Where the Rubber Meets the Road: A Dialogue

The following is a lightly edited transcript of a dialogue between four individuals especially well-suited to discuss secession, nullification, and interposition in Arkansas—past and present—as a practical matter:

- Bob Ballinger, 97th District, House of Representatives, State of Arkansas
- Max Brantley, Senior Editor of the Arkansas Times
- Moderator: Nate Coulter, Distinguished Practitioner-in-Residence, University of Arkansas School of Law
- Morril Harriman, Chief of Staff, Office of the Governor, State of Arkansas

Nate Coulter: Thank you, Professor Killenbeck. We want to move this discussion now from the more academic and theoretical to the practical—where the rubber meets the road in the State Capitol. When Professor Killenbeck asked me last spring to moderate this panel, it occurred to me that a discussion on the local aspects of modern secessionism might be a thin topic. Perhaps that is true if you focus only on secession. When Professor Levinson said that Arkansas, along with Virginia, was one of two states in the former Confederate States of America that did not have enough people to trigger the 25,000 threshold for people wanting the White House to note our desire to leave the Union,¹ I thought to myself that maybe secession has not been on our minds here as much. But that may be because we don’t have connectivity. [Laughter].

There are a couple of interesting footnotes about

secession in Arkansas’s past. We had two conventions in 1861 to consider seceding from the Union.\(^2\) At the first one, the motion failed, fairly substantially.\(^3\) A Washington County native, David Walker, chaired that convention in March.\(^4\) Events in South Carolina then transpired, and a second convention convened.\(^5\) This time, the vote was decisive—sixty-five (65) to five (5) to leave the Union.\(^6\) In between those two conventions, a group of people from the Delta counties—so irritated by the result of the first convention—discussed seceding from Arkansas.\(^7\) There was another period after the Civil War began that started going badly for the South when Arkansas Governor Henry Rector—frustrated that the Confederacy apparently did not care about provisioning more forces in Arkansas—threatened to secede from the seceded Confederacy.\(^8\) Nothing came of that,\(^9\) and we have not, in the last 150 or so years, talked much about secession.

But the cousins to secession—in the form of nullification, interposition, and what I will call our hardheaded resistance to federal laws (or the threat of them) that we just do not like—have been regular features in the Arkansas’s political dialogue. For example, in 1956, the voters adopted a state constitutional amendment, amendment 44, which was labeled the “Interposition Amendment.”\(^10\) This was before the Central High School

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3. See id. at 182-83.
4. Id. at 180.
5. Id. at 183.
6. Id. at 184.
crisis in Little Rock. This Interposition Amendment required the General Assembly to pass laws opposing the “Un-Constitutional desegregation decisions of May 17, 1954 and May 31, 1955.”\textsuperscript{11} The amendment also encouraged the General Assembly to impose criminal penalties on those who would fail to carry out the “clear mandates of this Amendment.”\textsuperscript{12}

The District Court for the Eastern District of Arkansas rejected this amendment in 1989,\textsuperscript{13} but it stayed on our records and in our Constitution until 1990, when the voters repealed it, barely.\textsuperscript{14} Amendment 69 passed with less than 51\% of the vote, by a margin of 10,266 votes,\textsuperscript{15} and Professor Killenbeck told me this morning that only sixteen of our seventy-five counties in Arkansas voted to repeal the Interposition Amendment in 1990.\textsuperscript{16}

In the spring of 1957—before the big confrontation between the state and federal authorities at the high school in Little Rock, where all three of my children attended—the legislature went on the record, saying that the parents of white children did not have to send their children to school with African Americans.\textsuperscript{17} We created something called the Sovereignty Commission,\textsuperscript{18} and we authorized local school

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\item \textsuperscript{11} ARK. CONST. amend. 44 (repealed 1990).
\item \textsuperscript{12} ARK. CONST. amend. 44, § 4 (repealed 1990).
\item \textsuperscript{14} ARK. CONST. amend. 69; \textit{Historical Initiative \& Referenda Election Results}, ARK. SEC’Y STATE, http://www.sos.arkansas.gov/elections/Documents/Initiatives\%20and\%20Amendments\%201938-2012.pdf (last visited Apr. 22, 2104) [hereinafter \textit{Historical Results}] (repealing amendment 44 by 1.92\%).
\item \textsuperscript{15} \textit{Historical Results, supra} note 14 (referring to amendment 69 as “Proposed Amendment 3” on the 1990 ballot).
\item \textsuperscript{17} \textit{See} Act 84, 1957 Ark. Acts 280; \textit{see also} Cooper v. Aaron, 358 U.S. 1, 9 (1958) (“Pursuant to [amendment 44], a law relieving school children from compulsory attendance at racially mixed schools, Ark.Stats. § 80–1525, . . . [was] enacted by the General Assembly in February 1957.”).
\item \textsuperscript{18} Act 83, 1957 Ark. Acts 271; \textit{see also} Dewey Dykes, \textit{Arkansas State Sovereignty Commission}, ENCYCLOPEDIA ARK. HIST. \& CULTURE, http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=6490 (last updated Mar. 12, 2013) (“The Arkansas State Sovereignty Commission (ASSC) was created in February 1957 to ‘protect the sovereignty of Arkansas . . . from encroachment by the federal government’ in
boards to fund the hiring of lawyers with tax dollars to fend off desegregation as ordered by Brown. That’s the background. Today, we seem to be flirting more openly than at any point since Brown with legislating our defiance of federal laws we don’t like, or ones that we anticipate we won’t like before they are enacted. That’s where I want to have our panelists start. We have three very experienced participants in, and observers of, Arkansas political and legislative history. I am going to let them speak in the order that I will introduce them.

Bob Ballinger represents District 97, which is mostly in Madison County but includes parts of Carol and Washington Counties. He is a native of Oklahoma, and he graduated from Northeastern State University, where he played football. He taught for a while and coached in the Sapulpa Public Schools before deciding to go back to law school. He graduated with honors in December 2004 from this law school, where he was a member of the Arkansas Law Review and an officer of the Federalist Society. He now practices law in Hindsville and needs to stay very busy doing that because he has six children to feed, clothe, and educate.

Representative Ballinger received a bit of attention in the last legislative session when he sponsored House Bill 1752. That bill was entitled: “An Act to Require State Agencies and Public Officers to Disregard Unconstitutional Overreaches of Power; to Protect the Constitutional Rights of Arkansans; to Prevent the Federal Government from Regulating the Manufacture, Assembly, and Trade of Firearms Within the Borders of Arkansas; and for Other Purposes.” For his effort, Representative Ballinger drew the wrath of the editorial page of the Arkansas Democrat Gazette, which took issue with the legislation and described it as containing the following message to Washington: “Not only can you federales not enforce your laws within our

response to the U.S. Supreme Court’s 1954 Brown v. Board of Education of Topeka, Kansas school desegregation decision and 1955 implementation order.”

22. Id.
borders, but we’ll throw you in jail if you try.” 23 Representative Ballinger, you are always welcome to come back to the law school no matter how often the Democrat Gazette scolds you. We are glad to have you.

Bob Ballinger: Thank you very much.

Nate Coulter: Seated two seats to Representative Ballinger’s left is Morrill Harriman, Governor Beebe’s Chief of Staff. Morril has had held that position since, probably de facto, the night of the Governor’s election in 2006. He is by all accounts the Governor’s closest friend, and I had a conversation with somebody back in the spring where it came up that maybe Morril Harriman would run to succeed Mike Beebe. One person in the group said: “Why would he want to be Governor for another eight years?” [Laughter].

Morril served for sixteen years as a State Senator from Crawford County. 24 He was widely held as a master of the process, and he authored numerous, very complicated pieces of legislation. Last week, I had former judge John Stroud in to talk to my Arkansas constitutional law class about amendment 80—the replacement to our 1874 Constitution’s Judicial Article. 25 Judge Stroud repeatedly heaped praise on these two leaders in the State Senate, who helped Judge Stroud navigate amendment 80 through the legislature to get it on the ballot in 2000. Those two guys were Mike Beebe and Morril Harriman. Judge Stroud noted that there were several critical decisions about which courts to eliminate and which ones to save in the proposed amendment, and he said that the two of you kept them from making bad mistakes that might have cost the ballot issue.

Morril is a native of Hamburg in southeast Arkansas. He graduated from the University of Arkansas School of Law before setting up his practice in Van Buren in Crawford County. He served for sixteen years in the State Senate

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25. See ARK. CONST. amend. 80; Arkansas Supreme Court, ARK. JUDICIARY, https://courts.arkansas.gov/courts/supreme-court (last visited Apr. 22, 2014) (“The judicial article of the Arkansas Constitution was rewritten by Amendment 80.”).
representing Crawford County.26

Sitting between Bob and Morril is Max Brantley. Max is my neighbor in Little Rock, and he is the Senior Editor of the Arkansas Times, which is a weekly news publication.27 He served as an editor from 1992 through 2011, and now he is the Senior Editor.28 He is editor emeritus, I suppose. Now he spends most of his time blogging for the Arkansas Times blog, which is devoted to Arkansas news and commentary and regularly breaks complicated news stories. And then the newspaper that criticized Representative Ballinger will pick up Max’s story the next day and claim it as its own, but Max and the Arkansas Times were responsible for giving it the light of day.

Before he joined the Arkansas Times, Max worked for nineteen years for the Arkansas Gazette as a reporter, city editor, and columnist. Max, like Representative Ballinger, is not a native of Arkansas. He grew up in Lake Charles, Louisiana. He is a graduate of Washington and Lee University in Virginia, and he is the only member of the panel who is not a lawyer. But he is married to a brilliant lawyer. His wife—Judge Ellen Brantley—retired earlier this year from the Pulaski County Circuit Court. She has probably schooled him to the point where he could pass a lot of the Bar exam. He knows a lot of law from living with Ellen. I was out exercising last Saturday morning when I came up behind Max and Ellen in Hillcrest. Max said that Ellen was trying to school him about some of these doctrines that the scholars are going to talk about today. So he has probably had an unfair advantage in preparing for this discussion.

With those introductions, let’s start with a broad question, and I am going to ask Representative Ballinger to address it first.

Do you see issues, similarities between the current climate and the issues that we faced in the 1950s after the Brown decision? And are we now more prone to enacting or adopting laws to resist mandates, edicts, or promulgations of

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28. Id.
the Federal Government that we just don’t like? If so, how do we square that with the Supremacy Clause in Article 6 of the U.S. Constitution?

And let me ask Representative Ballinger this question with particular reference to House Bill 1752, which would have, as the editorial pointed out, made it a misdemeanor for anyone to enforce in Arkansas a federal statute or regulation that related to personal firearms or ammunition on someone living in Arkansas.29 Tell us about your legislation and how that fits into this era of reenacting or readopting, via statute, measures that resist legislation and rules we do not like.

**Bob Ballinger:** Thank you very much. First, I just want to say thank you and express my appreciation to Mark Killenbeck and the law school for sponsoring this Symposium. I appreciate the opportunity to be here, and I am grateful for the chance to participate in what is clearly an important and timely discussion. Given the controversial nature of the subject and the fact that it invites such fervent debate, I am eager to hear what I expect will be a passionate presentation of ideas from all participants.

Although we do not necessarily reach similar conclusions, I believe Professor Levinson to be an intellectually honest surveyor of constitutional issues. He may not politically espouse some of the positions he is willing to examine, but the fact that he is willing to think outside the box speaks to his integrity. It is this kind of willingness to explore and consider possibilities outside our own mental constructs that makes fruitful dialog and real progress possible. Great minds are not threatened by ideas, and Professor Levinson represents the communication that the historical records reveal constrained the passions in the great debates at the founding of our country. I am confident that if each of us can bring that openness to this exchange, we can all leave better informed and, hopefully, a little wiser.

I am convinced that there is a sort of mantra, a spectrum of approved thinking among certain schools of thought, which constricts what expressions of alternative paradigms are customary or acceptable. I am confident that if each of us adopts Professor Levinson’s approach, we may be able to broaden our understanding in ways that do not negate our

individual presuppositions but, rather, expand them to include additional possibilities. We can be open without surrendering our convictions and ask ourselves if our own position must be absolute.

Is it not possible that our understanding may be substantially correct, yet incomplete? If this is sometimes true, can we set aside rigid inflexibility and admit to a dimension we have not considered or, in the light of new insights, might reconsider? I cannot imagine a more reliable indicator of the requisite humility that honest inquiry requires.

As Professor Levinson indicated, there are times and places where he would be persecuted for speaking forthrightly because he is willing to consider legal concepts outside that spectrum. But at the same time, if we are going to be confident in our own conclusions, we need to be considering the deeply held beliefs of those men and women who see things differently. Surely, if we are secure in our position, it will withstand scrutiny. I regard an unwillingness to hear alternative views as an indicator of insecurity, and I am hopeful and even confident that we who choose to participate in this kind of discussion would at least agree that the object of our inquiry is fidelity to the Constitution and, ultimately, to truth itself.

As attorneys, we are trained to take a position, to hold that position, and to explain how wonderful that position is and how any other positions are basically foolish. That works, so we say, in our adversarial court system; but in the universe of ideas, it stifles genuine and necessary debate. If the goal is to discover that which is right or effective, enforcing silence or conformity causes the exact opposite result. I am here because I believe that honest inquiry is not only possible but also, in fact, our intent.

House Bill 1752 has been characterized as a nullification bill. I consider this characterization to be overly simplistic for multiple reasons, but I will share two for the moment. First, the bill is contingent and activates only upon specific future actions by the Federal Government.30 It addresses

neither prior actions nor statutes. Secondly, it was focused only on new federal regulations on firearms and intrusions on certain intrastate firearms issues. It acknowledged federalism as substantive and not merely theoretical. At that point, one might characterize it as a nullification bill.

The fact of the matter is that I am a State Representative, and I have sworn an oath to protect and defend both the United States and Arkansas Constitutions. For me, the Second Amendment in the Bill of Rights and article 2, section 5 of the Arkansas Constitution are profoundly unambiguous. And for the record, while this is not central to today’s discussion, I must mention that I include in my personal calculus humankind’s natural rights of self-defense, and the Declaration of Independence’s reference to unalienable rights from our Creator. In my worldview, these rights are superior to any man-made law, and I make no apologies for that. Natural rights were of paramount importance to the framers, and I will not pretend that they are inconsequential to me.

My worldview is particularly relevant when I consider that during the legislative session—and any other legislator could tell you the same thing—I received literally thousands of emails from my constituents and from people all over the state, saying: “Protect my Second Amendment Rights.” Given my personal commitment to Liberty and the very real rights of my constituents, the messages gave me pause and forced me to consider how I might accomplish their requests. If the Federal Government infringes fundamental human rights that are protected by both the Arkansas and U.S. Constitutions, how might I, as a State legislator, protect those rights? To me, there is no question that the goal is worthy of the effort. As freedom was the object of the American Revolution and the preservation of Liberty the intent of the Constitution, to do otherwise would, in my mind, violate my oath as a representative of the people of my district, the State of Arkansas, and the country that I love.

I went through law school. Obviously, I have given thought to these things. I jokingly told Mark Killenbeck that

31. See id.
32. Id.
33. See id.
the *Arkansas Times* considered my position so obtuse that I was included in their list of ten worst legislators and described as “[a] strong candidate for this year’s Constitutional Law Quiz Bowl Least Valuable Player.”34 I told him my plan was to pass the buck and blame my constitutional law professor who, coincidentally, was Professor Mark. [Laughter].

However, in light of my earlier remarks, most will not find it surprising that I found myself asking what should be—but I admit rarely is—an elemental query: If a statute is unconstitutional, is it actually a law at all? If the Constitution is a collection of specific, delegated powers granted to the Federal Government, and if the Federal Government has no power outside of those delegated powers, and if we have a Bill of Rights with its own Preamble that speaks specifically to the concern of a centralized government that might seek to operate outside those delegated powers and proscribes such activities, then what is the source of the authority that such a government exercises, and how is this expansion into prohibited activities legitimate?

If for no other reason, as a State Representative, I am obligated to voice that objection. We do not consent to an extra constitutional and, as such, unconstitutional appropriation of power by the Federal Government that is profoundly contrary to the framers’ and founders’ intent, to the clear and unambiguous wording of the document, and to the spirit of our social compact.

Such activity exhibited by the Federal Government, if between contracting parties, would clearly violate their agreement. It is not unreasonable to constrain the Federal Government, as it is defined and limited, from operating lawfully outside the social compact. As an attorney, I have struggled with the painful conclusion that torturing the language of the Constitution to justify what a first-year law student would recognize as a violation of contract law is simply unacceptable.

Notwithstanding my assessment of our current

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condition, because most human beings generally loathe confrontation, there are numerous instances of federal incursion into state sovereignty that I—as an American, Arkansan, and Representative—believe unequivocally should be handled at the state level. However, I was not yet sufficiently alienated to fight and work to repeal some of the federal activities that I now frankly find repugnant. To fail to act has, for me, become a matter of conscience.

As Mr. Levinson pointed out, if a law is not constitutional, it should be unenforceable.\textsuperscript{35} I took the oath of office and swore that I would protect and defend the Constitution. I think part of that job is to protect my fellow citizens from unconstitutional color of law. My hope would be that, ultimately, any new law would have the opportunity to make its way through the courts to the Supreme Court. From there, the Supreme Court would look at the law and decide whether it violates the Constitution. And that would be the end of it. But even if the Supreme Court were to uphold any particular law, the question is why every edict from the Supreme Court is necessarily declared infallible? Essentially, this is what the Supreme Court declared for itself in the \textit{Cooper} decision of the mid-1950s.\textsuperscript{36}

The heart of the question is determining what power the Federal Government actually has. In what venue does the perpetrator determine his guilt or innocence? What logic would make the Federal Government the arbiter of its own limitations or transgressions? By what measure would such an arrangement meet the standards of federalism? Of those who have read the founders, who could imagine this was their intent? And why should we, a free people, settle for any arrangement where the overseer judges himself as to whether he has applied the lash excessively? Such an arrangement is facially absurd.

So for me, the federal apparatus has incrementally violated the natural rights of men that are protected by the Constitution. This rose to a level of attack against such a

\textsuperscript{35} See Levinson, \textit{supra} note 1, at 19.

\textsuperscript{36} See \textit{Cooper v. Aaron}, 358 U.S. 1, 18 (1958) ("\textit{Marbury} declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").
fundamental right that I felt it was a sufficiently serious matter as to warrant taking a stand.

The Cooper decision was flawed in that the State was trying to use a legitimate tool—nullification—to perpetrate an unconscionable act. From the vantage point of the twenty-first century, we are outraged that the State was trying to perpetuate what we clearly perceive as evil. This conundrum of using something good to accomplish an overt wrong allowed the Supreme Court to overreach with impunity. This would not be the case should a state use nullification against the Federal Government’s perpetration of evil on its own citizens. In fact, history supports this premise.

The “Supreme Court” is not the “Supreme Branch” of government. It was the Supreme Court that validated segregation in Plessy v. Ferguson.37 It was the Supreme Court that ruled that Dred Scott, a black man, was property.38 These decisions undermine the “infallibility” of the Court. Further, what do they tell us about the authenticity of conscience and the validity of the rights of man?

Yet, once the Supreme Court ruled, their decision became the law of the land.39 But it did not become the law of conscience. It did not become natural law. And that so-called “law” was horrendously wrong and absolutely invalid. Laws that only monsters and cowards will obey have no moral authority. Free men rightly refuse to bend a knee to that which is clearly wrong. Admittedly, taking a stand sometimes comes at a price; minimally, one runs the risk of being placed on unflattering lists.

Discussions can be complex. However, when boiled down to fundamentals, unalienable rights from God constitute true law. If these laws do not measure up to the standard of Liberty, they must—and will—fail. The people

38. See Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 451 (1857) (“[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution.”), superseded by constitutional amendment, U.S. Const. amend. XIV.
39. See Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).
in this very room make good arguments for and against secession or nullification; yet everyone here would have disobeyed the “law of the land” under the _Dred Scott_ decision regardless of the Supreme Court’s supposed supremacy. Even those who argue against nullification would have, through their refusal to obey, nullified _Dred Scott_. The exception (i.e., any act of de-facto nullification) proves the rule (i.e., nullification exists as a workable tool). I think that is something worth talking about. Thank you.

**Nate Coulter:** Morril, you want to respond?

**Morril Harriman:** Well, I will relate the 1950s nullification issues because I will either remind you, or I will bring to your attention, that today there is currently pending within the Eastern District of Arkansas a petition filed by the Arkansas Attorney General on behalf of the State of Arkansas. It is a microcosm of issues and complex factual and legal issues, but bottom line, the petition asks this: Your Honor, we ask that you declare that the State of Arkansas has finally complied with the mandates of _Brown v. Board of Education_. This case deals with the Little Rock desegregation issue. This issue has been ongoing since _Brown_, and while maybe some could argue this petition is not part of that, it is. It is almost directly part of _Brown v. Board of Education_. Why? Because this State, maybe it wasn’t Orville Faubus, but the public-policy makers of this State, namely the General Assembly, continued to seek nullification of the Court’s mandates through other means that continued the vestiges of segregation.

I respect Representative Ballinger for his views, and certainly for his right to file that which he deems is in the best interests of the people he represents. But this administration disagrees with and opposes Representative’s Ballinger’s bill, one reason being that, “where the rubber meets the road,” there are a lot of practical issues to consider. With that being said, we felt there were numerous bills within this past

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41. See supra notes 17-19 and accompanying text.
legislative session that we knew would immediately welcome lawsuits, that would become a liability to the State of Arkansas, both financial and, some, to be honest, from a public-perception standpoint.

Let’s return to Little Rock desegregation. Those of us who pay taxes in Arkansas should be aware that the State has paid hundreds of millions of dollars to the various districts, namely three districts, within Pulaski County, Arkansas, the sole purpose of which was to, again, attempt to comply with *Brown v. Board of Education.*42 So again, Bob, I don’t think you can be criticized because there is a strong history within this state of nullification. It is still with us today. We just felt, and do feel, in the Executive Branch—which, to some extent, is given the authority to implement and enforce the laws which are mandated—that we have been a nullification state for too long. We felt that the courts and the laws were very clear over what we could do and what we could not do. The Beebe administration felt like it was time for us to move on from the time of nullification—whether it be the Second Amendment or desegregation—and hopefully take the state in a different direction. And again, this is not because of any disrespect for Representative Ballinger, it is just because of what we had seen as history that had occurred in this state.

As Nate was saying, in dealing with the courts within the state, maybe arguments against judicial supremacy are valid and Professor Levinson raised some interesting points for us to really ponder. But the perspective is different when sitting in that chair having practical impact and seeing the implications of the policy decisions, as relating to legal decisions and what you have billed to be binding legal decisions, at least for the current time. If an elected official takes the oath seriously, he or she, unless they are one of the majority of the Supreme Court, probably should feel like they do not have the authority to make a decision as to the constitutionality of a particular law, whether it be federal or

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42. Meredith Turner, *Arkansas Attorney Approves the End of Desegregation Funding in Little Rock,* ARK. TRAVELER (Jan. 29, 2014, 8:00 AM), http://www.uatrav.com/news/article_94f7cb7a-87e3-11e3-9843-001a4bcf6878.html (“Arkansas pays around $67 million to the three districts each year ‘to affect the racial balance of students in schools in Pulaski County.’”)

state. We have a system right now that tells us who makes those decisions. Maybe that should be changed, but it has not been changed, and we think that we need to respect that.

**Nate Coulter:** Legislators always resent federal mandates, edicts, and regulations, but have you noticed, in the twenty-five-plus years that you have been at the Capitol, an evolution or difference in the tone or response to those kinds of things by the General Assembly, or by the people in the Executive Branch for that matter?

**Morril Harriman:** I think the dominant governmental entity is always making the subservient entity angry, whether it is the federal government dealing with the states or the state government dealing with the counties, cities, or even the school districts. There is always the perception that the dominant entity is overreaching. What I do see totally different is the much more strident tone that politics has taken, and the willingness for people to, in a sense, take a stand and become intractable. I spent most of this week trying to determine what happens to our “state federal employees.” Do they have a job Monday?  

43 It seems that we now have a Congress that cannot talk to each other; that will not talk to each other. There is no spirit of compromise. It is my way or it’s the highway, and we seem to see that more and more in a lot of our public-policy bodies at the local, state, and national levels. That is what I see as the huge difference. Instead of somehow accepting, disagreeing with, and attempting to modify and point out faults, and, thus, possibly make better that which we believe to be bad, it is just— “the hell with it, it’s wrong.” We stop there.

**Nate Coulter:** So, in essence, you think that what has afflicted and caused dysfunction in Washington is creeping into the State Capital?

**Morril Harriman:** Oh, yes. I don’t think there’s any question about it.

**Nate Coulter:** Max, you want to address this? What are your thoughts on the current climate?

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Max Brantley: Well thanks, Nate, for having me. I want to open by saying I am not quite sure why I am here. [Laughter]. I am not a lawyer, and I really need to issue a quick disclaimer on behalf of my wife. [Laughter]. I know she would want me to say this: I am not a lawyer; I just play one on TV sometimes—but never from advice from her. All the bad stuff you hear did not come from her. She should get no blame for what I say. Morril stole a little bit of what I planned to say, and I want to begin by noting that I think part of the reason I am here is to be a little foil to the honorable gentleman from Hinesville. I was a little hard on Representative Ballinger over some of his legislation, and I really... 

Nate Coulter: You want to give peace a chance.

Max Brantley: I actually cracked a book to prepare for coming here, and I about decided that I was wrong. I am jumping out of that box that Bob wants to jump out of and saying that there might be something to Representative Ballinger—and the reason why is based on Cooper v. Aaron and the history that it represents. I think Professor Levinson is correct that any lawyer or legal scholar today would say, at this moment in time, that Ballinger’s law is frivolous and stands no chance of being upheld in any court in the land. But that is today. That’s not tomorrow, and if there is any case in the world that teaches us that, it’s Cooper v. Aaron.

The words of Cooper v. Aaron say that a state executive or officer may not nullify desegregation indirectly through evasive schemes. Well, here’s the history. That opinion was written in 1958. In 1973, a cub reporter for the Arkansas Gazette had a rare front-page story about the first day of school in Little Rock, and the reason school opening was the page-one story was because, fifteen years after Cooper v. Aaron, we finally desegregated the elementary schools in

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45. 358 U.S. 1, 18-19 (1958).
Little Rock. And that was “deliberate speed.” Even under the force of federal troops and ringing U.S. Supreme Court declarations, it took fifteen years to truly integrate the elementary schools of Little Rock. Well, that fixed everything, right?

Actually, sixteen years later, the State entered into an incredibly dramatic settlement of the Pulaski County desegregation case that committed the State to this huge expenditure of money because of continuing violations of the constitutional rights of black children and black parents in Pulaski County. The violations occurred in many areas and were clearly proven in court—so much so that the Eastern District ordered, for a time, the consolidation of the three school districts. So sixteen years later, the State still had not gotten it right. It is true that eighteen years later, in 2007, we were on the cusp of being declared “unitary,” which is the fancy word for desegregated in the eyes of the law. This would mean that the State could go and sin no more, hoping that it will not have to pay any more money.


47. See Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294, 301 (1955) (requiring district courts to enter decrees and orders “as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases”).

48. See LITTLE ROCK DESEGREGATION, supra note 46.


52. See Green v. County Sch. Bd., 391 U.S. 430, 437 (1968) (explaining that a school achieves unitary status if it “has taken adequate steps to abolish its dual, segregated system”).
However, I think the State should pay more money because it continues to violate the constitutional rights espoused in Brown v. Board of Education and upheld in Cooper v. Aaron. And I can tell you why. We have pending today at the State Education Department an application for a “white flight” charter school in the western suburbs of Little Rock that is going to serve upscale white families because they do not want their kids to go to middle school with black children in Little Rock, which is an overwhelmingly black school district. Desegregation really worked well, thanks to the U.S. courts in Little Rock, Arkansas. This is yet another example in a series of charter schools that were established ostensibly to provide choice and better education opportunities, but which, in several cases—as with the very first one established in Little Rock, which was also in the western part of town, in a white neighborhood—attract an overwhelmingly white clientele. The Little Rock School District made a strategic mistake in not objecting to that school at the time. So we are still on a pattern of creating segregation in public institutions in Little Rock.

And that’s not all. Morrill is right about what is happening today in the state, but he has forgotten about a national development that really proves that if Bob Ballinger just hangs in there, in time the argument could come around to his side. The development is that the U.S.—and I am going to oversimplify some legal issues, but that’s kind of what I do [laughter] . . . .

Nate Coulter: We won’t blame Judge Brantley for that.

Max Brantley: But we now know that, essentially, the Supreme Court’s law of the land is that race no longer


matters.\footnote{See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 723-25 (2007) (plurality opinion) (prohibiting public schools from using race as the sole determinative factor in deciding admissions).} We have fixed race. You can no longer consider race in any kind of issue pertaining to education; you are discriminating against the white man by doing that, so you cannot consider race anymore.\footnote{See id.} The Court has rejected school-desegregation plans all over the country that take race into account.\footnote{See, e.g., id.; Gratz v. Bollinger, 539 U.S. 244, 270-75 (2003) (striking down a state university’s admissions policy because it did not provide for an “individualized consideration” of race).} I think we can see today that this charter school in West Little Rock will reach the U.S. Supreme Court, which will rule that it does not care what the racial impact is at this school because the Court has decreed that race no longer matters.

The other thing we have concerning the legislature is a law passed in 2013 that essentially says you can transfer among school districts for any reason, that residency in the district no longer matters.\footnote{See Act 1227, 2013 Ark. Acts 5020, 5028 (codified at ARK. CODE ANN. § 6-18-1901(b)(3) (Repl. 2013)) (“These benefits of enhanced quality and effectiveness in our public schools justify permitting a student to apply for admission to a school in any school district beyond the school district in which the student resides . . . .”).} Well, here is the effect of that. When this law takes full effect (and the biggest advocates want to remove the one little exception on school districts that have been involved in federal-court cases),\footnote{See Act 1227, 2013 Ark. Act 5020, 5032 (codified at ARK. CODE ANN. § 6-18-1906(b)(1) (Repl. 2013)).} there are any number of places—such as Camden, El Dorado, and Junction City—where the remaining whites in the school district will all go to neighboring white districts, and those places will create all-black school districts. Under the present state of U.S. Supreme Court law, I think this outcome likely will be deemed non-damaging.

Therefore, today—fifty-five years after \textit{Cooper v. Aaron}—the law of the land seems to be that you can segregate by state law, which is what Arkansas has done. So I do not dismiss what Representative Ballinger and others set out to do because I think, if you just hang in there long enough, nullification will work. And we are seeing it in a number of cases. I just wish sometimes the liberals could do
Nate Coulter: Well, can you think of an example, Max, in the last fifty or sixty years where people on your side of politics have attempted to defy or resist some edict?

Max Brantley: I think Roe v. Wade\(^{60}\) is the obvious example. We saw advocates of legal abortion take to the courts and establish a right to legal abortion, to at least some degree, in all fifty states.\(^{61}\)

Nate Coulter: But to further your analogy, is there a circumstance that you would cite where, after a legal determination by the federal judiciary, there has been resistance and a sort of nullifying, nullification mode, or quasi-nullification mode, from the other side?

Max Brantley: I think marijuana is the other brave one that is out there, and it is really kind of an amazing outcome.

Nate Coulter: Let’s talk more about the role of the United States Supreme Court. Professor Levinson talked about the need to have somebody pull the switch and decide, up or down, to make the call. In a culture where you have divergent views on divisive issues, who gets to decide? Is there a sense—I will start with you, Representative Ballinger—that the Supreme Court has lost a critical mass of support in terms of people not having the faith that the Court has the capacity to act independently or to decide these issues in a way by which people will abide?

Bob Ballinger: The short answer is that I do not think that the disagreement is new. That the Court’s decisions have been scrutinized and criticized is historically obvious. There have almost always been some who were unhappy with particular decisions. If I may, I would like to offer this abbreviated example:

Joshua Glover was a slave.\(^{62}\) He was sold in St. Louis.\(^{63}\) He was believed to be about thirty-six years old at the time.\(^{64}\)

\(^{60}\) 410 U.S. 113 (1973).

\(^{61}\) Id. at 164. (“A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.”).


\(^{63}\) Id.

\(^{64}\) Id.
Not surprisingly, he yearned for freedom. He escaped to Illinois, and he eventually arrived in Wisconsin. 65 At that time—the 1850s—there existed what were known as the fugitive slave laws. 66 These laws essentially created real penalties for anybody who would harbor or aid a runaway slave and authorized a bounty for the return of the slave to his or her “owner.” 67 The Underground Railroad comes to mind; it was illegal because of the fugitive slave laws. If caught, you could be penalized or thrown in jail for aiding and abetting a slave in escaping. 68 Federal agents were paid ten dollars to return a slave, but only five dollars if the slave was allowed to go free. 69

Obviously, many northern states did not like the fugitive slave laws. Consequently, they passed laws protecting the civil liberties of their citizens. 70 But in Wisconsin—and we know this through the story of Joshua Glover reported by a liberal newspaper editor, Mr. Sherman Booth—after the laws protecting runaway slaves were challenged, the supposedly absolute and infallible Supreme Court, ruling against the spirit of liberty enshrined in the Declaration and protected by the Constitution, upheld the fugitive slave laws and issued a decision in Ableman v. Booth that further legitimized the institution of slavery. 71 I challenge the notion that “legal” and “lawful” are identical. Statues that violate constitutional precepts or the unalienable rights of human beings can never be “lawful.”

The Ableman decision essentially allowed Southern

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65. Id. at 4-5.
67. See JOSHUA GLOVER BIOGRAPHY, supra note 62, at 6 (“The United States Congress passed the Fugitive Slave Law of 1850 on September 18, 1850. It declared that all runaway slaves were supposed to be returned to their masters. Anyone found helping escaped slaves could be fined $1000 and put in prison for six months.”).
68. Id.
71. 62 U.S. (21 How.) 506 (1858) (“[T]he act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States . . . .”).
bounty hunters to go into Northern states, find somebody who fits the description of one of the escaped slaves, kidnap them without due process, and then take them back to the South. Well, the people of Wisconsin did not like the Fugitive Slave Act. They refused to accept the idea that the Federal Government has the authority to enslave any of its citizens. Wisconsin fought it. Wisconsin said: “Not in our state.” In fact, hundreds of Wisconsin citizens freed Joshua Glover from jail, and he ended up living a long life in Canada as a free man because one state was willing to take a position and essentially nullify federal law.

Now, I think nullification is something we should be careful about. I believe it is good for the Supreme Court to be able to determine whether a law is constitutional. Chief Justice John Marshall thought so, and the Court historically assumed this authority in *Marbury v Madison*. However, the framers were clear: The Constitution never intended for the Supreme Court to operate as the final arbiter of all things constitutional. Other than that, within reason, the Court’s ability to rule on constitutional issues is certainly legitimate. The question is the finality of the judgment, and I will leave that for another discussion. I think it is helpful to consider the Supreme Court’s decision as final, except for when it is wrong.

[Laughter]

Granted, we are entering turbulent waters, but they are not unnavigable. In my perception of human nature, I am committed to the understanding that it is we—as beings endowed by our Creator with certain unalienable rights—who are sovereign. Now Mr. Morril may be a brilliant man, but one of the things he referred to was a subservient versus superior government. I disagree with his underlying

72. See Baker, supra note 70, at 1169-70.
73. See id.
74. JOSHUA GLOVER BIOGRAPHY, supra note 62, at 8-9.
75. Id. at 10.
76. See 5 U.S. (1 Cranch.) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).
77. See Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 SUP. CT. ECON. REV. 115, 117 (2004) (“[N]owhere in the Constitution does it say explicitly that the ‘Supreme Court, and such inferior courts as may be established by Congress, shall have power to nullify a Law enacted by Congress and signed by the President if the Law is unconstitutional.’”).
premise. We are a government of the people, for the people, by the people. It is we who are sovereign. It is government that is the servant. The Federal Government’s power is limited and restricted to those powers that are specifically enumerated in the Constitution. Those powers not enumerated belong to government entities to whom we have delegated and distributed various other responsibilities, and to the people, individually, in their capacity as free men and women.

Nate Coulter: Well, if it is not the Supreme Court, where do we go? Assuming these issues are fraught with contention and that they are closely divided, and roughly half of the country thinks the Court has decided wrongly and one half thinks otherwise, how do you resolve that? If the final decision does not come from the Supreme Court, where does it come from?

Bob Ballinger: That’s a great question. If the Supreme Court makes a decision, and enough of the population looks at it and says—“Hold on, that is morally wrong”—then what we should do is put on a Symposium so that we can consider the issues of nullification. [Laughter]. And if some dope tries to pass a bill that says—“Hey, if statutes conflict with true law, then we will nullify it”—he may get invited to speak at the Symposium. [Laughter].

Nate Coulter: After being lambasted by Paul Greenburg.

Bob Ballinger: This is a question that requires consideration on more than one level, but yes, in some instances, what you are suggesting is exactly right. One way the process can begin is by doing what we are doing today: starting the discussion. Fortuitously, that initiates a dialog and Mr. Levinson’s outside-the-box ideas are being discussed in a public forum.

We engage in honest exploration of the ideas where, among other things, we can consider whether or not we really should routinely yield to the Supreme Court without reflection. Or we can ask: When the Supreme Court says it is okay to round up Japanese-Americans and put them in
concentration camps, may we not question the wisdom, the moral consideration of arbitrarily incarcerating innocent victims? May we not, as a people, conclude that the Supreme Court’s decision was wrong? Is it even possible to arrive at a consensus if individuals have not first examined the issue?

The Cooper decision flowed out of Brown v. Board of Education, where the Supreme Court overruled its previous holding that separate but equal is the law of the land. The fact is that resistance is not futile; and the origin and history of our nation proves it.

The point I am making holds true: Nullification happens routinely, but it occurs through multi-dimensional expression. It is not necessarily an organized movement. It is sometimes simply a fact. I think a great example is the medical-marijuana issue. Indisputably, despite federal regulations to the contrary, you can smoke marijuana “legally” for any reason in a couple of states. The marijuana issue is an example of liberals or libertarians, or whoever their allies might be, using nullification. Some might classify it as quasi-nullification. It is obviously not Calhoun nullification. Regardless of what one calls it, it is an example of the state interposing, stepping in, and

78. See Korematsu v. United States, 323 U.S. 214, 217-18 (1944) (“[W]e are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.”). But see id. at 223 (“Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order.”).

79. 358 U.S. 1, 17 (“[T]he constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation . . . .”).


saying: “You know what? We don’t agree with that federal law.”

Another example is the REAL I.D. Act,82 which more than half the states have not implemented.83 None of us have a nationally compliant ID outside of our passports, and the reason for that is more than half the states said they are not going to do it.84

A third example is No Child Left Behind.85 Initially, non-compliance meant that federal funding would be withheld. Here in Arkansas, we were not supposed to have federal funding two years ago because we are not compliant with No Child Left Behind, but so many states are not compliant that the feds have simply not enforced it.86 Essentially, that sums up what we are looking at today.

The facts are incontrovertible and operate independently of our recognition of them. Calling nullification a crazy idea does not alter the fact that it is out there and functioning. It is a process, a recourse that has been utilized in the past, and a point that I will reiterate: All of us would have been on the side of Joshua Glover. Everyone in this room, I would hope, would have made the sacrifices to get Joshua Glover into Canada, even at the risk of going to jail.

No one is saying that standing up to power is easy or without consequences. Such is the nature of the preservation of liberty. It is not free. Sherman Booth spent a long time in jail,87 but he acted consciously. He acted with valor. Booth


84. See id.


87. See Booth’s Life in Jail, MILWAUKEE SENTINEL, May 30, 1897, at 15, available at
turned himself in to federal agents because he was determined to get the law changed.

Sometimes we are forced to examine and acknowledge truth when it boldly confronts us. Nullification—formal or informal, individual or societal, organized or spontaneous, through the channels of government or not—is a fact of political life. In fact, I conclude that, given our political origins—rooted as they are in the natural rights of men, endowed by their Creator and unalienable—nullification cannot be stopped without the most egregious violation of human nature and the spirit of our founding documents.

**Nate Coulter:** Morril, what happens if the Supreme Court’s orders are routinely dismissed? I am mindful of what Stalin purportedly asked about the Pope in Europe in the 1940s: “So, how many [tanks] does the Pope have?” The Supreme Court does not have any tanks. What happens if the moral authority of the Supreme Court is eroded by the kinds of things that Representative Ballinger is talking about?

**Morril Harriman:** Only in modern times have Supreme Court decisions been declared morally incorrect. In contrast, Supreme Court decisions have been declared legally incorrect beyond modern history. So I am not sure that pushback to Supreme Court opinions themselves is a new phenomenon.

Notwithstanding that we may push back, I think, as a nation, we still tend to respect, and to some degree, sigh relief when finality has been brought about. Who declared George Bush President? Did we have a revolution? Did the people that were supporting Al Gore like it? Hell no, they didn’t like it. But there was a degree of respect for the institutions created by our founding fathers, and through precedent, the ultimate arbiter had made that decision and achieved finality.

But that does not mean that the people cannot disagree

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with decisions made by the Supreme Court. Max brought up *Roe v. Wade*. We know that this country is divided along various lines, but there are those who have an extremely firm and serious moral belief that the *Roe* decision was wrong. Will they continue to seek, to some extent, nullification? I think they will. Do we continue to see that? Of course we do. This is a primary reason why you see a lot of the restrictions on choice, like the abortion-restriction bills in various state legislatures.90 Again, were I to have that strong a belief, I would push the limits too. I would see how far the Court would eventually let us go in reversing, to some extent, *Roe v. Wade*. That is an attempt to work through the existing process that we have for changing public policy and, perhaps, the laws of the state itself.

Now, Bob brought up a point about Arkansans calling for action through email. I see more and more emails saying: “Let’s deal with the Affordable Care Act or ‘Obamacare.’” I see more and more emails essentially demanding: “Governor, you are to resist and not enforce Obamacare in any manner. The Supreme Court was wrong in its decision, and we the people have declared it unconstitutional.” And I am very serious. That is the phrasing people use, and most of the time, the individual who sent the message probably has a firm belief that “we the people” are the ultimate arbiter and decision maker. I do not believe we can do that.

Again, there must be a decision maker. Practically, one of the issues that we have with Representative Ballinger’s bill is that it appeared to give the local deputy sheriff the right to decide that a federal law was unconstitutional. That probably would not work very well, but I do think that we need a voice of last resort and an end result. We need to know that finality has been brought about to an issue. Although people often still disagree with, or have no respect for, court decisions, I think they continue to follow those decisions.

**Nate Coulter:** Max, have you seen instances of the resistance to which Morril is alluding? One such example is the Florida Health Department refusing to allow the

Affordable Care Act navigators to operate out of the State health department’s offices to inform people about their ability to enroll. Do you see that kind of resistance—where a State impedes the enactment or execution of a legislative act that the Supreme Court has already approved?

Max Brantley: Well, we have not moved as far in Arkansas on the Affordable Care Act only because there was an uncommon bipartisan coalition that adopted it here.91 I know the Republicans do not like to say that is what they did, but it is true. But the legislature is asserting itself in any number of ways. For example, it is deciding who may and may not receive advertising dollars (based on some fairly subjective criteria, but I have a personal interest in that obviously).92 But also, more famously, the legislature said it does not want Planned Parenthood to be a navigator because it does not like what that organization does.93 To me, such action is a pretty obvious First Amendment violation by the State, but it was a fight that the Governor’s office did not want to wage over a small amount of money, and I understand the political implications of that decision.

But I am kind of with Morril. I really had never thought—until I heard Professor Levinson talk about not necessarily believing in Supreme Court supremacy—about the alternatives to Supreme Court supremacy. And like Morril, I think the average human being—although I do not include the Tea Party in this category [laughter]—tends to believe in systems, finality, and certainty in making resolutions and giving reasonable expectations about how

91. See generally Steve Barnes, Arkansas Lawmakers Vote to Fund State’s Alternative to Obamacare, REUTERS (Mar. 4, 2014, 7:34 PM), http://www.reuters.com/article/2014/03/05/usa-healthcare-arkansas-idUSL1N0M125Z20140305 (discussing the “Private Option” created by Democratic Governor Mike Beebe and Republican legislators as an alternative to the Affordable Care Act that uses $915 million in funds from the Act).

92. See Max Brantley, Obama Support Group Works to Spread the Word About Insurance Expansion, ARK. TIMES (Mar. 13, 2014, 1:39 PM), http://www.arktimes.com/ArkansasBlog/archives/2014/03/13/obama-support-group-works-to-spread-the-word-about-insurance-expansion (“The Arkansas legislature passed the private option version of Medicaid expansion this year only after adopting an amendment to prevent the state from advertising it.”).

things are going to work.

Currently, there is this revolutionary fervor in the legislative process that has produced some real results, but I think it is important to remember that immense financial support from some of the wealthiest people in America is driving the Tea Party movement. But at the end of the day, the Koch brothers do not want the financial markets of the world destroyed; therefore, they will not fund organizations that are going to destroy a system that has expected outcomes. And the minute that becomes a risk, I think they will take a different approach to how they foment their desired outcomes. One result caused by this movement is hyper-partisanization. We have seen a dramatic a shift in the U.S. Supreme Court, and the Senate is also becoming a partisan battle.

Nate Coulter: So not only has what Morril talked about splashed up against the State Capitol from Washington, but it has also afflicted the federal judiciary?

Max Brantley: Right, and we are also going to see that effect in the state judiciary in the years to come. In this next election, we are going to take a really significant step forward in partisan influence of judicial elections, even though judges do not run by party. But ultimately, the corporate influence counts the most—that is, money counts the most. The Supreme Court has said money is the people, and I believe that decision will reshape our political system more than just about anything for the rest of my lifetime.

Nate Coulter: Are there any issues you believe are worth breaking the bonds of the Union? I know every once in a while I see you blog about the Hillcrest neighborhood in Little Rock possibly seceding from Arkansas. If you use

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Professor Levinson’s domestic-relations analogy, if secession is divorce,\textsuperscript{97} are there things that you think would justify divorce from the state, in your neighborhood’s case, or from the union, in Arkansas’s case?

\textbf{Max Brantley}: I am thrilled to hear about the possibility that secession could still exist in Little Rock.

\textbf{Nate Coulter}: You and the Vermont secession movement.

\textbf{Max Brantley}: Hillcrest is going to be the “Free State of Hillcrest.” To answer your question, I think secession would be justified by an assembly of issues rather than by a single one. The southern tier of states has become, on a range of issues, almost monolithic in a set of viewpoints. We face so many cultural issues—such as guns, abortion, and church issues—that I almost see a time where, as a region, the South’s outlook is so different from that of California or New York.

\textbf{Nate Coulter}: So are you adopting Chuck Thompson’s semi-tongue-in-cheek book—\textit{Better Off Without ’Em}—where he advocates letting the old Confederacy go except for Texas,\textsuperscript{98} which would not be a hard sell in Arkansas to let Texas stay behind.

\textbf{Max Brantley}: I just recognize that the divide is so stark between regions and that it permeates so many issues. For example, it is going to affect the budget debate. Setting a budget or deciding whether to raise the debt ceiling is going to be difficult with all of these other add-ons that are moving this agenda forward. If every battle boils down to this set of agenda items, then you wonder if united we can stand.

\textbf{Nate Coulter}: Morril, what do you think? Is divorce ever justified?

\textbf{Morril Harriman}: I just want to throw out that we were extremely supportive of Governor Perry’s move to secede [laughter] because we already had sent a request in to the President to move all the military and NASA installations to Arkansas. So we were ready to go. [Laughter].

\textbf{Nate Coulter}: Would Jerry Jones move the Cowboys to Little Rock since he owns them?

\textsuperscript{97} See Levinson, \textit{supra} note 1, at 58.
\textsuperscript{98} CHUCK THOMPSON, \textit{BETTER OFF WITHOUT ’EM: A NORTHERN MANIFESTO FOR SOUTHERN SECESSION} vii (2012).
Morril Harriman: That part I am not sure of.

Nate Coulter: Alright.

Morril Harriman: But my biggest concern today is an influence on the courts or within the courts, an influence on the legislative bodies, or an influence within the executive branches of government at every level. I generally fear that the extreme polarization we have reached in this country is driving us not necessarily to bad policy but, instead, to having no policies. I hope at some point that we will come back to being people who are able to disagree and, yet, communicate with each other.

So my biggest concern is, again, not secession or nullification. My biggest concern is the ability of the people of this country to have those disagreements but still respect each other enough that we can go forward in this state or country with policies that we, at least, deem appropriate and in the best interests of the people that we serve. Now, I do not mean to sound flowery. I just happen to believe that respect and communication are important to the legislative process. Maybe that will happen. Hopefully, we will strive to make it happen.

Nate Coulter: Representative Ballinger, let me ask you the same question. You may be able to amplify it a little bit. Professor Levinson talked about, in the context of Spain and the separatist movements, that there must be some basic level of trust with your adversaries so that even when they disagree with you, they do not pose an existential threat. For example, in our scenario, this would essentially mean that someone could come to a different opinion about the Second Amendment that you and I might have, but that difference does not threaten the existence of the republic. Do you think we can attain this level of trust? If not, what would cause us to get in the divorce-court line?

Bob Ballinger: We have gotten to a point in our culture where we value diversity significantly and have an appropriate increased respect for our cultural differences. I think that a similar tolerance for differences in thought is appropriate.

The notion of federalism provides a cushion that protects people from excesses by state governments. People can
always leave a state. State government is accessible and compelled to remain attractive and competitive among the states. State legislators live near their constituents and are not insulated from the laws they pass. Consequently, there is a degree of latitude, one that is irreversibly restricted by the absolute nature of unalienable rights, but certainly one that plays itself out among the states as uniqueness that reflects the character of the people who live there.

Consequently, one of the things we should do is value those differences. There may be states that allow marijuana as a recreational drug contrary to federal law, just as there may be states that will not allow the enforcement of certain federal-firearms regulations. But these differences do not preclude us from working together to defend our nation against outside foes. We can work together to create a market free of government micromanagement and commercial barriers, allowing businesses to thrive and, thereby, create more jobs in our country.

We can work together in many different ways. What we must acknowledge—and I believe we have done so today—is the huge divide among us. People have very strong opinions on polarizing issues, but we need to learn to accept that. If we do, I do not think secession is an issue.

Obviously, there are probably times that secession would be appropriate, but that is looking at more than differences of opinion. I think that secession is a tool that is similar to using an ax to remove a mole. An axe is a useful tool in certain circumstances, but we will generally not use it in the same environment that requires a scalpel. If differences of opinion divide us, absent coercion, secession rarely will be the instrument of choice.

Nate Coulter: You triggered another thought of mine. I gather your notion is that we can have different federal laws on some issues in different states because different ideologies congregate in different areas of the country. What about on a state level? And I ask you in regard to your federal-firearms regulation issue.

In 1993, the Arkansas General Assembly adopted a law
that says pretty clearly: “A local unit of government shall not enact any ordinance or regulation pertaining to, or regulating in any other manner, the ownership, transfer, transportation, carrying, or possession of firearms, ammunition for firearms, or components of firearms, except as otherwise provided in state and federal law.” 99 Now, the U.S. Supreme Court, while striking down the D.C. ban on handguns, at least impliedly recognized that some firearms restrictions could be imposed.100

Bob Ballinger: Right.

Nate Coulter: Would you agree with the notion that what might be appropriate for restricting firearms and ammunition in Hindsville—which might be no restrictions—would not necessarily be what the people in Little Rock or all of Pulaski County believe is appropriate? And could we live with that kind of difference? If so, would you be in favor of repealing the 1993 Act?

Bob Ballinger: Professor Sheppard referenced that. We had a little exchange back and forth.

Nate Coulter: Some of it in the newspaper, but I did not quote him.

Bob Ballinger: One of the things Professor Sheppard opined is that I was ill-advised by my lobbyist or special-interest groups. I would like to disabuse him or anyone else of that presumption. Any time “big government” tells “little government” what to do, it raises red flags. If local government determines they desire more restrictive firearms regulations, for whatever reasons, I would vote and lobby against it, and I may give money to oppose it because I support the Second Amendment. More precisely, I acknowledge the God-given right of self-defense. Nevertheless, I generally do not want the State telling the City what to do. Remember, the larger the government

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100. See District of Columbia v. Heller, 554 U.S. 570, 597, 636 (2008) (“The Constitution leaves the District of Columbia a variety of tools for combating [gun violence], including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.” (citation omitted)).
entity, the more restricted the individual’s liberty to escape oppressive rules by leaving. More than any institution, the Federal Government eliminates the ability of the individual to avoid what he or she might perceive as a violation of rights.

Max Brantley: I am glad you raised that bill because it is wonderful the same legislators who passed the bill to strip cities and counties of home rule on guns argued in favor of guns in schools because they believe we should let those decisions be made at the local level. [Laughter]. Essentially, these legislators believe that if the local people want guns, we should let them make that decision; but if the locals do not want as many guns, we should not let them make the decision.

Bob Ballinger: While a proper response to your broad generalizations would require more time than we really have, let me suggest, in short, that there is a notable difference between the State imposing a restriction on home rule when it is protecting a fundamental right as opposed to when it is restricting one. Let me conclude by observing that preferences do not carry the same weight as fundamental rights and would naturally be handled differently.