
James H. Read*

I. INTRODUCTION

I would like to thank Professor Mark Killenbeck for inviting me to participate in this Symposium and Professor Sanford Levinson for his thought-provoking keynote address. I also want to thank the other scholars on this panel and the participants on the Arkansas panel for their observations on the ground-level politics of the issues we are examining today.

In his keynote, Professor Levinson asked whether the recent revival of nullification and secession rhetoric represents “frivolousness” or “serious arguments.”1 He rejects the claim that American states may constitutionally nullify federal law and remain in the Union.2 But secession, he argues, must be taken more seriously.3 Levinson observes that everyone can think of secessions worth defending.4

I agree with Levinson’s criticism of nullification. I also agree that one can more readily make a serious case for secession than for nullification. Stating, “We are staying in the game but playing by different rules” is different than saying, “We are exiting the game.” But politically, in the United States, nullification is the more immediate issue, as

* Professor of Political Science, College of St. Benedict and St. John’s University; A.B., University of Chicago, 1980; M.A., Harvard University, 1983; Ph.D., 1988.


3. Id.

4. See Levinson, supra note 1, at 78.
shown by several recent measures: the Missouri bill Levinson mentioned (H.B. 436), which sought to nullify federal gun-control laws;5 the Arkansas bill discussed in the previous panel (H.B. 1752), which sought to prevent federal officers from enforcing a federal law in Arkansas that regulated firearms;6 and many other current nullification initiatives. First, I will address nullification; second, I will turn to secession.

II. NULLIFICATION

First, states have many options other than nullification to resist overreaching federal policies and to demand changes. Nullification legislation is neither the only way, nor the most effective way, for states to signal their opposition to overreaching federal policies.7 Nullification does not occur when a state publicly expresses its view that the federal government has acted unconstitutionally, nor does it occur when a state challenges the federal government in court.8 Furthermore, one should not confuse nullification with civil disobedience, whereby individual citizens break laws they consider unconstitutional or unjust and accept the legal consequences.9 I will define nullification narrowly: It is the doctrine that each individual state, claiming to be fully sovereign, has the right—without exiting the Union—to be the final judge of its own constitutional rights and obligations, and the legal authority to act on that judgment by obstructing federal law within the state's boundaries.10

5. Id. at 17-18 (discussing vetoed Missouri legislation purporting to protect a citizen's Second Amendment Rights); see H.B. 436, 97th Gen. Assemb., First Reg. Sess. (Mo. 2013). The Missouri bill is discussed below, along with Governor Jay Nixon's veto message. See infra note 24 and accompanying text.
7. See John Dinan, Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism, 74 ALB. L. REV. 1637, 1638 (2011) ("[N]ullification . . . [is] inconsistent with the Supremacy Clause of the United States Constitution and [has] no place or effect in the United States federal system.").
9. See id.
10. Id.
Levinson and I agree in rejecting this constitutional argument.11

Second, the constitutional argument against nullification does not depend on whether one accepts the strong version of judicial supremacy announced by the United States Supreme Court in *Cooper v. Aaron*—that the Supreme Court is the ultimate interpreter of the Constitution.12 In short, nullification is not constitutionally and politically wrong because the Supreme Court said so. On this point, Levinson and I also agree.

Neither James Madison nor Abraham Lincoln would have accepted the Court’s assertion of judicial supremacy in *Cooper v. Aaron*. Madison and Lincoln both regarded the people of the United States, collectively, as the ultimate author and interpreter of the Constitution through the democratic process over time.13 For both Madison and Lincoln, nullification was wrong because it enabled a minority to dominate the majority on matters that affected everyone.14 In that respect, as Madison stated in an 1830 letter, nullification would “overturn the first principle of a free Government.”15

If “We the People” are the “ultimate interpreter” of the Constitution, then one might ask how those constitutional judgments are rendered. The Court is an institutional decision-maker; “We the People” are not. I would argue, however, that for better or worse, all of us interpret the Constitution all the time in our decisions as citizens, voters, elected officeholders, and so on. Our constitutional judgments may be well-informed or badly informed. They may be careful or sloppy. But in any event, these judgments

12. 358 U.S. 1, 18 (1958).
15. *See Letter from James Madison to Edward Everett, supra* note 13, at 392 n.2.
shape our political opinions and decisions in ways that the Court will never be able to control.

One example is the recent Missouri bill (H.B. 436) purporting to nullify a federal firearms law, together with Missouri Governor Jay Nixon’s veto message. The first question one might ask is whether the Supreme Court would have declared this measure unconstitutional had the Governor signed the bill into law. Undoubtedly, the Court would, at minimum, have struck down the bill’s imposition of criminal penalties for federal officials enforcing federal law.

But as we know from the civil-rights era, courts alone cannot enforce their decisions on deeply contested matters. Enforcing racial equality required the actions of three presidents, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the courage of thousands of civil-rights activists. Thus, although the Supreme Court had already spoken a decade earlier in Brown v. Board of Education, the ultimate jury here was the people of the United States, through a contentious, but ultimately decisive, process.

Likewise, I suggest that we view contemporary nullification claims and counterclaims as constitutional arguments presented not only to federal judges but also to us, as citizens. Both the text of H.B. 436 and Governor Nixon’s veto message make constitutional arguments. The

17. See infra note 24.
19. Id. at 32, 39, 333 (Dwight D. Eisenhower, John F. Kennedy, and Lyndon B. Johnson).
constitutional argument of H.B. 436 briefly paraphrases the Tenth Amendment, followed immediately by a long, unattributed allusion to Thomas Jefferson’s draft of the Kentucky Resolutions—as though it were text from the Constitution.

Governor Nixon’s veto message quotes, in full, the Supremacy Clause in Article VI, Clause 2, of the U.S. Constitution. He also argues that H.B. 436 violates the First Amendment “by making it a crime to publish the name or other information of someone who owns a firearm.” One does not need to be a Supreme Court Justice to decide whether the bill or the veto message makes a better constitutional argument.

Finally, the 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—even when different states, guided by opposing constitutional judgments, nullify federal law in opposite directions on matters that affect all states and regions. If, for example, Arizona were to nullify federal immigration law to seal its borders more effectively and California were to nullify federal immigration law to open its borders, would each state honor one another’s nullifications while remaining in a functioning federal union?

Probably not. Instead, Arizona and California would immediately begin nullifying one another’s nullifications. Such conflicting nullifications occurred in the 1850s on matters related to slavery, and the equivalent would happen today. If a state nullifies a federal law because it believes its own constitutional judgment is right, that state is unlikely

27. See Letter from Jay Nixon, supra note 24, at 1-2.
28. Id.
29. See Read & Allen, supra note 8, at 281-83 (noting disagreement between state political figures commenting on the nullification-like actions of other states in relation to federal laws).
to respect the nullifications of other states whose constitutional judgments it considers wrong.30

III. SECESSION

Professor Levinson is correct that the argument for secession is more serious than the argument for nullification.31 Levinson and I agree that, in the United States, secession is not a constitutional right and, therefore, it would need justification on other grounds.32 However, secession can sometimes be justifiable. But I disagree with Levinson on what criteria would justify secession. Further, I am also much more pessimistic that secession, in most cases, could be accomplished peacefully—in a way that safeguards the rights of all or resolves the conflicts that triggered the secession in the first place.

The argument for secession is strong in two types of cases. One is a clear case of oppression by the existing government, where secession is the most readily available remedy.33 The Declaration of Independence—borrowing from John Locke—asserts that dissolution of government is justified by “a long train of abuses and usurpations,” but not for “light and transient causes.”34 These phrases are fairly general, but the Declaration’s specific list of grievances gives them content.35 Of particular importance is the King’s dissolution of legislative bodies and resort to military rule, both of which deprived Americans of the normal, peaceful means of securing redress for their grievances.36 Nothing similar has occurred in any of the contemporary American secession movements Levinson mentioned.37

30. See id. at 281-82.
31. See Levinson, supra note 1, at 58-59, 77-78; States Can’t Nullify Federal Law, supra note 2.
33. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
34. THE DECLARATION OF INDEPENDENCE para. 2.
35. THE DECLARATION OF INDEPENDENCE paras. 3-30.
36. See THE DECLARATION OF INDEPENDENCE paras. 14, 24, 30.
37. See Levinson, supra note 1, at 28-29, 52-54 (noting several contemporary secessionist movements scattered throughout the United States, none of which have either dissolved a legislative body or subjected the civilian population to military rule).
Furthermore, in the case of the Confederate secession of 1860–1861, the slave states were not only represented in Congress and other branches of federal government, they were overrepresented because of the Senate’s composition and the three-fifths clause. The slave states seceded because they were not overrepresented enough to ensure the policy result they wanted—a guarantee that Congress would not prohibit slavery in the western territories.

In addition to an oppressive government, another justification for secession is where the parties mutually agree to part ways peacefully, with some agreed-upon process to settle claims and to protect the rights of internal minorities. The peaceful partition of Czechoslovakia into Slovakia and Czech Republic is perhaps the clearest example. Such cases, however, are the exception. The Yugoslavian scenario, whereby secession leads to secession-within-secession ad infinitum—of the kind Abraham Lincoln spoke about in his First Inaugural Address—may be more likely in many parts of the world today.

The Yugoslavian secessions of 1991–1992 resolved nothing; all the worst instances of ethnic cleansing and genocide occurred after the secession, not before. Bosnian Muslims and Kosovars might have remained safe in a united Yugoslavia, but they too had to secede in self-defense after the secessions began.

The Confederate secession of 1860–1861 would also have resolved nothing. Professor Levinson closed his keynote address with a quote from President Buchanan, who opposed secession but wanted to spare Americans a bloody

41. LINCOLN: POLITICAL WRITINGS AND SPEECHES, supra note 13.
42. See Milica Z. Bookman, War and Peace: The Divergent Breakups of Yugoslavia and Czechoslovakia, 31 J. PEACE RES. 175, 175-76 (1994) (detailing the domino-like stream of secessions arising in Yugoslavia).
43. See id. at 176-77.
44. See JELENA OBRADOVIĆ-WOCHNIK, ETHNIC CONFLICT AND WAR CRIMES IN THE BALKANS: THE NARRATIVES OF DENIAL IN POST-CONFLICT SERBIA 50-51, 56 (2013) (noting the incredible violence unfolding in Yugoslavia that motivated multiple local ethnic groups to secede as a means of self-defense).
war.45 I can sympathize with Buchanan’s agony, but letting the South go in peace would not have spared Americans a bloody war. This strategy would have only shifted the war westward and changed the label. The slave states, having seceded from the Union to ensure that slavery would not be shut out of the western territories, would certainly not have turned around and peacefully relinquished those same territories to the Union.46 Nor would the Union have conceded these territories to the newly independent Confederacy. The war would have become an “international conflict,” not a “civil war,” but it would have occurred nonetheless.

Further, if the slave states could justify secession based on an inherent right of self-determination,47 then surely the slaves themselves would have had an equal or greater right to “secede” from their slave owners and to call in any power on Earth—including the Union army—to support them in their effort. Levinson would likely agree on this point. He appears, however, to treat the Confederate secession as an outlier because of the centrality of slavery.48 Instead, I see significant parallels between the Confederate secession and many others that do not involve slavery.

Professor Levinson asks whether the United States has now become too large to function as a democracy.49 I hope this is not true because the alternatives are not good. If it is true, and if the United States would ultimately function better separated into smaller states and confederacies, then secession is a decision that affects everyone. The decision to secede would have to be made by all of us—not just by some states or regions unilaterally forcing the result upon the rest.

45. See Levinson, supra note 1, at 78-79.
46. The Confederacy also cherished hopes of securing California, or at least half of it. See J. M. Guinn, How California Escaped State Division, 6 ANN. PUBLICATION HIST. SOC’Y S. CAL. 223, 225-26 (1905).
47. See “Perpetual Union”, supra note 32, at 472-77 (noting that the heart of the South’s secessionist argument was self-determination).
48. See Levinson, supra note 1, at 60-62.
49. Id. at 76-77.
In conclusion, I certainly agree that some secessions can be justified.50 Secession, however, is a high-stakes decision, not an ordinary act of political opposition. It carries enormous consequences for many people besides those who decide to initiate it. For that reason, secession demands a high level of justification—one that I do not perceive in any of the American cases before us now.

50. See, e.g., OBRADOVIC-WOCHNIK, supra note 44, at 48-52 (discussing various atrocities and war crimes that occurred during the Yugoslav Wars, resulting in several “secessions”).