

The Many American Constitutions

AMERICA'S FORGOTTEN CONSTITUTIONS. By Robert L. Tsai. Cambridge, Massachusetts: Harvard University Press, 2014. 368 pages. \$35.00.

Aziz Rana*

I. Introduction: Recovering the History of Constitutional Skepticism

For all the disagreement and polarization that mark modern American politics, one commitment that enjoys wide-ranging support—able to unite even hardened foes on the right and on the left—is faith in the essential goodness of the federal Constitution. Members of both major political parties often clamor to display their constitutional loyalty, from establishing Constitution Day as a national holiday¹ to reading from the text to begin new sessions of Congress² to habitually invoking its wisdom during speeches and addresses.³ But in recent years, the halo around the Constitution appears to have fractured ever so slightly. Today, it has become almost a fad among legal scholars to attack the Constitution as outmoded and ill equipped to meet current political needs. The pages of *The New Yorker* discuss worries about whether the Constitution is “broken.”⁴ Various books declare the United States to be a “frozen republic”⁵ or a “republic[] lost”⁶ and call for “constitutional disobedience”⁷

* Associate Professor of Law, Cornell University Law School. 106 Myron Taylor Hall, Ithaca, NY 14853. I would like to thank Kate Ergenbright and the rest of the *Texas Law Review* editorial team for all their invaluable work on this Review.

1. 36 U.S.C. § 106 (2012).

2. This practice was started in 2011 by Republican members of the House of Representatives, with notable Democrats, such as Nancy Pelosi, participating. Two years later, according to Bob Goodlatte, the Republican House Judiciary Chair, the desire to participate in the reading was so strong that they “ran out of Constitution before they ran out of readers.” *66 Minutes to Read the U.S. Constitution*, NOTE, ABC NEWS (Jan. 15, 2013, 1:17 PM), <http://abcnews.go.com/blogs/politics/2013/01/66-minutes-to-read-the-constitution/>, archived at <http://perma.cc/D65T-NHNP>.

3. As just one illustration, the very first words of President Barack Obama’s second inaugural address, maintained that the inauguration itself should be viewed as a collective moment in which the country “bear[s] witness to the enduring strength of our Constitution.” President Barack Obama, Second Inaugural Address (Jan. 21, 2013) (transcript available at http://articles.washingtonpost.com/2013-01-21/politics/36473487_1_president-obama-vice-president-biden-free-market, archived at <http://perma.cc/AQ89-5BH4>).

4. Jeffrey Toobin, *Our Broken Constitution*, NEW YORKER, Dec. 9, 2013, <http://www.newyorker.com/magazine/2013/12/09/our-broken-constitution>, archived at <http://perma.cc/WHP2-EEWB>.

5. DANIEL LAZARE, *THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY* 9 (1996).

6. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 1 (2011).

7. LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* 10 (2012).

and even a second constitutional convention.⁸ Indeed, in republishing his seminal book *Constitutional Faith* in 2011, Sanford Levinson pointedly concludes that although he once chose to sign the Constitution as part of an exhibit celebrating the text's 200th anniversary, he would not do so again.⁹ He no longer believes in the document's basic utility "unless one reduce[d] 'constitutional faith' to a willingness to embrace the Preamble while being harshly critical of much of what follows it."¹⁰

But if constitutional skepticism has seen a marked revival in legal scholarship, far less attention has been paid to exploring the history of such skepticism and the extent to which current concerns resonate with early generations of Americans.¹¹ Some academics like Lawrence Lessig no doubt write that "[w]e were here at least once before"¹² and see a parallelism between the early twenty-first century and the early twentieth. For him, just as a hundred years ago the country struggled through a Gilded Age of corporate power, corruption, and striking economic inequality, he now worries that—against the backdrop of financial crisis and pervasive government gridlock—we are living through a second Gilded Age marked by dysfunctional political institutions and deepening class divides.¹³ In his view (not to mention Levinson's¹⁴), the Constitution's structure (its combination of countermajoritarianism and divided institutional power) has only made any confrontation of these problems all the more difficult.¹⁵ Still, even critics like Lessig and Levinson tend to assume both the contemporary and historical idiosyncrasy of their own positions and thus implicitly presuppose that the document is and virtually always has been a site of basic national reverence. In this way, many of the text's present-day opponents too seem to accept a basic narrative of American constitutional culture that highlights the depth and pervasiveness of constitutional veneration.

8. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 24 (2006).

9. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 249–50 (2011).

10. *Id.* at 245.

11. One noteworthy exception is Louis Michael Seidman's recent article, *The Secret History of American Constitutional Skepticism: A Recovery and Preliminary Evaluation*, 17 U. PA. J. CONST. L. 1 (2014).

12. LESSIG, *supra* note 6, at 3.

13. *See id.* at 7–9 (detailing the similarities between the Gilded Age and the present while also contending that contemporary corruption, unlike a century ago, is the product not of specific bad actors but of an entire political infrastructure that systematically generates poor governance and low levels of popular trust).

14. LEVINSON, *supra* note 9, at 247–50.

15. *Cf.* LESSIG, *supra* note 6, at 305 (arguing in favor of various governmental reform efforts, because of the failure of existing constitutional arrangements to counter corruption and to create "structures for controlling what happens").

As a consequence, despite the rise of scholarly skepticism, the dominant academic accounts of the Constitution continue to take for granted essential constitutional commitment among citizens and to downplay—if not ignore altogether—actual practices of opposition. Most histories describe how, following the American Revolution and the struggle for constitutional ratification, no anticonstitutional party took root in the newly independent colonies. Historians largely conclude from this fact that all relevant political voices almost immediately accepted the Constitution as the established basis for future debate. According to Lance Banning, “intellectually, the Antifederalists had no heirs”¹⁶ because “[w]hile interest in fundamental amendments persisted for years, determined opposition to the new plan of government disappeared almost as quickly as it arose.”¹⁷ Michael Kammen offers perhaps the most succinct and compelling expression of this view in his classic book on the Constitution in public life, *A Machine That Would Go of Itself*. Taking as uncontroversial the fact of agreement from the founding to the present, he writes:

Observers remind us how swiftly the Federalists and Anti-Federalists reached common ground. Although their disagreements about particular policy issues grew, within five years of ratification so many of those who had vigorously opposed the Constitution in 1788 warmly affirmed it. Similarly, in the crisis of 1860–61, southerners proclaimed their loyalty to the Constitution and imitated it closely (with a few key exceptions) in preparing the Confederate Constitution. Throughout the Civil War, Democrats and Republicans in the North disagreed about many matters but vied with one another in expressing reverence for the Constitution.¹⁸

Thus, in much of the literature, dissident practices of constitutional opposition are simply excised from the narrative. They are viewed as irrelevant for making sense of the development and transformations in American constitutional culture.¹⁹ And to the extent that they are recognized at all—like the example of the Confederate Constitution—they are reimagined instead as further proof of a general sentiment of veneration. Indeed, as Banning remarks, the very irrelevance of opposition is central to what makes “America unique”²⁰: namely, singular and unbending faith in

16. Lance Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793*, 31 WM. & MARY Q. 167, 169 (1974).

17. *Id.* at 168.

18. MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 29–30 (1986).

19. See, e.g., CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS CONSTITUTION* 131 (2005) (“[A]fter ratification the Anti-Federalists shrank into a tiny minority too small to affect policy. Anti-Federalism . . . ceased to exist as a policy to which electable politicians could attach themselves . . . [because] [t]he country liked the Constitution . . . [and it] was considered common sense at the time . . .”).

20. Banning, *supra* note 16, at 168.

the Constitution since the founding, with the “quick apotheosis of the American Constitution” nothing less than “a phenomenon without parallel in the western world.”²¹

No doubt scholars have acknowledged that American political life has faced extensive dissensus and division. But such dissensus is by and large presented as taking place against the backdrop of shared and near-unanimous constitutional support, in which “the basic pattern of American constitutionalism [has been] one of *conflict within consensus*.”²² Americans have fought vigorously about virtually every issue of social significance, from slavery and capitalism to matters of equality, inclusion, warfare, and government responsibility. Much of this conflict has even been about the Constitution itself—how to interpret the text and what its basic terms require. These struggles have often generated profoundly contradictory political visions of the Constitution, so contradictory that at times it can seem that activists are describing wholly different documents. Yet all these debates, according to the dominant narrative, have embraced one key element. They have assumed that the political process established by the Constitution is basically just and thus that the constitutional system is the appropriate framework within which political resolutions should be forged. Even when operating outside the existing laws or engaging in civil disobedience, Americans have claimed to be acting on behalf of and in the spirit of the Constitution; they have maintained their constitutional fidelity.

The new book by Robert Tsai, *America’s Forgotten Constitutions: Defiant Visions of Power and Community*, frontally challenges this pervasive historical account.²³ In it, Tsai describes in detail the efforts of various Americans from the founding until the present to generate and institute competing constitutional projects, from settler pioneers to utopian socialists, abolitionists, Confederate secessionists, indigenous communities, internationalists, black nationalists, and white-power activists. In the process, Tsai recovers extensive and diverse traditions of alternative constitution writing from across the political spectrum. He thus highlights the deep plurality of American constitutional culture as well as the centrality of dissident chords in shaping our legal and political institutions. The book is a remarkable feat of excavation, one that offers a much-needed corrective to the conventional histories of American constitutionalism—histories that deemphasize the vitality and importance of popular suspicion toward the federal Constitution. It thus enriches—quite dramatically—the current literature on contemporary constitutional opposition by implicitly placing today’s critics within a long-standing American struggle over the

21. *Id.*

22. KAMMEN, *supra* note 18, at 29.

23. ROBERT L. TSAI, *AMERICA’S FORGOTTEN CONSTITUTIONS: DEFIANT VISIONS OF POWER AND COMMUNITY* (2014).

compatibility between existing institutional arrangements and classic principles of popular sovereignty, self-government, and self-authorization.

Over the following pages, I plan to explore the significance of Tsai's book as well as to raise questions for future research. Part II will discuss in greater detail the basic argument of *America's Forgotten Constitutions* as well as how it exposes the problematic staying power of what is often called the "Consensus School" of historiography in American constitutional scholarship. Part III then turns to a basic concern with whether Tsai's narrative nonetheless still reads into the mainstream constitutional project an inherent liberal *telos* that ultimately cuts against the very plurality he seeks to recover. In other words, at the end of the day, the issue remains of whether Tsai goes far enough in challenging governing historical narratives around the permanence and inevitability of the modern and liberal American constitutional project. Finally, by way of conclusion, I explore future avenues for research opened up by Tsai's account. For instance, what does the book suggest about how precisely mainstream and dissident traditions have been stitched together in American constitutional life? And what has been the relationship between radical projects of alternative constitutionalism and more mainstream reform trends?

II. Bringing the Margins to the Center of American Constitutionalism

According to Tsai, the discursive tradition of American constitutionalism has been marked by many simultaneous projects of constitution writing. The Framers may have "unleashed" notions of popular sovereignty and written constitutionalism,²⁴ but they could hardly control its direction in the hands of ordinary citizens. This not only meant that citizens contested how best to interpret the federal Constitution, they also—from the very founding—engaged in their own efforts of re-founding and fundamental constitutional rupture. As Tsai writes, alongside practices of veneration, each generation of Americans embraced the "imaginative, lawbreaking strain of the political tradition,"²⁵ challenging root and branch the established legal order but in the language of constitutionalism and through the process of constitution writing. Thus, "[i]nstead of a single legal text standing intact for all time, citizens subsequently found themselves awash in competing constitutions."²⁶

For Tsai, there are two key reasons why the plurality and dissonance of American constitutionalism has been obscured. To begin with, opponents of the established order "lost crucial battles in their own time," with these struggles and defeats shaping our memory of the political and legal past.²⁷

24. *Id.* at 2.

25. *Id.* at 3.

26. *Id.* at 2.

27. *Id.* at 4–5.

But more importantly, although the survival of the 1787 Constitution may have been quite perilous at various moments in American history, the capacity of mainstream constitutionalism to steadily defeat and absorb its competitors has created a sense in the present of inevitability.²⁸ The document's very longevity has not only diminished the perceived utility today of alternative constitution writing but, in Tsai's words, it "has induced forgetfulness of much that has passed: failed democratic experiments, the ingenuity of alternative designs, certain tactics of direct action—even the inner workings of the ideological aspects of constitutionalism itself."²⁹

Above all, such forgetfulness has generated a contemporary scholarly and public sensibility that ignores the deep, internal ideological tensions and multiplicities within the constitutional tradition—a tradition for Tsai that for most of American experience has fundamentally been "at war with itself."³⁰ The 1787 text and mainstream constitutionalism may have promoted conventional theories of law and politics, grounded in the preservation of order and the enforcement of ordinary law.³¹ But at the same time, dissident and alternative constitutionalisms underscore the very ubiquity and breadth of divergent accounts of law and politics, based at times in *pioneer* logics of settlement, *tribal* notions of indigenous self-determination, *ethical* projects of equal liberty, *cultural* ideas of racially circumscribed membership, or even *global* accounts of world federation.

Tsai proceeds to illustrate the historical vitality of these competing theories through chapters that focus on specific constitution-writing efforts and that map the transformations in American life from the early nineteenth century until the present day. It is in these chapters, each a close case study of a particular episode, where the book truly shines. He describes the efforts of settlers in the 1830s in the contested territory at the border of British Canada and New Hampshire to establish their own independent political community, the Republic of Indian Stream.³² Tsai highlights how such settlers sought to legitimate their own acts of land expropriation by embracing a radicalized version of republican theories of productive use and land ownership as the condition for self-government.³³ He next explores the move by French utopian socialists to create an ideal ethical community on American soil, one that could avoid the problems of individualism and capitalism increasingly marking mid-nineteenth-century

28. *Id.* at 5.

29. *Id.*

30. *Id.*

31. *See id.* at 293 (describing how the "theory of conventional sovereignty" from the 1787 Constitution adapted to subsequent political movements).

32. *Id.* at 19–21.

33. *See id.* at 20 ("Their view of popular sovereignty was inextricably linked to territory: control of a parcel of land and productive work of it . . . generated true authority to govern.").

society.³⁴ Tsai then turns to John Brown's experiment in radical abolitionist constitution writing and engages in a close textual reading of Brown's 1858 Provisional Constitution and Ordinances for the People of the United States.³⁵ Through the document, Tsai examines the vision shared by Brown and his supporters (many of them African American) for transforming, by legal example and guerrilla war, the country from a corrupted slave society into a truly emancipatory and multiracial republic.³⁶

Tsai continues in following chapters by assessing the persistence in American history of racialized notions of sovereignty, particularly in constitution-writing projects by Southern Confederates and more recently white supremacists. He describes the Confederate Constitution as an effort to reaffirm the centrality of white rule to the American revolutionary and legal tradition.³⁷ By later juxtaposing the real strength of the white-sovereignist position in the Antebellum and Civil War periods with its marginality in twenty-first century white-power efforts among Aryan groups,³⁸ Tsai speaks to the fundamental shifts in mainstream constitutional discourse. Tsai further complicates questions of race and sovereignty by also detailing the effort of black nationalists in the 1960s and 1970s to establish a separatist state on American soil (the Republic of New Afrika), based on arguments about the irredeemability of white society and the impossibility—even with the decline of explicit white-supremacist discourse—of ever creating a national community not tainted by white power.³⁹ In addition, Tsai also describes attempts by indigenous peoples, most notably through the 1905 Constitution for the State of Sequoyah, to create an Indian-run state—in place of what eventually became Oklahoma—that would enjoy self-rule within the system of American federalism.⁴⁰ In the process, Tsai assesses the adaptive and creative efforts of indigenous peoples to use American constitutionalism to sustain meaningful tribal self-determination under incredibly hostile circumstances.⁴¹ And finally, he includes an account of post-World War II efforts among academics and policy makers to imagine a world constitution that

34. *Id.* at 49–50.

35. *Id.* at 91–98.

36. *Id.* at 111–17.

37. *Id.* at 135–36.

38. *Compare id.* at 120–27 (describing cultural sovereignty arguments advanced in Confederate states, predicated on “regional distinctiveness and the superiority of the white civilization,” as flourishing), *with id.* at 254–56, 259 (describing modern Aryan communities as “toiling at the margins of political relevance” and as a “dissident movement”).

39. *Id.* at 219–20.

40. *Id.* at 168–69.

41. *See id.* at 154–64 (describing how an indigenous movement “resorted to state constitutionalism” as a way of sustaining political autonomy in the face of coercive federal authority).

would extend far beyond the U.N. Charter and more directly challenge the global legitimacy of the nation-state system.⁴²

Taken as a whole, the chapters drive home the continuity and persistence of radical political experiments in American history—experiments that, rather than taking mainstream institutions as given, self-consciously employed and redirected constitutional discourses and practices. The result is not only a fascinating account that brings to the center what has traditionally been treated as marginal but a work of extensive archival and primary research that will be essential for future scholars. The chapter on John Brown is a particularly standout contribution,⁴³ and one that deepens immeasurably questions about the legal and political thought of radical abolitionism.

But perhaps the book's most significant contribution is how it contests the pervasive narrative of the role of constitutionalism as such in American public life. The familiar story is that the discursive traditions and practices of constitutional interpretation and writing in the United States have generated a very particular type of citizen–subject. Although Americans may disagree strenuously about substantive ends, the importance of constitutionalism as both a value and a mechanism for framing disputes has provided citizens with a common public language of self-critique. The overall constitutional tradition, in the words of Laurence Tribe, allows Americans to participate in a continuous practice of “collective interpretation and reinterpretation,” which promotes civic ideals of reason giving, critical engagement, and self-reflection.⁴⁴ Whatever their momentary passions, the fact that citizens privilege constitutionalism as the basic means for debate has had the effect of rationalizing disagreement, limiting the power of violent appeals, and above all making individuals more tolerant, pluralistic, and open-minded.

In some ways, the persistence of this narrative speaks to the remarkable staying power in academic and political life of the Consensus School of American historiography. Consensus history, most powerfully captured by Richard Hofstadter's seminal work, *The American Political Tradition*, maintained that regardless of real political division in the United States, “there has been a common ground, a unity of cultural and political tradition, upon which American civilization has stood.”⁴⁵ For Hofstadter and other mid-twentieth-century historians, writing in the context of Cold War orthodoxy, such essential agreement—especially around values of toleration, pluralism, and self-reflection—was a given in American life, a

42. *Id.* at 187.

43. *Id.* at 83–117.

44. Laurence H. Tribe, *America's Constitutional Narrative*, 141 DÆDALUS 18, 19 (2012).

45. RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION: AND THE MEN WHO MADE IT*, at xxxii (25th anniversary ed. 1973).

common cultural feature from the founding itself that spoke to the essentially liberal and egalitarian nature of the American project. In the years since the mid-1960s, the credibility of consensus history has more or less collapsed. As political scientist Rogers Smith wrote in the 1990s: if anything, collective life has been permeated by a multiplicity of inclusive and exclusive traditions—each equally American—with public figures blending “liberal, democratic republican, and inegalitarian ascriptive elements in various combinations designed to be politically popular.”⁴⁶

But one place where such historiography seems to maintain a toehold of academic authority is in scholarship on constitutional law.⁴⁷ The conventional narratives about both unanimous constitutional support from 1791 as well as regarding the role of constitutionalism in liberalizing American life often devolve into variants of the Consensus School. To date, these arguments have escaped recognition as such, let alone been subjected to systematic critique. Thus, more than anything else, what Tsai’s exploration of alternative constitution writing highlights is precisely how constitutional practices have been as open to illiberalism and intolerance as they have to liberal democratic values. Nothing about this shared discourse of constitutionalism—linking the mainstream to the margins—has necessarily facilitated rights protection, egalitarianism, or peaceful resolution. Both mainstream and dissident traditions have sought to impose their will through force and coercion and have developed sophisticated theories, depending on the political movements and constituencies in conflict, of both exclusionary and inclusionary sovereignty. In this way, Tsai helpfully grounds Smith’s “multiple tradition thesis” not only in American political culture generally but in constitutionalism more specifically. In the process, he therefore explodes whatever remains of the myth that American constitutional culture—due to the role of constitutionalism as a practice of critique, revision, and reinterpretation—has carried with it an inherent liberal direction.

III. Tsai’s Hidden *Telos*

If I have any significant concerns with the book’s analysis, it is that Tsai does not extend arguments about constitutional multiplicity far enough. At times, Tsai’s critique of the idea that American life has been marked by a single, unified constitutional tradition unwittingly tends to represent the mainstream 1787 document and tradition in Consensus History

46. ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 6 (1997).

47. See, e.g., Justin Driver, *The Consensus Constitution*, 89 *TEXAS L. REV.* 755, 757 (2011) (critiquing modern legal scholars’ use of the “consensus constitutionalism” approach, which “claim[s] that the Supreme Court interprets the Constitution in a manner that reflects the ‘consensus’ views of the American public”).

terms. In particular, the book associates mainstream constitutionalism with what he calls conventional sovereignty or theories of law and politics. For the most part, he defines “conventional” without giving any necessary content; it is simply whatever may have been dominant at a specific moment in American history. However, at places Tsai appears to slip between this content-free account of conventional and a presumption that conventional is equivalent to or somehow interlinked with liberal egalitarianism.

For example, he presents the defeat of the Confederate Constitution as a victory of “conventional sovereignty” over racially grounded and “cultural theories of power.”⁴⁸ Following the Civil War, he describes conventional sovereignty—embodied by the mainstream constitutional project—as increasingly “[i]nfluenced by ideas of liberal egalitarianism” and as “envision[ing] citizenship in ‘neutral’ political terms.”⁴⁹ Thus, the collapse of the Confederacy is marked as a key “turning point in the development of conventional sovereignty, which successfully defended the idea of one people and laid down new principles promoting national citizenship and civic equality.”⁵⁰ In effect, these arguments juxtapose an egalitarian mainstream constitutionalism with racialist alternative strands, at times appearing to embed within the 1787 constitutional tradition an inherent liberal *telos*. Tsai comes closest to making this claim in the book’s conclusion, where he combines liberal egalitarianism and conventional sovereignty, stating: “A theory of conventional sovereignty, descended from the 1787 Constitution and initially carried out through pioneer experiments, blossomed into a vision of law based on pluralism, individualism, and incrementalism.”⁵¹ At moments like these, Tsai seems to describe mainstream constitutionalism almost as an unfolding liberal endeavor that over time both defeated its illiberal challenges and steadily fulfilled its own initial promise.

This implicit, perhaps unintentional, image of the 1787 project deemphasizes the persistent and deeply exclusionary practices that remained dominant *within* mainstream constitutionalism far past the Civil War. Indeed, from the perspective of the post-Civil War period, it would be hard to describe mainstream constitutionalism in the late nineteenth and early twentieth centuries as opposed in any meaningful way to racial sovereignty. Similarly, one would have great difficulty in distinguishing conventional from Confederate constitutionalism on grounds that the latter was “cultural” and inegalitarian while the former increasingly plural and open. If anything, as Reconstruction receded, racially egalitarian readings

48. TSAI, *supra* note 23, at 12–13.

49. *Id.* at 12.

50. *Id.* at 13.

51. *Id.* at 293.

of the federal Constitution faded fairly rapidly from mainstream politics. By the turn of the century, different constituencies seriously debated whether the Constitution was outmoded, especially due to concerns about whether the divided and countermajoritarian nature of American government could successfully address growing industrial and labor problems.⁵² However, white views about racial supremacy had become so commonplace that there was far greater agreement that the country should remain a white republic than about whether or not essential changes were needed for the 1787 constitutional structure.

To underscore the point, one need only look at the dominant accounts of Reconstruction during the era in political and academic life. William Dunning, the president of both the American Historical Association and the American Political Science Association, described the end of Reconstruction and the reassertion of white oligarchy in the South in heroic terms as “the struggle through which the Southern whites, subjugated by adversaries of their own race, thwarted the scheme which threatened permanent subjugation to another race.”⁵³ Charles Francis Adams, scion of one of the nation’s founding families, great-grandson of John Adams, grandson of anti-slavery advocate John Quincy Adams, and another president of the American Historical Association,⁵⁴ similarly concluded that black limitations required treating the community generally as “a ward and dependent” rather than as a “political equal.”⁵⁵ And in his magisterial *The American Commonwealth*, perhaps the most academically well-respected account of the U.S. constitutional system during the era,⁵⁶ English jurist, politician, and diplomat James Bryce took for granted the impossibility of black civic inclusion, writing of former slaves in Louisiana: “Emancipation found them utterly ignorant; and the grant of suffrage found them as unfit

52. Aziz Rana, *Progressivism and the Disenchanted Constitution*, in *THE PROGRESSIVES’ CENTURY: DEMOCRATIC REFORM AND CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (Bruce Ackerman et al. eds., forthcoming 2015) (manuscript at 4–5) (on file with author).

53. HUGH TULLOCH, *THE DEBATE ON THE AMERICAN CIVIL WAR ERA* 214 (1999) (quoting 22 WILLIAM ARCHIBALD DUNNING, *RECONSTRUCTION: POLITICAL AND ECONOMIC, 1865–1877*, at xv (1907)) (internal quotation marks omitted).

54. Earl N. Harbert, *Charles Francis Adams (1807–1886): A Forgotten Family Man of Letters*, 6 *J. AM. STUD.* 249, 249 (1972); *Charles Francis Adams*, *AM. HIST. ASS’N*, <http://www.historians.org/about-aha-and-membership/aha-history-and-archives/presidential-addresses/charles-francis-adams>, archived at <http://perma.cc/7JJQ-5QZG>.

55. MARILYN LAKE & HENRY REYNOLDS, *DRAWING THE GLOBAL COLOUR LINE: WHITE MEN’S COUNTRIES AND THE INTERNATIONAL CHALLENGE OF RACIAL EQUALITY* 69–70 (2008) (quoting Charles Francis Adams, *Reflex Light from Africa*, *CENTURY MAG.*, May–Oct. 1906, at 101, 107).

56. Progressive politician and author Frederick Howe recalled in his memoir that in American universities at the turn of the century, “Mr. Bryce’s *American Commonwealth* was at the time a work of Biblical authority.” HUGH TULLOCH, *JAMES BRYCE’S AMERICAN COMMONWEALTH: THE ANGLO-AMERICAN BACKGROUND* 10 (1988) (quoting FREDERIC C. HOWE, *THE CONFESSIONS OF A REFORMER* 3 (1925)).

for political rights as any population could be.”⁵⁷ Indeed, such views were so widely held that even many socialists on the radical left defended the racially circumscribed nature of American membership, with Victor Berger declaring “there can be no doubt that Negroes and mulattoes constitute a lower race.”⁵⁸

In fact, by the eve of World War I, with President Woodrow Wilson and Supreme Court Chief Justice Edward White hosting private screenings at the White House and elsewhere for D.W. Griffith’s pro-Klan *Birth of a Nation*,⁵⁹ racially egalitarian arguments had retreated even as an account of the meaning of Gettysburg, where Lincoln had famously depicted the Civil War as a struggle over whether a nation “conceived in liberty” and “dedicated to the proposition” of equality “can long endure.”⁶⁰ For the fiftieth anniversary of the battle in 1913, white veterans from both armies returned to the site, with speakers and organizers emphasizing the importance of national healing but pointedly refraining from mentioning any of the claims about an egalitarian ethos invoked by President Lincoln.⁶¹ In the words of historian David Blight, the Gettysburg remembrances constituted “a Jim Crow reunion, and white supremacy might be said to have been the silent, invisible master of ceremonies.”⁶² For the progressive journal *Outlook*, Gettysburg—rather than highlighting a fundamental divide over racial sovereignty between conventional and Confederate constitutionalism—spoke instead to how North and South had really fought for a common ideal: “But in what other great war has it been true that both sides were loyal to the *same* ideal—the ideal of civil liberty.”⁶³

This far more complicated political history raises the worry that Tsai, by depicting American constitutionalism as marked by competing and distinct constitution-writing projects, inadvertently tends to compartmentalize the overall tradition. The result is that while he no doubt underlines the multiplicity of constitutionalisms, they at times appear insular and discrete, with the mainstream project in conflict with the theories of sovereignty expressed by alternative constitution-writing endeavors. The implicit consequence is to keep mainstream constitutionalism isolated from and uncontaminated by practices of illiberalism, in the

57. 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 335 (The Commonwealth Publ’g Co. 2d ed. rev. 1908) (1888).

58. MARK PITTENGER, *AMERICAN SOCIALISTS AND EVOLUTIONARY THOUGHT, 1870–1920*, at 181 (1993) (internal quotation marks omitted).

59. See TULLOCH, *supra* note 53, at 218–19.

60. President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), in 7 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 22, 23 (Roy P. Basler et al. eds., 1953).

61. DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* 386–87 (2001).

62. *Id.* at 9.

63. *Gettysburg: A Common Ideal*, *OUTLOOK*, July 12, 1913, at 554, 555.

form of racial ascription or other brands of political extremism. In fact, at a deeper level, this juxtaposition of conventional and alternative cultural or racial theories of sovereignty can make it appear that liberal egalitarianism does not itself carry embedded ascriptive visions of power and law. But given the mutations of racial politics in recent years, one may well wonder whether rather than separate currents flowing into the well of American values, liberal ideals have themselves operated through and sustained their own particular frameworks of exclusion and hierarchy. For a work that so powerfully captures the extent to which American ideas overflow classic assumptions of liberal consensus, this effect is occasionally jarring. At moments, Tsai appears close to embracing elements of the Consensus narrative that he otherwise works so thoughtfully to dislodge.

In a sense, this difficulty in the argument derives from the fact that Tsai never addresses in a direct and sustained manner the precise relationship between liberal egalitarianism and mainstream constitutionalism. In truth, given that the book is focused on recovering marginal and dissident projects of alternative constitutionalism it is hardly fair to ask that he also give a fuller account of mainstream constitutionalism and the process over time by which it became enjoined with a liberal egalitarian creed. But without interweaving this latter narrative, the book at times has the effect of flattening the dominant tradition. Whereas the dissident projects he details come across as richly textured and internally complex, the presentation of the mainstream constitutionalism—despite its changes and developments over the centuries—can have a static quality, serving as the rights-based liberalism in the background against which these contesting groups fight from the early nineteenth century until the present.

Still, one should not overemphasize this concern. If anything, the issue simply highlights the many fruitful paths for future research opened up by this compelling book. In particular, Tsai's work of constitutional recovery raises a set of key questions for future scholarship. If American constitutional history has not been marked by a single practice of near-unanimous support and veneration for the 1787 document, what exactly has been the relationship between the dominant constitutional project and competing alternatives? Which of the various dissident frameworks have ultimately been the most central for transformations in the overall constitutional tradition? More specifically, in what way have challenges to mainstream constitutionalism directly reshaped the 1787 text and its related practices? And finally, besides the Confederate challenge have there been any moments in which actual rupture or fundamental revision were politically viable? If so, what were the causes, as well as consequences, for long-term constitutional development? In the following conclusion, I would like to pursue some of these strands by raising a connected issue. Tsai's work on marginal constitutionalisms brings to the center the role of alternative projects in pressing the mainstream framework to institute

internal changes. What does this role suggest about the history of reformism in American law and politics?

IV. Conclusion: Reform and Revolution in Constitutional Thinking

One can read *America's Forgotten Constitutions* and be convinced that the United States has indeed had a far more multiple and plural constitutional tradition than is often appreciated. But at the same time, a reader may well conclude that in the present it is ultimately for the better—both in terms of political stability and ethical values—that alternative projects have disappeared or only exist at the extreme edges. In a sense, such a conclusion fits neatly into the conventional wisdom that stands behind the dominant scholarly view of the 1787 Constitution both as a site of near-unanimous support since the founding and as an historic instrument for liberalizing and rationalizing American politics. For instance, under this view, black nationalist efforts to create a separate Republic of New Afrika highlight precisely the problems of a revolutionary politics predicated on rupture and a repudiation of mainstream liberal constitutionalism. The rise of such voices to prominence in the late 1960s—especially given their militant posturing and fixation on armed self-defense⁶⁴—embodied the moment when the civil rights and student movements lost contact with most Americans and instead descended into violence and irrelevancy. By contrast with such extremist voices, so the claim goes, the mainstream constitutional tradition offered—and continues to offer today—a reformist mechanism for redeeming the nation from the sins of slavery and racism.

Although there is real power to this perspective, one of the key benefits of recovering alternative constitutional projects is that they hint at the deeply interconnected relationship in American history between reformist achievements and the threat of more revolutionary politics, embodied either by radical abolitionists such as John Brown or black nationalists in the late 1960s. Although Tsai does not explicitly develop this thought, I believe it is an important extension of his arguments and provides a key corrective to contemporary scholarly and political debates about how social change occurs. If anything, today's pervasive suspicion of any project that adopts the language of radicalism and rupture has generated a very specific vision of politics. This vision—one that undergirds the legitimacy of mainstream constitutionalism—suggests that all reform projects must operate in line with realizable, if narrow, agendas, in the process showing respect for the great symbols of American life, chief among them the Constitution. Moreover, reform action should be as suspicious of those radical impulses reminiscent of abolitionist, or more

64. TSAI, *supra* note 23, at 225–26.

recent black militancy, as they are of racially ascriptive politics on the far right—as both variants embody dangerous extremes.

Yet, a potential implication of Tsai's work is that those reforms to the mainstream project—reforms that American citizens are most proud today—may well have been bound to the threat of fundamental institutional and ideological challenges. Indeed, a tacit feature of Tsai's historical narrative is that every high tide of meaningful social change *within* mainstream constitutionalism appears to have occurred during a period with a viable and oftentimes revolutionary radical base. As Tsai repeatedly reminds us, the very success of the constitutional order—both its longevity and its capacity for adaptation and change—were sustained in part by the real dangers that it faced. To make the point more explicitly, during Reconstruction, the Progressive period, the New Deal, and the Civil Rights Era, reformers were able to build broad-based support for their policies precisely because these policies appeared moderate against the backdrop of politically relevant and more transformative alternatives. Although political actors—both mainstream and dissident—in these moments may not have always appreciated this dynamic, at key historical junctures the existence of a vibrant revolutionary discourse gave strength to reformist aspirations.

This fact speaks to what may well be the real significance of constitutional skepticism—and related efforts at alternative constitutionalism—in American life. Regardless of whether one believes that skeptics were right or wrong about the legitimacy and justness of the 1787 system, dissident constituencies nonetheless expanded the range of acceptable debate. In effect, by presenting the political possibility of another governing order, constitutional skeptics often helped to empower interpretations of the federal Constitution that facilitated much needed change. Indeed, a key concern for the present—so long as constitutional skepticism remains only in the academy—is that the disappearance of alternative constitutionalism as a real political force has removed, perhaps counterintuitively, a critical pillar of support for reformist agendas within the mainstream project.

In a sense, Tsai's book calls on scholars to explore in greater detail the history of those alliances, both witting and unwitting, between reformers and revolutionaries that have been read out of the constitutional experience. It suggests that whereas the mainstream project has taken credit for key social changes, engaging more fully with the actual process by which reform has occurred may require revising both our conventional histories as well as our assumptions about the relevant political players and even the past's actual heroes. Such a thought again underscores the sheer number of questions and avenues opened up by *America's Forgotten Constitutions*. It speaks to the book's many contributions and the manner in which Tsai has forged an important path for the retelling of the American constitutional tradition in all its plurality.