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Against (Constitutional) Settlement. Book Review Of: Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review. by Louis Michael Seidman

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AGAINST (CONSTITUTIONAL) SETTLEMENT

OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW. Louis Michael Seidman.[1] Yale University Press. 2001. Pp. 260. $35.00.

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A decade ago, Glenn Reynolds published a brief essay in which he invited scholars to view the activity of the Supreme Court through the lens of the then-emerging science of Chaos Theory.[3] Reynolds argued that students of the Court might learn from Chaos Theory's insight that seemingly random and unpredictable phenomena actually masked order, predictability, and stability. "Like the drop on the end of its faucet," Reynolds wrote, "a legal principle tends to expand to its logical limits, and then break off, to be replaced by a new one."[4] But "unlike scientists, who have learned better," legal scholars were still at work generating foundational theories to predict how and when this process takes place.[5] That these efforts at prediction had failed was of no surprise to Reynolds—especially as those theories attempted to predict the behavior of the U.S. Supreme Court. The Court's multi-member nature, its control over its docket, its relative lack of constraint in resolving issues before it, and the effects of politics on the Court make it particularly unpredictable.[6] For Reynolds, it all added up to the conclusion that the Court was unlikely to "ever reach a truly 'final' answer to very many questions that come before it, though most theories of constitutional

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3. Glenn Harlan Reynolds, *Chaos and the Court*, 91 Colum. L. Rev. 110 (1991).

4. Id. at 112 (footnote omitted).

5. Id. at 112, 113.

6. See id. at 114.

interpretation seem grounded in the assumption that such answers exist."[7]

Then Reynolds asked whether this lack of finality wasn't a *benefit* of our system, both politically and economically. The political benefit, he argued, stemmed from "the fluidity of the Supreme Court's jurisprudence over time [meant that] no coalition is set in stone over time, and that people are often pressed to become involved in politics to protect their interests, even when the judicial system has spoken."[8] Economically, this predictable unpredictability was important because "the 'chaotic' nature of the judicial system may mean that stagnation through special-interest domination is unlikely over the long term, as periodic shifts by the Supreme Court lead to the periodic need to renegotiate political/economic alliances," which, in turn, result in the maintenance of political and economic flexibility.[9]

Reynolds's doubts about the possibility of final settlements of contested constitutional issues, and his tentative identification of benefits to a regime in which those issues were *not* settled—not even by the U.S. Supreme Court—have much in common with the theory put forth by Louis Michael Seidman in his new book, *Our Unsettled Constitution.* Seidman argues that we are mistaken to think that the central mission of constitutional law is to effect settlement of contested political issues. Theories designed around that vision are thus fatally flawed and doomed to failure, he concludes. Seidman instead suggests that constitutional law exists to *unsettle* questions that are settled elsewhere in our political system, providing those who lose in the political process an opportunity to upset political settlement in the courts. This judicial safety valve, Seidman contends, offers political losers an incentive to work within the existing political community. Because judicial unsettlements themselves can become objects for unsettlement, constitutional law has, and ought to have, an ephemeral quality that frustrates attempts to settle constitutional questions for all time.

In the pages that follow, I will summarize both Seidman's critique of constitutional theory, as currently practiced, as well as his description and defense of "unsettlement theory." Then I will

7. Id. See also Barry Friedman, *Dialogue and Judicial Review*, 91 Mich. L. Rev. 577 (1993) (arguing that little in constitutional law is ever settled, and that this is a good thing).

8. Id. at 115.

9. Id.

highlight some possible problems with Seidman's unsettlement theory.

I

Seidman acknowledges that we are living "in an age of growing doubt as to the utility of any normative theory of constitutional law," but he argues that we have to be able to give some account of how we approach constitutional law, since it is not going away. (pp. 1, 3-5) A would-be theorist's challenge, then, is "to formulate a general approach to constitutional law that takes into account the intractable nature of our political disagreements instead of attempting to suppress them." (p. 7) Seidman's thesis is that "we can accomplish this task by reversing the two central assumptions upon which most prior theory has been based: that principles of constitutional law should be independent of our political commitments and that the role of constitutional law is to settle political disagreement." (p. 7)

Seidman defines constitutional law as "a system designed to prevent the polity from *de*constituting. It accomplishes this task by establishing terms of agreement to which all members of the polity can subscribe (or at least can be *expected* to subscribe) and which prevent the polity from disintegrating when confronted with political disagreement." (p. 19) What this system amounts to, then, "is a series of metarules or principles that allow people to abstract from ordinary disagreements," which he terms "the rules of constitutional settlement." (p. 20) But, he asks, "[h]ow are these rules to be justified when people disagree"? (p. 22) It turns out, argues Seidman, that the justification for adhering to settlement rules in the face of disagreement with outcomes owe little to the rules themselves, and more to ulterior motives of those in the political community, such as the desire to preserve the group, thinking that, in the aggregate, the types of settlement will benefit one in the long run. (pp. 22-26)

These rules of constitutional settlement have a further problem, though. There is often disagreement as to the substantive content of those rules and what they require. This means, for Seidman, that constitutional settlements are bound to fail.

> The settlements are supposed to allow us to resolve contested political disputes by reference to a "higher" set of rules on which there is agreement. But there is in fact no agreement on the higher set of rules, and to the extent that the competing sets of rules are foundational, there is no prospect of formu-

> lating arguments that would (or should) create agreement. Moreover, even if there were agreement, there is no reason why people should feel bound to follow the rules in circumstances where those rules produce results that are perceived as undesirable. (p. 28)

Instead of seeking settlement rules that forestall or short-circuit potentially divisive political controversies, Seidman argues that constitutional law should provide a forum for those frustrated by losses in the political system, and offer them an outlet for their frustration, in an effort to retain losers' loyalty to the system as a whole. Unsettlement theory allows them to remain within the political community, and, it is hoped, keeps them in an on-going political dialogue. The goal, writes Seidman, is to "build a community founded on consent by enticing losers into a continuing conversation." (pp. 8-9) Underlying unsettlement theory is Seidman's vision for a just community that is inclusive. Exclusion from the community, especially from community dialogue over divisive issues, is to be avoided if at all possible.

II

But even if actual settlement is impossible, because of the existence of multiple "settlements" generated by alternative interpretations, constitutional law is, he argues, "inevitable," because when conflict arises it must be settled according to some process. "[L]etting things come out the way they come out," Seidman writes, is not an attractive option, "[u]nless we are ready to give up not just on constitutional law but also on all our political commitments." (p. 33) If there is disagreement, Seidman does not dispute that there will be a settlement, because the disagreement has to be resolved one way or another. What Seidman argues, however, is that we are wrong to look to constitutional law to provide those settlements.

Courts should instead embrace the open texture of the law, and create unsettlement opportunities for political losers. "[P]oliticians," Seidman writes, "can be counted upon to find a modus vivendi. . . . Of course, any resolution that politicians devise will make some people unhappy." (p. 159) But the Court itself should not try to settle disputes through constitutional law because

> displacing a political with a constitutional settlement only makes the exclusionary problem worse. It is one thing to lose

> a political fight. It is another to be told that the loss is irreversible and foundational. When the Supreme Court uses constitutional rhetoric to shut down an argument by imposing one potential settlement rather than another, it is doing something more than announcing the outcome of a political struggle. It is attempting to constitute the community in a fashion that excludes the losers for reasons that cannot be explained in a fashion comprehensible to them. (p. 159)

Unsettlement works, he argues, because it "establishes a different sort of neutrality." (p. 202) By emphasizing "the contradictions in constitutional law . . . both sides . . . can go on using constitutional rhetoric that appeals to our core commitments" and "have a reason not to sever their ties with the community." (p. 202) If scholars and judges could abandon the notion that constitutional law settled matters, then judicial decisions would seem "worthy of respect not because they are substantively right but because they are (or at least can be) grounded in a method and a culture that encourages uncertainty, ambivalence, and contradiction." (p. 204)

III

Why should it fall to the courts to discharge this unusual "unsettlement" function? Seidman argues that judges (particularly Supreme Court Justices) occupy a position unique among our political actors. Their ability to serve as public officials while retaining much of their privacy allows them to personify the conflicts between public and private, between the particular and the universal, that Seidman finds at the heart of both political conflicts and constitutional law. Rather than adopting what he sees as late twentieth century constitutionalism's "unenviable choice between cynical withdrawal on the one hand and hypocritical, ineffective posturing on the other," (p. 74) Seidman embraces the contestable nature of the boundaries of constitutional law. He argues that it is precisely the lack of fixed boundaries (p. 75) in constitutional law, and judges' ability to exploit them, that continues to hold promise for a just community.

Much of contemporary constitutional theory, Seidman writes, consists of critiques of paired opposites—freedom vs. coercion, local vs. national, feasance vs. nonfeasance, public vs. private, equality vs. inequality—that characterize much of con-

stitutional law.[10] He includes critiques of an overarching paired opposite in constitutional law—law vs. politics.[11] At a micro level, Seidman argues, the efforts to fix boundaries in constitutional law—usually with reference to the paired opposites described above—replays political communities' efforts to fix boundaries at a macro level. This effort also involves a choice between another paired opposite: universalism and particularism. "[T]he unresolved conflict between particularism and universalism," he argues, "helps explain why and how the boundaries of political community remain contested. . . . It follows that a contested and uncertain boundary, formed by the unending struggle between particularist and universalist urges, may be the best means of ensuring a just peace." (p. 81)

This conflict is one that is played out in constitutional law,[12] as well as in other facets of human political life. And while boundaries must be set, conflicts settled, he writes that "we cannot, and would not want to, finally resolve our conflicting impulses toward particularism and universalism," which means that "the boundaries between constitutional law's paired opposites cannot be resolved according to law." (p. 82) So how can one set (tentative) boundaries and resolve conflict, at least temporarily? Seidman looks to the one set of political actors who straddle a unique line between their private and public roles, and whom one may see as the personification of this tension in life and the law: judges.

Judges can unsettle, Seidman argues, because they are able to retain control over their private lives by virtue of their insulation and relative independence. In his words, judges are—and should be—"separated in some measure from the political outcomes they criticize" in their rulings. (p. 83) Moreover, the common law method of inductive reasoning reinforces the particularist impulse, even in the rendering of decisions that have universal implications. If presented with new or different or changed facts in a *different* case, the previous case does not necessarily bind, or at least is not immune from alteration. (pp. 84-85) For Seidman, this means that judges "will be sensitive to the

10. See p. 62: "In its classical form, constitutional law privileges private over public, local over national, freedom over coercion, feasance over nonfeasance, and equality over inequality."

11. See p. 63: "Law is neutral, nondiscretionary, objective and rational. Politics is biased, idiosyncratic, subjective, and nonrational. Legislatures engage in politics; courts enforce the law."

12. See p. 81: "The conflict between the particular and the universal parallels the linked pairs that . . . are central to ordinary constitutional practice."

contradictory demands of public and private values," which "helps guarantee a permanently contested boundary between public and private." (p. 85)

This method and culture could be fostered by judges themselves who would make decisions (the case must, eventually, be decided), but who would also recognize the impossibility of "neutrality" and thus be less inclined even to *attempt* permanent solutions to perennially contested political matters. A combination of judges' self-awareness of the contestibility of the issues they decide and the relative political insulation and independence judges enjoy, Seidman argues, would serve to legitimate their decisions.[13]

IV

Seidman acknowledges that while constitutional law harbors the potential for employing unsettlement theory, that potential has remained largely unrealized. Seidman argues that American judges—especially Justices on the U.S. Supreme Court—have instead insisted that their job is to effect constitutional settlement. This has led judges to promote a view that most of the public just doesn't buy: that they are no more than disinterested appliers of "the law" who bravely rush in to settle political controversies based on an impartial application of "the rules" as they see them. To do otherwise, the argument runs, would be to move from law into politics, with all sorts of adverse consequences for courts' institutional legitimacy.[14] Seidman dismisses this fear as "simply a bugaboo." (p. 92)

In cases involving constitutional structure—separation of powers cases, for example—making such a frank admission of the principles' indeterminacy is unlikely to draw the Court's legitimacy into question. Suggestions that the dispute should be

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13. He writes:

> [A]lthough unsettlement does not mean that courts will invalidate all laws touching on religion, it does mean that all these laws pose constitutional issues, and that these issues cannot be resolved by reference to a grand theory that finally works out the conflict. This, too, is what unsettlement means. Moreover, precisely because the resolution of these issues is unconstrained by theory, judicial decisions will reflect the individual commitments, belief systems, and prejudices of the Justices making them. . . . Regardless of our views on the merits . . . the decisions gain legitimacy from the fact that they are rendered by actors who themselves straddle the public and private spheres and can therefore police an uncertain, shifting, and contested boundary between them. (pp. 207-08)

14. The example that leaps readily to mind—which Seidman uses—is the plurality opinion in *Planned Parenthood v. Casey*. (pp. 91-92)

left to the political process, he notes, are almost incoherent, since it is that very process that generated the constitutional conflict. (p. 160) Moreover, as he notes at several places, deference itself is a form of constitutional settlement. (p. 160-61)

As for judicial enforcement of enumerated and unenumerated rights, Seidman urges an

> end [to] our obsession with the rhetorical distinction between activism and restraint and focus instead on the real dispute, between libertarian and interventionist activists. Both libertarians and interventionists are prepared to substitute judicial for political judgments. But whereas libertarians favor an active judiciary to keep the political branches passive, interventionists favor an active judiciary to make the political branches more active. Put differently, whereas libertarians embrace the private conception of rights that associates freedom with government nonfeasance, interventionists embrace the public conception that links freedom to government intervention. (pp. 184-85)

In other words, not only is "restraint" simply another form of settlement, but it can be characterized as another form of activism as well. For Seidman, honesty and transparency demand that Justices and judges drop posturing in favor of candor. No one believes that judges are disinterested or that the law is "neutral," so why insult the public's intelligence by pretending otherwise?

But how *do* judges and Justices implement unsettlement theory? What does an unsettlement decision look like? How would a judge or Justice write one? Other than to say that judges ought "to candidly acknowledge that their choice between settlements is politically driven and contestable . . . and that the choice between structures will . . . be determined by politically controversial preferences for outcomes," Seidman is vague. (p. 159) Further suggestions include those mentioned above: conceding the underdeterminacy of the legal principles employed to decide constitutional cases; recognizing that delegation to political branches or private decisionmakers is not so much restraint as simply another attempt at settlement; skepticism of reductionists' resort to paired opposites; and resisting the temptation to employ bright-line tests over those requiring consideration of the totality of circumstances, balancing, or the like. (pp. 105-08)

However, while Seidman discusses some Supreme Court opinions to show how their reasoning is vulnerable to unsettlement, (e.g., pp. 125-34) he never takes the next step. He never offers an example of an opinion that strikes the proper balance

between the need to decide a case, and the need to avoid the temptation to create settlement rules for the constitutional issue involved. As I describe in more detail below, I think that this lack of concern with the ability of courts to implement his theory is an unfortunate omission that diminishes its ultimate utility.

V

Seidman has written a complex, challenging book; my summary of his argument is of necessity an oversimplification. While there can be no question whether Seidman has contributed significantly to the debate over constitutionalism, judicial review, and the proper role of the judiciary, elements of his theory are (forgive me) unsettling.

While Seidman did not set out to write a philosophical treatise on the creation of a just political community, I did find myself wishing for more description on his part of what his criteria for a "just community" were. Seidman only describes one—inclusiveness—which is the one criterion most relevant to his unsettlement theory. But his goal of inclusiveness highlights another gap in Seidman's argument. He never offers an explicit defense of his position that inclusiveness ought to be constitutional law's categorical imperative. Is it so bad that we have used constitutional law to effect settlements that have, over time, excluded slave-owners, white supremacists, secessionists, and would-be theocrats from our constitutional conversations? Should *all* of our constitutional principles be subject to unsettlement? Seidman would probably argue that unsettlement can occur whether we wish it to or not. He might also point to repeated caveats that unsettlement only gives others the *opportunity* to unsettle. (p. 9) Yet if certain issues (secession, slavery, *de jure* racial discrimination) have been "settled," or at least if most people *believe* they have been, then the opportunity to unsettle that Seidman holds out to opponents of those settlements looks to be cold comfort. It is unclear whether an illusory remedy to losers of political settlements will be sufficient to retain their loyalty.

There are other problems with unsettlement theory that would likely surface in practice. As mentioned above, I did not come away with any idea how a judicial decision could at once decide a case, yet embrace the open-texture of the law, all while providing useful precedent for the law's continuing development. In addition, Seidman never addresses how unsettlement

theory could work in a hierarchical court system. Though he talks about the role of "the courts" and of "judges," he really seems to mean the "Supreme Court" and "Justices." While Seidman is not alone among constitutional theorists to short-change the role federal and state courts play in implementing constitutional decisions, the omission of consideration in the context of unsettlement theory is glaring.

Whatever the fate of constitutional settlement in the Supreme Court, lower courts must implement the Court's decisions and apply them to the myriad fact situations that make up the workaday docket of the district courts and the courts of appeals. At that level, lawyers and clients *do* expect a settlement of their case. If the Supreme Court eschews attempts at settlement for "fuzzier" opinions, the likely result is that lower courts forced to implement such decisions will minimize their significance and simply rely on the legal status quo. Evidence from the lower courts' post-*Lopez* Commerce Clause decisions bears this out.[15] Moreover, by repeatedly admonishing lower courts that any overruling of Supreme Court precedent should be left to the Court itself, the Supreme Court has limited lower courts' ability to anticipate or fully implement successful unsettlement opinions issued by the Court.[16]

The difficulty that the lower courts judges have had implementing *Lopez*, even after clarifying opinions in *United States v. Morrison* and *United States v. Jones*, raises another important question that Seidman does not address: the institutional competence of courts at all levels to embrace and implement unsettlement theory.[17] Successful implementation of unsettlement theory would require judges to abandon two cherished articles of professional faith—that courts settle matters by deciding cases and that they do so by applying the law objectively, while recognizing that legal principles are sometimes incomplete—in favor of a decisionmaking process that could be perceived as more politicized. It is questionable whether judges could embrace the law's open texture and admit the contestability of legal principles

15. See, e.g., Brannon P. Denning and Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 Ark. L. Rev. 1255 (2003); Glenn H. Reynolds and Brannon P. Denning, *Lower Court Readings of* Lopez, *or What If the Supreme Court Held a Constitutional Revolution, and Nobody Came?*, 2000 Wisc. L. Rev. 369.

16. Denning and Reynolds, 55 Ark. L. Rev. at 1305-08 (cited in note 15).

17. See Cass R. Sunstein and Adrian Vermeule, *Interpretation and Institutions*, __ Mich. L. Rev. 885, 932-46 (2003) (testing theories of interpretation by reference to the institutional capacities of courts to implement them successfully).

without effecting a major change in the way American courts operated, and, more important, without affecting public perception of the judiciary's role in our system of government.

In fact, unsettlement theory, as described by Seidman, may have embedded in it the potential to undo itself. Recall that Seidman defended the role of the judiciary with reference to judges' unique position in our political system. They are public officials who render written opinions in controversies making them somewhat publicly accountable. The power is further tempered by the fact that they settle disputes at the retail level, rather than at wholesale (like the legislature), according to a professional ethos of disinterestedness I described above. However, judges are also able to preserve their independence and their privacy because of the manner in which they are selected and their lifetime tenure (for federal judges anyway).

If judges embrace Seidman's call to reject claims to objectivity and treat all legal principles as contestable, all settlements as temporary, and all claims to neutrality as mere pretension, then one wonders how long judges will be able to straddle the public-private divide. If the public (and other politicians) see judges as performing a task that requires little or no specialized knowledge—one not very different from the role elected officials perform, it seems that the case for the judicial privileges deemed essential to the judicial independence, like the selection process and the lifetime tenure, is substantially weakened.[18]

VI

Still, I think that Seidman's contribution to the debate is an important one. He asks the right questions: what does constitutional law *do*, exactly, in our system? What *should* it do? Though I have doubts about making inclusiveness the overriding value in our constitutional system, I think that Seidman is on to something when he suggests that providing political losers the opportunity to challenge settlements in court is an important function that constitutional law performs. It follows, then, that we ought to leave access to that avenue for change open to as many persons as possible, and that courts ought to give their constitu-

18. The present battles over the staffing of the courts of appeals may provide a preview of what would happen at every level should judges adopt the role that Seidman's unsettlement theory envisions.

tional arguments a respectful hearing, even if the arguments are ultimately rejected.

As Seidman points out, the fact that the extent of the Second Amendment's protection of private gun ownership has never been settled by the Supreme Court means that both proponents and opponents of gun control can invoke the Amendment to support their contradictory positions. This may ensure, as he feels, that "the very guns receiving uncertain Second Amendment protection will never be used to settle our political disputes."[19] (p. 209) Seidman's work comes as a welcome reminder that courts are often the last hope for our most marginalized and alienated citizens. When they resort to litigation to vindicate what they see as their constitutional rights, judges (and scholars) ought to afford them a fair hearing—and not label their arguments as "crazy" or "fringe." One might even argue that the more out-of-the-mainstream the legal argument, the *more* time a judge or scholar ought to spend trying to explain where the argument goes off track.

Moreover, his skepticism about the ability of theorists and courts to effect final, unalterable constitutional settlements, and about their value (assuming settlement is even possible), is refreshing after a decades-long quest for a unified theory of constitutional law that could produce answers to all of our constitutional questions.[20] Even a reader who takes issue with Seidman's theoretical prescriptions would be hard-pressed to disagree with his argument that judges and scholars should not uncritically accept constitutional law's familiar categories (freedom vs. coercion, feasance vs. nonfeasance, etc.) and should be aware that at-

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19. I am reminded of a similar observation of Alexander Bickel's comment about winning the *Pentagon Papers* case. After the case, he wrote,

> the conditions in which government will not be allowed to restrain publication are now clearer and perhaps more stringent than they have been. We are, or at least we feel, freer when we feel no need to extend our freedom. The conflict and contention by which we extend freedom seem to mark, or at least to threaten, a contradiction; and in truth they do, for they endanger an assumed freedom which appeared limitless because its limits were untried. Appearance and reality are nearly one. We extend the legal reality of freedom at some cost in its limitless appearance. And the cost is real.

Alexander M. Bickel, *The Morality of Consent* 61 (Yale U. Press, 1975). In other words, an additional disadvantage of having settled, bright-line rules is that they encourage regulation right up to the legal limit. Those regulations might never have issued prior to settlement, because of legal uncertainty.

20. See Daniel A. Farber and Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (U. of Chicago Press, 2002) (describing the efforts of liberal and conservative scholars in the 1980s and 1990s to produce such meta-theories).

tempts at constitutional settlement are as subject to the law of unintended consequences as any other human endeavor.

The lack of final answers in constitutional law, and the provisional nature even of "landmark" Supreme Court cases tends to make the American political and legal culture robust. This robust nature, in turn, may render both resistant to the decay and corruption that accompany the apathy and torpor that Seidman see as debilitating for democracies. Seidman writes:

> Healthy political communities are not fixed and static, and they do not have things worked out. Their past, as well as their future, is not settled. Instead, they are constantly reinventing their own histories and meanings.... Political community is maintained precisely because there is no permanent settlement and, indeed, no exclusive, agreed-upon method for amending temporary settlements. Instead, the community is built upon an endless battle, with no fixed rules and no hope of final resolution.[21] (p. 55)

Others have urged scholars to be more modest in their aims when writing about constitutional law in hopes of remaking it, Seidman's book furnishes a complementary caution that those who *make* constitutional law should similarly be modest about their ability to settle highly contested matters on constitutional grounds so that constitutional amendment is the only avenue left to the losing party. The inability of the U.S. Supreme Court to settle the issue of slavery (*Dred Scott v. Sanford*), abortion (*Roe v. Wade*), or public prayer (*Engle v. Vitale*), and the fact that the Court emerged from each attempt somewhat worse for wear suggests that there is wisdom in Seidman's counsel.

21. See also Glenn Harlan Reynolds, *Is Democracy Like Sex?*, 48 Vand. L. Rev. 1635 (1995).