Law & Legal Thought Across Disciplines

Union & States' Rights

A History and Interpretation of Interposition, Nullification, and Secession 150 Years After Sumter

Neil H. Cogan, editor

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Edited by Neil H. Cogan

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For my children, Eliya, Aviel, Saraleah, Chava, Hillel, Adina, and Jacob, and my grandchildren, Jonah, Jack, Eli, Sam, Caleb, and Anabella, with love and respect.

[A] new nation, conceived in liberty and dedicated to the proposition that all men are created equal.
—Abraham Lincoln

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I was fortunate that Farber, Finkelman, Hamilton, and Neff, all eminent scholars, graciously agreed to participate in the Section on Legal History at the Annual Meeting of the Association of American Law Schools on January 7, 2011, and subsequently agreed to expand their papers for inclusion in a published law review symposium. I was also fortunate that seven other eminent scholars agreed to contribute papers to this collection. I thank each of them.

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Contents

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Introduction

Neil H. Cogan, Whittier (College) Law School

This collection addresses questions fundamental to the American Union, from historical, legal, political, and social/moral perspectives. When deep substantive disagreements between the federal and state governments long persist without foreseeable resolution, what extraordinary options do the governments and the people have? That is, what options are available beyond discussion and compromise in the federal legislative and executive branches and political forums?

Do the states, on behalf of themselves and their citizens, have rights that authorize extraordinary options? May states interpose themselves between the federal government and the people? May states enact legislation nullifying federal law? May the states secede from the Union? May states call for regular constitutional conventions?

These are questions about the structure of our Union and the relationships of the Union, states, and people—about their 'rights' under the Constitution. This collection addresses the arguments and the history and memory of arguments made at the founding of our Union, during the antebellum and Civil War period, and today. The papers collected here assess those arguments, those interpretations of the Constitution.

At the beginning of national formation in the 1770s, when the states first met in Congress, they disagreed about the structure of their association and their relationships with one another. Disagreements about structure and relationships continued through and following the Revolution and War of Independence, into

the Continental Congress, and under the Articles of Confederation and Perpetual Union. And notwithstanding the historic agreement in 1787 at the Philadelphia convention, the ratification of the Constitution, and the foundational 1st Congress, the disagreements continued without abatement, as the United States of America became a nation and Americans a people.

Did the states remain sovereigns? If not, did they retain some attributes of sovereignty? If so, what attributes did they retain?

For seventy-six years, from the ratification of the Constitution through the end of the Civil War—or longer, in President Abraham Lincoln's viewpoint, from the Articles of Association in 1774 and the Declaration of Independence in 1776—the issues of federal and state power tore the fabric of nationhood until more than six hundred thousand combatants and the President himself lay dead. Now, 150 years after South Carolina's secession from the Union—and the *Charleston Mercury*'s declaration that "The Union is Dissolved"—and 150 years since mortar rounds were launched against federal troops holding Fort Sumter, the contributors to this collection and I think that it is important to remember and reassess the arguments used to justify those actions. The arguments were not stilled with the last gunshots at Appomattox and the surrender by the Confederacy.

In brief, the antebellum arguments fall largely within the popular political term 'states' rights,' a term that remains resonant.[1] Within decisional constitutional law, by contrast, the courts identify various and conflicting theories of federalism (sometimes capitalized as 'Federalism' or 'Our Federalism') as defining or underlying the structure and relationships of the United States and the states and as limiting federal power to burden the 'rights' of the states.[2] However styled, the arguments are being made once again in support of state nullification of federal law and even in support of secession.

In addressing the issues of Union and states' rights, the contributors parse the 'original meaning' and 'original understanding' of the Constitution and other founding documents, the principles at stake in the antebellum debates, and the legal effect of both the Union's victory in the Civil War and the states' ratification thereafter of the 14th Amendment. The chapters discuss whether the people, in ratifying the Constitution, relinquished the states' and their option of revolution. They address contemporary arguments for interposition and nullification. The collection concludes with a chapter on revisionism in the memories of slavery, secession, and war.

As editor of this collection, I am honored by and respectful of the learned papers of each of the contributors, whether they support or oppose states' rights

and federalism arguments for interposition, nullification, and secession, as well as constitutional convention. As editor, I am compelled to add that constitutional interpretation must reflect morality, as well as original meaning and understanding and attributes of sovereignty. The truth is that in seceding from the Union and instigating the Civil War, the states of the Confederacy were defending their dubious 'right' to subjugate and terrorize in chattel slavery more than four million descendants of Africans who survived kidnap and transportation to the United States. Moral blindness, racism, and economic self-interest, in my respectful opinion, underlay and enabled much of the legal, political, and social argument. Unconscionably, they promoted the enslavement of millions and the murder and rape of countless; and triggered the bloodiest and most senseless of our wars, what is politely termed the Civil War. Notwithstanding these tragedies and notwithstanding the postwar Reconstruction Amendments and civil rights laws, we as a nation failed to reflect adequately on the moral failures of slavery and its justifications, and the legal, political, and social restructuring that the war itself and the amendments had wrought.

I. ANTEBELLUM STATES' RIGHTS DISPUTES, IN BRIEF

In the decades before the Civil War, disputes—about slavery's abolition and its territorial limitation or expansion, federal enforcement and opposition to the return of fugitive slaves, the availability of money and credit and imposition of tariffs, and the acquisition of territory and initiation of war—divided the states by region as well as the states and federal government. When the federal government pursued policies that antagonized deeply held state positions on these issues, states frequently responded with claims that they held rights under or beyond the Constitution to oppose federal authority and, ultimately, to secede from the Union, or the Compact as they frequently termed the relationship.

One form of the claim was interposition—that the states had authority to interpose in some manner on behalf of their citizens against the federal government in order to prevent the unlawful exercise of federal authority. The Virginia Resolution of 1798, written by James Madison, made this state' rights claim but did not specify how interposition would be carried out.

Another form of the claim was nullification—that the states had authority to nullify federal law through the enactment of state law. The Kentucky Resolution of 1798, written by Thomas Jefferson, made this claim. The resolution was considered and rejected by several states at the time, but it gained traction in subsequent years. Antislavery advocates also argued for nullification of federal

fugitive slave laws. In 1832, South Carolina adopted an Ordinance of Nullification, which declared two federal tariffs unconstitutional, and the state prepared to resist the tariffs by military force. John Calhoun resigned from the vice-presidency over the issue, and the Congress passed the Force Bill to authorize military action against South Carolina.

The third form of the claim was secession—the idea that states had a reserved or inherent right to secede from the Union because of the federal government's breach of the Constitution or Compact. Whether the Union is perpetual and whether grounds exist for separation were issues raised during several crises, including at the Hartford Convention convened in 1814 to oppose the War of 1812 and at William Lloyd Garrison's New England Anti-Slavery Society Convention convened in 1844 to accelerate the abolition movement. The ultimate tragedy of the claim came in 1860, when South Carolina seceded from the Union, followed by ten other states, and then in 1861 when its troops launched a bombardment of the federal military installation at Fort Sumter.

II. POSTBELLUM JUDICIAL DEVELOPMENTS, IN BRIEF

The Civil War and the Reconstruction Amendments, it is often contended, ended once and for all the states' sights arguments supporting interposition, nullification, and secession. While prior to the war some might have argued that the United States of America 'are,' after the war it could only be said that the United States of America 'is.' That is, prior to the war, states might plausibly have argued that as sovereigns they were not ultimately bound by the actions of the Congress and President; after the war they could no longer make that argument. After the war, states were limited to pressing their interests in the Congress—indeed, until the ratification of the 17th Amendment in 1913, state legislatures appointed the members of the Senate—and federal law ultimately reflected those interests as negotiated and compromised among Representatives and Senators. Once federal law was enacted, it was supreme, and states qua states could not assert that the law did not bind them. That contention was not unanimously shared.

However states' rights fared in the popular arena, moreover, within the courts the 'rights' of states and principles and theories of federalism remained, sometimes prominent and sometimes quiescent. In the nineteenth century, particularly postbellum, and well into the twentieth century, the Supreme Court held that federal law could be challenged as overreaching the federal government's domain when the federal government sought to regulate activity that was within the exclusive jurisdiction of the states. Thus, notwithstanding negotia-

tions and compromises by and between Representatives and Senators elected by the people of the states, the Court interpreted the Congress's power to regulate commerce and its power to tax and spend in a manner that placed 'local matters' well beyond the competence of the United States.[3] Then, from about 1937 until the mid-1990s, the Court reversed track.[4] But, then again, for the last twenty years, the Court has reverted to its earlier interpretation that there are matters that traditionally belong to the states to regulate and not the United States. The mantra is that principles of federalism (not states' rights) justify the decisions.[5]

Moreover, for forty years, the Court has identified areas in which the Congress may not regulate the states and state officials. The Court has created doctrines, assertedly founded in principles and theories of federalism and supported by the 10th Amendment, that preclude suits against the states unless the suits come within 'exceptions' such as voluntary and knowing state consent to suit[6] or 14th Amendment remedial legislation.[7] In my view, Court doctrines that now protect the states from federal coercion or 'commandeering' would have surprised those who prevailed in the Civil War and enacted the transformative Reconstruction Amendments.[8]

III. RECENT ASSERTIONS OF NULLIFICATION AND SECESSION

Calls for states to nullify federal actions, particularly legislative actions, or to interpose the states between the federal government and the people have been frequent in recent years. Groups affiliated with the Tea Party movement are vigorously urging states to nullify federal legislation, with a special fervency against the Patient Protection and Affordable Care Act, President Barack Obama's health reform initiative. As one example, the Tenth Amendment Center lists on its website several nullification initiatives and proposals, including those against federal regulation of firearms, healthcare, and marijuana. The center urges its readers to attend national tours of prominent Tea Party activists with the slogan "Nullify Now."

Organizations that support nullification and interposition hold rallies, sponsor tours, distribute literature, and maintain websites.[9] Wyoming passed the Firearms Freedom Act, and the governor signed it on March 12, 2010.[10] The act calls for disobedience to federal firearms laws and regulations. In the 2011 session of the Texas House, H.B. 1937 was introduced to criminalize all searches, including airport screenings by the Transportation Security Administration, conducted without probable cause.[11] In 2010–11, bills were filed in thirteen leg-

islatures to nullify 'Obamacare.'[12] In the election of 2012, voters in Colorado and Washington approved the use of recreational marijuana, ostensibly in conflict with federal law, and a recent survey found that 51 percent of persons favor an exemption from federal law for persons who follow state law in using marijuana.[13]

In 2009, Governor Rick Perry of Texas twice adverted to whether Texas might lawfully secede from the Union.[14] His comments were noteworthy because they came from the governor of a large and influential state and because Governor Perry was a well-regarded candidate for the Republican presidential nomination. But his comments are not unique. Following the election of 2012, it is reported that 60,000 Texans and citizens of fifteen other states filed petitions to secede from the Union.[15] At the state and local level, there have been both recent and past calls for secession from states and the formation of new states.[16]

Arguing that "our Republic does not work as our Framers intended," on September 24–25, 2011, Harvard Professor Lawrence Lessig joined with Mr. Mark Meckler, a Tea Party Patriots national coordinator, to convene the Conference on the Constitutional Convention at Harvard Law School to discuss the advisability and feasibility of organizing a constitutional convention.[17] One of our authors, Sanford V. Levinson, is a nationally prominent critic of the defects in the Constitution's structure and an advocate for substantial amendment.[18]

IV. THE COLLECTION

This collection grew out of the symposium on Legal History I organized at the annual meeting of the American Association of Law Schools on January 7, 2011. Five eminent scholars gave four excellent papers and commentary on the legal history of secession and the related claims of interposition and nullification. Because of the excitement generated by the symposium, I asked the panel members whether they would be willing to expand their papers for publication and other scholars agreed to join the project. The expanded scope is intended to offer a comprehensive discussion of issues arising when disagreements between the states and the federal government cannot be resolved by ordinary political arrangements.

Part I of this collection discusses James Madison, of significance in parsing the views of a principal Framer. Part II discusses antebellum arguments for and against secession and nullification. Part III examines the antebellum debate and the impact of the 14th Amendment. In part IV, contemporary arguments for interposition and nullification are examined. And in part V, one chapter looks critically at arguments for federalism, and one chapter looks critically at collective memory of secession.

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