

**SYMPOSIUM: UNION AND STATES' RIGHTS:  
SECESSION, 150 YEARS AFTER SUMTER**

**PREFACE**

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THE AALS SECTION ON LEGAL HISTORY PROGRAM

It is my privilege to preface the symposium, "Union and States' Rights: Secession, 150 Years After Sumter," four papers presented at the Annual Meeting of the Section on Legal History, American Association of Law Schools, held on January 7, 2011, in San Francisco.

As chair of the Section in 2010-11, it was also my privilege to select the topic and panel for the year that coincided with the 150th anniversary of Secession and the Civil War. Secession commenced with South Carolina's declaration on December 20, 1860, and continued the next six months with declarations by ten sister States. But the April 12, 1861 bombardment by Confederate forces of Fort Sumter, South Carolina, a Union installation, and the following day's surrender and withdrawal by the fort's forces are popularly regarded as the opening battle of the Civil War and Secession from the Union. In these circumstances, it seemed quite appropriate to assemble a panel of distinguished scholars to discuss the legal arguments about seceding from the American Union.

I am sincerely grateful to Professor Paul Finkelman, President William McKinley Distinguished Professor of Law and Public Policy at Albany Law School, who urged me to select the topic and whose familiarity with scholars and their scholarship is unparalleled. I was fortunate that each scholar whom I did contact was gracious in agreeing to participate. In addition to Professor Finkelman, the participants were

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Daniel Farber, Sho Sato Professor of Law at University of California, Berkeley, School of Law; Daniel W. Hamilton, Associate Dean for Academic Initiatives and Professor of Law, University of Illinois College of Law; and Stephen Neff, Reader in Public International Law, The University of Edinburgh School of Law. And I was indeed fortunate that Professor Elizabeth Reilly, Vice Provost for Academic Planning and C. Blake McDowell Professor, University of Akron Law School, agreed to comment upon the papers. No doubt, it was the reputations of the presenters and commentator and their papers that attracted the largest audience in the memory of Section officers.

Because of the excitement generated by the Symposium, I asked the panel members whether they would be willing to expand their papers for publication in the University of Akron Law Review and also submit their papers for publication in an expanded collection to be published by the University of Akron Press. Once again, each was gracious in his and her acceptance. I am so grateful that Provost Reilly recommended that the Press consider my proposal for a collection. I have no doubt that her support was both respected and critical in the Press's publication decision.

In addition to papers on Secession, the collection includes papers on Interposition, Nullification, and Constitutional Amendment. The expanded scope is intended to offer a comprehensive discussion of legal issues arising when disagreements between the States and the Federal government cannot be resolved by ordinary political arrangements. I am delighted that the Review is publishing Professor Rob Natelson's paper on James Madison's understanding about the availability of constitutional amendment as a remedy for such deep disagreements. The paper will be published in the collection as well.

#### REMEMBRANCE AND REVIVAL OF THE TOPIC

No doubt naiveté prevented me from realizing how perspicacious my selection of the topic was. With the approach of the 150th anniversary of Secession and the Civil War, it was entirely appropriate to explore through the critical lens of legal history the issues raised by Secession. Moreover, the anniversary notwithstanding, the legal issues remain significant in the Nation's perpetual discussion of the nature of the Union and States' Rights, and more broadly their relation to the principles termed Federalism.

But beyond academic discussion, at the time of the AALS program, secession was on the political mind of some Americans. Nullification and Interposition became a rallying cry for Tea Party Patriots and others

disgruntled by Federal legislation. And Constitutional amendment prompted a conference at a prestigious law school.

In 2009, Governor Rick Perry of Texas twice adverted to whether Texas might lawfully secede from the Union.<sup>1</sup> His comments were noteworthy because they came from the governor of a large and influential State and because of Governor Perry's interest in the Republican Presidential nomination. But his comments are not unique. While there have been few explicit calls for secession from the Union, there have been both recent and past calls for secession from States and formation of new States.<sup>2</sup>

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. Organizations that support nullification and interposition hold rallies, sponsor tours, distribute literature, and maintain websites.<sup>3</sup> Wyoming passed the Firearms Freedom Act, and the Governor signed it on March 12, 2010.<sup>4</sup> 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

1. "When we came into the nation in 1845, we were a republic, we were a stand-alone nation," the governor can be heard saying. "And one of the deals was, we can leave anytime we want. So we're kind of thinking about that again." Maggie Haberman, *Rick Perry critics unearth another secession comment*, POLITICO (Aug. 10, 2011, 12:14 PM), <http://www.politico.com/news/stories/0811/61030.html>.

I think there's a lot of different scenarios. Texas is a unique place. When we came in the union in 1845, one of the issues was that we would be able to leave if we decided to do that. You know, my hope is that America and Washington in particular pays attention. We've got a great nation. There is absolutely no reason to dissolve it. But if Washington continues to thumb their nose at the American people, you know, who knows what may come out of that? But Texas is a very unique place and we're a pretty independent lot to boot.

Interview with Kelley Shannon, Associated Press, April 2009. R.G. Ratcliffe, *Perry Says Texas Can Leave the Union if it Wants To*, CHRON.COM (Apr. 15, 2009, 2:27 PM), [http://blogs.chron.com/texaspolitics/archives/2009/04/perry\\_says\\_texa.html](http://blogs.chron.com/texaspolitics/archives/2009/04/perry_says_texa.html).

2. See generally JAMES ERWIN, DECLARATIONS OF INDEPENDENCE, ENCYCLOPEDIA OF AMERICAN AND AUTONOMOUS AND SECESSIONIST MOVEMENTS (2006).

3. NULLIFY NOW!, [www.nullifynow.com](http://www.nullifynow.com) (last visited Nov. 16, 2011); THE TENTH AMENDMENT CENTER, [www.tenthamendmentcenter.com](http://www.tenthamendmentcenter.com) (last visited Nov. 16, 2011).

4. "A personal firearm, a firearm action or receiver, a firearm accessory, or ammunition that is manufactured commercially or privately in the state to be used or sold within the state is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce." WY. STAT. 1977 § 6-8-404 (2011). See Jeremy Pelzer, *Firearms Freedom Act: Symbolic Declaration of Rights or State-Federal Standoff?*, TRIB.COM (Mar. 12, 2010, 12:00 AM), [http://trib.com/news/state-and-regional/govt-and-politics/article\\_06b41f54-b4cb-566b-8ac2-c61ecf272d04.html](http://trib.com/news/state-and-regional/govt-and-politics/article_06b41f54-b4cb-566b-8ac2-c61ecf272d04.html). See also O. Shane Balloun, *The Disarming Nature of the Wyoming Firearms Freedom Act: A Constitutional Analysis of Wyoming's Interposition between its Citizens and the Federal Government*, 11 WYO. L. REV. 201 (2011).

criminalize all searches, including airport screenings by the Transportation Security Administration, conducted without probable cause.<sup>5</sup> In 2010-11, bills were filed in thirteen legislatures to nullify “Obamacare.”<sup>6</sup>

Arguing that “our Republic does not work as our Framers intended,” on September 24-25, 2011, Professor Lawrence Lessig and Mr. Mark Meckler convened a Conference on the Constitutional Convention at Harvard Law School to discuss the advisability and feasibility of organizing a Constitutional convention.<sup>7</sup>

So, what began as an academic discussion of 150-year-old event and issues became a discussion with present-day resonance.

#### THE AALS PROGRAM PAPERS<sup>8</sup>

The papers presented at the AALS program and expanded for this Symposium focus on the merits of arguments for Secession and the effect that the Civil War and Reconstruction had on their merits.

Professor Daniel Farber’s paper is “Secession and the Original Understanding.” His argument is that the constitutional status of Secession was deeply intertwined with conflicting antebellum views about the relationship between State and National citizenship. The citizenship clause of the Fourteenth Amendment, Professor Farber argues, made national citizenship paramount, thereby establishing that after 1868 Americans owed their primary allegiance to the Federal government rather than to their States.

Professor Paul Finkelman’s paper is “States’ Rights, Southern Hypocrisy, and the Crisis of the Union.” His argument is that Secession was mistakenly associated with a fear by the Southern States that their States’ Rights were in danger. To the contrary, Professor Finkelman

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5. Connor Boyack, Brian Roberts & Michael Boldin, *Feds Issue Threat: No Fly Zone for Texas?*, THE TENTH AMENDMENT CENTER (May 24, 2011, 10:20 PM), <http://www.tenthamendmentcenter.com/2011/05/24/feds-issue-threat-no-fly-zone-for-texas/>.

6. Matt Spalding, *Rejecting Nullification: Idaho Draws the Line*, THE HERITAGE FOUNDATION (Mar. 2, 2011, 10:00 AM), <http://blog.heritage.org/2011/03/02/rejecting-nullification-idaho-draws-the-constitutional-line/print/>.

7. *Conference on the Constitutional Convention*, HARVARD LAW SCHOOL, [www.conconcon.org](http://www.conconcon.org) (last visited Nov. 16, 2011). Professor Lawrence Lessig and Mr. Mark Meckler will co-chair the conference. Professor Lawrence Lessig is the director of the Edmond J. Safra Center for Ethics at Harvard University and the Roy L. Furman Professor of Law at Harvard Law School. He cofounded Change Congress, which aims to reduce the influence of private money in American politics. Mr. Mark Meckler is the Co-Founder and a National Coordinator for Tea Party Patriots (along with his Co-Founder and fellow National Coordinator, Jenny Beth Martin), the largest grassroots tea party organization in the nation with over 3,500 chapters spanning every state.

8. The descriptions of the papers are edited summaries written by the authors.

argues, the Southern States were afraid of the Northern States' assertion of their States' Rights. They were afraid that the National government was too weak to counter the Northern States' advocacy of abolition.

Professor Daniel W. Hamilton's paper is "Still Too Close to Call? Rethinking Stamp's 'The Concept of a Perpetual Union.'" He argues that in a classic article in the *Journal of American History*, Kenneth Stamp<sup>9</sup> made the claim that the arguments in favor of the constitutionality of Secession made by the Southern States were as strong, if not stronger, than the constitutional arguments made, then and now, in opposition to Secession. In light of the 150th anniversary of Secession, Professor Hamilton argues, it is useful to reconsider Stamp's thesis to examine the questions it raises about our current understanding of the meaning of the Civil War. Did Stamp, in his emphasis on constitutional thought standing alone, shed light on Secession or mischaracterize the centrality of slavery in the Secession crisis? Is it possible to answer the question: was Secession legal? If so, and the answer is, as Stamp suggests, likely yes, then does this change our assessment of Lincoln's drive to war? If there is no definitive answer to the question, then are there other essential issues revolving around the Civil War that are equally indeterminate?

Professor Stephen Neff's paper is "Secession and Breach of Compact: The Law of Nature Meets the U.S. Constitution." He argues that in Southern political theory, the American federal union was regarded as a compact between sovereign States—and consequently as governed by general natural-law rules on pacts or agreements. Under natural law, a breach of the pact by some of the parties (the Northern States) entitled the non-breaching parties (the Southern States) to terminate the compact—or, in popular parlance, to secede from the Union.

These papers provide an important critique of the arguments for Secession and Secession's connection to States' Rights, both 150 years ago and today.

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9. Kenneth M. Stamp, *The Concept of a Perpetual Union*, J. AM. HIST., June 1978.