

# THE SHRINKING CONSTITUTION OF SETTLEMENT

*David E. Pozen\**

## ABSTRACT

*Professor Sanford Levinson has famously distinguished between the “Constitution of Settlement” and the “Constitution of Conversation.” The former comprises those aspects of the Constitution that are clear, well-established, and resistant to creative interpretation. The latter comprises those aspects that are subject to ongoing litigation and debate. Although Americans tend to fixate on the Constitution of Conversation, Levinson argues that much of what ails our republic is attributable, at least in part, to the grossly undemocratic and “decidedly nonadaptive” Constitution of Settlement.*

*This Article, prepared for a symposium on Levinson’s coauthored book *Democracy and Dysfunction*, explains that the Constitution of Settlement is in fact becoming unsettled, as growing levels of political frustration and polarization have roused a growing number of actors to seek to challenge or circumvent various pieces of it. Fundamental reform is now on the table. The Constitution of Conversation, meanwhile, is becoming ever less conversational. As these developments reflect, the distinction between Levinson’s two constitutions is significantly more complicated—and fluid—than his binary implies. Ironically, Levinson is not just a leading critic of the Constitution of Settlement but also an active participant in its maintenance.*

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\* Charles Keller Beekman Professor of Law, Columbia Law School. For helpful comments and conversations, I thank Jed Britton-Purdy, Jessica Bulman-Pozen, Josh Chafetz, Jeremy Kessler, Genevieve Lakier, Marty Lederman, Neil Siegel, Nelson Tebbe, and my fellow participants in the Drake Constitutional Law Center’s symposium on *Democracy and Dysfunction*. This Article expands on a May 2019 blog post on *Balkinization*. I owe special thanks to Sandy Levinson, both for his generous response to that post and for a body of work that has deeply influenced and enriched my understanding of the Constitution.

## I. INTRODUCTION

In the afterword to the 2011 edition of *Constitutional Faith* and in the 2012 book *Framed: America's 51 Constitutions and the Crisis of Governance*, Professor Sanford Levinson introduced a distinction between the “Constitution of Settlement” and the “Constitution of Conversation.”<sup>1</sup> The Constitution of Settlement comprises those aspects of the Constitution that are clear, well-established, and resistant to creative interpretation: for example, the two-senators-per-state rule.<sup>2</sup> Because they are seen as straightforward, these provisions tend to be taken for granted. The Constitution of Conversation, in contrast, comprises those aspects of the Constitution that are sufficiently open textured as to invite ongoing litigation and debate: for example, the Equal Protection Clause.<sup>3</sup> The distinction between the Constitution of Settlement and the Constitution of Conversation has been embraced by scholars from diverse disciplines<sup>4</sup> and features prominently in the celebrated constitutional law casebook that Levinson coauthors.<sup>5</sup>

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1. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 246–54 (2d ed. 2011) [hereinafter LEVINSON, *CONSTITUTIONAL FAITH*]; SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 19–28 (2012) [hereinafter LEVINSON, *FRAMED*].

2. U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State . . . .”).

3. *Id.* amend. XIV, § 1 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”).

4. See, e.g., Mark A. Graber, *Teaching the Forgotten Fourteenth Amendment and the Constitution of Memory*, 62 ST. LOUIS U. L.J. 639, 652 (2018) (“Professor Sanford Levinson, in a pathbreaking work on America’s constitutions, coined the phrases ‘Constitution of Settlement’ and ‘Constitution of Conversation’ . . . .”); Andrew Arato, Book Review, 20 CONSTELLATIONS 503, 503 (2013) (reviewing LEVINSON, *FRAMED*, *supra* note 1) (describing the distinction as “fruitful” and “the most positive feature” of *Framed*); John E. Finn, Book Review, 13 PERSP. ON POL. 162, 163 (2015) (reviewing LEVINSON, *FRAMED*, *supra* note 1) (commending Levinson’s call “to set aside our fascination with the ‘Constitution of Conversation’ . . . in favor of thinking about the ‘Constitution of Settlement’”); Robert F. Williams, *Unsettling the Settled: Challenging the Great and Not-so-Great Compromises in the Constitution*, 91 TEX. L. REV. 1149, 1151 (2013) (book review) (“Levinson has . . . provided a fascinating review of the theory behind and the actual operation of our Constitution of Settlement.”).

5. The distinction between the Constitution of Settlement and the Constitution of Conversation is the subject of the first “note” in the current edition of the casebook. See PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 23–25 (7th ed. 2018).

From the moment he put forward this now “famous[]” distinction,<sup>6</sup> Levinson has been an indefatigable critic of the Constitution of Settlement. In scores of articles, blog posts, and books, he has argued that its structural pillars—from the Electoral College to congressional bicameralism to the apportionment of senators to the Article V amendment rules to the presidential veto to the requirement that the president be a “natural born Citizen”—violate basic principles of democracy and breed political dysfunction.<sup>7</sup> Lawyers like to obsess over relatively indeterminate phrases such as *cruel and unusual* or *due process*. But it is the more prosaic terms of the Constitution of Settlement that demand our attention, in Levinson’s telling, as these “*static, decidedly nonadaptive aspects*”<sup>8</sup> of the constitutional order are destroying any hope of realizing “the magnificent vision”<sup>9</sup> that the Framers set forth in the Preamble. To vindicate the Preamble’s promise today, Levinson asserts that nothing less than a second constitutional convention is needed, so that Americans can rewrite the canonical document and resolve its foundational flaws.<sup>10</sup>

Levinson’s letters in *Democracy and Dysfunction* repeatedly return to this theme, with a Trumpian twist. The parts of the Constitution of Settlement that make lawmaking so difficult, Levinson suggests, have created a perpetual “crisis of governance,” which in turn creates a hospitable political environment for a populist demagogue such as Donald Trump.<sup>11</sup> And as we all know, the Electoral College allowed President Trump to ascend to the White House even though Hillary Clinton received millions more votes.<sup>12</sup>

Responding to Levinson, Professor Jack Balkin contends that certain features of the Constitution of Settlement limit President Trump’s ability to do lasting damage to the republic, for which we should be grateful.<sup>13</sup> Balkin further contends that the most serious defects in our constitutional system can be remedied through subconstitutional measures, such as a new federal statute allowing

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6. Jack Balkin, *Dysfunctional Constitution or Regime Change?*, BALKINIZATION (Jan. 30, 2013), <https://balkin.blogspot.com/2013/01/dysfunctional-constitution-or-regime.html> [<https://perma.cc/CEJ5-UBBZ>].

7. See, e.g., LEVINSON, FRAMED, *supra* note 1, at 119 (Natural Born Citizen Clause); *id.* at 133–61 (bicameralism); *id.* at 148–51 (Senate apportionment); *id.* at 164–72 (presidential veto); *id.* at 178–90 (Electoral College); *id.* at 331–45 (Article V).

8. LEVINSON, CONSTITUTIONAL FAITH, *supra* note 1, at 249.

9. *Id.* at 251.

10. See, e.g., *id.* at 254; LEVINSON, FRAMED, *supra* note 1, at 391.

11. SANFORD LEVINSON & JACK M. BALKIN, DEMOCRACY AND DYSFUNCTION 14 (2019); see also *id.* at 12–14 (reviewing “some of the primary fault lines or hidden dangers in the Constitution of Settlement”).

12. *Id.* at 3, 64, 175.

13. *Id.* at 70–75, 99.

multimember districts for the House of Representatives or a new interstate compact guaranteeing the presidency to the candidate who receives the most votes nationwide.<sup>14</sup> Holding a constitutional convention, accordingly, would be unnecessary and unwise.<sup>15</sup>

Balkin's arguments about the possibilities for constitutional reform under conditions of functional unamendability gesture toward, and seek to advance, a phenomenon I wish to highlight: The Constitution of Settlement is becoming unsettled.<sup>16</sup> Not in the books, but in action. That is to say, many different features of Levinson's Constitution of Settlement no longer look as "static" as they used to look, as growing levels of political frustration and polarization have roused a growing number of actors to seek to challenge or circumvent them without necessarily pursuing a constitutional amendment. An appreciation of this phenomenon can help us to assess both Levinson's thesis and the state of contemporary constitutional politics.

## II. UNSETTLING DEVELOPMENTS

### A. *Indirect Examples*

Some of the ways in which the Constitution of Settlement is becoming unsettled are indirect. In these areas, politicians, activists, and academics have not, for the most part, contested the traditional understanding of the relevant constitutional limits; April Fools' jokes aside, they have not, say, advanced an alternative interpretation of Article I, Section 3's directive that

the Senate "shall be composed of two Senators from each State."<sup>17</sup> Rather, they have engaged in behaviors that have the purpose or effect of changing the practical implications of those limits. For example:

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14. *Id.* at 22–23, 199–203.

15. *Id.* at 199–203.

16. The so-called New Deal Settlement regarding the scope and distribution of the federal government's power is also becoming unsettled, at least around the edges, but that is another story. See generally Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1 (2013).

17. U.S. CONST. art. I, § 3, cl. 1. Fittingly enough, a brilliant April Fools' Day parody has Levinson's foil, Balkin, advancing the off-the-wall claim that "the phrase 'two Senators from each state' is a metonym for 'a number of Senators that is proportionate to the body that these Senators represent.'" Lawrence Solum, *Balkin on the Senate*, LEGAL THEORY BLOG (Apr. 1, 2010), <https://lsolum.typepad.com/legaltheory/2010/04/balkin-on-framework-originalism-and-the-senate.html> [https://perma.cc/P45N-U2DM].

- As of this writing, sixteen jurisdictions have signed on to the National Popular Vote Compact, which would effectively neuter the Electoral College and nationalize presidential elections if states controlling a majority of electors were to join it.<sup>18</sup> Other ideas for state-level Electoral College reform seem to be gaining traction as well.<sup>19</sup>
- Proposals to grant statehood to the District of Columbia and Puerto Rico through federal legislation have moved from the margins to the mainstream of the Democratic Party.<sup>20</sup> Meanwhile, a proposal to break up California into three states nearly made it onto the ballot in November 2018.<sup>21</sup> These and similar reforms would bring the Senate closer, albeit only modestly, to the one-person-one-vote norm without disturbing the two-senators-per-state rule.
- For a variety of reasons,<sup>22</sup> recent presidents have wielded the veto—a tool

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18. *See Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE, <https://www.nationalpopularvote.com/written-explanation> [<https://perma.cc/HRN9-RZB7>]; see also Jack Torry, *Presidential Election: Voters May Get to Change Way Ohio Awards Electoral Votes*, DAYTON DAILY NEWS (Apr. 7, 2019), <https://www.daytondailynews.com/news/state—regional-govt—politics/ohio-voters-may -get-chance-way-state-awards-electoral-votes/gbJ7FaaMC1h9QC170MDfAO> [<https://perma.cc/TYJ2-Y75M>] (noting that abolishing the Electoral College “has become one of the rallying cries of at least seven Democratic presidential candidates”).

19. *See, e.g.*, Edward B. Foley, *Want to Fix Presidential Elections? Here's the Quickest Way.*, POLITICO MAG. (May 4, 2019), <https://www.politico.com/magazine/story/2019/05/04/electoral-college-reform-2020-226792> [<https://perma.cc/9VVQ-ERBA>] (reviewing reform proposals currently “on the table” and recommending “an achievable, short-term solution” in which as few as five swing states “embrace, via ballot initiatives or legislation, electoral systems that reward only candidates who win a majority of the vote”).

20. *See* Marc Caputo, *Puerto Rico Emerges as 2020 Campaign Hotspot*, POLITICO (Feb. 27, 2019), <https://www.politico.com/story/2019/02/27/puerto-rico-2020-1194114> [<https://perma.cc/97LS-DBCV>]; Osita Nwannevu, *Democrats Push to Make Washington, D.C., the Fifty-First State*, NEW YORKER (Mar. 10, 2019), <https://www.newyorker.com/news/news-desk/democrats-push-to-make-washington-dc-the-fifty-first-state> [<https://perma.cc/MK4P-Y7FE>]; see also Katie Windham, *The Public Supports Statehood for D.C. and Puerto Rico*, DATA FOR PROGRESS (Mar. 13, 2019), <https://www.dataforprogress.org/blog/2019/2/28/the-public-supports-statehood-for-dc-and-puerto-rico> [<https://perma.cc/82LL-VS8X>] (reporting January 2019 survey results finding that a supermajority of Democratic voters and a “clear” majority of all Americans support D.C. and especially Puerto Rican statehood).

21. *See California Proposition 9, Three States Initiative (2018)*, BALLOTPEDIA, [https://ballotpedia.org/California\\_Proposition\\_9,\\_Three\\_States\\_Initiative\\_\(2018\)](https://ballotpedia.org/California_Proposition_9,_Three_States_Initiative_(2018)) [<https://perma.cc/VRV2-RVEP>].

22. *See* Alan Greenblatt, *5 Reasons Vetoes Have Gone Out of Style*, NPR (May 9, 2013), <https://www.npr.org/sections/itsallpolitics/2013/02/22/172698717/five-reasons-vetoes-have-gone-out-of-style> [<https://perma.cc/M5W5-M9Y3>].

Levinson describes as “very anti-democratic”<sup>23</sup>—significantly less often than their twentieth-century predecessors: fewer than two times per year since the turn of the millennium.<sup>24</sup> (Perhaps unhappily from Levinson’s perspective, recent presidents have also been relying less on their enumerated power “to make Treaties,”<sup>25</sup> subject to two-thirds Senate approval, and relying much more on congressional–executive agreements, sole executive agreements, and legally nonbinding political agreements.<sup>26</sup>)

- Since the 1970s, congressional leaders have increasingly resorted to “unorthodox lawmaking,” bypassing committees and conferences and making greater use of omnibus vehicles and informal bargaining practices.<sup>27</sup> These deviations from the textbook legislative process have allowed Congress to remain reasonably productive in the face of rising partisan rancor,<sup>28</sup> mitigating the efficiency costs of Article I, Section 7’s bicameralism and presentment requirements.<sup>29</sup>

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23. Sanford Levinson, *Against the Veto.*, NEW REPUBLIC (Oct. 8, 2006), <https://newrepublic.com/article/64983/against-the-veto> [https://perma.cc/67RY-F2KJ].

24. See Leah Libresco, *Comparing Obama’s Veto Rate to Other Recent Presidents*’, FIVETHIRTYEIGHT (Feb. 23, 2015), <https://fivethirtyeight.com/features/comparing-obamas-veto-rate-to-other-recent-presidents> [https://perma.cc/6JD8-PEJS]; Gerhard Peters & John T. Woolley, *Presidential Vetoes*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/data/presidential-vetoes> [https://perma.cc/ YZZ8-NUEC] (last updated Dec. 31, 2019).

25. U.S. CONST. art. II, § 2, cl. 2.

26. See Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1212–23 (2018) (estimating that “approximately 94% of [legally binding] U.S. international agreements made in the last several decades . . . are not treaties” and explaining that legally nonbinding political commitments have proliferated as well).

27. See generally BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (5th ed. 2016).

28. Definitions of legislative productivity are debatable, of course, but at least if measured (crudely) by raw numbers of bills and resolutions introduced and passed each session, congressional productivity has remained fairly stable in recent decades. See Drew DeSilver, *A Productivity Scorecard for the 115th Congress: More Laws than Before, but Not More Substance*, PEW RES. CTR. (Jan. 25, 2019), <https://www.pewresearch.org/fact-tank/2019/01/25/a-productivity-scorecard-for-115th-congress> [https://perma.cc/E8B9-DCSX]; *Legislative Productivity in Congress and Workload*, BROOKINGS INST., <https://www.brookings.edu/wp-content/uploads/2019/03/Chpt-6.pdf> [https://perma.cc/KW47-DAUR]; *Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> [https://perma.cc/9BUH-L2CL].

29. U.S. CONST. art. I, § 7, cl. 2–3; cf. Sanford Levinson, *Compromise and Constitutionalism*, 38 PEPP. L. REV. 821, 828 (2011) (observing that “American bicameralism,

- While the Supreme Court still refuses to declare partisan gerrymandering unconstitutional<sup>30</sup> and the Elections Clause still gives “the Legislature” of “each State” broad authority over redistricting,<sup>31</sup> the Court ruled in 2015 that voters may, by ballot initiative, force their state to adopt an independent commission for the drawing of all districts.<sup>32</sup> Assisted by this ruling, grassroots activists have made significant strides since 2015 in promoting anti-gerrymandering reforms.<sup>33</sup>

### B. Direct Examples

Other ways in which the Constitution of Settlement is becoming unsettled are somewhat more direct. In these areas, politicians, activists, and academics have not tried to find clever workarounds for disputed constitutional arrangements, so much as to alter the arrangements themselves through legal reinterpretation or political action. For example:

- The Senate filibuster rules had seemed so entrenched for so long that both Levinson and Balkin characterized them in prior writings as part of the Constitution of Settlement.<sup>34</sup> No more. Senate majorities eliminated the

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unlike many bicameral systems around the world, gives each house a death-lock over any legislation passed by the other” and asserting that “[w]e pay the costs [of this arrangement] every day”).

30. For the most recent, and seemingly definitive, refusal, see *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (“We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

31. U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

32. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2671–77 (2015).

33. See Nancy Martorano Miller, Keith E. Hamm, Maria Aroca & Ronald D. Hedlund, *An Alternative Route to Voting Reform: The Right to Vote, Voter Registration, Redistricting and U.S. State Constitutions*, 49 PUBLIUS 465, 467 (2019) (reviewing “recent efforts by voting and election reformers to utilize state constitutions in their efforts to challenge restrictive voting laws as well as partisan gerrymandering”); Michael Wines, *Drive Against Gerrymandering Finds New Life in Ballot Initiatives*, N.Y. TIMES (July 23,

2018), <https://www.nytimes.com/2018/07/23/us/gerrymandering-states.html> [https://perma.cc/HA9G-NKRV] (discussing a “remarkable” burst of anti-gerrymandering reform activity).

34. LEVINSON, FRAMED, *supra* note 1, at 160; Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159, 1164 (2014). As Levinson noted at the time, “[n]o one argues that the Constitution requires” the filibuster.

filibuster for all non-Supreme Court nominations in 2013 and for Supreme Court nominations in 2017.<sup>35</sup> The legislative filibuster may meet the same fate shortly.<sup>36</sup>

- “Suddenly,” Professor Stephen Carter remarked in late 2018, “everybody wants to explore term limits for Supreme Court justices.”<sup>37</sup> Carter may have put the point hyperbolically, but prominent commentators and advocacy groups on the left and the right now tout an idea that used to be considered an academic pipe dream,<sup>38</sup> as do ordinary Americans in surveys.<sup>39</sup> A variety of other court-reform ideas are also being actively

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LEVINSON, FRAMED, *supra* note 1, at 160. His decision to categorize the filibuster, nonetheless, as part of the Constitution of Settlement sits uneasily with his identification of that Constitution with “clear textual commands,” LEVINSON, CONSTITUTIONAL FAITH, *supra* note 1, at 249—a point to which I will return below. *See infra* notes 55–60 and accompanying text.

35. *See* Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 97–110 (2017) (describing these developments and their political context).

36. *See* Burgess Everett, *Coming Soon: The Death of the Filibuster*, POLITICO (Apr. 3, 2019), <https://www.politico.com/story/2019/04/03/senate-republicans-filibuster-1250082> [https://perma.cc/5FWM-Z87Y]; Paul Kane, *With Little Fallout from Nuclear Option, Senate’s Legislative Filibuster Is in Jeopardy*, WASH. POST (Apr. 2, 2019), [https://www.washingtonpost.com/politics/with-little-fallout-from-nuclear-option-senate-legislative-filibuster-is-in-jeopardy/2019/04/02/8d8bc7c4-554c-11e9-aa83-504f086bf5d6\\_story.html](https://www.washingtonpost.com/politics/with-little-fallout-from-nuclear-option-senate-legislative-filibuster-is-in-jeopardy/2019/04/02/8d8bc7c4-554c-11e9-aa83-504f086bf5d6_story.html) [https://perma.cc/G9FZ-59ZG]; Rebecca Shabad, Frank Thorp V & Ali Vitali, *Elizabeth Warren Calls for Eliminating Senate Filibuster for Legislation*, NBC NEWS (Apr. 5, 2019), <https://www.nbcnews.com/politics/congress/elizabeth-warren-calls-eliminating-senate-filibuster-legislation-n991301> [https://perma.cc/D3JW-3QQ8].

37. Stephen L. Carter, *The Supreme Court Needs Term Limits*, CHI. TRIB. (Oct. 8, 2018), <https://www.chicagotribune.com/opinion/commentary/ct-perspec-supreme-court-term-limits-brett-kavanaugh-life-tenure-1009-story.html> [https://perma.cc/NHE4-XNDB].

38. *See* Marcia Coyle, *Term Limits, 11 Justices, Balancing & More: Reshaping SCOTUS Is in Vogue*, NAT’L L.J. (Oct. 16, 2018), available at <https://finance.yahoo.com/news/term-limits-11-justices-balancing-053756585.html> [https://perma.cc/V3YL-PRGS]; Melissa Heelan Stanzione, *Kavanaugh Saga Amplifies Call for Supreme Court Term Limits*, BLOOMBERG L. (Oct. 13, 2018), <https://news.bloomberg.com/us-law-week/kavanaugh-saga-amplifies-call-for-supreme-court-term-limits> [https://perma.cc/PP3Q-BZK4]. Balkin and Levinson have long supported term limits for the justices. *See, e.g.*, Jack Balkin, *Reforming the Supreme Court, BALKINIZATION* (Feb. 13, 2009), <https://balkin.blogspot.com/2009/02/reforming-supreme-court.html> [https://perma.cc/YU2N-AG3M].

39. *See* UVA Ctr. for Pol., *New Poll: Americans Strongly Support Term Limits for Judges*, SABATO’S CRYSTAL BALL (July 19, 2018), <http://www.centerforpolitics.org/crystalball/articles/new-poll-americans-strongly-support-term-limits-for-judges> [https://perma.cc/D4CK-37YB]; Lydia Wheeler, *Majority of Americans Support Term Limits for Supreme Court Justices, New Poll Finds*, HILL (Nov. 1, 2018), <https://thehill.com/regulation/court-battles/414264-majority-of-americans-support-term-limits-for-supreme-court-justices> [https://perma.cc/8GKT-7QNS].

explored.<sup>40</sup> Supporters of term limits, moreover, are coming to insist that they could be implemented through ordinary legislation, on the view that Article III's Good Behavior Clause should not be read to require life tenure as an active-duty justice.<sup>41</sup>

- Although still a fringe position, constitutional scholars have begun to suggest that the Natural Born Citizen Clause may have been implicitly "repealed" by the Fourteenth Amendment (which, as construed by the Supreme Court, places sharp limits on national-origin discrimination).<sup>42</sup> More saliently, controversies over Senator John McCain's and Senator Ted Cruz's presidential eligibility alternately solidified and undermined support for the position that children of U.S. citizens born abroad are natural born citizens within the meaning of the Clause.<sup>43</sup>
- In October 2018, President Trump announced he was preparing an executive order that would deny birthright citizenship to children born in

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40. See, e.g., Josh Lederman, *Inside Pete Buttigieg's Plan to Overhaul the Supreme Court*, NBC NEWS (June 3, 2019), <https://www.nbcnews.com/politics/2020-election/inside-pete-buttigieg-s-plan-overhaul-supreme-court-n1012491> [https://perma.cc/H4L7-6YBD] (explaining that Democratic presidential candidates Pete Buttigieg and Beto O'Rourke have expressed interest in the "Balanced Court" plan proposed by Professors Daniel Epps and Ganesh Sitaraman); Pema Levy, *How Court-Packing Went from a Fringe Idea to a Serious Democratic Proposal*, MOTHER JONES (Mar. 22, 2019), <https://www.motherjones.com/politics/2019/03/court-packing-2020> [https://perma.cc/ 4NA2-TDET] (describing the possibility of "packing" the Court as "now a major theme of the Democratic primary and possibly the general election").

41. I myself have noted the plausibility of this view. See David E. Pozen, *Hardball and/or Anti-Hardball*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 949, 951–52 (2019).

42. See, e.g., Paul A. Clark, *Limiting the Presidency to Natural Born Citizens Violates Due Process*, 39 J. MARSHALL L. REV. 1343, 1343–65 (2006); Elwood Earl Sanders, Jr., *Could Arnold Schwarzenegger Run for President Now?*, 6 FLA. COASTAL L. REV. 331, 332–55 (2005); Josh Blackman, *Did the 14th Amendment (1868) Nullify the "Natural Born Citizen" Clause (1789)?*, JOSH BLACKMAN'S BLOG (Mar. 24, 2015), <http://joshblackman.com/blog/2015/03/24/did-the-14th-amendment-1868-nullify-the-national-born-citizen-clause-1789> [https://perma.cc/ZWH2-FPEF].

43. See Christopher W. Schmidt & Matthew T. Bodie, *The Natural-Born Citizen Clause, Popular Constitutionalism, and Ted Cruz's Eligibility Question*, 84 GEO. WASH. L. REV. ARGUENDO 36, 42–46 (2016) (explaining that "what appeared to be a stable academic [and political] consensus took shape" during McCain's presidential run "around the idea that those who are foreign born to U.S. citizen parents meet the requirements of the clause," but that this apparent consensus began to fray when challenged by then-presidential candidate Donald Trump in 2015 and 2016).

the United States to parents unlawfully in the country,<sup>44</sup> notwithstanding the Department of Justice's consistent stance that such a move would violate the Fourteenth Amendment's Citizenship Clause.<sup>45</sup> President Trump appears to have abandoned this plan, at least for the time being, but his revisionist understanding of the Citizenship Clause may yet become Republican Party orthodoxy.<sup>46</sup>

Many of the above-listed developments have the potential to make our constitutional system fairer and more rational by Levinson's lights. Yet as this last example reflects, efforts to reshape the patterns and principles of governance can cut in the opposite direction. The fact of constitutional norm change is, in itself, normatively ambiguous.<sup>47</sup>

Whether for good or for ill, all of this constitutional "unsettling" has been occurring outside the confines of Article V. Balkin is right that "the Constitution of Settlement can be changed . . . without a constitutional amendment, much less a new constitutional convention."<sup>48</sup> To varying degrees across different domains,

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44. Jonathan Swan & Stef W. Kight, *Exclusive: Trump Targeting Birthright Citizenship with Executive Order*, AXIOS (Oct. 30, 2018), <https://wwwaxios.com/trump-birthright-citizenship-executive-order-0cf4285a-16c6-48f2-a933-bd71fd72ea82.html> [https://perma.cc/8C64-VJ4G].

45. See, e.g., *Legislation Denying Citizenship at Birth to Certain Children Born in the U.S.*, 19 Op. O.L.C. 340 (1995).

46. See Ryan Bort, *Fox News Immediately Pivots to Birthright Citizenship Mode*, ROLLING STONE (Oct. 31, 2018), <https://www.rollingstone.com/politics/politics-news/fox-news-birthright-citizenship-749844> [https://perma.cc/BG8E-B4A6] ("After Trump reigned the birthright debate Tuesday morning, the [Fox News] network gladly crammed its programming with talking heads defending it from every angle . . . ."); Emily Ekins, *What Americans Think About Birthright Citizenship*, CATO INST. (Nov. 14, 2018), <https://www.cato.org/blog/what-americans-think-about-birthright-citizenship> [https://perma.cc/6WAM-P7JN] (reporting November 2018 survey results finding that over 60 percent of Republicans "oppose birthright citizenship for children born to mothers in the country illegally"); Niels Lesniewski, *Lindsey Graham Seconds Trump Proposal to End Birthright Citizenship*, ROLL CALL (Oct. 30, 2018), <https://www.rollcall.com/news/politics/lindsey-graham-trump-birthright-citizenship> [https://perma.cc/DZ5Z-QUCQ] ("Sen. Lindsey Graham, a previous advocate of bipartisan immigration overhaul and who could be the chairman of the Judiciary Committee in the next Congress, is praising President Donald Trump's effort to roll back birthright citizenship by executive fiat.").

47. See Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1445–50 (2018); Jedediah Britton-Purdy, *Normcore*, DISSENT (Summer 2018), <https://www.dissentmagazine.org/article/normcore-trump-resistance-books-crisis-of-democracy> [https://perma.cc/C669-SGVX].

48. Balkin, *supra* note 34, at 1164–65. On the general phenomenon of constitutional

such change is always already underway.

### *C. Meanwhile, About That Constitution of Conversation*

At the same time that the Constitution of Settlement has become less settled, the Constitution of Conversation has become less, well, conversational. Partisan polarization and the rise of the conservative legal movement, among other factors, have helped to reshape—and bifurcate—constitutional discourse. A wealth of qualitative evidence indicates that “[i]n addition to becoming more ideologically coherent and distinct, the parties have also become more *constitutionally* coherent and distinct over the past several decades.”<sup>49</sup> Along the way, “Americans on both the left and the right . . . have come to view the Constitution not as an aspirational statement

of shared principles and a bulwark against tribalism, but as a cudgel with which to attack [political] enemies.”<sup>50</sup>

Professor Julian Nyarko, Professor Eric Talley, and I recently enlisted computational methods to study the evolution of constitutional debate on the floor of Congress. On a variety of metrics, we found that Democratic and Republican members are now talking past each other in their constitutional rhetoric to a greater degree than ever before.<sup>51</sup> The same is true of liberals and conservatives (identified as such by their voting behaviors).<sup>52</sup> Since around 1980, it has become easier and easier for a machine-learning classifier to predict what sort of congressperson is speaking about the Constitution, based solely on the text of the remarks.<sup>53</sup>

The “Constitution of Conversation” evokes an image of a public sphere in which divergent constitutional views are debated, amicably and openly, in pursuit of common judgments and common solutions. The discursive environment

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propositions moving over time from “off-the-wall” to “on-the-wall,” see JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 12, 61, 69–70, 88, 119, 177–83 (2011).

49. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 965 (2018).

50. Amy Chua & Jed Rubenfeld, *The Threat of Tribalism*, ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/the-threat-of-tribalism/568342> [<https://perma.cc/JJ5G-446A>].

51. See David E. Pozen, Eric L. Talley & Julian Nyarko, *A Computational Analysis of Constitutional Polarization*, 105 CORNELL L. REV. (forthcoming 2019) (manuscript at 27–38), <https://ssrn.com/abstract=3351339> [<https://perma.cc/EZ8E-9TND>].

52. *Id.* (manuscript at 31–32).

53. *Id.* (manuscript at 29–36).

suggested by these findings, however, is more Schmittian than Habermasian.<sup>54</sup> If Levinson arguably paints too grim a picture of the Constitution of Settlement, he may paint too rosy a picture of the Constitution of Conversation. Both of his metaphors seem increasingly inapt.

### III. IMPLICATIONS

Constitutional movements and zeitgeists are hard to pin down. The list of unsettling developments sketched in Part II might be challenged or qualified in any number of respects, perhaps most obviously on the ground that some of the examples appear unlikely to result in fundamental change.

I hope others will refine and revise the list. But if this Article's overarching claim about the intensifying pressures being placed on the Constitution of Settlement is sound, it would seem to have significant implications for Levinson's thesis and for the country. Let me close by suggesting a few.

First, the distinction between the Constitution of Settlement and the Constitution of Conversation is more complicated—and fluid—than Levinson implies. On multiple occasions, Levinson has described himself as differentiating “sharply”<sup>55</sup> or “very sharply”<sup>56</sup> between the two. The norm-bending behaviors catalogued above suffice to show that the current constitutional landscape is quite a bit fuzzier.

Nor was there ever any sharp boundary here. As Professors Curtis Bradley and Neil Siegel have documented in detail, the perceived clarity and constraining force of any given piece of constitutional text are “constructed” to a significant degree by constitutional argumentation and other social practices.<sup>57</sup> Those same practices can destabilize preexisting perceptions of clarity and constraint, just as they can stabilize such perceptions. Even if the words of a constitution never change, the mix of elements that are thought to be settled versus unsettled may

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54. Compare, e.g., JÜRGEN HABERMAS, JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS 54–56 (Ciaran P. Cronin trans., 1993) (outlining conditions for an “ideal speech situation”), with CARL SCHMITT, THE CONCEPT OF THE POLITICAL 26–33 (George Schwab trans., Univ. of Chi. Press, expanded ed. 2007) (1932) (depicting politics as a life-and-death struggle between “friend” and “enemy”).

55. Sanford Levinson, *On the Inevitability of “Constitutional Design,”* 48 ARIZ. ST. L.J. 249, 250 (2016).

56. Sanford Levinson, *Why Strauder v. West Virginia Is the Most Important Single Source of Insight on the Tensions Contained Within the Equal Protection Clause of the Fourteenth Amendment*, 62 ST. LOUIS U. L.J. 603, 609 n.20 (2018).

57. See generally Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213 (2015).

vary over time. In any given period, some patterns of constitutional behavior and some propositions of constitutional law will be in the process of becoming more widely accepted and deeply entrenched—consider, for example, legal recognition of same-sex marriage in recent years—while other patterns and propositions will be in the process of becoming increasingly contested.<sup>58</sup>

Responding to this point, Levinson suggests that the distinction between the Constitution of Settlement and the Constitution of Conversation is not meant to be interpretive or “linguistic[]” in nature but

rather “is relentlessly pragmatic.”<sup>59</sup> This suggestion is belied, however, by Levinson’s persistent conflation of settledness with “clear and determinate” constitutional language.<sup>60</sup> Semantic clarity in an authoritative legal text may well contribute to social settlement. But a relentlessly pragmatic approach would have to consider the possibility that certain textually unspecified institutions, such as same-sex marriage, are at this point significantly more settled than certain textually specified ones, such as the Electoral College. There may be a perverse irony to Levinson’s program, insofar as his fatalistic laments about the Constitution of Settlement reinforce perceptions of fixity and thereby make those lamented parts of our constitutional order that much more immune from creative (re)construction than they might otherwise be. Levinson, in other words, is not merely an external critic of the Constitution of Settlement but an active participant in its maintenance.

Second, Levinson needs a theory of democracy to ground his critique of the Constitution of Settlement.<sup>61</sup> He maintains that institutions such as the Senate and

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58. The title of this Article is therefore potentially misleading, in that the Constitution of Settlement is both shrinking and expanding. My primary focus here is on the shrinking side of the ledger.

59. Sandy Levinson, *Reply to Critics—Part Three: David Pozen on the Potential Malleability of the Constitution of Settlement*, BALKINIZATION (June 9, 2019), <https://balkin.blogspot.com/2019/06/reply-to-critics-part-three-david-pozen.html> [https://perma.cc/D6KZ-HTV9].

60. LEVINSON, FRAMED, *supra* note 1, at 19; see, e.g., *id.* at 22 (identifying the Constitution of Settlement with “self-enforcing provisions” that have a “clear meaning”); *id.* at 23 (identifying the Constitution of Settlement with “clear constitutional commands”).

61. His critique might also be deepened by greater attention to comparative constitutional development and design. Cf. David Schleicher, *Things Aren’t Going That Well over There Either: Party Polarization and Election Law in Comparative Perspective*, 2015 U. CHI. LEGAL F. 433, 435–38 (arguing that the United States’ recent governance problems have been “driven by changes in the amount and type of radical opinion” common across Western democracies and that “it will prove difficult to use the tools of institutional design to make democracy work well when a substantial part of the population would rather hold out for fundamental change”);

the Electoral College are fundamentally undemocratic and must be reformed for that reason. President Trump and his supporters deny the

premise. They are apt to extol the “genius”<sup>62</sup> of these institutions and to assail birthright citizenship as an “undemocratic”<sup>63</sup> “scam.”<sup>64</sup>

I agree with Levinson on these matters and disagree with President Trump. But appeals to “democracy,” or to subsidiary principles such as majority rule or one person one vote,<sup>65</sup> will not tell us which elements in our constitutional system deserve to be celebrated and which deserve to be overhauled without an account of democracy’s purposes, preconditions, and normative priority. Different conceptions of democracy may point toward different problems and solutions.

Third, Levinson needs a theory of popular sovereignty or collective will formation to ground his call for a new constitutional convention.<sup>66</sup> Even if

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Gerard N. Magliocca, *Another Rendezvous with Destiny*, BALKINIZATION (May 7, 2019), <https://balkin.blogspot.com/2019/05/another-rendezvous-with-destiny.html> [https://perma.cc/YE82-5ZAQ] (“If the United States is just one of many dysfunctional democracies, then that suggests that [Levinson’s] focus on the hard-wired provisions of our Constitution as the source of our problems is incorrect. Other national constitutions with very different provisions are faring no better.”).

62. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 15, 2016, 7:40 AM), <https://twitter.com/realdonaldtrump/status/798521053551140864?lang=en> [https://perma.cc/5RDX-SN89] (“The Electoral College is actually genius in that it brings all states, including the smaller ones, into play.”).

63. See, e.g., Michael Anton, *Trump Should End Birthright Citizenship. It Shouldn’t Have Existed in the First Place.*, USA TODAY (Nov. 1, 2018), <https://www.usatoday.com/story/opinion/2018/11/01/framers-never-wanted-birthright-citizenship/1831577002> [https://perma.cc/U475-DJUH] (“There is nothing in the Constitution or in statute law that gives the federal government authority to grant citizenship to people not entitled to it. Federal agencies simply do it . . . . It’s one of thousands of examples of our runaway, undemocratic, unelected bureaucracy acting in concert with liberal interests.”).

64. See, e.g., Tucker Carlson, *Tucker Carlson: Birthright Citizenship Is a Scam. There Is No Other Word for It.*, FOX NEWS (Oct. 31, 2018), <https://www.foxnews.com/opinion/tucker-carlson-birthright-citizenship-is-a-scam-there-is-no-other-word-for-it> [https://perma.cc/P6PZ-XR7E] (“This is a scam. There is no other word for it.”).

65. On some of the persistent conceptual and empirical ambiguities of the one-person-one-vote norm, see generally Nathaniel Persily, *Who Counts for One Person, One Vote?*, 50 U.C. DAVIS L. REV. 1395 (2017).

66. Arguably, Levinson also needs a theory of constitutionalism to justify his support for revising the canonical document rather than scrapping it altogether or “systematically ignor[ing]” its commands. LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* 5 (2012).

Levinson is correct that the Constitution of Settlement is undemocratic, it does not necessarily follow that an Article V convention (or any other sort of convention) is the best method for remedying its defects. In practice, a convention might lead to an even worse Constitution. As Professor David Super has emphasized, much depends on how a convention is organized and

run,<sup>67</sup> matters to which progressives such as Levinson have thus far devoted little attention. In principle, it is not entirely clear why a constitutional convention should enjoy greater democratic or moral legitimacy than the more diffuse and informal processes of constitutional reform that are happening all around us. Levinson never explores, for example, whether and under what conditions a convention would be more or less likely than ordinary politics to generate inclusive forms of representation or creative coalition building.

What's so special, in short, about a constitutional convention? Unless Levinson can offer a good nonconsequentialist answer—and one may be available<sup>68</sup>—why shouldn't those who are troubled by the constitutional status quo simply make a practical political judgment about where their reform efforts are likely to have the greatest impact? That calculus, presumably, will often point them away from Article V.

#### IV. CONCLUSION

A final implication of the unsettling of the Constitution of Settlement should concern us all: It raises the stakes of electoral politics. Those stakes are high, of course, even in periods of relative constitutional quiescence. In a period when previously taken-for-granted constitutional institutions and distributions are increasingly subject to revision through subconstitutional means, they are higher still. More first principles of governance are up for grabs.

This observation is alarming but also invigorating. Counterpoised against President Trump's own reactionary reform agenda, the rapid mainstreaming of proposals to end partisan gerrymandering, nationalize the presidential vote, rein in

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67. See David A. Super, *The Hidden Threat to Our Constitution*, ACS EXPERT F. (June 19, 2019), <https://www.acslaw.org/expertforum/the-hidden-threat-to-our-constitution> [<https://perma.cc/E7BH-DSUA>].

68. Cf. David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 681 (2018) (book review) (explaining that constitutional lawmaking through popular “authorship, revision, or reaffirmation,” as in a referendum or special convention, was regarded in the Founding Era “as the sole possible form of democratic self-rule in the large and complex societies of political modernity”). Levinson and I share the view that Grewal and Britton-Purdy’s recovery of this strand of Founding-Era thought poses a powerful challenge for contemporary constitutional theory.

the Supreme Court, and grant statehood to the District of Columbia and Puerto Rico strike me as hopeful developments. “Fundamental political and constitutional reform is now a realistic possibility”<sup>69</sup> to a degree that seemed implausible even five years ago. Levinson’s conceit of a Constitution of Settlement underscores just how

transformative—how reconstitutive of our democracy—these sorts of structural changes could be. His contempt for that Constitution underscores just how overdue they are.

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69. Stephen Griffin, *On Democracy and Dysfunction*, BALKINIZATION (May 14, 2019), <https://balkin.blogspot.com/2019/05/on-democracy-and-dysfunction.html> [https://perma.cc/G3FN-HLQ9].