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States' Rights Gone Wrong? Secession, Nullification, and Reverse-Nullification in Contemporary America

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STATES' RIGHTS GONE WRONG? SECESSION, NULLIFICATION, AND REVERSE-NULLIFICATION IN CONTEMPORARY AMERICA

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PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA (UNIVERSITY PRESS OF KANSAS 2015). PP. 296. HARDCOVER $39.95.

SANFORD LEVINSON ED., NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT (UNIVERSITY PRESS OF KANSAS 2016). PP. 384. HARDCOVER $45.00. PAPERBACK $24.95.

In *The Making of Tocqueville's Democracy in America*, James Schleifer asked a reasonable question: how could Alexis de Tocqueville, a thoughtful observer of and committed believer in America's constitutional federalism and states' rights as a bulwark against the soft despotism of centralized power, condone secession while spitting his own wrath against John Calhoun and the nullifying fire-eaters he feared would break that Union?[1]

Although not rooting secession in a specifically constitutional right, as Tocqueville hinted at, Edward Livingston, Tocqueville's close American contact (and the only person to be thanked in *Democracy in America*), showed the theoretical and historical way to decouple Calhoun's nullification from secession. While Tocqueville's oft-repeated contempt for the rough populism and violent temper of Jackson appears through *Democracy in America*, Tocqueville admired Jackson's Secretary of State Livingston, a respected constitutional thinker and former Louisiana senator turned key member of Jackson's cabinet.[2]

Livingston had thought long and hard about states' rights and the methods to enforce

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1. JAMES T. SCHLEIFER, THE MAKING OF TOCQUEVILLE'S DEMOCRACY IN AMERICA 101, 134 (1980).

2. ALEXIS DE TOCQUEVILLE AND GUSTAVE DE BEAUMONT IN AMERICA: THEIR FRIENDSHIP AND THEIR TRAVELS 155 n.201, 203, 557 (Olivier Zunz ed., Arthur Goldhammer trans., 2010). That is not to say Tocqueville necessarily picked this up from Livingston; Schleifer offers plausible circumstantial evidence that Tocqueville acquired this notion from various circulating legal treatises. *See* SCHLEIFER, *supra* note 1, at 131–34.

them: in his first political life Livingston had been a young New York Congressman deeply committed to the states' rights principles of 1798 announced by his Republican heroes Jefferson and Madison in their Kentucky and Virginia Resolutions. Three decades later he similarly despised nullification as the underappreciated but arguably most important participant in the Webster-Hayne-(Livingston) debates, since he was one with unimpeachable states' rights bona fides who nonetheless assailed nullification as hostile to constitutional textualism.[3]

In this, he was like Jackson, whose Proclamation on Nullification Livingston helped write.[4] Livingston nonetheless conceded secession as a last ditch revolutionary (if not constitutional) tool to guarantee states' rights: if all of the constitutional mechanisms (such as judicial review or legislative interposition lobbying members of Congress) did ultimately fail and the federal government illegally amassed power, Livingston allowed that a state could claim the contract was broken and withdraw.[5] Stated more directly, for Livingston, nullification was *always* out of bounds but secession was not (a position later more forcefully adopted by Jefferson Davis, who did find it specifically constitutional).[6] What one could *not* do was remain in the Union, benefiting from its advantages while unilaterally vetoing its actions: if, Livingston held, one truly believed the Constitution had been broken, one had to walk away "at the risk of all the penalties attached to an unsuccessful resistance to established authority."[7]

And indeed, at the dawn of the Civil War, it was not only southerners who thought so: Lincoln's anti-secession hawkishness was not shared by all of his Republican contemporaries: future Chief Justice Salmon Chase, then a member of the peace commission trying desperately to avert the oncoming war, lamented that "[t]he thing to be done is to let the South go."[8]

Today, as Americans muse ever more openly about leaving the Union and unilaterally blocking federal power, two troubling but important books discuss the fragility of a federal system often taken for granted. Both focus on questions of constitutional failure from complementary angles, especially in an era of ever intensifying political polarization. One, Paul Nolette's *Federalism on Trial*, exposes the ways in which states' rights has created a paradoxical regime through which states dictate policy to both the federal government and their fellow states.[9] The other, *Nullification and Secession in Modern Constitutional Thought*, edited by Sanford Levinson, brings together a variety of perspectives assessing the past, present, and possible future of those doctrines and their

3. *See* RICHARD E. ELLIS, THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS AND THE NULLIFICATION CRISIS (1987); WILLIAM B. HATCHER, EDWARD LIVINGSTON: JEFFERSONIAN REPUBLICAN AND JACKSONIAN DEMOCRAT 46–50, 348 (1940).

4. SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 380–87 (2005).

5. 21 REG. DEB. 266–70 (1830). Should all those fail, and "if the act be one of those few which, in its operation, cannot be submitted to the Supreme Court, and be one that will, in the opinion of the State, justify the risk of a withdrawal from the Union, that this last extreme remedy may at once be resorted to." *Id.* at 270.

6. CONG. GLOBE, 36th Cong., 2d Sess. 487 (1861).

7. 21 REG. DEB. 270 (1830).

8. MARK TOOLEY, THE PEACE THAT ALMOST WAS 134 (2015) (quoting GEORGE SEWALL BOUTWELL, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 270 (1902)).

9. PAUL NOLETTE, FEDERALISM ON TRIAL (2015).

applicability within the American constitutional project.[10]

Paul Nolette's *Federalism on Trial* pivots on these questions, with an in-depth study showing how states can unilaterally steer federal policy through lawsuits by states' legal officials. The great achievement of this book is demonstrating how these ostensibly normal tactics—largely lawsuits and settlements—by state Attorneys General (henceforth AGs) can actually be more disruptive to the federalist constitutional order than some of the more radical "neonullification" politics discussed in Levinson's volume.

AGs operate in the twilight of politics and law, with institutional prestige, a legal pedigree, and a façade of apolitical public-interest lawyering. They are thus able to leverage legitimacy (to say nothing of standing) in seeking to advance controversial arguments that other plaintiffs such as businesses would have difficulty deploying.[11]

Federalism on Trial focuses on case studies on prescription drug policy (Chapters Three through Five), environmental issues and greenhouse gas litigation culminating in the 2007 case of *Massachusetts v. Environmental Protection Agency*[12] (Chapters Six through Seven), and a hybrid analytical chapter (Chapter Eight), before finally turning to a brief discussion of the more traditional conservative counter-efforts to block federal policy (Chapter Nine). Although mostly confined in its presentation to an appendix and a few charts interspersed throughout the text, Nolette has assembled an impressive quantitative data set to complement the rich case studies.

As this data shows, state AGs no longer serve a primarily defensive role, representing states in lawsuits raised against them. Instead, since the mid-1980s, they have increasingly collaborated on offensive multi-state litigation efforts entailing ever larger groups of states.[13]

Nearly all of this multistate litigation occurs in one of four broad issue areas: antitrust, consumer protection, health care, and the environment.[14] These are not, Nolette insists, state AGs operating in federal regulatory gaps but instead in political realms which are already heavily regulated, with the AGs jumping in on one side and leaning toward federal overregulation—an ironic result of states' rights.[15]

Nolette argues that this form of state AG litigation can be "policy-creating," insofar as it effectively forces corporations to adopt a policy desired by state AGs as the cost of a settlement (as in the case of drug pricing and consumer protection). It can also be "policy-forcing," requiring the federal government to act in a particular way (as with environmental emissions), largely with statutes featuring decentralized, litigious structures rather than self-enforcement.

The traditional story of states fighting against federal power—what he calls "policy-blocking litigation"—is thus a much smaller part of the book, but Nolette includes it at the

10. NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT (Sanford Levinson ed., 2015) [hereinafter NULLIFICATION AND SECESSION].

11. NOLETTE, *supra* note 9, at 102, 194–95.

12. 549 U.S. 497 (2007) (holding that the Environmental Protection Agency has authority under the Clean Air Act to regulate greenhouse gas emissions).

13. NOLETTE, *supra* note 9, at 19–22.

14. *Id.* at 25.

15. *Id.* at 207–09.

end to show how the same tactical and organizational dynamics of cross-state alliances developed by progressives seeking greater regulation in the medical and environmental realms are now employed by conservatives banding together in a polarized climate.

How did this happen? At the most basic level, this is the consequence of broader developments in American politics, namely the judicialization of all issues through adversarial legalism in lieu of traditional lawmaking, as Tocqueville long ago envisioned.[16]

Federal courts and members of Congress alike have worked to expand grants to and enlarge the jurisdiction of state AGs, with even some federal agencies colluding with state AGs in lawsuits against the federal government as a means to force federal action.[17] States, in turn, have bolstered the institutional apparatus of these offices, drastically scaling up budgetary support and staffing. State AGs themselves have contributed, building up a national association training fellow members to more effectively argue before the Supreme Court.[18]

The surprising paucity of earlier state collaborations against federal power is one reason for the brevity of the penultimate chapter, which describes what we might think of as more traditional state AG activism—so-called "policy-blocking litigation" challenging federal legislation and administrative rulings as impeding the rights reserved to the states. For example, AGs were marginal players in the judicial federalism revolution of the 1990s. Only three state AGs were involved in *United States v. Lopez*;[19] only Democratic AGs opposed the federal government in *New York v. United States*,[20] and most AGs, including most Republican AGs, supported the federal government's position in *United States v. Morrison*.[21]

Now, however, emboldened by progressive efforts to band together and press for regulatory settlements, conservatives are much more active. Nolette quotes a half joking then-Texas Attorney General, now Governor, Greg Abbott, who described his workday as "I go to the office. I sue the federal government. And then I go home," which as Nolette notes was not exactly a joke, since Abbott led twenty-four lawsuits against the Obama administration.[22]

Whereas governors historically were the state institution likely to insinuate themselves in federal controversies—as Abbott has done in throwing his weight behind the Convention of States movement aiming to claw back federal power through Article

16. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 257 (Harvey C. Mansfield & Delba Winthrop eds., trans., 2000); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001); GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS (2007).

17. NOLETTE, *supra* note 9, at 4, 35–42.

18. *Id.* at 33–34.

19. 514 U.S. 549 (1995) (holding that Congress's lawmaking authority under the Commerce Clause does not extend so far from commerce as to authorize the regulation of handguns in schools).

20. 505 U.S. 144 (1991) (holding that Congress may not require state legislatures to enact specific legislation).

21. 529 U.S. 598 (2000) (holding that Congress lacks authority under the Commerce Clause to create a federal civil cause of action for victims of gender-motivated violence). *See* NOLETTE, *supra* note 9, at 187–88.

22. NOLETTE, *supra* note 9, at 168.

V[23]—increasingly one sees blocs of state AGs rallying on either side of high salience federal issues—usually with GOP AGs aggressively coordinating their efforts against the federal government and Democrats defending it.[24]

Like many of the contributors in the Levinson volume, Nolette notes that state officials have an incentive to play up the level of federal conflict, appealing to constituents eager to see someone fight Washington, *especially* when overlaid with partisanship and polarization. Polarization and the nationalization of politics means AGs, always keen to leverage that position into higher office, have concluded that suing out-party feds makes a particularly useful platform for ascent.[25]

Federalism on Trial offers a firm rejoinder to those who, whether happily or dolefully, have marked the end of meaningful federalism in America.[26] That rejoinder is a troubling one, regardless of one's views on federalism—a lingering "national neurosis"[27] or the centerpiece and crown jewel of a lost Constitution.[28]

As many scholars have noted, the new regime of post-New Deal cooperative federalism is not zero-sum in limiting government power, like its dual federalist predecessor, but it instead authorizes the expansion of both sovereigns, with the states and federal government each more powerful when working for common aims and dividing responsibility based on effectiveness.[29] What Nolette shows, however, is that this paradoxically has empowered progressive state AGs to use litigation to force the feds to act in ways *states* want.

This at times leads Nolette to seem almost wistful for the now discarded "dual federalism," and its clearer channels of responsibility and accountability. Indeed, his unease with the implications of this new cooperative federalism lead him to point out that the vestiges of American federalism are no longer operating *either* for its original goals under dual federalism—decentralizing American governance, enabling diversity, and limiting federal power—*or* even the revisionist defenses offered for cooperative federalism, with dialogue, diffusion, experimentation, and gap-filling as benefits of divided sovereignty.[30] Instead, although he does not use this language specifically, he clearly fears an unholy hybrid of coercive federalism and a form of reverse nullification, resulting in states unilaterally dictating policy to the rest of the country.[31]

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23. Brandi Grissom, *Texas Gov. Greg Abbott Calls for Convention of States to Take Back States' Rights*, DALL. MORNING NEWS (Jan. 8, 2016), https://www.dallasnews.com/news/politics/2016/01/08/gov-greg-abbott-calls-for-constitutional-convention-to-take-back-states-rights.

24. NOLETTE, *supra* note 9, at 32, 187–88.

25. *Id.* at 162–63.

26. 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014); ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM (2001).

27. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

28. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

29. *See* ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY (2008); Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL'Y REV. 33 (2009).

30. NOLETTE, *supra* note 9, at 10–13; Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

31. John Kincaid, *From Cooperative to Coercive Federalism*, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 139 (1990).

Nolette recognizes the problem of democratic accountability, which John Marshall noted in *McCulloch v. Maryland*[32] and which was further developed into critiques of nullification by Daniel Webster and Edward Livingston.[33] Neither state governments, setting policy for their own citizens, nor the federal government, setting policy for the people of the United States (within constitutional limits), posed a (theoretical) problem of accountability. In both cases, the relevant group of citizens retained sovereignty to replace their officials and pursue a new policy. Nullification breaks this, allowing a subunit to control policy beyond its own borders and dictate policy to those who have no recourse—in effect, Eliot Spitzer as an inverted John Calhoun. As Nolette writes, "[a]lthough it is not unusual in the history of American federalism for individual state statutes to prohibit activity otherwise legal in other states, what is new is the AGs' effort to use the strict standards of state law for a form of national regulation . . . ."[34]

The new regime of AG lawsuits thus mirrors the problem of nullification: in that case, governing officials from a single state sought to set a negative national policy for the people of the country as a whole. Now, such a state or group of states sets an affirmative national policy, similarly without democratic control, an extreme example of what Jacob Levy has described as "outward-facing" federalism by which states affect politics beyond their borders rather than simply seek to be left alone.[35]

Moreover, Nolette shows that this is not only a problem of federalism but of the separation of powers, as AGs set policy without the benefits of deliberation produced by the elected branches. Nolette argues that under this litigation regime, just as a handful of states may not balance the needs of the country, neither do AGs have much of an incentive to balance competing public policy aims. For example, in targeting pharmaceutical pricing schemes, they do not have to factor in the implicit subsidization of other expensive procedures through arguably overpriced, ostensibly "fraudulent" drug pricing, or, in the case of environmental protection, economic vitality against carbon emissions. Legislators and executive branch officials must do this, either through direct law-making or administrative notice and comment, but AGs are able to operate with a troubling myopia which additionally allows a divide-and-conquer strategy targeting business by business, since corporations have far less incentive to assist a specific legal case against a rival than they do to band together for lobbying purposes. AGs can even help administrative agencies bypass their own democratic checks and arguably statutory authorization: for example, Nolette is troubled by the possibility of EPA officials colluding with state AGs to fix policy undesired by the administration. Such settlements, he fears, allow rogue bureaucrats to lock in and bind the hands of future EPA officials to whatever settlement the AGs have wrung out in expanding statutes beyond the purposes to which they were tailored by their drafters.[36] Even worse, Nolette worries that AGs may brush aside legal and constitutional

32. 17 U.S. 316, 428–30 (1819).

33. ELLIS, *supra* note 3; Sean Beienburg, *Neither Nationalism nor Nullification: The Battle for the States' Rights Middle Ground During Prohibition*, AM. POL. THOUGHT (forthcoming 2018).

34. NOLETTE, *supra* note 9, at 85, 110–13.

35. Jacob T. Levy, *Federalism, Jurisdiction, and Resistance*, NISKANEN CTR. (Feb. 22, 2017), https://niskanencenter.org/blog/federalism-jurisdiction-resistance.

36. NOLETTE, *supra* note 9, at 90–93, 158–67, 180–86.

issues constraining other actors: other institutions refrained from imposing or loosened advertising constraints on pharmaceuticals on grounds that they violated the First Amendment. The nominally "voluntary" settlements procured in AG settlements, however, bypassed these civil libertarian worries.[37]

My only real quibble with this remarkable book is the compressed treatment given to state pushback against federal power, which feels like something of an afterthought. This brevity leads him to at times impose an awkward analytical framework: for example, while Nolette concedes that its earlier roots make anti-federal, defensive litigation different, he holds that "policy-blocking litigation" is still thus ultimately nationalizing like the other two, but that does not necessarily seem right: lawsuits against Obamacare did not seek to have Romneycare wiped out as well.

One can understand why his focus remained elsewhere: the truly innovative argument is his claim that progressive AGs' use of states' rights actually inverted federalism by enabling a handful of states to dictate expansive federal policy.

Subsequent events have continued to vindicate Nolette's findings. Conservative columnist Charles Krauthammer observed that under the Obama administration, states (and specifically their attorneys general) became perhaps the strongest check on the executive in light of an increasingly pliant, risk-averse Congress.[38] Fights over President Trump's immigration proposals have now similarly ended up as dueling coalitions of state attorneys general.[39]

This is an important book for scholars of federalism, American Political Development ("APD"), and Law and Society alike. For federalism scholars, Nolette shows how cooperative federalism not only allows the federal government to dictate politics to the states, but the states to dictate to the federal government. For APD scholars, he conclusively demonstrates that AGs have become a key player in building national government institutions. And for Law and Society scholars, he shows that this key policy-making is not taking place either in legislation or grand trends in jurisprudence but in the shadows of bargaining among state officials, bureaucrats, and corporations.

Nullification and Secession in Modern Constitutional Thought, edited (and with lead essays) by Sanford Levinson and with contributions from a host of leading luminaries of public law, offers a timely engagement with these controversial constitutional doctrines.[40] Several of the contributors play with various metaphors in trying to understand the role secession and nullification play in constitutional thought—are they dinosaurs, relics from a bygone age to be observed from afar? Are they undead zombies, killed by the Civil War until resurrected by fringe necromancers? The trigger behind militia movements or

37. *Id.* at 69–84.

38. Charles Krauthammer, *The Revolt of the Attorneys General*, NAT'L REV. (Mar. 2, 2017), http://www.nationalreview.com/article/445423/barack-obama-legacy-state-attorneys-check-executive-branch.

39. Alexander Burns, *How Attorneys General Became Democrats' Bulwark Against Trump*, N.Y. TIMES (Feb. 6, 2017), https://www.nytimes.com/2017/02/06/us/attorneys-general-democrats-trump-travel-ban.html; Austin Yack, *On Immigration, GOP State Attorneys General Echo Trump*, NAT'L REV. (June 27, 2017), http://www.nationalreview.com/article/448987/immigration-policy-trump-administration-republican-state-attorneys-general-sanctuary-cities.

40. NULLIFICATION AND SECESSION, *supra* note 10.

deranged lone wolves? Or, might one or both be worthy of a grudging respect?

James Read and Neal Allen's entry rightly posits classic, Calhounian nullification as the proactive obstruction of federal enforcement of federal law by a state or group of states, but one of this book's strengths is to show that American political practice rather freely invokes the term nullification. Thus, nullification is used to refer to a wide variety of tactics resisting federal activity, from Calhoun's vision to less controversial but perhaps more important tactics such as non-commandeering[41]—seemingly almost everything but secession itself.

Another of the book's strengths, especially timely as some muse about "Calexit," is that it demonstrates that secession, although functionally more radical in terms of its practical consequences, is ironically more rooted in American thought and arguably less destructive of the constitutional (as opposed to political) order. Levinson observes in his lead essay that the United States was founded as a constitutional secessionist movement,[42] effectively an English civil war dividing those who had come to interpret the Glorious Revolution differently (either rooted in the doctrine of parliamentary supremacy, as among the Tory parliamentarians, or as a federalist compound empire leaving domestic legislation in the hands of local assemblies, with Parliament for the UK metropole and the Burgesses for Virginia).[43]

Levinson quotes from a variety of sources conceding the defensibility of secession, including, most surprising to this reviewer, John Quincy Adams, who grimly observed, "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."[44] His chapter reveals that discussions of secession have been more common than imagined, though with the important caveat that much of this rhetoric is secession from within a state, such as the State of Jefferson seeking to leave the states of the coastal west. After fading for many years however, there are growing separatist impulses seeking not merely a more responsive state legislature but full separation from the Union—on the right among Texans, on the left among Vermonters, and, since the book's publication, Californians.[45]

Levinson is clearly troubled by the divorce analogy raised by Adams and equally alienated by Lincoln's glib retort, that allowing divorce from the Union would result in little more than a "free-love arrangement."[46] Levinson notes that the same logic would see us eliminate no-fault divorce, though on the other hand, he retains the metaphor to echo Jack Balkin's worry about the fate of anti-secessionists—who, like impoverished children

41. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not require state legislatures to enact specific legislation); Printz v. United States, 521 U.S. 898 (1997) (holding that Congress may not require state executive officers to execute federal law).

42. Sanford Levinson, *The 21st Century Rediscovery of Nullification and Secession in American Political Rhetoric*, *in* NULLIFICATION AND SECESSION, *supra* note 10, at 10, 32.

43. *Id.* at 34. *See generally* JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION (2010).

44. Levinson, *supra* note 42, at 34–35.

45. *Id.* at 36–39.

46. President Abraham Lincoln, Speech from the Balcony of the Bates House at Indianapolis, Indiana (Feb. 11, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 195 (Roy P. Basler et al. eds., 1953).

or ex-wives, would be left behind when their state voted to walk away.[47]

Although he disavows any connection to federalism as an inherent good, Levinson's essays demonstrate a genuine sympathy for the Second Vermont Republic, rooted in claims of small scale and real community hostile to imperialism and mass corporate capitalism. Nor is the intellectual lineage of these Green Mountaineers an excavation of Jefferson Davis: as Levinson notes, it is built on the thoughts of respected establishmentarians like George Kennan and Louis Brandeis (who while a progressive was very much a skeptic of centralization, as evident from the tongue-lashing he delivered to the New Deal Brain Trusters after *A.L.A. Schechter Poultry Corporation v. United States*).[48]

Levinson thus finds himself taking the stance that does unify much of the book, reserving his real ire for nullification: "I strongly suspect that . . . no one reading this article adopts, as a blanket rule, the principle of opposition to all secessionist movements . . . . Thus, placing secession—and proponents of secession—in the same cage reserved for zombies or dinosaurs," or, as Levinson noted earlier, nullifiers, "seems foolhardy."[49]

Separating nullification from secession is not the only careful distinction drawn within its pages. Although we often speak of the Virginia and Kentucky Resolutions in tandem, Jonathan Gienapp's entry adopts the position sharply distinguishing the two.[50] For Madison, interposition, state protest against unconstitutional action, was a means of 'popular vigilance'—read popular constitutionalism— in maintaining the Constitution, not a call for destructive revolution. Gienapp argues that interposition was pedagogical, ensuring that the people rallied behind textualism and original *meaning* (instead of original *intent*), since the former directly involved the people themselves.[51] After the crucial act of ratifying, Gienapp notes Madison believed that "the people . . . had a crucial role to play in constitutional maintenance by watching for encroachments . . . to observe if politicians were respecting the Constitution's plain meaning."[52] Thus, in a well-functioning federal polity, they would be "guardians of the people's sovereignty rather than the final expositors of it."[53]

Conventional nullification takes a further blow in Read and Allen's chapter, adapted

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47. Levinson, *supra* note 42, at 42–45.

48. 295 U.S. 495 (1935). Immediately following Justice Hughes' announcement of the Court's opinion in *Schechter*, Justice Brandeis said to Thomas G. Corcoran:

> This is the end of the business of centralization, and I want you to go back and tell the President that we're not going to let this government centralize everything. . . . As for your young men, you call them together and tell them to get out of Washington – tell them to go home, back to the states. That is where they must do their work.

3 ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL 280 (1960).

49. Levinson, *supra* note 42, at 45.

50. Jonathan Gienapp, *How to Maintain a Constitution: The Virginia and Kentucky Resolutions and James Madison's Struggle with the Problem of Constitutional Maintenance*, *in* NULLIFICATION AND SECESSION, *supra* note 10, at 53, 53. *See also* CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR (2007); WAYNE D. MOORE, CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE 246–65 (1996).

51. Gienapp, *supra* note 50, at 75–79.

52. *Id.* at 80.

53. *Id.* at 83.

from an earlier article,[54] which shows the unexpected and unfortunate rebirth of nullification in the twentieth and twenty-first centuries. They collect various, surprisingly numerous nullification-inflected bills and failed bills in the last ten years, although only one, a thus untested Kansas gun law, truly rises to classic nullification.[55] This, they note, is in addition to similar, plausibly non-commandeering "quasi-nullification" maneuvers in the nineteenth century, as well as classic instances of true nullification, such as antebellum South Carolina's successful effort to quarantine all black seamen in violation of the Commerce Clause and James Kilpatrick's attempt to resurrect nullification as part of massive resistance in the 1950s.[56]

I take Read and Allen's project to be discrediting nullification as part of a renewed conversation about a decentralized/states' rights federalism, and in that, they succeed. As part of that effort, they go a step farther than Gienapp's defense of Madison and take great pains to similarly block the light of Jefferson's halo from casting any glow on nullification. Thus, Calhoun, not Jefferson's wispy allusion in the Kentucky Resolution, is the true formulator of nullification: "all subsequent advocates of nullification, however fond of quoting Jefferson, depend on Calhoun, whether they recognize it or not."[57] And similarly, echoing the project most closely associated with Charles Dew, they ensure that we know South Carolina really was defending slavery, not states' rights, since it protested Wisconsin's own nullification of *Ableman v. Booth*[58] in March 1859: "South Carolina, the slave state that pioneered . . . nullification, dissolved the Union when free states began nullifying laws that South Carolina considered essential."[59]

Read and Allen argue that Calhoun and his modern day disciples are wrong to argue that nullification is the only technique to defend decentralized federalism. Not only does it prevent the feds from protecting citizens from states, but it also is not an especially apt tool for the states protecting their citizens from federal overreach: "nullification [is not] the only means by which states communicate opposition to federal laws; to presume that states must either nullify or abjectly surrender to federal power is to pose a false choice."[60] But, they fear, more are insisting on precisely that choice.

Mark Killenbeck's chapter further complicates this by noting that the Supreme Court itself may be unintentionally encouraging a rekindling of these ideas through its state sovereignty doctrine and specifically its rhetoric of "states as states." The latter, ostensibly

54. James H. Read & Neal Allen, *Living, Dead, and Undead: Nullification Past and Present*, 1 AM. POL. THOUGHT 263, 263–97 (2012).

55. Gienapp, *supra* note 50, at 92–97.

56. James H. Read & Neal Allen, *Living, Dead, and Undead: Nullification Past and Present*, *in* NULLIFICATION AND SECESSION, *supra* note 10, at 91, 107–18.

57. *Id.* at 102–03; JAMES H. READ, MAJORITY RULE VERSUS CONSENSUS: THE POLITICAL THOUGHT OF JOHN C. CALHOUN (2009).

58. 62 U.S. 506 (1859) (holding that state courts cannot issue rulings that contradict the decisions of federal courts).

59. Read & Allen, *supra* note 56, at 111; CHARLES B. DEW, APOSTLES OF DISUNION: SOUTHERN SECESSION COMMISSIONERS AND THE CAUSES OF THE CIVIL WAR (2001); PAUL E. HERRON, FRAMING THE SOLID SOUTH (2017).

60. Read & Allen, *supra* note 56, at 97.

gleaned in spirit from *Texas v. White*,[61] thus appears to mark that case as not quite the anti-secessionist bulwark it is often hailed to be.[62]

But what of other "nullifications" and anti-federal activity beyond Calhoun's ghost? Ernest Young's provocative entry proposes that we should analyze federalism through the lens of our separation of powers doctrines: that dual federalism was closer to a rigid definition of separation of powers with clearly separate spheres, whereas the evolution toward concurrent and cooperative federalism means that it is more like overlapping checks and balances. As Young observes in his study of marijuana politics, in an age of cooperative rather than dual federalism, state pushback ironically has the effect of crippling the federal policy.[63] (This was equally true under the anomalous 1920s regime of prohibition which awkwardly fit "concurrent enforcement" within dual federalism.[64]) Thus, invoking anti-commandeering to block the machinery of state power is de facto "nullification for an age of concurrent jurisdiction, in which federal *authority* to legislate is largely uncontested but federal resources and political will are both highly limited."[65]

Similar to Stephen Engel's spectrum of court-curbing,[66] one might envision a spectrum of state tactics used to oppose federal power, but as this book shows, doing so becomes surprisingly difficult. At the tamest end—obviously regular politics—would be lawsuits and memorials (the Madisonian "interposition" studied by Gienapp), seeking to persuade courts or Congress to terminate some illegal activity by using what Madison described in the Virginia Resolution as the constitutionally inclined "necessary and proper" means to do so.[67] At the other end would be secession and nullification.

In the middle would be passive resistance by withdrawing state and local support for federal objectives through anti-commandeering—in effect, Heather Gerken and Jessica Bulman-Pozen's notion of "uncooperative federalism," of the sort written about by Young.[68] Passing statutes that clearly conflict with the then-existing interpretation of the Constitution (aimed at generating test cases) challenges the interpretation but, so long as

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61. 74 U.S. 700 (1869) (concluding that Texas had never ceased to be a state, despite secession from the Union).

> Not only . . . can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

Id. at 725.

62. Mark R. Killenbeck, *Political Facts, Legal Fictions*, *in* NULLIFICATION AND SECESSION, *supra* note 10, at 223, 242–45. *See also* MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE 182–86 (1992).

63. Ernest A. Young, *Marijuana, Nullification, and the Checks and Balances Model of Federalism*, *in* NULLIFICATION AND SECESSION, *supra* note 10, at 125, 126–30.

64. Beienburg, *supra* note 33; SEAN BEIENBURG, PROHIBITION, THE CONSTITUTION, AND STATES' RIGHTS, 1918–1933 (unpublished manuscript) (on file with author).

65. Young, *supra* note 63, at 139.

66. STEPHEN M. ENGEL, AMERICAN POLITICIANS CONFRONT THE COURT: OPPOSITION POLITICS AND CHANGING RESPONSES TO JUDICIAL POWER (2011).

67. *See* James Madison, Virginia Resolution of 1798, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliott ed., 2d ed. 1891).

68. Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

the state complies with a reaffirmed interpretation, should not necessarily bother us. Superficial compliance but functional evasion, of the sort described by Mark Graber's chapter, threatens constitutional implementation without challenging its underpinning norms (at least in the short term). A purely rhetorical but functionally toothless "quasi-nullification" of the type noted by Read and Allen—in either memorials or statutes or even constitutional amendments[69]—adopting the language and precedents of nullification but not its implementing logic, also fit somewhat uneasily in this hazy middle.

As Levinson observes, "the powerful point behind the notion of uncooperative federalism is that the practical consequences of the latter may be at least as important as the legalisms of the former."[70] Thus, as these works show, classifying and ranking these is much harder, and depends on whether one prioritizes theoretical damage to constitutional logic or the impact of policy obstruction as the measure of intensity.

From that midpoint, the entries turn from conventional high politics of American federalism to two useful perspectives: informal individualist constitutionalism and comparative federalism.

Mark Graber and Jared Goldstein's entries on private nullification offer perhaps the most dispiriting contributions in an already grim book. Graber worries about the de facto "partial nullification" of individual level disobedience hollowing out constitutional guarantees: police ignoring *Miranda v. Arizona*[71] or turning a blind eye to private violence, or juror nullification, whose prospect leveraged by defense lawyers is more important than actual nullification—as in the green light to white violence under Jim Crow.[72] Perhaps even more troubling is the example of legal officials hiding behind fact finding and the doctrine of standing to allow continued evasion while waiting for a formal slap down from above—if one comes at all, since settlements or pardons to avoid cases exposing constitutional violations remain a viable option to shield malfeasance.[73]

As Graber ominously concludes, "constitutional law is surprisingly equivocal when state and private actors either declare a federal law null and void or behave in ways that are forbidden by federal law, but do not attempt both simultaneously."[74] Jared Goldstein's entry fears popular constitutionalism taken to its endpoint by citizens doing both and feeling increasingly emboldened to act out through violence. If Gienapp held interposition to be collective popular vigilance in peacefully signaling Congress to stay within its boundaries, for Goldstein "insurrection . . . is simply nullification performed at the most local level of all: the individual citizen."[75]

Much like Read and Allen's entry, Ran Hirschl's introduction to the comparative

69. John Dinan, *Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism*, 74 ALB. L. REV. 1637, 1637–67 (2011); Sean Beienburg, *Contesting the U.S. Constitution Through State Amendments: The 2011 and 2012 Elections*, 129 POL. SCI. Q. 55–85 (2014).

70. Levinson, *supra* note 42, at 19.

71. 384 U.S. 436 (1966).

72. Mark A. Graber, *Almost Legal: Disobedience and Partial Nullification in American Constitutional Politics and Law*, *in* NULLIFICATION AND SECESSION, *supra* note 10, at 146, 165–67.

73. *Id.* at 172–74.

74. *Id.* at 175.

75. *Id.* at 180.

section offers a thorough chronicle of the many secession movements in recent world politics and the ease with which secession and nullification thinking drift together—and are far more common than Americans, bewildered at resurgent separatist movements within our borders, understand from looking only to their own history.[76]

Alison LaCroix illustrates the surprising continuities of the Confederate Constitution and the American charter, noting that many proposed changes were ultimately scrapped and the decision was often made to stick with the 1787 model, resulting in a text which was idolatrously faithful to U.S. constitutional law—even as leading Confederates reviled founding principles (for example, Alexander Stephens's infamous Cornerstone Speech).[77] Complementary pieces from Vicki Jackson and Zachary Elkins debate whether or not constitutions ought to include secession clauses,[78] while Mark Tushnet offers a concluding piece applying labor law logic to think through what good faith secession negotiations between the new or seceding nation and the 'remnant' would look like.[79]

Although, as with any edited volume, the pieces offer a variety of perspectives, there is much shared ground even as the contributors hold starkly different views about the extent to which America's decentralized federalism remains a celebrated treasure or an unfortunate historical relic. In short, classical Calhounian nullification gains few friends, uncooperative/anti-commandeering federalism receives generally positive kudos, and secession a grudging but ultimately surprisingly sympathetic treatment.

That American politics is ferociously polarized needs little further comment. As Levinson ominously concludes toward the end, nodding to *The Federalist No. 2*'s assessment of Founding-era America, the "political class, even if not necessarily the population as a whole, could be regarded as homogenous. We do not live in that country anymore."[80] Now, constitutionalism, partisanship, *and* geography/region all reinforce one another and the underlying fracture, with increasingly 'constitutional' dialogue alongside increasingly incompatible, polarized constitutionalisms.

A well-functioning federal system potentially offers a solution to polarization, scaling conflict down to subnational units, allowing both sides to win in their respective domains while lowering the stakes in any individual loss.

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76. Ran Hirschl, *Nullification: Three Comparative Notes*, *in* NULLIFICATION AND SECESSION, *supra* note 10, at 249.

77. Alison L. LaCroix, *Continuity in Secession: The Case of the Confederate Constitution*, *in* NULLIFICATION AND SECESSION, *supra* note 10, at 274. *See* Alexander H. Stephens, Vice President of the Confederate States of Am., Cornerstone Speech (Mar. 21, 1861), *in* HENRY CLEVELAND, ALEXANDER H. STEPHENS: IN PUBLIC AND PRIVATE 717–29 (Phila., National 1866).

78. Vicki C. Jackson, *Secession, Transnational Precedents, and Constitutional Silences*, *in* NULLIFICATION AND SECESSION, *supra* note 10, at 314; Zachary Elkins, *The Logic and Design of a Low-Commitment Constitution (Or, How to Stop Worrying About the Right to Secede)*, *in* NULLIFICATION AND SECESSION, *supra* note 10, at 294.

79. Mark Tushnet, *Secession as a Problem in Negotiation*, *in* NULLIFICATION AND SECESSION, *supra* note 10, at 343.

80. Levinson, *supra* note 42, at 49. *Contra* THE FEDERALIST NO. 2 (John Jay) (Clinton Rossiter ed., 1961) ("Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts . . . have nobly established general liberty and independence.").

As both these volumes show in their own way, we are not in that system. Instead, politics becomes ever more nationalized—including, as Nolette points out, counterintuitively due to the actions of progressive state AGs employing a paradoxical nationalist nullification, cloaked within winking but disingenuous nods to states' rights. The resulting unhealthy federalism—in which careful attention to enumerated powers is ignored, but the institutional machinery of state resistance and a latent antipathy to federal power remain to be mobilized—unsurprisingly threatens to unleash both forms of nullification chronicled in these books.

Rather than a serious bipartisan commitment to discussing and maintaining the enumerated powers—both what they allow and what they do not—our discourse on federalism has involved what Andrew Busch described as "limited government on the cheap."[81] A few political observers have proposed a descaling armistice, but they seem to be unheralded prophets in the wilderness. Instead, as many of the entries in the Levinson volume show, ever more radical solutions are finding favor again.

The stunning rapidity with which "Calexit" sanitized secession—largely spoken of and dismissed on prudential grounds (Is it worth it? Would it work?) rather than horrified normative ones (Is it illegal? Is this is going to restart the Civil War? Is this something only antebellum racists would do?)—suggests that long discarded constitutional reasoning has been put back on the table.

As Mark Killenbeck ominously noted, the U.S. Constitution, unlike the Articles of Confederation and Confederate Constitution, does not declare its own perpetuity.[82] That the Constitution endures but those supposedly immortal documents are now but historical relics is an amusing irony, but these books teach us that in light of the fractures arising in modern constitutional thought and practice we should perhaps not be so confident in that irony.

81. ANDREW E. BUSCH, THE CONSTITUTION ON THE CAMPAIGN TRAIL: THE SURPRISING POLITICAL CAREER OF AMERICA'S FOUNDING DOCUMENT 48 (2007).

82. Killenbeck, *supra* note 62, at 247.