

IN WHAT SENSE A COUP? A REVIEW OF *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION*
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In his magisterial history of the fraught and compromised origins of the Constitution, Professor Klarman explores in absorbing detail all the dimensions of the tumultuous events that led to the drafting, ratification, and amendment of the Constitution by the Bill of Rights. The book aspires, in the author's words, to put the entire history of these developments "between two covers."¹ This vast panorama of issues, actors, and historical context unfolds before the reader as each of the crises of the years from 1787 to 1791 comes into focus. To forestall any sense that the result was foreordained, Klarman regularly reports on the anxieties of the Framers, particularly James Madison, who worried that the whole effort would collapse, followed shortly thereafter by the descent of the country into anarchy and civil war, and then partition of the country among foreign powers and a return to monarchy. Madison was not alone in these apprehensions, as Federalists and Antifederalists alike recognized the weaknesses of the general government under the Articles of Confederation.²

Klarman invites the reader to relive the making of the Constitution in all its contingencies, some predictable and perennial, like the opposition between large and small states, some nearly forgotten, like disputes over navigation of the Mississippi River. The latter arose from southern suspicions that a commercial treaty with Spain would bargain away rights of settlers beyond the Appalachians to navigate on the Mississippi River.³ Klarman gives the reader the good, the bad, and the ugly: the good in the farsighted vision of the Framers; the bad in their tolerance of slavery and general distrust of democratic government; the ugly in the often cynical processes of ordinary politics that led to ratification of the Constitution. If

♦ George Rutherglen joined Virginia's law faculty in 1976. He teaches admiralty, civil procedure, employment discrimination and professional responsibility. He is grateful to have spent so many years with Prof. Klarman as a colleague and as a scholar, from whom he has learned so much, exactly in proportion as he has initially disagreed with him.

¹ MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* x (2016).

² *Id.* at 69–72.

³ *Id.* at 48–69.

you want a history unencumbered by hagiography of the Framers—and by the same token, of their Antifederalist opponents—this is the book for you. And it should be the book for everyone who wants a comprehensive and unvarnished look at the framing of the Constitution.

If Klarman does not come to praise the Framers, neither does he come to bury them. Like most historians, he accords Madison a preeminent place in the debates over the Constitution. Madison emerges from his account with his reputation intact as the genius behind the Constitution, although something of an evil genius in his adamant opposition to popular government. Klarman also acknowledges that Madison might have skewed the historical record in his favor by his prolific correspondence and his role as the principal chronicler of the otherwise secret deliberations of the Constitutional Convention.⁴ Still, Klarman observes that at the outset of the convention, its agenda “had pretty much existed only in Madison’s head,”⁵ and that throughout the process of framing and adopting the Constitution, Madison “played a critical role at almost every stage of this process.”⁶

Klarman’s most serious qualms about the Framers begin with the words that appear at the very beginning of the Preamble: “We the People.” He finds the Framers’ appeal to the people to be instrumental, if not entirely opportunistic. They had little hope of getting the state legislatures to ratify the Constitution since the increased powers of the national government came mainly at the expense of the states and state legislatures. That left ratifying conventions as the most likely means of securing approval of the Constitution, and even that course, as events bore out, proved to be a very close call. On a higher level of principle, republican political theory at the time held the people to be the ultimate source of political power and the only one sufficient to create national law that would be supreme over state law.⁷

But even though the Framers accepted these propositions in the abstract, their deliberations and proposals were rife with distrust of “the People.” Edmund Randolph of Virginia made a typical remark: “Our chief danger arises from the democratic parts of our constitution.”⁸ Klarman recounts in great detail the many provisions of the Constitution designed to insulate government from the people, foremost among them the allocation of seats

⁴ *Id.* at 135 n.*.

⁵ *Id.* at 536.

⁶ *Id.* at 596.

⁷ *Id.* at 312–13, 415–16, 603.

⁸ *Id.* at 209 (quoting James McHenry, Report (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 26 (Max Farrand ed., rev. ed. 1966)).

in the Senate, the indirect election of senators, and their comparative lengthy term of office. Randolph again observed that “[t]he democratic licentiousness of the state legislatures proved the necessity of a firm Senate.”⁹ The same checks against democracy were necessary to protect the interests of the property holding classes, from which virtually all the Framers were drawn. These elites had become alarmed by the issuance of paper money in the 1780’s and by Shays’s Rebellion.¹⁰ The prohibitions in Article I, Section 10, against impairing the obligation of contract, issuing bills of credit, and making paper money a form of legal tender were all directed at these populist measures by the states. This critical theme in Klarman’s book has led some reviewers to see it as an updated and sophisticated version of Charles Beard’s “An Economic Interpretation of the Constitution of the United States.”¹¹ He duly attends to this charge in a careful account of his differences with Beard.¹²

We can take him at his word and ask a different question. Just as Klarman has doubts about the Preamble, we can have doubts about his title. In particular, in what sense was the adoption of the Constitution a “coup”? Klarman apparently takes the primary sense of the term to be a “coup d’état”: a sudden forcible overthrow of the government and a seizure of power by a small group of conspirators.¹³ But the broader meaning of the term, taken from the original French, is a sudden, successful stroke.¹⁴ This sense does not exclude the other one, but it opens up the possibility of a more charitable interpretation of what the Framers accomplished. A coup in this sense could be a stroke of genius, in addition to simply a coup d’état. The Framers could both have displaced the system of government established by the Articles of Confederation and have done so through inspired political thought and action. Klarman might well resist this second sense of this term, since it could lead to the hagiography of the Framers that he sets himself against.

Yet neither sense of the term appears to be quite right. The entire series of events that led from the initial call for a constitutional convention to the

⁹ *Id.*

¹⁰ *Id.* at 88–101.

¹¹ Published in 1913. See Matthew C. Simpson, *The Founding Fathers’ Power Grab: Was the Constitution Designed to Make the United States Less Democratic?*, THE NEW REPUBLIC (Sept. 29, 2016), <https://newrepublic.com/article/137310/founding-fathers-power-grab>.

¹² KLARMAN, *supra* note 1, at 376–77.

¹³ “[A] sudden and decisive stroke of state policy; *spec.* a sudden and great change in the government carried out violently or illegally by the ruling power.” *Oxford English Dictionary Online Edition*. 2018. <http://www.oed.com>. (last visited July 12, 2018).

¹⁴ “[A] blow, stroke.” *Id.*

ratification of the Bill of Rights was drawn out over several years, with periodic crises that could have brought the process to an abrupt and untimely end. It was not as if the Framers enlisted military force to surround the Continental Congress and then seize power from it. If the Framers accomplished a coup in any sense, they did it in slow motion.

By referring to a “coup,” Klarman seems to be making a point different from the direct implications of the term: a point about the antidemocratic procedures that the Framers followed and about the antidemocratic proposals they adopted. The procedures they followed were disingenuous and hypocritical, with an appeal to “the People” at the same time as they were excluding ordinary people from the secret deliberations of the convention and manipulating them in the ratification process. The substance of the Constitution pushed this strategy forward to the operation of the federal government as a whole, in provisions like the composition of the Senate and the Electoral College. This review explores both of these features of “The Framers’ Coup” and then draws out the implications that a coup in the sense of an antidemocratic exercise of power has for current interpretation of the Constitution.

I. HOSTILITY TO DEMOCRACY

The Constitutional Convention originated in a call to revise, not replace, the Articles of Confederation. At the Convention, the Framers almost immediately abandoned this modest objective and transformed their commission into one of replacing the Articles in their entirety. The Framers, already drawn from the elite classes, worked to prevent anyone else from knowing of their deliberations. After the Convention proposed the Constitution, the Framers exploited the prevailing consensus that the Articles suffered from severe defects to force an all-or-nothing choice upon the ratifying conventions. Madison, ever present at critical moments, deftly removed from the Bill of Rights any structural amendments that would have weakened the powers of the federal government or restructure it in a more populist direction.¹⁵ In a telling detail, Klarman notes that Madison removed the word “expressly” from the Tenth Amendment, making clear that Congress enjoyed implied powers under the Constitution that it did not have under the Articles.¹⁶

¹⁵ KLARMAN, *supra* note 1, at 592.

¹⁶ *Id.* at 579.

The Framers plainly failed to accept, and in fact, rejected principles of democratic transparency. But we have to ask how, if at all, that compromised the legitimacy of their actions. Their procedures did, of course, depart from those for amending the Articles, which required unanimous approval of the states.¹⁷ Article VII of the Constitution required the ratification of only nine states for the Constitution to go into effect, although those nine could only bind themselves. That put great pressure on the few remaining holdouts to ratify or to be excluded from the union. Rhode Island was the most notorious holdout, refusing to ratify the Constitution until 1790. But the New York and North Carolina ratifying conventions were still in session after the Constitution had gone into effect, after ratification by New Hampshire and Virginia as the ninth and tenth states. Dispensing with the Articles' unanimity requirement gave extra force to the all-or-nothing choice that the Framers presented to the ratifying conventions. Those that ratified last, after the Constitution went into effect among the ratifying states, faced a hostile federal government with the resources to coerce ratification, for instance, by threatening a trade war, as the Antifederalists in Rhode Island soon discovered.¹⁸

The Framers' strategy dispensed with any pretense that the Constitution followed in a chain of authority from the Articles. Although Antifederalists soon abandoned arguments that the Constitution was an unauthorized replacement for the Articles, they objected strongly on this ground while the acceptance of the Constitution still remained in doubt.¹⁹ What weight did those objections have? Klarman seems to come around, as the Antifederalists did, to something like the modern view that replacement of one legal system by another does not require pre-existing authority. In the words of H.L.A. Hart, "all that succeeds is success."²⁰ In Hart's version of legal positivism, success in changing the foundations of a legal system requires acceptance by the officials of the system and obedience by the general population to the rules then promulgated by the officials.²¹ The elitism of the Framers, on this theory, did not detract from the authority of what they accomplished but assured it by obtaining the assent of a significant proportion of the legal elite. Objections to the legitimacy of the Constitution faded away as Antifederalists accepted it as the basis for their

¹⁷ ARTICLES OF CONFEDERATION OF 1781, art. XIII.

¹⁸ KLARMAN, *supra* note 1, at 516–30.

¹⁹ *Id.* at 619–22.

²⁰ H.L.A. HART, *THE CONCEPT OF LAW* 116–17, 153 (3d ed. 2012).

²¹ *Id.* at 116–17.

own exercise of federal power in the early decades of the nineteenth century.

No fundamental change in a legal system can be expected to take place strictly according to the terms for amendments under the status quo ante. The Framers' rejection of the Articles of Confederation and their terms for amendment cannot simply be attributed to their antidemocratic tendencies. The veto that any state could exercise over amendments under the Articles, and particularly the stubborn independence of Rhode Island, effectively precluded that avenue of constitutional change. To be sure, Rhode Island was also a hotbed of populist agitation for paper money and debtor relief, but that hardly made the procedure for amendment under the Articles a model of democratic government. Twice under the Articles, a single state—Rhode Island and then New York—blocked ratification of an amendment approved by all the other states.

If entrenchment is the measure of departures from democracy, the Articles were effectively more entrenched and less democratic than all but one of the provisions in the Constitution—equal representation of the states in the Senate.²² That provision can be abrogated only with the consent of the state “deprived of its equal Suffrage in the Senate.”²³ Klarman regards this provision as one of the great antidemocratic defects of the Constitution, along with the related provision for representation of states in the Electoral College.²⁴ Even so, the Constitution does not take entrenchment nearly as far as the Articles, which gave all states exactly one vote in the Continental Congress and entrenched that provision, and all the others, by requiring unanimous consent of the states to any amendment.²⁵ And, again, Klarman accepts the consensus of historians that the Constitution could not have been approved by the Convention, let alone ratified, without the Connecticut Compromise on representation of the states in the Senate and the House.²⁶ He finds the roots of this compromise in the equal representation that the small states received under the Articles, which then became the model for voting at the Convention and for the

²² This does not count the entrenchment of the provision on importing slaves, but it expired by its own terms in 1808. U.S. CONST. art. V.

²³ *Id.*

²⁴ *Id.* at art. II, § 1, ¶ 2. This provision is not explicitly protected from amendment without state consent, but a critical minority of 13 states that benefit from this provision could block any amendment to this effect. And they would, of course, have no incentive to support such an amendment.

²⁵ ARTICLES OF CONFEDERATION OF 1781, arts. V, XIII.

²⁶ KLARMAN, *supra* note 1, at 200–01 & n.*.

terms of ratifying the Constitution itself.²⁷ Once ingrained in the national government, equal representation of the states could not be displaced.

By the same token, the baseline for judging the Framers' procedures to be antidemocratic cannot be set by the Articles or by the existence of some feasible, more democratic, alternative available to the Framers at the time. Klarman ultimately appeals to our contemporary views, finding the principle of "one person, one vote" to be basic to our sense of democracy.²⁸ To his credit, he does not attempt to impose a "presentist" conception of political theory on the Framers, retrospectively holding them to our views centuries later. In his description of what the Framers did in their time, he remains agnostic about how it should influence what we should do in ours. Most readers would probably agree with equal representation in voting and apportionment as an axiom of acceptable democratic procedures today, assimilating "one person, one vote" to the rejection of the racist and sexist views of the Federalists—and no doubt Antifederalists as well. To this we might add the modern acceptance of paper money and the need for emergency debtor relief.²⁹

Klarman might well be right about this, but the minimalist strategy that he adopts of accepting only the least controversial principles of current democratic theory creates problems of its own. If, for example, a new constitutional convention were convened today, no one could safely predict exactly what it would propose and whether its proposals would be ratified by the necessary three quarters of the states.³⁰ That was, as Klarman astutely points out, exactly the objection of the Federalists to a second constitutional convention and to conditional ratification of the Constitution.³¹ They worried that, absent unconditional acceptance of the Constitution, all bets would be off. And today, just as much as in the Founding era, we could not expect the delegates to a constitutional convention to put themselves behind some kind of "veil of ignorance" that hid their own interests from themselves. They would not place themselves in an "original position" in which they adopted only the widely shared principles of an overlapping consensus.³² They would be subject to all the

²⁷ *Id.* at 202.

²⁸ *Id.* at 625–26.

²⁹ The first was rejected in the Legal Tender Cases, *Knox v. Lee*, 79 U.S. 457 (1871) and *Juilliard v. Greenman*, 110 U.S. 421 (1884), and the second during the Depression in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

³⁰ U.S. CONST. art. V.

³¹ KLARMAN, *supra* note 1, at 536–39.

³² JOHN RAWLS, *A THEORY OF JUSTICE* 15–19 (rev. ed. 1990).

forms of ordinary politics, conflicting interests, and devious strategies that Klarman documents so well.

II. THE JEFFERSONIAN PRINCIPLE

Klarman does not so much deny this indeterminacy as embrace it, following a famous passage in a letter by Thomas Jefferson on revision of the Virginia Constitution: “Each generation is as independent as the one preceding it, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness”³³ This principle makes constitutions good for this day and generation only. It is basically inconsistent with constitutionalism as an established structure for governance. But again, the problems run deeper than escaping the dead hand of the past. No one would deny, and probably could not consistently deny, the virtues of stability in the basic structure of government. Even Jefferson supposed that generational revision of a constitution would amount to “wisely yielding to the gradual change of circumstances, of favoring progressive accommodation to progressive improvement.”³⁴

Moreover, as Jefferson also recognized, determining what a majority of the current generation wants is itself a fundamental choice: “But how collect their voice? This is the real difficulty.”³⁵ He proposed a fixed hierarchy of wards, counties, and general government, presumably extending to the federal level.³⁶ To neglect this issue would be inconsistent with democratic government itself, which presupposes a structure of rules that determine who is eligible to vote, how voters and representatives are apportioned, and what the procedures are for legislation and governance. No system of representative democracy can get off the ground without some provisions like those to be found in Article I of the Constitution specifying how a bill becomes law.³⁷

Such provisions have their own entrenching effect by conferring advantages and disadvantages on different groups, and by inviting the groups initially with power to gain more. There is no getting away from the normative presuppositions of any form of government, democracy

³³ Letter to Samuel Kercheval (June 12, 1816), in THOMAS JEFFERSON, WRITINGS 1402 (Library of America 1984).

³⁴ *Id.* at 1401.

³⁵ *Id.* at 1402.

³⁶ *Id.* at 1399–1403.

³⁷ U.S. CONST. art I, §§ 1–9.

included, and the entrenching effects that selecting any one structure of government inevitably has. Klarman's vivid illustration of this point is in the far-reaching effects of equal state representation under the Articles of Confederation, which led directly to the Senate and the Electoral College we now have.

The Jeffersonian principle that each generation has the right to decide its own form of government does not dispense with these normative and consequentialist questions. At best, it evades them. It could be taken simply as a truism: that every generation could possibly exercise the power to overthrow the existing form of government. This formulation leans very heavily on the difference between a conceptual possibility—if the people decided to overthrow the government, it would be gone—and a live possibility—the people actually have a realistic opportunity to make this decision. In the latter form, it cannot generally be true. Only a few generations in our history have been faced with this fateful choice.

But in either form, the principle does not reach the further question whether the people should exercise the right to change their government. That is the real question that Jefferson evaded. The cost of constitutional change might not be worth the benefits, either because the process itself would lead to civil strife or because the resulting government would be worse than what it replaced. The proposition that this gamble should be taken every twenty years or so is not, to use Jefferson's own language in the Declaration of Independence, "self-evident."³⁸ It becomes so only on optimistic assumptions about the likely costs and benefits of the process. Imponderables abound at every turn.

Hard as it is to extract an "ought" from an "is,"—or for historians, what we should do now from what was done then—Klarman's account could yield either the Jeffersonian conclusion or exactly the opposite. The Federalists themselves thought they were fantastically lucky to have secured adoption of the Constitution, some of them attributing their success to divine intervention.³⁹ When the country revisited the constitutional principles adopted in the Founding Era, the result was the Civil War, which killed more Americans than all the other wars in our nation's history combined, and which could at several points have turned into a victory for the southern secession.⁴⁰ Could the enormous costs of that conflict, not to mention the continuation of slavery for the better part

³⁸ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³⁹ KLARMAN, *supra* note 1, at 539–40.

⁴⁰ JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 854, 857–58* (1988).

of a century, have been forestalled through a more democratic process of regularly amending the Constitution? It is hard to know how even to begin to answer this question.

Contingency on a smaller scale and with less violent immediate consequences can be found, as Klarman emphasizes, throughout the process of framing and ratifying the Constitution. It all would have failed if any of several conditions had not been met: if George Washington had not attended the Constitutional Convention and lent his enormous prestige to it; if the Connecticut Compromise between large states and small states had not been reached; if the Framers had not accepted the continuation of slavery; if the ratifying conventions in Virginia and New York had come out differently, which they probably would have had they been held a few months earlier; and if James Madison had not changed his mind about the Bill of Rights, been elected to Congress, pushed it through to ratification, and in the process omitted most of the structural provisions in the amendments favored by the Antifederalists. Klarman's book has the great virtue of not making any of this look easy, even when we know what happened in the end.

His narrative raises the question—without offering an answer to it—of why we should go along with Jefferson in urging that our nation go through similar crises regularly every few decades. Jefferson's advice is all the more puzzling coming from someone who did not participate in the Constitutional Convention because he was the ambassador to France, where he witnessed the first stages of the French Revolution.⁴¹ Perhaps this is not a recommendation, but a factual claim: that fundamental constitutional change regularly recurs with all its attendant costs. Any such claim of cyclical recurrence would, of course, have to extend beyond the single example of the U.S. Constitution and would raise interpretive questions of its own in assessing what counts as fundamental change and what its costs are. Yet another alternative, one that aligns with Klarman's distaste for making the Framers the prophets of constitutional law as our secular religion, makes Jefferson's principle into an interpretive warning: Do not give too much weight to the Constitution out of reverence for the Framers. The next section takes up this perspective on the lessons of the Founding era.

⁴¹ That did not stop him, however, from recalling in his memoirs that it all would have come out differently if the French had followed his advice. Thomas Jefferson, *Autobiography*, in THOMAS JEFFERSON, *WRITINGS* 85 (Library of America 1984).

III. IMPLICATIONS FOR INTERPRETATION

Klarman's catalogue of the antidemocratic provisions in the Constitution poses especially severe problems for originalist interpretation of the Constitution. Do originalists have to accept the Federalists' antipathy to democracy, at least as it has survived in unamended provisions of the Constitution? These extend beyond the composition of the Senate and the Electoral College to the several restrictions on state power in Article I, Section 10. More telling is the disdain frequently expressed by the Framers for the participation of ordinary people in government and their attempt to set up the federal government as one composed mostly of the elite. Should these antidemocratic tendencies become a touchstone for resolving uncertain issues of constitutional interpretation? Ironically for originalists, who espouse a conventionally conservative agenda, such distrust of the people would reinvigorate the case for judicial review to enforce individual rights. The familiar and accepted provisions for tenure of federal judges during good behavior, the supremacy of federal law, and the individual rights enumerated in the first eight amendments to the Constitution would all be given added force as the expression of the Framers' overriding intent to constrain majoritarian government.

Klarman obviously is no originalist, since he concludes his book with the admonition that "those who wish to sanctify the Constitution are often using it to defend some particular interest that, in their own day, cannot in fact be adequately justified on its own merits."⁴² Few constitutional scholars, however, would willingly concede that they have sanctified the Constitution, but would instead disclaim, with Noah Webster, any intent to opine that the Framers could "judge for future generations better than they can judge for themselves."⁴³ Yet conceding the fallibility of the Framers leaves open the question about the force of the Constitution itself. Absent an unlikely amendment to Article VI, the Constitution remains "the supreme Law of the Land." It therefore continues to constrain the ordinary processes of lawmaking, both in the states and in the federal government. We might not like how the Framers reached their compromises over the Constitution, or the compromises themselves, but that does not settle the question whether we should continue to be bound by them.

⁴² KLARMAN, *supra* note 1, at 631.

⁴³ *Id.* at 628.

Klarman takes a surprisingly meliorist view of how to reconcile the continued force of the Constitution with democratic principles.⁴⁴ Amendments have taken the edge off many of the antidemocratic provisions of the Constitution, notably the Thirteenth Amendment, which abolished slavery and therefore rendered the Three-Fifths and Fugitive Slave Clauses inoperative; the Seventeenth Amendment, which required direct election of Senators; and the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, which extended the franchise in a variety of ways. Changes in state law also extended the franchise so that it now approaches universal suffrage. Judicial decisions, beginning with the Warren Court, brought the principles of equality in the Fourteenth Amendment into effective operation, so that the Framers' views on race, sex, and apportionment of the right to vote have been discarded. Even the expansive interpretation of the Necessary and Proper Clause, which Klarman finds to have been a Federalist maneuver to enhance federal power, still had its good side in reconciling the country to the need for expanded regulation of an expanded economy. No doubt the same could be said of the New Deal decisions that further increased federal power over the economy. Only the composition of the Senate and the Electoral College remain immune to these developments.

Klarman endorses a strategy of minimal entrenchment, which finds the political commitments of the Framers to be more tolerable as they are more easily subject to revision.⁴⁵ This leads to a backhanded defense of progressive judicial activism as one way to counteract entrenchment. It might be an antidemocratic form of government but one better than being ruled by the dead hand of the past. This strategy, of course, applies to all decisions of the Supreme Court, regardless of how progressive they actually are. The Jeffersonian principle, by contrast, tries to preserve the power of each generation to choose by democratic means. In the process, it ends up diminishing both the disappointments and achievements of the Constitution, whose force would be diminished close to that of a statute.

The Constitution, on this view, would resemble another landmark of that era, the Judiciary Act of 1789,⁴⁶ which has been subject to far more amendments than the Constitution. It also has received far less of the adulation directed at the Constitution, although it is still celebrated as the

⁴⁴ *Id.* at 622–28.

⁴⁵ He has elsewhere defended this view in greater detail. Michael J. Klarman, *What's So Great About Constitutionalism?*, in *PRINCETON READINGS IN AMERICAN POLITICS* 81 (Richard M. Valelly, ed., 2009).

⁴⁶ Judiciary Act of 1789, 1 Stat. 73 (1789).

foundation of the federal judicial system.⁴⁷ Yet this example remains instructive because one of the central antipopulist features of the federal judicial system has remained a constant since 1789. It is diversity jurisdiction,⁴⁸ originally made available to the federal courts to protect creditors, particularly British creditors, from unfair treatment in state courts.⁴⁹ Diversity jurisdiction must be conferred by Congress and it can equally well be repealed by Congress. Yet it has become a fixture of the federal judicial system. Such is the force of tradition and established practice. If that holds for what some regard as an esoteric feature of federal jurisdiction, why shouldn't it hold more broadly? The cost of change might well outweigh any advantage gained from making the change.

Of course, that is an empirical question on which we have scant evidence, even with respect to particular issues such as the representation of the states in the Senate, and still less so with respect to the Constitution as a whole. Under a very simple model of assessing constitutional change by reference to the preference of the median voter, a number of variables complicate the analysis immediately: how preferences of the electorate are distributed around the median; whether the costs of transition are fixed or depend upon the magnitude of change from the status quo; and how much control key officials have in setting the agenda and how they exercise that power.⁵⁰ Further complexities ensue, of course, if constraints on democratic majoritarianism, such as protection of individual or minority rights, generate independent arguments for entrenchment. A constitution that entrenches least does not necessarily result in a regime that governs best.

In fact, on the plausible assumption that any change generates transition costs, the minimal level of acceptable entrenchment might be quite high. We can only tell as a matter of investigation, experiment, and historical experience. That lesson diminishes the significance of the Framers' antidemocratic tendencies. It could be that, despite their elitist motives, they hit upon about the right degree of entrenchment in our Constitution. Looking backwards to the origins of the Constitution does not tell as much

⁴⁷ An enduring pattern in the judicial history of the United States has been "the relative stability of the structure of courts established by the First Judiciary Act—at least as is based in the district courts and its apex in the Supreme Court." RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL JUDICIAL SYSTEM 26 (7th ed. 2015).

⁴⁸ *Compare* Judiciary Act of 1789 § 11 *with* 28 U.S.C. § 1332 (2012) (current codification).

⁴⁹ KLARMAN, *supra* note 1, at 166-67, 349-50.

⁵⁰ Michael D. Gilbert, Optimal Entrenchment of Legal Rules (May 17, 2017) (Virginia Law and Economics Research Paper No. 2017-10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2970164###.

about this question, as opposed to looking forward to experience under the Constitution. Perhaps this conclusion generally accords with an implication to be found in Klarman's book: that we should give no special reverence to the founding moment or to the Founders themselves. But once we see that entrenchment can be justified on other grounds, the question of how much continued force to give the Constitution, and the amendments enacted under it, becomes largely independent of the motives of the Framers, good or bad.

CONCLUSION

It is the great virtue of Klarman's book that he forces the reader to soberly reflect on the Constitution and its origins. We can still celebrate it, and the shrewd political judgment of the Framers, but we have to realize that their views and the Constitution they created and forced through the process of ratification ill accord with many of our contemporary values. Klarman brings this realization home, as starkly as possible, by allowing the Framers and their opponents to speak in their own words. The reader will often find their words understandable but strange, coming from a generation we might have revered but never knew. If what we hear makes us deeply uncomfortable—as it should—then his book has succeeded in its ambitious aims. For he has shown that the contingency that marked the process of drafting and ratifying the Constitution extends to our own time and our obligation to be bound by it.