

TIME, CHANGE, AND THE CONSTITUTION

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THE future is hard to predict and thus hard to control. A striking example of this principle in the context of *Brown v. Board of Education*¹ involves one of the central participants in that case, Justice Stanley Reed. According to some accounts, a few years after *Brown* was decided Justice Reed had some health troubles and was advised by his doctors that his long-term outlook was not good. In response to that advice, and possibly in order to spend what little time remained to him as pleasantly as possible, he resigned from the Supreme Court in 1957 after nineteen years of service.

It turned out that had the Justices marked *Brown* by forming a last man club, Stanley Reed would have won. He died in 1980 at the age of ninety-five, the only surviving member of the Court that sat in October Term 1953, and having lived longer than anyone else ever appointed to the Court. Things do not always work out as expected.

Much constitutional theorizing, especially with respect to *Brown*, is about the relationship between the present and the past. Indeed, if American constitutional theory has a cliché of clichés, it is the argument over whether the general acceptance of *Brown* means that it is now unacceptable to interpret the Constitution according to its original intention or understanding. The idea is that the drafters of the Fourteenth Amendment did not want to forbid separate but equal education, and more generally had no trouble with race-conscious but symmetrically discriminatory laws. *Brown* freed the country from the dead hand of the framers, the story goes, and a good thing.²

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¹ 347 U.S. 483 (1954).

² Now-Judge Michael McConnell acknowledges that *Brown*'s wide acceptance poses a challenge to originalism and argues in response that the Court's decision was consistent with the original understanding. Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 953-55 (1995).

But the present is the future's past, and just as Americans operate under constitutional constraints created in past times, so they often create—and even more often consider creating—constraints that will operate in the future. Every generation does some framing, changing the entrenched rules that bind ourselves and our posterity. For example, right now a Federal Marriage Amendment is an important issue in the American presidential campaign.³ Less public attention has been given to an amendment that would revise the continuity-of-government rules, but since the events of September 11, 2001, that technical topic has become a matter of considerable interest.⁴ This Essay takes the perspective of a present-day framer, rather than the more common perspective of one subject to the framers of the past. It seeks to apply some standard tools of constitutional theory to *Brown*, and the history of the Reconstruction Amendments more generally, and thereby derive four principles of interest to Americans who are considering changing their Constitution.

First, put not your faith in judges: American courts, and in particular the Supreme Court of the United States, are not reliably faithful agents of the people who make constitutional norms. One of the striking features of *Brown* is that no matter what one thinks the framers were seeking to accomplish with respect to public school segregation, the Court has spent a lot of time giving the wrong answer. If *Plessy v. Ferguson*⁵ was right then *Brown* was wrong, and the Court has been wrong ever since. But if *Brown* was right and *Plessy* was wrong, then the Court was wrong for at least the more than half-century between the two cases. Wrong about half the time is not good.

Moreover, many scholars believe that the Court's interpretation of the Fourteenth Amendment had gone off the rails long before

³ See H.R.J. Res. 56, 108th Cong. (2003).

⁴ In May 2003 the Continuity of Government Commission, jointly sponsored by the Brookings Institution and the American Enterprise Institute, recommended a constitutional amendment that would provide a mechanism other than special elections to fill the massive gaps in the House of Representatives that could be created by war or terrorism. Continuity of Gov't Comm'n, *Preserving Our Institutions: The First Report of the Continuity of Government Commission* 58 (2003). On September 4, 2003, the House of Representatives Committee On House Administration held hearings on the topic.

⁵ 163 U.S. 537, 551 (1896).

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Plessy, taking a very wrong turn in the *Slaughter-House Cases*.⁶ Different commentators have different views as to exactly what the error was, but there is good reason to believe that in that pivotal case the majority seriously misread the primary clause of Section 1, the Privileges or Immunities Clause.⁷

Debates over the details of the text may seem like hair-splitting, but one of the main themes of Michael Klarman's immensely important book, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, is that in close cases concerning race the Justices are strongly influenced by their own views on the merits of policy questions.⁸ While readers may respond that this is old news, it is then old news that judges, at least in those circumstances, are not faithful agents of the framers.

Klarman, though, suggests an important modification of judge-skepticism. Judges are after all judges, and in general have some loyalty to the rule of law. The result is the phenomenon, with which every law student becomes painfully familiar, of the judge asking whether the law gives enough room to reach the preferred result. Sometimes the answer is no, because the legal materials

⁶ 83 U.S. (16 Wall.) 36 (1872) (holding that a Louisiana statute restricting butchers as to where they could slaughter did not violate the Privileges or Immunities Clause of the Fourteenth Amendment).

⁷ One leading contemporary proponent of the view that the Privileges or Immunities Clause was designed to apply the protections of the Bill of Rights to the States says, citing *Slaughter-House*, "By 1873 the Supreme Court began dismantling the [Fourteenth] [A]mendment. In that year it nullified the privileges or immunities clause." Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 171 (1986). Akhil Amar, another member of the panel on which this Essay was originally presented, is another who believes that the Court's rejection of incorporation fundamentally misread the amendment. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998).

David Currie and I believe that *Slaughter-House* was if anything even more wrong; we maintain that the Privileges or Immunities Clause, not the Equal Protection Clause, was the primary anti-discrimination provision in Section 1 and hence the main vehicle for the constitutionalization of the Civil Rights Act of 1866. David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, at 342-51 (1985); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *Yale L.J.* 1385 (1992). If we are correct, then because of *Slaughter-House* neither *Brown* nor *Plessy* was even decided under the right clause.

⁸ "This book argues that because constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political contexts of the times." Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 5 (2004).

provide an unequivocal answer the other way. Although even that is not always enough to constrain judges, often it is. A modification of the principle that judges are not to be trusted is that if a framer must count on the judiciary, the clearer the provision the better.⁹

Put these two observations together and you get the first building block: expect that judicial fidelity to framer-made norms will depend on (1) the conformity of the norm with the judge's own view, (2) the felt importance of the issue, and (3) the clarity of the norm—the amount of wiggle room it leaves the judge.

The second building block of constitutional theory is that framers are well-advised to put more faith in structural provisions like the two-Senators rule than in substantive provisions like the First Amendment. Structural rules have a number of advantages, not least of which is that they frequently generate constituencies that then defend them. One Supreme Court decision that shows signs of lasting indefinitely is *Reynolds v. Sims*,¹⁰ which found in the standard-like and substantive Equal Protection Clause an eminently rule-like and structural requirement of equipopulous electoral districts and thereby empowered suburban voters. In national politics Americans who live in suburbs are now a central constituency. Indeed, they are perhaps the central constituency, and there is no indication that they are going to give back the power that reapportionment gave them. That rule is likely to stick.

In the context of race an example of a structural rule that has been remarkably robust concerns voting. The enfranchisement of black Americans has had powerful effects on state and national politics since it began in earnest during Reconstruction. While there is also a history of disenfranchisement, on this score it is important to bear in mind that the glass is also half full. First, it is easy to forget that post-Reconstruction disenfranchisement was a long time coming; black voting in the South was substantial through the

⁹ Klarman identifies an interaction between legal determinacy and political choice by judges, maintaining that as determinacy goes down the influence of non-legal factors goes up. See *id.*

¹⁰ 377 U.S. 533, 586–89 (1964) (holding that the existing and two legislatively proposed plans for apportionment of seats in the two houses of the Alabama Legislature were invalid under the Equal Protection Clause in that the apportionment was not on a population basis and was completely lacking in rationality).

1880s.¹¹ Second, when it came, disenfranchisement was often quite difficult. It is striking just how much effort it took in the South to disenfranchise blacks in the last decade of the nineteenth century and the first decade of the twentieth century. There were bitter political struggles, race riots, and close election contests in some states.¹² The disenfranchisement was sometimes a near-run thing and it was the product of concerted effort by the most powerful groups in Southern politics. It was a lot harder than getting the Court to decide *Plessy* the way it did. Third, the story in the North once the Great Migration got under way in the 1910s is one of rising black political power, especially as Northern, urban blacks became a constituency that could vote either Democrat (thanks to FDR) or for the party of Lincoln.¹³

Next, the story of the return of black suffrage in the South is not a lightning bolt in 1965. Rather, it began in the 1930s and gathered steam through the 1950s.¹⁴ Indeed, according to Klarman even the Supreme Court made a difference; he maintains that the white primary cases really mattered.¹⁵ They did matter, and it is important for my larger theme to see *how* they mattered: by disrupting a mechanism of political coordination whereby whites could make decisions as a group and then organize racial discipline as party discipline.¹⁶ The white primary was itself a structural mechanism, with all the power of a structural provision.

¹¹ Klarman states that “[a] majority of blacks still voted in most Southern states in 1880,” and goes on to cite examples of substantial black political participation and power through that decade. Klarman, *supra* note 8, at 31. The major decline in black political empowerment began in 1890, but as late as 1901 North Carolina still had a black member of the federal House of Representatives. *Id.*

¹² See Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 *Const. Comment.* 295 (2000) (describing history of black disenfranchisement).

¹³ 1934 may have been a crucial year for black political power in the North. In the congressional elections of that year a majority of blacks voted Democrat for the first time: “With some northern states electorally competitive for the first time in a generation, and blacks no longer dependably voting Republican, both parties had incentives to appeal for black votes, which sometimes held the balance of power in critical industrial states.” Klarman, *supra* note 8, at 111. In response, the Democrats in 1936 made major appeals to Northern blacks, which they had not done in 1932. *Id.*

¹⁴ *Id.* at 236–237.

¹⁵ Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 *Fla. St. U. L. Rev.* 55, 69 (2001).

¹⁶ Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *Stan. L. Rev.* 643, 643 (1998).

The third building block is about different kinds of provisions. Some are clearer than others (rules and standards is the common terminology). Clearer provisions generally work better for entrenchment. The favorite examples are the provisions that use numbers: two Senators for every state, elections on two-year, four-year, and six-year cycles. Lack of numbers can be a problem, as evidenced by Court-packing and Court-shrinking.¹⁷ Rules beat standards.

A prime example is *Brown v. Board of Education*. How did the historical confusion about the constitutionality of symmetrical and asymmetrical race-respecting rules come about? In part it came because the Joint Committee on Reconstruction, for both political and substantive reasons, drafted Section 1 of the Fourteenth Amendment in a less than clear fashion. Here I do not mean just John Bingham's alleged love of sonorous phrases. I mean something more specific: the Committee tried to draft at a level of abstraction higher than its actual target.

The story is interesting for many reasons. The primary point of Section 1 was to constitutionalize a statutory ban on race discrimination, the Civil Rights Act of 1866. That statute mentioned race—thereby obviating one of the most difficult questions that arises under the amendment, which is deciding which grounds of classification are suspect or forbidden—and maybe even resolved the question of symmetrical race-respecting laws by requiring that citizens of all races have the same rights. When the committee set about creating a constitutional provision that entrenched the statute, they actually considered a draft that would have forbidden discrimination on the basis of race with respect to political or civil rights. But the Republicans were apparently leery of seeming too

¹⁷ In 1949 former Justice Roberts proposed that the Court's vulnerability to manipulations of its size be eliminated through a constitutional amendment that would fix that size at nine. Owen J. Roberts, *Now Is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A. J. 1 (1949). President Franklin D. Roosevelt's proposal to expand the Court, which gave rise to the proposed amendment former Justice Roberts endorsed, was not adopted. Court-shrinking, however, has happened. When Andrew Johnson was President and the Republicans controlled Congress, President and Congress were at such odds that when a vacancy occurred in the then ten-member Court, Congress eliminated the seat rather than allow Johnson to fill it, and for good measure provided that the next vacancy was not to be filled either. See Henry J. Abraham, *Justices and Presidents* 124–25 (3d ed. 1992).

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attached to black interests, and they probably wanted to protect white unionists in the South from oppression by reconstructed state governments controlled by ex-Confederates. So they moved up a level of abstraction, from a ban on race discrimination to a requirement, to paraphrase it, that all citizens have the same privileges and immunities of citizenship and that all persons have the same protection of the laws.¹⁸

No doubt it seemed obvious to them that if all citizens have the same privileges and immunities then there cannot be any race discrimination with respect to privileges or immunities. As we have since learned, it is not so easy. Can it really be that government cannot discriminate among citizens at all? Surely not. What, then, does this idea of universal equality mean?

That problem is bad enough, but the more general language also exacerbated the specific *Plessy-Brown* problem by further fuzzing up the question of symmetrical race-respecting laws. Although it is possible to draft a rule that is specifically about race discrimination and that is still ambiguous on the separate-but-equal question, it is harder to do that. Some verbal formulations of an anti-discrimination rule will address the issue one way or another, even if only by accident. Moreover, in thinking more about the nitty-gritty of anti-discrimination, a drafter is more likely to be forced to address important questions of detail like that of symmetrical race-respecting laws.¹⁹

¹⁸ An excellent account of the drafting of § 1, with attention to the political constraints under which the Joint Committee's majority operated, is Earl M. Maltz, *Civil Rights, The Constitution, and Congress, 1863–1869*, at 79–120 (1990). My account of the drafters' strategy assumes the interpretation of the Privileges or Immunities Clause described above, *supra* note 7. The same point applies, however, to the provision that is more conventionally thought to be the Fourteenth Amendment's primary anti-discrimination rule, the Equal Protection Clause. It, too, operates, not by forbidding discrimination on some stated ground, but by providing that all members of some category (persons) are to be equal with respect to some legal advantage (the protection of the laws). It, too, is thus in the form of universal equality. For a discussion of the conceptual and historical connections between universal equality and anti-discrimination, see John Harrison, *Equality, Race Discrimination, and the Fourteenth Amendment*, 13 *Const. Comment.* 243 (1996).

¹⁹ The Civil Rights Act of 1866, for example, provided that "citizens, of every race and color, without regard to previous condition of slavery or involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts." Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (1868). Because a

The final building block has to do with the reasons for adopting constitutional provisions and the likely success of entrenchment depending on the initial reason. I think it is possible to distinguish four bases for entrenchment, each of which is very important in the American constitutional system.

The most basic deals with agency costs between the people and the politicians: It is a bad idea to let the politicians make the basic rules about their own power, because when they do, they will not reliably act in the people's interest. Just ask the Anti-Federalists, as Akhil Amar has explained.²⁰ This is probably the main reason for the entrenchment of constitutions. Next is collective self-binding, the constitutional analogue to putting the alarm clock on the other side of the room to make yourself get out of bed. For example, the more optimistic story about the Contracts Clause and the prohibitions on state paper money works this way: the people realized that they had a tendency to get drunk and act like Rhode Island, so they hid the bottle.²¹ Then there are deals among interest groups, deals that make the Constitution possible by allocating power and

requirement of the same rights is somewhat more precise than a requirement of equality, Homer Plessy had a good argument that Louisiana's statute requiring railroad segregation violated the act, as he and a white citizen had different rights, one to ride in the black car the other in the white car. About a hundred years later Congress adopted another civil rights statute, in the framing of which segregation and separate-but-equal were expressly on the table, and so addressed the issue explicitly. The Civil Rights Act of 1964 forbids covered employers to "limit, segregate, or classify" employees so as to adversely affect them because of race, color, religion, sex, or national origin. Pub. L. No. 88-352, § 703(a)(2), 78 Stat. 255 (1964).

²⁰ See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131, 1132-33 (1991) (describing the Bill of Rights as reflecting Anti-Federalist concerns about agency breakdown between the people and the government).

²¹ It might be fairer to say that the framers wanted the country to avoid acting like they believed Rhode Island generally acted. In the 1780s Rhode Island decided to deal with its heavy burden of revolutionary war debt with a paper money scheme that outraged many on-lookers. The paper money depreciated in value, and Forrest McDonald says that as a result "whatever reputation 'Rogue's Island' had among its sister states was destroyed. A New York newspaper, for example, ran a column called, 'The Quintessence of Villainy; or, Proceedings of the State of Rhode Island.'" Forrest McDonald, *E Pluribus Unum: The Formation of the American Republic, 1776-1790*, at 215 (1965). McDonald argues that the Rhode Island plan was not really irresponsible, but emphasizes its effect on the State's already iffy reputation: "Yet in the broad view what happened was not so significant as what outsiders thought was happening. What happened was . . . that the price of Rhode Island's prosperity was partial secession and partial ostracism from the Union. What people thought was that wild-eyed levellers had taken over the State." *Id.* at 216-17.

outcomes on an enduring basis. Here entrenchment is designed to protect groups that expect to be a minority in the ordinary political process created by the system and who do not want to have to constantly threaten to secede or revolt in order to keep from being oppressed. Two Senators from every state, sealed in titanium.

The last reason for entrenchment is my concern here. As I noted, self-binding is the optimistic version of the Contracts Clause story. The other version is that fat-cat creditors and their lawyer tools just happened to be over-represented in Philadelphia and used some agenda control to put a highly controversial provision that favored them into the Constitution. They were, perhaps quite temporarily, in control of the constitution-making process, and they wanted to use it to make their temporary advantage more permanent.

This is of interest in talking about *Brown* because it is possible to tell a similar story about the 1860s. A series of unusual political events gave the Republicans super-majorities in Congress and disproportionate power in the state legislatures. Indeed, the story of the Fifteenth Amendment is a particularly striking version of this. In 1868 Ulysses S. Grant was elected President on a platform stating that suffrage was a matter for the states.²² Although Grant won, Republican power in Congress was eroding.²³ With the outlook poor for Northern states to adopt black suffrage on their own, Republicans concluded that the lame duck session of the Fortieth Congress, to convene in December 1869, would have to act.²⁴ Democrats, believing that they had the people on their side, demanded that any amendment be referred to state conventions

²² See Klarman, *supra* note 8, at 28–29 (describing adoption of the Fifteenth Amendment).

²³ In the Fortieth Congress, elected in 1866, Republicans had an advantage in the House of 143 to 49 and an advantage in the Senate of 42 to 11. II Congressional Quarterly, *Guide to Congress* 1094 (5th ed. 2000). When the Forty-First Congress, elected in 1868, convened in 1869, Republicans would have an advantage in the House of 149 to 63 and in the Senate of 56 to 11. *Id.* Thus while they would still have two-thirds majorities in both houses in the 41st Congress, and could propose constitutional amendments, their majority in the House would be substantially narrower, so that the defection of just a few Republicans could block an amendment.

²⁴ William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* 45 (1965) (stating that after the 1868 elections Republicans were not sure what to do in order to secure black suffrage nationwide, but that they were sure that it had to be done by the Fortieth Congress).

elected to pass on it, or to legislatures elected after its proposal by Congress.²⁵ Republicans refused to take that chance and were lucky in that a large number of Republican-controlled legislatures were in session when Congress sent the amendment out to the states.²⁶ They seized the day and secured the ratification of an amendment that may not have reflected popular sentiment.

The kind of entrenchment that occurs when a political movement takes advantage of temporary control of the constitutional apparatus is almost certainly the hardest to make stick. Maybe it should be the most difficult to make stick, if the Constitution is supposed to reflect the long-run views of popular super-majorities.

Put these building blocks together and there are interesting implications for the two possible constitutional amendments currently under consideration. As for the proposed Federal Marriage Amendment, the implication is that it would not likely become well entrenched. It is a substantive provision and so cannot take advantage of the entrenchment features of structural provisions. It is on an issue on which attitudes are rapidly changing, and so may turn out to be Fifteenth Amendment-style fragile entrenchment (but without even the resilience of structural provisions that the Fifteenth Amendment enjoyed). Worse yet for its proponents, judges are generally on the other side of this issue even more than most voters, so it would be necessary to bind them quite strictly in order to have much chance of succeeding.

Yet the proponents of such an amendment face a tricky drafting problem, one that makes it hard to come up with a clear and precise rule-like provision. Some of them, at least, are trying to do two things: first, to forbid same-sex marriage, and second, to keep the courts from creating something short of that, the sort of arrangement often called civil unions. This presents two drafting problems: one is to distinguish between marriage and a civil union. Is there anything other than a word at stake? If so, what is it?

The second problem is more subtle and more interesting. Suppose you wanted to allow state legislatures but not state courts to create civil unions. How would you draft such a provision? Apparently the rationale of the leading version of the proposed amend-

²⁵ Id. at 88–89.

²⁶ Id. at 79.

ment seeks to achieve this end by saying that no state constitution or law shall be construed to give the benefit of marriage to same-sex couples (or something like that).²⁷ The word “construed” is the marker for distinguishing between what courts do (“construe” law) and what legislatures do (“make” law). If the courts are disposed to behave like faithful agents of the amendment’s drafters, this sort of thing can work: just generally indicate what you are trying to accomplish, maybe with a little technical imprecision, and the judges will fix it up for you.

If the courts cannot be expected to help because they feel strongly the other way, however, then the drafters are on their own and will have to draft so as to bind possibly unwilling judges. It is not clear that the drafters of the leading current version of the amendment have succeeded here. Laws need to be construed in order to be carried out. So if a court is forbidden to construe a law to mean *X* in order to keep it from misconstruing the law to mean *X*, the unfortunate side effect is to forbid the court from carrying out a law that actually means *X*. The reference to construction may be a marker for, or an allusion to, judicial activism, but it is no more than an allusion: a perfectly faithful court applying an explicit civil-union law would be construing it.

By contrast, things look brighter for any continuity-of-government amendment. It would not rely so much on judicial enforcement, being structural and not substantive. With some careful drafting it could be reasonably rule-like, and it is the most robust kind of provision when it comes to entrenchment because it deals with a long-term agency problem between the people and their agents, who cannot otherwise be trusted to deal with this problem.²⁸

²⁷ See H.R.J. Res. 56, 108th Cong. (2003).

²⁸ Agency costs are clearly on display with respect to continuity of government. The current presidential succession statute puts the Speaker of the House of Representatives and the President Pro Tempore of the Senate in the line of succession before members of the Cabinet. 3 U.S.C. § 19 (2000). This is of doubtful constitutional validity because it is doubtful whether Senators and Representatives are officers as that term is used in the presidential succession clause of the Constitution. U.S. Const. Art. II, § 1, cl. 6. Indeed, doubts on this score go all the way back to James Madison. See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 *Stan. L. Rev.* 113 (1995); William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: “The Emperor Has No Clones,”* 75 *Geo. L.J.* 1389 (1987).

Perhaps it would be better to say that this looks like a good candidate for entrenchment right now, but who knows? As Bill James says somewhere, no doubt the future will resemble the past more than it resembles our attempts to predict it.