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*Nullification and Secession in  
Modern Constitutional Thought*



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## Introduction

# Zombie (or Dinosaur) Constitutionalism?

## The Revival of Nullification and Secession

*Sanford Levinson*

This book is the outgrowth of an invitation by Mark Killenbeck to deliver a lecture at the University of Arkansas Law School in September 2013, which was published in the *Arkansas Law Review* and is republished with significant revisions in this volume. He also arranged to have several people deliver responses to the lecture. As a result of the discussion there, I was persuaded that the questions raised deserved more substantial elaboration, and I was fortunate enough to recruit a wonderful array of scholars for further exploration of the topics. Though this book was in substantial measure triggered by my lecture, this book in no way should be viewed as being about it. A few authors advert to it; most do not. What is important is the grappling with the important issues of nullification (or ne>nullification) and secessionism inasmuch as these have become part of discussion not only in the United States but also abroad. Although this book was conceived and invitations rendered in 2014, the issues have, for better or quite possibly for worse, become less purely academic; they are the continuing subjects of front-page news articles and passionate public discussion.

I take my title for this introductory essay from Christian Fritz, who broached the concept of “constitutional dinosaurs”—ideas seriously discussed, considered, and acted upon [in the past], but which are foreign to our present constitutional understandings.”<sup>1</sup> In our contemporary world, though, we know that remarkable things are becoming altogether thinkable: Consider a 2014 article in the *New York Times Magazine* on the prospect of resurrecting woolly mammoths and other extinct

1. Christian G. Fritz, *American Sovereigns: The People and America’s Constitutional Tradition Before the Civil War* 398 n.9 (2008).

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species thanks to the miracle of DNA cloning,<sup>2</sup> not to mention apparent proposals afoot to re-create a real live Neanderthal!<sup>3</sup> So we should recognize as well that certain ideas about the American constitutional order, also thought to be extinct and believed by some to be “foreign to our present . . . understanding” of constitutional possibility, may be rising from their graves. My friend Jack Balkin coined the term “zombie constitutionalism,” and one might imagine proponents of these ideas long thought dead, especially if we ourselves are opposed to them, as analogous to zombies trying to capture our brains. Proponents of these ideas would undoubtedly find more attractive metaphors to describe themselves.

The first central idea, the topic of most of the essays below, involves nullification or, as I suggest in my own essay, neonullification. These terms are not self-defining, and one will find some important differences with regard to the definitions proffered by the various authors, especially if one adds to the mix the associated term “interposition,” which is sometimes used as a near synonym for nullification. My own first essay should perhaps be viewed as a kind of tour d’horizon, which is followed by a number of far more specific and perhaps more meticulous explorations. Thus the essay that follows, by Jonathan Gienapp, carefully explicates James Madison’s Virginia Resolution of 1798 and then the Virginia Report of 1799. Although they are often simply coupled with the Kentucky Resolutions of 1798, drafted by Madison’s friend, Thomas Jefferson, Gienapp demonstrates that they formulate two quite different ideas, with considerably divergent implications, at least in the mind and writing of Madison. That being said, it is certainly the case that authors cannot necessarily control the use made of their own ideas. James H. Read and Neal Allen note, altogether accurately, the conflation of the two notions by those in the 1950s, especially the influential journalist James J. Kilpatrick, who tried to resist the implementation of the Supreme Court’s decision in *Brown v. Board of Education* by evoking (and running together) such American icons as Jefferson, Madison, and John C. Calhoun.

Read and Allen, after presenting a plethora of contemporary examples of state invocation of the term “nullification,” organize their own essay around what might be termed the classical definition of nullification: “the theory that each individual state is fully ‘sovereign’ and as such final judge of its own constitutional rights and obligations; that consequently it may legitimately rule that any federal act . . . is unconstitutional; and, most importantly, that it may *act* on this judgment by clocking the implementation of that federal act within the state’s boundaries.” This

2. Nathaniel Rich, *The Mammoth Cometh*, N.Y. Times Magazine, Mar. 2, 2014, <http://www.nytimes.com/>.

3. Svante Paabo, *Neanderthals Are People, Too*, N.Y. Times, Apr. 25, 2014, <http://www.nytimes.com/>.

offers a template against which one can measure certain contemporary claims and separate them into genuine or faux claims of nullification. They discuss a number of proposals in American state legislatures that “deliberately [echo]” the urtext of nullificationist arguments, Thomas Jefferson’s Kentucky Resolutions of 1798,<sup>4</sup> even if, at the end of the day, the proposals veer in important ways from the would-be precedent.

Read and Allen and I are all interested in the veering, though I suspect that I view as more independently significant what I am willing to term neonullification, which relies less on the legalistic claim to be able to invalidate federal legislation and more on the various tactics of resistance that states and localities are able to rely on, often quite successfully. Heather Gerken and Jessica Bulman-Pozen have advanced the extremely provocative notion of uncooperative federalism that dispenses with the emphasis on a truly constitutionally protected realm of state autonomy (or sovereignty) in favor of the practical ability of states and localities to get away, as it were, with flouting what lawyers might otherwise recognize as clearly valid federal commands. The paradox is that less flamboyant claims than the purported ability fully to nullify federal legislation may in fact lead to more success in rendering it nearly irrelevant.

It is thus fitting that the next essay, by Ernest Young, examines one of the most interesting episodes of contemporary uncooperative federalism or neonullificationism: the adoption by Colorado (among other states) of full-scale legalization of marijuana. To refer to legalization in this context requires that one ignore the fact that no state can render marijuana legal as a matter of federal law; all these laws can do is remove state-law prohibitions, but in no way, of course, could it provide a successful defense against federal prosecution. However, this legal reality may be completely irrelevant if, as appears to be the case, the national government in effect surrenders by exercising its discretion to turn aside and tolerate, if not applaud, the distinct state policy.

Some readers will no doubt view this as an unequivocally happy ending, assuming they approve of Colorado’s permissive drug law. One wonders, however, if they would be equally sympathetic to the wide array of neonullificationist or uncooperative actions limned in Mark Graber’s overview of the practical ability, particularly of low-visibility state officials, to make almost irrelevant what one might optimistically believe to be the law of the land as declared by the Supreme Court. Perhaps we should recognize that it takes a village not only to raise a child but also to make sure that legal commands from the center are in fact enforced at the periphery; all sorts of officials must exercise their often discretionary authority in ways they

4. James H. Read & Neal Allen, *Living, Dead, and Undead: Nullification Past and Present*, 1 *Am. Pol. Thought* 263, 263–264 (2012).

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might, like Herman Melville's *Bartleby the scrivener*, "prefer not to." Graber asks an immensely important question: Who tend to be the victims (assuming that is the right word) of nonenforcement of federal law? He suggests that the answer, most often, will be quite vulnerable groups who do not have the resources, either economic or political, to challenge the "uncooperative federalism" that works to negate the promise set out in some federal legislation that instead becomes what Madison termed a "parchment barrier" all too easily breached by a defiant state or locality. This is not to deny, as already noted, that we might be tempted to root for some of those states and localities that refuse to cooperate; the point, suggests Graber, is to develop some sense of what might be thought of as frequency distributions and ask who generally benefits—and who loses—from the de facto weakened national government instantiated in state or local resistance.

Whatever one's reactions to Graber's examples, it would be surprising indeed if much sympathy were generated by the example with which Jared Goldstein begins his own essay, the 2014 armed showdown in Nevada between the ultra-right-wing Cliven Bundy, who styled himself the champion of the true Constitution, and the United States Bureau of Land Management; that, too, was also settled, as a practical matter, by the decision of the federal government not to risk the violence that almost certainly would have attended attempts to enforce undoubtedly valid national law. (A 2015–2016 armed takeover of a federal facility in Oregon, led by Bundy's son, had a less pacific conclusion, however.) Still, it should be clear that would-be nullifiers or neonullifiers can be found across the political spectrum. At least some persons appalled by Idaho's attempt to undercut federal firearms laws or the Affordable Care Act (Obamacare) are, I suspect, quite receptive to sanctuary cities determined to do whatever they can (or can get away with) to hinder what some think to be the Draconian enforcement of federal immigration law against undocumented aliens trying to escape desperate conditions, especially in Central America.

One might well wonder what is encouraging some of these neonullificationist moments. Goldstein, of course, emphasizes the alienation of many of his subjects from those now in power (and viewed as rewriting the Constitution in order to justify their nefarious projects). But Killenbeck's essay notes the degree to which the contemporary Supreme Court has been more than happy to evoke the language of state "sovereignty," a term nowhere found in the United States Constitution, and indeed quite deliberately rejected by many of the participants in the Philadelphia Convention that drafted a Constitution that was designed to create a decidedly stronger central government.<sup>5</sup> Yet the notion of state sovereignty certainly persists as a theme in American political and constitutional thought, and it has historically

5. See, e.g., the discussion in Mary Sarah Bilder, *Madison's Hand: Revisiting the Constitutional Convention* 98–100 (2015).



served as an important underpinning of arguments for both nullification and secession. One classic notion of sovereignty is self-rule, which means that no one can command a sovereign to act contrary to his own will. Although there are some contemporary theorists who believe that the word does no useful work in the modern world,<sup>6</sup> which features states and other political entities in thoroughly enmeshed relations with one another, the Supreme Court has not received this message; if anything, it is more prone to sovereignty talk now, especially with regard to states, than has been the case for many decades, with consequences going beyond the musty pages of law reviews.

At least as important as state sovereignty, though, is the emphasis on popular sovereignty in American political and constitutional thought, as manifested, for example, in the ordination of the Constitution by “We the People.” Goldstein analyzes various strains of popular constitutionalism that emphasize certain members of the general population as the true defenders of the Constitution against public officials who would betray it. He notes the degree to which these arguments, dismissed twenty years ago as the ravings of fringe groups who contributed, among other things, to the bombing of the Alfred P. Murrah Federal Building in Oklahoma City in 1995, have gained a measure of respectability by being adopted by some, though certainly not all, members of contemporary Tea Party movements. Just as important is the support they have received from influential members of the Fox News team of commentators and even established political leaders, as was the case with Cliven Bundy, at least before the realization that he was a racist as well as a militant opponent of the United States government. And, if truth be told, popular constitutionalism can also easily be identified with decidedly non-right-wing constitutional theorists, including myself.<sup>7</sup>

One might be tempted, as I confess I originally was, to suggest that nullification or neonullification is simply an aspect of American exceptionalism, of little interest elsewhere, in decided contrast to secession, the other major focus of this book. But Ran Hirschl, in a survey of constitutional systems across the world, demonstrates this is not the case—that nullification is an important aspect of many operating constitutional systems, especially if they are federal. This should not be surprising, inasmuch as federalism itself, as an organizing principle, is almost certainly linked to the presence of geographically distributed groups that fundamentally mistrust one another in important ways, even if they have agreed, with whatever degree of uncertainty, to enter into a joint union under a given constitution. Hirschl, who teaches at the University of Toronto, pays special attention to Canadian episodes, including the “notwithstanding” provision that is part of Canada’s organic law and

6. See, e.g., Steven Krasner, *Sovereignty: Organized Hypocrisy* (1999).

7. Sanford Levinson, *Constitutional Faith* (2d ed. 2011).

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that presumably gives provinces (and, for that matter, the national government) the authority in effect to nullify decisions of the Canadian Supreme Court that are unacceptable to them. But he also has sagacious things to say about the legal system of modern Europe, where the European Union is clearly an example of a continent-wide legal order in which the constituent members, as sovereign states, most certainly preceded it and, as is dramatically true with regard to Germany, continue to assert at least some important prerogatives of sovereignty.

Hirschl's essay is also the transition to the second part of the book and the topic of secession. Even if most Americans agree with Laurence Tribe that "the ban on a state seceding from the Union [is] etched in the blood of civil war" whether or not it is explicitly included "in ink on" the Constitution itself,<sup>8</sup> that is surely not true of all Americans. My own essay adverts to then-Texas governor Rick Perry, who in his successful bid for renomination (and ultimately reelection) in 2010 seemingly broached the possibility of secession in twenty-first-century America.<sup>9</sup> "We've got a great union," said the governor, and "there's absolutely no reason to dissolve it."<sup>10</sup> But this was simply the rhetorical setup for his comment, "If 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."<sup>11</sup> A total of 125,000 Texans, after the reelection of President Barack Obama in 2012, signed a petition sent to the White House requesting that the United States "peacefully grant the State of Texas to withdraw from the United States of America and create its own NEW government."<sup>12</sup> In December 2015, the executive committee of the Texas Republican Party, by a two-thirds vote, rejected a proposal that had passed through a party committee that Republican primary voters in 2016 be presented with the opportunity to vote on a nonbinding resolution

8. Laurence Tribe, 1 *American Constitutional Law* 1246 (3d ed. 2000).

9. Mooney, *Texas Governor Says Secession Possible*, CNN, Apr. 16, 2009, <http://political.ticker.blogs.cnn.com/>.

10. Reid Wilson, *In Texas, Ted Cruz Has Allies*, Wash. Post, Oct. 22, 2013, <http://www.washingtonpost.com/> (internal quotation marks omitted). Nevertheless, one could question the aim of Governor Perry's statements. Was he truly engaging in a threat to the rest of the country or simply venting? Compare the recent heading in *Reason* about the response of the British government to *The Guardian* after it printed material that the government wished to suppress: J. D. Tucille, *British Snoops to The Guardian: Nice Little Newspaper You Got. It'd Be a Shame If Something Happened to It*, *Reason*, Aug. 19, 2013, <http://reason.com/>. In any event, Governor Perry later backtracked, especially when he decided that he might like to move to Washington and live in the White House.

11. Wilson, *supra* note 10 (internal quotation marks omitted).

12. *Petition to Peacefully Grant the State of Texas to Withdraw From the United States*, White House, Nov. 9, 2012, <https://petitions.whitehouse.gov/>.

in favor of secession. As one proresolution Republican from Lubbock put it, “I’m not in favor of secession yet and I hope I never will be. However if Hillary [Rodham Clinton] is elected, and the U.S. Supreme Court continues to create constitutional crises, things could change,”<sup>13</sup> and it would presumably be helpful to know how many Texas Republicans might be supportive of a move to secede. Or, as another compatriot had earlier put it, “There’s been a big groundswell of Texans that are getting into the Texas independence issue. I believe conservatives in Texas should have a choice to voice their opinion.”<sup>14</sup> That two-thirds of the executive committee balked at placing the resolution on the ballot does not negate at least the symbolic significance that one-third were apparently more than willing to give credence to the views of the Texas Nationalist Movement.

Texas may not be *that* unique, though. The Republican Caucus in Wisconsin’s sixth congressional district passed a resolution in April 2014 indicating “that we strongly insist our state representatives work to uphold Wisconsin’s 10th Amendment rights, and our right to secede, passing legislation affirming this to the U.S. Federal Government.”<sup>15</sup> After getting through the Resolution Committee of the state Republican convention, it was then “overwhelmingly” voted down by the apparently embarrassed delegates.<sup>16</sup> It is worth noting that secessionist sentiment is not necessarily confined to the far right; probably the most intellectually interesting such movement is the Second Vermont Republic, discussed at some length in my own essay.

It is undoubtedly the case that when most Americans hear the word “secession,” they think of the events that triggered the conflagration in the United States between 1861 and 1865—or, perhaps, until 1871, which is when the last of the would-be Confederate States of America was actually reseated in Congress.<sup>17</sup> Alison LaCroix’s close analysis of the Confederate constitution will surely surprise some readers—it certainly surprised me—in demonstrating Jefferson Davis’s explicit repudiation of the cogency of nullificationist claims made by states that chose to remain within the Union. No Calhounian he! Instead, he picked up another part of Calhoun’s legacy by suggesting that the ultimate recourse of sovereign “states” is to withdraw from

13. L. Scott Mann, *Texas GOP Votes “No” to Secession Question on Primary Ballot*, KCBD, Dec. 5, 2015, <http://www.kcbd.com/>.

14. Dylan Baddour, *Texas GOP Official Wants Secession on the Primary Ballot*, Chron, Nov. 25, 2015, <http://www.chron.com/>.

15. David Freedlander, *Wisconsin’s GOP Secession Panic*, Daily Beast, May 2, 2014, <http://www.thedailybeast.com/>.

16. Mary Spicuzza, *Wisconsin GOP Rejects Resolution on Secession*, Wisc. State J., <http://host.madison.com/wsj/>.

17. See Geoffrey Downs, *After Appomattox* (2015). See Sanford Levinson, *The Ten Year War: What If Lincoln Had Not Exited After Four Years?*, 51 *Tulsa L. Rev.* 313 (2016).

the Union. Yet as LaCroix demonstrates, the withdrawal was not accompanied by a denunciation of the Constitution; rather, the Confederates, like Goldstein's militia members and their ilk, genuinely—and no doubt sincerely—viewed themselves as faithful to the authentic Constitution that had been betrayed by illegitimate political leaders, culminating in the despised Abraham Lincoln. If the Confederates were revolutionary, which Davis denied, it was in the distinctively classical sense of attempting to return to, and reestablish, an admirable constitutional order that had been thrown out of orbit by Republicans eager to overthrow the constitutional settlement of 1787, which had promised to vindicate the equal rights of slaveholders. One might contrast this conservative view of revolution with the far more radical one adopted by American revolutionaries of 1776; by the time of the Declaration of Independence, there could be no doubt that they were devoted to upending and transforming the existing constitutional order of the British Empire and replacing it with a remarkably different one organized around the notion of popular sovereignty and government by consent of the governed.

Even if secession scarcely seems, at least as of 2016, to be a live political possibility in the contemporary United States, it is, as Hirshl clearly demonstrates, either a clear and present danger or an attractive possibility, depending on one's own politics, in countries including Canada, the United Kingdom, Spain, and a number of countries in Asia and Africa, as well as Ukraine and a host of other areas in the territory of the old Soviet empire and the present countries that seceded from that empire. There is also the prospect that by the time this book is actually published, Great Britain will have voted to secede from the European Union. Should that have occurred, one can easily predict that there will be renewed efforts in Scotland to secede from the United Kingdom. After all, a secessionist referendum in 2014 gained the support of just short of 45 percent of the voters, and the fact that Scots seem substantially more supportive of the European Union than are the English might easily tip the balance in favor of withdrawal from the United Kingdom and entry into the EU. Whether as an organized polity or simply as politically aware individuals, we are highly likely to be called on to take positions on one or another of these secessionist possibilities, and we may well wonder (and worry) what our responses should be.

One might think that those charged with designing constitutions—a more and more common practice in the aftermath of World War II, the dissolution of the Soviet Union, and the transformations within states throughout the world—would be especially attentive to the possibility of secessionism and thus willing to confront the issue in constitutional texts themselves. My University of Texas colleague Zach Elkins, a careful student, with Tom Ginsburg, of literally every constitution drafted over the past 225 years throughout the world, notes how rarely any potential legitimation of secession appears in texts. He goes on to offer a suggestive analysis of the paradoxical contribution that the “weak commitment” perhaps instantiated in se-

cession clauses, as with prenuptial agreements between couples, might in fact tend to encourage rather than discourage embarking on common projects, secure in the knowledge that one is not trapped forever if things do not work out. A distinct alternative to Elkins's relative support for secession clauses can be found in the essay that follows by Vicki Jackson, who argues that secession clauses ought not become part of the standard template for constitutions, federal or otherwise. She worries that recognition of rights to secede will risk creating incentives for ethnic cleansing, especially if secession can come about by only a majority vote. In addition, she fears the attendant risks of moving generally from more to less pluralist polities, as well as the detriments to liberal values of choice about how to live that such a movement entails; and finally she cites the adverse impact on attitudes of trust on which federal systems in particular may depend. She goes on to argue, however, that it might be an equal mistake to explicitly prohibit secession. Thus the kind of silence one finds, for example, in both the United States and South African constitutions may be better than the forthright acceptance of the possibility of dissolution or the "don't even think of it" message of a flat ban.

Jackson's Harvard colleague and fellow specialist in comparative constitutionalism, Mark Tushnet, concludes the volume with some speculations on the kinds of issues that will inevitably arise in attempts to negotiate presumptively peaceful secessions of the kinds hinted at in the Canadian case. Like Jackson, he draws on the extremely important, and somewhat mysterious, Quebec Secession Reference Case decided by the Canadian Supreme Court. He notes that at one and the same time it indicated in no uncertain terms that Quebec had no right to engage in unilateral withdrawal from Canada while it simultaneously suggested that if the province unequivocally indicated such a desire by some unspecified supermajority vote, then the rest of Canada would be under a duty to engage in serious negotiations over the terms of dissolution. Independent of the legal conundrums generated by the Canadian decision, there is also the reality that several countries have in fact dissolved, including, in Eastern Europe alone, Czechoslovakia and Yugoslavia. This last example especially demonstrates the breadth of possibilities generated by secessionist movements—from the almost completely peaceful withdrawal of Slovenia to the extraordinarily bloody, even genocidal, warfare in Bosnia-Herzegovina.

I am certainly grateful to Mark Killenbeck for what he set into motion. More importantly, I am confident that these essays offer a way—not always pleasant, perhaps—of understanding important constitutional developments within the contemporary United States and, even more certainly, in a number of countries, including a protcountry like the European Union.