Settling the West: The Annexation of Texas, The Louisiana Purchase, and *Bush v. Gore*

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How the West was settled is a central theme in American lore and scholarship. The conventional story begins with a trail and a few log cabins in a wilderness. Shortly thereafter, a clearing is made. The first saloon and a small bank are opened. Finally, civilization arrives, officially measured by a community theater that performs Neil Simon plays and a minor league baseball team.

Another story about how the West was settled begins with the Louisiana Purchase and explores how agreement was reached over what constitutionally constitutes the United States. National expansion excited numerous constitutional controversies. The Louisiana Purchase raised questions about whether the U.S. Constitution authorized the federal government to acquire territory. The Adams-Onís Treaty of 1819, abandoning American claims to Texas, raised questions about whether the Constitution authorized the federal government to cede territory. The joint resolution annexing Texas raised questions about the constitutionally mandated procedures for acquiring territory and whether the Constitution authorized the federal government to annex a foreign country. These constitutional questions had to be settled in both the short and long term. Americans in 1845 had to decide whether the Constitution permitted Texas to be annexed by a joint resolution of Congress. Representatives who in 1845 declared the joint resolution unconstitutional and void had to decide after 1845 whether they would nevertheless regard Texas statehood as an irremediable constitutional error. Although the Constitution of 1787 provided no clear guidelines for determining whether and how national expansion could take place, the West could be settled only when a broad consensus existed that such constitutionally controversial acts as the Louisiana Purchase, Adams-Onís Treaty, and annexation of Texas could not be repealed or revisited in future electoral campaigns or judicial decisions.

Efforts to analogize the process by which the West was settled to the processes by which the constitutional questions that occupy much contemporary
scholarship are settled risks embroiling American constitutionalism in a vicious
circle. George W. Bush professes to be a constitutional originalist in the mode of
Justices Antonin Scalia and Clarence Thomas. Justice Thomas frequently declares
that practices inconsistent with the original understanding of the Constitution
ought to be unsettled, no matter how ancient their lineage. Good reasons exist
for thinking that Texas was never constitutionally annexed. If Texas was never a
constitutional part of the United States, then George Bush is not constitutionally
qualified to be president of the United States and Al Gore gained the majority of
constitutionally legitimate electoral votes cast in 2000. Gore insists that "the
Constitution ought to be interpreted as a document that grows with our country
and our history." This commitment to living constitutionalism is more
conducive to acknowledging Texas as constitutionally part of the United States,
no matter what the constitutionality of annexation by 1845 standards. If Texas is
a state, then George Bush is qualified to be president of the United States and,
after Bush v. Gore, he won the 2000 presidential election. Thus, acting true to
their constitutional principles, President Bush's first act upon entering office
should have been to declare Texas never part of the Union, giving the election
to Gore, who should then have declared Texas never out of the Union, giving
the election to Bush, and so on. A similar vignette might be constructed by
taking seriously Jefferson's concern that the Louisiana Purchase was
unconstitutional.

The few people who currently think that the status of Texas remains tied to the
constitutionality of annexation in 1845 may universally be regarded as
"lunatics," but their insanity is to a remarkable degree aided and abetted by the
leading schools of contemporary thought on constitutional settlements.
Consider two prominent studies by exceptionally distinguished constitutionalists.
Larry Alexander and Frederick Schauer insist that the Supreme Court is the
institution responsible for settling constitutional questions. Louis Michael
Seidman maintains that fundamental constitutional questions should remain
unsettled. Both theories of constitutional settlement, framed with such issues as
abortion in mind, lend credence to claims that Texas may not be a
constitutional part of the United States. Occasional dicta aside, no judicial
decision has ever purported to settle the constitutionality of the Louisiana
Purchase, the annexation of Texas, or related measures. If judicial review is a
means for preventing permanent losers in politics, then the distinguished
statespersons who raised constitutional objections to the Louisiana Purchase and
annexation of Texas are entitled to their long overdue day in court.

This essay explores how the West, most notably Texas statehood, was
settled. Part of the concern is historical. The following pages call attention to a
series of debates over national expansion too long lost from studies of
American constitutionalism. Constitutional debate flourished in Jackson-ian
America in almost every institution but the courts. While the Taney Court was occupied with minutia concerning minor state laws that had some impact on interstate commerce, legislative giants in the Senate and House of Representatives debated more fundamental regime questions concerning the power of the national government, the nature of the constitutional regime, and whether fulfilling the American constitutional destiny required that the United States become an "ocean-bound republic." The other concern is theoretical. Existing commentary on constitutional settlements too often focuses exclusively on the processes necessary for temporarily resolving the constitutional status of such matters as abortion and school segregation at the expense of the processes necessary for permanently resolving the constitutional status of such matters as the American West. As a result, scholars ignore the vital difference between correctable and irremediable constitutional errors, and overlook how enduring constitutional settlements are more rooted in constitutional politics than constitutional law. Settlements take place, not when official law is pronounced, but when persons opposed to that constitutional status quo abandon efforts to secure revision. Such efforts are abandoned for both political reasons and, in the case of national expansion, because of a belief that the issue is best settled, even if not settled right. The judiciary, too often celebrated as the locus of constitutional settlement, played almost no role in settling the West.

The West was settled because opponents of the Louisiana Purchase and the annexation of Texas conceded defeat. Critics of American expansion did not acknowledge that the Constitution permitted the United States to acquire territory and annex foreign countries, and they did not think such unconstitutional practices were legitimated by judicial decisions that took place long after settlement. John Quincy Adams and others simply determined that the status of Texas could not and should not be further contested after Congress voted for statehood. This concession was politically and legally significant. The constitutional status of Texas was politically settled when political protests against annexation abated. This political settlement improved the legal foundations for statehood. The overwhelming consensus after 1845 that Texas was a permanent part of the United States entitled Texans and other Americans to act on the assumption that Texas was a permanent part of the United States. This reliance interest was generated by political decisions made by persons who thought the joint resolution unconstitutional to abandon opposition to Texas statehood, not by a specific act that constitutionally settled the status of Texas in the Union.

ORDINARY LEGAL THINKING ON THE CONSTITUTIONAL STATUS OF TEXAS
Persons opposed to the annexation of Texas declared that the proposed joint resolution was unconstitutional and, therefore, a constitutional nullity if passed. Representative Samuel C. Sample of Indiana stated, "annexation ... would be void and not obligatory and binding, either upon the States of this Union or upon the people." Representative Edward S. Hamlin of Ohio did "not see how a null and void act can have any effect." Should the joint resolution pass, "Texas would be no more annexed than it is now." "The act annexing it," Hamlin continued, "would be a dead letter, to which life could not be imparted." Several state legislatures passed resolutions denying the legal force of the joint resolution under congressional consideration. State representatives from Massachusetts declared that "such an act of admission would have no binding force." "The state of Connecticut," state representatives resolved, "can never consent to annex a foreign nation to the Union; and especially will it never consent to stipulate for its admission with the privilege of a slave representation."

At least one proponent of Texas statehood agreed that the joint resolution had legal force only if constitutional. Many Jacksonians insisted that Texas was included in the Louisiana Purchase and that the national government was not constitutionally authorized to cede claims to that territory in the Adams-Onis Treaty of 1819. Following the same logic as Sample, Hamlin, and several New England state legislatures, Senator Chester Ashley of Arkansas asserted that the 1819 treaty with Spain was "utterly void, because there was utter want of power to make such treaties, or enact such laws." No need existed for annexation, he informed the Senate: "Texas belonged to us; it was an acquisition, and nothing could do away with it." To those who thought "our long acquiescences and frequent recognition of [Texas independence] will militate against the position assumed," Ashley responded, "the cession was an act of moral treason against the principles of the constitution and of our free institutions; and any and all recognitions of this gross wrong was but an aggravation of the original wrong."

More than one hundred and fifty years later, some Americans fervently endorse these claims about the unconstitutional annexation of Texas and the null force of unconstitutional acts. Members of the Republic of Texas maintain that Texas is presently an independent nation. Devotees insist that Sample and Hamlin were correct to assert that the joint resolution annexing Texas was unconstitutional. "The United States Congress in 1845," Republic of Texas literature opines, "had no authority from their states or people to annex another nation by contract or resolution." Members further claim that Sample, Hamlin, and Ashley were correct to assert that time does not heal constitutional wrongs. A past leader of the Republic of Texas declares, "[n]o matter how long an unconstitutional action or statute has been enforced and imposed, it is forever unconstitutional and lawfully null and void."
Several Texas law professors and scholars have taken to the law reviews to refute these allegations. James W. Paulsen, a professor at the South Texas College of Law, declares the Republic of Texas’s "core claims are demon-strably false" in a short essay published by the *South Texas Law Review*. Ralph H. Brock, a practicing lawyer, has a longer attack in the *Texas Tech University Law Review*. Paulsen and Brock make no pretense at constitutional sophistication. They and other champions of Texas statehood are ordinary legal thinkers and practitioners who use ordinary legal logics to explain why Texas is constitutionally part of the United States. The ordinariness of their arguments is crucial. If the present constitutionality of Texas statehood can be demonstrated only by elite law professors using hitherto unrecognized constitutional logics, then Republic of Texas members who disagree might be charged with a lack of sophistication but not lunacy. That only lunatics think Texas an independent nation must be demonstrated by a straightforward application of broadly shared principles.

Paulsen and Brock give four reasons for regarding Texas as obviously not an independent nation.

1. The Constitution of 1787 plainly authorized Congress to annex a foreign country by joint resolution.  
2. The constitutional status of Texas was settled by judicial decisions establishing that Texas was constitutionally admitted into the Union.  
3. The constitutional status of Texas was settled by principles of international law decreeing that longstanding dominion of a territory without protest establishes legitimate sovereignty.  
4. The constitutional status of Texas was settled by the congressional decision to annex Texas by joint resolution.

The second argument carries the most weight. Ordinary constitutional thinkers in the United States tend to be judicial supremacists. Constitutional disputes are settled, the ordinary argument for Texas statehood maintains, when a series of judicial decisions clearly establish a particular proposition of constitutional law. "If there was any question about the constitutionality of annexation," Paulsen writes, "that simply would have raised a question for the United States Supreme Court to decide." Brock similarly asserts, "the Supreme Court is the final arbiter of the question whether an act of Congress is constitutional." Texas is a permanent part of the United States, in this view, because the Supreme Court has repeatedly regarded Texas as a permanent part of the United States.

These ordinary arguments for Texas statehood fail for ordinary reasons. None rely on uncontested principles of constitutional law. None explain the behavior of the rational persons from 1836 to 1845 opposed the annexation of Texas. All when applied generally have consequences many ordinary legal thinkers reject. Constitutionalists who rely on the claims presently used to demonstrate Texas
statehood might well have concluded that *Plessy v. Ferguson* and other judicial decisions had settled the constitutional status of school segregation.

**Original Authorization**

The legislators, jurists, and political activists who in 1845 opposed the annexation of Texas repeatedly declared that the national government had no constitutional power to annex a foreign country by a joint resolution of both houses of Congress. Whigs in all sections of the United States maintained that the United States had no constitutional power to annex any territory by a joint resolution. The only constitutional means for adding territory to the United States was a treaty signed by the president and approved by two-thirds of the Senate. Many opponents of annexation maintained that the United States had no constitutional power to annex a foreign country by treaty, joint resolution, or any other means. The Louisiana Purchase established that other nations could cede territory to the United States, not that other nations could join the Union as States. Some Northerners declared that the United States had no power to annex territory where slavery was legal, particularly when parts of that territory were above the Missouri Compromise line.

Contemporary proponents of Texas statehood are mistaken when they suggest that objections to annexation overtly based on opposition to the joint resolution and expansionism were smokescreens for the objections based on opposition to slavery. Many Northerners who maintained that Texas could not be annexed by joint resolution took more proslavery stands on other constitutional and political issues. Joseph Story, who maintained that "the admission of Texas into the Union would be a grossly unconstitutional act," upheld the constitutionality of the Fugitive Slave Act of 1793 in *Prigg v. Pennsylvania*. Daniel Webster, who helped secure the Massachusetts resolution condemning annexation, fought for the Compromise of 1850. Prominent Southerners whose support for slavery cannot be questioned challenged the constitutionality of annexation. Senator Alexander Barrow of Louisiana described the joint resolution as "the most daring and dangerous attempt to desecrate the constitution ever attempted." While sectional concerns were frequently raised during the debates over Texas, legislative divisions were more partisan than sectional. A majority of Whigs in both sections voted against the joint resolution.

Several arguments against annexation seem particularly strong. Southern Whigs pointed out that a framing generation concerned with preserving a sectional balance of power was unlikely to have sanctioned mere majorities to determine the course of American expansion. "Do you suppose," Senator William S. Archer of Virginia asked, "that the framers of this wise constitution contemplated a power in the government to throw complete ascendancy into either of these scales." Other opponents noted that immediate annexation of a foreign nation was inconsistent with the
constitutional requirement that members of the House of Representatives and Senate be citizens of the United States for seven and nine years respectively before taking office. Representative John P. Kennedy of Maryland declared, "Congress cannot make a new State from a foreign nation without first acquiring the territory of the foreign nation, and holding it long enough for its citizens to become endowed with the requisites to make them a State—that is to say, with qualifications essential to give them a representation in Congress." These claims, along with the more general assertion that any agreement with a foreign nation was a treaty that had to be confirmed by a two-thirds vote of the Senate, do not settle the matter. Proponents of the joint resolution pointed out that the Framers rejected language that would have explicitly confined the congressional power to make new states to states arising out of the existing territory of the United States. More generally, determining whether the joint resolution is unconstitutional is difficult because prominent Framers kept to themselves whatever thoughts they may have had on national expansion. Still, the transsectional appeal of the constitutional case against the joint resolution provides powerful evidence that, at a minimum, reasonable constitutionalists in 1845 could conclude that the joint resolution was unconstitutional.

Settlement by Judicial Decision

The constitutional status of Texas is not settled by judicial decision. No Supreme Court decision has specifically held that the joint resolution annexing Texas was constitutional. No argument on the constitutionality of annexing a foreign country by joint resolution has ever taken place before the justices. Brock notes that the Court in Texas v. White asserted that annexation created an "indissoluble relationship," but the justices in that case merely stated that "(t)he Republic of Texas was admitted into the Union, as a State, on the 27th of December, 1845." Brock's use of Mississippi v. Johnson is more misguided. Chief Justice Salmon Chase cited annexation as an instance where the Supreme Court was not asked to enjoin the president from enforcing what many thought was an unconstitutional act. "The constitutionality of the act for the annexation of Texas was vehemently denied," his opinion declared, "but no one seems to have thought of an application for an injunction against the execution of the act by the President." Far from settling the constitutionality of annexation, Mississippi casts doubt on whether a judicial decision could have resolved the matter.

The Supreme Court has indicated that Congress may annex a foreign country by joint resolution only in a single sentence in an opinion concerned with other issues. Territory acquired by conquest or treaty, De Lima v. Bidwell declares, "is acquired as absolutely as if the annexation was made, as in the case of Texas and Hawaii by act of Congress."
Such unsupported dictum is not normally considered sufficient to establish any proposition of constitutional law. Judicial precedent cautions against attaching too much legal significance to issues decided without the benefit of argument by counsel. Justice Powell observed that the Supreme Court "owe(s) somewhat less deference to a decision that was rendered without benefit of a full airing of the relevant considerations." Whether the United States may annex a foreign country by joint resolution has never been the subject of debate before the justices. That issue, under conventional understandings of legal precedent, remains undecided.

The present precedential support for Texas statehood bears a strong resemblance to the precedential support for segregated schools during the early New Deal. Judicial opinions in the late nineteenth and early twentieth century assumed that Texas was a part of the Union and that Jim Crow education passed constitutional muster, but no decision explicitly decided either matter. *Plessy v. Ferguson*, which approvingly cited a state court decision affirming the constitutionality of separate schools, provides far stronger precedential support for segregated education than any judicial decision provides for Texas statehood. If, despite this history, the Supreme Court in *Brown v. Board of Education* justifiably maintained that past precedents did not establish the constitutionality of segregated schools, then lawyers for the Republic of Texas are not violating ordinary principles of American constitutionalism when they maintain that past precedents do not establish Texas statehood.

Even a much clearer line of judicial precedents would not suffice by conventional legal logics to settle for all time the constitutionality of the joint resolution annexing Texas. Ordinary and elite constitutional thinkers frequently call on the Supreme Court to overrule lines of precedent far clearer and far more established than the line of precedents supporting Texas statehood. Many social conservatives demand that the Supreme Court overrule *Roe v. Wade*, even though that decision has been repeatedly reaffirmed. Many liberals would have the Supreme Court overturn the countless decisions holding the death penalty constitutional. Every tenured professor who teaches constitutional law has probably publicly insisted that the Supreme Court reverse a line of precedents with at least the same constitutional pedigree as the precedents supporting Texas statehood. These pleas sometimes succeed. The Supreme Court in *Alden v. Maine* (1999) abandoned an approach to sovereign immunity dating from *Chisholm v. Georgia* (1793). If the judicial precedents supporting Texas statehood are "obsolete and poorly reasoned," then ordinary legal thought would have those precedents overruled.

Whether any series of judicial decisions suffices to settle constitutional questions is also open to question. Mark Tushnet and Jeremy Waldron are the most recent in a long line of thinkers who question whether the judiciary should have the last or any word on constitutional matters. Barry Friedman documents how such attacks on the judiciary have often enjoyed substantial popular support. This history and
contemporary practice suggests that Re-^ public of Texas members would not venture beyond the fringe should they call on the national legislature to reopen constitutional issues previously decided adversely by courts and legislatures. Questioning judicial power is as distinguished a tradition as thinking Texas a part of the Union.

Looking for a judicial settlement of the constitutional issues raised by national expansion is false to American constitutional practice. The Supreme Court did not breathe a word on the annexation of Texas until after the Civil War and did not discuss whether the national government could constitutionally acquire territory until 1828.\textsuperscript{60} Opposition to the joint resolution and the Louisiana Purchase had long since dissipated. Federal justices were not called upon to settle constitutional questions associated with national expansion because those issues were settled long before relevant cases were argued before the Supreme Court. Chief Justice Chase in \textit{Texas v. White} assumed that Texas constitutionally joined the Union in 1845 because that was a given by 1868. Proponents of judicial supremacy fail to explain how a constitutionally controversial decision in 1845 shortly thereafter became the settled law of the United States without the aid of any judicial decision.

\textbf{Settlement by Prescription}

Prescription settles Texas statehood only from perspectives offered by living constitutionalism. Contemporary international law decrees that a country exercising sovereignty over a particular territory for a long period of time is deemed to have sovereignty, particularly when such sovereignty is exercised with the apparent consent of the natives.\textsuperscript{61} "[T]he uninterrupted possession of territory or other property for a certain length of time by one State," the Supreme Court held in \textit{Virginia v. Tennessee}, "excludes the claim of every other."\textsuperscript{62} Acquisitive prescription, however, was far more controversial during the period between ratification and the Civil War.\textsuperscript{63} Henry Wheaton, when defending the principle, acknowledged that "(t)he writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation."\textsuperscript{64} Americans during the debates over the annexation of Texas debated the constitutional significance of prescription. Senator William Archer of Virginia referred to "the great inestimable law of prescription" as supporting his claim that the United States after 1819 abandoned claims to Texas.\textsuperscript{65} Other senators and representatives rejected prescription, insisting that unconstitutional abandonments had no binding force. The 1819 treaty, future President Andrew Johnson declared, was "void from the beginning, never vesting Spain, with the shadow of title to the territory and people of Texas."\textsuperscript{66} Opponents of Texas annexation also denied prescription when claiming that they would never acknowledge Texas to be a part of the Union.\textsuperscript{67} Thus, while
prescription may compel such living constitutionalists as Al Gore to regard Texas as part of the Union, such purported originalists as George Bush may not be able in good faith to invoke that principle as justifying Texas statehood.

Prescription is false to American constitutional practice. The West was constitutionally settled long before principles of international law warranted settlement. Even if prescription foreclosed Gore's challenge to the constitutionality of Texas because "152 years after statehood" or "well over a century" "is too long," that principle does not explain why Samuel Tilden in 1876 did challenge the validity of the Louisiana Purchase or why Thomas Jefferson in 1796 did not suggest that Rhode Island in 1791 was unconstitutionally coerced into ratifying the Constitution. The status of the Louisiana Purchase and Texas statehood under international law may not have been settled until long after the Civil War, but the validity of these acts was uncontested in American politics long before Lincoln's election.

**Settlement by Congressional Decree**

The claim that Congress settled the constitutional status of Texas by passing the joint resolution is weak. Contrary to Paulsen, Americans rarely find "hard to swallow" assertions "that the President and a majority of the United States Congress knowingly chose to violate the Constitution." Jefferson did just that when approving the Louisiana Purchase. Claims that the government has violated the Constitution appear daily in public discourse, differing only with respect to the issue and an occasional willingness to drop the word "knowingly." Judicial supremacy is not an uncontested principle of American constitutionalism, but legislative supremacy is the minority view. The central issue in ordinary constitutional discourse is whether legislative decisions on constitutional questions have any constitutional weight. Moreover, Congress has the same power as the Supreme Court to overturn past precedents. The normal legislative prerogative to change its mind calls into question the finality of the joint resolution. Prominent Whigs highlighted the possibility of legislative reconsideration as a reason why Texas could be annexed only by a treaty. "If annexation is affected by act of Congress," Representative Kenneth Rayner of North Carolina asked, "will it not be repealable like other acts of Congress."

Prominent opponents of annexation rejected claims that the congressional vote on annexation settled the constitutional status of Texas. Some Whigs folded their tents when the joint resolution passed, but others did not. Conscience Whigs declared annexation "null and void." Representative Julius Rockwell of Massachusetts during the debate over Texas statehood that took HPlace during the fall of 1845 declared, "all that has been done is of no binding force, to compel us here to carry on this measure of annexation." After repeating the constitutional arguments made against the joint resolution, Rockwell asserted, "all those
objections to the annexation of Texas remain in their full force today. These arguments seemed to have had broad appeal. Most representatives who voted against annexation voted against statehood.

The subsequent legislative decision to annex Hawaii by joint resolution does not settle the constitutionality of the resolution annexing Texas. Two instances hardly demonstrate the "systematic, unbroken ... practice" necessary to settle a constitutional dispute. Throughout American history, treaties have been the preferred means for acquiring territory. Professors Bruce Ackerman and David Golove presently champion joint resolutions, but no nineteenth-century proponent of national expansion asserted the superior constitutional virtues of a joint resolution when support existed to pass both a treaty and a joint resolution. The Texas Minister to the United States was instructed to seek a joint resolution only "in the event that there should be doubts entertained whether a treaty made with this Government for its annexation to the United States would be ratified by a constitutional majority of the Senate." Congress relied on joint resolutions only in the case of Texas and Hawaii, and only when supporters in the Senate lacked the votes necessary to ratify a treaty. This practice does more to cast constitutional suspicion on joint resolutions than settle the constitutionality of Texas statehood.

The event that politically settled the status of Texas was the favorable vote on statehood in late 1845. After that vote, opposition to annexation ceased in the national legislature. No recorded challenge was made when representatives from Texas took their seats in the House and Senate. Politics moved to the threatened war with Mexico, and the constitutional issues raised by pros to acquire by conquest or treaty additional territory in the Southwest.

Ordinary legal thought does not explain why the vote on statehood apparently settled the constitutional status of Texas. No evidence exists that the constitutional arguments against the joint resolution were decisively refuted at some point in 1845. The constitutional need for a treaty seems as plausible today as it did before the Civil War. Antebellum opponents of annexation who frequently declared that they would "never" regard the fruits of the joint resolution to be constitutional failed to explain why the vote on statehood was granted authority not given the vote on annexation. Contemporary proponents of Texas statehood are similarly silent. The problem is not that the ordinary legal thinkers who think Texas statehood settled lack the constitutional sophistication necessary to explain why settlement took place after the December vote on statehood rather than the February vote on annexation. Paulsen, Brock, and others have trouble explaining why Texas is a state because they rely on common theories of constitutional settlement whose premises are as lunatic as the Republic of Texas.

THINKING ABOUT SETTLEMENT
The problems ordinary legal thinkers have explaining why no reasonable person thinks Texas an independent country are rooted in assumptions commonly made by elite legal thinkers. Elite constitutional theory is more sophisticated than ordinary legal thought. Judicial review and judicial supremacy are more often questioned in faculty symposia than in meetings local bar associations. Commentary on legitimate constitutional change outside of Article V remains largely confined to university presses and law reviews. Still, ordinary legal discourse is partly derived from more elite commentary as filtered through basic courses on constitutional law and legal methods. Legal practitioners who do not imbibe some version of judicial supremacy are taught that the rules for settling constitutional disputes do not vary by issue. Law students routinely learn that every constitutional question is a question of constitutional law. Nothing in the legal curriculum inspires ordinary legal thinkers to contemplate whether the processes for settling whether Texas is part of the United States differ from the processes for settling whether the Fourteenth Amendment permits school segregation, and whether the processes for the former are better conceptualized as matters of constitutional politics than matters of constitutional law.

Scholars writing on constitutional settlements focus on the judicial responsibility for providing authoritative answers to contested constitutional questions. Larry Alexander and Frederick Schauer insist that constitutional disputes need settlement and the Supreme Court is the institution responsible for settlement. In their view, "the settlement of contested issues is a crucial component of constitutionalism. . . . this goal can be achieved only by having an authoritative interpreter whose interpretations bind all others, and . . . the Supreme Court can best serve this role." Some scholars question the settlement function of constitutionalism and judicial review. "The function of constitutional law," Michael Seidman maintains, is "to unsettle any resolution reached by the political branches." Other scholars question whether the Supreme Court should bear exclusive responsibility for settling constitutional questions. Neal Devins and Louis Fisher endorse "coordinate construction," with each branch capable of and willing to make independent constitutional interpretations.

These disputes over the role of the federal judiciary are less wide-ranging than much rhetoric suggests. Opponents of judicial supremacy agree that judicial decisions permanently settle the legal rights of the parties before the court. Devins and Fisher regard "[t]he Supreme Court" as "the ultimate interpreter in a particular case." They object only to the view that the justices also settle "the larger social issues of which that case is a reflection." The canonical citation is to Lincoln's assertion that Dred Scott settled whether Dred Scott was a slave, just not the constitutional power of Congress to ban slavery in the territories. Proponents of judicial supremacy limit judicial authority to "deciding what is to be done now" (emphasis added). Alexander and Schauer state that the Supreme Court remains free
to change course and that all other political actors are free to do everything short of disobedience to encourage justices to change course. "[Widespread acceptance of our position," they declare, "would leave the Supreme Court with sufficient opportunities to reconsider earlier rulings that ought to be reconsidered."\textsuperscript{88} Judicial decisions settle present law, not future law. Present law in both a regime of judicial supremacy and a regime of coordinate construction may be unsettled by subsequent judicial decision and, all agree, by constitutional amendment.

Scholarship primarily concerned with whether judicial decisions temporarily resolve constitutional questions has little to say about questions raised by national expansion that concern more enduring constitutional settlements. When representatives in 1845 spoke of the constitutional status of Louisiana as settled, they were not referring only to "what is to be done now." Even those representatives who continued thinking the United States had no constitutional power to acquire territory agreed that the Louisiana Purchase could no longer be repealed by future legislative decree, judicial decision, or constitutional amendment.\textsuperscript{89} Texas would soon enjoy the same status. Within a year of annexation, Americans of all political persuasions agreed that Texas could no longer be constitutionally excluded from the Union, even if the joint resolution was a gross violation of the Constitution. Settlement constrained the future as well as the present.

Louisiana, Texas, and the West were not settled on grounds analogous to the grounds that led Abraham Lincoln to claim Dred Scott settled whether Dred Scott was a slave. No one took the Lincolonian position that ratification of the treaty with France or passage of the joint resolution settled the constitutional status of Louisiana and Texas, but not the broader constitutional questions associated with national expansion. Opponents of the proposed Louisiana Purchase and proposed annexation of Texas declared that these measures were void as applied to Texas and Louisiana.\textsuperscript{90} Southern Whigs declared that future legislatures were free to repeal the joint resolution.\textsuperscript{91} Northern Whigs declared the joint resolution not binding during the debate over Texas statehood.\textsuperscript{92} Something more than a simple legislative decision or judicial ruling settled the West, and that something resulted in a far more permanent settlement than the more temporary constitutional settlements that presently occupy scholarly attention.

\textbf{Settling States}

American constitutional practice recognizes that only some constitutional errors are correctable. Whether persons think the constitutional status of racial segregation settled depends in large part on whether they think previous judicial rulings accurately, or least reasonably, interpreted the Fourteenth Amendment. Citizens in 1954 cared whether Plessy and related constitutional decisions (inside and outside
of courts) justifying segregation were right. Constitutional mistakes made when interpreting the equal protection clause, all parties to the debate over Brown acknowledged, were remedial if legally and morally wrong. Whether persons think Texas statehood settled does not depend at all on the best interpretation of the treaty power or the congressional authority to admit new states. Few Americans care about the process by which Texas joined the Union. The occasional scholar who questions whether the joint resolution was constitutional thinks such analysis purely academic, having no bearing on the present standing of Texas. Constitutional mistakes made during national expansion, sane constitutionalists agree, are no longer remedial by any constitutional process.

The commonsense distinction between the constitutional origins of Jim Crow and the American West reflect broad recognition that, although constitutions may be designed to settle certain political issues, different settlements serve different purposes. Some constitutional provisions reflect founding beliefs that a fixed rule is desirable. Entrenchment may facilitate long-term plantations. Larry Alexander and Frederick Schauer insist that constitutional disputes need settlement and the Supreme Court is the institution responsible for settlement. In their view, "the settlement of contested issues is a crucial component of constitutionalism,... this goal can be achieved only by having an authoritative interpreter whose interpretations bind all others, and... the Supreme Court can best serve this rule." Some scholars question the settlement function of constitutionalism and judicial review. "The function of constitutional law," Michael Seidman maintains, is "to unsettle any resolution reached by the political branches." Other scholars question whether the Supreme Court should bear exclusive responsibility for settling constitutional questions. Neal Devins and Louis Fisher endorse "coordinate construction," with each branch capable of and willing to make independent constitutional interpretations.

These disputes over the role of the federal judiciary are less wide-ranging than much rhetoric suggests. Opponents of judicial supremacy agree that judicial decisions permanently settle the legal rights of the parties before the court. Devins and Fisher regard "[t]he Supreme Court" as "the ultimate interpreter in a particular case." They object only to the view that the justices also settle "the larger social issues of which that case is a reflection." The canonical citation is to Lincoln's assertion that Dred Scott settled whether Dred Scott was a slave, just not the constitutional power of Congress to ban slavery in the territories. Proponents of judicial supremacy limit judicial authority to "deciding what is to be done now" (emphasis added). Alexander and Schauer state that the Supreme Court remains free to change course and that all other political actors are free to do everything short of disobedience to encourage justices to change course. "[Widespread acceptance of our position," they declare, "would leave the Supreme Court with sufficient opportunities to reconsider earlier rulings that ought to be reconsidered." Judicial
decisions settle present law, not future law. Present law in both a regime of judicial supremacy and a regime of coordinate construction may be unsettled by subsequent judicial decision and, all agree, by constitutional amendment.

Scholarship primarily concerned with whether judicial decisions temporarily resolve constitutional questions has little to say about questions raised by national expansion that concern more enduring constitutional settlements. When representatives in 1845 spoke of the constitutional status of Louisiana as settled, they were not referring only to "what is to be done now." Even those representatives who continued thinking the United States had no constitutional power to acquire territory agreed that the Louisiana Purchase could no longer be repealed by future legislative decree, judicial decision, or constitutional amendment. Texas would soon enjoy the same status. Within a year of annexation, Americans of all political persuasions agreed that Texas even if the actual settlement is a gross constitutional wrong. Proponents and opponents of legal abortion prefer instability to their preferred entrenchment. Pro-life advocates believe superior to the regime inaugurated by Roe v. Wade a regime in which some states ban abortion and others do not, and one in which successful Democratic coalitions repeal bans passed by successful Republican coalitions. Pro-choice advocates believe a regime whose reproduction policies vary by time and place superior to a regime whose settled law forbids abortion. When a matter should be permanently settled only if settled right, diversity and instability are preferable to entrenching the wrong policy.

Instability is a constitutional problem only when at least some parties to a constitutional dispute think entrenching a constitutional wrong serves more important constitutional values than keeping open the question of constitutional right. All parties to the dispute over the 2000 election agreed that the person inaugurated in January 2001 should be recognized as the constitutional president of the United States for the next four years, barring death, resignation, or independent ground for impeachment. The numerous persons who thought Bush wrongly decided did not think constitutionally superior to the present regime a regime in which George Bush presided only over some states or one in which he and Al Gore shared the presidency. Bush v. Gore was not a constitutionally correctable error. Fidelity to the constitutional concern with entrenchment outweighed fidelity to constitutional understandings of equal protection.

The Louisiana Purchase and annexation of Texas are even clearer instances of constitutional decisions which, if wrong, were not correctable within a short period after being made. Bombast aside, antebellum Americans recognized that each successive administration could not consider and reconsider whether Texas was in the Union. At some point shortly after Texas joined the Union, future constitutional decision makers were not free to confess mistake. A profound injustice would presently occur if, after 160 years, constitutional authorities were to declare that,
because of an initial flaw in the Texas annexation or statehood process, Texas was actually an independent nation. National capacity for long-term planning and fundamental reliance interests would be destroyed if the composition of the United States was potentially at stake each time the national legislature met or the Supreme Court handed down a decision. These grounds for permanent entrenchment far outweigh the virtues of getting right whether a foreign country can be annexed by a joint resolution of Congress.

The settled status of national expansion transcends ordinary constitutional law. Texas statehood is settled both in the temporary sense that no reasonable constitutionalist claims Texas is presently an independent nation and in the more permanent sense that no reasonable constitutionalist would champion a constitutional amendment declaring that any territory annexed by a joint resolution shall henceforth be regarded as an independent nation. Such a proposal might be a clear example of an unconstitutional constitutional amendment, an amendment so inconsistent with fundamental constitutional presuppositions as to be illegitimate even if passed consistently with the processes set out in Article V." Most individual rights and other limitations on governmental power do not enjoy nearly this degree of entrenchment. Nothing in Casey or McCulloch v. Maryland bars a contrary constitutional amendment declaring that states can regulate abortion or that the federal government has no power to incorporate a national bank. The joint resolution, by comparison, within a short period of time had both Article I and Article V consequences, bringing Texas into the Union and, after statehood, barring any constitutional effort to reverse that decision. The constitutional requirement that no state be deprived of equal representation in the Senate in practice now entails that any jurisdiction once given representation may no longer be denied representation, even if the original reason for representation was a constitutional mistake. Such a principle seems to correctly describe the constitutional status of American expansionism, yet that principle has never explicitly been the subject of any legislation or judicial decision.

Ordinary constitutional law does not explain why some constitutional amendments not expressly barred by Article V are nevertheless off-the-wall if not unconstitutional. The constitutional text does not specify what constitutional errors are correctable, the conditions under which constitutional decisions made inside and outside of courts become irrevocable, or even, for that matter, what constitutes a temporary constitutional settlement. The framing debates and judicial decisions provide little help. Cooper v. Aaron was about the obligation to obey a judicial decision while that decision was good law. The justices said nothing in that case or in any other ruling about the conditions under which a constitutional mistake may become permanently entrenched. The reason for this official silence may be that more enduring constitutional settlements cannot be fashioned solely by official decisions. Government
officials determine what the Constitution officially means in the present. What the Constitution shall mean in the future is determined by whether persons out of power challenge the official constitutional law of their time.

The Constitutional Politics of Settlement

Ordinary constitutional thinkers and elite constitutional theorists maintain that official acts settle constitutional disputes. Much debate exists in elite theory over which official acts temporarily settle constitutional controversies.\textsuperscript{102} Still, Schauer, Alexander, Devins, Fisher, and others agree that only official actions by governing officials settle constitutional disputes. Whether an issue is best settled or best settled right is determined by some combination of elected officials, justices, and other official appointees. Constitutional law assigns no authority to decisions made by persons out of power.

This emphasis on governing officials is another consequence of the failure to distinguish between temporary and more permanent constitutional settlements. Only governing officials are authorized to determine "what is to be done now." Persons who fail to win election or appointment have no authority to determine what the Constitution presently means. Persons out of power, however, are relevant political actors when more enduring constitutional settlements are forged. The extent to which official decisions as a practical and constitutional matter permanently settle constitutional debates depends on how persons opposed to those decisions respond to what they believe is a constitutional wrong. Opponents may choose to keep the constitutional question open, contesting the matter in legislative and electoral fora. Alternatively, they may decide for political or constitutional reasons that what was once an open constitutional question should now be closed. Their practical decision to consider the matter resolved is both a political settlement and helps generate the reliance interests that justify treating the matter as permanently settled constitutionally.

Constitutional questions are politically settled when no coalition opposed to the present status quo is likely to triumph in forthcoming elections. That proponents of a particular constitutional position control all three branches of government does not secure their constitutional vision while their political rivals have the capacity to regain power. The constitutional status of the New Deal was settled when the Republican Party accepted the basic contours of the administrative state, not when the federal judiciary abandoned the Commerce Clause and other restrictions on national power. Had Republicans continued to run on platforms dedicated to restoring Hoover administration policies, the New Deal’s constitutionality would have been settled only when electoral returns made clear that such a platform would never again carry a national election.\textsuperscript{103} Brown was settled politically when southern politicians abandoned calls for segregation. Governing officials may have the power
to resolve questions of constitutional law, but persons out of power determine the extent to which these answers settle the constitutional controversy.

Political struggles over constitutional meaning are abandoned for several reasons. Crucial political actors may over time agree that a particular settlement is right. *Brown v. Board of Education* is in no danger of presently being overruled because an overwhelming public consensus now exists that Jim Crow was a constitutional evil. Leading politicians may agree that an issue should be settled, even if not settled right. Gore conceded the 2000 presidential election because he believed the costs of correcting the judicial mistake in *Bush* too high. Finally, members of the constitutional minority may conclude that for the foreseeable future they will not have the political support necessary to challenge a mistaken constitutional status quo. The Republican Party during the late 1930s abandoned opposition to the basic contours of the administrative state in order to remain competitive in national elections. These reasons often prove mutually supportive. Some persons may concede that a constitutional status quo cannot be successfully challenged because too many other persons now think the status quo was settled right or should be settled. The longer a matter is settled, the more people are likely to think the matter settled right.

Judicial review is a poor vehicle for bringing about the conditions necessary for enduring political settlements of constitutional controversies. Judicial opinions rarely create a strong public consensus that a proposed settlement is right. Studies suggest that controversial judicial rulings tend to intensify constitutional conflicts, inspiring both supporters and opponents of the decision to redouble their political efforts. Judicial opinions rarely persuade the losing party that their cause has little political appeal. Pro-life forces who have triumphed repeatedly in national elections have not been moved to forswear opposition to legal abortion merely because they have lost again and again in the judiciary. Judicial decisions may have put the final nail in the laissez-faire coffin, but the 1936 election better explains why Republicans accepted the New Deal than *NLRB v. Jones & Laughlin Steel Corp.* The election of 1964 did far more to scuttle Jim Crow than the Supreme Court.

Judicial decisions typically settle political disputes only when prominent political actors previously agreed that the judicial decision would be regarded as authoritative. Such agreements take place. Marylanders in 1819 agreed to stop taxing the national bank if the Supreme Court declared the state tax unconstitutional. These agreements, however, have historically bound only the parties to the deal. *McCulloch v. Maryland* ended the constitutional dispute between Maryland and the national government, but that decision did little to forestall antibank politics in other states. Northern Democrats honored their agreement to abide by the judicial decision in *Dred Scott*. Republicans who were not parties to that agreement castigated the Taney Court’s decision.
Opponents of national expansion recognized that their behavior would determine whether official acts temporarily or permanently settled the West. Those representatives who in 1845 insisted that the Constitution did not vest the national government with the power to acquire territory regarded the status of the Louisiana Purchase and Florida as settled by a "general acquiescence" that went far beyond the constitutional majority of elected officials necessary to ratify a treaty or pass laws. State representatives in Boston grudgingly declared that the Louisiana Purchase was part of the United States only because "the consent of Massachusetts may have been given or inferred to the admission of the States already by general consent, forming a part of the Union, from such territory." This "unanimity of public sentiment" entitled all persons to act on the basis that formerly disputed territories were permanent parts of the United States. "(W)e may submit to an unconstitutional act so long, making no efforts for its repeal or overthrow," Hamlin declared, "until the interests of innocent men have become so interwoven with its existence, as in the case of the Louisiana Purchase, that its repeal or overthrow would be unjust."

This consent was not initially given to the annexation of Texas. Hamlin predicted that should the joint resolution be passed, "there will go up one continued, determined, unceasing cry for repeal, till it is done." This outcry prevented Texans from developing the reliance interests necessary for permanent settlement of Texas statehood. Julius Rockwell emphasized the ongoing agitation against annexation when he declared that the joint resolution did not constitutionally bind future representatives. A congressional decision rejecting Texas statehood would be just, he declared, because "(i)t was well known to everybody in and out of Texas, that great and strenuous objection was made in that Congress against giving that consent [to annexation], and its constitutional power steadfastly denied."

The constitutional status of Texas was settled when opponents of annexation abandoned the fight. Hamlin's prediction of unrelenting opposition proved wrong. Texas was settled for the same reason Louisiana was settled. The issue was no longer contested. Some southern Whigs abandoned the fight as politically too risky. A few northern Whigs abandoned the fight before statehood on the ground that the annexation vote had settled matters. Other northern Whigs abandoned the fight after the vote on statehood for reasons not entirely known. What matters is the abandonment, not the reasons. Various Whig decisions to refrain from making further constitutional attacks on the joint resolution established that Texas was not an independent nation. For as long as opponents of annexation remained on the field of battle, the constitutional status of Texas was unsettled and could not be settled, even by a judicial decision or fifty declaring the joint resolution constitutional. What matters from a present constitutional perspective is not the validity of the constitutional reasons Whigs gave for opposition to the annexation of Texas, but the
brute fact that they abandoned those constitutional attacks after the vote on statehood.

By withdrawing their constitutional and other objections to annexation, opponents of Texas engendered reasonable expectations that Texas would be a permanent part of the United States. All persons could make political and economic plans knowing that the national government would for the foreseeable future regard Texas as a state. Texas statehood no longer depended on the outcome of elections because no social movement that might influence an election was contesting annexation. Politics, not law, initially made Texas statehood immune to partisan assault. As long as powerful opponents of annexation remained in the field, Texans had no more legitimate expectation that statehood was permanent than persons who presently operate an abortion clinic in a socially conservative state can expect their enterprise will survive the overruling of Roe. Reasonable expectations are created by practices of constitutional politics, most notably the willingness of persons to think a constitutional mistake settled, not theories about constitutional law. Rights and statuses depend on the outcome of no election only when those rights and statuses are not challenged during political campaigns.

Principles of constitutional law did not compel opponents of annexation to abandon their objection after the vote on statehood. The anti-Texas movement might have folded tents after the vote on annexation. Alternatively, the fight might have been carried to the Supreme Court, the next series of national elections, or for that matter, the oracle at Delphi. No particular process compelled Texas opponents to concede defeat. On some matters, opponents of slavery never gave up. Neither the Fugitive Slave Act of 1850 nor judicial decisions sustaining that measure weakened political attacks on fugitive slave laws. Texas proved different. Unlike other issues affecting slavery, opponents of annexation concluded after losing several votes that this constitutional issue was best settled, even if not settled right.

The West was similarly settled because opponents of national expansion consistently threw in the towel after initial defeats. Their willingness to abide by measures initially described as null and void created a constitutional understanding that constitutional mistakes made when acquiring territory cannot be cured. Once American sovereignty is extended over a territory intended to become a state, that sovereignty cannot be withdrawn merely because the original decision was unconstitutional. This actual practice has normative legal foundations. Entrenching statehood is more important than entrenching individual rights. The costs of instability are higher when states are not entrenched. The costs of mistakes are higher when individual rights are entrenched. Still, the normative force of these arguments depends to a fair degree on whether they describe a political practice. What matters when determining whether a constitutional issue is settled is whether most Americans accept some argument for settlement, not whether most Americans
should accept some argument for settlement. Settlement describes a practice of constitutional politics, not a principle of constitutional law.

NATIONAL EXPANSION AND CONSTITUTIONAL THEORY

The West was settled by persons who initially opposed national expansion and the annexation of Texas. Proponents of national expansion had the power to pass laws acquiring territories and annexing foreign countries by joint resolutions. Opponents of national expansion had the power to determine whether these decisions would be permanent. They exercised that power by consistently abandoning their objections to additional territories and the means by which those territories were acquired. Elite legal theorists might interpret these withdrawals as subtly amending Articles I and V. Ordinary citizens might simply note that territorial and statehood decisions cannot be revoked. Ordinary legal thought has difficulty explaining how the West was settled because permanent constitutional settlements are more about constitutional politics than constitutional law.

This excursion into the process by which the West was settled highlights several important reasons for considering the Constitution outside of the courts. The first, noted in the introduction to this volume, is that jurocentric constitutional law presents an incomplete picture of constitutional development. From the removals debate of 1789 to the impeachment debates of 1998, numerous constitutional controversies have taken place outside the courtroom. In Jacksonian America, scarcely any constitutional question arose that was converted into a judicial question. The presidential veto power, internal improvements, and the annexation of Texas were only a few of the constitutional controversies that arose and were settled to some degree by nonjudicial officials. As Michael Kent Curtis demonstrates, the post-Civil War Constitution was largely structured in light of prewar constitutional debates over free speech and other rights that took place almost entirely in the legislative branches of government.

The above analysis also suggests how constitutional theory has been skewed by a focus on the constitutional issues that routinely come before courts. As Keith Whittington astutely points out, claims that the judiciary is necessary to settle constitutional issues fail to acknowledge how numerous constitutional issues that need to be settled never come before the judiciary. Claims that all constitutional issues should be unsettled, while plausible with respect to the constitutional issues that routinely come before the judiciary, seem highly implausible with respect to the constitutional issues associated with national expansion. The very debate over which combination of government officials decide constitutional questions, appropriate when the issue is "what is to be done now," ignores the political and legal dynamics necessary for more permanent settlement of the constitutional questions raised by the Louisiana Purchase and the annexation of Texas.
This chapter is largely a first pass at how constitutional theory might incorporate the constitutional issues raised by national expansion. My analysis suggests that, rather than think in terms of settlement in general, we need to explore the different reasons why entrenchment is appropriate in some constitutional areas, making important distinctions between issues that should be settled and issues that should only be settled right. Constitutional analysis of more permanent settlements may roam outside of courts and outside of elections to informal decisions made by persons seeking future power to determine official constitutional meetings. These speculations, at best, require substantial revision and, at worse, are wrong. The fundamental insight, nevertheless, seems correct. A constitutional theory unresponsive to the questions raised by the Louisiana Purchase and annexation of Texas is no more justifiable than a constitutional history that does not discuss national expansion.

NOTES

3. See analysis that follows.
6. Gore wins if, in addition to Texas, the votes of any other constitutionally dubious state are tossed. This includes all states west of the Mississippi (Constitution gives the United States no power to acquire territory), Florida (same), and Rhode Island (coerced into joining the Union in 1791). Gore wins 164 to 111 if only states and territories as of 1789 are included. North Carolina (14 for Bush) should also be added, but a good case might be made that Rhode Island (4 for Gore) was unconstitutionally coerced into ratifying the Constitution. Bush gained 74 electoral votes from the Louisiana Purchase, 25 from the annexation of Florida, 12 from the Mexican War, 3 from the purchase of Alaska, and 32 from the annexation of Texas. Gore gained 39 from the Louisiana Purchase, 59 from
the Mexican War, and 4 from the annexation of Hawaii. In short, on any plausible constitutional theory that rejects some aspect of American expansionism (it is impossible to generate a theory by which Louisiana, Florida, and Texas are good, but gains from the Mexican War bad), Gore wins the 2000 election.

7. See Molly Ivins, "Hopelessness Sparks Militancy," San Antonio Express-News, May 2, 1997 (describing members of the Republic of Texas who believe that Texas was never a constitutional part of the United States).


10. See pp. 89-91, below.

11. Seidman, Our Unsettled Constitution.


18. See, for example, Congressional Globe, 28th Cong., 2d sess., app., 105 (speech of Dean); Congressional Globe, 28th Cong., 2d sess., app., 222 (speech of Andrew Johnson); Congressional Globe, 28th Cong., 2d sess., 158.


22. Paulsen, "If at First," 803.


27. Paulsen, "If at First," 806. See Paulsen, "If at First," 809 ("[t]he United States Supreme Court is the ultimate arbiter of the Constitution").
29. Ordinariness is again crucial to the argument. Republic of Texas assertions might be considered lunatic if the status of Texas can be straightforwardly decided from broadly accepted premises, even though some elite law professor has an intriguing theory
donstrating that Texas is really not part of the union.
32. See, i.e., *Congressional Globe*, 28th Cong., 1st sess., app., 682 (Jarnigan); *Congressional Globe*, 28th Cong., 2d sess., app., 298-95 (Kennedy); *Congressional Globe*, 28th Cong., 2nd sess., app., 336-37 (Hudson).
33. See *Congressional Globe*, 28th Cong., 2d sess., app., 377 (Hamlin); *Congressional Globe*, 28th Cong., 1st sess., app., 377 (Giddings); *Congressional Globe*, 28th Cong., 2d sess., app., 395 (Winthrop).
34. See Paulsen, "If at First," 805.
36. 41 U.S. 539 (1842).
43. See, for example, *Congressional Globe*, 28th Cong., 2d sess., 246 (Walker); *Congressional Globe*, 28th Cong., 2d Sess., app., 234-36 (Woodbury).
47. Mississippi v. Johnson, 475 U.S. 475, 500 (1866).
49. Monell v. Department of Social Servs., 436 U.S. 658, 709 n.6 (1978) (Powell, J.,
   concurring).
50. See Cumming v. County Board of Education, 175 U.S. 528 (1899); Gong Lum v.
   Rice, 275 U.S. 78 (1927).
51. Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (citing Roberts v. City of Boston,
   59 Mass. 198 (1849)).
   trine itself was not challenged").
55. 527 U.S. 706.
56. 2 U.S. 419.
57. Paulsen, "If at First," 808-9.
   University Press, 1999); Jeremy Waldron, Law and Disagreement (New York: Oxford
   University Press, 1999). See also Sanford Levinson, Constitutional Faith (Princeton,
59. See Barry Friedman, "The History of the Countermajoritarian Difficulty, Part One:
   The Road to Judicial Supremacy," 73 New York University Law Review 333 (1998); Barry
   Friedman, "The History of the Countermajoritarian Difficulty, Part II: Reconstruction's
   Political Court," 91 Georgetown Law Journal 1 (2002); Barry Friedman, "The History of
   the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner," 76 New York
   University Law Review 1383 (2001); Barry Friedman, "The History of the Countermajoritar
   ian Difficulty, Part Four: Law's Politics," 148 University of Pennsylvania Law Review 971
   (2000); Barry Friedman, "The Birth of an Academic Obsession: The History of the Coun
61. But see Brock, "The Republic of Texas," 735 (noting that some commentators dis
   pute the legitimacy of acquisitive prescription).
   Law).
64. Virginia v. Tennessee, at 524.
65. Congressional Globe, 28th Cong., 2d sess., app., 693.
66. Congressional Globe, 28th Cong., 2d sess., app., 222. For similar remarks, see Con
   gressional Globe, 28th Cong., 2d sess., app., 105 (Dean), 284-85 (Ashley); Congressional
   Globe, 28th Cong., 2d sess., 158 (Hammett).
67. See pp. 86-87, below.
68. Paulsen, "If at First," 811; Brock, "The Republic of Texas," 736.
69. John P. Kaminski, "Rhode Island: Protecting State Interests," in Ratifying the
   Constitution, ed. Michael Allen Gillespie and Michael Lienesch, 382-86 (Lawrence, KS:
70. Paulsen, "If at First," 805-6.
71. Thomas Jefferson to John C. Breckinridge, August 12, 1803, Thomas Jefferson: Writ

when I consider the limits of the U S are precisely fixed by the treaty of 1783, that the Constitution expressly declares itself to be made for the U S, I cannot help believing the intention was to permit Congress to admit into the Union new States, which should be formed out of the territory for which, & under whose authority alone, they were then acting.


74 Brauer, "Massachusetts State Texas Committee." 218 (quoting a resolution of the Massachusetts State Texas Committee).


79. For Hawaii, see Wm. A. Dunning, "Record of Political Events," 13 *Political Science Quarterly* 364, 370 (1898).

80. See *Congressional Globe*, 29th Cong., 1st sess., 553, 566, 952.

81. See, for example, *Congressional Globe*, 28th Cong., 2d sess., app., 377.


89. See Congressional Globe, 28th Cong., 1st Sess., App. p. 707; Congressional
Globe, 28th Cong., 2nd Sess., App. p. 79; Congressional Globe, 28th Cong., 2nd Sess.,
p. 281.
90. For Louisiana, see Annals of Congress, 11th Cong., 3d sess., 525-41 (Josiah Quincy
of Massachusetts); Annals of Congress, 8th Cong., 1st sess., 58 (Tracey of Connecticut).
91. See footnotes 66-67, above, and the relevant text.
92. See footnotes 74-75, above, and the relevant text.
93. Those scholars who think Brown constitutionally wrong but irreversible do so
cause they believe the result morally right. See Christopher Wolfe, The Rise of Modern
Judicial Review: From Constitutional Interpretation to Judge-Made Law (New York: Basic,
1986), 380 n. 52.
95. The canonical article on the virtues of entrenchment is Stephen Holmes,
"Precommitment and the Paradox of Democracy," in Constitutionalism and Democracy,
ed.
96. Outright fraud or certain forms of coercion may present other issues.
98. The paraphrase is from Casey, at 843 (opinion of O'Connor, Kennedy, and Souter,
JJ.).
99. For a discussion of unconstitutional constitutional amendments, see Walter F.
Murphy, "Merline's Memory: The Past and Future Imperfect of the Once and Future Pol
icy," Responding to Imperfection: The Theory and Practice of Constitutional Amendment
100. 17 U.S. 316 (1819).
102. See footnotes 82-84, above, and the relevant text.
103. Or, as recent events suggest, only temporarily settled.
104. See Charles Franklin and Liane C. Kosaki, "Republican Schoolmaster: The U.S.
Supreme Court, Public Opinion, and Abortion," 83 American Political Science Review 751
(1989).
105. 301 U.S. 1 (1937).
106. See Mark A. Graber, "The Passive-Aggressive Virtues: Cohen v. Virginia and the
Problematic Establishment of Judicial Power," 12 Constitutional Commentary 67, 86
(1995); Dwight Wiley Jessup, Reaction and Accommodation: The United States Supreme
107. See Mark A. Graber, "Desperately Ducking Slavery: Dred Scott and Contempo-


116. Secession complicates this a bit.

117. See especially, Whittington, *Constitutional Construction*.

118. See Graber, "Tocqueville's Thesis Revisited."

