

# Essay

## Let's Mess With Texas

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“New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the federal constitution.”

—Joint Resolution for Annexing Texas to the United States<sup>1</sup>

### I. Introduction

Texas Republicans have been thinking *waaaaay* too small. In 2003, for the first time since Reconstruction, Texas Republicans controlled both houses of the state legislature. Encouraged by House Majority Leader Tom DeLay (R-Texas) and perhaps Presidential adviser Karl Rove as well, Texas Republicans decided in the spring of 2003 to take up a new congressional redistricting plan that they hoped would “better reflect” the state’s increasingly Republican voting patterns.<sup>2</sup> The then-existing congressional map had been drawn up by a three-judge federal panel in 2001, after the state legislature could not agree to a new one.<sup>3</sup>

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1. Joint Resolution for Annexing Texas to the United States, J. Res. 8, 28th Cong., 5 Stat. 797, 798 (2d Sess. 1845) [hereinafter Joint Resolution for Annexing Texas to the United States]. For electronic access, see <http://memory.loc.gov/ammem/amlaw/lwslink.html> (last visited Feb. 23, 2004).

2. George Kuempel & Pete Slover, *Playing the Waiting Game; AWOL House Members, GOP Leaders Stick to Guns in Redistricting Standoff; Democrats To Stay Away At Least Until Thursday's Legislation Deadline*, DALLAS MORNING NEWS, May 14, 2003, at 1A (relaying the Democrats' message to Rep. DeLay to not “mess with Texas”). The “Don’t Mess With Texas” slogan originated with a state anti-littering campaign in the 1980s. See *About Us*, at <http://www.dontmesswithtexas.org/aboutus.php> (last visited Feb. 23, 2004).

3. See *Balderas v. Texas*, No. 6:01-CV-158, slip op. (E.D. Tex. Nov. 14, 2002), *aff’d mem.*, 122 S. Ct. 2583 (2002).

In a famous and comic Texas-sized drama (or fiasco, depending on one's point of view or one's politics) stretching throughout the four seasons of 2003,<sup>4</sup> the state's Republican Governor, Rick Perry, along with the Republican majorities in both houses of the state legislature, finally succeeded in outlasting more than 50 State House Democrats and 11 State Senate Democrats who had fled, respectively, to Ardmore, Oklahoma in the spring<sup>5</sup> and Albuquerque, New Mexico in the summer,<sup>6</sup> to deprive their respective houses of the necessary quorum to adopt the Texas Republicans' proposed redistricting plan.<sup>7</sup> (One could call this process—and in fact some already have called it—"perrymandering."<sup>8</sup>) Alas, no one can stay in a Holiday Inn forever, and the State Senate minority leader, John Whitmire of Houston ("Quitmire" as he is now disaffectionately known), turned tail after almost 30 days holed up in a hotel in Albuquerque and loped on home to the Lone Star State in the late summer,<sup>9</sup> bringing an end to the "Great Texas Redistricting Standoff" of 2003.

Well, the third special session was the charm. In mid-September, the Texas Republicans, quorum in hand, proceeded to de-gerrymander, un-gerrymander, or re-gerrymander (again, depending on one's point of view or one's politics) the state's congressional and other legislative districts, in all probability tilting the state's districts less in the Democrat direction and more

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4. For a concise timetable summary of the events summarized herein, see *A Look at the Texas Redistricting Process*, ASSOC. PRESS, Jan. 6, 2004, <http://www.ap.org>.

5. Pete Slover & Matt Stiles, *Democrats Disappear; Majority of AWOL Lawmakers Where You'd Least Expect: Oklahoma*, DALLAS MORNING NEWS, May 13, 2003, at 1A; Lee Hockstader, *"Missing" Democrats Found in Oklahoma; Texas Legislators Protest Redistricting*, WASH. POST, May 14, 2003, at A3; David Barboza & Carl Huse, *Texas' Republicans Fume; Democrats Remain AWOL*, N.Y. TIMES, May 14, 2003, at A17 (describing how Republicans placed pictures of absent Democrats on milk cartons and playing cards). For nearly all of the colorful facts concerning Texas's extraordinary efforts to find its missing legislators—including its request for federal assistance—see U.S. Dep't of Justice, Office of the Inspector General, *An Investigation of the Department of Justice's Actions in Connection with the Search for Absent Texas Legislators* (Aug. 12, 2003), <http://www.usdoj.gov/oig/special/0308a/index.htm> (last visited Feb. 23, 2004).

6. Natalic Gott, *Democratic Lawmakers Flee Texas in Effort To Thwart Congressional Redistricting*, ASSOC. PRESS, July 28, 2003, <http://www.ap.org>. For a blow-by-blow account, see Edward Walsh & Karin Brulliard, *'Hunch' Launched Second Flight of Texas Democrats*, WASH. POST, Aug. 2, 2003, at A3 (discussing an emergency airlift to carry Deinocratic lawmakers to Albuquerque, New Mexico).

7. Under the Texas Constitution, a quorum in the House of Representatives and Senate requires two-thirds of each House. TEX. CONST. art. III, § 10. Since the current House of Representatives consists of 150 members, and the current Senate has 31 members, that would mean that 51 State Representatives and 11 State Senators have the power to block a quorum.

8. See Note, *A New Map: Partisan Gerrymandering as a Federalism Injury*, 117 HARV. L. REV. 1196, 1196 n.3 (2004) (citing John Ratliff, *Texas Republicans Crossed the Line This Time*, WASH. POST, Oct. 19, 2003, at B1 as a potential source of this term). On the origin of the term "gerrymandering," which owes to Framer and Ratifier Elbridge Gerry of Massachusetts, see, for example, 6 THE OXFORD ENGLISH DICTIONARY 472-73 (2d ed. 1989) (referring to Governor Gerry's districting plan for the State Senate in 1812).

9. Edward Walsh, *One of Texas 11 Wants an Exit Plan*, WASH. POST, Sept. 3, 2003, at A2; *Texas Democrats Scorn Senator Who Returned*, N.Y. TIMES, Sept. 21, 2003, § 1, at 30.

in the Republican one. By mid-October, and after mediation by Representative DeLay, the Republican-controlled state legislature sent a "compromise" redistricting plan to Governor Perry for his signature, which was promptly received.<sup>10</sup> The Texas Democrats, not to be outdone, took the Texas Republicans' redistricting plan to federal court claiming that it was unconstitutional.<sup>11</sup> After the trial had begun, but before any opinion was issued, U.S. Attorney General John Ashcroft granted "pre-clearance" to the redistricting plan pursuant to Section 5 of the Voting Rights Act of 1965.<sup>12</sup> On January 6, 2004, a three-judge federal panel approved the redistricting plan.<sup>13</sup> The Texas Republicans' victory was sealed on January 16, 2004 when the U.S. Supreme Court refused to block it.<sup>14</sup>

According to some accounts, Texas's 32-member congressional delegation, which after the 2002 elections was split 15–17 Republican-Democrat, could shift to a 22–10 or 23–9 Republican majority as a result of the 2003 redistricting plan for a net gain of 7–8 Republican seats.<sup>15</sup> This might even give Republicans control of the House of Representatives for the rest of the decade, and would in all likelihood significantly enhance House Majority Leader Tom DeLay's prospects for becoming the next Speaker of the House.<sup>16</sup> Without a doubt, the Texas redistricting plan pushed through by the GOP in 2003 could set off a wave of gerrymandering across the country to "counterbalance" the Texas effect—for example, New Mexico's Democrat governor, Bill Richardson, who proudly harbored the State Senate Democrats on the lam,<sup>17</sup> recently considered (seriously) but has rejected (for now at

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10. See *Redistricting Plan Sent to Governor's Desk*, ASSOC. PRESS, Oct. 13, 2003, <http://www.ap.org>; Pete Slover, *Governor Signs Redistricting Bill; Dispute Over Whether It Hurts Minority Power Will Go To Court*, DALLAS MORNING NEWS, Oct. 14, 2003, at 5A.

11. See *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004); see also Dave Levinthal, *Frost, Barton Take Opposite Sides on Map, Democrats File Challenge in Tyler, GOP Says It Won't Work*, DALLAS MORNING NEWS, Oct. 15, 2003, at 3A.

12. Edward Walsh, *Justice Dept. Clears Redistricting; Democrats' Lawsuit Is Still Pending*, WASH. POST, Dec. 20, 2003, at A4.

13. *Perry*, 298 F. Supp. at 457 (holding that plaintiffs failed to prove that the redistricting plan violated the U.S. Constitution or Section 2 of the Voting Rights Act, and rejecting the claim that the Texas Legislature lacked authority to draw new districts after a federal court drew them after the 2000 census); see also Robert T. Garrett & Pete Slover, *Judges Uphold New GOP Map; Ruling Says Minorities Not Hurt; Appeal Planned*, DALLAS MORNING NEWS, Jan. 7, 2004, at 1A.

14. *Jackson v. Perry*, No. 03A581 (S. Ct. Jan. 16, 2004) (order denying stay or injunction pending appeals); see also Lee Hockstader, *Supreme Court Hands Texas GOP a Redistricting Victory*, WASH. POST, Jan. 17, 2004, at A2.

15. Hockstader, *supra* note 14.

16. Walsh & Brulliard, *supra* note 6.

17. See Gott, *supra* note 6 (quoting Governor Richardson as stating, "New Mexico has a long history of helping people on the run—and should these legislators decide to stay awhile, I will be proud to have them").

least) a redistricting plan in New Mexico that would have increased the Democrats' chances in that state.<sup>18</sup>

The year 2003 is likely to remain a grand and tall tale of Texas politics for many years to come. ("Remember the Albuquerque!?"?) But we've got a bigger, better idea yet. It's time to carve up the Lone Star State into *five* "mini-Texases"—"Texas Tots," if y'all will—pursuant to an arcane but historically important provision in Congress's Joint Resolution for the Annexation of Texas in 1845.<sup>19</sup> Congress apparently granted its consent to Texas's division into up to *four more* states at the time of Texas's admission into the Union, and all that remains is for Texas to agree to self-destruct.

Needless to say, five "mini-Texases" would give today's Texans and tomorrow's mini-Texans significantly more clout in the national political arena. Think of it: *Ten* Senators (hopefully, all conservative Republicans, but not necessarily or perpetually so) instead of a meager *two*, who really care about the Lone Star State! And a corresponding enlargement of the Electoral College impact of citizens from what is present-day Texas!<sup>20</sup> It could be fun; it could be politically profitable—that is, for the people of present-day Texas as a whole, and especially for Texas Republicans; it certainly would be interesting. And, we submit, it *would* even be constitutional.<sup>21</sup> Indeed, we think it could be done, without much more effort

18. See *Governor To Decide Next Week on Redistricting*, ASSOC. PRESS, Feb. 6, 2004, <http://www.ap.org>; *Governor Won't Put Redistricting on Agenda*, ASSOC. PRESS, Feb. 12, 2004, <http://www.ap.org>.

19. For the relevant text and discussion, see text *infra* accompanying notes 27–36.

20. A state's electoral votes equals the sum total of its Representatives and Senators. Texas currently has 32 Representatives and 2 Senators in Congress for a total of 34 electoral votes. U.S. CENSUS BUREAU, CONGRESSIONAL APPORTIONMENT, July 2001, <http://www.census.gov/population/cen2000/tab01.pdf> (last visited Feb. 23, 2004). The creation of four more Texas Tots would naturally imply 42 electoral votes for the five mini-Texases as a whole (32 Representatives plus 10 Senators). However, if the four Texas Tots are small enough (i.e., if they are created with populations less than 30,000), they would each be entitled to 1 Representative and may not (depending on rounding in cases of apportionment) take away from the number of Representatives afforded to today's Texas. See U.S. CONST. art. I, § 2, cl. 3 ("The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative . . ."); Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 358 n.221 (2002) (discussing the "House dilution problem"). This would imply 46 electoral votes for the five mini-Texases as a whole (32 Representatives for today's Texas plus 4 Representatives for the four more Texas Tots plus 10 Senators for the five mini-Texases).

21. To our knowledge, only a few other scholars have ever mentioned the possibility of additional Texas. See generally Paul E. McGreal, *There Is No Such Thing as Textualism: A Case Study in Constitutional Method*, 69 FORDHAM L. REV. 2393 (2001); Robert W. Bennett, *Democracy as Meaningful Conversation*, 14 CONST. COMMENT. 481, 485 n.7 (1997); Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 72 n.194 (1997); Ralph H. Brock, *"The Republic of Texas Is No More": An Answer to the Claim that Texas Was Unconstitutionally Annexed to the United States*, 28 TEX. TECH. L. REV. 679, 690 n.53 (1997). Of these, only Professor McGreal discusses the possibility at any length. But McGreal takes too ambivalent a view for our tastes, and the gentle reader is left wondering whether additional Texas would in fact be constitutional. More troubling, McGreal uses the Texas case study as an

than it took to redistrict in 2003 (and possibly less), and with *quintuple* the stakes.

We leave the question of whether Texas actually *would* do this to the people and politics of Texas. But why wouldn't Texans jump at the chance to puff up their power a little bigger, other than a misguided patriotic nostalgia for the Lone Star State? We think Texas has, in a *good* way, grown too big for its britches. So let's git on with it: Let's Mess With Texas!<sup>22</sup>

## 11. The Tale of Texas Statehood

Our constitutional argument traces back to the admission of the new state of Texas into the Union in 1845. As every Texas schoolchild knows,<sup>23</sup> and precious few in the rest of the country have taken the time to learn, Texas was admitted into the Union as the twenty-eighth state on December 29, 1845. The path to Texas's statehood, however, was marked by several twists and turns, involving politics of national and international dimensions. It was also a path that was about as long as it was constitutionally complex, and we can only hope to summarize the key facts here.<sup>24</sup>

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opportunity to decry "there is no such thing as textualism." *Id.* at 2393; *see also id.* at 2394 ("This Article searches for the mythical textualist monster, hoping to expose it for the fraud it is.").

We are hard pressed to think of a claim that is more methodologically off the mark than this one when it comes to constitutional interpretation, which is the subject of McGreal's article. To the extent that McGreal is making a point about "bare textualism," that is, textualism uninformed by context, and specifically uninformed by the quintessentially interpretivist tools of history and structure, *id.* at 2455–61, we have much less to disagree about. Since the publishing of his article, we have said a few words about what we consider to be *the* proper method of constitutional interpretation: objective-public-meaning textualism, which considers the meaning the Constitution's words and phrases would have had, in context, to ordinary, reasonably well-informed speakers and readers of the English language, at the time of the Constitution's adoption. *See generally* Vasana Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003); *see also* Kesavan & Paulsen, *supra* note 20, at 398–99 (discussing the objective-public-meaning approach to constitutional interpretation).

22. Like many of our other projects, this Essay has been a few years in the making. We first thought about messing with Texas when we entertained the possibility of messing with West Virginia, but decided after careful research to leave well enough alone when it came to the Mountain State. *See* Kesavan & Paulsen, *supra* note 20. In that article, in contemplating the possibility of big states somehow undoing the Great Compromise of equal state representation in the Senate and in writing about "Utah today, divided into four, multiplying conservative Republican senators," *id.* at 295, we pointed to Texas as the modern-day Utah we were dreaming of (no offense to Texans or Utahns intended). *See id.* at 295 n.5.

23. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle."). We find it reassuring that the Supreme Court too recognizes what every schoolchild knows.

24. Our lawyer's history in this section builds upon the work of others, who have, we hope, taken the time to get it right. For discussions of Texas's path to statehood from which this discussion is largely drawn, *see* GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY* 91–94 (2004). *See generally* JUSTIN H. SMITH, *THE ANNEXATION OF TEXAS* (1919); FREDERICK MERK, *SLAVERY AND THE ANNEXATION OF TEXAS* (1972); Eugene C. Barker, *The Annexation of Texas*, 50 SW. HIST. Q. 49 (1946);

We begin with the story as of March 2, 1836, when Texas declared independence from Mexico and became the Republic of Texas. Just over a year later, on March 3, 1837, the United States, in one of President Andrew Jackson's last acts, formally recognized the Republic of Texas as a sovereign nation. Texans at the time overwhelmingly supported annexation by the United States, and on August 4, 1837, Texas's minister to the United States formally proposed annexation to President Martin van Buren's administration. Texas was a slave state, and slavery was an essential aspect of its economy and had always been an important part of its history; moreover, Texas was big, making it not just any slave state, but a big, slave state. Because of President van Buren's increasing opposition to an extension of slavery and his fears of a war with Mexico, Texas's annexation proposal was not to be and Texas withdrew its proposal on October 12, 1838.

We skip ahead a few years to 1843–1844 when Great Britain was making overtures to Texas. There were fears, especially among pro-slavery Southerners such as Senator and soon to be Secretary of State John C. Calhoun, that Great Britain would seek the annexation of Texas and abolish slavery therein. Although Great Britain was not herself interested in annexing Texas, she opposed annexation by the United States, which would bring with it an extension of that evil institution and significant economic benefits. At around the same time, Santa Anna, the President of Mexico, made it known that Mexico would consider annexation to be “equivalent to a declaration of war against the Mexican Republic.” To complicate matters further, Great Britain hoped to negotiate a permanent peace between Mexico and the revolutionary Republic of Texas by persuading Mexico to recognize Texas as a sovereign nation if Texas would remain independent.

It was pro-slavery, pro-expansionist President John Tyler (dubbed “His Accidency” by detractors when he became the first Vice President to succeed to the Presidency upon the death of President William Henry Harrison in 1841) who brought the issue of Texas annexation front and center on the national political stage. According to some reports, Tyler was looking to bolster his bid for (re-)election in the upcoming presidential election year, eventually forming a new wing of the Democratic party with the slogan “Tyler and Texas!” He proposed annexation on October 16, 1843, to be accomplished as soon as possible. On April 11, 1844, President Tyler and President Sam Houston of the Republic of Texas concluded a treaty of annexation, and Tyler sent it to the Senate for ratification.

This treaty sparked a constitutional debate over American territorial expansion not seen since the Louisiana Purchase in 1803. Could the United States constitutionally annex a foreign state? Of course, the twin concerns

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McGreal, *supra* note 21, at 2398–2401. For a detailed timeline, see *Annexation Process: 1836–1845, A Summary Timeline*, at <http://www.tsl.state.tx.us/ref/abouttx/annexation/timeline.html> (last visited Feb. 23, 2004).

over slavery and war with Mexico also featured prominently in this debate. On June 8, 1844, the Senate overwhelmingly rejected the treaty by a vote of 35 to 16, with almost all anti-expansionist Whigs opposed; almost all pro-slavery Southern Democrats in favor; and anti-slavery, pro-expansionist Northern Democrats largely split.

The annexation of Texas became the key issue in the 1844 presidential election between Henry Clay of the Whig party and James K. Polk of the Democratic party. ("His Accidency" Tyler realized that he had little chance in the election and threw his support behind Polk). Because Polk was fervently committed to Texas annexation (and Oregon too) as soon as possible and because Clay was decisively against it, the presidential election of 1844 was about as direct a national referendum on a single issue as they come.

Despite the Democrats' win in the presidential election, a two-thirds supermajority in the Senate was difficult, if not impossible, to obtain, as it was still controlled by the Whigs. But majority approval in each House of Congress was much easier. It was Tyler, in the lame-duck months of his presidency, who introduced the concept of the annexation of Texas by joint resolution (that is, by statute), that sparked a second constitutional controversy. Could the United States annex a foreign state by statute and not by treaty? Could such a statute admit Texas as a new state into the Union pursuant to Article IV, Section 3? Was this not an unconstitutional end-run around the treaty-making power?

On January 25, 1845, the House of Representatives passed a joint resolution for the annexation of Texas by a vote of 120 to 98, and on February 27, 1845, the Senate passed a similar resolution by a razor-thin margin of 27 to 25. The House accepted the Senate's version on February 28, 1845, and President Tyler signed the resolution into law on March 1, 1845, just three days before the end of his term. This was, we think, the first "congressional-executive agreement"<sup>25</sup> in the history of the United States.<sup>26</sup>

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25. See RICHARD W. LEOPOLD, *THE GROWTH OF AMERICAN FOREIGN POLICY* 89-91 (1962) (identifying three types of executive agreements, highlighting the annexation of Texas as the prototype of executive agreements "authorized by Congress," and calling the arrangement "the most flagrant evasion of the treaty-making process before 1889").

26. To be sure, these problematic events raise thorny issues with respect to Texas's constitutionality and (to the extent there is any difference) its legitimacy. At the time (and since), several folks made a fuss about the procedure of Texas's admission into the Union via Article IV, Section 3, apparently believing that only a treaty could lawfully make a formerly independent nation part of the United States, and that Article IV, Section 3 could not be used to accomplish such a result and was an illegitimate end-run around the treaty process. Among those who had such worries were prominent constitutional commentators such as Justice Joseph Story and Senator Daniel Webster. See R. KENT NEWMAYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 351 (1985) (explaining that Story thought the annexation of Texas was "grossly unconstitutional"); Daniel Webster, *A Speech Delivered at Niblo's Saloon* (March 15, 1837), in *GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER* 422, 429 (F.B. Rothman ed.,

The key issue in the annexation debate was the dreaded slavery question: Should Texas be admitted as a free state or as a slave one? Other issues also prompted significant debate—including questions over Texas's boundary, debt, and whether Texas should become a state of the Union or a federal territory. From the standpoint of some, especially Southerners, whether slavery was to be permitted in Texas was up to the people of Texas; for others, especially Northerners, some part of Texas—particularly that part above the Missouri Compromise line (which at the time arguably extended considerably farther north than present-day Texas)—was always to be free. From the standpoint of yet others, there were fears that Texas would be too big a state (and perhaps too big a slave state), and that it ought to be diminished somewhat by being carved into parts. Thus, Texas was given the unique opportunity to divide up into *four more states*—potentially slave states—at *its* option.

The operative language is contained in the Joint Resolution for Annexing Texas, passed by the Twenty-eighth Congress and signed into law by President Tyler on March 1, 1845 (hereinafter, the Joint Resolution of March 1, 1845).<sup>27</sup> We reproduce it in full:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be*

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1993) (voicing opposition to the annexation of Texas and indicating that it was unconstitutional to form a new state out of foreign territory). Recently, others have taken up these issues. See, e.g., Brock, *supra* note 21, at 722–42; James W. Paulsen, *If at First You Don't Secede: Ten Reasons Why the "Republic of Texas" Movement is Wrong*, 38 S. TEX. L. REV. 801, 803–07 (1997).

Although we don't purport to offer a definitive resolution of that question here, we would tend to be more concerned had the reverse occurred: admission of a new state into the Union solely by virtue of a treaty with a foreign nation that thereby agreed to become a state. Whatever the virtues of a treaty may be for international law purposes, we see nothing in the Constitution that prohibits the United States from acquiring territory from a foreign nation by purchase, by conquest, or by mutual consent (either by treaty or by an executive agreement whose domestic law consequences are achieved by implementing legislation). Nor do we see anything in Article IV, Section 3 that requires that a state first have served a spell as a territory or as a jurisdiction of another state. The two steps can be taken at the same time, and a statehood admission act serves as implementing legislation for an executive agreement, sufficient to satisfy domestic constitutional processes. On the other hand, we would be concerned if the President and Senate could, by use of the treaty process, enact a supposedly "self-executing" treaty that made a foreign nation into a state, but cut the House of Representatives out of its share of the legislative power to admit (or not) new states into the Union. We think the latter is an exclusive power of Congress.

Our sincere apologies for passing over so briefly what is logically the question precedent, of Texas's legitimacy, before discussing the question present, of Texas's divisibility. We assume for the purposes of this Essay that Texas is legitimately a part of the Union—on the theory that we shouldn't mess with too much of Texas at once. We hope to address Texas's constitutionality in an unpublished, unwritten, unimaginable manuscript, provisionally entitled "Is Texas Unconstitutional?"

27. Joint Resolution for Annexing Texas to the United States, *supra* note 1.

adopted by the people of said republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union.

2. *And be it further resolved*, That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: *First*, Said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the constitution thereof, with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the first day of January, one thousand eight hundred and forty-six. *Second*. Said State, when admitted into the Union, after ceding to the United States, all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the Government of the United States. *Third*. New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the federal constitution. And such States as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri compromise line, shall be admitted into the Union with or without slavery, as the people of each State asking admission may desire. And in such State or States as shall be formed out of said territory north of said Missouri compromise line, slavery, or involuntary servitude, (except for crime,) shall be prohibited.

3. *And be it further resolved*, That if the President of the United States shall in his judgment and discretion deem it most advisable, instead of proceeding to submit the foregoing resolution to the Republic of Texas, as an overture on the part of the United States for admission, to negotiate with that Republic; then,

*Be it resolved*, That a State, to be formed out of the present Republic of Texas, with suitable extent and boundaries, and with two representatives in Congress, until the next apportionment of

representation, shall be admitted into the Union, by virtue of this act, on an equal footing with the existing States, as soon as the terms and conditions of such admission, and the cession of the remaining Texian territory to the United States shall be agreed upon by the Governments of Texas and the United States: And that the sum of one hundred thousand dollars be, and the same is hereby, appropriated to defray the expenses of missions and negotiations, to agree upon the terms of said admission and cession, either by treaty to be submitted to the Senate, or by articles to be submitted to the two houses of Congress, as the President may direct.<sup>28</sup>

As the captions in the *Statutes at Large* conveniently make clear, the first paragraph provides the “[c]onsent of Congress to the erection of Texas into a State for admission into the Union”; the second paragraph sets forth the “[c]onditions of admission”; the third paragraph provides that “the President may negotiate with Texas for admission” (on terms other than those contained in the second paragraph if he thinks proper); and the fourth paragraph provides that “Texas, [was] to be admitted, as soon as Texas and the U.S. agree upon the terms” and also provides for “Appropriation.”<sup>29</sup>

Of particular interest to us here is the third “condition” in the second paragraph of the Joint Resolution of March 1, 1845 which provides:

New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the federal constitution.<sup>30</sup>

This “[n]ew States” provision, authorizing the future subdivision of the new state into as many as four additional states, was incorporated nearly verbatim (with minor differences in style) into the Joint Resolution of the Congress of Texas.<sup>31</sup> This joint resolution, passed by both houses of the legislature of the

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28. *Id.* at 797–98.

29. *Id.* at 798.

30. *Id.*

31. Joint Resolution Giving the Consent of the Existing Government to the Annexation of Texas to the United States, 9th Cong., E.S., 1845 Repub. Tex. Laws 4, 4–5, reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1225, 1225–26 (Austin, Gammel Book Co. 1898). For online access, see <http://www.yale.edu/lawweb/avalon/texan02.htm>. The language is reproduced in relevant part:

And be it further resolved, That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: . . . Third. New States of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the Federal Constitution. And such States as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri compromise line, shall be admitted into the Union, with or without slavery, as the people of each State asking admission may desire. And in such

Republic of Texas and signed by President Anson Jones into law on June 23, 1845, provided the consent of the Republic of Texas to the annexation of Texas by the United States.<sup>32</sup> Thus, the Republic of Texas's consent to annexation to the United States was based on the latter's consent to future subdivision of the new state. This "[n]ew States" provision was obviously no accident, but reflected a number of debates about the proper size, number, and free- versus slave- status that ultimately would result from Texas's annexation. The provision was bargained for with the sovereign Republic of Texas, and given in exchange, in part, for the latter's agreement to enter the Union. From the standpoint of those who feared that Texas would be too big and ought to be diminished somewhat by being carved into parts, the effect, ironically, is the opposite: to enlarge, at Texas's discretion, its representation in the federal government, and thus its power and influence within the United States, by dividing itself into as many as four more "[n]ew States, of convenient size."

Perhaps because the Joint Resolution of March 1, 1845 was not thought to be fully self-executing,<sup>33</sup> or perhaps out of an abundance of caution, the Twenty-ninth Congress thought it proper to pass a Joint Resolution for the Admission of the State of Texas into the Union, which was signed by President James K. Polk into law on December 29, 1845.<sup>34</sup> This joint

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State or States as shall be formed out of said territory north of said Missouri compromise line, slavery or involuntary servitude (except for crime) shall be prohibited.

*Id.*

32. *Id.*

33. Compare Joint Resolution for Annexing Texas to the United States, *supra* note 1, para. 2, at 797 (first condition) (providing that "the constitution thereof, with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, *to be laid before Congress for its final action*, on or before the first day of January, one thousand eight hundred and forty-six") (emphasis added), *with id.* para. 4 (final resolution) (stating that "a state, to be formed out of the present Republic of Texas, with suitable extent and boundaries, and with two representatives in Congress, until the next apportionment of representation, *shall* be admitted into the Union, by virtue of this act . . .") (emphasis added).

34. Joint Resolution for the Admission of the State of Texas into the Union, J. Res. 1, 29th Cong., 9 Stat. 108 (1st Sess. 1846). For online access, see <http://www.yale.edu/lawweb/avalon/texan04.htm> (last visited Feb. 23, 2004). We reproduce it in relevant part, highlighting the incorporation by reference of the Joint Resolution of March 1, 1845:

Whereas, the Congress of the United States, *by a Joint Resolution approved March the first, eighteen hundred and forty-five*, did consent that the territory properly included within, and rightfully belonging to, the Republic of Texas, might be erected into a new state, to be called The State of Texas, with a republican form of government, to be adopted by the people of said republic, by deputies in Convention assembled, with the consent of the existing government, in order that the same might be admitted as one of the states of the Union; which consent of Congress was given upon certain conditions specified in the first and second sections of said Joint Resolution: And whereas the people of the said Republic of Texas, by deputies in Convention assembled, with the consent of the existing government, did adopt a Constitution, and erect a new state with a republican form of government, and, in the

resolution, which might be thought of as the actual statute admitting Texas into the Union, incorporated by reference the Joint Resolution of March 1, 1845 and formally recognized Texas's admission into the Union, all conditions to statehood contained in the March 1, 1845 resolution having been satisfied.<sup>35</sup>

We think that this "[n]ew States" language contained in the second section of the Joint Resolution of March 1, 1845, which we will hereafter refer to as the "Texas Tots provision," gives Texas the legal entitlement to reconstitute itself as five states, now, by simple act of the Texas Legislature, and with the consent of each of the new states thereby created<sup>36</sup>—a tricky mega-redistricting political problem to be sure, but probably not an impossible one. But no further legislative action by Congress is necessary for Texas constitutionally to have permission to become five Texas Tots. There may be details to work out—t's to cross and i's to dot. But the constitutionally necessary consent was given long ago, remains in effect today, and has not been superseded or impliedly repealed by any other provision of federal law.

Our argument hits each of these points in turn: In Part III, we ask five relevant questions. In subpart III(A), we ask whether Article IV, Section 3's constitutional requirements for state division have been satisfied—or will be satisfied, once Texas and its progeny act—without further requirement for congressional action, other than to change the number of stars on the national flag and the number of seats in Congress. The answer is *Yes*: Article IV, Section 3 permits a state to subdivide, with the consent of the mother state

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name of the people of Texas, and by their authority, did ordain and declare that they assented to and accepted the proposals, conditions, and guarantees contained in said first and second sections of said resolution: And whereas the said Constitution, with the proper evidence of its adoption by the people of the Republic of Texas, has been transmitted to the President of the United States and laid before Congress, in conformity to the provisions of said Joint Resolution: Therefore—

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of Texas shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever. Section 2. And be it further resolved, That until the representatives in Congress shall be apportioned according to an actual enumeration of the inhabitants of the United States, the State of Texas shall be entitled to choose two representatives.

*Id.* (emphasis added).

35. *Id.*

36. The Joint Resolution of March 1, 1845 does not itself impose a consent requirement for each of the Texas Tots. See Joint Resolution for Annexing Texas to the United States, *supra* note 1, at 798 ("New states . . . in addition to said State of Texas . . . may hereafter, by the consent of said State, be formed out of the territory thereof . . ."). The phrase "by the consent of said State" is best read to refer only to the consent of the mother State of Texas; if the consent of both the mother state and the baby state(s) was intended by the text, the "plural" phrase "by the consent of said States" might have been used. Nevertheless, the Constitution is best read to impose a consent requirement for each of the Texas Tots in the creation of new states from old ones. See *infra* note 43.

and of Congress. We draw on the example of West Virginia, carved out of Virginia (and about which we have written before, at great and persuasive length<sup>37</sup>), to help illustrate the correctness of this reading of Article IV, Section 3.

In subpart III(B), we take up the subsidiary question of whether, in admitting new states into the Union pursuant to Article IV, Section 3, Congress can simultaneously admit a state and grant consent to its future division. The answer is *Yes*: there is no requirement that Congress admit a State before it may provide for its future division, forcing Congress to speak twice on the same issue. Congress's consent under Article IV, Section 3 may be thought of as a conditional legislative enactment, which has the juridical status of "law" with no operative consequence until all of its conditions are satisfied.

In subpart III(C), we ask whether the granting of congressional consent, in advance, to Texas's partition in the Texas Tots provision, now over 158 years old, can possibly remain operative and valid today. The answer, again, is *Yes*: congressional enactments pursuant to Article IV, Section 3 of the Constitution, like any other congressional enactments, remain in force as law unless and until repealed. Here, we draw on the example of the Twenty-seventh Amendment (about which one of us has previously written, again, at great and persuasive length<sup>38</sup>), proposed by the First Congress in 1789 and ratified in 1992, to illustrate the general point about the permanency of unrepealed legislative enactments.

In subpart III(D), we ask whether the Texas Tots provision has been superseded or impliedly repealed by any subsequent federal law—more specifically by the Thirteenth Amendment's prohibition of slavery and involuntary servitude or by subsequent act of Congress. The answer is *No*: Certain parts of the Texas Tots provision may no longer be operable, but wholesale repeal by implication is rightly disfavored, and the inoperative provisions (if any) are clearly severable. In one respect, however, a new statutory requirement might be thought to be superimposed upon the still-extant authority of Texas to divide and multiply, at least before 2007—the preclearance requirements of the Voting Rights Act of 1965. We are not at all convinced that this statutory provision will stand in the way of the creation of Texas Tots. But we are confident that if Texas acts soon enough, and carefully enough, in creating Texas Tots (that really are representative of today's Texas), U.S. Attorney General John Ashcroft will find the Texas Tots to be in compliance, just as he did with the recent redistricting plan.

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37. See Kesavan & Paulsen, *supra* note 20.

38. See generally Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677 (1993).

In subpart III(E), we consider, very briefly (because we find it rather dull by comparison), the question of whether gerrymandering for transparently “partisan” purposes is invalid under any provision of the Constitution—the question presented in *Vieth v. Jubelirer*,<sup>39</sup> a case pending before the U.S. Supreme Court in the 2003–2004 Term. We conclude that nothing in the Constitution is legitimately interpreted to preclude messing with Texas in the manner we propose; and even if there were, the relevant motive could always be cast as one of maximizing the political clout of present-day Texans in national politics—and there’s nothing wrong with that.

Finally, in Part IV, we offer some brief concluding thoughts as to “Why Should We Mess with Texas Anyway?”—including what we might have to gain (and lose) from thinking carefully today about Texas, both as constitutional lawyers and as citizens.

### III. Can We Really Mess with Texas?

#### A. *Question One: Can Texas Even Divide Itself into Texas Tots?*

The threshold question in messing with Texas is whether the Constitution permits any Texas Tots to be formed out of mother Texas *at all*.<sup>40</sup> Article IV, Section 3, Clause 1 of the Constitution provides:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.<sup>41</sup>

Article IV, Section 3 provides that Congress has the power to admit new states into the Union. As we discussed above, it was pursuant to this power that the formerly independent nation, the Republic of Texas, became a state

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39. *Vieth v. Jubelirer*, 123 S. Ct. 2652 (2003) (mem.) (noting probable jurisdiction).

40. We have spilled, believe it or not, sixty-four pages of ink on this burning question of constitutional law which has tremendous consequences for whether West Virginia was constitutionally formed out of mother Virginia. Kesavan & Paulsen, *supra* note 20, at 332–95. That is probably enough (lengthwise at least) to give it standalone article status in most of the nation’s law journals and reviews. For Professor McGreal’s shorter take on this question as it applies to Texas, see McGreal, *supra* note 21, at 2401–16. We were unaware of McGreal’s work (as he was of ours) during the course of our research into this question for the West Virginia article, but became aware of his just as that article went to press. Though we and McGreal both conclude that Article IV, Section 3, Clause 1 of the Constitution permits new states to be formed out of old ones (with varying degrees of conviction, we suppose), we have some quibbles with his analysis in certain respects. See Kesavan & Paulsen, *supra* note 20, at 350 n.189, 352 n.196, 375 n.279.

41. U.S. CONST. art. IV, § 3, cl. 1. In the interest of concision, we will henceforth refer to this provision as Article IV, Section 3, though it does contain a “clause 2” which is commonly referred to as the Territories Clause. See U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”).

within the United States of America, after an attempt to admit Texas by treaty failed to receive the requisite two-thirds majority in the Senate. Because the Republic of Texas was an independent nation, Texas must have been admitted into the Union pursuant to the “first clause” of Article IV, Section 3: “New States may be admitted by the Congress into this Union”; the “second clause” and “third clause” of Article IV, Section 3 simply did not apply. Now that Texas is a state of the Union, however, the creation of any new States “formed or erected within the Jurisdiction of any other State” must comply with the terms of Article IV, Section 3—and in particular its second clause.<sup>42</sup>

The second clause establishes limits on baby States being formed from mother States. But what are those limits? The text of the second clause is subtly ambiguous. It may be read in two ways: (1) no new state shall be formed or erected within the jurisdiction of any other state—period, full stop; or (2) no new state shall be formed or erected within the jurisdiction of any other state, without the consent of the legislatures of the state or states concerned as well as of the Congress.

Dedicated textualists will notice that the choice between these two readings of Article IV, Section 3's second clause turns on very fine points of constitutional grammar—punctuation and ambiguous clause modification. What is the meaning of the second *semicolon* in Article IV, Section 3? Is it more like a *period* or more like a *comma*? If this semicolon is more like a period than a comma, the second clause of Article IV, Section 3 would seem to be a flat prohibition on new breakaway States. This is the problem of punctuation. Even if this semicolon is more like a comma than a period, however, it is not clear that the consent proviso “without the Consent of the Legislatures of the States concerned as well as of the Congress,” which appears at the end of the first paragraph of Article IV, Section 3, modifies the *antecedent* second clause as well as the *immediately preceding* third clause. This is the problem of ambiguous modification.

The best reading of Article IV, Section 3, we submit, is that it does permit the division of a mother State into a baby State(s) with the consent of the mother State, baby State(s), and Congress.<sup>43</sup> In our article about the

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42. The third clause of Article IV, Section 3 would govern any states to be formed or erected by Texas and any other state, including the Texas Tots, or by the four Texas Tots and any other state, including Texas. The Texas Tots provision does not give rise to this scenario and hence the third clause does not apply.

43. See Kesavan & Paulsen, *supra* note 20, at 395, 398–400. Article IV, Section 3's consent proviso—“without the Consent of the Legislature of the States concerned”—is ambiguous as to whether the consent of the baby state is required to the *division* of the mother state. See *id.* at 360–61, 392 (discussing the textual wrinkle caused by the pluralization of Article IV, Section 3's consent proviso). President Lincoln, in his written opinion on the admission of West Virginia into the Union, thought that the only consent required by Article IV, Section 3 was that of the mother state and of Congress. See *id.* at 324. Whether the consent of the baby state to *division* of the mother

possible unconstitutionality of West Virginia, we considered the gripping question posed by the twin problems of punctuation and ambiguous modification.<sup>44</sup> It was a high stakes interpretive exercise—if the no-new-breakaway-States reading was right, then West Virginia (formed from Virginia), Kentucky (also formed from Virginia), and Maine (formed from Massachusetts) were plainly unconstitutional, and perhaps Vermont as well.<sup>45</sup> We dared to go where the analysis would lead us, and employed an “interpretivist” methodology focusing on text, history, and the secret drafting history of the Constitution.<sup>46</sup>

After a long and (some might say) tedious examination of the original public meaning of semicolons in the Constitution (spanning nineteen pages),<sup>47</sup> and an also long and (some might say) also tedious examination of the problem of ambiguous modification (spanning ten pages),<sup>48</sup> we reached the conclusion that, as a matter of textual argument, Article IV, Section 3 really was ambiguous—that semicolons do not have a consistent usage in the Constitution; nor do they in this Essay; that the question of ambiguous modification had an ambiguous answer; and that context did not supply a clear answer.<sup>49</sup>

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state is required by Article IV, Section 3 or basic structural features of the Constitution itself, *cf.* CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969), is not of particular consequence here. In addition to consent to division, Article VII and basic structural features of the Constitution itself are best read to require the consent of the baby state to *membership in the Union*. See U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).

44. See Kesavan & Paulsen, *supra* note 20, at 332–95. We wish to note that we were inspired in this work by Professors Steiker, Levinson, and Balkin, who published an article in the *Texas Law Review* addressing the same twin problems of punctuation (focusing on the comma, not the semicolon) and ambiguous modification. See Jordan Steiker et al., *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEXAS L. REV. 237 (1995).

45. Kesavan & Paulsen, *supra* note 20, at 332.

46. *Id.* at 333–34.

47. *Id.* at 334–52. This is as good a place as any to note that a related, but distinct “semicolon problem” has featured prominently in Texas’s history. The “Semicolon Case,” *Ex parte Rodriguez*, 39 Tex. 706 (1873), decided by the Texas Supreme Court in 1873, which by virtue of its decision was branded as the “Semicolon Court,” involved the meaning of a semicolon in Article III, Section 6 of the Texas Constitution of 1869. For a brief discussion of the case, see Kesavan & Paulsen, *supra* note 20, at 339–40. See also James R. Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEXAS L. REV. 279 (1959); George E. Shelley, *The Semicolon Court of Texas*, 48 SW. HIST. Q. 449 (1945).

48. Kesavan & Paulsen, *supra* note 20, at 352–61.

49. *Id.* at 362. Since our article on West Virginia was published, we have discovered some additional evidence from the Founding which bears on the Article IV, Section 3 ambiguity. The Society of Western Gentlemen, consisting of Anti-Federalists Arthur Campbell and Francis Bailey, among others, proposed a revised Constitution which was printed in the *Virginia Independent Chronicle*. See 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 769–70 (John P. Kaminski & Gaspare J. Saladino eds., 1990). They proposed to amend Article IV, Section 3 thus:

If the text was ambiguous, we had to rely on history, structure, and perhaps even the Constitution's secret drafting history to discover the original public meaning of Article IV, Section 3. After a long but less tedious examination of history (including the public writings of the Federalists and the Anti-Federalists, the recorded debates of the several state ratifying conventions, and the early precedents of the admission of Vermont, Kentucky, and Tennessee into the Union),<sup>50</sup> we concluded that history leaned in the direction of concluding that breakaway States are permitted with appropriate consents, but that the history—especially that from early precedents—was simply not conclusive of the constitutional question.<sup>51</sup>

And so we turned our attention to the Constitution's secret drafting history to see what was contemplated and discussed by the Framers in the drafting of Article IV, Section 3, in the hopes that the process would shed some light on the constitutional provision—akin to mining the legislative history of a statute in statutory interpretation. (Admittedly, we did this somewhat sheepishly, not having worked out a theory for using the Constitution's secret legislative history, a problem that we have since solved.<sup>52</sup>) It was here that we found that the better conclusion, though by no means an unassailable one, is that new breakaway States are permitted with the appropriate consents—that this was clearly what was intended by the *text* of Article IV, Section 3, as well as the subjective intentions and

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New States ~~may be~~ containing a suitable extent of territory, and a number of inhabitants equal at least to some one of the original states, shall in due time be established in the western country, and admitted by the Congress into this Union; but no new State shall be ~~formed or erected within the Jurisdiction of any other State; nor~~ ~~any State be~~ formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

*Id.* at 778. A “[s]ummary of Alterations Proposed in the Revised Constitution” accompanying their mark-up of the Constitution made clear that the two changes to Article IV, Section 3 were (1) “New states to be admitted if they have ‘a suitable extent of territory’ and population equal to least populous state,” and of particular relevance here, (2) “Elimination of prohibition on creation of a new state from territory within jurisdiction of an existing state.” *Id.* at 771.

We mention this evidence here, not because it changes our conclusions in any way with respect to the original public meaning of Article IV, Section 3, but as a point of interest for dedicated original public meaning textualists. It is also something that further demonstrates the *linguistic plausibility* of the no-new-breakaway-states reading of Article IV, Section 3, which is not so bizarre as to not have been noticed by ordinary, reasonably well-informed Ratifiers.

50. See Kesavan & Paulsen, *supra* note 20, at 363–80.

51. *Id.* at 381. For additional discussion of the role of early precedents in constitutional interpretation, see *id.* at 380–83; Kesavan & Paulsen, *supra* note 21, at 1164–76.

52. See Kesavan & Paulsen, *supra* note 21. One additional tack to the textual argument that we could have taken (but did not) is to investigate the meaning of the semicolon based on the Framers' usage of it at the Philadelphia Convention of 1787—such contemporary usage of a grammatical mark would have provided additional context with which to determine the original, objective public meaning of the second semicolon in Article IV, Section 3.

understandings of its *Framers*. This evidence, combined with our assessments of the textual and historical arguments, sealed the deal.

If our analysis concerning West Virginia is right—and frankly no one has dared to say it isn't—Article IV, Section 3 permits the creation of Texas Tots with the appropriate consents. With the consent of Congress having been given in 1845, a subject we take up in subpart III(C), all that remains (consent-wise, that is) is the consent of the mother State of Texas and that of the Texas Tots.

*B. Question Two: Can Congress Simultaneously Admit a State and Grant Consent to Its Future Division?*

The second question—which we consider to be a subsidiary of the first—is whether, in admitting new states into the Union pursuant to Article IV, Section 3, Congress can simultaneously admit a state and grant consent to its future division.<sup>53</sup> The answer, again, is *Yes*: there is no requirement that Congress provides its consent to the admission of a state *before* it may provide its consent to the putative state's future division, forcing Congress to speak twice on the same issue.<sup>54</sup>

The textual tension, in the eyes of Professor McGreal at least, seems to be that the second clause of Article IV, Section 3—the part that pertains to the creation of Texas Tots—provides that “no new State shall be formed or erected within the Jurisdiction of any other State . . . [consent proviso],”<sup>55</sup> and that at the time of enactment of the Texas Tots provision, Texas itself was not yet a “State” within the meaning of this clause.<sup>56</sup> The perception of tension is both unnecessary and improper.

The Texas Tots provision in the Joint Resolution of March 1, 1845 may be thought of as a *conditional legislative enactment*, which has the juridical status of “law” with no operative consequence until all of its conditions are satisfied. In computer programming terms, the Joint Resolution of March 1, 1845 contains two nested “if, then” statements: *first*, if various conditions are satisfied, then Texas shall be admitted into the Union (pursuant to the first clause of Article IV, Section 3); and *second*, if Texas is in fact admitted into

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53. For Professor McGreal's take on this question, see McGreal, *supra* note 21, at 2416–24. We find McGreal's discussion unnecessarily belabored—the question is nowhere near as close as he seems to think it is. We hope that our presentation in the text makes this point clear. We think, and McGreal seems to agree, that there is no question that Congress can provide its consent to Texas's future division *in advance*—delegating to Texas the authority when the time is right to carve itself up into Texas Tots—in contrast, say, to granting its consent to Texas's division only *after* the latter makes such a request.

54. There is one other possibility. We also think that there is no requirement that a state actually be *admitted* into the Union before Congress may provide its consent to its future division.

55. U.S. CONST. art. IV, § 3, cl. 1 (emphasis added).

56. McGreal, *supra* note 21, at 2416.

the Union, then Texas shall have the right to carve itself up into Texas Tots (pursuant to the second clause of Article IV, Section 3).

This type of enactment—which some scholars have aptly called “contingent legislation”<sup>57</sup>—is commonplace and constitutional. Congress has passed such legislation since at least the early part of the nineteenth century, and Congress’s power to do so has been sustained in a line of cases ranging from *Cargo of the Brig Aurora v. United States*<sup>58</sup> to *Field v. Clark*<sup>59</sup> to *J.W. Hampton, Jr. & Co. v. United States*.<sup>60</sup> Of course, there are constitutional limits to the types of contingencies that may be specified in contingent legislation as well as to which constitutional actors have the power to make the determination that the contingency has occurred.<sup>61</sup> This

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57. See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 363–64, 367, 387–89, 391 (2002) (reviewing the acceptance of contingent legislation by the courts and providing a “delegational analysis”); Steven F. Huefner, *The Supreme Court’s Avoidance of the Nondelegation Doctrine in Clinton v. City of New York: More Than “A Dime’s Worth of Difference,”* 49 CATH. U. L. REV. 337, 342–46 (2000) (providing a historical look at the practice of contingent legislation). For an articulate definition of contingent legislation, see Lawson, *supra*, at 363:

Every law has an effective date. Laws can take effect immediately, on some specific future date, or on the happening of some future event that may or may not be certain to occur. If a law takes effect only on the happening of some future event that is not certain to occur (or is not certain to occur at a specific time), it is contingent legislation.

*Id.*

58. 11 U.S. (7 Cranch) 382, 388 (1813) (upholding an 1811 statute allowing the President to declare by proclamation whether Great Britain or France was no longer violating the neutral commerce of the United States, thereby suspending the statute’s effectiveness). The case is discussed in Lawson, *supra* note 57, at 363–64.

59. 143 U.S. 649, 692–93 (1892) (upholding a provision of the Tariff Act of 1890 requiring the President to suspend favorable tariff treatment for nations imposing “reciprocally unequal and unreasonable” trade restrictions on American products and substituting an alternative tariff schedule). The case is discussed in Lawson, *supra* note 57, at 361–65.

60. 276 U.S. 394, 409–10 (1928) (upholding a provision of the Tariff Act of 1922 allowing the President to alter the amount of a duty on certain imported merchandise in order to “equalize the . . . costs of production”). The case is discussed in Lawson, *supra* note 57, at 367–69. Indeed, *J.W. Hampton* has spawned a line of cases upholding a statute’s effectiveness upon the consent of the regulated—e.g., a regulation for product X effective on the approval of producers of product X. *Id.* at 369 n.163.

61. In a recent article on the origins of the nondelegation doctrine, Professor Lawson put the point nicely:

Normally, a statute’s effective date will be a calendar date, but there is no evident reason why that effective date cannot be determined by some event other than celestial motions—such as legislation that takes effect only upon occurrence of natural disasters. Once the statute identifies a contingent event as the trigger for effectiveness, someone must determine in any given case whether the event has occurred (just as someone must determine whether the relevant calendar date has occurred if the statute prescribes a calendar date). That someone will be either an executive agent or a judicial agent: The interpretation of the contingency (What counts as a natural disaster? How high does the water have to rise before it constitutes a flood?) and the ascertainment of whatever facts the contingency depends upon (How high did the water actually rise?) are core executive and judicial functions.

is, however, no problem for the Texas Tots provision. The admission of Texas into the Union—the contingent event giving rise to the legal effectiveness of the Texas Tots provision—is an event of the easiest variety: it simply turns on the number of stars on the national flag.<sup>62</sup>

C. *Question Three: Is Congress's Consent Given 158 Years Ago Still Valid?*

The third question is whether Congress's consent to potential Texas Tots given in 1845—over 158 years ago—is still valid. We think that the answer is plainly, incontrovertibly, and (hopefully) uncontroversially, *Yes*.<sup>63</sup> As a matter of “clausebound” textual interpretation, Article IV, Section 3 does not place any *express* time limits on the validity of Congress's consent to the admission of new States.

We might have an intratextual look to the rest of the Constitution for some clues.<sup>64</sup> Given that a host of clauses in the original Constitution and in the amended Constitution do place express time limits on constitutional actors—with actions to be (or not to be) taken immediately,<sup>65</sup> within days,<sup>66</sup> or within years<sup>67</sup>—it would certainly seem that if Article IV, Section 3 contained a time limit, it would have said so. Nevertheless, arguments from negative implication—from the interpretive canon *expressio unius est*

Lawson, *supra* note 57, at 364.

62. Lawson, *supra* note 57, at 391 (“If, for instance, a statute’s effective date turned on whether the President formally recognized a foreign country, that would seem to be a straightforward example of permissible contingent legislation.”). There are some additional considerations as to which department of the federal government—Congress, the President, or the federal judiciary (or some combination)—gets to make the determination that Texas has in fact been admitted into the Union. We are comfortable in leaving those considerations unaddressed here given that there is little question that Texas is part of the Union. For some observations on the who-gets-to-recognize-a-state question, see Kesavan & Paulsen, *supra* note 20, at 325–30.

63. For Professor McGreal’s take on this question, see McGreal, *supra* note 21, at 2424–35. As best as we can tell, McGreal reaches no firm answer to this question, perhaps intentionally—he uses this question to show that constitutional text, history, and structure (and “past government practice” and (judicial) “precedent”) does not yield a determinate answer. *Id.* at 2435 (“Our analysis has hit a dead end. Text allows opposite inferences. History is silent. Structure pulls both ways. Past government practice is too sparse to yield guidance. Four square precedent does not exist, and the only loosely analogous precedent is not supportive.”).

64. For a discussion of this interpretive technique including its history, strengths, and weaknesses, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730 (2000).

65. See, e.g., U.S. CONST. amend. XII (“[A]nd if no person have such majority; then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.”).

66. See, e.g., U.S. CONST. art. I, § 7, cl. 2 (“If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it.”).

67. See, e.g., U.S. CONST. art. I, § 2, cl. 3 (“The actual Enumeration shall be made within three Years after the first Meeting if the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”).

*exclusio alterius*—can sometimes be tricky.<sup>68</sup> Some things are perhaps too obvious to be expressed—for example, that the Vice President can't preside over his own impeachment trial<sup>69</sup> or that the President can't pardon himself (and we're not even absolutely sure about these).<sup>70</sup> The question thus becomes whether Article IV, Section 3 contains an implied time limit, notwithstanding its omission of an express one.<sup>71</sup>

Here too, we are hard pressed to see any reason for reading into Article IV, Section 3 any time limit, let alone a specific one as measured by a number of years. There is little reason for inferring a requirement of "contemporaneous consensus" into Article IV, Section 3. The Congress that granted its consent to the potential future division of Texas specifically contemplated that any division would not occur *immediately* but would occur in the *future*.<sup>72</sup> The fact that they contemplated this, of course, would not enlarge their constitutional powers if Article IV, Section 3 otherwise contains a contemporaneous consent requirement. But their contemplation does shed some light on the rationale for the Texas Tots provision—future Texas Tots might become necessary and proper, but might not—and it would be up to the *mother* State of Texas to decide, not Congress. That prerogative was (as they say in contract law) "bargained for and given in exchange" for the sovereign nation of Texas's agreement to join the United States of America. Congress committed itself, as a term of Texas's admission, to Texas's *future right to decide* whether to subdivide.

Moreover, once we agree that contemporaneous consent does not matter, it is most difficult to establish any time limit in Article IV, Section 3 that is not simply made up.<sup>73</sup> After all, what's the *constitutionally* significant

68. Expressio unius est exclusio alterius: the expression of one is the exclusion of another. For a classic exposition of this principle of textual interpretation, see THE FEDERALIST NOS. 32, 83 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

69. See U.S. CONST. art. I, § 3, cl. 6 ("When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present."). But cf. Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 CONST. COMMENT. 245 (1997) (suggesting that the Vice President may preside over his own impeachment trial).

70. See U.S. CONST. art. II, § 2, cl. 1 ("[H]e shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."). Cf. Brian C. Kalt, Note, *Pardon Me? The Case Against Presidential Self-Pardons*, 106 YALE L.J. 779 (1996).

71. Relatedly, one might consider whether the Texas admission statute contains an implied time limit for the creation of Texas Tots, for it too does not contain an express one. In other words, a requirement of action by Texas within some reasonable period of time might exist, not as a matter of interpreting Article VI, Section 3, but as a matter of interpreting the Texas Tots provision. The big problem with this approach is finding such a limitation in the Texas Tots provision, which is not expressed in its text or (from what we can tell) its history (though unenacted history would fail when compared to silent text). For a similar observation in the constitutional amendment/Article V context, see Paulsen, *supra* note 38, at 694 n.54.

72. See *supra* text accompanying note 28 ("New States . . . may hereafter . . . be formed . . .").

73. See Paulsen, *supra* note 38, at 692–95.

difference between 1 year and 158 years? Congress could have conditioned its consent to the potential future division of Texas on a specific number of years, just as Congress routinely establishes “sunset provisions” on the lives of federal statutes.<sup>74</sup> Such a time limit would undoubtedly be constitutional,<sup>75</sup> though not all conditional consents in Article IV, Section 3 might be.<sup>76</sup> Congress did, after all, think it wise enough to condition its consent to the creation of Texas Tots “not exceeding four in number.”<sup>77</sup> Actually, Congress carefully specified *several* additional conditions regarding Texas statehood. The second paragraph containing the famous Texas Tots provision begins thus: “*And it be further resolved, That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: . . .*”<sup>78</sup>

Indeed, if the Twenty-seventh Amendment is any guide, we think that Congress’s consent to Texas Tots is definitely valid. One of us exhaustively defended the validity of the Twenty-seventh Amendment over a decade ago.<sup>79</sup> The Twenty-seventh Amendment became a part of the law of the land

74. Indeed, sunset provisions have been considered by Congress from the start—in the First Congress, Representative James Madison vigorously and successfully argued for such a provision in the Impost Act. For a short discussion of the debate, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 540–41 (2003). See also GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 59–65 (1982) (discussing the need for, history of, and problems with sunset provisions in federal statutes). A computer-aided search of the United States Code for the phrase “sunset provision” in Westlaw yielded more than 233 references to some sort of sunset provision. Search of Westlaw, United States Code Database (Feb. 29, 2004).

75. See Paulsen, *supra* note 38, at 686–87.

76. See, e.g., *Coyle v. Smith*, 221 U.S. 559, 565 (1911) (holding that Congress’s power to attach conditions to the admission of new states under Article IV, Section 3 does not include the power to dictate the location of a new state’s capital, which would deprive the new state from being on an “equal footing” with the other states).

77. Whether Congress’s consent would be constitutionally valid if it did not limit the number of Texas Tots is an interesting question, but not one whose intricacy is proportioned to its interest. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (saying the same thing about the question of “judicial review”). To be sure, weird things could happen: Texas could subdivide into so many Texas Tots as to have outright control of the Senate—not just a simple majority, but a three-fifths supermajority, a two-thirds supermajority, or more. This would also give the Texas Tots a majority of electoral votes and a blocking position when it comes to the ratification of any constitutional amendment. As we have written elsewhere, the Constitution establishes a minimum population for a new state of six persons—one Representative, two Senators, and three Electors. See Kesavan & Paulsen, *supra* note 20, at 358 n.221. One might object to an unlimited Texas Tots provision on nondelegation grounds—that such a provision is too much of a “blank check” to the mother State of Texas, but this argument is unlikely to carry the day. The best objection to an unlimited Texas Tots provision is that it would be very entrenching—it would be impossible to repeal if Texas acted quickly enough. But, of course, if Congress came to fear this outcome, it could repeal its consent to Texas’s near-infinite subdivision. This might be a *breach of faith* with 1845 Texans—if any of them were still alive to care—but it would not be unconstitutional. Moreover, the fact that Congress can do stupid, destructive things does not mean that Congress does not have the power under the Constitution to do so. Allowing Texas to divide into five states, however, is not at all a stupid thing for Congress to do (or have done), as we argue below. See *infra* Part IV.

78. Joint Resolution for Annexing Texas to the United States, *supra* note 1, at 797.

79. See generally Paulsen, *supra* note 38.

on May 7, 1992—some 202 years after it had been proposed by Congress to the several States. We and others—including the National Archivist (the executive branch official charged by statute with the duty of certifying the adoption of a constitutional amendment), the Department of Justice's lawyers at the Office of Legal Counsel, and both Houses of Congress—are in agreement that the Twenty-seventh Amendment is constitutional.<sup>80</sup> To be sure, there are some skeptics, but no one has yet to make a sustained scholarly attack on the constitutionality of the Twenty-seventh Amendment.<sup>81</sup> There is some (and some would think, important) dicta in a 1921 Supreme Court case, *Dillon v. Gloss*,<sup>82</sup> suggesting an implicit time limit for ratification of constitutional amendments under Article V. We think that none of the four arguments for contemporaneous consensus set forth in *Dillon* is persuasive in the Article V context.<sup>83</sup> But even if they were, it does not at all follow that those arguments apply on their own terms in the Article IV, Section 3 context.<sup>84</sup> In any event, if 202 years between proposal and

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80. See *id.* at 680 n.6 (National Archivist), 7 (Department of Justice's lawyers), and 9 (both Houses of Congress).

81. E.g., Stewart Dalzell & Eric J. Beste, *Is the Twenty-seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501 (1994); Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-seventh Amendment*, 11 CONST. COMMENT. 101 (1994); JoAnne D. Spotts, Notes & Comments, *The Twenty-seventh Amendment: A Late Bloomer or a Dead Horse?*, 10 GA. ST. U. L. REV. 337 (1994); William Van Alstyne, *What Do You Think About the Twenty-seventh Amendment?*, 10 CONST. COMMENT. 9 (1993); Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-seventh Amendment*, 61 FORDHAM L. REV. 497 (1992); Christopher M. Kennedy, Note, *Is There a Twenty-seventh Amendment? The Unconstitutionality of a "New" 203-Year-Old Amendment*, 26 J. MARSHALL L. REV. 977 (1993). Most recently, Professor Bruce Ackerman has attacked (in passing) the constitutionality of the Twenty-seventh Amendment in his (ongoing) magnum opus on the "transformations" of our written Constitution. See BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 490–91 n.1 (1998) (concluding that the "so-called twenty-seventh amendment should be treated as a bad joke by sensible citizens"). It is not at all surprising that we formalists would disagree with Ackerman on this score. We think Ackerman is wrong here for the reason that he is wrong about most of the things that he is wrong about: Ackermanian, antiformalist, atextualist constitutional interpretation can yield just about any result. See, e.g., Michael Stokes Paulsen, *I'm Even Smarter Than Bruce Ackerman: Why the President Can Veto His Own Impeachment*, 16 CONST. COMMENT. 1 (1999).

82. *Dillon v. Gloss*, 256 U.S. 368 (1921) states:

First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.

*Id.* at 374–75.

83. See Paulsen, *supra* note 38, at 684–704 (debunking each argument of the *Dillon* dicta).

84. Even Professor McGreal, who seems to disagree with us as to whether there is a time limit on Article IV, Section 3, agrees with us on this score. See McGreal, *supra* note 21, at 2431–35

ratification works for the constitutionality of the Twenty-seventh Amendment, then a mere 158 years definitely works for the validity of Congress's consent to the potential future division of Texas—and with 44 years of margin to boot.

Needless to say, this comment is not to be interpreted as implying a time limit of 202 years on the validity of Congress's consent to the potential future division of Texas. As is the case in the Article V context, once we reject a contemporaneous consensus requirement, there is no logical, principled, or persuasive way to establish a time limit (which we, as formalists, think is all the more reason to conclude that there is none). To impose such a time limitation on Article IV, Section 3 "consents" would be, literally, to make up a constitutional requirement that just plain isn't there. We therefore conclude that there is no time limit at all for Article V ratifications or for Article IV, Section 3 consents.

This conclusion may beg several questions, and fortunately, one of us has comprehensively set forth a "general theory of Article V" that also applies to Article IV, Section 3.<sup>85</sup> That general theory, applied to the Article IV, Section 3 context is this: a "concurrent legislation" model which recognizes that Congress's consent given in 1845 to the creation of Texas Tots is an "ordinary legislative enactment" that still has the juridical status of "law" though it has not yet had operative consequence; that Article IV, Section 3 (and in this case, Congress's consent to the Texas Tots provision) supplies a "rule of recognition" for deciding when the Texas Tots provision has formal consequence; and that the rule of recognition is the "concurrent approval" of Texas Tots by the mother State of Texas and the Tots themselves. Congress's green light is "on" for the creation of Texas Tots, and all that remains is for the mother State of Texas to turn its light on as well. Of course, the concurrent legislation model begs the question of whether the *current* Congress could, if it acted quickly enough, turn its green light "off" to the creation of Texas Tots by repealing its consent given in 1845. The answer is that Congress could do so, but only before the mother State of Texas has turned *its* light on (just as, in the Article V context, Congress could rescind an amendment proposal before, but not after, three-fourths of the States have ratified it).<sup>86</sup> Such a repeal might be mean, nasty, and unfair (to Texans), but would undoubtedly be constitutional.

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(discussing each prong of the *Dillon* dicta and concluding that "[o]n the whole, the three *Dillon* factors provide weak support for a time limit on state division").

85. See Paulsen, *supra* note 38, at 682–83, 721–33 (establishing an interpretation of Article V).

86. One important wrinkle in the Article IV, Section 3 context, however, is that Congress's consent (or repeal of consent) requires Presidential presentment and approval. U.S. CONST. art. I, § 7, cls. 2, 3. Because Texans have a friend in the current President of the United States, "Dubya" as he is affectionately known, who is the former Governor of Texas, a simple majority of each House of Congress may not be sufficient to repeal Congress's 1845 consent. If Dubya vetoes Congress's repeal of its 1845 consent, a two-thirds supermajority of each House of Congress would be necessary to override the Presidential veto, which might be difficult (albeit not impossible) to do.

Perhaps this Essay will provoke Congress to turn its light off for the creation of Texas Tots, if the creation of mini-Texases is thought to be a bad thing (by non-Texans, of course). All we can say for now is that the Texas Republicans in the state legislature might have an edge over Members of Congress in obtaining a copy of this Essay and in understanding the constitutional issues involved, given that the *Texas Law Review* is conveniently located just steps from the Lone Star State's capital. But because of the enormous politics involved, Congress has at least a fighting chance to repeal the Texas Tots provision before the Texas Republicans in the state legislature agree on just how (best) to mess with Texas.<sup>87</sup>

*D. Question Four: Has Congress's Consent Been Superseded or Impliedly Repealed by Any Subsequent Legislative Act?*

A fourth question is whether Congress's consent given in 1845 to Texas Tots has been superseded or impliedly repealed by any subsequent legislative act—more precisely, by any subsequent constitutional amendment or any subsequent act of Congress. We have identified two subsequent legislative acts that must be considered—the Thirteenth Amendment, adopted in 1865, and the Voting Rights Act of 1965.

The Thirteenth Amendment, of course, prohibits slavery and involuntary servitude in the United States,<sup>88</sup> and perhaps much more.<sup>89</sup> Because the Constitution is superior to federal statutes (irrespective of which comes last in time),<sup>90</sup> the Thirteenth Amendment does supersede the part of

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Because Article V requires on its own terms a two-thirds supermajority of both Houses of Congress to propose amendments, it has not been thought necessary that proposed amendments be subject to Presidential presentment and approval. *See* *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 378–79 (1798) (noting that overriding the presidential veto would only require the same congressional vote); Paulsen, *supra* note 38, at 730–31 (noting that “essentially nothing turns on this long-standing technical departure from a strict legislation model” but stating that the “better approach” is strict adherence to Article I, Section 7's requirement of presentment and approval).

87. This Essay is projected to hit the newsstands during the summer of 2004 when the 108th Congress is not likely to be in session. What if Congress can't convene quickly enough to repeal its 1845 consent to Texas's right to subdivide? We leave it an open question whether the President, speaking clearly on behalf of the nation, could “freeze” the status quo so as to give Congress enough time to convene. *Cf.* U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”) (emphasis added).

88. *See* U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

89. *See* U.S. CONST. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”); *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409, 440 (1968) (holding that Congress has the power—and perhaps duty—to determine what are the badges and incidents of slavery and to translate that determination into legislation).

90. *See* U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

the Texas Tots provision relating to potential *slave* states. But because wholesale repeal by implication is disfavored,<sup>91</sup> and because the inoperative slave state provision is clearly severable and the rest of the Texas Tots provision is fully operative as a law,<sup>92</sup> the Thirteenth Amendment does not supersede the Texas Tots provision in its entirety. For convenience, we reproduce the relevant language of the Texas Tots provision below, with the italicized language representing what we think is superseded by the Thirteenth Amendment:

*And be it further resolved*, That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: . . . *Third*. New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the federal constitution. *And such States as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri compromise line, shall be admitted into the Union with or without slavery, as the people of each State asking admission may desire.* And in such State or States as shall be formed out of said territory north of said Missouri compromise line, slavery, or involuntary servitude, (except for crime,) shall be prohibited.<sup>93</sup>

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Authority of the United States, shall be the supreme Law of the Land.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (“It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is [first mentioned].”); THE FEDERALIST NO. 78 (Alexander Hamilton), at 468 (Clinton Rossiter ed., 1961) (contrasting constitutional supremacy with the last-in-time rule for conflicting statutes).

91. See *Allen v. McCurry*, 449 U.S. 90, 99 (1980) (“[R]epeals by implication are disfavored.”); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978) (“[I]ntention of the legislature to repeal must be clear and manifest.”) (quoting *Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936)); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”); see also *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 262 (1992) (restating the proposition that repeals by implication are disfavored); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981) (asserting the general rule against repeals by implication); *Watt v. Alaska*, 451 U.S. 259 (1981) (requiring clear legislative intent to repeal); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (affirming the requirement of clear intent to repeal).

92. See *Alaska Airlines v. Brock*, 480 U.S. 678, 678 (1987) (setting forth the standard of severability for federal statutes as “[u]nless it is evident that Congress would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law”). On severability clauses, see WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 888–89 (3d ed. 2001); Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41 (1995); John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993); Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937).

93. Joint Resolution for Annexing Texas to the United States, *supra* note 1, at 797–98 (emphasis added).

The Thirteenth Amendment makes the italicized language a legal nullity *only* insofar as any Texas Tots south of the Missouri Compromise line wish today to be slave states. To the extent that these “southern” Texas Tots wish today to be free states, and since even suggesting anything else would be unthinkable, the Thirteenth Amendment does not render the italicized language without meaning. The Thirteenth Amendment simply takes away, as a formal legal matter, the slave state “option” for any southern Texas Tots, and leaves the rest of the Texas Tots provision fully operative as a law. We consciously did not italicize the last sentence of the foregoing paragraph of the Texas Tots provision because it says something that is perfectly consonant with the Thirteenth Amendment (or to the extent there is any difference, could be interpreted to be), and there is no harm in saying something (good) twice or in being repetitive.

Though the admission statute does not contain an express severability provision (a drafting procedure which only came into vogue in the twentieth century), any judicial interpretation of the Texas Tots provision is likely to imply one in order to prevent the provision from being unconstitutional.<sup>94</sup> Thus, the slave-state option for southern Texas Tots can be safely severed from the Texas Tots provision. The most that could be said, on a severability challenge, is that *southern* Texas Tots would be unconstitutional—on the theory that Congress would not have included the provision for the creation of *any* southern Texas Tots in the admission statute if it knew that slavery would be illegal as a matter of domestic law. We feel that this severability challenge is, in a word, “challenged,” because Congress quite clearly contemplated that southern Texas Tots *could* be free (even if Congress did not expect them to be so).

In one respect, however, a new statutory requirement might be thought to be superimposed upon the still-extant authority of Texas to multiply, at least before 2007: the “preclearance” requirements established by Section 5 of the Voting Rights Act of 1965, which after the most recent amendments in 1982, expires in 2007.<sup>95</sup> Section 5 operates in addition to the Fifteenth Amendment and Section 2 of the Voting Rights Act of 1965.<sup>96</sup> In a nutshell, Section 5 requires “covered jurisdictions”—those with a history of voting discrimination, particularly against Blacks, to submit any changes with respect to voting to the federal government (specifically, the United States District Court for the District of Columbia or the United States Attorney General) for approval before they take effect, so as to prevent discrimination

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94. See *Alaska Airlines*, 480 U.S. at 686.

95. See 42 U.S.C. § 1973c (2000); U.S. Dep’t of Justice, Civil Rights Div., Voting Section, Introduction to Section 5 Preclearance, at [http://www.usdoj.gov/crt/voting/sec\\_5/about.htm](http://www.usdoj.gov/crt/voting/sec_5/about.htm) (last visited Feb. 23, 2004) [hereinafter Introduction to Section 5 Preclearance]. We thank Professor Daniel Farber for first bringing this issue to our attention.

96. 42 U.S.C. § 1973c (2000).

on account of race, color, or membership in a language membership group.<sup>97</sup> Because of its history, which leaves something to be desired,<sup>98</sup> Texas is one of nine States covered “as a whole” by Section 5.<sup>99</sup>

Unless the Texas Tots change their voting procedures, it does not appear (to us at least) that the preclearance requirements of Section 5 pose any impediment to the creation of Texas Tots. Even then, “Section 5 freezes changes in election practices or procedures in certain states until the new procedures have been ‘precleared’, either after administrative review by the United States Attorney General, or after a lawsuit before the United States District Court for the District of Columbia,”<sup>100</sup> and so, the voting procedures of Texas (which, absent change, have been approved by the federal government) would apply to the Texas Tots. Simply put, the creation of new States within a mother State is not a “change” with respect to “voting” in a covered jurisdiction,<sup>101</sup> though any discriminatory, retrogressive purpose in the creation of Texas Tots would certainly raise thorny issues of constitutional law (if not under Section 5, under the Constitution’s voting amendments<sup>102</sup> or Guarantee Clause which guarantees to every State a

97. According to the U.S. Department of Justice, Civil Rights Division, Voting Section: Under Section 5, any change with respect to voting in a covered jurisdiction—or any political subunit within it—cannot legally be enforced unless and until the jurisdiction first obtains preclearance. Section 5 provides that preclearance may be obtained only from the United States District Court for the District of Columbia, or from the United States Attorney General. Preclearance requires proof that the proposed voting change does not deny or abridge the right to vote on account of race, color, or membership in a language minority group. If the jurisdiction is unable to prove the absence of such discrimination, the District Court denies preclearance, or in the case of administrative submissions, the Attorney General objects to the change, and it remains legally unenforceable.

Introduction to Section 5 Preclearance, *supra* note 95. On the importance attached to Section 5 generally and the preclearance requirement specifically by both proponents and opponents of the Voting Rights Act, see Victor Andres Rodriguez, Comment, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 773 (2003).

98. See, e.g., *Nixon v. Herndon*, 273 U.S. 536 (1927) (striking down a Texas statute excluding Blacks from voting in Democratic Party primaries); *Nixon v. Condon*, 286 U.S. 73 (1932) (striking down a Texas statute granting party executive committees the power to prescribe membership qualifications); *Smith v. Allwright*, 321 U.S. 649 (1944) (striking down the Texas “White primary” as a violation of the Fifteenth Amendment).

99. U.S. Dep’t of Justice, Civil Rights Div., Voting Section, Section 5 Covered Jurisdictions, at [http://www.usdoj.gov/crt/voting/sec\\_5/covered.htm](http://www.usdoj.gov/crt/voting/sec_5/covered.htm) (last visited Feb. 23, 2004).

100. Introduction to Section 5 Preclearance, *supra* note 95.

101. See U.S. Dep’t of Justice, Civil Rights Div., Voting Section, Section 5 Requirements: How Section 5 Coverage Is Determined, at [http://www.usdoj.gov/crt/voting/sec\\_5/types.htm](http://www.usdoj.gov/crt/voting/sec_5/types.htm) (last visited Feb. 23, 2004) (addressing coverage formulas in the original act of 1965, the 1970 amendments, and the 1975 amendments, generally referring to a “test or device” restricting the right to register and vote).

102. The voting amendments prohibit the denial or abridgement of the right to vote by the United States or any state because of race, color, or previous condition of servitude; sex; failure to pay a poll tax (federal elections only); or age, if the person is 18 years old or older. See U.S. CONST. amends. XV, XIX, XXIV, XXVI; see also *Harper v. Va. Bd. of Elections*, 383 U.S. 663

Republican Form of Government<sup>103</sup>). We think that the worst that could happen is that the Texas Tots, once constitutionally formed and having the status of states in the Union (with all of the rights and privileges attendant thereto), might be prohibited from having any voting rights as a matter of federal law.<sup>104</sup> But we are confident that if Texas acts soon enough, and carefully enough, in creating Texas Tots (that really are representative of today's Texas), U.S. Attorney General John Ashcroft will find the Texas Tots to be in compliance under Section 5.

*E. Question Five: Is Gerrymandering for Plainly "Partisan" Purposes Unconstitutional?*

A final question is whether gerrymandering for plainly "partisan" purposes—"perrymandering" as it were—is unconstitutional under any provision of the Constitution. This is the question presented by *Vieth v. Jubelirer*,<sup>105</sup> a case which, as of this writing, is pending before the U.S. Supreme Court in the 2003–2004 Term. The case concerns a Pennsylvania congressional redistricting plan drawn up by the Republican-controlled state legislature in 2002 in the wake of the 2000 census. This redistricting plan is alleged to effectively guarantee that Republicans will have a supermajority of Pennsylvania's congressional seats even if they receive less than a majority of votes,<sup>106</sup> in a state where Democrats currently have a majority of registered voters.<sup>107</sup> The *Vieth* case has already generated some academic commentary,<sup>108</sup> and as one of the most important voting rights cases of the twenty-first century is likely to generate substantially more.

The Supreme Court last addressed the partisan gerrymandering issue in *Davis v. Bandemer*,<sup>109</sup> which concerned an Indiana state legislative

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(1966) (extending the logic of the Twenty-fourth Amendment to state elections via the Fourteenth Amendment's Equal Protection Clause).

103. See U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government."); *Coyle v. Smith*, 221 U.S. 559, 567–68 (1911) (stating that the Guarantee Clause may imply that Congress has a duty of "seeing that [a republican state government] is not changed to one anti-republican") (citing *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 174, 175 (1874)).

104. One historical analogy here would be the almost wholesale exclusion of Senators and Representatives from the Southern States by the 39th Congress that proposed the Fourteenth Amendment. See 2 ACKERMAN, TRANSFORMATIONS, *supra* note 81, at 100–04.

105. 123 S. Ct. 2652 (2003) (mem.) (noting probable jurisdiction).

106. See, e.g., Brief for Appellants at \*1–\*2, *Vieth v. Jubelirer*, 2003 WL 22070244 (U.S. 2003) (No. 02-1580).

107. See, e.g., Bill Toland, *Both Parties Focusing on Voter Recruitment*, PITTSBURGH POST-GAZETTE, Mar. 14, 2004, at B3 (noting that "registered Democrats outnumber Republicans by about 467,000, 3.7 million to 3.2 million").

108. See, e.g., Note, *supra* note 8 (urging the Supreme Court to strike down perrymandering as unconstitutional); J. Clark Kelso, *Vieth v. Jubelirer: Judicial Review of Political Gerrymanders*, 3 ELECTION L.J. 47 (2004) (considering the Supreme Court's options in light of recent cases).

109. 478 U.S. 109 (1986).

redistricting plan drawn up by the Republican-controlled state legislature in 1982 after the 1980 census.<sup>110</sup> In that case, a majority of the Court held that partisan gerrymandering claims are justiciable,<sup>111</sup> and a plurality determined that the standard of proof for such claims is “both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”<sup>112</sup> Although the intent element may be easy to prove,<sup>113</sup> the effects element is not: “[T]he mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination. . . . Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”<sup>114</sup>

The outcome of *Vieth* will almost certainly bear on the constitutionality of the Texas redistricting plan of 2003, which was about as partisan as they come.<sup>115</sup> However, the case may or may not bear on the creation of Texas Tots—depending on the extent to which the Texas Tots are created for plainly partisan purposes (perhaps both in intent and in effects) and depending on the extent to which the limitations (if any) on gerrymandering

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110. For the basic facts, see *id.* at 113–18.

111. See *id.* at 118–27. The Court based its reasoning on the concept of equal protection. We cannot help but state that the Equal Protection Clause is a “most unsturdy foundation” for the constitutional analysis of voting rights generally and partisan gerrymandering specifically—a clause whose text extends to aliens (who paradigmatically have no voting rights) and whose history had absolutely nothing to do with political rights, only civil rights. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 218 (1999); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 754 (1994). This might have the unfortunate consequence of upsetting a few decades of jurisprudence, but we feel that issues of voting rights are best discussed when cast in light of the Constitution’s clauses that might pertain to such rights (such as, for example, the Guarantee Clause, which guarantees a “Republican Form of Government” to every state, see U.S. CONST. art. IV, § 4, and which paradigmatically addresses the issue of suffrage). We find it difficult to believe that political parties are “cognizable groups” for the purposes of Equal Protection Clause analysis (or any more cognizable than Vegetarians and Non-Vegetarians). And we are truly left wondering what level of scrutiny ought to apply to such groups. Cf. Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENT. 397 (1998) (analogizing the Supreme Court’s levels of scrutiny to steak-grilling).

112. *Id.* at 127.

113. See *id.* at 129 (“As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.”).

114. *Id.* at 132; see also *id.* at 133 (stating that in a statewide redistricting case “an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively” and that “such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process”).

115. To no surprise, the Texas Democrats and the Great Texas Redistricting Standoff of 2003 feature prominently in the briefs in *Vieth*. See, e.g., Brief for Appellants, *supra* note 106, at \*10; Brief of Amici Curiae Texas House Democratic Caucus and U.S. Representatives John Lewis, Chris Bell, Martin Frost, Sheila Jackson Lee, and Nick Lampson in Support of Appellants at \*8–\*12, *Vieth v. Jubelirer*, 2003 WL 22070239 (U.S. 2003) (No. 02-1580).

for such purposes apply to the creation of new States pursuant to Article IV, Section 3. Though the case is likely to be decided before this Essay appears in print, we feel it necessary to provide some thoughts as to how the perrymandering issue might affect the creation of Texas Tots.

We think that the Court could go basically one of two ways. It could hold that partisan gerrymandering claims (in contrast to, for example, racial gerrymandering claims) are nonjusticiable, overruling *Bandemer* on this point and exiting a most political business altogether. There would appear to be at least two votes on the current Court for this proposition—Chief Justice Rehnquist and Justice O'Connor<sup>116</sup>—and possibly more. Or the Court could lower the rather high standard for unconstitutional partisan gerrymandering set forth by the *Bandemer* plurality, which the plurality admitted “may be difficult of application”<sup>117</sup> and which Justice O'Connor criticized as “nebulous.”<sup>118</sup> Such a lowering would presumably be in the direction of “mere . . . proportional representation” by political party, with (one would hope) a better specification of the facts that would need to be shown before such proportional representation is required.<sup>119</sup>

How might this affect the creation of Texas Tots? If partisan gerrymandering claims are found to be nonjusticiable, then the partisan partitioning of a state under Article IV, Section 3 would seem to be as well. The creation of Texas Tots would be off-limits to the state and federal judiciaries on this score. But if there are judicially determined limits to partisan gerrymandering, it is not at all clear that those limits apply to Article IV, Section 3 (or ought to). From our earlier survey into the original public meaning of Article IV, Section 3, we found that the purpose of Article IV, Section 3 was to allow separate political interests in a state—specifically, separate *geopolitical* interests—to form their own state, whenever they found it advantageous to do so, with the appropriate consents.<sup>120</sup> This is the lesson from all of the new-breakaway-States that have joined the Union: Kentucky (which separated from Virginia), Maine (which separated from Massachusetts), West Virginia (which also separated from Virginia), and possibly Vermont (which was once within New York but which may have joined the Union as a separate sovereign state). One additional check to any

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116. *Bandemer*, 478 U.S. at 144–55 (O'Connor, J., concurring; joined by Rehnquist, J.).

117. *Id.* at 142.

118. *Id.* at 145.

119. If this is the holding, the Texas redistricting plan of 2003 might be thought to be “remedial” although it may “overshoot” its remedial purpose. Under the 2001 redistricting plan drawn up by the federal district court, Republicans got 53.33% of the total votes yet won only 15 seats (47%), while Democrats got 43.89% of the total votes yet won 17 seats (53%). See Clerk of the House, Statistics of the 2002 Congressional Election, at [http://clerk.house.gov/members/election\\_information/elections.pbp](http://clerk.house.gov/members/election_information/elections.pbp) (last visited Feb. 23, 2004).

120. See Kesavan & Paulsen, *supra* note 20, at 367–68, 383–95.

Article IV, Section 3 mischief—not applicable in the context of partisan gerrymandering claims—is the consent of the new state.<sup>121</sup>

We see nothing in the Constitution that is legitimately interpreted to preclude messing with Texas in the manner we propose; and even if there were, the relevant motive could always be cast as one of maximizing the political clout of present-day Texans in national politics—and there's nothing wrong with that. To be sure, the Republican-controlled state legislature could execute a very nifty let's-give-consent-to-ourselves-maneuver to form four *really*-Republican (or, even *totally*-Republican) Texas Tots, which would obviously also provide their consent thereto. (And if the Republican-controlled state legislature did this right, they could still be left with a Republican-controlled Texas!). We see nothing constitutionally wrong with this either. And if all this fails, we suppose that the Texas state legislature could always create the Texas Tots to “mirror” today's Texas, politically speaking that is.<sup>122</sup>

#### IV. Why Should We Mess with Texas Anyway?

But, some might ask, *why* should we mess with Texas? Lots of reasons: First, one might say, *because it is there*. Texas, that is. In addition, there is the ready-made opportunity, constitutionally permissible and statutorily authorized, to split it up. Isn't the mischief of it all sufficient reason in and of itself?

But there's more. Texas is one of the nation's largest states, in population as well as in geographic territory.<sup>123</sup> That means that it is, compared to other states, woefully under-represented in the U.S. Senate on a per capita basis. Imagine it: Puny Vermont and Empty Wyoming have as much representation in the U.S. Senate as Texas does!<sup>124</sup> Texas is also, compared to some of the smallest states, under-represented in the U.S. House of Representatives as well, where every state, however undeserving, gets at

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121. Cf. *supra* note 43 (bracketing the question of whether the consent of the new state is required by Article IV, Section 3 or implicitly by Article VII and/or basic structural features of the Constitution itself).

122. If worse came to worst, the Texas Legislature could always throw the Democrats a bone by creating one reliably Democrat state. If such political or legal need existed, we suggest a straightforward regional division of Texas into the five states of “North Texas” (Republican, probable capital Dallas), “South Texas” (Republican, probable capital San Antonio), “East Texas” (Republican, probable capital Houston), “West Texas” (Republican, probable capital either Lubbock or El Paso) and “The People's Republic of Austin.”

123. The *Rand McNally* 2003 Road Atlas ranks Texas second in the nation (behind Alaska) in land area, with 261,914 square miles, and second in the nation (behind California) in population, with 21,319,300 people. RAND MCNALLY, THE ROAD ATLAS '03 (2003), at 97.

124. U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.”).

least one seat.<sup>125</sup> And Texas is under-represented in the Electoral College, largely because of the equal Senate representation rule and the distorting effects of that rule that are carried forward to a state's Electoral College vote total.<sup>126</sup> It's all colossally unfair to Texans and inconsistent with democratic principles generally, as more than a few legal scholars have noted before.<sup>127</sup>

Now, we're not against the Senate in principle, as some are. But we take their point to some extent. Certainly, where it is possible to do so without other undesirable effects, the population-representation inequality created by the equal Senate representation proviso should be mitigated, in order to make our nation more democratic.

This is also, obviously, better for Texans, other things being equal. In terms of electoral representation in the nation, they are getting taken to the cleaners. The average Vermonter has more electoral might than the average Texan—certainly a cause for alarm on many grounds. Sure, one might say that California and New York are in a similar plight. But Texas, unique to the nation, has the opportunity to fix it. They negotiated, up-front, for the right to avoid precisely such a swindle. Texans are fools not to fix what needs fixin', and Texans ain't no fools. It is, thus, far from absurd to contemplate the possibility of Texas's division.<sup>128</sup>

125. U.S. CONST. art. I, § 2, cl. 3 ("The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative. . ."). For an excellent discussion of some of the other wrinkles in apportionment that make the House less than perfectly democratic, see generally Paul H. Edelman & Suzanna Sherry, *Pick a Number, Any Number: State Representation in Congress After the 2000 Census*, 90 CAL. L. REV. 211 (2002).

126. U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . ."). Texas is also woefully under-represented in presidential selection whenever there is no electoral college majority, and the decision is "thrown into" the House of Representatives, where each states' delegation votes as a unit and each state receives one vote. See U.S. CONST. art. II, § 1, cl. 3. ("But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote. . ."). On the other hand, there might be an argument that Texas's collective clout in the presidential selection process is enhanced by its size, combined with its winner-take-all electoral college rule (which is constitutionally permissible but not constitutionally required). We are not convinced. Assuming that the Fab Five are drawn-up properly, they could well constitute a bloc of states likely to throw its support (now enlarged by a more proportionate share of the electoral votes) to a common presidential candidate.

127. See, e.g., Suzanna Sherry, *Our Unconstitutional Senate*, 12 CONST. COMMENT. 213, 213 (1995) ("How, then, can a democratic nation tolerate a Senate in which the largest state has more than 65 times the population of the smallest and yet each has two Senators? . . . What, then, should we conclude about a Senate in which slightly over 17% of the population elects a majority of the members?"). For other criticisms of the Senate as undemocratic and contrary to the principles of the Republic, see Baker & Dinkin, *supra* note 20; William N. Eskridge, Jr., *The One Senator, One Vote Clause*, 12 CONST. COMMENT. 159 (1995); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1069–71, 1071 n.98 (1988).

128. To their credit, Californians have thought about the issue of division a few times. See, e.g., Charles Hillinger, *Two Californias? A Split Decision, More Than 100 Attempts Have Been Made to Divide State*, L.A. TIMES, Aug. 25, 1986, at V6.

There might be other good reasons as well. Nearly all the reasons why federalism is often thought desirable—state government closer to the people, greater local control of local affairs, greater accountability of state elected officials, easier “exit” from an undesired state in order to move someplace more in conformity with one’s political preferences, the opportunity to have different legal rules for different locales to reflect different situations—apply to a large state’s voluntary fission.<sup>129</sup> On the other hand, there might be efficiency and “good-government” gains by being large—economies of scale and such. But on balance, we doubt that the economies of scale argument justifies the huge size of Texas today. The diminutive term “Tots” notwithstanding, the five states created from present-day Texas would each be large enough to gain whatever benefits there are to size, while gaining the benefits of not being oversized. Texas is just too darned big for its own britches, and Texans probably would be better off with state governments more regular-sized.

But wouldn’t it be, well, kind of sad to see the unique, distinctive Lone Star state torn asunder, merely for political fun and profit? Texas is, well, *Texas*, and things just wouldn’t be the same with a bunch of little ones.

The late Charles Black of the Yale Law School (from whom one of us had the privilege to study Constitutional Law), famously used an illustration to make a point about “state sovereignty” under the Constitution. “What’s all this about state sovereignty?” he would begin, and then slowly walk over to the chalkboard and draw a simple rectangle. “This,” he said, “is the ‘sovereign state’ of Kansas.” Long pause. “Now *that* isn’t a ‘sovereign state.’ That’s just some lines that somebody drew on a map. A ‘sovereign state’ doesn’t look like that.” Professor Black would then return to the blackboard and draw a more distinctive, less regular polygon, large, with a big panhandle. *Texas*. “Now *that*,” he would drawl. “*That’s* a ‘sovereign state.’”

We’ve all met Texans who think that there’s something, well “national,” about Texas. It’s part of their *identity*. But mere sentimental schlock like that (if you’ll forgive us Yankees for saying so) shouldn’t keep Texans from pursuing their self-interest. In fact, y’all should think of it as part of your tradition and heritage. Texans proudly note the Six Flags that have flown over them.<sup>130</sup> Why not keep up the tradition and just rename the theme parks “Eleven Flags Over Texas”?

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129. Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

130. For pictorials of the six national flags that have flown over Texas, see *The Six National Flags of Texas*, at <http://www.lsjunction.com/facts/6flags.htm> (last visited Feb. 23, 2004).