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Distending the Republic

Russell L. Hanson

Democratic Beginnings: Founding the Western States. By Amy Bridges. Lawrence: University Press of Kansas, 2015. 216p. $34.95 cloth, $26.95 paper.

Nullification and Secession in Modern Constitutional Thinking. Edited by Sanford Levinson. Lawrence: University Press of Kansas, 2016. 384p. $45.00 cloth, $24.95 paper.

Democratic governments are particularly susceptible to the mischief of faction, averred James Madison in Federalist No. X. But the mischief could be controlled by extending the republic so as to encompass diverse interests, he asserted. A broad union of states made it less likely that a majority could form at the national level and subjugate minority interests or sacrifice individual liberties to its will. Antifederalists, citing Montesquieu, warned that an extended republic was too diverse, and could only be governed by a dictator willing to impose order by force. This debate continued even after the U.S. Constitution went into effect in 1789, particularly in decisions about the admission of new states, the power of states within the union, and some states' attempts to withdraw from it.

Under the Articles of Confederation, a supermajority of nine votes of states in Congress assembled was required to admit any new state; hence a small number of states could regulate diversity, except in the case of Canada, which was invited to join the confederation. The Constitution of the United States required only concurrent majorities in the House of Representatives and Senate to admit new states to the Union. Congress would decide how much, or little, diversity to allow. The early admission of Vermont, Kentucky, and Maine did little to change the complexion of the United States, as these were formed out of existing states in the Union and the Republic of Vermont.

Article IV, Section 3 also awarded Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." This allowed Congress to govern territories with an eye toward shaping terms of admission to statehood at a later date. The Missouri Compromise exemplified Congress's determination to limit the extent of the republic so as to preserve the balance of power between free and slave states. The U.S. Supreme Court vitiated that compromise in the infamous Dred Scott decision, which declared not only that African Americans were not, and never could be, citizens of the United States but also that Congress had no authority to ban slavery from territories of the United States.

Ratification of the Thirteenth Amendment settled that question. Slavery was no longer an issue, but partisan control of Congress was, especially after Confederate states regained representation in Congress, presenting a northern Republican majority with a southern Democratic opposition. Thus, when the Dakota Territory was considered for admission to statehood, the Republican majority in Congress stipulated that two states, not one, should be admitted, thereby doubling the number of Republicans who would enter the Senate from North and South Dakota.

I stress the constitutional authority of Congress to admit states by way of challenging colloquial references to states "joining the union." That way of putting it suggests that territories were autonomous and, hence, that the decision to seek statehood was primarily a local matter. This notion informs states' opposition to federal directives, even in areas that were constitutionally reserved to the federal government under laws enabling territories to become states in the first place. Such opposition, couched in the language of states' rights, fails to acknowledge the terms of admission, as defined by Congress when it admitted any territory or possession to statehood.

This point is critical for understanding the authority that states enjoy in the Union, which is the focus of Sanford Levinson's anthology. But it is also crucial for understanding congressionally imposed obligations and limitations on territories in legislation enabling them to become states, or admitting them directly, which is the object of Amy Bridges's investigation.

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doi:10.1017/S1537592717002730
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https://doi.org/10.1017/S1537592717002730 Published online by Cambridge University Press

In *Democratic Beginnings*, Bridges provides a wonderfully detailed account of the formation of new states in the American West, that is, territories in the Mountain West and on the Pacific Rim. She offers an original analysis of the constitutional conventions leading to western states' application for admission to statehood, based on a close and sensitive reading of transcripts of the proceedings and newspaper accounts. She notes the ways in which national trends affected western deliberations, and the growing impact of western views on national deliberations as the center of population, and hence representation in Congress, moved westward.

As Bridges shows, control over land and natural resources loomed large in conventions that proposed constitutions for citizens to approve. These were important concerns in Congress, too, which reserved federal control over extensive public lands in the newly admitted states. In some states, a third or even half of the territorial lands were reserved and left under federal control. In other words, substantial areas of these new states were not subject to the jurisdiction of newly established state governments. Moreover, congressional legislation enabling the formation of new states limited what states might do within areas subject to their jurisdiction, and imposed obligations there, too.

The author alludes to these original understandings in passing, but she is primarily interested in the deliberations that took place in western constitutional conventions. In her view, the conventions were unusually democratic, being more representative than state legislatures—and far more inclusive than the Philadelphia convention. She also presents ample evidence that elected delegates were not especially deferential toward constitutional and legal traditions. They came together with a sense of mission, and an openness to new ideas in the face of unprecedented challenges, such as allocating control over precious natural resources, including water; protecting people from powerful out-of-state corporations, particularly railroads; and upholding the rights of laborers and (eventually) the enfranchisement of women. There were few "originalists" in state conventions called to resolve pressing issues of the time and place, notwithstanding the valorization of that particular brand of constitutional interpretation in our own day.

Analytically, Bridges traces three generations of western constitutional conventions. The first generation involved California in 1850, Oregon in 1859, and Nevada in 1864 (admitted just in time to bolster Republicans in the House of Representatives if neither Abraham Lincoln nor George McClellan attained a majority in the Electoral College). Delegates to all three conventions were far removed from other states in the Union, but they shared many of the same values, according to the author. They agreed on the importance of citizens' character in a republic of virtue, and that white male citizens had the best character and so were entitled to vote and hold office. Like their counterparts elsewhere, western delegates opposed granting special favors to banks and limited-liability corporations. But the political implications of these shared values differed from place to place. California, Oregon, and Nevada each "took its own path through argument, compromise, invention, and bargaining to consensus" (p. 57) in proposing a constitution to voters for approval or disapproval. In particular, each state struck its own balance in regulating the activities of corporations that powered economic development in the West.

The Gilded Age spawned a second generation of constitutional conventions: Colorado in 1876, California (again) in 1879, Montana and Idaho in 1888, and Wyoming in 1889, plus Washington in 1890 and Utah in 1895. Oddly, Bridges did not discuss conventions in North and South Dakota, which were certainly considered western states in 1889; they were also expressly covered under the same act by which Congress enabled Montana and Washington to become states. The act imposed several conditions for these territories to become states, at a time when Congress declined to admit Utah to statehood until the Mormon Church disavowed polygamy, which was forbidden under federal law. Surely the conditions for admission to statehood established by Congress shaped the deliberations of delegates to these conventions—but the author does not attend to them.

Instead, Bridges emphasizes federal inattention to western interests and inaction on controversial issues of special concern to western states. These included abuses of power by railroads, mining companies, and other outside interests. Such entities were vital for development, but their lack of accountability spurred delegates to empower states, and to create regulatory institutions, like railroad commissions, mining inspection agencies, and departments of labor. Most importantly, delegates wrestled with the allocation of water rights and the need to establish rules and agencies for resolving water disputes among mining companies, cattle ranchers, and farmers.

As they proposed stronger state governments, convention delegates also expanded the range of negative liberties enjoyed by individuals and added an impressive array of positive rights. The latter included free public education, protection for workers, and equal protection under the laws. Progressivism came early to the West, and naturally, in the course of addressing problems unique to the West or at least particularly pertinent to its people. Bridges attributes this to the representativeness of constitutional conventions composed of men from all walks of life, who were used to solving problems and committed to the cause of statehood.

Arizona and New Mexico both held conventions in 1910; they comprise the third generation of conventions that Bridges analyzes. It is interesting to note that these

https://doi.org/10.1017/S1537592717002730 Published online by Cambridge University Press

two neighbors diverged widely, with New Mexico proposing a very conservative constitution, "considerably to the right of President Taft," and Arizona risking its prospects for statehood by embracing direct democracy and labor protections "well to the left of Theodore Roosevelt and Woodrow Wilson," as Bridges puts it (p. 103). She explains this by noting that both were one-party states, with Arizona controlled by Democrats and New Mexico by Republicans.

In Arizona, Democrats favored the initiative, referendum, and recall—the instruments of direct democracy—even though that put statehood in jeopardy, since Taft opposed them, and his certification was required under the enabling legislation. New Mexico Republicans rejected these "heresies," which "constitute the first movement in the direction of anarchy in this government of ours" (p. 117).

Analysis of this generation of conventions is limited by the absence of any transcription of the New Mexico deliberations; only newspaper reports are available, and they provided scant coverage of closed Republican caucus deliberations. As a result, it is not altogether clear what this generation adds to Bridges's account of the western foundings, although it provides an interesting contrast on direct democracy, which was common in that region, at least among states where parties were competitive. Indeed, much of the chapter is framed in national terms, not regional priorities. To a considerable extent this is true of the first generation, too, leaving the Gilded Age generation as the most distinctly western set of constitutional deliberations.

Having achieved statehood, what options are available to western states at loggerheads with federal authorities? The question is significant, given the extent of lands in western states reserved to the federal government upon admission to statehood. The terms of admission made jurisdictional conflict inevitable, but the difference reached critical mass in the "Sagebrush Rebellion" of the late 1970s, followed by the "wise-use," or privatization, movement of the 1990s, which culminated in the 2014 standoff at Cliven Bundy's ranch in Nevada and the deadly 2016 occupation of Malheur National Wildlife Refuge in Oregon. More recently, a summit of western states pressed Congress to devolve control over public lands, though they were careful not to say "return" of lands that were never theirs to control in the first place, as the appeal to Congress proves.

Other states, some western, some not, have resisted federal efforts to expand Civil Rights—by asserting state sovereignty in cultural matters, including same-sex marriage, abortion, and birth control. Health care and gun control have been flashpoints, too, with the legalization of marijuana a bit further behind. On these issues, the most strident opposition has come from southern states refounded after the Civil War, seconded by northern states in the Mountain West. Talk of state nullification of federal law has resurfaced, and assertions of a state's right to secede have begun to percolate.

Nullification and Secession in Modern Constitutional Thought is, therefore, a timely volume, which includes editor Sanford Levinson's "Introduction" and a revised version of his 2013 essay, "Zombie (or Dinosaur) Constitutionalism? The Revival of Nullification and Secession." That essay provoked several responses and inspired a full-fledged and wide-ranging discussion of the revival of state efforts to "nullify" federal actions and threaten secession, or at least to reserve the right to secede from the Union. The election of Donald Trump in 2016 led to a similar outburst, this time from Democratic strongholds, especially California.

Levinson's anthology includes eight essays on nullification and four on secession, though several themes cut across this division. One involves differences between the legal understanding of nullification and secession and more philosophical discourses, on the one hand, and political usage, on the other. A second theme involves differences between U.S. understandings and usage and those being expressed elsewhere in the world, some of which invoke nullification or its functional equivalent, and some of which demand outright secession in the legal sense of the term. The evolution of U.S. interpretations of nullification and secession is a third theme, and a fourth involves the political valence of nullification and secession. Who benefits from state challenges to federal authority, and are there other, perhaps better, ways of managing conflict in federal systems?

In the United States, "ground zero" for understanding nullification and secession was the opposition of Thomas Jefferson and James Madison to the 1798 Alien and Sedition Acts. The acts were unconstitutional, said the Virginians, who based their conclusion on a compact theory of the Constitution's ratification. In Jefferson's version of this theory, states ratified the Constitution, and as parties to this compact, states were the final judges of constitutionality. State legislatures could declare federal acts "null and void" within their jurisdictions, trumping the Supreme Court's authority to resolve questions of constitutional interpretation. This is the fountainhead of claims about state sovereignty in the extended republic of the United States.

Madison's version of the compact theory was less militant and more intellectually consistent, as Jonathan Gienapp's essay in the volume shows. In a republic, the people are sovereign, and it was the people of each state who ratified the Constitution and gave it legitimacy. State legislatures could certainly declare federal acts unconstitutional, but their role was to mobilize the people to pursue constitutionally provided avenues of redress: corrective action by Congress or concerted action in pursuit of constitutional amendments. The legislatures themselves were not sovereign in the way Jefferson asserted.

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Madison's remedy—interposition—which involved collective action by peoples aroused by their state legislatures, was much less radical than Jefferson's. There is nothing antediluvian about it; in fact, it is the basis for contemporary Article V movements to hold a constitutional convention by demand of the states, which Congress cannot refuse, though it might obstruct. Regrettably, this option receives little attention in this volume, though it is more potent than some contemporary expressions of Jeffersonian nullification.

Jefferson's mistaken assignment of sovereignty to state legislatures, and not the people they represent, is the target of James Read and Neal Allen, who trace the evolution of nullification over time, through the Civil Rights movement and up to the present rash of state challenges to federal actions under the Obama administration. They see no legal basis for nullification in the Jeffersonian sense of not only condemning federal action but also preventing enforcement by federal agents in states. But they rightly urge us to look beyond legality to treat nullification's resurgence as a sign of ill health in the body politic, of rising temperatures in a federally organized and increasingly polarized society. The absence of any legal basis for nullification is in some ways beside the point; it is the political reality of governing a greatly extended, and much diversified, republic that matters.

Reinforcing that point, other contributors explain that contemporary nullification takes many forms, some stronger, and some weaker, than Jefferson's version. The weaker forms may be less confrontational in a legal sense but more effective than open defiance of federal authorities. As Zachary Elkins reports, western states have been in the forefront of efforts to legalize marijuana, not only for medicinal purposes but also for recreational use. For instance, Colorado and Washington have not formally declared federal law null and void within their borders; they simply rescinded state laws criminalizing possession and consumption of marijuana—and withdrew state and local support for federal agencies charged with enforcing national law. This was effective, insofar as federal agencies rely heavily on state and local governments to accomplish federal purposes. The Supreme Court has ruled that federal officials may not commandeer state and local resources to enforce federal law; this is an opening that sanctuary cities and states are now exploring.

Noncooperation is one form of "soft" nullification. Mark Graber describes more aggressive, "almost legal" forms of disobedience on the part of state and local officers. These involve taking advantage of federal laws and regulations that turn on questions of fact, which provide states with an opportunity to shape—or shade—the facts to their own advantage. Moreover, states can delay substantive rulings by challenging the justiciability of federal regulations, questioning the standing of challengers in litigation, and so forth. In jury trials, states may encourage "juror sovereignty" in deciding the facts of a case, but also the justice or constitutionality of laws applying to the case being tried. The incidence of these quiet forms of disobedience is probably much higher, and more consequential, than more public incidents of formal nullification.

Jury nullification nods in the direction of popular sovereignty, although Madison was always committed to well-structured processes of deliberation. Jury sovereignty is much closer to the insurrectional movements that Jared Goldstein examines: constitutional nationalists, whose commitment to the preservation of the constitutive values of American life, as they understand them, is expressed by the Posse Commitatus, organized militias, and Oathkeepers. This includes the Bundys and others willing to resort to violence in order to restore their version of the Constitution. As Goldstein notes, "the difference between nullification and insurrection is not a matter of theory or ideology but one of tactics" (p. 222), for it is grounded in a theory of state or even individual sovereignty that privileges personal consent above all other considerations.

While sentiment for nullification is rising in the United States, talk of secession has remained just that, perhaps because of its association with slavery, but also because of post–Civil War Supreme Court decisions declaring the Union to be perpetual and indivisible. Mark Killenbeck challenges the reasoning behind those decisions, suggesting that they are vulnerable. He notes that recent Supreme Court decisions defer to states in ways that imply that reports of the death of nullification and secession in the United States are exaggerated, even in a legal sense.

I presume that Zachary Elkins would welcome this turn of events, if not in the United States then elsewhere. Under certain circumstances, he argues, low-commitment constitutions (which allow secession and respect the integrity of territories dominated by different groups) may induce the formation of unions, and they may maintain cooperation by allaying concerns about being trapped in a bad political arrangement, and by fostering ongoing, active consent from constituent units. Vicki Jackson agrees that a right to secession must not be dismissed, for there are instances in which secession is morally justified. But she also contends that a constitutional right to secession invites threats to secede from those who abuse human rights or democratic principles. It also undermines trust and predictability. She recommends constitutional silence on the question of secession, leaving an opening for "creative ambiguity" to generate alternative forms of dispute resolution.

Ron Hirshl, Vicki Jackson, Zachary Elkins, and Mark Tushnet all range beyond the United States. They catalog numerous instances of nullification and secession around the world, not only in the obvious cases of Quebec, Scotland, and Catalonia but also of the USSR, Czechoslovakia, Sudan, Sri Lanka, western Australia, and

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Indonesia. Some also address the voluntary separation of Norway from Sweden, and others, such as Hirschl and Jackson, consider the impact of international agreements on national law and the reaction of national judiciaries to the jurisdiction of international agreements. The arguments for states' rights in the United States are replayed in Europe, both in national courts and European tribunals. But there is little deference to American experience there. The Canadian experience is far more relevant in terms of how to weigh competing claims, and in which arena.

Ironically, none of the essayists in this volume considers the question of expelling a state or subnational entity from its union. If a constituent member of a union enjoys the right to secede, perhaps the union should have a reciprocal right to expel members for bad behavior. That would be the model if we think of units as joining an organization, instead of being admitted to the union, and it might temper the demands of a unit at odds with its union. But even if we proceed as though units are admitted at the discretion of a union, why should that union be prevented from expelling a member that in its judgment is undermining the whole project of union?

This leads me to Mark Tushnet's essay, which seems relevant to Great Britain's dissociation from the European Union. Brexit fits the model of peaceful "secession" that Tushnet envisions, which is (and should be) conducted in "good faith" on both sides. As he notes, though, this limitation places few a priori limits on bargaining tactics; the limits are contextual and situational. The dissolution of Czechoslovakia was smooth by comparison to the bloody dismemberment of Yugoslavia. Brexit is beginning to look more like the negotiation of a bilateral peace treaty, as Tushnet anticipated.

On the whole, Amy Bridges offers an important corrective to political scientists' understanding of American political development, bringing the western states to center stage and shining the spotlight on their distinctive contributions to constitutional thought: the institutions of direct democracy and, not coincidentally, constitutional limits on legislatures' ability to accommodate limited liability corporations, including common carriers (i.e., railroads). Her account of western admission to statehood during the Gilded Age is exceptional, as is her insistence that we understand the American founding as a prolonged, and continuing, exercise in political invention involving states, especially newly entering states in the late nineteenth century.

That said, *Democratic Beginnings* offers fewer insights on the politics of admission to statehood, particularly insofar as convention delegates, who were certainly attuned to the preferences of those they represented, might have tailored their proposals to meet the anticipated concerns of Congress. Surely that was on the mind of delegates to constitutional conventions in the South during Reconstruction, which overlapped the Gilded Age. I suspect that a different scheme for studying state constitution conventions, one that focuses on the Gilded Age and compares western applications for statehood to southern efforts to regain representation in Congress, would be most enlightening.

It is interesting that the essays in *Nullification and Secession* feature many western and southern states. Western states' interest in seeing federal lands "returned" to them, though they never enjoyed sovereignty over them, implicitly acknowledges the reservation of specific public lands to congressional control. This was a condition of admission to statehood and under any "originalist" understanding must be observed, unless Congress relents and cedes control to states. That is not an issue in Confederate states, as the Congress reserved few public lands for control at the time of the admission, nor did it further limit geographic jurisdiction for restoration of representation in Congress after the Civil War.

In southern states there is no comparable acknowledgment of federal supremacy in matters of due process and equal protection under the laws, even though they ratified the Thirteenth and Fourteenth Amendments. That was a condition for regaining representation, for under the Constitution of the United States each chamber of Congress determines who shall be seated in it. That was true under the Constitution of the Confederate States of America, too. Complaints about ratification under duress ring hollow, therefore. That is why nullification and secession are legally suspect in the United States.

Levinson's superb anthology reminds us, though, that politics in an extended republic are not determined solely by law, nor can they be confined only by law or constitutional prescription. Madison's optimism on this point notwithstanding, Brutus and the Federal Farmer rightly anticipated the problems of governance that arise in polities that are, or become, extremely diverse. This is why questions about full-fledged membership in the polity are consequential—and why the terms of admission ought to be a restraint on new members' actions. Originalism binds states, as much—or as little—as it binds nations.

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