



Washington and Lee University School of Law
Washington and Lee University School of Law Scholarly Commons

Scholarly Articles


Faculty Scholarship

2023

Allow Me to Transform: A Black Guy's Guide to a New Constitution

Brandon Hasbrouck

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlufac>

 Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), and the [Law and Race Commons](#)

ALLOW ME TO TRANSFORM: A BLACK GUY'S GUIDE TO A NEW CONSTITUTION

Brandon Hasbrouck*

ALLOW ME TO RETORT: A BLACK GUY'S GUIDE TO THE
CONSTITUTION. By *Elie Mystal*. New York: The New Press. 2022.
Pp. 270. Cloth, \$25.10; paper, \$17.66.

INTRODUCTION

What happens to a dream deferred?
—Langston Hughes¹

Constitutional law seeps into our daily lives in America. Whether it's a state legislature taking another shot at undermining civil rights or a police car that just pulled up behind you, the Constitution matters for how you will—or, if you're Black, more likely won't—enjoy meaningful recourse to the law. Unsurprisingly, both the function and malfunction of the Constitution have generated numerous volumes of commentary, some aimed at specialists and some at the general public.²

Elie Mystal's *Allow Me to Retort: A Black Guy's Guide to the Constitution*³ works within the tradition of lay synopses of constitutional law, filling a gap among those that came before. Some works have provided nonlawyers with an

* Associate Professor of Law, Washington and Lee University School of Law. J.D., Washington and Lee University School of Law. I want to thank Melissa Murray, Leah Litman, Alex Klein, and Jillian Hasbrouck for their inspiration, guidance, and feedback. Shout out to my research assistant Warren Buff whose outstanding work and humor made this Review better. I am grateful for the extraordinary support of the Frances Lewis Law Center at the Washington and Lee University School of Law. So much love to the amazing editors at the *Michigan Law Review*—specifically Elena Meth, Gabe Chess, Robert Brewer, Ted Steinberg, David Holmes, Rita Elfarissi, and Carter Brace—for superb editing and thoughtful comments that significantly advanced this piece. For my daughters. Black Lives Matter.

1. LANGSTON HUGHES, *Harlem* (1951), reprinted in THE COLLECTED POEMS OF LANGSTON HUGHES 426, 426 (Arnold Rampersad & David Roessel eds., 1995).

2. See generally, e.g., JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021); CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA (2021); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (6th ed. 2019) (well, okay, Chemerinsky's supplement isn't exactly for general audiences).

3. Legal Analyst, *The Nation*.

explicitly Black perspective on major issues in modern civil rights,⁴ while others have provided an introduction to constitutional law as a field.⁵ Mystal broadens the focus and audience, illuminating constitutional issues with his trademark humor and his life experience as a Black man in America. He creates a comprehensive overview for lay readers, emphasizing the experiences and needs of Black men. The result is a guidebook to recognizing, applying, and navigating the Constitution in its intersections with our daily lives.

While the Constitution's engagement with substantive rights might be the most obvious topic for a practical, lay guide, *Retort* also explores constitutional structures. This examination proceeds with an impulse toward remedy and repair, either by changing the Constitution or its interpretation. There's no question that the Constitution fails—perhaps intentionally—to serve large portions of American society.⁶ *Retort* consequently takes right-wing, results-oriented originalism to task for its disingenuous methodology of choosing “original” meanings to exalt and its inaptness in choosing appropriate rules for an egalitarian, multiracial society.⁷ Plenty of people involved in the drafting and later interpretation of the Constitution favored a social order dominated by white men (p. 129). But the preferences of the dead hardly form a reasonable basis for organizing our society today.⁸ By exploring both the structural and rights-oriented dimensions of constitutional law, *Retort* can fully engage with racism—past and present—in the field.

Part I explores how *Retort* works as a guide to the Constitution. Because the relationship between *Retort*, the Constitution, and the reader alternately progresses through different practical approaches, Part I explores in turn the roles of field, user's, and survival guides. While the first two formats should be entirely familiar to the general reader, the third is easily the most pertinent to

4. See generally, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* (2018).

5. See generally, e.g., COREY BRETTSCHEIDER, *CIVIL RIGHTS AND LIBERTIES* (2013); ABRAHAM L. DAVIS & BARBARA LUCK GRAHAM, *THE SUPREME COURT, RACE, AND CIVIL RIGHTS* (1995).

6. See Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, *FREEDOM CTR. J.*, 2019, at 75.

7. Compare Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006), with JACK M. BALKIN, *LIVING ORIGINALISM* (2011). Originalism isn't inherently aligned with conservative outcomes, but it is particularly attractive as a political justification for conservative legal doctrines. The doctrine's rise to prominence in the wake of the civil rights movement's legal victories should surprise precisely no one. See Calvin TerBeek, “*Clocks Must Always Be Turned Back*”: *Brown v. Board of Education and the Racial Origins of Constitutional Originalism*, 115 *AM. POL. SCI. REV.* 821, 832 (2021) (“[T]he modern GOP's constitutional ‘originalism’ grew directly out of resistance to *Brown*.”).

8. See Letter from Thomas Jefferson to “Henry Tompkinson” (Samuel Kercheval) (July 12, 1816), in 10 *THE PAPERS OF THOMAS JEFFERSON, RETIREMENT SERIES* 220, 226–27 (J. Jefferson Looney ed., 2013) (“[L]aws and institutions must go hand in hand with the progress of the human mind . . . [W]e might as well require a man to wear still the coat which fitted him when a boy, as civilised society to remain ever under the regimen of their barbarous ancestors.”).

a Black man in America. Some of the user's-guide material is geared toward survival, too—particularly the passages oriented toward altering the structure of our government. *Retort* succeeds in being a guide to the institutions and injustices of American constitutional law.

There's more to constitutional law than just identifying its injustices, though. *Retort* is rather brief in its attention to the abolitionist potential of the Constitution and the ways we might improve upon this document drafted by slavers, colonizers, and their comrades. While I can't help but agree with Mystal that any novel interpretive frame or beneficial amendment is dead on arrival with the current Supreme Court, that hardly justifies excluding them from the discussion. Mystal does say he'd prefer a new constitution (pp. 237–38)—and has doubled down on this in his recent media appearances.⁹ But he spends very few pages, relatively speaking, on what a better constitution would look like. Part II connects the dots between the problems in current constitutional law and their solutions in abolition constitutionalism. Part III goes further, expanding on the few constitutional reforms suggested in *Retort* to build a more complete vision of what a new constitution would look like for America.

I. A GUIDE TO OUR APARTHEID CONSTITUTION

*Does it dry up
like a raisin in the sun?
Or fester like a sore—
And then run?
Does it stink like rotten meat?
Or crust and sugar over—
like a syrupy sweet?
—Langston Hughes¹⁰*

Constitutions are not always static, living on and on in a kind of institutional inertia. Occasionally, constitutional governments have experienced a moment of profound rupture—the kind of rupture that prompts a wholesale reappraisal of the foundations of government. South Africa is instructive on this point. The transition from South Africa's colonial, racially exclusionary constitution to its fully representative constitution proceeded in stages. First, a series of conventions and forums attempted to foster multiparty negotiations on a constitutional transition.¹¹ These negotiations eventually produced an interim constitution, principles to guide the development of a permanent constitution, and a democratically elected body to draft the new constitution.¹²

9. The View, *Elie Mystal Shares the Reason Behind His Book, 'Allow Me to Retort,'* ABC NEWS (Mar. 4, 2022), <https://abcnews.go.com/theview/video/elie-mystal-shares-reason-book-retort-83255082> [perma.cc/APP5-6QND].

10. HUGHES, *supra* note 1, at 426.

11. Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT'L L. 47, 58–59 (2004).

12. *Id.*

While the initial negotiating groups were not democratically elected, their commitment to broad, democratic participation in the final process helped ensure the constitution's legitimacy.¹³

The United States is currently facing the kind of disruptive moment that *should* prompt reappraisal of the basic foundations of our government. Our government is deeply unpopular¹⁴ and faced with a series of crises that threaten our society.¹⁵ Despite over a year of public protests and commentary, we have done little to meaningfully address racial inequality¹⁶—and a political solution may be impossible under our current system.¹⁷ *Retort* comes to the Constitution with an awareness of this moment and of how the Constitution shaped and was shaped by previous disruptions.

Mystal argues that—unlike South Africa—when the United States first faced a reckoning for its racist original sins, we left our apartheid constitution in place and hoped a few Band-Aids would fix it (p. 127). Thanks to the modern efforts of bad-faith conservatives and their bad-faith legal philosophy of originalism,¹⁸ that failure to start the whole thing over from scratch perpetuates a litany of injustices, old and new. With so many participants in the system

13. See *id.* at 59.

14. See *Congress and the Public*, GALLUP, <https://news.gallup.com/poll/1600/congress-public.aspx> [perma.cc/T69R-8UHG] (showing consistently low approval of Congress as an institution for almost two decades); Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sept. 23, 2021), <https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx> [perma.cc/M6V4-P3QY].

15. See, e.g., Tobi Thomas, Adam Gabbatt & Caelainn Barr, *Nearly 1,000 Instances of Police Brutality Recorded in US Anti-Racism Protests*, GUARDIAN (Oct. 29, 2020, 11:01 AM), <https://www.theguardian.com/us-news/2020/oct/29/us-police-brutality-protest> [perma.cc/5LP5-ZFGQ]; Melissa Denchak & Jeff Turrentine, *What Is Climate Change?*, NRDC (Sept. 1, 2021), <https://www.nrdc.org/stories/what-climate-change> [perma.cc/8LDM-YH95]; David Wallace-Wells, *What a Single Metric Tells Us About the Pandemic*, N.Y. MAG. (Mar. 26, 2022), <https://nymag.com/intelligencer/2022/03/covid-excess-mortality.html> [perma.cc/2ZDB-DJ65] (exploring excess mortality during the coronavirus pandemic); Anneken Tappe, *Consumer Price Inflation Hit a New 40-Year High in March*, CNN BUS. (Apr. 12, 2022, 11:07 AM), <https://www.cnn.com/2022/04/12/economy/consumer-price-inflation-march/index.html> [https://perma.cc/5K5Z-Y5JQ]; John Gramlich, *A Look Back at Americans' Reactions to the Jan. 6 Riot at the U.S. Capitol*, PEW RSCH. CTR. (Jan. 4, 2022), <https://www.pewresearch.org/fact-tank/2022/01/04/a-look-back-at-americans-reactions-to-the-jan-6-riot-at-the-u-s-capitol/> [perma.cc/ZB5N-XZUU] (describing deep partisan divisions in Americans' views on the insurrection).

16. Janell Ross, *Americans Have Learned to Talk About Racial Inequality. But They've Done Little to Solve It*, TIME (May 13, 2021, 6:30 AM), <https://time.com/6046298/america-racial-inequality/> [perma.cc/D2EW-HCYN].

17. See Brandon Hasbrouck, *Don't Be Fooled by the 2022 Congressional Map*, NATION (Apr. 5, 2022), <https://www.thenation.com/article/politics/2022-congressional-map/> [perma.cc/85ZD-VDF8] (describing the inequalities baked into our legislative districts through disenfranchisement).

18. Dean Obeidallah, *Elie Mystal: Our Constitution Is "Actually Trash" — But the Supreme Court Can Be Fixed*, SALON (Mar. 23, 2022, 6:30 AM), <https://www.salon.com/2022/03/23/elie-mystal-our-constitution-is-actually-trash--but-the-can-be-fixed/> [perma.cc/M57C-LG9F] (“Originalists have this PR campaign that they’re going back to the original definitions of the

arguing in bad faith, the already technical field of constitutional law gets a bit more obscure.¹⁹

Thankfully, *Retort* serves as a guide to the Constitution on many levels. It functions as a field guide, helping readers identify the role of constitutional law in their daily lives. It also functions as a user's guide, pointing out practical areas of constitutional law that Americans might actually redress and reform through political processes. Finally, it functions as a survival guide for Black men. In this respect, it makes clear that for some Americans, merely understanding the Constitution at both the surface and granular levels will not suffice. Indeed, the Constitution itself may cultivate the conditions that render America *unsafe* for certain constituencies. With this insight in mind, *Retort* is a survival guide for Black men in America, providing them with practical information for interacting with—and surviving—the various encounters with the law that the Constitution underwrites. Overall, these approaches combine to make *Retort* a useful and entertaining lay guide to the Constitution, even if its proposed solutions leave something to be desired.

A. Field Guide

Retort acts as a field guide—a genre more typically found guiding readers through plants, animals, and minerals in the natural world—by pointing out the various ways that our Constitution intersects with our mundane lives. The Constitution not only governs our relationship with our government, it also comes up constantly in the myriad bad-faith arguments conservatives casually throw around. They'll distort the Constitution, claiming that their liberty rights mean you have to make special allowances for them but that the Constitution doesn't really protect equality in any meaningful way. *Retort* aims to help the lay reader recognize such bad-faith individual rights arguments. In matters of criminal procedure, many of those bad-faith arguments have crystallized into bad doctrines thanks to conservative courts, and *Retort* serves as a field guide to these, too. Although this is an area where *Retort* does little new in the realm of lay constitutional law guides, Mystal's biting insight and humorous treatment of the Constitution land admirably, making *Retort* a worthy choice among a crowded field.

Retort opens its discussion of the Constitution with three chapters about some of the rights we most often encounter in bad-faith conservative arguments: free speech, freedom of religion, and the right to bear arms. Bad-faith freedom-of-speech arguments mostly stem from conflating the ideal of free speech with the protection from government interference with speech

Constitution as understood by the founders, when really they're just making stuff up that's convenient for their current political agenda.”).

19. See also Elie Mystal & Dahlia Lithwick, *Nation Conversation: A Black Guy's Guide to the Constitution*, NATION (Mar. 16, 2022), <https://www.thenation.com/events/elie-mystal-book-black-guys-guide-to-constitution/> [perma.cc/BED3-LKL3] (discussing Justice Scalia's intellectual dishonesty in citing George Mason's speech promoting the Second Amendment as evidence that it was meant for self-defense while leaving unsaid what Mason wanted protection from).

(pp. 11–12). *Retort* aims to help readers recognize when freedom of speech protects the very things that conservatives complain are infringing upon their “rights” (p. 12). Yet these very conservatives often seek to weaponize the law against free speech—whether it’s Peter Thiel and company suing Gawker out of existence, Devin Nunes going after a parody Twitter account claiming to be his cow, or police beating and gassing people for protesting police brutality (pp. 16–17). Similarly, conservative arguments on freedom of religion have a tremendous propensity to reduce to a defense of the right to persecute others in the name of religion (p. 29). By contrast, conservative bad-faith arguments about gun rights hide the ball by ignoring the intensely racist original intent behind the Second Amendment—which was added entirely to ensure the ability of white southerners to maintain a militia against the risk of slave revolts (p. 37).²⁰ *Retort*, recalling the work of historians like Carol Anderson,²¹ shows how the old white-supremacist militia reasoning held out long enough to determine that the Black Panthers didn’t have gun rights, then gave way to the disingenuous self-defense rationale to privatize racist violence (pp. 34, 39). Conservatives consistently resort to bad-faith constitutional arguments to justify using their liberty rights to push around other people—especially if those other people are Black, female, or queer.

Since kicking people when they’re down is practically the conservative way of life, it’s also no surprise that the conservative theory of equal protection under the Constitution does just that. They act like the Reconstruction Amendments did nothing to drive out the racism that infested the original constitutional order (p. 127). “Originalists try to lock the country into an eighteenth-century kind of understanding of racial equality, and when that fails, as it must in the face of the Reconstruction Amendments, they argue with a straight face that we should be locked into a nineteenth-century white man’s idea of racial justice” (p. 133). Savvy originalists might contort their logic to avoid saying that foundational racial justice cases like *Brown v. Board of Education*²² and *Loving v. Virginia*²³ lack justification in the intended meaning of the Reconstruction Amendments (p. 147). But when they dissent from a decision ensuring that Black people or queer people enjoy equal protection, they slip right back into the arguments of the *Plessy v. Ferguson*²⁴ majority (pp. 153–54). *Retort* lays bare that originalists don’t really believe some kinds of people are, well, people (p. 154). And even though none of the rationales for choosing

20. See generally ANDERSON, *supra* note 2; Carl T. Bogus, Opinion, *Was Slavery a Factor in the Second Amendment?*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/opinion/second-amendment-slavery-james-madison.html> [perma.cc/R3J4-VKNX].

21. See generally ANDERSON, *supra* note 2.

22. 347 U.S. 483 (1954).

23. 388 U.S. 1 (1967). Emphasis on *might* for this one. See Jordan Weissmann, *Senator Says Legalizing Interracial Marriage Was a Mistake, Backtracks Unconvincingly*, SLATE (Mar. 22, 2022, 8:25 PM), <https://slate.com/news-and-politics/2022/03/republican-sen-mike-braun-says-supreme-court-should-not-have-struck-down-state-laws-banning-interracial-marriage-then-backtracks-unconvincingly.html> [perma.cc/EAX4-Q578].

24. 163 U.S. 537 (1896).

classes of people to protect under the Equal Protection Clause can support the notion that white people are a suspect class, conservatives will revolt if any remedial benefit doesn't fall evenly on white people along with the marginalized groups it's meant to help (p. 157). *Retort* exposes the hypocrisy of conservative hot takes on equality—even if correcting them will never result in conservatives accepting that the law should protect everyone (including by improving the lot of oppressed people).

Finally, *Retort* can act as a field guide by helping us recognize copaganda²⁵ in action. Anyone with even a modicum of legal knowledge understands that you don't talk to the police (p. 79). We even make the police remind arrestees that they don't have to talk (p. 80). And yet, the constitutional protection against self-incrimination is incredibly weak—cops can lie and threaten your family to extract a confession (pp. 78, 82–83). The system still fails to prevent even false confessions like those used to convict the Exonerated Five (pp. 83–84). But that failure isn't decried, it's positively celebrated—Linda Fairstein, the prosecutor who relentlessly pursued the prosecution of the Exonerated Five, went on to become a best-selling crime-fiction author and inspired a lead character on the hit TV show *Law & Order: Special Victims Unit* (p. 86). Once you know that, you'll never be able to hear “dun-dun”²⁶ without thinking that someone's civil rights have been—or are about to be—violated.

While these observations are hardly original to *Retort*, they still serve a foundational purpose in a lay discussion of constitutional law. Until we see where our constitutional rights are being eroded, we can't effectively fight to preserve them. As Mystal notes, it is in these encounters with police and other criminal justice officials that laypeople encounter constitutional law, whether they know what to look for or not (pp. 44–45). Having a field guide can help readers spot such encounters early and engage knowledgably with bad-faith conservative arguments. *Retort's* succinct and humorous presentation of the issues make it one that a lay reader can enjoy reading, too.

B. *User's Guide*

Once we recognize the role the Constitution plays in our daily lives, we can get angry about its injustices in more productive ways. *Retort* serves as a user's guide—like the overview of a piece of software's major functions—to the Constitution in large part by directing us to the ways bad Supreme Court decisions could be changed, if we had the political will. Well, if we had the political will *and* a way to muster enough white people to vote against white

25. See Palika Makam, *Copaganda: What It Is and How to Recognize It*, TEEN VOGUE (Aug. 5, 2020), <https://www.teenvogue.com/story/what-is-copaganda-explainer> [perma.cc/99R5-7MCH].

26. If this onomatopoeia is somehow unclear, see Scott Stump, *The Story Behind the Famous 'Dun-Dun' Sound on 'Law & Order'*, TODAY (Feb. 24, 2022, 11:22 AM), <https://www.today.com/popculture/tv/law-order-dun-dun-sound-story-famous-noise-rcna17526> [perma.cc/EM6K-4XR2].

supremacy. *Retort* explicitly claims to be an instruction manual (p. 7) and serves this purpose well.

The brutal reality of politics is that making any meaningful change to policing will be next to impossible. The politicians on the Supreme Court have proven unwilling to rein in police brutality, and local and state politicians have demonstrated no more stomach for the task (pp. 53–56, 58). *Retort* gives a gut-wrenching example from a state the Democrats hold in near-absolute control: California.²⁷ Simply changing the standard for when police could use deadly force—from whenever they “reasonably” believed it was necessary to only when they had “no reasonable alternative”—was too much to ask (pp. 58–60). While that language already falls short of an objective standard, police and their unions threw a fit over the very idea that their behavior might be judged in a court of law (p. 59). The final compromise, while shifting the focus to the necessity of the use of force, still evaluates that necessity from the perspective of a reasonable *police officer*.²⁸ But, “[b]ringing the police to heel will require us to stop letting them substitute their judgment for our constitutional protections” (p. 60). Even if we could reform policing into something that respects human rights, white people probably lack the will to do it.²⁹

Retort rightly recognizes the role of legislatures in ensuring that white people retain political power at the expense of everyone else.³⁰ Any substantive change will require convincing elected leaders to implement it, which gets exponentially harder when they’re elected by illegitimate processes insulating them from the public. In one narrow area, though, that task is significantly more attainable: Electoral College reform. While eliminating the Electoral College entirely would take a constitutional amendment, state legislatures can circumvent it by promising to allocate their electors to the winner of the national popular vote (p. 232). Unfortunately, enacting such a change is fraught with danger. Without a national system for protecting the right to vote, Republican-controlled states would have an extreme incentive to manipulate their reported vote totals (p. 233). And with our current Court, they’d probably get away with it so long as they have even a barely plausible argument (pp. 233–34). Fixing our political system can’t be accomplished by any single reform; and without at least a better Court—and possibly constitutional change—any reform is difficult at best.

Which brings us to the prospect of amending the Constitution. *Retort* begins with a piss-take by charitably considering that conservatives might be

27. Laurel Rosenhall, *Dem Domination: California Legislature Is Turning Many Shades of Blue*, CALMATTERS (June 23, 2020), <https://calmatters.org/politics/2018/11/dem-domination-california-legislature-is-turning-many-shades-of-blue/> [perma.cc/9ZNS-3PV2].

28. See CAL. PENAL CODE § 835a(a)(2) (West 2020).

29. See Laura Santhanam, *A Majority of Americans Say Policing Should Be Reformed. But Most White People Still Don’t Think Police Treat Black People Differently*, PBS (May 21, 2021, 12:00 PM), <https://www.pbs.org/newshour/nation/a-majority-of-americans-say-policing-should-be-reformed-but-most-white-people-still-dont-think-police-treat-black-people-differently> [perma.cc/H4FW-MMMP3].

30. See pp. 224–27.

hemming and hawing about institutions in good faith—maybe “they just honestly believe that the only legitimate way to move beyond our white male supremacist roots is through additional amendments recognizing our evolution as a society” (p. 190). But given that “people who believe in the most shallow and vindictive version of the Constitution are never at the vanguard of amending it” (p. 191), we know that’s implausible. Take the last serious push to amend the Constitution.³¹ The Equal Rights Amendment would have clarified that all those rights the Fourteenth Amendment said everyone gets would also be protected for the rather large portion of “everyone” that are women (p. 194). But it didn’t stall because it was redundant; it was stopped by the twisted argument that “social inequality *benefited* women instead of harming them” (p. 195; emphasis in original).³² Conservatives only care to help the amendment process along when it would “prevent the government from helping people” (pp. 196–97). Even if we had a Court that wouldn’t subvert any amendment with a rotten interpretation, amending the Constitution for the better through its own processes is likely off the table with conservative control entrenched in so many states.

Just having a user’s guide doesn’t make navigating the Constitution easy—it’s a Nintendo Power Strategy Guide, not a Game Genie.³³ The point of reading *Retort* as a user’s guide is to get us thinking about where political pressure could make significant improvements in how the Constitution affects our daily lives. It succeeds in this regard by analyzing not just the legal structures that can and should change, but the pragmatic concerns of mustering the political will to change them. Unfortunately, the prospects in many important areas are bleak, which leaves us to turn to *Retort*’s final area of analysis: surviving constitutional law as a Black man in America.

31. Yes, we’ve ratified the Twenty-Seventh Amendment in the time since Congress sent the Equal Rights Amendment to the states. See Matt Largey, *The Bad Grade That Changed the U.S. Constitution*, NPR (May 5, 2017, 5:00 AM), <https://www.npr.org/2017/05/05/526900818/the-bad-grade-that-changed-the-u-s-constitution> [perma.cc/97F8-4259] (describing how an amendment initially proposed with the Bill of Rights was finally ratified two centuries later). But the Twenty-Seventh Amendment started way earlier, and the push to ratify the Equal Rights Amendment is still a live controversy. See Richard Albert, *Will the Supreme Court Strike Down the Equal Rights Amendment?*, HILL (Mar. 22, 2022, 2:00 PM), <https://thehill.com/opinion/civil-rights/599116-will-the-supreme-court-strike-down-the-equal-rights-amendment/> [perma.cc/KM3R-ABGW] (“In the 40 years since the expiration of the ratification deadline in 1982, three additional states have ratified the ERA: Nevada in 2017, Illinois in 2018 and Virginia in 2020.”).

32. See also Lesley Kennedy, *How Phyllis Schlafly Derailed the Equal Rights Amendment*, HISTORY (Feb. 9, 2021), <https://www.history.com/news/equal-rights-amendment-failure-phyllis-schlafly> [perma.cc/S3VS-V9D5].

33. For anyone under thirty reading this, a Game Genie was an attachment you could put between your game cartridge and the Nintendo that allowed you to use some ridiculous cheat codes.

C. *Survival Guide*

Centering the author's experience as a Black man in America allows *Retort* to provide a view of the Constitution missing from other lay synopses: that of a survival guide. Survival guides tend to focus on keeping yourself alive when everything's going wrong³⁴—which is an apt description of the position of Black men in American constitutional law. Many of *Retort's* chapters—particularly those on criminal law and procedure—focus on some of the most racially imbalanced areas of constitutional law. Given our criminal legal system's propensity for executing Black men—with or without due process—understanding the constitutional contours of criminal law really is a matter of survival.

Retort's engagement with criminal law begins with a phrase simultaneously casual and damning: “The *first four times* I was stopped for driving while Black . . .” (p. 41; emphasis added). That phrase resonates with me. I've been stopped the same way forty-one times in my own thirty-five years, which in anything approaching a just system should shock the conscience. But such justice is not ours, and if you dare to show the police anything other than complete deference, the encounter turns into an invasive search and manhandling (p. 43). “Very few Black men will ever be arrested. But almost all of us have a story about a Terry stop³⁵ that nearly killed us” (p. 45). Those stops stem from a doctrine that was deliberately expressed as a balance of the rights and interests implicated in policing, all of which was almost immediately ignored by the police applying it (pp. 46–48).³⁶ The chapter on police stops may not be the most useful survival lesson, but it provides a reminder of the consequences of running afoul of police who've been given even the slightest latitude to stretch their racist wings.

Retort has many other such useful reminders: “Black police officers can be just as racist as white ones” (p. 53). “[Police] can literally impose the death penalty upon you without a fair trial or a right to appeal . . .” (p. 55). “[T]he right to self-defense, as applied in this country, is one of the most provably racist functions of law that we have statistics for, and stand your ground just

34. See, e.g., FORREST GRIFFIN & ERICH KRAUSS, BE READY WHEN THE SH*T GOES DOWN: A SURVIVAL GUIDE TO THE APOCALYPSE (2010); CODY LUNDLIN, WHEN ALL HELL BREAKS LOOSE: STUFF YOU NEED TO SURVIVE WHEN DISASTER STRIKES (2007).

35. See *Terry v. Ohio*, 392 U.S. 1 (1968).

36. Compare *id.* at 15 (“Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires.”), with Ashley Southall & Michael Gold, *Why ‘Stop-and-Frisk’ Inflamed Black and Hispanic Neighborhoods*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2019/11/17/nyregion/bloomberg-stop-and-frisk-new-york.html> [perma.cc/UJR6-YCSC] (“During [Michael Bloomberg’s] tenure [as mayor] . . . police officers stopped and questioned people . . . on the street more than five million times. Officers often then searched the detainees — the vast majority of whom were young [B]lack and Latino men — for weapons that rarely materialized.”).

makes those racial disparities worse” (p. 63). The Fourth Amendment is “damn near unenforceable” (p. 68). “[T]he cops are there to protect [white] privilege, not enforce the law and keep the peace” (p. 74). “Miranda warnings have become a dumb and reductive prophylactic that law enforcement uses to sanitize otherwise unconstitutional interrogation tactics” (p. 81). Understanding the rules of engagement of policing and other forms of racist violence can all too often save a Black man’s life. While “the Talk”³⁷ covers the material shape and consequences of those rules, *Retort* digs into the structures behind them.

More than just evaluating the symptoms or diagnosing the disease, though, *Retort* addresses the underlying conditions and prescribes the treatment to address them. Chief among those underlying conditions is the bad faith of conservative judges in refusing to simply apply the self-evident meaning of the Constitution’s text. Take the Fifth Amendment’s prohibition on compelled testimony against self-interest. Sure, the originalist reading is that this deals with confession under the duress of torture or compelling answers under oath, but there’s no good reason to be bound by that understanding.³⁸ Modern police who intimidate through their armed presence and coerce through threats and deception weren’t the concern the authors of the Fifth Amendment sought to remedy—because they didn’t exist yet.³⁹ Or take the Eighth Amendment: James Madison didn’t understand that solitary confinement has all the psychological earmarks of torture—but why should that matter when evaluating whether it’s cruel and unusual?⁴⁰ The words are clear whether or not a bunch of eighteenth-century enslavers and colonizers had the foresight to grasp the circumstances of modern life and science.

Originalism’s bad faith is particularly apparent in the judicial mistreatment of the Reconstruction Amendments. “Looking to Jim Crow-era white society for guidance on how to bring about racial equality, of all things, is insane” (p. 143). The Reconstruction Amendments can and must mean more than the narrow interpretations they were given in the *Slaughter-House*

37. See e.g., Gustavo Solis, *For Black Parents, “the Talk” Binds Generations and Reflects Changes in America*, USC NEWS (Mar. 10, 2021), <https://news.usc.edu/183102/the-talk-usc-black-parents-children-racism-america/> [perma.cc/KUJ4-KRFD]; *Utah v. Strieff*, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting) (“For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.”).

38. Pp. 77–78; see U.S. CONST. amend. V (“No person shall . . . be compelled in any criminal case to be a witness against himself . . .”); Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457, 1486 n.56 (1997) (book review) (discussing the originalist understanding of the prohibition against torture in terms of historical concerns about torture as legal process).

39. Gary Potter, *The History of Policing in the United States, Part 1*, EKU ONLINE (June 25, 2013), <https://ekuonline.eku.edu/blog/police-studies/the-history-of-policing-in-the-united-states-part-1/> [perma.cc/EXC7-G4TU].

40. P. 117; U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

Cases,⁴¹ the *Civil Rights Cases*,⁴² and *Plessy v. Ferguson*.⁴³ But *Retort* points out that the current Court is too much like its nineteenth-century iterations in those cases to advance the sort of color-conscious jurisprudence it did in the era of *Loving* and *Brown* (pp. 150–51, 154). So long as bad-faith originalism reigns supreme at the Supreme Court, our constitutional law will retain its racist edge.

The remedies *Retort* puts forward for this problem are incomplete, at best. Sure, we could read the clearly rights-affirming text of the Constitution in good faith and decline to limit it to what mediocre-to-awful white men over a century ago could conceive (pp. 134–35). That would require a judiciary willing to reject bad-faith originalism, though, and conservative politicians are dead set against allowing that.⁴⁴ Maybe *Retort's* structural solution—expanding the Supreme Court (p. 252)—could help with their intransigence, but conservative politicians remain dead set against that, too.⁴⁵ Court expansion is probably a necessary precursor to remedying our constitutional order, but it's insufficient on its own.⁴⁶ That leaves little more than *Retort's* suggestion that we reinvigorate the Ninth Amendment (p. 238). But conservatives practically ignore the Ninth Amendment's protection of unenumerated rights while salivating at the thought of allowing states to trample them through Tenth Amendment deference (p. 240). An honest originalist would acknowledge the intended power and purpose of the Ninth Amendment—but we don't have honest originalists. We have conservative ideologues who understand that the Ninth Amendment is one of the Constitution's greatest threats to their project (p. 239). Ninth Amendment originalism will fare no better than Supreme Court expansion or wishing for good-faith readings of the Constitution. Unfortunately, these are the best solutions *Retort* offers. While they're meritorious, they likely would fail to remedy our unjust constitutional regime.⁴⁷ Without better solutions than these, Black people will continue to need a survival guide to constitutional law.

41. 83 U.S. (16 Wall.) 36 (1873).

42. 109 U.S. 3 (1883).

43. 163 U.S. 537 (1896).

44. Canaan Suitt, Note, *The Promise and Perils of Textualism for Environmental Advocacy*, 46 WM. & MARY ENV'T L. & POL'Y REV. 811, 813–14 (2022).

45. See e.g., Jordain Carney, *Senate GOP Proposes Constitutional Amendment to Keep Supreme Court at 9 Seats*, HILL (Mar. 25, 2019 7:42 PM), <https://thehill.com/blogs/floor-action/senate/435742-senate-gop-introduces-constitutional-amendment-to-keep-scotus-at-9> [perma.cc/JE7Q-SJ7E].

46. See Brandon Hasbrouck, *Pack the Court with Color-Conscious Justices*, RICH. TIMES-DISPATCH (Oct. 9, 2020), https://richmond.com/opinion/columnists/brandon-hasbrouck-column-pack-the-court-with-color-conscious-justices/article_fbd0ab39-0a70-51d0-a144-a889dd96f158.html [https://perma.cc/Q5JZ-9P2M] (discussing the racial justice issues necessitating Court expansion and the deliberate sort of expansion they demand).

47. See Brandon Hasbrouck, *Democratizing Abolition*, 69 UCLA L. REV. (forthcoming 2023) (discussing the breadth of political, legal, and social activism likely necessary to bring about a complete reconstruction of American society).

II. WHERE'S THE ABOLITION?

*Maybe it just sags
like a heavy load.
—Langston Hughes*⁴⁸

I want to be perfectly clear that I'm not at all disappointed with what Mystal has done in *Retort*. *Retort* works well as a guide to the Constitution, which is precisely what it purports to be. But there are flashes in the text where Mystal has clearly thought further on the issues and chosen to pull back—maybe he's saving some material for *Allow Me to Retort 2: When the Revolution Comes*. To the extent I'm disappointed, it's mostly that I don't get to read his take on an area of law where our thinking seems to be pretty close. So please understand that these next two Parts are an exploration of where I think the work could go next, not me smashing up Mystal's neighbor's car and screaming, "Do you see what happens, Elie?"⁴⁹

The most wanting portion of *Retort* came in the chapter introducing the Reconstruction Amendments—appropriately titled, "The Most Important Part" (ch. 12). The chapter concludes: "[The Reconstruction Amendments] can cure the Constitution of its addiction to white male supremacy, if white people would just take the medicine" (p. 135). But we should not allow bad-faith conservatives to limit the meaning of these amendments to a single, mythical, "original" public meaning (p. 133). This Part examines how we can reclaim the tools of abolition embedded in the Constitution through a concerted campaign of advocacy and organizing that starts with believing in a better constitutional vision—a project I have explored in considerably greater detail in *The Antiracist Constitution*.⁵⁰

That vision is the root of abolition democracy.⁵¹ As *Retort* frequently shows, there is no good reason for us to bind ourselves to bad-faith originalist interpretations of what the Constitution can be (pp. 126, 133, 143, 172–73). But *Retort* focuses on the views of particularly milquetoast abolitionists in its exploration of what the Reconstruction Amendments meant to the Congress

48. HUGHES, *supra* note 1.

49. See *THE BIG LEBOWSKI* (Working Title Films 1998). And seriously, if you haven't seen it, see it.

50. See generally Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87 (2022).

51. See W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880* 182–89 (Free Press 1998) (1935) (describing abolition democracy as requiring universal enjoyment of the respect, education, economic security, resources, civil rights, and franchise that is needed for full, free, and active participation in all significant aspects of public life); Hasbrouck, *supra* note 47 (exploring how a modern abolition democracy could be constructed with an abolitionist understanding of the Reconstruction Amendments).

that passed them (pp. 133–34).⁵² There were far more radical voices—both Black and white—who treated the language of the Reconstruction Amendments as the foundation of a complete reshaping of American society.⁵³ Abolition did not just mean an end of slavery; it meant an end to the political and economic dominion of any group over another.⁵⁴ Considered as a whole, the contributions of these radicals show that the Reconstruction Amendments worked to systematically create an egalitarian society founded upon liberty, opportunity, and fundamental fairness.⁵⁵ We can choose to center the voices of mediocre—or even awful—dead white men, or we can throw in our lot with those who wanted to create a better political, social, and economic order.

The Supreme Court, of course, has thrown its lot in with the former. While Justice Harlan’s famous dissenting proclamation that the Constitution is color-blind⁵⁶ gets a lot of love, *Retort* rightly steps back to the beginning of that paragraph.⁵⁷ When we view him without blinders on, Justice Harlan “was a former slave owner, initially opposed [to] the Thirteenth Amendment, and tolerated various forms of segregation, notwithstanding his *Plessy* dissent.”⁵⁸ And this was the one guy on the Court who thought separate-but-equal was too racist. “[E]ven the ‘best available’ nineteenth-century white men were racist assholes” (p. 146). Because they throw in their lot with the less racist dead white men rather than with antiracism, the Supreme Court rejects color-conscious remedies to racial inequality and perpetuates de facto discrimination.⁵⁹ While *Retort* recognizes the problems of constitutional theories that water down abolition, it fails to embrace abolitionist constitutional interpretations as a retort to bad-faith conservatism.

52. In clinging to the moderate abolitionists, *Retort* mostly centers the views of Abraham Lincoln and Ulysses S. Grant. John Bingham gets a one-sentence mention, but there is little exploration of his more radical views or those of his contemporaries in Congress.

53. See Hasbrouck, *supra* note 50, at 130–41 (exploring the contributions of abolitionists such as Lysander Spooner, Salmon P. Chase, James Harlan, and Lyman Trumbull, among others, to the language and intent of the Reconstruction Amendments); Dorothy E. Roberts, *The Supreme Court 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 57–62, 64 (2019) (discussing the contributions of Frederick Douglass and other Black abolitionists and Reconstruction politicians to the egalitarian reimagining of American society).

54. See DU BOIS, *supra* note 51, at 188; Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1112 (2020) (discussing the power of the Thirteenth Amendment to redress the badges and incidents of slavery).

55. See Hasbrouck, *supra* note 50, at 163.

56. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

57. P. 146; see *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) (“The white race deems itself to be the dominant race in this country. And so it is . . . [and] [s]o, I doubt not, it will continue to be for all time . . .”).

58. Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1, 5 (2013).

59. See Hasbrouck, *supra* note 50, at 113–15; EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 1–4 (6th ed. 2022).

Abolition constitutionalism⁶⁰ isn't just a better interpretation in terms of outcomes for marginalized people, though. It's a coherent theory of the Constitution that applies historical understandings and motivations in line with modern sensibilities—and it does so in ways that can support the entire progressive constitutional enterprise.⁶¹ It's big enough to support remedial legislation far beyond anything our present Congress is even talking about, including reparations and even more radical action.⁶² If we want the Constitution to work for a just society rather than against it, we need to get serious about advocating for abolition constitutionalism. That includes approaching judicial appointments as the life-and-death matter that they are. The judiciary is full of conservative ideologues, and progressives need to fight back by appointing judges who embrace abolition democracy and abolition constitutionalism.⁶³ *Retort* calls for expanding the Supreme Court to remedy the ill effects of the Court's antidemocracy (p. 252). That idea has potential but would be squandered if progressives filled those new seats with mild liberals and institutionalists rather than movement judges.

A shift in the understanding, interpretation, and implementation of the Constitution will require an all-hands-on-deck approach. The struggle for justice must be collaborative and inclusive, with a clear vision of how conservative jurisprudence and politics thwart meaningful liberty and equality.⁶⁴ In *Retort*, Mystal lays bare the racism and injustice of the Constitution as conservatives have interpreted it, contrasting this vision with a common sense reading of the document as a celebration of liberty and equality. Yet *Retort* all too often stops short of spelling out what would make the Constitution not merely okay, but good. This understated approach can raise awareness, but falls short of providing the comprehensive vision needed for the coming struggle. We must unite behind a clear vision of how the Constitution can promote liberty and justice for all—if we're going to keep the current one, that is.

60. See generally Roberts, *supra* note 53 (proposing the utility of the constitutional theories of nineteenth-century abolitionists for modern abolitionist struggles).

61. Compare Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 555 (2015) (summarizing progressive constitutionalism's difficulty in squaring the Warren Court's rights-affirming decisions and *Roe v. Wade* with a rejection of *Lochner*'s primacy of economic rights under substantive due process), with Hasbrouck, *supra* note 50, at 163.

62. See Hasbrouck, *supra* note 50, at 135–36 (discussing the Reconstruction Congress's understanding of the viability of reparations under its concept of the protection of the laws); Hasbrouck, *supra* note 47 (“The institutions liberationist movements seek to build . . . promote the respect, education, economic security and resources, civil rights, and franchise necessary to that participation.”).

63. See Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U.L. REV. 631, 638 (2022) (“Where the progressive judge trusts in judicial norms to eventually bring about a more just society, the movement judge engages in the hard work of shifting fundamental understandings of how the law operates.”).

64. See Hasbrouck, *supra* note 47 (describing the intersectional approach needed among liberationist social movements to advance their goals in solidarity).

III. SAYING THE QUIET PART OUT LOUD

Or does it explode?
—Langston Hughes⁶⁵

Mystal is quite clear, both in *Retort* and his media appearances and social media posts supporting it, that we need a new constitution: “[T]he Constitution is actually trash” (p. 1), “If it were up to me, I’d light the entire Constitution on fire and start over with a document that wasn’t so goddam racist” (pp. 237–38). If we adopted an abolitionist reading of the current Constitution and committed to completing the work of Reconstruction, that’s not strictly necessary—though considering the incredible inertia of bad-faith conservative political and legal maneuvering, it might be just as easy to draft and adopt an entirely new one. Aside from a few stray remarks, *Retort* is relatively quiet as to what that new constitution would include. Still, there are hints in the text. The Constitution’s white-supremacy issues arise in its treatment of both the structure of government and the rights of individuals. The Senate, and to a lesser extent the Electoral College, is designed to frustrate republican self-government (p. 226). Despite nearly a quarter of the amendments since the Founding Era attempting to expand the franchise,⁶⁶ conservative jurisprudence has consistently moved to suppress the vote (pp. 204, 213). Substantive rights such as the prohibition of unreasonable searches and seizures and the equal protection of the law fare little better. *Retort* rightly identifies the project of rejecting modern ideals of fairness and equality through originalism as an exercise in making the Constitution illegitimate (p. 134). We can fight back against these illegitimate interpretations of a document admittedly drafted by deeply flawed white men, or we can make a better document.

So let’s take the time to dive into the ideas that *Retort* only hints at; let’s say the quiet part out loud. *Retort* gets loud about plenty of things that discussions about constitutional law have left quiet for years—like how the Constitution is a trashy apartheid document—but the next step of the conversation is still a bit muted. To a certain degree, that’s appropriate. Any effort to scrap the Constitution and replace it with something better would need to come from a process that involved many people who look like a cross section of America.⁶⁷ The Constitution, and even its major reworking through the Reconstruction Amendments, came from a process that exclusively involved white men, most of whom were Christian and wealthy (pp. 2–3). If there’s any

65. HUGHES, *supra* note 1.

66. See U.S. CONST. amend. XV (forbidding disenfranchisement based on race or prior slavery); U.S. CONST. amend. XIX (forbidding disenfranchisement based on sex); U.S. CONST. amend. XXIV (forbidding tax requirements for voting); U.S. CONST. amend. XXVI (forbidding disenfranchisement of adults based on age).

67. See Fred O. Smith, Jr., *The Other Ordinary Persons*, 78 WASH. & LEE L. REV. 1071, 1075–79 (2021) (discussing the value of deliberately including the previously excluded when restructuring the legal and social order).

value in representative government—and the Constitution seems to be premised on that idea—then the process of establishing that representative government should also be representative. But even before gathering a new constitutional convention on a model like South Africa’s, it’s worth thinking about what such a convention could aim to produce. While discussing a new constitution is nearly unheard of in the American legal academy, this Review is as good a place as any to answer *Retort*’s understated call to do just that. This Part explores proposals—both from *Retort* and elsewhere—as to what a constitution that wasn’t so goddam racist would look like, first in its structure of government, then in its protection of rights.

A. Structures

There are multiple kinds of structures at work in the Constitution, including the institutions of government, their relationships to each other and the people, and the way the Constitution interacts with them. This Section will first address our three branches of government—examining the means of filling positions within them, the powers they possess, and the relationships they have with other branches and the public. It will then turn to the Constitution itself, particularly the process for amending it. These changes should not be considered a complete constitutional vision, but a first step toward building a free and democratic society.

The Constitution we have starts off with the legislature, and that remains as good a place as any to begin. *Retort* rightly identifies the Senate as an anti-democratic institution; we should abolish it.⁶⁸ Land masses shouldn’t be the basis for selecting who gets how much political power.⁶⁹ Most modern democracies get by just fine with unicameral legislatures,⁷⁰ and there’s no reason we can’t too. The modern trend is also to select legislative bodies by some sort of proportional representation system,⁷¹ and we should enshrine that principle

68. P. 226. Mystal has argued as much elsewhere. See Elie Mystal, *The Senate Cannot Be Reformed—It Can Only Be Abolished*, NATION (Nov. 12, 2021), www.thenation.com/article/politics/abolish-us-senate/ [perma.cc/ZK8R-27K8].

69. See Douglas J. Amy, *How Proportional Representation Would Finally Solve Our Redistricting and Gerrymandering Problems*, FAIRVOTE, <https://fairvote.org/archives/how-proportional-representation-would-finally-solve-our-redistricting-and-gerrymandering-problems> [perma.cc/9H4J-49F5].

70. See also CONST. UNIT, SCH. OF PUB. POL’Y, UNIV. COLL. LONDON, CHECKS AND BALANCES IN SINGLE CHAMBER PARLIAMENTS: A COMPARATIVE STUDY 7 (1998), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.637.7667&rep=rep1&type=pdf> [perma.cc/32G8-RHCE] (noting that several of the unicameral parliaments studied had recently transitioned from bicameralism).

71. Gary W. Cox, Jon H. Fiva & Daniel M. Smith, *Parties, Legislators, and the Origins of Proportional Representation*, 52 COMPAR. POL. STUD. 102, 103 (2019) (tracing the rise of proportional representation models to the turn of the twentieth century); Keith Zimmerman, *Coming to America: An Analysis of Proportional Representation in the States*, GEORGE WYTHE REV., Spring 2018, at 89, 99 (“A large portion of European countries have been using proportional representation for fifty years . . .”).

in the new constitution. Regardless of the exact method of proportional representation, those elections should be conducted with reasonable limits on campaign spending and advertising, including by outside groups. That's likely to break the two-party hegemony, which could potentially open up a much greater range of debate in American politics. To further break up the accumulation of political power, we should add in term limits for our legislature too.⁷² While some degree of continuity is beneficial, too much leaves our politics stagnant—the exact number is probably best left to that truly representative convention, though. Similarly, there's little reason to maintain the constant campaign mode brought on by changing out our legislators every two years.⁷³ Several modern parliamentary democracies set a maximum time between general elections of somewhere around five to seven years, with some mechanism for calling the election sooner if the government grinds to a halt.⁷⁴ Along those lines, basic functions like the budget shouldn't be subject to brinksmanship. Instead, the budget should simply default to the last year's if a new one isn't approved. All these changes would encourage the legislature to become a government that actually governs.

To streamline functional government even further, we could cut out a lot of dysfunction by abolishing state sovereignty and resting the general police power in Congress. The notion that the states were pre-existing sovereign entities that gave up some of that authority to join the union is by this point an outdated fiction. Outside of the original thirteen, only Vermont, Texas, and Hawaii, at best, were truly independent before becoming states.⁷⁵ Really, the only sovereigns within the United States that should retain any sort of separate authority are those by and of Indigenous Americans. Exactly what relationship those governments should have with the United States must be decided with their participation and consent. Aside from some degree of autonomy for our

72. This is likely an issue that various political factions of voters can agree on, even if their representatives can't. See DAN GREENBERG, *TERM LIMITS: THE ONLY WAY TO CLEAN UP CONGRESS* (1994), <https://www.heritage.org/political-process/report/term-limits-the-only-way-clean-congress> [perma.cc/LFX5-7WXH].

73. See Jim Arkedis, *Stop the Never-Ending Campaign*, POLITICO (Nov. 21, 2012, 9:49 AM), <https://www.politico.com/story/2012/11/challenge-our-elected-to-stop-the-never-ending-campaign-084135> [perma.cc/PF5J-C732].

74. See, e.g., Bojan Brkic, *Serbia's Presidential and Parliamentary Elections Explained*, EURONEWS (June 4, 2022), <https://www.euronews.com/2022/04/01/serbia-s-presidential-and-parliamentary-elections-explained> [perma.cc/XFR8-UU9V] (describing a parliamentary election in Serbia which was called earlier than it had to be through the mechanism of the government resigning).

75. See Joshua Nichols, *The Vermont Republic – The Story of When Vermont Was an Independent Country*, VT. MATURITY MAG. (Dec. 1, 2019), <https://vermontmaturity.com/vermont-history/the-vermont-republic-the-story-of-when-vermont-was-an-independent-country/> [perma.cc/3P2T-EZ7H]; Joseph M. Nance, *Republic of Texas*, TEX. ST. HIST. ASS'N, <https://www.tshaonline.org/handbook/entries/republic-of-texas> [perma.cc/D4CB-9Z89]; Keanu Sai, *The Illegal Overthrow of the Hawaiian Kingdom Government*, NAT'L EDUC. ASS'N (Apr. 2, 2018), <https://www.nea.org/advocating-for-change/new-from-nea/illegal-overthrow-hawaiian-kingdom-government> [perma.cc/P765-82M5].

Indigenous communities, the United States would be better organized as a unitary republic.

Reforming the executive branch is more a matter of employing structural finesse and limiting presidential power than the grand restructuring our legislature needs. Eliminating the states would have the benefit of also abolishing the Electoral College, leading to the direct election of the president. Since the introduction of proportional representation would likely lead to a multiparty democracy, we could also emulate similar countries and select the president through a two-round process.⁷⁶ Unless the first round produced a majority winner, the top two candidates would run off against each other.⁷⁷ A new constitution would also do well to examine the unitary executive. The most important executive role to separate from presidential authority is that of the attorney general.⁷⁸ Some alternative form of direct or indirect selection would promote the independence of legal investigations and litigation, discouraging abuses of power. The states—the laboratories of democracy—have largely settled on a model of electing many state executive positions directly.⁷⁹ While states must go, we might borrow from this model as we usher them out. A new constitution should consider which federal executive offices should be directly elected by the people and provide Congress with a means for creating such offices. Another major change to consider for the executive branch is a streamlining of the appointments process. Rather than requiring legislative approval, administrative and judicial appointments would move forward unless explicitly rejected by the legislature within a fixed time. All of this would encourage the smooth operation of a democratically selected government.

The end of the unitary executive would necessarily mean a reduction in presidential power by itself, but further limitations are in order. With several executive positions excluded from the President's appointment power, the extent of the office's removal power should also be made explicit on a statutory basis. Similarly, without a unitary executive, the power to declare a state of emergency (currently a statutory creation) would need to be limited. A simple temporal limitation on any emergency powers of the President, with an option for either Congress or the other executive officers to extend the emergency,

76. See Tracy McNicoll, *Explainer: How Does France's Two-Round Presidential Election Work?*, FR. 24 (Feb. 11, 2022), www.france24.com/en/france/20220211-explainer-how-does-france-s-two-round-presidential-election-work [perma.cc/3VRU-4R5E].

77. See, e.g., Francois Murphy & Kirsti Knolle, *Austrians Roundly Reject Far Right in Presidential Election*, REUTERS (Dec. 3, 2016, 6:34 PM), <https://www.reuters.com/article/us-austria-election/austrians-roundly-reject-far-right-in-presidential-election-idUSKBN13S0W0> [perma.cc/SS65-ADF7] (describing a run-off election for Austria's presidency).

78. See Daniel Cotter, *The Attorney General Should Be Separate*, HARV. L. & POL'Y REV. (Apr. 22, 2020), <https://harvardlpr.com/2020/04/22/the-attorney-general-should-be-separate/> [perma.cc/8HTN-75RQ].

79. See COUNCIL OF STATE GOV'TS, *THE BOOK OF THE STATES* 126–33 (2021 ed. 2021), https://issuu.com/csg_publications/docs/bos_2021_issue [perma.cc/4KA2-CDDL] (detailing which state executive officials are elected or appointed, and which are creations of state constitutions or statutes).

should be included. The ability to deploy military force abroad should also be severely limited.⁸⁰ Absent a declaration of war or a treaty obligation previously ratified by Congress, the President should be constrained by a nonaggression clause modeled on Japan's.⁸¹ That clause would also limit congressional authority to approve the use of force short of a declaration of war.⁸² Furthermore, the executive branch should be constrained in its foreign affairs—outside of engagements in the territory or with the citizens of a hostile power following a declaration of war—by the same privacy and search-and-seizure protections that apply domestically. As an analog to the exclusionary rule, the government would be prohibited from making use of any information gained in violation of those protections when seeking a declaration of war. Clear limits on executive powers and the division of the unitary executive would help prevent some of the worst abuses of executive authority and push the United States away from colonial imperialism.

No matter how good the rest of this new constitution is, though, it will fail to bring about a free, egalitarian society if the judiciary remains a bastion—and claims supreme power in the service—of antidemocracy. Under our current system, unelected and unaccountable judges deploy judicial review to protect wealthy litigants and restrict congressional authority to aid marginalized people through remedial legislation.⁸³ Judicial review is an undemocratic tool routinely aimed at thwarting efforts to build democracy. When you look under the hood, you'll find the three legs of white supremacy hard at work: insistence on colorblindness, protection of propertied interests, and reframing of debates about racial remedies in terms of taxation.⁸⁴

Rather than lifetime appointments, judges need (long) term limits too. The judiciary should periodically expand to meet the needs of its caseloads; trial or appellate courts should automatically add seats to keep their caseloads close to average—and the legislature should be empowered to contract a court with an abnormally light load. Those judges—from top to bottom—need to be subject to judicial ethics.⁸⁵ But beyond ethical restraints, the judiciary should

80. See Stephen Wertheim, Opinion, *End the Imperial Presidency*, N.Y. TIMES (Aug. 25, 2021), <https://www.nytimes.com/2021/08/25/opinion/declaration-war-president-Congress.html> [perma.cc/NY2E-REEW].

81. See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9, para. 2 (Japan) (restricting the Japanese government from maintaining offensive forces or engaging in belligerence).

82. Cf. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the War on Terror).

83. NIKO BOWIE, PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., THE CONTEMPORARY DEBATE OVER SUPREME COURT REFORM: ORIGINS AND PERSPECTIVES 8–11 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf> [perma.cc/BL2F-H6JD].

84. Cf. Terbeek, *supra* note 7, at 824 (evoking the putative—and disingenuous—“three-legged stool” of movement conservatism: social, economic, and foreign policy conservatism).

85. See Veronica Root Martinez, *A Weakened Supreme Court Needs a Code of Ethics*, BLOOMBERG L. (Nov. 5, 2020, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/a-weakened-supreme-court-needs-a-code-of-ethics> [perma.cc/9F22-CXDL].

be given an explicitly limited power of judicial review with clear guidance on what standard to apply. Legislation constraining rights—or mediating the balance between them—should be subject to strict scrutiny to ensure that it is consistent with a free and democratic society.⁸⁶ Rights-protective and remedial legislation, meanwhile, should be subject to a lax standard, akin to rational basis review.⁸⁷ In the likely case that some legislation does both, both standards would need to apply to the extent that the legislation constrains *and* protects rights, and those standards would need to be balanced with an understanding of fundamental principles. Even a great constitution isn't immune to subversion by bad-faith conservatives, but a judiciary with explicit guardrails would sure help.

An even better countermeasure against bad faith, though, is empowering the people to control the amendment process. No matter where they originate, amendments should rise or fall on a national popular vote. Citizens should have the ability to initiate the amendment process through referendum, though with a somewhat higher bar to meet than a simple majority. A process allowing either a supermajority or legislative confirmation to pass an amendment would be a middle road between California's free-for-all and our current Constitution's fossilization. We should also borrow a process from some of the early state constitutions and periodically convene a review commission⁸⁸ to evaluate the constitution and propose amendments to be confirmed by a simple-majority popular vote. The commission, ideally, would be composed mostly of ordinary citizens—maybe even summoned like jurors—with a few retired legislators and judges to help provide practical context. If we want public confidence in a constitution, we need to ensure that it's not a suicide pact carved in stone.⁸⁹

B. Rights

The constitution of a free and democratic country necessarily contains some guarantees of fundamental rights. It also faces the problem that they will inevitably come into conflict with each other and must be balanced against each other.⁹⁰ To guide courts through such a conflict, a statement of general

86. See Jamal Greene (@jamalgreene), TWITTER (Mar. 6, 2022, 8:51 AM) (deleted tweet, screenshot on file with author) (“Rights being unlimited, unalienable, and universal sounds nice but makes it hard to build a society. How about adding that rights are subject to such limits as can be justified in a free and democratic society?”).

87. See generally GREENE, *supra* note 2 (proposing a model of rights whereby their promotion is primarily a duty of legislatures rather than courts).

88. See, e.g., VT. CONST. ch. II, § XLIV (1777).

89. See *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”).

90. See Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 *RATIO JURIS* 131, 134 (2003) (“The phenomenon of balancing in constitutional law leads to so many problems that it is not even possible to list them here, much less talk about them.”).

principles (absent from our current Constitution) should provide that no right may be protected if its exercise is aimed at the subversion of the rights of others.⁹¹ Beyond a guarantee of equal dignity before the law and equal access to political processes, the exact contours of the balance between rights can be allowed to shift through democratic processes.⁹² We can't guarantee that our current understanding of which rights are important will hold for our descendants; outside of being fodder for student notes, the Third Amendment isn't exactly doing much work, but it seemed like a big deal at the time.⁹³ That's part of why the structure of government is so important. Even well-defined rights are hard to protect against bad-faith actors, so it needs to be hard for any group bent on oppression to gain a death grip on government power.

We also need to ensure that our new constitution starts from a position that guarantees the substantive rights of all Americans. That starts with the understanding that a written constitution protects more rights than those listed. *Retort* rightly points out that the Ninth Amendment already does this (pp. 236–37). But *Retort* misses a beat by failing to connect this with the *other* places the Constitution tries to protect unenumerated rights. Those rights were also included even before the Bill of Rights in the Privileges and Immunities Clause.⁹⁴ The drafters of the Fourteenth Amendment tried to emphasize this further by including a Privileges *or* Immunities Clause. Our courts have tried to protect some of our general rights further through the concept of substantive due process. We have a lot of rights in a free and democratic society, and no constitution will ever be able to list them all. But we definitely need to list some.

To ensure that our society remains free and democratic, our constitution must embrace full abolition. The right to bodily autonomy and the fundamental equality before the law of all persons irrespective of their race, gender, religion, ability, origin, and other such core elements of their identity must be central to the new constitution's conception of rights. Functionally inequitable

91. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 30 (Dec. 10, 1948) (“Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”); American Declaration of the Rights and Duties of Man, Ninth International Conference of American States, art. XXVIII, May 2, 1948 (“The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.”).

92. See generally GREENE, *supra* note 2.

93. See, e.g., Samantha A. Lovin, Note, *Everyone Forgets About the Third Amendment: Exploring the Implications on Third Amendment Case Law of Extending Its Prohibitions to Include Actions by State Police Officers*, 23 WM. & MARY BILL RTS. J. 529 (2014); James P. Rogers, Note, *Third Amendment Protections in Domestic Disasters*, 17 CORNELL J.L. & PUB. POL'Y 747 (2008); John Gamble, Note, *The Third Artefact: Beyond Fear of Standing Armies and Military Occupation, Does the Third Amendment Have Relevance in Modern American Law?*, 6 ALA. C.R. & C.L. L. REV. 205 (2015).

94. See U.S. CONST. art IV, § 2.

laws should presumptively be evidence of discriminatory policy.⁹⁵ For example, if the right to keep and/or bear arms remains in the new constitution, it must be divorced from its origins in racial subjugation and applied equitably to protect marginalized communities. The new constitution would need to guarantee dignity and full participation in public life to all, free of intimidation, economic coercion, and social degradation. It should embrace the abolitionist concept that all people are entitled to the protection of the law. That protection should encompass a modern understanding of human rights rather than the current Constitution's focus on a Lockean social contract. That modern understanding should include labor protections, as many modern European constitutions do—a point Mystal has made in recent interviews but left out of *Retort*.⁹⁶ By adopting an abolitionist understanding of rights, the new constitution can proactively seek to remedy the harms of our current apartheid regime.

Ensuring the longevity of the abolitionist project requires strict protections of citizenship and voting rights. The franchise must be explicitly and universally extended to all adults residing in America without exceptions for felons or immigrants. The history of racist enforcement of criminal and immigration statutes demonstrates the extreme danger of allowing any means to categorically disenfranchise people. Similarly, the Fourteenth Amendment's guarantee of birthright citizenship should be extended to automatically grant citizenship to foreigners who reside in the United States for a specified length of time. To prevent the most obvious means of circumventing this protection, the new constitution should also include a right of immigration for refugees and people with families or jobs in the United States. By ensuring the broadest possible access to the franchise and citizenship, the new constitution would “secure the Blessings of Liberty to ourselves and our Posterity . . .”⁹⁷

Finally, the new constitution should explicitly tackle some legal procedural rights that the old one has left open to debate. To ensure that the government respects the rights of all people, suits for damages—against the government and its individual agents—must be available as a remedy for violations of our rights. Those government agents should only be exempted from liability if a finder of fact, at trial, determines that their behavior was consistent with the overall protection of a free and democratic society. That sounds like it could generate a lot of litigation, but a more rights-protective approach to criminal procedure would prevent most of it. We can simply create an explicit

95. See Ibram X. Kendi, *Pass an Anti-Racist Constitutional Amendment*, POLITICO (2019), <https://www.politico.com/interactives/2019/how-to-fix-politics-in-america/inequality/pass-an-anti-racist-constitutional-amendment/> [perma.cc/YEV4-P7A2].

96. See Touré, *Elie Mystal—I Want to Kill the Constitution*, TOURE SHOW, at 07:55-08:20 (Mar. 20, 2022), <https://podcasts.apple.com/us/podcast/elie-mystal-i-want-to-kill-the-constitution/id1313077481?i=1000554603716> [perma.cc/9Q32-P65K]; see also, e.g., art. XXXVI COSTITUZIONE [COST.] (It.) (providing for a right to fair compensation, a maximum hours limitation to be set by statute, and an unwaivable right to a weekly rest day and annual paid leave); CONST. art. XII (Pol.) (protecting the right to unionize).

97. U.S. CONST. pmbl.

right to privacy and make warrants an absolute requirement for any search, and for any seizure beyond what is necessary to end some immediate physical danger. Boom: there goes most of the problem with invasive policing. We need a constitution that acknowledges that there is no legitimate consent to search or interrogation when a person is confronted with an armed agent of the state. And when someone does face trial for criminal conduct, the jury should explicitly be reflective of the community impacted by the crime. At least one third of the jury should be composed of people from the same broad racial and ethnic background as the defendant, and another third should be composed of people from the same background as the victim.⁹⁸ Similarly, the right to counsel should include a requirement that appointed counsel be culturally competent to represent the defendant's interests and come from broadly the same racial and ethnic background as the defendant.⁹⁹ None of this can guarantee that government agents respect people or a jury gets the right result, but it would push those protections a whole lot closer to the finish line.

These are, of course, just some starting points for the massive project of drafting a new constitution. The actual process of drafting a new constitution would need to take many more details into account and include significantly more diverse input than just one law professor writing a book review. But *Retort* implicitly raises the question of what a better constitution would look like, and Mystal has explicitly raised it elsewhere. Answering that question requires an exploration of how we might promote the Constitution's highest ideals while moving beyond its most damning flaws—mostly the racism. *Retort* invites dialog on how to improve the Constitution by pointing out how it has failed Americans generally and Black people specifically. Our task as readers is to give that conversation our full engagement as we carry *Retort's* lessons forward with us.

CONCLUSION

Those who are racially marginalized are like the miner's canary: their distress is the first sign of a danger that threatens us all.

—Lani Guinier & Gerald Torres¹⁰⁰

Allow Me to Retort is a must-read synopsis of constitutional law, humorously presented in succinct and accessible overviews of some of the most important topics in the field. While educating the reader, it questions the legitimacy of the Constitution to guide a modern, egalitarian democracy. The

98. Cf. S. 2, 39th Cong. (1865) (proposing legislation requiring half of a jury to consist of persons of African descent when a person of African descent is a party to the claim, suit, or demand).

99. See Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1532–46 (2021) (discussing the importance of racial representation within the legal system for both the perception and reality of substantive justice).

100. LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11 (2002).

failure to include large portions of society—women, people of color, Indigenous Americans, poor people—in the creation of the Constitution has led to a document that repeatedly fails those excluded groups. For many such Americans, the Constitution’s promises of defense, welfare, and liberty have been a dream deferred. In their place, injustice persists as an open sore, fragrant with the rotten stench of bad-faith conservative doctrines. *Retort* analyzes the tensions brought on by deferring dreams of justice, which now grow ripe to explode.