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2014

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#### Recommended Citation

Mark E. Brandon, *Secession and Nullification in the Twenty-First Century*, 67 Ark. L. Rev. 91 (2014).

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# Secession and Nullification in the Twenty-First Century

Mark E. Brandon\*

As he always does, Professor Sanford Levinson asks hard questions. In answering those questions, he is engaging, he is thoughtful, he is learned. And he is not afraid of hard solutions. I am at something of a disadvantage in offering critical commentary because I substantially agree with much of his analysis and with several of his conclusions. So at the risk of inadequate and inelegant redundancy, I will offer observations on four fronts: (1) the United States Supreme Court's claim to judicial supremacy in *Cooper v. Aaron*;<sup>1</sup> (2) the current condition of American constitutional law and politics; (3) the constitutionality of nullification; and (4) the constitutionality of secession.

## I. COOPER REVISITED

I begin with the inspiration for this Symposium: the Supreme Court's decision in *Cooper v. Aaron*, which, in 1958, famously ordered the immediate desegregation of Little Rock's public schools.<sup>2</sup> I have no doubt that the Supreme Court's decision in *Brown v. Board of Education*<sup>3</sup> was correct as a matter of political morality and as a matter of substantive constitutional law. Nor do I doubt that the Supreme Court's decision in *Cooper* was correct, notwithstanding the enormous challenges that the school board faced in carrying out the order.

I disagree, however, with aspects of the Court's syllogism in *Cooper*. That syllogism runs something like this:

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1. 358 U.S. 1 (1958).

2. *Id.* at 4.

3. 347 U.S. 483 (1954).

- Major premise: The Constitution is the supreme law of the land.<sup>4</sup>
- Minor premise: Interpreting the Constitution is the duty of the federal judiciary.<sup>5</sup>
- Inference from minor premise: The federal judiciary is the supreme expositor of the law of the Constitution.<sup>6</sup>
- Conclusion: The Supreme Court's decisions are the supreme law of the land.<sup>7</sup>

In my view, the Court stumbles in its inference from the minor premise, which leads to a faulty conclusion.

To say this, again, is not to challenge *Cooper's* substantive holding. My view merely challenges the expansive notion of judicial supremacy that the Court deploys to bolster its authority. Other institutions do have authority to interpret the Constitution,<sup>8</sup> and in some circumstances, their interpretations will be the final and effectively supreme interpretation.<sup>9</sup> In some other circumstances, non-judicial institutions may well have at their disposal the proper political and legal means to resist policies or decisions of even a federal court, or to get those policies or decisions reversed.<sup>10</sup> This view was certainly

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4. *Cooper*, 358 U.S. at 18 (“[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land . . .”).

5. *Id.* (“It is emphatically the province and duty of the judicial department to say what the law is.” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

6. *Id.* (explaining that the Court's decision in *Marbury* “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution”).

7. *Id.* at 19-20 (“The principles announced in [*Brown*] and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us.”).

8. See, e.g., David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 325-26 (2010) (“[T]here is and always has been a vibrant culture of constitutional interpretation outside the courts in the United States, both within elected institutions and outside them.”).

9. See *id.* (“[H]istorically the legislature and the executive have settled many issues of constitutional law without the help of the courts.”).

10. See Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1240 (2008) (discussing President Lincoln's view that “the Court's authority to interpret the law [is] not . . . exclusive and supreme in the sense that no other political authority legitimately could contest it”).

Abraham Lincoln's position on the Supreme Court's infamous decision in *Dred Scott v. Sandford*.<sup>11</sup> And this position was part of the strategy of Franklin Roosevelt (and others) to resist the Court's decisions striking down enactments of Congress (often on the ground that Congress was invading the province of states) and enactments of state legislatures (on the ground that such legislation violated the freedom of contract and a substantive liberty in due process).<sup>12</sup> Quite simply, the New Deal Congress continued enacting laws despite what the Supreme Court said, and eventually the Court conceded the doctrinal turf.<sup>13</sup>

Even states may have tools for resistance. But are nullification and secession proper political or legal means for states to resist the reach of a federal law or decision with which they disagree?

## II. MOTIVES

Depending on one's point of view, people today might have any number of motives for wanting either to nullify or secede. Consider just a few of the cleavages that have arisen around issues of policy:

- Same-sex marriage: Some fret that marriage is gradually being nationalized, while others complain that it is not yet fully protected constitutionally.<sup>14</sup>
- Abortion: Some complain that abortion is constitutionally protected while the rights of fetuses are ignored, and others worry that

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11. *See generally id.* at 1231-43 (discussing Lincoln's position on the decision).

12. For a discussion on Roosevelt's relationship with the Court regarding the New Deal, see generally Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 242-50 (1996) (reviewing WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995)).

13. *See id.* at 248.

14. *See generally* MARK E. BRANDON, *STATES OF UNION: FAMILY AND CHANGE IN THE AMERICAN CONSTITUTIONAL ORDER* 240-273 (2013) (assessing the constitutional debates over same-sex marriage); Sonia Bychkov Green, *Currency of Love: Customary International Law and the Battle for Same-Sex Marriage in the United States*, 14 U. PA. J.L. & SOC. CHANGE 53, 62-76 (2011) (providing background on the same-sex-marriage debate and the various statutory approaches taken by federal and state legislatures).

the right to terminate a pregnancy is slowly being eroded.<sup>15</sup>

- Taxation: Some—especially those who want to “strangle the beast” of government—complain that the level of taxation is extravagant, while others are worried that the rate of taxation is too low to finance basic services and to elevate the nation from recession.<sup>16</sup>
- The national debt: Some consider this issue to be one of the greatest moral crises of our age, while others disparage this view as a trumped-up issue designed to gut social services.<sup>17</sup>
- The right to bear arms: Some see in this right the very foundation of free government, while others view an expansive protection of the right as a threat to civil liberty and, in innumerable cases, to life itself.<sup>18</sup>

These divisions over policy aside, there exist other, deeper tendencies that may well corrode the values and institutions that underwrite constitutional government. Consider, for example, a nation for which war has become a way of life and national security a supreme value.<sup>19</sup> Consider

15. See generally Janet L. Dolgin, *New Terms for an Old Debate: Embryos, Dying, and the “Culture Wars”*, 6 HOUS. J. HEALTH L. & POL’Y 249, 251-60 (2006) (summarizing the history of the abortion debate in the United States).

16. See generally Susannah Camic Tahk, *Making Impossible Tax Reform Possible*, 81 FORDHAM L. REV. 2683, 2683-95 (2013) (discussing the federal tax-reform debate).

17. This debate over fiscal policy culminated most recently in an October 2013 shutdown of the United States federal government after Congress failed to raise the debt ceiling amid partisan disagreement over funding of President Obama’s healthcare reform law. Jake Sherman et al., *Government Shutdown: Congress Sputters on CR*, POLITICO (Sept. 30, 2013, 10:03 AM), <http://www.politico.com/story/2013/09/house-senate-government-shutdown-97557.html>.

18. See generally Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 90-93 (2013) (discussing modern American gun culture).

19. See Cheryl Pellerin, *Military Essential in U.S. Foreign Policy Future*, Hagel Says, U.S. DEP’T DEF. (Nov. 5, 2013), <http://www.defense.gov/News/newsarticle.aspx?ID=121057>. See generally Mark E. Brandon, *War and American Constitutional Order*, 56 VAND. L. REV. 1815 (2004) (showing the constitutional consequences of the practice of war as a way of life).

also a distribution of wealth that is so grossly disparate that republican institutions have been supplanted by an oligarchic government in the service of a plutocratic class.<sup>20</sup> Consider finally a political class that is unwilling or unable to enact national policy, even when a substantial majority of people agree that the policy is desirable.<sup>21</sup>

At a higher level of abstraction, the contemporary American polity suffers from three incapacitating conditions: (1) a dissipated sense of common purpose; (2) a loss of civic trust; and (3) a genuinely dysfunctional national government. Professor Levinson is concerned mainly about the third condition, but he is not oblivious to the first two.

Still, the mere presence of problems—even problems that are deep and enduring—does not necessarily mean that nullification or secession is an efficacious or desirable solution. Nor do such problems mean that nullification or secession is a permissible solution. The following sections address the last of these questions: Are nullification and secession permissible? I will approach this question not from the perch of moral philosophy or from the perspective of international law, but as a question of constitutional law, history, and theory.

### III. NULLIFICATION

In assessing the constitutionality of nullification—whether as interposition or as a system of concurrent majorities—we should begin with the first “constitution” of the United States: the Articles of Confederation. The Articles were authorized by “the Delegates of the . . . States”<sup>22</sup> and were expressly styled as a confederacy and a “league of friendship,”<sup>23</sup> in which “[e]ach State retain[ed] its

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20. See G. William Domhoff, *Wealth, Income, and Power*, UNIV. CAL. SANTA CRUZ, <http://www2.ucsc.edu/whorulesamerica/power/wealth.html?print> (last updated Feb. 2013).

21. For example, a June 2013 Gallup Poll indicated that seventy-eight percent of Americans disapprove of the way Congress is performing its job—primarily due to partisan gridlock in Washington. Lydia Saad, *Gridlock Is Top Reason Americans Are Critical of Congress*, GALLUP (June 12, 2013), <http://www.gallup.com/poll/163031/gridlock-top-reason-americans-critical-congress.aspx>.

22. ARTICLES OF CONFEDERATION of 1781, pmb1.

23. ARTICLES OF CONFEDERATION of 1781, art. III, para. 1.

sovereignty, freedom and independence.”<sup>24</sup> The Articles required a supermajority of nine votes (roughly two-thirds) to enact policy.<sup>25</sup> They denied to Congress even basic powers to tax or to regulate commerce.<sup>26</sup> The Articles also omitted a national executive for enforcing national policy<sup>27</sup> and allowed for only a thin and feeble federal judiciary.<sup>28</sup> As James Madison suggested, the Articles were, in form and function, a treaty among states—not a constitution.<sup>29</sup>

Compare the Articles with the text that calls itself the Constitution of the United States. The “People” of the United States authorized the Constitution.<sup>30</sup> It was styled expressly as a constitution that aimed at ambitious purposes and claimed to be the supreme law of the land.<sup>31</sup> The Constitution provided not only for a national legislature but also for a national executive and judiciary.<sup>32</sup> It delegated to those three institutions substantial powers, the exercise of which was not subject to the permission of the states.<sup>33</sup> The Constitution further provided that Congress could enact policy through a simple majority of each house, subject to a possible veto by the executive.<sup>34</sup> It also bound state judges to the Constitution, treaties, and laws of the nation.<sup>35</sup>

Consider the arguments offered for ratifying the Constitution. Alexander Hamilton, for example, criticized the weakness and “imbecility” of the national government under the Articles of Confederation.<sup>36</sup> He observed that it was incapable of enacting and enforcing policy even within

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24. ARTICLES OF CONFEDERATION of 1781, art. II, para. 1.

25. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 2, art. X, para. 1.

26. ARTICLES OF CONFEDERATION of 1781.

27. ARTICLES OF CONFEDERATION of 1781.

28. *See* ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1-2.

29. JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES (Apr. 1787), *in* 9 THE PAPERS OF JAMES MADISON 351 (Robert A. Rutland & William M.E. Rachal eds., 1975) [hereinafter MADISON PAPERS], available at <http://nationalhumanitiescenter.org/pds/makingrev/constitution/text1/madisonvices.pdf>.

30. U.S. CONST. pmbl.

31. U.S. CONST. art. VI, cl. 2.

32. U.S. CONST. art. I–III.

33. U.S. CONST. art. VI, cl. 2.

34. U.S. CONST. art. I, § 7, cl. 2.

35. U.S. CONST. art. VI, cl. 2.

36. THE FEDERALIST NO. 15, at 107 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

its borders.<sup>37</sup> Moreover, he characterized the government as feeble and embarrassing in its relations with other nations.<sup>38</sup>

Even if one recognizes an implied and later explicit reservation of powers in the several states,<sup>39</sup> it is impossible to imagine that nullification was constitutionally permissible, even in the earliest years of the republic (well before the Fourteenth Amendment), when states continued to exercise expansive authority.<sup>40</sup> This conclusion does not rest on the fact that Andrew Jackson controlled the most guns in 1828 or 1832. Rather, nullification is constitutionally impermissible because it rests on an implausible understanding of the Constitution, the institutional structure it created, and the purposes for which it was ratified. The Constitution did provide for concurrent majorities to create policy—involving the House of Representatives, the Senate, and the President<sup>41</sup>—but this system had nothing to do with empowering states to countermand a policy of the nation. Such a countermanding power was precisely one of the perceived defects of the Articles of Confederation and, thus, was one of the reasons for creating an invigorated national power under the Constitution.<sup>42</sup>

However, this underlying rationale for creating the Constitution does not mean that all was nationalism in the constitutional order, or that states were mere political subdivisions of the nation—even after the Civil War and the Fourteenth Amendment. But as a constitutional device, state-based nullification was buried in 1789. The reappearance of nullification in our own time may be good or bad, but it is not constitutional—at least not under the current Constitution.

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37. *See id.* at 106-07.

38. *Id.*

39. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively . . .”).

40. *See* U.S. CONST. amend. XIV, § 1 (limiting the actions of state and local officials, as well as the actions of individuals acting on behalf of those officials).

41. U.S. CONST. art. I, § 7, cl. 2.

42. *See* MADISON PAPERS, *supra* note 29.



## IV. SECESSION

Secession is different.<sup>43</sup> Today, several types of justification for secession exist, and Professor Levinson alludes to most of them: (1) moral theory (proposed, for example, by Allen Buchanan);<sup>44</sup> (2) international law (by Diane Orentlicher and others);<sup>45</sup> (3) economics (by James Buchanan);<sup>46</sup> and (4) geo-politics (by Akhil Reed Amar, who deploys geo-strategic concerns to argue *against* a right of secession, at least in the United States).<sup>47</sup> There is also a simple, pragmatic argument for secession: that when a society fractures deeply, and when the fracture is enduring, and when the fracture aggregates along geographical lines, and when the aggregated differences create long-term moral, economic, or political stresses, secession can be a plausible solution to those stresses.

I do not want to discount any of these approaches. But I am interested in a slightly different question—and maybe one that is closer to home: Is secession ever justifiable *constitutionally*? If so, why and how? In the United States, the question hits three immediate roadblocks. First, did not the Civil War decide this question?<sup>48</sup> Answer: The Civil War

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43. See generally MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* 170 (1998) (reasoning that secession was arguably permissible under either the federalists or the antifederalists' theory for America's foundation).

44. Allen Buchanan, *Federalism, Secession, and the Morality of Inclusion*, 37 ARIZ. L. REV. 53, 58 (1995) (positing that, according to one major moral outlook, "individuals are free to choose those with whom they will form a political association").

45. Diane F. Orentlicher, *Separatism and the Democratic Entitlement*, 92 AM. SOC'Y INT'L L. 131, 132 (1998) ("[I]nternational law no longer abides colonization or forcible annexation.").

46. James M. Buchanan, *An American Perspective on Europe's Constitutional Opportunity*, 10 CATO J. 619, 620 (1991) ("The potentiality of a viable secessionist threat could emerge only if the central government . . . should take action that differentially damages citizens of the separate state or regions within its territory.").

47. Akhil Reed Amar, *The David C. Baum Lecture: Abraham Lincoln and the American Union*, 2001 U. ILL. L. REV. 1109, 1130 (explaining that secessionist states during the Civil War "had no right to take the land with them, or to try to bind their pro-Union neighbors").

48. See, e.g., Kristen Svoboda, Comment, *No Success in Secession: 135 Years Ago the United States of America Experienced Civil War, Now Canada Grapples with the Possible Secession of Quebec*, 44 ST. LOUIS U. L.J. 747, 748 (2000) ("Past generations of Americans fought the Civil War to prove that the South had no right to end the Union based on territorial differences.").

did decide the secessions of 1861 as a matter of raw force; but it did not—it *could not*—decide secession as a matter of constitutional authority. Second, did not the Supreme Court decide the question in *Texas v. White*?<sup>49</sup> It did not. For the decision in *White* is so riddled with contradiction—the South left the Union, the South never left the Union<sup>50</sup>—that it is an unreliable foundation for any coherent principle of whether secession is constitutionally justifiable. Third, the Supreme Court aside, perhaps Abraham Lincoln had a point when he argued that the Union was perpetual—and secession, being incompatible with perpetuity, is simply unconstitutional.<sup>51</sup> This position is more interesting. But there are two problems with the claim to perpetuity. One is empirical. The other is grounded in constitutional authority.

The empirical problem is simply that perpetuity is an illusion or a delusion. As an empirical matter, political regimes fall apart.<sup>52</sup> Nations are born. They die. The sun also rises. Any regime that believes it is perpetual believes in ghosts.

The problem of constitutional authority is more complicated. It starts with this insight: Every political system that claims to be constitutional must justify its existence.<sup>53</sup> It is not sufficient to say that the regime has power. The question is whether the regime also has authority. Simply declaring that authority comes from a constitution is also insufficient. For the constitution, too, must be justified.<sup>54</sup> One day a constitution does not exist. The next day it does. Why follow it? Why pay attention to it at all?

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49. See 74 U.S. (7 Wall.) 700, 726 (1868) (holding that “Texas continued to be a State, and a State of the Union, notwithstanding [the South’s attempt at secession]”).

50. See *id.* at 705, 726.

51. Abraham Lincoln, Message to Congress in Special Session, July 4, 1861, in CIVIL WAR 150: READER #2: RECKONING WITH THE WAR 33 (2012), available at <http://www.gilderlehrman.org/sites/all/themes/gli/panels/civilwar150/Civil%20War%20reader%202.pdf>.

52. See generally THE HISTORIANS’ HISTORY OF THE WORLD (Henry Smith Williams et al. eds., 1904) (depicting the rise and fall of several historical civilizations).

53. See SOTIRIOS A. BARBER, WELFARE AND THE CONSTITUTION 116 (2003) (“[U]ltimate public acceptance is a necessary condition for the legitimacy of any constitutional doctrine . . .”).

54. See *id.*

One possible answer is that the constitution is good and true and right—the best conception of political morality that one can implement for now.<sup>55</sup> I do not want to denigrate this claim, but we can take it only so far with respect to the Constitution of the United States. For one thing, the constitutional text was riddled with pragmatic compromise.<sup>56</sup> Compromise, in and of itself, is not necessarily bad, but it usually does not present a robust substantive vision of the good life.<sup>57</sup> For another thing, there is the problem of slavery. The unfortunate truth is that one point of the Constitution was to maintain a slaveholding republic.<sup>58</sup> That fact is a problem for any moral justification for the Constitution's authority.

Thus, if the Constitution can claim authority, it comes not strictly from the position of goodness, truth, and right, but from a different place. Typically, that place is the story of how the Constitution came to be. In the American experience, at least three strands of the founding story reinforce a “right” of secession.

The first strand involves the Declaration of Independence and the American Revolution. As Professor Levinson mentions, the American Revolution was not a “revolution” at all.<sup>59</sup> Rather, it was a war of secession.<sup>60</sup> In this way, secession became a basic part of the original DNA of the American order.<sup>61</sup>

Second, the mode for ratifying the Constitution was structured, potentially at least, as a kind of secession. According to Article VII, an affirmative vote of conventions

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55. *See id.* at 116-17.

56. *See generally* CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION* (1966) (depicting the many “debates” and “compromises” that led to the birth of the Constitution).

57. Steve Inskip & Shankar Vedantam, *Why Compromise Is a Bad Word in Politics*, NPR (Mar. 13, 2012, 4:00 AM), <http://www.npr.org/2012/03/13/148499310/why-compromise-is-terrible-politics> (discussing the perception of political compromise in American culture).

58. BOWEN, *supra* note 56, at 204.

59. Sanford Levinson, *The Twenty-First Century Rediscovery of Nullification and Secession in American Political Rhetoric: Frivolousness Incarnate or Serious Arguments to Be Wrestled With?*, 67 *ARK. L. REV.* 17, 49 & n.177 (2014).

60. *Id.* (“Had American Indians led the American Revolution, I would not be inclined to describe *that* as ‘secession.’”).

61. *See id.* at 49 n.177.

in nine states ratified the Constitution “between the States so ratifying the Same.”<sup>62</sup> In short, once nine states ratified, they had technically seceded from the antecedent confederation to form a new constitutional union.<sup>63</sup> The remaining four states were on their own, either to continue the confederation or to become separate sovereign entities.<sup>64</sup> Eventually, of course, all thirteen states joined the new union. But their non-acquiescence would not have changed—in fact it would have underscored—the secessionist character of the new Constitution.

The third strand reinforcing a right of secession involves “the People” as the ultimate source of political authority in the American order—as the authorizers (if not the authors) of the Constitution. The premise of this strand is this: If the people can make the Constitution, they may unmake, or de-authorize, the Constitution;<sup>65</sup> and they may do so by imitating the method they used for making the constitutional order or for ratifying the Constitution in the first place.<sup>66</sup> The existing constitutional order cannot deny the people this authority without undermining the very authority of the Constitution itself.<sup>67</sup>

If my analysis of these three strands is correct, then the only question is not whether, but how, secession may proceed—by the unilateral action of seceding states or by some mechanism that reflects or represents the consent of the whole? In either case, there would likely be a negotiated settlement concerning the status of persons and the ownership or control of property. And in either case, the

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62. U.S. CONST. art. VII.

63. See THE CONG. RESEARCH SERV., LIBRARY OF CONG., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, at XXIII (Kenneth R. Thomas & Larry M. Eig eds., Centennial ed. 2013), available at <http://beta.congress.gov/content/conan/pdf/GPO-CONAN-2013.pdf>.

64. See *id.*

65. While the topic of secession remains as contentious as ever, the more general notion of public participation in policymaking is becoming relatively standard. For example, on September 22, 2011, President Obama launched an online petitioning system by which the government guarantees an official response from expert policymakers for any petition that receives the requisite amount of signatures. *We the People: Your Voice in Our Government*, WHITE HOUSE, <https://petitions.whitehouse.gov> (last visited Feb. 6, 2014).

66. See *id.*

67. BARBER, *supra* note 53, at 116-17.

argument would be over methodological or procedural details, not over the constitutionality of the separation itself.