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## Is West Virginia Unconstitutional?

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# Is West Virginia Unconstitutional?

Vasan Kesavan & Michael Stokes Paulsen

*When the Commonwealth of Virginia announced it was seceding from the Union, the northwestern corner of Virginia formed a rump government-in-exile, declared itself the lawful government of Virginia, and gave "Virginia's" consent to the creation of a new State of West Virginia consisting of essentially the same northwestern corner of old Virginia. Congress and the Lincoln administration recognized the northwestern rump as the legitimate government of Virginia, and voted to admit West Virginia as a State.*

*Could they do that? This article takes on the odd but amazingly complicated (and occasionally interesting) constitutional question of whether West Virginia is legitimately a State of the Union or is instead an illegal, breakaway province of Virginia. While scarcely a burning legal issue in the twenty-first century, the question of West Virginia's constitutionality turns out to be more than of just quaint historical interest, but also to say a great deal about textualism and formalism as legitimate modes of constitutional interpretation today.*

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.

U.S. Constitution, Article IV, Section 3, Clause 1

Brace yourselves for this one, Mountaineers: West Virginia might not legitimately be a State of the Union, but a mere illegal breakaway province of the Commonwealth of Virginia. In the summer of 1861, following the outbreak of the Civil War, thirty-five counties of Virginia west of the Shenandoah Valley and north of the Kanawha River met in convention in the town of Wheeling, to consider seceding from secessionist Virginia. In short order, the Wheeling convention declared itself the official, lawful, loyal government of Virginia and organized a proposed new State of (what would come to be called) West Virginia. Then, in what must certainly rank

as one of the great constitutional legal fictions of all time, the legislature of Virginia (at Wheeling) and the proposed government of the new State of West Virginia (at Wheeling), with the approval of Congress, agreed to the creation of a new State of West Virginia (at Wheeling), thereby purporting to satisfy the requirements of Article IV, Section 3 of the Constitution for admission of new States "formed or erected within the Jurisdiction of any other State."<sup>1</sup>

Could they do that? In this Article, we take on the amazingly complicated question of whether West Virginia is lawfully a State of the United States, a question whose answer is more than a quaint historical curiosity, but is surprisingly rich in its implications for constitutional interpretation today. The constitutionality (or not) of West Virginia is a parable with potentially huge lessons to teach about constitutional "formalism"—strict adherence to the clear structural commands of the Constitution, even when they seem inconvenient or even nonsensical—and about "textualism"—legal interpretation governed by the meaning the language (and punctuation) a legal text would have had to a fully informed speaker or reader at the time of its adoption—as a methodology of constitutional interpretation.

Part I addresses the question of formalism: Did the Wheeling government's let's-give-consent-to-ourselves maneuver actually satisfy the requirements of Article IV, Section 3 for the admission into the Union of new breakaway "States"? Does formal compliance with the Constitution depend (at least sometimes) only on matters of form, ignoring underlying reality? The answers to these questions, as they concern the (alleged) State of West Virginia, turn out to tell us much about the constitutional validity of Reconstruction generally and, indeed, about the legal fictions underlying the Lincoln and Johnson administrations' prosecution of the Civil War and promulgation of Reconstruction. They also shed light on the question of whether the adoption of the Thirteenth and Fourteenth Amendments complied with the formal requirements of the Constitution, given the extravagant, and closely related, legal fictions used to justify the adoption of these provisions by a (rump?) "Congress" and (puppet?) "State governments"—a question that has generated considerable constitutional debate of late, mostly because it serves as the linchpin of Yale Law School Professor Bruce Ackerman's much-abused theory of extratextual constitutional amendment.<sup>2</sup>

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1. U.S. CONST. art. IV, § 3, cl. 1.

2. See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; BRUCE ACKERMAN, 2 *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*]; Bruce Ackerman, *A Generation of Betrayal?*, 65 *FORDHAM L. REV.* 1519 (1997); Bruce Ackerman, *Revolution on a Human Scale*, 108 *YALE L.J.* 2279 (1999); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013 (1984).

Part II addresses the question of textualism: Even assuming that Wheeling-consenting-with-Wheeling would satisfy Article IV, Section 3's consent requirement, is it clear that the text of the Constitution permits creation of new States out of existing States at all, irrespective of anybody's "consent"? A careful look at Article IV, Section 3 reveals a subtle ambiguity: A semicolon, rather than a comma, separates the "Junction of two or more States, or Parts of States" clause—which contains the consent requirements—from the prohibition of new States being "formed or erected within the Jurisdiction of any other State."<sup>3</sup>

Should the semicolon be understood as separating two distinct commands—as appears to be the case with the first semicolon of Article IV, Section 3, separating the grant of power to Congress to admit new States from the (two separate?) limitations on the power of Congress to admit States in the special case (cases?) of States formed by junction or separation, out of existing States? If so, even formal, legal-fiction consent does not matter: The limitation on admission of States carved from the "jurisdiction" of an existing State is a flat prohibition, not a description of circumstances for which consent is required; the consent proviso only applies to new States created by the junction of two or more existing States, or parts thereof, and thus cannot save poor West Virginia (and probably cannot save Kentucky, Maine, and possibly Vermont, either) from unconstitutionality. Indeed, even if the semicolon is merely an overgrown comma, and not a hard clause-break, the same conclusion might follow under the grammatical convention that a qualifying phrase (usually) modifies only the immediately preceding antecedent phrase. Both grammar rules and punctuation marks thus appear to conspire against the constitutionality of West Virginia.

This is perhaps not (quite) as crazy as it seems, if one considers the Philadelphia Convention's obsession with the rule of equal state representation in the Senate and the care the Framers took to build anti-circumvention rules into the Constitution to preserve this crucial compromise.<sup>4</sup> If big States could somehow convince Congress to assent, couldn't they deal themselves more senators simply by dividing up into smaller States? (Imagine Utah today, divided into four, multiplying conservative Republican senators!)<sup>5</sup>

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3. U.S. CONST. art. IV, § 3, cl. 1. Here's the whole proviso again, for easy reference: "[B]ut 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.*

4. See *infra* text accompanying notes 221-23.

5. Indeed, it is possible (on such a reading of Article IV, Section 3) that Texas already can do this: Congress (apparently) granted its consent to Texas's partition at the time of Texas's admission to the Union and all that remains is for Texas to agree to self-destruct. We will not address the specifics of Texas in this Article. One commentator has offered a first stab at how Article IV, Section 3 applies to the Texas question, see Paul E. McGreal, *There Is No Such Thing as Textualism: A Case Study in*

But is Article IV, Section 3 really a reflection of such constitutional paranoia? And could Utah and Nevada not conspire to circumvent such an anticircumvention rule anyway, simply by conjoining pieces of their States to each other? For that matter, couldn't Pennsylvania lend an acre or two to West Virginia, in order to circumvent such a strict formal requirement? Or is the fact that an anti-circumvention rule is not conspiracy-proof of little probative value?

More centrally: Can the meaning of the Constitution, and the number of stars properly on the United States Flag, actually turn on whether a semicolon should be read more like a comma or a period, under late-eighteenth-century rules of style and syntax? Did the Framers intend such an outcome (and does their intent matter)? Could the Committee of Style have smuggled such a change into the text? If so, does its success count, or not?

Part II, in addition to offering what we immodestly think is the most comprehensive analysis ever written on the linguistic meaning and original understanding of the Constitution's use of semicolons and antecedent phrase modification, offers serious lessons of more general application, concerning what should count as persuasive evidence of constitutional meaning, and the relationship of considerations of text, history, structure, purpose, intention, and accident, in theories of constitutional interpretation.

An irony that runs throughout our discussion is how counterintuitive the answers to the formalism and textualism riddles turn out to be. Upon just about everyone's first impression, the seeming absurdity of the Wheeling-gives-consent-to-Wheeling formalist legal fiction makes this the obvious stumbling block to accepting West Virginia's admission to statehood as constitutionally legitimate—and thus drives the search for some other theory of constitutional legitimacy. At the same time, nearly everyone's first impression is that the text of Article IV, Section 3 does not pose the slightest of problems, compared to the difficulty in swallowing a thirty-five-county legal fiction. We think this has matters exactly backward. Our analysis suggests that the "hard" question is really fairly easy, and that the "easy" question is rather more hard. Whether West Virginia is constitutional or not turns out to depend much less on the formalism question than the textualism one.

We will not spoil the end of our story by telling you our conclusion about West Virginia up front (or our conclusions about the possible unconstitutionality of Kentucky, Maine, and Vermont). But we will give a hint, by way of presaging Part III's answer to the broader question of "Why

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*Constitutional Method*, 69 FORDHAM L. REV. 2393 (2001), but in our view has missed the mark badly, both at the methodological level and in his application of the provision to Texas. We slice up Texas (and, more delicately, Professor McGreal's analysis) in forthcoming work. See Vasan Kesavan & Michael Stokes Paulsen, *Let's Mess with Texas* (unpublished manuscript, on file with authors).

Would Anybody Care?" Given that nobody would take seriously, other than as a parable about constitutional interpretation generally, the conclusion that West Virginia is unconstitutional, and that nobody today would act on such a conclusion (other than, we suppose, to attempt a retroactive "fix" of any constitutional problem),<sup>6</sup> why spill any ink over the theoretical issues? Or even more of a challenge: Isn't constitutional meaning determined by actual practice—what works, or has been accepted as if valid—more than by constitutional provisions themselves? West Virginia exists and it ain't going nowhere (leastwise back to Virginia), no matter what we say here.

Our answer is that constitutional formalism, and principled textualism, matter and that their results, typically, are not to be feared but embraced. It is better to acknowledge mistakes as mistakes than to treat them as negating basic constitutional principles or, worse, as the cornerstones for theories of the Constitution that disrespect the text and treat its formal requirements as inconveniences to be ignored at will. The story of West Virginia, whatever the ultimate answer, is one in which text and formal constitutional requirements were serious points of concern and discussion, and affected the choices made, just as (we submit) such considerations should form the core of constitutional discussion on the difficult textual and structural issues of constitutional law today.

## I

### FORMALISM AND STATE FORMATION: THE STORY OF WEST VIRGINIA

#### A. *Nothing Secedes Like Secession*

We begin with the story. The putative State of West Virginia was carved out of the northwest section of the State of Virginia, a section that had always leaned more north (toward Pennsylvania) and west (toward Ohio) than south and east. Wheeling, the largest city of the region in the 1860s, is only sixty miles from Pittsburgh. It is 330 miles from Richmond—over five times as distant. In terms of physical and natural features, too, northwestern Virginia was always distinct from the rest of Virginia. It is for the most part separated from the east by the Blue Ridge mountains. Rivers in the northwest flow into the Ohio River, rather than east to the Atlantic-oriented piedmont and, eventually, tidewater lowland regions of Virginia. Culturally, economically, and politically, the tilt of the region was always more toward the north and west, too. The region had one-fourth of the free population of all of Virginia, and very few of the slaves. The northwestern counties were a perpetual minority in State

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6. Cf. Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907, 909-11 (1994) (criticizing "Saxbe Fix" of Emoluments Clause violation as in conflict with the formal rule of the Emoluments Clause).

politics, and had little in common with the interests of the "tidewater aristocrats" who governed the whole State from the east, in the east, and for the east. Slave property was taxed at one-third of its market value, while other property was taxed at full value, essentially giving tidewater "planters" (a euphemism for slaveholders) a tax break at the expense of the free-labor northwest at the same time that the east received the benefit of most of the internal improvements.<sup>7</sup> Restrictions on the franchise, to land-owners, also favored the east. One historian notes that when the Virginia Constitution of 1830 was framed, "it was felt to be so partial to the 'eastern aristocrats' that every voting delegate from the west opposed it; and when submitted to the people it was condemned in the west by an impressive majority."<sup>8</sup>

The northwest had long been culturally, geographically, and economically distinct from the rest of the State. Thus, by the time the Civil War came, there had already been a long history of sectional resentments between the two regions of the State. The debate over secession stirred up old resentments and, in very short order, old sentiments for separate statehood in the west.

Let us begin by setting the stage of this constitutional drama. The year was 1861. Virginia, joining its friends in the deep South, had just passed an ordinance of secession, on April 17, at a convention in Richmond.<sup>9</sup> Delegates from northwest Virginia voted twenty-six to five against the secession resolution, and ultimately, voters in the region rejected secession by a three-to-one margin.<sup>10</sup> Within a week of the Richmond ordinance, Union sympathizers had launched the process that eventually would result in the creation of a separate State. On April 22, a meeting at Clarksburg issued a call for delegates to a May 13 convention in Wheeling, a hotbed of Unionist and separationist sentiment. This rapidly improvised convention, comprised of delegates from twenty-six of the fifty counties that eventually would become West Virginia, condemned the Richmond ordinance, called on the people to reject the ordinance in the coming referendum, and scheduled a "general convention" to meet again in Wheeling on June 11 in the likely event of statewide ratification of the Richmond secession

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7. JAMES GARFIELD RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 434-36 (University of Illinois Press, rev. ed. 1951) (1926); JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 297-98 (1988). We rely heavily, throughout this Article, on the work of excellent historians (which we are not) for the basic facts, occasionally augmented by our interested amateur reading of original documents. We are mere lawyers; we can pretend to offer penetrating analysis of the issues of constitutional interpretation framed by the historical record, but we cannot pretend to improve upon the historical scholarship of others, and so we will not. If James McPherson, David Donald, James Randall, and Eric Foner have the facts wrong, our conclusions are flawed to the extent their history is. (We feel pretty confident that we can safely rely on them, however.)

8. RANDALL, *supra* note 7, at 436.

9. RANDALL, *supra* note 7, at 437; MCPHERSON, *supra* note 7, at 298.

10. MCPHERSON, *supra* note 7, at 298.



ordinance.<sup>11</sup> The May convention called upon the “proper authorities” of Virginia to permit pro-Union counties to separate from the rest of the State, in the event of secession.<sup>12</sup>

It was only a short time before the pro-Union counties declared themselves to be the “proper authorities” of Virginia. Professor Randall notes that the May convention “was quite without regular authority to take action either for Virginia or for the northwestern portion thereof” and that the subsequent June convention acknowledged that the May gathering was simply a mass meeting whose delegates were appointed in an “irregular manner” and that was “not calculated for the dispatch of business.”<sup>13</sup>

The convention that met in Wheeling on June 11, however, was ready to rumble, even if not greatly more representative or regular in its composition, authority, or manner of election.<sup>14</sup> The June Wheeling convention declared Richmond’s secessionist-Confederate legislature illegal and promptly constituted itself as the “restored government” of all of Virginia, passing an “ordinance for the reorganization of the State government,” declaring all State offices vacant and, on June 20, appointing new temporary State officials, including Francis H. Pierpont as governor.<sup>15</sup> A permanent government was created by requiring all State, county, town, and city officials and legislators to swear an oath of loyalty—closely paralleling that required by Article VI of the U.S. Constitution—to “the Constitution of the United States, and the laws made in pursuance thereof, as the supreme law of the land, anything in the constitution and laws of the State of Virginia or in the ordinances of the [secession] convention at Richmond . . . to the contrary notwithstanding,” and also to the “restored” government of Virginia.<sup>16</sup> Whenever the oath was refused, the office was to be declared vacant and special elections held to fill the vacancy. Appointive offices

11. RANDALL, *supra* note 7, at 438-39.

12. *Id.* at 439 (citing and quoting WEST VIRGINIA LEGISLATIVE HANDBOOK 261-63 (1916)).

13. *Id.* (quoting WEST VIRGINIA LEGISLATIVE HANDBOOK 275 (1916)).

14. Randall notes that “[t]he delegates to the June convention were chosen in various ways, sometimes by mass meeting, sometimes by the county committee, sometimes apparently by self-appointment. There was no popular election in the true sense.” RANDALL, *supra* note 7, at 440-41 (footnote omitted). Moreover, the “process” (if such it can be called) was not designed to be representative of diverse opinion, but instead “to promote the selection of men actively interested in what the convention was expected to do—i.e., lay plans for a separate State . . .” *Id.* at 441.

15. MCPHERSON, *supra* note 7, at 298; RANDALL, *supra* note 7, at 443-44.

16. RANDALL, *supra* note 7, at 444 (alteration in original) (quoting WEST VIRGINIA LEGISLATIVE HANDBOOK 268-69 (1916)). Article VI of the U.S. Constitution provides in pertinent part as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and the several States, shall be bound by Oath or Affirmation, to support this Constitution; . . .

U.S. CONST. art. VI, cls. 2-3.

could be filled at once by the new governor.<sup>17</sup> A “rump” legislature, essentially identical in membership to that of the June convention, was convened for the “restored government” of Virginia. The “legislature” proceeded to hold a special session under the call of Governor Pierpont on July 1, just twelve days after the Wheeling convention had passed the ordinance creating a new government, and promptly named two new senators from “Virginia.”<sup>18</sup> In short, the Wheeling Convention assumed to itself the powers of a revolutionary legislature—and not just a revolutionary legislature for the northwestern counties, but purportedly for all of Virginia. As Professor Randall sums it up, “a form of government was devised which, while drawing its support exclusively from the Unionist element of the State, claimed to be the only legitimate government of Virginia.”<sup>19</sup>

President Lincoln soon recognized the Pierpont regime as the lawful government of the State of Virginia—a very significant move, as we discuss presently. Congress also went along, seating the two Wheeling-appointed senators as Virginia’s senators on July 13, 1861—barely a month after the June convention in Wheeling was first called to order—and seating three Congressmen from western Virginia in the House of Representatives.<sup>20</sup> It is worth pausing for a moment in this whirlwind tour of the whirlwind events of spring and summer 1861 to let the point sink in: both President Lincoln and Congress acted quickly, each within their respective spheres, to recognize the Wheeling government as the lawful government for the State of Virginia. This legal fiction, as we shall see, is the linchpin of the constitutional argument for West Virginia’s validity as a State.

Meanwhile, back in Wheeling, the legislature/convention reassembled in August, this time once again as a convention, proposing a new State of “Kanawha” (after the river) for the northwestern counties and providing for an election on October 24, 1861, in which voters could vote for or against the new State and elect delegates to a constitutional convention for that State. The reported vote on the statehood referendum—there were doubtless irregularities in the tally, quite apart from the fact that Confederate sympathizers regarded the whole process as illegitimate and refused to participate—was 18,408 in favor and 781 against.<sup>21</sup> The delegates selected for a constitutional convention met in late December and by February of 1862 had generated a constitution for the proposed new State and settled on the clunkier name of West Virginia. Voters in the proposed new State ratified

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17. McPHERSON, *supra* note 7, at 298; RANDALL, *supra* note 7, at 443–44.

18. See McPHERSON, *supra* note 7, at 298–99; RANDALL, *supra* note 7, at 449–50.

19. RANDALL, *supra* note 7, at 444.

20. McPHERSON, *supra* note 7, at 298; RANDALL, *supra* note 7, at 453.

21. RANDALL, *supra* note 7, at 451–52; McPHERSON, *supra* note 7, at 298–99.

the proposed constitution in April of 1862, again by a suspiciously lop-sided majority: 18,862 in favor and 514 against.<sup>22</sup>

One thing more was needed before the proposed new State could be submitted to Congress for admission into the Union: the consent of "Virginia" to dismemberment. Recall the Constitution's language: "[B]ut no new State shall be formed or erected within the Jurisdiction of any other State; [there's that potentially significant semicolon] 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>23</sup> It was at this point that the "restored legislature" of Virginia (at Wheeling) re-entered the picture, passing an act consenting to the formation of the proposed new State of West Virginia.<sup>24</sup> Congress, after much debate over whether this consent was spurious (which we discuss presently), passed a West Virginia statehood bill in December 1862, and President Lincoln, after much debate in the cabinet over the same issue (which we also discuss presently), signed it. The bill required emancipation of slaves as a condition of statehood, and West Virginia complied, with a modified constitution freeing slaves born after July 4, 1863, and all others on their twenty-fifth birthday.<sup>25</sup> West Virginia thus formally became a State—if it ever did—on June 20, 1863.<sup>26</sup>

### B. *Lincoln, Formalism, and the Civil War*

The formation of West Virginia is a classic story of legal formalism, in which legal fiction triumphed over reality. There is certainly something odd, to say the least, about the Wheeling convention both creating a new State government for Virginia and proposing a new State of West Virginia, with each entity's essentially identical membership agreeing with the other (that is, agreeing with themselves) to the new arrangement, and counting this as satisfying Article IV, Section 3's consent requirements. There is something hypertechnical, and almost duplicitous, about a process that complies in form, but not at all in spirit or substance, with the requirements of the Constitution. But does hypertechnicality and real-world irregularity

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22. RANDALL, *supra* note 7, at 452.

23. U.S. CONST. art. IV, § 3, cl. 1.

24. RANDALL, *supra* note 7, at 452.

25. MCPHERSON, *supra* note 7, at 303-04; RANDALL, *supra* note 7, at 460-61.

26. As for the restored government of "Virginia," Governor Pierpont moved east and set up shop in Alexandria, Virginia, where the restored government of Virginia purported to govern those remaining areas of the Commonwealth under Union control. RANDALL, *supra* note 7, at 461-63. Indeed, the legislature of this government eventually gave its assent to the Thirteenth Amendment and was recognized by President Johnson, after the war, as the legitimate government of Virginia. See John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 393-94, 429 (2001). The administrations of Lincoln and Johnson, and the State administration of Pierpont, thus kept alive, and acted on, the legal fiction of the Pierpont government's legitimate authority to speak for Virginia throughout the war and into Reconstruction.

equal actual unconstitutionality, in a legal sense? Several commentators have suggested so, notably Professor Randall: "To say that in this way 'Virginia' gave her consent, is to deal in theory and fiction and to overlook realities."<sup>27</sup> Historian David Donald characterizes "[t]he whole process of partitioning Virginia" as "extraordinarily complicated and largely extralegal."<sup>28</sup>

Our theory is that theory counts, and that legal fictions can have a powerful, important validity, notwithstanding their seeming incongruence with reality. Indeed, for purposes of law, legal fictions can be more valid than mere "realities." Where reality is illegality, legal fictions better describe the lawful state of events. If what is sought is the correct, legal, constitutional answer to a question, it is often important to (in Professor Randall's supposedly disparaging words) "deal in theory and fiction and to overlook realities." Professor Donald has it half-right: the process of partitioning Virginia was extraordinarily complicated, but it was not "extralegal." Quite the contrary, the process of West Virginia statehood was hyper-legal, which is exactly why it was so extraordinarily complicated. The process described above placed great value, as we shall see, on literal compliance with all formal requirements of the Constitution. To be sure, this required turning some supposedly "square corners" around obtruding reality. But, what is extraordinary is the care and attention that the actors involved placed on literal compliance with the Constitution's formal requirements, even during the time of the Civil War—on adhering to legal forms, and adjusting (or constructing) facts and reality to fit the demands of law, rather than abandoning the forms of law entirely. In a sense, this is the essence of adherence to the rule of law. Legal fiction should triumph over illegal reality.<sup>29</sup>

This is not just our theory. It was Abraham Lincoln's. Indeed, we submit that the entire Civil War was fought for a formidable, but absolutely foundational, legal fiction: "Union." Lincoln's most unshakable constitutional premise was the inviolability of the Union, the unconstitutionality of secession, and the consequent legal duty of the President to suppress a massive, illegal domestic insurrection and take the steps necessary to preserve the Constitution and assure the faithful execution of the laws in all the States of the Union. Lincoln's lawyerly logic in following legal premise to legal conclusion was, in this area at least, relentlessly formalist. (At the

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27. RANDALL, *supra* note 7, at 453.

28. DAVID HERBERT DONALD, LINCOLN 300-01 (1995).

29. Indeed, there is a sense in which the term "legal fiction" might legitimately be thought to be something of a misnomer here. "Legal fact" might be a better phrase, were it not so clunky: As a matter of law, the Wheeling government was, in fact, the lawful government of Virginia. We nonetheless will stick with the term "legal fiction" (but without the burden of quotation marks), because it better conveys the sense of legal reality prevailing over factual accuracy, even if "legal fiction" is not a perfectly accurate shorthand.

same time, Lincoln could be intensely practical in his treatment of facts, massaging them to conform to his understanding of legal imperatives.) The constitutional validity of West Virginia, we submit, follows from the central legal myth of the legal unconstitutionality, and therefore the factual impossibility, of secession. And that central legal fiction, we submit, was correct. The legitimacy of West Virginia's "secession" from Virginia thus depends, ironically, on the illegitimacy of Virginia's secession from the United States, and on the further legal fictions that succeed upon the unsuccessful secession of a section.

Lincoln's legal theory of the Civil War is set out most fully in two speeches early in his administration, his First Inaugural Address (of March 4, 1861) and his Special Message to Congress of July 4, 1861. The First Inaugural is a masterpiece of constitutional analysis, and should be studied and taught alongside *Marbury v. Madison*<sup>30</sup> and *McCulloch v. Maryland*<sup>31</sup> as a classic of carefully reasoned legal analysis of the text, structure, and internal logic of the Constitution. (The First Inaugural is more than that, to be sure, but Lincoln's legal analysis is central to the political analysis, moral discussion, and civic rhetoric of the speech.) Lincoln's speech addresses five (at least) constitutional questions of fundamental importance to the Republic: first, the legal status of slavery under the Constitution; second, the nature of the federal Union and the permissibility (or not) of State secession from the Union, consistently with the Constitution; third, the power of Congress to restrict the expansion of slavery in federal territories; fourth, (and relatedly,) the authoritativeness (or not) of Supreme Court decisions (like *Dred Scott*<sup>32</sup>) in settling disputed questions of constitutional interpretation for all branches as a matter of national policy; and fifth, the mandatory duty of the executive, flowing from his constitutional oath, to preserve the Constitution and the constitutional order as he understands it, and faithfully to execute the laws of the nation in conformity with that understanding.

With respect to slavery, Lincoln carefully acknowledged the Constitution's legal protection for the institution of slavery in the Fugitive Slave Clause of the Constitution and the obligation of the federal government to enforce this clause. He also affirmed his party's pledge not to interfere with the (constitutional?) right of States to maintain the institution of slavery as a matter of their domestic law.<sup>33</sup> But he also affirmed, implicitly,

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30. 5 U.S. (1 Cranch) 137 (1803).

31. 17 U.S. (4 Wheat.) 316 (1819).

32. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

33. 2 ABRAHAM LINCOLN, SPEECHES & WRITINGS, 1859-1865: SPEECHES, LETTERS, MISCELLANEOUS WRITINGS, PRESIDENTIAL MESSAGES & PROCLAMATIONS, at 215-17 (Library of America ed., 1989) [hereinafter LINCOLN, SPEECHES & WRITINGS]; *id.* at 222 (stating his willingness to accept a proposed constitutional amendment forever banning federal interference with a State's

the power of Congress to ban or restrict slavery in federal territories, and, in a famous passage hedged with brilliant ambiguity, denied the binding character of the Supreme Court's contrary decision in *Dred Scott* as a political rule limiting the constitutional prerogatives of Congress, the President, and the people as a whole.<sup>34</sup>

But the bulk of Lincoln's analysis focused on the themes of Union and secession. He began with an argument about the nature of constitutional government:

I hold, that in contemplation of universal law, and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper, ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our national Constitution, and the Union will endure forever—it being impossible to destroy it, except by some action not provided for in the instrument itself.<sup>35</sup>

Lincoln then proceeded to buttress his argument from first premises with specific references to the constitutional text (“to form a more perfect union”),<sup>36</sup> history (tracing the Articles of Association of 1774, the Declaration of Independence of 1776, and the 1778 language of the Articles of Confederation saying that the Union was perpetual, and concluding that “[t]he Union is much older than the Constitution”),<sup>37</sup> and logic (“if destruction of the Union, by one, or by a part only, of the States, be lawfully possible, the Union is *less* perfect than before the Constitution, having lost the vital element of perpetuity”).<sup>38</sup> Lincoln repaired to basic principles of contract law to reach the identical conclusion that secession could not be the unilateral act of one or more States, unconsented to by the Union. Indulging arguendo the neo-Calhounian premise that “the United States be not a government proper, but an association of States in the nature of contract merely,” he asked whether a contract could “be peaceably unmade, by less than all the parties who made it? One party to a contract may violate it—break it, so to speak; but does it not require all to lawfully rescind it?”<sup>39</sup>

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domestic institutions, including slavery, on the ground that he understood “such a provision to now be implied constitutional law” and had “no objection to its being made express, and irrevocable”).

34. *Id.* at 220-21. For extended analysis of the latter point, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 275-84 (1994); and Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993).

35. 2 LINCOLN, SPEECHES & WRITINGS, *supra* note 33, at 217.

36. *Id.* at 218 (quoting U.S. CONST. pmbl.).

37. *Id.* at 217-18.

38. *Id.* at 218.

39. *Id.* at 217.

Lincoln answered his own rhetorical questions and summarized his conclusion:

It follows from these views that no State, upon its own mere motion, can lawfully get out of the Union,—that *resolves* and *ordinances* to that effect are legally void; and that acts of violence, within any State or States, against the authority of the United States, are insurrectionary or revolutionary, according to circumstances.<sup>40</sup>

That, in a nutshell, is the legal theory that would propel Lincoln throughout the Civil War. No State could secede, without the consent of the United States—the lawfully constituted government of the whole, acting in accordance with the Constitution. Purported acts of secession were therefore “legally void.” There was no such thing as secession, only insurrection against the authority of the United States. And that, Lincoln continued, was something that he as President had a sworn constitutional obligation—an “oath registered in Heaven”<sup>41</sup>—to resist with the constitutional power vested in him (Lincoln’s theory of constitutional duty).<sup>42</sup>

Lincoln then formulated the legal fiction that would govern his actions as President throughout the Civil War:

I therefore consider that, in view of the Constitution and the laws, the Union is unbroken; and, to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States.<sup>43</sup>

Under Lincoln’s fiction, the Union “is unbroken” as a matter of law (“in view of the Constitution and the laws”) and fact—and executive action must therefore be treated as conforming to this legal reality. Lincoln then proceeded to explain exactly what such faithful execution might entail, in terms of delivering mails and holding (or attempting to hold) federal property. His position was firm and clear, but his tone was not intentionally bellicose and the First Inaugural concludes with famous words of conciliation.<sup>44</sup>

Despite Lincoln’s words, the War came. By the time Lincoln addressed Congress on July 4, 1861, Fort Sumter had been fired upon and captured by the South; Lincoln had issued a call for troops (fired on by Confederate sympathizers in Baltimore) and authorized suspension of the

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40. *Id.* at 218.

41. *Id.* at 224.

42. *Id.*

43. *Id.* at 218.

44. See *id.* at 224 (“I am loth to close. We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battle-field, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.”).

privilege of the writ of habeas corpus (declared unconstitutional in an opinion by Chief Justice Taney);<sup>45</sup> the Richmond convention had passed a resolution of secession for Virginia; and the Wheeling convention had met and formed itself into the "restored" pro-Union rump government-in-exile for Virginia. Lincoln had plenty to talk about on July 4, but he still managed to say a few words about the unconstitutionality of secession, and even about the lawful government of Virginia.

As to secession: Lincoln buttressed his First Inaugural arguments with a few new ones, and elaborated on others, ratcheting up the harshness of his rhetoric against the theory of secession (Lincoln being no longer quite as concerned with conciliation, since the upper South had seceded after all). "It might seem, at first thought, to be of little difference whether the present movement at the South be called 'secession' or 'rebellion,'" he told Congress. But this was not so: Secession implied respectability and legality; rebellion "implies *violation* of law."<sup>46</sup> The Southerners' argument for session was "an ingenious sophism, which, if conceded, was followed by perfectly logical steps, through all the incidents, to the complete destruction of the Union."<sup>47</sup> The sophism was that a State could, consistently with the Constitution, "and therefore *lawfully*, and *peacefully*, withdraw from the Union, without the consent of the Union, or of any other State."<sup>48</sup> This was "rebellion . . . sugar-coated" and Southern propagandists had "been drugging the public mind of their section for more than thirty years" with this sophism.<sup>49</sup> The secessionist argument derived its force from the false assumption "that there is some omnipotent, and sacred supremacy, pertaining to a *State*—to each State of our Federal Union."<sup>50</sup> In fact, however, "[o]ur States have neither more, nor less power, than that reserved to them, in the Union, by the Constitution."<sup>51</sup> Lincoln repeated the argument of the First Inaugural that the Union was "older than any of the States; and, in fact, it created them as States."<sup>52</sup> Since the Union created the States, and not the other way around, it could not be among States' reserved powers "to destroy the government itself."<sup>53</sup>

Lincoln then shifted the burden of persuasion to secessionists, noting that nothing in the Constitution expressly provided for secession, and that "nothing should ever be implied as law, which leads to unjust, or absurd

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45. See *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

46. Message to Congress in Special Session (July 4, 1861), reprinted in 2 LINCOLN, SPEECHES & WRITINGS, *supra* note 33, at 254.

47. *Id.* at 255.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 256.

53. *Id.*



consequences.”<sup>54</sup> And secession was, for Lincoln, both unjust and absurd: Its principle, Lincoln contended (again building on the argument of the First Inaugural), “is one of disintegration, and upon which no government can possibly endure.”<sup>55</sup> Moreover, “if one State may secede, so may another; and when all shall have seceded, none is left to pay the debts”<sup>56</sup>—an unjust consequence. Finally, the logic of the State sovereignty argument for a right of secession implied a parallel right of eviction: if one or a few States could secede from the Union, the many likewise could “secede” from the few (presumably leaving them with the old Union’s debts, to boot).<sup>57</sup>

If secession was illegal, and invalid, what power existed in the Constitution to combat it and what model best described the relationship between the “so-called seceded States” (as Lincoln called them)<sup>58</sup> and the Union? This, of course, was a theoretical question with enormous practical constitutional consequences, and one that eventually would come to bedevil Reconstruction after the War. It was a question with immediate consequences for the conduct of the War, and the policy to be followed in waging and ending it. If the conflict were a true war between the United States of America and the “Confederate States of America,” Congress would need to declare it. And, upon the United States’ victory, the old Confederacy would become newly conquered territory, with Congress possessing plenary power to legislate for these territories, and controlling the terms of admission of new States, the old ones having committed “state suicide” by seceding.<sup>59</sup> But if the conflict was a rebellion by disloyal cabals, the President arguably had power to act alone, pursuant to his Article

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54. *Id.* at 257.

55. *Id.* at 258.

56. *Id.* at 257.

57. *See id.* at 257-58. Lincoln of course did not mention that that was essentially the plan of the original Constitution, providing that a majority of nine States “shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same,” U.S. CONST. art. VII, essentially permitting a majority of States to secede from the Articles of Confederation (but assuming responsibility for the Confederation’s debts). *See* U.S. CONST. art. VI, cl. 1 (“All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be valid against the United States under this Constitution, as under the Confederation.”).

58. *See, e.g.,* Message to Congress in Special Session (July 4, 1861), reprinted in 2 LINCOLN, SPEECHES & WRITINGS, *supra* note 33, at 258.

59. *See* U.S. CONST. art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union; . . .”); *id.* 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 . . .”). The “conquered province” and “state suicide” ideas were the Reconstruction theories of Radical Republicans like Thaddeus Stevens and Charles Sumner (Sumner is the source of the term “state suicide”), and the upshot of these theories was plenary power in Congress to control the terms of Reconstruction. *See* MCPHERSON, *supra* note 7, at 699; ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877, at 228-39 (1988); *see also infra* text accompanying notes 87-92 (summarizing position of Radical Republicans during congressional debate over West Virginia statehood bill).

II duty to "take care" that the laws be faithfully executed, aided by whatever congressional legislation reinforced this power, to suppress the rebellion.<sup>60</sup> Moreover, since this was not a war with a foreign sovereign, there was no occasion for making a peace treaty, and negotiations toward such an end simply were not possible. And, further, upon successfully squashing the rebellion, the President, not Congress, would have the primary power to set the terms of Reconstruction, as a consequence of the executive power to suppress the rebellion, take care that the laws be faithfully executed, and grant pardons and reprieves.

One can already see in Lincoln's July 4, 1861 address the seeds of his theory of Reconstruction, noting that "*after* the rebellion shall have been suppressed," it would be his understanding that "the powers, and duties of the Federal government, relative to the rights of the States, and the people," would remain as before—though Lincoln wisely added the word "probably."<sup>61</sup> Lincoln pointed to the Guarantee Clause of Article IV both to reinforce his argument against the legitimacy of secession and as a source of extant federal authority (and by implication presidential authority) to act to preserve the Union.

The Constitution provides, and all the States have accepted the provision, that "[t]he United States shall guarantee to every State in this Union a republican form of government."<sup>62</sup> But, if a State may lawfully go out of the Union, having done so, it may also discard the republican form of government; so that to prevent its going out, is an indispensable *means*, to the *end*, of maintaining the guaranty mentioned; and when an end is lawful and obligatory, the indispensable means to it, are also lawful, and obligatory.<sup>63</sup>

The Guarantee Clause was the perfect textual vehicle for turning Lincoln's theory of the unconstitutionality of secession into an operating theory of federal government power to prevent secession. If secession was illegal—rebellion against the Constitution—the clause authorized, indeed required, the federal government to intervene to preserve republican

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60. See U.S. CONST. art. II, § 3; see also DONALD, *supra* note 28, at 303 ("Lincoln's July 1861 message, together with his proclamations, also made it clear that he considered the prosecution of the war primarily a function of the Chief Executive, to be carried out with minimal interference from the other branches of the government . . .").

61. Message to Congress in Special Session (July 4, 1861), reprinted in 2 LINCOLN, SPEECHES & WRITINGS, *supra* note 33, at 260.

62. See U.S. CONST. art. IV, § 4.

63. Message to Congress in Special Session (July 4, 1861), reprinted in 2 LINCOLN, SPEECHES & WRITINGS, *supra* note 33, at 261. Lincoln, a good constitutional lawyer, appears to be consciously paralleling the Supreme Court's language and analysis in the landmark case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

government.<sup>64</sup> In addition, the clause, ambiguously but also somewhat usefully, did not specify exactly what the federal government could or could not do pursuant to this power. Again ambiguously but usefully, the clause vests whatever broad power is thus granted in "the United States" and does not specify which part of the federal government is empowered. For a politician as skilled as Lincoln in the arts of selective compromise, selective unilateral action, and selective issue-avoidance, this was a constitutional godsend. The clause could be read as permitting unilateral presidential action, at the same time that a congressional role could be accepted or, on some aspects of whether a "republican form of government" existed, conceded entirely. For example, Lincoln throughout his presidency sought to maintain presidential control over the terms and conditions of Reconstruction—to determine whether and when lawful State governments were in place, dictating or obviating the need for continued federal executive intervention. But he granted that Congress possessed the exclusive prerogative to decide whether to seat the senators and representatives elected from such executive-reconstructed States.<sup>65</sup> As James McPherson has observed of the Guarantee Clause, "[h]ere was a concept of sufficient ambiguity to attract supporters of various viewpoints."<sup>66</sup>

Finally, the clause offered another huge asset: The Supreme Court had held, a decade and a half earlier in the famous case of *Luther v. Borden*,<sup>67</sup> involving competing claims to be the legitimate State government of Rhode Island, that matters of recognition of who constituted the lawful government of a State were "political questions" committed by the Guarantee Clause to the judgment of Congress (and the President, acting pursuant to authority granted by Congress), not to the Court. This widely known holding, leaving the field broadly to the political judgment of Congress and the President, would prove important in the congressional

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64. *Accord* THE FEDERALIST NO. 43, at 274-78 (James Madison) (Clinton Rossiter ed., 1961) (explaining Guarantee Clause and federal power to intervene and quell insurrections within a State).

65. MCPHERSON, *supra* note 7, at 699 (collecting sources). Lincoln's proclamation of December 8, 1863, announcing the terms on which he would recognize other reconstructed Southern governments as legitimate, is an especially good example. Lincoln expressly bracketed out the question of congressional representation from that of legal recognition by the executive for all other purposes: "[I]t may be proper to further say that whether members sent to Congress from any State shall be admitted to seats constitutionally rests exclusively with the respective Houses, and not to any extent with the Executive." Abraham Lincoln, Proclamation (Dec. 8, 1863), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 215 (James D. Richardson ed., 1897) [hereinafter Lincoln Proclamation]. Lincoln's approach did not precisely track the Supreme Court's approach in *Luther v. Borden*, 48 U.S. 1 (1849), which apparently made congressional action with respect to representation the determiner of whether a state government satisfied the Republican Form of Government Clause. But this was not the only time that Lincoln's constitutional analysis, and action, departed from Chief Justice Taney's rulings. See Paulsen, *The Most Dangerous Branch*, *supra* note 34 (noting Lincoln's refusal to acquiescence in the holding of *Dred Scott* and to abide by Chief Justice Taney's order in *Ex Parte Merryman*).

66. MCPHERSON, *supra* note 7, at 702.

67. 48 U.S. 1 (1849).

debate over West Virginia statehood, providing a measure of preclearance legitimacy to what Congress determined to be the lawful government of Virginia.<sup>68</sup>

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68. See *supra* note 65 (discussing *Luther*) and text accompanying *infra* notes 97-106 (discussing congressional debate over West Virginia statehood bill). All of this, of course, predated the Supreme Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969), by more than a century. *Powell* rejected a claimed power by the House of Representatives pursuant to Article I, Section 5's assignment to each house the power to "Judge of the Elections, Returns and Qualifications of its own Members" and to refuse to seat a Member on the basis of a "Qualification[]" other than those listed in Article I, Section 2—age of twenty-five years, citizen of the United States for seven years, and an inhabitant of the State when elected. U.S. CONST. art. I, § 5, cl. 1; *id.* art. I, § 2. (The House could expel Representative Powell for misconduct, but that is a different power, and constitutionally requires a two-thirds vote of the House. *Id.* art. I, § 5, cl. 2. See *Powell*, 395 U.S. at 506-12.)

We do not read *Powell* as in any way inconsistent with Lincoln's position that, under the Guarantee Clause, where Congress judges a State's regime not to be a "Republican Form of Government," the Constitution commits exclusively to Congress's judgment whether that State's elected representatives to Congress should or should not be seated. *Powell* is properly read as limited to the imposition of additional "qualifications" on *individual* representatives or senators, beyond those specified in Article I, §§ 2, 3. See also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787-98 (1995). We think it would require a significant overreading of *Powell* to conclude that Congress lacks plenary power to refuse to seat a proposed congressional delegation, where it determines that the elections producing that delegation were not legitimately conducted, or are from States not possessing legitimate republican regimes, or that exclusion of a State's representatives from Congress is a necessary punitive or coercive measure designed to carry out the national government's obligation to "guarantee" a republican form to a State's government. If we are mistaken as to the proper reading of *Powell*, then we submit that *Powell* (so read) is mistaken as to the proper reading of the Constitution.

Though the question is somewhat more difficult, we also believe, with Lincoln (and in some tension with *Luther v. Borden*), that the question of representation in Congress is theoretically separate and distinct from the question of recognition by the executive, for Guarantee Clause purposes. See *supra* note 65. This follows, we believe, from basic notions of separation of powers under the Constitution and from the nature of the Guarantee Clause as a power assigned to "the United States" government—the Clause, as noted above, is ambiguous as to which Department of the national government is to act for "the United States" on such matters—and thus is most plausibly read as a shared (and thus potentially divisible) power of Congress and the President. The judgment of the President that a State's government is republican in form, for purposes of application of executive branch powers (such as suppression of insurrection, execution of the laws, and preserving the Constitution's operation in all the States), is not necessarily binding on Congress, for purposes of application of Congress's legislative powers and power to judge the elections, returns, and qualifications of members coming from States whose regimes are of doubtful or legitimately disputed validity. The latter question, we agree with Lincoln, "constitutionally rests exclusively with the respective Houses, and not to any extent with the Executive." Lincoln Proclamation, *supra* note 65, at 215. (Of course, a president certainly may take into consideration Congress's action with regard to representation in reaching his own constitutional judgment about the legal status of a purported state government. But the action of neither branch literally binds the other in its province of action. See THE FEDERALIST NO. 47 (James Madison); see generally Paulsen, *The Most Dangerous Branch*, *supra* note 34.)

If our view (and Lincoln's) is correct, Professor Bruce Ackerman starts in part from a mistaken premise when he argues that the adoption of the Fourteenth Amendment did not conform with the Constitution's formal requirements under Article V for making amendments because the Congress that proposed the amendment refused to seat delegations from States whose ratifications of the Thirteenth Amendment had been accepted as valid. See ACKERMAN, *TRANSFORMATIONS*, *supra* note 2, at 99-119. Under our view—and Lincoln's—of the Guarantee Clause, Congress alone and independently is permitted to judge whether representatives and senators should be seated from unreconstructed (or only partially reconstructed), unrepresentative (or only partially representative), or otherwise unrepresentative

Throughout the war, Lincoln remained remarkably consistent on his core constitutional theory of the unconstitutionality of secession and the consequent power of the federal government, led by the President, to suppress the "rebellion," bending his theory only to accommodate practical exigencies (like the necessity for prisoner exchanges and for a blockade of Southern ports) that the legal fiction could not readily embrace.<sup>69</sup> He would not refer to the South as the Confederacy or the Confederate States of America and objected to the use of the terms in his presence; his speeches and writings, starting with the July 4 address, only refer to "so-called seceding States."<sup>70</sup> As historian David Donald writes, Lincoln meticulously sustained, throughout the next four years, "the legal fiction that the war was an 'insurrection' of individuals in the southern States who joined in 'combinations too powerful to be suppressed by the ordinary course of judicial proceedings.'"<sup>71</sup> Lincoln on occasion referred to the conflict as a civil war, but, Donald notes, "he usually called it a 'rebellion'—a term he employed more than four hundred times in his messages and letters."<sup>72</sup> As James McPherson puts it, "Lincoln never deviated from the theory that secession was illegal and southern States therefore remained in the Union. Rebels had temporarily taken over their governments; the task of reconstruction was to return 'loyal' officials to power."<sup>73</sup>

This theory—this "legal fiction," as Donald calls it—obviously had a profound impact on the creation of West Virginia.<sup>74</sup> And in his July 4, 1861 address to Congress, Lincoln applied this theory to the situation in Virginia. In a bitter-sounding portion of the address, Lincoln noted how the

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(or only partially republican) regimes. The fact that those regimes' state governmental actions may have been considered valid for other, different constitutional purposes (like ratification of amendment proposals) is simply not controlling as to the logically distinct question of representation in Congress. Another part of Professor Ackerman's mistaken point of departure may be in assuming that the Constitution commits to Congress the determination of whether a State's ratification of a proposed constitutional amendment is valid—a mistake the Supreme Court has made as well. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 706-21 (1993) [hereinafter Paulsen, *A General Theory of Article V*] (discussing *Coleman v. Miller*, 307 U.S. 433 (1939)). If one assumes that determination of the validity of a State's ratification of a proposed constitutional amendment and acceptance of a State's representation in Congress are both exclusive powers of Congress, one might well come to Professor Ackerman's conclusion—though there are still other good grounds for distinguishing the acceptance of State ratifications of the Thirteenth Amendment and the exclusion of a State's representatives from the Congress that proposed the Fourteenth Amendment, such as an otherwise valid regime's denial of the franchise to a large class of newly free citizens. See also discussion *infra* Part I.D.

69. See DONALD, *supra* note 28, at 302.

70. Message to Congress in Special Session (July 4, 1861), reprinted in 2 LINCOLN, SPEECHES & WRITINGS, *supra* note 33, at 257.

71. DONALD, *supra* note 28, at 302.

72. *Id.*

73. McPHERSON, *supra* note 7, at 699; see also DONALD, *supra* note 28, at 302-03.

74. The debate in Congress over West Virginia was in some ways the forerunner of the more extensive and more bitter debates over Reconstruction legal theory that followed the end of the Civil War—but that is getting ahead of the story a bit. See FONER, *supra* note 59, at 228-39.

Richmond convention had proposed secession, but not waited for the people of the State to ratify it. Instead, the convention and legislature "immediately commenced acting, as if the State were already out of the Union. They pushed military preparations vigorously forward all over the State. They seized the United States Armory at Harper's Ferry [which would eventually become part of West Virginia], and the Navy-yard at Gosport, near Norfolk. Yet more, they purported to enter into a treaty of alliance with the so-called 'Confederate States,' and sent members to their Congress at Montgomery. And, finally, they permitted the insurrectionary government to be transferred to their capital at Richmond."<sup>75</sup>

All of this preceded popular ratification of the Richmond secession ordinance by the people of Virginia. Thus, Lincoln was referring in part to Virginia when, later in the Address, he questioned "whether there is, to-day, a majority of the legally qualified voters of any State, except perhaps South Carolina, in favor of disunion" and observed that "the result of an election, held in military camps, where the bayonets are all on one side of the question voted upon, can scarcely be considered as demonstrating popular sentiment."<sup>76</sup> The Richmond government was an insurrectionary government, and likely not even popularly supported. Thus, Lincoln reasoned, it was not the lawful government of Virginia. Rather, the government of Virginia consisted of the loyal citizens of the State (that is, those remaining loyal to the United States, of which Virginia remained a part):

The people of Virginia have thus allowed this giant insurrection to make its nest within her borders [referring to Richmond becoming the capital of the so-called Confederacy]; and this government has no choice left but to deal with it, *where it finds it*. And it has the less regret, *as the loyal citizens have, in due form, claimed its protection. Those loyal citizens, this government is bound to recognize, and protect, as being Virginia.*<sup>77</sup>

There it is: loyal citizens, "in due form"—complying with all formal requirements—have constituted themselves the government of Virginia and asked for the protection of the United States government, as contemplated by the Guarantee Clause, and those loyal citizens are entitled to be recognized as being "Virginia."

We submit that this legal fiction is eminently sound. And it follows, we submit, that "Virginia" validly consented to the creation of West Virginia with its borders. Indeed, one can deny this conclusion only if one denies one of Lincoln's twin premises: the unlawfulness of secession; or

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75. Message to Congress in Special Session (July 4, 1861), *reprinted in* 2 LINCOLN, SPEECHES & WRITINGS, *supra* note 33, at 251.

76. *Id.* at 258.

77. *Id.* at 251.

the power of the national government, under the Guarantee Clause, to recognize alternative State governments created by loyal citizens in resistance to insurrectionary regimes that have taken over the usual governing machinery of their States. We now turn to that argument, and its history, as applied to create the new free State of West Virginia pursuant to Article IV, Section 3.

*C. West Virginia and Formalism: Lincoln's Constitutional Theory Applied*

If the Wheeling government was "Virginia," as a matter of law, recognized as such by the national government (pursuant to the power of the political branches to make such a determination, under the Guarantee Clause), then the legislature of this Virginia government was the only appropriate body lawfully authorized to give (or withhold) the consent of Virginia to the creation of a new State within its territory.<sup>78</sup> The fact that that body's membership was nearly identical to that of the convention proposing statehood for West Virginia is an inconvenient fact, but one that in our view should be of no legal consequence whatsoever. It is, in today's colloquial legal parlance, merely a "bad fact"—the type of fact that, to be sure, often influences legal analysis (usually for the worse), but that is strictly speaking irrelevant and misleading. Bad facts notoriously make for bad law: The capacity of judges (and other constitutional interpreters) to be misled by bad facts into reaching unsound legal conclusions is the story of perhaps dozens of "great cases" in constitutional law.<sup>79</sup>

But the story of West Virginia is different. "Bad" facts did not make bad law, precisely because Congress and the President were willing, by and large, to disregard such facts—perhaps because of the presence of really bad facts on the other side (disloyalty, rebellion, slavery) and the other circumstances presented. Thus, they were willing to test the validity of West Virginia's admission into the Union strictly on the basis of the Constitution's formal requirements. And nearly everybody agreed that those had been satisfied.

To briefly reprise the historical context: Within days after Lincoln's July 4 address, the Reorganized General Assembly for Virginia appointed senators, and Congress declared vacant the seats of Virginia's former

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78. This assumes, of course, that the Constitution permits new States to be carved out of existing ones at all—the question we take up in Part II *infra*.

79. We nominate *United States v. Nixon*, 418 U.S. 683 (1974), easily one of the five most important Supreme Court decisions of the last fifty years, as one of our favorite examples. See generally Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337 (1999) (arguing that the fact that President Richard M. Nixon appeared in fact to be "a crook" influenced and distorted the Court's constitutional analysis).

(disloyal) senators and seated the Wheeling government's senators,<sup>80</sup> effectively acknowledging the Wheeling legislature's legitimacy as the government of Virginia, as far as Congress was concerned for purposes of representation. The Second Wheeling Convention convened less than a month later, in August, and proposed a statehood ordinance that was overwhelmingly ratified by popular vote in October, leading in rapid sequence to a constitutional convention in November of 1861, a proposed State constitution by February 1862, approval by the people of West Virginia on April 3, 1862, and the consent of the legislature of "Virginia" (that is, the Wheeling rump government-in-exile recognized by Lincoln and whose senators and representatives were seated by Congress) on May 13, 1862.

The scene then shifted to Congress, where a remarkably substantive debate took place over the constitutional issues surrounding West Virginia's admission into the Union as a State, lasting two days in the Senate and two days in the House. One cannot read the debates in the *Congressional Globe* without being impressed with the seriousness of purpose and sophistication of analysis with which Congress considered the constitutional problem. The debate was in many ways a dress rehearsal for various constitutional theories of Reconstruction that would be developed more fully at the end of the Civil War. Members of Congress divided on the question (more or less as they would later divide on constitutional theories of Reconstruction) into "conservatives," like Kentucky's John Crittenden, who thought the creation of West Virginia unconstitutional; "moderates," like John Bingham, a leading sponsor of the West Virginia bill (and later one of the leading authors of the Fourteenth Amendment) who crafted a superb constitutional argument connecting Lincoln's constitutional views on the illegality of secession to the validity of West Virginia; and "radicals" like Thaddeus Stevens, who believed that the creation of West Virginia was essentially extralegal and unconstitutional, but should be done anyway as part of the war power.<sup>81</sup> Ironically, the conservatives and the radicals—the two ends of the spectrum—agreed against the middle that the creation of West Virginia was not lawful under Article IV,

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80. The Wheeling legislature appointed senators on July 9; the seats of Virginia's secessionist senators were declared vacant on July 11, and the Wheeling government's senators were seated on July 13. See VIRGIL A. LEWIS, HISTORY OF WEST VIRGINIA 367-68 (1889); RANDALL, *supra* note 7, at 451 (citing JOURNAL OF THE HOUSE OF DELEGATES OF VIRGINIA 32 (extra session commencing July 1, 1861, Wheeling); and JOURNAL OF THE SENATE 23 (same session)); CONG. GLOBE, 37th Cong., 1st Sess. 109 (1861).

81. The terms "conservatives," "moderates," and "radicals" are woefully imprecise, and are potentially misleading because of their almost complete lack of correspondence with modern connotations of these terms. Yet they are useful general labels and conform reasonably closely to conventional historical formulations for the differences among congressional Republicans on constitutional issues of secession, war, and reconstruction. Accordingly, we apply such formulations here, and will no longer burden the presentation with quotation marks around the labels conservatives, moderates, and radicals.



Section 3 of the Constitution, but disagreed over whether this mattered. Representative Crittenden, a leading spokesman for the conservatives, was disturbed, first and foremost, by the notion that Virginia would no longer exist as it had before. He argued that at the close of the rebellion Virginia should be returned to the Union whole, not carved up.<sup>82</sup> "If Virginia were to-morrow to lay down . . . arms . . . and ask to be admitted," Crittenden asked, "what would you say to her if you had created a new State out of her territory?"<sup>83</sup> Linked to this policy objection was a legal one: The so-called Restored Government at Wheeling did not truly represent the people of all of Virginia, but less than one-fourth of the counties and one-fourth of the population of the State as a whole.<sup>84</sup> It was thus a pretense to claim that the Wheeling government was the legitimate government of "Virginia." Worse, the Wheeling government was essentially giving consent to itself. "It is the party applying for admission consenting to the admission. That is the whole of it."<sup>85</sup> For those already predisposed against dismembering old Virginia, the combination of legal fictions was simply too much to bear:

This Legislature is here applying to be admitted as a new State, and at the same time and in the same character consenting that they themselves shall be so admitted! What does it amount to but that here is an application to make a new State at the instance of the parties desiring to be made a new State, and nobody else consenting, and nobody else left to consent to it?<sup>86</sup>

The radicals, with Thaddeus Stevens their most unabashed leader, agreed with the legal critique, but were prepared to disregard the technical niceties of Article IV and rely on the "war power" and the consequent freedom of Congress to treat Virginia as it wished—a precursor of radical Republican theories of Reconstruction, which proposed to treat seceded States as conquered provinces.<sup>87</sup> Stevens described the constitutional

82. RANDALL, *supra* note 7, at 455.

83. CONG. GLOBE, 37th Cong., 3d Sess. 47 (1862) (remarks of Rep. Crittenden).

84. See, e.g., *id.* (remarks of Rep. Crittenden) (noting that Wheeling government represented "perhaps only thirty or forty counties out of the one hundred and fifty in the State"); CONG. GLOBE, 37th Cong., 2d Sess. 3320 (remarks of Sen. Powell) (making similar observation).

85. CONG. GLOBE, 37th Cong., 3d Sess. 47 (1862) (remarks of Rep. Crittenden).

86. *Id.* at 46 (statement of Rep. Crittenden). In point of fact, Crittenden's factual premise is overstated. West Virginia did not include all of the counties represented in the Wheeling government. There were also counties in the east, near Washington, D.C., that were part of the Wheeling loyalist government. See, e.g., CONG. GLOBE, 37th Cong., 3d Sess. 39 (1862) (statement of Rep. Brown) (noting that the counties of Alexandria and Fairfax and "two or three more" were part of the Wheeling legislature but not part of the proposed State of West Virginia); *id.* at 44 (statement of Rep. Colfax) ("I am glad to say that [the proposed State of West Virginia] does not even embrace all the loyal people of Virginia."). Indeed, after West Virginia became a State, the Pierpont regime relocated to Alexandria and "bravely maintained the legal fiction that it was still the government of Virginia." RANDALL, *supra* note 7, at 461.

87. See FONER, *supra* note 59, at 232-33. Writing of Radical Republican thought in 1865 (and of Thaddeus Stevens's views in particular), Foner states as follows:

argument for admission of West Virginia as "one got up by those who either honestly entertain, I think, an erroneous opinion, or who desire to justify, by a forced construction, an act which they have predetermined to do."<sup>88</sup> Even less charitably, he described the argument as a "forced argument, intended to justify a premeditated act."<sup>89</sup> The State of Virginia consisted of a majority of the people of the entire State, according to Stevens. While secession was "treason," it was still the action of the State. The legal theory supporting West Virginia's statehood—that the Wheeling government constituted the legitimate government of all Virginia—was simply dead wrong.

Nonetheless, the war power permitted Congress to admit West Virginia:

I say, then, that we may admit West Virginia as a new State, not by virtue of any provision of the Constitution, but under our absolute power which the laws of war give us in the circumstances in which we are placed. I shall vote for this bill upon that theory, and upon that alone; for I will not stultify myself by supposing that we have any warrant in the Constitution for this proceeding.<sup>90</sup>

Other radicals took essentially the same position as Stevens, but cast it as having a warrant in the Constitution, sketching in rough the position that would later become Stevens's own with respect to Reconstruction. Representative Conway, for example, stated that "the situation with regard to our seceded States is that they are out of the Union by having acquired at least a belligerent character, thus securing an international status incompatible with their Federal relations."<sup>91</sup> Under this theory, Congress could treat any area of Virginia not under the control of Virginia as U.S. territory. As much a formalist with respect to his theory as Lincoln was with respect

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For Stevens, the war had created its own logic and imperatives. "We are making a nation," he told the House, and obsolete "technical scruples" must not be allowed to stand in the way. The Southern states had seceded, waged war against the Union, and been vanquished; having sacrificed their constitutional standing, they could be treated as conquered provinces, governed according to the will of Congress. This position had the advantage that it accorded with reality. Whatever the metaphysical reasoning of legal theorists, the South had in fact been subjugated on the battlefield. Yet Stevens displayed too little regard for constitutional niceties to command broad support.

*Id.* at 232.

88. CONG. GLOBE, 37th Cong., 3d Sess. 50 (1862).

89. *Id.* at 47; see also RANDALL, *supra* note 7, at 455.

90. CONG. GLOBE, 37th Cong., 3d Sess. 59 (1862). Representative Olin of New York took a similar position: "I confess I do not fully understand upon what principles of constitutional law this measure can be justified. It cannot be done, I fear, at all. It can be justified only as a measure of policy, or of necessity." CONG. GLOBE, 37th Cong., 3d Sess. 45 (1862). Representative Noell had "grave constitutional doubts" about the West Virginia bill, but said that "we cannot afford, while the nation is trembling upon the brink of destruction, to split hairs on technical constitutional points." *Id.* at 53. In the end, though, Representative Noell thought the admission of West Virginia constitutional on something like a totality-of-circumstances test, taking into account "all the clauses of the Constitution in connection, and the condition in which [he] found those people in Western Virginia." *Id.*

91. CONG. GLOBE, 37th Cong., 3d Sess. 38 (1862) (statement of Rep. Conway).

to his, Conway stated that he would vote for the West Virginia bill if it were drafted to admit the "Territory of West Virginia" into the Union as a new State!<sup>92</sup>

The moderates responded to the legal arguments of the conservatives and radicals with a well-developed (and, we think, correct), Lincoln-esque constitutional argument. To the argument that the Wheeling government did not represent a majority of the people of Virginia, the moderates responded that the Wheeling Legislature surely represented three-fourths of the loyal population of Virginia, and that this was the relevant population.<sup>93</sup> To the argument that what was formerly Virginia was now a simple United States territory, the moderates objected strenuously (along Lincolnian lines) that the territorial view implied that a State could, in legal contemplation, secede—that purported secession had legal consequences.<sup>94</sup> But "[i]t is not within the power of a State to secede," insisted Representative Brown, of "Virginia": "The Constitution has prescribed the only mode in which a State can be relieved from all the obligations assumed by her; and although the State of Virginia could not commit treason, her functionaries might, and leave the legislative and executive power with the people, to whom they originally and primitively belonged."<sup>95</sup> Even Representative Olin, who had serious doubts about the constitutionality of admitting West Virginia, nonetheless thought "there are in favor of it a thousand probabilities, in a legal point of view, compared with the authority to create a territorial government in any part of Virginia."<sup>96</sup>

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92. *Id.* at 37, 44.

93. CONG. GLOBE, 37th Cong., 2d Sess. 3320 (1862) (remarks of Sen. Willey) (noting that Wheeling legislature and West Virginia constitutional convention represented three-fourths of the loyal population of western Virginia); CONG. GLOBE, 37th Cong., 3d Sess. 43 (1862) (remarks of Rep. Colfax) (framing question as whether the Wheeling governor and the legislature to which he communicates "are really the Governor and the Legislature of the loyal people of Virginia"). Obviously, three-quarters of the loyal population was a good bit less than all of the loyal population, and substantially less than a majority of the population as a whole.

94. CONG. GLOBE, 37th Cong., 3d Sess. 39 (1862) (statement of Rep. Brown) (arguing against territorial view).

95. *Id.*

96. CONG. GLOBE, 37th Cong., 3d Sess. 45 (statement of Rep. Olin). It helped the moderates that Congress had already seated the senators and representatives representing the Wheeling regime. Representative Brown of "Virginia" noted the irony that if Virginia had, by seceding, reverted to territorial status, he had no business representing Virginia in the House of Representatives: "If Virginia is a Territory, then by the unauthorized and illegal act of secession of that State I have no business to a seat upon this floor." *Id.* at 42. And the same could be said of Representative Segar, also of "Virginia," and one of the advocates for the "territory" theory. Senator Ten Eyck also noted that the territory theory was inconsistent with the Senate's act of seating the Wheeling Government's two senators as the senators from Virginia: "I apprehend the Senate by the vote which it gave on that occasion has fixed the legality of the action of the Legislature of Virginia. That settles the legal question." CONG. GLOBE, 37th Cong., 2d Sess. 3319 (1862). See also CONG. GLOBE, 37th Cong., 3d Sess. 43-44 (1862) (statement of Rep. Colfax) (listing the Senate and House precedents among the facts establishing the Wheeling Government as the government of Virginia and concluding that "all that remains now to be

But it was left to Representative John Bingham to make the most systematic, theoretical, and thorough affirmative legal case for the propriety of West Virginia's admission under Article IV, Section 3. Bingham directly confronted Thaddeus Stevens's contention that a State must be understood as a majority of the people of the State. Bingham agreed that this was true only insofar as "the majority act in subordination to the Federal Constitution, and to the rights of every citizen of the United States guaranteed thereby."<sup>97</sup> The reference to "rights" of citizens of the United States "guaranteed" by the United States was a reference to the Guarantee Clause. Bingham's exposition of how that clause played out in these circumstances deserves quotation at length:

[W]here the majority become rebels in arms, the minority are the State; and the minority, in that event, have a right to administer the laws, and maintain the authority of the State government, and to that end to elect a State Legislature and executive, by which they may call upon the Federal Government for protection "against domestic violence," according to the express guarantee of the Constitution. To deny this proposition is to say that when the majority in any State revolt against the laws, both State and Federal, and deny and violate all rights of the minority, that however numerous the minority may be, the State government can never be reorganized, nor the rights of the minority protected thereby so long as the majority are in the revolt.<sup>98</sup>

This is eminently sound analysis, and Bingham quoted James Madison's words in *The Federalist No. 43* as support for this reading of the Guarantee Clause:

"Why may not illicit combinations, for purposes of violence, be formed as well by a majority of a State as by a majority of a county or a district of the same State? And if the authority of the State ought, in the latter case, to protect the local magistracy, ought not the Federal authority, in the former, to support the State authority?"<sup>99</sup>

This was "precisely" the situation in Virginia, Bingham observed.<sup>100</sup> "I do recognize, in the language of Mr. Madison, even the rights of a minority in a revolted State to be protected, under the Federal Constitution, both by Federal law and by State law."<sup>101</sup> Given the political axiom that the legislative power of a State must always be present, Bingham concluded that "the

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done is for this House to reaffirm what it has already done before, and make this history consistent with itself").

97. CONG. GLOBE, 37th Cong., 3d Sess. 57 (1862) (statement of Rep. Bingham).

98. *Id.*

99. *Id.* (quoting *THE FEDERALIST* No. 43, at 276 (James Madison) (Clinton Rossiter ed., 1961)).

100. *Id.*

101. *Id.* at 58.

legislative powers, incapable of annihilation, have returned to the people at large for their exercise."<sup>102</sup> And the relevant "people" was, of course, the loyal people within Virginia: "I say that the power remained with the loyal people of that State to call a convention and create a provisional government, which they did."<sup>103</sup>

It followed from this premise, and from the then-recent precedent of *Luther v. Borden*,<sup>104</sup> that Congress possessed plenary power to decide which legislature in Virginia was the Legislature of Virginia: "[T]he ultimate power to decide that question, 'which of these bodies is the Legislature of Virginia?' is in the Congress of the United States."<sup>105</sup>

[I]t has been affirmed by every branch of this Government, legislative, executive, and judicial, and more than once, that when the storm of revolution shakes the civil fabric of a State of the Union, the ultimate and final arbiter to determine who constitute the legislative and executive government of that State, and hold its great trust of sovereignty, is the congress of the United States, or the President acting by authority of an act of Congress.<sup>106</sup>

Congress had decided earlier that, for purposes of selecting Virginia's senators, the Wheeling Legislature was the Legislature of Virginia. In for a penny, in for a pound: Congress now accepted the "Virginia" legislature's consent to the creation of West Virginia and added its own. The West Virginia bill passed 23 to 17 in the Senate, and 96 to 55 in the House.<sup>107</sup> The bill was sent to the President in December of 1862.

The passage by Congress of the West Virginia bill was an application, and in some ways a vindication, of President Lincoln's constitutional theory of secession and federal power. But it was not an application Lincoln necessarily desired. Various commentators have noted evidence of Lincoln's reticence about the West Virginia statehood movement.<sup>108</sup>

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102. *Id.* at 57.

103. *Id.* Representative Olin took the "loyal population" point to its logical extreme, arguing that "so long as a loyal man could be found in the State of Virginia it was the duty of the General Government to throw around him the shield of its protection, and secure every right under the Constitution of the United States." *Id.* at 45.

104. 48 U.S. 1 (1849); see also *supra* notes 67-68 and accompanying text.

105. CONG. GLOBE, 37th Cong., 3d Sess. 57 (1862).

106. *Id.* Bingham's analysis seems a straightforward application of Madison's explication of Article IV, Section 4 in *The Federalist No. 43*. See *supra* note 99 and accompanying text. Article IV, Section 4 not only provides a national guarantee of republican state government, but also obliges the national government to suppress local insurrections at the request of the state government. The power to send in forces to suppress rebellions necessarily implies the power to decide which state government is the lawful one.

107. RANDALL, *supra* note 7, at 456 (collecting Congressional Globe citations).

108. See, e.g., *id.* ("The thought of disrupting the Old Dominion caused him much distress . . ."); *id.* at 460 (footnote omitted) ("There is evidence that President Lincoln disapproved of the disruption of the State . . .") (noting evidence from references in the diaries of Senator Browning of Illinois and Secretary of the Navy Gideon Welles); DONALD, *supra* note 28, at 301 (stating that Lincoln "looked with considerable skepticism on the movement for statehood for West Virginia").

Lincoln was intensely pragmatic on such policy matters, however. He solicited his cabinet for their opinions in writing on the subject, including the constitutional questions involved, and also produced an opinion of his own for the deliberations.<sup>109</sup>

The cabinet split three-to-three, with opinions mirroring the various positions in Congress. Cabinet conservatives (Attorney General Edward Bates, Secretary of the Navy Gideon Welles, and Postmaster-General Montgomery Blair) were unwilling to swallow the legal fiction of Virginia's consent. The moderate-to-radical wing of the cabinet (Secretary of State William H. Seward, Secretary of the Treasury Salmon P. Chase, and Secretary of War Edwin M. Stanton) either offered constitutional arguments for the validity of such consent or (in the case of Stanton) simply dismissed any constitutional objection.

Attorney General Bates had been an early opponent of West Virginia statehood, providing an opinion letter to one of Kanawha's constitutional convention delegates in August of 1861, in which he described the West Virginia statehood movement as "an original, independent act of Revolution."<sup>110</sup> In 1862, as the West Virginia statehood bill proceeded through Congress, it was Bates that suggested to Lincoln that he ask for the opinions of each cabinet member.<sup>111</sup> Bates's own opinion was adamant against the validity of the process of obtaining Virginia's "consent" through the Wheeling government, which he regarded as a sham on two counts. First, the Wheeling legislature did not "represent and govern more than a small fraction of the State—perhaps a fourth part."<sup>112</sup> Second, and perhaps even more importantly,

[t]he Legislature which pretends to give the consent of Virginia to her own dismemberment is (as I am credibly informed) composed chiefly if not entirely of men who represent those forty-eight counties which constitute the new State of West Virginia. The act of consent is less in the nature of a law than of a contract. It is a grant of power, an agreement to be divided. And who made the agreement, and with whom? The representatives of the forty-eight counties with themselves! Is that fair dealing? Is that honest legislation? Is that a legitimate exercise of a constitutional power by the Legislature of Virginia? It seems to me that it is a mere

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109. RANDALL, *supra* note 7, at 456-57.

110. GRANVILLE PARKER, *THE FORMATION OF THE STATE OF WEST VIRGINIA & OTHER INCIDENTS OF THE LATE CIVIL WAR* 48-50 (1875).

111. RANDALL, *supra* note 7, at 457 (collecting original sources).

112. ABRAHAM LINCOLN, *COMPLETE WORKS: COMPRISING HIS SPEECHES, LETTERS, STATE PAPERS, AND MISCELLANEOUS WRITINGS* 309 (John G. Nicolay & John Hay eds., 1894) [hereinafter Nicolay & Hay]. Nicolay & Hay usefully collects all the cabinet opinions.

abuse, nothing less than attempted secession, hardly veiled under the flimsy forms of law.<sup>113</sup>

Secretary Welles was more restrained, doubting but not condemning the Wheeling government. While the Wheeling government might be recognized out of wartime necessity, it was not really the government of Virginia. "[W]e cannot close our eyes to the fact that the fragment of the State which, in the revolutionary tumult, has instituted the new organization," was but a "loyal fragment."<sup>114</sup> When such a remnant "proceeds . . . to erect a new State within the jurisdiction of the State of Virginia, the question arises whether this proceeding is regular, right, and, in honest faith, conformable to" Article IV of the Constitution.<sup>115</sup>

Postmaster-General Blair drew an interesting distinction between the legitimacy of "Virginia" being represented in Congress and the idea of a new State of West Virginia. The "circumstances of the case" excused the "irregularity" in the former, but not the latter:

But whilst it was just to the people of Western Virginia, whose country was not overrun by the rebel armies, to allow this representation, and for this purpose, and for the purposes of local government to recognize the State government instituted by them, it would be very unjust to the loyal people in the greater part of the State . . . to permit the dismemberment of their State without their consent.<sup>116</sup>

Thus, Blair's singular objection appears to have been not that Wheeling was unrepresentative of the whole State, but that the loyal people of eastern Virginia were not adequately represented in the Wheeling legislature.

Seward and Chase, in contrast to the conservative wing of the cabinet, fully embraced the legal fiction of the Wheeling regime as following logically from Lincoln's central legal fiction—inuch as Lincoln had intimated in his July 4, 1861 address to Congress. Because the United States could not recognize secession, it must recognize the loyal remnant as the legitimate government of Virginia. Thus, Secretary of State Seward reasoned, the Wheeling government was "incontestably the State of Virginia."<sup>117</sup>

113. *Id.* As Randall notes at some length, Bates's privately expressed opinions after the fact were even more vitriolic, referring to statehood as the work of "a few reckless Radicals, who manage those helpless puppets (the *straw* Governor, & Legislature of Virginia) as a gamester manages his marked cards," and the West Virginia bill as filled with "the most glaring blunders." RANDALL, *supra* note 7, at 459, 460 (quoting Diary of Edward Bates, Dec. 15, 1864, Oct. 12, 1865).

114. Nicolay & Hay, *supra* note 112, at 304-06.

115. *Id.* Randall notes that Welles was more direct in his diary: "The requirements of the Constitution are not complied with, as they in good faith should be, by Virginia, by the proposed new State, nor by the United States." RANDALL, *supra* note 7, at 458 (quoting Diary of Gideon Welles, Dec. 4, 1862).

116. Nicolay & Hay, *supra* note 112, at 308.

117. *Id.* at 300-01. Note how Seward's formulation echoes Lincoln's July 4, 1861 Message to Congress on this point: "Those loyal citizens, this government is bound to recognize, and protect, as being Virginia." 2 LINCOLN, SPEECHES & WRITINGS, *supra* note 33, at 251.

Secretary of the Treasury Chase's opinion was to similar effect. Chase drew a sharp distinction, like that which John Bingham drew in the House debates, between the population of a State and its loyal population. In times of insurrection, the loyalists "must be taken to constitute the State" as far as the national government was concerned:

It would have been as absurd as it would have been impolitic to deny to the large loyal population of Virginia the powers of a State government, because men, whom they had clothed with executive or legislative or judicial powers, had betrayed their trusts and joined in rebellion against their country. It does not admit of doubt, therefore, as it seems to me, that the Legislature which gave its consent to the formation and erection of the State of West Virginia was the true and only lawful Legislature of the State of Virginia. . . . It was the only Legislature of the State known to the Union. If its consent was not valid, no consent could be. If its consent was not valid, the Constitution, as to the people of West Virginia, has been so suspended by the rebellion that a most important right under it is utterly lost.<sup>118</sup>

This was a nifty argument. The alternative to recognition of the Wheeling Legislature's validity was denial of loyal Virginians' rights to form a State government—a huge, unacceptable concession to secession.

Secretary of War Stanton's opinion can be discussed briefly. He literally saw no constitutional problem at all. "The Constitution expressly authorizes a new State to be formed or erected within the jurisdiction of another State," he wrote. "I have been unable to perceive any point on which the act of Congress conflicts with the Constitution."<sup>119</sup>

President Lincoln reportedly quipped, in response to this even division of opinion, that "[a] President is as well off without a Cabinet as with one."<sup>120</sup> But Lincoln was never dependent on the consensus of his cabinet; he drew on advice where he found it sound, and in any event had formulated his own written opinion, which he reportedly read aloud to the cabinet.<sup>121</sup> The opinion, in its legal analysis, focused almost exclusively on the question of the status of the Wheeling government as the legitimate government authorized to act on behalf of Virginia, and not at all on the fact that the same group of men had granted consent to themselves (Bates's chief objection). Lincoln's opinion is a classic of clear thinking and clear presentation, and so we reproduce it in full, for we cannot improve on it:

The consent of the Legislature of Virginia is constitutionally necessary to the bill for the admission of West-Virginia becoming a law. A body claiming to be such Legislature has given it's [sic]

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118. Nicolay & Hay, *supra* note 112, at 301-03.

119. *Id.* at 303-04.

120. LEWIS, *supra* note 13, at 391.

121. RANDALL, *supra* note 7, at 457.



consent. We can not well deny that it is such, unless we do so upon the outside knowledge that the body was chosen at elections, in which a majority of the qualified voters of Virginia did not participate. But it is a universal practice in the popular elections in all these states, to give no legal consideration whatever to those who do not choose to vote, as against the effect of the votes of those, who do choose to vote. Hence it is not the qualified voters, but the qualified voters, *who choose to vote*, that constitute the political power of the state. Much less than to non-voters, should any consideration be given to those who did not vote, *in this case*: because it is also matter [sic] of outside knowledge, that they were not merely neglectful of their rights under, and duty to, this government, but were also engaged in open rebellion against it. Doubtless among those non-voters were some Union men whose voices were smothered by the more numerous secessionists; but we know too little of their number to assign them any appreciable value. Can this government stand, if it indulges constitutional constructions by which men in open rebellion against it, are to be accounted, man for man, the equals of those who maintain their loyalty to it? Are they to be accounted even better citizens, and more worthy of consideration, than those who merely neglect to vote? If so, their treason against the constitution, enhances their constitutional value! Without braving these absurd conclusions, we can not deny that the body which consents to the admission of West-Virginia, is the Legislature of Virginia. I do not think the plural form of the words "Legislatures" and "States," in the phrase of the constitution "without the consent of the Legislatures of the States concerned &c" has any reference to the *new* State concerned. That plural form sprang from the contemplation of two or more old States contributing to form a new one. The idea that the new state was in danger of being admitted without its own consent, was not provided against, because it was not thought of, as I conceive. It is said, the devil takes care of his own. Much more should a good spirit—the spirit of the Constitution and the Union—take care of it's [sic] own. I think it can not do less, and live.

But is the admission into the Union, of West-Virginia, expedient. This, in my general view, is more a question for Congress, than for the Executive. Still I do not evade it. More than on anything else, it depends on whether the admission or rejection of the new state would under all the circumstances tend the more strongly to the restoration of the national authority throughout the Union. That which helps most in this direction is the most expedient at this time. Doubtless those in remaining Virginia would return to the Union, so to speak, less reluctantly without the division of the old state than with it; but I think we could not save as much in this quarter by rejecting the new state, as we should lose by it in West-Virginia. We can scarcely dispense with the aid of

West-Virginia in this struggle; much less can we afford to have her against us, in congress and in the field. Her brave and good men regard her admission into the Union as a matter of life and death. They have been true to the Union under very severe trials. We have so acted as to justify their hopes; and we can not fully retain their confidence, and co-operation, if we seem to break faith with them. In fact, they could not do so much for us, if they would.

Again, the admission of the new state, turns that much slave soil to free; and thus, is a certain, and irrevocable encroachment upon the cause of the rebellion.

The division of a State is dreaded as a precedent. But a measure made expedient by a war, is no precedent for times of peace. It is said that the admission of West-Virginia, is secession, and tolerated only because it is our secession. Well, if we call it by that name, there is still difference enough between secession against the constitution, and secession in favor of the constitution.

I believe the admission of West-Virginia into the Union is expedient.<sup>122</sup>

Lincoln's opinion on West Virginia is, we think, a succinct masterpiece of legal and practical analysis. The first, long paragraph (the opinion was not written for publication) makes a powerful legal argument, building on arguments by Bingham, Seward, and Chase, and on Lincoln's own constitutional views concerning secession. The relevant voters of a State are the loyal voters of the State. Otherwise, rebellion confers a political veto power of the disloyal over the loyal. Lincoln's reasoning is formalistic, almost Euclidean. The Wheeling legislature "is the Legislature of Virginia," or else absurd, unacceptable consequences follow. Lincoln then offers an interesting reading of the plural form of the "consent proviso" of Article IV, Section 3—a point we take up below.<sup>123</sup> He concludes that the only required consent—that of Virginia—was lawfully given.

The second and third paragraphs speak to the policy question of admitting West Virginia, which is less our particular concern here. But it is worth noting how Lincoln responds to concerns, like Representative Crittenden's, that partition might make the rest of Virginia less enthusiastic about returning to the Union, by noting the primacy of protecting the justifiable expectations of the loyal part of the State. It is also worth noting Lincoln's emphasis, in a separate short paragraph, on how the admission of West Virginia, by turning so much slave soil to free, rolls back, to that extent, the successes of secession.

The fourth, final substantive paragraph addresses two quasi-legal concerns: whether admission of West Virginia would constitute an

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122. Abraham Lincoln, *Opinion on Admission of West Virginia into the Union*, (Dec. 1862), reprinted in 2 LINCOLN, SPEECHES & WRITINGS, *supra* note 33, at 421-23.

123. See text accompanying *infra* notes 229-30, 371-72.

undesirable constitutional precedent; and whether admission of a break-away State would be hypocritical acceptance of "secession." Lincoln's answers—that war measures are not necessarily precedent for peacetime and that West Virginia "seceded" "in favor of the constitution"—are not fully satisfying, but they do make the necessary point: West Virginia may lawfully be admitted; and doing so does not mean that similar arrangements need follow in dissimilar circumstances. West Virginia's "secession in favor of the constitution" is essentially a short form of Lincoln's larger constitutional theory: It is not possible for a State to leave the Union. Secession is illegality, and (so-called) secession from such illegality is lawful.

That, in brief, is the argument for the lawfulness of the Wheeling regime, and thus for the validity of its consent to the creation of West Virginia within Virginia's borders. The legal fiction of Virginia's consent to the creation of West Virginia follows logically as a sound conclusion from the sound premises that secession is unlawful and that the federal government has the power to recognize a lawful, alternative State government where rebellion has displaced the lawful, loyal, republican regime of a State with a traitorous government.

#### *D. Playing West Virginia Forward: Rehearsal for Reconstruction*

The West Virginia story offers potential lessons for other constitutional issues that have bedeviled the law for a century and a half. If the Lincoln-Bingham-Seward-Chase argument for the constitutionality of West Virginia is accepted—that secession is unconstitutional; that States cannot as a matter of law leave the Union; that States purporting to do so lack valid republican governments; that the Guarantee Clause empowers the federal government to intervene and to recognize alternative, loyal republican governments constituted by loyal citizens; that the State governments so recognized lawfully may act on behalf of a State, giving the State's assent to matters on which the Constitution requires such assent by a State's legislature; and that Congress has a separate power under the Guarantee Clause to determine whether or not to seat representatives and senators from a State that had purported to secede—then we have gone three-quarters of the way to understanding the lawfulness (in general) of Republican Reconstruction and the adoption of the Thirteenth and Fourteenth Amendments. These points were much in dispute at the time of the events involved, and recently have been brought back to the forefront of constitutional discourse by Professor Bruce Ackerman.<sup>124</sup>

This is neither the occasion for a full-blown treatment of Reconstruction, nor for a full-scale critique of Professor Ackerman's unique reading of these events and imaginative constitutional theories

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124. See sources cited in *supra* note 2; ACKERMAN, *TRANSFORMATIONS*, *supra* note 2, at 99-119.

predicated on that reading. It is sufficient, for now, to mark out the lines of argument and leave to another day the full implications of the formalist defense of West Virginia for these other issues.

The central puzzle framed by Professor Ackerman also has to do with the legal status of the so-called seceded States, as applied to the power of those States to ratify proposed constitutional amendments. Ackerman's thesis, to simplify drastically, is that the adoption of the Fourteenth Amendment cannot be justified in terms of the formal requirements of Article V, since the formerly seceded States were excluded from representation in the ("rump") Congress proposing it, even though those States had been counted as being in the Union and their governments' ratifications counted for purposes of adoption of the Thirteenth Amendment.<sup>125</sup> Still more, Congress figuratively (and, in some respects, the administration literally) held a gun to the head of the South, refusing to accept formerly accepted State governments as legitimate so long as their legislatures refused to ratify the Fourteenth Amendment. Congress essentially conditioned formerly "seceded" States' congressional representation on their State legislatures' ratifications of the Fourteenth Amendment.<sup>126</sup> This presents, for Ackerman, a huge dilemma:

The forensic challenge is to elaborate an Argument X that will justify the Republicans' exclusion of the Southern Senators and Congressmen [from the Thirty-ninth Congress that proposed the Fourteenth Amendment] *without impugning the status of the governments from which they came* [which had just recently ratified the Thirteenth Amendment]. If the hypertextualist can

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125. Professor Ackerman extrapolates from this conclusion, and other historical instances that he maintains conform to a similar pattern, an elaborate theory of extratextual constitutional amendment, occurring at unique "constitutional moments" in our nation's history, that have a status as "higher law" equivalent to that of a formal textual amendment of the Constitution. See generally sources cited in *supra* note 2; see also ACKERMAN, FOUNDATIONS, *supra* note 2, at 266-94 (summarizing extratextual theory of "higher lawmaking"); ACKERMAN, TRANSFORMATIONS, *supra* note 2, at 279-382 (discussing extratextual New Deal "amendments"). For a sympathetic and accessible treatment of Ackerman's project, see L.A. Powe, Jr., *Ackermania or Uncomfortable Truths?*, 15 CONST. COMMENT. 547 (1998) (reviewing Ackerman's second book, *Transformations*, ACKERMAN, TRANSFORMATIONS, *supra* note 2). A discussion of Ackerman's positive theory of constitutional law is beyond the scope of this Article. We do, however, address (in the text) the serious tension between Ackerman's point of departure for his general theory—the supposed inability to explain the Reconstruction amendments in terms of traditional, formal constitutional argument—and Lincoln's theory of the Constitution, as reflected in the West Virginia experience. For an account of the issues concerning the counting of state ratifications of the Fourteenth Amendment, see Paulsen, *A General Theory of Article V*, *supra* note 68, at 709-12.

126. See ACKERMAN, TRANSFORMATIONS, *supra* note 2, at 110-13; see also Ferdinand F. Fernandez, *The Constitutionality of the Fourteenth Amendment*, 39 S. CAL. L. REV. 378 (1966); Joseph L. Call, *The Fourteenth Amendment & Its Skeptical Background*, 13 BAYLOR L. REV. 1 (1961); Pinckney G. McElwee, *The 14th Amendment to the Constitution of the United States and the Threat that It Poses to Our Democratic Government*, 11 S.C.L.Q. 484 (1958); Walter J. Suthon, Jr., *The Dubious Origin of the Fourteenth Amendment*, 28 TUL. L. REV. 22 (1953); Note, *Was the Fourteenth Amendment Adopted?*, 30 AMER. L. REV. 761 (1896); Note, *The Fourteenth Amendment Was Adopted*, 30 AMER. L. REV. 894 (1896).

execute this maneuver successfully, he might have his cake and eat it too. Thanks to X, Congress would be within its rights to proceed without the Southerners and propose the Fourteenth Amendment. But since X does not discredit the Southern governments, the textualist might successfully explain why they remained constitutionally empowered to ratify the Thirteenth Amendment.

Easier said than done: Are there any X's that will serve?<sup>127</sup>

The answer is "Yes," at least potentially, if Lincoln's constitutional theory of the unlawfulness of secession, and the consequent status of State governments in the so-called seceded States, is valid and if the West Virginia experience is a valid application of it. The central constitutional question that would come to frame the debate between Radical Republicans and President Andrew Johnson over Reconstruction after the Civil War was the legal status of the (so-called) seceded States, once defeated by the Union armies—essentially the same question Lincoln faced at the outbreak of the war. If anything, the practical consequences attending the question of the legal status of southern States were even greater at the end of the war than at the beginning. Were the States that had formed the Confederacy now conquered provinces, having committed "state suicide" and therefore now subject to the plenary legislative power of Congress pursuant to the Territory Clause of Article IV, the United States having reacquired such unincorporated "territory" as the spoils of military victory (as radicals like Thaddeus Stevens and Charles Sumner believed)? Or were they States as they always had been, but with governments that had temporarily come under the control of disloyal elements, subject to being "restored" (by the executive) to their status within the Union as self-governing States once the insurrection had been suppressed (by the executive) and lawful republican State governments installed in power (by the executive), with Congress left to a secondary role in Reconstruction, except as to matters of a State's representation in Congress? The latter was the theory of Reconstruction that flowed from Lincoln's constitutional theory and that Lincoln pursued, artfully and flexibly, and that President Andrew Johnson pursued, witlessly and woodenly, after Lincoln's death.

Under Lincoln's theory, the Radical Republicans' constitutional theory of Reconstruction was simply wrong. The arguments are exactly the same as those with respect to West Virginia, and were all rehearsed during the discussion of West Virginia statehood: To accept the Stevens-Sumner "Conquered Territories" theory of plenary congressional power would require according legal effect—operative validity, of a sort—to secession; it implicitly would concede the power of a State's act of secession to transform the State's legal relationship with the United States of America into that of a foreign quasi-nation, one that, once vanquished, becomes

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127. ACKERMAN, *TRANSFORMATIONS*, *supra* note 2, at 103-04.

conquered United States property.<sup>128</sup> In contrast, it was exactly the legal inoperativeness of secession as a matter of the Constitution that was the foundation of Lincoln's constitutional justification for refusing simply to let the South go. The act of secession, because invalid, must be for all purposes a legal nullity. To be sure, one could maintain that secession was illegitimate as a matter of the Constitution but that, once adopted by the (former) State, it does transform the constitutional status of the State. But if that is true, it undermines the central premise supporting the North's refusal to accept secession, and virtually every policy pursued by Abraham Lincoln in the prosecution of the Civil War.

Professor Ackerman's thesis seems implicitly to embrace the Radical Republicans' view in this regard, against that of Lincoln. What gives the Thirteenth-Amendment-ratification-but-Thirty-ninth-Congress-exclusion dilemma its persuasive punch is the idea that if a State is counted as a legitimate State at all, it must be counted as legitimate for all purposes, and thus should not have been excluded from the "rump" Thirty-ninth Congress that proposed the Fourteenth Amendment. As noted above, however, Lincoln's position was that executive reconstruction and congressional representation were separate decisions.<sup>129</sup> To be sure, they would often go hand-in-hand, but Lincoln was careful never to claim, and explicitly denied, that they were necessarily linked.<sup>130</sup> The existence, within a State, of an operative State government so far as the Executive is concerned, does not control Congress's judgment about whether exclusion from congressional representation is a necessary measure to "Guarantee" a republican form of government to that State. While one can question Congress's exercise of its exclusion power, the Guarantee Clause is sufficiently ambiguous to make different executive and congressional judgments, for different purposes, constitutionally legitimate.<sup>131</sup> One can, of course, also defend such a congressional judgment as eminently sound on the ground that State regimes that excluded from the franchise a large class of free (male) citizens were not (any longer) "republican" in form, for purposes of being entitled to have Congress judge their elections and returns as legitimate. The fact that Congress itself, as a consequence, did not contain representatives from all the States of the Union is, on this view,

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128. See *supra* notes 87-92 and accompanying text (discussing congressional debates over this theory with respect to the West Virginia statehood bill).

129. See *supra* notes 64-67 and accompanying text.

130. See text accompanying *supra* notes 65-66.

131. As noted earlier, Professor Ackerman may also be assuming that Congress is vested with exclusive constitutional power to decide whether a constitutional amendment has been validly ratified, which would make the decision to accept state ratifications of the Thirteenth Amendment and then to refuse to accept those States' congressional delegations appear much more inconsistent. See *supra* note 68. The Supreme Court has indeed said that Congress possesses such exclusive power over the ratification process, but we think that such a conclusion is utter nonsense (as one of us has argued at length). See Paulsen, *A General Theory of Article V*, *supra* note 68, at 706-21.

merely a reflection of the Guarantee Clause power.<sup>132</sup> It is a "bad fact," perhaps, but it is formally valid. Similarly, the "rump" Thirty-ninth Congress exercising the legislative power of the United States is no different in principle from the "rump" Wheeling Legislature, in fact representing only about one-fourth of the counties and one-fourth of the populace, exercising the legislative power of Virginia. In each case, the factual situation and the operation of other constitutional principles may have created a formally legitimate but factually irregular situation. But the fact that the arrangement is an anomaly does not establish its unconstitutionality.

Even more clearly, the actions of the federal government in muscling new southern State governments into place as part of Reconstruction, even after those States had agreed to ratify the Thirteenth Amendment, is not a problem at all if one accepts the sweeping Guarantee Clause power of the United States government to determine what government constitutes the legitimate, lawful, republican government of a State, a reading of the Guarantee Clause fairly attributable to James Madison in *The Federalist No. 43* and embraced by the Supreme Court in *Luther v. Borden*<sup>133</sup> in 1849. The West Virginia lesson is that a loyal minority may constitute the legitimate government of a State and that the elected, disloyal majority may not; and that it is, ultimately, in the power of Congress (and the President) to make this judgment, under the Guarantee Clause power of Article IV. Again, one might (or might not) disagree with Congress's judgment that the southern governments needed to be replaced, or that the former regimes were in some relevant sense unrepresentative. But if the proper construction of the Guarantee Clause truly grants the national government such broad discretion—the premise of *Luther* and of Lincoln's recognition of the Wheeling government as the legitimate government of wartime Virginia—then Congress's actions are constitutionally allowable, even if highly debatable on grounds of policy and good judgment.

There is much more that could be said of the relevance of the West Virginia experience to the legal issues of Reconstruction and amendment ratification. But the sufficient point is simply this: The constitutionality of West Virginia, on formalist grounds, works; and the same "legal fictions" that operated in the creation of West Virginia might fairly be applied to justify, on purely formalist grounds, the constitutional course of the nation after the Civil War, without the need to resort to extravagant theories of extratextual constitutional amendment. As Lincoln recognized, a sound legal fiction may be more faithful to the Constitution, and to the rule of

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132. As Professor John Harrison has observed, the Thirty-eighth and Thirty-ninth Congresses retained constitutional quorums even with the exclusion of southern representatives. See Harrison, *supra* note 26, at 378 n.11. We discuss Professor Harrison's thesis presently. See *infra* note 134.

133. 48 U.S. 1 (1849).

law, then unsound warping of the Constitution to accommodate unruly, unacceptable facts—like treason against the Constitution.<sup>134</sup>

### E. *Reconstructing West Virginia*

The story of West Virginia is the story of a victorious legal fiction. Actually, it is the story of a series of successful legal fictions and formalisms, each of which appears (to us at least) to be eminently sound: The United States government has power to determine what government constitutes the lawful government of a State, under the Guarantee Clause of Article IV of the Constitution. A State may not lawfully secede from the Union under the structure and nature of the Constitution; it is not authorized by any provision of the Constitution; it is not a reserved power of States; and it is not implicit in the structure, history, or nature of the Constitution. It follows that a purportedly secessionist State government

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134. For further exploration of the formal legal validity of the Reconstruction Amendments, we commend Professor John Harrison's outstanding recent article, which in general is quite congenial to the formalist approach we believe justifies the validity of the West Virginia arrangement (save for the semicolon problem, which we discuss below). See generally Harrison, *supra* note 26. For pertinent discussion of the Virginia/West Virginia experience, see *id.* at 381-85, 447-49.

Professor Harrison's careful historical research and patient explanation of Reconstruction legal theories supplies a devastating critique of the historical and analytic foundations of Professor Ackerman's extratextual amendment thesis, as applied to Reconstruction generally. Taking those theories seriously on their own terms, Harrison demonstrates that while they are not without their problems, they provide a serious basis for affirming the constitutional propriety of the process by which the Thirteenth and Fourteenth Amendments were adopted.

Professor Harrison concludes that the Reconstruction amendments were valid on either or both of two theories. First, the constitutional power of the government of the United States under the Guarantee Clause of Article IV (and more specifically, as interpreted by the Supreme Court in *Luther v. Borden*, the power of the political branches of the national government) to determine what government constitutes the lawful, republican, loyal government of a State (that is, a state government maintaining a proper relation to the Union) provides a basis for the validity of both the first-round (presidential) reconstruction governments that ratified the Thirteenth Amendment and the second-round (congressional) reconstruction governments that ratified the Fourteenth Amendment. *Id.* at 414-18, 422-29. Professor Harrison is sensitive to the factual problems confronting this theory and treats the question as a close one, but we find his analysis quite convincing on the points it addresses.

Second, Professor Harrison defends the validity of the Reconstruction Amendments on the theory that *de facto* regimes can possess authority to take legally binding acts. Professor Harrison finds this to be a complete justification for the lawfulness of the ratifications of the two different sets of reconstructed state governments that ratified the Thirteenth and Fourteenth Amendments, respectively. We find this argument somewhat more troubling, though still powerful. The difficulty lies in the possible implication that a secession government similarly might be thought a "*de facto* government" capable of taking legally binding acts, an implication that would be contrary to Lincoln's theory of the entire invalidity of secession and that would undermine the case for the formal validity of "Virginia's" consent to the creation of West Virginia as we have defended it. Professor Harrison is careful to note this distinction, setting forth the classic republican position that rebel governments' actions in support of the rebellion were in general invalid but otherwise could have legal effect. *Id.* at 442-44. Though there is no necessary contradiction between Harrison's approach and our own, we think that the "*de facto* government" theory of the validity of the Reconstruction amendments only works if explicitly wedded to the Guarantee Clause power of the national government to assure that any *de facto* government also be one that is reliably loyal to the U.S. Constitution (a variation on Professor Harrison's first argument).



cannot be the lawful government of a State, under the Constitution, and that the United States may recognize the validity of an alternative, lawful State government, even if that government does not in fact possess effective governing power within the State because of the circumstances of the rebellion. The *de jure* government is still the *de jure* government, even if it might not be the *de facto* government of a State. If such a duly recognized and lawful alternative State government may be treated, in law, as the government of a State, that government possesses the constitutional authority of the State to give or withhold the State's consent to the creation of a new, separate State within the borders of the mother State.

That is exactly what happened with West Virginia. The circumstance—one cannot fairly say the happenstance—that those who acted to give consent, on behalf of Virginia, to the creation of West Virginia, were by and large the same folk who would become the government of West Virginia, should not change the analysis. The lawful government of the parent State gave lawful consent. The constitutional convention that framed the government for the proposed State of West Virginia was also legitimate, Congress applying its judgment to this question the same as with the question of any proposed statehood admission act. In many ways the facts were molded, adjusted, and perhaps even twisted to fit within the formal legal constructs for creation of a new State under the Constitution. But in the end, the formalism worked. The Constitution's formal requirements for creation of a new State within an existing one were all met, and that is all that the Constitution requires. If such a result is odd, it is because the Constitution permits the oddity. If such a formalist reading could give rise to mischief—North Dakota severing itself into twenty-five additional States and acquiring a third of the nation's representation in the Senate—the check on the mischief is the necessity of Congress's approval. Congress, in the end, judged the creation of West Virginia to be neither so odd nor so mischievous, under the circumstances, as to refuse to give its consent to the creation of the new State.

If there is a problem with the constitutional validity of West Virginia, then, it does not lie in noncompliance with the requirement of formal consent by the lawful government of Virginia. This supposed "hard" aspect of West Virginia's constitutionality is, we think, actually quite an easy issue, if one first recognizes the validity of strict legal formalism—as many of the constitutional actors at the time did. Rather, if there is a constitutional problem with West Virginia, it lies instead with the too-quick assumption—an assumption made by just about all of the players in the West Virginia saga—that new States may be carved out of existing ones at all, consent or not. The framers of the alleged State of West Virginia were not too formalist; rather, they may not have been formalist enough, in failing to pay strict attention to the true literal commands of Article IV, Section 3,

and in assuming, too casually, that what apparently had been done before with other breakaway States (Kentucky, Maine, and perhaps Vermont) was not unconstitutional.

This is the semicolon problem. We think that the real issue on which the constitutional validity of the State of West Virginia turns is the proper textual reading of Article IV, Section 3's little "dot" over what would otherwise be a comma—an issue that turns out to teach as many lessons about textualism as the issue of Virginia's consent has to teach about formalism. Does the constitutionality of the State of West Virginia really turn on an extremely fine-point ink-blot that turns a comma into a semicolon? To that earthshaking (or at least State-shaking) question of constitutional law we now turn.

## II

### TEXTUALISM AND STATE CREATION: THE MEANING OF ARTICLE IV, SECTION 3

We begin the textual question of the meaning of Article IV, Section 3 with—what else?—the words of the provision itself:

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>135</sup>

This text is subtly ambiguous. Its "second clause" 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 States concerned as well as of the Congress. The interpretive stakes are very high: if the first reading is adopted, then West Virginia is plainly unconstitutional, not to mention Kentucky, Maine, and possibly Vermont.<sup>136</sup>

What is the meaning of the second semicolon of Article IV, Section 3? Is it more like a period or is it more like a comma? If this semicolon is more like a period than a comma, the second clause of Article IV, Section

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135. U.S. CONST. art. IV, § 3, cl. 1.

136. We discuss the constitutionality of Kentucky, Maine, and Vermont in Part II.B.3 *infra*. We do not discuss the constitutionality of Maine at any depth. Whether Maine is constitutional depends on whether Kentucky is constitutional (both States present identical legal questions). Moreover, Maine was admitted into the Union several decades after the Founding, in contrast to Kentucky which was admitted into the Union just a few years after the Founding, and we prefer to investigate the earlier precedent in our inquiry into the original public meaning of Article IV, Section 3. See *infra* note 234 and accompanying text.

3 would seem to be a flat prohibition on new breakaway States.<sup>137</sup> This is the problem of punctuation. Moreover, even if this semicolon is more like a comma than a period, West Virginia and the other new breakaway States may still be unconstitutional—it is not clear that the consent proviso “without the Consent of the Legislature of the States concerned as well as of the Congress,” which appears at the end of 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. To dedicated textualists, the twin problems of punctuation and ambiguous modification are very fine points of constitutional debate.<sup>138</sup>

Article IV, Section 3 should lend itself to one best reading. As constitutionalists who wish to avoid “free-form”<sup>139</sup> methods of constitutional interpretation, we feel duty-bound to go where the analysis leads. In this Part, we take up this surprisingly complicated task. We set forth three “interpretivist” arguments to determine the best reading of Article IV, Section 3. The textual argument tackles the twin problems of punctuation and ambiguous modification. The historical argument explores the standard historical sources at the Founding and the early precedents of Vermont, Kentucky, and Tennessee. Finally, the argument from secret drafting

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137. Three scholars have noticed this ambiguity. See McGreal, *supra* note 5, at 2395 (“The interpretive question [of Article IV, Section 3] is whether the consent provision leaps back across the second semi-colon to allow division of a state with proper consent.”); Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 72-74 (1997) (Article IV, Section 3 “anticipates” self-partitioning of large States with requisite consents but the second semicolon may be read “to indicate that this clause constitutes a per se prohibition against the partitioning of existing states except through the amendment or repeal of this clause”). Two other also scholars may have noticed this ambiguity. See Carsten Thomas Ebenroth & Matthew James Kemner, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards*, 17 U. PA. J. INT’L ECON. L. 753, 786 & n.186 (1996) (stating that the constitutionality of West Virginia is “legally suspect under U.S. law” by reference to Article IV, Section 3, but not indicating whether Article IV, Section 3 is a flat prohibition on new breakaway States or whether West Virginia did not obtain requisite consents).

138. There is a third problem that deserves brief mention: the meaning of the word “Jurisdiction” in the second clause is ambiguous. On one reading, the word refers to the territory of a State—as in “no new State shall be formed or erected within the territory of any other State.” On another reading, the word refers to the power of another State “to say what the law is,” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), as in “no new State shall be formed or erected under the control of any other State.” For additional discussion, see *infra* note 232.

The hyper-literalist might also argue that the word “within” in the phrase “within the Jurisdiction” means that the second clause only relates to the formation or erection of new States that share all borders with the parent State. On this reading, the new State of Pittsburgh would be “within” Pennsylvania, but the new State of San Francisco, the “City by the Bay,” would not be “within” California. We reject this “doughnut-hole” literalism for good reason.

139. See generally Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (criticizing the “free-form” method of constitutional interpretation as an assault on the coherent and constrained character of the legal enterprise and calling for a method that is attentive to the “stubborn truths” of text, history, and structure).

history mines the legislative history of Article IV, Section 3 at the Philadelphia Convention of 1787.

### A. *The Textual Argument*

#### I. *The Problem of Punctuation*

Here is a constitutional fact: the original Constitution contains, from the Preamble to Article VII, nearly 4,400 words, and approximately 375 commas, 140 periods, sixty-five semicolons, ten colons, and ten em dashes.<sup>140</sup> Words have meaning but so do punctuation marks. It seems

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140. We counted them. You can look it up. (But if you do so, you should round to the nearest ten, as we generally did). The exact results very much depend on which Constitution we employ: the parchment of September 17, 1787 (the "engrossed copy"), or the parchment of September 28, 1787 (the "printed copy"). The engrossed copy, as its name suggests, is the Constitution signed by the Framers of the Philadelphia Convention of 1787, the one on display at the National Archives in Washington, D.C., and the one in use by nearly all of us today. The printed copy is the Constitution expressly included in some state ratification instruments and the one authorized as the "correct" copy of the Constitution by one of the first acts of the First Congress. For an insightful narrative of these two copies of the Constitution, see Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 281-85 (1987); and THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 83rd Cong., 2d Sess., Senate Doc. No. 126 (1954), at 16-34.

The differences between the engrossed copy and the printed copy are significant when it comes to punctuation and capitalization, and to a lesser extent, the actual text of the Constitution. For example, the engrossed copy of the Constitution uses the label "Section" to introduce sections of articles of the Constitution, whereas the printed copy uses the label "Sect." The printed copy of the Constitution also contains at least one obvious printer's error. See U.S. CONST. art. III, § 1 ("The judges, both of the supreme court and inferior court[s], shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.").

But thankfully, for our purposes, the copies are not different with respect to the twin problems of punctuation and ambiguous modification in Article IV, Section 3, Clause 1. The only differences in Article IV, Section 3, Clause 1 are due to capitalization. The engrossed copy 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.

And the printed copy 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.

In the textual argument that follows, see Part II.A *infra*, we use the engrossed copy of the Constitution (the one in use by nearly all of us today). Another important disclosure: The interested reader may notice some discrepancies with his or her own copy of the Constitution. It should be noted that the vast majority of the copies of the Constitution (which are of the engrossed copy of the Constitution)—whether they be found in pocket guides or in constitutional law casebooks and treatises—are incorrect copies of the engrossed copy of the Constitution (though, the widely available pocket guide to the Constitution published by the West Group comes very close). Rest assured, we have used the correct engrossed copy of the Constitution, as determined, we think, by more reliable sources. For the engrossed copy of the Constitution, see, e.g., 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 306-17 (Merrill Jensen ed., 1976); 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1787-1870, at 3-20, 56th Cong., 2d Sess., House Doc. No. 529 (Department of State, Washington, D.C., 1894); and DOCUMENTS ILLUSTRATIVE OF THE

almost self-evident that textualism involves more than just interpreting words and phrases; textualism, after all, is not "wordism" or "phraseism." While this view of textualism has been well-embraced with respect to statutory interpretation,<sup>141</sup> no one seems to pay attention to the many punctuation marks in the Constitution. This neglect is hopefully not because points of grammar and syntax are irrelevant to constitutional interpretation, but probably because constitutional problems involving points of punctuation are even more peculiar and isolated. Not many clauses other than Article IV, Section 3 possibly turn on points of punctuation.<sup>142</sup>

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FORMATION OF THE UNION OF THE AMERICAN STATES 989-1002, 69th Cong., 1st Sess., House Doc. No. 398 (GPO, Washington, D.C., 1927). For the printed copy of the Constitution, see, e.g., THE CONSTITUTION OF THE UNITED STATES OF AMERICA, *supra*, at 1-12.

141. E.g., WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 38 (1994) ("The simplest version of textualism is enforcement of the 'plain meaning' of the statutory provision: that is, given the ordinary meanings of words and accepted precepts of grammar and syntax, what does the provision signify to the reasonable person?"); WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 640 (2d ed. 1995); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 664 (1990) ("[T]here has been a mini-revival of the long-eschewed punctuation canon, which presumes that Congress follows ordinary rules of punctuation and that the placement of every punctuation mark is potentially significant.").

For cases relying on the meaning of punctuation, see, e.g., *United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241 (1989) (reading of statute is mandated by its "grammatical structure" including meaning of comma); *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 80 (1991); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 528-29 (1987). For a more exhaustive collection of cases on the "punctuation canon," see Peter Jeremy Smith, *Commas, Constitutional Grammar, and the Straight-Face Test: What If Conan the Grammarian Were a Strict Textualist?*, 16 CONST. COMMENT. 7, 24 n.51 (1999).

142. The current legal literature has identified five clauses other than Article IV, Section 3 whose meanings may turn on points of punctuation, all of which involve the comma. For other comments in the current legal literature on punctuation in the Constitution, see *infra* notes 181, 184, and 218.

First, the clause which has received the most attention is the Exceptions and Regulations Clause, U.S. CONST. art. III, § 2, cl. 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."). Professors Merry and Berger have argued that the Exceptions and Regulations Clause is limited to questions of fact, and does not apply to questions of both law and fact. See RAOUL BERGER, CONGRESS V. THE SUPREME COURT 285-96 (1969); Henry J. Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1963). This position is grammatically insupportable and has attracted little support. See Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385, 401 (1983); Thomas B. McAfee, *Berger v. The Supreme Court—The Implications of His Exceptions-Clause Odyssey*, 9 U. DAYTON L. REV. 219 (1984); Gerald Gunther, *Congressional Power to Curtail Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 901 (1984); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 217 n.50 (1985).

Second, Professor Van Alstyne has suggested that the phrase "or other crime" in the excepting phrase of Section 2 of the Fourteenth Amendment does not include felonies but only includes those crimes relating to rebellion. William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-ninth Congress*, 1965 SUP. CT. REV. 33, 55, 58; see U.S. CONST. amend. XIV, § 2 ("[W]hen the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such

State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein [House of Representatives] shall be reduced . . ."). Such a reading is belied by punctuation. The excepting phrase has "two forms of disenfranchisement," not one. *Richardson v. Ramirez*, 418 U.S. 24, 43 (1974). Cf. U.S. CONST. amend. XXIV, § 1 ("The right of citizens of the United States to vote . . . shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.").

Third, Professors Steiker, Levinson, and Balkin have examined the punctuation of the Presidential Eligibility Clause, U.S. CONST. art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; . . ."). See Jordan Steiker et al., *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995). They argue, albeit not seriously, that the phrase "at the time of the Adoption of this Constitution" modifies both "natural born Citizen" and "Citizen of the United States." The implication is that the President must be a "natural born Citizen . . . at the time of the Adoption of this Constitution" or a "Citizen of the United States . . . at the time of the Adoption of this Constitution" in order to be eligible to the Office of President. And no President since Zachary Taylor meets the constitutional requirement of this reading! (Even Taylor's two predecessors, John Tyler and James K. Polk, fail this reading because they were both born after the adoption of the Constitution.) According to Professors Steiker, Levinson, and Balkin, "[i]ndeed, it seems clear enough that our reading of the text is absolutely required under a plain-meaning approach that pays due attention to the Constitution's words and its punctuation." *Id.* at 245. The very absurdity of this reading suggests that the phrase "at the time of the Adoption of this Constitution" only modifies the immediately preceding phrase "or a Citizen of the United States," a punctuation convention that has critical implications for the question of whether West Virginia is constitutional. See text accompanying *infra* notes 204-18.

Finally, Peter Jeremy Smith has examined the punctuation of the Twenty-sixth Amendment and the Seventeenth Amendment. See Smith, *supra* note 141. He argues, albeit not seriously, that the Twenty-sixth Amendment overwrites the Citizenship Clause of the Fourteenth Amendment by referring to the class of United States citizens as those persons "who are eighteen years of age or older." Compare U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."), with U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."). He also argues, albeit not seriously, that the Seventeenth Amendment has a "sunset" provision such that State Peoples shall directly elect senators only for six years from the date of the Amendment's adoption with the selection process for future senators left unresolved. See U.S. CONST. amend. XVII, § 1 ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.").

In addition to these five examples, the punctuation of the Fifth Amendment creates an interesting interpretive ambiguity:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V. The Fifth Amendment employs semicolons to separate the various clauses, but does not employ a semicolon to separate the Self-Incrimination Clause from the Due Process Clause. Thus, there are two possible readings of the Self-Incrimination Clause: (1) "No person . . . shall be compelled in any criminal case to be a witness against himself"—period; and (2) "No person . . . shall be compelled in any criminal case to be a witness against himself . . . without due process of law." The case for rejecting the second reading becomes stronger when we consider Representative James Madison's original draft of the precursor to the Fifth Amendment, submitted to the House of Representatives on June 8, 1789:

Before we tackle the problem of punctuation caused by the second semicolon in Article IV, Section 3, we should briefly explain why our inquiry into punctuation in the Constitution is not as arcane (some might say silly) as it may seem. The Founding generation justly prided itself on the "writtenness" of the Constitution. We have a written Constitution so that we may read it and hopefully follow it.<sup>143</sup> If we quietly brush aside the problem of punctuation in Article IV, Section 3 when nobody is looking, we risk a worse kind of sloppiness when it comes to words, phrases, or even entire clauses of the Constitution, not to mention the possible propagation of our errors by future generations.<sup>144</sup>

We should remember that the Framers paid attention to seemingly small matters of interpretation. The Framers were conscientious draftsmen who generally paid attention to fine distinctions in drafting substantive provisions.<sup>145</sup> Punctuation was not a trivial matter to them. Consider that after four months of hard work drafting a Constitution in the hot Philadelphia summer of 1787, the Framers—working on a Saturday—specially created a "Committee of Style and Arrangement" whose mandate was "to revise the style of and arrange the articles agreed to by the

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No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall he be compelled to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 297 (Neil H. Cogan ed., 1997). The very absurdity of the second reading suggests that the phrase "without due process of law" only modifies the immediately preceding phrase "nor be deprived of life, liberty, or property" and not the Self-Incrimination Clause. *But see* MARYLAND CONST. OF 1776, art. XX (Declaration of Rights) ("That no man ought to be compelled to give evidence against himself, in a common court of law, or in any other court, but in such cases as have been usually practiced in this State, or may hereafter be directed by the Legislature."). This punctuation convention also has critical implications for the question of whether West Virginia is constitutional. *See* text accompanying *infra* notes 204-18.

143. *See, e.g.,* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken or forgotten, the constitution is written."); *see also* Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1164-69 (1995).

144. *See* Amar, *Our Forgotten Constitution: A Bicentennial Comment*, *supra* note 140, at 286 n.25 (noting potential importance of punctuation in constitutional interpretation); Smith, *supra* note 141, at 21 ("This lack of attention [to constitutional grammar] is distressing because the use (or misuse) of grammar in constitutional texts potentially can determine how subsequent generations will interpret those texts.").

145. For example, on August 20, 1787, James Madison suggested that the word "and" be changed to the word "or" in a draft of the Treason Clause so that both offenses of "levying War" and "adhering to their Enemies" would not be required to constitute treason against the United States. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 346 (Max Farrand ed., Yale Univ. Press 1966) (1911) [hereinafter *Farrand, RECORDS*]. For another reflection on the Framers' penchant for precision (including examples), *see* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903 & nn.88-90 (1985). This is not to say that the Framers did not make several "mistakes" in drafting the Constitution. *See generally* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford V. Levinson eds., 1998) (collecting short essays by leading constitutional scholars on the "stupidest features" of the Constitution, including drafting errors, oversights, and the like).

House.”<sup>146</sup> The Committee of Style was to attend to the mundane matters of spelling, punctuation, capitalization, arrangement, and the like.<sup>147</sup> Unlike Mark Twain who reportedly sent his editor a page of punctuation marks with a note to “[p]ut them wherever they seem to fit,”<sup>148</sup> the Framers did not simply attach a page of punctuation marks to the Constitution.

Even more importantly, at least two Framers thought that a punctuation mark—and the semicolon no less—could be of critical, if not grave, interpretive significance. Consider Article I, Section 8, Clause 1, commonly referred to as the Spending Clause or the Taxing Clause:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;<sup>149</sup>

According to Professor Farrand, Gouverneur Morris, the Chairman of the Committee of Style, cleverly and cunningly changed the meaning of the Spending Clause in the Committee of Style. Morris purportedly replaced the comma following the word “Excises” with a semicolon, so as to dramatically expand the power of Congress by creating an independent “General Welfare Clause” which was “more in accordance with Morris’s ideas.”<sup>150</sup> Morris was apparently only later thwarted by an ever-watchful

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146. 2 Farrand, RECORDS, *supra* note 145, at 547 (Sept. 8, 1787). The Committee of Style included five persons: William Samuel Johnson (Connecticut), Alexander Hamilton (New York), Gouverneur Morris (Pennsylvania), James Madison (Virginia), and Rufus King (Massachusetts). *See id.* at 554. Gouverneur Morris was apparently the *de facto* Chairman of the Committee of Style. *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 181 (1913) [hereinafter FARRAND, THE FRAMING OF THE CONSTITUTION]; Letter from James Madison, to Jared Sparks (Apr. 8, 1831), in 3 Farrand, RECORDS, *supra* note 145, at 499.

147. The Committee of Style lacked authority to change the meaning of any provision in the draft Constitution. *See, e.g.,* CHARLES WARREN, THE MAKING OF THE CONSTITUTION 422 n.1 (1929); *Nixon v. United States*, 506 U.S. 224, 231 (1993). This is not to deny, however, that the committee did so. Indeed, Gouverneur Morris, “Chairman” of the Committee of Style, would later write, “That instrument was written by the fingers which write this letter.” Letter from Gouverneur Morris, to Timothy Pickering (Dec. 22, 1814), in 3 Farrand, RECORDS, *supra* note 145, at 420.

148. THE NEW YORK PUBLIC LIBRARY, WRITER’S GUIDE TO STYLE AND USAGE 267 (1994).

149. U.S. CONST. art. I, § 8, cl. 1.

150. *See* FARRAND, THE FRAMING OF THE CONSTITUTION, *supra* note 146, at 181-83; *see also* FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 264-65 (1985) (noting Gouverneur Morris’s purposeful attempt to create an independent “General Welfare Clause” by the strategic placement of a semicolon). The draft Spending Clause referred by the Framers to the Committee of Style provided:

Sect. I. The Legislature shall have power to lay and collect taxes, duties, impost and excises, to pay the debts and provide for the common defence and general welfare of the United States.

2 Farrand, RECORDS, *supra* note 145, at 569. The draft Spending Clause reported by the Committee of Style provided:

Sect. 8. The Congress may by joint ballot appoint a treasurer. They shall have power.



Roger Sherman of Connecticut, and the comma was restored after the word "Excises" in the Constitution as finally engrossed.<sup>151</sup>

Gouverneur Morris and Roger Sherman are not the only individuals to have noticed the power of punctuation and that of the semicolon in particular. Texas lawyers will undoubtedly be familiar with another famous story of the semicolon in American constitutional history: the "Semicolon Case"<sup>152</sup> decided by the Texas Supreme Court in 1873, which by virtue of

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<(a)> To lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defence and general welfare of the United States. <but all duties imposts & excises shall be uniform throughout the U. States.>

*Id.* at 594 (footnotes omitted).

151. See FARRAND, *THE FRAMING OF THE CONSTITUTION*, *supra* note 146, at 182-83. Professor Farrand's primary material for this claim of stylistic subterfuge is a speech by Representative Albert Gallatin on June 19, 1798. Representative Gallatin stated that

he was well informed that those words ["to pay the Debts and provide for the common Defence and general Welfare of the United States"] had originally been inserted in the Constitution as a limitation to the power of laying taxes. After the limitation had been agreed to, and the Constitution was completed, a member of the Convention, (he was one of the members who represented the State of Pennsylvania) being one of a committee of revisal and arrangement, attempted to throw these words into a distinct paragraph, so as to create not a limitation, but a distinct power. The trick, however, was discovered by a member from Connecticut, now deceased, and the words restored as they now stand.

3 Farrand, *RECORDS*, *supra* note 145, at 379.

We are not convinced that Professor Farrand and Representative Gallatin are correct that Morris's punctuation change would have created an independent "General Welfare Clause." It is far from clear how the simple replacement of a comma with a semicolon would create a "distinct paragraph" or a "distinct power." Note that each enumerated power in Article I, Section 8 is separated from the others by both a punctuation mark and a carriage return, and that the first word "To" in each enumerated power is capitalized. This was true in the drafts of Article I, Section 8 too. See 2 *id.* at 569-70 (draft referred to the Committee of Style); 2 *id.* at 594-96 (report by the Committee of Style). James Madison, another member of the Committee of Style, agreed. In a private memorandum (not used) in a letter to Andrew Stevenson concerning the Spending Clause, he wrote:

The only instance of a division of the clause afforded by the journal of the Convention is in the draught of a Constitution reported by a committee of five members, and entered on the 12th of September.

But that this must have been an erratum of the pen or of the press, may be inferred from the circumstance, that, in a copy of that report, printed at the time for the use of the members, and now in my possession, the text is so printed as to unite the parts in one substantive clause; an inference favoured also by a previous report of September 4, by a committee of eleven, in which the parts of the clause are united, not separated.

Letter from James Madison, to Andrew Stevenson (Nov. 17, 1830), in 3 Farrand, *RECORDS*, *supra*, at 492. For Madison's early response to Anti-Federalists' fears of an unbounded "General Welfare Clause," see *THE FEDERALIST* NO. 41, at 263 (Clinton Rossiter ed., 1961) ("But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows and is not even separated by a longer pause than a semicolon?").

For another strong claim that no stylistic subterfuge took place, see David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 253 n.192 (1995). Engdahl wrote:

Whether behind these changes lay typographical error, an artless styling touch, or a sneaky ploy of craft, cannot be known with certainty; but the last seems by far the least likely. Correcting the punctuation would prove useful even if the possibility of misunderstanding were inadvertent; and it seems rather unlikely that Sherman (and everyone else) would have remained silent at the time had they suspected a trick. . . . Gallatin's aspersion on Morris was dubious at best and deserves no further credit among fair-minded scholars.

*Id.*

152. *Ex parte Rodriguez*, 39 Tex. 705 (1873).

its decision was branded as the "Semicolon Court."<sup>153</sup> The Semicolon Case involved the validity of the heated gubernatorial election of 1873, in which Democrat Richard Coke soundly defeated Republican Governor E.J. Davis, and the interpretation of Article III, Section 6 of the Texas Constitution of 1869, which provided:

All elections for State, district and county officers shall be held at the county seats of the several counties, until otherwise provided by law; and the polls shall be opened for four days, from eight o'clock A. M. until four o'clock P. M. of each day.<sup>154</sup>

On March 31, 1873, the Texas legislature, with the approval of Governor Davis, eliminated county-seat voting in favor of individual precinct voting pursuant to its legislative power given in the phrase "until otherwise provided by law," but also eliminated four-day voting in favor of one-day voting.<sup>155</sup> After Governor Davis lost the gubernatorial election held on December 2, 1873, he asserted that the election was wholly void, claiming that the legislature did not have the legislative power to change the four-day voting requirement under Article III, Section 6 of the Texas Constitution.<sup>156</sup> The Semicolon Court agreed and voided the gubernatorial election, placing special emphasis on the semicolon, of course, as evidence of separation of the county-seat voting clause from the four-day voting clause. The decision was almost certainly correct as a matter of the plain meaning of the constitutional text,<sup>157</sup> but it did not much matter. Democrats seized control of the State capitol after a daring military confrontation with Governor Davis and all three judges of the Semicolon Court promptly lost their jobs.<sup>158</sup>

Maybe the lesson of the Semicolon Case is that we shouldn't take punctuation in a constitution too seriously, or seriously at all. But

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153. For a detailed historical account of the case, see James R. Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEXAS L. REV. 279 (1959); and George E. Shelley, *The Semicolon Court of Texas*, 48 SW. HIST. Q. 449 (1945).

154. TX. CONST. OF 1869, art. III, § 6.

155. See Tex. Sess. Laws 1873, ch. 19, § 12 ("[A]ll the elections in this State shall be held for one day only at each election, and the polls shall be open on that day from eight o'clock A.M. to six o'clock P.M.").

156. It should be noted that Governor Davis was not a party to the case. The case involved Joseph Rodriguez, a voter arrested upon the charge of voting twice at the election. Rodriguez sought an original writ of habeas corpus in the Texas Supreme Court contending that the election was illegal. It is not surprising that the case was widely viewed as "a trumped-up affair to get the court to pass upon the legality of the election." Norvell, *supra* note 153, at 285.

157. Under the Semicolon Court's plain meaning approach to Article III, Section 6 of the Texas Constitution, there is no patently absurd or unconstitutional result, and further interpretive analysis should be unnecessary under the "scrivener's error" doctrine of statutory interpretation. See *infra* note 185. But see Norvell, *supra* note 153, at 285 (arguing that four-day voting provision becomes "patently absurd" when there is no county-seat voting).

158. See Mikal Watts & Brad Rockwell, *The Original Intent of the Education Article of the Texas Constitution*, 21 ST. MARY'S L.J. 771, 784 n.69 (1990); 1 THE HANDBOOK OF TEXAS 370 (Walter Prescott Webb ed., 1952).

constitutional interpretation cannot turn on potential concerns of job security or self-interest—no matter what. Accordingly, we now turn to a very serious examination of the meaning of the semicolon in the Constitution.

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What is the meaning of the second semicolon in Article IV, Section 3? Many probably learned in grammar school that the semicolon represents more of a pause than a comma, but less of a pause than a period.<sup>159</sup> This elementary rule is not very helpful in determining the meaning of Article IV, Section 3. We should start with the presumption that the semicolon is neither a comma nor a period, but a punctuation mark with distinct meaning and one that cannot be overlooked.<sup>160</sup> In order to determine the meaning of the second semicolon in Article IV, Section 3, we will need an interpretive theory of the semicolon in the Constitution. A dedicated approach to the constitutional text demands nothing less.

Treatises on punctuation, historical and contemporary, provide an important theoretical framework.<sup>161</sup> An examination of these treatises uniformly reveals that the semicolon does not have any one meaning. In other words, “a semicolon is not a semicolon is not a semicolon.” This should not be troubling even for the most staunch textualist because the meaning of the semicolon is not subject to easy manipulation, but depends on grammatical context. The best place to test an interpretive theory of the

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159. See, e.g., PATRICIA O'CONNOR, *Woe Is I: The Grammarphobe's Guide to Better English* 139 (1996) (“If a comma is a yellow light and a period is a red light, the semicolon is a flashing red light—one of those lights you drive through after a brief pause. It's for times when you want something stronger than a comma but not quite so final as a period.”); WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1060 (1988) [hereinafter WEBSTER'S] (defining semicolon in present use as “punctuation mark . . . indicating a degree of separation greater than the comma but less than the period”); OXFORD ENGLISH DICTIONARY 952 (2d ed. 1989) (defining semicolon in present use as “the chief stop intermediate in value between the comma and the full stop; usually separating sentences the latter of which limits the former, or marking off a series of sentences or clauses of co-ordinate value”).

160. See also Steiker et al., *supra* note 142, at 245 n.46. Steiker and his colleagues make a similar point with respect to commas in the Constitution:

One might argue that the Constitution's use of commas often strikes a modern reader as especially promiscuous [citations]. But surely not all commas can be overlooked, and one must presumably have a theory that allows one to differentiate between meaningful and superfluous commas. It seems most charitable to begin with the presumption that commas were intended to be meaningful, so that the burden of proof should be on the person who wishes to ignore certain commas as superfluous. And, needless to say, a preference for one or another political result cannot, for dedicated constitutionalists, count as a sufficient reason for respecting or ignoring the controversial comma.

*Id.*

161. It should go without saying that in order to determine the original public meaning of the second semicolon of Article IV, Section 3 it is necessary to consult treatises on punctuation in existence at that time, not others. We rely on a combination of treaties on punctuation of varying vintage, published before and after the Founding, having found that the meaning of the semicolon has not changed appreciably in the past 213 years of our Republic.

semicolon in the Constitution is the Constitution itself—to use the Constitution as its own “concordance,” in effect.<sup>162</sup> A close examination of the some sixty-five semicolons in the Constitution reveals that there are at least four distinct meanings of the semicolon:

(1) The semicolon is sometimes used instead of the period to connect two independent clauses that are separated by a conjunction such as “and.” By independent clauses, we mean clauses that are independent sentences under standard precepts of grammar, in contrast to clauses that are not independent sentences, but depend on a preceding phrase for meaning. Consider the only semicolon in the very next paragraph of Article IV, Section 3:

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.<sup>163</sup>

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162. In what follows, we employ a species of textual argument now known as “intratextualism.” For a discussion of this interpretive technique including its history, strengths, and weaknesses, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); and Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble With Intratextualism*, 113 HARV. L. REV. 730 (2000).

We might also employ a species of textual argument known as “intertextualism” by comparing the semicolons in the Constitution with semicolons in other important Founding documents, such as the Declaration of Independence, the Articles of Confederation, the public writings of the Federalists and Anti-Federalists, the several early state constitutions, as well as possibly the drafts of the Constitution at the Philadelphia Convention. We are sensitive to the limitations of intertextualism, however, because punctuation as a form of style differs among authors and with time. For example, Thomas Jefferson’s punctuation of the Declaration of Independence need not be consistent with the Committee of Style’s punctuation of the Constitution. Nevertheless, certain styles represent best practices, and it is very unlikely that these best practices changed appreciably between 1776 and 1787-1788. We leave intertextualism for another time and place because we find ample answers within the Constitution, and because a focus on intratextualism makes our interpretive project much less vast and more tractable.

163. U.S. CONST. art. IV, § 3, cl. 2. For other such examples, see, e.g., 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 Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *id.* art. I, § 2, cl. 3 (Apportionment Clause); *id.* art. I, § 3, cls. 1, 2 (Senate Composition, Classification, and Vacancies Clauses); *id.* art. I, § 5, cl. 3 (Journal of Proceedings Clause); *id.* art. I, § 6, cl. 1 (Speech and Debate Clause); *id.* art. I, § 6, cl. 2 (Emoluments Clause); *id.* art. I, § 7, cl. 3 (Presentment Clause); *id.* art. I, § 9, cl. 7 (Appropriations Clause); *id.* art. I, § 10, cl. 2; *id.* art. II, § 1, cl. 3 (Electoral College Clause); *id.* art. II, § 2, cl. 2 (Appointments Clause); and *id.* art. III, § 2, cl. 3 (Jury Trial Clause).

This punctuation is, however, not uniform. Sometimes the comma is used and the conjunction “and” is not capitalized. See, e.g., U.S. CONST. art. I, § 2, cl. 1 (House Composition Clause) (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”); *id.* art. I, § 4, cl. 2 (Congress Meeting Clause); *id.* art. I, § 5, cl. 1 (House Judging Clause).

Sometimes the colon is used and the conjunction “and” is capitalized. See, e.g., U.S. CONST. art. I, § 3, cl. 6 (Impeachment Clause) (“When the President of the United States is tried, the Chief Justice

The semicolon is also used instead of a period to connect two independent clauses that are separated by a conjunction such as "but." In such a case, the second independent clause marks a contrast to the first independent clause, or may be said to be antithetical to it.<sup>164</sup> We need look no further than Article IV, Section 3:

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>165</sup>

The first semicolon in Article IV, Section 3 separates the antithetical second independent clause from the first independent clause.<sup>166</sup>

shall Preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present."); *id.* art. I, § 9, cl. 8 (Federal Title of Nobility Clause).

Sometimes the colon is used and the conjunction "and" is not capitalized. *See, e.g.*, U.S. CONST. art. I, § 10, cl. 2 (Imposts or Duties Clause) ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; . . .").

Sometimes the period is used and the conjunction "and" is capitalized. *See, e.g.*, U.S. CONST. art. II, § 1, cl. 3 (Electoral College Clause); *id.* art. IV, § 1 (Full Faith and Credit Clause) ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

In one instance, the semicolon is followed by an em dash and the conjunction "and" is capitalized. *See* U.S. CONST. art. I, § 8, cl. 17 (Seat of Government Clause). It states:

[The Congress shall have Power] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And . . .

164. *See, e.g.*, JOSEPH ROBERTSON, AN ESSAY ON PUNCTUATION 78 (1785) ("Some conjunctions, when they express an addition, an inference, an opposition, &c. admit of a semicolon before them. The proper point however does not depend upon any particular conjunction; but upon the degree of connection, subsisting between the two adjoining clauses."); ASA HUMPHREY, THE RULES OF PUNCTUATION 24 (1847) ("The two clauses of an antithetical sentence may be separated by a semicolon."); WILSON, A TREATISE ON ENGLISH PUNCTUATION 113 (1871) ("When two clauses are united by either of the conjunctions *for*, *but*, *and*, or an equivalent word,—the one clause perfect in itself, and the other added as a matter of inference, contrast or explanation,—they are separated by a semicolon.").

165. U.S. CONST. art. IV, § 3, cl. 1.

166. For other such examples, *see* U.S. CONST. art. I, § 4, cl. 1 (Times, Places, and Manner Clause); *id.* art. I, § 5, cl. 1 (House Judging Clause); *id.* art. I, § 7, cl. 1 (Revenue Bills Clause); *id.* art. I, § 8, cl. 1 (Spending Clause); *id.* art. III, § 2, cl. 3 (Jury Trial Clause); *id.* art. VI, cl. 3 (Religious Test Clause). Some copies of the Constitution contain a "; but" in the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, but others do contain a ": but".

This punctuation is, however, not uniform. Sometimes the comma is used and the conjunction "but" is not capitalized. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 3 (House Representation Clause); *id.* art. I, § 7, cl. 2 (Presentment Clause); *id.* art. I, § 8, cl. 12 (Army Clause); *id.* art. I, § 9, cl. 1 (Migration or Importation Clause); *id.* art. III, § 3, cl. 3 (Treason Clause). Sometimes the colon is used and the conjunction "but" is not capitalized. *See, e.g.*, U.S. CONST. art. I, § 3, cl. 7 (Judgment of Impeachment

(2) The semicolon is used instead of the period to separate short independent clauses that are closely connected in purpose and meaning.<sup>167</sup> In such a case, conjunctions are unnecessary. Consider the semicolons in Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.<sup>168</sup>

Article II, Section 3 uses the semicolon three times within the same paragraph to append closely connected independent clauses defining the contours of the President's executive power.<sup>169</sup>

(3) The semicolon is used to separate a series of expressions, each of which is not an independent clause and therefore depends on a preceding or succeeding phrase for its meaning.<sup>170</sup> Consider the semicolons in Article III, Section 2, Clause 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to

Clause); *id.* art. II, § 1, cl. 2 (Elector Qualifications Clause). Sometimes the period is used and the conjunction "but" is capitalized. *See, e.g.*, U.S. CONST. art. I, § 7, cl. 2 (Presentment Clause); *id.* art. II, § 1, cl. 3 (Electoral College Clause).

167. *See, e.g.*, ROBERTSON, *supra* note 164, at 80 ("The connection, which appears between the several parts of the following compounded sentences, is properly distinguished by a semicolon."); WILSON, *supra* note 164, at 125 ("When several short sentences follow one another, slightly connected in sense or in construction, they should be separated by a semicolon."); MARSHALL T. BIGELOW, PUNCTUATION AND OTHER TYPOGRAPHICAL MATTERS 22 (14th ed. 1893) ("The semicolon may also be used between short complete sentences, where the period would indicate more of a pause than the connection between the sentences renders necessary.").

168. U.S. CONST. art. II, § 3.

169. For other such examples, *see, e.g.*, U.S. CONST. art. II, § 1, cl. 3 (Electoral College Clause); *id.* art. II, § 2, cl. 1 (Commander-in-Chief, Opinion, and Pardon Clauses) ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."). Note that the Pardon Clause is not separated from the foregoing clauses by a semicolon but by a comma.

170. *See, e.g.*, WILSON, *supra* note 164, at 120 ("When in a series of expressions, the particulars depend on a commencing or a concluding portion of the sentence, they should be separated from each other by a semicolon, if they are either laid down as distinct propositions, or are of a compound nature."); BIGELOW, *supra* note 167, at 22 ("The semicolon is used between expressions in a series which have a common dependence on, or relation with, other words or expressions at the beginning or end of a sentence.").

all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.<sup>171</sup>

Article III, Section 2 employs the semicolon seven times within the same paragraph to neatly separate the nine categories of federal jurisdiction. It is beyond question that the preceding phrase, "The judicial Power shall extend," applies to each member of the series.<sup>172</sup> Similarly, Article I, Section 8 employs the semicolon (and carriage return) to neatly separate the eighteen enumerated powers of Congress. We will, of course, not reproduce all eighteen clauses here, but it is beyond question that the preceding phrase "The Congress shall have Power" in Article I, Section 8, Clause 1 applies to each member of the series, trumping the separation between each enumerated power provided by the semicolon and carriage return.<sup>173</sup>

(4) The semicolon is used instead of the comma to connect two clauses when either of the clauses already contain commas (sometimes referred to as internal commas).<sup>174</sup> In such a case, the purpose of the semicolon is to improve the readability of the text and to avoid the interpretive confusion that might result from too many commas. We will refer to this as the "nested comma problem." Consider Article I, Section 10, Clause 1:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of

171. U.S. CONST. art. III, § 2, cl. 1. For the only other uses of the em dash in the original Constitution, see U.S. CONST. art. I, § 8, cl. 17 (Seat of Government Clause); and *id.* art. II, § 1, cl. 8 (Presidential Oath or Affirmation Clause).

172. For another example, see U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."). The three-word phrase "No State shall" obviously applies to each member of the series.

173. See U.S. CONST. art. I, § 8, cls. 1-18.

174. See, e.g., WILSON, *supra* note 164, at 116 ("A semicolon is placed between two or more parts of a sentence, when these, or any of them, are divisible by a comma into small portions."); JOSEPH A. TURNER, A HANDBOOK OF PUNCTUATION 55 (1877) ("Very often the only reason for using the semicolon between sentences or clauses rather than the comma is that the latter has been used *within* them, and it is less confusing to use the semicolon *between* them: "In once we most admire the man; in the other, the work." If the comma is retained after *other*, the semicolon after *man* is more diacritical than the comma would be in the same place."); W.J. COCKER, HAND-BOOK OF PUNCTUATION 23 (1878) ("When the smaller divisions of sentences are separated by commas, the main divisions should be separated by semicolons."); BIGELOW, *supra* note 167, at 22 ("1. The semicolon is used to separate clauses from each other, where the clauses themselves are subdivided by commas and might not otherwise be readily distinguished."); WEBSTER'S, *supra* note 159, at 27 (The semicolon "separates the clauses of a compound sentence in which the clauses contain internal punctuation, even when the clauses are joined by conjunctions[.]").

Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.<sup>175</sup>

This paragraph employs the semicolon to separate closely connected clauses, at least two of which contain internal commas. A paragraph containing all commas and no semicolons would cause more interpretive confusion. This nested comma problem is well-evidenced by Article I, Section 10, Clause 3:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.<sup>176</sup>

Three of the four "clauses" in this paragraph contain internal commas, but these clauses are nevertheless appended by commas instead of semicolons.<sup>177</sup> To be sure, Article I, Section 10, Clause 3 stands as powerful evidence that the nested comma problem was not always solved by the Framers with the use of semicolons instead of commas.

For a far more interesting example, consider the first semicolon of one of the most frequently cited clauses of the Constitution, the Supremacy Clause of Article VI:

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 Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>178</sup>

Common sense tells us that the first semicolon of the Supremacy Clause does not function like a period—otherwise only treaties shall be the supreme law of the land, and the phrase preceding the semicolon would have no meaning. Consider the closely-related Arising Under Clause of Article III, Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and

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175. U.S. CONST. art. I, § 10, cl. 1.

176. *Id.* cl. 3.

177. A repunctuated Article I, Section 10, Clause 3 employing semicolons to separate the various clauses would provide: "No State shall, without the Consent of Congress, lay any Duty of Tonnage; keep Troops, or Ships of War in time of Peace; enter into any Agreement or Compact with another State, or with a foreign Power; or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

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



Treaties made, or which shall be made, under their Authority; . . .<sup>179</sup>

The Arising Under Clause contains nearly identical text to the first part of the Supremacy Clause—and no capricious punctuation.<sup>180</sup> Based on this example, it would seem that the first semicolon in the Supremacy Clause is more like a comma than a period. This is especially so because the clauses on either side of this semicolon contain internal commas (note that there is one internal comma preceding the first semicolon and three internal commas succeeding the first semicolon). The rules of punctuation indicate that a semicolon may be used instead of a comma to avoid interpretive confusion.<sup>181</sup>

In addition to these four meanings of the semicolon, we cannot disregard the possibility that the second semicolon of Article IV, Section 3 is simply without meaning. We daresay that our Constitution contains several

179. *Id.* art. III, § 2, cl. 1.

180. The similarity is no coincidence. See 2 Farrand, *RECORDS*, *supra* note 145, at 431 (recording the rewording of the Arising Under Clause to make it conform to the Supremacy Clause); see also Amar, *Intratextualism*, *supra* note 162, at 766 (noting this point).

181. If we look extratextually, we see that the first semicolon in the Supremacy Clause is a product of the Committee of Style. The draft referred by the Framers to the Committee of Style simply provided:

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 authority of the United States shall be the supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; any thing in the constitutions or laws of the several States to the contrary notwithstanding.

2 Farrand, *RECORDS*, *supra* note 145, at 572.

Professor White offers an alternate, but flawed interpretation of the punctuation of the Supremacy Clause:

Given the sequencing and punctuation of the Supremacy Clause, its intent appears to be to distinguish the first two sources of law, which derive from the Constitution, from treaties, which derive from "the Authority of the United States." The separation of the Constitution and federal laws from treaties might be read to imply that the framers did not think that the "Authority of the United States" is limited to the constitutional authority of the federal government, but that it also derived from the inherent powers of the United States as a political entity, a sovereign nation.

G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 13 (1999). This truly would be a stretch, belied by both the punctuation of the Arising Under Clause as well as the punctuation of the draft of the Supremacy Clause referred by the Framers to the Committee of Style. Punctuation aside, the Framers employed the phrase "under the Authority of the United States" for good reason, and not the one Professor White suggests. See, e.g., 4 ANNALS OF CONG. 721 (remarks of Rep. Goodrich during Jay Treaty debates, March 1796) ("Two kinds of treaties are contemplated. Treaties made under the Confederation, and Treaties to be made by the PRESIDENT and Senate. The words authority of the United States are inserted as comprehensive terms, including, without circumlocution, both descriptions of Treaties."); *id.* at 549 (remarks of Rep. Bradbury during Jay Treaty debates, March 1796). Representative Bradbury stated:

The words "made under the authority of the United States," were evidently chosen instead of the words "made by the President, with the advice and consent of the Senate," because they were to refer to Treaties then already made, as well as to such as should be thereafter made, the former not having been made by the President, but by Congress, but both might truly be said to be made under the authority of the United States.

*Id.*

punctuation mistakes, at least to the modern eye. Consider one of the most frequently cited clauses of Article II, the Vesting Clause of Section 1:

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows<sup>182</sup>

Upon very close inspection, we find that the second sentence of the Vesting Clause is missing an ending punctuation mark.<sup>183</sup> Several other clauses, mostly involving the comma, seem to contain truly gratuitous (one could also say strange) punctuation marks.<sup>184</sup> Although these clauses do not create any meaningful interpretive ambiguity, they do caution us against placing too much reliance on fine points of punctuation in constitutional interpretation. To borrow the words of Justice Scalia (in another context), it is possible that the second semicolon may simply be a case of "scrivener's error."<sup>185</sup>

What does all of this mean for the meaning of the second semicolon in Article IV, Section 3? We cannot reliably say that the second semicolon in Article IV, Section 3 has the same meaning as the first semicolon because, as we have shown, the meaning of the semicolon depends on grammatical context, and the grammatical contexts are different. The different meanings of the two semicolons in the Supremacy Clause are a prime example. The intratextual argument is of limited utility. The logical construction of Article IV, Section 3 with the conjunction "but" in the second clause

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182. U.S. CONST. art. II, § 1, cl. 1.

183. This error in punctuation is not the product of the Committee of Style. Compare 2 FARRAND, RECORDS, *supra* note 145, at 572 (draft referred to the Committee of Style) ("He shall hold his office during the term of four years, and together with the Vice President, chosen for the same term, be elected in the following manner."), with *id.* at 597 (report of the Committee of Style) ("He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected in the following manner:").

184. See, e.g., U.S. CONST. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."); *id.* at 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."). Some scholars have addressed the meaning of the comma in the Constitution and have provided several examples. See, e.g., Steiker et al., *supra* note 142, at 245 n.46; Smith, *supra* note 142, at 18-20 & nn.32-34; Ian Ayres, *Pregnant with Embarrassments: An Incomplete Theory of the Seventh Amendment*, 26 VAL. U. L. REV. 385, 386-89 (1991). The meaning of the comma is, mercifully, beyond the scope of this Article. Peter Jeremy Smith has documented that strange and seemingly inconsistent punctuation also extends to the apostrophe. See Smith, *supra* note 142, at 20 n.34. We would add that strange and inconsistent punctuation also extends to the hyphen (although this is not a problem in the original Constitution). For example, is Richard B. Cheney the "Vice President" or the "Vice-President?" Compare, e.g., U.S. CONST. art. II, § 1, cl. 1 ("Vice President"), with *id.* amend. XII ("Vice-President").

185. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY 20 (1997). Under the "scrivener's error" doctrine of statutory interpretation, a court may rewrite (or repunctuate) a statute so as to avoid patent absurdity or an arguably unconstitutional result. See, e.g., *Green v. Bock Laundry Machinery Company*, 490 U.S. 504, 527-30 (1989) (Scalia, J. concurring); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting).

followed by the conjunction “nor” in the third clause is unique, and thus we cannot directly compare the logical construction of Article IV, Section 3 with any other clause in the Constitution. The punctuation of the third clause “; nor” is also unique. The word “nor” appears three other times in the Constitution, but in two of the three cases the word is preceded by a comma and a colon, respectively, and in one case, the word is preceded by no punctuation mark at all.<sup>186</sup> These cases seem to suggest that the second semicolon is more like a comma than a period. Indeed, it is tempting to argue that the second semicolon is presumptively not like a period because the Framers could have chosen to use a period but did not. This argument cannot do all of the work, however, because the Framers could have chosen to use a comma but did not. Our theory of the semicolon in the Constitution suggests that there is a good reason why the Framers did not employ a comma in Article IV, Section 3: the Framers may have simply wanted to avoid the nested comma problem, given that the third clause contains two internal commas.

Given the incredible ambiguity in Article IV, Section 3 due to punctuation, it is simply surprising that it is not quoted with precision. The second semicolon did not prove to be a stumbling block for Justice Story in his famous *Commentaries on the Constitution of the United States* in which he misquotes the operative text, deftly replacing the second semicolon with a comma and the first semicolon with a period:

The first [of the two distinct clauses of the third section of the fourth article] is: “New States may be admitted by the Congress into this Union. But no new States 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 legislature of the States concerned, as well as of the Congress.”<sup>187</sup>

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186. See U.S. CONST. art. I, § 5, cl. 4 (“Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.”); *id.* art. I, § 9, cl. 6 (“No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.”); *id.* art. II, § 1, cl. 7 (“The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”).

187. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1314, at 195 (5th ed., 1891). St. George Tucker, another early and famous constitutional commentator, similarly misquoted Article IV, Section 3 (albeit preserving the first semicolon). See BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 278 (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) (1803) (“Congress may admit new states into the 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 congress.”).

Nor has the second semicolon been a stumbling block for the Supreme Court; in three cases citing Article IV, Section 3, the second semicolon has been unsuspectingly replaced by a comma!<sup>188</sup> We cannot possibly countenance misquoting constitutional text. Only a desperate interpreter would consider these data points for their possible weight as understandings—through misquotation—of the constitutional text.<sup>189</sup>

The important point for present purposes is that punctuation alone is not a reliable guide to discovering the meaning of Article IV, Section 3. The Framers, many of whom were among the most well-read lawyers of their day, were undoubtedly familiar with the punctuation convention across the pond. The British Parliament regularly enacted laws without any punctuation marks at all—clerks or printers inserted punctuation marks (presumably at their discretion) after the laws were enacted.<sup>190</sup> The strict British rule of statutory interpretation was that punctuation “forms no part of an act.”<sup>191</sup>

To be sure, the Framers did not follow the convention of the British Parliament in drafting the fundamental law of the United States. They almost always employed punctuation marks in drafting the substantive provisions of the Constitution, and they created a Committee of Style to attend to punctuation and other matters before submitting the Constitution to the several States for ratification. More important than British convention and the strict British rule of statutory interpretation is, of course, American practice. The punctuation canon has long been eschewed in America in statutory interpretation. Chief Justice Marshall, riding circuit in 1828, was of the view that “the construction of a sentence in a legislative act does not

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188. See *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845); *Dred Scott v. Sanford*, 60 U.S. (17 How.) 393, 500 (1856); *Coyle v. Smith*, 221 U.S. 559, 566 (1911). But see *Florida v. Georgia*, 58 U.S. (17 How.) 478, 482 (1854) (using correct punctuation). One state court also got it right. See *Hile v. City of Cleveland*, 141 N.E. 35, 37 (Ohio 1923). The second semicolon did not seem to bother the Confederates, either. See CONST. OF THE CONFEDERATE STATES OF AMERICA art. IV, § 3, cl. 1, in A COMPILATION OF THE MESSAGES & PAPERS OF THE CONFEDERACY 51 (James D. Richardson ed., 1905) (“Other States may be admitted into this Confederacy by a vote of two-thirds of the whole House of Representatives and two-thirds of the Senate, the Senate voting by States, 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.”).

189. But see McGreal, *supra* note 5, at 2414-15 (presenting constitutional argument from “precedent” based on Supreme Court’s implicit understandings—through misquotation—of Article IV, Section 3).

190. See, e.g., *Doe dem. Willis v. Martin*, 100 Eng. Rep. 882, 897 (K.B. 1790) (opinion of Kenyon, C.J.) (“[W]e know that no stops are ever inserted in Act of Parliament . . .”); see also Raymond B. Marcin, *Punctuation and the Interpretation of Statutes*, 9 CONN. L. REV. 227, 230 n.8 (1977) (collecting other British cases after the Founding).

191. See Marcin, *supra* note 168, at 233-35.

depend on its [punctuation]."<sup>192</sup> The Supreme Court would later observe in 1837 that

[p]unctuation is a most fallible standard by which to interpret a writing; it may be resorted to, when all other means fail; but the Court will first take the instrument by its four corners, in order to ascertain its true meaning: if that is apparent, on judicially inspecting the whole, the punctuation will not be suffered to change it.<sup>193</sup>

(This is overstating the case. Sometimes punctuation can determinatively, and intentionally, affect and alter meaning. Consider the difference between the statement, "We are fools for Christ's sake," and the statement, "We are fools, for Christ's sake.")<sup>194</sup> James Madison, for his part, thought that punctuation alone should not be controlling in constitutional interpretation. In discussing Gouverneur Morris's alleged stylistic subterfuge concerning the "General Welfare Clause," Madison rhetorically asked "whether the construction put on the text, in any of its forms or punctuations, ought to have the weight of a feather against the solid and diversified proofs which have been pointed out, of the meaning of the parties to the Constitution."<sup>195</sup>

We have a workable interpretive theory of the semicolon in the Constitution that enables us to read the second semicolon in Article IV, Section 3 as something other than a full stop, for good reason instead of for political convenience. As we have (hopefully) shown, it is not a necessary reading of the second semicolon in this context that it operate as a full stop. The semicolon had, at the time, no definite, determinate meaning; its meaning depended on grammatical context; and the grammatical context of

192. *Black v. Scott*, 3 F. Cas. 507, 510 (C.C.D. Va. 1828) (No. 1,464); see also *In re Irwine*, 13 F. Cas. 125, 130 (C.C.E.D. Pa. 1842) (No. 7,086) (Baldwin, J.) (asserting, in a case involving a federal bankruptcy law, that the punctuation of statutes "is generally the act of the clerk or printer" and "is no criterion of the sense of the legislature, unless it is in conformity with their intention as expressed in the words they use").

193. *Ewing's Lessee v. Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837). But see *Durousseau v. U.S.*, 10 U.S. (6 Cranch) 307, 319 (1810) ("The court can no more alter the punctuation of a statute than the words."). See also, e.g., *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83 (1932) ("Punctuation marks are no part of an act. To determine the intent of the law, the court, in construing a statute, will disregard the punctuation, or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed.") (citations omitted); *United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am. Inc.*, 508 U.S. 439, 455 (1993) ("No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning. Statutory construction 'is a holistic endeavor,' [citation], and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.") (internal citation omitted).

194. Cf. Michael Stokes Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863 (1997) (recounting a controversy involving a speech by Justice Scalia where numerous members of the press misunderstood his spoken words because they did not recognize it as a direct quotation from the Bible).

195. Letter from James Madison, to Andrew Stevenson (Nov. 17, 1830), in 3 FARRAND, RECORDS, *supra* note 145, at 493.

Article IV, Section 3 does not resolve the interpretive ambiguity clearly. Moreover, the semicolon was not uniformly employed in any given grammatical context, and we cannot rule out the possibility that the second semicolon is simply a case of "scrivener's error." We must therefore continue our analysis of the text of Article IV, Section 3, bearing in mind that the second semicolon may be more like a comma than a period.<sup>196</sup>

## 2. *The Problem of Ambiguous Modification*

Even if we read the second semicolon in Article IV, Section 3 as more like a comma than a period, there remains a significant (actually, more significant) problem of interpretation. It still 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, "but no new State shall be formed or erected within the Jurisdiction of any other State," as well as the immediately preceding third clause, "nor any State be formed by the Junction of two or more States, or Parts of States." This is the problem of ambiguous modification. The interpretive stakes remain very high: if the consent proviso does not modify the antecedent second clause, then no new State may be formed or erected within the jurisdiction of any other State—period, full stop.

Like the problem of punctuation, the problem of ambiguous modification is not unknown to constitutional lawyers, and there are strong reasons to believe that this problem was known to the Framers.<sup>197</sup> There is a general rule of statutory interpretation for resolving problems of ambiguous modification. Jabez Sutherland summarizes the general rule as follows:

Relative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refer solely to the last antecedent. A proviso is construed to apply to the provision or clause immediately preceding. . . . Qualifying words have been applied to several preceding sections where the nature of the provisions and the obvious sense required it.<sup>198</sup>

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196. Thus, Professor McGreal is wrong on both scores when he says that "[t]he existing evidence suggests that the drafters either ignored the significance of punctuation or used semi-colons much as we use commas today." McGreal, *supra* note 5, at 2406.

197. See DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 164-65 (1963) (tracing problem of ambiguous modification back to the sixteenth century).

198. JABEZ G. SUTHERLAND, *SUTHERLAND ON STATUTORY CONSTRUCTION* § 267, at 349-51 (1891) [hereinafter SUTHERLAND]. "Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma." Steiker et al., *supra* note 142, at 245 n.46. See also BLACK'S LAW DICTIONARY 611 (6th ed. 1990) (defining last-antecedent rule as "[a] canon of statutory construction that relative or qualifying words or phrases are to be applied to the words or phrases immediately preceding, and as not extending to or including other words, phrases, or clauses more

According to Sutherland, a referential and qualifying phrase presumptively applies only to the last antecedent. This rule of interpretation is commonly known as the "doctrine of the last antecedent,"<sup>199</sup> and we will refer to it as the "last-antecedent canon."<sup>200</sup> Under the last-antecedent canon, the consent proviso presumptively applies only to the immediately preceding third clause that relates to the junction of States or parts of States. Thus, under the last-antecedent canon, West Virginia and the other breakaway States are presumptively unconstitutional, with or without the consent of their respective parent States and Congress.

The question is whether the consent proviso may also modify the antecedent second clause that relates to the partition of a State. According to Professors Steiker, Levinson, and Balkin, "[e]vidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma."<sup>201</sup> Put more strongly, the last-antecedent canon "can be trumped by the punctuation rule [of a comma]."<sup>202</sup> On this basis of punctuation, the consent proviso may (but not must) also modify the antecedent second clause because there is a comma that separates the consent proviso from the immediately preceding third clause. But this comma is no "ordinary" comma that separates a referential or qualifying phrase from an antecedent clause—it is the right shoe to the pair of commas that set off the four-word phrase "or Parts of States" in the third clause. This is almost certainly not the comma that Sutherland had in mind. The mere presence (or absence) of a comma preceding a referential or qualifying phrase is not dispositive. In Sutherland's words, we need to determine whether there is a "contrary intention" in the text of Article IV, Section 3 to trump the last-antecedent canon, or whether the "sense of the entire act" demands that the last-antecedent canon not be applied.<sup>203</sup> These are the tough questions.

Before we take up these tough questions of ambiguous modification in Article IV, Section 3, let us briefly consider three short problems of

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remote, unless such extension or inclusion is clearly required by the intent and meaning of the context, or disclosed by an examination of the entire act").

199. For an excellent discussion with actual legal examples, see Terri LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 1996 J. LEGAL WRITING INST. 81 (1964).

200. For cases discussing the last-antecedent canon, see *Nobelman v. American Sav. Bank*, 508 U.S. 324, 330-31 (1993); *In re Bellamy*, 962 F.2d 176, 180 (2d Cir. 1992); *In re Hougland*, 886 F.2d 1182, 1184 (9th Cir. 1989); *Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975); *Quindlen v. Prudential Ins. Co. of Am.*, 482 F.2d 876, 878 (5th Cir. 1973); *Mandel Bros. v. FTC*, 254 F.2d 18, 22 (7th Cir. 1958), *rev'd on other grounds*, 359 U.S. 385 (1959); *United States ex rel. Santarelli v. Hughes*, 116 F.2d 613, 616 & n.14 (3d Cir. 1940). See also ESKRIDGE & FRICKEY, *CASES AND MATERIALS ON LEGISLATION*, *supra* note 141, at 640-41; LeClercq, *supra* note 199, at 86 n.15.

201. Steiker et al., *supra* note 142, at 245 n.46.

202. ESKRIDGE & FRICKEY, *CASES AND MATERIALS ON LEGISLATION*, *supra* note 141, at 641.

203. See SUTHERLAND, *supra* note 198, § 267; Steiker et al., *supra* note 142, at 245 n.46.

ambiguous modification in the Constitution in order to determine whether the Framers relied on the last-antecedent canon at all.<sup>204</sup>

First, Professors Steiker, Levinson, and Balkin have flagged the problem of ambiguous modification in the Presidential Eligibility Clause.<sup>205</sup> That clause provides that "[n]o Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States."<sup>206</sup> The problem of ambiguous modification is whether the referential or qualifying phrase "at the time of the Adoption of this Constitution" modifies the antecedent phrase "a natural born Citizen" as well as the immediately preceding phrase "a Citizen of the United States." If it does, then "[n]o person except a natural born Citizen . . . at the time of the Adoption of this Constitution," or "a Citizen of the United States, at the time of the Adoption of this Constitution," is eligible to be President, and every President since Zachary Taylor is unconstitutional.<sup>207</sup> Although Professors Steiker, Levinson, and Balkin advance this reading as "absolutely required under a plain-meaning approach that pays due attention to the Constitution's words and its punctuation,"<sup>208</sup> the very absurdity of this reading strongly suggests that the Framers did rely on the last-antecedent

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204. The Framers did not always rely on the last-antecedent canon to resolve problems of ambiguous modification that would otherwise arise. For two paradigmatic examples, see U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."); and *id.* art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

To be sure, the Framers could have drafted Article IV, Section 3 along the lines of the foregoing two clauses, eliminating any problem of ambiguous modification. Such an Article IV, Section 3 might take the following form:

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

The fact that they did not do so, however, sheds little light on the answer to the problem of ambiguous modification. There is more than one way to express the idea that the consent proviso modifies the second clause of Article IV, Section 3 as well as the immediately preceding third clause. Whence the requirement that there be no ambiguity? We must therefore part company with Professor McGreal who summarily concludes based on the simple intratextual comparison of Article IV, Section 3 with Article I, Section 10, Clause 3 that the Framers "meant the consent provision to apply only to part 3 regarding consolidation of states." McGreal, *supra* note 5, at 2405.

205. See Steiker et al., *supra* note 142, at 243-46.

206. U.S. CONST. art. II, § 1, cl. 5.

207. See also *supra* note 142 (recounting this problem of punctuation).

208. See Steiker et al., *supra* note 142, at 245.



canon in the Presidential Eligibility Clause, notwithstanding the comma preceding the referential or qualifying phrase.<sup>209</sup>

Second, consider the Corruption of Blood Clause of Article III, which provides that “[t]he Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”<sup>210</sup> It is not entirely clear whether the referential or qualifying phrase “except during the Life of the Person attainted” also modifies the antecedent phrase “Corruption of Blood.” The absence of a comma preceding the referential or qualifying phrase would suggest that it does not, but if we look extratextually, we find that several drafts of the Corruption of Blood Clause, including the draft referred by the Framers to the Committee of Style and the report of the Committee of Style, contained a comma before the referential or qualifying phrase.<sup>211</sup> It is highly doubtful that the Framers intended to permit an attainder of treason to work corruption of blood during the life of the person attainted.<sup>212</sup> The Framers probably did rely on the last-antecedent canon in drafting the Corruption of Blood Clause, notwithstanding the comma preceding the referential or qualifying phrase.<sup>213</sup>

Third, consider the Grand Jury Clause of the Fifth Amendment, adopted just three years after the adoption of the Constitution, which provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,

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209. We have unearthed some evidence ignored by Professors Steiker, Levinson, and Balkin that powerfully suggests reliance on the last-antecedent canon by other members of the Founding generation. The fifth amendment proposed by the New York ratifying convention provided:

That no Persons except natural born Citizens, or such as were Citizens on or before the fourth day of July one thousand seven hundred and seventy six, or such as held Commissions under the United States during the War, and have at any time since the fourth day of July one thousand seven hundred and seventy six become Citizens of one or other of the United States, and who shall be Freeholders, shall be eligible to the Places of President, Vice President, or Members of either House of the Congress of the United States.

Ratification of the Constitution by the State of New York (July 26, 1788), at [http://www.constitution.org/rc/rat\\_decl-ny.htm](http://www.constitution.org/rc/rat_decl-ny.htm). This proposed amendment strongly suggests that the New York ratifying convention applied the last-antecedent canon when parsing the Presidential Eligibility Clause. The desperate critic would argue that the New York ratifying convention was trying to amend the Presidential Eligibility Clause so as to eliminate the very reading advanced by Professors Steiker, Levinson, and Balkin—but this seems most unlikely.

210. U.S. CONST. art. III, § 3, cl. 2.

211. See 2 FARRAND, RECORDS, *supra* note 145, at 182, 345, 571 (draft referred to the Committee of Style), 601 (report of the Committee of Style). But see *id.* at 168 (Committee of Detail, IX draft with no comma).

212. See Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727, 729-33 (1992) (suggesting Founding generation’s revulsion to corruption of blood penalty in Anglo-American tradition).

213. Compare, e.g., U.S. CONST. art. III, § 3, cl. 2 (“The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”), with KY. CONST. OF 1792, art. XII, § 20 (“That no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth.”).

except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . ”<sup>214</sup> The problem of ambiguous modification is whether the referential or qualifying phrase “when in actual service in time of War or public danger” modifies the antecedent phrase “the land or naval forces,” as well as the immediately preceding phrase “the Militia.” The Commander-in-Chief Clause of Article II contains some similar language, but it is of no help in resolving the ambiguity. That clause provides that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; . . . ”<sup>215</sup> One would hope that the President is Commander-in-Chief of the Army and Navy of the United States at all times. The Supreme Court resolved this problem of ambiguous modification in the case of *Johnson v. Sayre*<sup>216</sup> by reversing a circuit court that had departed from the last-antecedent canon.<sup>217</sup>

The foregoing examples suggest that the Framers (and the First Congress) did at times rely on the last-antecedent canon, even in cases where a comma appears before the referential or qualifying phrase.<sup>218</sup> If the

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214. U.S. CONST. amend. V.

215. *Id.* art. II, § 2, cl. 1.

216. 158 U.S. 109 (1895).

217. According to the Supreme Court, although it is “grammatically possible” for the referential or qualifying phrase “when in actual service in time of War or public danger” to modify only the antecedent phrase “in the land or naval forces,” such a construction “is opposed to the evident meaning of the provision, taken by itself, and still more so, when it is considered together with the other provisions of the Constitution.” *Id.* at 113.

218. Given the foregoing discussion, we cannot help but critique the most recent argument in the legal literature implicating the twin problems of punctuation and ambiguous modification (these arguments are ever so rare). The argument involves the semicolon and the Supremacy Clause. The Supremacy Clause bears quoting in its entirety:

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 Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. Professor Nelson has recently suggested that the referential or qualifying phrase “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding” (which he refers to as the “*non obstante*” provision) also modifies the antecedent clause “This Constitution . . . shall be the supreme Law of the Land,” as well as the immediately preceding phrase “and the Judges in every State shall be bound thereby.” See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 254-60 (2000). As a matter of punctuation, he suggests that the second semicolon is the equivalent of a comma because the first semicolon is the equivalent of a comma. See *id.* at 259. Professor Nelson’s mistake is that he ignores grammatical context when interpreting the semicolons in the Supremacy Clause. The first semicolon is properly interpreted as a comma because of the nested comma problem, see text accompanying *supra* notes 174-81, but the second semicolon is properly interpreted as a period because it unites two independent clauses, see text accompanying *supra* notes 163-66. Even if the second semicolon is more like a comma than a period, it still is not clear that the “*non obstante*” provision modifies the antecedent “supreme Law” clause. The last-antecedent canon squarely suggests not, but Professor Nelson doesn’t address the more significant problem of ambiguous modification or the last-antecedent canon. It may be that the “sense of the entire act” supports Professor Nelson’s novel

Framers similarly relied on the last-antecedent canon in Article IV, Section 3, then the second clause is a flat prohibition on new breakaway States (even if the second semicolon is more like a comma than a period), and West Virginia, Kentucky, Maine, and possibly Vermont are all unconstitutional. To the question of the Framers' possible reliance on the last-antecedent canon in Article IV, Section 3 we now turn.

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Is there a "contrary intention" in the text of Article IV, Section 3 to overcome the presumption of the last-antecedent canon? Does the "sense of the entire act" require that the consent proviso modify the antecedent second clause that relates to the partition of a State? It is now time to take up these tough questions. The text of Article IV, Section 3 is worth repeating once again:

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>219</sup>

There are some considerations that suggest that the consent proviso may modify the antecedent second clause as well as the immediately preceding third clause. The second and third clauses seem to form a textual pair. The conjunction "but" appears once in the paragraph, marking one divide between the first clause and the succeeding two clauses in the paragraph. The syntax of the second and third clauses is negative, in contrast to the positive syntax of the first clause. This construction could be taken to suggest that the intent of Article IV, Section 3 is not to divide the first clause from the second clause from the third clause. The word "formed" appears in both the second and third clauses. More interestingly, the third clause is missing a directive before the word "be," in contrast to the phrase "may be" in the first clause and the phrase "shall be" in the second clause. Given the selective use and nonuse of the words "may" and "shall" in the Constitution,<sup>220</sup> the construction of the third clause is a little odd. It appears

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interpretation of the Supremacy Clause; only such an analysis can overcome the presumption of the last-antecedent canon.

219. U.S. CONST. art. IV, § 3, cl. 1.

220. See Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 782 & n.147 (1984) (stating that the Framers used "shall" as a word of obligation and "may" as a word of discretion and providing numerous examples in the Constitution); see also 2 FARRAND, RECORDS, *supra* note 145, at 485-86. (Framers carefully distinguishing between the words "ought," "shall," and "may" in the drafting of the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1).

that the referent of the word "be" in the third clause is the word "shall" in the second clause.

More importantly, the second and third clauses seem to form a logical pair. The second clause relates to the partition of a State, and the third clause relates to the junction of States. Partition and junction are near-perfect antonyms, and it would seem that the same consent provisions ought to apply to both transactions. At first blush, if one new State may be formed or erected within the jurisdictions (emphasis on plural) of two States pursuant to the third clause, why cannot one new State be formed or erected within the jurisdiction of one State pursuant to the second clause? Does the involvement of a second State make a constitutionally significant difference? We shall return to this point shortly. The important point for present purposes is that the consent proviso may modify the antecedent second clause as well as the immediately preceding third clause. But it is fair to say that neither the "contrary intention" in the text of Article IV, Section 3 nor the "sense of the entire act" is so compelling as to require that the consent proviso modify the antecedent second clause.

There are, however, some countervailing considerations that suggest that the consent proviso may only modify the immediately preceding third clause. The admission of new States into the Union pursuant to Article IV, Section 3 is important because it seriously affects the relative representation of States in the Senate. A new State dilutes the vote of all existing States in the Senate on an equal basis. We will refer to this phenomenon as the "Senate dilution problem."<sup>221</sup> (Recall the possibility of North Dakota "self-partitioning" into twenty-five additional States, and acquiring fully one-third of the seats in the Senate.) The argument for restricting the modification of the consent proviso to the immediately preceding third clause is

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221. A new State also leads to the "Senate dilution problem" by making the amendment of the Constitution pursuant to Article V more difficult. *See* U.S. CONST. art. V (amendments "shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress"). A new State also leads to the "House dilution problem" if admitted from territory of the United States pursuant to the first clause, but not if admitted from the territory of the several States because the new State's representation in the House would already be reflected in the parent State's representation. There is, however, one *de minimis* exception. The Constitution provides that "[t]he Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative." U.S. CONST. art. I, § 2, cl. 3. Thus, a new State admitted from the territory of the several States will lead to the "House dilution problem" if the new State's population is less than 30,000 (and possibly in other cases of "rounding" in apportionment). This leads to an interesting question: What is the minimum population of a State required by the Constitution? By our count, the answer is six persons: one representative, two senators, and three Electors! *See* U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 3, cl. 1; *id.* art. II, § 1, cl. 2. These six persons may "double" as state officers, in accordance with the original expectation that members of Congress might also be members of state legislatures. *See* THE FEDERALIST NO. 56, at 348 (James Madison) (Clinton Rossiter ed., 1961); 1 Farrand, RECORDS, *supra* note 145, at 391.

that such a reading of Article IV, Section 3 affords better protection to the interests of small States vis-à-vis the large States.

The Framers recognized that large States would have a decided mathematical advantage over small States in the House of Representatives, but not in the Senate.<sup>222</sup> As noted at the beginning of this Article, one can imagine the horrifying scenario whereby the large States gang up on the small and self-partition into many smaller States so as to dilute the voting power of the small States in the Senate. In one fell swoop, the large States could undo the Great Compromise and circumvent Article V's paranoiac command that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."<sup>223</sup> The large States have a decided advantage in carrying out such a destructive plan. The admission of new States into the Union requires bicameralism, and the large States by definition control the House of Representatives.<sup>224</sup>

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222. See, e.g., THE FEDERALIST No. 58, at 357 (James Madison) (Clinton Rossiter ed., 1961) ("[F]our only of the largest [states] will have a majority of the whole votes in the House of Representatives."); 1 JONATHAN ELLIOT, THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 364 (1901) [hereinafter ELLIOT'S DEBATES] (Luther Martin's Letter) (setting forth "a mathematical proof that the state of Virginia has thirty-two times greater chance of carrying a measure against the sense of eight states than Delaware, although Virginia has only ten times as many delegates [in the House of Representatives]").

223. U.S. CONST. art. V. For an elaboration of this idea, see Baker & Dinkin, *supra* note 137, at 72-74; and JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 60-82, 92-93 (1996). For a different but related horrifying scenario, see McGreal, *supra* note 5, at 2406 ("[A] majority party could use state division to perpetuate its hold on government power. That party could divide a sympathetic state into infinitely smaller units, each entitled to two senators. The majority party would overwhelm its political opponents, as well as the other states, in the Senate. All of this could be done over the objection of minority parties and without consent of the other states.").

Lawrence Frankel seems to have the wrong scenario in mind in concluding that "joining distinct political and geographic entities in order to reduce their political influence and representation in the Senate is contrary to the principles of this republic." Lawrence M. Frankel, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. PA. L. REV. 1659, 1671 (1991). Needless to say, the junction of existing States pursuant to the third clause of Article IV, Section 3, which would reduce absolute and relative representation in the Senate, can only take place with the consent of the States concerned, in consonance with Article V's provision that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." U.S. CONST. art. V.

224. At the Founding, the large States had a sizable presence in the Senate too. A quorum in the Senate was a simple majority of twenty-six senators, a majority of whom (just eight senators) could vote to admit new States into the Union. What if the senators of the large States carried out their destructive self-partitioning plan when the senators of the small States were absent? For a similar worry that the senators of the Northern States would cede navigation rights on the Mississippi River when the senators of the Southern States were absent, see, e.g., 3 ELLIOT'S DEBATES, *supra* note 222, at 502 (remarks of William Grayson) ("Gentlemen had said that the senators would attend from all the states. This, says he, is impracticable, if they be not nailed to the floor. If the senators of the Southern States be gone but one hour, a treaty may be made by the rest, yielding that inestimable right."). Moreover, the large States—because of their (indirect) control over the purse in the House of Representatives—would have possibly coercive power in the Senate vis-à-vis the small States. See, e.g., THE FEDERALIST No. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961) (noting that "the larger States will always be able, by their power over the supplies, to defeat unreasonable exertions of this prerogative [check on legislation] of the lesser States [in the Senate]").

If the Framers and Ratifiers were worried about this scenario, the second clause may well be meant as a flat prohibition on the formation or erection of new breakaway States by self-partitioning.<sup>225</sup> Thus, under Article IV, Section 3, there may be good reason not to treat the second and third clauses as a textual and logical pair modified by the consent proviso. The admission of a new breakaway State pursuant to the second clause necessarily increases the number of States in the Union by one, leading to the Senate dilution problem, and, if abused by the large States, the possibility of undoing the Great Compromise. But the admission of a new State pursuant to the third clause does not increase the number of States in the Union. A new State may be formed by the junction of two or more States, thereby reducing the total number of States by one, or a new State may be formed by the junction of one State and a part (or parts) of other States, thereby leaving the number of States unchanged. Importantly, however, a new State may also be formed by the junction of parts of two or more States, thereby increasing the number of States by one, and leading to the same problems as in the case of a new breakaway State.<sup>226</sup> Thus, large States could still carry out the destructive self-partitioning plan by "lending" an acre or two to each other, but it is harder to circumvent the no-new-breakaway-States reading of the second clause in this way.<sup>227</sup> To be sure, the no-new-breakaway-States reading of the second clause may be circumvented in yet another way. The large States could first cede territory to the United States with the consent of Congress, and, then the United States could form a new State out of this territory and admit it into the Union pursuant to the first clause. But, again, this is harder to do. Maybe the Framers did not think of everything, but the thought of large States dealing themselves more senators and undoing the Great Compromise was very much an issue.<sup>228</sup>

There remains one other consideration—a textual wrinkle of sorts—that suggests that the consent proviso may only modify the immediately preceding third clause. The consent proviso provides: "without the Consent of the Legislatures of the States concerned as well as of the

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225. *Accord* McGreal, *supra* note 5, at 2406 (positing similar scenario and concluding that "it makes some sense for the Constitution to prohibit division of States, which Congress can manipulate to political ends" and that a "strict grammatical reading is not absurd").

226. The third clause does not easily countenance this scenario. In contrast to the first and second clauses, which refer to "New States" and "new State," respectively, the third clause simply provides, "[N]or any State be formed by the Junction of two or more States, or Parts of States . . ." U.S. CONST. art. IV, § 3, cl. 1. The third clause seems to not contemplate "new" States. Indeed, in the case of the junction of two or more existing States, or the junction of one existing State and part(s) of existing State(s), the result is hardly a "new State," but an existing State with merely a change in territory. *Cf. infra* note 365 (presenting extratextual evidence supporting this intuition).

227. *Accord* McGreal, *supra* note 5, at 2406 (stating that "consolidation" of States pursuant to the third clause is "not so vulnerable to partisan abuse" as self-partitioning pursuant to second clause).

228. *See* RAKOVE, *supra* note 223, at 92.

Congress.”<sup>229</sup> The consent proviso is plural. In the case of a new State formed by the junction of two or more States, or parts of States, the consent proviso obviously refers to the States involved in such a transaction. But what about the case of a new State formed or erected within the jurisdiction of another State? Does the consent proviso require the consent of the new State as well as that of the parent State? Is a new State—before it formally becomes a State—a State “concerned” within the meaning of the consent proviso? If so, does the consent proviso similarly require the consent of the new State formed pursuant to the third clause?<sup>230</sup>

The consent proviso may well contemplate that the new State also provide its consent, but the plural form should at least raise an eyebrow or two. The construction of the consent proviso suggests the distinct possibility—already the presumption of the last-antecedent canon—that the proviso does not modify the antecedent second clause at all, and that Article IV, Section 3 therefore prohibits the creation of new States exclusively from within the boundaries of existing ones.

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The consent proviso may modify the antecedent second clause, but it is not at all clear that it must do so, especially given the Senate dilution problem. Indeed, the better answer—from the “intention” of the text of Article IV, Section 3—is that the consent proviso may only modify the third clause because of the Senate dilution problem. The answer to the problem of ambiguous modification would be significantly more clear if the no-new-breakaway-States reading of the second clause could not be circumvented by the first or third clauses. The last-antecedent canon, fairly applied, seems to squarely indicate that the consent proviso doesn’t modify the antecedent second clause, but, in Sutherland’s words, the canon “is not inflexible and uniformly binding.”<sup>231</sup> The answer to the problem of ambiguous modification is, well, ambiguous.<sup>232</sup>

229. *Id.*

230. Recall that Lincoln thought not. See *supra* text accompanying notes 122-23; see also *infra* notes 371-72.

231. See SUTHERLAND, *supra* note 198, § 267; Steiker et al., *supra* note 142, at 245 n.46. The Supreme Court has recently stated that in statutory interpretation the last-antecedent canon need not be applied if impractical. See *Nobelman v. American Sav. Bank*, 508 U.S. 324, 330-31 (1993); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term: Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 98 (1994). We are not at all sure what this means for resolving the interpretive ambiguity of Article IV, Section 3.

232. As we noted earlier, there remains a third textual problem of Article IV, Section 3: the meaning of the word “Jurisdiction” in the second clause is ambiguous. See *supra* note 138. On one reading, the word refers to the territory of a State, as in “no new State shall be formed or erected within the territory of any other State.” On another reading, the word refers to the power of another State “to say what the law is,” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), as in “no new State shall be formed or erected under the control of any other State.”

### 3. *Conclusions*

What shall we make of thirty pages of analysis on the twin problems of punctuation and ambiguous modification? The conclusion is surprisingly straightforward: the text of Article IV, Section 3, understood according to the linguistic conventions of the day, is still ambiguous! As to the problem of punctuation, the second semicolon of Article IV, Section 3 may be more like a comma than a period—but maybe not. We cannot reliably determine the meaning of this semicolon because punctuation use in the Constitution is too imprecise, too non-uniform, and too unclear. As to the problem of ambiguous modification, the consent proviso may modify the antecedent second clause that relates to the partition of a State—but it may not. Indeed, the presumption of the last-antecedent canon is that the consent proviso does not modify the antecedent second clause. The answer is not clear one way or the other, and the last-antecedent canon is not an inflexible rule.

The text of Article IV, Section 3 supports an interpretation of the second clause that permits the admission of new breakaway States into the Union with the appropriate consents, as well as an interpretation that flatly prohibits new breakaway States. Even under the most careful textual analysis of Article IV, Section 3 and the Constitution as a whole, the constitutionality of West Virginia (and that of the other breakaway States) is up for grabs. If the text is ambiguous, we must rely on history, structure, and perhaps even the secret drafting history to discover the original public

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The case for the first "territorial" reading is not crystal clear. If "jurisdiction" means "territory," why did the Framers not provide that "no new State shall be formed or erected within the Territory of any other State"? See U.S. CONST. art. IV, § 3, cl. 2 (employing the word "Territory"). Or why didn't the Framers simply provide that "no new State shall be formed or erected within any other State"? See U.S. CONST. art. III, § 2, cl. 3 (employing the phrase "within any State"). The word "jurisdiction" may be an elegant variation of the word "territory." Indeed, Professor Laycock seems to believe that the word "jurisdiction" in Article IV, Section 3 is a "synonym or metaphor for territory" and that "[w]hen the Constitution says that no new state shall be formed within the jurisdiction of any other, it does not mean within the reach of the interests of any other. It can only mean within the territory of any other." Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 317 (1992). The case for the second "control" reading—that "no new State shall be formed or erected under the control of any other State," is also plausible. Indeed, in the early part of the last century, the Supreme Court of Oregon gave the second clause this very interpretation in two cases finding Article IV, Section 3 to prohibit the "creation of states within the state." See *Straw v. Harris*, 103 P. 777, 782 (Or. 1909); *Kiernan v. City of Portland*, 111 P. 402, 406 (Or. 1910).

We believe the first "territorial" reading is the better one in the context of Article IV, Section 3 because it coheres with the first and third clauses that do relate to territory. We believe, however, that the word "jurisdiction" is not a synonym or metaphor for "territory," but that it is best interpreted as a subset of the physical space represented by the word "territory." Recall that in early America, several States had significant claims to western territory, but did not have jurisdiction over all of the claimed territory (hence, the policy of making sometimes competing land grants to citizens in order to establish jurisdiction). See, e.g., U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies . . . between Citizens of the same State claiming Lands under Grants of different States . . ."); see also ARTICLES OF CONFEDERATION OF 1781, art. IX (similar).



meaning of Article IV, Section 3. To these remaining arguments we now turn.

### B. *The Historical Argument*

We scarcely need remind anyone that the number of stars at stake on the flag is more than one. If West Virginia is unconstitutional because the second clause of Article IV, Section 3 is a flat prohibition on the admission of new breakaway States into the Union, then so are Kentucky, Maine, and possibly Vermont.<sup>233</sup> Kentucky was formed or erected within the jurisdiction of Virginia, Maine within the jurisdiction of Massachusetts, and, as we shall see, Vermont possibly within the jurisdiction of New York.

Of course, as a matter of discovering the original public meaning of Article IV, Section 3, not all precedents are created equal—earlier precedents are more important than later ones.<sup>234</sup> Two precedents come within three years of the adoption of the Constitution. Both Kentucky and Vermont were admitted into the Union by the First Congress and President Washington in 1791, and should carry the greatest weight among the precedents. Two precedents come much later, and importantly, in time of crisis and controversy. Maine was admitted into the Union over thirty years after the adoption of the Constitution, pursuant to the Missouri Compromise of 1820, the first of a series of crises concerning slavery. As we saw in Part I, West Virginia was admitted into the Union forty-plus years later and during the Civil War. But precedents, however numerous, do not answer constitutional questions in and of themselves. We must remember the fact that “[t]hat an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.”<sup>235</sup> In other words, precedents may simply be wrong, and then should carry no weight whatsoever.<sup>236</sup> As faithful interpreters of the

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233. These States are the only breakaway States in the Union. There are no States in the Union that were formed or erected pursuant to the third clause of Article IV, Section 3. For a useful summary of the admission of States into the Union, see 5 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE 372-73 (Ronald D. Rotunda & John E. Nowak eds., 1999).

234. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 980 (1991) (stating that “[t]he actions of the First Congress . . . are of course persuasive evidence of what the Constitution means”) (citations omitted); *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (“[T]he precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787.”); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (stating that an act “passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning”); *Knowlton v. Moore*, 178 U.S. 41, 56 (1900) (similar).

235. *Powell*, 395 U.S. at 546-47.

236. Cf. Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1551-67 (2000); Akhil Reed Amar, *The Supreme Court, 1990 Term: Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

Constitution, we must hold out the possibility that West Virginia, Kentucky, Maine, and possibly Vermont are all unconstitutional.

The historical context of the Founding is important. It was well known that the peoples of the future States of Vermont, Kentucky, and Tennessee—the first three new States admitted into the Union—were clamoring for admission into the Union as new breakaway States. New York laid claim to Vermont; Virginia to Kentucky; and North Carolina to Tennessee. At the time of the framing and ratification of the Constitution, Vermont's statehood movement was over ten years old; Kentucky's was three years old; and Tennessee's original statehood movement to form the State of Franklin (named in honor of Benjamin Franklin) was also three years old.<sup>237</sup> Each of these would-be States had petitioned the Continental Congress for statehood, but with no success.<sup>238</sup>

Was Article IV, Section 3 originally understood as a provision that would permit the admission of these would-be States into the Union with the consent of their parent States and of Congress? Or was it understood as an important counterrevolutionary provision designed to discourage separatist movements from further taking afoot in the large States? In this section, we explore the standard historical evidence from the Founding, namely the public writings of the Federalists and Anti-Federalists and the recorded debates at the several State ratifying conventions. We also explore the early precedents of Vermont, Kentucky, and Tennessee.

### 1. *The Public Writings of the Federalists and Anti-Federalists*

The public writings of the leading Federalists and Anti-Federalists on the Constitution are good extratextual sources of the original public meaning of the Constitution.<sup>239</sup> The Federalists won the battle over the adoption of the Constitution, so we turn to their public writings first.

Article IV, Section 3 is mentioned exactly once in *The Federalist*. James Madison briefly discussed the provision in *The Federalist No. 43*, which contains a "fourth class" of "miscellaneous powers."<sup>240</sup> Madison's presentation is worth quoting at some length:

In the Articles of Confederation, no provision is found on this important subject.<sup>[241]</sup> Canada was to be admitted of right, on her

237. See text accompanying *infra* notes 262 (Vermont), 283 (Kentucky), and 298 (Tennessee).

238. See text accompanying *infra* notes 260 (Vermont), 281 & 287 (Kentucky), and 306 (Tennessee).

239. Cf. SCALIA, *supra* note 185, at 38; David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 819-39 (2000); John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1342-45 (1998); Akhil Reed Amar, *Of Sovereignty & Federalism*, 96 YALE L.J. 1425, 1498 n.285 (1987).

240. THE FEDERALIST NO. 43, at 271 (James Madison) (Clinton Rossiter ed., 1961).

241. See ARTICLES OF CONFEDERATION OF 1781, art. XI ("Canada acceding to this confederation, and joining in the measures of the united states, shall be admitted into, and entitled to all the advantages

joining in the measures of the United States; and the other *colonies*, by which were evidently meant the other British colonies, at the discretion of nine States. The eventual establishment of *new States* seems to have been overlooked by the compilers of that instrument. We have seen the inconvenience of this omission, and the assumption of power into which Congress have been led by it. With great propriety, therefore, has the new system supplied the defect. The general precaution that no new States shall be formed without the concurrence of the federal authority and that of the States concerned is consonant to the principles which ought to govern such transactions. The particular precaution against the erection of new States, by the partition of a State without its consent, quiets the jealousy of the larger States; as that of the smaller is quieted by a like precaution against a junction of States without their consent.<sup>242</sup>

Article IV, Section 3 cures the defect in the Articles of Confederation by providing for the admission of new States into the Union pursuant to the first clause. But what about the second clause? According to Madison, the second clause is not a flat prohibition on new breakaway States, but provides for the admission of new breakaway States into the Union with the consent of the parent State and of Congress. The second clause relates to "partition" and the third clause to "junction" (note the textual and logical pair), and the consent proviso modifies the antecedent second clause. Moreover, the second "partition" clause is addressed to the "larger" States, and the third "junction" clause to the "smaller" States.

Madison was correct in noting that the prohibition on the partition of a State without its consent "quiets the jealousy of the larger States." Alexander Hamilton observed in *The Federalist No. 7* that the "small States" were "solicitous to dismember" New York with respect to Vermont because they "saw with an unfriendly eye the perspective of [New York's] growing greatness."<sup>243</sup> Elsewhere, Madison suggested that new States would be formed by the partition of existing States. "[T]he immediate object of the federal Constitution," said Madison in *The Federalist No. 14*, "is to secure the union of the thirteen primitive States, which we know to be practicable; and to add to them such other States as may arise in their own bosoms, or in their neighborhoods, which we cannot doubt to be equally practicable."<sup>244</sup>

These statements are good evidence of the meaning of Article IV, Section 3, unless Madison was somehow overstating the case with respect

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of this union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.").

242. THE FEDERALIST No. 43, at 273-74 (Clinton Rossiter ed., 1961).

243. THE FEDERALIST No. 7, at 62 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

244. THE FEDERALIST No. 14, at 102 (James Madison) (Clinton Rossiter ed., 1961).

to the second clause in favor of the smaller States. In October of 1785, the Continental Congress had considered a similar provision to amend the Articles of Confederation so as to provide for the admission of new break-away States into the Union, but the motion failed with the large States, including Massachusetts, New York, North Carolina, and Virginia, which were each facing separatist movements—voting against the motion.<sup>245</sup> The possibility remains that these large States had not changed their positions on this issue.

Let us now turn to the public writings of the Anti-Federalists. Article IV, Section 3 is discussed at considerable length in Maryland Anti-Federalist Luther Martin's "Genuine Information," an expanded pamphlet version of his address to the legislature of Maryland on November 29, 1787 regarding the hitherto secret proceedings of the Philadelphia Convention.<sup>246</sup> Martin devotes nine paragraphs to the provision. In the first of these nine paragraphs, he introduces Article IV, Section 3 as follows: "By the third section of the fourth article, no new State shall be formed or erected within the jurisdiction or [sic] any other State, without the consent of the legislature of such State."<sup>247</sup> This is not exactly right—Martin forgot to mention the consent of Congress—but he made his point. The remaining paragraphs are largely dedicated to the following complaint: Article IV, Section 3 prohibits the formation or erection of new breakaway States without the consent of parent States; these (larger) States will not provide their consent; domestic violence will likely ensue; and the smaller States will be forced to defend the larger States against domestic violence pursuant to the Guarantee Clause. Martin eloquently observes in his penultimate paragraph (the italics are his, not ours):

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245. See 29 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 811 (1933). The motion provided:

"That a committee be appointed to devise and report an additional article to the Confederation, to be submitted to the legislatures of the several States, for the purpose of empowering and authorizing any nine states, or two thirds of the states in the federal Union, for the time being, of the United States in Congress assembled, to erect into a new state, and admit into the federal Union, on certain terms to be specified in the said article, any part or district of any of the United States: Provided that the legislature of the state to which such district may belong, shall join with the people of such district in an application to Congress, for the exercise of the power and authority aforesaid."

*Id.* The motion failed by a vote of four to six, with one State divided. *Id.*

246. See Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia*, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 19-82 (Herbert J. Storing ed., 1981) [hereinafter Martin, *Genuine Information*]. Luther Martin's "Genuine Information" was first printed in the *Maryland Gazette* and *Baltimore Advertiser* beginning December 28, 1787, and was published as a pamphlet in early 1788. See 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 20; 2 FARRAND, RECORDS, *supra* note 145, at 171 (noting printing dates of December 28, 1787 to February 7, 1788). "Widely read and commented on at the time, the Genuine Information is a major source of Anti-Federalist thought and of information about the Convention." 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 20.

247. Martin, *Genuine Information*, *supra* note 246, at 72.

When we further reflect that they *now* have a *motive* for desiring to preserve their territory entire and unbroken, which they *never had before*—the gratification of their ambition in possessing and exercising superior power over their sister States—and that this constitution is to give them the *means* to effect this desire of which they were formerly destitute—the whole force of the United States pledged to them for restraining intestine commotions, and preserving to them the obedience and subjection of their citizens, even in the *extremest part of their territory*:—I say, Sir, when we consider these things, it would be too absurd and improbable to deserve a serious answer, should any person suggest that *these States* mean ever to give their consent to the erection of new States within their territory: Some of them it is true, have been for some time past *amusing* their inhabitants in those districts that wished to be erected into new States, but should this constitution be adopted, armed with a sword and halter to compel their obedience and subjection, they will no longer act with indecision; and the State of Maryland may, and probably will be called upon to assist with her wealth and her blood in subduing the inhabitants of Franklin, Kentucky, Vermont, and the provinces of Main and Sagadahock, and in compelling them to continue in subjection to the States which respectively claim jurisdiction over them.<sup>248</sup>

The entirety of Martin's detailed discussion of Article IV, Section 3 makes clear that the would-be States of Franklin (Tennessee), Vermont, and Maine could be admitted into the Union as new breakaway States with the consent of their parent States and of Congress.<sup>249</sup>

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248. Martin, *Genuine Information*, *supra* note 246, at 74-75; see also *id.* at 73. Martin wrote: [I]f the general government was not by its constitution to interfere [in dismembering large States], the inconvenience would soon remedy itself, for that as the population increased in those States, their legislatures would be obliged to consent to the erection of new States to avoid the evils of a civil war; but as by the proposed constitution the general government is obliged to protect each State against domestic violence, and consequently will be obliged to assist in suppressing such commotions and insurrections as may take place from the struggle to have new States erected, the general government ought to have a power to decide upon the propriety and necessity of establishing or erecting a new State, even without the approbation of the legislature of such States, within whose jurisdiction the new State should be erected . . . .

*Id.*

Elsewhere in his discussion of Article IV, Section 3, Martin directly suggested that domestic violence would be justified should the large States of Georgia, North Carolina, and Virginia refuse to form or erect new States within their respective jurisdictions in the Western Territory. See *id.* at 72-73 ("The hardship, the inconvenience, and the injustice of compelling the inhabitants of those States who may dwell on the western side of the mountains and along the Ohio and Mississippi [sic] rivers to remain connected with the inhabitants of those States respectively, on the atlantic side of the mountains, and subject to the same State governments, would be such, as would in my opinion, justify even recourse to arms, to free themselves from, and to shake off, so ignominious [sic] a yoke.").

249. Consider also a third public writing by Framers and Ratifiers Charles Pinckney of South Carolina. See CHARLES PINCKNEY, OBSERVATIONS ON THE PLAN OF GOVERNMENT, SUBMITTED TO THE FEDERAL CONVENTION, IN PHILADELPHIA, ON THE 28TH OF MAY, 1787, reprinted in 3 FARRAND, RECORDS, *supra* note 145, at 119-20. Penned at the start of the Philadelphia Convention and published

In sum, both James Madison and Luther Martin agreed that the second clause of Article IV, Section 3 is not a flat prohibition on new breakaway States. They both parsed the second clause as providing in effect that "no new State shall be formed or erected within the Jurisdiction of any other State . . . without the Consent of the Legislature . . . of the State . . . concerned as well as of the Congress." These statements are good evidence of the original public meaning of Article IV, Section 3, especially because Madison for the Federalists and Martin for the Anti-Federalists are in agreement. It is important to remember, however, that these statements are extratextual and hence second-best evidence of the original public meaning of Article IV, Section 3. These statements are therefore of persuasive, but not authoritative value. As Professor Manning has recently observed: "Given the historical status of *The Federalist*, a textualist judge must treat Publius's essays as a source of highly informed persuasion—to be evaluated critically on the merits, but never to be taken at face value as an authoritative exposition of constitutional meaning."<sup>250</sup> The statements of Madison and Martin, needless to say, only represent the views of two individuals, albeit leading ones. Was their understanding of Article IV, Section 3 shared by those individuals who ratified the Constitution in the several States?

## 2. *The Recorded Debates of the Several State Ratifying Conventions*

Article IV, Section 3 was perhaps the least discussed provision of the Constitution at the several State ratifying conventions. To our knowledge, there is no statement directly addressing the provision in any of the remaining records of the conventions. There are, however, a few statements by individual delegates that shed some light on its possible original public

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afterwards, Pinckney's public writing (assuming it was not changed from its original version) only sheds light on his intention at the Philadelphia Convention, which, needless to say, may or may not have been reflected in the text agreed to by the Framers. He observed:

The article empowering the United States to admit new States into the Confederacy is become indispensable, from the separation of certain districts from the original States, and the increasing population and consequence of the Western Territory. I have also added an article authorizing the United States, upon petition from the majority of the citizens of any State, or Convention authorized for that purpose, and of the Legislature of the State to which they wish to be annexed, or of the States among which they are willing to be divided, to consent to such junction or division, on the terms mentioned in this article.—The inequality of the Federal Members, and the number of small States, is one of the greatest defects of our Union. It is to be hoped this inconvenience will, in time, correct itself; and, that the smaller States, being fatigued with the expence of their State Systems, and mortified at their want of importance, will be inclined to participate in the benefits of the larger, by being annexed to and becoming a part of their Governments. I am informed sentiments of this kind already prevail; and, in order to encourage propositions so generally beneficial, a power should be vested in the Union, to accede to them whenever they are made.

*Id.* at 119.

250. Manning, *supra* note 239, at 1365. For other commentary cautioning against use of *The Federalist* as an authoritative source of constitutional meaning, see McGowan, *supra* note 239, at 825-35 (arguing that *The Federalist* should be used as "learned commentary").

meaning. At the Virginia ratifying convention, Federalist George Nicholas repeatedly stated that Kentucky would become a new State. At one point, Nicholas mistakenly reported, "I am informed by very good authority, Congress has admitted Kentucky, as a state, into the Union."<sup>251</sup> At the New York ratifying convention, Alexander Hamilton, in defending the Apportionment Clause<sup>252</sup> and the small size of the Congress, observed:

The Congress is to consist, at first, of ninety-one members. . . . There is one source of increase, also, which does not depend upon any constructions of the Constitution; it is the creation of new states. Vermont, Kentucky, and Franklin will probably become independent. New members of the Union will also be formed from the unsettled tracts of western territory.<sup>253</sup>

These statements imply that the second clause of Article IV, Section 3 is not a flat prohibition on new breakaway States. To be fair, however, these statements do not specify how Vermont, Kentucky, and Franklin (Tennessee) would be admitted into the Union, pursuant to the second clause or otherwise.

Nary a word was said about Article IV, Section 3, but what shall we make of this silence? If the second clause is a flat prohibition on the admission of new breakaway States into the Union, one might well be tempted to conclude that someone, somewhere would have objected to Article IV, Section 3 (or at least noted the point), especially given the well-known separatist movements in Vermont, Kentucky, and Franklin. Indeed, the fourteen Kentucky delegates who attended the Virginia ratifying convention were most obviously interested in Kentucky's statehood. The Federalists knew that the vote was going to be very close, possibly in the hands of the Kentucky delegates.<sup>254</sup> The Kentucky delegates said nothing

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251. 3 ELLIOT'S DEBATES, *supra* note 222, at 357. *See also id.* at 241 (remarks of George Nicholas at the Virginia ratifying convention) ("Considering Kentucky as an independent state, she will, under the present system, and without the navigation of that river, be furnished with the articles of her consumption through the medium of the importing states."); *id.* at 359 ("Kentucky, added to the other states, will make fourteen states.").

252. U.S. CONST. art. I, § 2, cl. 3.

253. 2 ELLIOT'S DEBATES, *supra* note 222, at 238-39.

254. Wrote James Madison to George Washington on June 13, 1788: "There is reason to believe that the event may depend on the Kentucky members, who seem to lean more against than in favor of the Constitution. The business is in the most ticklish state that can be imagined." Letter from James Madison, to George Washington (Jun. 13, 1788), in 11 THE PAPERS OF JAMES MADISON 134 (Robert A. Rutland & Charles F. Hobson eds., 1977). Wrote James Madison to Alexander Hamilton on June 16, 1788: "If we lose it [Virginia ratification] Kentucke will be the cause; they are generally if not unanimously against us." Letter from James Madison, to Alexander Hamilton (Jun. 16, 1788), in 5 THE PAPERS OF ALEXANDER HAMILTON 9 (Harold C. Syrett & Jacob E. Cooke eds., 1962) (footnote omitted). The Kentucky delegates were not to make the difference. On June 25, 1788, Virginia ratified the Constitution by a thin margin of eighty-nine to seventy-nine, in spite of the Kentucky delegates who overwhelmingly voted against ratification. *See* General Ratification Chronology, 1786-1791, in 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at xxi (John P. Kaminski & Gaspare J. Saladino eds., 1988); ELLIOT'S DEBATES, *supra* note 222, at 654.

about Kentucky's statehood pursuant to Article IV, Section 3. To be sure, the Kentucky delegates had another, more important issue on their minds: navigation rights on the Mississippi River.<sup>255</sup> Put simply, the Mississippi River issue was the critical issue of the Virginia ratifying convention,<sup>256</sup> and the silence of the Kentucky and Virginia delegates with respect to Article IV, Section 3 is not especially probative. Similarly, the silence of the delegates in the New York and North Carolina ratifying conventions is even less probative. These ratifying conventions met after the requisite nine States had adopted the Constitution, and to our knowledge, no Vermont or Franklin (Tennessee) delegates attended the New York and North Carolina ratifying conventions, respectively.

Can a meaningful interpretive clue be drawn from silence—from the fact that no one spoke about the particular problem of Article IV, Section 3—under these particular circumstances? Sherlock Holmes famously solved the case of the Silver Blaze by drawing a correct inference from the “curious incident” of the “dog that did not bark,”<sup>257</sup> but this is an unreliable canon for interpreting legislative acts,<sup>258</sup> and it seems especially

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255. The Mississippi was (and still is) the lifeblood of Kentucky, so important that some leading Kentuckians in the 1780s seriously contemplated that Kentucky declare independence from the United States and become a province of Spain because of repeated attempts by the northern States to cede navigation rights to that country. See William R. Shepherd, *Wilkinson and the Beginnings of the Spanish Conspiracy*, 9 AM. HIST. REV. 490 (1904); LOWELL H. HARRISON, KENTUCKY'S ROAD TO STATEHOOD 48-72 (1992).

256. See, e.g., 3 ELLIOT'S DEBATES, *supra* note 222, at 352 (remarks of Patrick Henry) (“To preserve the balance of American power [between the Northern and Southern States], it is essentially necessary that the right of the Mississippi should be secured.”); *id.* at 501 (remarks of William Grayson) (“The prevention of emigrations to the westward, and consequent superiority of the southern power and influence, would be a powerful motive to impel [the northern States] to relinquish that river.”). Grayson also stated:

I look upon this as a contest for empire. Our country is equally affected with Kentucky. The Southern States are deeply interested in this subject. If the Mississippi be shut up, emigrations will be stopped entirely. There will be no new states formed on the western waters. This will be a government of seven states. This contest of the Mississippi involves this great national contest; that is, whether one part of the continent shall govern the other. The Northern States have the majority, and will endeavor to retain it. This is, therefore, a contest for dominion—for empire.

*Id.* at 365.

257. See 1 SIR ARTHUR CONAN DOYLE, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES 383 (1953). As the story goes, Sherlock Holmes correctly deduced the murderer's identity by noting that the victim's dog did not bark on the night of the murder. Near the end of the story, Inspector Gregory, the officer in charge, asks Holmes, “Is there any other point to which you wish to draw my attention?” Holmes replies, “To the curious incident of the dog in the night-time.” Gregory remarks, “The dog did nothing in the night-time.” Holmes then replies, “That was the curious incident.” *Id.* at 397.

258. See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) (noting the “questionable wisdom of assuming that dogs will bark when something important is happening”); *id.* (Scalia, J., dissenting) (“We are here to apply the statute, not legislative history, and certainly not the absence of legislative history. Statutes are the law though sleeping dogs lie.”) (citations omitted); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495-96 n.13 (1985) (stating that “congressional silence, no matter how ‘clanging,’ cannot override the words of the statute”); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (“In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.”). But see *Chisom*, 501 U.S. at 396



hard to draw a reliable inference from the Ratifiers' silence about the interpretive ambiguity of Article IV, Section 3. It would be dangerous to interpret the silence as evidence of some implicit understanding that its second clause permits the admission of new breakaway States into the Union with the consent of the parent State and of Congress. The opposite understanding is also plausible. Or perhaps everyone simply missed the subtle textual ambiguity caused by the twin problems of punctuation and ambiguous modification. Moreover, it is even more difficult to interpret the silence because the no-new-breakaway-States reading of the second clause would not have been a change to the then-existing higher law (recall Madison's statement that the Articles of Confederation did not countenance the admission of new States into the Union).<sup>259</sup> The dog would have less reason to bark in the night, other things being equal, since no "curious incident"—no departure from past practice—had occurred.

### 3. *The Early Precedents*

Given the importance of early history,<sup>260</sup> we focus our discussion of precedents on the first three new States admitted into the Union after the ratification of the Constitution by the original thirteen States: Vermont, Kentucky, and Tennessee, which entered the Union in 1791, 1792, and 1796, respectively. These States (and, to a lesser extent, Maine) are possible paradigm cases for interpreting Article IV, Section 3.<sup>261</sup> In what follows, we briefly explore the statehood movements of Vermont, Kentucky, and Tennessee by assembling the historical evidence that most directly bears on the original public meaning of Article IV, Section 3.

#### a. *Vermont*

Vermont was the first new State admitted into the Union, admitted March 4, 1791, less than a year after Rhode Island ratified the Constitution.<sup>262</sup> Vermont's admission into the Union capped a long and

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n.23 (Stevens, J.) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.") (quoting *Harrison*, 446 U.S. at 602 (Rehnquist, J., dissenting)) (internal quotation marks omitted). For additional discussion of the dog-that-did-not-bark canon of statutory interpretation, see ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION*, *supra* note 141, at 220-21, 325.

259. See text accompanying *supra* note 242.

260. See *supra* note 234 and accompanying text.

261. See text accompanying *supra* note 248 (Luther Martin's "Genuine Information") (referring to "the inhabitants of Franklin, Vermont, and the provinces of Main and Sagadahock" in discussing Article IV, Section 3); see also Letter from James Madison, to Professor Davis (1832), in 3 *Farrand, RECORDS*, *supra* note 145, at 519 ("Kentucky was then known to be making ready to be an independent State, and to become a member of the Confederacy. What is now Tennessee was marked by decided circumstances for the same distinction.").

262. For a useful discussion of Vermont's statehood movement, see Peter S. Onuf, *State-Making in Revolutionary America: Independent Vermont as a Case Study*, 67 J. AM. HIST. 797 (1981).

well-known struggle for statehood that started in 1777.<sup>263</sup> The Continental Congress never recognized Vermont as an independent State because New York laid claim to her territory under lands granted by the Crown.<sup>264</sup> Although Vermont was admitted into the Union with New York's consent, it is not at all clear that New York's consent was constitutionally necessary. While Vermont was within the territory claimed by New York, the preponderance of evidence suggests that Vermont was not within the jurisdiction of New York. Thus, Vermont may have been admitted into the Union not pursuant to the second clause, but pursuant to the first clause, which provides that "[n]ew States may be admitted by the Congress into this Union."<sup>265</sup>

The relevant evidence is illuminating. On January 15, 1777, some six months after the Declaration of Independence, Vermont declared her independence from New York, expressly repudiating New York's jurisdiction:

And whereas by the declaration [Declaration of Independence] the arbitrary acts of the crown are null and void, in America, consequently the jurisdiction by said crown granted to New York government over the people of the New Hampshire Grants is totally dissolved:

... That we will, at all times hereafter, consider ourselves as a free and independent state, capable of regulating our internal police, in all and every respect whatsoever—and that the people on said Grants have the sole and exclusive and inherent right of ruling and governing themselves in such manner and form as in their own wisdom they shall think proper, not inconsistent or repugnant to any resolve of the Honorable Continental Congress.<sup>266</sup>

During the following fourteen-year period, Vermont was an independent revolutionary State, a position unique among new States admitted into the Union. For example, Vermont exercised her independent sovereignty by coining money, establishing post offices and post roads, negotiating treaties, passing acts of naturalization, granting public lands, providing for the common defense and general welfare of her people, and so on.<sup>267</sup> Vermont's courts, not New York's, had the power "to say what the law [was]"<sup>268</sup> in Vermont.<sup>269</sup> Two States, New Hampshire and Massachusetts,

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263. See *Vermont v. New Hampshire*, 289 U.S. 593, 608 (1933) ("Following Vermont's declaration of independence [in 1777], and until her admission to statehood in 1791 she, from time to time, sent representatives to Congress seeking admission to the Union and published to the world numerous appeals, vindications and arguments to develop public opinion in favor of her admission.").

264. *Id.* at 606-11.

265. U.S. CONST. art. IV, § 3, cl. 1.

266. THE DECLARATION OF INDEPENDENCE (Vermont 1777).

267. See WALTER HILL CROCKETT, 2 VERMONT: THE GREEN MOUNTAIN STATE 389-437 (1921).

268. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

269. See Michael A. Bellesiles, *The Establishment of Legal Structures on the Frontier: The Case of Revolutionary Vermont*, 73 J. AM. HIST. 895, 907 (1987) ("[The courts] were at the center of most people's understanding and acceptance of any government. When the people of the Green Mountains

conditionally recognized Vermont's independence from New York in 1777 and 1781, respectively.<sup>270</sup> Alexander Hamilton later referred to New York's "lost jurisdiction" in Vermont in *The Federalist No. 28*.<sup>271</sup> Hamilton was not alone in this characterization: during the debates in the several State ratifying conventions, others echoed the sentiment that Vermont was not within the jurisdiction of New York.<sup>272</sup>

Notwithstanding the foregoing, in February of 1789 within a year after the adoption of the Constitution, a bill was introduced in the New York Assembly granting New York's consent to the admission of Vermont into the Union as a new State pursuant to Article IV, Section 3.<sup>273</sup> The bill passed in the New York Assembly but failed in the Senate.<sup>274</sup> It is fair to conclude that at least one House of the New York legislature did not think that Article IV, Section 3 flatly prohibited the admission of new breakaway States into the Union. But it is also fair to conclude that the Hamilton and the New York Assembly thought that Vermont was in fact within the jurisdiction of New York and that the consent of the legislature of New York was therefore constitutionally necessary. Within a few months thereafter, in July of 1789, a bill was passed providing for the appointment of commissioners who would have the power to provide the consent of the legislature of New York to the admission of Vermont into the Union.<sup>275</sup>

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rejected New York's courts as inadequate, . . . they rejected all aspects of that province's rule. When they created their own state, its courts stood at the core of its legitimation, its reason for being.").

270. See 289 U.S. 593, 608 (1933).

271. See *THE FEDERALIST NO. 28*, at 178-79 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Suppose the State of New York had been inclined to re-establish her lost jurisdiction over the inhabitants of Vermont, could she have hoped for success in such an enterprise from the efforts of the militia alone?"). But cf. *THE FEDERALIST NO. 7*, at 62 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (referring to the "district of Vermont").

272. See, e.g., 2 ELLIOT'S DEBATES, *supra* note 222, at 213 (remarks of Robert Livingston at New York ratifying convention) ("How has it happened, said be, that Vermont is, at this moment, an independent state?"); *id.* at 212 (remarks of Robert Livingston at New York ratifying convention) ("[H]e showed Vermont ready to avail itself of our weakness, speaking of the people of that state, as a brave and hardy body of men, that we had neither the spirit to subdue, nor, what he more strongly recommended, the magnanimity to yield to."); 2 *id.* at 223 (remarks of Melancton Smith at New York ratifying convention) ("Why, said he, are we told . . . of Vermont having separated from us, and assumed the powers of a distinct government?"); 3 *id.* at 195 (remarks of Governor Edmund Randolph at Virginia ratifying convention) ("[The inhabitants of Vermont] took [the] opportunity of erecting themselves into a state. They pressed the Congress for admission into the Union. Their solicitations were continually opposed till the year 1781, when a kind of assent was given.").

273. See 2 CROCKETT, *supra* note 267, at 450.

274. See *id.* Two years before, in the Spring of 1787, Alexander Hamilton introduced a bill to recognize Vermont's independence, which also passed in the New York Assembly but failed in the Senate. See *id.* at 441-45. Of course, this bill could not shed light on the meaning of Article IV, Section 3, which had not been adopted, let alone drafted, at that point in time.

275. See 2 CROCKETT, *supra* note 267, at 450. In addition, it was becoming increasingly clear to New York that it was not in her political interest to withhold her consent to the admission of Vermont into the Union. It was well-known that Kentucky would soon be admitted into the Union, tipping the balance of power in favor of the Southern States, and the admission of Vermont into the Union would

The most important evidence that Vermont was not admitted into the Union pursuant to the second clause of Article IV, Section 3 comes from a careful comparison of the act admitting Vermont into the Union (the "Vermont Act") and the act admitting Kentucky into the Union (the "Kentucky Act"), both of which were passed by the First Congress within two weeks of each other. We reproduce the Vermont Act and the Kentucky Act, each in relevant part:

*An Act for the admission of the State of Vermont into this Union.*

THE state of Vermont having petitioned the Congress to be admitted a member of the United States, *Be it enacted* . . . That on the fourth day of March, one thousand seven hundred and ninety-one, the said state, by the name and style of "The State of Vermont," shall be received and admitted into this Union, as a new and entire member of the United States of America.<sup>276</sup>

*An Act declaring the consent of Congress, that a new State be formed within the jurisdiction of the Commonwealth of Virginia, and admitted into this Union, by the name of the State of Kentucky.*

WHEREAS the legislature of the commonwealth of Virginia, by an act entitled "An act concerning the erection of the district of Kentucky into an independent state" . . . have consented, that the district of Kentucky, within the jurisdiction of the said commonwealth, and according to its actual boundaries at the time of passing the act aforesaid, should be formed into a new state: And whereas a convention of delegates, chosen by the people of the said district of Kentucky, have petitioned Congress to consent, that, on the first day of June, one thousand seven hundred and ninety-two, the said district should be formed into a new state, and received into the Union, by the name of "The State of Kentucky:"

SECTION 1. . . .

SEC. 2. . . .<sup>277</sup>

Three key differences are readily apparent. First, the Vermont Act does not refer to New York's consent at all, whereas the Kentucky Act refers to Virginia's consent. Second, the Vermont Act does not contain the

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even the scales. *See, e.g.,* Letter from Alexander Hamilton, to Nathaniel Chipman (July 22, 1788), in 5 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 254, at 186 (footnote omitted). Hamilton wrote:

One of the first subjects of deliberation with the new Congress will be the Independence of Kentucky for which the Southern States will be anxious. The Northern will be glad to send a counterpoise in Vermont. These mutual interests and ambitions will facilitate a proper result.

I see nothing that can stand in your way but the interfering claims under the grants of New York.

*Id.*; *see also* HARRISON, *supra* note 255, at 90 (recounting a contemporary jingle reflecting this geopolitical concern: "Kentucky to the Union given, Vermont will make the balance even, Still Pennsylvania holds the scales, And neither South nor North prevails").

276. 1 Stat. 191 (Feb. 18, 1791).

277. 1 Stat. 189 (Feb. 4, 1791).

critical phrase "within the Jurisdiction", whereas the Kentucky Act does in both title and text. Third, the Vermont Act refers to the "State of Vermont," whereas the Kentucky act refers to the "district of Kentucky" and the "new State" of Kentucky. These differences strongly suggest that the First Congress did not think that Vermont was within the jurisdiction of New York, and therefore admitted her into the Union pursuant to the first clause of Article IV, Section 3.<sup>278</sup>

In sum, there is precious little evidence that Vermont was "within the Jurisdiction" of New York, as that phrase would have been understood by the hypothetical, reasonably well-informed ratifier of the Constitution. The evidence strongly suggests that Vermont was not admitted into the Union as a new breakaway State pursuant to the second clause of Article IV, Section 3, but pursuant to the first clause. If the second clause is a flat prohibition on new breakaway States, Vermont is nevertheless constitutional, although it is impossible to say so with certainty. Thus, the Vermont precedent does not resolve the interpretive ambiguity of Article IV, Section 3.<sup>279</sup>

#### b. *Kentucky*

Kentucky was the second new State admitted into the Union, admitted on February 4, 1791, effective June 1, 1792.<sup>280</sup> As we just saw, the

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278. Professor Currie has also picked up on these intertextual points, concluding that "Congress seems to have thought New York's approval unnecessary and to have implicitly rejected its claim; but since New York had consented, the validity of its claim was no longer of constitutional significance." David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 838-39 (1994).

What about the other branches of Government? President Washington may have thought that New York's consent was constitutionally necessary and that Vermont was admitted into the Union pursuant to the second clause of Article IV, Section 3. See also Currie, *supra* note, at 838. In his message to Congress on the admission of Vermont into the Union, he stated, "I have received from the Governor of Vermont, authentic documents expressing the consent of the Legislatures of New York and of the Territory of Vermont, that the said Territory shall be admitted to be a distinct member of our Union; . . ." 2 ANNALS OF CONG. 1798. Approximately a century and a half later, the Supreme Court considered whether Vermont was admitted into the Union pursuant to the first or second clause of Article IV, Section 3 in a boundary determination case in the original jurisdiction of the Supreme Court, but reserved the question. See *Vermont v. New Hampshire*, 289 U.S. 593, 607 (1933) (noting the "consequent uncertainty whether [Vermont] was admitted under the second clause . . . as a new state formed out of the territory of New York, with her boundary accordingly determined by that of New York, or whether she was admitted under the first clause . . . as an independent revolutionary state with self-constituted boundaries").

279. For these reasons, we think that Professor McGreal seriously errs when he concludes that the Vermont precedent unambiguously supports the admission of new breakaway States into the Union. See McGreal, *supra* note 5, at 2415 n.116 ("But, because New York consented [to Vermont's admission into the Union], the issue of New York's rights [over the jurisdiction of Vermont] was moot. The main point is that regardless of New York's rights, all parties agreed that if Vermont was within New York's jurisdiction, Congress could still admit Vermont with New York's consent."). He further errs by equating the Vermont and Kentucky precedents—precedents with very different (to put it mildly) fact patterns. See *id.* at 2429 n.172 ("Since Vermont followed the same pattern as Kentucky, Vermont merely supports whatever precedent Kentucky establishes.").

280. See 1 Stat. 189 (Feb. 4, 1791).

Kentucky Act makes clear that Kentucky was admitted into the Union pursuant to the second clause of Article IV, Section 3 with the consent of the legislature of Virginia and of Congress.<sup>281</sup> The Kentucky precedent deserves particular weight because it is the first statehood admission decision to implicitly resolve the ambiguity of Article IV, Section 3. To our knowledge, nobody objected to the admission of Kentucky into the Union on constitutional grounds. Indeed, President Washington recommended that Kentucky be admitted into the Union, presumably pursuant to the second clause of Article IV, Section 3, in his second State of the Union Message of December 8, 1790.<sup>282</sup>

Kentucky's admission into the Union capped a long and well-known struggle for statehood that started in 1784.<sup>283</sup> In 1782 and 1784, the inhabitants of Kentucky unsuccessfully petitioned the Continental Congress to be granted statehood, and the First Convention assembled in December of 1784.<sup>284</sup> The inhabitants of Kentucky, unlike those of Vermont, fully recognized Virginia's jurisdiction and sought separation with her consent.<sup>285</sup> The Virginia Constitution of 1776 provided that new governments could be established within the territory of Virginia with the consent of her legislature.<sup>286</sup> Given the geographic isolation of Kentucky from the seat of the government of Virginia, the emergence of a separatist movement in Kentucky was only a matter of time.<sup>287</sup> Some Virginians viewed separation

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281. See text accompanying *supra* note 277.

282. See Second Annual Address of President George Washington (Dec. 8, 1790), reprinted in 1 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, at 5 (Fred L. Israel ed., 1966).

Since your last sessions I have received communications by which it appears that the district of Kentucky, at present a part of Virginia, has concurred in certain propositions contained in a law of that State, in consequence of which the district is to become a distinct member of the Union, in case the requisite sanction of Congress be added. For this sanction application is now made. I shall cause the papers on this very transaction to be laid before you. The liberality and harmony with which it has been conducted will be found to do great honor to both the parties, and the sentiments of warm attachment to the Union and its present Government expressed by our fellow-citizens of Kentucky can not fail to add an affectionate concern for their particular welfare to the great national impressions under which you will decide on the case submitted to you.

*Id.*

283. For an easily accessible summary of Kentucky's statehood movement, see HARRISON, *supra* note 255. On the birthdate of the statehood movement, see, e.g., *id.* at 20-21.

284. See *id.*

285. See 1 HISTORY OF KENTUCKY (BEFORE THE LOUISIANA PURCHASE IN 1803) 357-58 (Temple Bodley ed., 1928) [hereinafter HISTORY OF KENTUCKY].

286. See VA. CONST. OF 1776 ("The western and northern extent of Virginia shall, in all other respects, stand as fixed by the Charter of King James I. in the year one thousand six hundred and nine, and by the public treaty of peace between the Courts of Britain and France, in the year one thousand seven hundred and sixty-three; unless by act of this Legislature, one or more governments be established westward of the Alleghany mountains.").

287. See Frederick Jackson Turner, *Western State-Making in the Revolutionary Era II*, 1 AM. HIST. REV. 251, 265-66 (1896) ("All of these [Kentucky, Franklin, West Virginia] movements were natural expressions of physiographic influences."); *Relations Between the Vermont Separatists and Great Britain, 1789-1791*, 21 AM. HIST. REV. 547, 547 (1916) (noting geographic similarity between Vermont and Kentucky).

as mutually beneficial and therefore did not oppose separation: "[N]ot only was the need of the Kentucky people for a government of their own apparent, but by the separation Virginia would be rid of her burdensome obligations to govern and defend them."<sup>288</sup> Thus, in January of 1786, Kentucky experienced little difficulty in securing an Enabling Act from the legislature of Virginia, apparently drafted by none other than James Madison, who was ostensibly sympathetic to Kentucky's statehood.<sup>289</sup> (If Madison drafted Article IV, Section 3, one would think that its second clause would not flatly prohibit the admission of Kentucky into the Union.)

In February of 1788, during the ratification struggle, Kentucky once again petitioned the Continental Congress for statehood.<sup>290</sup> The Second Enabling Act of the Virginia legislature required that the Continental Congress admit Kentucky into the Union by July 4, 1788.<sup>291</sup> The Committee of the Whole of the Continental Congress reported that Kentucky be admitted into the Union pursuant to the Articles of Confederation.<sup>292</sup> Just one day before the Second Enabling Act was to expire (and just a few days after the Constitution had been adopted), the Continental Congress considered the issue.<sup>293</sup> The Continental Congress voted to delay the admission of Kentucky into the Union (remember that with the adoption of the Constitution, the Continental Congress lacked legal authority under the Articles of Confederation).<sup>294</sup> Most interestingly, the resolution adopted by the Continental Congress suggests that Kentucky would be admitted into the Union as a new State under the Constitution—presumably pursuant to the second clause of Article IV, Section 3:

*Resolved . . . that the said Legislature and the inhabitants of the district aforesaid be informed, that as the constitution of the United States is now ratified, Congress think it unadvisable to adopt any further measures for admitting the district of Kentucky into the federal Union as an independent member thereof under the Articles*

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288. 1 HISTORY OF KENTUCKY, *supra* note 285, at 365-66; see also HARRISON, *supra* note 255, at 17 ("If [Virginia's] rights were protected, opposition to Kentucky's detachment would be minor. Indeed, it might be a relief to get rid of the flow of complaints from beyond the mountains.")

289. See HARRISON, *supra* note 255, at 41; 1 HISTORY OF KENTUCKY, *supra* note 285, at 36.

290. See 1 HISTORY OF KENTUCKY, *supra* note 285, at 432.

291. See HARRISON, *supra* note 255, at 45; 1 HISTORY OF KENTUCKY, *supra* note 285, at 433.

292. See 1 HISTORY OF KENTUCKY, *supra* note 285, at 433; 34 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 194 (1937) (internal quotations omitted) (footnotes omitted).

That in their opinion it is expedient that the district of Kentucky be erected into an independent state and therefore they submit the following resolution, That the address and resolutions from the district of Kentucky with the acts of the legislature of Virginia therein specified be referred to a committee consisting of a member of each state, to prepare and report an act for acceding to the independence of the said district of Kentucky and for receiving the same into the Union as a member thereof, in a mode conformable to the Articles of Confederation.

*Id.*

293. See 1 HISTORY OF KENTUCKY, *supra* note 285, at 433.

294. For a similar observation, see *id.* at 433, 435.

of Confederation and perpetual Union; but that Congress thinking it expedient that the said district be made a separate state and member of the Union as soon after proceedings shall commence under the said constitution as circumstances shall permit, recommend it to the said legislature and to the inhabitants of the said district so to alter their acts and resolutions relative to the premisses [sic] as to render them conformable to the provisions made in the said constitution to the End that no impediment may be in the way of the speedy accomplishment of this important business.<sup>295</sup>

In sum, the Kentucky precedent is strong evidence that Article IV, Section 3 is not a flat prohibition on the formation or erection of new States within the jurisdiction of another State. The mere fact, however, that Kentucky was admitted into the Union as a new breakaway State is not conclusive of the constitutional question, a point which we take up in short order.

c. *Tennessee*

Tennessee was the third new State admitted into the Union—admitted on June 1, 1796.<sup>296</sup> The constitutionality of Tennessee is not at all in doubt: Tennessee was formed or erected out of the southwest Territory ceded by North Carolina to the United States in 1790,<sup>297</sup> and therefore admitted into the Union pursuant to the first clause of Article IV, Section 3. This road to statehood may be significant. It was no secret at the Founding that starting in 1784 the inhabitants of the future State of Tennessee were pushing for admission into the Union as the new breakaway State of Franklin, and importantly, without the consent of the parent State of North Carolina.<sup>298</sup> One historian has suggested that the cause of the State of Franklin movement was Vermont's asserted independence from New York.<sup>299</sup> Was the admission of Tennessee into the Union pursuant to the first clause of Article IV, Section 3, and not pursuant to the second clause, an indication that the second clause is a flat prohibition on the admission of new breakaway States into the Union?

A short summary of the State of Franklin movement is illuminating. On June 2, 1784, the legislature of North Carolina passed an act for the

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295. 34 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 293-94 (1937). A public handbill of October of 1788, issued by Chief Justice George Muter of Kentucky, was more clear. The Muter manifesto warned that "the new federal constitution prohibited the formation of a new State without the consent of Congress and the parent State." HARRISON, *supra* note 255, at 66.

296. See 1 Stat. 491 (1796).

297. 1 Stat. 106 (1790).

298. For useful summaries, see SAMUEL COLE WILLIAMS, HISTORY OF THE LOST STATE OF FRANKLIN (1924); George Henry Alden, *The State of Franklin*, 8 AM. HIST. REV. 271 (1903); and 1 TENNESSEE: A HISTORY, 1673-1932, at 113-32 (Philip M. Hamer ed., 1933) [hereinafter TENNESSEE: A HISTORY]. On the birthdate of the statehood movement, see, e.g., TENNESSEE: A HISTORY, *supra*, at 117.

299. See Alden, *supra* note 298, at 271-72.



cession of lands in North Carolina's western territory.<sup>300</sup> North Carolina would retain jurisdiction over the lands until the Continental Congress accepted the cession.<sup>301</sup> Some of those who voted for the cession were "desirous of avoiding the expense of defending the westerners against the Indians or of pacifying the Indians by making presents to them,"<sup>302</sup> others more bluntly stated that the inhabitants of western North Carolina "were the offscourings of the earth" and that North Carolina "would be well rid of them."<sup>303</sup> When news of the act of cession reached the western counties of North Carolina, the leaders in those counties sought to organize a government and petition the Continental Congress for the formation or erection of the new State of Franklin pursuant to the Northwest Ordinance of 1784.<sup>304</sup> The North Carolina Constitution of 1776 provided for the establishment of new governments within the territory of North Carolina with the consent of her legislature.<sup>305</sup> The inhabitants of Franklin apparently believed that North Carolina's consent was implied in her act of cession. The first convention met in August of 1784.<sup>306</sup> When this news reached the seat of the government of North Carolina, the legislature of North Carolina promptly withdrew any implied consent by repealing the act of cession in November of 1784, before the Continental Congress could act on the matter.<sup>307</sup>

Nevertheless determined, the inhabitants of Franklin created a separate government in March of 1785, much to the dismay of Governor (and future Framer) Alexander Martin of North Carolina, who issued a threatening manifesto warning the inhabitants of Franklin to return their duty and allegiance to North Carolina.<sup>308</sup> In May of 1785, the would-be State of Franklin turned to the Continental Congress for help and presented a memorial asking the Congress to accept North Carolina's original offer of cession (which had since been formally repealed) and to admit Franklin into the Union as an independent State (obviously without North Carolina's consent).<sup>309</sup> This memorial failed, but at least five states supported the decision to dismember North Carolina without her consent.<sup>310</sup>

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300. See TENNESSEE: A HISTORY, *supra* note 298, at 116-17.

301. *Id.* at 117.

302. *Id.*

303. Alden, *supra* note 298, at 272.

304. See TENNESSEE: A HISTORY, *supra* note 298, at 117.

305. See N.C. CONST. OF 1776, art. XXV (Declaration of Rights) (providing that the State constitution "shall not be construed so as to prevent the establishment of one or more governments westward of this State, by consent of the Legislature").

306. TENNESSEE: A HISTORY, *supra* note 298, at 117.

307. *Id.* at 119.

308. *Id.* at 120-21.

309. *Id.* at 123.

310. 28 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 382. New Hampshire, Rhode Island, Connecticut, New York, and Georgia supported the motion; New Jersey, Maryland, and Virginia opposed it; and Massachusetts, Pennsylvania, and South Carolina were divided. *Id.* at 385. See

The fate of the State of Franklin was sealed. North Carolina reasserted her jurisdiction over her western territory by early 1787<sup>311</sup>: "There was danger of civil war. Two sets of courts, two sets of county officials, two rival militia organizations made for the utmost confusion."<sup>312</sup> As the Framers gathered in Philadelphia, rebellion loomed in North Carolina. Governor John Sevier of Franklin wrote Governor Richard Caswell of North Carolina, "We shall continue to Act as Independent and would rather Suffer death in all its Various and frightful shapes than Conform to any thing that is disgraceful."<sup>313</sup> The State of Franklin movement collapsed soon thereafter.

In sum, the Tennessee precedent casts some doubt upon the interpretation of the second clause that permits the admission of new breakaway States into the Union with the consent of their parent States and of Congress. The Franklin episode suggests that, at the time of the framing of the Constitution, North Carolina was once bitten and twice shy. It is not unthinkable that Article IV, Section 3 could be a counterrevolutionary provision by large States to quash troublesome separatist movements in the western territory, unless and until those States decided to formally cede jurisdiction over such lands to the United States.

#### 4. *Conclusions*

What shall we make of the historical argument? The conclusions are more complicated than one might think. The first-best historical evidence—the recorded debates of the several State ratifying conventions—is of no utility, unless one insists on interpreting silence in favor of one reading or another.

What remains, of course, is the second- and third-best historical evidence. The second-best historical evidence—the statements of James Madison and Luther Martin—are of significant utility. These statements strongly support the constitutionality of West Virginia, Kentucky, Maine, and (to the extent still in doubt) Vermont. These statements are not, however, authoritative expositions of constitutional meaning.

The third-best historical evidence—the early precedents of Vermont, Kentucky, and Tennessee (not to mention the much later precedent of Maine)—are of some utility. The precedents of Vermont and Tennessee do not resolve the interpretive ambiguity of Article IV, Section 3. The meaning of early precedents thus turns on the single precedent of Kentucky. The

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also TENNESSEE: A HISTORY, *supra* note 298, at 124 (noting that seven States supported a motion to accept a recommendation that Congress accept North Carolina's cession despite its repeal).

311. See TENNESSEE: A HISTORY, *supra* note 298, at 127-28.

312. TENNESSEE: A HISTORY, *supra* note 298, at 128; see also Alden, *supra* note 298, at 286 ("Many of the people took advantage of the situation, particularly in the manner of tax paying, professing to be uncertain which was the rightful authority and so paying no taxes at all.").

313. TENNESSEE: A HISTORY, *supra* note 298, at 128.

admission of Kentucky into the Union as a new State formed or erected within the jurisdiction of Virginia is certainly relevant and possibly persuasive evidence, but it is hardly dispositive of the constitutional question.<sup>314</sup> Is it simply unthinkable that the First Congress and President Washington acted contrary to the correct interpretation of Article IV, Section 3?

The historical record should give anyone cause for concern. Early Congresses arguably acted contrary to the correct interpretation of the Constitution on several occasions. Consider four well-known examples: Section 13 of the Judiciary Act of 1789,<sup>315</sup> the Presidential Succession Act of 1792,<sup>316</sup> the Fugitive Slave Act of 1793,<sup>317</sup> and the Alien

314. Cf. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 550-51 (1994) (questioning the legitimacy of relying on "the Constitution's postenactment 'legislative' history").

315. See 1 Stat. 73, 80-81 (1789); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175-80 (1803) (invalidating Section 13 of the Judiciary Act of 1789). Of course, the serious critic would argue that Section 13 did not purport to expand the original jurisdiction of the Supreme Court, and that Chief Justice Marshall creatively misread Section 13 so as to cement the doctrine of judicial review of federal law. For an argument that Chief Justice Marshall may have "needlessly" interpreted Section 13 to confront the constitutional problem, see Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 453-63 (1989). See also William N. Eskridge, *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1526 n.59 (1998) (describing Chief Justice Marshall's opinion in *Marbury v. Madison* as "applying an untextualist approach to construing the Judiciary Act of 1789").

We find it ironic that Chief Justice Marshall arguably misinterpreted Section 13 because of a punctuation mark—and one none other than the semicolon. We reproduce Section 13 in full:

*And be it further enacted*, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81. The textual argument is that the writs of prohibition and writs of *mandamus* clauses are appended by a semicolon to a phrase that only addresses the Supreme Court's appellate jurisdiction, and that therefore Section 13 did not concern the Supreme Court's original jurisdiction at all. Other scholars have made this argument. See, e.g., Amar, *supra*, at 454; William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 15. For a sharp critique of this argument and another (and perhaps better) textual argument that Chief Justice Marshall misinterpreted Section 13, see Amar, *supra*, at 454-63.

316. See 1 Stat. 239-40 (1792) (providing for legislative succession to the Presidency). For a strong and persuasive argument that legislative succession to the Presidency is unconstitutional, see Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 125 (1995). For thoughtful responses, see John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141 (1995); and Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155 (1995).

and Sedition Acts of 1798.<sup>318</sup> And we know that the early Congresses acted contrary to the correct interpretation of the Constitution in yet another instance: the Second Congress passed an unconstitutional bill pursuant to the Apportionment Clause<sup>319</sup> which did not become law because of President Washington's veto on constitutional grounds.<sup>320</sup> As Justice Souter recently observed, "If the early Congress's political actions were determinative, and not merely relevant, evidence of constitutional meaning, we would have to gut our current First Amendment doctrine to make room for political censorship."<sup>321</sup>

Nevertheless, an interpretation of the Constitution by early Congresses is entitled to weight as a correct understanding of the Constitution, especially if it was uncontroversial at the time.<sup>322</sup> On this basis, the Kentucky precedent should be persuasive precedent—in contrast to, for example, the quite controversial Presidential Succession Act of 1792 and the Alien and Sedition Acts of 1798. (James Madison famously objected to both.) This line of argument, however, cannot do all the work. To our knowledge, nobody objected to Section 13 of the Judiciary Act of 1789 or the Fugitive Slave Act of 1793. The point is simply this: precedents, however uncontroversial, are not conclusive of the constitutional question. Under even the most careful historical analysis of Article IV, Section 3, the constitutionality of West Virginia, Kentucky, Maine, and (to the extent still

317. See 1 Stat. 302 (1793); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (Story, J.) (affirming the constitutionality of the Fugitive Slave Act of 1793 as a quasi-direct implementation of the Fugitive Slave Clause, U.S. CONST. art. IV, § 2, cl. 3); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 105 (1861) (suggesting that the Fugitive Slave Act of 1793 is a constitutional exercise of Congress's power under the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, to "prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof," although this clause in no way modifies the Fugitive Slave Clause).

318. See *The Sedition Act*, ch. 74, 1 Stat. 596 (1798) (expired Mar. 3, 1801); *The Alien Act*, ch. 58, 1 Stat. 570 (1798) (expired June 25, 1800); *The Naturalization Act*, ch. 54, 1 Stat. 566 (1798) (*repealed by* Act of April 14, 1802, ch. 28, § 5, 2 Stat. 153, 155). The Alien Enemies Act is, however, constitutional. See *The Alien Enemies Act*, ch. 66, 1 Stat. 577 (1798) (current version at 50 U.S.C. §§ 21-23 (1988)).

319. See U.S. CONST. art. I, § 2, cl. 3 ("The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; . . .").

320. The bill allotted to eight States more than one representative for every thirty thousand based on fractional parts resulting from the division of the actual enumeration by thirty thousand. The episode is discussed in WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA*, 38-39 (1825). For the text of President Washington's veto, see *The Papers of George Washington*, George Washington's Presidential Vetoes, at <http://www.virginia.edu/gwpapers/presidency/vetoes/#1> (last visited Feb. 12, 2002). Notably, President Washington's veto of this bill was the first Presidential veto under the Constitution, on constitutional or any other grounds. *Id.* Soon afterwards, Congress decided to apportion Representatives based on the ratio of one for every thirty-three thousand in each State. See 1 Stat. 273 (1792).

321. *Lee v. Weisman*, 505 U.S. 577, 626 (1992) (Souter, J., concurring).

322. See Manning, *Not Proved*, *supra* note 316, at 151.

in doubt) Vermont is still not conclusively established. We must therefore continue our interpretive journey.<sup>323</sup>

### C. *The Argument from Secret Drafting History*

Thus far, we have employed a quintessentially interpretivist methodology of arguments from text and history, but have not mined the legislative history of Article IV, Section 3 at the Philadelphia Convention of 1787. It is well known that this legislative history was secret at the Founding. Just a few days after assembling in Philadelphia in May of 1787, the Framers adopted a rule of secrecy that lasted for the duration of the Convention.<sup>324</sup> Indeed, the proceedings of the Philadelphia Convention did not become fully public until some thirty years after the Founding.<sup>325</sup>

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323. In addition to textual and historical arguments, there remains the structural argument. For a short description of this type of argument, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 74-92 (1982). We think the structural argument is very important, but does remarkably little to resolve the interpretive ambiguity of Article IV, Section 3, and so we will not burden the presentation with it. We will note in passing, however, that Article IV, Section 3 may be the font of two general structural principles: the territorial integrity of the several States (a "federalism" principle), and the territorial integrity of the Union (a "nationalism" principle). For example, in the recent federalism case of *Printz v. United States*, the Supreme Court described Article IV, Section 3 as a constitutional provision guaranteeing the existence of the several States by prohibiting "any involuntary reduction or combination of a State's territory." 521 U.S. 898, 919 (1997). In the early case of *Green v. Biddle*, the Supreme Court plainly stated that under Article IV, Section 3 "[a] State may refuse to allow another State to be carved out of its territory." 21 U.S. (8 Wheat.) 1, 42-43 (1823). This latter statement is good evidence of the early judicial interpretation of Article IV, Section 3, and both statements squarely suggest that a new State may be formed or erected within the jurisdiction of another State with the appropriate consents. The "federalism" principle does not resolve the interpretive ambiguity of Article IV, Section 3, however, because the no-new-breakaway-States reading of the second clause also protects federalism. Indeed, this reading arguably better protects federalism by reducing the possibility that Congress could coerce a State legislature to consent to the "reduction" of State territory.

The "nationalism" principle is even less probative. As noted earlier, the most important "national" structural consideration is the preservation of the Great Compromise of equal representation in the Senate, threatened by the admission of new breakaway States. (Recall the possibility of North Dakota "self-partitioning" into twenty-five additional States, and acquiring fully one-third of the seats in the Senate.) See text accompanying *supra* notes 221-26 (discussing Senate dilution problem). The check to such mischief is the necessity of Congress's approval. It is equally plausible that the second clause permits the admission of new breakaway States into the Union (trusting Congress to check any mischief), or prohibits the admission of new breakaway States entirely (distrusting Congress to check any mischief). Indeed, the latter reading arguably better protects the Great Compromise of equal representation in the Senate.

324. See 1 Farrand, *RECORDS*, *supra* note 145, at 15 (secrecy rule placed on May 29, 1787); *id.* at 650 (secrecy rule removed on Sept. 17, 1787). For some of the Framers' reflections on the prudence of the secrecy rule, see Letter from George Mason, to George Mason, Jr. (June 1, 1787), in 3 *id.* at 33; Letter from Nathan Dane, to Rufus King (June 18, 1787), in 3 *id.* at 48; Letter from Alexander Martin, to Governor Caswell (July 27, 1787), in 3 *id.* at 64; and Journal of Jared Sparks (Apr. 19, 1830) (notes of a visit to James Madison), in 3 *id.* at 479.

325. The federal government first published the secret proceedings of the Philadelphia Convention in 1819, and later posthumously published James Madison's notes in 1840. For a useful discussion, see James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 *TEX. L. REV.* 1 (1986).

If We the People didn't have access to the secret drafting history of the Constitution when it was adopted, why should we use it as an interpretive tool today? Few in the legal academy these days seem bashful about using the secret drafting history as a source of original public meaning. Is this cheating? The secret drafting history of Article IV, Section 3 is good evidence—and maybe the best available evidence—of its contemporaneous understanding, including the meaning of the ambiguous second semicolon and the ambiguous modification of the consent proviso; and the secret drafting history is, of course, the only source of the Framers' intent. Most would agree that the secret drafting history of a clause should not trump its text,<sup>326</sup> but if there is no good public evidence of original public meaning, or if that meaning remains ambiguous after consulting text, history, and structure, then the secret drafting history can provide valuable insight.<sup>327</sup>

In this section, we set forth in detail the legislative history of Article IV, Section 3 at the Philadelphia Convention of 1787. We will somewhat spoil the story by telling you upfront that this legislative history, if a valid source for ascertaining constitutional meaning, presents a near knock-down case in favor of the constitutionality of West Virginia, Kentucky, Maine, and Vermont, but only if we accept that no one on the Committee of Style cunningly changed the text, and thus the meaning, of Article IV, Section 3 at the last minute.<sup>328</sup> We present this legislative history in three discrete chunks—the work of the Committee of Detail, the recorded debate on Article IV, Section 3, and the work of the Committee of Style—and then we consider whether Article IV, Section 3 is a case of stylistic subterfuge, as we saw earlier in our discussion of the “General Welfare Clause.”<sup>329</sup>

### 1. *The Work of the Committee of Detail*

The Committee of Detail was responsible for drafting many of the provisions of the Constitution.<sup>330</sup> The Committee's first draft of Article IV,

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326. See, e.g., Amar, *The Document and the Doctrine*, *supra* note 236, at 47 n.65 (“Details of legislative history invisible to ratifiers and later generations of ordinary Americans should never trump the text itself, though drafting history can at times help highlight certain features of the text.”).

327. This is not to say that the secret drafting history may *only* be consulted if ambiguity remains after consulting text, public history, and structure. One type of extratextual and hence second-best evidence may serve to qualify conclusions derived from other types of second-best evidence. The role of the secret drafting history of the Constitution in constitutional interpretation is the subject of a forthcoming article. See Vasan Kesavan & Michael Stokes Paulsen, *Should We Read the Secret Drafting History of the Constitution?* (unpublished manuscript, on file with authors).

328. See *supra* note 147 (noting that the Committee of Style lacked authority to change the meaning of any provision in the draft Constitution).

329. See *supra* notes 149-51 and accompanying text.

330. The Committee of Detail consisted of five persons: Oliver Ellsworth (Connecticut), Nathaniel Gorham (Massachusetts), Governor Edmund Randolph (Virginia), John Rutledge (South Carolina), and James Wilson (Pennsylvania). See 2 Farrand, *RECORDS*, *supra* note 145, at 97, 106. The Committee of Detail's mandate was to report a Constitution “for the establishment of a national government, except what respects the Supreme Executive.” *Id.* at 85.

Section 3 simply provided “[t]hat Provision ought to be made for the Admission of States lawfully arising within the Limits of the United States, whether from a voluntary Junction of Government and Territory, or otherwise, with the Consent of a number of Voices in the national Legislature less than the whole.”<sup>331</sup> Subsequent work by the Committee of Detail clearly indicates that they considered the possibility of new break-away States. The cryptic notes of the Committee of Detail, III refer to the “[p]ower of dividing annexing and consolidating States, on the Consent and Petition of such States.”<sup>332</sup> The detailed notes of the Committee of Detail, IV provided that “[n]ew States soliciting admission into the Union . . . must lawfully arise” in one of two ways: “(a- in the territory of the united states, with the assent of the legislature)” or “(b- within the limits of a particular state, by the consent of a major part of the people of that state.)”<sup>333</sup> These notes were spun into a draft clause by the Committee of Detail. Article XVII of the Report of the Committee of Detail provided:

New States lawfully constituted or established within the limits of the United States may be admitted, by the Legislature, into this Government; but to such admission the consent of two thirds of the members present in each House shall be necessary. If a new State shall arise within the limits of any of the present States, the consent of the Legislatures of such States shall be also necessary to its admission. If the admission be consented to, the new States shall be admitted on the same terms with the original States. But the Legislature may make conditions with the new States, concerning the public debt which shall be then subsisting.<sup>334</sup>

As far as the members of the Committee of Detail were concerned, Article XVII of the Report of the Committee of Detail clearly provided for the admission of new breakaway States into the Union. So far, so good.

## 2. *The Recorded Debate on Article IV, Section 3*

The Framers took up Article XVII of the Report of the Committee of Detail on August 29, 1787.<sup>335</sup> Gouverneur Morris immediately moved to strike the last two sentences of Article XVII, which provided for the admission of new States into the Union on an equal footing with the original States, because “[h]e did not wish to bind down the Legislature to admit Western States on the terms here stated.”<sup>336</sup> James Madison opposed Morris’s motion, “insisting that the Western States neither would nor ought

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331. *Id.* at 133; *see also id.* at 39 (similar Resolution 14 passing unanimously); *id.* at 46 (same).

332. *Id.* at 136.

333. *Id.* at 147. A marginal note added: “<States lawfully arising & if within the Limits of any of the prest. States by Consent of the Legisle. of those States.>” *Id.*

334. *Id.* at 188; *see also id.* at 173 (similar draft by the Committee of Detail, IX).

335. 2 Farrand, RECORDS, *supra* note 145, at 454.

336. *Id.* at 454.

to submit to a Union which degraded them from an equal rank with the other States.”<sup>337</sup> Morris explained that he “did not mean to discourage the growth of the Western Country,” which he knew to be “impossible,” but that “he did not wish however to throw the power into their hands.”<sup>338</sup> The larger States, of course, laid claim to the Western Territory, and Morris’s root concern was that the equal representation in Congress of new break-away States from the Western Territory would tip the balance of power in favor of those States. Hugh Williamson fully concurred with Morris. “The existing *small* States enjoy an equality now,” said Williamson, “and for *that* reason are admitted to it in the Senate. This reason is not applicable to <new> Western States.”<sup>339</sup> Morris’s motion to delete the equal footing clauses of Article XVII of the Report of the Committee of Detail overwhelmingly passed by a vote of nine to two.<sup>340</sup>

Morris then proposed a substitute for Article XVII which provided that “[n]ew States may be admitted by the Legislature into this Union: but no new State shall be erected within the limits of any of the present States, without the consent of the Legislature of such State, as well as of the Genl. Legislature[.]”<sup>341</sup> The first part of this substitute was agreed to without discussion, but the second part, which permits the admission of new break-away States into the Union (the precursor to the second clause of Article IV, Section 3), evoked significant debate. Luther Martin objected to the second part of Morris’s substitute, stating that

[n]othing he said would so alarm the limited [smaller] States as to make the consent of the large States claiming the Western lands, necessary to the establishment of new States within their limits. It is proposed to guarantee the States. Shall Vermont be reduced by force in favor of the States claiming it? Frankland [Tennessee] & the Western country of Virginia were in a like situation.<sup>342</sup>

Martin’s statement strongly suggests that the smaller States would prefer that new breakaway States from the Western Territory be admitted into the Union without the consent of the larger, parent States—not that the smaller States would prefer a flat prohibition on new breakaway States from the Western Territory. To the contrary, Martin’s cryptic reference to the Guarantee Clause suggests that the smaller States were solicitous to dismember the larger States so that the smaller States would not be forced to protect the Western Territory of the larger States against domestic

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337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at 455.

342. *Id.*



violence should the parent States refuse to provide their consent to demands for separate statehood by the peoples residing there.<sup>343</sup>

Morris's substitute passed narrowly by a vote of six to five,<sup>344</sup> but debate continued on the precursor to the second clause of Article IV, Section 3. Roger Sherman opposed the second part of Morris's substitute because "[h]e thought it unnecessary. The Union cannot dismember a State without its consent."<sup>345</sup> John Langdon of the small State of New Hampshire agreed with Martin's assessment of the second clause, believing that Morris's substitute "would excite a dangerous opposition to the plan."<sup>346</sup> Morris defended his second clause, stating that he "thought on the contrary that the small States would be pleased with the regulation, as it holds up the idea of dismembering the large States."<sup>347</sup>

Several others spoke on the second part of Morris's substitute. Pierce Butler and James Wilson each defended the additional consent requirement for new breakaway States as consonant with general principles of republican government.<sup>348</sup> William Samuel Johnson and John Langdon each expressed concern that the additional consent requirement would prevent the admission of Vermont into the Union.<sup>349</sup> John Dickinson of the small State of Delaware "dwelt on the impropriety of requiring the small States to secure the large ones in their extensive claims of territory."<sup>350</sup> Morris closed out the debate on August 29, 1787, by stating that "[i]f the forced division of the [larger] States is the object of the new System, and is to be pointed agst one or two [large] States, he expected, the gentleman from these would pretty quickly leave us."<sup>351</sup>

The Framers took up Morris's substitute again on the next day. Daniel Carroll of Maryland moved "to strike out so much of the article as requires the consent of the State to its being divided" and "proposed a committment

343. Recall that this was Martin's complaint-in-chief in his publicly distributed "Genuine Information." See *supra* notes 246-48 and accompanying text.

344. 2 Farrand, *RECORDS*, *supra* note 145, at 455.

345. *Id.*

346. *Id.*

347. *Id.*

348. See *id.* at 455 (remarks of Pierce Butler) ("If new States were to be erected without the consent of the dismembered States, nothing but confusion would ensue. Whenever taxes should press on the people, demagogues would set up their schemes of new States."); *id.* at 456 (remarks of James Wilson) ("When the *majority* of a State wish to divide they can do so. The aim of those in opposition to the article [ ] was that the Genl. Government should abet the *minority*, & by that means divide a State against its own consent.").

349. See *id.* at 456 (remarks of William Samuel Johnson) ("[He] agreed in general with the ideas of Mr[.] Sherman, but was afraid that as the clause stood, Vermont would be subjected to N—York, contrary to the faith pledged by Congress. He was of opinion that Vermont ought to be compelled to come into the Union."); *id.* (remarks of John Langdon) ("[He] said his objections were connected with the case of Vermont. If they are not taken in, & remain exempt from taxes, it would prove of great injury to N. Hampshire and the other neighbouring States . . .").

350. *Id.*

351. *Id.* (footnote omitted).

[sic] to a member from each State" that the United States would have sole rights to the "back lands" of the Western Territory ceded by Great Britain in the Treaty of Peace of 1783.<sup>352</sup> This motion for a "commitment" failed soundly by a vote of three to eight,<sup>353</sup> with Rutledge of South Carolina, Williamson of North Carolina, and Wilson of Pennsylvania each defending the additional consent requirement for new breakaway States.<sup>354</sup>

At this point, a series of three key motions was made regarding Morris's substitute, which shed considerable light on the meaning of Article IV, Section 3. These motions are as follows:

Mr. Sherman moved to postpone the substitute for art: XVII agreed to yesterday in order to take up the following amendment "The Legislature shall have power to admit other States into the Union, and new States to be formed by the division or junction of States now in the Union, with the consent of the Legislature of such State" (The first part was meant for the case of Vermont to secure its admission)

Docr. Johnson moved to insert the words "hereafter formed or" after the words "shall be" in the substitute for art: XVII<sup>[355]</sup> (the more clearly to save Vermont as being already formed into a State, from a dependence on the consent of N. York to her admission.)

<The motion was agreed to Del. & Md. only dissenting.>

Mr. Governr. Morris moved to strike out the words "limits" in the substitute, and insert the word "jurisdiction" (This also was meant to guard the case of Vermont, the jurisdiction of N. York not extending over Vermont which was in the exercise of sovereignty, tho' Vermont was within the asserted limits of New York)

On this question

... [Ayes—7; noes—4.]<sup>356</sup>

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352. *Id.* at 461-62.

353. *See id.* at 462.

354. *See id.* (remarks of John Rutledge) ("[I]s it to be supposed that the States are to be cut up without their own consent. The case of Vermont will probably be particularly provided for. There could be no room to fear, that Virginia or N—Carolina would call on the U. States to maintain their Government over the Mountains."); *id.* (remarks of Hugh Williamson) ("[He] said that N. Carolina was well disposed to give up her Western lands, but attempts at compulsion was not the policy of the U.S. He was for doing nothing in the constitution in the present case, and for leaving the whole matter in Statu quo."); *id.* (remarks of James Wilson) ("[He] was against the commitment. . . . He should have no objection to leaving the case of New States as heretofore. He knew of nothing that would give greater or juster alarm than the doctrine, that a political society is to be torne asunder without its own consent—").

355. *See id.* at 455 (Morris's substitute for Article XVII of the Report of the Committee of Detail) ("New States may be admitted by the Legislature into this Union: but no new State shall be erected within the limits of any of the present States, without the consent of the Legislature of such State, as well as of the Genl. Legislature.").

356. *Id.* at 462-63.

The first motion failed, but the second and third motions both passed.<sup>357</sup> These motions demonstrate that the word “jurisdiction” was inserted into Morris’s substitute so as to provide for the admission of Vermont into the Union without the consent of New York, and confirm our earlier intuitions that Vermont may not have been admitted into the Union as a new breakaway State pursuant to the second clause of Article IV, Section 3.<sup>358</sup>

But Luther Martin forcefully reiterated his objection to the additional consent requirement for new breakaway States. He “urged the unreasonableness of forcing & guaranteeing the people of Virginia beyond the Mountains, the Western people, of N. Carolina & of Georgia, & the people of Maine, to continue under the States now governing them, without the consent of those States to their separation.”<sup>359</sup> He was concerned that the larger States would “still keep the injured parts of the States in subjection, under the guarantee of the Genl. Government agst. domestic violence,” and he “repeated and enlarged on the unreasonableness of requiring the small States to guarantee the Western claims of the large ones.”<sup>360</sup> He then raised the stakes in an important way:

It was said yesterday by Mr[.] Govr Morris, that if the large States were to be split to pieces without their consent, their representatives here would take their leave. If the Small States are to be required to guarantee them in this manner, it will be found that the Representatives of other States will with equal firmness take their leave of the Constitution on the table.<sup>361</sup>

If Martin’s fulmination was correct, the smaller States would certainly take leave of the Constitution if Article IV, Section 3 were to flatly prohibit new breakaway States, thereby unconditionally forcing the smaller States to guarantee the Western Territory of the larger States. Martin proposed a substitute that would permit the admission of new breakaway States without the consent of the parent States, but only three small States—New Jersey, Delaware, and Maryland—voted for it.<sup>362</sup>

Morris’s amended substitute that “[n]ew States may be admitted by the Legislature into the Union: but no new State shall be hereafter formed or erected within the jurisdiction of any of the present States without the consent of the Legislature of such State as well as of the General

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357. *Id.*

358. *See supra* notes 262-78 and accompanying text.

359. 2 Farrand, RECORDS, *supra* note 145, at 463.

360. *Id.* at 463-64.

361. *Id.* at 464.

362. *See id.*; *see also id.* (Luther Martin’s substitute proposal) (“The Legislature of the U—S— shall have power to erect New States within as well as without the territory claimed by the several States or either of them, and admit the same into the Union: provided that nothing in this constitution shall be construed to affect the claim of the U—S. to vacant lands cede to them by the late treaty of peace—”).

Legislature” finally passed by a vote of eight to three, with only New Jersey, Delaware, and Maryland disagreeing.<sup>363</sup> It was at this point that John Dickinson proposed an important addition to the amended substitute. This stand-alone clause provided: “Nor shall any State be formed by the junction of two or more States or parts thereof, without the consent of the Legislatures of such States, as well as of the Legislature of the U. States,” which passed without discussion.<sup>364</sup> As far as the Framers were concerned, Morris’s amended substitute clearly provided for the admission of new breakaway States into the Union with requisite consents.<sup>365</sup> So far, so good.

### 3. *The Work of the Committee of Style*

In order to determine whether the Committee of Style changed the meaning of the precursor to Article IV, Section 3, let us lay side-by-side the amended Article XVII referred by the Framers to the Committee of Style and the precursor to Article IV, Section 3 in the Report of the Committee of Style, paying careful attention to changes in text and particular attention to changes in punctuation:

[Draft Referred to Committee of Style, Article XVII]

New States may be admitted by the Legislature into this Union: but no new State shall be hereafter formed or erected within the jurisdiction of any of the present States, without the consent of the Legislature of such State as well as of the general Legislature. Nor shall any State be formed by the junction of two or more States or parts thereof without the consent of the Legislatures of such States as well as of the Legislature of the United States.<sup>366</sup>

[Word count: 82; Character Count (no spaces): 373]

[Draft Reported by the Committee of Style, Article IV, Section 3:]

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

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363. *Id.*

364. *Id.* at 465.

365. This point is underscored by the precursor to the Apportionment Clause, U.S. CONST. art. I, § 2, cl. 3, referred by the Framers to the Committee of Style:

As the proportions of numbers in the different states will alter from time to time; as some of the States may hereafter be divided; as others may be enlarged by addition of territory; as two or more States may be united; as new States will be erected within the limits of the United States, the Legislature shall, in each of these cases, regulate the number of representatives by the number of inhabitants, according to the rule hereinafter made for direct taxation not exceeding the rate of one for every forty thousand. Provided that every State shall have at least one representative.

2 Farrand, RECORDS, *supra* note 145, at 566.

366. *Id.* at 578.

states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.<sup>367</sup>

[Word Count: 60; Character Count (no spaces): 263]

We must consider the changes wrought by the Committee of Style in a holistic fashion. The Committee of Style made minor changes to Article XVII in capitalization and replaced the word "Legislature" and the phrase "Legislature of the United States" in Article XVII with the word "Congress" in Article IV, Section 3. The major change is, of course, the deletion of the sixteen-word proviso "without the consent of the Legislature of such State as well as of the general Legislature" in the second clause of Article XVII. There are six important minor changes to Article XVII that explain the deletion of this important proviso in the second clause of Article XVII.

First, the colon at the end of the first clause in Article XVII gave way to the semicolon. Second, the word "hereafter" in the second clause was deleted and the phrase "within the jurisdiction of any of the present States" was changed to "within the jurisdiction of any other state." Third, the period at the end of the second clause in Article XVII gave way to the all-important semicolon. Fourth, the first word of the third clause in Article XVII—"Nor"—lost its capitalization. Fifth, the second word of the third clause in Article XVII—"shall"—was deleted. Sixth, and perhaps most importantly, the punctuation of the third clause of Article XVII was changed. The third clause of Article XVII contains zero internal commas, whereas the third clause of the Report of the Committee of Style contains two internal commas which set off the phrase "or parts of states" from its surrounding text.<sup>368</sup>

The upshot of these six changes is that the deletion of the sixteen-word proviso "without the consent of the Legislature of such State as well as of the general Legislature" in the second clause of Article XVII makes good aesthetic and interpretive sense. The Report of the Committee of Style is considerably less prolix than its predecessor, and the Committee of Style's mandate probably included the deletion of unnecessary words.<sup>369</sup> Remember that punctuation rules caution that we should not read the

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367. *Id.* at 602.

368. It should be noted that the original motion in support of the third clause of Article XVII contained two internal commas (albeit in different places), although the third clause of Article XVII as referred by the Framers to the Committee of Style contained no such punctuation. Compare *id.* at 465 (motion of John Dickinson) ("Nor shall any State be formed by the junction of two or more States or parts thereof, without the consent of the Legislatures of such States, as well as of the Legislature of the U. States."), with *id.* at 578 ("Nor shall any State be formed by the junction of two or more States or parts thereof without the consent of the Legislatures of such States as well as of the Legislature of the United States.").

369. See, e.g., Letter from Gouverneur Morris, to Timothy Pickering (Dec. 22, 1814), in 3 *id.* at 419 ("Having rejected redundant and equivocal terms, I believed [the Constitution] to be as clear as our language would permit . . .").

second semicolon of the Report of the Committee of Style as a period when the semicolon is used to append two dependent clauses, either of which contains internal commas.<sup>370</sup>

Admittedly, the deletion of the sixteen-word proviso in the second clause of Article XVII creates one interpretive wrinkle that we identified earlier in our holistic analysis of the "intention" or "sense" of Article IV, Section 3.<sup>371</sup> It is not clear which State(s) must consent to the formation or erection of a new breakaway State. Article XVII makes clear that the only State that must provide its consent for the admission of a new breakaway State is the parent State. The Report of the Committee of Style's sole consent phrase—"without the consent of the legislatures of the states concerned as well as of the Congress"—suggests that the admission of a new breakaway State requires the consent of the parent State and the new breakaway State. Perhaps the consent phrase should not be read literally in the case of the admission of a new breakaway State—perhaps only the consent of the parent State is required.<sup>372</sup> A severe textual critic might argue that the meaning of Article XVII was in fact changed by the Committee of Style, but this ever-so-slight possible change in meaning is a seemingly small price to pay for the deletion of sixteen largely duplicative words.

#### 4. *A Case of Stylistic Subterfuge?*

The sole question that remains is whether the changes wrought by the Committee of Style in revising the "style" of Article XVII surreptitiously changed the meaning of the second clause so as to flatly prohibit the admission of new breakaway States into the Union. Did Gouverneur Morris or another member of the Committee pull a fast one by slipping in the second semicolon or by reconstructing Article XVII so that the consent proviso does not modify the antecedent second clause relating to the partition of States? Is Article IV, Section 3 an instance of stylistic subterfuge involving the semicolon, as we saw earlier regarding the "General Welfare Clause?"<sup>373</sup>

To be sure, Gouverneur Morris had the motive to change the meaning of the second clause of Article IV, Section 3 so as to prohibit new breakaway States. He was solicitous to provide for the admission of Vermont into the Union—hence the motion to insert the word "jurisdiction" in Article XVII in place of the word "limits."<sup>374</sup> But Morris's deep hatred of slavery might well have led him to want to make sure that none of the

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370. See *supra* notes 174-81 and accompanying text.

371. See *supra* notes 229-30 and accompanying text.

372. That was, of course, President Lincoln's construction in his December 1862 opinion on the admission of West Virginia into the Union. See text accompanying *supra* notes 122-23.

373. See *supra* notes 149-51 and accompanying text.

374. See text accompanying *supra* note 356.

large, slave States spawned any more slave-friendly senators.<sup>375</sup> Moreover, Morris was perpetually concerned throughout the Philadelphia Convention that the admission of new States from the Western Territory would tip the balance of power in Congress away from the original Atlantic States.<sup>376</sup> A flat prohibition on new breakaway States would surely help preserve the balance of power at the Founding by making the admission of new breakaway States into the Union more difficult under the first or third clauses of Article IV, Section 3.

Morris's position on the controversy surrounding the Louisiana Purchase is illuminating. In a private letter, he wrote, "I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion."<sup>377</sup> Morris then admitted, "Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made."<sup>378</sup> Did Morris also make a similar, subtle effort to prohibit new breakaway States?

Such an effort would not have been out of character. Professor Farrand described Gouverneur Morris as "probably the most brilliant member of the Pennsylvania delegation and of the convention as well," but who "was admired more than he was trusted, for he was inconsistent and he was suspected of being lax in morals as well as lacking in principles."<sup>379</sup> Morris also had the power as the chief scrivener of the Committee of Style to change the meaning of the second clause of Article IV, Section 3 so as to prohibit new breakaway States. A few years before his death, Madison observed that "[t]he *finish* given to the style and arrangement of the

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375. For a strongly worded statement of Morris's hatred of slavery, see 2 Farrand, RECORDS, *supra* note 145, at 221-23. Recall that it was Morris who moved to insert the word "free" before the word "inhabitants" in the precursor to the Apportionment Clause, U.S. CONST. art. I, § 2, cl. 3, which provided for the apportionment of representatives at the rate of one for every 40,000 inhabitants. *Id.* at 221. This motion was rejected by a vote of ten to one. *Id.* at 223.

376. See text accompanying *supra* note 338; see also 1 Farrand, RECORDS, *supra* note 145, at 533 ("He looked forward also to that range of New States which wd. soon be formed in the west. He thought the rule of representation ought to be so fixed as to secure to the Atlantic States a prevalence in the National Councils."); *id.* at 571 ("He dwelt much on the danger of throwing such a preponderancy into the Western Scale, suggesting that in time the Western people wd. outnumber the Atlantic States. He wished therefore to put it in the power of the latter to keep a majority of votes in their own hands."); *id.* at 583 ("If the Western people get the power into their hands they will ruin the Atlantic interests."); *id.* at 604-05 ("It has been said that N.C. S.C. and Georgia only will in a little time have a majority of the people of America. They must in that case include the great interior Country, and every thing was to be apprehended from their getting the power into their hands.").

377. Letter from Gouverneur Morris, to Henry W. Livingston (Dec. 4, 1803), in 3 Farrand, RECORDS, *supra* note 145, at 404.

378. *Id.*

379. FARRAND, THE FRAMING OF THE CONSTITUTION, *supra* note 146, at 21.

Constitution fairly belongs to the pen of Mr[.] Morris”<sup>380</sup> “It is true,” said Madison “that the state of the materials, consisting of a reported draft in detail, and subsequent resolutions accurately penned . . . was a good preparation for the symmetry and phraseology of the instrument, but there was sufficient room for the talents and taste stamped by the author on the face of it.”<sup>381</sup> This is not to say that the other members of the Committee of Style were sleeping at the constitutional switch. As Professor Engdahl has written, “because the other members were Madison, Hamilton, the very able Rufus King of Massachusetts, and Connecticut’s highly respected William Samuel Johnson, this was not a group easily duped by one member, no matter how clever he might be.”<sup>382</sup>

If somebody on the Committee of Style changed the meaning of Article IV, Section 3 at the last minute, no one caught it. The documentary record of the exchange between Gouverneur Morris and Roger Sherman concerning the “General Welfare Clause” might support an inference that no stylistic subterfuge took place with respect to Article IV, Section 3, but the opposite inference is equally plausible. Given the multitude of changes wrought by the Committee of Style to the Constitution as a whole, it is possible that no one paid much attention to Article IV, Section 3. Luther Martin, for his part, would have paid close attention, but he left the Philadelphia Convention several days before the Committee of Style finished its business in mid-September.<sup>383</sup> We do know that the Framers as a whole considered Article IV, Section 3 once more on September 15, 1787—just two days before the Convention officially finished its business—and that nobody said “Boo” to any change in intended meaning.<sup>384</sup> The Framers, however, apparently focused on the third clause,<sup>385</sup> and it is possible that the Framers, eager to return home, simply missed the subtle changes wrought by the Committee of Style.

It is not at all clear that Gouverneur Morris or another member of the Committee of Style did in fact change the meaning of Article IV, Section 3 so as to flatly prohibit the admission of new breakaway States into the Union. If somebody did pull a fast one, however, it was not fast enough.

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380. Letter from James Madison, to Jared Sparks (Apr. 8, 1831), in 3 FARRAND, RECORDS, *supra* note 145, at 499.

381. *Id.*

382. Engdahl, *supra* note 151, at 253 n.192.

383. See 3 FARRAND, RECORDS, *supra* note 145, at 589 (noting that Luther Martin left the Philadelphia Convention on September 4, 1787). To be sure, Luther Martin later publicly interpreted Article IV, Section 3 as permitting new breakaway States with requisite consents, see text accompanying *supra* note 247, but it is possible that Martin did not focus on the text as ultimately agreed to by the Framers.

384. See 2 FARRAND, RECORDS, *supra* note 145, at 628.

385. The records indicate that Elbridge Gerry, ever the formalist, “moved to insert after ‘or parts of States’ the words ‘or a State and part of a State’ which was disagreed to by a large majority; it appearing to be supposed that the case was comprehended in the words of the clause as reported by the Committee.” *Id.*



The Supreme Court has recently observed that because the Committee of Style “had no authority . . . to alter the meaning” of a clause, the presumption is “that the Committee’s reorganization or rephrasing accurately captured what the Framers meant in their unadorned language . . . that the Committee did its job.”<sup>386</sup> Given that the effect of the semicolon is ambiguous, any intended ruse did not succeed. At most it created an interpretive ambiguity in the text of Article IV, Section 3, for which it is appropriate to repair to extratextual evidence of original public meaning, which in the end resolves the ambiguity. The better conclusion is that the admission into the Union of new breakaway States was contemplated in Article IV, Section 3 and permitted with the consent of parent States and of Congress.

#### *D. Conclusions*

The long journey resists summary, but a short summary is useful nonetheless. The first-best evidence of the original public meaning of Article IV, Section 3—the text—is ambiguous. The second-best evidence—the history—better (though imperfectly) supports the interpretation that new States may be formed or erected within the jurisdiction of another State with the appropriate consents. The secret drafting history clearly shows that this interpretation was intended. Only if one ascribes presumptive (or more) significance to the semicolon and the last-antecedent canon; leans against the position of both advocates of the Constitution (James Madison) and opponents (Luther Martin); treats as immaterial the construction placed on Article IV, Section 3 by early Congresses; and ignores the records of the Philadelphia Convention suggesting a contrary specific intention and understanding (even if not public) can one conclude that the second clause of Article IV, Section 3 is a flat prohibition on new breakaway States. One has to work hard to adopt the destructive interpretation, and as we noted earlier, even that interpretation is not conspiracy-proof. The better conclusion, though by no means an unassailable one, is that new breakaway States are permitted with the appropriate consents, and that West Virginia (and Kentucky, Maine, and to the extent still in doubt, Vermont) are constitutional.

### III

#### WHY WOULD ANYBODY CARE?

We conclude with the last set of questions with which we began: Given that, realistically, West Virginia is not, regardless of anyone’s constitutional argument, going to be absorbed back into old Virginia, why does any of this matter? Why would anyone write a 100-page law review

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386. *Nixon v. United States*, 506 U.S. 224, 231 (1993).

article on such a topic (and, still more absurdly, why would anyone read one)?

We hope, in these pages, to have suggested some answers (beyond those of pure sport). Correct principles of legal interpretation, we submit, matter. We believe that the Constitution is best interpreted, as a legal document, through traditional, formal means of legal interpretation that accord primacy to the text, structure, and history of the document in ascertaining the meaning of its provisions and then applying that meaning in a rigorous, logically formal way. Such a method requires inquiry into the original public meaning of the Constitution as a legal text, paying attention to even such seemingly arcane things as punctuation marks, and interpreting such texts (and marks) as they would have been understood, in context, by speakers, readers, and writers of the English language at the time of the proposal and adoption of the provisions in question, resorting to second- and third-best evidence of such understanding only in accordance with a reasonably strict hierarchy of interpretive sources, principles, and canons, selected and organized based on their ability to help ascertain the actual meaning of the legal text. These traditional means of legal interpretation also include rigorous legal formalism—following sound premises to sound logical conclusions, even when doing so might sometimes produce unexpected consequences. Despite the cumbersomeness that these inquiries sometimes entail, they repay the effort, we submit, by providing for sounder, more durable constitutional conclusions than those created by the more freewheeling (no pun intended), less text-focused, antiformalist interpretive approaches that have become so common in constitutional law scholarship today.

The first part of our analysis focused on formalism, and its application by the actors involved in the story of West Virginia's creation. In a sense, this puts things in reverse order, for our understanding of formalism in law has to do with how one goes about applying a legal text to concrete situations once one knows what a text means (the question of textual interpretation).

The essence of legal formalism, we believe, lies in the insight that the meaning of a legal text may diverge significantly from the apparent purpose behind the text—a text may overshoot or undershoot its objective, sometimes by quite a bit—but that treating a text as law (as the Constitution says its text should be treated)<sup>387</sup> means following that text rather than the imagined objective behind it and adhering to the rules established by the text, and logical inferences derived from those rules, even when doing so might produce results that diverge from what one might imagine was the policy intended to be served by the rule. Put more simply,

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387. U.S. CONST. art. VI, cl.2 ("This Constitution . . . shall be the supreme Law of the Land . . .").

legal formalism means treating rules as rules, even when they don't seem to make much sense.

Not all provisions of the Constitution are rules, of course. Some are standards. And not all of the rules are stated in clear, unambiguous terms or are clear in their application. Indeed, sometimes ambiguity can lie in something as seemingly minor as a semicolon. There thus arises, even for a Constitution that is largely a supreme law of rules, the challenge of faithful interpretation in the first instance. But the presence, frequently, of interpretive challenges or difficulties does not justify wholesale abandonment of the rule-like nature of much of the Constitution.

West Virginia is a parable of working constitutional formalism. The story of West Virginia is one in which the actors involved, for the most part, took the text, and the formal rules established by the text, seriously, wrestling with them, fighting over their proper interpretation and application, disagreeing about what steps were required and what steps were not, but never abandoning the Constitution as a set of formal legal rules to which adherence was required. The framers of the State of West Virginia took the rules seriously. President Lincoln took them seriously, in propounding a constitutional theory to justify the Civil War and the policies of the federal government throughout it.

Once one knows what the rules are, one can judge whether the rules were broken by the events of history. It is never proper to do things the other way around: one should not use the events of history to judge what the legal rules were. The written Constitution is the standard for judging the lawfulness of the actions of the men and women operating under it; the actions of the men and women do not change the meaning of the Constitution as a written document (except when those actions result in changes to the written document).

The truly amazing thing about the Civil War era in this regard is not that there was some breaking of legal rules and legal forms. Civil wars and reconstructions are decidedly messy business. The truly amazing thing is how little legal breakage there was in the American Civil War, how much constitutional propriety remained in the forefront, and how much that constitutional propriety was measured in formal, literal terms. We got through the Civil War precisely because Lincoln anchored his theory of the war in the Constitution. Similarly, West Virginia is legitimately a State of the Union because the loyalists followed the letter of the constitutional law. Any theory of the Constitution, of Lincoln's conduct of the Civil War, of the formation of West Virginia, and of the fight over Reconstruction, that fails to take seriously constitutional formalism and the rules supplied by the written text, simply fails to engage the historical and constitutional issues on the terms that the interpreters, framers, and reconstructors of the 1860s understood them and is, to that extent, anachronistic.

Of course, it remains possible that the interpreters-reconstructors-framers of the 1860s, even with their commitment to the letter of the law, had that letter (or the punctuation and grammar) all wrong. Thus, we have explored at length the question of just what is the meaning of the text that Lincoln, Bingham, and the Unionists at Wheeling thought themselves to be applying. In searching for the single best meaning of Article IV, Section 3, and hopefully absolving West Virginia of the accusation of being an unconstitutional State, we have offered as well some serious lessons of more general application, concerning what should count as persuasive evidence of constitutional meaning, and the relationship of considerations of text, history, structure, purpose, and accident in theories of constitutional interpretation.

If the object is to ascertain the meaning of the Constitution as a written document—to discover the content of the rules and standards contained therein, so as to apply them faithfully—we believe the appropriate search is for the original public meaning of the Constitution's language. That is, the meaning the language would have had (both its words and its grammar) to an average, informed speaker and reader of that language at the time of its enactment into law. This is sometimes clear on direct evidence, but not always. It is thus necessary to discern second-order rules for ascertaining constitutional meaning—to determine what counts as good, second-best evidence of the original public meaning of constitutional language and when it is appropriate to repair to such second-best evidence. A reasonably strict hierarchy of constitutional argument is important; not all types of constitutional argument are created equal.<sup>388</sup>

The case of West Virginia has taken us on a walk through those sources and arguments, in what we consider to be roughly their order of priority and relative weight. Where the text, considered in context, and taking account of contemporaneous rules of grammar and style (itself not always an easy task, as we have seen with Article IV, Section 3!), does not yield a single clear meaning, consider the structure and logic of the provision in relation to other constitutional provisions, contemporaneous public sources that explicate the meaning of the provision at issue or the terms used, contemporaneous private sources that explicate the meaning of the provision at issue or the terms used, and early applications of the provision in concrete situations. Each of these sources has its limitations of reliability and pertinence, but in terms of ascertaining the original meaning of the Constitution's language, each of these sources is at least a competent

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388. For a thoughtful discussion, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

source of evidence that should be considered, and—usually—in roughly this order of priority.<sup>389</sup>

In the case of Article IV, Section 3, it takes resort to second- and third-best evidence of constitutional argument to reach the conclusion that new breakaway States are permitted with the appropriate consents, and reliance on this evidence is never perfectly safe. But sometimes arguments in one category can reinforce weak conclusions in other (higher priority) categories. In many ways, our discovery of the best meaning of Article IV, Section 3 is one that emphasizes both hierarchy and interconnectedness in the different types of constitutional argument.

Significantly, it is only when we reach the records of the Philadelphia Convention—the “secret legislative history” unavailable (except through leaks) to those with the political authority to ratify the Constitution—that we can feel reasonably comfortable in the conclusion that Article IV, Section 3 permits new States to be formed from within existing ones. Text alone (semicolons, antecedent reference problems) is not determinative, inclining (slightly) against the validity of breakaway States. The structure and logic of Article IV, Section 3 dictate no single necessary conclusion; it is not at all absurd to think the Framers might have meant to prevent such arrangements (to preserve the Senate representation rule of the Great Compromise), even if other means of circumventing such a prohibition might be found. Madison’s exposition in *The Federalist* and Martin’s similar reading in *Genuine Information* support the conclusion permitting breakaway States, but not overwhelmingly. It takes the Philadelphia debates to seal the deal. Absent this second- or third-best evidence, and its coherence with the public statements on this issue of both proponents and opponents of the Constitution, the constitutional validity of West Virginia would remain, we think, up for grabs. The fact that early practice fits the breakaway-States-permitted reading would not be sufficient, in our view, because practice only sometimes matches constitutional meaning, and a wrong precedent is still, well, a wrong precedent.

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389. In part aided by the experience of the investigation of the West Virginia question, and in part aided by the scholarship of others, we are becoming increasingly convinced that the popular tendency of originalists today to prefer sources like *The Federalist* and State ratification debates to the records of the debates at the Philadelphia Convention, on the ground that the Philadelphia Records were not public, is not strongly justified on an interpretive theory that seeks the original “public” meaning of the language enacted into law. The fact that specific sources or documents might not have been available to the Constitution’s ratifiers lessens the Philadelphia Records’ relevance only if the relevant inquiry is into the ratifiers’ subjective understanding of the meaning of the Constitution’s language rather than into the objective public meaning that that language would have had—and did have—to informed members of the general public at the time. If the latter is the inquiry, even “private” documents can be fully probative of public meaning, sometimes more so than public statements intended to persuade a specific audience at a specific time. We seek to develop this idea at much greater length in a forthcoming article. See Kesavan & Paulsen, *supra* note 327.

We took West Virginia as our test case in part because of its surprising difficulty and the diversity of methodological issues it presents concerning constitutional interpretation. We took it as our test case in part also because it is just plain fun—a nifty historical and linguistic curiosity. We hope to leave West Virginia better off than we found it—constitutionally, that is. For now, after 139 years, we hope we can finally extinguish a long-smoldering, but surely not burning, historical constitutional issue. West Virginians may rest secure in the knowledge that their State is not unconstitutional.

Probably.