

MICHAEL KLARMAN'S *FRAMERS' COUP*
(AND THE NEWS FROM ANTIFIDELITY)

THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION. By Michael J. Klarman.¹ Oxford University Press. 2016. PP. xii + 865. \$39.95 (hardcover).

*Frank I. Michelman*²

"I got no dog in that fight" — Anon.

I. INTRODUCTION

A. KLARMAN'S DOG?

A tonic to the mind is *The Framers' Coup*, Michael J. Klarman's imposing new investigative report on the great American founding. Formally (and formidably), the book stands as a contribution to scholarly researches in United States history and the politics of laws. But of course it carries cues and messages, too, for all who would expound or instruct upon the Constitution's place in American life and politics. For this is not a tale simply of *coup d'état*, of triumph "by one party in a debate that genuinely had two sides" (p. 5). It is also a close and expert study of complexities—ambiguities, accidents, miscalculations, confusions, contradictions and reversals—in the lining up, sometimes sooner, sometimes later, of delegates at Philadelphia behind one or another article of constitutional text, and of state conventions behind the whole shebang.

As a first consequence: When, predictably in times to come, we see Klarman's researches getting caught up in tangles of law-office history,³ it will not be his fault. Neither can it be his wish,

1. Kirkland & Ellis Professor of Law, Harvard Law School.

2. Robert Walmsley University Professor, Emeritus, Harvard University.

3. See Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 123 n.13 ("By 'law-office' history, I mean the selection of data favorable to the position

because Klarman is an avowed foe of originalist-minded constitutional application.⁴ Any sight of his pages being rummaged and sacked by lawyers and judges out for proofs of neatly amberized framers' intents and original public meanings will be for him, we must assume, a cause of chagrin.

Still, if you were looking for some present-day political fight in which *Coup* has its intended dog, you might easily find one—not that Klarman ever tells you directly what it is. He has pretty much, in this present text (the contrast, as we will see, is with some earlier writings of Klarman's on the topic of American constitutional devotion) kept clear of normative overhangs, preferring to let his history speak for itself toward whatever actions or postures in response it might move his readers to take up. His closest approach to the pulpit comes at the close of the book's lead-off chapter, where Klarman prompts readers to consider how they should “think” and “feel” about constitutional provisions (he anticipates here some of what his pending historical account will show)

continuing to bind Americans today despite their inconsistency with modern democratic norms? More generally, how should one feel about a modern democratic society's being governed by a [virtually non-amendable] constitution that was written 225 years ago by people possessed of very different assumptions, concerns, and values [from those today prevailing]? (pp. 9-10).

How we should *feel* is the aim of the jab, not what we should *do*. At no point does the book speak directly—as some other worried contemporary authors do—to the question of what steps we should think of taking in response to this situation, about which we presumably are meant to feel not good.

being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.”).

4. See Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1915 (1995) (“No originalist thinker of whom I am aware has convincingly explained why the present generation should be ruled from the grave.”); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 770 (1991) (“[O]ne must wonder why the current generation should consent to be ruled on critical questions of government policy by the constitutional choices of persons dead almost two hundred years who . . . inhabited a radically different world.”).

B. A FRAMING ON CLAY FEET

Compare the example set by Sanford Levinson. Having charted at length and detail the defects that block his endorsement of the Constitution as one that Americans today in their right minds could adopt as truly fit to govern their affairs,⁵ Levinson issues a call for corrective action of a kind that still maintains a thread of constitutional attachment, to wit, a campaign of petitioning to Congress to exercise a constitutionally vested responsibility to call, when and as the times may require, a national convention “to assess the adequacy of the . . . Constitution to our . . . needs.”⁶

The Framers’ Coup might perfectly well have been drafted as a brief in support of exactly such a cry to the country for a national project of major constitutional repair. Viewed thus, the book’s particular input would be more in the line of replication than case-in-chief. “[T]hroughout American history,” as Klarman reminds us early on, “political actors have invoked the wisdom and virtue of the Framers as arguments against constitutional change” (pp. 4-5). His work in *Coup* seems perfectly designed to cut the ground from under that sort of resistance against meddling with the wisdom of historical framers deemed better situated, better able, or better motivated than us to call the shots correctly for the long run. The facts assembled and presented here about the values,⁷

5. See SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006) (recalling his rejection of the National Constitution Center’s invitation to “re-sign” the Constitution, while explaining that this choice does “not necessarily mean that I would have preferred that the Constitution go down to defeat in the ratification votes of 1787-88”).

6. *Id.* at 173–74; see U.S. CONST. art. V (directing Congress to “call a convention to propose amendments” for ratification by three-fourths of the states upon application therefor by two thirds of the states). Levinson joins with the suggestion of Akhil Amar that Article V can be read to envisage a congressional convention call without applications from the states, and furthermore to allow for ratification of convention handiwork by a single nationwide majority vote. See *id.* at 174, 177; see also Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1054 (1988) (reading Article V to provide channels for constitutional amendment by government action but not to exclude amendment by “appeals to the People themselves”).

7. Klarman reverts throughout to the Framers’ elitist approach to politics, out of keeping, as he suggests, with the modern American democratic temper (*e.g.*, pp. 606-609), starting with a contempt on the Framers’ part for the ability of their own contemporaries at large “to intelligently rule themselves” (p. 4).

aims,⁸ beliefs,⁹ tactics,¹⁰ and strategies¹¹ of those who took controlling parts in the Constitution-making process, or about general hazards to rationality affecting the process as a whole,¹² or about the role in these events of sheer accident and luck,¹³ seem designed to counter any lingering dispositions toward “sanctimonious reverence” for the outcome.¹⁴ *The Framers’ Coup* shines its light on the Framing’s seamier side, its face of ordinary politics. Without denying the Framers their reputations for exceptional intelligence, statecraft, and patriotism, the book

8. *Coup* takes repeated note of how, in the founding negotiations, “interests” (of class or section) took precedence over “ideas” (of public weal and good government) (p. 7), and of how crucial parts in the emerging constitutional blueprint were outcomes of “compromise,” not “principle” (pp. 6, 153; see p. 541, describing small state acceptance of strong national powers in exchange for equal representation in Senate; pp. 291-296, describing a “package deal” by which Southern delegates accept a national commercial power in exchange for protection of slavery).

9. A chief example here would be the framers’ failure to foresee, although it was right at their doorstep, the rise of organized political-party competition as the engine of American electoral contestation, with disastrous results both for the framers’ calculations of the ease of amendment as scripted by Article V (pp. 316-317), and their expectations regarding benign effects of cross-branch political conflict (p. 629).

10. Klarman refers to use of extremist proposals and scare tactics to elicit preferred outcomes (pp. 6-7, on threats of walkouts; p. 534, on questionable sincerity of warnings by Federalists of civil war in case of non-ratification). He shows other prevarications by delegates regarding true intentions (p. 237, on suspected ulterior motive for a small-state delegate’s preference of the Senate over the Supreme Court as trier of impeachments; p. 609, on Federalist use at ratification of justifications for controversial features that differed from their arguments at Philadelphia).

11. Examples would include Article VII’s switching of the ground rules for ratification away from unanimity of the states (p. 8), and maneuvering by Federalists (as by resistance against conditional ratifications and “antecedent amendments”) to confront voters at the ratification stage with a rigidly binary choice between “the obviously defective Articles of Confederation” and a “vastly more nationalist and democracy-constraining Constitution” than most voters likely would have wanted (pp. 8, 533, 536, 545, 611-612).

12. The hazards include effects on key votes and actions of personal and partisan animosities and paybacks (pp. 428-429, 472 n.*, 560); distraction of delegations by short-term from longer-term considerations (pp. 426, see p. 615, on Georgia’s quick ratification in fear of abandonment by the union in immediately pending Indian wars, and hasty action by mid-Atlantic states in hopes of housing the national capital city); influence of path dependencies, availability and anchoring heuristics, and cascade effects (pp. 605-606; see p. 6: “A constitution written in the years before Shays’ Rebellion and the enactment [in the states] of populist relief legislation . . . probably would have looked very different . . .”), including successive effects of state ratifications on other states (pp. 430-431, 452, 485, 540-544).

13. See pp. 406-411, describing various off-the-merits advantages enjoyed by the Federalist side at ratification; pp. 540, 596, noting very slight margins of victory in several states; pp. 542-549, noting possibly outcome-determinative contingencies in the timing of various state ratification votes; and p. 620, noting lucky effect of the coincidence of a “surging economy” at the time of the ratification votes.

14. P. 631, quoting, of course, Thomas Jefferson.

2018]

BOOK REVIEWS

113

stands as a takedown of the Framing from any high pedestal of reverence it may hitherto have occupied in the minds of readers.¹⁵ The work thus incidentally also serves as a response to other reasons sometimes heard against upending ancient laws, such as a need of the community to maintain its identity or integrity or confidence through time, or an obligation of respect owed by posterity to ancestors. And that, indeed, is the note on which the book ends:

That [the Constitution] has been around for a long time or that its authors were especially wise and virtuous should not be sufficient to immunize it against criticism. . . . As Jefferson would have recognized, those who wish to sanctify the Constitution are often using it to defend some particular interest that, in their own day, cannot be adequately justified on its own merits (p. 631).

So there, in sum is one perfectly plausible attribution of a fight in which Klarman has entered his dog: to wit, a nascent agitation for major constitutional repair, perhaps by way of a new constitutional convention.

C. ANTIFIDELITY?

I bring up now a rather different, more radical possible attribution. Klarman's dog could *not*, as I have said, be any preference of his over specific applications of constitutional clauses. But what about an exactly opposite kind of preference? I have in mind an agitation (which does occasionally make it into the op-ed zone of current American awareness)¹⁶ over the very constitutional faith that makes those applications seem to matter in our lives in the way that they do. *Coup* could plausibly be meant for service in a project of detox of American politics from this not-so-minor tic by which the Constitution is allowed, or is imagined, to stand as sovereign guide to policy and law.¹⁷

15. "The men who wrote the Constitution were extremely impressive, but they were not demigods . . ." (p. 5).

16. See Louis Michael Seidman, *Let's Give Up on the Constitution*, N.Y. TIMES (Dec. 30, 2012), <http://www.nytimes.com/2012/12/31/opinion/lets-give-up-on-the-constitution.html> (an op-ed piece naming as the chief culprit in American political dysfunction "our insistence on obedience to the Constitution").

17. See Michael J. Klarman, *What's so Great About Constitutionalism?*, 93 NW. L. REV. 145, 155 (1998) [hereinafter Klarman, *Constitutionalism*] (pointing to tension between the idea of the Constitution as our national act of precommitment to a distinct set of values and ideals and our experience of the indeterminacy of application to concrete controversies of many of its key clauses); *id.* at 169 (suggesting that the same indeterminacy

Such thoughts will come easily to anyone on terms with Klarman's earlier writings on this topic of American constitutional devotion. Our author has in the past stood out from the crowd of American constitutional-legal academics for the nerve and verve of scholarship of declared Constitution-resistant leanings.¹⁸ These older works of Klarman's were addressed largely to the question of what he called "judicially enforceable" constitutionalism, as distinct from a broader Constitution-skeptical stance as above defined.¹⁹ But they contain plenty of more broadly anticonstitutional fodder, too, as I shall be showing below. As Klarman has said, "constitutionalism without judicial review shares many of the virtues and vices of its judicially-enforceable variety."²⁰

The concession of virtues should not be overlooked; we will get back to it. It has not kept Klarman in the past from proposing seriously to Americans, as our path of escape from a choice deemed unacceptable, between rule from eighteenth-century graveyards and rule by electorally untethered judges doing on-the-fly, to-suit-themselves constitutional reconstruction, that "we can simply be anticonstitutionalists. That is, we can decide controverted policy questions for ourselves through political struggle (as much of the rest of the world does it), rather than through the edicts of long-dead Framers or relatively unaccountable judges."²¹

"Anticonstitutionalist" (as you see) was one name Klarman had for that option. "Antifidelity" was another.²² He did not in that place actually sign on the dotted line for party membership under either name, nor has he since then done so that I know of. But neither has he retracted the suggestion, and now comes *Coup*, bearing on its face what may easily be read as express incitement to Constitution-resisting deductions, those leading questions to

means that often "the real ground of controversy is over what *we* think should be done").

18. A few titles tell the tale. See Klarman, *Constitutionalism*, *supra* note 17; Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997) [hereinafter Klarman, *Antifidelity*]; Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 FORDHAM L. REV. 1739 (1997). Klarman has had L. M. Seidman for company, see Seidman, *supra* note 16; LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE (2012).

19. See Klarman, *Constitutionalism*, *supra* note 17, at 146 (asserting a "principal" concern with "constitutionalism . . . [in] its judicially-enforceable" form).

20. *Id.* at 146.

21. Klarman, *Antifidelity*, *supra* note 18, at 411–12.

22. By his title for the article proclaiming it, see *id.*

2018]

BOOK REVIEWS

115

readers to which I have already directed attention. Should we read them as a call to Antifidelity?

I am going to doubt it. Setting the Framing on clay feet is one thing; a call for ejection of the resulting Constitution from its place of providing, while it stands, a basic law for the country is quite another thing. The second thing is not logically deducible from the first; and while Klarman plainly does mean for his history to do the first thing, his book—to my eye, anyway—stops noticeably short of the second. There may even be reason to think that it does so partly as a result of Klarman’s experience in researching and writing this treasure of scholarship.

In short, then, my thesis: Klarman’s past scholarship posts an open invitation to Americans to get serious about ditching the Constitution from the conduct of our politics—or at least (a needed qualification, as we will see below) the Constitution’s substantive parts, the parts that set restrictions or requirements on the goals to be sought or effects to be wrought by exertions of state powers as distinct from parts laying down organizational and procedural forms for such exertions. The new book, I think, may be pulling back, inferentially, from that brink.

But let us pause now to define more carefully some key terms in our discussion.

II. FIDELITY AND ANTIFIDELITY

A. “CONSTITUTION”

In the senses that concern us here, “fidelity” is to a constitution, and a “constitution” is an interpretable, objective, verbal artifact of basic law. “Artifact” means it is fashioned in historical time for the country whose constitution it is. “Verbal” means it is made up of words and sentences. “Basic law” means the words and sentences set terms of permission and validation for any and all subsequent acts of lawmaking or legal administration in the country at hand.

“Objective” means this prescriptive text is the same to all observers. It means people can point to *this* text, show *it* to each other, all easily agreeing that yes, *that* is the Constitution. (So all can immediately see and agree, for example, that “No state shall pass any law impairing the obligation of contracts” is a part of this

country's constitution.)²³ “Interpretable” means the constitutional text connects with its relevant audience—fits into its cultural context—in such a way that debates about *its* correct applications (as distinct from guidance elsewhere obtained) will be or will feel, for that audience, persuasively decidable by argument. The words and phrases composing the mandates may appear as more or less open-ended, abstract, ambiguous, vague, arcane, or otherwise contestable in concrete application. But however seemingly contestable the applications may be, the constitutional text presents itself to its audience (deluded on this point as the audience may or may not be) as receptive to duly informed and reasoned argument, with a view to possible agreement, over what actions or courses of action do or do not fall within its mandates. (Note that this condition can hold in the sight of interpretive theories that allow for appeal to reasons beyond the text, as long those are treated as reasons about *how to read the text*, not as reasons having force (so to speak) on their own.)²⁴

A constitution thus—now to finish off the definition—preexists its applications. However freely alterable it might be, however weak its amendment rule, there are intervals of time between changes. The constitution at any given instant is caught in one of those intervals, fixed and binding as it then stands on actions then occurrent. A constitution—just in order to be one—must, to that liminal extent, have the property sometimes decried as entrenchment²⁵ and sometimes explained as precommitment.²⁶

23. U.S. CONST. art. 1, § 10.

24. See JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* 22, 80–81 (2015) (describing a “philosophical” mode of fidelity in which judges seek out the “true meaning” or “best account” of “constitutional commitments” often “phrased” as “referring to general goods and principles,” and calling this “a kind of textualism”).

25. See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 *GEO. L.J.* 491, 508–09 (1997) [hereinafter Klarman, *Majoritarian*] (“If a present majority is bound by the constitutional handiwork of a past majority until it can assemble the supermajority necessary to secure constitutional change, then we have cross-temporal entrenchment, which is inconsistent with the democratic principle that present majorities rule themselves.”).

26. See Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195, 235–36 (Jon Elster & Rune Slagstad eds., 1988).

B. “FIDELITY”

A political culture’s trait of *constitutional fidelity* (hereinafter often just “fidelity”) is its convergence and reliance on this idea of an interpretable verbal object setting terms of validity for acts of lawmaking and legal administration.²⁷ It is the culture’s predilection to insist that the country’s officers and lawmakers, without exception—the President, the Congress, their counterparts in the fifty states, and thence on down—stand under obligation of submission to this publicly identifiable body of interpretable norms for the conduct of their business and that of the government. Officials thus are denied permission ever to set these constraints aside on the spot, no matter how good and strong the reasons they may sometimes perceive for doing so. They will be censurable as somehow miscreant—as lawless, disloyal, faithless to trust—insofar as they fail or refuse to submit themselves to the Constitution’s constraints, construed and applied by them in good faith.²⁸

C. “ANTIFIDELITY” (AND WHAT IT IS NOT)

Resistance to that cultural predilection is the stance of Antifidelity. Antifidelity reflects and flows from suspicion or conviction that our country’s governance would be morally and practically improved—more in line with true political values, more respectful of ordinary people, more responsive to popular opinion and preference, defter at solving problems and setting policy—if Americans could somehow teach themselves to “systematically ignore the Constitution”²⁹ or to cast aside “the entire enterprise of seeking constitutional meaning.”³⁰ Note that Antifidelity thus stands opposed to calls for “popular” constitutionalism.³¹ The latter evince a preference for populist

27. See J. M. Balkin, *Agreements With Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1704 (1997) (“Within our legal culture the idea of constitutional fidelity is seen as pretty much an unquestioned good.”).

28. See Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: The Judicial Duty of Good-Faith Constitutional Construction*, *GEO. L. SCHOLARLY COMMONS*, <http://scholarship.law.georgetown.edu/facpub/1946>, at 3–4 (urging that judges may properly engage in constitutional construction, fashioning law in accord with the spirit of the clause when the words are underdeterminative, as long as they do “conscientiously,” aiming in good faith “to follow the instructions given them in ‘this Constitution’”).

29. SEIDMAN, *supra* note 18, at 5.

30. Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 *CALIF. L. REV.* 1465, 1466, 1476 (2006).

31. See LARRY D. KRAMER, “THE PEOPLE THEMSELVES”: POPULAR

over elite forums to decide on the correct applications of constitutional constraints, but still in “a constitutional system that [is] self-consciously legal” and binding as such on acts of public officials.³² The Antifidelity position, by contrast, is that it would be better were such questions not to be raised at all in any forum—that Americans have no good reason for wishing their lawmakers and other officials to worry in the least about whether their acts and policies are or are not in accord with the Constitution.

I need now also to mention, before moving on, three other things that Antifidelity is not, or at least could not be and still contain the thought of Michael Klarman.

1. Not antipositivism

Klarman has accepted the need of a representative-democratic political order—or indeed of any project of social ordering by law—for an establishment of “background rules” to “establish the criteria for valid legislation.”³³ But of course this rule-of-recognition excuse for constitutional law³⁴ covers only, as Klarman has also pointed out, a highly truncated sort of constitutionalism. It does not in itself reach to entrenchment in constitutional law of “substantive standards against which otherwise constitutional practices must be tested.”³⁵ What results is that “Antifidelity” for Klarman is fully satisfied by overthrow of our sense of subjection to *substantive* constitutional law, but still with retention of mandatory attention to some part, at least, of structural constitutional law.

CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

32. *Id.* at 30.

33. Klarman, *Constitutionalism*, *supra* note 17, at 183. In a federal system, the category of needed background rules would cover not only the forms for election of federal officials and enactment of federal laws but also the rules for deciding the relative priorities of federal and state laws in cases of conflicts. *See also id.* at 184 (accepting the choice to put these rules in a constitutional writing, while pointing out that the purpose can be served while leaving them to oral tradition).

34. I take that description from Klarman, who here follows the well-known account in Hart’s *The Concept of Law*. *See id.* at 145, 183 & n.210 (citing H.L.A. HART, *THE CONCEPT OF LAW* 100–10 (1961)).

35. *Id.* at 183.

2018]

BOOK REVIEWS

119

2. Not mere constitutional fault-finding: “derogation” and “repair”

As we saw above, Antifidelity is a big step beyond constitutional fault-finding, even beyond the most adamant refusal to endorse the Constitution in force as one that could be found truly fit to serve as the country’s governing basic law. Suppose you hold to the latter view. Caught in a prevailing political culture of fidelity, what path of remedy would you choose to pursue?

We have already before us the major choice you face. One option is the path of opposition against that very culture of fidelity. Your aim then is to bring down the Constitution (its substantive parts, anyway) to the status of derelict on the waters of the law, ceasing to make any final difference in the conduct of the country’s affairs. You would be seeking, in other words, a political-cultural condition in which lawmakers and other officials can never-mind the substantive Constitution at zero cost in social disapproval. Call this the remedial path of derogation from fidelity, or sometimes in what follows “derogation” for short.

Your wish could also, though, be for a quite different and indeed contrary remedial path—the path (as we have called it) of constitutional repair, hereinafter sometimes simply “repair.” You seek an ongoing process of removal or correction of the Constitution’s faults while still upholding, in the meantime, fidelity to it. Repair would be your preference over derogation in case you saw as prohibitive certain major collateral costs or risks—say, of Caesarist rule or political breakdown—in trying to move along now without a supposedly binding constitution in force. I will return briefly later on to this question of comparative risks. For now, assume with me that risks from derogation are counted as substantial.

So then there we are. Your assignment of a failing grade to the Constitution as it stands might issue in a call either for derogation or, alternatively, repair. (“Repair” is always here meant to imply “without derogation yet.”) A call for repair is thus not tantamount to a cry against fidelity. Bearing these points in mind, many readers may share my own sense (and Klarman’s, too) that the full-bore Antifidelity stance, the call for a full and immediate suspension of the American political habit of

obedience to the Constitution, is truly radical, rarely met on the American academic scene.³⁶

Is *The Framers' Coup* intended, and is it serviceable, as a full-bore Antifidelity brief, a call for release of American politics from any and all sense of answerability to substantive constitutional constraints?

III. KLARMAN'S OLDER SCHOLARSHIP AND *THE FRAMERS' COUP* COMPARED

It turns out, interestingly, that some kinds of constitutional fault-finding point more insistently than others toward the more radical remedy of derogation from fidelity, *and* that a sorting of complaints into those two piles—"requires derogation," "receptive to repair"—corresponds with a marked difference in emphasis and focus between Klarman's older scholarship and *The Framers' Coup*. Where the older work is strongly centered on a complaint of constitutional-legal entrenchment that only an overthrow of the substantive constitutional traces can cure, the newer book has very much and maybe foremost on its mind a desanctification of the Framing, thus removing or reducing an obstacle that Klarman might see standing in the way of present-day movement toward a major constitutional fix-up.

A. CONSTITUTIONAL FAULTS AND THEIR FIXES (EXTREME NUTSHELL EDITION)

Complaints against the Constitution's fitness as it stands to serve as American democracy's basic law can refer either to the Constitution's content or to some past process of events by which that content was fixed. Complaints against content can go either to form or to substance. On the side of form we may see a concern about abstraction running to vagueness. Too many clauses, the complaint would run, use language that can be read to say just about anything anyone might ever want to make it say—no doubt unavoidably in the reach for wide acceptance but still turning fidelity into an instrument of manipulation of our politics by illusive deployments of constitutional arguments. (We should

36. See Frank I. Michelman, *Why Not Just Say No: An Essay on the Obduracy of Constitution Fixation*, 94 B.U. L. REV. 1143, 1149–52 (2014) (explaining and documenting this claim); Klarman, *Antifidelity*, *supra* note 18, at 382 (“[T]he anticonstitutionalist approach has obvious (or at least apparent) costs, which most scholars seem unwilling to bear.”).

here recall *Coup*'s parting protest against use of the Constitution in the defense of interests that could not prevail in a straight-out merits argument.) For those who subscribe heavily to the vagueness complaint, release from fidelity (equivalently, a purge of all substantive content from the Constitution) must figure as the only plausible cure.

Once beyond vagueness, constitutional content may be found defective by reason of conflict with preferred values and ideals (in this Constitution, the right to bear arms, for some) or mechanical or practical malfunction (the electoral college, for some). Objections of these kinds are curable by repair. Holding to them does not yet commit you to the cause of Antifidelity, which could well strike you as overkill depending on how you sorted out and weighed the prospects and risks of either remedial course.

We turn to faults of origin, defects in the process of Constitution-creation. You have just read through *The Framers' Coup*, let us say, and your faith in the Constitution's presumptive soundness for present use has been shaken by facts presented there. This new learning of yours could work in tandem with content-based discontents you already held, to stir you into a drive for major constitutional repair work. With vision cleared by the newly presented evidence, you are now disposed to agitate for a constitutional convention, although not yet for suspension of fidelity.³⁷

There remains for mention one further major ground for Antifidelity, one that it seems must apply to any possible

37. Might you possibly conclude that the process of the Constitution's creation was so irrational or arbitrary, so devoid of public motivation and public reason, so deviant from procedural norms of legitimate lawmaking—fair inclusion of affected constituencies, transparency, legality—as to forfeit any claim to the character of publicly binding law by which any body of citizens could rightly purport to constrain any other body? If so, then that might strike you as a ground of objection—you would call it the Constitution's natal lack of legitimacy as law—for which, you might think, only derogation from fidelity to it could serve as an adequate remedy. I will not here say more about this possibility, because Michael Klarman has himself disavowed it as a part of a case against fidelity today. He has rather allowed that a natal lack of legitimacy can be, and in American history has been cured by subsequent widespread acceptance in fact of the Constitution as American basic law. See p. 313: "In the end, the charge of procedural irregularity would have to be adjudicated by the people. What would they [at the ratification stage and thereafter] make of the Constitution written for them in Philadelphia?"; Klarman, *Constitutionalism*, *supra* note 17, at 184–85 ("[O]ur Constitution plainly was, at its inception, an illegal document. Yet arguments to this effect today would get one nowhere in public debate, much less in a court of law. The reason is that the ultimate rule of recognition is public acceptance." (citations omitted))

constitution. We have called it the objection of entrenchment. Entrenchment—the constitution’s character of antecedent bindingness until changed on political actions “under” it—is the indispensable core of constitutionalism, every constitution’s indelible original sin. If you hold to the view of the absolute non-acceptability of any subjection of the choices of current political majorities to the dictates of an antecedently binding law, then this essential feature of any constitution worthy of the name will supply for you the ground of a fully adequate case against fidelity. It will, moreover, be a ground that no sort of constitutional repair can cure.³⁸ Antifidelity will be the only way out.

From the preceding brief survey, it seems we can draw the following takeaway. Out of various possible heads of complaint against our Constitution’s worthiness to govern on the current American political scene, we have turned up two for which only derogation from fidelity could possibly serve as a cure. They are (1) susceptibility of unavoidably indeterminate constitutional clauses to prevaricative deployments in political argument, and (2) antecedent bindingness on rule by current majorities. All other objections concerning current content or process of formation can possibly be addressed by repair. We can put these observations to use in some comparisons between Klarman’s prior scholarship and his work in *The Framers’ Coup*.

B. THE PRIOR SCHOLARSHIP

A few representative quotations tell most of the story. First as applied to the Constitution of the United States:

Why would one think, presumptively, that Framers who lived two hundred years ago, inhabited a radically different world, and possessed radically different ideas would have anything useful to say about how we should govern ourselves today? This is the famous dead-hand problem of constitutionalism: Why should today’s generation be ruled from the grave?³⁹

38. Subject to certain reservations regarding the need for sufficient precision in expression, Klarman’s prior scholarship accepted as “justifiable on majoritarian grounds” a living majority’s right and power to subject *itself* (but not any posterity) to basic-law restraints against future temptations to act politically against, for example, freedom of expression. See Klarman, *Majoritarian*, *supra* note 25, at 507–08. I will not deal further here with this wrinkle in the antientrenchment position staked out in the prior scholarship.

39. Klarman, *Antifidelity*, *supra* note 18, at 381; see authorities cited in note 4, *supra*.

Then as applied to any and all possible constitutions: “The problem of cross-temporal majorities renders suspect all of constitutionalism.”⁴⁰ “Dead hand” and “entrenchment” are Klarman’s twin names for this objection to the subjection of a current political representative majority to an antecedently binding law. And since subjection to rule by freewheeling judges is no more democratically acceptable than subjection to rule by dead framers, Antifidelity beckons as the way to avoid either.

Such is the central burden and drumbeat message of the older scholarship. The rest goes largely to rebuttal of attempts to evade or override the objection to entrenchment. (I do not thus mean to make light of this work, which is formidable, resourceful, and enlightening.) Among the failed evasions, in Klarman’s view, are ideas of the Constitution’s origin as an autonomous act of authorship by the people of the rules for their own political life,⁴¹ and then of its susceptibility to cross-generational updating whether by non-formal amendment⁴² or by interpretation.⁴³ Among the failed attempts at override are ideas of the Founding’s claim to some “special normativity” that would warrant our subjection to its wisdom;⁴⁴ of the containment within the very idea of democracy of a commitment to protection of minority rights;⁴⁵ and of a people’s paramount need for preservation of their sense of identity and integrity over time,⁴⁶ for a symbolic expression of “national unity,”⁴⁷ for a common platform for civic education,⁴⁸ or for a fallback law by which to settle otherwise intractable political disputes.⁴⁹

C. NORMATIVE TRACES IN THE FRAMERS’ COUP

The prior work of Klarman’s we have just been reviewing is legal scholarship distinctly of the type called “normative” (not always with intention of endearment), composed of arguments

40. Klarman, *Majoritarianism*, *supra* note 25, at 509.

41. We can subsume here both of what Klarman calls the “agency” and “precommitment” accounts of constitutionalism. *See* Klarman, *Constitutionalism*, *supra* note 17, at 146, 152.

42. *See* Klarman, *Antifidelity*, *supra* note 18, at 387.

43. *See id.*

44. *Id.*

45. *See* Klarman, *Constitutionalism*, *supra* note 17, at 160.

46. *See id.* at 163 (naming this the “continuity” justification).

47. *Id.* at 169.

48. *See id.* at 175.

49. *See id.* at 179 (calling this the “finality” justification).

about what sorts of laws we should and should not be trying to make, enforce, or obey. In *The Framers' Coup*, by contrast, objective historical-factual accounts come front and center, with normative insertions few and far between. On the question of a choice between derogation and repair as courses of response to the Constitution's defects, the import of these few remarks is uncertain, but on balance they point, as I think, toward repair.

We can start with that introductory battery of leading questions to which we have already twice paid heed:

How ought one to think about [constitutional] provisions continuing to bind Americans today despite their inconsistency with modern democratic norms? More generally, how should one feel about a modern democratic society's being governed by a [virtually non-amendable] constitution that was written 225 years ago by people possessed of very different assumptions, concerns, and values [from those today prevailing]? (pp. 9-10)

What is the controlling objection there? Is it the bare fact of entrenchment, pointing to derogation from fidelity as the only sufficient remedy? Or is it anachronism, fixable by repair (including of the amendment rule to assure better updating going forward)?

From there we can skip to the end, the book's parting shot to which we have also adverted above:

In the final analysis, the Constitution—like any governmental arrangement—must be defended on the basis of its consistency with our basic (democratic) political commitments and the consequences that it produces. That it has been around for a very long time or that its authors were especially wise and virtuous should not be sufficient to immunize it against criticism. . . . As Jefferson would have recognized, those who wish to sanctify the Constitution are often using it to defend some particular interest that, in their own day, cannot be adequately justified on its own merits (p. 631).

That is where Klarman leaves us. He tells us there the two sole bases on which we ought alone to think of defending the Constitution, if defend it we will—those being (1) consistency (or not) with current commitments and (2) consequences of submission. As between defending or not, though, how then shall we decide? *Not*, Klarman tells us—and this surely is the chief advisory burden of his book's account of the Constitution's history of origination—on the basis of adulation of the Framing.

And if we try to get beyond that “not?” Then, I think the key word in Klarman’s advice must be “consequences.”

Defense of the Constitution, if that will be your choice, carries the consequence that then we must act politically in the mode of fidelity to it, despite doubts we might have about the fitness of its content to our values and needs, and furthermore despite the dangers from prevaricative deployments of the Constitution in political argument. But the opposite choice, for a dissolution across our country of the culture of constitutional fidelity, has consequences also, and Klarman must be read, I think, to mean that those, too, will have to be weighed in any choice about “defending” the Constitution or not.

That brings me, then, to one more normatively suggestive passage to which I want to call attention. *The Framers’ Coup* carries what might almost be called a kind word from Klarman toward judge-led engineering of constitutional reconstruction, as enabled by the indeterminacy of application of some key constitutional clauses. Klarman recalls the great shift in judge-declared constitutional-legal doctrine brought on by New Deal responses to the Great Depression. There then occurred, he writes, a “revolution” in constitutional law but “without any formal constitutional amendments to authorize it” (p. 624). And that, he adds, is “as it should be: Every generation must govern itself” (p. 624) and the barriers posed by Article V have prevented the generations from doing so by formal amendment. But “govern itself” here seems somehow to have merged with government by judiciary. Through gates of ambiguity the Framers luckily left open, judges ride to the rescue—not all on their own, of course, FDR plays his part—but still a key force in the array. “Without the open texture of the constitutional provisions [in question] and the Supreme Court’s latitudinarian interpretations of congressional power,” Klarman rounds off this passage in his book, Americans would had have little choice but to “scrap” the Constitution as of “antiquarian interest” only (p. 624).

Now, to be sure, Klarman is not here out advocating loudly on behalf of freewheeling judicial constitutional reconstruction as the first choice of a democracy for basic-law updating. And yet it seems his opposition to that prospect may have softened, to a degree, by comparison with some earlier positions. Rescue by judges now is expressly noted by him as a possible path of escape from possibly lethal civic breakdowns, for the availability of which

Americans have had reason to be grateful. And grateful, indeed, precisely because their only other option would have been a “scrapping” of the Constitution—the same outcome, it seems, under a different name, as the one at which Antifidelity points. What it all comes down to seems to be this. There may be times when we (Klarman along with the rest?) will see the path of high-handed judicial rewrites of constitutional law as less bad than further endurance of dangers to the commonwealth and less bad, too, than the “scrapping” alternative.⁵⁰

IV. CONCLUSION

It is from Klarman’s prior scholarship that I draw that trilemmatic casting of the question. We choose one from among three options: dead-handed rule from the Framers, anachronistic and democracy-flouting; high-handed rule from the judges, erratic and democracy-flouting; or else rejection altogether of pretense of constitutional fidelity. The overt leaning of Klarman’s thought was that among those options the third, Antifidelity, was the least bad. Granting what he (somewhat teasingly) called “obvious (or at least apparent) costs, which most scholars seem unwilling to bear,” that choice seemed to him the only one loyal to an overriding American commitment to democracy, if that is what we really meant to sustain.⁵¹ *The Framers’ Coup*, I have been saying, seems to me to carry signs of a diminished readiness on Klarman’s part to make a like declaration now.

If so, is there anything we can say about why so? We can speculate about whether some part of a cause might lie in Klarman’s experience in researching and writing *The Framers’ Coup*, digging out and pondering his facts and then writing up the results in historical-narrative form. Traveling thus day to day and

50. For Klarman this might hold all the more so given his view, already at work in the prior scholarship and much amplified in his three intervening book-length works of American constitutional-legal history, that “judicial review has only marginally counter-majoritarian potential [because judges] are part of society, and thus are unlikely to interpret the Constitution in ways that radically depart from contemporary popular opinion.” Klarman, *Constitutionalism*, *supra* note 17, at 192; see MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2013); MICHAEL J. KLARMAN, BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT (2007); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

51. Klarman, *Antifidelity*, *supra* note 17, at 382–83.

2018]

BOOK REVIEWS

127

hand in hand with the Framers, reliving with them their quest for unity, their horror of breakup—their willingness, then, to bend on principles, yield on interests, gamble on artifice and abstraction—perhaps has had its effect. The Framers’ doggedness in the search for solutions that all the main constituencies could live with (deficient as were their imaginings of constituencies who counted) might register with us as their generation’s anticipation of an incessant deep problem of togetherness, for the management of which Americans have come to depend on a faith in the Constitution.

A highly diverse and broadly free society like ours seeks constantly its basis for civic unity. We may wish for that basis not to be visceral only. We may rather hope for something more discursive, more grounded in reasons we can talk about, as a marker for the regime’s continued wide acceptability overall. The terms of that discursive marker—not all, but some key ones—would have to be sufficiently abstract to evade foreclosures of matters of moral or practical moment on which agreement does not yet exist throughout the constituencies. Call that marker, as Seidman has suggested, a “common vocabulary for our disagreements,” a “site for contestation” if not a “source for answers;” call it, as Levinson does (or once did, before he took back his John Hancock) the sign of our mutual engagement to “take political conversation seriously.”⁵² Just as such and as nothing more, the Constitution still may serve as our society’s sovereign reminder and pledge for the project of civic union. Mark Tushnet puts it well: As long as we are able, by social observation or convention, to identify some body of principles as our country’s fundamental law, “vigorous disagreement over what those principles mean for any specific problem of public policy does not mean we as a society have no fundamental law in common.”⁵³

Of course, we would not necessarily have to treat the mandates, such as they are, of this agreed contestation site as laws in the ordinary sense, to be judicially policed and enforced. But still court-like institutions could possibly play a useful part in the process—serving as trusted interlocutors, even as provisional

52. SEIDMAN, *supra* note 18, at 142; SANFORD LEVINSON, CONSTITUTIONAL FAITH 193 (1988).

53. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 14 (1999).

referees for constitutional debate, without trying or pretending to be the sole or final deciders. And again of course (and as Michael Klarman might be the first to point out) you do not necessarily need a codified “constitution” to fill this public space of a loose but still binding discursive convention.⁵⁴ But a codified constitution *might* be what has, in fact, come in your country to occupy this space in civic life. If that were in fact the case, you might think twice about issuing calls for its displacement, faulty as it presently surely is, before you had the replacement for it securely in hand.

Be all of that as it may: Insofar as *The Framers’ Coup* might by anyone be read as a brief in support of political action toward any Constitution-related end, the book’s clearest implicit call is for constitutional repair. Levinsonian agitation for a new constitutional convention can certainly make good use of it. Boosters of wide-bodied judicial constitutional reconstruction need not be overly cowed by it. For the cause of clear-sighted American historical self-understanding, *The Framers’ Coup* deserves to be everywhere. For the cause of Antifidelity, it is neither here nor there.

54. Cf. Klarman, *Constitutionalism*, *supra* note 17, at 184 (“In other regimes, tradition and custom establish the rule of recognition.”).