

“CRITICAL LEGAL STUDIES, AGAIN?”  
“AGAIN AND AGAIN!”

**FROM PARCHMENT TO DUST: THE CASE FOR CONSTITUTIONAL SKEPTICISM.** Louis Michael Seidman.\* New York: The New Press. 2021. Pp. viii + 311. \$27.99 (Hardcover).

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You’d be forgiven for assuming that Louis Michael Seidman’s estimation of the U.S. Constitution had improved over the course of the last decade. In his 2012 book, *On Constitutional Disobedience*, he asked whether anyone should “feel obligated to obey [a] deeply flawed, eighteenth-century document,” and answered (emphatically) “No.”<sup>2</sup> Now he has published *From Parchment to Dust: The Case for Constitutional Skepticism*. At first blush, skepticism seems rather different and less radical than disobedience. Has he come to think better of the “oldest [constitution] currently in force in the world”?<sup>3</sup>

No. Seidman remains dedicated to demystifying the U.S. Constitution, U.S. constitutional law, and the institution most closely associated with both—the Supreme Court of the United States—in the hopes that doing so will persuade readers to make a break with them. The end goal remains robust democracy that “rule[s] no outcomes out of bounds and encourage[s] unending argument” between citizens who will better “negotiate [their] differences . . . listen to others . . . [and] compromise rather than insist on using all the power we have” (p. 246).

In other words, Seidman is an unreconstructed critic, in both the ordinary and legal-academic sense. In the ordinary sense, he finds fault with the Constitution, constitutional law,

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2. LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 4 (2012).

3. *Id.* at 11.

and the Supreme Court; in the second, he regards all of the above as incapacitating, alienating, and authoritarian, for reasons that he and his fellow participants in the American critical legal studies (“CLS”) movement urged from the movement’s inception. Seidman’s book invites reconsideration of the analytical power and politics of CLS’s cynical acid.

Indulge an analogy, anticipated by this Essay’s title.<sup>4</sup> For a brief period, CLS was to legal scholarship what the Wu-Tang Clan was to rap music.<sup>5</sup> It was cool, groundbreaking, and distinctive. It had a committed following, and its leaders were stars in their own right. You could love it or hate it, but you could not ignore it. And then it fell apart.

The first Wu-Tang “cycle,” encompassing the group’s debut, *Enter the Wu-Tang: 36 Chambers*, and five solo albums by group members, includes some of the most highly regarded rap albums ever released.<sup>6</sup> Things began to fall apart after the second group album—the epic, double-disk *Wu-Tang Forever*—was released in 1997.<sup>7</sup> But the group and its members continued to work, and some of their productions—like Ghostface Killah’s 2000 *Supreme Clientele*—are unqualified masterpieces. CLS was pronounced dead in 1996 by one of its principal founders, Duncan Kennedy.<sup>8</sup> But Crits have gone on to produce stellar scholarship.

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4. See WU-TANG CLAN, *Protect Ya Neck*, on ENTER THE WU-TANG (36 CHAMBERS) (Loud Records, 1993).

5. For a comprehensive, track-by-track analysis of each album, see S. H. FERNANDO, JR., FROM THE STREETS OF SHAOLIN: THE WU-TANG SAGA 141–364 (2021).

6. Of particular note among these are GZA’s *Liquid Swords* and Raekwon’s *Only Built 4 Cuban Linx*, both released in 1995. See *id.* at 240–305.

7. For an overview of the group’s internal disputes, see Jeff Rosenthal, *A Comprehensive History of the Wu-Tang Clan’s Endless Beefs*, VULTURE (Apr. 24, 2014), <https://www.vulture.com/2014/04/comprehensive-history-of-wu-tang-clans-beefs.html>. Note the timeline—things begin to go downhill after *Wu-Tang Forever*’s release in 1997. This should not be taken as an indictment of the latter’s quality—although it is beyond the scope of this Essay to defend this position, I regard it as superior to the group’s debut.

8. See Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 525 n.21 (2000).

As *Supreme Clientele* is a Wu-Tang album,<sup>9</sup> *From Parchment to Dust* (“FPD”) is a CLS book. More specifically, it is a work of critical *constitutionalism* that applies to constitutional decision-making characteristically critical insights about the indeterminacy of law, the political nature of legal decision-making, and the disutility of rights.<sup>10</sup> And, like Ghostface’s second album, it reminds us why this stuff caught on to begin with.

FPD is not, however, quite the constitutional-law equivalent of *Supreme Clientele*. The latter is chock-full of experimentation with symphonic sounds, bizarre stream-of-consciousness storytelling, and (non-Wu) guest appearances that would have been entirely out of place on Ghost’s first album, *Ironman*, to say nothing of the bare-bones, Wu-only *36 Chambers*. Seidman’s book would have benefited from analogous innovation. There are missed opportunities here for engagement with longstanding criticisms of CLS that are highly relevant to Seidman’s case for skepticism; considered attention to constitutional law’s current place in a particular political-economic order; and conversation with emerging left-legal scholarship that shares certain of CLS’s commitments.

Part I summarizes Seidman’s argument for constitutionalism skepticism. Part II sketches the history of CLS as a movement,

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9. I consider “Wu-Tang album” to be a cluster concept, the instances of which include one or more of the following 10 properties:

- (1) Dense, multisyllabic rhymes that range from the hilariously abstract to the horrifyingly concrete
- (2) Production by the RZA of more than two tracks
- (3) Braggadocio, particularly about lyrical prowess
- (4) Appearances by founding Wu-Tang members, especially on posse cuts with more than one member
- (5) Geek culture, especially kung-fu films and comics
- (6) Neologisms, alter egos, and aliases that can make entire verses (particularly those of Ghostface and Raekwon) impenetrable
- (7) Cinematic references (particularly to kung-fu and gangster movies), sound samples, and structure
- (8) Extreme violence, some amusingly and obviously fictional, some plausible enough to be menacing
- (9) Gangster lore
- (10) Black nationalist ideology, especially drawn from the Five-Percent Nation.

Not all Wu-Tang albums have all of these properties, but none lack all of them; the more an album possesses, the more likely it is to be a Wu-Tang album.

10. See Louis Michael Seidman, *Critical Constitutionalism Now*, 75 *FORDHAM L. REV.* 575, 577 (2006) (describing critical constitutionalism as advancing “two overlapping critiques of standard constitutional practice—the critique of determinacy and the critique of rights”).

identifies hallmarks of critical scholarship, and describes left critiques of CLS that are implicated by Seidman's arguments. Part III critiques the book. The Essay ends on a note of solidarity and optimism of the will.

## I. ENTER SKEPTICISM<sup>11</sup>

### A. SKEPTICISM, EXPLAINED

Before the reader is told anything about what "constitutional skepticism" is, Seidman recites a laundry list of dispiriting facts about U.S. political life that prime readers to be receptive. We can place them into three categories:

- (1) **DEMOCRATIC DEFICITS.** Four out of the last eight U.S. Presidents have been elected by a minority of the U.S. population; representation in the U.S. Senate is apportioned indifferently to state population; an unelected, life-tenured Supreme Court has unreviewable power over fundamental political questions.
- (2) **BAD RULES.** There's no good reason today for requiring that a President be a "natural born Citizen" and excluding from consideration otherwise qualified candidates.<sup>12</sup>
- (3) **OBFUSCATING DISCOURSE.** The Supreme Court engages in constitutional interpretation that happens to regularly align with political priorities but is passed off as being dictated by commands from the Constitution's Framers (pp. 1–2).

Seidman seems most concerned about the first category, and indeed the other two might be seen as species of the genus "democratic deficits." The dumb, fixed rules are undemocratically fixed and produce undemocratic outcomes; the obfuscating discourse impedes forthright democratic engagement with one another about things that really matter.

Seidman then delineates "what constitutional skepticism is all about" (p. 3). Skeptics have a "coherent and unified" stance towards what I'll refer to as the capital-C "Constitution" (p. 4). They are skeptical about all of the following:

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11. See *WU-TANG CLAN*, *supra* note 4.

12. U.S. CONST. art. II, § 1, cl. 5.

- (1) Individual constitutional provisions that “entrench unjust, anachronistic, undemocratic, and unworkable” limitations on political choice (p. 3).
- (2) Many Supreme Court decisions that “impose contestable and sometimes downright evil, idiosyncratic judicial judgments on the rest of us” (p. 3).
- (3) Whether “our country’s fate should be determined by a deeply entrenched, essentially unamendable document” (p. 3).
- (4) “[T]he role that a group of unelected, often partisan judges play in our polity” (p. 4).
- (5) “[T]he uniquely American reverence for the Constitution and for the Supreme Court,” which “denies our own responsibility to create the kind of country we want to live in” (p. 4).
- (6) The way in which the Americans “formulate ordinary political disputes in terms of ‘rights’ that are absolute and nonnegotiable,” which “exacerbates political tension[,]” “obstructs authentic dialogue[,]” and is “driving the country toward irreparable fissures” (p. 4).

Seidman undertakes to defend all six, skepticism-constitutive claims. But he allows that a reader might be persuaded by some and not others, and says that he would consider that a “(partial) victory” (p. 4).

Having stated what constitutional skepticism is, Seidman makes clear what it isn’t. It isn’t committed to the idea that constitutions are always and everywhere net-negatives. It is focused on the U.S. Constitution—its hard-wired features, its interpretation by the Supreme Court, its privileged place in U.S. politics—here and now (p. 4). Nor is constitutional skepticism committed to moral skepticism—the belief “that one moral claim . . . is no stronger or weaker than another moral claim” (p. 5). Indeed, Seidman emphasizes that “constitutional skepticism is almost always rooted in some sort of normative judgment” and that that judgement “often takes the form of a vision of substantive social justice—a conception of what people deserve and what is necessary for human flourishing” (p. 5).

Indeed, skeptics are firm believer in *a* constitution. Call it the *s*-constitution. The *s*-constitution “is a set of customs, attitudes, practices, and mutually observed constraints that we share without much thinking about them, and that are necessary

to unify a country where people disagree about many foundational questions” (p. 9). These constraints include “documents”—among other things, “the Preamble to the standard Constitution” and Martin Luther King Jr.’s “I Have a Dream” speech (p. 9). But the s-constitution is “nowhere codified”; its content is “subject to reasonable disagreement”; and it is “implemented and amended daily” (p. 9). Skeptics are confident in “the ability of citizens to engage in untrammelled and mature deliberation and debate” (p. 9) without being compelled to do this or that by “a piece of parchment” (p. 10) that specifies detailed rules.

Seidman is thus calling for a bloodless *ideological* revolution, not any particular set of institutional changes. The Constitution’s Preamble structures his book, and he expresses confidence that Americans will not lightly discard “established understandings and ways of doing things” (p. 10). Come the revolution, “institutional redesign will be on the table” and “the Constitution says X” won’t be an argument-stopper (p. 10). But Seidman doesn’t offer a recipe or a blueprint.

Still, this revolution would be a big deal. Seidman believes that it would make our political life better rather than worse. He therefore must persuade readers that the Constitution has serious problems, *and* that the s-constitution would improve things enough to justify the transition. It is to be doubted that any revolution in history has come about without confidence that the expected benefits would exceed the expected costs. Because the costs of transition are always significant, the initial burden is always on the revolutionary.<sup>13</sup>

#### B. SKEPTICISM IN ACTION

Seidman’s critique of the Constitution is foundational. He contends that the Framers distrusted democracy for class-situated reasons and therefore created undemocratic institutions that reflect that distrust. The first two chapters, entitled “We the People,” elaborate this argument.

Seidman’s analysis of *Federalist 10* and *Federalist 51*, both authored by James Madison, discloses the class-situated

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13. Specifically, the costs of uncertainty about the effects and the transaction costs associated with any institutional changes that are expected to produce them. See JON ELSTER, *SECURITIES AGAINST MISRULE: JURIES, ASSEMBLIES, ELECTIONS* 286 (2013).

preoccupations and calculations that underwrote the construction of “a dizzying array of obstacles to concerted action” (p. 22). The political-economic context for the latter included “[s]tate governments with weak executives and courts, where legislatures served for short terms and . . . popular pressure was sufficient to force enactment of redistributive and debtor relief legislation” (p. 20). Famously, Madison warned of the “dangerous vice” of “faction,” defined broadly to include “a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”<sup>14</sup> The definition is broad enough to encompass majoritarian or minoritarian threats to the general welfare. But the Framers’ primary concern with majoritarian faction is evinced by the “divide and conquer” strategy that they built into the Constitution’s structure to “provide [a] buffer between the people and public policy” (p. 21).

Division took place through two primary means. The first was through geography. A large country with many political units would, Madison predicted, “be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.”<sup>15</sup> Madison anticipated that for the most part “fit characters” would be selected to hold national office because of the need to appeal to “so many parts, interests, and classes.”<sup>16</sup> Second, even if “enlightened statesmen will not always be at the helm,”<sup>17</sup> the Framers erected so many “veto gates” through which legislation must pass to be enacted that the sort of legislation Madison feared would be shot down before going into effect (p. 22).

Consider: The House may pass a bill, but the bill may not clear the Senate. The Senate may send the bill to the President, but the President may veto it. It takes a supermajority of both Houses to override the President’s veto. The President may sign it into law, but the Supreme Court may hold it unconstitutional (p. 22).

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14. THE FEDERALIST No. 10, at 56–57 (James Madison) (Jacob E. Cooke ed., 1961).

15. THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

16. THE FEDERALIST NO. 10, *supra* note 14, at 63 (James Madison); THE FEDERALIST NO. 51, *supra* note 15, at 351 (James Madison).

17. THE FEDERALIST NO. 10, *supra* note 14, at 60 (James Madison).

The gridlock is the point. As Seidman explains, “[e]ach of these branches of government is responsible to different constituencies[,]” in order to ensure that the “chances that they would unite around a common ‘passion’ are . . . remote” (p. 22). If one accepts Madison’s premises that (1) popular organization around redistributive legislation is dangerous and (2) minoritarian factions are a lesser evil because of regular elections, the institutional conclusions seem to follow easily.

Seidman rejects Madison’s premises. What Madison feared from the multitude should be celebrated as “an exhilarating manifestation of self-governance” (p. 22). Regular elections do not prevent minoritarian factions from emerging, because “well-organized and concentrated interest groups . . . overwhelm diffuse and relatively powerless majorities” (p. 23). The result of building a government around these mistaken premises has been paralysis in the face of pressing national problems and accompanying disengagement from the political process, manifested in low voting turnouts and lack of confidence in Congress, the presidency, and how democracy is working more generally (pp. 15–17).

By contrast with the other branches, the Supreme Court has no great difficulty making decisions of fundamental importance to U.S. political life and reliably polls better than its institutional competitors (pp. 16–17). Seidman contends that, unfortunately, its power is largely unjustified and its reputation for what the Preamble calls “establish[ing] justice”—the subject of Chapter 3—is largely undeserved (p. 40). The Justices have sterling academic credentials but limited experience relevant to the decisions they make (pp. 49–50). Many ascended to their positions as a consequence of “deep ties of personal and political loyalty,” and “in case after case with political implications, the justices vote as their patrons would like” (pp. 50–51). It has been thus from the early days of the republic.

And, Seidman argues, the results have been bad. The Court “has rendered many, many truly terrible decisions” (p. 54). The Court has sided with slaveholders, read the Thirteenth, Fourteenth, and Fifteenth Amendments so narrowly as to enable states to continue racial apartheid after the Civil War, upheld forced sterilization, eviscerated economic regulations designed to protect and empower workers, and signed off on concentration camps for American citizens of Japanese ancestry



(pp. 54–59). Over the long run of its history, it has failed to earn the esteem in which it is currently held.

What of the Warren and early Burger Courts, celebrated by liberals for their decisions desegregating schools, constraining the police, promoting gender equality, protecting reproductive rights, and requiring counsel for indigent criminal defendants? In short, the Court did too little, for too short a time, to inspire any confidence today. Meaningful desegregation required a Democratic Congress and a Democratic President (pp. 60–61). The same Warren Court that required the exclusion of evidence collected by police in violation of the Fourth Amendment insulated law enforcement from civil suits for violating constitutional rights and held that there was no constitutional problem with stopping and frisking people without a warrant (p. 61).

In Chapter 4, Seidman turns to the Preamble’s commitment to “promot[ing] the General Welfare,” which he uses as a jumping-off point to discuss economic distribution. He begins by pointing out that precisely what a commitment to the “general welfare” entails is complex, contested, and unelaborated in the Constitution (pp. 73–77). That doesn’t stop the Supreme Court’s constitutional decisions from regularly affecting—even where they do not expressly address—matters of economic distribution.

Conventional account of the Court’s decisions hold that the Court stopped engaging distributional questions in the 1930s, in the wake of a fight with President Franklin Delano Roosevelt over New Deal legislation. On this account, “matters of economic and social policy [were] left to the political sphere,” and the Court focused instead on “civil liberties and human rights” (pp. 82–83). As Seidman explains, however, this distinction was unstable from the beginning: “[i]t is impossible for the Court to rule in one area while abstaining from the other” (p. 83).

Why? Capitalism! Speech that reaches an audience has always required resources—even if that resource is as simple as a soap box. In any capitalist state, most resources are privately owned and unevenly distributed (p. 85). To protect—or fail to protect—the freedom to speak is therefore to protect some underlying economic distribution. That is true whether the Court

recognizes a First Amendment right on the part of corporations to spend money on political campaigns<sup>18</sup> or to publish editorials critical of politicians.<sup>19</sup> In both cases, “[p]rotecting . . . speech rights means protecting the economic distribution” that enabled the corporations to amass resources in the first place (p. 86). By contrast, consider the Court’s holding in *McKune v. Lile*,<sup>20</sup> that the Fifth Amendment right against self-incrimination does not prohibit a state from conditioning the transfer of an incarcerated person to a rehabilitation program on confession to a crime for which that person has not been convicted. If the incarcerated person refused, they would be transferred to a different facility with worse living conditions and lower wages (p. 91). In effect, by enabling the state to make this threat, the Court held that incarcerated people lack a property right to any particular living conditions or wages (p. 91).

None of this distributional analysis, of course, is in any of the Court’s opinions. By erecting a bevy of barriers against redistributive legislation, the Constitution “bias[es] outcomes toward a certain distributional pattern” (p. 92). The Court then makes matters worse by “hid[ing] economic rulings behind a veil of misleading civil liberties rhetoric” (p. 93). The s-constitution contains no “detailed ground rules” for determining how to conceive of or promote the general welfare and empowers no Court to settle distributional issues—or perhaps provide “protection for civil liberties” at all (p. 93).

Seidman acknowledges that that last bit might sound scary. But he thinks any fears are unwarranted because rights are overrated. “By their very nature,” Seidman asserts, “claims of constitutional rights shut down the kinds of respectful discussion that should go on in a healthy democracy” (p. 136). They “tend[] to divide”; they “obstruct[] agreement on less basic matters”; they “get[] in the way when we try to create a more perfect union” (p. 139). Despite acknowledging that there are “times and places where it is appropriate to make rights claims,” Seidman is overwhelmingly negative in his depiction of rights-based argumentation (p. 154). It should be a “last resort” (p. 154), given the ways in which rights-talk has made us “more self-righteous, less tolerant, and more isolated from our fellow inhabitants” (p. 136).

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18. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

19. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

20. 536 U.S. 24 (2002).

As he is skeptical of rights, so, too, is Seidman skeptical of rules. His rule-skepticism comes through most clearly in his discussion of the Warren Court's creation of "a large number of complex rules that the police were obligated to follow" (p. 170). Though well-intended, Seidman argues that they were "bound to fail" (p. 173). First, over 95 percent of criminal cases are resolved by plea bargains in which a defendant waives their right to contest the constitutionality of their treatment (p. 173). Second, rules "must be enforced even if, on the individual facts of an individual case, they are counterproductive" (p. 174). Seidman contends that the Court lost public support as a consequence of what were perceived as counterproductive decisions to exclude "voluntary admissions of guilt because of a technical violation of the *Miranda* rules" (pp. 174–75) and "the results of an entirely reasonable search because of minor defects in a warrant application" (p. 175). Eventually, the Court caved, creating a bevy of exceptions that "left us more or less back where we started" (p. 174).

The concluding chapters of Seidman's book seek to document a deeply rooted tradition of constitutional skepticism. Madison and Alexander Hamilton expressed doubts about the power of "parchment barriers" to constrain officials (p. 184); Thomas Jefferson proposed that the Constitution be re-ratified every nineteen years for the sake of democracy (pp. 192–93); Abraham Lincoln issued the Emancipation Proclamation in 1863, despite stating in his inaugural address that he had no power to interfere with slavery and supporting an amendment that would have explicitly protected it (pp. 204–15). Both Theodore Roosevelt and Franklin Delano Roosevelt denied that the Supreme Court had final interpretive authority (pp. 217, 226) and FDR defended New Deal programs "based on an idiosyncratic reading of [the Constitution] that combined an audacious insistence on his independent authority to interpret the Constitution with a substantive interpretation that eliminated virtually all occasions for violation" (p. 224). Seidman identifies Roosevelt's Constitution—his understanding of it as a flexible "layman's document" consisting of "general principles" rather than "a lawyer's contract"—as "the skeptic's constitution" (p. 226).

Seidman claims that lawyers, too, have implicitly embraced the s-constitution—including Supreme Court Justices in what are

generally regarded as the Court's best moments. *Brown I*,<sup>21</sup> holding racial segregation in public education unconstitutional, had only "shaky support . . . in standard constitutional materials" (p. 232). Subsequent desegregation decisions "in contexts that had nothing to do with children or education" suggested "the Court had actually embarked on an extraconstitutional social and political project" (p. 233). Judges and academics across the ideological spectrum have labelled the Court a political body, argued for a far more limited role for judicial review, and claimed that the Constitution's hard-wired features are sufficiently deficient to warrant a new constitutional convention (pp. 239–42).

Seidman recognizes that "[a]ll political entities have to tell a coherent story about themselves over time" (p. 242). He throws a spotlight on a skeptical tradition in order to suggest the possibility of telling a different story than the one that tends to dominate our political life. It is a story of "continual struggle against constitutional authority[.]" understood as the authority of the Constitution and the Supreme Court (p. 242). It is not a noble lie; it is "more than adequately supported by the historical record," and Seidman urges that "we . . . have the power to define for ourselves who we are" (p. 242).

### C. NEXT STEPS

So, what is to be done? Embrace the s-constitution. It's easy if we try, Seidman explains, because "in important respects, it is the Constitution we already have" (p. 246). Congress, the President, and the Supreme Court all forebear from acting in ways that are not "prohibited by our written constitution" but are nonetheless "unthinkable" because "they violate long-standing traditions . . . that are widely recognized as necessary to keep our country together" (p. 247).

Still, Seidman thinks that embracing the s-constitution would produce important and beneficial changes. It would "build[] community by ruling no outcomes out of bounds and encouraging unending argument" (p. 246). It would encourage "all-things-considered judgments" about the value of "tradition, custom, reciprocal restraint, and inertia" (p. 248). Instead of arguing about, say, whether the suspension of elections is

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21. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

unconstitutional, we would argue about whether the reasons for doing so “outweigh the fraying of our political commitments to each other that would surely ensue” (p. 248). And we would be better off for doing so, empowered by the recognition “that we have the freedom and responsibility to make rules for our own time and our own country” (p. 248).

Seidman does offer some concrete prescriptions. After cataloguing Madison’s mistakes, he puts forward “some modest proposals” for democratization (p. 30). These range from automatic voter registration to the abolition of partisan gerrymandering to—most radically—requiring that one-quarter of the House of Representatives be chosen at random from the citizenry, through a sortition system (pp. 29–39). Seidman also speaks favorably of a number of Court reform proposals, from expanding the Court’s size to imposing term limits to elevating nine judges chosen by lot from the entire federal judiciary onto the Court to decide cases (pp. 69–71). He also floats some of his own that are intended to “delegitimize the Court in the eyes of the public,” including a requirement that a seven-justice majority invalidate a statute and mandating the release of draft opinions for public comment before they are finalized (p. 71).

But Seidman is primarily concerned with critique. His desire for a better future is palpable, his optimism that the s-constitution can get us there evident on every page. He is less interested in specifying the details of what that future will look like or how to get there than with opening up space for readers to imagine for themselves something different from the status quo. Like the s-constitution itself, he articulates certain principles to which he is committed—democracy being chief among them—while giving the impression of being flexible as to the details. However complex the latter, the core message of Seidman’s book calls to mind Thomas Paine’s declaration in *Common Sense* on the eve of the Revolutionary War: “We have it in our power to begin the world over again.”<sup>22</sup>

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22. THOMAS PAINE, *Common Sense, in COMMON SENSE, AND OTHER WRITINGS* 48 (Gordon S. Wood ed., 2003).

## II. BRING DA RUCKUS: THE CRITS AND THEIR CRITICS<sup>23</sup>

### A. ORIGINS AND THEMES

One of the most striking features of *FPD* is that the phrase “critical legal studies” appears in Seidman’s book precisely once—three times, if you count the index and the jacket cover that identifies Seidman as “a major proponent of the critical legal studies movement” (p. 310). Seidman’s case for constitutional skepticism displays all of the characteristic features of CLS scholarship, and critiquing it provides a valuable opportunity to revisit CLS—its emergence as a movement, its distinctive features, and its relevance today.

CLS emerged in the 1970s at a time of general dissatisfaction with the state of legal liberalism, understood for present purposes as the belief that Supreme Court-centered constitutionalism was the primary means through which left-liberals could achieve positive social change.<sup>24</sup> The heady days of the Warren Court were over; the Burger Court was scaling back its most significant progressive achievements; and “Crits” offered explanations for what was going wrong.<sup>25</sup>

Corinne Blalock has isolated four veins of critical scholarship.<sup>26</sup> The first vein is indeterminacy. Like the legal realists before them,<sup>27</sup> Crits argued that conventional legal materials like text and precedent did not dictate case outcomes because many outcomes were consistent with those materials.<sup>28</sup> The second, related vein held that law is inherently political; although it has some “relative autonomy”<sup>29</sup> from material

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23. See WU-TANG CLAN, *Bring Da Ruckus*, on WU-TANG CLAN, *supra* note 4.

24. See, e.g., Guyora Binder, *On Critical Legal Studies as Guerrilla Warfare*, 76 *GEO. L.J.* 1, 13–24 (1987); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 1–10 (1996).

25. See David Kennedy & William W. Fisher III, *Introduction*, in *THE CANON OF AMERICAN LEGAL THOUGHT* 1, 8–9 (David Kennedy & William W. Fisher III eds., 2006) (summarizing foundational literature).

26. Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 *LAW & CONTEMP. PROB.* 71, 74 (2014) [hereinafter, Blalock, *Neoliberalism*].

27. See Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 50, 51–52 (Martin P. Golding & William A. Edmundson, eds., 2010).

28. Blalock, *Neoliberalism*, *supra* note 26, at 74.

29. For an overview of relative autonomy within Marxist legal and political theory, with a special focus on the contributions of Louis Althusser and Nicos Poulantzas to its development, see Christopher Tomlins, *Marxist Legal History*, in *THE OXFORD*

conditions and class interests, it ultimately operates to implement “white, male, heteronormative, ruling-class values.”<sup>30</sup> Third, Crits held that people do not interpret the law from the standpoint of an impartial spectator; they do so in a way that is determined by structures outside of their control, which structures define their identities and the lens through which they view the world—including the law.<sup>31</sup>

Fourth, Crits built upon the insights of Robert Hale and other legal realists who rejected the coherence of the distinction between “private” and “public” power, “state action” and “private action.”<sup>32</sup> They pointed out that because the content of private rights is supplied by the state in the form of common-law rules, protecting the latter by enforcing those rules is no less an exercise of the state’s regulatory power as the decision to tax that property for redistributive purposes.<sup>33</sup> And, they added, the content of those rules serves to create and maintain class inequality.<sup>34</sup>

I would add one more vein: A critique of rights. Crits regarded rights as a particularly pernicious means of liberal order-maintenance.<sup>35</sup> Like other liberal legal concepts, they were malleable and were primarily used to further the interests of the powerful.<sup>36</sup> They seemed to promise protection for the

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HANDBOOK OF LEGAL HISTORY 515, 526–27 (Markus D. Dubber & Christopher Tomlins, eds., 2018). *See also* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 328 n.23 (1987) (“In contrast to the view of law as completely reflexive, ‘relative autonomy’ attempts to account for the occasional development of law in seeming contradiction to existing material conditions.”); Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law*, 11 LAW & SOC’Y REV. 571 (1977) (providing a detailed and influential discussion).

30. Blalock, *Neoliberalism*, *supra* note 26, at 75.

31. *Id.*

32. *Id.* *See* Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

33. Blalock, *Neoliberalism*, *supra* note 26, at 75.

34. *Id.*

35. *See, e.g.*, Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Symposium, *A Critique of Rights*, 62 TEX. L. REV. 1363 (1984); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); *see also* Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 716 (2011) (describing how, as applied to constitutional law, the critique holds that “constitutional rights politically insulate and valorize subordination, legitimate and thus perpetuate greater injustices than they address, and socially alienate us from community”).

36. *See, e.g.*, Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

marginalized and were advertised as such but they did not consistently do so.<sup>37</sup> Further, the veneration of rights alienated people from one another and from the state from which rights supposedly protected them.<sup>38</sup> This discouraged the development of the kind of solidarity that might lead to collective efforts to attack oppression, whether in the “public” or “private” sphere.<sup>39</sup>

Crits didn’t share a view of what ought to replace liberalism. But they hoped for more community, more democracy, and less hierarchy.<sup>40</sup> Showing that the law is indeterminate, alienating, and serves the powerful would encourage the construction of informal, nonhierarchical decision-making institutions and processes that provide for robust participatory democracy.

Seidman taps all of the above veins. In his presentation, text and precedent does not dictate constitutional decision-making; constitutional decision-making consistently serves the interests of the powerful; interpretations of the Constitution are inextricably socially situated; and constitutional law maintains the status quo of economic distribution without acknowledging it. Seidman’s hostility to rights is characteristic of critical literature. And Seidman’s demystification efforts are directed towards the creation of an informal, participatory-democratic, egalitarian polity.

## B. CRITIQUING THE CRITS

After extensive criticism of rights-based argumentation, Seidman acknowledges the work of Patricia Williams. He praises her for “writ[ing] movingly about how the assertion of rights

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37. See, e.g., Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673 (1992).

38. See, e.g., Robert Gordon, *Some Critical Theories of Law and Their Critics*, in *THE POLITICS OF LAW; A PROGRESSIVE CRITIQUE* 641 (David Kairys ed., 1998).

39. See, e.g., Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE* 178, 183–88 (Wendy Brown & Janet Halley eds., 2002) (summarizing the rights critique). *But see* Roberto Magabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 597 (1983) (distinguishing between property rights and political/civil rights on the ground that only the former tend to create hierarchy and make some people dependent upon others).

40. See, e.g., Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 199–202 (1984); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978).



transformed the consciousness of African Americans who had been deprived of their very right to be human” (pp. 153–54). There is a history here that warrants revisiting.<sup>41</sup>

Patricia Williams is one of the founders of Critical Race Theory (“CRT”), a movement and mode of scholarship that branched off from CLS because of disagreement regarding race and rights.<sup>42</sup> Race-Crits contended that Crits failed to appreciate the centrality of race to U.S. law or the efficacy of rights as means of achieving social change. As to race, Race-Crits contended that race was a primary means through which power was exercised through law.<sup>43</sup> It was not enough to say that law served to maintain and perpetuate ruling-class rule; Race-Crits emphasized that racism plays a central role in legitimating class domination, and that even facially neutral laws can operate to coercively maintain and perpetuate race/class domination.<sup>44</sup>

As to social change, Race-Crits acknowledged that constitutional decisions desegregating public institutions came about through complex contingencies involving the convergence of social-movement demands for racial equality with elite interests.<sup>45</sup> But they stressed that rights-claims had been effectively used to achieve tangible harm-reduction; inspired and empowered marginalized people; and gave participants in an ongoing struggle for racial justice a sense of continuity with those who had organized around them in the past.<sup>46</sup> Williams

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41. For general overviews of CRT’s break with CLS from differing perspectives, see Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking back to Move Forward*, 43 CONN. L. REV. 1253 (2011) [hereinafter Crenshaw, *Twenty Years*]; David M. Trubek, *Foundational Events, Foundational Myths, and the Creation of Critical Race Theory, or How to Get Along with a Little Help from Your Friends*, 43 CONN. L. REV. 1503 (2011).

42. See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741 (1994); Crenshaw, *Twenty Years*, *supra* note 41.

43. See CRITICAL RACE THEORY, *supra* note 42, at xiii.

44. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1357 (1988) [hereinafter Crenshaw, *Race, Reform, and Retrenchment*] ([Crits’] principal error is that their version of domination by consent does not present a realistic picture of racial domination. . . . Black people do not create their oppressive worlds moment to moment but rather are coerced into living in worlds created and maintained by others. Moreover, the ideological source of this coercion is not liberal legal consciousness, but racism.”).

45. See, e.g., Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

46. See, e.g., Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 44; Lani

contended that the concept of rights was for Black people “the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no-power . . . the marker of our citizenship, our participatoriness, our relation to others.”<sup>47</sup> Whether one regards this as a difference in degree or kind from Seidman’s “last resort” language—which is not qualified to take into account of the experience and needs of particular marginalized groups—it is a big difference.

In substantial part because they thought that Crits underappreciated the importance of race and right, Race-Crits raised concerns about the fate of marginalized people in the utopia that CLS sought to build. Richard Delgado, for instance, argued that “[w]hatever sense informal, small-scale politics may make for the CLS membership, it is bad news for minorities.”<sup>48</sup> He contended that “[d]iscretionary judgments colored by racism or other forms of prejudice are made possible by replacing rules, guidelines and rights with fluid, informal decision making” and that hard rules curbing racism have psychological effects underappreciated by Crits.<sup>49</sup> “Radical social reform,” averred Delgado, requires providing racial minorities “the protection and security they need to function in a world dominated by persons of a race and heritage different from their own.”<sup>50</sup> And that, in turn, requires “formal barriers”; marginalized people cannot “rely on local authority to redistribute power and physical resources because it is too close to the community and unlikely to upset the status quo.”<sup>51</sup>

Seidman’s analysis invites us to revisit these critiques. In discussing the Constitution’s deficiencies, Seidman characterizes “the coddling of slavery” as the product of “more or less reluctant compromises necessitated by political exigencies” and says that they “set us on the course toward civil war” (p. 19). He details how the Court prior to and following the Civil War

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Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 *YALE L.J.* 2740 (2014); Dorothy E. Roberts, *The Meaning of Blacks’ Fidelity to the Constitution*, 65 *FORDHAM L. REV.* 1761 (1997).

47. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *HARV. C.R.-C.L. L. REV.* 401, 431 (1987).

48. Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 *HARV. C.R.-C.L. L. REV.* 301, 315 (1987).

49. *Id.*

50. *Id.* at 322.

51. *Id.* at 321.

consistently made racially regressive decisions (pp. 54–56). But race is not central to his understanding of the Constitution or his case for the s-constitution. And he is relentlessly critical of rights; the acknowledgment of Williams’s defense is exceptional.

### C. DOES IT WORK?

Perhaps the most famous criticism of the CLS holds that Crits did not put forth any practical alternatives to the status quo.<sup>52</sup> This criticism came largely from liberal quarters, and it was largely unfair. Crits offered a number of concrete proposals for improving contract law, labor law, antidiscrimination law, property law, and welfare-benefits administration, among other subjects.<sup>53</sup> Less well-known is a criticism from the left that questioned whether Crits had a plausible account of how to get “there” from “here.” These leftists held that it was naïve to expect the world to change because of academic takedowns of incoherent concepts said to be downstream from liberalism’s contradictions.<sup>54</sup>

The latter charge of idealism might seem ironic, given CLS’s association with Marxism.<sup>55</sup> Marx and Engels could scarcely have been clearer in their critiques of the Young Hegelians that ideas cannot alone bring transformative social change; changes in socioeconomic conditions are required.<sup>56</sup> But in spite of the prevalence of citations to Gramsci and accompanying discussions of hegemony, CLS could never be accurately

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52. See Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 *LAW & SOC. INQUIRY* 779 (1992). Fischl, himself a Crit, was being ironic and the article itself is a critique of the critique. See also John Henry Schlegel, *CLS Wasn’t Killed by a Question*, 58 *ALA. L. REV.* 967 (2007).

53. See Robert W. Gordon, *American Law Through English Eyes: A Century of Nightmares and Noble Dreams*, 84 *GEO. L.J.* 2215, 2240–41 (1996).

54. See, e.g., Stefan Sciaraffa, *Critical Legal Studies: A Marxist Rejoinder*, 5 *LEGAL THEORY* 201 (1999); E. Dana Neascu, *CLS Stands for Critical Legal Studies, If Anyone Remembers*, 8 *J.L. & POL’Y* 415 (2000); Brian Leiter, *Is There an “American” Jurisprudence?*, 17 *OXFORD J. LEGAL STUD.* 367, 382–85 (1997).

55. An association that, although overstated, was substantial enough to see CLS participants in conversation with leading Marxist theorists. See, e.g., Stuart Hall & Alan Hunt, *Interview with Nicos Poulantzas*, *MARXISM TODAY*, July 1979, at 194 (1979).

56. See Karl Marx & Friedrich Engels, *The German Ideology*, in *THE MARX-ENGELS READER* 146, 149 (Robert C. Tucker ed., 1978) (“Since the Young Hegelians consider conceptions, thoughts, ideas, in fact all the products of consciousness . . . as the real chains of men . . . it is evident that the Young Hegelians have to fight only against these illusions of the consciousness. . . . They forget, however, that to these phrases they are only opposing other phrases, and that they are in no way combating the real existing world when they are merely combating the phrases of this world.”).

described as Marxist.<sup>57</sup> What elements of the Marxist (broadly construed) tradition were incorporated into Crits' work was the "Critical Marxism" of Georg Lukács and the Frankfurt School.<sup>58</sup> Lukács incorporated left-Hegelian themes into the Marxist tradition;<sup>59</sup> the Frankfurt School broke with Marx over the revolutionary potential of the working class.<sup>60</sup> What serious consideration Crits gave to Marxist legal theory led them to conclude that it had limited explanatory power.<sup>61</sup>

If all of this left criticism amounted to was a complaint that Crits weren't Marxist, or were the wrong kind of Marxists, it would be of limited interest to non-Marxists. But there is a broader concern lurking here: whether Crits had an adequate account of the relationship between law and social change.

It is worth emphasizing that Crits *did* want to change society. As David Trubek put it, CLS rested on the premise that "legal scholarship can be a kind of transformative political action."<sup>62</sup> The point of "show[ing] relationships between the world views embedded in modern legal consciousness and domination in capitalist society" was "to change that consciousness and those relationships."<sup>63</sup> Take the "trashing" of legal texts for which they became (in)famous—in essence, taking the texts seriously, finding them hopelessly contradictory, and explaining why the contradiction serves some (generally conservative) ideological function.<sup>64</sup> They did not engage in this for fun; they did it to understand and create space for legal change and thence left social change. Robert Gordon's description of feudalism is illustrative of how Crits viewed the

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57. See generally Akbar Rasulov, *CLS and Marxism: A History of an Affair*, 5 *TRANSNAT'L LEGAL THEORY* 622 (2014).

58. *Id.* at 628.

59. See Michael Peters, Colin Lankshear & Mark Olssen, *Introduction: Critical Theory and the Human Condition*, 168 *COUNTERPOINTS* 1, 6–8 (2003).

60. See TOM BOTTOMORE, *THE FRANKFURT SCHOOL AND ITS CRITICS* 18, 30 (1984).

61. See, e.g., Mark V. Tushnet, *Marxism as Metaphor*, 68 *CORNELL L. REV.* 281 (1983); Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 *AM. U. L. REV.* 939 (1985); Hugh Collins, *Roberto Unger and the Critical Legal Studies Movement*, 14 *J.L. & SOC'Y* 387, 390 (1987) ("Unger rejects Marxism and other structural theories on the ground that they defy historical experience.").

62. David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *STAN. L. REV.* 575, 591 (1984).

63. *Id.* (alteration omitted).

64. See Mark G. Kelman, *Trashing*, 36 *STAN. L. REV.* 293 (1984).

relationship between legal and social change:

[H]ow could one say something like “medieval law bolstered (or undermined) the structure of feudal society”? Again, a particular (though conceded in this case very hazily defined) set of legal relations composes what we tend to call feudal society. If those relations change (commutation of in-kind service to money rents, ousting of seignorial jurisdiction to punish offenses, etc.) we speak not simply of changes in “the legal rules regulating feudal institutions,” but of the decline of feudalism itself.<sup>65</sup>

If Gordon is not identifying “medieval law” with “feudal society,” he is coming very close. Feudal society is “compose[d]” by “a set of legal relations,”<sup>66</sup> the alteration of which makes it something other than feudalism. Gordon doesn’t specify what would have to happen to bring about this alteration. But that’s just the point raised by Marxist critics, and it generalizes—how does this all of this work?

So: Just how is it that Seidman’s s-constitution is going to be ratified? How do we get there from here?

### III. CLS FOREVER?<sup>67</sup>

#### A. TRIUMPH<sup>68</sup>

*From Parchment to Dust* is terrific stuff. In the best critical tradition, Seidman takes ideas seriously. He anticipates and responds to strong objections; he builds trust by acknowledging the force of arguments advanced by people whose politics could not be more different from his; and he busts myths dear to the left as well as to the right.

Take his dissection of Madison’s political theory. The reader is presented with a succinct and clear summary of the theory; a historically and socially situated account of Madison’s particular concern with redistributive legislation; and cogent arguments that Madison (1) failed to appreciate the benefits of passionate majoritarian factions; (2) failed to appreciate the costs to the general welfare of minoritarian factions; and (3) established institutions that perpetuate his (representative) errors.

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65. Gordon, *supra* note 40, at 104.

66. *Id.*

67. See WU-TANG CLAN, WU-TANG FOREVER (Loud Records, 1997).

68. See WU-TANG CLAN, *Triumph, on WU-TANG*, *supra* note 67.

And there's more. As if anticipating the response that the system just needs to be tweaked to lower the barriers to effective political action, Seidman submits that the problem is deeper—democracy and constitutionalism will *forever* be in tension. A constitution-writing generation will always be different than a later, constitution-following generation, and the latter will always be limited by choices made by the former (p. 26). Just like that, we are questioning the extent to which any dead hands, however wise, should bind the living in the event of disagreement with rules that the living had no part in shaping.

Relatedly, Seidman demonstrates an appreciation of the practical *determinacy* of legal rules that goes some way to dispelling the notion that Critics think everything is up for grabs. The Constitution contains hard-wired features that no one seriously considers up for legal debate. You will not find Seidman arguing that the Senate's apportionment scheme is up for grabs because "there is no outside-text"<sup>69</sup> or because liberalism is laden with contradictions. The scheme is *very* determinate, it is not proportionate to population, and (on Seidman's) account it is bad for those reasons. Not merely bad; like other hard-wired features, including the electoral college and life tenure for federal judges, it is bad in a way that affects aspects of our constitutionalism that at first blush seems to be more susceptible to change. Should it surprise anyone that judicial interpretation of a Constitution that enables the elevation to office of Presidents who did not win a popular vote, and for which there is no meaningful mechanism of electoral accountability after judicial appointment, is often idiosyncratic and unrepresentative?

When it comes to doctrine, Seidman is an effective critic of both conservative and liberal decisions. Indeed, perhaps because he recognizes that it is readers on the left whom he most needs to convince about the Supreme Court's defects, it is the Warren Court's decisions that receive the most criticism.

Seidman's takedown of *Miranda v. Arizona* is particularly powerful. By following Seidman's dissection of how and why it was "bound to fail," the reader becomes skeptical of the general

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69. See JACQUES DERRIDA, *OF GRAMMATOLOGY* 158 (1976). Derrida is notoriously difficult to parse, but this famous deconstructionist declaration is generally understood to mean that we have no unmediated access to truth.

enterprise of regulating police through “rule-like decisions” (p. 173). Seidman’s determination to avoid giving left-leaning readers the “out” of blaming conservative judges for bad decisions runs deep enough that he cannot resist drawing a connection between *Citizens United v. Fed. Election Comm’n* and *New York Times, Co. v. Sullivan*. Although one is hated and the other loved by the left, Seidman explains how they both “favor[] people who are wealthy” (p. 86).

Radicals must be able to simultaneously make vivid the limitations of the status quo and articulate a compelling vision of the future. Seidman does so. He paints an uncomfortably familiar picture of a fractured, lonely, polarized polity that argues about everything but the most important things; faces indefensible roadblocks to collective solutions to fundamental problems; and has convinced itself that it cannot do any better, lest it descend into chaos and anarchy. He then juxtaposes it, not with what would be an implausible vision of unity around the questions that currently divide us, but with a polity characterized by honest, open, respectful arguments, structured by informal but stable norms that themselves are always up for debate. His optimism is as once infectious and clear-eyed, and driven by a profound belief in the power and responsibility of people to shape their own future for the better, without failing to be stirred by and responsive to “mystic chords of memory.”<sup>70</sup>

Finally, taking his criteria in turn, Seidman has convinced me that I’m skeptic. I think that (1) the United States Constitution entrenches unjust, anachronistic, undemocratic, and unworkable requirements; (2) many individual decisions made by the Supreme Court are evil; (3) our country’s fate should not be dictated by the Constitution; (4) unelected, often partisan judges play too significant a role in our polity; and (5) uncritical fidelity to the Constitution denies our moral responsibility (pp. 3–4). (6), with its antipathy to rights “that are absolute and nonnegotiable” gives me pause (p. 4). But I concur in Seidman’s judgment that “ordinary political” disputes are too readily formulated in terms of those rights (p. 4).

I do, however, have some substantial disagreements with Seidman. His book invites critiques that have long been levelled

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70. See Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861). [https://avalon.law.yale.edu/19th\\_century/lincoln1.asp](https://avalon.law.yale.edu/19th_century/lincoln1.asp).

against critical scholarship—about the centrality of race to the operation of legal power in the United States, about the fate of marginalized people in the world that Critics seek to build, and about the mechanics of social change. In what follows, I’ll argue that Seidman doesn’t meet them.

### B. MISSING RACE

As ratified in 1788, the Constitution of the United States systematically entrenched the institution of slavery. It may be that it would be unrealistic for it to have done so to a lesser extent than it in fact did.<sup>71</sup> And antislavery Framers made concerted efforts to avoid textually endorsing “property in man.”<sup>72</sup> Still, Paul Finkelman’s assessment of “little ventured, little gained” resonates, as does his summary of the Constitution’s features that support that assessment:

The success of the slave owners at the Convention was sweeping. Under the new Constitution, slaves would be counted for representation in Congress, thus augmenting the South’s power in both the House of Representatives and the electoral college. The Constitution prohibited the free states from liberating fugitive slaves and instead required that runaway slaves be “delivered up” on demand of the owner. The new national government promised to suppress slave rebellions or insurrections. Although it empowered Congress to regulate international and domestic commerce, the Constitution prevented the national government from stopping the African slave trade or the domestic slave trade for *at least* twenty years. Most important of all, the Constitution created a government of limited powers and precluded the national government from ending slavery in the states where it existed. Rarely in American political history have the advocates of a special interest been so successful. Never has the cost of placating a special interest been so high.<sup>73</sup>

Pause on the counting of enslaved people for representation in Congress and on the Electoral College. These two features helped ensure the domination of all three branches of the federal

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71. See MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 303 (2016) (suggesting this possibility).

72. See generally SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING* (2018).

73. Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 *YALE J.L. & HUMAN.* 413, 413, 414–15 (2001).



government by enslaving states throughout the entirety of the antebellum period. Congress enacted proslavery legislation. Slaveholding Presidents selected slaveholding Justices that made proslavery constitutional doctrine by upholding proslavery legislation against constitutional challenges. The result was a proslavery constitutional political economy—the same interests in racialized hyper-exploitation of forced Black labor that led to proslavery constitutional design produced proslavery *legislation* as well as proslavery constitutional law.

I underscore *legislation* for a reason. The Constitution did erect processes that were designed to make it more difficult to enact redistributive legislation than it would have been with a unicameral legislature. But a specific kind of property is singled out for protection against redistribution—property in enslaved people. The representation formula and the Electoral College were designed to ensure that enslaving states would be able to punch above their numerical weight in sending representatives to Congress and electing Presidents, if one counted only their free population.<sup>74</sup> Meanwhile, Article I, Section 9 of the Constitution forbade Congress from banning states' involvement in the Atlantic slave trade for twenty years.<sup>75</sup> Basically, the Constitution was carefully designed to make it easier to enact proslavery legislation and harder to enact antislavery legislation.

Madison, himself an enslaver,<sup>76</sup> had a leading role in the shaping of the Constitution's proslavery features and advertising them to the ratifying public. He opposed the direct election of the President because the "right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes."<sup>77</sup> And he told the Virginia legislature:

Another clause secures us that property which we now possess. At present, if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws; for the laws of the states are uncharitable to one another in

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74. See *id.* at 427–30 (representation formula), 441–43 (Electoral College).

75. U.S. CONST. art. I, § 9, cl. 1.

76. See JESSE J. HOLLAND, *THE INVISIBLES: THE UNTOLD STORY OF AFRICAN AMERICAN SLAVES IN THE WHITE HOUSE* 6 (2016) (“[Madison] owned more than one hundred slaves at his Montpelier estate, and refused to release them upon his death as his other wealthy and powerful compatriots did.”).

77. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* at 57 (Max Farrand ed., 1966).

this respect. But in this Constitution . . . [the Fugitive Slave] [C]lause was expressly inserted, to enable owners of slaves to reclaim them.<sup>78</sup>

Here we have the “father of the Constitution” touting the single most obvious example of proslavery constitutional design as a reason for its ratification by an enslaving state. It was under this clause that Congress would enact and the Supreme Court would uphold the Fugitive Slave Act of 1793 in *Prigg v. Pennsylvania*.<sup>79</sup>

I emphasize all of this because Seidman does not. Madison’s mistakes, in Seidman’s telling, are downstream of his elitism. The systematic entrenchment of property in people—by no means a quirk of the judiciary, which could only uphold the Fugitive Slave Act because Congress enacted it—is mentioned but not centered in his account of the Constitution’s flaws. Similarly, Seidman upholds the Court’s racially regressive decisions during the antebellum period as illustrations of the Court’s predilection for the powerful, not as the predictable consequences of selectively empowering enslaving states at the Founding.

This omission might seem to be excusable because the proslavery component of Madison’s mistakes has been corrected. Madison’s elitism is perpetuated through the continued existence of veto-gates that were designed to impede redistributive legislation. Those veto-gates *still* do that; the past explains the present. But are the 1788 Constitution’s proslavery features still relevant today?

They are. A vivid illustration is provided by the Supreme Court’s decision in *Shelby County v. Holder*,<sup>80</sup> holding unconstitutional the coverage formula that was central to the operation of the Voting Rights Act of 1965. The coverage formula singled out states that Congress found to have particularly high rates of voting-related racial discrimination and required that changes in their election laws receive prior federal approval.<sup>81</sup> Overwhelmingly, these were states that had once

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78. 3 JOHN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 453 (1787).

79. 41 U.S. 539 (1842).

80. 570 U.S. 529 (2013).

81. See Voting Rights Act of 1965, § 4(a), 42 U.S.C. § 10303(a), *invalidated by* *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

been part of the Confederacy. In holding the formula unconstitutional, the Court relied upon a notion of “equal state sovereignty” that can be traced to the antebellum period;<sup>82</sup> was grounded in structural inferences from the antebellum Constitution;<sup>83</sup> and was later invoked by opponents of Reconstruction, without much success, to build political resistance to federal occupation.<sup>84</sup> As Joseph Fishkin has put it the effect of the Court’s decision was to “inscribe into the Constitution some of the core constitutional claims, unsuccessful even in their own time, of the defeated Confederacy and its apologists.”<sup>85</sup> So long as the Court continues to rely upon interpretations of the antebellum Constitution to undermine the rights of Black voters today, the antebellum Constitution’s proslavery features remain part of our law. This past isn’t past.

At the same time, the very existence of the Voting Rights Act requires an explanation for which “proslavery political economy” would be inadequate. So, too, does the constitutional authority under which it was enacted: the Fifteenth Amendment. The latter—like the Fourteenth and Thirteenth Amendments that preceded it—was made possible by a mass political movement against slavery that eventually succeeded in building and holding federal power, against the odds that the antebellum Constitution stacked against them.<sup>86</sup> That success was formalized in constitutional text that would, in turn, underwrite antislavery legislation that the Constitution had once made effectively impossible. And that text, as well as the institutions and ideals associated with it, would serve as a constant source of inspiration to those who considered themselves participants in an ongoing struggle for Black liberation.

Indeed, the amended Constitution can be deployed against institutions that resemble those that the 1788 Constitution was designed to entrench. Engaging the abolitionist constitutional theory and practice that ultimately informed the content of the

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82. See James E. Pfander & Elena Joffroy, *Equal Footing and the States “Now Existing”*: Slavery and State Equality over Time, 89 *FORDHAM L. REV.* 1975, 1994 (2021).

83. See Abigail B. Molitor, *Understanding Equal Sovereignty*, 81 *U. CHI. L. REV.* 1839, 1857 (2014).

84. See Joseph Fishkin, *The Dignity of the South*, 123 *YALE L.J.F.* 175, 181–85 (2013).

85. *Id.* at 192.

86. See RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* 89–108 (2021).

Reconstruction Amendments, Dorothy Roberts has found resources that modern prison abolitionists can use to undermine “a . . . system of carceral punishment that legitimizes state violence against the nation’s most disempowered people to maintain a racial capitalist order for the benefit of a wealthy white elite.”<sup>87</sup> She has highlighted how prison abolitionists see themselves as part of the same struggle as those who sought to abolish slavery: “While human freedom required slavery abolition then, today it requires the abolition of the prison industrial complex that has replaced slavery as the bulwark of racial capitalism.”<sup>88</sup> Thus, an Constitution shaped by racial capitalism to facilitate racial capitalism has been amended in ways that can help us dig the latter’s grave.

An underappreciated feature of the Thirteenth, Fourteenth, and Fifteenth Amendments is that they specifically empower Congress to implement their guarantees through appropriate legislation. These drafting choices were carefully considered by Reconstruction Republicans; they followed from well-earned distrust of the Supreme Court that decided *Prigg v. Pennsylvania* and *Dred Scott v. Sandford*,<sup>89</sup> as well as the institutional judgment that Congress was better-positioned to formulate prospective, generally applicable rules to protect civil rights.<sup>90</sup> As Joseph Fishkin and William Forbath, drawing upon the work of Mark Graber,<sup>91</sup> have highlighted, the Fourteenth Amendment in particular has an antislavery political economy built into it.<sup>92</sup> Section 2 of the Amendment penalizes states that deny the right to suffrage to Black citizens with reduced representation in Congress; Section 3 disqualified former Confederates from federal office. Although neither provision went as far as Radical

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87. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 14 (2019).

88. *Id.* at 48.

89. 60 U.S. 393 (1857).

90. See BARNETT & BERNICK, *supra* note 86, at 250–55; Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1810 (2010).

91. See JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* 126–28 (2021).

92. See Mark A. Graber, *Constructing Constitutional Politics: Thaddeus Stevens, John Bingham, and the Forgotten Fourteenth Amendment* 65 (2014) [available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2483355](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483355)].

Republicans wanted, they inverted the 1788 Constitution's selective empowerment of proslavery states.

Abolitionists and Reconstruction Republicans would have been outraged by *Shelby County's* micro-managing of Congress's factual findings regarding continued racial discrimination, as well as the Court's extension of antebellum notions of state sovereignty into Fifteenth Amendment law. And they would have been appalled by the Court's determination in *City of Boerne v. Flores*<sup>93</sup> that Congress could not enact legislation predicated on disagreement with the Court about the scope of constitutional rights. They knew well that the Court could make evil decisions, and the amended Constitution reflects that understanding.

The above, concededly abbreviated analysis illustrates the utility of centering race in thinking about constitutional politics. The Constitution of 1788 had features that made racially regressive politics—emphatically including judicial decision-making—more rather than less likely. But the amended Constitution has features that can be used to resist those outcomes and have served as inspiration for racially progressive constitutionalism, inside and outside the courts. Left constitutionalists have focused attention in recent years on how Congress—as transformed by the Reconstruction Amendments—was the primary enforcer of constitutional rights during Reconstruction, and did far more than the courts to secure Black freedom during the Second Reconstruction.<sup>94</sup>

Understanding how we got here and where we ought to go next requires more analysis of how race has shaped and been shaped by the Constitution than Seidman provides. That analysis might ultimately vindicate Seidman's critique and recommend his alternative. But Seidman's failure to take adequate account of the relationship between race and the Constitution justifies skepticism about whether his revolution would provide security and protection to marginalized people.

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93. 521 U.S. 507 (1997).

94. See, e.g., FISHKIN & FORBATH, *supra* note 91; Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160 (2021); Nikolas Bowie & Daphna Renan, *The Supreme Court is Not Supposed to Have This Much Power*, THE ATLANTIC (June 8, 2022), <https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/>; MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); Rebecca E. Zietlow, *To Secure these Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945 (2005).

## C. MISSING PROTECTION

We've seen that Seidman directs some of his most exacting criticism at Supreme Court decisions that liberals have upheld as examples of the Constitution at its finest. The benefits of the liberal Warren Court criminal-procedure revolution, Seidman argues, have been overstated. *Mapp*, *Miranda*, *Gideon*,<sup>95</sup> and the like must be considered alongside other decisions that empowered police and insulated them from accountability for constitutional violations. More fundamentally, Seidman contends that the Warren Court's basic approach to systemic reform—its use of broad, non-negotiable constitutional rules to constrain the police and protect the rights of criminal defendants—was fatally flawed, and so was bound to fail.

Seidman's criticism of the Warren Court's record is incisive. But his rejection of the Court's rule-based approach represents an overcorrection. And his proposed alternative is unlikely to afford greater protection to marginalized people who are disproportionately subjected to surveillance, arrest, prosecution, and incarceration.

Let's begin with Seidman's discussion of the exclusionary rule. Seidman correctly observes that it has “long been the whipping boy of law-and-order conservatives” who have cultivated “[t]he image of a clearly guilty defendant smirking as he leaves the courtroom a free man because the police made some technical mistake” (p. 163). Seidman doesn't endorse this criticism—in fact, he says that depriving the government of evidence to which isn't constitutionally entitled is “actually the cost of effective enforcement of the Fourth Amendment itself (p. 163).<sup>96</sup> But, he says “the argument in favor of the rule is complicated and its optics can be terrible[.]” encouraging conservative Justices to “add[] so many exceptions to it that it has become toothless” (p. 163). The problem with the rule, then, is that it generates *perceived* consequences that conservatives have highlighted in gutting it. Together with other constitutional decisions, it left the Court “vulnerable to the charge that it was protecting criminals at the expense of ordinary citizens” and lead

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95. See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

96. For Seidman's elaboration of this argument, see Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 *YALE L.J.* 2281, 2297–2303 (1998).

to “a collapse of public support that, rightly or wrongly, ultimately doomed the whole project” (pp. 169, 175).

Seidman isn’t alone in arguing that the Warren Court’s approach to reforming the criminal legal system has proven counterproductive. Paul Butler has contended that *Gideon*’s provision for state-funded indigent defense has benefited some criminal defendants at the cost of legitimating an unjust system that incarcerates the poor at a greater rate than when *Gideon* was decided.<sup>97</sup> William Stuntz has claimed that the Warren Court’s creation of “expansive” trial rights encouraged the enactment of mandatory minimums and the expansion of plea bargaining.<sup>98</sup> But legitimation costs are difficult to measure, and Stuntz’s claim has been criticized for getting the chronology wrong.<sup>99</sup> Further, Seidman’s causal story faces the additional barrier of avowedly resting on misperception. Is it really the Warren Court’s fault that future Courts undermined its rules on the basis of false beliefs about their effects?

Even assuming that Seidman’s backlash claim is correct, he must provide an alternative. Seidman details the phenomenon generally known as mass incarceration—an unprecedented growth in the U.S. prison population that is disproportionately composed of people of color.<sup>100</sup> He condemns the “outrages of police officers murdering Black people in the streets” (p. 160). He decries the “daily indignities produced by discriminatory traffic stops, stop-and-frisk, and harassment for minor ‘quality of life’ offenses” (p. 160). And he urges that the fact that these evils have taken place despite the Warren Court’s efforts to make the criminal legal system more humane “raise[s] doubts about the overall project of looking to the Constitution to guarantee domestic tranquility” (p. 166).

There is an important ambiguity in Seidman’s “looking to.”

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97. See Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013).

98. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 260–65 (2011).

99. See Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1077 (2013) (“[arguing that] [l]egislatures enacted harsher sentencing policies at a time when decisions like Mapp, Miranda, and other procedural landmarks had been largely or entirely de-fanged [and that plea bargaining had been on the rise since before these decisions].”).

100. See generally Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949 (2019).

He might mean “relying exclusively upon”; he might mean “drawing upon at all.” In the broader context of his book, the latter seems the most accurate interpretation. Ideally, we wouldn’t have a Supreme Court that does what the Warren Court did in promulgating constitutional rules that constrain the operation of the criminal legal system—rules that can’t be displaced absent extraordinary political activity. What we would have instead is “dialogue, political pressure, legislation, administrative action, and compromise” (p. 176). Seidman lauds the “systematic review of policing” in which communities have engaged following George Floyd’s murder by Minneapolis police, noting that they are “open-ended and inclusive . . . the proposed solutions creative and frankly experimental” (p. 177).

A world without constitutional rules governing the criminal legal system would be different than one with it. In fact, it *was* different in ways that highlight the dangers of relying entirely on “dialogue, political pressure, legislation, administrative action, and compromise” for protection against police, prisons, and other punitive modes of social control that have always been racialized in the United States (p. 176).

I’ll focus on policing. Sally Hadden has detailed how the history of policing in the United States began before the Founding, with slave patrols that were created by Spanish and English settlers in the Caribbean and Latin America.<sup>101</sup> These patrols resembled the early-modern posse comitatus—the group of men called out to chase down and arrest fleeing felons—and the “hue and cry” of the constable that summoned all available men to capture elusive criminals.<sup>102</sup> They used their vast, discretionary power to enforce a racial hierarchy. Freed people wrote of how the patrollers “kept close watch” on Black people “so they have no change to do anything or go anywhere”; “cr[ept] into slave cabins, to see if they have an old one there”<sup>103</sup> and “dr[ove] out husbands from their own beds, and then take their places.”<sup>104</sup>

After the Civil War, the basic functions of slave patrols

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101. SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 7 (2001).

102. *Id.* at 3.

103. *Id.* at 71.

104. LEWIS GARRARD CLARKE & MILTON CLARKE, *NARRATIVES OF THE SUFFERINGS OF LEWIS AND MILTON CLARKE* 114 (1846).



were taken up by Southern officials who—like virtually all adult white men—received military training in the Confederate army.<sup>105</sup> These postwar forces relied upon prewar patrolling experience to maintain a regime of racial oppression. And they permitted the Ku Klux Klan to engage in terrorism against freed people and their white allies.<sup>106</sup>

The first full-time police forces in the United States were established in the northern U.S. before the Civil War. In 1845 New York organized an 800-person force under captains, each of which was assigned to one city ward.<sup>107</sup> Officers were political appointees who served for terms.<sup>108</sup> The New York model was adopted by Chicago, New Orleans, Cincinnati, Philadelphia, St. Louis, Newark, Baltimore, Detroit, and Buffalo over the course of the next two decades.<sup>109</sup>

The New York model was borrowed from England, where in 1829 Home Secretary Robert Peel established a bureaucratically organized, publicly funded, official police force.<sup>110</sup> Peel's successful efforts to persuade Parliament to establish a force of some three thousand men, including a hundred and sixty-five uniformed "bobbies" with badges and batons (named for "Bobby" Peel), appear to have been animated by labor unrest.<sup>111</sup> So too, did labor troubles play a prominent role in the development of police forces in the United States. Between 1881 and 1900, worker strikes numbered in the thousands, spanned multiple cities, and cost nearly \$45 million.<sup>112</sup> Vagrancy played a central role in the deployment of force that served to preserve a social hierarchy, with white Americans at the top.<sup>113</sup>

By the 1890s, several civic commissions in major cities had published reports complaining of pervasive police corruption and incompetence.<sup>114</sup> A comprehensive and rigorous 1922 survey

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105. *Id.* at 202.

106. *Id.* at 214.

107. SIDNEY L. HARRING, *POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES 1865–1915*, at 30 (1983).

108. *Id.* at 31.

109. *Id.*

110. See ALEX VITALE, *THE END OF POLICING* 35 (2017).

111. *Id.*

112. Matthew DeMichele, *Policing Protest Events: The Great Strike of 1877 and WTO Protests of 1999*, 33 AM. J. CRIM. JUST. 1, 5 (2008).

113. See Schulhofer, *supra* note 99, at 1050.

114. See THE CLEVELAND FOUND., *CRIMINAL JUSTICE IN CLEVELAND* (Roscoe

of the criminal legal system in Cleveland demonstrated that police, prosecution, and courts alike suffered from informality, political control, and lack of expertise.<sup>115</sup> Police had little training; lines of authority between commanders and patrol officers were difficult to discern; prosecutorial “traditions and methods [were still those] shaped at the time of the Civil War”; judges lacked a central system for case assignments and had difficulty retrieving written records when making bail, dismissal, and sentencing decisions.<sup>116</sup>

With the late 1920s came President Herbert Hoover’s Crime Commission, chaired by Attorney General George W. Wickersham.<sup>117</sup> Known today as the “Wickersham Commission,” it issued reports documenting the existence of Cleveland-like conditions across the nation’s cities and denouncing “lawlessness in law enforcement.”<sup>118</sup> The incompetence, political biases, and brutality of the police were central themes.<sup>119</sup>

The problems identified by the Wickersham Commission persisted for decades, eventually precipitating two subsequent reform efforts—one by the American Bar Foundation, the other by President Lyndon Johnson’s Commission on Law Enforcement and the Administration of Justice.<sup>120</sup> Both reported, roughly contemporaneously with the initial stages of the Warren Court’s criminal-procedure heyday, that the criminal legal system systematically discriminated against marginalized groups and failed to ensure a bare minimum of safety against violence.

Seidman surely doesn’t want to return us to this world. But elected officials often respond to popular demand for harsh penal policies, from mandatory minimums to three-strike laws to the death penalty, which have a disproportionate impact on marginalized people.<sup>121</sup> Seidman has a good deal to say in favor

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Pound & Felix Frankfurter eds., 1922).

115. *Id.* at 7–8.

116. *Id.* at 620, 629–32.

117. Schulhofer, *supra* note 99, at 1049. See GEORGE W. WICKERSHAM, NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931) [hereinafter WICKERSHAM REPORT].

118. WICKERSHAM REPORT, *supra* note 117, at 1–4.

119. On brutality in interrogation, see *id.* at 173–80.

120. Schulhofer, *supra* note 99, at 1057–58.

121. For a summary and discussion of the literature, see John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 749–86 (2020). See also RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF

of populism, even as he acknowledges “the worst impulses embedded in the populist tradition,” including “racism, misogyny, xenophobia, and homophobia” (p. 133). To the extent that he would redistribute power over the content, enforcement, and prosecution of criminal law from the judiciary to “the community,” he owes readers an account of how doing so will not leave marginalized people worse off, as well as a defense of his particular conception of democracy.

The latter point is worth elaborating. Among the demands articulated by activists against police violence who compose the Movement for Black Lives (“M4BL”) is *community control of policing*.<sup>122</sup> “Democratic community control” of police has been emphasized by M4BL because of the “destructive policing” that marginalized communities have experienced. It is not straightforwardly majoritarian. It would empower particular groups—those “most harmed” by policing—“to hire and fire officers, determine disciplinary action, control budgets and policies, and subpoena relevant agency information” will render visible, remedy, and reduce police violence against marginalized people.<sup>123</sup> This is not populism.<sup>124</sup> It is agonistic, contestatory

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MASS INCARCERATION 124 (2019) (“Strong political and psychological forces remain decidedly in favor of long sentences and an expansive criminal state—even when doing so is best characterized as pathological. If reform is sought directly through the political process, it will achieve only so much before running up against these political forces.”).

122. See *Community Control*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/community-control/> (last visited June 26, 2023); see also M. Adams & Max Rameau, *Black Community Control Over Police*, 2016 WIS. L. REV. 514; Max Rameau & Nefta Freeman, *Community Control vs. Defunding the Police: A Critical Analysis*, BLACK AGENDA REPORT (June 10, 2020), <https://www.blackagenda.com/community-control-vs-defunding-police-critical-analysis/>; Olufémi Táíwò, *Power Over the Police*, DISSENT (June 12, 2020), [https://www.dissentmagazine.org/online\\_articles/power-over-the-police](https://www.dissentmagazine.org/online_articles/power-over-the-police). For criticism from abolitionists, see, for example, Beth Richie, Dylan Rodriguez, Mariame Kaba, Rachel Herzog, Melissa Burch & Shana Agid, *Problems With Community Control of Police and Proposals for Alternatives*, CRITICAL RESISTANCE (June 19, 2020), <https://drive.google.com/file/d/12q4eWZQzwIj-EFrLUU2XbnLipKnXIuxG/view> (contending that “even in best case scenarios, the institution of policing cannot be reformed”); Carl Williams & Christian Williams, *Community Control Won’t Fix What’s Wrong With Cops*, IN THESE TIMES (Aug. 25, 2020), <https://inthesetimes.com/article/carl-christian-williams-police-control-abolition> (“[Because] th[e] police system has served as the country’s primary engine to uphold white supremacy by destroying the lives of Black people. . . . [a]ny policy that does not directly move us toward abolition should be viewed with suspicion, including proposals (popular even on the Left) for community control over police.”).

123. MOVEMENT FOR BLACK LIVES, *supra* note 122.

124. See Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 843–48 (2021).

democracy, in which no “community” dominates and provision is made for disempowered groups to challenge reigning ideas.<sup>125</sup>

Seidman is correct that reformers who saw professionalization-by-judiciary as the cure for what ailed policing were mistaken. Professionalization itself was a fraught concept. Consider that the Wickersham Commission complained that the police left “the citizen [feeling] helpless in the hands of the criminal *class*.”<sup>126</sup> Khalil Gibran Muhammad has detailed how the belief that Black people in particular were major producers of urban crime and constituted a dangerous criminal population contributed to and legitimated segregation and discrimination in the northern U.S.<sup>127</sup> And if discretion was deemed problematic in the hands of the ignorant and unskilled, it wasn’t always seen so when exercised by experts.

An example: the Court’s approval in *Terry v. Ohio*<sup>128</sup> of warrantless investigatory stops that are supported by “reasonable suspicion.” *Terry* reads like a paean to the newly professionalized cop on the beat.<sup>129</sup> As Paul Butler notes, however, the Court never mentioned that John Terry was Black in praising Officer Martin McFadden’s work preceding his arrest.<sup>130</sup> Any confidence that professionalized police would exercise their *Terry* discretion in nondiscriminatory ways proved unwarranted. *Terry* “became the gateway case for racial profiling” in the form of stop-and-frisk policies that have had the effect of “signal[ling] to any [B]lack man that [he is] subject to being detained and searched.”<sup>131</sup>

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125. *See id.*

126. GEORGE W. WICKERSHAM, NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON POLICE 1 (1931).

127. KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 227 (2010). Seidman’s comments on the prevalence of “violent crime” that is “not evenly distributed among the population” (p. 159) are troubling in light of the latter’s research into crime statistics, which illuminate just how contingent the latter are on discriminatory patterns of enforcement. Relatedly, Alice Ristroph and David Sklansky have shown that what constitutes “violence” for the purposes of criminal law is politically contingent and may not consistently correspond with ordinary intuitions about what is violent. *See* Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011); DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIME AND WHAT IT MEANS FOR JUSTICE (2021). That is, “violent crime” is a legal term of art. By contrast, the police conduct that he highlights—choking, shooting, penetrating—is unambiguously violent in the ordinary sense of the word. Seidman’s caveat that “[c]rime statistics in general are notoriously imprecise” is insufficient (p. 159).

128. 392 U.S. 1 (1968).

129. *Id.* at 27.

130. PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 90 (2017).

131. *Id.* at 90, 111.

Even so, Warren Court criminal procedure has empowered criminal defendants in ways that Seidman doesn't consider. Alice Ristroph has written about how the right to exclude evidence gathered in violation of the Constitution can give people an opportunity unlike any they would otherwise have to "push[] the state to articulate and defend the principles of coercion that underlie the operation and enforcement of the criminal law."<sup>132</sup> It may be motivated only by a self-interested desire to avoid punishment, but it's an inescapably political act—an "assertion of the defendant's status as an autonomous agent in the larger political community."<sup>133</sup> As Ristroph notes, "[a] great many criminal defendants do not vote, march in picket lines, or write letters to their elected representatives."<sup>134</sup> Yet, the Warren Court's rules give them an opportunity to speak in ways to which the state must be responsive as well; a chance at freedom that wouldn't otherwise be available; and an opportunity to—even if they lose—produce an opinion that serves as a public record of the social choices made.<sup>135</sup>

What's missing from these decisions is any connection to a shared history that might have grounded them in something other than elite perceptions of what made good policing. All of these decisions involved the "incorporation" of individual rights listed in the first eight amendments—the Bill of Rights—to the states through the Fourteenth Amendment. But none of them discuss the latter's text; the mass movement for Black freedom that made it possible; or the constitutional vision that inspired and was instantiated, if imperfectly, in its guarantees. That is to say, nothing about the Warren Court's articulation of these constitutional rules encouraged Black people—disproportionately subjected to the criminal system—to see them as their own, as part of a democratic story that included them.

It's not as if such stories can't be told about criminal-procedural rights. My own research into the original meaning of

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132. Alice Ristroph, *Regulation or Resistance?: A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1556 (2015).

133. *Id.* at 1598.

134. *Id.*

135. *See id.* at 1603 ("Though defendants obviously do not benefit from a presumption that effective law enforcement—defined as apprehension, conviction, and punishment—is the paramount purpose of our criminal justice system, as a society we are better off if we state that choice explicitly.").

the right to confront witnesses has yielded evidence that confrontation rights were used during the antebellum period as a means of democratically building antislavery power.<sup>136</sup> Abolitionists insisted upon the right to face-to-face cross-examination of witnesses and denounced the Fugitive Slave Act of 1850 for not requiring confrontation—and not just because they considered the out-of-court statements of purported slaveholders to be unreliable evidence of a person’s fugitive status.<sup>137</sup> Confrontation enabled abolitionists to rally public opinion against the injustice of particular prosecutions and the FSA in general;<sup>138</sup> produce material for antislavery literature;<sup>139</sup> and delay proceedings enough to gather funds that could be used to purchase the freedom of those who were convicted.<sup>140</sup>

There may be opportunities today to use confrontation to build power against a criminal legal system that is the subject of cross-ideological concern.<sup>141</sup> Jocelyn Simonson has documented the activities of “court-watching” groups that attend bond hearings, arraignments, pleas, and trials to document everyday proceedings and use the information that they collect argue for changes in criminal-legal policy.<sup>142</sup> She points out that in so doing, they are drawing upon the Fifth and Sixth Amendments, which “guarantee the right to a public criminal adjudication.”<sup>143</sup> Broader confrontation rights mean more witnesses who must be produced by the state at trial for cross-examination in open court. At the very least—as Seidman has elsewhere recognized—

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136. See Evan D. Bernick, *Fourteenth Amendment Confrontation*, HOFSTRA L. REV. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4180826](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4180826).

137. *Id.* at 27.

138. *Id.* at 28. For a deep dive into abolitionist lawyering and its relationship with the antislavery movement, see generally Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877 (2019).

139. Bernick, *supra* note 136, at 1.

140. *Id.* at 28–29.

141. See, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); STUNTZ, *supra* note 98; STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012); BARKOW, *supra* note 121; MARIAME KABA, *WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMATIVE JUSTICE* (Tamara K. Nopper ed., 2021).

142. See Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019).

143. *Id.* at 285.

they can be used by defendants to secure more favorable plea agreements.<sup>144</sup>

Would grounding constitutional rules in abolitionist history make them more difficult to undermine? Perhaps not, and perhaps the Warren Court's particular rules couldn't be convincingly grounded in that history. And I'm enough of a realist to recognize the limitations of the historical record as a constraint upon the Court's decision-making. But I'm also enough of a Spinozist to maintain that governance that fosters human flourishing requires psychological buy-in—specifically, hope rather than fear, borne of a sense that one's power has increased.<sup>145</sup> Stories that situate people in a history of participatory-democratic struggle for the rights that they are invoking hold the potential to inspire hope—not only for their own liberation, but for the transformation of the system that they are resisting. They are worth telling.<sup>146</sup>

Ultimately, Seidman does not sufficiently address concerns that the s-constitution would provide marginalized people with less protection than the Constitution offers. Neither the Warren Court's mixed record nor subsequent retrenchment demonstrates that broad, non-negotiable constitutional rules should not constrain the criminal legal system. The Court's interpretation of the Constitution has demonstrably failed to secure domestic tranquility, and Seidman is right to highlight movement demands for the radical transformation of policing. It seems telling, however, that none of these demands include continued retreat from *Mapp*, *Miranda*, or *Gideon*.

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144. Louis Michael Seidman, *Hyper-Incarceration and Strategies of Disruption: Is There a Way Out?*, 9 OHIO ST. J. CRIM. L. 109, 119 (2011).

145. See Benedictus de Spinoza, *Political Treatise*, in 2 THE COLLECTED WORKS OF SPINOZA 503, 530 (Edwin Curley ed. 2016) (“[A] free multitude is guided by hope more than by fear, whereas a multitude which has been subjugated is guided more by fear than by hope. The first want to cultivate life; the second care only to avoid death. . . . [t]he second are slaves, and the first free.”); *id.* at 513 (“[E]ach person can do that much less, and so has that much less right, the greater the cause he has for fear.”); see also Justin Steinberg, *Spinoza on Civic Liberation*, 47 J. HIST. PHIL. 35, 51 (2009) (“[Spinoza argued] hopeful citizens are freer than fearful citizens because they are in an affectively superior position, which reflects a corresponding superiority in their level of power.”).

146. Of course, the appointment of judges who could be expected to be responsive to such arguments would require a concerted political strategy. For a discussion of what that strategy might look like, see Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631 (2022).

## D. MISSING MOVEMENTS

With all that being said, I agree entirely with Seidman that the Constitution exerts too strong of an influence on our political life, and the Court's monopolization of constitutional discourse is profoundly unhealthy. Like him, I would like to change the status quo. I suspect, however, that this book—or a thousand books like it—can't produce that change.

The Constitution Seidman decries didn't come to occupy the place that it currently does in our political life because people were persuaded by all-things-considered arguments in its favor, nor did it take the particular form that it has today because of such arguments. I know that Seidman knows this. Which is why I regret that he doesn't engage emergent scholarship that substantiates it; proposes institutional reforms that are designed to simultaneously undermine the status quo, improve people's lives in the present, and anticipate transformational political change; and is informed by the day-to-day work of activists who are dedicated to the same ends.

I have in mind here two often-overlapping academic movements. The first, law and political economy (“LPE”) unites scholars who seek to highlight how and why law—including constitutional law—has come to formally exclude questions of economic distribution while in fact operating to “encase[] forms of private, material power” in ways that reinforce a particular political order: neoliberalism.<sup>147</sup> The second is composed of practitioners of what Amna Akbar, Sameer Ashar, and Jocelyn Simonson call “movement law.”<sup>148</sup> Movement-law scholars

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147. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1808 (2020). For a general introduction to the movement, see *id.* For a discussion of how LPE's critique of capitalism builds upon and distinguishes itself from CLS, see Corinne Blalock, *Introduction: Law and the Critique of Capitalism*, 12 S. ATL. Q. 223, 229 (2022) (“[LPE's] recognition of law as both deeply embedded and complicit in capitalism but also not fully constitutive of it, represents a different relationship to legal indeterminacy than CLS embraced. Law is indeterminate, as CLS forcefully proved; it is just not radically so, because it comprises but a part of the capitalist relation. Accordingly, contemporary critical legal projects focus on using the law as a means of shifting and building power.”).

148. Amna A. Akbar, Sameer M. Ashar, & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021). For a sampling of this literature, see, for example, Hasbrouck, *supra* note 146; Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 578–86 (2021); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1791–800 (2019); Roberts, *Abolition Constitutionalism*, *supra* note 87;



forthrightly embrace “visions of liberation, solidarity, and equality,” and do not imagine that they can realize those visions on their own.<sup>149</sup> They “work[] alongside grassroots social movements with particular visions,” and generate normative scholarship that is informed by their experience.<sup>150</sup> These movements aspire to identify with precision and build political power to transform the socioeconomic conditions in which the Constitution became hegemonic and operates as it does.

First Amendment law provides a ready-to-hand illustration. Everyone recognizes that it changed dramatically in ways that do not seem to have been compelled by any constitutional text. But why did the Court shift from affording no protection at all to commercial speech to providing expansive protection?<sup>151</sup> Why did the Court once think that it could distinguish between the use by public employee unions of mandatory dues for “political” speech, on the one hand, from “economic” activities, on the other?<sup>152</sup> Why did it conclude some decades later that the distinction was untenable?<sup>153</sup> And why do Americans care so much about what it concludes?

LPE scholarship’s centering of neoliberalism—a term that appears nowhere in Seidman’s book—has enabled it to address these questions.<sup>154</sup> The perceived importance of the information

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Farbman, *supra* note 138; Alexi Nunn Freeman & Jim Freeman, *It’s About Power, Not Policy: Movement Lawyering for Large Scale Social Change*, 23 CLINICAL L. REV. 147, 161–66 (2016); Guinier & Torres, *supra* note 46; Michael Grinthal, *Power with: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 26–28, 33–59 (2011).

149. Akbar, Ashar, & Simonson, *supra* note 148, at 873.

150. *Id.* at 871.

151. Compare *Valentine v. Chrestensen*, 316 U.S. 52 (1942), with *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

152. See *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977).

153. See *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps. Council*, 138 S. Ct. 2448 (2018).

154. See David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 2–3 (2014) (“[Neoliberalism is] a set of recurring claims made by policymakers, advocates, and scholars in the ongoing contest between the imperatives of market economies and nonmarket values grounded in the requirements of democratic legitimacy.”); Blalock, *Neoliberalism*, *supra* note 26, at 85–88 (identifying neoliberalism’s foundational tenets as (1) a circumscribed role for the state, consisting in avoiding impediments to and actively promoting the operation of, market activity; (2) an understanding of state legitimacy grounded in the performance of (1); (3) the impossibility of collective pursuit of genuinely common goods and corresponding valorization of competition as an indirect means to just allocations—with “just” being defined as “efficient”).

conveyed through commercial speech to efficient markets underwrote more constitutional protection for the latter.<sup>155</sup> The distinction between the “political” and “economic” activities of unions was deemed tenable because the economic representation unions provided had ceased to be seen as a means of promoting self-government; the once-commonly-appreciated dependence of political freedom on material comfort and security.<sup>156</sup> The distinction was ultimately abandoned because unions came to be viewed as instruments of left-wing redistributive politics.<sup>157</sup> These decisions are, in the words of Jedediah Britton-Purdy, downstream of “a shared sense of the distinctive problems of capitalist democracy and the role of a constitutional order in mitigating them.”<sup>158</sup> In one sense, that sense emerged from postwar concerns that “[t]oo much political control of the economy, bolstered by unions and by the left, would stifle personal liberty and initiative, leading to some combination of stagnation and tyranny.”<sup>159</sup> In another, it was older than the Constitution, which was structured in part to prevent redistribution.

As for why we care: Aziz Rana has amassed evidence that we did not *used* to care nearly as much.<sup>160</sup> On his account, the big-C-Constitution began its ascent to a central place in political discourse because it served the interests of empire. The conquest of the Philippines and Puerto Rico was justified on the ground that the U.S., unlike the colonial powers it displaced, was bound by a Constitution containing universalizable principles.<sup>161</sup> The Constitution’s entrenchment in *Brown* aligned with elite interests in distinguishing the United States from the totalitarian Soviet Union.<sup>162</sup> It was used to win “hearts and minds” in Africa

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155. See, e.g., Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. F. 179 (2018); Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165 (2015); Amy Kapczynski, *Free Speech, Incorporated*, 44 BOS. REV. 156 (2019).

156. See Jedediah Purdy, *Beyond the Bosses’ Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161 (2018).

157. *Id.* at 2182; FISHKIN & FORBATH, *supra* note 91, at 444–47.

158. Purdy, *supra* note 156, at 2166.

159. *Id.*

160. See generally AZIZ RANA, *THE CONSTITUTIONAL BIND: HOW AMERICANS CAME TO IDOLIZE A DOCUMENT THAT FAILS THEM* (forthcoming 2024).

161. See Aziz Rana, *Why Americans Worship the Constitution*, PUBLIC SEMINAR (Oct. 11, 2021), <https://publicseminar.org/essays/why-americans-worship-the-constitution/>.

162. *Id.*

and Asia; it was used to reinforce the post-WWII welfare state against leftist political transformation.<sup>163</sup>

If the Constitution emerged under and presently reinforces a particular political order, undermining its hegemony may first require institutional change. Here, movement law can help. The Constitution will likely never be interpreted to require the dismantling of the prison-industrial-complex. But it cannot stop grassroots campaigns against building new jails or efforts to direct resources towards noncarceral means of resolving disputes and providing for public safety.<sup>164</sup> It will likely never be interpreted to confer a right to housing. But it cannot stop tenants from organizing to collectively buy the buildings they rent.<sup>165</sup> It has been interpreted to facilitate settler-colonialism and to abet the conquest and domination of Native Nations and people.<sup>166</sup> But it cannot stop American Indians from organizing to purchase their ancestral land.<sup>167</sup> Those campaigns and efforts may be “non-reformist reforms” that reduce harm in the present while anticipating a differently constituted polity.<sup>168</sup> Or, they may not, in which case their failure can be instructive concerning what *not* to do.

The case of Native activism warrants additional comment. The United States is a settler-colonial nation built on the conquest of Indigenous people, a fact about which the Supreme Court’s early Indian-law opinions are remarkably candid.<sup>169</sup> Still,

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163. *Id.*

164. *See, e.g.*, Osha Oneeka Daya Brown, Lee Doane, Sterling Fleming, Hakim Trent, Jeremy Valerio & Outside Organizers with No New Jails NYC, *\$11 Billion for What?! Incarcerated Organizers with No New Jails NYC Explain How to Shut Down Rikers Without Building New Jails*, 23 CUNY L. REV. FOOTNOTE F. 1 (2020); Invest-Divest, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/invest-divest/> (last visited June 26, 2023).

165. *See, e.g.*, DEBT COLLECTIVE, CAN’T PAY WON’T PAY: THE CASE FOR ECONOMIC DISOBEDIENCE AND DEBT ABOLITION (2020).

166. *See, e.g.*, Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014); WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED (2010); STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005).

167. *See, e.g.*, THE RED NATION, THE RED DEAL: INDIGENOUS ACTION TO SAVE OUR EARTH (2021).

168. For a genealogy of the concept of “non-reformist reforms” and a defense of its analytical utility, see Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 98–106 (2020).

169. *See, e.g.*, Johnson v. M’Intosh, 21 U.S. 543, 588–89 (1823) (“Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim

constitutional doctrine has given the federal government and the states far more power over Native Nations than the text and history of the Constitution or the Court's early case law supports.<sup>170</sup>

Maggie Blackhawk has shown how Native people have worked through “formal lawmaking institutions”—legislatures, agencies, and the courts—to “carve out jurisdiction and to govern” despite pointedly *not* “first confronting . . . dominant ideology.”<sup>171</sup> Native people have drawn upon what commitments to tribal sovereignty are still embedded in federal treaties, statutes, and canons of interpretation applicable to the same to “change the world before changing minds.”<sup>172</sup>

The Court's holding in *McGirt v. Oklahoma*<sup>173</sup> that “three million acres and [] most of the city of Tulsa”<sup>174</sup> rested on land reserved for the Muscogee (Creek) Nation might have seemed unthinkable, given the dominant ideology of Native erasure on which Oklahoma depended and to which the Court's own doctrine contributed.<sup>175</sup> But it happened, Blackhawk argues, because of Native advocacy that included engagement with Congress and administrative agencies through lobbying and petitioning, the embedding of commitments to tribal sovereignty in treaties and statutes, and “more radical strategies like land seizures, including the island of Alcatraz, and the occupation of

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which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. . . . It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.”). On settler-colonialism, see generally Lorenzo Veracini, *Settler Colonialism*, in *THE PALGRAVE ENCYCLOPEDIA OF IMPERIALISM AND ANTI-IMPERIALISM* 2412, 2412 (Zak Cope and Immanuel Ness eds., 2016) (“[Settler colonialism is] a specific mode of domination where a community of exogenous settlers permanently displace to a new locale, eliminate or displace indigenous populations and sovereignties, and constitute an autonomous political body.”).

170. See, e.g., Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignties*, 170 U. PA. L. REV. 549 (2022); Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. CHI. L. REV. 413 (2021); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L. J. 113 (2002).

171. Maggie Blackhawk, *On Power and the Law: McGirt v. Oklahoma*, 2021 SUP. CT. REV. 367, 372–73.

172. *Id.* at 374.

173. 140 S. Ct. 2452 (2020).

174. *Id.* at 2482 (Roberts, J., dissenting).

175. See Blackhawk, *supra* note 171, at 386–90.

offices of the Bureau of Indian Affairs.”<sup>176</sup> It wasn’t critique of the incoherence of Indian law that made Native governance of a major U.S. city possible. It was the persistence in fact of tribal self-governance—sovereignty—that existed at the Founding and which the Constitution itself acknowledged, despite centuries of efforts to diminish it and the Court’s own complicity in those efforts.

Seidman recognizes how social movements have succeeded in shaping the Constitution, in spite of the odds (pp. 231–34). He describes how opponents of racial segregation deployed a variety of tactics, some of which saw them invoking constitutional norms and ultimately seeking their judicial enforcement, others which included civil disobedience and direct action. This is the stuff of movement law, and it is welcome. But it follows an entire chapter dedicated to claiming the “great men” of U.S. history—Jefferson, Lincoln, and Roosevelt—for the s-constitution. There is a missed opportunity here to consider the legacy of unambiguously s-constitutional movements, the goals of which resemble those of current left formations and which have served as inspiration to them. I have in mind two in particular: the Socialist Party of America and the Black Panther Party (“BPP”).

The Socialist Party of America, in connection with Eugene Debs’s campaigns for President, demanded sweeping revisions to the constitutional system. Although Debs frequently invoked the Founders, he did so to criticize their handiwork for falling short of their professed democratic ideals. The 1912 Socialist platform demanded “the abolition of the Senate and of the veto power of the President,” “the election of the President and Vice-President by direct vote,” “the abolition of the power usurped by the Supreme Court of the United States to pass upon the constitutionality of . . . legislation enacted by Congress,” and “national laws to be repealed only by act of Congress or by a referendum vote of the whole people.”<sup>177</sup>

The BPP went still further. At a 1970 Revolutionary People’s Constitutional Convention attended by as many as 15,000 people, including members of the American Indian Movement, the Young Lords, Students for a Democratic

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176. *Id.* at 403.

177. See Aziz Rana, *Who Owns the Constitution?*, JACOBIN (Oct. 15, 2020), <https://jacobin.com/2020/10/us-constitution-law-supreme-court-socialism>.

Society, the Young Patriots, and the National Urban League, among other groups, the BPP condemned the Constitution for its role in “economic and political subordination.”<sup>178</sup> A joint BPP message calling for the convention is worth quoting at length:

The Constitution of the U.S.A. does not and never has protected our people or guaranteed to us those lofty ideals enshrined with it. When the Constitution was first adopted we were held as slaves. We were held in slavery under the Constitution. We have suffered every form of indignity and imposition under the Constitution, from economic exploitation, political subjugation, to physical extermination.

We need no further evidence that there is something wrong with the Constitution of the United States of America. We have had our Human Rights denied and violated perpetually under this Constitution—for hundreds of years. As a people, we have received neither the Equal Protection of the Laws nor Due Process of Law . . . The Constitution of the United States does not guarantee and protect our Economic Rights, or our Political Rights, nor our Social Rights.

It does not even guarantee and protect our most basic Human Right, the right to LIVE!

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For us, the case is absolutely clear: Black people have no future within the present structure of power and authority in the United States under the present Constitution. For us, also, the alternatives are absolutely clear: the present structure of power and authority in the United States must be radically changed or we, as a people, must extricate ourselves from entanglement with the United States.

If we are to remain a part of the United States, then we must have a new Constitution that will strictly guarantee our Human Rights to Life, Liberty, and the Pursuit of Happiness, which is promised but not delivered by the present Constitution. We shall not accept one iota less than this, our full, unblemished Human Rights.<sup>179</sup>

This is industrial-strength constitutional skepticism. It repudiates the Constitution for failing to effectively deliver on its promises (“promised and not delivered”) and for not promising enough (“does not guarantee . . .”). These limitations have enabled

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178. Akbar, Ashar & Simonson, *supra* note 148, at 861.

179. *Id.* at 269–70.

“every form of indignity and imposition,” among which police violence emphasized. They are too fundamental to admit of redress within the existing constitutional system; a revolution is required, and revolutionary convention is therefore demanded.

Of course, Debs wasn't elected to the Presidency. The kinds of arguments he made were driven out of public discourse and those who made them were driven out of public institutions during the Red Scares.<sup>180</sup> The BPP was violently suppressed by the federal government; none of its major demands were met.<sup>181</sup> The fates of these skeptics raise the question of how useful the skeptical tradition could possibly be to present-day left politics. It is, however, a question that constitutional skeptics must confront. They don't, after all, make history as they please. If the historical record attests to “constitutional struggle against constitutional authority” (p. 242), there is much that we might be able to learn from trauma as well as triumph.

#### IV. A BETTER TOMORROW<sup>182</sup>

The Wu-Tang Clan's last group album may never be heard by the public. Over the course of six years, Wu-Tang founding member, producer, and de facto leader RZA worked with Wu affiliate Cilvaringz to record a nearly two-hour album, *Once Upon a Time in Shaolin*. In March of 2015, the album was exhibited for the first and only time to about 150 people in an outdoor dome adjacent to the Museum of Modern Art in Queen. They heard 13 minutes of it.<sup>183</sup>

There was some ceremony beforehand. RZA removed the record from a hand-carved, jewel-encrusted box sealed by the Wu-Tang insignia and accessible only with a one-of-a-kind key. After playing the record, he announced his intention to auction off the record—the only record in existence—to the highest

180. See generally LANDON R. Y. STORRS, *THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT* (2013).

181. See generally WARD CHURCHILL & JIM VANDER WALL, *AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT* (1988).

182. See WU-TANG CLAN, *A Better Tomorrow*, on WU-TANG CLAN, *A BETTER TOMORROW* (Warner Bros. Records 2014).

183. See FERNANDO, *supra* note 5, at 432–33. The experience is discussed in Matt Rasmussen, *You'll Never Hear the New Wu-Tang Clan Album, But This Is What It Sounds Like*, *COMPLEX* (Mar. 3, 2015), <https://www.complex.com/music/a/mattyraz/wu-tang-clan-rza-once-upon-a-time-in-shaolin>.

bidder in an auction, subject to legal agreements forbidding its commercial exploitation for 88 years.<sup>184</sup>

This effort to renew appreciation of what RZA and Cilvaringz called “the intrinsic value of music”<sup>185</sup> resulted in the sale of *Once Upon a Time in Shaolin* to Turing Pharmaceuticals CEO Martin Shkreli for \$2 million.<sup>186</sup> By the time that the sale was publicized, Shkreli had become notorious for obtaining the manufacturing license for an antiparasitic drug and promptly raising its price by 5,455%. After he was convicted on unrelated securities-fraud charges, the album was forfeited to the federal government, which auctioned it to a group that sells non-fungible tokens.<sup>187</sup> As an illustration of the absurdity of the present political-economic moment, it will do.

There are more serious things to be worried about. We confront multiple, interrelated, mutually reinforcing crises of economic precarity and inequality, environmental deterioration, reproductive control, carceral expansion, and democratic backsliding, to name only a few. For that reason—and in spite of the criticism I have offered—*From Parchment to Dust* is an important book at a pivotal moment. To meet the challenges before us, we must listen to, learn from, and support one another. I think that the Constitution, as shaped by mass struggle, has virtues that Seidman sells short. But I hope that he will consider it at least a partial victory that I emerged from the experience of reading his book more skeptical than I began. And I am glad that there is more than one copy of it.

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184. FERNANDO, *supra* note 6, at 433.

185. *Id.* at 434.

186. *Id.* at 435.

187. See Ben Sisario, *Meet the New Owners of the Wu-Tang Clan’s One-of-a-Kind Album*, N.Y. TIMES (Oct. 20, 2021), <https://www.nytimes.com/2021/10/20/arts/music/wu-tang-clan-once-upon-a-time-in-shaolin.html>.