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Book Reviews

What Do We Talk About When We Talk About the Constitution?


Reviewed by Akhil Reed Amar* & Sanford Levinson**

I. Dear Akhil,

It is certainly not surprising that America’s Unwritten Constitution is remarkably stimulating, informative, and challenging. You are surely correct that one cannot possibly understand the American constitutional system simply by reading the text of the Constitution (or, for that matter, reading decisions of the judiciary ostensibly “interpreting” the text). Instead, one must not only look at long-established American practices but also at social movements and transcendent moments in American history—the Gettysburg Address and Martin Luther King’s “Dream” speech are two that you emphasize—that have provided the rationales for how we understand those practices (and, on occasion, become willing to transform them). Your Constitution is necessarily a “living Constitution,” for the American people, as active agents of their own constitutional destinies, are constantly debating one another about what constitutes its deep meanings; they constantly create new movements, which in turn generate new political leaders committed to particular understandings. This is one way of understanding not only the civil rights movement that is so important to both of us, but also the Tea Party, which cannot be understood without paying careful attention to its

* Sterling Professor of Law, Yale Law School.
** W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas. Readers should not believe that Akhil and I are in the habit of footnoting our correspondence with each other! Thus I am grateful to the editors of the Texas Law Review for their sometimes remarkable diligence—as with tracking down the potential negative effects of taking aspirin—in verifying my often off-the-cuff assertions or allusions (e.g., the House of Atreus). I’m sure I speak for Akhil as well.

narratives of the Constitution and calls both for fidelity to its ostensible norms and for amendments, such as repeal of the Seventeenth Amendment,\(^2\) that would return the Constitution to its intended—and they argue better—embrace of a far stronger form of federalism than we in fact have today.

It is also not surprising that we continue to have some quite fundamental disagreements, whatever our personal closeness. Each of us recognizes in his respective acknowledgments the importance of our relationship over what is now more than a quarter century,\(^3\) which includes for the last decade our service as co-editors of a casebook in constitutional law, *Processes of Constitutional Decisionmaking.*\(^4\) But that does not mean, of course, that we have become clones of one another. We met initially when you came to Austin for a symposium on Philip Bobbitt’s then recently published *Constitutional Fate,*\(^5\) and we bonded during the course of what turned out to be (at least) a two-hour visit to the monument to Confederate war dead in front of the Texas State Capitol. As noted in our casebook, that monument presents what might be described as the “standard” Southern view of the War:

**DIED FOR STATE RIGHTS GUARANTEED UNDER THE CONSTITUTION.**

THE PEOPLE OF THE SOUTH, ANIMATED BY THE SPIRIT OF 1776, TO PRESERVE THEIR RIGHTS, WITHDREW FROM THE FEDERAL COMPACT IN 1861. THE NORTH RESORTED TO COERCION. THE SOUTH, AGAINST OVERWHELMING NUMBERS AND RESOURCES, FOUGHT UNTIL EXHAUSTED.\(^6\)

We debated at length whether this is a “possible” interpretation of the War in relation to the Constitution, which is a very different question from whether it is the “best” interpretation. Your view, I think it is safe to say, is that this does not rise to the level of a “possible” interpretation—that it would deserve an “F” if submitted on a final examination. My view was that it is, for better or worse, a possible view, because the 1787 Constitution, correctly interpreted, is ambiguous (or, in the language of the 1980s, when we first met, “indeterminate”). In the interim, neither of us has changed our fundamental view.

Thus I was startled (though I should not have been surprised) to see your declaration that “the original Constitution emphatically denied state


\(^3\) AMAR, supra note 1, at 597; SANFORD LEVINSON, FRAMED: AMERICA’S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 399 (2012).


\(^6\) BREST ET AL., supra note 4, at 219.
authority to unilaterally secede." As many times as I have read the Constitution, I quite literally don’t see this “emphatic[al] denial." At most, I see an aspiration, set out in the Preamble, which both you and I admire greatly, that the new Constitution would indeed be the instrument creating a “Perfect Union.” For me, the Preamble is the equivalent of the hope announced during a traditional wedding ceremony—admittedly in the form of a promise—that this union will last forever, until death separates the two partners. What this means, however, in both written and unwritten American legal culture, is only that one hopes that the marriage will generate a truly lasting commitment because of mutual appreciation of what marriage brings; however, in the not-unlikely circumstance that that won’t actually happen, then divorce, amicable or otherwise, is a possibility. Everyone, whether those at the altar or the onlooking audience, knows this.

Lincoln, unequivocally one of your heroes, offered a mocking response to those defending the legitimacy of secession: “In their view, the Union, as a family relation, would not be anything like a regular marriage at all, but only as a sort of free-love arrangement [laughter] to be maintained on what that sect calls passionate attraction.” Unlike Lincoln’s audience, I don’t view this as a laughing matter. After all, consider a sentence that appeared in the penultimate paragraph of the penultimate draft of the Declaration of Independence, where Thomas Jefferson noted the British misconduct served to generate “the last stab to agonizing affection,” so that “manly spirit bids us to renounce forever these unfeeling brethren.” The affection necessary to maintain political unity, especially in a federal political system that can be understood only against the background of dissensus and potential for “disaffection,” can never be taken entirely for granted. Such dissensus had made a truly unified government—or even the more truly centralized system that James Madison in fact yearned for in Philadelphia and was, to his chagrin, systematically denied by his fellow delegates—impossible. We were a “house divided,” and it was the perhaps dubious premise of the 1787 Constitution that it was building a structure that would enable such a house to stand instead of inevitably imitating the House of Atreus by generating a tragic and bloody carnage.

7. AMAR, supra note 1, at 85.
10. The Greek myth of the cursed family follows the descendants of Atreus, who served King Thyestes his murdered sons for dinner. Atreus’s son Agamemnon continues the slaughter when he sacrifices his daughter Iphigenia to further the Trojan War. Agamemnon’s wife Clytemnestra avenges Iphigenia by murdering Agamemnon with the help of her lover Aegisthus, who is Thyestes’s surviving son. Agamemnon’s son Orestes concludes the legend when he kills Clytemnestra and Aegisthus. Helene P. Foley, Introduction to AESCHYLUS, THE ORESTIA, at vi, vii (Peter Meineck trans., Hackett Pub. Co. 1998).
You have written with true eloquence, both in this book and in your earlier “biography” of the Constitution, of the ravages generated by the “rotten compromise,” in the words of Israeli philosopher Avishai Margalit, that entrenched slavery and made us, in the title of Don Fehrenbacher’s last work, a “slaveholding republic.” We’ll never know, of course, whether Romeo and Juliet, had they lived, could have successfully surmounted the bitter divisions between the Capulets and Montagues. We do know that this proved unsuccessful, as an empirical matter, with regard to the “free North” and the slaveholding South. And both sides claimed constitutional support, including, inevitably, the support of America’s unwritten norms. One might well perceive one of those norms as a willingness to engage in bisectional compromise—think of the Missouri Compromise or the Compromise of 1850. Both, not at all coincidentally, involved the issue triggered by what I suspect both of us view as the most important constitutional event of 1803, the Louisiana Purchase (far more important than Marbury): Would slaveowners be welcome in the vast new territories that constituted the reality of American expansionism (a topic, I should note, that does not garner extensive discussion in your book)? There is a reason that Justice Catron, in his concurrence in Dred Scott (reprinted, I think uniquely, in our casebook) could claim that the basic premise of “EQUALITY” (as he spelled it) guaranteed that slaveowners would have the same ability to take their legal property, as defined by state law, into the territories operated by a fiduciary Congress in the equal interest of all citizens.

Perhaps the greatest difference between us is that I basically accept in a way that you do not William Lloyd Garrison’s view of the 1787 Constitution as a “Covenant with Death and an Agreement with Hell.” Pacts with the Devil make their own claim to “honorable” lawyers of the Marshallian persuasion; he insisted, after all, on separating the role of the “jurist” from that of the “moralist,” a distinction repeated, of course, by his successor Roger Taney in Dred Scott. Garrison notably burnt the Constitution and, indeed, suggested that there should be “No Union with Slaveowners.” Imagine for a moment that he was actually successful in generating a secessionist movement within New England, so that the six New England

12. LEVINSON, supra note 3, at 43-44 (quoting AVISHAI MARGALIT, ON COMPROMISES AND ROTTEN COMPROMISES (2010)); see also DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY (2002).
15. Dred Scott, 60 U.S. at 529 (Catron, J., concurring); BREST ET AL., supra note 4, at 248–49.
17. The classic formulation of this distinction appears in Marshall’s opinion in The Antelope, 23 U.S. 66, 121 (1825): “Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution . . . .”
18. BREST ET AL., supra note 4, at 253.
What Do We Talk About?

states tried to secede on antislavery grounds. Would you have supported James K. Polk or Franklin Pierce if they sent troops to prevent secession and preserve the Union and, if so, why? Is your opposition to secession within the United States simply positivistic—i.e., it is, you believe, the unequivocal command of the Constitution that any faithful constitutionalist must adhere to—or does it rest on a stronger moral principle? One such principle, of course, is antislavery, and one might support the War as basically a "humanitarian intervention" by which the slaveowners' regimes would be transformed. But if that is the basis for one's support, then the operative principle is surely not "secessionist movements are always to be opposed, wherever and whenever they occur."

Both of us agree that the Constitution was far better after the slaughter of War and the addition of the "Reconstruction Amendments." One of your most striking chapters is the defense of the Fourteenth Amendment—and the Military Reconstruction necessary to realize its ratification—as Congress simply acting under its power to guarantee to the states a "Republican Form of Government." Your chapter is eloquent and incisive. I certainly find it a "possible" view of the Guarantee Clause, even as one must recognize that such a strong reading of the Guarantee Clause by Congress is quite literally unique, both unprecedented prior to 1866 and left untapped since then as a defense for subsequent congressional actions regarding state governments. I continue to accept Bruce Ackerman's view of the Amendment as a basically extra-constitutional addition, the extra-constitutionality being necessary because of the truly egregious Article V and its setting of basically insurmountable hurdles to those striving for fundamental change.

But even if the Constitution is decidedly better after the Reconstruction Amendments, whatever their provenance, for me it is not sufficiently better to warrant the love you so movingly display for the Constitution. And, as you well know, what has generated my deep alienation from the Constitution has almost literally nothing to do with the Reconstruction Amendments or, for that matter, the doctrinal Constitution as enunciated by the judiciary and others, but instead, the fundamental institutional structures established in 1787 and left remarkably unchanged since then. What most disappoints me about your new book is your confidence that clever lawyering can provide adequate "workarounds" to what you so obviously believe yourself to be real problems. At one level, you might be right: Should the general public be convinced that the unamended Constitution is taking us over a cliff, as I sometimes believe to be the case, it might well accept the determination of a clever lawyer that we can avoid that fate.

The problem, though, is that a dreadful part of our "unwritten Constitution" is that it should be treated as a basically sacred document and

19. AMAR, supra note 1, at ch. 2.
thus subjected to little, if any, radical criticism. I don’t think this can be
traced in any uncomplicated way to 1787 itself, save for Madison’s hope,
expressed in Federalist No. 49, that the Constitution be treated as an object
of reverence and “venerat[ed]” rather than coldly analyzed.22 A century ago,
when Woodrow Wilson and Theodore Roosevelt ran against each other (and
William Howard Taft) for the presidency, they both were more than willing
to offer fundamental critiques of constitutional practices and norms.23 My
own view is that one of the consequences of World War II was an
unwarranted faith in the Constitution as the unquestioned symbol of what we
were fighting for. Even though (should it be because of?) both of the
candidates in 2012 were graduates of the Harvard Law School, we received
not one moment of serious discussion of the adequacy of the Constitution
from either of them. Of course, Yale Law School-educated Bill Clinton was
no better. Since neither of us is truly complacent about the American polity,
we might wonder whether this contemporary silence has anything to do with
the way constitutional law is taught at our leading law schools.

Along with reading your undoubtedly lively responses to my arguments
above, I hope you write as well of what changes you would like to see in
what might be termed the pedagogy of the Constitution. Both of us, in recent
years, have been teaching undergraduates as well as fledgling lawyers. Both
of us, I have no doubt, hope to reach a wide audience of our fellow citizens.
But I am curious which, as between law schools and undergraduate classes,
you expect to be the actual venue for reading and confronting your always
imaginative takes on the Constitution. If, as I suspect, the answer is the
latter, then how would you change the culture of the legal academy to make
it more receptive to your distinctive way of approaching the Constitution?

In friendship and fondness,
Sandy

II. Dear Sandy,

It is great to be back in conversation with you—this time, about your
new book and mine. By highlighting the classic constitutional question of
secession in your opening missive to me, you have chosen a great place to
begin our epistolary exchange—namely, at the beginning. Not just at the
beginning of our quarter-century friendship, which did indeed start with an
intense and extended debate over the Confederacy’s legal theory, but also at
the beginning of our Constitution’s text and history. For (as you know) I
believe that the secession issue is powerfully illuminated by the
Constitution’s opening sentence (A.K.A. the Preamble) and also by the epic

23. Sanford Levinson, Our Imbecilic Constitution, CAMPAIGN STOPS, N.Y. TIMES (MAY 28,
yearlong continental conversation in 1787–1788 that accompanied the Constitution’s ratification.

Let me first summarize my legal reasoning, and then step back and discuss some of the implications of this reasoning—what this reasoning says about the similarities and the differences between your approach and mine, in our two new books and elsewhere.

The terse text that we call the Constitution begins, in its opening sentence, by calling itself a “Constitution.”24 Not a “league,” not a “confederacy” or a “confederation,” nor a treaty based on states that retain their full “sovereignty” and “independence”—highly significant legal keywords that were all prominently featured in the opening passages of a predecessor document, the 1781 “Articles of Confederation,”25 that the 1787–1788 document aimed to wholly displace. In lieu of the old 1781 compact/league/treaty/confederation, what was instead being offered up to the American people in 1787–1788 was made clear by the new document’s opening words: a “Constitution” obviously modeled on the extant state constitutions. The literally primary purpose of this 1787–1788 document was to form a “more perfect” union—one that would safeguard “common defence” and thereby preserve “the Blessings of Liberty.”26

The terse text’s penultimate section, Article VI, explains quite clearly what the legal status of “this Constitution” would be, once ratified.27 The text was to be—and has legally always remained—“the supreme Law of the Land.”28 The Articles of Confederation had never described themselves as “law,” much less as supreme law. Nowhere was the old “Congress” under the Articles described as a “legislature” or a “lawmaker,” and this old body in fact was more of an international assembly/war council on the model of today’s NATO Council and UN Security Council. Under the Articles of Confederation, state officials were not obliged by oath to treat the Articles themselves or congressional edicts pursuant to the Articles as supreme domestic law trumping the contrary commands of state legislatures (which were in fact described by the Articles as “legislatures” and whose commands were thus seen by that 1781 document as true laws).29

In emphatic and unambiguous contrast, the 1787–1788 Constitution makes clear that all state officials are indeed oath bound to follow the Constitution as supreme law,30 and further makes clear that nothing that a state does unilaterally—nothing in any future state constitution or state

25. ARTICLES OF CONFEDERATION of 1781, arts. I, II, III, IV.
27. U.S. CONST. art. VI, para. 2.
29. See AMAR, supra note 11, at 40–41, 64–65, 301 (describing the relationship between state legislatures and federal law under the Articles).
30. U.S. CONST. art. VI, para. 3.
statute—can change the hierarchical status of the U.S. Constitution and federal statutes and treaties pursuant to that Constitution as the supreme law of the land.\(^{31}\) Period. No ifs, ands, or buts. Disgruntled individuals are always free to leave, but the land remains as part of America, and the supreme law that governs that land is the U.S. Constitution "notwithstanding" any "Contrary" unilateral state action.\(^{32}\) Unilateral state secession is simply not provided for, and indeed is emphatically ruled out. (If a state did actually retain a right to unilaterally exit, surely we would expect to see all sorts of rules about how that could happen—for example, how a departing state would need to shoulder its fair share of the pre-existing national debt and guarantee peace with neighboring union states. But we don’t see any of that stuff in the text because, to repeat, unilateral state secession is not allowed by the Constitution, which makes itself supreme regardless of what individuals within an individual state might say or do.) As I sometimes say to my kids, “What part of ‘No!’ did you not understand?” Sandy, it’s just that simple, textually.

But of course there is far, far—far!—more legal evidence than this, and I spent some thirty pages in the opening chapter of my 2005 book (\textit{America's Constitution: A Biography}—the predecessor to my latest volume, \textit{America's Unwritten Constitution}) laying out this evidence.\(^{33}\) Just a few highlights. Article III explicitly says that anyone who wages war against the Union commits “Treason,” even if that individual is supported by, and supportive of, his anti-Union state government.\(^ {34}\) When Antifederalist Luther Martin explicitly objected to precisely this result at Philadelphia, he was pointedly outvoted—and in the ratification conversation he brought the issue prominently to the attention of his fellow Americans, who once again outvoted him by ratifying the clear antisecession rules of Article III and the document as a whole.\(^{35}\) Article VII made clear that no state could be bound by the new Constitution unless it chose to sign on: Precisely because each state was indeed sovereign and independent prior to 1787, no state could bind any other.\(^{36}\) But in obvious and unmistakable contrast, Article V made clear

\begin{itemize}
  \item \(31.\) U.S. \textit{Const.} art. VI, para. 2.
  \item \(32.\) U.S. \textit{Const.} art. VI, para. 2.
  \item \(33.\) \textit{See} AMAR, supra note 11, at 5–39 (deducing from a variety of textual differences that the Articles allowed for unilateral secession as part of each State’s sovereignty and that the Constitution disavowed this as a failure of the Articles).
  \item \(34.\) U.S. \textit{Const.} art. III, § 3; \textit{see also} AMAR, supra note 11, at 242–45 (discussing the Treason Clause and the debates surrounding its ratification).
  \item \(35.\) AMAR, supra note 11, at 242.
  \item \(36.\) \textit{See} U.S. \textit{Const.} art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between States so ratifying the Same.”); \textit{see also} AMAR, supra note 11, at 34–35 (“Article VII made it clear that the people of [a non-ratifying] state were a distinct sovereign entity free to vote down the new Constitution and ignore it.”). \textit{But cf.} Donald S. Lutz, \textit{Constitutional Bricolage?: A Commentary on Akhil Reed Amar’s America's Constitution: A Biography}, 57 \textit{Syracuse L. Rev.} 311, 314 (2007) (“[Amar’s] use of Article VII is imaginative and probably correct, but this and other pieces of evidence are trotted out repeatedly in
that once a state joined the new union, it could indeed be bound by future constitutional amendments agreed to by the conventions of enough other states, even if its own state convention voted against these future amendments.\(^\text{37}\) The clear structural logic here, reinforcing text and history, is that a state would no longer be fully sovereign once it chose to join the new Constitution. And without full state sovereignty, secession as a legal, constitutional right simply has no leg to stand on.\(^\text{38}\)

Now turn briefly to consider the epic continental conversation that accompanied the Constitution’s ratification. At Philadelphia, James Madison clearly said that while a sovereign state might secede from a treaty/league/confederation if the sovereign state deemed the treaty to have been breached or to threaten its sovereign existence, no such secession was permitted by nonsovereign subparts within a true legal “Constitution”—e.g., cities or counties within a state, or states within the proposed federal Constitution.\(^\text{39}\) Madison here invoked the famed British legal authority Blackstone, whose bestselling treatise had clearly explained that the 1707 union of Scotland and England forbade unilateral secession of either part.\(^\text{40}\) In *Federalist No. 5*, Publius made clear that this indivisible 1707 union was indeed the precise model for what was now being proposed four score years later in America.\(^\text{41}\) Indeed, Publius explicitly linked the words of the Preamble about the formation of a “more perfect union” with the language

\(^{37}\) See U.S. Const. art. V (requiring only two-thirds of the States to call a constitutional convention and only three-fourths of the states’ approval to bind all the states under a constitutional amendment).

\(^{38}\) Two sidenotes: First, the natural right to revolt in case of true tyranny might remain as a right above all law, but this right has nothing to do with whether there happens to exist majoritarian electoral support within the boundaries of any particular state. In any event, Jeff Davis and company were never able to point to anything truly tyrannical justifying their treason. These rebels purported to secede before Lincoln had even taken office; Lincoln in 1860 had scrupulously played by the rules in winning election; so had congressional Republicans; courts remained open to hear valid legal disputes; and anti-Lincoln forces had full freedom of speech—even as they denied that freedom to others, and indeed made a mockery of the natural rights of Southern slaves and violated many legal rights of pro-Lincoln citizens in the South, citizens who were legally entitled to all the protections of the U.S. Constitution, including the right to have their land governed by that Constitution rather than by those aiming to overturn binding law and valid continental elections by force of arms.

Second, even though a state may not unilaterally secede, the Union itself might lawfully decide to dissolve via various legal federal procedures provided for by the text itself—constitutional amendments, federal statutes, federal treaties, even federal presidential elections. But all of these procedures would involve democratic decision making by the Union as a whole and not unilateral decision making merely by one geographical part of the Union called a “state.”

\(^{39}\) AMAR, supra note 11, at 31.

\(^{40}\) See id. at 30-32, 36 (summarizing Blackstone’s argument and crediting it as the source for Madison’s own “breached treaty defense”).

\(^{41}\) The Federalist No. 5 (John Jay), supra note 22, at 44-45, 48; AMAR, supra note 11, at 36.
that had accompanied the 1707 unification of the British isle. In *Federalist No. 11*, Publius explicitly described the Constitution's proposed union as "strict and indissoluble," and indeed the entire opening section of the *Federalist Papers*—encompassing Numbers 2 through 9—was premised on the need for an indivisible American union on the 1707 English–Scotch model. Only if internal land borders were demilitarized could Americans prevent states from warring against each other and keep Europe from playing divide and conquer in the New World. Unilateral secession was wholly inconsistent with the main structural argument for union sketched out in these essays.

And this argument was raised not just in these essays, but in the ratification conversations themselves, where leading Federalists repeatedly said that the new union would not permit unilateral secession. As I explain in my book, "[James] Wilson contrasted traditional 'confederacies' that historically 'have all fallen to pieces' with the proposed Constitution, in which 'the bonds of our union' would be 'indissolubly strong.'" Wilson himself had emigrated from Scotland, as had North Carolina's Federalist Governor Samuel Johnston, who could not have been clearer in thought or expression: "[T]he Constitution must be the supreme law of our land; otherwise, it would be in the power of any one state to counteract the other states, and withdraw itself from the Union." In every state, Antifederalists got the message and loudly warned their audience that if the Constitution were ratified, their state would lose its sovereignty and be unable to exit unilaterally. Again and again and again the Antifederalists said this. *Yet never in this entire year long continental conversation—not once!—did any prominent Federalist say that each state would indeed have the right to leave if subsequently dissatisfied.* Sandy, if secession was permitted, why didn't the Federalists say so? Surely a money-back guarantee/right to return the purchase no questions asked would have been a great selling point if true.

But it was not true, legally. No state ratifying convention explicitly purported to reserve a right of unilateral secession in the course of approving the federal Constitution. And when the unilateral secession issue arose at

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42. See *The Federalist* No. 5 (John Jay), *supra* note 22, at 44–45 (praising this element of the unification); *Amar, supra* note 11, at 36 (linking Jay's praise of this language to the Preamble).
43. *Amar, supra* note 11, at 36.
44. See id. at 34–37 (recounting the Federalists' comments relevant to unilateral secession made during the ratification debates).
45. *Id.* at 36–37.
46. *Id.* at 37.
47. *Id.* at 38; *see also* id. at 35 (outlining a number of sovereignty-based criticisms of the Constitution leveled by Antifederalists).
the New York ratifying convention, Federalists explicitly rejected the idea, and did so at the risk of losing the ultimate ratification vote. The final vote—with no secession reservation—was a nailbiter, 30 to 27. Had New York voted no, it is doubtful that the fledgling Constitution would have actually succeeded without the deep-water ports of New York City and control over West Point and the mighty Hudson River, the geographic keys to the continent. In short, when ratification hung in the balance, the Federalists emphatically rejected the secession idea—at the risk of losing everything. Alexander Hamilton proclaimed that the plain language of Article VI “stands in the way” of any subsequent right of unilateral secession. John Jay pronounced secession rights “inconsistent with the Constitution.” And Madison penned a letter, read aloud by Hamilton and later published for the benefit of the entire world (which was in real time following the New York cliffhanger with rapt attention, in rather the same way that all eyes are today, as I write these words to you, Sandy, focused on fiscal-cliff negotiations). Here is what Madison wrote: “[T]he Constitution requires an adoption in toto, and for ever. It has been so adopted by the other States.”

OK, now what does all of this mean for our two new books—your new book, \textit{Framed: America's 51 Constitutions and the Crisis of Governance}, and mine, \textit{America's Unwritten Constitution: The Precedents and Principles We Live By}—and for constitutional interpretation more generally? Here are some similarities and differences between you and me. First, we are both interested in deep and abiding issues of constitutional law, whether or not they are the hot topics of the moment. Some secessionist nonsense did bubble up recently, after Obama’s reelection, but you and I have been interested in this issue for decades.

Second, you and I both find federalism fascinating—and in particular both your new book and mine explore ways of thinking about the federal Constitution alongside state constitutions. Your book showcases state

\footnotesize{Kenneth M. Stampp, and surely qualifies his claim that ‘no state convention made the right of secession the subject of extended inquiry.’”).

49. AMAR, \textit{supra} note 11, at 38.
51. AMAR, \textit{supra} note 11, at 38.
52. \textit{id.}
53. \textit{id.;} Kaminski, \textit{supra} note 50, at 112–14; \textit{cf. id.} at 100 (“As the delegates converged on Poughkeepsie, they realized the critical situation of the state and country.”).
54. AMAR, \textit{supra} note 11, at 38.
55. LEVINSON, \textit{supra} note 3.
56. AMAR, \textit{supra} note 1.
constitutions alongside the federal charter in its very subtitle—*America’s 51 Constitutions*—and my book’s concluding chapter features an extended analysis of the similarities and differences between the one federal Constitution and the fifty state constitutions. The secession question tightly focuses on the relationship between state and federal constitutions: Can South Carolina amend its *state constitution* so as to exit from the *U.S. Constitution*? You think this is (or at least was in 1861) an arguable question. I say (among other things) that precisely because the federal “Constitution” is explicitly and self-consciously modeled on pre-existing state constitutions, unilateral secession is impermissible. South Carolina may not unilaterally secede from the Union, just as Spartanburg County may not unilaterally secede from South Carolina.

Third, you and I both care deeply about conscience and legal ethics. In particular, both you and I have written extensively about legal oaths—you in your first book, *Constitutional Faith* (which I reviewed way back when for the *Texas Law Review*) and I in the penultimate chapter of my new book, a chapter entitled “Doing the Right Thing: America’s Conscientious Constitution.” Lincoln began his time in office by swearing a solemn legal oath to “preserve, protect, and defend the Constitution.” Did this oath oblige him to defend “the land” and to “protect” the Constitution and loyal Unionists—and there were such men, Sandy!—in the South? Lincoln thought that his oath did indeed require this, and I think he was plainly correct. Though I do not agree with all of his legal reasoning, I find his actions to be profoundly legal and oath observing on the secession question—perhaps the most momentous question of all of American constitutional law.

Fourth, and related, both you and I are interested in American constitutional *culture*—in what our mutual friend Philip Bobbitt describes as America’s constitutional “ethos” and what our mutual co-author Jack Balkin discusses under the rubric of constitutional “narrative.” Lincoln of
course is central to our constitutional culture. My 2005 book's opening chapter ended with extended quotations from Lincoln on the secession issue, and my new book features Lincoln prominently throughout its twelve chapters—especially its chapter (Chapter 6, to be specific) on America's cultural icons and symbols. Lincoln is iconic. So are many of his great texts—the First and Second Inaugurals, the Gettysburg Address, the Emancipation Proclamation, and so on. Most of the biggest Supreme Court cases in any given year pivot on the Fourteenth Amendment, an amendment that—along with the adjacent Thirteenth and Fifteenth—memorializes the constitutional vision of Lincoln and his party. My defense of Lincoln aligns me with this defining national narrative—with America's mainstream culture and ethos. But if you are right, Sandy, Lincoln was . . . what? A lawless butcher? A man whose vision in 1861 was no better, legally, than Jeff Davis's?

In turn, this leads to other differences in temperament between us. You are more comfortable playing the role of gadfly. I by contrast aim to offer a more orthodox account—both of what the Constitution rightly read means, and about the proper rules for reading it.

My 2005 book focused more on what the “right answers” to various constitutional questions are, and my new book highlights how we go about finding those right answers. By temperament, you are more agnostic about just how many right answers there may be, and also more playful about permissible interpretive methods. But I do share your view that the text of the Constitution only gets us so far. That is indeed the unifying methodological theme of my new book—the need to go beyond text in various ways, even as we ultimately remain faithful to the text (rightly read). My antisecession argument is an apt case study. Alongside what the text explicitly says (“Constitution,” “more perfect union,” “Treason,” “supreme Law of the Land, notwithstanding” “Contrary” state rules, etc.), I emphasize many unwritten elements. I highlight what the text pointedly omits and portentously does not say: “Confederation,” “league,” state “sovereignty,” and so on. I highlight not just what Federalists did say in the ratification conversation, but what they did not say—what they NEVER said, namely that states would retain a right of unilateral secession. And I tie all these points together with a structural argument requiring us to read the document as a whole instrument, centrally aimed at achieving a geostrategic continental union with defensible borders. The need for structural argumentation—for reading between the lines of various clauses—is the main theme of the opening chapter of my new book.

specifically the issue of whether the Balkin’s narrative of progressive constitutional faith can be reconciled with constitutional fidelity).

67. AMAR, supra note 11, at 51–53.

68. LEVINSON, supra note 3, at 17–22.

69. AMAR, supra note 1, at 1–5.
Which takes me, finally, to the link between the ideas that I sketch out in the opening chapters of my two most recent books and the ideas about America’s current “crisis” that you present in your new opening chapter. I have argued that America has been strong and free for most of its history precisely because the Constitution structured an indivisible geographic union prohibiting unilateral exit. This union kept states from warring against each other (about western land) and enabled them to keep Europe from intermeddling in the American heartland. Liberty thrived because no major standing army in peacetime was necessary for the first 150 years of our constitutional existence. Thanks to the Constitution, the Louisiana Purchase, the Monroe Doctrine, and Manifest Destiny, American liberty was protected first and foremost by our vast oceanic moats (just as England and Scotland, once unified, were safe from foreign invasion thanks to the English Channel). As late as 1945, America benefited from this geostrategic situation. Because of our wide oceans, only Pearl Harbor was bombed—not New York, or San Francisco, or Austin. Meanwhile everyone else in the world fought the war in their own back yards.

Sandy, if the Confederacy had prevailed in the 1860s, heaven help us! Venturing into counterfactual history/science fiction is always perilous, but who knows whether the White Supremacists in a Texas-dominated Confederacy in 1941 would have allied with the USA or with the Nazis? So I continue to think you were mistaken way back when we first started our debate—in Austin, in 1986—and I think you continue to misdiagnose America’s constitutional situation today.

You think there is a genuine “crisis” of governance and you tend to blame the Constitution. I see things differently. First, I don’t blame the Constitution for most of our problems; I blame the fact that too many of our fellow citizens are kooky—beginning with the Governor of your own state and with his many admirers in Texas and elsewhere. If a huge proportion of Americans have outlandish views, there is only so much that constitutional forms can do. Second, while I admit that foreign parliamentary systems don’t have all the same pathologies as presidentialist models—there is less gridlock abroad—I think that foreign parliamentary systems have offsetting pathologies. For example, a plurality party that does not in fact have a genuine mandate for change and that has never won the considered support of the median voter might nevertheless be able to effect major policy change—perhaps for the worse. Parliamentary incumbents can manipulate electoral timing with “snap” elections; and policy can sometimes shift drastically in the wake of a single low-turnout election.

70. See DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS 16–25 (1998) (explaining the median voter theorem); Andrew D. Martin et al., The Median Justice on the United States Supreme Court, 83 N.C. L. Rev. 1275, 1281 (2005) (noting that the Medium Voter Theorem states that “if voters have single-peaked preferences in a single-dimensional issue space, then the position of the median will prevail under majority rule and various voting procedures” (footnotes omitted)).
So I think that America’s situation is not really more critical than, say, Greece’s or Italy’s or Japan’s or France’s or Britain’s. America is no longer quite the hegemon it was in 1945, but this is because in 1945 America was the only nation standing (thanks to our geostrategic isolation and unification). Today, other nations are now back on their feet—and this is a good thing. Today, many other nations are genuinely democratic—following in America’s footsteps!—and this, too, is a good thing for America and the world. True, many of these other nations are parliamentary and not presidential, but both brands of constitutional democracy are viable and attractive. Other countries have workable multiparty systems, but two parties, each vying for the median voter, have worked fairly well for America over the long haul.\footnote{AMAR, supra note 1, ch. 10.} True, America’s Constitution is very hard to amend—but because of this fact, very few bad amendments have prevailed over the course of history, while many good amendments have ultimately cleared the bar. Are state constitutions, which are much easier to amend, generally more functional and more admired by Americans than the federal Constitution? In short, America is no longer the towering hegemon it was in 1945 because many other countries are beginning to emulate our democratic system; because many other nations have now thankfully demilitarized; and because Americans now spend way more than we did prior to 1945 on national and world defense, and way more than does most of the rest of the world. Plus, our system is truly continental, which poses unique challenges and opportunities. Sandy, even if you think Britain has a better constitutional system than America, does Europe as a whole? C’mon!

In short, Sandy, I am doubtful that there is a genuine crisis in America that would be solved by major constitutional reform. That said, I actually agree with many of the specific reform proposals you favor—direct national election of the President, a less malapportioned Senate, quicker transitions of power after national elections—\footnote{LEVINSION, supra note 3, at 186–90, 154–58, 24–27.}—but I frankly don’t think any of these reforms would make a major difference solving America’s biggest problems, problems which are, to repeat, no more daunting than the problems facing other nations and regions today. And even more happily, some of the problems that you have identified might be solvable without the need to formally amend the Constitution, as I have explained in the concluding chapter of my new book, and elsewhere. Perhaps in our next go-round we could talk about some of the reforms we would both like to see?

Fondly,

Akhil

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71. AMAR, supra note 1, ch. 10.
III. Dear Akhil,

So what is the key difference between us concerning secession? By and large, our argument is academic, in both the descriptive and perhaps, for some, pejorative sense. That is, I think it boils down to whether the argument for secession—what you call “unilateral withdrawal” from the Union—is “frivolous,” in the sense that no reasonable lawyer could possibly present the argument and, indeed, it would merit sanctions under Rule 11 of the Federal Rules of Civil Procedure if (s)he did so to a federal court. I continue to think that the answer is no, even if I certainly agree with you that almost all contemporary lawyers may well see no merit at all in such a claim and even, more controversially, that most lawyers in 1860 would have been equally dismissive. I once wrote an article on “frivolous cases,” not least because at that time I was teaching “professional responsibility”; one of the most important questions, both practically and jurisprudentially, facing any lawyer is whether there are indeed professional, and not only prudential, limits on what they can argue. Frank Easterbrook, both then and now a distinguished judge on the Seventh Circuit Court of Appeals (and, of course, a member of the University of Chicago Law School faculty as well), proffered the notion that “frivolousness” required near-unanimous rejection by the professional community of lawyers. To adopt the language of our friends Stanley Fish and Jack Balkin, it has to be so “off the wall” that any “interpretive community” of which one is a party would scoff at it and seriously question the competence of the person asserting it. Perhaps it is simply meant as a joke! Jack, Jordan Steiker, and I once wrote a piece in the Texas Law Review that questioned whether one could always tell the difference between “serious” arguments and “parodies” of legal argument.

I think you make extremely powerful arguments on why the “better reading” of the Constitution prevents “unilateral withdrawal.” But, as I’ve already suggested, that’s not the most basic question. It is, rather, whether the Southern reading, based in part on the “compact theory” of Union enunciated in the Kentucky and Virginia Resolutions written by Jefferson and Madison, respectively, was a “possible” reading. You will tell me, of course, altogether correctly, that Madison rejected, near the end of his life, when John Calhoun and other South Carolina hotheads began bruiting about

73. FED. R. CIV. P. 11.
75. Id. at 375.
76. Jack M. Balkin, How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure, 39 SUFFOLK U. L. REV. 27, 28 (2005); Stanley Fish, How Come You Do Like You Do? A Response to Dennis Patterson, 72 TEXAS L. REV. 57 (1993).
78. LEVINSON, supra note 3, at 322–23.
the possibility of secession, the legitimacy of reading the 1798 Resolutions as supporting secession.\footnote{Daniel Farber, Lincoln's Constitution 62–69 (2003).} I have no doubt that this was Madison’s sincere belief. But, of course, authors do not control the use that readers make of their arguments.

Also, for what it is worth, I think that the word “unilateral” is doing a lot of work in your argument. I’m curious what you think of the Quebec Secession Reference case decided by the Canadian Supreme Court, which seemingly held both that Quebec had no right, under either Canadian or international law, unilaterally to secede from Canada, but that Canada might be under a duty to negotiate with Quebec about possible terms of secession if the province clearly indicated a desire to leave the country.\footnote{Reference re Secession of Quebec, [1998] S.C.R. 217, 271–73 (Can.).}

Finally, although I happen to agree with you that Robert E. Lee and Jefferson Davis might well have been tried (and executed) as traitors to the Union instrumental in causing the death of 750,000 Unionists and Confederates on behalf of the totally abhorrent cause of maintaining chattel slavery, that is not the way our history worked out. To be sure, Lee and Davis were not pardoned during their lives, but it is illuminating—and perhaps discouraging—that Congress in 1975 and 1978 passed Joint Resolutions posthumously restoring full rights of citizenship to both.\footnote{S.J. Res. 23, 94th Cong., 89 Stat. 380 (1975); S.J. Res. 16, 95th Cong., 92 Stat. 1304 (1978).} In signing the 1978 Resolution concerning the would-be President of the Confederacy Davis, President Jimmy Carter, wrote that

\begin{quote}
[j]n posthumously restoring the full rights of citizenship to Jefferson Davis, the Congress officially completes the long process of reconciliation that has reunited our people following the tragic conflict between the States. Earlier, he was specifically exempted from resolutions restoring the rights of other officials in the Confederacy. He had served the United States long and honorably as a soldier, Member of the U.S. House and Senate, and as Secretary of War. General Robert E. Lee’s citizenship was restored in 1976. It is fitting that Jefferson Davis should no longer be singled out for punishment.

Our Nation needs to clear away the guilts and enmities and recriminations of the past, to finally set at rest the divisions that threatened to destroy our Nation and to discredit the principles on which it was founded. Our people need to turn their attention to the important tasks that still lie before us in establishing those principles for all people.\footnote{President Jimmy Carter, Statement on Signing S.J. Res. 16 into Law (Oct. 17, 1978), available at http://www.presidency.ucsb.edu/ws/index.php?pid=29993.}
It was, of course, William Faulkner, the great Mississippi-born novelist, who wrote “The past is never dead. It’s not even past.”\textsuperscript{83} So it is the great conflagration of 1861–1865 which continues to shape our history and our sense of constitutional possibility a full 150 years after its occurrence. If we really viewed Lee and Davis as “traitors” who committed “treason,” then Carter’s remarks and the congressional resolution would be as unthinkable as the British placing a monument honoring George Washington in Trafalgar Square.

There is also, let me note, a certain irony in pointing to the British Treaty of Union of 1707 between England and Scotland (that created the United Kingdom), for Scotland will be voting next year on withdrawing from the United Kingdom and thus basically undoing the Treaty.\textsuperscript{84} The vote is occurring with the reluctant approval of Her Majesty Queen Elizabeth II’s Government,\textsuperscript{85} and we certainly do not know what the consequences of an affirmative vote would be. But, again for better and for worse, secessionist movements are alive and well in today’s world, whether based on abstract notions of “self-determination” and, as The Declaration of Independence put it, the fundamental norm of government by “consent of the governed,”\textsuperscript{86} or on more legalistic notions. After all, the oft-derided Soviet Constitution, in its Article 72, explicitly permitted the secession of the constituent Soviet Socialist Republics.\textsuperscript{87} To be sure, one can presume that it never occurred to any member of the Soviet elite that Article 72 would be taken seriously. But there it was, to provide a legitimizing rhetoric for the republics wanting to leave the Soviet empire. But enough about secession, which we can both agree is not a live political possibility in the contemporary United States and, therefore, renders legal arguments of no practical interest.

I want to move on to the last part of your letter. It is certainly true that I do blame the Constitution for the present pickle we are in regarding the actual inability of the American national government to engage in any serious attempt to resolve the manifest challenges that face us as a polity. One need not look far to read respected analysts and political pundits refer to the present American political system as “dysfunctional” or even, in Thomas L. Friedman’s word, “pathological.”\textsuperscript{88} I quite deliberately begin

\textsuperscript{86} THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
\textsuperscript{87} KONSTITUTSIA SSSR (1977) [KONST. SSSR] [USSR CONSTITUTION] art. 72.
\textsuperscript{88} THOMAS L. FRIEDMAN & MICHAEL MANDELBAUM, THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND HOW WE CAN COME BACK 243 (2011) (lamenting the “pathologies of the [American] political system”).
Framed with a review of such comments by Friedman and others. If one does not find these descriptions at all plausible, then in a deep sense, we have nothing to discuss. Those who believe that nothing is broken also, obviously, see nothing that may need fixing. But I don’t think you are so complacent.

Let me be clear, though, that when I say the Constitution deserves its share of the blame, I do not mean to say that it is even remotely the sole cause of our present discontents. All I want to insist is that it is at least a partial cause, with the exact weight inevitably unknown. Perhaps it is only 5%, perhaps 25%; even I do not argue for a larger number. But I think it is important to realize that in times of crisis, like being faced with the prospect of driving over a cliff, factors that in calmer and happier times might be nearly irrelevant can suddenly precipitate the ultimate disaster. “I knew I should have checked those brakes, but they always stopped in time before.”

Or consider the aspirin tablet, a true friend of humankind in many important respects. Like most people my age, I take an aspirin every night before retiring, secure in the knowledge that it will do its part to prevent heart attacks and, apparently, many other diseases. That is the unequivocal good news. But it turns out that aspirin can be literally fatal under certain circumstances, either by interacting with other drugs in a decidedly negative way or by preventing the body, say, from forming necessary blood clots when bleeding. (This is why one is told not to take aspirin before undergoing surgery, for example.) So it is with the Constitution. I certainly don’t have to agree that it is deficient in all respects at all times; that is not my view. Nor do I even have to agree with William Lloyd Garrison that prior to the Reconstruction Amendments, it was a “covenant with Death and an agreement with Hell,” though that is in fact my view. That is irrelevant with regard to determining the consequences of living under our Constitution in 2013. All I have to do is to persuade you—and, I hope, other readers—that the framework of government established in 1787 and left remarkably unchanged in too many important respects thereafter has become toxic when interacting with other aspects of our polity and political culture.

Consider, for example, the recent book by Norman Ornstein and Thomas Mann, It’s Even Worse Than It Looks: How the American Constitutional System Collided With the New Politics of Extremism. It is, as they suggest, “the American constitutional system” that has rendered pathological the capture of one of our two leading political parties by

89. Levinson, supra note 3, at 7–12.


91. See Kenneth S. Scher, Unplanned Reoperation for Bleeding, 62 Am. Surgeon 52, 52 (1996) (finding that preoperative use of aspirin was associated with heavy bleeding in most patients).

ideological extremists who have adopted a scorched-earth approach to politics. James Madison and his friends were desperate to stave off the rise of political parties, which could well be viewed as exemplars of what Madison so memorably called “factions” in Federalist No. 10. Quite obviously, they utterly failed, and Madison himself became one of the key leaders of the Jeffersonian Democratic-Republicans who contended with Hamiltonian Federalists. But we have never in our 225-year history truly figured out how to integrate partisan political parties and the “divided governments” they often produce (as has been true during most of the lifetimes of most of our readers) into our system of “separation of powers.” As Daryl Levinson (no relation) and Richard Pildes have argued, we must fully confront the implications of “separation of parties” instead of being fixated on eighteenth-century notions of “separation of powers.”

The written Constitution is almost wholly devoid of anything helpful in this regard, save the importance of the implicit recognition within the Twelfth Amendment that presidents would be elected as the result of partisan elections and, therefore, that there should be separate tracks for the president and vice president instead of asking electors to vote for the two individuals they thought were best qualified to be president (which gave us the very bad political marriage of John Adams and Thomas Jefferson in 1797–1801). Do you believe that the “unwritten Constitution,” properly understood, provides any genuine guidance with regard to preventing the further breakdown of our political system?

Finally, I want to resist your invitation to spend much of our exchange on specific reforms. I certainly have many in mind, some of which I know you agree with. They concern such subjects—and this is only a partial list—as the electoral college, the allocation of voting power in the Senate, life tenure for Supreme Court justices, and perhaps most importantly, changing the Draconian Article V that makes it next to impossible seriously to amend the Constitution with regard to anything of genuine significance (and controversy). But what most dismays me, and I’m afraid sometimes turns me into something of a crank, is that there is no serious conversation at all taking place at the national level about any kind of serious constitutional reform. What I strongly desire, as you know, is a new constitutional convention. I think there is much to learn from, and emulate, in the fact that there have been 233 state constitutional conventions in our national history and that each of the fifty states has had an average of almost three

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93. Id. at xiii–xiv.
94. THE FEDERALIST NO. 10 (James Madison), supra note 22, at 42.
96. U.S. CONST. amend. XII.
constitutions. The 1787 Constitution, as you know very well, ruthlessly displaced the six-year-old Articles of Confederation, our first constitution, and what makes the Philadelphia convention and the ratifying process afterwards so inspiring to many of us was precisely the willingness of leading figures of the time to engage in full and frank—often quite brilliant—debate about the adequacy of our political institutions. That's what is missing today.

There are two Madisons who haunt our national history. One is the Madison of Federalist No. 49, who sharply rejected the advice of his friend Thomas Jefferson, a supporter of frequent conventions and the scrutiny they would bring, in favor of trying to create a national culture of “veneration” of the Constitution. The other is the Madison of Federalist No. 14, my favorite of all of the 85 essays that he, Hamilton, and Jay wrote to defend what came out of Philadelphia. I cannot too often reread (or quote) the final paragraph of that essay:

Is it not the glory of the people of America that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? ... Had no important step been taken by the leaders of the Revolution for which a precedent could not be discovered, no government established of which an exact model did not present itself, the people of the United States might, at this moment have been numbered among the melancholy victims of misguided councils, must at best have been laboring under the weight of some of those forms which have crushed the liberties of the rest of mankind. Happily for America, happily, we trust, for the whole human race, they pursued a new and more noble course.... They formed the design of a great Confederacy, which it is incumbent on their successors to improve and perpetuate.

I have no hesitation, therefore, in embracing this Madison by suggesting that the lessons of our own experience, in today’s America, suggest that we need to ask hard questions about what aspects of our Constitution, written or unwritten, are worth preserving and which, concomitantly, should be changed.

Finally, I repeat my entreaty from my first letter: How should we change our pedagogy—and perhaps our casebooks as well—in order to instantiate the visions of constitutional discourse that we believe are too often missing within the crabbed confines of the contemporary legal academy? In many ways, you have the easier task, for, as you emphasized, you see your
central task as preparing students to be lawyers, though ones who are sensitized to the importance of making new arguments, based on the "unwritten Constitution," that may be lacking in their present education. My critique, in contrast, is directed far more at training our students to become better citizens and leaders, capable of asking how well the Constitution serves us as a structure of governance, rather than better lawyers as such. It is, after all, one of my central arguments that there are two Constitutions, the "Constitution of Conversation" that we obsess about in our classes and articles and the "Constitution of Settlement" that we ignore precisely because there is really nothing to argue about in terms of "interpretation" or "approaches to the Constitution" with respect to the meaning of "two senators," January 20, or the various percentages of the vote needed to override presidential vetoes or propose or ratify constitutional amendments. They raise profound questions about wisdom, but legal education shies away from those discussions in favor of endless debates about interpretation—such as the possible legitimacy of secession!

So, on to you, my friend, with, as always, deepest esteem and best wishes,

Sandy

IV. Dear Sandy,

So much to talk about, and so little time! So let me narrow the issues down. I don’t know enough about Canadian constitutional law or international law to have strong views about Quebec. Nor do I have much to say about how best to construe a Soviet Constitution born in blood and terror, force and fraud—unlike America’s Constitution, which emerged via a continental vote and conversation far more democratic and participatory than anything the world had ever seen. (On this last point, see Chapter I of America's Constitution and Chapter 2 of America's Unwritten Constitution.) For better or worse, I have concentrated on American constitutional law—its text, history, structures, doctrines, traditions, and so on. As for England and Scotland, please note that Britain as a whole has agreed to put various issues of Scottish autonomy/independence on the agenda. So nothing happening there today retroactively supports the right to unilaterally secede claimed by South Carolina in 1860.

On my view, then, were there no legal arguments on South Carolina’s side? I needn’t say that. I need only insist that whatever legal arguments South Carolina did make and could have made, these arguments were clearly worse—legally, as measured by the proper rules and modalities of constitutional interpretation—than the contrasting Unionist arguments. (An analogy: Obama did not need to win every electoral vote. He just needed to

101. See supra note 85 and accompanying text.
What Do We Talk About?

So why then did South Carolinians and others in 1860 make the legal arguments they did in support of secession? Not, on my view, because these arguments were legally strong when compared to the decisive Unionist refutations. The deal in 1787–1788 was straightforward: The text meant what it said about “the supreme Law of the Land” and virtually no one in that fateful year said that a state could secede unilaterally. But for all its admirable and democratic features, the Founders’ Constitution failed to put slavery on a path of extinction, and in fact featured key provisions—especially the Three-Fifths Clause—that ended up giving slavocrats far too much power in antebellum America. With that undue power, Southern slavocrats in the mid-nineteenth century tried to rewrite history, twist law, and suppress truth. Ultimately, this slave-sick Southern society tried to undo a lawful and democratic election by force of arms, and nearly destroyed the last, best hope of earth—government of, by, and for the people.

If my account is right, what follows? Among other things, we can see more clearly where the Founders went right and where they went wrong, and what we must do today—the very issues, Sandy, that you want our fellow citizens to ponder. But our fellow citizens are unlikely to think straight about these issues unless they understand history and law with rigor and precision. Contrary to what you sometimes seem to be saying (or might be misunderstood as saying), the Founders did not go wrong by being unclear about secession. But they did go wrong in failing to credibly address the deadly cancer of slavery in their midst. This failure, and this cancer, almost killed America. And even today, there are remnants of this Founding failure in our existing constitutional regime. The electoral college is a close cousin of the Three-Fifths Clause. It was initially designed in 1787, and redesigned in 1803–1804 (via the Twelfth Amendment), to accommodate southern slaveholding.

In a direct-election world, the South would have consistently been outvoted, because of course slaves could not vote. But thanks to the electoral college, the South could count its slaves in the electoral college; the more slaves a slave state had, the more House seats and electoral votes that slave state would get—a truly vicious system.

So a more careful and correct legal story about secession and slavery can actually help our fellow citizens see that perhaps the electoral college should be modified today. The college’s roots are in fact intertwined with slavery and the Three-Fifths Clause. And even today, our presidential election system has democracy-dampening features, compared to direct national election. Just as Virginia at the Founding got a fixed number of

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102. U.S. CONST. art. I, § 2, para. 3, repealed by U.S. CONST. amend. XIV.
103. U.S. CONST. art. II, § 1, para. 2–3, amended by U.S. CONST. amend. XII.
105. Id.
electoral votes regardless of how many or how few persons it enfranchised—and even though it disfranchised a vast proportion of its population—so Virginia today gets a fixed number of electoral votes whether lots of Virginians or very few show up on election day. But in a reformed, Levinson–Amar world of direct popular election, Virginia's government would have incentives to facilitate voting in Virginia. The more voters from Virginia, the more clout Virginia would have in the overall presidential contest; the fewer voters, the less clout.

In Chapter 12, I explain how a direct-popular system could actually take root without the need for an Article V amendment. (Once this system actually began to operate, it would then become easier to adopt a formal amendment codifying the new status quo.) Chapter 12 also offers up a way to unclog the amendment process more generally via textual amendments that could be voted upon now but that would not go into effect—would not "sunrise"—until far in the future, enabling the current generation to become Rawlsian framers, behind a veil of ignorance, for generations yet unborn. I first floated this idea in my 2005 book, and I was delighted to see that in your first two chapters, you, too, sought to invite "readers [to] detach themselves from the immediate political moment by contemplating the powers they would wish (or at least be willing) to grant the (unknown and unpredictable) president who will be elected in 2016 (or 2020)." To do you one better, Sandy, how about an amendment agreed to now that would only go into effect in 2056 or 2060? With such a time horizon, it might be possible for today's Americans, in your words, to "tame some of the partisan passions almost necessarily present if we focus on known political leaders or groups."

106. AMAR, supra note 1, at 456–63.
107. Id. at 475.
108. AMAR, supra note 11, at 428 n.*.
109. Id. at 475.
110. Id. Your mention of "partisan[ship]" in this passage does prompt me to respond to what you say about political parties in your most recent letter. As you know, I devote an entire chapter to political parties—Chapter 10, "Joining the Party: America’s Partisan Constitution." In that chapter, I try to show how parties are in fact more visible in the text of the written Constitution than is conventionally understood, and how these parties are also an enormous feature of America’s unwritten Constitution. You seem to think America’s two-party system itself is dysfunctional. I say that in general a two-party system is an important stabilizing mechanism in actual American governance, and that our present woes are simply due to the fact that at present, a significant portion of the Republican Party has gone kooky. But I predict that the party will straighten itself out because the system creates strong incentives (called elections) for it to do so. And I had you specifically in mind when I wrote the concluding words of Chapter 10:

Despite all that we have seen, it cannot be said that the Constitution directly addresses political parties in a comprehensive fashion. Is this because, as some scholars have claimed, the document’s rules concerning elections and the political process—especially its provisions governing presidential politics and presidential authority—are the petrified fossils of an eighteenth-century world, wholly ill-fitting the political realities of modern America?
And here we come back to our contrasting accounts of secession. You seem to suggest, in your opening chapter, that the Constitution of 1787–1788 was “resolutely silent” on the secession issue because the issue was perhaps “too volatile.” Hogwash. The Constitution was clear, but the war came in the 1860s because the Constitution elsewhere pandered to slavery, and slavery corrupted all it touched—including the truth and proper legal argumentation. But on my account, slavery itself did raise difficult political issues: How could free states and slave states in the 1780s find common ground and come together to form the necessary geographically indivisible union? I claim that the Founders failed not because they compromised with slavery: Some compromise was indeed necessary to launch the Union. But the Three-Fifths Clause was the wrong kind of compromise—the kind of compromise that you in your book refer to as a “rotten” compromise, building on the work of Israeli philosopher Avishai Margalit. The reason the Three-Fifths Clause was truly “rotten” is that it surrendered the future. It gave slavocrats extra political clout in every election in perpetuity. It failed to provide a structural mechanism for the long arc of history to bend toward justice. The framers should have instead used more “sunrise” clauses, I argue. Just as the Constitution allowed the transatlantic slave trade to continue for twenty years, but provided that Congress could ban this odious

The evidence suggests otherwise. At the very moment that national parties arose, they began to integrate themselves into the Constitution in both text and deed. America’s modern presidency is not the product of eighteenth-century mistakes that later Americans have simply been unable to comprehend or correct. Although the presidency was originally designed for a nonpartisan figure—George Washington—the office was repeatedly redesigned, via many different amendments adopted over the course of many decades, to fit the rise of more partisan chief executives including Thomas Jefferson, Abraham Lincoln, Franklin Roosevelt, and Lyndon Johnson. Most of the rules of presidential power are robust. These rules first worked without an entrenched two-party system and now work within such a system.

To put the point another way, virtually all states have created governorships that look amazingly like the presidency, and most states created these presidential look-alikes after the rise of America’s two-party system. Almost no state constitution comprehensively regulates political parties, even though many written state constitutions are quite detailed and relatively easy to amend.

All this evidence suggests that there is a different reason why political parties receive rather spotty treatment in America’s fifty-one written constitutions, state and federal. The explanation, quite simply, is that it is far from clear what a more comprehensive constitutional regulatory framework should look like. [V]irtually no state constitution regulates political parties in dramatically different fashion than does the federal Constitution. Unless and until several state constitutions come along and demonstrate a better mousetrap for addressing American-style political parties, most Americans are unlikely to view the federal Constitution as defective in this regard.

AMAR, supra note 1, at 415–16.

111. LEVINSON, supra note 3, at 19.

112. See id. at 43–53 (considering the Constitution in light of Margalit’s theory of “rotten compromise”).

113. AMAR, supra note 1, at 474–76.
traffic in 1808 and thereafter, so the document should have allowed slave states to get extra credit in the House and electoral college (via the Three-Fifths Clause, or some variant) only until 1808, but not thereafter. Likewise, the Framers could and should have provided that slavery as a legal system would need to begin to end by 1808, and that all persons born in America after 1808 would be born free. Or all persons born after 1818, or 1838, or 1888. The specific date is less important than the big, Rawlsian idea: Since slavery was morally wrong, the Founders should have provided for its ultimate extinction. After 1808 or 1838 or whenever, antislavery rules agreed to in 1788 should have been allowed to “sunset.”

And with that idea, Sandy, I come to the final questions that you have posed. When I teach law students, I do indeed stress proper rules of legal interpretation, and I use the secession issue as a case study in proper legal method. Here was perhaps the most momentous constitutional question ever to arise in America, and the standard legal methods do indeed point to a clearly correct legal result! But when I teach undergraduates, Sandy, I am more concerned with larger issues of citizenship preparation. And so I end my undergraduate class, as I end both America’s Constitution and America’s Unwritten Constitution, with a sweeping gesture toward the twenty-second century and beyond. Though I do not believe our very constitutional system is currently in crisis, I do find it notably imperfect, and I urge my students—the future leaders of the twenty-first century—to ponder perhaps the most important aspects of America’s unwritten Constitution: the amendments still to be written, and the Constitution of 2020, of 2121, and beyond.

I began this letter by saying that we have so much to talk about and so little time. Of course, I meant only that there is little time left in this final round. But I hope there will be lots of time in other venues down the road. Here’s to the next quarter century, my friend!

As ever,

Akhil

V. Dear Akhil,

As I write this literally on December 31, 2012, I can’t think of a better way to begin the New Year than by continuing, albeit briefly, the discussion—and looking forward, of course, to far more extended conversations in the future.

I suspect there’s not much more to say about secession. I think the most important area in which we agree is not only that the original Constitution was significantly blemished by its “rotten compromises” with slavery, but also that the ostensible “reconstruction” of the nation following the slaughter of roughly 750,000 participants in the warfare of 1861–1865114 was itself

114. J. David Hacker, A Census-Based Count of the Civil War Dead, 57 CIV. WAR HIST. 307, 311 (2011). Relying on newly-released census data from the 1850, 1860, 1870, and 1880 censuses,
blemished by the unwillingness or political inability of those who wished to achieve truly fundamental "regime change" to achieve their objectives. As I write in *Framed*, the benefits to the "slavocracy" of the Three-Fifths Clause were followed, perversely, by the even greater benefits of counting the former slaves as full persons, but still, in much of the former Confederacy, not voting participants. Thus what I called the "segregation bonus" entrenched Southern racists in the House (and, for somewhat different reasons, the Senate) until my adult lifetime. I am aware, of course, of your efforts in your chapter on the Warren Court to read Section 2 of the Fourteenth Amendment as an instrument combating this "segregation bonus." I have no trouble accepting your interpretation of Section 2, and one can imagine an alternate history of American constitutional development in which Section 2 would have been vigorously enforced by Congress (or even by the judiciary). Alas, that is not the constitutional development we in fact got, and Section 2 was functionally rendered a dead letter, much to our mutual dismay. True "regime change" was just too radical to contemplate, especially when the American narrative turned to "reconciliation" of the white North and South.

It may be that the most important disagreement concerns the perception of "crisis" confronting the American political system. Again, as I originally wrote these words, the United States seemed poised to go over what has (probably unhelpfully) become labeled as the "fiscal cliff." Even though I now know (on January 2) that a patchwork agreement between Vice

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demographic and social historian J. David Hacker has challenged the most frequently cited figure of Civil War fatalities, 620,000, estimating that 750,000 men died as a result of the War, with a probable margin of error of plus or minus 100,000. *Id.* at 311–12.


116. *Id.* at 186–187.

117. *AMAR*, *supra* note 1, at 187–89. The Amendment reads:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. *But when 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 shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.*

U.S. CONST. amend. XIV, § 2 (emphasis added).

118. See *DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* 107 (2001) (arguing that "the most vigorous advocates of reconciliation believed they had to banish slavery and race from the discussion").

President Biden and Senate Minority Leader Mitch McConnell staves it off, no one seriously believes that it will do anything more than kick the can down the road perhaps only for several weeks, let alone months or years. It is all too likely that we continue to face a debacle over raising the national debt ceiling, which in 2011 led to the downgrading of United States financial instruments, not because of worries about the American economic system as such, but because of concerns that were expressed about the American political system. I really do think you underestimate the importance of the alarms being sounded by such sober analysts as Mann and Ornstein or Tom Friedman. And if it is true, as I far more than you believe is the case, that the Constitution itself contributes to the dysfunctionality by virtue of the interactive effects of the separation-of-powers system with what Mann and Ornstein call the basically parliamentary party ethos, especially of the Republican Party, then I think we must address these issues sooner rather than later. More than you, I suspect, I am disinclined to believe that most lawyers have much to say that is helpful concerning these issues precisely because, with rare exceptions, they don’t call on our well-developed talents for interpretation, but rather, ultimately, the redesign of some of our institutions in light of what Madison called the “lessons of experience” and the best teachings of what Hamilton in Federalist No. 9 was willing to call “[t]he science of politics.”

I do believe that the challenge facing any of us teaching about constitutions in America in the 21st century is to figure out ways genuinely to integrate both the United States and American state constitutions, on the one hand, and the Constitution(s) of Settlement with the Constitution(s) of Conversation, on the other. Sufficient integration raises questions not only of pedagogy, but also, of course, of decisions by law school appointment committees as to what skill sets should be sought in potential teachers and,


121. See David Brooks & Gail Collins, The Fiscal Riff, OPINIONATOR, N.Y. TIMES, Jan. 2, 2013, http://opinionator.blogs.nytimes.com/2013/01/02/the-fiscal-riff/?hp (“Not averted. Postponed. We’ve got another catastrophe coming in a couple of months with the return of sequestration. And by the way how is anybody in government actually supposed to plan a budget when the whole thing may blow up again in 60 days?”).

122. In a statement published August 5, 2011, Standard and Poors explained that it had lowered its long-term sovereign credit rating on the United States because it believed that the “prolonged controversy” over raising the debt ceiling and “the related fiscal policy debate” indicated that “further near-term progress containing the growth in public spending, especially on entitlements, or on reaching an agreement on raising revenues is less likely than [it] previously assumed and will remain a contentious and fitful process.” United States of America Long-Term Rating Lowered To “AA+” Due To Political Risks, Rising Debt Burden: Outlook Negative, STANDARD & POORS (Aug. 5, 2011, 8:13 PM EST), http://www.standardandpoors.com/ratings/articles/en/us/?assetID=1245316529563.

ultimately, decisions by curriculum committees as to how much “constitutional law” should be required, as against being left to the market-system of electives. Both of us teach at schools that continue to emphasize the importance of “constitutional law.” But Yale and The University of Texas may become increasing outliers in this regard, especially as the legal academy responds to the economic crises that are reshaping legal education in front of our eyes (and about which I know that you have especially strong views).

There is certainly not time now to explore all of the implications raised by various conceptions of what my friend and colleague Gary Jacobsohn calls “constitutional identity.” But I certainly hope that we have many years together of active conversation and colleagueship exploring those implications.

Sandy
Unsettling the Settled: Challenging the Great and Not-So-Great Compromises in the Constitution

Reviewed by Robert F. Williams*

Sandy Levinson has, once again, written an extremely interesting and provocative book. It follows rather directly from his 2006 Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It), continuing his “loving criticism” of the American federal Constitution. Levinson’s overall thesis is that the United States Constitution was framed in an atmosphere of national crisis, resulting in a number of compromises as to governmental structures that were understandable at the time but which may have become dysfunctional and in need of change after several centuries of operation. He points to the tremendous growth of the American territory and population, together with the unanticipated rise of political parties, as providing a partial explanation for the current “crisis in governance” that he describes in the book. He contends that we are trapped, or “framed,” by the view that federal governmental structures that are entrenched in the Constitution cannot (and should not) be changed. He asks “whether fears that made sense in 1787 need control us today.”

Levinson reviews the “crisis in governance” at both the national and state levels. He describes the “gridlock” in Washington, D.C., in areas such as major policy initiatives, approval of judicial nominations, ratification of

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3. Levinson, Framed, supra note 2, at 12, 34–40.

4. Id. at 7, 9.

5. Id. at 8.

6. Id. at 215.
treaties, etc. Further, he reminds us of the dysfunction and possible "ungovernability" of states like California. He acknowledges that not all problems arise from the provisions of the formal federal and state constitutions themselves, but contends that the "settled" provisions of these constitutions may, in fact, be the root of a number of these problems.

This book, as Professor Levinson proudly notes, is unusual for several reasons. First, its focus is on the provisions of the federal Constitution that are "settled" and therefore not subject to academic debate or analysis, or to judicial interpretation and litigation. Almost the entire focus of American constitutional law, in both political science and law, is on the great questions of interpretation of the Constitution, with very little attention to its clear provisions, such as the date on which the President will be inaugurated. Levinson refers to these "settled" (and, for the most part, unquestioned and accepted) provisions as the "Constitution of Settlement." By contrast, he refers to the open-textured provisions of the Constitution, subject to scholarly debate and judicial interpretation, as the "Constitution of Conversation." He breaks with almost all American constitutional law scholarship by only considering the former:

This book is far more concerned with analogues to the Inauguration Day Clause than to the Equal Protection Clause. Though their meaning is indisputable, there is nothing trivial about such clauses. In fact, they may better explain the failures of our political system and fears about governability than the "magnificent generalities" explain its successes.

Indeed, this book is predicated on the proposition that almost all of the Constitution of Settlement is very much worth talking about by anyone interested in the practicalities of American government. However, the nature of the discourse about the Constitution of Settlement is quite different from that generated by the Constitution of Conversation. The latter involves constitutional meaning; the former involves the wisdom of clear constitutional commands.

Secondly, Professor Levinson includes in his analysis recurring references to the constitutions of the fifty American states. Today, most "constitutional law" study and scholarship retains an exclusive focus on the

7. Id. at 1–5.
8. Id. at 4–5.
9. Id. at 5–7 ("But the formalities can make a real difference.").
10. Id. at 19, 25–26.
11. Id. at 19.
12. Id.; see id. at 6 ("This book is very much about constitutional structures, and not, for example, about constitutional rights.").
13. Id. at 19, 23; see also id. at 354 ("One lesson is that constitutions of settlement do not necessarily settle, once and for all, the issue under examination."); id. at 146–47, 357–58 (contending that the Constitution cannot and should not "settle" issues for every generation).
Further, he regularly refers to the constitutions of other countries as shedding light on choices reflected in our federal Constitution, the most obvious being their use of a parliamentary rather than a presidential system.

This book is extremely important and useful for a variety of reasons. First, it provides a clear and understandable analysis of the original reasons (often compromises) for many of the structural and seemingly noncontroversial provisions of the Constitution. Levinson refers to the Federalist Papers (which often adverted to state constitutions), the arguments of the Anti-Federalists, and the debates at the state ratifying conventions. Then, he places these provisions in modern context. He describes the current serious defects in many of the structural arrangements by reference to actual, fairly recent events, as well as to interesting and troubling hypotheticals about things that might happen in the future. Levinson has therefore provided a fascinating review of the theory behind and the actual operation of our Constitution of Settlement.

Levinson dissects most of the compromises in the original Constitution arising from the familiar small-state/large-state clash as well as the North/South, slave-state/free-state conflict. In a chapter on compromise itself (Chapter 2), Levinson notes that compromise is necessary in most aspects of life and is certainly necessary, as Edmund Burke, James Madison, and others recognized, in constitution making, both federal and state. But some compromises are so "rotten" as "to establish or maintain an inhuman regime . . . of cruelty and humiliation, that is, a regime that does not treat humans as humans." Levinson questions whether the constitutional compromises surrounding slavery were "worth it," particularly from the point of view of the slaves themselves. Most people assume that we would not have had a federal Constitution, at least not in 1787, without (1) the "Great Compromise" where the House of Representatives was based on population (including the "3/5 Compromise" which gave the slave states greater representation in the House; that influence spilled over into the Electoral College, thereby gaining a greater say for the southern states in who would become President and, among other things, appoint Supreme Court Justices) and the Senate was based on equal votes for the states; and (2) the continuation of slavery. The slavery question is a very important question,

15. LEVINSON, FRAMED, supra note 2, at 33, 40.
16. Id. at 43 (citing AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES (2009)).
17. Id. at 44 (quoting MARGALIT, supra note 16, at 2).
18. Id. at 51.
19. Id. at 37–38.
20. Id. at 38–40.
albeit academic today. But even asking the question may move readers to let their reverence and veneration for the federal Constitution slip a bit to consider whether the current dysfunction of some of these compromise provisions is "worth it" today.

Levinson shines his analytical light on, among other "settled" provisions, the clauses specifying the date of inauguration, state control of elections, eligibility for public office, bicameralism (with particular criticism of the Senate), the presidential veto, the Electoral College, the presidential as opposed to parliamentary system, the unitary Executive—including powers such as pardoning, making treaties, etc.—length of presidential terms, the role of the Vice President, impeachment (only for misconduct and not for incompetence), divided government, the independent judiciary (including methods of selection and judicial review), federalism, methods of amendment, and emergency powers. It is the wisdom of these provisions today in which Professor Levinson is interested. He admits that readers might disagree with him as to the actual negative consequences of these provisions ("empirical assumptions"), or whether these consequences are "desirable or undesirable" ("normative arguments").

Surprisingly, a number of these "settled" provisions turn out to be problematic under Levinson's critical eye. Just a few examples will indicate the fresh look that he provides for many of the provisions we all take for granted. For example, returning to the Inauguration Day Clause, this results in a several-month "lame duck" period for either a defeated president or one who has served his or her second term—longer than the same period for state governors. During this period presidents have issued many questionable

21. Id. at 22–24.
22. Id. at 100–02.
23. Id. at 117–19.
24. Id. at 142–44.
25. Id. at 164–73.
26. Id. at 178–83.
27. Id. at 175–78.
28. Id. at 239–44.
29. Id. at 194–201.
30. Id. at 201–02.
31. Id. at 209–13.
32. Id. at 211–28.
33. Id. at 213–19.
34. Id. at 229–33.
35. Id. at 245–48.
36. Id. ch. 14.
37. Id. at 331–36.
38. Id. at 208, 374–83.
39. Id. at 7.
40. Id. at 22–25.
pardons of convicted criminals, initiated substantial administrative rule-making processes or repeals, and taken a number of other actions which do not take place in, for example, a number of European countries where transitions of power are quite swift.41 The American bicameral system, with each house having an absolute veto over lawmaking, is one of the undemocratic features of the United States Constitution that has already been pointed out by Professor Levinson.42 This situation is exacerbated by the structure of the Senate, which with equal votes for each state, permits “the smallest twenty-six states, which together have approximately 17 percent of the national population, [to] elect a majority of the Senate.”43 The presidential veto, of course, is also undemocratic, and Levinson criticizes it for permitting the veto of legislation enacted by both houses based on the policy preference of the President rather than only on constitutional considerations.44 He contrasts the federal Constitution’s single Executive official, the President, with a number of the state constitutions that provide for a “plural” executive, where a number of officers other than the Governor are elected on a statewide basis.45 He notes that “forty-eight of the fifty states do not give their governors the authority to name the attorney general, perhaps the most important single executive branch official in terms of providing potential oversight of the executive branch with regard to criminal conduct.”46 Levinson also points out that the federal unitary Executive, which gives the President “the power to appoint all executive branch officials,” “lends a winner-take-all partisan character to presidential elections.”47 Many of us recognize this when we tell our friends that it is important not simply to vote for a President whom one likes, but to remember that the President who is elected will also likely appoint members of his or her party all the way down to postmaster.

The much-maligned Electoral College, of course, does not escape Levinson’s criticism, where he describes the process of choosing the President as “quite [a] spectacularly different process [than that for choosing] any state governor, all of whom are elected in statewide popular elections.”48 Levinson notes further the Electoral College’s potential for nonmajority-elected presidents, the possibility of “so-called faithless electors who . . . reject their party’s candidate in favor of their own idiosyncratic choices,” and the “winner-take-all” problem of state electors and “the one state, one vote

41. Id. at 24–25.
42. LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, supra note 1, at 30–38.
43. LEVINSON, FRAMED, supra note 2, at 150.
44. Id. at 164.
45. Id. at 240.
46. Id.
47. Id. at 243.
48. Id. at 178.
process by which the House breaks deadlocks." The conclusion that Professor Levinson reaches concerning the Electoral College represents a major theme in this book:

At the end of the day, the electoral college, perhaps like the specific day the Constitution specifies for the inauguration of a new president, simply exemplifies the importance of path dependence, the inertial force possessed by past decisions whether or not we believe they make much sense for us today. One can well doubt that "We the People" would maintain the electoral college if the U.S. Constitution were as easy to amend as most state constitutions. That it persists tells us almost nothing about actual public opinion and much about the difficulty of formal amendment.

The federal Constitution has, of course, endured with very few amendments since its ratification in 1789. That record, Levinson notes, is far beyond the average length of duration for national constitutions. This is a consequence of the reality that the federal Constitution is the most difficult in the world to amend, let alone revise, and is generally a revered and venerated document. The "last truly significant change to the Constitution" was in 1951, limiting presidents to two terms. A constitution under which formal change is extremely difficult leads to more change by interpretative methods, either by the judiciary or through "constitutional moments" accomplished by the Legislative and Executive Branches, with the possible acquiescence of the judiciary. State constitutions, by contrast, are much easier to amend and therefore, as Dr. Alan Tarr has observed, state constitutional change has occurred more often (too often, some would say) through formal amendment and revision mechanisms.

Professor Levinson points out that the evolution of the structures of state government, made possible through the availability of formal change, has permitted the states to reevaluate, modify, and improve their governmental structures. As Dr. John Dinan has noted, this availability of

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49. Id. at 188. Some states have taken it upon themselves to try to deal with the “non-majority elected president” problem. See 888-Word Interstate Compact, NAT'L POPULAR VOTE, http://www.nationalpopularvote.com/pages/misc/888wordcompact.php. See generally Robert W. Bennett, Possibilities and Problems in the National Popular Vote Movement, 7 ELECTION L.J. 181 (2008) (reviewing JOHN R. KOZA ET AL., EVERY VOTE EQUAL (1 ed., 8th prtg. 2006), and assessing the “State-Based Plan for Electing the President by National Popular Vote”).

50. LEVINSON, FRAMED, supra note 2, at 190; see also id. at 127 (describing Madison’s lack of confidence in the ability of ordinary Americans to “exercise genuine political autonomy”).

51. Id. at 335–37 (citing ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009)).

52. Id.

53. Id. at 210. Levinson notes that this settled provision bars even exceptional presidents from serving more than two terms. Id. at 212.

54. Id. at 339.


56. LEVINSON, FRAMED, supra note 2, at 336.
formal change enabled the people of the states to have an actual constitutional conversation about unsettling governmental structures that had been seemingly settled by earlier generations. This kind of conversation has been virtually impossible, with minor exceptions, at the federal level.

Some caution, however, should be exercised in looking to state constitutional arrangements as models for our federal Constitution. This is because the American state constitutions function within the overall federal constitutional structure, and are to some extent limited by that structure. Furthermore, state constitutions operate with respect to subnational polities, rather than a single national polity. As a consequence, at least in the United States, state constitutions' origins, functions, form, and substance all differ from the federal model. American state constitutions draw their essence from the people themselves, who exercise forms of popular sovereignty in adopting, amending, and revising state constitutions, and further in actually participating in constitutional government through their approval at the polls of matters such as the assumption of debt and the approval of gambling programs. Further, the voices of nonelite people such as women, African Americans, Native Americans, Latinos, plaintiffs, union members, and prison reformers, as well as those of opponents of abortion and same-sex marriage have been heard, and sometimes have prevailed, in the processes of state constitutional change.

State constitutions, in contrast to the federal Constitution's grants of power to a limited federal government (albeit one expanded through judicial decision and the practice of "constitutional moments"), function primarily to limit the residual power the states retained at the time the United States Constitution was ratified. This different function leads to a differing form and content for the state constitutions. For example, they contain long articles on taxation and finance, education, natural resources, etc., which are the matters that were retained for state competency. In addition, the state constitutions contain much in the way of policy pronouncements that could be relegated to ordinary statutes within the competence of state legislatures. Consequently, care should be taken when looking to state constitutions as substantive models for the federal Constitution. Further, the matters that will

57. JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 5 (2006) ("[S]tate constitution makers' departures from the federal model are primarily attributable to the flexibility of state amendment processes and the resulting opportunities to benefit from institutional knowledge and experience throughout American history . . . ."); WILLIAMS, supra note 14, at 25, 82–83;

58. LEVINSON, FRAMED, supra note 2, at 8, 14.

59. WILLIAMS, supra note 14, at 15–36.

60. Id. at 31.

61. Id. at 34–36.

62. Id. at 34–35.

63. Id. at 27, 249–55.

64. See, e.g., TEX. CONST. art. VII ("Education"); TEX. CONST. art. VIII ("Taxation and Revenue").
arise in any process of amendment or revision of the federal Constitution will differ materially from those that will arise in the parallel state constitutional processes.\footnote{65}

Having issued that note of caution, however, state constitutional arrangements (which are much less “settled” than federal constitutional arrangements) such as an elected judiciary,\footnote{66} term limits, a plural executive, and direct democracy, are matters that, despite one’s view of them as policy matters, do not seem dependent on the differences between state and federal constitutions. This is particularly true for the mechanisms of change, through amendment or revision, of state constitutions. Those do not necessarily have to differ because they are subnational rather than national.\footnote{67} Of course one of the criticisms of state constitutions is that they are too easy to amend or revise.\footnote{68}

There is always a tension in constitutions between rigidity and ease of change. Thomas Jefferson supported the idea of easily amended constitutions with review every generation.\footnote{69} James Madison, by contrast, supported more permanent constitutions.\footnote{70} As I have said, “If state constitutional revision is too difficult, constitutionalism overwhelms democracy; if it is too easy, democracy overwhelms constitutionalism. It is difficult to achieve exactly the right balance, and this point might change over time.”\footnote{71} If many states (and they vary significantly) are too far toward the democratic end of the continuum, then it seems like the federal constitutional system (at least according to Article V) may be too far toward the “constitutionalism” end.

\footnote{65. See generally 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM (G. Alan Tarr & Robert F. Williams eds., 2006) (describing how traditionally, amendments to state constitutions concern local issues like state revenue rather than national issues). However, recently a number of national issues such as same-sex marriage, labor law, health reform, and others have been reflected in state constitutional amendments placed on the ballot in some states. Robert F. Williams, Why State Constitutions Matter, 45 NEW ENG. L. REV. 901, 903 (2011).}
\footnote{66. WILLIAMS, supra note 14, at 290.}
\footnote{67. But see Tom Ginsburg & Eric A. Posner, Subconstitutionalism, 62 STAN. L. REV. 1583, 1599–600 (2010) (contending that substate constitutions tend to be easier to amend than federal constitutions).}
\footnote{68. See, e.g., James A. Gardner, The Failed Discourse of State Constitutionalism, 90 MICH. L. REV. 761, 818–22 (1992) (enumerating a number of apparently frivolous state constitutional provisions and linking their existence with the relative ease of amending state constitutions). But see WILLIAMS, supra note 14, at 25 (“Because of their relative ease of amendment, state constitutions could be modified through trial and error over the years concerning matters that, for all practical purposes, remain frozen in the federal Constitution.”).}
\footnote{69. LEVINSON, FRAMED, supra note 2, at 61; WILLIAMS, supra note 14, at 363. Levinson reveals that he has discovered his “inner Jefferson.” LEVINSON, FRAMED, supra note 2, at 396.}
\footnote{70. WILLIAMS, supra note 14, at 363.}
\footnote{71. Id.}
In the face of the reality that the federal Constitution is virtually unamendable, because of the restrictive requirements of Article V, Professor Levinson makes a radical proposal: Do not follow Article V! He invokes the crisis atmosphere of the 1780s, analogous to today’s crisis in governance at the state and federal levels, which of course led the Framers of the federal Constitution to engage in a “runaway constitutional convention” in violation of the instructions from Congress and the amendment mechanisms of the Articles of Confederation. He describes the issue facing the Framers in 1787:

The fate of the country was at stake, and one should hardly feel obliged to conform to a provision of the existing constitution [the requirement of unanimity to amend the Articles] that if followed in its clear, unequivocal, and semantically undefeatable meaning would doom the enterprise of what Madison and others viewed as absolutely necessary constitutional revision.

Again, what interests Levinson is not debate over the meaning of the Constitution’s settled provisions but rather an assessment of their wisdom in current times. If the consequences of these settled provisions are bad enough, he suggests a process to change them even if it defies the seemingly settled provisions of Article V. This is serious stuff.

An instructive process took place at the state constitutional level where conflicts arose over whether the rules laid down in the first state constitutions for their amendment and revision actually had to be followed, or rather whether the people in the exercise of their revolutionary popular sovereignty could make extralegal but binding changes in their constitutions.

Dr. Christian Fritz explained:

All Americans agreed that the people created government. They differed over when that collective sovereign might be recognized as having exercised its authority. Some recognized a multitude of ways, none of them exclusive, in which the people could express their will. In their expansive view, the people could use the formal procedures articulated in a constitution to amend or dissolve that document. Such procedures were not indispensable and the people’s will could be recognized in other ways. On the other hand, some took a more

72. LEVINSON, FRAMED, supra note 2, at 11. Actually, the provisions of Article V are a bit less clear than most of us have thought. See generally RESPONDING TO IMPERFECTION, supra note 2 (discussing the difficulties with the interpretation of Article V in a number of essays). Also, Levinson is not alone in suggesting that the formal requirements of Article V be “side-stepped.” LEVINSON, FRAMED, supra note 2, at 343–44.
73. LEVINSON, FRAMED, supra note 2, at 343–44.
74. Id. at 347–58.
75. Id. at 354.
76. See generally CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR (2008) (tracing America’s post-Revolution political and constitutional history and the struggle to adopt and implement a collective sovereignty by “the people”).
constrained view. For them the sovereign spoke only in conformity with procedures it set forth in advance. That was the exclusive way in which the sovereign's voice would be recognized and heard.

The implications of this divide about when the sovereign had spoken were significant. For instance, one implication was whether the people of a past generation could bind a future one. If the people were, in fact, sovereign, their hands could not be tied and their sovereignty limited by an earlier generation. During this period, many Americans believed that a constitution's expression of fundamental rights and requirements for revisions could not dictate those terms to future generations. The unborn sovereign people of a later period were at liberty—just as the revolutionary generation had been—to express their sovereign will. Thus, each generation of American sovereigns would govern in its own way.77

The necessity of following the "rules laid down" ultimately has won out at the state constitutional level, but there were a number of examples of extralegal successes.78 At the federal level as well, obedience to the rules laid down in Article V has been assumed; that point of view is rejected here by Professor Levinson.

Levinson proposes an unlimited federal constitutional convention, with the delegates chosen at random and compensated adequately, with their proposed revisions being submitted to the people at a national referendum.79 A similar, although not extralegal (because it was a proposed two-step process, with authorization first provided through an amendment to the state constitution), approach was recently explored in California, but had to be abandoned when fundraising failed to support the necessary steps of amending the state constitution to implement the idea.80

Levinson points out that the Constitutional Convention's secrecy made it easier to reach compromise than it would be now, when instant news coverage would bring instant pressure and compromise has become less supported.81 Also, compromise must often be accomplished in "real time,"82 with the actors being able to assess the actual partisan impact of their concessions. For this reason, Levinson wisely suggests a Rawlsian "veil of

77. Id. at 293.
78. Id. at 285–88; see also LEVINSON, FRAMED, supra note 2, at 358 (pointing to Fritz's conclusion that carrying out state constitutional change "even if contrary to established constitutional procedures—is one of the hallmarks of American constitutionalism" (quoting Christian G. Fritz, Recovering the Lost Worlds of America's Written Constitutions, 68 ALB. L. REV. 261, 262 (2005))).
79. LEVINSON, FRAMED, supra note 2, at 391–92.
81. LEVINSON, FRAMED, supra note 2, at 49–50.
82. Id. at 26, 34.
Unsettling the Settled

ignorance,” or “original position,” approach, where any federal constitutional changes are delayed to the point where there is no clear partisan advantage that can be discerned.

Professor Levinson’s proposal is radical because it is “extralegal” and beyond the “rules laid down” in Article V of the federal Constitution. It also raises the fears of those who oppose even a constitutional convention within the terms of Article V, not only because they fear what such a convention might propose, but also because they fear a “runaway” convention like that in 1787. These are widespread and deeply held concerns. For that reason, Professor Levinson might have delved even further into the state constitutional experience with the processes of amendment and revision. For example, a number of states have provided in their constitutions for an automatic, periodic vote on whether to call a state constitutional convention. Article V could be amended to provide for this or some variant of it.

In fact, my colleague Alan Tarr and I have pointed out that there is an extremely wide range of state constitutional amendment and revision procedures that have been or could be used in the states to accomplish needed constitutional change. New approaches had to be, and have been, developed at the state level to deal with the problem of state constitutional rigidity. A number of these approaches could be tailored to fit a perceived need for change in the federal Constitution without the fear of a runaway convention. For example, several states have utilized a “two-step process” to achieve needed amendment or revision in their state constitutions. The first, more moderate step is to formally change the “rules laid down” initially following the established process for a constitutional amendment that authorizes a new, even one-time, process for amendment or revision of the state constitution. Why not consider this approach, now, at the federal

83. Id. at 33–34.
84. Id. at 26, 33–34.
86. See generally 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM, supra note 65 (analyzing the political obstacles to state constitutional reform through case studies of reform efforts in Alabama, California, Colorado, Florida, New York, and Virginia); G. Alan Tarr & Robert F. Williams, Foreword: Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform, 36 RUTGERS L.J. 1075 (2005) (encouraging state constitutional reformers to take advantage of the numerous available options for reforming their constitutions); Robert F. Williams, Should the Oregon Constitution Be Revised, and If So, How Should It Be Accomplished?, 87 OR. L. REV. 867 (2008) [hereinafter Williams, Oregon] (examining the Oregon Constitution and efforts to revise it and discussing state constitution revision generally).
87. WILLIAMS, supra note 14, at 380.
88. Id.
level? For example, in Michigan, a 1960 first-step amendment eased the requirements for calling a constitutional convention, leading to the successful 1961–1962 Constitutional Convention. A similar first-step amendment was adopted in 1950 in Illinois, leading to that state’s well-regarded 1970 Constitution. Texas amended its constitution to authorize the Legislature to sit as a constitutional convention for one time only. Although the convention’s proposals failed to get the necessary votes to be proposed to the voting public, this was an innovative mechanism. New York used, albeit unsuccessfully, a Temporary Commission that proposed (based on the federal military base closing commission) “a unique action-producing alternative to a state constitutional convention,” where the Governor and legislature were urged to act on proposed constitutional amendments and statutes by a date certain.

Again, one of the fears about federal constitutional amendment and revision concerns the legal ability to limit a federal constitutional convention. The experience in the states over the years, however, has indicated that limited state constitutional conventions have been successful in taking “hot button” topics off of the table, and those limits have been seen as legally enforceable. An initial step at the federal level could be to propose an amendment to Article V that clearly provides for a legally enforceable limited constitutional convention, whether on a one-time basis (in response to a perceived crisis or to limit opposition), with its use limited to periodic intervals, or as a permanent amendment to Article V. This would have to be drafted with care, providing a mechanism for determining and enforcing such limitations, processes for choosing delegates, etc. In the states, the objective of a limited convention has been achieved by submitting not only the question whether to have a constitutional convention, but also how such a convention should be limited, to the voters themselves. In this way, the limitations are seen as emanating from the people themselves when they vote to call a constitutional convention, therefore binding their delegates. A similar mechanism could be included in such a limited constitutional convention amendment to Article V, thereby eliminating the possibility of a runaway convention. This two-step approach would solidify the legality of new federal amendment or revision procedures by actually changing the

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89. Williams, Oregon, supra note 86, at 882.
90. Id. at 884–85. The Florida Legislature successfully proposed an entirely revised constitution in 1967. Id. at 891.
91. Id. at 888.
92. Id. at 888–89.
93. Tarr & Williams, supra note 86, at 1095; Williams, Oregon, supra note 86, at 894.
94. Tarr & Williams, supra note 86, at 1085–92.
96. Tarr & Williams, supra note 86, at 1087–88.
“rules laid down” prospectively, before the new procedures are utilized. Then, the second stage would not be extralegal and could be carried out in a much more moderate and less uncertain process than an unlimited federal constitutional convention. An appointed constitutional commission, described below as a matter of state constitutional practice, could make important preparatory recommendations and provide background research and training for the delegates to such a limited federal constitutional convention.

There are a variety of additional techniques that have been developed or suggested in the state constitutional context that might be tailored for use at the federal level. For example, amendments have been proposed with “sunset” provisions limiting their length of effectiveness, shifting the burden to those who want to continue them at their point of expiration from those who want to eliminate them.\(^9\) There is, of course, already federal precedent for this in the clause prohibiting Congress from banning the international slave trade until a date certain.\(^9\) Professor Levinson’s suggestion of delaying the effective dates of changes, so that partisan advantage cannot be weighed,\(^9\) is also very important. A variation on the sunset approach would be constitutional amendments that, after a period of time, may be changed by less onerous amendment procedures or even by statute, possibly by supermajority.\(^10\)

During the last century, states have had much success with the use of constitutional commissions, which are appointed bodies of experts who prepare proposed changes to the state constitutions and submit them to state legislatures.\(^10\) This commission mechanism, not included in state constitutional amendment and revision procedures, has been developed in the states as an alternative to (or sometimes in preparation for) constitutional conventions, because they cost much less, rely on expertise, and report back to the legislative branch, which can thereby maintain control of the submission of state constitutional amendments or revisions to the electorate.\(^10\) Commissions have been criticized, on the other hand, because they do not rely on the involvement of elected delegates the way constitutional conventions do, and therefore have been described as undemocratic.\(^10\) Despite these drawbacks, the commission mechanism that has been developed successfully in the states could certainly be adapted for

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97. Id. at 1113–14.
99. LEVINSON, FRAMED, supra note 2, at 26–27.
100. Tarr & Williams, supra note 86, at 1114–15.
101. Id. at 1094–100.
102. See id. at 1094–95 (characterizing commissions as providing expert opinions while preserving ultimate authority with the legislature).
103. Id. at 1099.
use at the federal level. This would be a moderate approach and would not require an amendment to Article V or operate in defiance of it.

Almost all state constitutional commissions have operated without any formal change to the "rules laid down" for state constitutional amendment or revision. This is an unnecessary step because the commissions' proposed amendments or revisions are submitted to the legislative branch for its consideration pursuant to the formal processes of state constitutional change that are already in place.\textsuperscript{104} So, the use of an appointed commission, broadly representative but utilizing expertise, might be able to examine some of the "settled" provisions of the federal Constitution that Professor Levinson describes as dysfunctional and contributing to the current gridlock in our federal government. Compromise would be necessary here, as it is in all constitution making. Thinking of constitutional commissions somewhat differently, one could be utilized to advise Congress on how to propose an amendment or amendments to Article V that would authorize limited constitutional conventions, what the limits should be, and how to make such limits legally enforceable. A commission was used recently in New Jersey for this purpose.\textsuperscript{105}

One of the keys to the success of state constitutional revision has been moderation.\textsuperscript{106} State constitutional conventions and commissions that have attempted to do too much, or to accomplish radical change, have often ended in failure.\textsuperscript{107} Therefore, any proposed method of amendment or revision of the federal Constitution should aim for moderation. Some improvement is better than none. Levinson recognizes that "the best works as an enemy of the good."\textsuperscript{108} It may be that reasonable and moderate adjustments to some of the "settled" provisions of the federal Constitution, such as the Inauguration Clause (probably not two Senators, per state), would not be nearly as controversial as proposed changes to other parts of the Constitution of Conversation. A limited federal constitutional convention, or constitutional commission, might be structured to focus only on the Constitution of Settlement and not be permitted to consider the more controversial Constitution of Conversation.

\textsuperscript{104} The one exception to this is Florida, where the state constitution creates two appointed commissions that meet periodically and can submit their proposed revisions directly to the voters. Rebecca Mae Salokar, 

\textsuperscript{105} Tarr & Williams, \textit{supra note} \textit{86, at 1104–05;} \textit{see also} Williams, \textit{Oregon, supra note} \textit{86, at 884} (describing similar use of a commission in Illinois).

\textsuperscript{106} \textit{Williams, supra note} \textit{14, at 378.}

\textsuperscript{107} Salokar, \textit{supra note} \textit{104, at 39–40;} Williams, \textit{Oregon, supra note} \textit{86, at 892.}

\textsuperscript{108} \textit{Levinson, FRAMED, supra note} \textit{2, at 391.}
A careful evaluation of the defects in the Constitution of Settlement, described by Professor Levinson, must consider whether the individual defects could be remedied by a series of unrelated amendments, or rather the defects are so interrelated as to render the federal Constitution incoherent and in need of more extensive revision rather than mere amendment. Alan Tarr noted that:

Of course, it is possible to introduce significant constitutional reform without calling a convention or adopting a new constitution—amendments proposed by constitutional commissions, by initiative, or by state legislatures may also produce constitutional reform. But in thinking about constitutional reform, it is important to distinguish it from the ordinary constitutional change that is so prevalent in the states. Any alteration of a state constitution, no matter how technical or minor, qualifies as constitutional change. In contrast, constitutional reform involves a more fundamental reconsideration of constitutional foundations. It introduces changes of considerable breadth and impact, changes that substantially affect the operation of state government or the public policy of the state. The replacement of one constitution by another obviously qualifies as constitutional reform. So too may major constitutional amendments or interconnected sets of amendments. However, most constitutional change in the states does not qualify.  

Many people, as Levinson acknowledges, “are basically terrified” of a federal constitutional convention. This fear also now manifests itself at the state constitutional level, where political scientists Gerald Benjamin and Thomas Gais have observed what they call “conventionphobia.” Calls for state constitutional conventions are now routinely defeated by the voters. I have said:

109. G. Alan Tarr, Introduction to 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM, supra note 65, at 1, 2 (footnote omitted). As Bruce Cain has noted:

In theory, constitutional revision should be more comprehensive and qualitatively more significant than a constitutional amendment. But what if revision occurs increasingly through amendment: What is gained and what is lost? The most important advantage should lie in the ability of a Revision Commission to consider how all the pieces fit together. Where the amendment process is piecemeal and sequential, the revision process affords the opportunity to logically relate proposals to goals, and to make the entire package of proposal[s] coherent.

Bruce E. Cain, Constitutional Revision in California: The Triumph of Amendment over Revision, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM, supra note 65, at 59, 64.

110. LEVINSON, FRAMED, supra note 2, at 392.

The public seems to view a constitutional convention as political business as usual by the “government industry.” Constitutional conventions seem to have lost their legitimacy in the public mind. At the time many states’ original constitutions were drafted, the politicians and special interests were afraid of the people acting through constitutional conventions. Now, by contrast, the people are afraid of politicians and special interests acting through constitutional conventions.1

This is certainly an attitude that will provide additional resistance to Professor Levinson’s proposal, but which might not reject more moderate approaches out of hand.

Sandy Levinson has made important, and often convincing, criticisms of provisions of our Constitution that are not often debated. His proposed remedy, however, is radical, and in many people’s view, dangerous to our federal constitutional system. For readers who agree with some of his criticisms, but worry about an extralegal, unlimited federal constitutional convention (or even a legal convention under Article V), the lessons learned from state constitutional amendment processes may be much more practical, moderate, and comforting.

Those seriously seeking to resolve at least some of the difficulties we currently experience because of the “settled” provisions of the federal Constitution would be wise to pick and choose among the lessons from the states to develop realistic possibilities for moderate change at the federal constitutional level. After all, despite the fact that most people think our Constitution has served us very well, it seems clear now that it could certainly be improved upon. Possibly now is the time that Article V should be made (“framed”) to serve us rather than us having to serve (be “framed” by) Article V.

112. WILLIAMS, supra note 14, at 388 (footnote omitted).
The Limits of Antitrust Scholarship


Reviewed by Barak Orbach*

About thirty years ago, Professor Frank Easterbrook published his seminal article, The Limits of Antitrust, in the Texas Law Review.1 Easterbrook declared that “[t]he goal of antitrust is to perfect the operation of competitive markets,”2 and concluded that “[a]ntitrust is an imperfect tool for the regulation of competition.”3 It is an imperfect tool, he explained, “because we rarely know the right amount of competition there should be, because neither judges nor juries are particularly good at handling complex economic arguments, and because many plaintiffs are interested in restraining rather than promoting competition.”4

Since Easterbrook published his article, the intellectual resources invested in antitrust in the United States have been in decline (see Figure 1). Easterbrook wrote about institutional and conceptual limits of antitrust—the internal limits of antitrust. Others have addressed the extrinsic limits of antitrust—the relationships of antitrust with other areas of law, such as intellectual property and regulation.5 The decrease in depth of antitrust writing introduced a new form of limits in antitrust: diminishing critique and intellectual development in the field. This is the depth limit of antitrust. Of course, one may argue that there is no need for antitrust enforcement or antitrust scholarship, or at least no need for much.6 Such arguments, however, tend to reflect general objections to regulation that have their own

* Professor of Law, The University of Arizona College of Law.
2. Id. at 1.
3. Id. at 39.
4. Id.
6. See, e.g., Robert W. Crandall & Clifford Winston, Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence, 17 J. ECON. PERSP. 3, 4 (2003) (“We find little empirical evidence that past [antitrust] interventions have provided much direct benefit to consumers or significantly deterred anticompetitive behavior.”); Thomas W. Hazlett, Is Antitrust Anticompetitive?, 9 HARV. J.L. & PUB. POL’Y 277, 336 (1986) (“Given the long history of antitrust law and its contempt for true market rivalry, perhaps the most effective proconsumer program would be to consider federal enforcement of the antitrust laws to be a per se restraint of trade.”).
social costs. They often rely on “fire of truth” theories that no knowledge or analysis can possibly challenge. The oversimplicity of such “fire of truth” arguments has been burdening antitrust for too long.

![Figure 1: Frequency of the Phrases “antitrust” “Sherman Act” in U.S. Publications in English, 1890-2008](image)

Source: Google Ngram.

Ioannis Lianos and Daniel Sokol’s *The Global Limits of Competition Law* (*GLCL*) is the first book in a series intending to develop antitrust scholarship. *GLCL*’s “starting point [is] the intrinsic limits of competition law that Judge Frank Easterbrook highlighted.” The purpose of the book is to explore a broad set of limits to competition laws, “some intrinsic to antitrust, others extrinsic.” By definition, antitrust scholarship, including scholarship about the limits of antitrust, expands the depth limits of antitrust.


12. *Id.*
GLCL is a book about competition laws, known in the United States as antitrust. The book examines “competition laws” as a concept. It consists of fifteen essays written by prominent antitrust scholars. As a collection of essays, GLCL presents complementary perspectives of today’s limits of antitrust.

The understanding of GLCL requires some appreciation of the simplicity and hospitality traditions in antitrust. The simplicity tradition refers to the tendency of individuals to view markets, businesses, and business practices either as competitive or as anticompetitive. That is, the individual simplifies facts and realities in a manner that allows her to consistently reach the same conclusion about competitiveness. In The Limits of Antitrust, Frank Easterbrook described the “inhospitality tradition” as “[t]he tradition [in which] judges view each business practice with suspicion, always wondering how firms are using it to harm consumers. If the defendant cannot convince the judge that its practices are an essential feature of competition, the judge forbids their use.”

GLCL’s essays shed light about the complexities of reality effectively rejecting the simplicity and hospitality traditions. As Herbert Hovenkamp sums up in his essay: “extremes [in] antitrust policy should [be] avoid[ed].”

Easterbrook’s The Limits of Antitrust is a seminal article that, unlike ordinary academic works, has survived developments in time and is still relevant. Being a Chicago School disciple, Easterbrook presented a taxonomy of antitrust errors, arguing that if we “let some socially undesirable practices escape, the cost is bearable,” while the “costs of deterring beneficial conduct (a byproduct of any search for the undesirable examples) are high.” This taxonomy was insightful as an instrument against the “inhospitality tradition of antitrust.”

Easterbrook’s taxonomy, however, is simple and may backfire under the antithetical tradition where judges perceive the marketplace as the cure for all problems and government intervention as the source of all problems. The taxonomy was helpful for certain things, but it reflects the simplicity tradition in antitrust. To illustrate, consider judges who endorse the Chicago

14. Easterbrook, supra note 1, at 4. Easterbrook attributed the phrase to Donald Turner. Id. at 4. While heading the Antitrust Division at the Department of Justice, Turner described the “inhospitality in the tradition of antitrust law.” Donald F. Turner, Some Reflections on Antitrust, 1966 N.Y. St. B.A. Antitrust L. Symp. 1, 1–2. The phrases “a tradition of inhospitality” and “inhospitality in a tradition” are not equivalent, of course.
16. See, e.g., Fred S. McChesney, Easterbrook On Errors, 6 J. Competition L. & Econ. 11, 12–13 (2010) (highlighting the large number of citations to Easterbrook’s article in cases and secondary sources as evidence of its success).
17. Easterbrook, supra note 1, at 14.
18. Id. at 15.
For example, in 1979, relying on a dubious study written in the Chicago tradition, the Supreme Court stated that the goal of antitrust is "consumer welfare." The U.S. Supreme Court has never examined the standard, yet it keeps using it.

While antitrust has many limits, studies show that human overconfidence tends to have fewer limits. People tend to be dismissive of and reject information that conflicts with their own beliefs. Specifically, people who hold strong opinions are likely to evaluate facts and empirical evidence in a biased manner. This well-documented tendency has profound effects on communication and political polarization. It also explains the simplicity tradition in antitrust. An influential article, which argues that action is costly but inaction is bearable, may become immortal for those who want to believe that, notwithstanding evidence to the contrary, government action is costly. That is, a study of policy limits may establish limits, if the study forms a belief that problems solve themselves, while policies cause problems.


22. See generally Albert H. Hastorf & Hadley Cantril, They Saw a Game: A Case Study, 49 J. Abnormal & Soc. Psychol. 129 (1954) (explaining divergent perceptions of violence in a football game corresponding to team identification with the proposition that from the total array of possible perceptions, viewers select those which they understand as significant); Hugo Mercier & Dan Sperber, Why Do Humans Reason? Arguments for an Argumentative Theory, 34 Behav. & Brain Sci. 57 (2011) (reevaluating the function of human reasoning to account for the fact that people typically ignore arguments that do not support their own views); Raymond S. Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises, 2 Rev. Gen. Psychol. 175 (1998) (marshaling evidence demonstrating the strength of confirmation bias).

23. See generally Charles G. Lord et al., Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence, 37 J. Personality & Soc. Psychol. 2098 (1979) (finding that people who hold strong opinions on complex social issues fail to give equal weight to confirming and disconfirming evidence).

Scholarship, antitrust scholarship included, has its own limits. This is why we should be concerned about the depth limits of antitrust. *GLCL* is an important book for its survey of the constraints of antitrust. The works in the book explain how antitrust can work in the real world when constraints exist. Under the simplistic tradition, the government is the primary source of constraints, and we should "let some socially undesirable practices escape [because] the cost is bearable." In the real world, however, there are several sources of constraints: transaction costs, inadequate information, preferences for differentiation, bounded rationality, and fallibility. Antitrust as a form of government regulation is needed to address the way market participants utilize these constraints or to evaluate the effects of these constraints on business conduct. The imperfections of antitrust, its intrinsic limits, are a byproduct of these constraints.

*GLCL* explores some of the complexities of managing antitrust in the real world. The book includes three essays about the institutional design of antitrust. Javier Tapia and Santiago Montt describe the relationships between courts and competition agencies. Frédéric Jenny analyzes the significance of independency and advocacy for the work of competition agencies. Ioannis Lianos describes the misunderstanding of antitrust remedies.

*GLCL* includes four essays on the intrinsic limits of antitrust. George Priest explains the intellectual foundation of Easterbrook’s *The Limits of Antitrust* in the Chicago School tradition. Herbert Hovenkamp describes the relationships among several schools of thoughts in antitrust, focusing on transaction cost economics, which is related to the Chicago School of antitrust. Hovenkamp’s review stresses the need for depth in antitrust, describing several points of stagnation. Jeffrey Harrison presents the challenges of competition policy in addressing the powerful buyers. Anne-Lise Sibony reviews the challenges of the legal institution to properly utilize

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32. *Id.*
In some ways, her essay explains the spirit of the simplistic tradition.

Like most distinctions, the distinction between the intrinsic and extrinsic limits of antitrust is somewhat artificial. These limits are interrelated and define each other. The internal strengths and weaknesses of competition policies influence their reach, while other legal regimes and policies external to antitrust influence the effectiveness of competition policies.

GLCL’s essays on the extrinsic limits of antitrust illustrate this point. Daniel Sokol reviews the effects of government policies on the strength of antitrust policy, focusing on regulatory regimes that weaken antitrust. Damien Gerard’s essay describes one form of such regulatory policies: the state action doctrine in Europe. Daniel Crane describes choices of litigants between antitrust and intellectual property, considering the limits of each area of law. And Paolisa Nebbia describes the relationships between competition law and consumer protection. One of the central debates in antitrust is whether the law serves (or ought to serve) as a means for consumer protection, or whether consumer protection is outside the limits of the field.

GLCL does not explore or even present all the limits of antitrust. The book offers fifteen perspectives of certain limits. It should be understood as a book that seeks to challenge the present depth limits of antitrust by offering important antitrust contributions. As such, GLCL is indeed an important antitrust book.

Contrary to Easterbrook’s statement, the goal of antitrust is not “to perfect the operation of competitive markets.” Perfection has never been the goal of antitrust, and it should not be the goal of any policy. Perfection is also not a trait of scholarship. But antitrust scholarship is too often a messenger of the tradition of hospitality in antitrust. GLCL is a successful collective effort to explain the depth needed in antitrust.

34. Anne-Lise Sibony, Limits of Imports from Economics into Competition Law, in GLCL, supra note 10, at 39.
37. Daniel A. Crane, IP’s Advantages over Antitrust, in GLCL, supra note 10, at 117.
40. Easterbrook, supra note 1, at 1.
Stirring the Melting Pot: A Recipe for Immigrant Acceptance


Reviewed by Michael Scaperlanda*

The interstate highway “made distant what had been close, and close what had been distant.”

In The Immigration Crucible, Philip Kretsedemas hopes to break the “habit of developing arguments that are simply reactions to the ‘other side’” and desires to “map a political, cultural, and economic terrain that ... provides some new insights into why so many noncitizens are in a difficult situation” while drawing “attention to the limitations of the mainstream proimmigration position.” Toward this end, he seeks “an engagement across lines of difference that has the potential to transform the perspectives of all parties ... involved in the encounter.” In this spirit, I offer my critique of this challenging book. I share Kretsedemas’s sentiment—if my Review “is successful in getting people to think about U.S. immigration policy in a new way, ... I will be more than pleased. Either way, I have put forward my best effort.”

Kretsedemas ultimately fails in his task because as much as he tries to escape—to transcend—liberal anthropology with its peculiar notions of the state and the state’s relationship to immigrants and other denizens, he remains within liberalism’s orbit, pulled in by its unseen gravitational forces. Instead of providing “a paradigm shift” that leads to “an entirely new understanding,” he offers a particular view of the terrain from a worn and aging neoliberal spacecraft.

This Review will proceed in five stages. First, I will provide a brief summary of the book. Second, I will offer three critiques: (a) Kretsedemas’s

* Gene and Elaine Edwards Family Chair in Law and Associate Dean for Academics, University of Oklahoma College of Law.
3. Id.
4. Id.
5. Id. at 148. “Instead of retreating from the public debate—or simply tolerating the status quo—more effort should be made to open up and pluralize this field of debate.” Id. at 147.
6. Id. at XV.
7. Id. at 151.
creation of a stereotyped “Other,” which he marginalizes and stigmatizes, undermines his call to transformational dialogue; (b) while decrying both Executive discretion and state control over immigration, he fails to recognize and therefore leaves unresolved the question of how immigration policy ought to be adopted and implemented; and (c) although he desires a “stronger ethical foundation” for the pro-immigration discourse, he offers none.\(^8\) Finally, I will offer a brief response to the central theme of his book, which is a desire “to address the problem of immigrant marginality.”\(^9\)

I. The Book: A Summary

Even though Jim Crow is now a closed chapter in U.S. legal history, there is still a romantic attachment within the popular culture to images of national community that stem from this era.\(^10\) Kretsedemas believes that images of national community formed in the Jim Crow era drive immigration policy, fostering structures and institutions that create immigrant alienation. He hopes his book project will serve as a vehicle for “transforming the political culture to make it more inclusive of new immigrant populations.”\(^11\) To succeed, his project “requires a critical race analysis . . . that is not just oriented toward fixing racial inequalities” but also displays “a willingness to examine and reconstruct popular ideas about whiteness and the cultural difference of immigrants.”\(^12\)

Three key factors enter into Kretsedemas’s equation: the marginal immigrant, the state with its broad discretionary powers, and the acquiescence of a broad spectrum of intellectuals—“liberal, conservative, and Marxist”—in the status quo.\(^13\) The introductory chapter provides a broad overview of his case stating that both pro- and anti-immigrant forces have worked to expand the “extralegal (or marginally legal) discretionary powers” of the state, which sometimes favor “liberalization of migrant flows” and at other times serve “to control racial minority populations.”\(^14\)

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9. \textit{Id.}
10. \textit{Id.} at 151. He uses Jim Crow as a rhetorical device recognizing that there are significant distinctions between Jim Crow and the current immigration landscape. \textit{E.g.,} \textit{Id.} at 87 (“It does not appear that Latino migrants are being treated like a separate racial caste, as was the case for black populations during Jim Crow.”); \textit{Id.} at 83 (“The exclusion of the black person under Jim Crow was justified by their so-called racial difference. The exclusion of the undocumented migrant, on the other hand, is justified by the fact of their unauthorized entry.”).
11. \textit{Id.} at 150. He also hopes that this project is “connected to a broader project of regenerating a political culture that does a better job of including and safeguarding the rights of the entire U.S. population.” \textit{Id.}
12. \textit{Id.} “Unfortunately, the postracial rhetoric of the Obama era has made this already difficult task even more daunting” because the “subtle message sent by Obama’s campaign speeches is that systemic racial inequalities can be addressed, in a way that avoids divisive racial politics.” \textit{Id.} at 150–51.
13. \textit{Id.} at 130.
14. \textit{Id.} at 8.
Rejecting—or at least deemphasizing—formal “legal categories . . . defined by the state,” Kretsedemas uses Chapter Two to reimagine many noncitizens, many nonimmigrants, the undocumented, and even some immigrants, as “de facto stateless.” With respect to nonimmigrants, he emphasizes the changing nature of arrivals to the United States: in the early twentieth century the immigration flow dwarfed the nonimmigrant flow but today the nonimmigrant flow is thirty times greater than the immigration flow. The increase in the number of nonimmigrants, Kretsedemas suggests, makes it possible to expand the pool of noncitizen workers without the political cost of increasing immigration with the corollary benefit that this population can be controlled through the government’s “security-enforcement apparatus.” De facto statelessness befalls a segment of nonimmigrant visa holders because many of these “persons enter with dependents and with an intent to settle,” with the nonimmigrant visa serving as “a probationary legal status.”

15. Id. at 13.
16. Id. at 44 (“‘[I]llegality’—a more dire kind of statelessness.”). “Illegality has become the organizing framework for recruiting and regulating the workforce.” Id. at 31.
17. Id. at 43 (discussing a case of denaturalization and then deportation).
18. E.g., id. at 19 (“The recent literature on statelessness has made a deliberate effort at complicating the relationship between statelessness as a formal, legal-juridical status and statelessness as a sociopolitical condition.”). Toward what end? In this view, “victims of hurricane Katrina” and those citizens “subjected to warrantless searches” are de facto stateless because they “are subject to the law but not protected by the law.” Id. at 20–21. This deliberate jettisoning of legal-juridical categories obfuscates the plight of and duties owed to two very different kinds of marginalized persons. In this era of the nation-state, the truly stateless person finds herself without the benefit of a nation-state that in some sense owes allegiance to her just as she, in a reciprocal manner, owes allegiance to her country. The claim of the Katrina victim or the citizen subjected to warrantless search is very different. It is that the nation-state that owes her its allegiance and protection has failed in its duty to administer justice.
19. Id. at 17.
20. Id. at 21.
21. Id. at 34–35. Kretsedemas focuses on the wrong ratios in the narrative because visitors—overwhelmingly tourists—make up the vast majority of nonimmigrant arrivals. His analysis would be tighter if he focused on the ratios between temporary workers and immigrants. In 2009, the last year he deals with, 1.13 million people were granted permanent residence. U.S. DEP’T OF HOMELAND SEC., 2010 YEARBOOK OF IMMIGRATION STATISTICS 5 (2011), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf. In that year, 1.7 million temporary workers (and their families) entered the United States out of 36.2 million nonimmigrant I-94 admissions. Id. at 65. After refocusing, the ratio is reduced from 30:1 to 1.5:1. In drawing his conclusions, Kretsedemas also fails to address the changes in travel between 1909 and 2009 and how that alone may account for a shift in the ratio.
22. KRETSEDEMAS, supra note 2, at 17–18. Kretsedemas fails to address two obvious sets of questions. First, is a nonimmigrant who can return to his country of citizenship really “stateless?” If he is, as Kretsedemas seems to assume, why? Second, most nonimmigrant visa holders must by law have nonimmigrant intent and have a foreign residence that they have “no intention of abandoning.” E.g., 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2006). What responsibility does the nonimmigrant visa holder bear for her situation? Should fraud in the visa application have consequences, including deportation?
Chapter Three reviews "the expansion of executive authority within the U.S. presidency" to "explain how this expanded authority has been used to craft immigration policy." Kretsedemas notes that Executive discretion grew out of necessity to manage crises but that beginning with President Theodore Roosevelt the Executive began to exercise discretion "in an active, creative way" and not merely in reaction to external conditions or events. Discretion unleashed can be used to expand or restrict rights. Kretsedemas’s thesis plays out, sometimes in unexpected ways, in the arena of immigration enforcement. For example, "Despite the fact that Democratic administrations are often viewed as being more proimmigrant than Republican administrations, [they] have actually been tougher on border control and immigration enforcement." Far from being an accumulation of power in the Executive, expanded discretion—at least in American history—has a devolutionary component where private entities and local governments share in this discretion.

In Chapter Four, Kretsedemas links the expansion of Executive discretionary authority with recent growth in local enforcement of immigration law, which "has produced a situation in which police officers, landlords, election booth workers, and health care workers have been given more freedom to participate in enforcement practices that used to be regarded as the exclusive preserve of the federal immigration system." Drawing a

23. KRETSEDEMAS, supra note 2, at 49. The Obama administration's decision to provide "certain young people sometimes called 'Dreamers'" legal protection despite their undocumented status provides a perfect example of an Executive's exercise of discretion. See President Barack Obama, Remarks by the President on Immigration (June 15, 2012), available at http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration (highlighting that the announced policies on immigration enforcement came "[i]n the absence of any immigration action from Congress"); see also Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David Aguilar, Acting Comm'r, U.S. Customs & Border Prot. et al. (June 15, 2012), available at http://www.dhs.gov/xlibrary/assets/sl-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf (setting forth guidelines for enforcing the Administration's policy of providing protection for those who came to the United States as children, thus "exercis[ing] discretion within the framework of the existing law").

24. KRETSEDEMAS, supra note 2, at 54 ("In these situations, the executive officer is no longer reacting to unforeseen, calamitous events. It begins to craft the definition of 'emergency conditions' in ways that complement its ideology, strategic interests, and specific policy objectives.").

25. Id. at 63. For example the immigrant-welcoming Bracero program and the immigration-restrictionist Operation Wetback "were both creatures of discretionary executive authority." Id. at 68 (arguing that both programs are more about the labor market and less about transnational migration).

26. Id. at 66.

27. Id. at 61.

28. Id. at 73 ("[L]ocal immigration laws have allowed the authority of the federal government to be parcelled out to a variety of state and nonstate actors."). Kretsedemas's argument would have been more powerful if he had acknowledged the nuanced and complex historical relationship between federal, state, and nonstate actors in enforcing United States immigration laws. See, e.g., Gerald L. Neuman, The Lost Century of American Immigration Law (1776–1875), 93 COLUM. L.
parallel between local enforcement of immigration laws and Jim Crow laws, he argues that both provided a strategy for integrating the marginalized group into the economy while maintaining their status as inferior beings. And he sees masked racism behind much of the local immigration law enforcement movement.

For Kretsedemas, immigration laws, like Jim Crow laws, provide an example of the ways that local governance is “bound up with the symbolic politics of the majority group identity.” Chapter Five, therefore, leaves the practical world of laws and governance to explore the intellectual world where scholars from multiple ideological schools have converged to lay a foundation that fails to support adequately legal and cultural structures that welcome the immigrant. Through a convergence of “liberal, conservative, and Marxist intellectuals,” governing strategies that lead to immigrant alienation have “been quietly reinforced by both sides of the debate over immigration policy.” Strands of liberalism, for example, unwittingly collude with “racist ideologies” by promoting a pragmatic “cost-benefit rationality that becomes invested in perpetuating” inequality.

The book’s conclusion reveals the marginalized immigrant as a symbolic representative of all who live on the margins of American life. As an important step toward eliminating immigrant (and others’) alienation, Kretsedemas desires an “informed public dialogue” on immigration, “the meaning of democracy, national identity, and the continuing legacy of race in

\[\text{REV. 1833, 1873–74 (1993) (noting that the states, enlisting the aid of private individuals, including ship captains, controlled immigration for the United States’ first century).}\]

29. KRETSEDEMAS, supra note 2, at 84–85. “Like Jim Crow, these laws may be viewed as an exercise in coercive integration that secures a place for most noncitizens in the U.S. socioeconomic order, but in a way that underlines the inferior legal and social status of unauthorized and low wage migrant populations.” Id. at 85.

30. Id. at 88 (“[O]utrage against the illegal alien appears to offer a legitimate—that is, nonracist—way of redefining the scope and limits of an increasingly complex society.”).

31. Id. at 103.

32. Id. at 130–32.

33. Id. at 130.

34. Id. at 131. “Liberal individualism” is weak on creating structural equality because it views interventions of this type “as illiberal impositions on the individual rights and freedoms of others.” Id. at 107. Liberal cultural pluralism mutes the discussion of racial inequality because it seeks “to deemphasize the continuing significance of race.” Id. at 109–10. Rather than focus on the structural causes of inequality, “liberal pluralist theory has tended to place most of the responsibility for overcoming social barriers to integration in the hands of immigrants themselves.” Id. at 112. With a hands-off approach, these liberal tendencies reinforce “a field of racial-ethnic dividing lines” that cultural preservationists insist “must not be transgressed.” Id. at 113. Marxists like Slavoj Zizek offer “a new kind of egalitarian unity that liquidates all differences” between persons, forcing the marginalized immigrant (and all others) “to conform to an already established set of ideals.” Id. at 127.

35. See id. at 150 (“[I]mmigrant marginality is just one manifestation of a type of legal-political marginality that is shared by a growing number of legal residents and native-born persons. Simply put, the same policy developments that have weakened immigrant rights have also weakened the social, civil, and legal rights of all U.S. residents.”).
the United States." To harness the potential "to transform the perspectives of all parties ... involved in the encounter," the dialogue must engage people "across lines of difference." To advance this debate, he wants the public to "be exposed to arguments that demonstrate that conservative populists are not the only ones who are frustrated with the current immigration situation." In the end, he advocates a paradigm shift that will encourage the public "to become actively involved in a discussion about 'who we are' as a national people."

II. Critique One: Extinguishing the Possibility of Dialogue

Just as the Jim Crow laws were designed to exclude those of African descent from American society, the laws excluding Asian immigrants upheld in $Chae\ Chan\ Ping$ and $Fong\ Yue\ Ting$ betray a belief in racial separation. Race has played a large and infamous role in United States immigration law and policy, gaining the imprimatur of the Supreme Court a generation after the end of the Civil War. In $The\ Chinese\ Exclusion\ Case$, the Court upheld the exclusion of Chae Chan Ping, a twelve-year resident of the United States, stating:

If ... the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.

Although immigration laws are now facially race neutral, there are undoubtedly lingering present effects of these past practices. And it would

36. $Id.$ at 147–48.
37. $Id.$ at 148.
38. $Id.$ at 147. Some of these conservative populists engage in "incendiary rhetoric" emanating from an "outrage" that "rests on a foundation of white privilege," which justifies "incitement to violence ... as an expression of patriotism." $Id.$ at 145–46.
39. $Id.$ at 147.
42. $Id.$ at 606. California had asked Congress to take action barring Chinese immigration:
   In December, 1878, the convention which framed the present constitution of California, being in session, took this subject up, and memorialized Congress upon it, setting forth, in substance, that the presence of Chinese laborers had a baneful effect upon the material interests of the State, and upon public morals; that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization; that the discontent from this cause was not confined to any political party, or to any class or nationality, but was well-nigh universal . . .

$Id.$ at 595.
43. See Chin, supra note 40, at 38–50 (noting that, as a result of past immigration laws, Asian Americans are underrepresented in the political process, have fewer connections through which to
deny human experience to suggest that covert or subconscious racial classifications have been eliminated from the minds and hearts of all denizens of the United States. But does this mean that all immigration restrictionists and all persons who favor stopping the flow of illegal migration are motivated by racial prejudice? Might they have some legitimate nonracial concerns?

Kretsedemas dreams of an America where structural and institutional barriers to immigrant inclusion are eliminated. To get there from here, he desires a robust and transformative dialogue involving individuals across the ideological and racial spectra. Given our history, he sees “critical race” analysis as necessary to this dialogue. Despite recognizing the difficulty of this task, Kretsedemas’s method of using race to frame his argument ultimately disserves his stated objective, undermining rather than advancing the dialogue on immigrant marginality.

In any transformative dialogue, rigorous truth telling and truth recognition is vital. But dialogue is difficult if not impossible when one of the dialogue partners—especially the one calling for the dialogue—assumes the worst of another partner with little or no evidence. Yet this is the path chosen by Kretsedemas. He, for example, argues that “[t]here is evidence that the contemporary anti-immigrant movement is still steeped in the racial ideologies of the Jim Crow era and that this has carried over into the movement to expand local enforcement laws.” His evidence? The KKK “tried to use local complaints about illegal immigration as a recruitment tool.” This would be like saying that the current labor movement is steeped in Marxist ideology because the Communist Party is using the “assault” on public unions as a recruiting tool. He further suggests that “outrage against the illegal alien appears to offer a legitimate—that is, nonracist—way of redefining the scope and limits of an increasingly complex society.” This conservative “ populist outrage rests on a foundation of white privilege, which makes it possible for the incitement to violence to be viewed as an assimilate into new occupations and geographic regions, and still face the “stigma of discrimination”).

44. See generally Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987) (describing the effects of subconscious racism on the legislative process, particularly as it relates to the distinction between discriminatory purpose and disproportionate impact standards of discrimination).

45. KRETSEDEMAS, supra note 2, at 148.

46. Id. at 150.

47. See DANIEL PHILPOTT, JUST AND UNJUST PEACE: AN ETHIC OF POLITICAL RECONCILIATION 183 (2012) (“Acknowledgment of past injustice ... aims to achieve intrinsically valuable primary restorations, redressing wounds that are wider and deeper than is often recognized.”).

48. KRETSEDEMAS, supra note 2, at 87.

49. Id.

50. Id. at 88.
expression of patriotism—and not as a threat to the public safety." 51 Ironically, he creates a stereotyped "Other" who is to be stigmatized and marginalized. 52 As a scholar with an admittedly pro-immigrant bent, 53 I would find it impossible to have a transformative dialogue with those I have stereotyped and associated with the KKK, Jim Crow, 54 white privilege, and violence unless they were superhumanly able to turn a blind eye and forgive me my prejudices.

III. Critique Two: Some Institution Must Govern

According to Kretsedemas, "structural-institutional conditions . . . produce immigrant marginality." 55 Eliminating these conditions will require dialogue among an inclusive populace "about 'who we are' as a national people" so that our "popular concept of the nation can be interrogated and transformed." 56 To be effective though, the fruits of this dialogue will need to be implemented by some governing authority. And, it is here, at the stage

51. Id. at 146. In stark contrast to Kretsedemas's approach, Kevin Johnson provides a challenging but nonaccusatory call to dialogue on the racial implications of immigration law and policy. See, e.g., Kevin R. Johnson, Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique, 2000 U. ILL. L. REV. 525, 534 ("[O]ne cannot categorically state that the U.S. immigration laws are 'racist.' Nonetheless, a greater percentage of immigrants would be people of color without the many screening devices that disparately impact potential immigrants from developing nations.").

52. See KRETSEDEM, supra note 2, at 145–46 ("[S]ome conservative populists [assert] the moral authority to take the life of the Other.").


54. Throughout the book, Kretsedemas draws parallels between the sentiment that motivated Jim Crow and the sentiment that motivates today's immigration restrictionist arguments. Jim Crow is mentioned on 24 of the book's 151 pages (more than 15%). See KRETSEDEM, supra note 2, at 209 (listing pages where the term Jim Crow appears).

55. Id. at 134; see also id. at 101 ("[S]tructural inequalities and forms of institutional discrimination . . . may [a]ffect the life chances of [immigrant] children.").

56. Id. at 147.
of governing, that an unstated ambivalence appears in the argument, leaving
an unresolved tension as to who ought to govern with respect to immigration
law and policy.

Kretsedemas devotes two of his six chapters to executive and local
governance of immigration law. In Chapter Three ("The Secret Life of the
State"), he decries the expansion of Executive discretion in the American
political landscape. In Chapter Four ("Concerned Citizens, Local
Exclusions: Local Immigration Laws and the Legacy of Jim Crow"), he
criticizes the devolution of authority over immigration to state and local
governments. Does he want more congressional or judicial involvement?
He doesn’t say! Do Executive discretion and local immigration lawmaking
contribute to the structural and institutional defects that “produce” immigrant
marginality? If so, what is the solution? He doesn’t offer one!

By criticizing the “who” without offering a viable alternative,
Kretsedemas misses out on the “what.” Our history makes clear that both
good and bad policy can be made at all levels of government and in all
branches of government. And it makes equally clear that both fair and
arbitrary implementation of that policy can be made at all levels of
government. No one level or branch of government has a monopoly on the
virtues or the vices. Therefore, exposing the vices of two groups of policy
makers/implmenters without an argument as to why those groups are
particularly ill suited to address the immigration issues confronting them is
singularly unhelpful in advancing the dialogue.

In the end, Kretsedemas seems to favor a strong centralized governing
authority that would bind itself and others to “predefined rules and
regulations” that diminish the ability to exercise discretion in the face of
“unfolding contingencies.” He decries “deregulation and federal
devolution” because they “create spaces of decision-making authority—
which free the individual from binding legalities—that can be granted to a
variety of private and public actors.” But he does not tell us who this
centralized authority is, why he has confidence that it will—at least in his
opinion—get the rules and regulations right, or how various actors are to
respond to unforeseen contingencies in the absence of discretion.

57. If he were to add chapters on congressional and judicial decision making, he would need to
include their racially laced actions, including passage of and judicial acquiescence in the Chinese
Exclusion laws. See supra notes 41–42 and accompanying text.

58. KRETSEDEMAS, supra note 2, at 61. But see Arizona v. United States, 132 S. Ct. 2492,
2499 (2012) (“Discretion in the enforcement of immigration law embraces immediate human
corns.”).

59. Id. With devolution and deregulation, “[p]rivate corporations are given more freedom to
relocate their manufacturing centers and recruit (and terminate) workers as needed.” Id.
Philosopher Bertrand de Jouvenel articulately sums up what I take to be Kretsedemas’s ideal
governing authority: “[I]t aims at being the organizer-in-chief of society, and at making its
monopoly of this role ever more complete.” BERTRAND DE JOUVENEL, ON POWER 236 (1949).

60. Kretsedemas views broad discretion as “a forbidden continuity that connects the power
practices of modern governments to those of the feudal monarchy.” KRETSEDEMAS, supra note 2,
IV. Critique Three: In Search of an Ethical Foundation

To address the problem of "immigrant marginality," Kretsedemas wants to move beyond an "emphasis on the utility of the immigrant worker" and put the pro-immigration case on "a stronger ethical foundation." But, he fails to offer one! A stronger ethical foundation requires an answer to this critical question: Why should we as individuals or as a nation care about the immigrant, marginal or not? He does not ask, much less answer, the question.

Although liberalism's framework has its own set of problems, its framework is not available to Kretsedemas on his stated terms because he wants "to look beyond the neoliberal common sense that has dominated federal policy for the past several decades." In addition to liberalism, he discusses the approach of two other rival intellectual traditions—conservatism and Marxism—to the problem of immigrant marginality, finding all three traditions deficient. But he never proposes an alternative. Although his critical race analysis shines a particular light on immigrant marginality, it does not provide a framework for answering the foundational question of why we should care about the immigrant.

Kretsedemas suggests that American "ideals could be revitalized by an agnostic engagement with [a] wider world of ideas" as it searches for a

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at 53. De Jouvenel offers a different perspective: "The assents of people or assembly, so far from fettering for the rulers a freedom to act which they never had, made possible an extension of governmental authority." DE JOUVENEL, supra note 59, at 208–09 ("The power to legislate is not an attribute which was taken from Power by the establishment of an assembly or by popular consultation. It is an addition to Power, of so novel a kind that without an assembly or without popular consultation it would have been impossible.").

61. KRETSEDEMAS, supra note 2, at 4.

62. Kretsedemas does ask important foundational questions: "[E]ven if we all agree that we are in favor of a more just and democratic society, who gets to define what those terms mean? . . . And at what point does this willingness to be perpetually open to new voices . . . run the risk of collapsing into an incoherent relativism?" Id. at 148. Great questions—especially given his desire for a stronger ethical foundation—but he punts, saying that "thorough exploration of these questions is beyond the scope of this book." Id. Without this exploration, Kretsedemas leaves us without criteria for assessing the answers.


64. KRETSEDEMAS, supra note 2, at 4.

65. Id. at 130. Kretsedemas does not explore whether religious traditions—Jewish, Christian, or Muslim, for instance—have resources that might aid in solving the problem of immigrant marginality. Cf. Soskin v. Reinertson, 353 F.3d 1242, 1265 n.1 (10th Cir. 2004) (Henry, J., dissenting) ("If an alien will reside with you in your land, you shall not persecute him. The alien who resides with you shall be to you like a citizen of yours, and you shall love him as yourself, because you were aliens in the land of Egypt. I am the YWYH, your God." (quoting Leviticus 19:33–34)).

66. Id. at 129–30. American identity "is better described as an open-ended project (propelled by an agnostic dialogue between social equals)." Id. at 135. His "agnostic engagement" like Bruce Ackerman's "neutral dialogue" plants him firmly within liberalism's orbit. See generally BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1981).
“forward-looking vision” for immigration policy. Unfortunately, lacking a foundation, an “agnostic engagement” cannot produce a “forward-looking vision.” When I get into my car, I would be negligent to approach the gears with agnostic engagement. Foundations—including ethical foundations—require a clear sense of where one stands, what is behind, and what is in front. In short, ethical foundations require a criterion for judgment.

Standing on a firm ethical foundation with a clear vision forward does not necessarily entail arrogance or close mindedness. With proper humility, anyone standing on what she thinks is the strongest ethical foundations will be open to taking direction and even correction from those with whom she is engaged. Instead of an agnostic engagement, I suggest a thickly pluralistic engagement, where each participant in the dialogue brings herself, including her intellectual tradition with its ethical core, to the conversation. In this difficult dialogue, there will be, as Kretsedemas understands, multiple and contested visions of forward.

In our pluralistic society, the difficulty lies in the fact that we have rival intellectual traditions with different ethical foundations and “there is no neutral way of characterizing . . . the standards by which their claims are to be evaluated.” Alasdair MacIntyre suggests a difficult two-stage process for engagement under these conditions. First, each participant “characterizes the contentions of its rival in its own terms.” Second, after recognizing the inability of one’s own tradition to solve intractable problems, the participant looks to another tradition to see if it has the resources to solve these problems in a more satisfactory fashion. In short, I advocate an openness without agnosticism.

V. Response: Immigration and the Human Experience

Kretsedemas argues that “neoliberal priorities guiding U.S. immigration policy have been actively creating the structural-institutional conditions that produce immigrant marginality.” Structural-institutional conditions can exacerbate or mitigate immigrant marginality, but they do not produce it.

67. Id. at 136. Despite his calls for agnosticism, it is clear that Kretsedemas is not an immigration-policy agnostic, having rejected the ideas of “cultural conservatives” like Huntington. KRETSEDEMAS, supra note 2, at 129.
69. Id. In doing this, each tradition must “mak[e] explicit the grounds for rejecting what is incompatible with its own central theses” while recognizing what it might learn from its rival “on marginal and subordinate questions.” Id.
70. Id. at 166–67. As MacIntyre notes:

In controversy between rival traditions the difficulty in passing from the first stage to the second is that it requires a rare gift of empathy as well as of intellectual insight for the protagonists of such a tradition to be able to understand the theses, arguments, and concepts of their rival in such a way that they are able to view themselves from such an alien standpoint . . . .

Id. at 167.
71. KRETSEDEMAS, supra note 2, at 134 (emphasis added).
Immigrant marginality is a reality, inherent to the human condition. Believing that institutional or structural changes can eliminate it is simply fanciful utopian thinking.

Even if the term “alien” is in some sense pejorative in labeling an immigrant, in a very real sense “alien” is an appropriate term for describing the relationship between the immigrant and his new country. Language, culture, history, and tradition often create a wide gulf between the migrant and the native. They do not yet belong to each other. Each may view the other with suspicion. The migrant may wonder whether he can trust the police and other local authorities, whether he will be discriminated against in the workplace, and ultimately whether he will be accepted. The native may wonder whether the migrant can be trusted to obey the laws, whether he will deplete precious community resources—including jobs—and whether he will disrupt and perhaps destroy the embedded language, culture, and traditions. To borrow a popular phrase from Kretsedemas, each looks at the other as “Other.”

The difference between the migrant and the native is that the migrant is alone, or at least more alone, having left her community—her language, culture, history, and tradition—to begin life anew in another community. Almost by definition, the alien will reside on the margins of that new community. No change in institutional structure or condition can change this fact. In his autobiographical account, Next Year in Cuba: A Cubano’s Coming-of-Age in America, Gustavo Pérez Firmat describes refugees as:

> amputees. . . . Just as people who lose limbs sometimes continue to ache or tingle in the missing calf or hand, the exile suffers the absence of the self he left behind. I feel the loss of that Cuban boy inside me. He's my phantom limb, at times dogging me like a guilty thought, at other times accompanying me like a guardian angel.

Although Firmat draws a distinction between a person in “exile” and an “immigrant,” his metaphor applies to economic immigrants as well, especially those who leave their country of origin because of an inability to support themselves or their families.

72. See Stephen Legomsky & Cristina Rodríguez, Immigration and Refugee Law and Policy 1–2 (5th ed. 2009) (“[T]he word ‘alien,’ even when not adorned with the modifier ‘illegal,’ has always struck a disturbing chord. Many feel that the term connotes dehumanizing qualities of strangeness or inferiority (space aliens come readily to mind) and that its use builds walls, strips human beings of their essential dignity, and needlessly reinforces an ‘outsider’ status.”).


75. Id. at 121–22.
The migrant suffers great loss and often bears the burden alone. But it would be a mistake to ignore the loss—real, perceived, or potential—suffered by the native population. In advocating open borders, Joseph Carens acknowledges that “immigration . . . might destroy old ways of life, highly valued by some, but it would make possible new ways of life, highly valued by others.” As Wendell Berry’s character, Jayber Crow, recognizes, change can make “distant what had been close, and close what had been distant.”

Speaking of himself, Crow said:

If you have lived in Port William a little more than two years, you are still, by Port William standards, a stranger, liable, to have your name mispronounced. . . . Though I was only twenty-two when I came to the town, many . . . would call me “Mr. Cray” to acknowledge that they did not know me well. . . . Once my customers took me to themselves, they called me Jaybird, and then Jayber. Thus I became, and have remained, a possession of Port William.

Integration of migrants takes time. Although governmental institutions and structures do not cause migrant marginality and cannot eliminate it, they might serve to mitigate it. Congress could enact legislation that more effectively closes the backdoor of illegal migration by giving the Executive the discretionary authority to match the number of nonimmigrant laborers to the rise and fall in the demand for labor coupled with effective sanctions for employing unauthorized workers. Giving nonimmigrants job portability might reduce the incidences of employer exploitation. Any enforcement officer—whether federal or state—ought to be held accountable if they fail to treat noncitizens with dignity and respect. And states ought to remove barriers that raise the cost for individuals and communities to care for the immigrant as she adjusts to her new life in a new country.

The government will assign the nonimmigrant an identifying number but will not learn the nonimmigrant’s name, much less how to pronounce the name. The government will not take a personal interest in the nonimmigrant’s family, culture, or history. Immigrant marginality recedes and immigrant integration begins at the backyard barbecue, the pub, and the church as families celebrate births, graduations, marriages, deaths, and holidays together. The migrant will not be at home in her adopted country until she is known and loved in her new community. And that takes time.

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77. See BERRY, supra note 1, at 281.
78. Id. at 11. Crow, the stranger, was born in the town of Goforth a couple of miles from Port William. Id. at 11–12.
Making Sense of the Marriage Debate


Reviewed by Jane S. Schacter*

When are courts justified in trumping a majority’s will? Can countermajoritarian decisions produce meaningful social change? Which minority groups command special judicial protection from the depredations of the majority? These are classic questions of constitutional law and theory and have shaped the scholarly literature for two generations. The ongoing movement for marriage equality features all of these questions and has, since its inception in the early 1990s, spawned a national debate about the role of courts.

Michael Klarman’s From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage comprehensively traces the marriage debate with a special eye on the role of courts in propelling it. Among its many gifts is that of exquisite timing. The book was published only a few months before the Supreme Court announced in late 2012 that it would hear constitutional challenges to the federal Defense of Marriage Act and to California’s Proposition 8. If the marriage debate were a symphony whose first movement began with an unexpected Hawaii decision in 1993, one might say that the Supreme Court’s twin grants of certiorari in these cases foreshadowed a crescendo of sorts. Or maybe not. In fact, as the book reflects, the Supreme Court will enter this debate after some twenty years of groundbreaking litigation around the country, noisy debates in state and federal legislative chambers, and scores of hotly contested ballot measures. What the Supreme Court decides to do will be significant and highly watched. But one of the points the book communicates so effectively is that

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4. KLARMAN, supra note 1, at 48–89, 90–91.
5. Id. at 108–09, 143–55.
the trajectory of public opinion strongly favors marriage equality, with young people vastly more supportive than older citizens. The proverbial writing seems to be on the wall. Thus, the Court’s first foray into this national debate may well tell us more about how the justices want their role in it to be remembered than it does about how the issue will be substantively settled in American society.

Klarman’s book will, in any event, equip its readers to reflect thoughtfully about whatever the Court decides to do. The book sets the stage for the Court’s action by offering a readable history, in chapter and verse, of the developments that have shaped the marriage equality movement. Klarman closely follows the legal trajectory from the 1993 Hawaii decision that made same-sex marriage appear imminent, through the 2003 Massachusetts decision that actually legalized same-sex marriage for the first time in the United States, through many other state court decisions, as well as the more recent federal cases. But this history goes far beyond any narrow charting of judicial decisions or doctrinal developments. Klarman also closely explores the fierce backlash around the country in the form of dozens of anti-same-sex-marriage measures on the state and federal level, as well as the political context that shaped this backlash. Throughout, he deftly explores the key dynamics in the social, political, and cultural environment that have both fueled and thwarted the claim in favor of same-sex marriage. For those who have pressed for marriage equality, this history has been full of soaring victories and bruising defeats, along with plenty of political mobilization and countermobilization. But through it all, there has been a steady growth of public support for what was once seen as the marginal and socially implausible idea of state-recognized same-sex marriage.

The book sets out not only to tell, but to understand, this deeply mixed history and to consider what lessons we might draw from it. In this review, I first assess Klarman’s rendering of the story and the conclusions he reaches. I then consider what the story he tells might suggest about some enduring questions in American constitutional law and scholarship.

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About two-thirds of the book tells the story of the movement for marriage equality. The remaining third reflects on the causes and implications of the backlash against the equalizing efforts of courts. The

7. Id. at 199–200, 218.
8. Id. at 57–60.
9. Id. at 90–93.
10. Id. at 26–29, 68, 80–83, 95–98, 144–46, 175–76.
11. Id. at 31–36, 60–63.
12. Id. at 105–06, 135–37, 161, 166–69, 178–98; see also Frank Newport, Religion Big Factor for Americans Against Same-Sex Marriage, GALLUP (Dec. 5, 2012), http://www.gallup.com/poll/159089/religion-major-factor-americans-opposed-sex-marriage.aspx (discussing the results of a Gallup poll conducted in November 2012 showing that a majority of young Americans support same-sex marriage).
careful historical chapters are fascinating in their own right, and also set the stage for the later reflections on the role played by litigation.

The principal historical narrative stretches from the 1950s and 1960s to mid-2011, when the New York legislature enacted marriage-equality legislation. The radically disparate periods that bookend the historical portion of the book speak volumes about one of Klarman’s principal themes: the enormous and ongoing social change in the LGBT-rights arena. In the time period addressed in Chapter 1, every state criminalized consensual sexual activity between partners of the same gender, the medical profession saw homosexuality as a disease, and even the ACLU saw no problems criminalizing behavior that it called “socially heretical or deviant.” Early attempts to protest or organize against a pervasively repressive status quo were fraught with danger. The contrast with 2011 could hardly be starker. When New York enacted its marriage legislation with the enthusiastic support of Governor Andrew Cuomo, not only did it join five other states and the District of Columbia in offering full marriage equality, but an additional twelve states offered civil union or domestic partnership protection, twenty-one states had added sexual orientation to their antidiscrimination statutes, the Supreme Court had ruled bans on consensual sodomy unconstitutional, and it had become common for LGBT persons to come out and to be widely featured in popular culture, to name just a few developments of note.

Klarman’s first eight chapters touch on many of the key developments—large and small—that put such a great distance between the 1950s and 2011. None are bigger for his story of the marriage-equality movement than the 1993 Hawaii Supreme Court decision in *Baehr v. Lewin*. *Baehr* was a case that LGBT-rights litigators had declined to bring, fearing that it was premature. It was brought by a private attorney. Much to the surprise of virtually all observers, the decision held that the Hawaii Constitution mandated the application of strict scrutiny to the state’s traditional marriage laws—making it highly likely that the state law restricting marriage to a man and a woman would be found unconstitutional. The specter of same-sex couples getting married in

13. Id. at 163–64.
14. I will use the inclusive term “LGBT” (lesbian, gay, bisexual, and transgender), though the issues relating to bisexuality and transgender do not figure much in the book.
15. Id. at 3–6.
16. Id. at 7.
17. Id. at 163–64; see also Same-Sex Marriage, Civil Unions, and Domestic Partnerships, N.Y. TIMES, Dec. 30, 2012, http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html (providing an overview of recent legal, political, and public opinion changes with regard to same-sex marriage).
19. KLARMAN, supra note 1, at 55.
20. Id.
21. Id. at 56.
Hawaii and seeking recognition in other states was the big bang, as it were, of a debate that has been roiling ever since. As Klarman and others have noted, soon after *Baehr*, LGBT-rights litigators felt they had little choice but to hop on a train that they themselves had not thought ready to leave the station.22

While history will record 1993 as the key start date, Klarman’s narrative reflects that it was, in fact, only a few years after the Stonewall uprising kicked off the modern gay-rights movement in 1969 that the first marriage-equality lawsuits were launched.23 They were not taken terribly seriously, though it was, interestingly, one of these early suits—pressed by two gay students at the University of Minnesota who had unsuccessfully sought a marriage license—that led to the Supreme Court’s summary affirmance in *Baker v. Nelson*.24 That ruling has regularly shown up in briefs opposing marriage equality.25 It seems unlikely the justices deciding the pending *Windsor*26 and *Perry*27 cases will be too concerned with a forty-year-old summary affirmance issued before any of the contemporary gay-rights cases in constitutional law, but it will surely be enlisted for support by those defending DOMA and Prop 8.

Much of the story Klarman tells will be familiar to students of the LGBT-rights movement. Indeed, because a lot of it is very recent and has been the subject of extensive media coverage, some will be familiar even to those who have not immersed themselves in the history of LGBT rights. Still, the history is quite well told and is synthesized in ways likely to engage a general audience. One might wish that Klarman had devoted more

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22. Id. at 55; see also Scott L. Cummings & Douglas NeJaime, Lawyering for Marriage Equality, 57 UCLA L. REV. 1235, 1245 (2010) (explaining that LGBT lawyers “did not affirmatively pursue litigation to achieve the right to marry in Hawaii,” but instead joined the *Baehr* effort after the fact to help shape legal strategy); Jane S. Schacter, Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now, 82 S. CAL. L. REV. 1153, 1165–66 (2009) [hereinafter Schacter, Politics of Backlash] (discussing how the major gay-rights litigators refused to take on the *Baehr* action, believing it to be premature).

23. See Schacter, Politics of Backlash, supra note 22, at 1165 (explaining that neither *Goodridge* nor *Baehr* was the first lawsuit to challenge different-sex-only marriage and pointing to early test cases in Kentucky, Minnesota, and Washington that the government won). See generally Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973) (affirming the lower court’s refusal to issue a marriage license to a same-sex couple); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (holding that Minnesota law limited marriage to different-sex couples, which did not violate the United States Constitution), appeal dismissed, 409 U.S. 810 (1972); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) (holding that the statutory prohibition on same-sex marriage did not violate state or federal constitutional rights).

24. 191 N.W.2d 185 (Minn. 1971).


27. Hollingsworth, 133 S. Ct. 786.
attention to certain stories that profoundly capture the kinds of personal struggles that happen when the way people live is not matched by an available legal infrastructure. For example, Klarman only briefly touches on the stories of two women—both, coincidentally, named Sharon—who became iconic within the LGBT community as their legal battles unfolded in the 1980s and '90s.\textsuperscript{28} Sharon Kowalski was in a disabling auto accident in 1983, and her longtime partner was shut out of her life for years by Sharon’s family of origin.\textsuperscript{29} Ultimately, a court allowed Sharon to choose her own guardian and she chose her partner.\textsuperscript{30} In 1993, in Virginia, Sharon Bottoms lost custody of her son Tyler to her own mother after Sharon came out as a lesbian and her mother alleged she was an unfit parent.\textsuperscript{31} In this instance, the courts did not rule in her favor.\textsuperscript{32} Much more could have been said about both, though, in fairness to Klarman, he does not purport to offer a detailed exposition of all important LGBT legal battles.

Klarman also weaves into his narrative some information that is less widely known. Three examples of such stories are illustrative, and each ties to a larger theme that characterizes the movement for marriage equality. One example is when Klarman tells of an early attempt by an unnamed male couple to secure a same-sex marriage license in Colorado in 1975.\textsuperscript{33} After receiving advice from a local district attorney that the state marriage law did not clearly outlaw same-sex marriage, a county clerk granted licenses to this couple and a few others.\textsuperscript{34} About a month later, the state Attorney General shut down the clerk by issuing an opinion that same-sex marriage was prohibited.\textsuperscript{35} While this episode of on-the-ground activism garnered some publicity and seems to have exposed the couples to some hostile reactions, its relatively modest public profile contrasts starkly with the climate over the last two decades. In that more recent climate—one in which the internet has turbocharged the flow of information—all things same-sex marriage have been a magnet for media attention and have quickly become part of a polarized national political debate.\textsuperscript{36}

A second example sheds some light on precisely the absence of a polarized national political debate in the 1970s. Klarman explores the role of

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\item 28. KLARMAN, supra note 1, at 50–51.
\item 29. Id. at 50.
\item 30. Id.
\item 31. Id. at 51.
\item 32. Id. at 50–51.
\item 33. Id. at 20–21.
\item 34. Id. at 21.
\item 35. Id.
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LGBT issues in helping to propel the rise of the religious right in the late 1970s and early 1980s. He notes that the first-ever advertisement on gay issues to run in a presidential campaign was offered up by a group called “Christians for Reagan” in the 1980 election.37 Whereas President Carter had carried evangelical voters in 1976, Klarman notes, Reagan won them by a two-to-one margin in 1980.38 Reagan’s election has proven to be something of a prototype for what has now become utterly routine and familiar: the close intersection of LGBT and other social issues with electoral politics, and a steady and predictable partisan alignment. That linkage has played a big role in the marriage debate. By 1993, when Baehr was decided, the forces who would oppose same-sex marriage had long since mobilized against LGBT rights and made themselves a vocal part of national politics. That political organization helped to shape—and quickly nationalize—the backlash by positioning cultural conservatives to respond quickly to developments like the surprise ruling in Hawaii.39

A third example relates to another main theme in the book: the veritable chasm of an age divide in the general public on the same-sex marriage issue.40 Klarman emphasizes the pronounced difference in support for same-sex marriage, as between older and younger segments of the electorate.41 At one point, though, he probes an interesting variant of this phenomenon with poll data reflecting a pronounced age effect even within the LGBT community. In 2003, 18-year-old gay respondents were 31% more likely to support same-sex marriage than 65-year-old gay respondents.42 Generational differences in this context suggest a change in both expectations and priorities in the LGBT community.

All in all, Klarman’s telling of the story is well done in the way it weaves together the interacting legal, political, social, and cultural forces, and connects small details to larger developments. He makes clear, moreover, that while the same-sex marriage movement began with a Hawaii lawsuit, its dynamics have ranged far beyond the judicial domain and have proven quite complex.

Having said that, though, there are places where assertions are made that seem puzzling or unpersuasive. For example, in the course of introducing the debate over same-sex marriage, Klarman observes that the “[a]rguments for and against gay marriage have not changed much over the past two decades.”43 While he may be correct that some core concepts have

37. KLARMAN, supra note 1, at 33.
38. Id.
39. See id. at 55–57 (chronicling the circumstances leading up to and the backlash against the Hawaii ruling).
40. Id. at 199–200.
41. Id.
42. Id. at 51.
43. Id. at 52.
persisted through these years—say, the much debated link between procreation and marriage—in fact, opponents of marriage equality have markedly refined and moderated their arguments over the years. For example, whereas the congressional debates about DOMA in 1995 featured plenty of references to “perversion” and “lust,” the campaign for Prop 8 in 2008 stayed studiously away from such incendiary rhetoric and focused, instead, on claims about what children would have to be taught in schools. The perceived strategic advantage in toning down arguments is a point worth pausing to note because it captures the dynamic nature of the debate, and corresponds to the rise in pro-gay public opinion that Klarman makes a central point of his analysis.

A more significant issue in the book, though, is with some problematic claims of cause and effect. At one point, for example, Klarman suggests that some wondered if the rash of pro-marriage-equality developments in what he calls the “gay marriage spring” of 2009 would affect the California Supreme Court justices deliberating on a state constitutional challenge to Prop 8. Having raised that possibility, he then concludes that the developments did not, in fact, influence them. He reaches that conclusion, presumably, because the state supreme court went on to uphold Prop 8. But it is only a very narrow concept of “influence” that would reason to that conclusion from the outcome of the case. It could well be that the justices were influenced, but in the other direction. That is, it is plausible that they were influenced to turn down the challenge because they could see the trajectory of public opinion and were less inclined to believe that judicial intervention would be necessary to overturn Prop 8. In any event, the question of how outside developments actually “influence” judges is a difficult one to study. Even assuming that judges themselves could correctly identify what influences their decisions, they are not likely to recite or reveal it.

Consider another example: Klarman’s treatment of the marriages performed in 2004 in San Francisco, as directed by then-Mayor Gavin Newsom. Newsom acted without legal authority, and the marriages he permitted were later declared invalid. There is no question that, as ably described by Klarman, the Newsom weddings were quite controversial, and
many thought they were counterproductive. But it is puzzling for Klarman to assert, without any obvious way to prove it, that the rogue weddings in San Francisco (as well as similar weddings in Oregon) "more than the Goodridge decision that inspired them, ignited the powerful political backlash of 2004." That statement begs any number of questions—how could one know which action caused more backlash, or make fine calibrations, given that they took place within months of each other? How could or would one test this proposition? The facts, cited by Klarman, that legislators like Barney Frank and Dianne Feinstein lamented what Newsom did, that opponents of marriage equality thought it helped them, and that Karl Rove seemed to feel that President Bush derived political benefit from it, do not supply that proof.

At one point, Klarman speculates that these weddings backfired because observers had a "visceral[ly]" negative reaction to seeing the celebrating couples. That is plausible and, for some who watched the coverage, likely to be true. But the suggestion is in some tension with the point stressed elsewhere that a key dynamic in boosting public support for gay rights has been the increased visibility of gay people. Klarman explicitly discusses the proliferation of gay television characters in the 1990s, as well as the effect of more gay people coming out to friends, family, and others. It is, then, unclear how particular images of weddings would be in a totally different category. To the extent the backlash he associates with the west-coast weddings involves couples kissing, in particular, perhaps there is a distinguishing characteristic there. But, of course, not all couples on line to get married kissed one another, not all who saw those images would have reacted the same way, and—in general—the proof remains elusive.

None of these individual points is overwhelmingly important, and the point is not to nitpick. The point is, instead, to notice that it is difficult to make confident assessments of causation when there are so many complex dynamics in play, and so many different individuals and subcommunities taking it all in. The scholarly impulse to reach causal conclusions is understandable, but the facts are often too messy to warrant sure conclusions.

Indeed, one of the most salutary aspects of the book is that, on the large issue of assessing backlash, Klarman demonstrates an admirable ability to capture this messiness. In fact, this is a significant way in which the book compares favorably with Klarman’s own earlier work on same-sex marriage

50. Id. at 192; cf. id. at 189 (arguing that these weddings “early in 2004 generated at least as much backlash against gay marriage as had Goodridge itself”).
51. Id. at 192.
52. Id. at 175.
53. Id. at 73.
54. Id. at 175–76.
and backlash. In a 2005 article, he compared *Brown*, *Lawrence*, and *Goodridge* as he explored what causes antijudicial backlash. There, he offered up discrete criteria for predicting backlash and made stronger, more categorical pronouncements about the negative effects of launching litigation before public opinion is sufficiently supportive. His proffered criteria looked to whether a court ruling made an issue more salient, generated anger over “outsider interference” or “judicial activism,” and pursued social change in a different order than what majoritarian institutions would do. He argued in 2005 that *Goodridge* fit these criteria, as did the Supreme Court’s decision in *Lawrence*, which became more controversial than might otherwise have been the case because its invalidation of sodomy laws was assessed as part of the ongoing controversy about marriage. His conclusion in the article was summed up as: “By outpacing public opinion on issues of social reform, such rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance.” In the course of this argument, he attributed to *Goodridge* several consequences that undermined LGBT interests—not only the enactment of many anti-same-sex-marriage measures, but possibly delivering the 2004 election to George Bush; providing the margin of difference to several Republican Senate candidates in close races and thus making it more difficult for LGBT-supportive Democrats to block the appointment of conservative federal judges; and giving cultural conservatives an enduring political issue to use to great effect.

Although Klarman covers much of the same ground in the book and alludes to the same factors in explaining the backlash, there is a noticeable change of tone and conclusion from the earlier article. In the book, Klarman is much less committed to a negative assessment of litigating for same-sex marriage at a time when public opinion was not supportive. Indeed, having explored both the costs and benefits of litigation, he concludes in the book that, “[o]n balance, litigation has probably advanced the cause of gay marriage more than it has retarded it.” And, to a much greater degree than he did in his earlier work, Klarman recognizes that “[l]itigation put gay marriage on the table,” and that, had early litigation not made marriage

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59. Id. at 473.
60. Id.
61. See id. at 459–73 (discussing backlash against *Goodridge*); see also id. at 459 (connecting adverse reaction to *Lawrence* to the marriage debate).
62. Id. at 482.
63. Id. at 459–73.
64. Klarman, *supra* note 1, at 218. Here, he lists the costs as impeding progress on other gay-rights priorities, causing Senate candidates to lose reelection and state judges to lose their positions, and perhaps affecting the outcome of the 2004 election, which in turn led to a more conservative court. Id. at 218–19.
salient, it is "unlikely that more than 50 percent of Americans would support gay marriage in 2012."\textsuperscript{65} To his credit, Klarman notes expressly in the book that some of his views have changed.\textsuperscript{66} Klarman is not alone in having perspectives on the marriage controversy that have "evolved,"\textsuperscript{67} and I think his candor about it is admirable. Indeed, the fact that the marriage debate has moved so quickly, and public support for marriage equality risen so rapidly, has created a challenge for scholars analyzing the debate in real time. At a minimum, the fast pace of change means that it is wise for anyone studying the issues to revisit and reassess, rather than clinging to earlier expressed opinions.

The more ambivalent assessment he offers in the book strikes me as on much more solid ground than the earlier writing. I have argued elsewhere that approaches to backlash that make categorical assumptions about the involvement of courts in contested policy issues can be both too generalized (in positing that court decisions will reliably generate backlash under a relatively general set of circumstances)\textsuperscript{68} and too particularized (in treating backlash against courts as different in kind from other kinds of political backlash).\textsuperscript{69} Moreover, the idea of backlash itself must be disaggregated. As we see in the context of the marriage debate, the widespread policy backlash reflected in DOMA and scores of anti-marriage-equality measures in the states was not accompanied by a similar public opinion backlash. To the contrary, favorable opinion has grown sharply over time.\textsuperscript{70} As we think about the role of courts, then, it is crucial to remember that the Hawaii courts started the debate at a time when the issue of same-sex marriage was nowhere near the political or cultural radar.\textsuperscript{71} Courts entered the marriage debate years before any majoritarian institution would have. It would be erroneous to say that courts therefore "caused" the skyrocketing public support for marriage equality over the last several years, but it is fair to say that courts crucially ignited a movement that otherwise looked to be years away. Decisions like \textit{Goodridge} and those in the next few states that adopted same-sex marriage as a result of a court decision are, moreover, responsible for another effect: the reality, as opposed to the frightening possibility, of married same-sex couples. What has the effect of that reality been? It seems safe to say that it has not had the same effect on all observers, but it is reasonable to hypothesize that it has increased public support because those marriages have simply not had the kind of palpable and catastrophic social effects that some opponents had predicted.

\textsuperscript{65} \textit{Id.} at 208.
\textsuperscript{66} \textit{Id.} at 223.
\textsuperscript{67} \textit{Cf. id.} at 196 (noting that Barack Obama had said several times that his views on same-sex marriage were "evolving").
\textsuperscript{68} Schacter, \textit{Politics of Backlash}, supra note 22, at 1217.
\textsuperscript{69} \textit{Id.} at 1218.
\textsuperscript{70} \textit{Id.} at 1219–23.
\textsuperscript{71} \textit{Id.} at 1220.
The central point here is that it is very difficult to draw clean causal arrows from point A to point B when exploring something as complex as the same-sex-marriage debate, which has involved multiple institutions (courts, legislatures, direct democracy, and electoral politics), multiple venues (local, state, and federal), and multiple domains (cultural, political, and social). The challenges of mapping actions to consequences in such circumstances lie at the heart of a book committed to better understanding the dynamics of antijudicial backlash, yet those challenges are formidably difficult. For the most part, Klarman skillfully acknowledges the complexity and the ambiguous picture of simultaneous progress and retrenchment for supporters of marriage equality. At points, as he enumerates the adverse developments for the LGBT community following Baehr and Goodridge, one is left with a vague sense that he would like to return to the more critical stance he took in 2005 toward early litigation. But his conclusions at the end of the book are more balanced and nuanced, and ultimately more persuasive, than was his earlier analysis.

Are there larger lessons here for the way scholars think about constitutional law and theory? My answer is: on some points, yes; on others, maybe. The way the marriage debate has unfolded can be read to suggest that we take a fresh look at some staples of constitutional law. But on some points, there are reasons to wonder if the marriage debate is too idiosyncratic to warrant much generalization.

First, as I have suggested above, the marriage debate illustrates the perils of reductionism in explaining cause and effect in the context of court decisions. Too often, debates about the consequences of controversial constitutional cases devolve into misleading questions about whether courts “can” or “cannot” produce meaningful social change. Take Gerald Rosenberg’s well known book, The Hollow Hope,\(^72\) in which he pitted the romantic myth of a “Dynamic Court” (one able and willing to pursue needed change even when elected officials won’t) against his revisionist reality of the “Constrained Court” (one unable to do so).\(^73\) Though controversial in some of its particulars, the book is a leading work on litigation as a means of social change. In 2008, Rosenberg published a second edition of The Hollow Hope that incorporated the same-sex marriage debate into his analysis.\(^74\) The original edition of Rosenberg’s book in 1991 emphasized Brown v. Board of Education\(^75\) and Roe v. Wade,\(^76\) arguing that observers misattribute to those decisions (and others) more impact than they actually had, and that changes

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\(^{73}\) Id. at 10–27.
brought about by political institutions are both necessary to achieve lasting change, and less likely to backfire. In his second edition, Rosenberg ardently defended this same view about same-sex marriage litigation:

Ultimately, the use of litigation to win the right to same-sex marriage lends further support to the argument that courts are severely limited in their capacity to further the interests of the relatively disadvantaged.... By litigating when they did, proponents of same sex marriage moved too far and too fast ahead of the curve, leaping beyond what the American public could bear. The lesson here is a simple one: those who rely on the courts absent significant public and political support will fail to achieve meaningful social change, and may set their cause back.

In support of this conclusion, Rosenberg relied on the fact that, as of the time he wrote, full marriage equality had not migrated beyond Massachusetts. He also considered the case for several possible “indirect” benefits of litigation, but rejected most of them. He concluded, for example, that there was more media coverage of same-sex marriage as a result of litigation, but that much of it was negative; that there had been no rise in contributions to gay rights groups that could be attributed to the marriage litigation; and that, on his reading, public opinion about same-sex marriage had not changed substantially between 1992–2006.

Rosenberg’s work has been influential and is impressive in many ways, but he seems far too committed to the purity of his institutional claim to acknowledge the complexity and ultimate ambiguity of the dynamics in play. I have argued elsewhere that Rosenberg’s approach to courts fails to appreciate the murkiness of what might constitute social change. I have argued, as well, that when applied in the area of LGBT rights, his approach fails to account for significant instances in which judicial action supporting equality has escaped backlash, and the actions of politically accountable institutions have provoked it. Examples, among others, are the successful litigation to secure adoptive rights for same-sex partners in nearly half the states in the country (producing no backlash), and newly elected President Bill Clinton’s attempt to open the military to gays in 1993 (producing strong backlash).

The marriage debate strongly suggests the need for a less dogmatic, more pragmatic approach—one that recognizes the ways in which judicial

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77. ROSENBERG, supra note 72, at 107–56, 228–46.
78. ROSENBERG 2008, supra note 74, at 419.
79. Id. at 353–54.
80. Id. at 355–419.
81. Id. at 360–61, 382–407.
83. Id. at 875–78.
84. Schacter, Politics of Backlash, supra note 22, at 1218–19.
action can generate both progress and backlash at the same time. Indeed, one takeaway from Klarman’s book is that how one judges the wisdom of beginning a battle in court can depend critically on when the judging takes place. The aftermath of litigation can look very different based on when it is assessed. The time that elapsed between the Baehr decision in 1993 and Goodridge in 2003 would support a fairly bleak assessment. Most of the activity had been in the form of anti-equality, backlash measures on the federal and state level. In the pursuit of marriage equality, only the Vermont Supreme Court’s 1999 decision leading to civil unions marked any significant progress during this time and, of course, by today’s standards, it looks fairly retrograde. While Goodridge marked a stunning victory, it was quickly followed by another round of state ballot measures designed to head off Goodridge-clone rulings in other states. With the marriage issue achieving new salience in the 2004 election, anxieties about backlash were perhaps at their peak. Indeed, it was in the wake of this election that Klarman, in his 2005 article, seemed to come down more on the Rosenberg side of the ledger.

Looked at from 2012, though, the picture is dramatically different. Indeed, Rosenberg himself said in his second edition that his analysis might be “overtaken by events.” And so it seems to have been. It is instructive to consider what happened between 2007 (the last year for which Rosenberg reported new developments) and February 2012 (the end of the period addressed at all by Klarman). These events alone might explain why Klarman is, justifiably, more restrained in his critique of litigation than is Rosenberg. Eight states plus the District of Columbia adopted full marriage equality, some by judicial action, others by legislative action. These were Connecticut (2008), California (2008), Iowa (2009), Vermont (2009), New Hampshire (2010), District of Columbia (2010), New York (2011), Maryland (2012), and Washington (2012). Even though the California state supreme court’s ruling was wiped out by Prop 8 later in 2008, and the legislative actions by both Maryland and Washington were put to voter referenda later

85. See KLARMAN, supra note 1, at 57–68 (recounting federal and state legislation after Baehr limiting recognition of gay marriages and defining marriage as between a man and a woman).
87. KLARMAN, supra note 1, at 105.
88. ROSENBERG 2008, supra note 74, at 341.
89. Id. at 351.
90. Klarman’s last historical chapter ends in 2011, but his conclusion addresses some developments in early 2012. KLARMAN, supra note 1, at 223.
in 2012, the eruption of marriage equality in several different parts of the country in this time period is quite striking. In addition to states moving to marriage equality, four states began to recognize same-sex marriages performed in other states; four states adopted comprehensive civil unions; and three states adopted limited relationship protections for same-sex couples.

There was, to be sure, some further retrenchment between 2007 and February 2012. In addition to the enactment of Prop 8, both Arizona and Florida passed anti-same-sex-marriage amendments in 2008. But even taking account of these, the national map on relationship recognition for same-sex couples came to look vastly different between the Rosenberg second edition and the Klarman book. Also conspicuously "overtaken" was Rosenberg's claim that public opinion on marriage had not changed much since 1992. That claim was questionable even as of 2007, but by the time of Klarman's book, it simply fell outside any range of plausibility.

The trend continues, moreover, for the picture has changed substantially even since the end of the period covered by Klarman. Consider a few data points. Not unreasonably, Klarman rated it unlikely that President Obama would announce support for same-sex marriage before the election, yet the President did exactly that in May 2012. In addition, for the first time, supporters of marriage equality prevailed at the ballot box on Election Day 2012, as measures in four states that opposed marriage equality were all rejected by voters. True, an anti-marriage amendment had carried in North Carolina by a large margin in June 2012, but the Election Day four-state sweep reflected major change and might one day be seen as a tipping point.

94. These were Rhode Island, Maryland, New Mexico, and Illinois. Relationship Recognition for Same-Sex Couples in the U.S., supra note 91.
95. These were Washington, Nevada, Illinois, and Delaware. Id.
96. These were Colorado, Maryland, and Wisconsin. Id.
98. Schacter, Politics of Backlash, supra note 22, at 1193–94.
99. KLARMAN, supra note 1, at 223.
102. Bruni, supra note 93.
And the upward trend in public support for same-sex marriage is, if anything, seemingly accelerating.03

What has followed litigation in *Baehr* and *Goodridge*, then, is both dramatic retrenchment and dramatic progress. At the very least, this ambiguous picture challenges any simple faceoff like the one Rosenberg posits between a romantic and a revisionist notion of courts. It suggests that it was neither a brilliant tactic nor a grave mistake that the campaign for marriage equality began with litigation. In showing that judicial decisions can both further and undermine social change, and can do these two things simultaneously, one point comes across clearly: courts rarely act in a vacuum. What courts do is necessarily mediated and communicated through politics, social movements, media, popular culture, and any number of other forces. How those forces interact, and the trajectory that interaction creates for the social change sought, is likely to be complex and deeply contextual, and to defy easy mapping. It also cannot necessarily be predicted in advance by those who see litigation as all virtue or all vice. Finally, the trajectory will not be the same for all. Consider the regional and cultural differences that have long characterized the marriage debate and help to explain why marriage equality has come to some states far sooner than others and, conversely, why some states have been more prone to backlash than others.04

A second point driven home by the marriage debate is that academic inquiries about the capacity of courts to generate social change have often been excessively focused on the United States Supreme Court. *Brown* and *Roe* are canonical examples, but they are not the only ones.05 As the marriage debate now moves to the Supreme Court, perhaps the names *Perry* and *Windsor* may be added to that pantheon. But the virtue of Klarman’s book (and other studies of same-sex marriage) being published before the Court issues any pronouncements on the issue is that it chronicles the two decades of judicial developments, overwhelmingly in state courts, that preceded the Court’s entry. This was by the express design of LGBT-rights litigators, who elected to stay out of federal court for nearly twenty years. True, *Lawrence* was decided only a few months before *Goodridge*, and several of the justices’ opinions gestured in some way toward same-sex


105. See ROSENBERG 2008, supra note 74, at 292–93, 303–04 (discussing the Supreme Court’s role in the “[r]eapportionment [r]evolution” and in extending procedural rights to criminal defendants).
But the drivers of the debate were *Baehr* and *Goodridge* and, to a lesser extent, some of the state supreme court cases that followed those crucial firsts. What is missed by an excessive focus on the Supreme Court? One important point is that this focus offers only one very familiar picture of the well-known countermajoritarian difficulty. In that picture, the justices are appointed with life tenure, and, most of the time, they are reviewing the actions of elected officials, whether legislative or executive. While Hawaii and Massachusetts likewise have appointed judges, California and Iowa, for example, have systems in which judges have to face the voters in some way. In many states, moreover, the voters have recourse to direct democracy to enact policy and to counter judicial actions and, of course, in the Prop 8 case, the marriage ban under review was passed by voters, not by a legislature. These institutional differences do not eliminate the countermajoritarian difficulty, but they do recast it in certain ways. The fact that some judges face voters might, on some views, mitigate the anxieties of countermajoritarianism. The fact that voters have enacted laws on same-sex marriage directly might either exacerbate or mitigate that difficulty, depending on the normative posture one takes about direct democracy. In any event, these institutional factors merit notice and study.

The role of state courts in the marriage debate does, however, reflect one respect in which the marriage cases might be somewhat idiosyncratic. Unlike many other matters litigated in state courts, this one was nationalized very quickly. The Supreme Court did not decide a marriage case between 1993–2012, but as Klarman effectively conveys, the issue nevertheless commanded the national stage and triggered a debate about judicial activism comparable to the one triggered by major Supreme Court cases. That owes, at least in part, to how nationalized the larger debate about LGBT rights

106. See *Lawrence v. Texas*, 539 U.S. 558, 585 (O'Connor, J., concurring in judgment) (arguing that Texas's sodomy laws are not supported by a legitimate state interest such as "preserving traditional marriage"); id. at 604 (Scalia, J., dissenting) (warning that the Court's decision will lead to the "judicial imposition of homosexual marriage").

107. See *Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–17 (1962) (acknowledging that when the Supreme Court declares a legislative or executive act unconstitutional, it "thwarts the will of representatives" elected by the majority). For a historical perspective, see *BARRY FRIEDMAN, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 258–62 (2009).


already was when the marriage controversy first appeared. It is also related
to the idea that a couple married in one state would seek recognition in
others.112 With interstate travel being routine, a similar dynamic might have
some role to play in other contested areas—say, abortion or public benefits—
but the idea of a chain reaction in the realm of marriage has a particularized
purchase of its own.113

Finally, the marriage debate also poses some very fundamental
questions about standard doctrinal approaches to constitutional law. A staple
of federal equal protection and due process review has been the issue of
choosing the appropriate standard of review. This has played out, as well, in
the marriage arena, with virtually all the state courts adopting some version
of the relevant federal constitutional doctrine and attending to the standard of
review.114 But the state cases, taken as a whole, suggest that this inquiry does
not count for all that much. They are all over the map on standard of review.
For example, cases overturning state marriage statutes have been decided at
every level of equal protection review—rational basis, intermediate, and
strict scrutiny.115 Similarly, the two circuits that have struck down DOMA
on equal protection grounds employed different levels of review.116 This
variability suggests that all the attention paid to level of review, and all the
thousands of pages written about it in briefs about marriage equality, may
prove to have been mostly a sideshow.

Moreover, significant conceptual problems with one particular aspect of
the scrutiny issue are thrown into high relief in the marriage litigation. One
prong of the analysis traditionally used to decide whether to heighten
scrutiny is an inquiry into whether the group is politically powerless, such
that aggressive judicial review is necessary to protect the group’s interest.117
This issue was, in fact, the subject of extended expert testimony in the federal
court trial on Prop 8’s constitutionality.118 As I have suggested elsewhere,
issues about the political power or powerlessness of the LGBT community
reveal enigmatic aspects of this part of the doctrine. Among the vexing
questions made salient by the marriage debate are how to measure political
power, how to account for the fact that groups may develop some measure of
political power only because they are subjected to special discrimination in

112. Id. at 1185.
113. Id.
114. See, e.g., Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 961 (holding that because a
same-sex marriage prohibition fails a rational basis test the court need not determine whether a strict
scrutiny test is warranted).
115. Jane S. Schacter, Ely at the Altar: Political Process Theory Through the Lens of the
116. The First Circuit employed a version of rational basis review. Mass. U.S. Dep’t of Health,
682 F.3d 1, 10–11 (1st Cir. 2012). The Second Circuit employed intermediate scrutiny. Windsor v.
117. Schacter, supra note 115, at 1372.
118. Id. at 1383.
the first instance, how to assess a history that includes both political victories and political defeats, and how to understand the extension of heightened scrutiny to race- and sex-based classifications notwithstanding the fact that racial minorities and women have won significant political and legislative battles.119

Indeed, the election of 2012 is likely to pose further questions about what it means for LGBT persons to have or to lack political power. Recall that supporters of the marriage equality side won on four of four ballot measures on Election Day (having lost in North Carolina in June of 2012). Recall, as well, that the President endorsed marriage equality before the election and paid no obvious political price for doing so. Indeed, the issue was not raised by his Republican opponent—a stunning contrast to the election of 2004, in which President Bush used his opposition to marriage equality as a prominent issue, and Republicans perceived great strategic advantage in getting the issue on the ballot in thirteen states that year.120

Finally, in 2012, Representative Tammy Baldwin, an openly lesbian candidate in Wisconsin, was elected to the Senate.121

The events of the 2012 election are likely to be aggressively argued as evidence of the growing political power of the LGBT community. This will not and should not resolve the doctrinal question of political powerlessness at a time when thirty states still have laws banning same-sex couples from marrying in their constitutions and several other states have statutory bans,122 most states do not include sexual orientation in their antidiscrimination laws,123 and antigay hate crimes statistics are on the rise.124 But the election results are likely to complicate the conversation. And that is consistent with what I take to be a central lesson from the marriage debate and from Klarman’s book: There are no easy institutional answers or lessons here. Embrace the complexity.

119. See id. at 1390–96 (describing the problems with political process theory in the context of the marriage debate).