Bad Company?

Mark R. Killenbeck

What are we to make of current calls for secession, nullification, and/or interposition? For virtually all of us, the instinctive reaction is to condemn them out of hand, given the company they keep. Secession, after all, is the handmaiden of slavery and civil war, a violation of the bedrock principle “that no State upon its own mere motion can lawfully get out of the Union.”\(^1\) Nullification was secession’s evil precursor: South Carolina’s “strange position that any one State may not only declare an act of Congress void, but prohibit its execution.”\(^2\)

Interposition, in turn, was embraced on November 6, 1956, by some 185,374 citizens good and true when they expressed their absolute certainty that “We the People,” Arkansas Division, had the “right” and “powers” to “interpos[e] our sovereignty . . . to the end of nullification of these and all deliberate, palpable and dangerous invasions . . . or encroachments.”\(^3\) In particular, these resolute individuals proclaimed their intent to “take appropriate action and pass laws opposing in every Constitutional manner the Un-Constitutional desegregation

---

\(^1\) Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 7 (James D. Richardson ed., 1897). I am not certain how to characterize the fact that Arkansas initially voted against secession, only to change its mind in the wake of Fort Sumter. See Where the Rubber Meets the Road: A Dialogue, 67 ARK. L. REV. 113, 114 (2014). Rather, I worry about the balance between principle and opportunism implicit in this fact.

\(^2\) Andrew Jackson, A Proclamation Respecting the Nullifying Laws of South Carolina, 8 Stat. 771, 772 app. (Dec. 10, 1832).

decisions of May 17, 1954 and May 31, 1955.”⁴ These opinions had been issued, in the words of Arkansas’s then favorite son, Orval Faubus, by “a new court headed by an arrogant, pious, self-righteous, ambitious politician with little judicial experience.”⁵

Secession, nullification, and interposition are then the legal, political, and social equivalents of the refrain of dread voiced by Dorothy as she and her companions worked their way toward Oz: “Lions, and tigers, and bears! Oh My!” So, for example, in his study of Southern “massive resistance” to Brown, Numan Bartley stated that “advocates of interposition rested their arguments upon constitutional ‘mumbo-jumbo.’”⁶ More recently, no less an authority than the editorial board of the New York Times declared that “[t]he word ‘interpose’ is a yellow flag in the history of state and federal relations. The southern states claimed a right of ‘interposition’ as a basis for secession before the Civil War, and they resurrected the idea in the 1950s.”⁷ Thus sayeth the Times, and so we all believe.

The task that Sandy Levinson sets in his masterful Wylie H. Davis Lecture is then formidable.⁸ How should we assess contemporary calls for secession, nullification, and interposition in a world within which such matters were supposedly settled by two seismic events: the Civil War,

---

⁵ Orval Eugene Faubus, Down from the Hills 121 (1980).
⁸ Sanford Levinson, The Twenty-First Century Rediscovery of Nullification and Secession in American Political Rhetoric: Frivolousness Incarnate or Serious Arguments to be Wrestled With?, 67 Ark. L. Rev. 17 (2014). This article is an expanded version of the Wylie H. Davis Distinguished Lecture, given on September 27, 2013, as the keynote address for the Symposium, Cooper’s Shadow: Secession, Nullification, and States’ Rights, Circa 2013.
a.k.a. “Grant v. Lee (Appomattox Courthouse, 1865),” and the decision whose fifty-fifth anniversary provided the impetus for this Symposium, Cooper v. Aaron? Are the myriad current expressions of these states’-rights doctrines the musings of individuals at, if not beyond, the fringes of constitutional and political respectability? For example, is Texas Governor Rick Perry simply marching hand-in-hand with former Arkansas Governor Orval Faubus? I suspect—but do not know for a fact—that Mr. Perry would be appalled by such a comparison. But just how much distance is there between the two? Mr. Perry waxes eloquent about the “unique[ness]” and “independ[ence]” of Texas and the need to resist federal tyranny. His many press statements and speeches to this effect are arguably different from Faubus’s praise for the “people” in their “resistance to illegal, court-made law.” And, for that matter, his rhetoric may be distinct from U.S. Representative Howard Smith’s 1956 request in the “Southern Manifesto” that the nation “pause and consider how far [the nation] may have drifted from her moorings,” in particular, to recognize “the right [of parents] to direct the lives and education of their own children.” But it seems to me at least that there is a scant difference between much of what Mr. Perry routinely says—and the policies that inevitably follow—and Mr. Faubus’s belief that the events in Little Rock were only tangentially about race, with the “states rights issue, standing alone, ha[ving] overwhelming support.”

9. Id. at 56 n.231. Supplemented, perhaps, by Texas v. White, 74 U.S. (7 Wall.) 700 (1868) (holding that the U.S. Constitution established a perpetual union and, thus, does not allow for secession).

10. 358 U.S. 1 (1958). I take a certain amount of pride in the fact that the written opinion was released on my birthday, September 29, 1958. I also confess that I have absolutely no memory of it from the time.

11. See, e.g., Levinson, supra note 8, at 28 (quoting Reid Wilson, In Texas, Ted Cruz Has Allies, WASH. POST (Oct. 22, 2013, 6:00 AM), http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/22/in-texas-ted-cruz-has-allies).

12. FAUBUS, supra note 5, at 451.

13. 102 CONG. REC. 4514, 4515 (1956) (statement of Rep. Howard Smith). Smith had taken the floor to discuss and place in the record a “Declaration of Constitutional Principles” that we now know and routinely refer to as the “Southern Manifesto.”

14. 102 CONG. REC. at 4516.

15. FAUBUS, supra note 5, at 398.
The Faubus claims are found in a segment of his autobiographical sketches, within which he also maintained that “[t]he rank and file voters of the state, both black and white, both poor and middle class, had a feeling of mutuality with me” and that “the issue of race, or race prejudice, had never alone been sufficient to determine the outcome of a race for public office in Arkansas.”\textsuperscript{16} Statements like these lend credence to the notion that zombies and dinosaurs do indeed lurk just over the horizon. But, as Sandy argues convincingly, we must not view these matters solely through the lenses of slavery and invidious discrimination.

We need to take a broader view. And when we do, we must admit that much of the current states’-rights rhetoric is not as radical as it might initially seem. Indeed, as Sandy properly reminds us, interposition was actually the mild and principled response championed by James Madison in the wake of the Alien and Sedition Acts.\textsuperscript{17} Mild, that is, if we think carefully about what Madison actually said,\textsuperscript{18} and certainly when we compare his approach to the one championed by Thomas Jefferson.\textsuperscript{19}

Sandy focuses our attention on salient truths. One is that the very existence of an entity known as the United States of America “is rooted in secession.”\textsuperscript{20} The notion that a single state—much less a single political subdivision—might declare itself free of its constitutional bonds may be a

\textsuperscript{16} Id. at 397-98.  
\textsuperscript{17} See Levinson, supra note 8, at 22 (“[T]he more temperate Madison refrained from using such a volatile term as ‘nullification.’”).  
\textsuperscript{18} See JAMES MADISON, VIRGINIA RESOLUTIONS AGAINST THE ALIEN AND SEDITION ACTS (1798), reprinted in JAMES MADISON: WRITINGS 589 (Jack N. Rakove ed., 1999) (contending that states “are in duty bound[] to interpose for arresting the progress of the evil”).  
\textsuperscript{19} See, e.g., Thomas Jefferson, Drafts of the Kentucky Resolutions of 1798 (Nov. 1798), in 8 THE WORKS OF THOMAS JEFFERSON 458, 461-62 (Paul Leicester Ford ed., 1904) (noting that each state “has an equal right to judge for itself, as well of infractions as of the mode and measure of redress” and to declare that a federal statute “is not law, but is altogether void and of no force”). While not expressed in so many words, secession lurked in the background for Jefferson in 1798. See, e.g., Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 5, 1799), in 9 THE WORKS OF THOMAS JEFFERSON 79-80 (Paul Leicester Ford ed., 1905) (having posed the specter of “scission” in his draft, Jefferson stated that “from this I recede readily, not only in deference to [Madison’s] judgment, but because we should never think of separation but for repeated and enormous violations”).  
\textsuperscript{20} Levinson, supra note 8, at 49.
bit too much to swallow. But what should we say, much less do, when the sense of injustice is pervasive, such that multiple states are prepared to assert both their sovereignty and their independence? In particular, what is the proper response in the face of judicial and political “answers” to these calls for secession that rests more on force than on principle?

More tellingly, jumping on one of Sandy’s favorite hobby horses, what follows from recognizing that the Constitution—the document supposedly standing for the proposition that the Union is perpetual—may not be all that it is cracked up to be.21 There are indeed compelling reasons to believe that the current text may well be both an inappropriate and inadequate guide for resolving any number of issues in the current political, social, and legal environments. The world we live in, after all, bears scant resemblance to the one that provided the contexts and shaped the assumptions within which that document was drafted and ratified. And the Constitution itself acknowledges that it was an act of the people that created only a “more perfect Union,” not the perfect one.22

I do not for a moment believe that this brief summary does justice to the breadth and depth of Sandy’s treatment and his arguments. My job here is to simply open the door; to tantalize; to induce you to enter, to reflect, and to learn. So too, I invite you to study the remarks of our other participants, both those who wrote for this volume and those who participated in the sessions at the Symposium proper.23

21. For Sandy’s musings on this subject, see SANFORD LEVINSON, FRAMED: AMERICA’S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE (2012); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006). For an earlier version of many of these same thoughts, see CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

22. I am simply acknowledging the point, neither agreeing nor disagreeing with the premise or many of the details.

23. This includes Kit Wellman, who offered incisive and insightful comments as a member of the academic panel but declined to write, believing that his views on the validity of secession as a philosophical and social matter were fully explored elsewhere. See, e.g., CHRISTOPHER HEATH WELLMAN, A THEORY OF SECESSION: THE CASE FOR POLITICAL SELF-DETERMINATION (2005).
Jack Rakove, appealing, as always, largely to the ideas and ideals of James Madison, both disagrees with certain aspects of what Sandy says and refines the arguments. Jack draws a distinction between doctrines that “have no legitimate place in our constitutional universe” and more neutral terms, like states’ rights, that one can use “to identify areas of governance where the states have some residual power to act.” He also emphasizes the difference between discussion of these matters as a “mere” political right, as opposed to assertions that they are or should be part of the accepted constitutional canon. Of course, as Jack recognizes, this difference leaves the resolution of states’ rights to “the messy and uncertain course of constitutional jurisprudence.” Devotees of the Court applaud. But we may well need to ask, albeit at another time and in another place, what we should make of all of this in the light of the reality that various members of the current Supreme Court seem wed to the notion that “[u]pon ratification of the Constitution, the States entered the Union ‘with their sovereignty intact.’”

Mark Brandon begins his contribution by asking us to think carefully about the governance regime supposedly enshrined in Cooper. He notes that a variety of avenues exist through which the Constitution may be and is interpreted. Accordingly, as a practical matter, one errs by accepting without question the Court’s attempt to arrogate to itself exclusive interpretive authority. Mark draws sharp and important distinctions between and among the various states’-rights tropes. Nullification, for example, “rests on an implausible understanding of the Constitution.” As such, at least as a “constitutional device, state-based nullification was

25. Id. at 82.
26. Id.
27. Id. at 89.
30. See id.
31. Id.
Secession, in turn, is both a plausible doctrine and a constitutional one, once we remind ourselves that the Constitution is indeed a document of “We the People” and that the United States is a union of the same. There are, Mark stresses, practical and mechanical problems with secession, the implementation equivalents of the ancient warning that when one goes off the map, “Here Be Dragons.” But the existence of these problems does not mean that one should reject a move toward secession out of hand.

James Read also has scant use for nullification, even as he too makes a case for secession as at least a justifiable remedy in the face of pervasive perceived problems. Nullification fails to the extent that its normal incarnation purports to give “a minority” the ability “to dominate the majority on matters that affected everyone.” That said, Jim stresses that one should not regard nullification as the sole means by which the people might express their views on important matters of public policy. In particular, he reminds us that, in our system, achieving a workable consensus and fashioning a workable solution requires the assent of all parties. Secession, in turn, while not a constitutional “right,” is nevertheless justifiable in the face of serious oppression or mutual agreement. It may not, as he stresses, prove to be a workable solution, as it requires “a high level of justification.” Current calls for secession within the United States do not meet that threshold. But the fact that most of today’s malcontents cannot make out a credible case does not mean that the idea is without merit.

The issues are rich and complex, a fascinating mixture of law, history, and policy. But we must be mindful of some

32. Id.
33. See id. at 98-102.
35. Id. at 105 (emphasis in original).
36. Id. at 104.
37. See id. at 107 (“[T]he nullification doctrine can only work within a functioning federal union if each state extends ‘full faith and credit’ to the nullification acts of other states . . . .” (emphasis in original)).
38. Id. at 108-09.
39. Read, supra note 34, at 111.
crucial realities. The first—imagine your surprise—is that perspective is everything. The second is the need to take into account what happens when these disputes leave the all-too-often dry pages of books and journals and inject themselves into political debates that have the potential to impact the actual lives of real people. When, as Nate Coulter stresses at the outset of a remarkable exchange between and among four prominent Arkansans, the focus shifts from “the more academic and theoretical to the practical—where the rubber meets the road in the State Capitol.”

The importance of perspective permeates Bob Ballinger’s remarks. He thanks Sandy for “thinking outside the box” and then takes us for a stroll down his own decidedly contrarian legislative path. This is a populist journey, he tells us, fueled by “literally thousands of emails from [his] constituents and from people all over the state.” This journey is also, he stresses, one within which it is important to differentiate between the “tool”—nullification—and the very “evil” practice it served in the past. In particular, he reminds us that the regime championed by Orval Faubus, James K. Kilpatrick, and their allies was one shaped in large part by decisions of the Supreme Court that countenanced the very beliefs and practices repudiated by Chief Justice Earl Warren and his brethren in Brown and Cooper. He also asserts that one can just as easily view the federal judicial-supremacy rubric that suffuses these cases as a force for evil, given the realities that underscored decisions like Ableman v. Booth.

40. Where The Rubber Meets the Road: A Dialogue, supra note 1, at 113.
41. Id. at 119-21.
42. Id. at 121.
43. Id. at 124.
44. Kilpatrick’s role and influence in post-Brown resistance to integration were significant. In his states’-rights magnum opus, he stated bluntly that his “aim is not to be objective; it is to be partisan. I plead the cause of States’ rights.” JAMES JACKSON KILPATRICK, THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA ix (1957). For a current biography and assessment, see WILLIAM P. HUSTWIT, JAMES J. KILPATRICK: SALESMAN FOR SEGREGATION (2013).
45. See Where the Rubber Meets the Road: A Dialogue, supra note 1, at 123-24.
46. 62 U.S. (21 How.) 506 (1858); see Where the Rubber Meets the Road: A Dialogue, supra note 1, at 132-34 (discussing the story of runaway-slave Josh Glover and the Supreme Court’s decision to uphold the fugitive-slave laws).
As Morril Harriman reminds us, it is also a mistake to assume that the Arkansas of 2014 is separate and apart from the Arkansas of the 1950s in at least one crucial respect: the extent to which the state continues to do penance for its sins.\footnote{47. See Where the Rubber Meets the Road: A Dialogue, supra note 1, at 125 (noting current efforts to secure a finding “that the State of Arkansas has finally complied with the mandates of \textit{Brown v. Board of Education}”). This is not to say that Arkansas stands alone in these matters. \textit{See}, e.g., Alan Blinder, \textit{F.B.I. Joins Ole Miss Inquiry After Noose Is Left on Statue}, N.Y. TIMES, Feb. 19, 2014, at A12 (“[A] statue of the university’s first black student [James Meredith] was found with a noose and a flag with the Confederate battle emblem.”).} Policy decisions have implications, and Morril’s job, and that of his boss, Governor Mike Beebe, is to keep that in mind as they assess proposals like those that Bob has made.\footnote{48. See Where the Rubber Meets the Road: A Dialogue, supra note 1, at 125 (noting the State’s difficulty in receiving recognition for complying with the mandates of \textit{Brown} because “the public-policy makers of this state . . . continued to seek nullification of the Court’s mandates through other means and manners that continued the vestiges of segregation”).} Morril notes, for example, that amendment 44 to the Arkansas Constitution and the statutes passed in its wake have cost the state “hundreds of millions of dollars,”\footnote{49. Id.} a reckoning that has taken sixty-plus years to settle.\footnote{50. As Morril noted, settlement of the Pulaski desegregation lawsuit was pending at the time of the Symposium. \textit{Id}. Judge Price Marshall of the U.S. District Court for the Eastern District of Arkansas approved the settlement order on January 13, 2014. Settlement Agreement, Little Rock Sch. Dist. v. Pulaski Cnty. Sch. Dist. (E.D. Ark. 2013) (No. 4:82-CV-866); \textit{see also} Max Brantley, \textit{Federal Judge Accepts Settlement of Pulaski Desegregation Case}, ARK. TIMES (Jan. 13, 2014, 4:07 PM), http://www.arktimes.com/ArkansasBlog/archives/2014/01/13/sherwood-objection-opens-pulaski-desegregation-hearing.} Such disagreements are, to his way of thinking, inevitable.\footnote{51. \textit{Where the Rubber Meets the Road: A Dialogue, supra note 1, at 127 (“[T]he dominant governmental entity is always making the subservient entity angry.”).} The key question is the extent to which the parties remain willing to work together, a quality he sees as all too often lacking in the current, toxic political environment.\footnote{52. \textit{Id}. (noting “the much more strident tone” of contemporary politics and “the willingness for people . . . to take a stand and become intractable”).}

Max Brantley is characteristically blunt. Fifty-five years after \textit{Cooper}, the state still has not “gotten it right.”\footnote{53. \textit{Id}. at 129.} This, he stresses, is not simply a matter of settling issues litigated in the past.\footnote{54. \textit{Id}. at 129-30.} It also requires the state to confront new
threats. 55 In his estimation, for example, many charter schools in Arkansas, championed as vehicles for “choice” and “better education opportunities,” have all too often provided the means for perpetuating segregation. 56 Max reserves special ire for the current United States Supreme Court, one that in his eyes has mistakenly concluded “that race no longer matters.” 57 This, among other things, leads him to declare that “I just wish sometimes the liberals could do some nullifying.” 58 And to contemplate with relish the possibility that there could be a “‘Free State of Hillcrest.'” 59

What are we to make of all of this? Is support for secession, nullification, and/or interposition beyond the pale? The eight thoughtful individuals whose words follow can hardly be said to share the same general worldviews and political inclinations. Each of them, nevertheless, appreciates the complexities. Each stakes a claim for accepting the legitimacy of certain aspects of the current states'-rights agenda. And each challenges us to think carefully about what all of this means.

Consider, for example, the ongoing debate about the Patient Protection and Affordable Care Act. As a threshold matter, it is one thing to resist Medicaid expansion as a principled stand against “‘brazen intrusions into the sovereignty of our state.’” 60 It is quite another to leave thousands of citizens without any insurance coverage, or at least without adequate protection in the face of often catastrophic medical expenses. That is especially true in a healthcare system that is the costliest in the world, 61 within which, in many instances, the bills generated and payments actually realized defy rational explanation. 62

55. Id at 130.
56. Where the Rubber Meets the Road: A Dialogue, supra note 1, at 130.
57. Id. at 130-31.
58. Id. at 131-32.
59. Id. at 142.
62. See, e.g., Elisabeth Rosenthal, Patients’ Costs Skyrocket: Specialists’ Incomes Soar, N.Y. TIMES, Jan. 19, 2014, at A1. It is especially telling that the poster child for
The “exuberant[]” Idaho measure Sandy mentions was arguably both a mild and an extreme exemplar of the positions against medical-care reform routinely taken by states’-rights advocates.63 In one respect, the Idaho bill seemed conditional, expressing a desire to “interpose between said citizens and the federal government, when it has exceeded its constitutional authority.”64 That, without more, might be viewed as a simple call to arms. The bill expresses nothing more than a desire to pursue appropriate and lawful political remedies in the face of supposed unconstitutional federal usurpation. In that respect, it and like measures resemble the political-process remedy recognized by the Supreme Court in an admittedly fragile 5–4 majority in Garcia v. San Antonio Metropolitan Transit Authority.65

That was, of course, not the sole message the proposed Idaho measure conveyed. It also stated in no uncertain terms that the federal act was “void and of no effect.”66 That formulation, had it passed, would have placed Idaho squarely within the tent first pitched in South Carolina by John C. Calhoun and his allies. Our instinctive reaction, assuming we agree with that characterization, is to shudder. If no less a states’-rights advocate than Andrew Jackson found the South Carolina position impossible to embrace, who are we to disagree?

With that said, some interesting possibilities lurk. As I noted at the outset, slightly over 185,000 people voted in 1956 to make “interposition” the official policy of the State of Arkansas.67 To their credit, an arguably different Arkansas electorate repealed that amendment in the general election held on November 6, 1990.68 The margin in 1956 was

---

65. See 469 U.S. 528, 556 (1985) (“The political process ensures that laws that unduly burden the States will not be promulgated.”).
67. See supra note 3.
56% in favor, 44% opposed,\textsuperscript{69} consistent with the general picture of “massive resistance” in Arkansas. In 1990, the vote was 50.96% for repeal, 49.04% against, with some 263,261 Arkansans believing that amendment 44 should remain on the books—77,887 more than those who supported its initial adoption.\textsuperscript{70}

Those numbers are both deceiving and revealing. The state’s population grew by over 500,000 from 1956 to 1990.\textsuperscript{71} Thus, the simple fact that more people supported amendment 44 in 1990 than in 1956 does not tell us all that much. But, as Sandy notes, a robust version of the arguments in favor of secession carries with it the assumption that if a given state may secede, so too may a city or region within that state reject the decision and chart its own course.\textsuperscript{72} He refines this assumption as a matter of Texas politics when he states: “One can easily predict, for what it is worth, that Austin and points south within the state would almost certainly attempt to emulate the ‘Free State of Winston’ by promptly attempting to secede from the presumptively right-wing reincarnation of the Lone Star Republic.”\textsuperscript{73} In a similar vein, Max waxes eloquent about the possibility that the Hillcrest neighborhood might be able to free itself from the bondage of Little Rock and/or, possibly, Pulaski County.\textsuperscript{74}

Back to the 1990 vote. In the lead-up to the general election, most people who spoke about repeal supported it.\textsuperscript{75}

\textsuperscript{69} See Historical Results, supra note 3.
\textsuperscript{70} ELECTION RESULTS 1990, supra note 68; Historical Results, supra note 3.
\textsuperscript{71} Arkansas Vital Statistics, Ark. Dep’t Health, Population Summary, 1940 to Present (1997), http://www.healthy.arkansas.gov/stats/ann97/ANN07.HTM (last visited March 17, 2014). In 1956, the state population was 1,835,567, of whom 405,660, or 22%, were “nonwhite.” Id. In 1990, there were 2,354,266 Arkansans, of whom 399,148, or 17%, were “nonwhite.” Id.
\textsuperscript{72} See Levinson, supra note 8, at 64 (discussing the “Free State of Winston” in Alabama and the “Republic of Jones” in Mississippi).
\textsuperscript{73} Id. at 78.
\textsuperscript{74} See Where the Rubber Meets the Road: A Dialogue, supra note 1, at 142.
\textsuperscript{75} See, e.g., Sandra Cox, Candidates Address Ballot Measures, ARK. DEMOCRAT, Oct. 28, 1990, at 1B (noting that all candidates for constitutional offices supported repeal, with the exception of the Secretary of State, who took no position, maintaining a “conflict of interest”); Lloyd George & Vic Snyder, Erase the Mistake of Amendment 44, ARK. GAZETTE, Nov. 2, 1990, at 13B (“This proposal is supported by Republicans and Democrats, blacks and whites, downtown Danville and downtown Little Rock.”).
Many believed it would pass handily. Interestingly, Orval Faubus, who wrote an op-ed urging voters to reject all of the proposed constitutional amendments, could not bring himself to actually identify what amendment 44 stood for, stating only that it “has already been nullified by court decisions” and that “[t]he overwhelming majority of people will never know the difference if it passes or fails.” Critics characterized Faubus and other individuals opposing repeal as out of step with the majority and castigated them as “bigots,” sometimes in their own words. And yet, arguably inexplicably, repeal barely passed.

Only the truly naive or fatuous would argue that persistent racism was not a factor in that result. Immediately after the election, one individual observed that “‘[a]ll [racism] needs is a little instances where it can come to the surface’ . . . . ‘People have the opportunity to privately go in that voting booth and vote their hearts and their conscience.’” Was racism a factor? Or was opposition to

---

76. See, e.g., Editorial, Bipartisanship, ARK. DEMOCRAT, Oct. 29, 1990, at 5B (praising bipartisan support for repeal “not because there’s any fear that Arkansans won’t [r]eject 44 but because the people should be encouraged to [r]eject the thing overwhelmingly”); Deborah Mathis, Benham Loses His Power, Not His Bigotry, ARK. GAZETTE, Nov. 2, 1990, at 13B (“For sure, there will be some ‘no’s’ to [repeal] and they will not all be the result of careless voting.”).

77. Orval E. Faubus, Op-Ed., ARK. DEMOCRAT, Nov. 3, 1990, at 11B. Judge Henry Woods did not, of course, “nullify” amendment 44. See Dietz v. State, 709 F. Supp. 902, 904-05 (E.D. Ark. 1989). Rather, he held that “th[is] intemperate text represents a reckless defiance of the rule of law” and, as such, was unconstitutional and “stricken from the Arkansas Constitution.” Id.

78. See, e.g., Nancy Pfister, Trying to Turn Back the Clock, ARK. GAZETTE, Nov. 1, 1990, at 1A (quoting Betsy Wright—then Chairman of the Arkansas Democratic Party—to the effect that “Amendment 44 is pointed to in the courts as an example of the current mentality of Arkansas. It is not the current mentality except for a small minority.”); Mathis, supra note 76 (characterizing State Senator Paul Benham as “a lost cause . . . one who must be written off in the ledger of enlightenment and tolerance”).

79. Mathis, supra note 76 (noting that Populist Party Chairman John Norman Warnock, who used his own money to fund radio ads against repeal, said he would “wear the button of a bigot without any displeasure whatsoever”). Warnock was earlier quoted as saying: “I don’t hate anyone. I don’t know what racism means. We live separately in neighborhoods. With integration, students learn how to hate each other. I attended segregated schools, so I didn’t learn to hate anyone.” Pfister, supra note 78, at 3A.

80. Tom Hayes, Close Vote Exposes Closet Racism, Blacks Say, ARK. DEMOCRAT, Nov. 8, 1990, at 1A (quoting Hayward Battle, Chairman, Urban League of Arkansas). Interestingly, the same story notes that repeal failed “in 16 of the 17 counties with the highest black populations,” id. at 17A, the exception presumably
repeal, as Sandy once observed regarding “Confederate memorializers,” simply a reflection of state pride and state heritage, perhaps even an “insist[ence] that the Southern cause had been just and legal.” 81 In Arkansas, after all—as has been the case for years—Monday, January 20, 2014, was, by state law, “Dr. Martin Luther King Jr. and Robert E. Lee’s Birthdays.” 82

Many of the sentiments expressed in 1990 were then entirely consistent with what Elizabeth Jacoway has characterized as “the language [and views] of the hard-working, God-fearing, rural people of the traditional South,” individuals “who believed as passionately in the American Dream as any urban Horatio Alger.” 83 For them, amendment 44 was in 1956 and remained in 1990 a question of states’ rights and state heritage. It was not a referendum on whether the Warren Court was right or wrong when it rejected the views of “some of the greatest jurists of the nation,” individuals who had previously declared “that some separation of the races was permissible.” 84 That was, the Southern Manifesto stressed, an “interpretation, restated time and again, [which] became a part of the life of the people . . . and confirmed their habits, customs, traditions, and way of life.” 85

This makes the fact that fifteen of the state’s seventy-five counties supported repeal—virtually all of which had significant urban cores—a horse of a decidedly different color. 86 The statewide margin for approval in 1990 was


84. FAUBUS, supra note 5.


86. See ELECTION RESULTS 1990, supra note 68. This number is suspect, given that the official report issued by the Secretary of State shows the vote in Marion county as 100% in favor, none opposed, with a grand total of one person voting. Id.
10,266,87 a result that would have been wiped out with the elimination of a single county—Pulaski—where the votes to repeal outnumbered those to retain by 24,795.88

So: what if? What if the viability of secession is simply a matter of whether “the separatist group and the remainder state would be able and willing to perform the requisite political functions”?89 What if communities at odds with the larger body politic could act on their belief that enough is enough and go their separate ways? Indeed, what if the voters in Pulaski County had not been part of the electorate in 1990, leaving amendment 44 in the Arkansas Constitution?

In 1820, in the wake of the Missouri Compromise, Thomas Jefferson recognized that the issue of slavery “divides us at this moment too angrily.”90 He hoped that the passage of time would give both parties the opportunity “to cool” and to “divin[e] a practicable process of cure.”91 But he also noted, with no apparent disapproval, that secession, albeit possibly only for a short time, might be the course pursued:

Should time not be given, and the schism be pushed to separation, it will be for a short term only; two or three years’ trial will bring them back, like quarrelling lovers to renewed embraces, and increased affections. The experiment of separation would soon prove to both that they had mutually miscalculated their best interests. And even were the parties in Congress to secede in a passion, the soberer people would call a convention and cement again the severed attempted by the insanity of their functionaries.92

Fanciful? Perhaps. But, as Sandy makes quite clear, our obligation today is to pay “respectful attention to the reality

87. See id.
88. Id.
89. WELLMAN, supra note 23, at 64.
91. Id.
92. Id. at 283-84. Aha! Levinson’s real agenda is offering support for secession in the hope that there will be a new constitutional convention!
of secession,"93 and, by necessary implication, to its coconspirators—nullification and interposition. We cannot ignore the history. We must be sensitive to, but not diverted by, the contexts within which these tools of self-determination were initially forged and the unfortunate circumstances within which they were applied. This is not, as Sandy muses, a call for us to take a trip to “a constitutional theorist’s version of Jurassic Park.”94 Rather, it is the simple admission that these are serious issues, worthy of our concern, in spite of the company they keep.

93. Levinson, supra note 8, at 78.
94. Id. at 28.