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IF THE STATES HAD BEEN SOVEREIGN

*Edward L. Rubin**

As is generally known, the latter part of Article IV, clause 3 of the Constitution originally read: "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." As is also generally known, the words "of the Legislatures of the States concerned as well as" were deleted from the text in the special session of the Constitutional Convention held in October of 1787.¹ Had these words not been deleted, existing states could not be combined or divided by Congressional action alone, as is presently the case; the approval of the states themselves would have been required. There is a story, perhaps apocryphal, that an attorney from France happened to be visiting Philadelphia during that fateful October and spoke with several members of the Convention, including Madison and James Wilson. He explained to them that France was expected to undergo a revolution in a few years time and that the revolutionaries would undoubtedly divide France's historical and disproportionately-sized provinces, which had generated so much sectional animosity, into a more rationally-ordered set of departments that would be more consonant with the needs of modern government.² Whether this interesting information played a role in convincing the members of the Convention to make the revision is unknown.

I am generally averse to counterfactual speculation; however, in response to a request by the editors of *Constitutional Commentary*, for their symposium entitled "The Sound of Legal Thunder: The Chaotic Consequences Of Fabricating Constitutional Butterflies"), I will try to imagine the course of American

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1. Max Farrand, ed., *The Records of the Federal Convention of 1787* at 826 (Yale U. Press, 1966).

2. Bernard Miasma, *Adumbrations of the Revolution* (Knopf, 1987).

history had the revision not been made and had the original words remained in the constitutional text. I apologize in advance for the somber character of these speculations and would only say, in my defense, that the lugubrious events that I am envisioning should serve to underscore the fortunate condition of our nation at the present time.

It seems unlikely that the retention of the deleted words in Article IV, and the consequent restriction on the Congressional reorganization of states, would have produced any noticeable effects during the first seventy years of the new republic. States were being created at a steady rate during this entire period, but there was no particular need or demand for reorganizing the existing ones. There was some discussion of dividing Texas into several states on account of its ungainly size when it was admitted to the Union in 1845; the general sense, however, was that its historical experience and unusual sense of solidarity made such action undesirable.

The Reconstruction period that followed the Civil War was the first time in American history that existing state boundaries were redrawn. Of course, it is conceivable that these salutary reorganizations could have been effected even if the deleted language had remained in the Constitution; while the Southern states themselves would obviously not have agreed, their governments had been dissolved, and the entire region was under military occupation. The North, however, was deeply divided; there were some who were prepared to redistribute the land of the plantations to the former slaves, while others who were adamantly opposed to giving former slaves the franchise, or any other rights beyond their legal freedom. Overall, it seems unlikely that Congress, even though it was dominated by Radical Republicans in the years following the Civil War, would have possessed the political will to redraw state lines without the specific authorization that Article IV provides. Consequently, the new state of Appalachia would not have been formed out of the pro-Union regions in western North Carolina, northern Georgia, northern Alabama, and eastern Tennessee. Even more importantly, central Georgia, southern South Carolina, and the South Carolina and Georgia coasts could not have been combined into the predominantly black state of Savannah River, nor could the parts of Mississippi, Arkansas, and Louisiana that lie along the Mississippi River have been combined into the predominantly black state of Yoknapatawpha. These three states, of course, were the only ones in the South that resisted the Redeemer

movement, the only ones that did not fall prey to Ku Klux Klan influence, and thus the only ones that did not enact segregationist laws or effectively disenfranchise blacks. It was pressure from the congressional representatives of these states, particularly the black representatives of Savannah River and Yoknapatawpha, that secured the limited enforcement of the Civil Rights Law in the South during the period when segregation prevailed in the remaining Southern states. The political apparatus of these latter states, moreover, produced many of the black leaders who campaigned so effectively for social justice during the post-Reconstruction period, while the black business interests in these states provided the funding to support their efforts.

The possible effect on Supreme Court doctrine is more speculative. It is unduly cynical to suggest that the Court follows political trends; nonetheless, the condemnation that its decision in *Plessy v. Ferguson*³ received, not only from more radical black leaders such as Representative W.E.B. Dubois of Savannah River, but also from moderate figures such as Senator Booker T. Washington of that same state, must have had their effect. More directly, the difference between the condition of blacks in white-dominated Southern states (such as Alabama, Louisiana, East Mississippi, and South Georgia) and their condition in the black majority states challenged the empirical premises of *Plessy*'s separate but equal doctrine. Without the political influence and empirical example that these states provided, it is entirely possible that the Supreme Court would not have overruled *Plessy* during the Progressive Era.⁴ In fact, recent writing by critical race theorists has suggested that the Court might not have done so until after World War II.⁵ While this position is so extreme that it cannot be taken seriously, it seems plausible to suppose that the *Brown* decision would have been delayed by a significant number of years.

Whatever the possibility that the salutary reorganization of the Southern states following the Civil War could have been carried out even if the deleted language had remained in Article IV, it is obvious that the Congressional reorganization that occurred during the New Deal period would have been impossible had that language remained in the text. The consequences of pre-

3. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

4. See *Brown v. Board of Education*, 247 U.S. 483 (1918).

5. See, e.g., Derrick Bell, *And We Were Barely Saved* (Basic Books, 1987); Charles R. Lawrence III, *The Id, the Ego, the Superego and Equal Protection: Wrecking Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

venting this second reorganization are somewhat easier to imagine, since the event is closer to the present time. Suppose Congress had been unable to respond to the economic crisis in the United States by making the largest cities and their surrounding areas separate states? To begin with, these cities would have remained dominated by rural districts in their former states, with much-needed tax revenues continuing to be drained out of them. Sustained attention at the state level to characteristically urban problems such as transportation, housing renewal, social welfare, recreation, and mass public education might not have occurred. More basically, the political commitment to coordinated metropolitan planning of the sort we see today might have been difficult to sustain had these metropolitan areas remained attached to their former states, and perhaps impossible for those urban areas, such as New York, Philadelphia, Chicago, and St. Louis, that were actually divided by the former state lines.

The suburbanization that followed World War II would have produced additional problems under these circumstances. Instead of being incrementally incorporated into a unified political entity by the metropolitan states, these communities might have allied themselves with the rural districts and maintained their political independence.⁶ As a result, the development of coordinated taxation schemes, transportation networks, educational systems, and housing programs would have been impossible.⁷ Such difficulties have in fact occurred in smaller cities that remained within states dominated by rural districts, although the example of the large metropolitan states has, to some extent, compelled these states to follow more rational and equitable policies. Thus, if Congress had not been able to reorganize the states, problems of decaying center cities and economic stratification might not be restricted to secondary urban areas such as Buffalo, Toledo, and Memphis, but might characterize America's great cities like New York, Philadelphia, Detroit, Chicago, and Los Angeles.

Suppose, moreover, that Congress had been unable to consolidate small-population states into larger entities, as it did in its

6. See Richard Briffault, *The Absence of the Local Government Boundary Problem in Metropolitan Areas*, 48 *Stan. L. Rev.* 1115 (1996).

7. For a discussion of this approach's virtues, see Gerald Frug, *The City as a Well-Accepted Legal Concept*, 93 *Harv. L. Rev.* 1059 (1980). While this article has been criticized as presenting an overly positive view of American cities, its conclusions seem well-justified.

New Deal reorganization in order to facilitate the delivery of federal services to citizens of these states. Imagine, for example that Idaho, Montana and Wyoming had remained separate instead of being combined with Colorado into the state of North Rockies, or that North Dakota and South Dakota had not been joined with Nebraska to form the state of Great Plains. Even today, the regions represented by each of these five former states have populations of less than one million people. Had they continued to exist as separate political entities, it seems inconceivable that they could have maintained a properly-staffed legislature, or operated an administrative system that provided adequate health, education, welfare and law enforcement services, or established high quality state universities. In addition, several of these states, and other small-population states that were consolidated into larger entities, contained within their borders scenic attractions and open space that belongs to the nation as a whole. Had they remained separate entities, their limited tax base and absence of counterbalancing urban communities might have tempted them to exploit these resources in counterproductive fashion or even oppose federal efforts to protect them.

The question remains whether the retention of the deleted language would have produced any positive results. We can dismiss at the outset any assertion about the evils of big government, the national government's lack of connection to the people, or the virtues of federalism. These claims are overstated, but even if one assumes that they are valid, it is clear that rational boundaries facilitate the decentralization of authority from Washington to the states, rather than impeding it. Had the metropolitan states had not been created, Congress would not have been able to use state governments to implement its urban policies, but would have been required to bypass these governments and deal directly with the cities. Had small, rural states not been consolidated into larger entities, with fuller administrative capabilities, Congress could not have responsibly used these states to implement federal programs.

We are left then with the claim advanced by fringe groups such as the Committee for the Retention of Old States (CROS) and the John Calhoun Alliance of State Supporters (JCASS), namely, that there is inherent value in the historical states or that they reflect genuine political communities that should have been preserved. Although these claims were articulated by intransigent Southerners during the first Congressional reorganization,

and by dyspeptic Republicans during the second reorganization, no one takes such them seriously anymore. A large, complex industrial nation cannot be governed according to the dictates of nostalgia. Besides, the historical states possess a much greater romantic appeal now that they have passed out of existence than they would have had as continued encumbrances to effective regional administration. As for the claim of political community, it is hard to imagine any particular bond between the residents of New York City and those of western New York State, or between residents of Los Angeles and those of the central California farmlands. Even though Texas was one of the few states that was a genuine political community at one time, having existed as an independent nation, the citizens of the current metropolitan states of Houston and Dallas-Fort Worth show no particular desire to reunite with West Texas. Conversely, former states such as South Dakota or Wyoming were arbitrarily defined, rectilinear divisions of the pre-existing federal territories, with nothing to distinguish their citizens from those of the neighboring states. The consolidated states such as North Rockies and Great Plains have now existed for sixty years, and the former states have been virtually forgotten by everyone but history buffs.

These speculations only emphasize the wisdom of the Framers in reopening the Constitutional Convention and deleting the language that restricted Congressional reorganization of the states. The legislatures of most modern nations possess this power. Had it been denied to the U.S. Congress, our nation would have been seriously impeded in its triumphantly successful efforts to achieve racial justice, coherent urban planning, and effective regional administration.