Some Hollow Hopes of States’-Rights Advocates

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I. INTRODUCTION

For better or worse, Americans inhabit a land of constitutional metaphor. We have long been used to the ongoing debate between advocates of a “living Constitution” and originalists who think that the Constitution’s meaning was properly fixed at the moment of its adoption. Some conservatives argue that the true Constitution went into “exile” with the rulings of the New Deal Court, and that the goal of constitutional interpretation should be to end that diaspora and restore the pre-1937 understandings of the due limits of national power. For this Symposium, Sanford Levinson brings a new metaphor to the debate by evoking the idea of “zombie constitutionalism”—a process whereby terms and arguments, such as secession and nullification, that once flourished in the land but that were successfully anathematized and extinguished, have resurrected in our political conversation, even after the famous “case” of Grant v. Lee drove a stake through their pulsing hearts. This revival of nullificationist and secessionist talk may be nothing more than a manifestation of “popular constitutionalism” in the broad sense of the term—that is, the survival in political discourse of ideas that no longer form part of our constitutional doctrine. One can safely confine

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1. The notion of “the Constitution in exile” reminds me of the concept of tzimtzum in the Lurianic Kabbalah, but pursuing that analogy might prove a bit recherché for our purposes, so I will let it go. One can also distinguish the phrase “Constitution in exile” from another metaphor: that the Constitution contains “sleeper clauses” that lie dormant for decades but spring into vigorous life with the unanticipated arrival of fresh controversies.

terms and concepts that are legally dead to the dustbin of history, but that dismissal need not prevent latter-day advocates from trying to revive them. The revival of such arguments must be one of the political rights that the First Amendment protects.

Still, constitutional scholars face few problems dispensing with two of the three terms in the subtitle of Levinson’s article for this Symposium—“nullification” and “secession”—which have no legitimate place in our constitutional universe. Law and history effectively renounce these doctrines or concepts. “States’ rights,” by contrast, is a more neutral concept. Though one may give states’ rights a hard edge—equating it with the capacity to resist exercises of national authority—one may also use the term to identify areas of governance where the states have some residual power to act. The idea that Congress cannot “commandeer” state officials to execute national law is one example. Sovereign immunity provides a better example as it is based on the text of the Eleventh Amendment. In its vernacular usage, where it is routinely associated with overt defiance of national law, “states’ rights” remains deeply problematic. But if used as a way of describing the residual autonomy of the states, the term may be somewhat more acceptable than nullification and secession. Of course, states’ rights can always appeal to the Tenth Amendment, whether that clause is a mere “truism” or not.

II. NULLIFICATION AND INTERPOSITION

Nullification is the easiest concept to eliminate. De minimis, beyond its plain absence from the text of the Constitution, nullification faces two major objections. The

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3. Id.
5. The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.
6. See United States v. Darby, 312 U.S. 100, 124 (1941) (“The amendment states but a truism that all is retained which has not been surrendered.”).
first objection is the Supremacy Clause. This momentous provision generated remarkably little discussion at Philadelphia, but it silently evolved into one of the most powerful tools of the final text. In its origins within the Constitutional Convention, the Supremacy Clause appeared as an element in the New Jersey Plan, and it first gained traction after the framers rejected James Madison's congressional negative on state laws. Initially, the Clause bound state judges only to federal laws and treaties, “any thing in the respective laws of the individual States to the contrary notwithstanding.” Article VI of the New Jersey Plan was silent, however, on what might happen should a state constitution impose some version of a loyalty test on provincial judges. This language survived when Luther Martin moved to substitute it for Madison’s negative on state laws on July 17, the day after the ostensible, if misnamed, Great Compromise over representation. The decision to substitute was non-controversial, but so were the subsequent changes that made the Federal Constitution—as well as national laws and treaties—superior to the constitutions and laws of the individual states, requiring state judges to abide thereby. The change came in two parts: first, by the work of the committee of detail; and then, in an amendment proposed by John Rutledge of South Carolina, which made the Constitution the supreme law of the land. No one at the time suggested that the states should retain some opt-out mechanism to negate federal laws they found deeply objectionable. The strongest complaint came later from Luther Martin, who claimed that the changes in the Clause rendered his original proposal “worse than useless”

7. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).
9. Id. at 82 (internal quotation marks omitted).
10. See id. at 172-73.
11. Id. at 81-82.
12. See id. at 82.
13. See RAKOVE, supra note 8, at 174.
14. Id. at 173-74.
because national acts “were intended to be superior [only] to the laws of our state government, where they should be opposed to each other,’ but not ‘to our constitution and bill of rights.””  

Yet at the time, Martin evidently did not object to the non-controversial amendments.16 Thus, the Supremacy Clause provides a sufficient basis for rejecting the idea of nullification.

But beyond the Supremacy Clause, one further consideration weighs heavily against nullification. The whole premise of rethinking American federalism in 1787, as seen from Madison’s perspective, was to make national laws directly enforceable on the people of the United States—rather than allowing the states to implement the resolutions of the national government, as had been the case under the Articles of Confederation.17 That premise was the genius of Madison’s brilliant assessment of the underlying federalism problem of the Articles of Confederation in item seven of the Vices of the Political System of the U. States.18 Any system of federalism that allowed the states to judge the propriety and necessity of federal decisions, Madison concluded, “will never fail to render federal measures abortive.”19 In this sense, the states should be thought of in relation to the Union as counties were in relation to the states. “If the laws of the States were merely recommendatory to their citizens, or if they were to be rejudged by County authorities, what security, what probability would exist, that they would be carried into execution?”

Whatever homage one would pay to the later genius of John C. Calhoun—and there is no doubt that his was indeed a formidable mind—he was not a founder of the federal

15. Id. at 174.
16. Id.
17. See Jack N. Rakove, The Beginnings of National Politics: An Interpretative History of the Continental Congress 172-73 (1979) [hereinafter The Beginnings of National Politics] (“The Articles contained no provision empowering Congress to use coercive authority against the states because, quite simply, it was difficult to believe they would willingly defy its decisions.”).
19. Id.
20. Id. This analysis is echoed in The Federalist No. 15 (Alexander Hamilton).
nullification is a terribly interesting argument, but it is neither part of the Constitution nor consistent with its meaning. Nullification advocates in South Carolina in the late 1820s and early 1830s understood that the ordinary state legislature could not apply the doctrine—saying a great deal about the doctrine’s authority. To make nullification effective, it had to be pronounced by a specially elected convention—one whose authority would somehow become tantamount to that of the ratification conventions of 1787–1788. This convention would revive a potential exercise of popular sovereignty in a way that the ordinary processes of political representation and legislation could not, bringing the people of South Carolina closer to the original condition that permitted ratification of the Constitution in 1788.

No system of national legislation could work if states retained the capacity to threaten nullification. What possibility of collective deliberation would exist if states, somehow acting though their delegations, could ratchet up their opposition to particular measures and thwart the decision of constitutionally qualified majorities? However, a lesser version of state opposition to national legislation exists that is distinguishable from outright nullification: interposition.

If nullification draws some inspiration from the Kentucky Resolutions that Thomas Jefferson drafted in 1798, interposition lies closer to the animus behind Madison’s concurrent Virginia Resolutions. In thinking about the role that states could play in checking constitutionally dubious policies, Madison was careful to remain consistent with his analysis of 1787–1788. That is, he

22. See id.
23. See id. at 29 (characterizing a specially elected convention as “the highest expression of the will of the sovereign people”).
never thought of the states as retaining an independent legal authority to prevent the implementation of duly adopted national laws, but their political capacity remained intact. As the original compacting parties to the Union, states had not forfeited their rights to express political opinions and, thus, mobilize opposition to positions they found objectionable. As Madison made clear in the concluding passages of his Report on the Virginia Resolutions, the “necessary and proper measures” available to the states involved the public expression of their opinions or other devices appropriate to the Constitution—presenting “a direct representation” of their views to Congress or urging the states to call a convention for considering amendments, independent of any action by Congress. But interposition, in these constitutionally legitimate forms, falls well short of nullification.

III. SECESSION AND STATE SOVEREIGNTY

The idea that the states could resort to methods beyond interposition and nullification—such as secession and calling for regular constitutional conventions—ultimately became part of the ideology of states’ rights. A convention might not work for the purposes of nullification, but in a more radical situation, why could it not undo the original work of 1788? If states had used this device to accept the Constitution, presumably they could run this reel backward and use it to opt out via secession as well. Of course, one might wonder how states like Mississippi, Alabama, or Arkansas, which owe their existence to the legislative action of the national government, could acquire the requisite primordial sovereignty to leave the Union of their own wills.

25. See id.
27. For an excellent discussion of interposition, see Christian G. Fritz, Interposition: An Overlooked Tool of American Constitutionalism, in UNION & STATES’ RIGHTS, supra note 24, at 165-203.
28. See Neil H. Cogan, Introduction to UNION AND STATES’ RIGHTS, supra note 24, at 1 (characterizing such methods as “questions about the structure of our Union and the relationships of the Union, states, and people—about their ‘rights’ under the Constitution”).
But that argument would never work in an original compacting state such as South Carolina. Nor indeed does that argument counteract the revolutionary logic of secession. The logic of secession does not rest on the prior constitutional status or duty of a state; rather, it rests on a state’s conviction that the proverbial long train of abuses and its anticipated consequences place the community inhabiting that state’s territory within striking distance of some form of tyranny.

As a constitutional theory, secession enjoys no advantage over nullification. If it were a legitimate practice, secession would also fatally threaten the groundwork premise of deliberative government. But as a revolutionary response to the perceived threat of tyranny, one cannot deny the potential existence of secession. Absent a constitutional clause explicitly providing opt-out options from a federal union, conventional legal analysis can never account adequately for the possibility of secession as a revolutionary act. As a fundamentally political act, the idea of secession can never be wholly foreclosed by constitutional theory or the doctrinal legacy of Texas v. White.

The irony of this situation is that a state would move closest to a position of sovereignty—the ostensible principle on which theories of states’ rights rests—only when it prepares to exit the Union in a revolutionary act undertaken in defiance of looming tyranny. However, the language of sovereignty—essential as it sometimes seems to claims of states’ rights—does more to confuse our discussion than to assist it. Like nullification and secession, “sovereignty” is a word that never appears in the Constitution, though it had

29. See Rakove, supra note 24.


31. See generally 74 U.S. (7 Wall.) 700, 725 (1868) (nullifying Texas’s ordinance of secession because “[t]he Constitution . . . looks to an indestructible Union, composed of indestructible States”).

32. See Rakove, supra note 24, at 15 (“[S]ecession is credible only when one can imagine the people of a state or region mobilizing to sustain such a decision.”). See generally White, 74 U.S. (7 Wall.) at 726 (“The Union between Texas and the other States was as complete, as perpetual, and as indissoluble as the Union between the original States. There was no place for reconsideration, or revocation, except through revolution, through consent of the States.”).
been part of Article 2 of the Articles of Confederation. Indeed, one can make a plausible case that the remarkable aspect about the history of sovereignty in the United States is that the American founders essentially destroyed the received concept, as authorities such as Bodin, Hobbes, and Blackstone (a latter-day interpreter) had defined it; nonetheless, the founders held onto the word, to the eventual confusion of our political discourse. Sovereignty, in its traditional sense, meant that every state and polity must have some ultimate, final, absolute, unitary, and irresistible source of legal authority. As nineteenth-century commentators often noted, one could not divide sovereignty between two governments without running the grave risk of creating “imperium in imperio”—two ultimate authorities within one system—which would create a “solecism or ‘monster’ in politics.” In the argument famously developed by James Wilson, to say that the people could act as the sovereign may have solved rhetorical problems in 1787–1788 by demonstrating that unitary sovereignty existed somewhere in the American system. But as an analytical description of how that system would work in practice, Wilson’s argument was useless. The people could never act as a sovereign according to Bodin and Hobbes’s vision of unitary authority within a polity.

The one American who arguably grasped this problem most clearly was James Madison. Back in 1787, Madison fashioned his own solution to the problem of dividing sovereignty within a federal system—the negative on state

33. ARTICLES OF CONFEDERATION OF 1781, art. II (“Each state retains its sovereignty, freedom, and independence . . . .”). On the term’s appearance there, and the significant role of Thomas Burke, a pro-states’-rights politician from North Carolina, see the discussion in THE BEGINNINGS OF NATIONAL POLITICS, supra note 17, at 164-76.
35. Id. at 36 (“[S]overeignty by its nature had to be both absolute and unitary. That is . . . a truly sovereign must have all the power that a state could legitimately exercise . . . . (internal quotation marks omitted)).
36. Id. at 42.
37. See id. at 42-43.
38. See Rakove, supra note 30, at 51.
laws.39 If the federal government had applied this negative in the universal way Madison envisioned, it would have maintained the sovereignty of the states.40 A state that could not finally exercise its legislative authority without Congress’s approval could never be sovereign in any meaningful sense of the term. But the Supremacy Clause—which left the assertion of national sovereignty to the messy and uncertain course of constitutional jurisprudence—ultimately replaced Madison’s solution.41 In the aftermath of that decision, Madison’s efforts to capture the underlying characteristics of American federalism took the complicated form first laid out in Federalist No. 39, where he identified no fewer than five categories for describing the national and federal aspects of that system.42 The idea that state governments could play some additional role in challenging doubtful exercises of national power deepened this analysis by a degree or two, but it did not alter its essential character.43 Indeed, those who think that Madison underwent some radical transformation—from the arch-nationalist of 1787–1788 to the creator of the interposition doctrine of 1798—should recall that he had considered this conception a decade earlier in Federalist No. 46.44

Throughout his life, Madison remained loyal to the analytical approach outlined in Federalist No. 39. If the federal system was to work, the temptation to appeal to heresies like nullification had to be resisted.45 No alternative existed to describing American federalism on its own terms. Resorting to prior authorities—to the great public-law

39. See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in JAMES MADISON: WRITINGS, supra note 26, at 146-52 (advocating his proposed negative on state laws).
40. See id.
41. U.S. CONST. art. VI., cl. 2.
42. See THE FEDERALIST NO. 39 (James Madison).
43. See MADISON, supra note 26 (outlining Madison’s view of states’ roles in challenging the federal government through interposition while maintaining respect for the federalism structure in the Constitution).
44. See THE FEDERALIST NO. 46 (James Madison).
45. See Letter from James Madison to William Cabell Rives (Mar. 12, 1883), in JAMES MADISON: WRITINGS, supra note 26, at 864 (“The words of the Constitution are explicit that the Constitution & laws of the U.S. shall be supreme over the Constitution & laws of the several states; supreme in their exposition and execution as well as in their authority. Without a supremacy in those respects it would be like a scabbard in the hand of a soldier without a sword in it.”).
writers whom Madison had studied—would be of marginal value. Madison observed the reason for this late in life:

Our political system is admitted to be a new Creation—a real nondescript. Its character therefore must be sought within itself; not in precedents, because there are none; not in writers whose comments are guided by precedents. Who can tell at present how Vattel and others of that class, would have qualified (in the Gallic sense of the term) a Compound & peculiar system with such an example of it as ours before them.46

In this respect, an abstract commitment to ideas of states’ rights would work no better than the heresies of nullification and secession. For the federal system to continue functioning, one had to reason about its specific characteristics. For that there could be no substitute.

46. Id.