

Essay

Let's Mess With Texas

Vasan Kesavan* and Michael Stokes Paulsen**

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

—Joint Resolution for Annexing Texas to the United States¹

I. Introduction

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

* B.A.S., B.S., B.A., University of Pennsylvania, 1995; J.D., Yale Law School, 2001; Friend of Texas.

** Briggs & Morgan Professor of Law, University of Minnesota Law School. J.D., Yale Law School, 1985; Friend of Texas. For their helpful comments and suggestions, thanks to David Fontana and Kumar Kesavan. Special thanks to Alexander L. Kaplan and the editors of the *Texas Law Review*.

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

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

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

In a famous and comic Texas-sized drama (or fiasco, depending on one's point of view or one's politics) stretching throughout the four seasons of 2003,⁴ the state's Republican Governor, Rick Perry, along with the Republican majorities in both houses of the state legislature, finally succeeded in outlasting more than 50 State House Democrats and 11 State Senate Democrats who had fled, respectively, to Ardmore, Oklahoma in the spring⁵ and Albuquerque, New Mexico in the summer,⁶ to deprive their respective houses of the necessary quorum to adopt the Texas Republicans' proposed redistricting plan.⁷ (One could call this process—and in fact some already have called it—“perrymandering.”⁸) Alas, no one can stay in a Holiday Inn forever, and the State Senate minority leader, John Whitmire of Houston (“Quitmire” as he is now disaffectionately known), turned tail after almost 30 days holed up in a hotel in Albuquerque and loped on home to the Lone Star State in the late summer,⁹ bringing an end to the “Great Texas Redistricting Standoff” of 2003.

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

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

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

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

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

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

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

in the Republican one. By mid-October, and after mediation by Representative DeLay, the Republican-controlled state legislature sent a “compromise” redistricting plan to Governor Perry for his signature, which was promptly received.¹⁰ The Texas Democrats, not to be outdone, took the Texas Republicans’ redistricting plan to federal court claiming that it was unconstitutional.¹¹ After the trial had begun, but before any opinion was issued, U.S. Attorney General John Ashcroft granted “pre-clearance” to the redistricting plan pursuant to Section 5 of the Voting Rights Act of 1965.¹² On January 6, 2004, a three-judge federal panel approved the redistricting plan.¹³ The Texas Republicans’ victory was sealed on January 16, 2004 when the U.S. Supreme Court refused to block it.¹⁴

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

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

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

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

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

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

15. Hockstader, *supra* note 14.

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

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

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

The year 2003 is likely to remain a grand and tall tale of Texas politics for many years to come. (“Remember the Albuquerque!?”) But we’ve got a bigger, better idea yet. It’s time to carve up the Lone Star State into *five* “mini-Texases”—“Texas Tots,” if y’all will—pursuant to an arcane but historically important provision in Congress’s Joint Resolution for the Annexation of Texas in 1845.¹⁹ Congress apparently granted its consent to Texas’s division into up to *four more* states at the time of Texas’s admission into the Union, and all that remains is for Texas to agree to self-destruct.

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

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

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

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

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

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

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

II. The Tale of Texas Statehood

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

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

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

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

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

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