

2020

Book Review: Putting the Constitution in its Place

Edward L. Rubin

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

Edward L. Rubin, *Book Review: Putting the Constitution in its Place*, 71 Case W. Rsrv. L. Rev. 15 (2020)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol71/iss1/4>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

— Book Review —

PUTTING THE CONSTITUTION
IN ITS PLACE

SHLOMO SLONIM, FORGING THE AMERICAN
NATION, 1787-1793: JAMES MADISON AND
THE FEDERALIST REVOLUTION (NEW
YORK: PALGRAVE MACMILLAN 2017).

Edward L. Rubin[†]

CONTENTS

INTRODUCTION	16
I. SLONIM'S ACCOUNT	17
II. SLONIM'S LESSONS.....	23
III. THE ELECTORAL COLLEGE	33

[†] Edward Rubin is University Professor of Law and Political Science at Vanderbilt University. He specializes in administrative law, constitutional law and legal theory. He is the author of *Making Regulation Work* (Eliva, forthcoming 2021), *Soul, Self and Society: The New Morality and the Modern State* (Oxford, 2015); *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton, 2005) and two books with Malcolm Feeley, *Federalism: Political Identity and Tragic Compromise* (Michigan, 2011) and *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge, 1998). In addition, he is the author of two casebooks, *The Regulatory State* (with Lisa Bressman and Kevin Stack) (Wolters Kluwer, 3d ed. 2020), and *The Payments System* (with Robert Cooter) (West, 1990), three edited volumes (two on legal scholarship and one on crime policy) and *The Heatstroke Line* (Sunbury, 2015) a science fiction novel about the fate of the United States if climate change is not brought under control. Professor Rubin joined Vanderbilt Law School as Dean and the first John Wade–Kent Syverud Professor of Law in July 2005, serving a four-year term. Previously, he taught at the University of Pennsylvania Law School from 1998 to 2005, and at the Berkeley School of Law from 1982 to 1998, where he served as an associate dean. Professor Rubin has served as a consultant to the People's Republic of China on administrative law and to the Russian Federation on payments law.

INTRODUCTION

The fact that Donald Trump became President in 2016, despite losing the popular vote by a substantial margin, has brought renewed attention to the Electoral College system.¹ In *Forging the American Nation*,² Shlomo Slonim provides an illuminating account of the process that led to this bizarre method of determining the outcome of presidential elections. But Professor Slonim's book also provides insights into the origins of many other structural features of our constitutional system that are of questionable value in a modern democracy, such as elections by state for the Senate, the Senate's exclusive exercise of legislative authority for treaties and appointments, and the constraints on the authority of our central government.

The book covers the drafting and ratification of the Constitution between the years 1787 and 1791,³ and also moves backward into times preceding the Articles of Confederation era and forward to the Marshall Court's decisions, culminating with *McCulloch v. Maryland* in 1819.⁴ Although the events it describes are among the most fully documented in world history,⁵ *Forging the American Nation* provides a new and

-
1. See Editorial Board, Editorial, *Time to End the Electoral College*, N.Y. TIMES, Dec. 19, 2016, at A26; Kyron Huigens, *The Electoral College Is Actually Worse Than You Think—Here's Why*, OBSERVER (Feb. 27, 2019, 4:37 PM), <https://observer.com/2019/02/electoral-college-explanation-popular-vote-loses/> [<https://perma.cc/7RJ3-PL7B>]; Denise Lu, *The Electoral College Misrepresents Every State, But Not as Much as You Think*, WASH. POST (Dec. 6, 2016), <https://www.washingtonpost.com/graphics/politics/how-fair-is-the-electoral-college/> [<https://perma.cc/PX2Y-LUJC>]; William Petrocelli, *Voters in Wyoming Have 3.6 Times the Voting Power That I Have. It's Time to End the Electoral College*, HUFFPOST (Nov. 11, 2017, 4:52 PM), https://www.huffpost.com/entry/its-time-to-end-the-electoral-college_b_12891764 [<https://perma.cc/FPT3-C48G>].
 2. SHLOMO SLONIM, FORGING THE AMERICAN NATION, 1787-1791: JAMES MADISON AND THE FEDERALIST REVOLUTION (Palgrave Macmillan, ed. 2017).
 3. *Id.* at 1, 9–10.
 4. SLONIM, *supra* note 2, at 85–90, 205–27; see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).
 5. For just some of the recent books on the subject, see RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION (2009); MICHAEL J. FABER, AN ANTI-FEDERALIST CONSTITUTION: THE DEVELOPMENT OF DISSENT IN THE RATIFICATION DEBATES (2019); MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016); PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–88 (2010); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION (2007).

valuable perspective on them. Slonim joins other recent authors who approach the Convention and ratification process with a degree of skepticism, but, in this relatively succinct book, he identifies certain themes with unusual clarity and legal precision. In doing so, he also offers clear lessons for constitutional interpretation and particular support for the Legal Process School's argument that the structural features of the Constitution should not be interpreted strictly, if at all, by the courts.⁶ This review summarizes some of the main themes that Professor Slonim describes (Part I) and then discusses the implications about contemporary constitutional interpretation that flow from that account (Part II). It ends with some specific implications about the Electoral College and a pending effort to reform it, the National Popular Vote Initiative.

I. SLONIM'S ACCOUNT

The story of the book is so familiar as to render even a brief summary unnecessary. Instead, this section will describe some of the principal themes that emerge from Professor Slonim's rendition of the story. These are the character and fate of James Madison's nationalist ideas, the role of the small states, and the role of slavery.

Madison is described in popular literature about American history as the Father of the Constitution.⁷ Professor Slonim's account reveals that this sobriquet (and incidentally, his own subtitle) is misleading.⁸ To be sure, we tend to view the Constitutional Convention through Madison's eyes, since his notes are the centerpiece of the leading document collection on the subject.⁹ He is also the author of the most

-
6. For two comprehensive examples of this approach, see JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980) and JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). The theory these authors describe developed during the previous three decades.
 7. See, e.g., *James Madison, Father of the U.S. Constitution*, CONSTITUTIONFACTS.COM, <https://www.constitutionfacts.com/us-constitution-amendments/james-madison/> [<https://perma.cc/8KPR-KRD9>] (last visited Oct. 12, 2020); Irving Brant, *James Madison: The Father of the Constitution*, ENCYC. BRITANNICA (June 24, 2020), <https://www.britannica.com/biography/James-Madison/The-father-of-the-Constitution> [<https://perma.cc/FX8J-TCC4>]; Colleen Sheehan, *James Madison: Father of the Constitution*, HERITAGE FOUND. (Apr. 8, 2013), <https://www.heritage.org/political-process/report/james-madison-father-the-constitution> [<https://perma.cc/Z43R-MCBW>].
 8. SLONIM, *supra* note 2, at 31.
 9. 1 UNITED STATES CONSTITUTIONAL CONVENTION, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at xv–xvii (Max Farrand ed., 1966) (“And from the day of their publication until the present, Madison’s notes

noteworthy justifications for the constitutional structure¹⁰ and the primary draftsman of the Bill of Rights.¹¹ But ascribing parentage to Madison obscures the extent to which the Constitution was not in fact the product of this great political theorist and visionary, but of a host of ordinary politicians, concerned with their own careers, answerable to their home-state interests and interest groups, and dominated or distracted by the immediate pressures of the day.

As Professor Slonim recounts, Madison had a very different vision of the Constitution from the one that actually emerged from the Convention.¹² He could be described, at least at that time, as a radical nationalist or Federalist.¹³ His position was that “the states, as such, would have to be precluded from any role in the governing structure of the national authority, and secondly, the authority would be empowered to exercise a supervisory veto over state legislation.”¹⁴ Both elements of this formulation were defeated in the Convention. The first, embodied in the Virginia Plan, was rejected in favor of the New Jersey Plan, which granted all states an equal vote in the legislature’s upper house, whose members were to be chosen by the state legislatures.¹⁵ That body, where states and not citizens were represented, was then given the sole authority to approve treaties (by a two-thirds vote in fact) and to confirm presidential appointments. Madison’s proposal for a Congressional veto was modified and then rejected, with even his Federalist allies opposing it because they thought it would make ratification impossible.¹⁶ Several months after the Convention ended, Madison continued to bemoan the rejection of the veto as undermining the authority that he thought the central government needed to fulfill

of the Debates have remained the standard authority for the proceedings of the Convention.”). The third volume of this definitive collection features supplementary materials; mainly letters. Most of them are by people other than Madison, but he dominates the final 70 documents, which consist of later reminiscences about the Convention. *See 3 id.* at 434–551.

10. *See* THE FEDERALIST NOS. 10, 14 (James Madison).
11. SLONIM, *supra* note 2, at 179–89.
12. *Id.* at 31–32.
13. *Id.* For his subsequent political gyrations, see SLONIM, *supra* note 2, at 206–18; *see also* LYNNE CHENEY, JAMES MADISON: A LIFE RECONSIDERED (2014); NOAH FELDMAN, THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT (2017).
14. SLONIM, *supra* note 2, at 32.
15. *Id.* at 33–34, 39.
16. *Id.* at 66–70.

its mission.¹⁷ As a strong or radical Federalist, Madison also believed that a bill of rights was an unnecessary constraint on the national legislature.¹⁸ The reason he acceded to Jefferson's demand and drafted the document was not because he shared Jefferson's belief in its necessity but because he realized that it would be the best way to forestall demands by New York and Virginia Anti-Federalists for a second constitutional convention that might weaken the national government still further.¹⁹ In short, the Constitution is at best a wayward child, badly injured and debased by a rough world from which its parent could not shield it.

Many of those injuries and debasements result from a second theme in Professor Slonim's book—the role of the small states at the Convention. While the disproportionate influence that the Constitution, and specifically the Electoral College system, gives to smaller states is widely recognized, and commentators discern a resulting conservative bias, we do not think of small states as a separate interest group. The most common contrast notes that votes for President in Wyoming, a reliably red state, count for 3.6 times as much as votes in California, a reliably blue one.²⁰ But the calculation yields an almost equal disproportion between Wyoming and Texas, also a red state, or between Texas and the next least populous state, Vermont, which is reliably blue.²¹ In other words, there is no politically salient difference between large and small states per se.²² Thus, the contemporary political signi-

-
17. *Id.* at 70–71; see also Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of the Republican Government*, 36 WM. & MARY Q. 215, 216, 229–32 (1979).
 18. Lesley Kennedy, *Before Drafting the Bill of Rights, James Madison Argued the Constitution Was Fine Without It*, HISTORY (Sept. 9, 2019), <https://www.history.com/news/bill-of-rights-constitution-first-10-amendments-james-madison> [<https://perma.cc/CW65-9T42>].
 19. SLONIM, *supra* note 2, at 163–75.
 20. See, e.g., Editorial Board, *supra* note 1; Petrocelli, *supra* note 1.
 21. See *United States Electoral College Votes by State*, ENCYC. BRITANNICA (Nov. 7, 2016), <https://www.britannica.com/topic/United-States-Electoral-College-Votes-by-State-1787124> [<https://perma.cc/FPT3-C48G>]. Wyoming and Vermont each have three electoral votes, while Texas has thirty-eight. *Id.*
 22. One scientist and mathematician, who measured impact against number of ballots cast, confirmed that small states are most advantaged by the Electoral College, with the eight states whose votes counted for more than twice the average being Wyoming, District of Columbia, Vermont, Alaska, Hawaii, North Dakota, Rhode Island, and South Dakota, all with three or four electoral votes. Dale R. Durran, *Whose Votes Count Least in the Electoral College?*, CONVERSATION (Mar. 13, 2017, 8:19 PM), <http://theconversation.com/whose-votes-count-the-least-in-the-electoral-college-74280> [<https://perma.cc/88SE-QKXJ>]. All these states vote reliably in one direction or another, but exactly half vote blue and in fact are among

ficance of the Electoral College is not entirely clear. Professor Slonim explains, however, that the small states functioned as a unified interest group at the Constitutional Convention.²³ Their concern was that the larger states, specifically Massachusetts, Pennsylvania, and Virginia, would use a strong central government to dominate them, and perhaps even destroy them.²⁴ This led them to oppose Madison's Virginia Plan with the New Jersey Plan that gave all states equal representation in the Senate and gave the Senate its authority over treaties and appointments. And it was directly responsible for the Electoral College.²⁵

The concerns of the smaller states, as Professor Slonim explains them, are understandable, but they are neither admirable nor far-sighted. Each of the thirteen colonies had been administered separately by Britain.²⁶ Although independence was declared by the newly formed Continental Congress, and the war against Britain was pursued under Congress' auspices, the machinery of day-to-day governance of each state was in the hands of the local elites who had taken control of the colonial apparatus.²⁷ It was natural for them to see the nation as separate polities that might engage in commercial or even military conflict, and for those who controlled the smaller states to ally with each other and assert disproportionate control over the central government.²⁸ However understandable, this was certainly not admirable; it committed the common error of assuming that the interests of the governing elites were equivalent to the interests of the citizens, and that their continued control of the state government would be more beneficial for their citizens than any decision made by the majority of the nation.²⁹ Neither was the alliance of small states particularly far-sighted. It should not have required much imagination to realize that

the most reliably Democratic states in the nation, none having voted Republican in the last seven presidential elections. *See, e.g.*, David Weigel, *The 50 Political States of America*, WASH POST (Sept. 22, 2020), <https://www.washingtonpost.com/graphics/2020/politics/united-states-political-geography/> [<https://perma.cc/Z8G8-VYAY>].

23. SLONIM, *supra* note 2, at 41.

24. *Id.* at 35, 44.

25. *Id.* at 41–46, 49–50.

26. *See* JON BUTLER, *BECOMING AMERICA: THE REVOLUTION BEFORE 1776*, at 89–130 (2000); ALAN TAYLOR, *AMERICAN COLONIES: THE SETTLING OF NORTH AMERICA* 117–272 (2001).

27. *See* Robert M. Weir, *Who Shall Rule at Home: The American Revolution as a Crisis of Legitimacy for the Colonial Elite*, 6 J. INTERDISC. HIST. 679, 679–84 (1976).

28. *Id.*

29. *Id.*

the issues that would divide a functioning nation would not revolve around the size of its political subdivisions. The separate identity of the small states disappeared almost as soon as the nation was formed, to be replaced by more substantive divisions.³⁰ But it left a powerful imprint on the constitutional design, one that we continue to live with long after the birth pains of the new nation had been forgotten.

The most divisive of those substantive issues was slavery, and this also left an indelible imprint on the Constitution. As Professor Slonim notes, William Wiecek identifies ten clauses in the Constitution that explicitly refer to slavery,³¹ while Paul Finkelman identifies no fewer than fifteen.³² In fact, Slonim argues, every clause of the Constitution was influenced by the Southern states' desire to protect their "peculiar institution."³³ It motivated the Southern delegates to increase the representation of the slave states in the House of Representatives through the three-fifths clause;³⁴ to demand that the Senate be designed to represent states, rather than citizens who were more numerous in the North despite that clause;³⁵ to insist that this Senate be given the exclusive role in approving treaties and ambassadors;³⁶ to endorse a bizarre method of determining the election of the chief executive that gave decisive weight to the three-fifths-based House and the states-qua-states Senate;³⁷ to enumerate the powers granted to Congress in place of a general provision that might have permitted legislation regarding slavery; and to construct an elaborate method of amendment that demanded both a supermajority in the three-fifths-based House, the state-qua-states Senate, and the states themselves.³⁸ Based on the picture that Professor Slonim paints for us, it is clear that slavery was never absent from the minds of the Southern delegates. Those provis-

-
30. Cf. SLONIM, *supra* note 2, at 205, 214–15.
31. *Id.* at 38 n.38 (citing William M. Wiecek, *The Witch at the Christening: Slavery and the Constitution's Origins*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 167, 168 (Levy W. Mahoney & Dennis J. Mahoney eds., 1987)).
32. *Id.* (citing Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 188, 190–92 (Richard R. Beeman, Stephen Botein & Edward Carlos Carter, eds., 1987)).
33. KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* (1st ed. 1956); see SLONIM, *supra* note 2, at 38–41.
34. SLONIM, *supra* note 2, at 38.
35. *Id.* at 39.
36. *Id.* at 45–46.
37. *Id.* at 38–39.
38. *Id.* at 37, 39.

ions that reflect a more democratic ethos, such as the requirement that money bills begin in the House, or that reflect a concern for human rights, such as the prohibition against bills of attainder, were adopted because there was no way to use them to abolish or diminish slavery.³⁹

The enumerated powers clause is a particularly notable example of this issue's overwhelming influence. Madison's original proposal for the powers of Congress, regarded throughout the Convention as the defining feature of federal authority, was that it would legislate "in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual [state] [l]egislation."⁴⁰ When the subject was discussed by the Convention as a whole, the slave state delegates objected, clearly concerned that it would empower a Northern controlled Congress to express its disapproval of slavery.⁴¹ Pierce Butler of South Carolina (the state that would subsequently start the Civil War⁴²) declared: "The security the South[ern] States want is that their negroes not be taken from them which some gentlemen within or without doors, have a very good mind to do."⁴³ But proposals to enumerate, and thereby limit, the powers of Congress were rejected by the Convention as a whole.⁴⁴ Because the Southern demand was insistent, and several of the leading nationalists such as James Wilson and Gouverneur Morris wanted a more precise formulation, the issue was referred to the Committee on Detail, chaired by John Rutledge, also of South Carolina.⁴⁵ Contrary to the instructions of the Convention when referring the matter, Rutledge induced the Committee to produce a clause enumerating specific powers that were granted to Congress.⁴⁶ Slonim concludes that "the prime consideration for enumeration was the demand of the slave states to ensure that the federal government not be empowered to interfere with the system of slavery."⁴⁷ The delegates accepted Rutledge's revision of their original plan because they were aware that in this case, as in so

39. *Cf. id.* at 36–41.

40. *Id.* at 60 (alteration in original) (quoting 3 UNITED STATES CONSTITUTIONAL CONVENTION, *supra* note 9, app. C at 593 (The Virginia Plan)).

41. *Id.* at 61–62.

42. See DAVID J. EICHER, THE LONGEST NIGHT: A MILITARY HISTORY OF THE CIVIL WAR 33–52 (2001); KENNETH M. STAMPP, AND THE WAR CAME: THE NORTH AND THE SESSION CRISIS 85 (1950).

43. SLONIM, *supra* note 2, at 62 (quoting 1 UNITED STATES CONSTITUTIONAL CONVENTION, *supra* note 9, at 605).

44. *Id.* at 62–63, 65.

45. *Id.* at 65–66.

46. *Id.* at 64.

47. *Id.* at 65–66.

many others, a weakened federal government was the price of Southern agreement to the union.

II. SLONIM'S LESSONS

It is difficult, in general, to avoid drawing normative implications from history. It is impossible for a history of the Constitution, not only because the Constitution is so important to us, but also because public officials who must follow the Constitution regularly and explicitly invoke history to guide their actions. Thus, it is natural to ask what lessons we can learn from Professor Slonim's account or—to be more specific—what can he tell us about the way we should interpret the document. The lesson that seems to emerge with striking clarity is that we should not treat the language of the Constitution with the sort of reverence and excessive attention that popular discourse and originalist scholars demand. In other words, based on the way Professor Slonim puts the Constitution in context as an historical matter, we should put it in its place as a normative matter.

Of course, no constitutional scholar or political leader argues that we should ignore the language of the Constitution. It is enacted positive law and deserves the attention and obedience that attaches to such enactments in our legal system. The question is whether it merits additional respect as the pronouncement of people with unusual wisdom, or who were positioned at an unusually fortuitous time in our political history. In other words, should the Constitution be treated as ordinary law, to be interpreted in the light of current circumstances and evolving norms, or should we treat it as a higher law to be interpreted in accordance with its original meaning?⁴⁸

48. It is, of course, possible to argue that ordinary law, that is, statutes, should also be interpreted based on their original meaning. This does not correspond to any of the prevailing schools of statutory interpretation, however. Textualists are certainly opposed to approaches that allow the meaning of a statute to evolve over time, but they want to ground interpretation on the enacted language, not original intent. See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 533 n.2, 548 (1983). Justice Scalia's insistence that legislative history should never be considered is emblematic of this focus on enacted language as opposed to intent. Those who argue that legislative history should be consulted want to treat it as one consideration, not an exclusive principle, and generally favor the idea of evolving meaning as well. See, e.g., ROBERT KATZMANN, *JUDGING STATUTES* 35, 39 (2014); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 428-29, 493 (1989).

In the Western world, approaches to authoritative texts derive from the interpretation of Scripture.⁴⁹ Over the course of the two millennia of Christianity, there have been a variety of approaches, but the Modern Era is dominated by the rivalry between Catholic and Protestant interpretation, one of the main theoretical issues that define these contesting faiths.⁵⁰ Catholics believe that there is a human agency on Earth that can provide definitive interpretations of the text—the Church, headed by the Pope.⁵¹ Thus, the understanding of the text can change in response to changing circumstances, not because the text is wrong, but because its significance for people’s lives is revealed over time through authoritative interpretation.⁵² Protestants believe that

-
49. *See generally* FRIEDRICH SCHLEIERMACHER, HERMENEUTICS AND CRITICISM: AND OTHER WRITINGS (Andrew Bowie ed. & trans., 1998) (developing a method of interpreting the language used within biblical text); HANS-GEORG GADAMER, *The Universality of the Hermeneutic Problem*, in PHILOSOPHICAL HERMENEUTICS 3, 17 (David E. Linge ed. & trans., 1976) (“Language occurs once again, in vocabulary and grammar as always, and never without the inner infinity of the dialogue that is in progress between every speaker and his partner. That is the fundamental dimension of hermeneutics.”); RICHARD E. PALMIER, HERMENEUTICS: INTERPRETATION THEORY IN SCHLEIERMACHER, DILTHEY, HEIDEGGER, AND GADAMER (1969) (comparing and contrasting definitions of hermeneutics and the perspective of foundational theorists). The tradition of modern literary analysis in the Western world is generally regarded as beginning with Schleiermacher’s interpretation of the Bible. Nasrullah Mambrol, *Literary Criticism of Friedrich Schleiermacher*, LITERARY AND THEORY CRITICISM: LITERARINESS (Dec. 23, 2017), <https://literariness.org/2017/12/23/literary-criticism-of-friedrich-schleiermacher/> [<https://perma.cc/H43C-B272>] (“The German philosopher and Protestant theologian Friedrich Schleiermacher . . . is generally credited with having laid the foundations of modern hermeneutics, or the art of systematic textual interpretation.”).
50. Protestants identify five Solae as distinguishing their version of Christianity from that of the Catholic Church. JOHN BARBER, THE ROAD FROM EDEN: STUDIES IN CHRISTIANITY AND CULTURE 233 (2008) (“The message of the Lutheran and Reformed theologians has been codified into a simple set of five Latin phrases: *Sola Scriptura* (Scripture alone), *Solus Christus* (Christ alone), *Sola Fide* (faith alone), *Sola Gratia* (by grace alone) and *Soli Deo Gloria* (glory to God alone).”).
51. *See, e.g.*, *Bible Can Only be Understood with the Church, Pope Tells Scholars*, CATH. NEWS AGENCY (Apr. 23, 2009, 11:00 AM), https://www.catholicnewsagency.com/news/bible_can_only_be_understood_with_the_church_pope_tells_scholars [<https://perma.cc/PET9-S3Y5>] (quoting Pope Benedict XVI, Address at the Pontifical Biblical Commission’s Plenary Assembly (Apr. 23, 2009)) (“[A] correct understanding of Scripture . . . rises from the Tradition of the Church.”).
52. *See generally* CHRISTOPHER MCMAHON, READING THE GOSPELS: BIBLICAL INTERPRETATION IN THE CATHOLIC TRADITION (2012); Peter S. Williamson, *Catholic Principles for Interpreting Scripture*, 65 CATH. BIBLICAL Q. 327, 336 (2003) (recognizing the principle that “the Bible itself and the history of its interpretation demonstrate a pattern of re-reading texts in the light of new circumstances”).

there is no such human agency, but rather that the true interpretation resides in the text itself, and each generation of people must refer back to that original text for authoritative guidance.⁵³

The way in which these theories of Biblical interpretation have been translated into constitutional law is obvious, but one aspect of the analogy merits emphasis in exploring the significance of Professor Slonim's book. The Catholic approach, which clearly informs the theory of an evolving Constitution, depends on accepting both the authority of the judiciary and the force of precedent. The analogy is imperfect, of course, because the Supreme Court does not claim to be directly inspired by the Framers nor infallible in its interpretations. But the force of the analogy lies in the common idea that the text, although authoritative, is a product of its times, that is, the text spoke to people in the language of its day and thus must be reframed for people of a later era by agents that the text itself empowers. The Protestant approach, which informs originalism, is that each era must approach the text anew and has the authority to correct prior misinterpretations.⁵⁴ Again, the analogy is imperfect because no originalist asserts that the Constitution was written by an omniscient being who could speak directly and comprehensibly to people in a future time. But the force of this analogy is that the Framers of the Constitution were unusually wise and prescient human beings who could craft a document that transcended the particular concerns of the time when it was drafted.

Professor Slonim's account of the Constitution's framing refutes this originalist image of its authors. The men who gathered in Philadelphia in the summer of 1787 were not a group of sages or Platonic Guardians meeting in some empyrean realm to contemplate the long-

53. See generally JOEL R. BEEKE, SINCLAIR B. FERGUSON, W. ROBERT GODFREY, RAY LANNING, JOHN MACARTHUR, R.C. SPROUL, DEREK W.H. THOMAS & JAMES WHITE, *SOLA SCRIPTURA!: THE PROTESTANT POSITION ON THE BIBLE 3* (Don Kistler ed., 2009) (describing the Protestant position "that all things *necessary* for salvation and concerning faith and life are taught in the Bible clearly enough for the ordinary believer to find it there and understand"); KEITH A. MATHISON, *THE SHAPE OF SOLA SCRIPTURA* (2001) (defending the ancient doctrine regarding Christian scriptures as the exclusive source of authority); JOHN C. PECKHAM, *CANONICAL THEOLOGY: THE BIBLICAL CANON, SOLA SCRIPTURA, AND THEOLOGICAL METHOD* (2016) (developing a detailed theological approach to the doctrine of *Sola Scriptura*).

54. See, e.g., Keith Bartholomew, *Biblical and Constitutional Interpretation and the Role of Originalism in Sixteenth and Twentieth-Century Societies*, 82 *ANGLICAN THEOLOGICAL REV.* 537, 538 (2000) (citation omitted) ("By originalism, I refer to the hermeneutical approach used by both biblical and constitutional scholars (and followed by millions of lay persons) that accords binding authority to the strict text of the source document or to the intentions if its authors or adopters.").

term future of a new nation that would someday assume a dominant position in the world. They were, for the most part, ordinary politicians thinking in terms of their particularized concerns. To be sure, they were confronting large issues with long-term significance. The government that had been established to declare the independence of the thirteen colonies and carry out the resulting war was failing as a means of managing the nation that had emerged from these events.⁵⁵ The task confronting the delegates to the Convention, therefore, was to design a political system rather than a specific statute. In doing so, however, they were motivated by the same sorts of immediate concerns that are almost universally recognized as the motivations for legislators in more ordinary situations.⁵⁶ They protected their personal political position in their home states,⁵⁷ based their votes on whether their home state was large or small,⁵⁸ protected slavery because they themselves, as well as their important supporters, were slave holders,⁵⁹ and reflected the immediate and not necessarily well-founded fears of their constituents.⁶⁰

There were obvious exceptions, including Benjamin Franklin, George Washington, and Alexander Hamilton. But Franklin, elderly and somewhat debilitated, generally limited himself to urging compromise and unity,⁶¹ while Washington, already an icon, tended to remain

55. SLONIM, *supra* note 2, at 1–10.

56. *See generally* JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS (3d ed. 1989) (examining the decision-making process underlying legislative voting decisions); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974) (describing how the quest for reelection motivates almost all elected legislators' conduct); STEVEN S. SMITH & GERALD GAMM, *The Dynamics of Party Government in Congress*, in CONGRESS RECONSIDERED 163 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., Sage 11th ed 2017) (emphasizing the need to distinguish between the policy and electoral goals of congressional parties).

57. *See, e.g.*, SLONIM, *supra* note 2, at 96 (describing how recently-elected Governor of Virginia Edmund Randolph refused to sign the Constitution because he was concerned about local opposition from Patrick Henry and Richard Henry Lee).

58. *Id.* at 41–50.

59. *Id.* at 59–63, 64.

60. *See id.* at 36–37, 40–41, 47–48.

61. *See* BEEMAN, *supra* note 5, at 52 (“[W]eakened by age and painful kidney stones—and less convinced of the need for dramatic change—he was unlikely to supply either the energy or the ideas for a revolution in government.”); *see also* WALTER ISAACSON, BENJAMIN FRANKLIN: AN AMERICAN LIFE 445–54 (2003). Franklin wanted to raise objections to slavery at the Convention, but was persuaded by other Northern delegates that it would endanger ratification of the Constitution. JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 110–11 (2000).

neutral in his role as president of the Convention.⁶² The most important exception was James Madison. As Professor Slonim recounts, Madison seems to have been motivated by a genuine desire to create a strong central government,⁶³ a position he would soon repudiate.⁶⁴ But he was also an exception for being the one active participant who was truly an extraordinary political thinker, worthy of being ranked with the great theorists in the Western tradition. Ironically, his political theory was grounded on the insight that government cannot teach virtue to its citizens, and cannot rely on the virtue of its leaders, but will always be a contest among self-interested individuals and factions.⁶⁵ He himself, on the basis of this theory, sought to create a strong central government that could counteract the more particularized interests of the separate states, but saw his vision eviscerated by the very process that he declared unavoidable, and that formed the basis of his approach to governance. As for Hamilton, he was at this time entirely allied with Madison; thus, whatever his excellence of mind, his views suffered the same degree of frustration.⁶⁶

Because originalism is subject to well-known conceptual defects, such as the difficulty of determining the intent of a collective body and the difficulty of discerning the intentions of people in the distant past,⁶⁷ some scholars who claim to be originalists have sought to distance their approaches from the actual intentions of the delegates at the Convention. One such approach is to shift attention to the intentions of the ratifying conventions in the states, on the ground that it was their actions that established the Constitution as authoritative law.⁶⁸ Professor Slonim's book challenges this view as well, and for the same reason. The state ratifying conventions displayed the same mixture or *mélange* of personal motivations and quotidian political interests as the drafting Convention in Philadelphia.⁶⁹ Several of the small states

62. BEEMAN, *supra* note 5, at 110; RAKOVE, *supra* note 5, at 136; JOSEPH J. ELLIS, *HIS EXCELLENCY: GEORGE WASHINGTON 177* (2004) ("Washington was simultaneously the most important person at the Constitutional Convention and the least involved in the debate that shaped the document that emerged. His importance was a function of his presence . . .").

63. SLONIM, *supra* note 2, at 32 ("Madison was a supreme nationalist.").

64. *Id.* at 205–07.

65. *See* THE FEDERALIST NO. 10 (James Madison).

66. *See generally* THE FEDERALIST NO. 21 (Alexander Hamilton); SLONIM, *supra* note 2, at 17.

67. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214, 221–22 (1980).

68. *See, e.g.*, Charles A. Lofgren, *The Original Understanding of Original Intent*, 5 CONST. COMMENT. 77, 85–93 (1988).

69. *See, e.g.*, SLONIM, *supra* note 2, at 127–51.

hastened to ratify because they realized that they had gotten such a sweet deal from the Convention.⁷⁰ John Hancock, fortuitously recovering from a case of gout that had kept him home while he weighed his options, came out in favor of ratification and swayed the vote in Massachusetts because the Federalists promised him the Vice-Presidency of the new nation, or the Presidency if George Washington proved to be ineligible due to Virginia's failure to ratify.⁷¹ The Anti-Federalists, in the majority at the New York State convention, were motivated to ratify because they simultaneously hoped that New York City would be chosen as the nation's capital if they did so and feared that the City would secede from the State, for commercial reasons, if they didn't.⁷²

A second and more formidable effort to distance originalism from the actual intent of the Framers is the invocation of original public meaning. This is a complex theory that, at its outer limits, views the Constitution as an evolving process that would be only vaguely informed by an historical account of its origins such as Professor Slonim's book.⁷³ In its more delimited form, the claim is that the proper interpretation of a constitutional provision should not be based on the Framers' personal or subjective views about the language they enacted, but rather on the general understanding of that language at the time of enactment.⁷⁴ Whatever problems with the theory of originalism that

70. *See id.* at 49–50, 134.

71. *Id.* at 130–31.

72. *Id.* at 149.

73. *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 303–04 (2007); *cf.* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 447–51 (2007) (arguing that originalism is a commitment to the principles of the Constitution rather than how the framers meant for their words to apply to future generations).

74. *See* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 89–94 (2004); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 35–37 (1999); Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1132–33 (2003) (advocating that originalism pays attention to how the words and phrases of the Constitution “would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted”); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992) (recognizing public opinion at the time of Constitutional ratification is one method of interpretation); Samuel T. Morison, *The Crooked Timber of Liberal Democracy*, 2005 MICH. ST. L. REV. 461, 465 (2005). A related idea is that determining the original meaning of the Constitution should rely on extra-legal sources. *See* Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935 (2013),

this idea resolves, it does not rescue originalism from the implications of Slonim's observations.

The men who gathered in Philadelphia were members of the elite, certainly among the best educated people in the nation. There were a sufficient number of them to wash out truly idiosyncratic uses of language, so that their actual intent, assuming it can be discerned, would have been reasonably close to the public meaning of the American elite as a whole. If the general public meaning of the language was different, it would be because it included the views of much less educated people, including subsistence farmers living in fairly isolated settings.⁷⁵ The normative argument for treating this larger group of people with reverence, and granting their views more weight than their mere enactment of positive law would demand, is rather weak. Professor Slonim does not attempt to discern the views of this larger public, but to the extent that they are reflected in his account of the leading political actors, the dominant mood seems to have been fear—fear by slaveholders that their slaves would be taken away, fear by residents of small states that they would be conquered by their larger neighbors, fear of internal rebellion by disadvantaged regions of the nation,⁷⁶ and fear by everyone that the new nation would fall prey to the great powers that were hovering around them, specifically Britain, France, and Spain.⁷⁷ People who are afraid of things that we are not afraid of now are not a particularly convincing source of wisdom.

If we proceed from theories of interpreting the U.S. Constitution to theories of constitutionalism itself, Professor Slonim provides a similar lesson. One of the best-known theories of the constitutional meaning is Jon Elster's idea of self-binding, which he derives from the story of Ulysses and the Sirens.⁷⁸ Knowing that the Sirens' song will irresistibly

1973–75 (citing AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 247–48 (2012)).

75. See Morris D. Forkosch, *Who are the "People" in the Preamble to the Constitution?*, 19 CASE W. RES. L. REV. 644, 676–81 (1968). There is, moreover, the sticky question of whether to include among the public those who were excluded at the time, but whom we would insist on including at present, such as African-Americans, Native Americans, and women, collectively the majority of the nation's inhabitants. See *id.* at 684–85, 708–09.
76. See SLONIM, *supra* note 2, at 33–39, 53 n.28, 131. Specifically, "Shays' Rebellion" was an internal rebellion arranged by farmers as a response to their desperate economic circumstance. *Id.* at 20–23.
77. See *id.* at 4, 23–24, 47.
78. JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 88–92 (2000); JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 39–47 (1979) [hereinafter *ULYSSES AND THE SIRENS*].

attract all those who hear it to abandon their voyage and die on the Sirens' island, Ulysses instructs his sailors to stop their ears with wax. He, however, lashes himself to the mast of the ship and instructs the sailors to keep him bound, no matter how insistently he entreats or, being the captain, commands them to release him.⁷⁹ Elster takes this as a general pattern of rational action, where actors at Time One make a definitive commitment that constrains their actions at Time Two, when their rationality may be impaired.⁸⁰ He then suggests that a Constitution operates in this manner.⁸¹ The Framers, realizing that the confusions and conflicts that will afflict a polity in a momentary crisis may lead it to abandon its principles, embody those principles in a set of rules intended to constrain such deviations.⁸²

It is an inspiring image, and one that supports a mode of interpretation that features fidelity to the original text of the Constitution, and perhaps an originalist orientation. But it depends on the assumption that the actors at Time One are more rational than at Time Two, that they can think in more principled and less circumstantial terms.⁸³ Professor Slonim's account refutes this claim. He demonstrates that the Framers were subject to the same confusions and conflicts that affected future generations.⁸⁴ They were just as bound by their personal interests, their prejudices, and the immediate stresses of

79. HOMER, THE ODYSSEY bk. XII, 441–43 (Maynard Mack ed., Alexander Pope trans., London: Methuen & Co. Ltd. 1967) (“I give the sign, and struggle to be free: Swift row my mates, and shoot along the sea; New chains they add, and rapid urge the way, ‘Till dying off, the distant sounds decay . . .”).

80. ULYSSES AND THE SIRENS, *supra* note 78, at 39–47.

81. *Id.* at 88–174.

82. *Id.*

83. In fact, I have argued previously that Elster is wrong about both constitutions and *The Odyssey*. See Edward L. Rubin, *Hyperdepoliticization*, 47 WAKE FOREST L. REV. 631, 637 (2012). A constitution is not a case of self-binding, as he asserts. A higher authority, the convention or constitutional assembly, makes a law that binds subsequently selected officials, just the way an ordinary statute binds those that are subject to it. Unlike a legislature, the convention then passes out of existence, but this is not the same thing as self-binding. *Id.* at 639–41. And in *The Odyssey*, Ulysses does not decide to bind himself to the mast. A god, Circe, orders him to do so, and Ulysses obeys because obedience to the gods is one of his virtues, as established in the invocation. See HOMER, *supra* note 79, at 28–29, 430–33. In other words, Elster ignores the crucial issue of obedience to law in using the image of Ulysses and the mast, possibly because he ignores the issue of obedience in the original source. As argued here, we should not treat the Constitution as the pronouncement of hyper-rational beings whom we must revere, but as enacted law that we are required to obey that is subject to interpretation on the basis of changed circumstances.

84. See SLONIM, *supra* note 2, at 127–51.

their time as those who would be governed by the document that they devised. Indeed, as just described, they either constituted or answered to a public that was besieged by fear bordering on panic. Madison was the exception (and Hamilton perhaps another), but Slonim demonstrates that their vision for the national government was altered, and indeed eviscerated, by the other delegates. What emerged then, was not an optimal and timeless framework for the future, but a set of makeshift provisions and patched-together compromises that would provide a solution to the pressing problems of the time when the document was drafted.

Again, while none of this means that the text of the Constitution should be ignored, Professor Slonim's book strongly suggests that the reverential attitude toward the Framers that characterizes much of our constitutional interpretation, particularly by judges and scholars who regard themselves as originalists, is unjustified.⁸⁵ Most of the Framers were ordinary people subject to ordinary motivations, and, as such, are entitled to no more deference or attention than their enactment itself would demand. It can nonetheless be argued that the Constitution's text or intent is entitled to greater deference because it is an organic enactment for the nation as a whole. The countervailing argument, of course, is that the Constitution's generality, and the fact that it was written long ago by people who thought differently and faced different issues, requires that it be interpreted flexibly if it is serve our purposes, rather than frustrate them.⁸⁶ This is a debate about interpretive theory and cannot be resolved by an historical study such as Professor Slonim's. What his study suggests, however, is that the argument for originalism must rest on this debate and cannot rely on arguments or imagery about the superior wisdom, rationality, or impartiality of the Constitution's authors.

The implication that flows from this conclusion is that constitutional provisions should be strictly enforced when they are supported by some external norm to which we as a society are committed. In particular, those provisions that protect human rights, such as the First Amendment and the guarantees of equal protection and procedural due process, are grounded in strong norms which are important to us, while structural provisions such as federalism and the separation of powers should be recognized as pragmatic arrangements that can be varied

85. *See id.* (demonstrating that the Framers were ordinary people subject to the same motivations as modern politicians).

86. *See* *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 415 (1819) ("This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."); *see also* BRANDON J. MURRILL, CONG. RSCH. SERV., R45129, MODES OF CONSTITUTIONAL INTERPRETATION 7, 9–10 (2018).

because they do not implicate such norms or commitments.⁸⁷ This is, of course, the position set out in footnote four of *United States v. Carolene Products*,⁸⁸ and that became the central theme of the Legal Process School's approach to constitutional interpretation.⁸⁹ The footnote, which emerged out of the Supreme Court's rejection of substantive due process,⁹⁰ was based on the idea that the Court should not intrude into

87. The argument that these structural features secure political and human rights is too parochial to be accepted. The two independent organizations that rate the level of democracy throughout the world give their highest rating to a number of nations that have parliamentary systems with no separation of the executive and the legislature, or unitary systems with no legal autonomy for geographic subunits of the nation, or both. These organizations give the United States, despite the structural features of the Constitution, a slightly lower rating. See FREEDOM HOUSE, FREEDOM IN THE WORLD 2018, at 10, 106, 470, 480, 653, 700–01, 953, 1058, 1064 (Arch Puddington, ed., 2018) (on a 1 (best) to 7 scale for two elements of freedom, Italy, Japan, Netherlands, Sweden and United Kingdom receive a 1.0, while the United States receives a lower 1.5 rating, the same as Belize and Mongolia); *The Economist Intelligence Unit's Democracy Index*, ECONOMIST, <https://infographics.economist.com/2019/DemocracyIndex/> [<https://perma.cc/SQ6W-QLP5>] (last visited Oct. 10, 2020) (on a 1 (worst) to 10 scale, the ratings are: Germany, 8.68, Japan, 7.99, Netherlands, 8.89, Sweden, 9.39, while the United States is rated 7.96, about the same as Botswana and Estonia); see also *Italy: Main Executive and Legislative Bodies*, EURYDICE (Mar. 6, 2020, 3:56 PM), https://eacea.ec.europa.eu/national-policies/eurydice/content/main-executive-and-legislative-bodies-39_en [<https://perma.cc/NXZ5-2EEN>]; *Government and Society: Constitutional Framework*, BRITANNICA, <https://www.britannica.com/place/Japan/Government-and-society> [<https://perma.cc/GT5D-ZDZ7>] (last visited Oct. 14, 2020); Chuka Nwanazia, *The Trias Politica: Dutch System of Government and Why it Matters*, DUTCHREVIEW (May 23, 2018), <https://dutchreview.com/culture/society/the-trias-politica-dutch-system-of-government/> [<https://perma.cc/J4CQ-77EN>]; *National Parliaments: Sweden*, LIBR. CONG. (July 24, 2020), <https://www.loc.gov/law/help/national-parliaments/sweden.php> [<https://perma.cc/3UC4-9WW8>]; *The Three Branches of Government*, LAWWALES, <https://law.gov.wales/constitution-government/intro-to-constitution/three-branches-government/?lang=en#/constitution-government/intro-to-constitution/three-branches-government/?tab=overview&lang=en> [<https://perma.cc/57VV-3TV9>] (last visited Oct. 14, 2020).

88. 304 U.S. 144, 152 n.4 (1938).

89. See CHOPER, *supra* note 6, at 75; ELY, *supra* note 6, at 75–76, 151–53; A. Michael Froomkin, *Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process (Book Review)*, 66 TEX. L. REV. 1071, 1081 & n.65 (1988).

90. The definitive case, *West Coast Hotel v. Parrish*, had been decided the previous term. 300 U.S. 379, 389–91, 400 (1937) (holding that substantive due process rights do not exist that can prevent states from restricting the terms of private contracts when they are acting to protect the welfare of citizens). *West Coast Hotel* overruled *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), and distinguished *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

democratic decisions except to correct defects in the political process itself, such as denial of the right to vote.⁹¹ Legal Process scholars, unwilling to restrict human rights protection to such a narrow compass, developed the idea that all human rights should be protected by the Court because they defend against the tyranny of the majority (a central concern of Madison's) whereas structural provisions would be enforced by majoritarian politics,⁹² such as the role of the states in the national legislature that the Framers established over Madison's objection. Professor Slonim's book suggests a third rationale for this same principle, namely, that the Framers were ordinary politicians whose pronouncements possess no greater normative force than ordinary legislation, and that constitutional provisions should be interpreted with the usual flexibility and concern for practicality and efficiency unless they can derive their normative value from some other source.⁹³

III. THE ELECTORAL COLLEGE

Of the Constitution's structural features, the one that is perhaps most strange and convoluted is the Electoral College. George Edwards III and Sanford Levinson have stated the basic argument against it, which is that it is inconsistent with our current conception of democracy.⁹⁴ Arguments in favor are notoriously weak, often little more than

-
91. The footnote is composed of two elements. *Carolene*, 304 U.S. at 152 n.4. The first is that “[i]t is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.” *Id.* The second is that “[n]or need we enquire whether . . . prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” *Id.* at 153 n.4. As is apparent from the language, both elements point to defects in the political process as the basis of heightened scrutiny. *Id.* at 152 n.4.
92. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 18–19 (2d ed. 1962); CHOPER, *supra* note 6, at 4–6, 9–10; THE FEDERALIST No. 51 (James Madison); Jeffrey Rosen, *America is Living James Madison's Nightmare*, ATLANTIC (OCTOBER 2018), <https://www.theatlantic.com/magazine/archive/2018/10/james-madison-mob-rule/568351/> [<https://perma.cc/HBJ4-FLA8>]; William N. Eskridge Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2031, 2042 (1994); Kent Roach, *What's New and Old About the Legal Process*, 47 U. TORONTO L.J. 363, 374, 393 (1997).
93. See *supra* notes 7–19 and accompanying text.
94. GEORGE C. EDWARDS III, *WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA* 150–51, 157–58 (2004); SANFORD LEVINSON, *OUR UNDEMOCRATIC*

generalized objections to change.⁹⁵ As Professor Slonim's account explains, the device was an improvised alternative to majority voting or legislative selection, designed to appease the fears of the small states and incorporating the inequalities that had already been established to appease the fears of the slave states.⁹⁶ It seemed like an acceptable solution at a time when democracy was still an untried experiment, when the British system of representation that the Framers knew imposed highly restrictive property qualifications on the grounds that only a small elite could be expected to vote responsibly,⁹⁷ and when the other leading examples of electoral regimes were the Ancient Greek city-states reflected through the accounts of Aristotle, Plutarch, and Cicero, where Rome and Sparta were more admired than Athens.⁹⁸ Things have changed since then. The Western world has more than two centuries of experience with democracy, much of it successful, and our current view

CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 81–83, 85–91, 95–97 (2006).

95. See, e.g., TARA ROSS, WHY WE NEED THE ELECTORAL COLLEGE 32 (2017) (“The Founders’ Constitution employs an elaborate system of checks, balances, and separated powers . . . [e]liminating any one of them is certain to have unintended and potentially devastating consequences.”); John O. McGinnis, *Popular Sovereignty and the Electoral College*, 29 FLA. ST. U. L. REV. 995, 995 (2001) (“[A]n electoral system designed to distill the will of a national majority would have a tendency to lead to notions of social democracy that are foreign to the American experience”); John Yoo, *A Defense of the Electoral College in the Age of Trump*, 46 PEPP. L. REV. 833, 860 (2019) (“If we should discard with the Electoral College as an obstacle to the majority, critics should explain why the American people should retain the Constitution’s other limits on pure majoritarian democracy. . . . Why not replace [American separation of powers] with a British-style parliament . . . ?”).
96. SLONIM, *supra* note 2, at 39–41.
97. Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787–1828*, 33 J. EARLY REPUBLIC 219, 220–21 (2013); Pat Stuart, *Voting: The Great American Experiment*, POWELL TRIB. (May 19, 2020, 8:05 AM), <https://www.powelltribune.com/stories/voting-the-great-american-experiment>, 25446 [<https://perma.cc/24FY-4YH6>]. This view, widely accepted in the eighteenth century, became one of the dominant political issues of the nineteenth century, but even after two reform bills, only a small majority of the most prosperous people in England had the right to vote for members of Parliament. See 4 WINSTON S. CHURCHILL, A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE GREAT DEMOCRACIES 45–54 (1958); 3 G.M. TREVELYAN, HISTORY OF ENGLAND 158–60, 163, 170–80, 182–84, 186–89, 191, 203–04 (3d ed. 1945); see also MALCOLM CHASE, CHARTISM: A NEW HISTORY 2 (2007) (discussing the first Reform Bill).
98. See PAUL CARTLEDGE, DEMOCRACY 293–97, 299, 301–04 (2016); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 100–03 (1991); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 423–25 (1969); THE FEDERALIST NO. 63 (James Madison).

is that the citizens themselves should decide. But the Electoral College system persists. Instead of being lashed to the mast of rationality, we are confined below decks in the ship of state's scullery, amidst the outworn and grimy utensils left over from earlier times.

A possible escape route from this artifact of the Convention's eighteenth-century conflicts is at hand. The National Popular Vote Interstate Compact (NPV) is an agreement among a group of states to award their electoral votes to the candidate who receives the largest popular vote, regardless of who achieves a majority of the popular votes in that state.⁹⁹ The agreement will only go into effect if states with more than 270 electoral votes join; at that point, it will determine the election.¹⁰⁰ Currently, 16 jurisdictions with 196 electoral votes have joined, almost all tending to vote Democratic in presidential elections.¹⁰¹ Prospects for obtaining agreement of states with the remaining 74 votes are uncertain, but far from impossible.¹⁰² If these are obtained, however,

99. Michael Brody, *Circumventing the Electoral College: Why the National Popular Vote Interstate Compact Survives Constitutional Scrutiny Under the Compact Clause*, 5 LEGIS. & POL'Y BRIEF 33, 33–34 (2013).

100. See CONG. RSCH. SERV., R43823, THE NATIONAL POPULAR VOTE (NPV) INITIATIVE: DIRECT ELECTION OF THE PRESIDENT BY INTERSTATE COMPACT 7 (2019); JOHN R. KOZA, BARRY F. FADEM, MARK GRUESKIN, MICHAEL S. MANDELL, ROBERT RICHIE & JOSEPH F. ZIMMERMAN, EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 265 (4th ed. 2013).

101. *A National Popular Vote for President*, FAIRVOTE, https://www.fairvote.org/national_popular_vote [<https://perma.cc/VSQ3-C8K2>] (last visited Oct. 2, 2020). As of January 2020, the NPV has been adopted by California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, New Mexico, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington. CONG. RSCH. SERV., NPV—THE NATIONAL POPULAR VOTE INITIATIVE: PROPOSING DIRECT ELECTION OF THE PRESIDENT THROUGH AN INTERSTATE COMPACT, <https://crsreports.congress.gov/product/pdf/IF/IF11191> [<https://perma.cc/C8S4-SJY4>] (Oct. 29, 2019); NAT'L CONF. OF STATE LEGISLATURES, *National Popular Vote* (Jan. 27, 2020), <https://www.ncsl.org/research/elections-and-campaigns/national-popular-vote.aspx> [<https://perma.cc/35AV-V36A>]. All these states have voted Democratic in the seven presidential elections since 1992, except Colorado in 1996, 2000 and 2004 and New Mexico in 2004. *Presidential Voting History by State*, BALLOTPEDIA, https://ballotpedia.org/Presidential_voting_history_by_state [<https://perma.cc/V2P6-88W4>] (last visited Oct. 3, 2020).

102. The NPV has been introduced but not enacted in a number of states. See Julia Foodman, *National Popular Vote: A Status Update*, FAIRVOTE (July 1, 2019), https://www.fairvote.org/national_popular_vote_a_status_update?gclid=EAIaIQobChMI8KWc0cLz5gIVGaSzCh1TVAgTEAAYASAAEgJ8lvD_BwE [<https://perma.cc/Q33R-PN4H>]. Nate Silver has offered a statistical analysis demonstrating that the NPV would not favor either political party. See Nate Silver, *Will the Electoral College Doom the Democrats Again?*, FIVETHIRTYEIGHT (Nov. 14, 2016, 2:59 PM),

there will then be a legal challenge to NPV on the ground that it constitutes an “interstate compact” for which the Constitution requires Congressional approval.¹⁰³

There is substantial uncertainty about whether the NPV falls within the prohibition of this clause. While it would appear to be a compact among the states, the Supreme Court has held that only agreements “tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States” require Congressional approval.¹⁰⁴ Scholars have expressed a variety of conflicting views about whether the NPV would constitute such an encroachment.¹⁰⁵ They have also disagreed on whether the NPV would infringe on the rights of states that were not party to the agreement.¹⁰⁶ But the odds are that the current Court

<https://fivethirtyeight.com/features/will-the-electoral-college-doom-the-democrats-again/> [<https://perma.cc/245L-A3EY>]. However, the pattern of enactments thus far suggests that approvals will come only from states that have Democratic voting records in presidential elections. The number of states that are as consistently Democratic as those that have already agreed is small, but if momentum builds and some of the states that have tended to be more Democratic than Republican in recent elections (Maine, Minnesota, Michigan, New Hampshire, Nevada, Pennsylvania, Virginia, Wisconsin) join, the NPV could go into effect. *See Presidential Voting History by State*, *supra* note 101; *see also 2017 Party Affiliation by State*, GALLUP, <https://news.gallup.com/poll/226643/2017-party-affiliation-state.aspx> [<https://perma.cc/3XKX-FU49>] (last visited Oct. 12, 2020).

103. U.S. CONST. art. I, § 10, cl. 3 (“No state shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . .”).
104. *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). *See U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 469–70 (1978) (reaffirming that, per *Virginia*, “not all agreements between States are subject to the strictures of the Compact Clause”).
105. *See, e.g.*, Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N.U. L. REV. 467, 477–78 (2007) (explaining that agreements between states, such as the NPV, are not truly interstate compacts); Ian J. Drake, *Federal Roadblocks: The Constitution and the National Public Vote Interstate Compact*, 44 PUBLIUS 681, 681–83 (2007) (arguing that the NPV would displace a federal mechanism for determining presidential elections); Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 739–40 (2007) (asserting that the NPV would limit the power of the national government by displacing the authority of the House of Representatives to resolve contested elections).
106. *Compare* Drake, *supra* note 105, at 682, 687 (arguing that NPV member states will decrease the power of nonmember states by actually determining the election), *and* Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELEC. L.J. 372, 373 (2007) (contending that the NPV increases the power of populous states vis-a-vis less populous ones), *with* Jennifer S. Hendricks, *Popular Election of the President: Using or Abusing the Electoral College?*, 7 ELEC. L.J.

would strike down the NPV on one ground or another. Although it is generally advisable to avoid vulgar political realism when discussing the Court, the fact remains that the conservative majority of the last two decades has repeatedly decided cases with direct and significant political consequences in favor of the Republican party, often on grounds that seem questionable, at best.¹⁰⁷

Professor Slonim's book suggests that this would be the wrong decision. No independent norms support the complex and idiosyncratic Electoral College system.¹⁰⁸ In fact, our prevailing norm of democracy—that the majority should decide—runs strongly in the opposite direction. The argument for interpreting the Electoral College provisions, and the interstate compact provision that might protect it, in a strict rather than flexible manner must therefore rest on a belief that these provisions represent some particularly wise and prescient vision on the part of the Framers. In fact, they represent nothing of the sort. The Framers in general were ordinary politicians, responding to the crises of their times and the misconceptions of the moment on the basis of self-interest, prejudice, and compromise. In crafting the Electoral College, they were motivated by a sense of small state identity that quickly disappeared and a commitment to slavery that we now regard an anathema. It is time to put these provisions in their place. They are law, but they are old law that should be flexibly interpreted in light of current norms and circumstances.

218, 224 (2008) (arguing that non-member states do not lose any pre-existing power if the NPV goes into effect).

107. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497–98, 2500–01 (2019) (declaring that partisan gerrymandering is an abuse of democratic processes but that the Court would do nothing about it because any remedy would require more complicated mathematics than the one-person-one-vote standard that the Court imposes); *Shelby Cnty. v. Holder*, 570 U.S. 529, 551, 557 (2013) (striking down highly effective preclearance provisions of the Voting Rights Act because they were based on data collected at the time of enactment); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371–72 (2010) (striking down portions of federal election law limits on campaign contributions on the ground that corporations have First Amendment rights); *Bush v. Gore*, 531 U.S. 98, 101, 105–06, 110 (2000) (allowing determination of Florida's Republican Secretary of State to stand on the basis of an unprecedented equal protection rationale, thereby ensuring Bush's election as President).

108. See Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205, 205 (2007) (“The Electoral College is an anomaly of the American democracy.”).