
ONE(?) NATION OVEREXTENDED

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On August 6, 1787 John Rutledge presented to the Constitutional Convention a report from the Committee of Detail containing a draft constitution.¹ Article IV, Section 3 of the document specified the initial representation of each State in the House of Representatives, in numbers that ultimately became part of the United States Constitution.² Article IV, Section 4 of the Committee's draft, which did not make the final constitutional cut, then proposed:

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 provisions hereinafter made, at the rate of one for every forty thousand.³

The clear import of this provision was to place a cap on the number of people that any House Member could represent as the country expanded. The clear assumption behind the provision was that the country would indeed expand.

Two days after the Committee presented its draft constitution, James Madison objected to a flat-cap representation requirement for the House because “[t]he future increase of population if the Union sh[ould] be permanent, will render the number of Representatives excessive.”⁴ Madison was quite prescient: If the proposed formula were in force today, California

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¹ See *Journal of the Federal Convention*, reprinted in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 120, 223-30 (Jonathan Elliot ed., Washington, 2d ed. 1836).

² See U.S. CONST. art. I, § 2, cl. 3.

³ *Journal of the Federal Convention*, *supra* note 1, at 224.

⁴ JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 410 (Adrienne Koch ed., 1966).

alone would have more than 900 representatives, and the total membership of the House would exceed 7500.⁵

Nathaniel Gorham, who was a member of the Committee of Detail that proposed the fixed representation formula, responded to Madison with elegant simplicity: “It is not to be supposed that the Gov[ernment] will last so long as to produce this effect. Can it be supposed that this vast Country including the Western territory will 150 years hence remain one nation?”⁶ And keep in mind that in 1787 the “Western territory” included in this “vast Country” ended at the Mississippi River. Gorham was not contemplating Wyoming or California, much less Alaska or Hawaii.

Gorham’s projected dissolution of the United States reflected the conventional wisdom of eighteenth-century political science, which held that republics could only function or survive in relatively small, homogeneous territories, the maximum boundaries of which were already tested, if not exceeded, by the thirteen original States.⁷ Of course that Montesquievan (and Aristotelian) conventional wisdom has long since been displaced by a subsequent conventional wisdom which holds that Madison decisively refuted the superiority, and a fortiori refuted the exclusivity, of small republics in the *Federalist No. 10*. There, Madison famously contrasted republics with democracies, emphasizing “the greater number of citizens and extent of territory which may be brought within the compass of republican . . . government,” and arguing that “this circumstance . . . renders factious combinations less to be dreaded in the former than in the latter.”⁸ And, Madison continued, “the same advantage which a republic has over a democracy, in controlling the effects of faction is enjoyed by a large over a small republic”⁹ Hence, goes the post-Madisonian (or perhaps post-

⁵ Such a large number of representatives would obviously create insuperable difficulties. Just try to imagine, for example, how Reagan National Airport could possibly provide free preferential parking to that many Members of Congress.

⁶ MADISON, *supra* note 4, at 410. As an anticlimactic end to this saga: After Oliver Ellsworth noted that any future problems of representation could be handled by subsequent amendment, *see id.*, Madison and Roger Sherman proposed adding “not exceeding” before the words “1 for every 40,000,” *id.*, thereby – in a rather remarkable reversal – capping the size of the legislature rather than the number of people that any Member could represent. This proposal, with a last-second change in the “not exceeding” proviso from 40,000 to 30,000, *see* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 12-13 (1998), made it into the final Constitution, *see* U.S. CONST. art. I, § 2, cl. 3. Subsequently, the original First Amendment to the Constitution – the first of the twelve amendments submitted to the States for ratification in 1791 – combined, in a complex formula, limitations on both the extent of representation and the size of the House. The amendment failed to achieve ratification by one vote. *See* AMAR, *supra*, at 14-17.

⁷ *See* SANFORD LEVINSON, FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 93 (2012).

⁸ THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 2003).

⁹ *Id.*

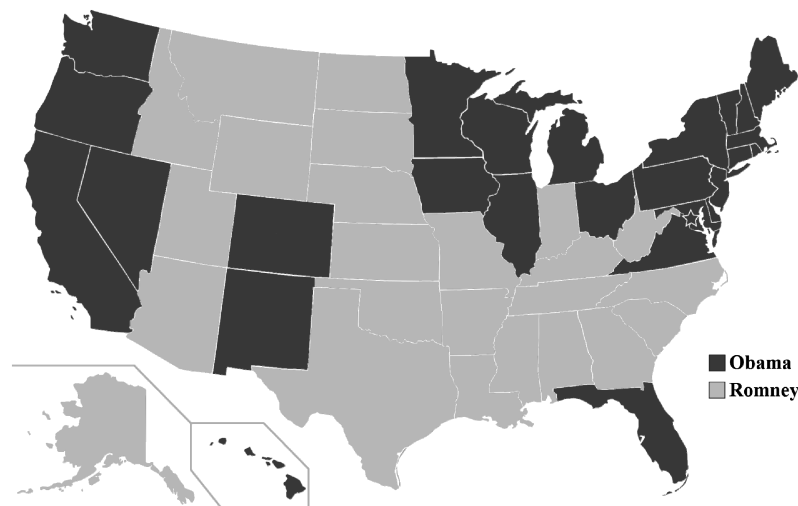
Humean¹⁰⁾ conventional wisdom,¹¹ the United States not only could survive and even prosper as a republic in its 1788 form and size, but also could continue to survive and prosper as the nation expanded to the Pacific Ocean and beyond.

But what if Gorham was right all along?

* * *

At one level, of course, Gorham was clearly wrong: The United States still stands as one nation, as a glance at the table of contents of any atlas can verify. But at another level Gorham's concerns cut more deeply than a perusal of atlases might suggest.

Consider the state-by-state electoral map from the 2012 presidential election¹²:



¹⁰ See F.H. Buckley, *The Efficient Secret: How America Nearly Adopted a Parliamentary System, and Why It Should Have Done So*, 1 BRIT. J. AM. LEGAL STUD. 349, 362 (2012) (tracing the Humean origins of the idea of the extended republic). *But cf.* Ian Bartrum, *Constructing the Constitutional Canon: The Metonymic Evolution of Federalist 10*, 27 CONST. COMMENT. 9, 20 n.37 (2010) (noting the dispute about Hume's influence on Madison).

¹¹ Whether it was the conventional wisdom *immediately* post-Madison or only became the conventional wisdom considerably later is another matter altogether. See Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611 (1999) (suggesting the latter).

¹² Adapted from map image available in the Wikimedia Commons. *File:ElectoralCollege2012.svg*, WIKIMEDIA COMMONS (Mar. 25, 2014, 9:35 PM), <http://en.wikipedia.org/wiki/File:ElectoralCollege2012.svg>, archived at <http://perma.cc/L8EE-MH79>.

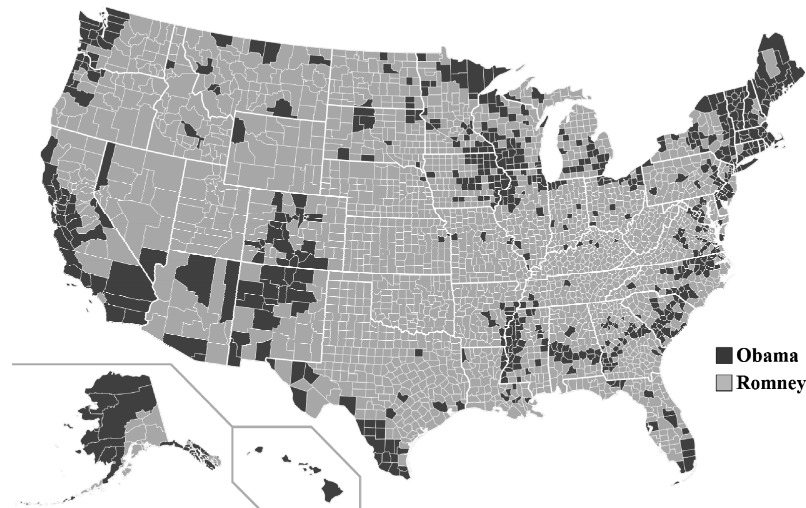
Perhaps the map functions as a Rorschach test and this observation says more about me than it does about the map, but when I look at this map, I see at least six countries combining to form the continental United States:



The geographical divides among those countries seem very natural, with the possible exception of Gadsdenburg and, perhaps, East Disneyland (and both countries would be welcomed with open arms into NASCAR if they have buyer's remorse from their 2012 decision). Amateur sociological observation further suggests that those geographical differences reflect real cultural, religious, and ideological differences among the inhabitants of the land mass we know as the United States. There are reasons why Wyoming and Rhode Island vote differently.

The piercing of the veil of national unity is even more dramatically illustrated by a map showing voting in the 2012 presidential election by county¹³:

¹³ Adapted from map image available in the Wikimedia Commons. *File:2012 Presidential Election by County.svg*, WIKIMEDIA COMMONS (Mar. 25, 2014, 9:35 PM), http://en.wikipedia.org/wiki/File:2012_Presidential_Election_by_County.svg, archived at <http://perma.cc/RU4L-ZHK4>.



This map shows a vast expanse of territory effectively ruled (in the limited but important sense established by a presidential election¹⁴) by a relatively small but densely populated set of counties – which means essentially that a modest number of cities rule (in the aforementioned limited sense) over a vast rural domain. And if the 2012 election had gone the other way, the map presumably would have looked much the same, leaving the vast rural areas effectively ruling the populous cities. Again, amateur sociology suggests that the differences in voting patterns reflect real differences in worldviews; there are reasons why rural Oklahomans and urbanite New Yorkers vote differently.

Accordingly, Gorham's question about the expectations for survival of the United States as a unified nation can be rephrased to take account of modern circumstances: Does the United States survive in the same way that Yugoslavia or the former Soviet Union survived for many decades – as an artificial construct of boundaries held together by a combination of force (threatened or actual), inertia, and indoctrination?¹⁵ Has the United States long since exceeded the plausible bounds of the Constitution of 1788?

¹⁴ Under a sound originalist interpretation of the Constitution, Presidents cannot meaningfully be described as rulers even in a metaphorical sense; they simply do not have that much constitutional power. But in the modern world, in which executive agents acting pursuant to numerous (and unconstitutional) delegations function as the principal lawmakers, and in which Presidents exercise vague foreign affairs powers that are not easily traceable to the “executive Power” with which they are vested, the significance of presidential elections is more readily understated than overstated.

¹⁵ Roughly a week after I wrote this sentence, Pat Buchanan published a column making almost precisely the same point – complete with references to Yugoslavia and the former Soviet Union. See Patrick J. Buchanan, *Is Red State America Seceding?*, WORLD NET DAILY

An anarcho-libertarian (as this Author well knows) would say that *all* governmental boundaries are held together by nothing more than force, inertia, and indoctrination. But Gorham was no anarchist. He was chairman of the Committee of the Whole and a member of the Committee of Detail. He was working very hard to craft a government – and a national government at that. His belief, or perhaps fear, was that the government that he was crafting, like the Constitution that he was drafting, was suitable only for a relatively small portion of the North American continent. If he was right, perhaps the constitutional failure at the heart of any current political dysfunction is a spectacular mismatch between, on the one hand, a Constitution that is suitable for at most a particular geographical and cultural context¹⁶ and, on the other hand, the current geographical and cultural composition of the United States. Maybe the country is just too damned big for its Constitution.¹⁷

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There are several predicates for any hypothesis that seeks to explain constitutionally driven political dysfunction in terms of national size. The first predicate is that there is some kind of political dysfunction to explain. Any such claim presupposes a baseline of political normalcy, and the specification of any such baseline is an inherently normative task. One person's dysfunction is another person's success. Is it dysfunctional to have part of the federal government shut down for lack of appropriations because of a budget stalemate among the Houses of Congress and the President¹⁸ – or is the real dysfunction that those shuttered parts of the federal government came to exist in the first place, or that only a small portion of an overweening federal Leviathan was shuttered for a very brief time, or that discussion of these issues among political and media elites takes place solely in the context of funding “the government” as an undifferentiated entity, as though every single part of the mammoth government is equally valuable and justifiable? Is it a sign of dysfunction that many eligible voters do not vote¹⁹ – or that so many actual

(Oct. 10, 2013, 7:58 PM), <http://www.wnd.com/2013/10/is-red-state-america-seceding>, archived at <http://perma.cc/NL5S-2EEN>.

¹⁶ The phrase “at most” leaves open the possibility – left for another day and another person – that the Antifederalists were right that the creation of a central government was a bad idea from the get go.

¹⁷ See LEVINSON, *supra* note 7, at 95 (posing the question whether Madison's argument holds for the modern extended United States).

¹⁸ See Katharine G. Young, *American Exceptionalism and Government Shutdowns: A Comparative Constitutional Reflection on the 2013 Lapse in Appropriations*, 94 B.U. L. REV. 991 (2014).

¹⁹ Michael P. McDonald, *2012 General Election Turnout Rates*, U.S. ELECTIONS PROJECT, http://elections.gmu.edu/Turnout_2012G.html (last updated July 22, 2013), archived at <http://perma.cc/3FVK-ZBNS> (finding that only 58.2% of the voting-eligible population voted in the 2012 presidential election).

voters are so clueless that pundits had to invent a new term (“low-information voters”) to describe them? Should one be worried that a large percentage of people distrust the federal government²⁰ – or that the number is less than one-hundred percent? Lawyers and legal scholars are no better situated to give answers to these questions than are electricians, nuclear physicists, or bus drivers, and having spent much of my professional life pointing out that normative legal scholarship is mostly hot gas,²¹ I have no intention of wading into that swamp here. Obviously, I lean toward the latter answers to all of these questions, but I will not defend those positions. Instead, I will proceed as long as I can and as far as I can without staking out a normative position on what constitutes dysfunction. Everyone can plug in their own favorite conception of dysfunction for now, as long as it involves some group of people using the governmental machinery for ill (however defined) ends.

A second predicate is that the Constitution can somehow be blamed at least in part for whatever dysfunction one identifies; otherwise, the relevant dysfunction is not “constitutional” in a meaningful sense for purposes of this Symposium.²² In my story the Constitution functions as a facilitator of size-related consequences by accommodating, even if not openly encouraging, the broad expansion of the American polity. It is perhaps an overstatement to claim, as did Jefferson in 1809, that “no constitution was ever before so well calculated as ours for extensive empire,”²³ but the Constitution does permit the limitless addition of new states through treaty and annexation.²⁴ Jefferson’s early doubts on that score,²⁵ shared by relatively few others at the time,²⁶ were

²⁰ *Trust in Government*, GALLUP, <http://www.gallup.com/poll/5392/trust-government.aspx> (last visited Mar. 2, 2014), *archived at* <http://perma.cc/3LZN-URMM> (indicating that, in 2010, eighty-one percent of those surveyed trusted the government to do what is right “only some of the time or never”).

²¹ That enterprise dates from my very first scholarly article. See Gary Lawson, *The Ethics of Insider Trading*, 11 HARV. J.L. & PUB. POL’Y 727, 775-83 (1988).

²² For example, one could identify as a “dysfunction,” and a very dangerous one at that, the widespread belief that the birth of someone in a distant location, whose creation I did not cause, constitutes some kind of moral claim on my time and resources, either just because that person is born or just because he or she is born within some arbitrary geographical boundary. When examined rationally, that belief does not pass the laugh test, but its broad acceptance is a moral and epistemological dysfunction, not a constitutional one.

²³ Letter from Thomas Jefferson to President James Madison (Apr. 27, 1809), *reprinted in* 12 THE WRITINGS OF THOMAS JEFFERSON 274, 277 (Albert Ellery Bergh ed., 1905).

²⁴ Whether it permits the acquisition of territory not destined for statehood is another question altogether, which will loom large shortly. See *infra* notes 66-73 and accompanying text. For exploration and elaboration of a broad range of points regarding the constitutional foundations of expansion, including identification of the forms and limits that constrain the territorial expansion of the United States as a matter of original constitutional meaning, see GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* (2004).

²⁵ See Letter from Thomas Jefferson to John Dickinson (Aug. 9, 1803), *reprinted in* 8

simply misplaced.²⁷ Given that accommodation, there is much to the idea that once the Constitution came into being, replacing the thirteen nations participating in the Articles of Confederation with a consolidated central government, vigorous expansion of the United States was not merely predictable but inevitable. Manifest Destiny was built into the American constitutional culture long before the 1840s.

Of course, if that is true, then some expansion surely would have taken place without consolidation of the original thirteen nations/states into a single country. Nonetheless, there were likely to be economies of scale in the kind of territorial expansion relevant to the eighteenth and nineteenth centuries, so that a consolidated government could pursue expansionist policies more effectively than could the individual nations/states. For example, could the Louisiana Purchase have taken place without a consolidated national government? Could any of the states, alone or in some combination, have laid claim to Oregon? Perhaps, but if the country has indeed gotten too big for its britches, the Constitution's function as an enabler of expansion is plausibly at least part of the reason.

So, assuming some kind of political dysfunction, and assuming that the Constitution is at least partly to blame for the nation's current size, how are size and political dysfunction related to each other? Where, if at all, did Madison go wrong?

I am no more a political scientist than I am a moral theorist, so with a warning to beware of impending hot gas: Madison may have left out of his analysis one very key element about the size of a country. Put simply, all else being equal, the larger the polity, the broader the pickings for looters.²⁸ Madison may be right that large, extended republics increase the costs of assembling ruling coalitions,²⁹ but they also increase the potential returns from success, because there are more people and resources within the jurisdiction to exploit. Accordingly, the forces diffusing the effects of faction in an extended republic are counterbalanced, and perhaps even swamped, by the benefits to the ultimate victors.³⁰ If that is right, then it sometimes, and perhaps even often, makes sense for factions to expend the considerable resources necessary

THE WRITINGS OF THOMAS JEFFERSON 261, 262 (Paul Leicester Ford ed., New York, G. P. Putman's Sons 1897).

²⁶ See EVERETT SOMERVILLE BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE 1803-1812, at 17-29 (1920).

²⁷ See generally LAWSON & SEIDMAN, *supra* note 24, at 17-86 (explaining why the Louisiana Purchase was constitutionally authorized).

²⁸ This is hardly an original insight. See Alberto Alesina, *The Size of Countries: Does It Matter?*, 1 J. EUR. ECON. ASS'N 301, 306 (2003) ("Dictators prefer large empires to small countries, because they can extract larger total rents from larger populations . . .").

²⁹ See MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 38-39 (2012).

³⁰ Again, this is hardly an original insight. See RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 22 (2014) ("[T]he greater costs of organizing national coalitions are often offset by the greater gains to be obtained.").

to overcome the transaction costs of assembling a controlling coalition. Madison's point, after all, is not that factional control of extended republics is impossible, but only that it is comparatively difficult and costly. The extended republic raises the stakes of gaining control over the machinery of government. Even control of parts of the government, such as the presidency, can offer huge payoffs to the eventual rulers.

Since "looting" is a loaded and equivocal term, I hasten to add that this analysis is essentially neutral among competing conceptions of looting. Looting might involve seizure of the wealth of the productive in order to try to buy the votes of the unproductive. It might involve seizure of whatever wealth is possessed by the relatively unproductive to reward already well-off political favorites. It might be imposition of a particular moral or religious viewpoint on others – a kind of spiritual looting (after all, if one believes in the imposition of viewpoints, imposing them on more people is likely to be more attractive than imposing them on fewer). And looting can be quite subtle; as Richard Epstein points out, limiting the activities of your competitors through regulation can sometimes transfer wealth more effectively – and less visibly – than can outright expropriation.³¹ My point is general across competing conceptions of looting: size roughly correlates with expected payoffs from control of the government. All else being equal, more republic means bigger payoffs.³²

Of course, if Madison is even close to right, more republic also means larger transaction costs of obtaining those payoffs (including as transaction costs the risks and expenses incurred in maintaining control over territory once control is acquired). Just as determining the optimal size of a firm requires difficult, fact-based assessments of the tradeoffs between efficiencies and agency costs from make-or-buy decisions in any given context,³³ so determining the "optimal" size of a republic, given any particular understanding of optimality,³⁴ is an empirical rather than a theoretical task. At some point the marginal cost of fencing and maintaining a certain-sized herd of cattle exceeds the marginal value of the additional hamburger. Bigger is not always better,

³¹ See *id.* at 21.

³² All else may not be equal. At some point expanding the size of a country may reduce rather than increase the available wealth once the costs of consolidation and coordination exceed the gains from expansion. But as long as cross-border trade is not entirely free, it is plausible to think that larger national markets generally mean more wealth than smaller ones. See Alberto Alesina & Enrico Spolaore, *On the Number and Size of Nations*, 112 Q.J. ECON. 1027, 1029 (1997).

³³ See R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 390-98 (1937).

³⁴ Determining a metric for optimality is no small task, even once one has settled on a normative framework for making that judgment. See, e.g., David Friedman, Book Review, 10 *INDEP. REV.* 281 (2005) (reviewing ALBERTO ALESINA & ENRICO SPOLAORE, *THE SIZE OF NATIONS* (2003)). Getting the normative framework right is another matter altogether. For a welfarist analysis of optimal national size, see Alesina, *supra* note 28; Alesina & Spolaore, *supra* note 32. For doubts about the coherence, attractiveness, or both, of welfarist analysis in general, see Gary Lawson, *Efficiency and Individualism*, 42 *DUKE L.J.* 53 (1992).

even for looters. It should at least be open to question, however, whether the present boundaries of the United States are supraoptimal by any relevant metric,³⁵ and in particular by any metric that worries about concentrations of governmental power.

As the last phrase indicates, in order to turn a suggestion of supraoptimal national size into a claim about political dysfunction, one must add the normative premise that facilitating large-scale looting is dysfunctional. Not everyone will agree with that premise. The farmer, for example, is likely to say to his cattle that grinding hamburger is just the name they give to the things they do together, though the cattle may have a somewhat different view. If one thinks that looting – however one defines it – is a good idea, one will be unconcerned, or even pleased, by the prospect of facilitating it on a large scale.

And that is quite often a plausible position to hold. Abolitionists who came to the defense of slaves with rifles and cannons, for example, were both spiritual and material looters from the perspective of advocates of slavery, but that certainly does not mean that the abolitionists were wrong to defend slaves; the slaveholders were the true looters and the abolitionists were simply righting a wrong. More generally, the justifiability of any particular looting of material wealth depends on whether the looters or the lootees have the stronger claim to the resources, which depends on an underlying theory of property rights.³⁶ It is not self-evident that the lootees will always have the stronger argument.

So my claim here is not that any particular practice in modern America is or is not specific evidence of dysfunction. That would require a normative argument that I do not want to make; the law reviews already contain more than enough hot gas without my contribution. My general, and quite modest,

³⁵ As Sandy Levinson quite elegantly put it in his comments at this Symposium: Is it really plausible to think that the 2013 borders of the United States hit the perfect “Goldilocks” spot – not too big, not too small, but just right? Sanford Levinson, Professor, Univ. of Tex. Sch. of Law, Remarks at the Boston University School of Law Symposium: America’s Political Dysfunction (Nov. 16, 2013).

³⁶ For example, I am comfortable with first possession as a foundation for property rights. See Gary Lawson, *Truth, Justice, and the Libertarian Way(s)*, 91 B.U. L. REV. 1347 (2011). Others, however, find it odd. See SOTIRIOS A. BARBER, *THE FALLACIES OF STATES’ RIGHTS* 208 (2013) (“[L]ucky ones are called ‘first possessors.’ What they control is called ‘property.’ Official coercion to secure property from third persons is called ‘justice.’ And social justice, including equal opportunity, by the visible hand of public-spirited authority, is called ‘theft.’”). Take away the phrase “public-spirited” and substitute “outcomes preferred by liberals” for the term “social justice,” and I would heartily adopt in its entirety Professor Barber’s account of first possession as both descriptively and normatively correct. But Professor Barber is right in his implicit claim that first possession, as with every other normative concept, needs a defense rather than an assertion (and, I would add, needs a foundationally sound defense at that). That defense can only come from moral and political theory, which means that a humble law professor, who is not prepared to derive a foundationally sound theory from metaphysics through epistemology through ethics through politics, needs to shut up and talk about law.

claim is that large republics are likely to display more of certain kinds of practices, which some normative theories would plausibly deem dysfunctional, than will smaller republics – or at least that such a circumstance is conceivable under some realistic set of conditions.

If that modest claim is true, then what might be a viable solution to any resulting problems of dysfunction?

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Several solutions to the potential problem of supraoptimal national size suggest themselves. The most obvious is to lower the stakes of factional success by reducing the gains from seizing control of an extended republic. That would require a significant, perhaps even massive, reduction in the size and scope of the national government's activities, so that much less turns than it does now on electoral success. That answer has much to commend it as a matter of original constitutional meaning, since a large portion of the plunder presently at stake in national elections results from a wildly distorted conception of the role of the national government prescribed by the Constitution.³⁷ It would also have the effects – which some might regard as salutary – of reducing the informational demands that living under Leviathan places on people and thereby reducing the domain of rational ignorance.³⁸

But it is simply not going to happen. In a political culture in which proposing a modest reduction in the rate of growth of federal spending – not federal spending, mind you, but the rate of growth of federal spending – generates apocalyptic wailing and gnashing of teeth in many influential quarters, any kind of nontrivial movement toward a constitutional baseline of limited government seems wildly unlikely. People who have gotten used to having agents of the government take stuff from their neighbors (and their neighbors' grandkids) and hand it over to them are not likely to give up the goodies simply because some eighteenth-century document tells them to do so. If "Thou shalt not steal" will not do the trick, the doctrine of enumerated powers probably will not fare much better. Perhaps just as importantly, people who have come to view their moral self-worth in terms of their willingness to spend other people's money are unlikely to trade that relatively convenient position³⁹ either for one that makes personal action rather than political

³⁷ Or so I would argue in a different paper at a different symposium. For preliminary thoughts, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

³⁸ See ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* (2013).

³⁹ Is this needlessly snarky? Perhaps. But it gets more than a bit tiresome listening to people bleat about how "compassionate" they are because they are oh so very willing to force other people to do their bidding and to spend other people's money. When those people stop bleating about their compassion and start serving lepers in Calcutta instead, I will stop snarking. In fact, I will settle for having the apostles of compassion donate to

affiliation the mark of good character, or for one that regards personal development rather than other-regardingness as the proper moral standard.⁴⁰ All things considered, as far as correspondence with reality is concerned, “the era of big government is over” is right up there with “I did not have sex with that woman,” “read my lips – no new taxes,” and “if you like your plan, you can keep your plan.”

A second solution to the problem of faction in a world of supraoptimal national size would be to raise the costs of obtaining factional success. Not being a political scientist, I cannot think of any obvious way to do so that does not involve simply shifting the balance of forces among competing factions. For example, limiting or forbidding the use of money in political activity merely moves the levers of factional success to money substitutes such as time, media influence, or rhetorical skill – which is why it is not surprising that those who believe that they have an advantage in time, media influence, or rhetorical skill quite often seek to limit the use of money. Changing the relevant advantages of different factions does not avoid the problem; the cattle do not much care whether a poor farmer or ConAgra is doing the grinding of hamburger that they all do together.

A third solution is to constrict the size of the republic. The most obvious way to do so is to turn one very large republic into several smaller ones – as Gorham predicted would happen two centuries ago, and as quite plausibly could have happened as Gorham predicted without any need for science fiction scenarios.⁴¹ It is therefore time to think seriously, at least at a theoretical level, about the possibility of dissolution of the American Union – that is, about the possibility of secession.

The idea is not as radical as it might seem. While secession today suffers from its association with some very unsavory mid-nineteenth-century advocates, one must beware of the ad hominem fallacy. Some prominent abolitionists were early advocates of secession,⁴² and the idea went through several quite serious iterations, in various regions of the country, long before it took hold in the antebellum South.⁴³ It lives today in, among other places, the movement for a Second Vermont Republic,⁴⁴ which was formed in 2003;⁴⁵ and

charity all of their income above the world median salary.

⁴⁰ See, e.g., DAVID L. NORTON, *PERSONAL DESTINIES* (1976); TARA SMITH, *AYN RAND'S NORMATIVE ETHICS* (2006).

⁴¹ See LEVINSON, *supra* note 7, at 52 (observing that the United States could have become three countries in 1787).

⁴² See Aaron T. Knapp, *Law's Revolution: Benjamin Austin and the Spirit of '86*, 25 YALE J.L. & HUMAN. 271, 354 n.482 (2013).

⁴³ See JAY WINIK, APRIL 1865: THE MONTH THAT SAVED AMERICA 16-20 (2001).

⁴⁴ See Thomas H. Naylor, *Mission Statement*, SECOND VT. REPUBLIC (Aug. 14, 2012), <http://vermontrepublic.org/svr-mission>, archived at <http://perma.cc/3JE2-8FQS>.

⁴⁵ See Frances Romero, *Second Vermont Republic*, TIME (Jan. 10, 2011), http://content.time.com/time/specials/packages/article/0,28804,2041365_2041364_2041351,00.html, archived at <http://perma.cc/ZZ3S-D82Y>.

petitions for secession currently exist in some form today in all fifty states, perhaps most notably Texas.⁴⁶ As Sotirios Barber reminds us,⁴⁷ Madison himself declared that his recommendation, “[w]ere the union itself inconsistent with the public happiness, . . . would be, abolish the union.”⁴⁸

Globally, the trend in recent decades has been decidedly in favor of more and smaller nations. Since World War II, the number of countries has almost tripled.⁴⁹ Even within countries that remain whole, powerful separatist movements strain the relevance and durability of formal boundaries; think of Canada and Quebec or Spain and the Basques and Catalans. While that kind of open separatism has not yet visibly happened in the modern United States to any significant degree, it may be happening substantively under the radar. Many people in the flyover states, for example, have about as much in common with Massachusetts liberal elites (and vice versa) as they do with the people of Nepal or Finland. Much of Northern California probably has more in common with Wyoming or Oklahoma than with the southern or northern coastal parts of California. It is only accidents of history, geography, and warfare that place some people within the governmental jurisdiction of – and thus subject to governmental exploitation by – others. We are presently seeing quite serious discussions of secession at the local level in several states, such as California and Colorado,⁵⁰ with five counties in Colorado formally voting on November 5, 2013 to pursue the idea of secession from their state.⁵¹ Is secession a viable option at the national level?

There are at least three dimensions to that question: political, normative, and constitutional. In other words, is it feasible, is it desirable, and is it legal?

As to feasibility, I leave that question to the pundits and political scientists, with only the amateur observation that it may be a more serious question than some might like to believe. Indeed, secession is probably more plausible than a large-scale reduction in the size and scope of the consolidated federal

⁴⁶ See Manny Fernandez, *White House Rejects Petitions to Secede, but Texans Fight On*, N.Y. TIMES, Jan. 16, 2013, at A11.

⁴⁷ See BARBER, *supra* note 36, at 3.

⁴⁸ THE FEDERALIST NO. 45, *supra* note 8, at 286 (James Madison).

⁴⁹ See Alesina, *supra* note 28, at 302.

⁵⁰ See Michael Bastasch, *California Secession Movement Picks Up Steam*, DAILY CALLER (Sept. 25, 2013, 9:38 PM), <http://dailycaller.com/2013/09/25/california-secession-movement-gains-steam>, archived at <http://perma.cc/9ZJY-XQU5>; Greg Campbell, “North Colorado” Secession Movement Inches Forward, DAILY CALLER (Aug. 20, 2013, 2:21 PM), <http://dailycaller.com/2013/08/20/north-colorado-secession-movement-inches-forward>, archived at <http://perma.cc/A2K8-2Q3P>.

⁵¹ See *At Least 5 Rural Colorado Counties Vote to Explore Secession*, FOX NEWS (Nov. 5, 2013), <http://www.foxnews.com/politics/2013/11/05/at-least-5-rural-colorado-counties-vote-to-explore-secession>, archived at <http://perma.cc/M2RY-G9L2>. To be clear, those counties want to remain in the United States as the fifty-first state. They simply want to secede from what they regard as an unrepresentative (of them) Colorado state government.

government, though there is reason to think that the sheer number of American States makes secession movements almost impossibly difficult.⁵²

As to desirability, that is also something that I leave to others, with only two countervailing amateur observations. One is that cattle will often have very good reasons for wanting to secede from farms. The second is that such cattle need to avoid the “grass is greener” fallacy. The fact (if it is a fact) that a large republic is functioning poorly does not mean that smaller republics would therefore function better. Cattle looking for a better life are well advised to heed the old adage, “out of the slaughterhouse and into the abattoir.”

As to the constitutionality of secession, that is a question – unlike many others raised by this subject matter – mercifully within the competence of legal scholars qua legal scholars, and it proves to be slightly, even if only slightly, more interesting than it seems at first glance.

If we are talking about states leaving the Union, as the slave states attempted to do prior to the Civil War, then as a matter of original meaning⁵³ the answer is pretty clearly “no.” Akhil Amar has elegantly articulated the reasons for this conclusion,⁵⁴ and I briefly summarize and embellish those reasons here.

First, the Constitution prescribes specific procedures for adding new states to the Union⁵⁵ but no procedures for subtracting them.⁵⁶ One would certainly expect something as dramatic as departure from the Union to be provided for in the Constitution if it was contemplated by the document. The removal of a state could have many ripple effects. As Professor Amar pointedly asks: Would a seceding entity no longer bear any responsibility for previously amassed national debt?⁵⁷ What if the entity’s representatives consistently voted for more and more debt before secession and the debt were used to provide benefits to the now-seceding territory? What about land held as federal enclaves within the former State? Even today, with secession and other forms of state succession becoming almost commonplace, international law does not have clear background norms to address these kinds of issues.⁵⁸ Surely there

⁵² See Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1, 10-14 (2011).

⁵³ When discussing what the Constitution prescribes (as opposed to, for example, discussing how real-world actors should behave), “original constitutional meaning” is a redundancy. Originalism is the uniquely correct methodology for identifying the communicative signals contained within the document, though that identification by itself carries no normative significance. For a brief argument to this effect, see Gary Lawson, *Originalism Without Obligation*, 93 B.U. L. REV. 1309 (2013).

⁵⁴ See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 33-39 (2005); Akhil Reed Amar & Sanford Levinson, *What Do We Talk About When We Talk About the Constitution?*, 91 TEX. L. REV. 1119, 1125-29 (2013).

⁵⁵ See U.S. CONST. art. IV, § 3, cl. 1.

⁵⁶ See Steven G. Calabresi, *The Right to Buy Health Insurance Across State Lines: Crony Capitalism and the Supreme Court*, 81 U. CIN. L. REV. 1447, 1474-75 (2013).

⁵⁷ See Amar & Levinson, *supra* note 54, at 1126.

⁵⁸ See generally Andreas Zimmerman, *Secession and the Law of State Succession*, in

was nothing resembling international norms on secession in 1788,⁵⁹ and one suspects that people as well versed in, and as focused on, international law as the Framers could not help but know this. They were not unaware of problems of succession, as is evidenced by the Engagements Clause of Article VI, which provided that “[a]ll Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.”⁶⁰

Moreover, as both Professor Amar and Chief Justice Marshall have pointed out,⁶¹ the States were not the relevant parties to the Constitution. The document was ordained and established by We the People,⁶² and the document purports to subject the states to the dominion – indeed, to the supreme dominion⁶³ – of the central government. If any entity is capable of dissolving the ordained and established union, it would have to be the We the People that ordained and established it rather than individual states or regions. Finally, and perhaps most significantly, every state official must swear an “Oath or Affirmation, to support this Constitution,”⁶⁴ which seems flatly to rule out action that undermines rather than supports the constitutional union. To be sure, the oath is to the Constitution, not to the Union (which is why Professor Levinson may be right that the argument in favor of secession, while unpersuasive, is not utterly frivolous⁶⁵), but the overall structural inference against the constitutionality of state secession is very powerful.

*Texas v. White*⁶⁶ was a poorly reasoned decision in many important respects,⁶⁷ but its basic observation about the indestructibility of the Union as a constitutional matter is correct.⁶⁸

But just suppose that some county in Colorado manages to secede from its home state. To make the argument interesting, I am assuming that such secession will be valid under that state’s constitution, either by interpretation or by amendment, and that the secession is (unlike the currently proposed Colorado secessions) intended to sever ties with the United States as well as

SECESSION: INTERNATIONAL LAW PERSPECTIVES 208 (Marcelo G. Kohen ed., 2006).

⁵⁹ Indeed, apart from the Dutch separation from Spain in the sixteenth century, it is hard to find instances of secession that asserted any kind of legal authority prior to the American Revolution. See Andrei Kreptul, *The Constitutional Right of Secession in Political Theory and History*, 17 J. LIBERTARIAN STUD. 39, 62-63 (2003).

⁶⁰ U.S. CONST. art. VI, cl. 1.

⁶¹ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1455-62 (1987).

⁶² See U.S. CONST. pmb1.

⁶³ *Id.* art. VI, cl. 2.

⁶⁴ *Id.* art. VI, cl. 3.

⁶⁵ See Amar & Levinson, *supra* note 54, at 1134.

⁶⁶ *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869).

⁶⁷ See LAWSON & SEIDMAN, *supra* note 24, at 162-64.

⁶⁸ See *White*, 74 U.S. at 724-26.

with the former state. Will that assumedly state-law-valid secession also succeed in removing the county from the jurisdiction of the United States?

The first-cut answer seems to be “no.” If the territory is legally subject to the constitutional jurisdiction of the United States when it was part of a State, and if no provision is made in the Constitution for secession by a part of the Union, then the seceding county can perhaps remove itself from the jurisdiction of its former State but not from the jurisdiction of the national government. The county would remain part of the United States as a territory subject to the authority of Congress under the Territories and Property Clause of Article IV.⁶⁹ The county, no longer part of any state, would not have representation in the House or Senate, nor would it be entitled to electoral votes in presidential elections, but it would still be under the heel of the national government – just as are Puerto Rico, Guam, and various guano islands.

But here is where matters get a bit more interesting. There is not even the remotest possibility that a thinly populated county in Colorado that seceded from that state would ever be seriously considered for American statehood – complete with two senators and at least three electoral votes – in its own right. And that circumstance gives rise to an intriguing – even if strained and ultimately unsuccessful – constitutional argument for national secession.

As a matter of original meaning, it is doubtful at best whether the United States can acquire territory by treaty or annexation that is not either destined for statehood or necessary and proper for executing some valid federal function such as national defense. Guy Seidman and I make the complex argument for this position at length elsewhere,⁷⁰ and I will not repeat it here.⁷¹ Suffice it to say that the United States could not properly have acquired the Philippines in 1898.⁷² If the United States is not eventually going to make territory acquired by treaty or annexation a state, and that territory is not “necessary and proper” for executing some other enumerated federal power,⁷³ the United States must

⁶⁹ U.S. CONST. art. IV, § 3, cl. 2.

⁷⁰ See LAWSON & SEIDMAN, *supra* note 24, at 32-85.

⁷¹ It is easy to see how this works in the case of annexation, which requires a statute to incorporate the new territory into the United States. As there is no specifically enumerated power of acquisition by annexation, any such statute could only be authorized by the Necessary and Proper Clause, which requires any such law to be “necessary and proper for carrying into Execution” some other federal power. U.S. CONST. art. I, § 8, cl. 3. But what about acquisitions of territory by treaty? The Treaty Clause merely says that the President can “make Treaties, provided two thirds of the Senators present concur,” *id.* art. II, § 2, cl. 2, and contains no apparent limitation that such treaties be “necessary and proper” for anything. That apparent absence is, however, an illusion; as a matter of original meaning, the Treaty Clause is an implementational provision, just like the Necessary and Proper Clause, and is subject to very similar internal limitations. Or so I have elsewhere argued at interminable length. See generally Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1.

⁷² See LAWSON & SEIDMAN, *supra* note 24, at 111-15.

⁷³ In the execution of what kinds of federal powers might it be “necessary and proper” to

relinquish that territory, either by transferring it to some other jurisdiction or by granting it independence. And if the United States cannot legitimately acquire such territory through treaty or annexation, asks the hypothetical seceding Colorado county, can it acquire and hold such territory, with no realistic prospect of statehood, through default by secession?

As it turns out, probably yes it can. The arguments that limit the usual mechanisms of acquisition, specifically the treaty power and annexation, depend on limitations built into the enumerated powers (the Treaty Clause and the Necessary and Proper Clause) that permit acquisitions. Those arguments accordingly do not apply to the exotic acquisition-by-secession scenario that I have here devised, because the “acquisition” in the latter case happens without any affirmative steps being taken – that is, without any enumerated powers being exercised – by the national government. Territory that was already part of the United States by virtue of being part of a state remains territory of the United States; an affirmative act is needed to sever that relationship, but not to create it. Thus, even if I am right as an original matter about the general limits on federal power to acquire and hold territory, it does not follow that seceding counties must be cut loose in the same way that the Philippines constitutionally needed to be cut loose half a century before it actually happened. There is, in the end, no good constitutional case for secession without an amendment – or a revolution – permitting it.