

REVIEW

The Nefarious Intentions of the Framers?

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*The Framers' Coup: The Making of the
United States Constitution*

Michael J. Klarman. Oxford, 2016. 865 pages.

INTRODUCTION

The timing of Professor Michael Klarman's *The Framers' Coup* is fortuitous. Under a never-used constitutional provision,¹ twenty-eight states have asked for a convention to write a balanced budget amendment.² Should six more states ask for a convention, presumably Congress will call one. Such a convention could lead to a simple amendment on this issue. But it could also lead to a full-blown attempt to rewrite the Constitution. Klarman's book is an important contribution to this conversation. While I disagree with some of Klarman's arguments, if we have a new constitutional convention, this book—along with Professor Richard Beeman's elegant *Plain, Honest Men*³—ought to be required reading for every delegate.

Klarman's mammoth book is reminiscent of Professor Charles Beard's *An Economic Interpretation of the Constitution of the United States*.⁴ Like Beard, Klarman has a conspiratorial

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¹ See US Const Art V.

² See Michael Leachman and David A. Super, *States Likely Could Not Control Constitutional Convention on Balanced Budget Amendment or Other Issues* (Center on Budget and Policy Priorities, Jan 18, 2017), archived at <http://perma.cc/3XWW-N7CC> (arguing that “[a] convention held today could set its own agenda” with “no guarantee that a convention could be limited to a particular set of issues”).

³ See generally Richard Beeman, *Plain, Honest Men: The Making of the American Constitution* (Random House 2009).

⁴ See generally Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (Macmillan 1913).

tone. His title—*The Framers' Coup*—implies that James Madison and company stole liberty and self-government from the American people. Beard sought to discredit the Constitution (and by implication, Supreme Court decisions) during the *Lochner* era. Like Beard, Klarman argues that the Framers ignored populist sentiments and that ratification was the result of “calculations of material interest” (p 615). Beard’s Framers were motivated by narrow economic self-interest, while Klarman sees the Convention as a coup and ratification as a result of “interest-based thinking” (p 615).

This Review challenges Klarman’s argument that the Philadelphia Convention was essentially an antidemocratic coup that produced a document that ran counter to the wishes of the American people. Klarman and I agree the Constitution of 1787 was deeply flawed. However, unlike Klarman, I argue many of these flaws stem from the nationalists’ inability to overcome populist opposition to democratic values, and thus the Constitution’s flaws result from the very populism that Klarman embraces. Rather than a coup, I argue that the Constitution was an incomplete and imperfect revolutionary transformation that gave most voters the political, economic, and diplomatic stability they wanted and the military security they needed.

I. THE HERITAGE OF 1787 AND THE “IMBECILITY OF THE CONFEDERATION”

Opponents of a new convention (and I am firmly in that camp) fear that such a gathering might try to undermine privacy, civil rights, civil liberties, and other fundamental rights, instead of just writing a balanced budget amendment.⁵ As Chief Justice Warren Burger observed:

[T]here is no effective way to limit or muzzle the actions of a Constitutional Convention. The Convention could make its own rules and set its own agenda. Congress might try to limit the Convention to one amendment or to one issue, but there is no way to assure that the Convention would obey. After a Convention is convened, it will be too late to stop the Convention if we don’t like its agenda.⁶

⁵ See, for example, Leachman and Super, *States Likely Could Not Control Constitutional Convention* (cited in note 2).

⁶ Letter from Chief Justice Warren Burger to Phyllis Schlafly (June 22, 1988), archived at <http://perma.cc/97BB-QGGW>.

Justice Antonin Scalia succinctly noted: “I certainly would not want a constitutional convention. Whoa! Who knows what would come out of it?”⁷

If delegates to a modern convention strayed beyond a balanced budget amendment, they would violate their mandate. That would be a runaway convention. But was the Philadelphia gathering a runaway convention? Congress gave the Convention an open-ended mandate for “revising the Articles of Confederation” with “such alterations and provisions” necessary to “render the federal constitution adequate to the exigencies of Government & the preservation of the Union.”⁸

Professor Klarman argues that the Convention exceeded this mandate in an undemocratic coup that imposed “a system of government very different from the one that most Americans would have expected or desired” (p 616). But the Convention certainly complied with the mandate of “revising the Articles of Confederation.”⁹ As Governor Edmund Randolph explained to the Convention, the fatally unwieldy and dysfunctional Articles led to “the difficulty of the crisis, and the necessity of preventing the fulfilment of the prophecies of the American downfall[.]”¹⁰ Randolph detailed the “[i]mbecility of the Confederation,”¹¹ later arguing that “[w]hen the salvation of the Republic was at stake, it would be treason to our trust, not to propose what we found necessary” (p 143). He stressed “the imbecility of the existing confederacy and the danger of delaying a substantial reform.”¹² This “imbecility” made it impossible for the national government to adjudicate disputes between the states, collect taxes, evict British troops from American soil, suppress domestic disturbances, negotiate foreign trade agreements (pp 11–12), or secure American access to the port of New Orleans (pp 48–69).

As Klarman demonstrates, “By 1787, most politically prominent Americans agreed that the Articles of Confederation were flawed and in need of amendment” (p 69) while “[n]ewspapers were filled with calls for a more powerful federal government” (p 69). Most Americans hungered for change. They may not have

⁷ Marcia Coyle, *Scalia, Ginsburg Offer Amendments to the Constitution* (Law.com, Apr 17, 2014), online at <http://www.law.com/sites/articles/2014/04/17/scalia-ginsburg-offer-amendments-to-the-constitution/> (visited Aug 26, 2017) (Perma archive unavailable).

⁸ Max Farrand, ed, 3 *The Records of the Federal Convention of 1787* 14 (Yale 1911).

⁹ *Id* at 14.

¹⁰ *Id* at 18.

¹¹ *Id* at 25.

¹² Farrand, ed, 3 *Records of the Federal Convention* at 14 (cited in note 8).

expected a wholesale revamping of the Articles, but the “imbecility” of the Articles illustrates why the Convention accepted the arguments of nationalists like James Madison, James Wilson, and Gouverneur Morris—all supported by George Washington—that radical change was needed. That most Americans accepted this change undermines the claim that this was a coup by a runaway convention.

Klarman’s strongest argument for a coup comes from the Framers’ end run around the process for amending the Articles. The Articles required that amendments be unanimously approved by the states.¹³ Instead of legislative ratification, the Convention provided for special elections to choose delegates to state ratification conventions.¹⁴ Jettisoning the unanimity requirement, the Framers provided that the Constitution would be in force when nine state conventions had ratified it.¹⁵ This revolutionary provision violated the Articles, but if it constituted a coup, it was a popular coup: in the end, Congress and all thirteen states peacefully accepted the process.

This deviation from the amendment process reflected the practical reality that the unanimity requirement made it impossible to change the Articles. Klarman demonstrates the enormous nationwide support for change, but Rhode Island’s refusal to send delegates to Philadelphia underscored the impossibility of achieving unanimity. As Madison rhetorically asked Patrick Henry at the Virginia ratifying convention: “Would the honorable gentleman agree to continue the most radical defects in the old system, because the petty state of Rhode Island would not agree to remove them?” (p 611). Similarly, in July, two of New York’s three delegates returned home, denouncing the Convention in a public letter to Governor George Clinton (p 253). If the Convention had left ratification in the hands of the state legislatures, Rhode Island and New York would have raced to see which state could sink the Constitution first.

In 1787, many leaders feared that, without reform, the nation would devolve into anarchy or tyranny (p 316). One member of Congress noted, “The period seems to be fast approaching when the people” of the nation “must determine to establish a permanent capable government or submit to the horrors of anarchy and licentiousness” (p 316). Similarly, Randolph warned the

¹³ Articles of Confederation Art XIII.

¹⁴ US Const Art VII.

¹⁵ *Id.*

Convention “of anarchy from the laxity of government every where.”¹⁶ Most Americans believed that anarchy and lawlessness would inevitably lead to tyranny.¹⁷ Without a new constitution, the experiment in “government of the people” would have “perish[ed].”¹⁸ Thus, the Convention offered a radical but practical alternative to the existing amendment process. After ten months of intense debate, the country accepted the offer. Had Congress or the states seen this as a coup, they could have easily stopped the Constitution. They did not.

II. PROBLEMS WITH THE CONSTITUTION

The Framers created a deeply flawed and, in many ways, undemocratic system. These defects reflect compromise, stubborn demands for special treatment by some states, and strategic moves to help secure ratification. Professor Klarman argues that the Framers pulled off an undemocratic, antipopulist coup. However, many of the most undemocratic elements of the Constitution resulted from populist demands that nationalists like Madison grudgingly accepted although they were antithetical to the essence of representative government.

The populists at the Convention saddled the nation with the deeply unrepresentative Senate, which equalizes state representation irrespective of the states’ respective populations. In our own time this has led to the “imbecility” that the 568,000 people in Wyoming get two senators while the 37,000,000 people in California also get only two.¹⁹ The imbecility of the Senate that denies fair political representation to the majority of Americans is compounded by Article V, which provides that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”²⁰ In 1962, the Supreme Court recognized the deeply anti-democratic nature of such a system:

¹⁶ Max Farrand, ed, 1 *The Records of the Federal Convention of 1787* 19 (Yale 1911).

¹⁷ See generally Paul Finkelman, *Between Scylla and Charybdis: Anarchy, Tyranny and the Debate over a Bill of Rights*, in Ronald Hoffman and Peter J. Albert, eds, *The Bill of Rights: Government Proscribed* 103 (Virginia 1997).

¹⁸ Abraham Lincoln, *Gettysburg Address* (Nov 19, 1863), archived at <http://perma.cc/K8LF-8N78>.

¹⁹ Kristin D. Burnett, *Congressional Apportionment: 2010 Census Briefs *2* (US Census Bureau, Nov 2011), archived at <http://perma.cc/U59X-B5PN> (Table 1). For a more elaborate discussion of this issue, see Paul Finkelman, *Who Counted, Who Voted, and Who Could They Vote For*, 58 *SLU L J* 1071, 1081–82 (2014).

²⁰ US Const Art V.

[I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.²¹

The Court ended such systems for state legislatures and congressional districts²²—but not for the Senate.

This undemocratic outcome was not a nationalist coup. It resulted from the nationalists' failure to completely undo the imbecility of state equality under the Articles. This antidemocratic provision resulted from persistent demands of delegates from small states—Klarman's populists. Madison argued political power should be "immediately derived from the people, in proportion to their numbers"²³ while Wilson argued that "equal numbers of people ought to have an equal no. of representatives."²⁴ The originators of Klarman's Federalist coup articulated the concept of "one person, one vote" about 175 years ahead of the Supreme Court. A more successful coup by the Founders would have eliminated state equality in the Senate.

Similarly, the Convention left us with the Electoral College, setting the stage for candidates winning the most votes yet losing the election at least five times, and maybe six²⁵—about one out of every seven elected presidents. By basing a state's electoral votes on its full congressional delegation, the Electoral College dramatically favors smaller states because of the rule that each state gets two senators no matter how small the state is. This was a victory for the small-state populists at the expense of the more populous states, and continues to give disproportionate and undemocratic power to the small states.

²¹ *Reynolds v Sims*, 377 US 533, 562 (1964).

²² See generally *Baker v Carr*, 369 US 186 (1962); *Wesberry v Sanders*, 376 US 1 (1964).

²³ Farrand, ed, 1 *Records of the Federal Convention* at 472 (cited in note 16).

²⁴ *Id.* at 179.

²⁵ Andrew Jackson (1824), Samuel J. Tilden (1876), Grover Cleveland (1888), Al Gore (2000), and Hillary Clinton (2016) won the popular vote but lost the election. In addition, it is likely that John Adams won the popular vote in 1800, but we have no records of that vote. Thomas Jefferson won the election in 1800 because of electoral votes created by counting slaves for purposes of representation. If we take the presidential electors from Jefferson created by counting slaves, and do the same for Adams, then Adams wins the election. See Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 *Cardozo L Rev* 1145, 1145–46 & nn 1–5 (2002).

The origin of the Electoral College is particularly perverse. Nationalists at the Convention favored a direct election of the president. Madison believed that “the people at large” were “the fittest” to choose the president.²⁶ But Madison rejected this concept mostly because the slave states “could have no influence in the election on the score of the Negroes.”²⁷ Thus, the Electoral College folded the political power of the three-fifths clause into the election of the president.

The Constitution also protected slavery by making it impossible to end human bondage through any normal political process,²⁸ giving southerners extra representation in Congress because of their slaves, promising that the national government would suppress slave rebellions, protecting the right to import new African slaves for *at least* twenty years, and allowing slave owners to hunt down fugitive slaves in free states (pp 257–304).²⁹ After the Convention, General Charles Cotesworth Pinckney bragged to the South Carolina legislature, “In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make.”³⁰ This is one area in which Klarman’s coup theory makes sense. The slave owners were the great winners in 1787. Through bluster, bluffs, and threats, they won almost everything they demanded.

III. WAS THE CONVENTION A COUP?

The central question raised by the book is Professor Klarman’s complicated argument that the Convention accomplished a coup by creating a document that was antidemocratic, antipopulist, and against the wishes of the American people. Yet Klarman never defines what he means by a coup. The common understanding is that a coup is accomplished by force or threat of force, as a minority illegally seizes power from the majority or the government in power. Did the Convention accomplish a coup—as Klarman claims—in any meaningful sense?

Nor does Klarman define what he means by “populist,” although he seems to imply that the populists were the “good

²⁶ Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 56 (Yale 1911).

²⁷ *Id.* at 57.

²⁸ See Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* 6–8 (Routledge 2d ed 2014).

²⁹ See US Const Art I, § 9, cl 1; US Const Art IV, § 2, cl 3.

³⁰ Jonathan Elliot, 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 286 (Burt Franklin 2d ed 1966).

guys” and the Federalists were the “bad guys” who imposed a Constitution against the wishes of the majority (p 609). Throughout the book, he characterizes the Federalists as “antidemocratic” and, by default, their opponents—the populists and Antifederalists—were “democratic” (pp 244–46). But he never confronts the possibility that his populists and Antifederalists were often antidemocratic. For example, Rhode Island, the least democratic state in the nation, with the most restricted suffrage,³¹ was also the most Antifederalist. On the other hand, strongly Federalist Pennsylvania had the nation’s most democratic state constitution, expansive suffrage that included free blacks, and a “political culture . . . that was the most democratic and fractious of any in America.”³²

The creation of the Senate illustrates this tension. James Madison and other nationalists wanted Senate seats based on population. This was the most “democratic” way to create a new government and reflect the principle, set out in the Declaration of Independence, that governments derived “their just powers from the consent of the governed,”³³ which required that representation be based on the governed—in other words, the population. The Senate resembled the rotten boroughs of Great Britain, which so infuriated Revolutionary-era Americans. That tiny Delaware or Rhode Island would have the same vote in the Senate as Virginia or Pennsylvania was a throwback to the state equality in Congress under the Articles that the leading Framers wanted to discard. Thus, Governor Randolph argued that representation in the new legislature should be based on population, and “Madison moved . . . the following resolution—‘that the equality of suffrage established by the articles of Confederation ought not to prevail in the national Legislature, and that an equitable ratio of representation ought to be substituted.’”³⁴

But the populists at the Convention insisted on state equality in the Senate, leading, as I already noted, to a system of representation that gives voters in small states far more political power

³¹ Beeman, *Plain, Honest Men* at 29 (cited in note 3). See also William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* 86–88 (Cornell 1972) (noting that Rhode Island’s government was established by its charter in 1663, that suffrage under the charter was limited to male property owners and their oldest sons, and that the allocation of seats in the legislature had not been changed since 1663).

³² Beeman, *Plain, Honest Men* at 39 (cited in note 3). See also *id.* at 132 (noting that the Pennsylvania state constitution was “more radically democratic than any in America”).

³³ US Declaration of Independence ¶ 2 (1776).

³⁴ Farrand, ed, 1 *Records of the Federal Convention* at 36 (cited in note 16).

than those in large states, which can skew presidential elections (through the Electoral College). The Senate, rooted in populism, was a rejection of the federalist goal of getting rid of state equality. This antidemocratic institution is an example of how the Framers' "coup" failed.

The chronology of the adoption of the Constitution also undermines the coup argument. Congress, composed of representatives chosen by state legislatures, called for the Convention in early 1787. The state legislatures then chose delegates. This process was not directly democratic, but it was consistent with how delegates to all national gatherings had been chosen since before the Revolution.

Klarman argues that the coup began with this process and claims that allowing the state legislatures to choose the delegates "probably ensured that nationalist and antipopulist views would be overrepresented" (p 246). But why should this be so? Klarman correctly explains that most state legislatures were reasonably democratic. Legislators served short terms, came from small districts, and were thus close to the people. Why would these populist state legislatures have sent nationalists to Philadelphia unless they understood the need for a new government?

Klarman notes that the "[s]tate legislatures were apt to choose prominent citizens to represent their states at a national convention" (p 246) and that these "prominent citizens" were more likely to be nationalists (p 246). This double claim is problematic. Who else should the legislatures have chosen? Unknown random citizens? Colonial and state legislatures had been choosing "prominent" men for national service since the Stamp Act Congress in 1765. But this does not mean they had to be nationalists or antipopulists. Virginia chose committed antinationals, Patrick Henry (p 250) and George Mason (pp 203–04), as well as nationalists, Madison and George Washington. New York chose two antinationals, John Lansing (p 253) and Robert Yates (p 253), and one nationalist, Alexander Hamilton.

Klarman complains that thirty of the delegates were Revolutionary War veterans (p 246), implying that these former officers helped engineer the coup. But who else should have been chosen? In the eighteenth century, military service was a key component of citizenship and a civic duty that almost all adult

men willingly and often enthusiastically accepted.³⁵ Should the legislatures have chosen former Tories or “shirkers” who did not fight for Independence? Wartime military service has always been a stepping stone to a political career. For example, from 1869 to 1900, every elected president but Grover Cleveland was a Civil War officer and every president from 1952 to 1993 was an officer in World War II, except Jimmy Carter, who had been too young. Similarly, most of the delegates at the Convention had served in the Patriot army or the Revolutionary government.

It is also hard to imagine that, if the delegates had been directly elected, the outcome would have been different. If Generals Washington, Pinckney, John Dickinson, Thomas Mifflin, or Colonel Hamilton, or Captain Nicholas Gilman had run for a position at the Convention, the voters in Virginia, South Carolina, Delaware, Pennsylvania, New York, or New Hampshire would probably have elected them. Virtually all the delegates were experienced wartime patriots and seasoned politicians whom average voters believed in, trusted, and admired. But not all were nationalists.

Klarman correctly notes that the “nationalist and antipopulist bent of the convention was a function [also] . . . of who chose not to participate” (p 248). Rhode Island simply refused to send delegates while the antinationalist Henry declined his appointment (pp 248–50). Professor Beeman dramatically says that if Henry had known about Madison’s plans, “he would have mounted his horse, ridden to Philadelphia, and voiced his vehement opposition.”³⁶ While Henry declined his appointment well before the Convention met, he knew that Madison and Washington hated the Articles. Surely Henry knew the views of the extreme nationalist, Hamilton of New York. Given who was pushing for a convention, only a politician with his head in the sand would not have known that nationalism was in the air, and men like Madison, Hamilton, and James Wilson were ready to create a stronger national government. Henry’s failure to show up may be America’s first example of the aphorism, “if you snooze, you lose.” But you can hardly claim that those who were awake conspired to pull off a coup because Henry, or the entire state of Rhode Island, chose to snooze.

³⁵ See Akhil Reed Amar, *America’s Constitution: A Biography* 323–27 (Random House 2005).

³⁶ Beeman, *Plain, Honest Men* at 92 (cited in note 3).

Normally, we think of a coup as an illegal takeover of the government through violence. Even the term “bloodless coup” suggests a threat of violence. But in September 1787, there was no threat of violence. No Brown Shirts threatened Congress; no army surrounded Federal Hall. It was all peaceful and calm. Some coup!

If the Congress believed this was a coup, it could have rejected the Constitution, ruled that ratification had to be unanimous, or amended the document. Rejecting such options, demonstrating there was no coup, Congress directed the state legislatures to call for democratically elected ratification conventions. The state legislatures had good reasons to block the Constitution, which would make them subordinate to the national government under the Supremacy Clause.³⁷ If this was the “Founders’ Coup”—abolishing the existing Congress, centralizing all this power, undermining state power, and compelling state officials to place the national constitution above their own—then it was accomplished with shocking ease and the complicity of Congress and most state legislatures.

The states dutifully accepted the revolutionary ratification process. Surely such a revolution or coup should have required troops in the street and cannons aimed at statehouses. But none of that happened. Except for Rhode Island, every state complied with Congress’s request and held conventions within ten months. This is powerful evidence that the process was not a coup, but rather a peaceful transition to escape the imbecility of the Articles.

During the Revolution, the states had often refused to comply with congressional requisitions of money and troops, and “the continental government struggled to persuade the individual state governments to match their words with their deeds.”³⁸ By 1777, national officials “were reduced to begging the states to contribute their fair share to the war effort.”³⁹ After the war, many states refused to comply with the peace treaty with England.⁴⁰ Time and again, the states notoriously ignored Congress, which is why Congress was bankrupt in 1787.

³⁷ US Const Art VI, cl 2.

³⁸ Beeman, *Plain, Honest Men* at 8–9 (cited in note 3).

³⁹ *Id.* at 9.

⁴⁰ In Virginia, some of these issues would not be resolved until the Supreme Court decided *Martin v Hunter’s Lessee*, 14 US (1 Wheat) 304 (1816).

The Framers offered the nation one last chance to avoid anarchy, tyranny, or the dissolution of the nation into a number of small countries that would have been vulnerable to Great Britain, France, or Spain. The nation accepted the offer, and the states deferred to Congress on the ratification process. By early January, five states had ratified, and on June 25, Virginia gave the Constitution its tenth ratification.⁴¹ A month later, New York became the eleventh pillar of the federal edifice.⁴² Congress immediately accepted the work of the Framers, which was ratified after democratic elections in eleven jurisdictions⁴³ following extensive, robust, and open debate. There has never been a coup like that.

Was the Philadelphia gathering a “runaway” convention, exceeding the purpose for which it was called? That call itself was ambiguous. Congress instructed the states to choose delegates “for the sole and express purpose of revising the Articles of Confederation and reporting” their work to Congress and the states in order to “render the federal constitution adequate to the exigencies of Government & the preservation of the Union.”⁴⁴ The Framers took this language and applied it to a robust Convention that did what was necessary for “the preservation of the Union.” After that, they sent it to the states for debate in separate conventions.

Klarman argues that the “lack of transparency in the process leading to the drafting of the Constitution” led to the Federalist coup (p 616). He claims “some people who might have resisted the dominant tendencies of the convention chose not to participate” because of “the lack of transparency in the convention’s agenda” (p 249).

The problem here is that people like Henry declined their appointment well before the Convention met, before anyone knew what was going to happen, before there was anything to be transparent about. It was not lack of transparency that kept Henry

⁴¹ See Gordon Lloyd, *State-by-State Ratification Table* (Ashbrook, 2017), archived at <http://perma.cc/T7AQ-D6SG>.

⁴² See Linda Grant DePauw, *The Eleventh Pillar: New York State and the Federal Constitution* 44 (Cornell 1966).

⁴³ Rhode Island boycotted the ratification process until after the Constitution had gone into effect. The North Carolina convention adjourned without a vote, reassembling and ratifying in November 1789. Rhode Island finally ratified in May 1790. See Lloyd, *State-by-State Ratification Table* (cited in note 41).

⁴⁴ Farrand, ed, 3 *Records of the Federal Convention* at 14 (cited in note 8) (describing the February 21, 1787, resolution of Congress).

in Virginia, but his lack of interest⁴⁵ (p 250) and his desire to return to his law practice “to earn some money.”⁴⁶ Had Henry predicted what the Convention was going to do, he might have attended, but his failure to attend cannot be explained by a lack of transparency.

Before the Convention met, there was no “agenda.” Some delegates—Madison, Hamilton, Wilson—were openly nationalist, and everyone would have been aware of their goals. But other delegates had different agendas. The Delaware delegates arrived sworn to insist on state equality in the national legislature and threatened to withdraw from the Convention over the issue.⁴⁷ South Carolina’s delegates favored a stronger national government but only if it protected slavery.

What would “transparency” have looked like before the Convention? The men pushing for a convention notoriously favored a stronger national government. The proto-Antifederalists in New York shrewdly sent two antinationalists to outvote the nationalist Hamilton. Virginia chose the antinationalists Henry and Mason to counter Madison and Washington. But Henry refused to serve and the two New York antinationalists left the Convention early, after they were fully apprised of the nationalists’ goals (pp 248–50). This was not a transparency issue—it was the failure of the antinationalists to engage in the debate.

Any presumed lack of transparency does not explain why Antifederalists abandoned the Convention. If John Lansing and Robert Yates, “two of the most implacable opponents of a strengthened government,”⁴⁸ had remained in Philadelphia, New York would have voted against the document and the signing statement could not have claimed the Constitution was approved by the “Unanimous Consent of the States present.”⁴⁹ If James McClurg had remained, he probably would have joined Randolph and Mason in not signing, and Virginia’s delegation would have been equally divided. Had Henry attended, the state would have voted “no” at the Convention. Had Luther Martin and John F.

⁴⁵ See Beeman, *Plain, Honest Men* at 92 (cited in note 3).

⁴⁶ John A. Ragosta, *Patrick Henry: Proclaiming a Revolution* 85 (Routledge 2017).

⁴⁷ Farrand, ed, 1 *Records of the Federal Convention* at 4 (cited in note 16) (“On reading the Credentials of the deputies it was noticed that those from Delaware were prohibited from changing the Article in the Confederation establishing an equality of votes among the States.”). See also *id* at 6, 37 (noting that delegates threatened to leave the Convention).

⁴⁸ Beeman, *Plain, Honest Men* at 203 (cited in note 3).

⁴⁹ US Const Art VII, cl 2.

Mercer remained (p 254), they would have significantly increased the “non-signers” at the end of the Convention. These Antifederalists could have collectively issued a powerful dissenting statement, or they might have forced the Convention to change the document. That these Antifederalists abandoned their posts, or never showed up, has nothing to do with Federalist practices, an alleged coup, or a lack of transparency.

Klarman also complains about the ratification process, arguing that:

[W]hat most Federalists wanted was not a genuine national debate on the merits of the Constitution but simply its ratification. During the ratifying contest, they generally sought to preempt the debate, recognizing that the longer the process lasted and the more people learned about the Constitution, the worse were their chances of winning (p 618).

This argument does not comport with the realities of politics or with what the Federalists actually did. To say that the Framers wanted “simply its ratification” hardly seems surprising. They wrote the Constitution to save the nation from anarchy, not to create some grand debating society. However, there was in fact voluminous debate across the country. *The Federalist Papers* are only the best known of the massive amount of Federalist constitutional analysis. There were equally important Antifederalist publications.⁵⁰

Klarman is correct that the Federalists pushed for speedy ratification, but they did not avoid debate. State conventions were elected after robust debates. Federalists everywhere engaged in open and enthusiastic debate to choose ratification delegates, often winning resounding victories. In other states, such as Virginia and Massachusetts, elections were quite close, and in New York the Federalists were swamped at the polls.

In the states where Federalists won decisive victories, there was less debate in the conventions; lengthy debate was unnecessary or actually impossible because all the delegates supported ratification. But, even where Federalists had unstoppable majorities, there was debate. It is not clear how much more debate Klarman thinks there should have been or where it should have been held. Politics and elections are not like moot court arguments. The Federalists wanted to see the Constitution ratified.

⁵⁰ See generally Merrill Jensen, ed, 2 *The Documentary History of the Ratification of the Constitution* (Historical Society of Wisconsin 1976).

Three of the first five state conventions ratified unanimously, so the debates were short. There was no one on the other side of the issue to carry on a debate. There was no reason for Federalists in the Delaware, Georgia, or New Jersey conventions to play devil's advocate or have a moot debate just for the sake of talking.

Federalists completely controlled Pennsylvania's Convention. Nevertheless, they held more than three weeks of spirited debate before voting two-to-one to ratify.⁵¹ In Connecticut, the Federalists had a three-to-one majority, and the debates lasted only six days.⁵² Perhaps this is what Klarman has in mind when he argues that the Federalists suppressed the debate (p 618). But six days was enough to consider the document when three-quarters of the delegates wanted to ratify. The votes were so lopsided in these first five conventions because the voters in these states overwhelmingly favored the Constitution.

In Pennsylvania, Antifederalists—not Federalists—opposed debate. After the Convention ended, the Pennsylvania legislature moved to call for a ratification convention (p 427). The Pennsylvania constitution required two-thirds of the legislature for a quorum, rather than a simple majority. To prevent the legislature from calling a convention, nineteen Antifederalists boycotted the legislature to prevent a quorum. A Philadelphia mob forced two legislators to return to the legislature. Antifederalists properly denounced the mob action. However, the legislature's sergeant at arms would have arrested the boycotters if the mob had not done so. Meanwhile, Federalists denounced the “barefaced act of tyranny and wickedness” of those elected officials who neglected their duty by boycotting the legislature (p 427). Both sides had a point. But the boycott shows it was Antifederalists, not Federalists, who opposed debate.

In other states, the Federalists won precisely because of lengthy debates. Federalists in the Massachusetts, New Hampshire, and Virginia conventions initially lacked a majority.⁵³ A quick vote might have defeated the Constitution in those states. But, after weeks of debate in Massachusetts and Virginia, votes shifted, and the Federalists won. In New Hampshire, the debates

⁵¹ The vote in the Pennsylvania ratifying convention was forty-six in favor of the Constitution and twenty-three against. See Beeman, *Plain, Honest Men* at 382 (cited in note 3).

⁵² See *id.* at 384–85.

⁵³ See *id.* at 387, 391, 395–400. Beeman notes that “the Massachusetts ratifying convention would offer the opponents of the Constitution a greater opportunity to voice their misgivings than . . . the conventions that had preceded it.” *Id.* at 387.

were shorter, but the result was the same.⁵⁴ Federalists carried the day in these debates. In Virginia, Madison and his allies eviscerated the antinationalist proto-states' rights arguments of Henry and other Antifederalists. In Rhode Island, the Antifederalist legislature refused to call a convention at all, thus refusing to engage in debate.

Antifederalists adopted what might be called the “ostrich strategy”—ignoring the process, hoping it would go away. It took nine states to ratify the Constitution but only five to derail it. Antifederalists controlled New York,⁵⁵ North Carolina,⁵⁶ Rhode Island,⁵⁷ and Virginia, where they “were more formidable than those anywhere in America.”⁵⁸ In Massachusetts, the outcome was “too close to call” when the state’s ratification convention began.⁵⁹ Instead of calling conventions and defeating the Constitution, the Antifederalists did nothing and, contrary to Klarman, refused to engage in politics or debate. Meanwhile, Federalists in Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut quickly ratified either unanimously or by impressive majorities.⁶⁰ If the Constitution was as unpopular as Klarman claims—if it was a coup by a runaway convention—why weren’t the opponents willing to call ratifying conventions to defeat it?

Klarman argues that the Federalists had “built-in advantages” in the ratification process (p 610) because opponents were in the backwoods and harder to organize and most of the newspapers were Federalist (p 610). But this cannot explain the Antifederalists’ failure to act in Rhode Island, New York, Virginia, New Hampshire, or North Carolina, where they were enormously powerful. Klarman says the Virginia and New York Antifederalists “made a serious tactical blunder by scheduling their states’ ratifying conventions so late in the process that they became mostly irrelevant to the larger outcome” (p 610). But Antifederalist incompetence does not make Federalist success a coup. The Antifederalists’ “tactical blunder” resulted from their political ideology and their refusal to engage in debate. In the end, the lethargy of the Antifederalists reflected their ideology and their lack of energy.

⁵⁴ See *id.* at 391.

⁵⁵ DePauw, *The Eleventh Pillar* at 57 (cited in note 42).

⁵⁶ Beeman, *Plain, Honest Men* at 403–05 (cited in note 3).

⁵⁷ *Id.* at 391–92.

⁵⁸ *Id.* at 395.

⁵⁹ *Id.* at 386.

⁶⁰ See Lloyd, *State-by-State Ratification Table* (cited in note 41).

By contrast, the Federalists had “energy”—one of Publius’s favorite words. In *The Federalist Papers*, Hamilton argued the nation needed “[a]n enlightened zeal for the energy and efficiency of government,”⁶¹ while the government under the Articles was “desitute of energy.”⁶² The Federalists had energy; the Antifederalists had none. Klarman complains about Federalist tactics, the fact that most newspapers supported them, that they were politically aggressive. But Klarman ultimately admits:

Despite all their advantages and shrewd tactical decisions, Federalists probably could not have won the battle over ratification had a great many Americans not agreed with Randolph’s assessment that the Articles of Confederation had “proved totally inadequate to the purpose for which it was devised” and had become a “political farce” that needed to be drastically revised or replaced (p 611).

Thus, in eleven states, the people elected conventions that ratified the Constitution because it was the only viable alternative to the “imbecility” of the Articles. This was not a coup; it was a popular revolution in government with enormous electoral support.

Klarman claims that the ratification process “depart[ed] from existing norms—especially in New England—of how important governance decisions were to be made” (p 618). He explains how town meetings voted on the Massachusetts constitution of 1780 (p 618).⁶³ But he fails to acknowledge that Massachusetts was the *only* state to send its Revolutionary-era constitution to the people for their consideration. In each of the other ten states⁶⁴ that adopted constitutions during that time period, the legislature simply wrote and promulgated the constitution.

Here, Klarman has it completely backwards. With the exception of Massachusetts, the Federalists proposed the *most democratic* process ever used in the new nation to ratify a constitution.

⁶¹ Federalist 1 (Hamilton), in *The Federalist* 3, 5 (Wesleyan 1961) (Jacob E. Cooke, ed).

⁶² Federalist 15 (Hamilton), in *The Federalist* 89, 93 (cited in note 61).

⁶³ See Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 91 (North Carolina 1980). Equally important, Massachusetts was the only state in this period to hold a constitutional convention. *Id.* at 92.

⁶⁴ Connecticut and Rhode Island did not write constitutions until 1818 and 1843, respectively. See *Constitution of the State of Rhode Island and Providence Plantations: Introduction* (Rhode Island General Assembly), archived at <http://perma.cc/93WU-GR3L> (stating that Rhode Island did not adopt a constitution until 1843); *Constitution of Connecticut. 1818*. (Connecticut General Assembly), archived at <http://perma.cc/P8PP-PAQE> (listing 1818 as the date of the adoption of the original Connecticut constitution).

Special elections to choose delegates to ratification conventions were far more democratic—more “populist” in Klarman’s terms—than having existing state legislatures ratify, as the Articles required.

Having admitted the inadequacies and unpopularity of the Articles, Klarman argues—as Antifederalists would have—the Federalists offered the nation a “stark choice” between the new system and keeping the Articles (p 611). He complains that the “Federalists triumphed” because “they managed to avoid offering the American people the option that most of them probably would have favored: ratification of the Constitution together with amendments to significantly limit the power of the new national government and to alter its structure to permit greater populist influence” (p 617). Antifederalists surely demanded prior amendments or conditional ratification. But these Antifederalists were defeated, often decisively, in almost every state. If the people really wanted prior amendments, they would have elected Antifederalist majorities, but in most states they did not. In the context of Antifederalist defeats at the polls, it is difficult to understand the basis of Klarman’s claim that “most” Americans wanted prior amendments to eviscerate the power of the new government.

Neither Klarman nor the Antifederalists ever explained how prior amendments would have worked. Several state conventions suggested future amendments. Eventually, Madison would sort through some two hundred proposed amendments in drafting the Bill of Rights.⁶⁵ By eliminating duplications, “[a]bout 100 separate proposals [could] be distinguished,” and a “clear majority” called for structural changes to undermine the power of the new government.⁶⁶ However, even when the goals of the proposals were duplicative, the details and wording were not. Thus, there would have been about two hundred prior amendments, many of which contradicted each other.

⁶⁵ See Richard Labunski, *James Madison and the Struggle for the Bill of Rights* 199–200 (Oxford 2006) (discussing the various sources Madison used to compile his proposed amendments). For a broader discussion, see generally Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 S Ct Rev 301.

⁶⁶ Kenneth R. Bowling, *A Tub to the Whale: The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J Early Republic 223, 228 (1988). See also Paul Finkelman, *A Well Regulated Militia: The Second Amendment in Historical Perspective*, 76 Chi Kent L Rev 195, 200–04 (2000). All the proposals can be found in Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds, *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 1–54 (Johns Hopkins 1991).

Klarman argues that the “Antifederalists made a strong case for conditional ratification” (p 616) but never explains how this would have worked. Would a new government have been conditionally formed, or would the old Congress under the Articles have operated, with all its imbecilities, while another convention considered amendments? Would every ratifying convention have had to reassemble to approve the amendments? Would the nation have had to wait until 1790 or 1791 for another convention to deal with amendments and start the ratification process all over again?

In reality, conditional ratification was implausible. Each set of proposed amendments differed in significant ways, and many were inconsistent with each other. It would have been impossible for the new government to accept all of them under conditional ratification. Five states ratified quickly, with no proposed amendments.⁶⁷ Would their ratifications have been voided by the subsequent conditional ratifiers? What if these early ratifiers refused to accept the amendments subsequently proposed by other states? The nation needed a functional government—not a perpetual debating society. Did the nation have the patience for a multiyear process of conditional ratifications followed by debates in the old Congress (or the new Congress?) or in new ratifying conventions to determine which conditional amendments should be ratified?

Klarman claims that most Americans wanted amendments “to significantly limit the power of the new national government and to alter its structure to permit greater populist influence” (p 617). But the Federalist avalanche in the 1788 elections undermines this claim. Campaigning in support of the existing Constitution and running against amendments—especially structural amendments—the Federalists swamped their opponents across the country.⁶⁸ This suggests that Americans wanted stability, not endless tinkering with the structure of government. Meanwhile, in every state except Virginia, the state legislatures—which should have been the bastions of populism and antinational power—sent Federalists to the new Senate.⁶⁹

After ratification, Madison proposed what became the Bill of Rights but did not offer amendments to alter the structure of the

⁶⁷ See Lloyd, *State-by-State Ratification Table* (cited in note 41).

⁶⁸ See Michael J. Dubin, *United States Congressional Elections, 1788–1997* 1–3 (McFarland 1998).

⁶⁹ *Senators of the United States: 1789–Present* *2 (US Senate), archived at <http://perma.cc/5Z86-CVM6>.

Government or sap its energy. He refused to support “a reconsideration of the whole structure of the Constitution—for a reconsideration of the principles and the substance of the powers given.”⁷⁰ His amendments mostly protected civil liberties and were “limited to points which are important in the eyes of many and can be objectionable in those of none,” while “the structure & stamina of the Govt. are as little touched as possible.”⁷¹ Significantly, the states did not ratify the two amendments Madison proposed that went to the structure of the government.⁷² This suggests that most Americans were not as keen on structural changes as Klarman argues.

IV. WHAT THE CONVENTION OF 1787 LOOKED LIKE

How did the Convention accomplish its clear departure from the existing political structure? Does the Convention of 1787 offer a model for a modern convention? If we have a modern convention, it will probably not resemble the gathering in Philadelphia. The nation is desperately short of a James Madison, a James Wilson, or a Gouverneur Morris, who were thoughtful, politically experienced, well educated, and steeped in political theory and the concept of governance. No living American has the credibility or prominence of Benjamin Franklin or George Washington. We can find Alexander Hamilton on Broadway, but while Lin-Manuel Miranda’s skills as a composer, lyricist, and actor/singer are superb, I am not sure he can write a new version of *The Federalist Papers*. The other delegates were similarly distinguished and famous, heroes of the Revolution, signers of the Declaration of Independence, diplomats, and scientists. Writing from Paris, Thomas Jefferson marveled, “It is really an assembly of demigods.”⁷³ Sadly, the modern United States is mostly bereft of demigods.

Beyond personnel, it is unlikely that a modern convention would operate as our first one did. The 1787 Convention held its

⁷⁰ Finkelman, *James Madison and the Bill of Rights* at 337 (cited in note 65).

⁷¹ Letter from James Madison to Edmund Randolph (June 15, 1789), in Charles F. Hobson and Robert A. Rutland, eds, 12 *The Papers of James Madison* 219 (Virginia 1979).

⁷² These were amendments regulating the size of the House of Representatives and preventing a sitting Congress from raising its own salary. This eventually became the Twenty-Seventh Amendment.

⁷³ Letter from Thomas Jefferson to John Adams (Aug 30, 1787), in Julian P. Boyd, ed, 12 *Papers of Thomas Jefferson* 66, 66–69 (Princeton 1955).

meetings in secret and did not record votes of particular delegates. These two rules are essential elements of Professor Klarman's coup (pp 136–37). They lead to Klarman's complaints about the lack of "transparency" (pp 249, 616–17) at the Convention. But transparency was mostly unknown in the eighteenth century. For example, for its first six years the Senate kept no record of its debates, which were held behind closed doors.⁷⁴

Convention rules provided "[t]hat nothing spoken in the House be printed, or otherwise published, or communicated without leave."⁷⁵ Significantly, there was no public outcry over this rule. Privately, Jefferson complained of the "abominable [] precedent . . . of tying up the tongues of their members," which ignored "the value of public discussions."⁷⁶ But Klarman offers no other contemporary complaints about the secrecy. After being defeated in their ratifying convention, Pennsylvania Antifederalists ranted about the "secret conclave" (p 252). Similarly, Antifederalists in Albany complained that secrecy was the "genius of aristocracy" (p 252). But these are the carpings of the losing side. It seems likely that if the Convention had given Antifederalists what they wanted, they would not have murmured a word about the closed convention. These Antifederalist complaints during ratification do not demonstrate public opposition to the closed convention in the summer of 1787.

Klarman argues that secrecy was central to the coup because it allowed a "relatively like-minded group of elite nationalists" to "maneuver independent of public opinion" (p 253). Klarman's delegates are hiding in Independence Hall, preventing the people from hearing the debates, and plotting their coup. However, the Convention adopted this rule *before* the debates began and delegates who disagreed vehemently on substantive issues supported secrecy. Madison claimed that "no Constitution would ever have been adopted by the convention if the debates had been public,"⁷⁷ while his nemesis George Mason agreed that secrecy was "a necessary precaution."⁷⁸ The complaints of the Albany

⁷⁴ See Kenneth R. Bowling and Helen E. Veit, eds, *The Diary of William Maclay* xi–xii (Johns Hopkins 1988) (noting the lack of "documentary evidence" of senate debates "during the six years when it met in secret"); Todd Estes, *The Jay Treaty Debate, Public Opinion, and the Evolution of Early American Political Culture* 34 (Massachusetts 2006).

⁷⁵ Farrand, ed, 1 *Records of the Federal Convention* at 15 (cited in note 16).

⁷⁶ Letter from Thomas Jefferson to John Adams (Aug 30, 1787), in Boyd, 12 *The Papers of Thomas Jefferson* at 69 (cited in note 73).

⁷⁷ See Beeman, *Plain, Honest Men* at 83 (cited in note 3).

⁷⁸ Farrand, ed, 3 *Records of the Federal Convention* at 33 (cited in note 8).

Antifederalists, which Klarman favorably quotes, seem less credible when we know that Robert Yates, the leader of the state's Antifederalists, supported the secrecy rule at the Convention.⁷⁹

Tied to the secrecy rule was the decision not to record the votes of individual delegates because, as Rufus King impressively argued, "changes of opinion would be frequent in the course of the business" and such a record would impede deliberations.⁸⁰ Only the yeas and nays of each state delegation were recorded. Another rule allowed any delegate to ask for a reconsideration of any vote.⁸¹ Similarly, there was no formal record of the debates.

We have a general idea of what happened at the Convention, mostly because Madison kept fairly detailed notes of the debates and other delegates kept some notes. But modern scholars have demonstrated that Madison changed his notes after the Convention,⁸² and his note taking was not as superb as we once thought.⁸³

V. CIVILITY AND CRISIS

What then do the Convention of 1787 and Professor Klarman's book teach us, as we face the possibility of a new convention? Beyond the difference in structure and rules, the circumstances of 1787 differed dramatically from today in three significant ways. First, America faced a genuine crisis in 1787. The government was bankrupt, with no coherent and workable foreign or trade policy. Second, it was virtually impossible to amend the Articles because of the unanimity rule.⁸⁴ Third was the civility of debate at the Convention. Despite strong ideological beliefs, delegates worked together all summer.

This remarkable civility is perhaps the greatest difference between then and now. "As inheritors of a classical republican tradition, the delegates were deeply committed to retaining decorum

⁷⁹ See Farrand, ed, 1 *Records of the Federal Convention* at 13–16 (cited in note 16) (recording no opposition to the rule of secrecy).

⁸⁰ *Id.* at 10.

⁸¹ See *id.* at 16.

⁸² See Mary Sarah Bilder, *Madison's Hand: Revising the Constitutional Convention* 179–222 (Harvard 2015).

⁸³ See Beeman, *Plain, Honest Men* at 98 (cited in note 3).

⁸⁴ Amendment of the US Constitution is difficult, and some amendments, such as eliminating "equality" in the Senate, are structurally impossible. But the other constitutionally absurd provision—the Electoral College—can be practically eliminated when a sufficient number of states pass legislation to implement the National Popular Vote Compact. See *Agreement among the States to Elect the President by National Popular Vote* (National Popular Vote, Jan 4, 2016), archived at <http://perma.cc/9VUY-SBU7>.

in their proceedings and enforcing a code of gentlemanly respect.”⁸⁵ The Convention provided that any delegate “be called to order” for disrespectful language and “to explain his conduct or expressions, supposed to be reprehensible.”⁸⁶ Delegates usually debated with great civility. As Benjamin Franklin noted, initially the “debates were carried on with great coolness & temper.”⁸⁷ When debates became more tense, Franklin wisely noted that “[p]ositiveness and warmth on one side, naturally beget their like on the other” and “harmony & [u]nion are extremely necessary to give weight to our Councils, and render them effectual in promoting & securing the common good.”⁸⁸ Given the toxic nature of contemporary politics, it is hard to imagine a modern convention functioning around notions of “positiveness and warmth” and conducting debates “with great coolness & temper.” Despite strong disagreements, delegates generally displayed remarkable civility and seriousness of purpose throughout the Convention. But given their many disagreements and heated debates at the Convention, they would be surprised—even shocked—by Klarman’s assertion that they were a “relatively like-minded group of elite nationalists” (p 253).

Some groups were less willing to compromise. Southerners gained enormous protection for slavery, while small-state populists saddled the nation with the imbecility of state equality in the Senate, leading, in our own time, to the 204 million people in the fifteen largest states being represented by thirty US senators, while the 105 million people in the thirty-five smallest states are represented by seventy US senators.⁸⁹ The president was (and still is) elected by that absurdity known as the Electoral College, which favors small states over large states and allows a minority of voters—Klarman’s populists—to defeat the majority.

Klarman is right that the final Constitution was clearly undemocratic in many ways. But these results are as much a function of the populists as the nationalists. Thus the Senate (along with the Electoral College) was thoroughly undemocratic and remains so today, but its cause was not the nationalists—the men

⁸⁵ Beeman, *Plain, Honest Men* at 81 (cited in note 3).

⁸⁶ Farrand, ed, 1 *Records of the Federal Convention* at 9 (cited in note 16) (relaying the May 28 report of Mr. Wythe from the Rules Committee).

⁸⁷ *Id.* at 197 (summarizing the debate of June 11).

⁸⁸ *Id.*

⁸⁹ See Burnett, *Congressional Apportionment* at *2 (cited in note 19) (Table 1). For a more elaborate discussion of this issue, see Finkelman, 58 *SLU L J* at 1081–82 (cited in note 19).

who ran the coup, according to Klarman (p 247)—but the populists from small states. The nationalists at the Convention wanted congressional representation based on population. Nothing could be *more* democratic than this. But the populists—the antination-
alists from the small states—insisted on equality in the Senate (p 203). Even in the House, representation favors the small states, making it impossible to achieve anything close to “one person, one vote” for the House. This remains a huge problem, complicated by the absurdity of the decision by Congress more than a century ago to freeze the size of the House of Representatives.⁹⁰

The Convention was hardly a coup. It was the work of diverse delegates with conflicting agendas and various notions of self-interest. It might be time to dump the whole system and start over. That would require another constitutional convention, not simply a special convention to consider the call for a single amendment. Are we ready for either kind of convention? Here, the wisdom of Justice Scalia shines through. “Whoa! Who knows what would come out of it?”⁹¹

⁹⁰ Finkelman, 58 *SLU L J* at 1081–82 (cited in note 19).

⁹¹ Coyle, *Scalia, Ginsburg Offer Amendments to Constitution* (cited in note 7).