I. ZOMBIE (OR DINOSAUR) CONSTITUTIONALISM?
THE REVIVAL OF NULLIFICATION AND SECESSION

I begin with some news regarding contemporary American politics. On July 5, 2013, Governor Jay Nixon of Missouri vetoed a bill\(^1\) widely described as an attempt to “nullify” federal gun-control laws.\(^2\) According to one reporter:

The Missouri legislation called for misdemeanor charges punishable by up to a year in jail and a $1,000 fine against federal agents. It would have applied broadly to any attempt to enforce federal gun laws and regulations—past, present, or future—that “infringe on the people’s right to keep and bear arms.”\(^3\)

A Republican legislator from a St. Louis suburb aptly described the legislation as “probably the most far-reaching attempt by a state to protect a citizen’s Second Amendment
The Missouri bill would have purportedly invalidated a number of federal laws, including a law dating back to 1934 that imposes a tax on transferring machine guns or silencers. More broadly, the Missouri bill also would have invalidated any federal law that, according to Representative Doug Funderburk, "could have a chilling effect on the purchase or ownership of those items by law-abiding citizens." After Funderburk acknowledged that lawmakers may have drafted the bill a bit too broadly, he responded that the principal aim was to underscore, as summarized by the reporter, that "federal laws [restricting] Second Amendment rights aren't made in compliance with the Constitution and thus don't have the protection of the supremacy clause."

Although widespread predictions claimed that the Republican legislature would have little trouble rounding up enough votes to override Governor Nixon’s veto, the Missouri Senate—following a successful override vote in the Missouri House—failed to do so on September 11, 2013, by a margin of one vote. Apparently key to the Senate Republican floor leader’s withdrawal of his support for the override was a letter submitted by the State’s Democratic Attorney General, in which he opposed the bill on both constitutional and policy grounds. The Attorney General noted, for example, that the law might prevent cooperative efforts between Missouri and federal law-enforcement agencies.

The Missouri law is certainly not unique. In April 2013, the Kansas legislature passed a law signed by Governor Sam Brownback that purports to prevent the enforcement of any federal laws applied to guns produced and used within that state.
state. According to the Kansas legislation, “‘any act, law, treaty, order, rule or regulation of the government of the United States which violates the second amendment to the constitution of the United States is null, void and unenforceable in the state of Kansas.’” Obviously, any law that “violate[s] the second amendment” is “null, void and unenforceable,” not only in the Sunflower State but also throughout the entire United States as well. Perhaps one should place the Kansas statute in a category of laws that are “full of sound and fury” but ultimately “[s]ignify[] nothing” beyond the most basic understanding of the meaning of living within a political system based on constitutional supremacy. Yet the Washington Post story noted that U.S. Attorney General Eric Holder is not pleased with the Kansas statute. He apparently wrote Governor Brownback that the law is unconstitutional and that the United States “will take all appropriate action including litigation if necessary, to prevent the State of Kansas from interfering with the activities of federal officials enforcing federal law.” Surely, though, Holder cannot believe that federal officials have carte blanche to enforce even unconstitutional laws. Presumably, the debate—as is so often the case in American constitutional history—is far more about who precisely gets to say whether—and when—a law is unconstitutional than about the abstract proposition that an unconstitutional law is really no law at all.

Moving a bit farther south, to Texas, one should note that the Republican primary for governor in 2010 featured

13. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (“[A] law repugnant to the constitution is void.”).
14. WILLIAM SHAKESPEARE, MACBETH, act 5, sc. 5, available at http://shakespeare.mit.edu/macbeth/macbeth.5.5.html. Perhaps including the lead-up description, “a tale [t]old by an idiot,” would be a bit too harsh. Id.
15. Weiner, supra note 11.
16. Id. (internal quotation marks omitted).
one candidate, Debra Medina, who became the darling of many Tea Party supporters by appearing to offer full-throated support for the idea of state authority to nullify federal laws. ¹⁸ Medina’s website proclaimed, under the label “Restore Sovereignty,” that the U.S. Constitution “divides power between the federal and state governments and ultimately reserves final authority for the people themselves. Texas must stop the over reaching federal government and nullify federal mandates in agriculture, energy, education, healthcare, industry, and any other areas D.C. is not granted authority by the Constitution.” ¹⁹ Again, one assumes that Ms. Medina thought she was stating more than a commonplace idea about the limits of national claims that, “in fact,” are unconstitutional. Rather, I presume that Ms. Medina and her supporters additionally offered a particular theory about who would ascertain that possibly controversial “fact”—the ostensibly aggrieved states themselves.

The notion that the U.S. Constitution might constrain state power continues to perturb Texas politicians. Thus, Governor Rick Perry responded to a February 2014 decision by a United States District Judge invalidating Texas’s refusal to recognize same-sex marriages ²⁰ by issuing the following statement:

“Texans spoke loud and clear by overwhelmingly voting to define marriage as a union between a man and a woman in our Constitution, and it is not the role of the federal government to overturn the will of our citizens. The 10th Amendment guarantees Texas voters the freedom to make these decisions, and this is yet another attempt to achieve via the courts what couldn’t be achieved at the ballot box. We will continue to fight for

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¹⁹. Id. (emphasis added) (internal quotation marks omitted).

the rights of Texans to self-determine the laws of our state." 21

Even if one agrees with Governor Perry on the merits (which I do not), he obviously misinterpreted the 10th Amendment as "guarantee[ing] Texas voters the freedom to make . . . decisions" that contravene the national Constitution.

Professor James Read began an excellent recent article—with the telling title Living, Dead, and Undead: Nullification Past and Present—by noting a number of proposals in American state legislatures that "deliberately echo[]" the "ur-text of nullificationist arguments, Thomas Jefferson’s Kentucky Resolutions of 1798. 22 The very first of those “resolutions” proclaims:

[T]he several states composing the U[nited] S[tates] of America are not united on the principle of unlimited submission to their general government; but that, by a compact under the style & title of a Constitution for the U.S., and of Amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whenever the General government assumes undelegated powers, its acts are unauthoritative, void, & of no force. 23

Thus, in February, 2011, the Idaho House of Representatives passed “An Act Relating to State Sovereignty and Health and Safety,” exuberantly declaring the Patient Protection and Affordable Health Care Act of 2010—now popularly known as “Obamacare”—“void and of no effect.” 24 Idaho claimed a “sovereign power” to “interpose between said citizens and the federal government, when it has exceeded its constitutional

authority.”25 Incidentally, the word “interpose” suggests, at least to the cognoscenti, the greater influence of The Virginia Report, which James Madison prepared to express Virginia’s opposition to the Alien and Sedition Acts; indeed, the more temperate Madison refrained from using such a volatile term as “nullification.”26 This article further elaborates on the distinction between “interposition” and “nullification” in Part II.27

As it happens, the Idaho Senate failed to pass the bill, in part because some legislators expressed the view that, however much they might share the belief that Obamacare is unconstitutional, the suggested legislation itself ran afield of constitutional limits.28 Thus, Professor Read refers to the situation in Idaho—where some Idaho politicians have argued that “[t]he courts, not state lawmakers, should decide the question—”29 as a powerful affirmation of what might well be called judicial supremacy, which is something quite different from the reliance on the particular form of state-centered constitutional supremacy emphasized by other would-be nullifiers or interpositionists.30 One presumes that many Idahoans were not pleased with the Supreme Court’s decision in Sebelius.31

Idaho did pass a bill, which the Tenth Amendment Center nicknamed the “grandson of nullification,”32 that

25. Id.
27. See infra Part II.
30. See Read & Allen, supra note 22.
32. Idaho Senate Says No to Federal Health Care, TENTH AMENDMENT CENTER (Apr. 5, 2011), http://blog.tentamendmentcenter.com/2011/04/idaho-senate-says-no-to-federal-health-care/#more-7291. Though passed by both the Senate and the House, the Governor vetoed the bill. House Bill 298, IDAHO LEGISLATURE,
explicitly bars the state from participating in any “discretionary” aspect of the national healthcare law. The Center is actively promoting what it calls the “Federal Health Care Nullification Act.” Bills introduced by legislators in Maine, Montana, Oregon, Texas, and Wyoming all declare that Obamacare is invalid, shall not be recognized, is specifically rejected, and shall be considered null and void and of no effect. The bills have not passed. Interestingly enough, the South Carolina legislature rejected its particular heritage of fire-breathing nullificationism by adjourning without taking up a bill that would have declared Obamacare beyond federal power and, thus, without effect in the Palmetto State. South Carolina did, however, pass a bill that would have permitted South Carolinians to “produce the incandescent light bulbs banned by Congress,” which a Washington Times editorial commended—along with Washington and Colorado’s marijuana laws that run directly contrary to existing
interpretations of federal drug law—as actions one might term “neo-nullificationism.” 39

One might also place in this category the refusal of several states to obey U.S. Secretary of Defense Chuck Hagel’s command that state national guards honor the Supreme Court’s decision in United States v. Windsor—which struck down the so-called Defense of Marriage Act (DOMA) 40—and facilitate the ability of “same-sex spouses of military personnel [to] be given full spousal and family benefits.” 41 Three states—Georgia, Louisiana, and Mississippi—flatly refuse to obey the order, while several others have adopted a policy of “equality” by forcing all applicants for such benefits to travel from wherever they may be located to federal military facilities in lieu of being able to enroll for benefits at state facilities. 42 This situation does not involve a federal statute; nonetheless, no reason exists to take seriously an argument that the Secretary of Defense is acting beyond his authority.

Importantly, from one perspective, Idaho’s declaration that it will refuse to cooperate with “discretionary” provisions of Obamacare is not “nullification” at all. 43 Likewise, neither is it “nullification” for Texas, among other states, to refuse to participate in the enhanced Medicaid provisions of Obamacare, courtesy of the same Sebelius decision that made it unconstitutional for Congress to require participation as a condition of receiving any Medicaid funds at all. 44 The whole point regarding any and all conditional funding is that the targeted recipient, including a state, has the option to reject the offer in lieu of allowing the payer of the state piper to call the policy tune. 45 That it may prove difficult, as a political matter, for states to

40. 133 S. Ct. 2675, 2681 (2013).
42. Id.
43. See supra note 33 and accompanying text.
45. See id.
reject the offer being made by the national government is not the equivalent of being required to follow national policy.46

One might offer a similar analysis of the recent decision in Louisiana by the “Orleans Parish sheriff [that he] will no longer honor many requests from the federal immigration authorities to detain people who are suspected of being here illegally.”47 According to the New York Times, this decision makes New Orleans “one of a growing number of jurisdictions to adopt such a policy and the first to do so in the Deep South.”48 Such practices may be very much within what Jessica Bulman-Pozen and Heather K. Gerken have illuminatingly labeled “uncooperative federalism.”49 Such lack of cooperation—indeed, outright hostility, regardless whether some theorists would recognize it as “genuine” nullification under some criteria—is a phenomenon that we ignore at our peril in trying to understand the actualities of both contemporary and past American politics. After all, the unwillingness of Northern states to cooperate with Southern states regarding the return of fugitive slaves heightened the polarization that led to secession and war.50 One might also argue, however, that insofar as the Northern states were violating their constitutional duty to return fugitive slaves—and not simply being “uncooperative” in the sense of exercising their acknowledged discretion in what some saw as an infelicitous manner—they earned the label “nullifiers.”

46. See id.
48. Id.

The Southern States, standing on the basis of the Constitution, have a right to demand this act of justice [i.e., the return of fugitive slaves] from the States of the North. Should it be refused, then the Constitution, to which all the States are parties, will have been willfully violated by one portion of them in a provision essential to the domestic security and happiness of the remainder. In that event the injured States, after having first used all peaceful and constitutional means to obtain redress, would be justified in revolutionary resistance to the Government of the Union.

Id.
Thus, South Carolina justified its secession in 1860, in part, by referring to the “increasing hostility on the part of the non-slaveholding States to the institution of slavery” and the concomitant “disregard of their obligations, and the laws of the General Government.”

Thirteen states are described as having “enacted laws which either nullify the Acts of Congress or render useless any attempt to execute them.”

I dare say, though, that most of us today do not censure those states for their choices, which suggests that “nullification,” at least as a political matter, may be a more complicated issue than one might think initially.

If America depends in large measure on “cooperative federalism,” then the states’ withholding of such kindness—even if described as “defiance,” and even if (or especially if) it is constitutionally protected—may only add to the widespread impression that the United States suffers under a dysfunctional form of government. Even if constitutionally protected, “uncooperative federalism” may help to trigger a “crisis of governance.”

Also worth mentioning in this context is a constitutional amendment advocated by Georgetown University Law Center Professor Randy Barnett—the architect of the near-successful attack on the constitutionality of Obamacare as going beyond Congress’s powers to regulate interstate commerce. The aptly named “Repeal Amendment” initially would have allowed a vote of the legislatures of two-thirds of the states to repeal any congressional legislation.

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52. Id.
53. Perhaps we should adopt the phrase “the kindness of strangers,” joined together in an often uneasy union. See TENNESSEE WILLIAMS, A STREETCAR NAMED DESIRE 178 (1947) (describing the condition of Blanche DuBois).
Tea Party, one might view the proposed amendment as a form of “weak-tea” nullificationism, inasmuch as it obviously requires the assent of most of the states to actually achieve the goal of negating a federal law even if, like Obamacare, the law has survived judicial scrutiny. Were the Repeal Amendment actually proposed and ratified, it would raise questions only of wise constitutional design rather than the specific questions of constitutional interpretation provoked by John Calhoun and others. What is appalling about the initial version of the “Repeal Amendment” is its insouciance about the possibility that the legislatures of the repealing states could represent, collectively, less than one-third of the national population. The United States certainly does not need an enhancement of the already-pervasive disdain for majority rule that characterizes our political system. As a matter of fact, Barnett has significantly modified his proposal. Now, he would reduce the number of required states to only a majority (twenty-six instead of thirty-four); but in return, the given states would also have to contain a majority of the population. This revised proposal is not at all so objectionable, given its embrace of a more robust majoritarian principle; though I would probably be even more likely to support a proposal to emulate Maine by giving the national electorate the opportunity to override laws passed by Congress. In any event, Barnett’s modified proposal is worth serious discussion in a way that was never the case with the original “Repeal Amendment.”

Whether recent nullification-like actions are weak or strong, the question is whether we are facing an invasion of what might be called “zombie” constitutional arguments—

57. See id.
61. See Levinson, supra note 59, at 277-78 (quoting ME. CONST. art. IV, § 17).
where arguments thought to be long dead seem to be stalking us and threatening our brains. Or perhaps the question concerns what Professor Christian Fritz labels “‘constitutional dinosaurs’—ideas seriously discussed, considered, and acted upon [in the past], but which are foreign to our present constitutional understandings.”

Though we might believe dinosaurs are extinct, perhaps a constitutional theorist’s version of Jurassic Park exists where the dinosaurs take on new life and even escape to the mainland—or what is often called the “mainstream” of constitutional thought. Should we dismiss such ideas with contempt or, instead, take them with some degree of seriousness?

Nullification is only one example of contemporary zombie (or dinosaur) constitutionalism. Whether or not offering a specific response to Debra Medina in the 2010 Republican primary race for Texas Governor, incumbent (and ultimately re-elected) Governor Rick Perry raised the stakes by mentioning the possibility of secession. “We’ve got a great union,” said the Governor, and “there’s absolutely no reason to dissolve it.” Perry immediately went on to say: “[I]f Washington continues to thumb their nose at the American people, you know, who knows what might come out of that. But Texas is a very unique place, and we’re a pretty independent lot to boot.”

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65. 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 (internal quotation marks omitted). Nevertheless, one could question the aim of Governor Perry’s statements. For example, compare the sentence, “That’s a nice puppy there; it would be a shame if anything happened to it,” with, more realistically, the recent heading in Reason about the response of the British government to The Guardian, J.D. Tuccille, British Snoops to The Guardian: Nice Little Newspaper You Got. It’d Be A Shame if Something Happened to It, REASON.COM (Aug. 19, 2013, 11:30 PM), http://reason.com/blog/2013/08/19/british-snoops-to-the-guardian-nice-litt.
66. Wilson, supra note 65 (internal quotation marks omitted).
Texas not only attempted to secede from the Union in 1861, but it also, and more successfully, seceded from Mexico to become an independent country. Not surprisingly, Governor Perry later backtracked, especially when he decided that he might like to move to Washington and live in the White House.

Perry’s “leadership,” however, might help to explain why over 125,000 people signed a petition sent to the White House requesting that the United States “[p]eacefully grant the State of Texas to withdraw from the United States of America and create its own NEW government.” This article discusses secession—and these petitions—in later sections. Secession generates far more fundamental intellectual challenges for anyone concerned not only with American politics but also with political possibilities around the world. First, though, this article returns to nullification—partly because some states, urged by the Tenth Amendment Center, evoke the language of what is, for better or worse, an important aspect of our political and constitutional heritage.

II. NULLIFICATION

The Tenth Amendment Center is easily identified with the contemporary American far-right, which comes close to despising the strong national government that has existed at least since the New Deal and, from one perspective, since

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67. RANDOLPH B. CAMPBELL, GONE TO TEXAS: A HISTORY OF THE LONE STAR STATE 147, 158, 244-45 (2003).
70. Petition to Peacefully Grant the State of Texas to Withdraw from the United States, WHITE HOUSE (Nov. 9, 2012), https://petitions.whitehouse.gov/petition/peacefully-grant-state-texas-withdraw-united-states-america-and-create-its-own-new-government/BmdWCP8B.
71. The Tenth Amendment Center describes itself as “a national think tank that works to preserve and protect the principles of strictly limited government through information, education, and activism.” About the Tenth Amendment Center, TENTH AMENDMENT CENTER, http://tenthamendmentcenter.com/about/#.UuVSIRMHIU (last visited Feb. 14, 2014).
President Lincoln’s decision to resist secession in 1861. Unsurprisingly, Thomas E. Woods, Jr.—the author of a recent book titled *Nullification: How to Resist Federal Tyranny in the 21st Century*\(^{72}\)—is linked with the Center, but some will be surprised to know that he was educated at Harvard and Columbia.\(^{73}\) I should note that Woods takes me to task in that book for an article I published in the *Austin American-Statesman* reflecting on the statements of Republican gubernatorial candidates Medina and Perry about nullification and secession, respectively.\(^{74}\) Woods was particularly irate about my dismissal of Medina, describing me as “rushing to assure Texans and the American public that there was nothing to see here, that of course they could not resist their wise overlords no matter what Thomas Jefferson had tried to tell them.”\(^{75}\)

Does Woods’s critique possibly have some merit, even if one ultimately rejects Medina, Woods, and other neo-nullificationists? Consider a sentence from a new book, *The Revolutionary Constitution* (more mainstream in every way than Woods’s volume), by Professor David Bodenhamer and published by the Oxford University Press.\(^{76}\) He writes that “the argument for a state-based resistance [to arguable federal overreaching] was neither illogical nor unreasonable.”\(^{77}\) Bodenhamer ultimately offers little reason to think that he supports those arguments, but at the very least, his language suggests that one must do more with nullification arguments than engage in casual dismissal. One of the greatest lessons taught by thinking seriously about law—or about the history of American politics—is the realization that one may find logic and reason on both sides of the bitterest disputes. What makes politics and law so genuinely tragic is that everyone may have good arguments, but only one can prevail. A profound difference exists between a “losing argument” and a “frivolous” one. Rule 11

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74. Levinson, supra note 18; Woods, supra note 72, at 134.
75. Woods, supra note 72, at 134.
77. Id. at 71.
of the Federal Rules of Civil Procedure requires that “legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.” Distinguishing between the merely unpersuasive and implausible and the out-and-out “frivolous” raises profound questions of both practice and jurisprudence. A quarter century ago, I delivered, and then published, a lecture entitled Frivolous Cases: Do Lawyers Really Know Anything at All? So perhaps I should have titled this article and lecture “What Do Lawyers Really Know About Nullification and Secession?”

One might offer a quick—and to some, definitive—answer to this question by adopting the definition of law proffered by then-Massachusetts Supreme Judicial Court Justice Oliver Wendell Holmes in the most important lecture on law ever delivered in America—The Path of the Law—given at Boston University Law School in 1897. Holmes directed his remarks at law students and practicing lawyers, and he stated that, for them, the answer to the question—“What constitutes the law?”—is surprisingly simple. Answering this question has nothing to do with, as some might suggest, “systems of reason” or “deduction[s] from principles of ethics”; rather, it has to do with the desire to know what given “courts are likely to do in fact. . . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”

If we are full-throated Holmesians, then we can say with absolute confidence that any suggestion of so-called “sovereign states” having the power to “nullify” federal law is utter nonsense. No federal judge (or, for that matter, all but the most deviant state counterpart) is going to uphold state authority against the Supremacy Clause in Article VI, which clearly and unequivocally gives all laws passed pursuant to the Constitution the power to negate any state

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78. FED. R. CIV. P. 11(b)(2).
81. Id. at 460-61.
82. Id.
laws—or, indeed, state constitutions—to the contrary.\footnote{U.S. Const. art IV., cl. 2.} Although the possibility exists that a court will agree with a state that the federal law in question is unconstitutional, the bare assertion of unconstitutionality by a state provides no evidence at all for the fact asserted. Of course, a state can offer sound arguments on behalf of its assertion, but that is another matter.

Still, the obvious question is whether this prediction of judicial response is truly enough to resolve all questions about the intellectual merits of nullificationist arguments. After all, I suspect that everyone reading these comments can think of at least some well-settled judicial doctrines upholding state or federal statutes that are objectionable, if not repulsive. Thus, whatever our ultimate conclusion, we must return to the implications of Professor Bodenhamer’s statement, or even the exuberant arguments that Thomas Woods offers, and treat them with some respect.

Two overriding problems confront anyone who professes to take the U.S. Constitution—or perhaps any constitution—seriously. One, of course, is trying to figure out what the Constitution means. As we know all too well, many—though certainly not all—clauses of the Constitution are subject to multiple interpretations. What exactly is the scope of Congress’s power under the Commerce Clause or the President’s power to impose embargoes or blockades on American ports during times of international or domestic conflict? Examples of interpretive controversies are obviously endless. But a second problem, absolutely central to the debate about nullification, involves deciding who has the authority to answer the interpretive disputes about the Constitution.

My first book, \textit{Constitutional Faith},\footnote{Sanford Levinson, \textit{Constitutional Faith} (1988).} explored both of these questions, analogizing the answers given within our own legal culture to those offered by various Christians and Jews with regard to similar dilemmas in their own religious traditions.\footnote{See id. passim.} Thus, even if one proclaims that a given text—whether the Bible or the Constitution—guides him or her, disputes will inevitably arise over the meaning of that text.
Within Christianity, Roman Catholicism and dissenting Protestant sects like Southern Baptist provide the two polar alternatives to dispute settlement. For Catholics, institutional authority is ultimately lodged in the Vatican and, more particularly, the Papacy. Southern Baptists are notoriously more individualistic in terms of interpretive authority, as one would expect from a tradition that exalts the “priesthood of all believers.” Anyone within the faith community has an equal right to interpret the sacred text. Doctrinal outliers will undoubtedly feel all sorts of communal pressures from their friends and neighbors, but no institutions can proclaim their literally God-given authority to provide closure to discussions.

Constitutional Faith argued that one could look at many of our enduring legal controversies through the lens provided by the history of Christianity (or Judaism). Thus, one cannot only divide interpreters by the degree to which they focus on text alone—as against the supplement provided by other sources, including decisions of courts—but one can also separate interpreters by the degree to which they privilege the decisions of courts over the interpretations offered by non-judicial institutions or, ultimately, by ordinary citizens themselves.

The Symposium for which I prepared this article occurred near the anniversary of the events in Little Rock in 1957, when attempts by the Arkansas General Assembly to “interpose” its understanding of the proper meaning of the Fourteenth Amendment were met by the United States Supreme Court’s declaration that it is the ultimate interpreter of the Constitution and that the duty of all good Americans, including all other political institutions, is to accept what the Court says as a binding statement of legal reality. To be precise, the Court stated in Cooper v. Aaron that its decision in Marbury v. Madison declared the “basic

87. WILLIAM H. BRACKNEY, HISTORICAL DICTIONARY OF THE BAPTISTS 454 (2d ed. 2009).
88. See id. (stating that “each believer has direct access to God through Jesus Christ”).
89. See LEVINSON, supra note 84, passim.
90. Cooper v. Aaron, 358 U.S. 1, 18 (1958) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . . .”).
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."91 Given the particular circumstances of Cooper, including the antics of Arkansas Governor Orville Faubus, “one could easily sympathize with the Court’s description of its role,”92 and, as Justin Driver has recently demonstrated, the American legal culture contained widespread, pre-existing support for the proposition.93 The Court’s assertions did not come out of nowhere; after all, they existed as part of American jurisprudence for over two centuries.94 However, that reality does not entirely overcome the fact that “the Court’s statement is really quite preposterous in its depiction of American history. If a student wrote such a statement in a final exam, it would receive a D at best . . . .”95

Why am I so critical? The answer is easy. First, one must “ignore, for starters, the thought of Madison, Jefferson, Andrew Jackson, John Calhoun, Lincoln, and Franklin Roosevelt—to name only the best-known critics of overinflated claims of judicial supremacy.”96 As one might gather from any list that includes both John Calhoun and Abraham Lincoln, the particular character of their critiques could be quite different, but they were all united by a rejection of what I termed the hyper-“Catholicism” of the Court’s claim to interpretive authority.97 Constitutional supremacy, which is comparable to what one might call

91. Id. For a similarly effusive description of the Court’s authority, see the plurality opinion by Justices O’Connor, Kennedy, and Souter in Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992).
94. 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.”).
95. MCCLOSKEY, supra note 92, at 257.
96. Id.
97. See LEVINSON, supra note 84, at 37-39.
“Biblical supremacy,” does not entail either judicial supremacy or acceptance of Papal authority. But in both religion and law, problems emerge with the rejection of the Papacy or its judicial analogues. Is there a “final authority” at all? If so, who is it? Nullification is obviously one answer to that question, and, as Professor Bodenhamer suggested, even if one disagrees, nullification may not merit condemnation as being either “illogical [or] unreasonable.” After all, nullification—like secession—is an attempt to come to terms with theoretical and practical complexities, especially of a federal constitutional order.

What explains federalism in the first place? I have been persuaded that the answer is the existence of geographically distributed groups who, for a variety of reasons both good and bad, simply do not trust one another enough to accept membership in a truly unitary system of government that unequivocally places all legal power in a single government. Nor do these groups trust those who are likely to exercise central authority to adopt decentralization in both the creation and implementation of important public policies. Talk is cheap, after all, and promises are made to be broken. Thus, what constitutes federalism as a particular type of constitutional order is the ostensible guarantee to sub-national units that not only will the central government have limited powers but also that the states will retain a variety of “reserved” powers. But almost inevitably, those at the helm of the national government will engage in what many will perceive as overreaching, just as states will renege

98. See id. at 43. Indeed, Mark Graber has suggested in conversation that “judicial supremacy” is a product of the 1890s that was ratified by the New Deal and then, even more certainly, by the response of most political elites to Brown v. Board of Education, which led directly to the Court’s self-description of itself as the “ultimate interpreter” of the Constitution. See, e.g., Baker v. Carr, 369 U.S. 186, 211 (1962).
100. See id.
on their own commitments to the national political system that, after all, represents the alternative to remaining separate and, more plausibly, “sovereign states” in an international political system.104

Although nullification and interposition are identified, perhaps understandably, with the all-too-pervasive American political traditions of slavery and segregation, these doctrines initially arose in the context of what most analysts today agree was profound overreaching by the denizens of the Federalist administration of John Adams—most notably through the Sedition Act of 1798.105 Federalists in control of Congress and the Executive Branch were clearly disdainful of the notion that the First Amendment truly placed limits on the ability of the national government to criminalize anti-governmental speech.106 James Madison famously expressed his skepticism about the efficacy of what he called “parchment barriers” to limits on governmental excess,107 and the disregard for the First Amendment certainly appeared to vindicate such skepticism.

Jeffersonians also argued that Article I of the Constitution did not affirmatively grant Congress the power to legislate on immigration (as opposed to naturalization of immigrants), thereby making the Alien Act unconstitutional insofar as Congress authorized the President to expel aliens from states with which the United States was at peace.108 One obvious possibility was that Republicans, after having lost the struggle in Congress and the White House, would head to the nearest federal court and seek a declaration that

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104. See Crusto, supra note 103, at 520.
the Acts were void. Such action is undoubtedly the first idea that occurs to most Americans today when the national government does something they find objectionable. So why did Virginia and Kentuck not simply file suit?  

Some technical aspects of late eighteenth-century law may help to provide part of the answer. After all, federal courts did not have general federal-question jurisdiction until 1875, and the Supreme Court did not accept the ability of courts to issue declaratory judgments until the twentieth century. To be sure, constitutional attacks on the validity of the Sedition Act were put forth in some of the criminal trials brought against purported seditionists. However, those challenges did not fare very well, being brushed aside by Federalist judges who would have gladly voted for the legislation and who saw no constitutional problems with the Act at all. But in The Virginia Report, the relatively temperate James Madison—at least when compared to Jefferson—provided a more profound, perhaps troublesome, answer to the question about the wisdom of relying on federal courts. Part of the argument adverts to what I sometimes call the “metaphysics of Union”—that is, the assertion in both the Kentucky and Virginia Resolutions that:

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112. See, e.g., Lyon’s Case, 15 F. Ca. 1183, 1185 (No. 8640) (C.C.D. Vt. 1798) (providing example of a criminal defendant charged with violating the Sedition Act attempting to challenge the Act’s constitutionality).  
[The Union was a] compact, to which the states are parties, as limited by the plain sense and intention of the instrument constituting that compact . . . . [I]n case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states . . . have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights, and liberties appertaining to them.115

The States themselves are entitled to exercise these rights because:

[T]here can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated; and, consequently, that, as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition.116

But is not the Supreme Court—perhaps even any federal court—a “tribunal above their authority”? For Madison, the ultimate response is that Virginia’s fear of usurped power extended beyond Congress or the Executive; “the judicial department also may exercise or sanction dangerous powers beyond the grant of the Constitution.”117 Therefore, “the ultimate right of the parties to the Constitution, to judge whether the compact has been dangerously violated, must extend to violations . . . by the judiciary, as well as by the executive, or the legislature.”118

Thus, even if Madison concedes that

the judicial department, is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort, this resort must necessarily be deemed the last [only] in relation to the authorities of the other departments of the government; not in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated trusts. On any other hypothesis, the delegation of judicial power would annul the authority delegating it; and the concurrence of this department

115. Id. at 190 (emphasis omitted).
116. Id. at 192 (emphasis added).
117. Id. at 196.
118. Id.
with the others in usurped powers, might subvert for ever, and beyond the possible reach of any rightful remedy, the very Constitution which all were instituted to preserve.119

The central premise of Madison’s classic argument in *Federalist No. 51* is that persons will develop loyalties to their own institutions.120 The “ambition[s]” that will “counteract ambition[s]” are not merely individual; rather, members of the House, Senate, or Executive will become committed to maintaining the prerogatives of their respective institutions.121 Interestingly enough, Madison did not discuss the judiciary in his essay, but in *The Virginia Report*, he seems to suggest that national judges—whatever their background or presumptive commitment to the law—will almost invariably develop commitments to enhancing the power of their institution, which is not only the judiciary but also the full panoply of national institutions.122 As Charles Black suggested a half-century ago, *M'Culloch v. Maryland*123—the subject of an important book by University of Arkansas Professor Mark Killenbeck124—is far more important than *Marbury v. Madison*125 precisely because *M'Culloch*—as is true of the overwhelming majority of Supreme Court decisions involving contests over the extent of national powers—legitimizes national authority and diminishes assertions of state autonomy.126 *M'Culloch* is the classic “two-fer.” Not only does the Court acknowledge Congress’s power—however unspecified in the Constitution—to charter the Bank of the United States, but also, just as importantly, the Court tells Maryland that the

119. THE VIRGINIA REPORT, supra note 114, at 196 (emphasis added).
120. See THE FEDERALIST NO. 51 (James Madison).
121. See id. at 268 (James Madison) (George W. Carey & James McClellan eds., 2001).
123. 17 U.S. (4 Wheat.) 316 (1819).
125. 5 U.S. (1 Cranch) 137 (1803).
State cannot exercise its power of taxation as it wishes, that is, to cripple the Bank.\footnote{127}

Most of us, I dare say, support both aspects of Marshall’s great opinion, but that may be evidence only of the fact that we are, in effect, children of Marshall who have been taught to find his interpretations almost self evidently true. But that is not the case, although this may be difficult to realize because of Marshall’s most systematic victory in at least the first two decades of his reign as Chief Justice—the elimination of so-called “seriatim” opinions\footnote{128} in favor of single opinions issued in the name of “the Court,” ideally with neither dissents nor concurrences.\footnote{129} Viewing Justice Marshall as the disinterested “umpire” of the federal system, in the absence of vigorously dissenting opinions, is far easier.\footnote{130} One can be certain, though, that neither Jefferson nor Virginia Judge Spencer Roane would have accepted Marshall as a neutral “umpire” anymore than Arkansans would accept referees selected by the University of Texas should those two great schools meet again in one or another sport. Interestingly enough, some analysts identified with the “new conservatism” within constitutional law are increasingly willing to admit their hostility to central aspects of Marshallian jurisprudence as set out in \textit{McCulloch}.\footnote{131} In this regard, one might cite Chief Justice Roberts’s attempt to

rein in the Necessary and Proper Clause as the constitutional foundation for Obamacare, which I thought, and still believe, made Sebelius an “easy” and, perhaps, even “frivolous” case.

Even if we grant a full measure of attention to the conservatives who dominate the current Court, one must recognize that they have scarcely acted as a unified phalanx with regard to protecting assertions of state power. Consider only the string of cases limiting states’ capacities to award punitive damages. Certainly no federal statute claims supremacy, nor does the Constitution explicitly limit state power in this regard. For Justice Scalia, the lack of federal law in this area is sufficient to uphold state power. Yet Scalia is generally in dissent, usually with more liberal colleagues, because his conservative colleagues prefer to read the Constitution as protecting business corporations against presumptive overreaching by juries, rather than as upholding the ability of states to structure their tort systems, including awarding damages however they wish. But of course, Scalia himself broke Randy Barnett’s heart in Gonzalez v. Raich by ruling against Angel Raich—and the ability of California to protect medical marijuana from national prohibition—and in favor of the comprehensive national program of drug control. Interestingly enough, Alabama, among other states, submitted an amicus brief supporting California’s autonomy, even as it emphasized that it had no intention of emulating the Golden State’s latitudinarianism on drugs. However, national interests prevailed—either because that is simply the correct reading of the Constitution or, as Madison predicted, 

134. See, e.g., id. at 599 (Scalia, J., dissenting).
135. See, e.g., id. at 585 (majority opinion).
136. Randy Barnett is the attorney that brought the appeal in Gonzalez v. Raich, 545 U.S. 1 (2005), in which Justice Scalia authored a concurring opinion dealing with Barnett’s positions. Randy E. Barnett, Turning Citizens into Subjects: Why the Health Care Insurance Mandate Is Unconstitutional, 62 MERCER L. REV. 608, 613 (2011).
137. Gonzalez, 545 U.S. at 39-40 (Scalia, J., concurring).
139. Gonzalez, 545 U.S. at 32-33.
because the Supreme Court could not truly be trusted to keep the national government within the boundaries of assigned powers or to recognize the concomitant prerogatives of states.140

Still, one can easily read Madison as denying a state’s power to invalidate national law.141 “Interposition” can mean only that states—like any citizen—are free to articulate their views about the possible unconstitutionality of national laws and to attempt to generate a national movement to repeal those laws.142 An extremely interesting analysis by Professor Christian Fritz links Madison’s arguments to those set out by Alexander Hamilton in *Federalist No. 26*, where Hamilton described state legislatures as “jealous guardians of the rights of the citizens” that would exercise this guardianship by “sound[ing] the alarm to the people” should the national government overreach its limited powers.143 One could easily doubt whether Hamilton believed his own argument; and Hamilton certainly had little regard for state legislatures, as was also the case with Madison at the time of the Philadelphia Convention.144 But the 1788 text of *The Federalist* was written in the name of an abstract figure named Publius, and Hamilton and Madison’s views expressed in Philadelphia were unknown until the

142. One might imagine that such appeals would have received a receptive audience from a state’s senators, who were, after all, appointed by the state legislature and, according to at least some theorists of the time, expected—if not required—to submit to “instructions” from the appointing legislature.
publication of the relevant documents many years later. What is important, above all, was the placement of sovereign authority, relative to the national Constitution, in “the people of the ‘States,’” a conceptually different notion, incidentally, from the *legislatures* of the respective states.\(^{146}\)

The legislatures, of course, played no official role in ratifying the Constitution. Indeed, the Founding Fathers defined Article VII—in defiance of Article XIII of the Articles of Confederation—as a deliberate method of sidestepping the likely opposition of state legislatures and their leaders to the radical new document drafted in Philadelphia.\(^{147}\) At most, Fritz argues, the state legislature can serve a certain “Paul Revere” function, announcing to “‘the people’”—beginning with those from their own state and proceeding to the wider American community—that the national government has violated the Constitution and that a response is necessary.\(^{148}\) As Madison wrote late in life—when he was fending off suggestions that John Calhoun could legitimately view himself as a faithful adherent of the Virginia Resolution’s theory—the Resolution “was expressly *declaratory*, and proceeding from the Legislature only, which was not even a party to the Constitution, [and] could be declaratory of opinion only.”\(^{149}\) The elderly Madison—who would become the last surviving member of the Constitutional Convention\(^{150}\)—rejected unequivocally the proposition that a state, even if deemed “sovereign” a la *M’Culloch*,\(^{151}\) had the authority to invalidate a federal law, whatever one might think as to the merits of the state’s “declaration.”\(^{152}\)

Perhaps the best example of “nullification” as the result of *popular* sovereignty is “jury nullification.” Occasionally,
ordinary citizens serving on juries defy the legal instructions they receive from the judge in favor of invoking their own notions of popular justice.\textsuperscript{153} Consider, for example, Clarence Darrow’s defense of jury nullification regarding prohibition:

A small minority cannot nullify a law, but where a statute is considered tyrannical and unjust it always meets with protest. Refusal to be bound by it is such a protest. If protest is so great as to interfere with its enforcement by ordinary methods, it is plain that it has no place in the law of the land.\textsuperscript{154}

Darrow’s eloquence might be unpersuasive were he referring, instead, to the American South and the propensity of white juries to effectively nullify the enforcement of federal civil-rights statutes. Of course, that mix of responses attends any and all political processes.

As a practical matter, what has always defeated “nullification,” or particularly robust notions of “interposition,” is the difficulty of constructing a mechanism that would enable the doctrine to work with regard to legislation. Jury nullification has the benefit of focusing exclusively on what one might term discrete “retail” instances involving very specific individuals whose acquittals will have no formal precedential effect whatsoever—beyond, perhaps, sending a message to prosecutors about the potential futility of further prosecutions in the specific area.\textsuperscript{155} “Nullification,” however, generally suggests a far more “wholesale” perspective by which a law can be suspended with regard to all Americans (or, at least, all residents of a given state).

“Nullification” by the Supreme Court, for better or worse, has become an established part of the American political system, not the least because the Court, quite


\textsuperscript{154} Clarence Darrow, The Story of My Life 296 (1932).

\textsuperscript{155} See Conrad, supra note 153, at 96.
obviously, is a national institution that can be (relatively) trusted not to display merely parochial hostility to national legislation. Similarly, “nullification” by an Article V constitutional amendment is set out in the Constitution itself and relies—in fact overly relies—on the presence of supermajoritarian agreement that the measure is necessary. But Calhoun (or Calhoun’s would-be successor, Richmond journalist James Jackson Kilpatrick)—the intellectual leader of Virginia’s “resistance” to Brown v. Board of Education—certainly did not settle for the state’s relatively modest role as Paul Revere.

Instead, as Kilpatrick argued in his 1957 book, The Sovereign States, a state upset by what it deems overreaching by the national government “could invoke [its] inherent right” of interposition to “suspend the operation of a law they regarded as unconstitutional pending a decision by all the States in convention assembled.” Presumably, this right of interposition is the equivalent of granting an individual state the authority to issue an injunction against any federal law—including a decision of the United States Supreme Court—that it “regard[s] as unconstitutional” and which would remain in effect as long as it takes for “all the States” to assemble in a new national convention that would presumably consider the arguments presented by the state in question. Kilpatrick had immense intellectual influence on Southern segregationists—with whose racism and zealous desire to preserve white supremacy he fully shared—precisely because he had constructed a “nullification” theory that traced back to the sacred icons of Jefferson and Madison and precluded one from mentioning race while focusing instead on the rights of sovereign states within the American

156. See U.S. Const. art. V.
159. Id. at 179 (emphasis omitted). Kilpatrick is the subject of a recent book by William Hustwit. William P. Hustwit, James J. Kilpatrick: Salesman for Segregation (2013). As the subtitle suggests, no one should doubt that Kilpatrick, a thorough-going white supremacist, found “interposition” useful as a purported rationale for Virginia’s massive resistance against Brown v. Board of Education. See id. at 42.
Four states—Alabama, Florida, Georgia, and Mississippi—declared *Brown* “null and void, and the Mississippi legislature forbade public employees from complying with desegregation orders.”161 “If the states are to preserve their sovereignties,” declared Mississippi Representative John Bell Williams, “if they are to preserve the Constitution, they must interpose and declare the Black Monday decisions [i.e., *Brown* and *Bolling v. Sharpe*] to be illegal and invalid and of no force and effect.”162 By 1957, eight states had passed interposition resolutions.163 Therefore, no one can doubt that “interposition” became a force to be reckoned with politically during the 1950s. But recognizing that reality is very different from granting Kilpatrick’s (or Calhoun or Jefferson’s) notions any legal validity. Williams's assertion, to use a highly technical legal term, is crazy. No sane political system would place such power in a single state, or even a small number of states. This fact is quite different, incidentally, from arguing that Kilpatrick or others are crazy in suggesting the need for an alternative to the Supreme Court; this suggestion is just Madison in 1798. Imagine, for example, if the delegates to Philadelphia had established a “constitutional court,” composed of judges appointed by the individual states, who would adjudicate challenges brought by a state to any given federal law, which would, by stipulation, remain in force until final adjudication by the “constitutional court.” Indeed, such a proposal for a new “‘Court of the Union,’” consisting of fifty state judges, was proposed and debated at the annual meeting of the General Assembly of the States in December

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160. See HUSTWIT, supra note 159, at 42.
161. Id. at 63.
162. Id.
163. Id. One should differentiate these interposition resolutions—passed by state legislatures and often supported by state governors—with the interestingly different rhetoric adopted by the nineteen senators and seventy-seven national representatives who signed the so-called “Southern Manifesto” objecting to *Brown*. See Judith A. Hagley, Massive Resistance—The Rhetoric and the Reality, 27 N.M.L. REV. 167, 189 (1997). The Manifesto (whose signatories include Arkansas’s distinguished Senator J. William Fulbright) was far more moderate in tone and did not directly challenge judicial supremacy even as it suggested that the decision was incorrect and should be changed either by the judiciary itself or, if need be, by constitutional amendment. See Driver, supra note 93 (manuscript at 5, 7, 9).
Senator Strom Thurmond of South Carolina, the initial force behind the Southern Manifesto, introduced the proposal to the Senate in February 1963 as a potential constitutional amendment. One might well regard that proposal as a terrible idea, but it certainly is not “unthinkable” or unresponsive to the concerns expressed by Madison in 1798.

It is telling that Thomas Woods, the most active contemporary proponent of nullification—which he regards as a necessary mode of “resist[ing] federal tyranny”—simply asserts that “[w]e need an institutional structure in which another force in the U.S. [besides the Supreme Court] may say no after the federal government has said yes.” Thus, he suggests, “we might consider a second-best alternative [to nullification by a single state] whereby, say, a vote of two-thirds of the states could overturn a federal law.” This suggestion is, of course, precisely the “Repeal Amendment” being advocated by Randy Barnett and a number of conservative state officials. I have already indicated that I am opposed to that proposal, even though I would be sympathetic to a national referendum that could invalidate federal laws thought to be unconstitutional or—perhaps more importantly—unwise.

165. Driver, supra note 93 (manuscript at 2, 13).
166. See Swindler, supra note 164, at 11; see also CHIEF JUSTICE EARL WARREN, THE MEMOIRS OF EARL WARREN 311 (1977) (discussing the impact of the proposed amendment).
167. One might argue that such a proposal describes the European judicial system, where the European courts are very deliberately composed of judges from all of the constituent members. See LESLIE FRIEDMAN GOLDSTEIN, CONSTITUTING FEDERAL SOVEREIGNTY: THE EUROPEAN UNION IN COMPARATIVE CONTEXT 45 (2001). In turn, this structure might help explain why the decisions of the European courts have met significantly less resistance than was the case within the United States in its first six decades. See id. at 14.
168. Woods, supra note 72.
169. Id. at 128.
170. Id.
171. See, e.g., Randy E. Barnett, The Case for the Repeal Amendment, 78 TENN. L. REV. 813, 816 (2011) (advocating the Repeal Amendment, introduced into Congress, which would give states the power to repeal any federal legislation upon a two-thirds vote); see also supra notes 55-61 and accompanying text (discussing the proposed amendment and its recent revision).
To summarize this article thus far: Even if one recognizes, as does Professor Bodenhamer, that nullificationist arguments possess a certain logic, these arguments clearly run afoul of the most practical issues of implementation unless we reduce “interposition” to an appeal by a state that a total of two-thirds of the states exercise their undoubted Article V right to petition for a new constitutional convention. Of course, no constitutional problem arises from arguing that such a convention could rectify whatever outrage the initiating state has identified. In fact, I strongly support a new constitutional convention, though not because I am particularly worried about the national government overreaching against vulnerable states. Instead, I focus on the extent to which our byzantine eighteenth-century Constitution, written under a variety of fallacious assumptions, has resulted in a basically dysfunctional political system. I believe that the Constitution threatens to take us all over a cliff because of the increasing inability of the national government to respond adequately to almost any of the challenges that face us as a nation (where states are seemingly irrelevant). One virtue of a new convention would be the opportunity for a thorough discussion about the genuine meaning of a federal system in the twenty-first century and what kinds of institutions are best designed to implement that meaning. Still, I am well aware that such a convention has little support, and it must surely be depressing to a state upset by national policy that the answer to Lenin’s question—“what is to be done?”—is, basically, nothing.

Having disposed of the hopes and dreams of Debra Medina and various legislators in Idaho, Missouri, and elsewhere, we must now turn to Governor Rick Perry and the hundreds of thousands of Americans who signed

172. See Bodenhamer, supra note 76, at 71.
175. See V. I. Lenin, WHAT IS TO BE DONE? BURNING QUESTIONS OF OUR MOVEMENT (1929).
secessionist petitions following the 2012 elections. Is secession also dismissible with contempt as “zombie” or “dinosaur” constitutionalism, or is there something in such arguments that one should take more seriously than nullification?

III. SECESSION

Begin with the “simple” fact that the United States is rooted in secession from the British Empire, predicated on the claim and enunciated in the Declaration of Independence that all political legitimacy rests on the “consent of the governed.” As is common in the case of revolutionary movements, justifications for the initial revolution can become embarrassing should the revolution be successful and lead to the establishment of a new government. What if claims made to justify the revolution begin appearing even in the new post-revolutionary setting? Someone reading post-Revolutionary American history might even believe that secession is as American as apple pie. The most obvious example is Vermont, which representatives from the Grants region created in 1777 out of lands claimed from New York and New Hampshire. Precisely because Vermont was the product of de-facto secession, it was not recognized as a state at the time of the Constitutional Convention. Rhode Island was

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177. See David Armitage, Secession and Civil War, in SECESSION AS AN INTERNATIONAL PHENOMENON: FROM AMERICA'S CIVIL WAR TO CONTEMPORARY SEPARATIST MOVEMENTS 47 (Donald H. Doyle ed. 2010). Whether or not all independence movements by colonized peoples resisting control by an imperial power—e.g., those resisting British rule in India—are secession movements, I am fully confident using the term with regard to the American breakaway, given that most of the colonists were British subjects whom Britain had sent to the New World to settle it on behalf of their country. Had American Indians led the American Revolution, I would not be inclined to describe that as “secession.”

178. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).


unrepresented because it chose not to send delegates to Philadelphia.\footnote{181} Vermont, on the other hand, was unrepresented because, one suspects, had it sent any delegates to Philadelphia, they would promptly have been shown the door.\footnote{182} Vermont would enter the Union in 1791, but for the fourteen years between 1777 and 1791, it was an independent republic.\footnote{183} Professor Peter Onuf is worth quoting at length:

> Outside the union, Vermont could not make the kinds of claims to statehood so essential to the pretensions of the United States. Only in Vermont was the concept of a state as a self-constituted political community fully and radically tested against, rather than in tandem with, orthodox notions of legitimate state authority, premised on succession to the claims of colonial communities and recognized and guaranteed by other states in Congress. In this sense, Vermont was the only true American republic, for it alone had truly created itself.\footnote{184}

Christian Fritz notes that Vermont was unique in its success,\footnote{185} unless one views Kentucky as a secessionist breakaway from Virginia, Tennessee as seceding from North Carolina, or Maine as seceding from Massachusetts. But Fritz discusses other movements that only professional historians—and even then only a minority among them—will easily identify.\footnote{186} He refers to a variety of “American Determinist Settlements” in the 1770s and 1780s,\footnote{187} by which he is referring to groups of people who made arguments based on the right of “self-determination”\footnote{188} that presumably underlay the Declaration of Independence. Thus, Fritz writes that “[t]hroughout the revolutionary period, Americans developed forms of governance based on consent

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\footnote{181. See id.; see also WILLIAM G. MCLoughlin, RHODE ISLAND: A HISTORY 104 (1978) (discussing Rhode Island’s ratification of the Constitution in 1790).}
\footnote{182. See Onuf, supra note 179, at 797-98.}
\footnote{183. Id. at 797.}
\footnote{184. Id. at 815.}
\footnote{185. See FRITZ, supra note 62, at 60-61.}
\footnote{186. See id. at 49.}
\footnote{187. Id. at 50 (illustrating the “Selected American Determinist Settlements, 1770s–1780s”).}
\footnote{188. Id. at 49.}
\end{footnotesize}
and the people’s sovereignty.”189 Besides the “well-known statehood efforts of Vermont, Kentucky, and Maine,” there were also the decidedly “less well-known movements for the would-be states of ‘Westsylvania,’ ‘Transylvania,’ and ‘Franklin,’” as well as “the frequently overlooked efforts at self-government” that took place in the Wyoming Valley of Pennsylvania, Tennessee’s Cumberland Gap, and North Carolina’s Watauga River.190

A common trope of later political argument was that adoption of a given policy might threaten the maintenance of the Union, which, as the late Kenneth Stampp argued, suggested “the concept of a perpetual union” was somewhat fragile within American political thought, whatever one might believe were the intentions of those who wrote or ratified the Constitution.191 For example, Stampp describes Thomas Jefferson during his presidency as “view[ing] with equanimity the prospect of an eventual separation of the eastern and western states.”192 He quotes Jefferson’s statement: “‘God bless them both and keep them in the union if it be for their good, but separate them if it be better.’”193 Indeed, Stampp also quotes a future President—a “young” John Quincy Adams: “I love the Union as I love my wife. But if my wife should ask for and insist upon a separation, she should have it though it broke my heart.”194

Moreover, just as antebellum “nullificationists” existed on both sides of the political spectrum, one must recall that initial proposals for secession came from New Englanders distinctly unhappy about Jefferson and Madison’s policies

189. Id. at 48.
190. FRITZ, supra note 62, at 48-49.
193. Id.
194. Id. (internal quotation marks omitted).
toward Great Britain (and the ensuing War of 1812)—not to mention the flamboyant call by the great abolitionist William Lloyd Garrison for “NO UNION WITH SLAVEHOLDERS!” 195 Thus, the 1843 gathering of the Massachusetts Anti-Slavery Society resolved that “the compact which exists between the North and the South is ‘a covenant with death, and an agreement with hell’—involving both parties in atrocious criminality; and should be immediately annulled.” 196 As Professor Mark Brandon writes, in the aftermath of the Mexican War, “Garrison intensified his disunionist position in the most impassioned terms.” 197 Garrison, not one of the fire-breathing South Carolinians, publicly burned the Constitution in 1854 and then proposed a “National Disunion Convention” in 1857. 198 We should ponder Professor Brandon’s comment that “[h]ad New England seceded, forming a slaveless commercial republic, or had the Garrisonians persuaded the North and the West to secede and establish a new republic of free citizens, we might now view secession as an institution of liberty and righteousness” instead of automatically identifying the impulse with the preservation of chattel slavery. 199

Returning to actual, rather than counterfactual, American history, we should recall that Texas—the precipitating excuse for Polk’s expansionist “war of choice” with Mexico200—is the result of a successful secession from Mexico. 201 Moreover, West Virginia joined the Union in 1863 as a result of an arguably constitutional secessionist

196.  Id.
197.  Id.
198.  Id.
199.  Id. at 198-99.
200.  See CHARLES SELLERS, JAMES K. POLK: CONTINENTALIST, 1843–1846, at 419 (1966) (describing the passage of a war bill as demonstrating President Polk’s “ability to compel a reluctant Congress to support a jingoistic foreign policy”).
201.  See Andrés Reséndez, Texas and the Spread of That Troublesome Secessionist Spirit Through the Gulf of Mexico Basin, in SECEDION AS AN INTERNATIONAL PHENOMENON: FROM AMERICA’S CIVIL WAR TO CONTEMPORARY SEPARATIST MOVEMENTS 193 (Don H. Doyle ed., 2010) [hereinafter SECEDION AS AN INTERNATIONAL PHENOMENON].
withdrawal from Virginia. There has, of course, been no successful secessionist movement within the United States since 1863—though the notion, or fantasy, of secession has continued to inspire a variety of groups. Indeed, five Colorado counties voted in November 2012 to secede from Colorado (a vote, needless to say, with no actual legal effect). The Colorado would-be secessionists are not alone, even if they are the only ones who have actually held a referendum on the issue.

A 2013 article in the New Republic drew a map of “The 61 States of America,” based on the obviously “bizarro” notion that those groups within the existing fifty states calling for “state partition” would be successful. As one might expect, many of these movements occur in California, our nation’s longest state. For example, a movement sparked by inhabitants of sparsely populated northern counties, frustrated about their ostensible lack of representation in the contemporary California legislature, sought to create a new state of “Jefferson.” In December 2013, Tim Draper, described as a “leading venture capitalist,” released a plan to divide California into six new states, one of which would be a metaphorical Silicon


203. See, e.g., Manny Fernandez, supra note 176 (discussing the secessionist movement after President Obama’s reelection).


207. See JEFFERSON DECLARATION, http://jeffersondeclaration.net (last visited Jan. 18, 2014). I am extremely grateful to Los Angeles Times reporter Leora Romney for informing me about the existence and politics of this movement, which dates back to efforts in 1941 to form a new state out of far northern California counties and several southern Oregon counties.

And ever-more-libertarian techies are apparently attracted to visions of creating an autonomous polity free of present encumbrances altogether. Indeed, the New York Times story describing Draper’s initiative notes that Peter Thiel, another venture capitalist, has “floated the idea of independent seaborne nations somewhere off the coast of San Francisco.”

No one will be surprised that Texas possesses its own Texas Nationalist Movement. What may be far more surprising is that “perhaps the foremost active secessionist organization in the country” is the Second Vermont Republic (SVR). This group has, if not a sacred text, at least a serious tract written by Thomas H. Naylor, a long-time professor at Duke University who retired to Vermont. In 2005, the State gave the SVR permission to hold a convention in the Vermont State House (one can only imagine the national response if a similar event occurred in Texas), which passed a resolution that “the state of Vermont peacefully and democratically free itself from the United States of America and return to its natural status as an independent republic as it was between January 15, 1777 and March 4, 1791.” A number of candidates have run for state office on secessionist platforms. A candidate for lieutenant governor received almost 5% of the vote.


211. Streitfeld, supra note 208.


216. Davis, supra note 213.

217. Id. (“In 2010, nine Vermonter ran for state political office—including for governor and lieutenant governor—on a secessionist platform.”).

218. Id.
though the most “successful” candidate was a 19-year-old undergraduate student “who received 14 percent of the vote for a seat in the state house of representatives.”  A recent book, *Most Likely to Secede*, offers many articles taken from a journal devoted to the secessionist cause.

Immediately after the 2012 election, thousands of Americans from a variety of states petitioned the White House for permission to withdraw from the Union. The petitions followed a common form, requesting that the United States “[p]eacefully grant the State of [X] to withdraw from the United States of America and create its NEW government.” These petitions drew over 675,000 signatures from across the nation, including 26,104 from South Carolina and 125,746 from Texas. The White House pledged to reply to any petition signed by over 25,000 Americans. Although persons from all fifty states submitted petitions, only the residents of nine reached the magic number of 25,000 signatories; incidentally, and perhaps not surprisingly, these nine states had also attempted to secede in the early 1860s. Among the former members of the would-be Confederate States of America,

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223. Martosko, *supra* note 221.


only Arkansas, Mississippi, and Virginia failed to reach the required number.\footnote{See id.}

In any event, the White House did indeed respond. After a statement celebrating freedom of speech in America, the official White House response cited both Abraham Lincoln and the Supreme Court decision \textit{Texas v. White}\footnote{74 U.S. (7 Wall.) 700, 725 (1868).} for the proposition that the Constitution establishes a perpetual Union and, therefore, does not countenance the possibility of secession.\footnote{See Carson, supra note 222.} The response noted: “Although the founders established a perpetual union, they also provided for a government that is, as President Lincoln would later describe it, ‘of the people, by the people, and for the people’—\textit{all} of the people. Participation in, and engagement with, government is the cornerstone of our democracy.”\footnote{Id.}

Worth mentioning is the response to secessionist argument of my friend and distinguished historian, Paul Finkelman. Finkelman asserts: “That the Constitution was not a treaty, and therefore presumably one signer could bail out of the treaty, [] was decided quite decisively, by the case of \textit{Grant v. Lee}, argued at Appomattox Courthouse in 1865,” where Confederate General Lee surrendered to the Union after his contention “that his state and others were free to pull out of the [Constitution].”\footnote{Sanford Levinson, “Perpetual Union,” “Free Love,” and Secession: On the Limits to the “Consent of the Governed”, 39 TULSA L. REV. 457, 460 (2004) (quoting E-mail from Paul Finkelman, Capman Distinguished Professor of Law, Univ. of Tulsa Coll. of Law, to CONLAWPROF@listserv.ucla.edu, Re: Just for Laughs (Aug. 7, 2003) (copy on file with Tulsa Law Review)). In further correspondence, Finkelman asserted that “any doubt[s] were resolved in two court cases: \textit{Grant v. Lee} (Appomattox Courthouse, 1865) and \textit{Texas v. White}. E-mail from Paul Finkelman, President William McKinley Distinguished Professor of Law & Pub. Policy & Senior Fellow, Gov’t Law Center, Albany Law Sch., to Sanford Levinson, W. St. Garwood & W. St. Garwood, Jr. Centennial Chair; Professor of Gov’t, Univ. of Tex. Sch. of Law (July 10, 2013, 5:03 PM) (on file with author).}

Respectfully, I do not know why anyone would regard Finkelman’s assertions as knockdown arguments to anyone who is genuinely committed to the potential desirability of secession, whether in Vermont or Texas. \textit{Texas v. White}\footnote{74 U.S. (7 Wall.) at 725 (“The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states.”).}
merely rejects the arguments presented by Madison in 1798 about why the Supreme Court should not be the Constitution’s definitive interpreter, to use the Court’s concept adopted in *Cooper v. Aaron*. Moreover, as Mark Brandon has well argued, because “*Texas v. White* was an attempt to reconcile Lincoln’s theory of Union with the Radical Congress’s policy of Reconstruction,” it is “fundamentally incoherent” and, therefore, “of little value” as anything other than a brute precedent for the sheer assertion that the Union is indissoluble. Invoking Appomattox, as Finkelman does, may be determinative in terms of explaining why the prospect of unilateral secession, at least within the United States, is a decided non-starter. Should the national government decide to use force to prevent secession—again, it does not matter whether we are talking about Vermont or Texas—there is no doubt who would prevail, and it would not take four years to do so. But to treat this fact as an argument of philosophical principal, or of law, is simply to embrace a version of “might makes right.” Most of us reject the argument initially made by Thrasyvachus that justice is the interests of the stronger, even if we regretfully agree that a given society’s notion of justice may well reflect the highly self-interested views of powerful elites or, occasionally, mass movements.

Even more likely is that “law” declared by judicial elites will reflect elite views, but ironically or not, lawyers and law professors like to assert that law and legal reasoning offer an alternative to resolving disputes through violence. However, Chairman Mao Tse-tung, who famously said that “[p]olitical power grows out of the barrel of a gun,” would disagree. We would like to think that Mao’s statement is not completely true; even more so, we generally wish to deny that law is best explained by who has the guns. But we are, of course, assuming that unilateral attempts at secession would necessarily be met with resistance. Indeed, at least

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one study of the international law concerning secession seems to build resistance by the larger state entity into the very definition. Thus, Professor Marcelo Kohen writes: “The lack of consent of the predecessor State,” commonly reflected by forcible attempts to stifle the secessionist movement, “is the key element that characterizes a strict notion of secession.” Otherwise, he suggests, we should refer instead to “devolution.”

I am not an international lawyer, and perhaps experienced international lawyers do distinguish between secession and devolution on the basis of whether the event—in either case, the creation of at least two states where only one existed before—was consensual or the result of violent struggle. From this perspective, Slovakia did not secede from the former Czechoslovakia, nor did the former Soviet Socialist Republics secede from the USSR. But frankly, why should anyone not confined within the limits of positive international law be constrained to adopt such a distinction? Consented-to divorce is still divorce—even if sometimes described as an amicable divorce, distinguished from more acrimonious episodes of marital dissolution. Still, we do not require the occurrence of bitter conflict that often occurs between the two spouses to recognize that a divorce has occurred. Why should the requirements for secession be any different?

Secessionist arguments raise important theoretical—and sometimes legal—issues that one cannot dismiss in the way that he or she can dismiss nullificationist arguments. One reason, incidentally, is that one cannot ascribe secession, unlike nullification, to “American exceptionalism.” John C. Calhoun and his contemporary devotees may be truly “only in America” characters. One

238. Id. (emphasis added).
239. Id.
240. See, e.g., O’Neal v. O’Neal, 17 So. 3d 572, 575 (Miss. 2009) (describing the process of a consented-to divorce).
241. See, e.g., id.
242. One must read the sentence in the text against the remarkably illuminating comment by University of Toronto Professor Ran Hirschl, who is truly one of the world’s ranking experts on comparative constitutionalism. Hirschl writes:
has difficulty believing that any foreigner not particularly interested in American history would find Calhoun or Kilpatrick worth reading in terms of any wisdom they might convey. Rightly or wrongly, people would view them as desperate defenders of slavery and its successor, segregation, and not otherwise take them seriously.

But this surely is not true about secession. Consider only the title of an excellent collection of articles edited by University of South Carolina Professor Don H. Doyle:

Well, it seems to be one thing to have nullificationist procedures formally written into a constitution (say veto mechanisms in consociational settings, see below), and another to raise such arguments in the heat of debate when a court decision x or statute y is not to one’s liking. Either way, there is certainly an exclusively American undertone to nullification arguments but one can think of arguments and procedures that come close elsewhere. In Canada, nullification arguments are made occasionally, not always in the “notwithstanding” context (by which laws become immune against Charter-based judicial review). For example, Newfoundland, British Columbia and Alberta raise arguments of that nature from time to time in the context of allocation of natural resource revenue allocation. In 2004, a Texas-style “flag flap” occurred in Newfoundland and Labrador when the premier removed all Canadian flags from government buildings and raised provincial flags instead, on the heels of a dispute over oil fields revenues. Nullificationist and secessionist arguments are increasingly common in oil-rich sub-national units in Angola, Nigeria, Bolivia and Ivory Coast, calls for not transferring moneys to the center, etc. There are strong nullificationist voices in several Mexican states with respect to abortion and gay marriage, and a vociferous debate in several Indian states with respect to the supremacy of Hindu culture regardless of what the center says.

With respect to formal rules, there are nullificationist procedures written into several consociational constitutional pacts, for example in Bosnia & Herzegovina with respect to the Serb enclave (Republica Srpska), Aceh province (Indonesia) with respect to Islamic law, in Macedonia (the Ohrid agreement), and recently in a deal between the government of the Philippines and the Muslim enclave Bangsamoro. And there are also interesting “opt-out” options in Canada in case sub-national units are willing to forgo federal funding and go their own way on a particular matter/policy.

It may be safer to restate your point by stating that the magnitude, national exposure and persistence of nullificationist arguments in the U.S. are uniquely American; in no other place arguments of that nature have repeatedly become a matter of serious debate beyond the directly involved units.

E-mail from Ran Hirschl, Professor of Political Sci. & Law, Univ. of Toronto, to Sanford Levinson, W. St. Garwood & W. St. Garwood, Jr. Centennial Chair; Professor of Gov’t, Univ. of Tex. Sch. of Law (Aug. 26, 2013, 2:40 PM) (on file with author). To put it mildly, I am immensely grateful to Professor Hirschl for his learning.
Secession as an International Phenomenon. Two points are important to make. The first point is a crucial, perhaps even determinative, difference between secession and revolution. We refer to our forefathers as “revolutionaries,” and we celebrate their success every July 4. But in one extremely important sense, they were not “revolutionaries” at all. After all, they had no desire to invade London and replace the presumptively oppressive government of his Majesty King George III with a new republican form of government elected by a newly sovereign people. That desire—and the execution of King Charles—was what made those who rallied around Cromwell a century before genuine revolutionaries. In contrast, the people we call American revolutionaries were satisfied to expel King George’s emissaries (and those colonists who were loyal to the King) and to destroy a number of statues of the King. But King George remained on the throne, and John Adams—our first ambassador to the Court of St. James—certainly recognized him without controversy as the lawful Monarch of Great Britain. For better or worse, people throughout the world, especially in the United States—at least as measured by the response of People Magazine and other celebrity-oriented magazines—recently celebrated the birth of the presumptive future Monarch in the still non-republican Great Britain.

The only secessionist movement most Americans ever think about is the one that resulted in the conflagration of 1861–1865. This unfortunate truth not only blinds us to other aspects of our national and local history that require confronting the reality of secessionism, but it also reveals our continuing parochialism vis-à-vis the rest of the world, where secessionist movements are, for better and for worse, not merely “theoretical”—as they are in the United States—but

243. Secession as an International Phenomenon, supra note 201.
very real. Almost certainly, the most significant—and unpredictable—political event in the last fifty years was the dissolution of the Union of Soviet Socialist Republics (USSR) through the secession of the constituent republics within the Union. For what it is worth, secession was a legally recognized possibility under Article 72 of the oft-derided Soviet Constitution,248 and one can speculate whether that legal possibility, however unlikely it seemed prior to 1989, played at least a minor role in the astoundingly peaceful dissolution. A far less happy example of secessionism occurred in the former Yugoslavia, and the subsequent history of that unhappy region includes not only the dissolution of that country but also the secession of Kosovo from Serbia.249 Furthermore, consider not only that Scotland will be holding a referendum in 2014 on whether to withdraw from the United Kingdom—itself a creation of the 1707 Act of Union250—but also that the United Kingdom itself may move to a national referendum on whether to withdraw from the European Union.251 Finally, Catalonia is experiencing a serious secessionist movement; and whether Belgium—created in 1830 out of France—will maintain itself as the country we now know is certainly an open question.252

Recall that Norway was created only in 1905, as the result of a peaceful secession from Sweden.253 Not at all coincidentally, a recent article on that Scandinavian episode asks explicitly what lessons one might learn relative to the

248. KONSTITUSIIA SSSR, § III, ch. 8, art. 72 (1977) [KONST. SSSR] [USSR CONSTITUTION], available at http://www.departments.bucknell.edu/russian/const/77cons03.html.


ongoing desire by many, though not yet a majority, living in Quebec to secede from Canada. Should a majority of Quebecers ever agree with the Quebecois Party that the province ought to secede, an endlessly fascinating decision of the Canadian Supreme Court suggests that the national government would be, at least, under a duty to take the request seriously and to negotiate with the secessionists, even if the decision denies the validity of unilateral secession. As we move elsewhere around the contemporary world, it would not be completely surprising if Syria ultimately broke down into a number of separate enclaves organized around ethnic lines, nor would it be surprising if one consequence of the Syrian debacle—which includes many Syrian Kurds fleeing to the part of Iraq controlled by Kurds—is ever greater pressure for what is now the Kurdish province of Iraq to proclaim its entirely separate identity as an independent country. Indeed, as I am engaging in the final preparation of this Article for publication (in March 2014), the leading story around the world is what appears to be the almost certain secession (or, if one prefers, forcible transfer) of the largely ethnically Russian territory of Crimea from Ukraine (to which it was apparently given by Premier Nikita Khrushchev in 1954) to Russia.

The secessionist movements around the world raise the second important point: Some of those secessions were peaceful, which by definition means that those ruling the

254. See id.
country from which secession occurred chose not to resist. Perhaps we might refer to these peaceful dissolutions as de-facto “bilateral secession” or, in the alternative, as a simply nonviolent acquiescence to “unilateral secession.” In addition to the examples given above, consider the dissolution of Czechoslovakia into the new separate countries of Slovakia and Czech Republic. Indeed, even with regard to Yugoslavia, think of the remarkable difference between the altogether peaceful creation of the breakaway country of Slovenia and what happened with regard to the other constituent provinces that formerly existed within the country.

John Quincy Adams’s analogy between secession and a marital partner’s request for a divorce has become a standard trope. Thus, President-elect Abraham Lincoln, while travelling from Springfield, Illinois, to Washington, D.C., for his inauguration, used this analogy in a speech in Indianapolis on February 11, 1861. He derided the secessionist argument in the following way: “In their view, the Union, as a family relation, would not be anything like a regular marriage at all, but only as a sort of free-love arrangement—[laughter]—to be maintained on what that sect calls passionate attraction. [Continued laughter].” This analogy is no laughing matter unless we view it as an example of “gallows humor.” How many of us in the twenty-first century identify Lincoln as against John Quincy Adams? That is, do we maintain a view of “regular marriage” that precludes divorce, particularly if “passionate attraction” has disappeared and been replaced by what an aggrieved spouse views as exploitation? There is a reason, after all, why most states over the past half-century have

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263. Id. (internal quotation mark omitted).
adopted forms of “no-fault” divorce that serve to encourage “amicable” divorces.\textsuperscript{264} Even if one of the partners refuses to consent—perhaps because no genuinely offensive misconduct has occurred—contemporary American states will recognize the reality of marital breakdown and, thus, practically support, based on the logic of individual consent, what might be termed “unilateral secession” from the marriage.\textsuperscript{265}

In many instances of divorce, one may need to ask the questions, “but what about the children” or “what are the economic consequences for the more vulnerable of the two spouses”? Divorce rarely affects only the two primary people.\textsuperscript{266} As my friend Jack Balkin suggested in responding to an earlier draft of this article, the equivalent of “the children” or of “the feminization of poverty” that has become the reality of many abandoned ex-wives is the fate of various groups within a seceding territory who may not share the views or aspirations of the seceding majority and who are distinctly worse off in the new independent country than in the older version of the polity. Anyone familiar with the Civil War is aware of the “Free State of Winston,” an upper-state county in Alabama—very different from the plantation and slavery-dependent lower-state—that had no desire to leave the Union and, instead, tried to leave Alabama.\textsuperscript{267} Somewhat less well-known is the apocryphal “Republic of Jones” in northern Mississippi, another bastion of pro-Union sentiment.\textsuperscript{268} Perhaps more seriously, anyone thinking of the realities of Quebec seceding from Canada must address the reality that not only Anglophones, but also hosts of “First Peoples,” have no desire to live in a country dominated by Francophone nationalists.\textsuperscript{269}

\textsuperscript{266} See Allen M. Parkman, Reforming Divorce Reform, 41 Santa Clara L. Rev. 379, 398 (2001).
\textsuperscript{267} See, e.g., Don Dodd & Amy Bartlett Dodd, The Free State of Winston 7 (2000).
\textsuperscript{268} See Brandon, supra note 195, at 185-86.
\textsuperscript{269} National Self-Determination and Secession 152 (Margaret Moore ed., 1998).
Still, recognizing the reality of vulnerable children and the dire fate of some former spouses is surely not enough for most of us to oppose a state-provided system of divorce and to prefer a notion of marriage that necessarily lasts until death parts the particular couple.\textsuperscript{270} For that matter, little real support seems to exist for a return to more stringent requirements before a state will grant a divorce.\textsuperscript{271} Our society seems committed to reinforcing values underlying individual autonomy and, thus, allowing individuals to live out their own visions of what is necessary for self-realization—even if the policies protecting such values inevitably bring costs as well as benefits.

Of course, no international court can issue authoritative commands with regard to the legitimacy of secessionist movements or the treatment of dissenting groups within the territory.\textsuperscript{272} However, as Professor Bridget Coggins has recently argued, the alternative to a court is what she calls “friends in high places”—that is, the willingness of significant members of the international political community to recognize a breakaway country.\textsuperscript{273} We might even compare such recognition to common post-divorce decisions by friends of the former couple who must, in effect, declare loyalties regarding incompatible claims of the now-divided partners. We must never forget, for example, that French recognition of American secessionists was absolutely critical to the success of the colonists’ attempt to win their independence from British rule.\textsuperscript{274} Similarly, the inability of the Confederate States of America to gain all-important

\footnotesize\begin{itemize}
\item \textsuperscript{270} See Lynn D. Wardle, Divorce Reform at the Turn of the Millennium: Certainties and Possibilities, 33 Fam. L.Q. 783, 786 (1999) (“76 percent of those polled agree . . . that divorce is acceptable at least sometimes . . . .”).
\item \textsuperscript{271} See Parkman, supra note 266, at 398.
\item \textsuperscript{272} But see Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 452-53 (July 22), available at http://www.icj-cij.org/docket/files/141/15987.pdf (upholding right to issue a declaration of independence); see also James Ker-Lindsay, Preventing the Emergence of Self-Determination as a Norm of Secession: An Assessment of the Kosovo ‘Unique Case’ Argument, 65 Europe-Asia Studies 837, 852 (2013) (discussing the ICJ advisory opinion’s proclamation).
\end{itemize}
recognition from the United Kingdom helps explain why the Confederacy failed.275

In any event, these various examples emphasize the importance of onlooking audiences—whether courts, other countries, or even the “court of public opinion.” What kinds of arguments sway such audiences? Perhaps for courts, the answer must be “legal arguments”; and formal law, as the creation of established states, is undoubtedly unsympathetic to secession.276 But exceptions exist, including the former Soviet Union,277 or, for that matter, the Constitution of the Socialist Federal Republic of Yugoslavia, which listed as one of its “basic principles” the proposition that “‘[t]he nations of Yugoslavia, proceeding from the right of every nation to self-determination,’ possesses ‘the right of secession’”278

Another possible exception—as with the United States or South African Constitutions—is deafening silence about the very possibility of secession.279 Surely, though, legal formalities are not determinative in deciding how to allocate our own sympathies toward secessionist arguments. I strongly suspect that even if our own opinions differ with regard to the examples proffered above, no one reading this article adopts, as a decision rule, the principle of opposition to all secessionist movements. Such a principle would not only betray the origins of the United States284—and at least

275. See Thomas H. Lee, The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal for Modern Transformations, 53 St. Louis U. L.J. 53, 61 (2008) (“If Great Britain . . . were to recognize the Confederate States . . . then they might be more inclined to give them military and economic assistance in their conflict with the Union.”).


277. See USSR Constitution, supra note 248.


two of its states—285—but it would also make illegitimate many members of the contemporary United Nations.286 Can one really disagree with Professor Brandon’s assertion that “secession—the separation of a geographically coherent unit from what had previously been a ‘whole’—is sometimes a plausible strategy for an alienated minority and a plausible national solution to problems of social, economic, and political stress”?287

Indeed, Professor David Armitage begins an extremely valuable article on the formation of states by noting:

For the past two centuries, state breaking has been the primary method of state making around the world. More than half the states currently represented at the UN emerged from the wreckage of colonial empires [like the United States], the collapse of multinational federations, or the fission of existing states.288

Thus, Armitage observes, there were only fifty-one states within the international system in 1945 and 192 in 2010.289 Professor Kohen further clarifies this statistic: “The growth of UN membership from its original 51 member states in 1945 to 149 in 1984 was essentially due to decolonization,”290 where the presumption of the international community—and often even of the colonial power—was the illegitimacy of continuing imperial rule and the concomitant recognition of independence of the colonies in question. On the other hand, “[t]he increase in this figure

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287. BRANDON, supra note 195, at 168.
288. David Armitage, Secession and Civil War, in SECSSION AS AN INTERNATIONAL PHENOMENON, supra note 201, at 37.
289. Id.
from 151 in 1990 . . . has been essentially due, broadly speaking, to secession.”

Thus, placing secession and its proponents in the same cages reserved for zombies or dinosaurs seems foolhardy. Professor Christopher Wellman is arguably the leading contemporary “pro-secession” philosopher, inasmuch as he takes with consummate seriousness the arguments on behalf of political self-determination. Thus, Wellman places the burden of persuasion on those who would prevent such efforts. In particular, he argues that there is a presumptive moral right to self-determination, but since realizing this right in a world where all the land is already taken generates obvious difficulties, the presumption is subject to being overridden. Still, “the burden of proof to establish the empirical fact of the matter lies squarely on the shoulders of those who would restrict these moral rights and . . . it would not be sufficient to show that there is merely a slight advantage in favor of restricting these rights.” I agree with Wellman’s assertion, at least so long as one recognizes the potential force of what Balkin referred to as the “what about the children” or fate-of-the-left-behind-spouse arguments.

As Wellman and his distinguished predecessor in taking secessionist arguments seriously, Allen Buchanan, both emphasize, secessionist arguments almost invariably take one of two forms, both found in our Declaration of Independence. One form is to emphasize the right to “consent of the governed.” The other form is to focus on the oppression being visited upon those seeking independence. These two forms are obviously connected whenever a group points out that it certainly has not, and would not, consent to its own subordination and oppression.

291. Id.; cf. supra note 177 and accompanying text (discussing the arguable distinction between the American Revolution and the Indian independence struggle as “secessionist” movements).
292. Christopher Wellman, The Morality of Secession, in SECESSION AS AN INTERNATIONAL PHENOMENON, supra note 201, at 34.
293. See id.
294. Id.
295. See Buchanan, supra note 261, at 4, 6; Wellman, supra note 292, at 20.
296. Buchanan, supra note 261, at 4; see also Wellman, supra note 292, at 20.
297. Buchanan, supra note 261, at 4, 6; see also Wellman, supra note 292, at 20 (noting that states lose claim to their territory once “their citizens become the victims of injustice”).
But what if one is not convinced of these claims? Does support for American secession in 1776 depend on agreeing that King George and his minions inflicted a long train of abuses on brave colonists who were, in effect, forced to join the insurgency against their oppressors, or is it sufficient to believe that even if King George had been, like Frederick the Great, a “benevolent despot[,]” that fact would have been irrelevant? The answer to this question may depend on how one inflects the ending to the Gettysburg Address, where Lincoln speaks of “government of the people, by the people, for the people.” One should recognize, incidentally, that the begged question within the Lincolnian formulation is who precisely constitutes “the people,” which is almost invariably a contested question in any serious secessionist movement.

Even if we dismiss this all-important question of deciding “who counts” as “a people,” Lincoln’s maxim still leaves us with a number of problems. A truly benevolent despot surely meets the condition of governing for the people, and an entrenched, non-aristocratic oligarchy, indeed a tyrant, can easily claim to be of the people. Only those who give full weight to the requirement of government by the people will be fully attentive to constructing robust mechanisms of continuing consent and possess the concomitant ability to throw the rascals out should popular consent be withdrawn. But one might well believe that even more than notional consent at regular elections is necessary and, therefore, adopt a civic republican emphasis on engaged citizenship, going well beyond casting an occasional vote. Consider Justice Brandeis’s classic opinion in Whitney v. California:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary . . . .

They believed . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. 301

An obvious question then becomes what is necessary to constitute a “non-inert people.” To frame this question within the language of the Constitution, what precisely is the “Republican Form of Government”302 that the Constitution ostensibly guarantees to all citizens—at least of the states and, one might well believe, of the nation? In particular, are there potential size limits upon any government that might aspire toward preserving a republican character?

Both Alexander Hamilton and James Madison notably argued in The Federalist that Montesquieu and other proponents of smallness as a necessary condition for maintaining republican government were simply wrong.303 Publius was a proponent of the extended republic.304 In Federalist No. 9, for example, Hamilton concludes the central lesson of the “science of politics” is that one can maintain “the excellences of republican government” through “the enlargement of the orbit within which such systems are to revolve.”305 Undoubtedly, Madison’s argument in Federalist No. 10 is better known; it is perhaps the greatest critique of localism ever written by an American. For Madison, the states turned out to be little more than breeding grounds for hegemonic “factions” acting against the “common good,” whereas the extended republic that he advocated would tame, if not eliminate, the ravages of

301. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), overruled in part by Brandenburg v. Ohio, 395 U.S. 444 (1969). Technically speaking, Brandeis’s opinion is a concurrence, though it may be considered a de-facto dissent given the complacent authoritarianism of the majority opinion. See id. at 372.
faction and increase substantially the prospects for the
triumph of the public good.306

One should have no illusions about where Madison
would stand with regard to the Lincolnian trilogy. Although
Madison was a dedicated republican insofar as he linked all
national institutions to “the people,” he had little regard for
any robust notion of government by the people. He would
later write in Federalist No. 63 about the importance of
maintaining a “total exclusion of the people in their
collective capacity from any share” in the actualities of
governance.307 One can only imagine what Madison would
have thought about the adoption, in many American states,
of various methods of “direct democracy” to complement
the exclusive reliance on “representative democracy” that he
advocated.

In any event, what makes the Second Vermont Republic
truly interesting, intellectually, is not only its critique of what
it terms the Empire, but also its belief that “the U.S. suffers
from imperial overstretch and has become unsustainable
politically, economically, agriculturally, socially, culturally,
and environmentally. It has become both ungovernable and
unfixable.”308 Given my own concerns about the potential
“ungovernability” of the United States and my belief that
fixing it would require a new constitutional convention—
which is almost certainly unlikely to take place—I have a
certain sympathy with the Vermonter’s arguments even
though I certainly do not share all of their specific political
views as to what evidences the evils of the “Empire.” But
part of what drives the Vermonter’s commitment to the
distinctly anti-Madisonian proposition that “small is
beautiful,” which is the title of E. F. Schumacher’s famous
1973 manifesto that inspired an earlier generation.309

By placing the Vermonters commitment to small
government within the context of Albert Hirschman’s
justifiably famous argument about “exit, voice, and

306. THE FEDERALIST NO. 10, at 64-66 (James Madison) (Tudor Publishing
Co., 1937).
307. THE FEDERALIST NO. 63, at 6 (James Madison) (Tudor Publishing Co.,
1937) (emphasis omitted).
308. NAYLOR, supra note 215, at 24.
309. E. F. SCHUMACHER, SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE
MATTERED (1973).
loyalty,”310 one can view the Vermonter as arguing that the United States has become too large—not to mention too devoted to imperial overreach—to merit genuine loyalty. The sheer size of the country makes voice almost irrelevant. Economists regularly demonstrate the “irrationality” of actually taking part in political rituals like voting, at least if one views them as actual instruments to effectuate social change.311 The Constitution guarantees to each state the maintenance of a “Republican Form of Government,”312 and the paradox is that such a guarantee might require letting a state go rather than insisting that it remain within a bloated Union.313

I confess that what most surprised me when reading the Vermonter’s own manifesto was the role of patron saint played by George F. Kennan.314 In one of his final books—subtitled A Personal and Political Philosophy—Kennan revealed the extent of his alienation from the political culture of the United States, which he linked, at least in part, to its excessive size.315 Although Kennan does not invoke Louis Brandeis, he evokes the Justice’s own repeated denunciations of the “curse of bigness”316 and the importance of vibrant states as locales for the kind of engaged citizenship that Brandeis articulated in Whitney.317 Uncoincidentally, Brandeis was very much influenced by Alfred Zimmern’s book—The Greek Commonwealth318—

315. Id. at 144.
316. See, e.g., the Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis (Osmond K. Frankel ed., 1934).
which focused on the glories of Athenian democracy and certainly reinforced the association between limited size and the realization of a genuine “commonwealth.”

Kennan wrote of his own “views about the disadvantages of ‘bigness’” and noted that he “often diverted [him]self, and puzzled [his] friends, by wondering how it would be if our country, while retaining certain of the rudiments of a federal government, were to be decentralized into something like a dozen constituent republics.” Each of these republics would absorb “not only the power of the existing states but a considerable part of those of the present federal establishment.” One might well describe Kennan’s idea as an envisioned return to the Articles of Confederation. In any event, Kennan conceives of something like nine of these republics—let us say, New England; the Middle Atlantic states; the Middle West; the Northwest (from Wisconsin to the Northwest, and down the Pacific coast to central California); the Southwest (including southern California and Hawaii); Texas (by itself); the Old South; Florida (perhaps including Puerto Rico); and Alaska; plus three great self-governing urban regions, those of New York, Chicago, and Los Angeles—a total of twelve constituent entities. To these entities I would accord a large part of the present federal powers than one might suspect—large enough, in fact, to make most people gasp.

One suspects that Kennan would, like the Vermont secessionists, be appalled by the recent decision of the Court of Appeals for the Second Circuit, which held that Vermont is wholly without power to shut down the Vermont Yankee nuclear reactor because the national government preempts regulation of nuclear reactors, including determination of their safety. I am altogether uncertain where I stand with

319. See id. at 160.
320. KENNAN, supra note 314, at 149.
321. Id.
322. Id. at 149-150.
regard to Kennan’s suggestion—or, for that matter, where I stand on the ability of Vermont to engage in a “one-state veto” of what might be the nationally, or at least regionally, desirable use of nuclear energy. I know that I am generally unsympathetic to the invocations of federalism and “states’ rights” regularly offered by the current United States Supreme Court. Like Franz Neumann, I am not persuaded that there is any necessary connection between federalism and the protection of important substantive values.324

And yet, at the very least, Kennan offers an interesting thought experiment. Hamilton and Madison were defending an “extended republic” of approximately four million people—most of them prohibited from actual participation in the political system—spread largely along the Atlantic coast from Boston to Savannah.325 Although John Jay preposterously overestimated the homogeneity of the new nation in Federalist No. 2,326 one can hardly ignore the extent to which the United States is wildly more pluralistic along almost every conceivable dimension than it was when George Washington was inaugurated in 1789. If one is at all sympathetic to Kennan’s vision—and I repeat that I am not willing to sign on to it without much further thought—then it most likely requires for its realization a serious threat from one or more of his constituent republics to secede, strongly supported by their citizens who have reached a point of “terminal alienation” from what they perceive as the Leviathan society and state instantiated in the contemporary United States.

If you find Kennan’s ideas, and their embrace by the Vermont proponents of secession, to be “fantastic” in a quite pejorative sense, then the successor question is this: If we do not need to get smaller in order to realize the values


325. See STATES’ RIGHTS AND AMERICAN FEDERALISM 9-10 (Frederick D. Drake & Lynn R. Nelson eds., 1999).

associated with what Justice Breyer recently labeled “active liberty,” then should we get even larger, perhaps even moving toward hemispheric and, ultimately, world government? After all, if one carefully reads The Federalist, especially the essays written by Hamilton, one quickly realizes that the most fundamental argument for rejection of the Articles of Confederation and embrace of a newly empowered centralized government involved its efficacy in allowing the fledgling nation to defend itself against a variety of enemies who certainly did not wish the new country well. Indeed, one could cite Montesquieu himself for the laconic proposition that “[i]f a republic be small, it is destroyed by a foreign force.” Hamilton certainly agreed with this aspect of Montesquieu’s philosophy inasmuch as he emphasized the necessity of American unification in order to stave off a variety of enemies. Thus, he concludes Federalist No. 6 by citing French philosopher L’Abbe de Mably, who wrote that “‘neighboring nations . . . are naturally enemies of each other unless their common weakness forces them to league in a confederate republic, and their constitution prevents the differences that neighborhood occasions, extinguishing that secret jealousy which disposes all states to aggrandize themselves at the expense of their neighbors.’” In the absence of the move to unity, one can expect only continued warfare and the fear, even in ostensible times of “peace,” of renewed hostilities. This expectation, of course, privileges the “common defense” over a wider collective vision of what constitutes the “general welfare”—but should that surprise us?

The decision to adopt the Constitution plus, at least as importantly, the separation from Europe provided by the

327.  STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 15-16 (2005). Breyer was clearly writing in a Brandeisian vein, at least with regard to the importance of encouraging an “active” citizenry.


331.  Id. at 41 (emphasis omitted).
Atlantic Ocean, significantly protected the United States against full participation in the international political system. Nonetheless, the United States was scarcely a model of a truly pacific nation prior to World Wars I and II. But one of the meanings of World War II and its aftermath (World War I, of course, generated a significant “isolationist” movement within the United States) is that the United States became a full participant in the militarized geopolitics of the international system, ranging from establishing multi-million-member standing armies to foreign bases or deployments in well over 100 countries—not to mention active involvement in a variety of foreign wars (about which Kennan had grave doubts, as with Vietnam) or the ability of the National Security Agency to gain electronic intelligence from almost anywhere in the world.

Some of us grew up in the “bi-polar” world divided between the United States and the Soviet Union, which included, among its other charms, the participation by school children in “duck-and-cover” exercises that would ostensibly protect them in case of a nuclear attack. We now live in a considerably more multi-polar system. Rightly or wrongly, little fear of nuclear war exists, even though far more countries possess such weapons than was the case in what may appear to be the halcyon days of the Cuban Missile Crisis. Instead, fear of “terrorist” attacks that could emanate from both governments and non-governmental groups anywhere on the globe, as occurred on September 11, 2001, has replaced the fear of nuclear war.

One might describe it as almost a self-evident truth that the United States today is both more involved in a variety of what Jefferson memorably called “entangling alliances” and that it is less truly secure against foreign attacks than was the case 200 years ago. A strong argument against secessionism, particularly if the new states would possess fearsome weapons, is that this would only add to the general insecurity already pervading our lives. But if that is the case, why not support even larger and extended governmental systems? Can anyone rationally believe that the United

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States today has reached the “Goldilocks moment” of being “just right” in both population and territorial size?

Consider that one reputable report predicts that the population of the United States in 2050, less than four decades from now, will be 438 million.\textsuperscript{333} And what if by 2050, or earlier, the United States adds Puerto Rico to the Union, thus establishing our formal boundaries as beginning in the Caribbean and extending to the mid-Pacific? If we are comfortable with such possibilities, then why not return to the hope that many Americans expressed from 1775 onward—that Canada would join the Union, supplemented in the twenty-first century by Mexico and other points south, especially as Hispanics become an ever-more substantial cohort of our national population and culture? But as already suggested, we might want to begin thinking of enhancing the powers of the United Nations to provide some global order and possible solution to the potential for international anarchy that exercised Hamilton in 1787.\textsuperscript{334} At the very least, opposition to secession may have implications that would be disquieting to many of those who believe that opposing secession only entails acceptance of preserving current boundaries.

IV. CONCLUSION

For better or worse, proponents of nullification and secession exist in the United States and—probably more importantly, at least with regard to secession—throughout the world at large. Although one might be tempted to ridicule such arguments—consider Salman Rushdie’s comment in \textit{Shalimar the Clown}: “Why not just stand still and draw a circle round your feet and name that Selfistan?”\textsuperscript{335}—that temptation should be rejected. Not only do proponents of secession raise the most fundamental

\begin{itemize}
  \item \textsuperscript{334} \textit{THE FEDERALIST NO. 16} (Alexander Hamilton).
\end{itemize}
questions of political theory regarding such basic issues as political identity and the meaning of “self-determination,” but also, as set out above, one simply cannot understand American or world history without paying respectful attention to the reality of secession.

One has good reason to oppose zombies, and one might well doubt that our world today could co-exist peacefully with dinosaurs unless we could safely confine them to Jurassic Park. But there will be no practical alternative to learning to live with successful secessionists, just as we have happily learned to accept Vermont as part of our Union and the former members of the USSR as independent states and, indeed, members of NATO—whose independence and territorial integrity we would ostensibly protect at the cost of American lives and treasure. I continue to suspect that almost all of us pick and choose among secessionist movements and, in fact, support some, therefore condemning the would-be “central” governments that try to prevent their success.

Thus, I pose a final question: Imagine that, contrary to any plausible expectation, a majority of Texans exhibit a credible desire to secede. 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. In any event, assuming you are not a Texan, would you support a violent response by the United States or would you, instead, bid the Lone Star State a peaceful farewell, at least following negotiation with the leaders of the secessionist regime to ensure that the United States confiscates any nuclear weapons now stored in Texas or that Austinites and residents of the Rio Grande Valley are given the opportunity to set up their own independent states?

In his final message to Congress in December 1860, President James Buchanan explained why he believed that secession was illegal and that the national government was without power to prevent it by force of arms:

The fact is that our Union rests upon public opinion, and can never be cemented by the blood of its citizens shed in civil war. If it can not live in the affections of the
people, it must one day perish. Congress possesses many means of preserving it by conciliation, but the sword was not placed in their hand to preserve it by force.336

If we prefer Lincoln to Buchanan, is it because we reject as simply unacceptable Buchanan’s vision of a Union built only on “the affections of the people,” or rather, is it because of Buchanan’s remarkable obtuseness about the reality of slavery, something never absent from Lincoln’s politics and the eradication of which justifies breaching a variety of norms, including a presumption in favor of political self-determination by alienated minorities that we might otherwise be correctly tempted to accept?