. One Virginia supreme court judge, who had drawn on Justice Grier's "wager of battle" language in recognizing the Confederacy as a de facto legal entity during the war, seized the opportunity to reflect on how the constitutional argument for secession would have fared had the Confederacy succeeded in gaining its independence.[52] Judge Richard Moncure mused, "Suppose the decision by this wager of battle had been different from what it was, as it might well have been; how would this

---

war, see Edwin C. Surrency, "The Legal Effects of the Civil War," *American Journal of Legal History* 5 (1961): 145–65.

51. *Caperton v. Martin*, 4 W.Va. 138, 152 (1870). See also "Charge to the Grand Jury at Richmond," *Daily National Intelligencer* [Washington, D.C.], November 10, 1865.

52. Recognizing the Confederate government's de facto status (a term that carried indefinite legal connotations) would have validated everyday legal actions—such as marriages, contracts, wills—that had taken place in the Confederate states during the Civil War, while denying legal recognition of Confederate acts that furthered the war effort. In *Keppel's Admrs. v. Petersburg R.R. Co.*, 14 F. Cas. 367 (1868), Chief Justice Chase ruled that ordinary legal transactions that had occurred in the Confederacy would be recognized by United States courts, although he objected to the use of the term "de facto" in describing the legal status of the Confederate government. The Supreme Court affirmed the Confederacy's de facto legal status in *Ford v. Surget*, 97 U.S. 594 (1878), (Clifford, J., concurring). See also Mark A. Weitz, *The Confederacy on Trial: The Piracy and Sequestration Cases of 1861* (Lawrence: University of Kansas Press, 2005); Surrency, "Legal Effects of the Civil War," 150–64.

case then have stood? Could it then have been said that the Confederate government was not a government?"[53] Clearly, for Moncure, as for many other American legal thinkers, the constitutional legitimacy of secession depended entirely on the outcome of the Civil War.[54]

A Relic of Barbarism: Henry Charles Lea's *Superstition and Force*

Jurists were not the only American intellectuals to explore the concept of trial by battle in the aftermath of the war. In 1866, *Superstition and Force*, a book chronicling the "primitive" legal customs of medieval society, first appeared. Its author, Philadelphia historian Henry Charles Lea, devoted a chapter of his work to the historical practice of trial by battle. For Lea, chronicling the legal customs of any society remained the best way to gain insight into the character of that people. He described "the history of jurisprudence" as "the history of the life of man." Lea viewed wager of battle as an outdated custom mired in barbarism and saw the history of European legal customs as a progression toward civilization wherein men gradually repudiated the legal practices of wager of law, battle, and the ordeal in favor of the enlightened splendor of trial by jury. He sniffed disdainfully at the custom of trial by battle from the supposedly superior vantage point of nineteenth-century America, commenting that "wise in our generation, we laugh at the inconsistencies of our forefathers."[55]

Lea was not alone in viewing the trial by battle as a terrible medieval superstition. A tone of modern condescension laced discussions of the historical practice of trial by battle, coupled with a clear sense of moral superiority about the advent of the supremely rational process of trial by jury. For instance, the *Albany Law Journal* called the concept of trial by ordeal "foolishly absurd" and almost baffling, if viewed from the standpoint of the

53. *Walker v. Christian*, 62 Va. 291, 296 (1871). Another American who admitted that Confederate victory would have constrained northern courts to find secession constitutional was George Ticknor Curtis, whose writings are discussed below.

54. Other Reconstruction-era cases discussing the Civil War as a trial by battle include *Keppel v. Petersburg R. Co.*, 14 F. Cas. 357 (N.C. 1868), *McCafferty v. Guyer*, 59 Pa. 109 (1868), *Green v. Sizer*, 40 Miss. 530 (1866), and *Bilgerry v. Branch*, 60 Va. 393 (1869). In *Keppel*, government attorney H. H. Wells argued, employing Grier's "wager of battle" language from the *Prize Cases*, that the legitimacy of secession would have been definitively established had the Confederacy won the war, just as it was now irrefutably defunct because of the triumph of Union forces. See *Keppel*, 359.

55. Lea, *Superstition and Force*, 1, 73.

supremely rational and civilized present day, commenting that "the superstitions of our ancestors appear almost incredible to the enlightened spirit of the nineteenth century."[56] The idea of importing uncivilized and backward practices (such as trial by battle) into the nineteenth century would have proved disquieting to many Americans. As anthropologist George Stocking has demonstrated, English Victorians believed strongly in the idea of human progress and often measured the merits of their own "advanced" civilization by its distance from the "primitive" practices of the past.[57] Nineteenth-century Americans, like their English counterparts, prided themselves on their refinement, gentility, and self-control. A proliferation of etiquette manuals instructed Americans in how to behave in all aspects of life, seeking to curb any uncivilized tendencies and mold the uncouth into civilized beings.[58] Law, according to the prevailing understanding among nineteenth-century legal scholars and historians, had progressed along the same lines as other aspects of civilized culture, and a modern society's adherence to the rule of law rather than the prospect of violence served to mark its progression from the barbarism of the past.[59] Accordingly, comparing the convulsion of the American Civil War to the antiquated legal oddities of the distant past would have proved disquieting to many Americans.

56. "Trial by Ordeal," *Albany Law Journal* 1 (1870): 305. See also "An Interesting Scrap of Legal History," *Milwaukee Daily Sentinel*, May 15, 1867, "Trial by Battle," *Cornhill Magazine* 22 (1870): 715–37; "The Marriage Laws—No. II," *Upper Canada Law Journal* 3 (1867).

57. George Stocking, *Victorian Anthropology* (New York: Free Press, 1987). See also Norbert Elias, *The Civilizing Process: The History of Manners*, 2 vols. (New York: Urizen, 1939). The notion of human progress was linked to Darwinism, and later, to Social Darwinism.

58. On the subject of Victorians' obsession with manners and the civilization, see generally Karen Haltunnen, *Confidence Men and Painted Women* (New Haven, Conn.: Yale University Press, 1982), esp. 92–123; Gail Bederman, *Manliness and Civilization* (Chicago: University of Chicago Press, 1995), 23–31; Daniel Walker Howe, "Victorian Culture in America," in *Victorian America*, ed. Daniel Howe (Philadelphia: University of Pennsylvania Press, 1976), 3–28; Stow Persons, *The Decline of American Gentility* (New York: Columbia University Press, 1973), 1–129; Steven Mintz, *A Prison of Expectations: The Family in Victorian Culture* (New York: New York University Press, 1983), 80–81; John F. Kasson, *Rudeness and Civility: Manners in Nineteenth-Century Urban America* (New York: Hill and Wang, 1990).

59. See George Stocking's discussion of the work of Sir Henry Maine in his *Victorian Anthropology*, 117–28. Phillip Paludan's "The American Civil War Considered as a Crisis in Law and Order," and *A Covenant with Death*, and Arthur Bestor's "The American Civil War as a Constitutional Crisis," *American Historical Review* 49 (1963): 327–52, explore Civil War Americans' attachment to the rule of law. For a philosophical discussion of the function of law in society, see Thurman W. Arnold, *The Symbols of Government* (New Haven, Conn.: Yale University Press, 1935).

Indeed, historian Lea, whose historical scholarship later earned him the reputation of the first great American medievalist, labored on his treatise in the midst of the Civil War.[60] During the war, he also engaged in organizational efforts on behalf of the Union war effort. As a member of Philadelphia's Union League Club, Lea raised money to recruit and equip black troops and authored a number of pamphlets strongly supportive of the war effort.[61] Although Lea wrote *Superstition and Force* during and in the wake of the upheaval of the Civil War, he did not comment directly on the parallels between his own country's recent experience and medieval trial by battle. His private correspondence does, however, show that he connected his historical work to the present. In an 1861 letter to John Bell, who had run for president in 1860 on a platform that promised to keep the Union together, Lea berated Bell for siding with the Confederacy during the war. Lea saw the war as putting the right of secession to the test in a trial by battle and accordingly told Bell that "the result of this contest is in the hands of the God of Battles, but whatever it may be, we are resolved that the right of secession shall no more be heard of in public law of the United States; or even if it should remain theoretically unsettled, that practically the ordeal through which the seceders must pass shall put an end to the day dreams of ambitious aspirants for a country to come."[62] Lea expressed no discomfort with the realization that his own thoroughly "civilized" nineteenth-century nation had adopted the worst aspects of medieval law to settle the question of secession. Confronted with the circumstances of the Civil War, Lea readily applied the concept of trial by battle to the conflict.

In reviewing Lea's first edition of *Superstition and Force*, the *Nation* reflected on the similarity between the "barbarous" custom of trial by battle among medieval Europeans and the experience of the Civil War. The war had, according to the magazine, shown that nineteenth-century Americans *needed* such a hideous process to settle the momentous question of

60. One historian referred to Lea as "America's most prominent medievalist of the nineteenth century, while another called him "the greatest historian in nineteenth-century America and the most accomplished American historian of medieval Europe before [early twentieth-century historian] Charles Homer Haskins." John M. O'Brien, "Henry Charles Lea: The Historian as Reformer," *American Quarterly* 19 (1967) 104; Edward Peters, "Henry Charles Lea, 1825–1909," in *Medieval Scholarship: Biographical Studies on the Formation of a Discipline*, 3 vols., ed. Helen Damico and Joseph B. Zavadil (New York: Garland, 1995), 1:89.

61. Edward Sculley Bradley, *Henry Charles Lea: A Biography* (Philadelphia: University of Pennsylvania Press, 1931), 77–122.

62. Henry C. Lea to John Bell, n.d., 1861, Box 3, Henry C. Lea Papers, University of Pennsylvania Special Collections Library, Philadelphia, Pennsylvania (collection cited hereafter as Lea Papers).

secession. "After all," the magazine editorialized, "is not war itself—war, we will say, between sovereign states, which admit no arbiter—is this not a remnant both of superstition and impiety, the wager of battle on a frightful scale?" While the paper acknowledged the necessity of trial by battle, it also exhibited a certain squeamishness about the implications of violence substituting for rationalism: "What is decided by a resort to arms—a right? But is God, then, always on the side of the heaviest battalions . . . We seem to have passed the time when such interpositions should be seriously imputed to a merciful Providence."[63]

The applicability of trial by battle to American shores also did not escape the notice of the newly inaugurated *American Law Review*, edited by young Boston lawyers John Codman Ropes and John Chipman Gray.[64] Ropes and Gray, friends from their Harvard days who had opened a joint law practice upon Gray's return from serving in the Union army, praised the book for its accurate research but believed that it suffered from inattention to the practices of wager of law, trial by battle, and other "barbarous customs" in the history of "this country."[65] Recognizing that the superstitions of trial by battle did not only apply to the unenlightened European past, the review mentioned several instances in which these seemingly obsolete customs had crept into American law.

Lea evidently took the review to heart, ruminating on the possibility that the barbarous customs of the English past had indeed made their way onto American soil. In March 1867, he wrote Gray to ask for more details about American cases involving "medieval" legal customs, which he then included in a section on wager of battle in America in the second edition of his book. Gray referred him to an appeal of a felony case from colonial Maryland and several more informal instances of judicial ordeals in the United States, pointing out that several states maintained the option of wager of battle into the nineteenth century.[66] Reflecting on the fact that trial by battle had indeed crossed the Atlantic and infiltrated American society, Lea expressed disappointment that "America, inheriting the blessings of English law, inherited also its defects."[67]

63. "The Way out of Barbarism," *The Nation*, September 13, 1866, 208–9. Lea saved a clipping of this review in his personal papers. Lea Papers, Box 158.

64. Roland Gray, *John Chipman Gray* (Boston: Massachusetts Historical Society, 1916), 14. For more details about Gray's life and his law partnership with John C. Ropes, see Albert Borden, *Ropes-Gray, 1865–1940* (Boston: Lincoln and Smith, 1942).

65. "*Superstition and Force*, by Henry C. Lea," *American Law Review* 1 (1867): 378. See also John C. Gray to Henry C. Lea, July 27, 1866, Lea Papers, Box 9.

66. John Chipman Gray to Henry C. Lea, March 15, 1867, Lea Papers, Box 9.

67. Lea, *Superstition and Force*, 199. Lea's new 1870 edition still did not discuss the Civil War in the context of trial by battle.

While Lea only dimly grasped that the hated archaism of trial by battle had gripped the United States for the duration of the Civil War, Gray, who had actually fought in the war, saw the connection far more clearly. For Gray, only a war could definitively settle the constitutional dispute between North and South over the legality of secession. Gray wrote his father in the spring of 1865 that "it does not seem to me that such a rebellion as this even after it has been put down can be treated like an ordinary violation of the laws of society." Because "the question of the right of secession and of State Rights generally was one with two sides and which honest men might well differ, war was the only tribunal to which it could be referred; it has been referred to that, and what we consider the right side has conquered."[68]

Northern Commentators on Trial by Battle

While it seems only natural that ex-Confederates would turn to the metaphor of trial by battle as a way of explaining secession's extinction, it is somewhat more surprising—and accordingly, more intriguing—that many northern writers engaged in their own struggle to assess the consequences of permitting the war to function as a supreme legal tribunal. After all, Confederate defeat provided a definite spur to introspection on the part of those who experienced it firsthand,[69] and victorious northerners had no cause to do any soul-searching about the somewhat uncomfortable implications of settling a highly contentious legal question through violence. Some commentators celebrated the fact that state secession had been destroyed by force, arguing that only a war that had exacted such a tremendous human sacrifice could ensure the permanency of the federal Union. Others were clearly troubled by the realization that armed conflict had resolved the ongoing debate over secession's constitutionality, doubting whether secession's proponents could ever really accept the war's outcome, and wondering if the results of victory could be contained or if the demise of secession would signal the end of decentralized government in the United States.

Massachusetts historian Richard Frothingham fell into the first category. In his 1872 treatise *The Rise of the Republic of the United States*, Frothingham rhapsodized about the positive benefits of defeating secession in the crucible of civil war. Although America's "greatest crisis by far was

68. John C. Gray Jr. to John C. Gray Sr. May 14, 1865. John Chipman Gray and John Codman Ropes, *War Letters, 1862–1865* (Boston: Riverside, 1927), 484–85.

69. See C. Vann Woodward, *The Burden of Southern History* (Baton Rouge: Louisiana State University Press, 1993).

the late appeal in the only tribunal having full jurisdiction between nations and fragments of nations, the ultima ratio regum,—the tribunal of force," northern victory proved that the nation "has triumphantly met every trial." The national government had merely exercised the unqualified right to "vindicate its authority by force." Frothingham found this method of testing constitutional questions not in the least bothersome, writing in stirring and patriotic terms that "the verdict rendered in the tribunal of force was in favor of the Constitution—that there shall but one republic, with one law for all."[70] Wisconsin senator James R. Doolittle received cheers when he told an assembled crowd in Madison that northern soldiers had given their lives in order to ensure that the Confederate states could not leave the Union: "The rebels asserted, both in the forum and on the field . . . this right of secession . . . We beat them . . . on the field, after many struggles; after more than a hundred bloody battles, we beat them there and thus settled the question . . . that the States had neither the right nor the power to secede from the Union."[71] Herman Melville's war poetry reflected a similar satisfaction with the permanency of the legal settlement achieved by battle. Upon hearing of the fall of Richmond in April 1865, Melville wrote: "But God is in Heaven, and Grant in the Town, / And Right through might is Law— / *God's way adore*."[72]

An 1867 article in *Harper's Weekly* also celebrated the military triumph over secession, insisting that the battlefield resolution of this question was tantamount to a constitutional amendment, and would remain far more enduring than any mere court decision declaring the permanency of the Union. Now that the war had established secession's illegality, the article argued, that principle "was not in the reversible decision of a court, but it is in the organic law as interpreted by the decision of the people." The deliberate obscurity of the U.S. Constitution on this question had left matters unsettled, but the ongoing issue "has now appealed to the sword; and if the fathers doubted the children do not. They have routed that dogma [of secession] and utterly destroyed it in the field." The paper thus found the war to be the superior method of deciding this constitutional question,

70. Richard Frothingham, *Rise of the Republic of the United States* (Boston: Little, Brown, 1872), 3–4, 608.

71. "Senator Doolittle's Madison Speech," *Chicago Tribune*, October 12, 1865.

72. Herman Melville, "The Fall of Richmond: The Tidings Received in the Northern Metropolis," in *Battle-Pieces and Aspects of the War: Civil War Poems* (New York: De Capo, 1995), 136. See Deak Nabers, "'Victory of Law': Melville and Reconstruction," *American Literature* 75 (2003): 1–30; Deak Nabers, *Victory of Law: The Fourteenth Amendment, the Civil War, and American Literature, 1852–1867* (Baltimore: Johns Hopkins University Press, 2006).

because the violent struggle, undergirded by the sacrifice of 620,000 lives, carried far more weight than the ordinary processes of law.[73]

Others took a less sanguine view of the conflict. John Norton Pomeroy, in his 1868 treatise *An Introduction to the Constitutional Law of the United States*, expressed regret that the ongoing national debate on the topic of secession had degenerated from "the arena of peaceful debate and the contests of intellect, to the arbitrament of the battle, to the fierce discussion of the battery and the bayonet, to be finally and forever put to rest by the force of the nation wielded in solemn war."[74] In a lengthy letter to Vermont senator Solomon Foot written in the fall of 1865, former Vermont chief justice Isaac F. Redfield sought to bridge the gap between rational legal argument and the brutality of war. He declared war to be a type of legal action that appropriately arbitrated between countries, asserting that "war may fairly be considered an action pending in the only tribunal having full jurisdiction of questions between nations or fragments of nations—the tribunal of force—*ultima ratio regum*." The outcome of the war accordingly carried the same, if not more, legal weight than any court proceeding, and "may be, not inaptly, considered under the figure of a judgment, in an action in a court of justice; for such in fact is war more than anything else." The war acted as a final court of appeal, as the "great and main question involved in the war"—whether secession was constitutionally permissible—had been "forever put at rest by the result of the war, or the judgment in the action."[75]

However, because secession had succumbed to the triumph of arms rather than to the force of argument, Redfield worried that the results of the war might prove difficult to contain. The war had rightfully ensured the subordinate position of the states within the Union, but Redfield feared

73. *Harper's Weekly*, April 6, 1867. For a discussion of Civil War Americans' struggle to give meaning to the massive scale of death and dying in the war, albeit in a much different context, see Drew Gilpin Faust, *This Republic of Suffering: Death and the American Civil War* (New York: Alfred A. Knopf, 2008).

74. John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* (New York: Hurd and Houghton, 1868), 21. See also Charles E. Larsen, "Nationalism and States' Rights in Commentaries on the Constitution After the Civil War," *American Journal of Legal History* 3 (1959): 360–69; Phillip S. Paludan, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era* (Urbana: University of Illinois Press, 1975), 219–48.

75. Redfield's letter was published in pamphlet form. Isaac Redfield, *Judge Redfield's Letter to Senator Foot* (New York: Hurd and Houghton, 1865), 7–8. Redfield's (and others') insistence on the legitimacy of war to settle the question of secession is somewhat at odds with the premises of international law, which sought to substitute legal rules for the Hobbesian state of nature in which nations related to one another. See, for example, Wheaton, *Elements of International Law*, §§1–15.

that the end of secession might well portend the destruction of the states themselves. Because the unnatural and inorganic experience of war and not the deliberative processes of government had made "the nation supreme and the states subordinate," there might be no way to prevent the inevitable accretion of federal power at the expense of the states. Redfield expressed concern that the results of the Civil War might pose a threat to the survival of the very structure of American federalism. Only through vigilance could the nation prevent this extreme form of federal power from taking hold. Redfield accordingly called upon "the nation [to] exercise the utmost circumspection not to claim more of the States than its own indispensable necessities demand."[76]

Speaking to a New York audience on the topic of the nature of the American Union in 1875, attorney George Ticknor Curtis evinced some discomfort with the notion that the brutal process of war had resolved the question of secession's constitutionality. Curtis told his fellow New Yorkers that until 1861, secession's legality had remained an open question, with defensible positions being espoused on both sides of the issue. Curtis acknowledged that his own "northern" views on the question had taken shape during the course of his legal studies at Harvard, where he "sat at the feet of more than one great teacher of constitutional law, as it was held and taught in New England. Of course, I imbibed the doctrines of a school which found its grand expression in the speeches of [Daniel] Webster and the commentaries of [Joseph] Story. How could I help it?" Curtis realized that his experience had been repeated all over the North, while "any young man who was being educated at the time in a Southern college and under Southern influences" would have learned the opposite principles. Raised on the state sovereignty ideology set forth by John C. Calhoun and other southern constitutional theorists, southerners held their beliefs just as strongly as Curtis's northern compatriots did. Each position, according to Curtis, "was, in its respective section, held with equal firmness and equal sincerity."

Despite the reasonableness of the pro-secession argument, Curtis insisted that "state secession from the Union, as a constitutional right, is as dead as are the thousands of brave men who were slain in asserting and defending it."[77] The fact that the war had obliterated secession gave Curtis pause; he acknowledged that "all the intellectual elements of the controversy remain, of course, just what they were." "It might seem, in

76. Redfield, *Letter to Senator Foot*, 9.

77. Curtis also believed, along with Judge Redfield, that northern victory in the trial by battle over secession might lead down the slippery slope towards complete "consolidation" of the federal Union and urged his fellow northerners to guard against this occurrence. George Ticknor Curtis, *A Discourse on the Nature of the American Union, as the Principal Controversy Involved in the Late Civil War* (New York: E. P. Dutton, 1875), 30–31.

the abstract," he admitted uncomfortably, "somewhat paradoxical to suppose that such a question could be definitively settled by fighting." In fact, Curtis confessed himself somewhat at a loss as to how to explain this distinctly prickly matter to future generations of American children, but he "consoled" himself with the notion that children should learn the harsh ways of the world sooner rather than later. This philosophical lesson would teach them that in "our imperfect state of existence in this world . . . mere opinions, which are abstractly nothing but intellectual processes and moral convictions, do become, in the affairs of nations, so intermixed with material interests and necessities, and with the physical forces of society, that it is possible for physical force to put an end to one or the other side of a political controversy." After all, Curtis reminded his audience, had the Confederacy won the war, no northerners "would thereafter have hesitated to say that for any practical and useful purpose the Northern theory of the Constitution of the United States was gone forever."[78]

A full ten years after the war had ended, Representative (and future president) James Garfield remained uncertain about whether ex-Confederates had really accepted that the Civil War had "disproved" the compact theory of the Union. Garfield voiced his doubts to colleagues in the House of Representatives, telling them that he could not fully believe that "the conquered party accept[s] the results of the war . . . Is it not asking too much of human nature to expect such unparalleled change to be not only accepted, but in so short a time, adopted by men of strong and independent opinions?" To Garfield's mind, ex-Confederates had believed so deeply in their pro-secession ideology that no war could genuinely effect a wholesale change of heart. What was more, ex-Confederates could still wrest a victory for secession from the victorious North if they succeeded in convincing future generations of Americans of the merits of their viewpoint; northerners had to remember "that after the battle of arms comes the battle of history. The cause that triumphs in the field does not always triumph in history." Northerners thus could "never safely relax their vigilance until the ideas for which they have fought have become embodied in the enduring forms of individual and national life."[79] The victors had to divine a way to change the hearts of the unreconstructed if their triumph was to last.[80]

78. Curtis, *Discourse*, 24–26, 28, 31. Curtis expressed the same sentiments about the war twenty years later in his *Constitutional History of the United States*. See George Ticknor Curtis, *Constitutional History of the United States*, 2 vols. (New York: Harper's, 1895–1896), 2:293, 294, 300.

79. *Congressional Record*, August 4, 1876, 44th Cong., 1st sess., 5180. See also John Quincy Adams II, *Massachusetts and South Carolina* (Boston: J. E. Farwell, 1868), 11–13.

80. Interestingly, Garfield exhibited much more certainty about the completeness of Union victory upon taking the presidential oath of office almost five years later. In his inaugural

One northerner who proved that the war could indeed alter opinions about the validity of secession was Orestes Brownson. Since the 1820s, Brownson, a New England newspaper editor and public intellectual, had publicly avowed his allegiance to the states' rights doctrines of John C. Calhoun, even while staunchly denouncing slavery as immoral. In his articles in the *Boston Quarterly Review*, he insisted that federal authority "needs a check, a counterbalancing power . . . [in order to ensure] no danger that the state will swallow up the individual."[81] But Brownson's views underwent a radical shift as a result of the war. In the opening pages of his *American Republic*, which appeared in late 1865, Brownson announced: "I reject the doctrine of State sovereignty, which I held and defended from 1828 to 1861."[82]

For Brownson, the convulsion of the war had completely transformed the nature of the Union. Ex-Confederates could never again hope to raise the specter of secession; it had died with the Confederacy. Brownson insisted that "the judgment of the court of last resort has been rendered, and rendered against the [Confederacy]. The cause is finished, the controversy closed, never to be re-opened." What now remained was for philosophically minded statesmen to work out the delicate contours of a new postwar balance of power between the states and federal government. Brownson had thus taken up his pen to help Americans tackle the

---

address, Garfield insisted that "the supremacy of the nation and its laws should no longer be a subject of debate. That discussion, which for half a century threatened the existence of the Union, was closed at last in the high court of war by a decree from which there was no appeal—that the Constitution, and the laws made in pursuance thereof, are and shall continue to be the supreme law of the land, binding alike upon the States and the people." James Garfield, "Inaugural Address," March 4, 1881, http://www.bartleby.com/124/pres36.html.

81. Orestes A. Brownson, "Slavery—Abolitionism," *Boston Quarterly Review* 1:242, 157 (1838).

82. Orestes A. Brownson, *The American Republic* (New York: P. O'Shea, 1865), xi. See also Patrick W. Carey, *Orestes Brownson: American Religious Weathervane* (Grand Rapids, Mich.: William B. Eerdmans, 2004), 336–43; Hugh Marshall, *Orestes Brownson and The American Republic: An Historical Perspective* (Washington, D.C.: Catholic University of America Press, 1971), 220–40; Arthur Schlesinger Jr., *A Pilgrim's Progress: Orestes A. Brownson* (Boston: Little, Brown, 1966), 259–60. A Confederate who did admit that his opinion on secession's constitutionality changed as a result of the war was David Levy Yulee, a former U.S. senator from Florida who had been arrested and held at Fort Pulaski following the war. Yulee told President Johnson in his amnesty petition: "I frankly own that events have seriously shaken the foundations of my opinions, and to much extent affected my views." He declined to elaborate further, fearing that his present posture as a penitent prisoner might call the veracity of his statement into question. David L. Yulee to Andrew Johnson, June 24, 1865, U.S. War Department, *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, 127 vols., (Washington: GPO, 1880–1901), 121:670.

problem of "how to assert Union without consolidation, and State rights without disintegration." Like Isaac Redfield and George T. Curtis, Brownson worried that the eradication of state secession in the strife and violence of the Civil War might portend the end of states themselves. Brownson queried: "In suppressing by armed force the doctrine that the States are severally sovereign, what barrier is left against consolidation?" It remained the duty of public intellectuals such as Brownson himself to grapple with the consequences of the war and to prevent the enlarged power of the federal government from completely eclipsing the states.[83]

By contrast, radical Massachusetts abolitionist Lysander Spooner unabashedly condemned the concept of trial by battle. Spooner believed that holding the Confederate states within the Union through the use of force constituted a form of "political slavery," which differed from the chattel slavery practiced in the South only in degree but not in kind.[84] In his lengthy 1867 pamphlet *No Treason*, which was published in various newspapers, Spooner insisted that military conquest could not legitimately compel an individual's loyalty to a particular government and sorrowfully asserted that "the late war has practically demonstrated that our government rests upon force." Such a settlement of the political differences between North and South could never be permanent, Spooner insisted, because "a contest—however bloody—can, in the nature of things, never be finally closed, so long as man refuses to be a slave." Thus, according to Spooner, northern victory could never truly establish secession's illegality, because military defeat had not altered ex-Confederates' opinions on this constitutional question. In a Union held together by force, the possibility of another southern revolution would always linger.[85]

At the end of 1865, the organ of the American Peace Society, a pacifist organization headquartered in Boston, the *Advocate of Peace*, reproved other northerners for endorsing the notion that "the right of secession was 'submitted to the arbitrament of war,' and was settled by the conquest and surrender of the secessionists." The paper argued that a violent contest could settle nothing and quoted Charles Sumner's 1854 declaration about the settlement of the slavery expansion question through the passage of the Kansas-Nebraska Act: "Nothing is settled which is not right."[86] Because

83. Brownson, *The American Republic*, 334–35, 7, 8.

84. Spooner intimated that he might have been more friendly towards a war waged to liberate southern slaves, but he insisted that northerners had not fought the Civil War with this purpose in mind. Because no higher purpose had animated the northern war effort, there was no justification for forcing the recalcitrant South to remain in the Union.

85. Lysander Spooner, *No Treason, No. 1* (Boston: Self-published, 1867), 5, http://www.lysanderspooner.org/notreason.htm.

86. "Speech of the Honorable Charles Sumner," February 21, 1854, in *The Nebraska Question: Comprising Speeches in the United States Senate* (New York: Redfield, 1854), 117.

Confederates had genuinely believed in the constitutionality of secession throughout the Civil War, "they yet believe they were in the right, though defeated in the struggle for it." Ex-Confederates could not be swayed from their convictions merely because they had suffered defeat, and the paper predicted that the old question could someday come back to haunt the nation—"vigorously contended for, with an opposite result." Because waging war remained a singularly ineffective means of resolving disputes, as well as a very costly one, the paper expressed hope that when the question of secession's legality arose again, as it inevitably would, "we trust that . . . such contention may not be again attempted by the blood-stained sword, but by the peaceful arbitrament of judicial or political action." The *Philadelphia Christian Recorder*, published by the African Methodist Episcopal Church, expressed complete agreement with the Boston pacifists. Even after the conclusion of the war, the paper maintained, it was necessary to hold an ordinary judicial trial to effect a true settlement of secession's legal status. Otherwise, the paper argued, "the question is left at issue, and may be again discussed amid the thunder of artillery and the flash of musketry on the bloody field of fratricidal war."[87]

Legal scholar John Codman Hurd's extensive treatise on federal-state relations in the United States, *The Theory of Our National Existence*, published in 1881, also betrayed an ambivalence about using violence to settle the question of secession's constitutionality. In the book, Hurd adopted a pose of studied neutrality, from which he sought to discover the true locus of sovereignty through unbiased historical inquiry into the nature of the Union, divorced from contemporary political wranglings. The book thus began with an emphatic declaration that one could not simply rely on the results of the Civil War to demonstrate the fallacy of the pro-secession viewpoint and the compact theory of the Union. Only reasoned argument and historical inquiry into the American founding could definitively establish the permanence of the Union.[88]

87. J. P. B., "Settlement by War," *Advocate of Peace*, November/December 1865, 366; *Philadelphia Christian Recorder*, May 18, 1867.

88. John Codman Hurd, *Theory of Our National Existence* (Boston: Little, Brown, 1881). Hurd's book drew on ideas he first articulated in a Reconstruction-era law review article. See John Codman Hurd, "Theories of Reconstruction," *American Law Review* 1 (1867): 238. While Hurd's "Theories of Reconstruction" and his 1890 book *The Union-State* demonstrated a strongly Republican point of view on the Civil War, his *Theory of Our National Existence* did not ultimately take any position. Hurd in fact acknowledged that many Americans (before 1861), including a number of the Founders, quite rationally believed the states to be the ultimate sovereign, and the Union to be merely their creature. See Hurd, *Theory of Our National Existence*, 101–3, 285–86. Reviews of Hurd's book complained about his refusal to take any definitive stand. See "Constitutions of the New World and Old," *Law Magazine and Review Quarterly* 7 (1881–1882): 178; *Theory of*

Hurd insisted that "military success and defeat cannot, in themselves, however decisive strategically, indicate any political supremacy for the affirmance or denial of which the victor and the vanquished may respectively have taken up arms." To admit that the outcome of the war could sort out the relative merits of the Unionist and secessionist positions was to acknowledge that if the Confederacy had established its independence "the courts [would] have held, against the old 'overwhelming argument' that the doctrine of a State's right of peaceable secession had been established, for the states remaining in the Union." Attacking the argument of Isaac Redfield, Hurd went on to deny that any parallel could exist between "a war, the nature of which excludes the idea of a legal determination, and an action at law between two private parties," because in a private action, a court—a third party—would decide the ruling and the extent of victory, whereas the proponents of trial by battle "arrogated to [themselves] individually the right to settle, after the supposed trial of the action, the issues which were to be judged." This type of "settlement" of the issue of secession's constitutionality was fleeting at best, Hurd argued. Without convincing ex-Confederates of the merits of the logical position in favor of a perpetual Union, northerners could expect that unrepentant southerners would eventually attempt another secession.[89]

Conclusion

Contrary to what many historians have assumed, coming to terms with the understanding that the constitutionality of state secession from the Union had achieved resolution on the battlefield rather than in the courtroom was neither an easy nor an automatic process for most Americans. In the post–Civil War world, American theorists struggled to come to grips with the notion that a legal issue that had engendered such vigorous debate prior to 1861 could be definitively resolved in the crucible of war. In so doing, they likened their late war to the medieval legal practice of trial by battle. As the medieval wager of battle had relied on otherworldly intervention in a physical combat between two litigants in order to establish the truth of their assertions, the Civil War had similarly pitted two mighty

Our National Existence, *American Law Review* 16 (1882): 389 (book review). Hurd also received a letter from historian George Bancroft about the argument of his book, which Bancroft confessed he had not "been able to get the key to." George Bancroft to John Codman Hurd, October 7, 1881, Box 3, Folder 150, Ellis Gray Loring Papers, Schlesinger Library, Harvard University, Cambridge, Massachusetts.

89. Hurd, *Theory of Our National Existence*, 1, 89, 449, 480.

armies against one another in a military contest as a method of adjudicating a particularly thorny legal issue.

The widespread use of the metaphor of the Civil War as a trial by battle—employed by people who held widely divergent opinions on the desirability of Union victory and the validity of the right of secession—highlights a deep uneasiness among nineteenth-century American intellectuals about the tension between the rule of law and the chaos of war. Although Civil War-era Americans prided themselves on their commitment to reasoned argument as the only acceptable method of settling legal disputes, they recognized that their civil war deviated monstrously from this ideal. The experience of armed conflict on such a massive scale forced Americans to confront the harsh realization that they had resorted to the irrationality of violence in order to settle the most contentious legal issue of their time.