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Random Heterogeneous Materials? The Robert Williams Book, News From Florida, the Stuff of State Constitutional Law Reconceived (Book Review)

Patrick O. Gudridge
University of Miami School of Law, pgudridg@law.miami.edu

RANDOM HETEROGENEOUS MATERIALS? THE ROBERT WILLIAMS BOOK, NEWS FROM FLORIDA, THE STUFF OF STATE CONSTITUTIONAL LAW RECONCEIVED

Patrick O. Gudridge[*]

The Law of American State Constitutions. Written by Robert F. Williams. *Oxford University Press*, 2009. Pp. 456.

Robert Williams is a distinguished theorist and critic of state constitutional law – a pioneer and a leader. At first glance, *The Law of American State Constitutions* looks to be a grand summing up, a magisterial synthesis.[1] But the book is even better: Williams asks hard questions about likely still the most significant project in state constitutional law across the past two or three decades—the articulation and elaboration of individual rights truly alternative to federal constitutional law. Williams closely maps the several ways that state courts (and sometimes constitution-writers) have in fact hesitated along the way, expressed reluctance, frequently refusing to take up the project and in the process collectively putting in place an awkward jumble of stops and starts.

Professor Williams describes something we already know. It's just short of thirty-five years since Justice Brennan "taught the band to play,"

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* Vice Dean and Professor, University of Miami School of Law. The first part of this essay draws heavily on a shorter review of Professor Williams's book that I posted on Jotwell. *See* Pat Gudridge, *There There? Does State Constitutional Law Exist*, JOTWELL (June 21, 2010), http:// conlaw.jotwell.com/?s=robert+williams. I was helped greatly by questions and comments of participants in a faculty workshop at the University of Miami. I learned much helpful in the writing of this essay from conversations with my colleagues Charlton Copeland and Bernard Oxman. Thanks also to Gerald Cope and Frank Shepherd. The first phrase of the title borrows from SALVATORE TORQUATO, RANDOM HETEROGENEOUS MATERIALS: MICROSTRUCTURE AND MACROSCOPIC PROPERTIES (2002).

1. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS (2009); *see* Jim Rossi, *Assessing the State of State Constitutionalism*, 109 MICH. L. REV. 1145, 1145 (2011) ("the go-to treatise for the next generation of state constitutional law practitioners and scholars").

trumpeting the importance of state constitutional law as an available, independent resource for rights protection.[2] Academic critiques surfaced in due course. For example, Paul Kahn deployed an abstractly tuned skepticism:

> To rest state constitutionalism on an idea of the state as an already-defined historical community, with a text that can be interpreted to reflect the unique political identity of members of that community, is to try to build a serious legal doctrine on what may be no more than an anachronism or romantic myth. Methodologically, the doctrine is backwards: as the subjects of debate become more difficult, the need to be open to the widest possible sources increases.[3]

James Gardner was blunter:

> [S]tate constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements. . . .
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> . . . The central premise of state constitutionalism is that a state constitution reflects the fundamental values, and ultimately the character, of the people of the state that adopted it. This premise, however, cannot serve as the foundation for a workable state constitutional discourse because it is not a good description of actual state constitutions; it embraces theoretical inconsistencies that undermine its value as a framework for a coherent discourse; and it takes an obsolete and potentially dangerous view of the texture and focus of American national identity.[4]

Rejoinders followed.[5] The result, we may think, was a not unfamiliar academic stalemate—assertion and counter, both persisting.

Williams, participant throughout, now brings the war back home. He shows just how well entrenched uncertainty has become, how irresolute state constitutional law appears to be, not only as jurisprudence, but as day to-day judicial practice. Federal constitutional understandings often continue to

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2. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

3. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1160 (1993).

4. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763-64 (1992).

5. *E.g.*, Hans A. Linde, *State Constitutions Are Not Common Law: Comments On Gardner's Failed Discourse*, 24 RUTGERS L.J. 927 (1993); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389 (1998).

matter most. His account rings true. Importantly, of course, irresolution does not mean deferral across the board. In this century, we know, some judges invoking their state constitutions have proceeded markedly independent of federal colleagues in the course of recognizing rights protections for same sex marriage.[6] Longer-term projects in some states—for example, attention to school funding inequalities in New Jersey[7]—also show persistent state constitutional elaborations of rights and limits markedly distinct from federal preoccupations. Irresolution, however, does mean that state constitutional law treatments of individual rights—or at least, the constitutional provisions and judicial opinions that are first materials—display a seemingly random heterogeneity, no relatively uniform or otherwise well-defined set of commitments or recurring preoccupations, indeed (because of ubiquitous deferrals to federal law) no strong sense of regime or identity.

In this essay, I ultimately call attention to an alternate conception of state constitutional law, federal constitutional law, and their interplay. Federal and state constitutions may inhabit, as it were, a common field, even if never *only*. But it is also the case, I think, that constitutional understandings, as they emerge federally or in states, are importantly *intermittent*: often enough formulations of ideas and vocabularies in response to prompts, to circumstances pushing against casual or familiar formulations, occasions for re-sorting ideas and vocabularies. (It is to the extent that this is so, after all, that federal and state constitutional law distinctively *matters*.) In these ad hoc processes, the common field sometimes becomes put to new work, seized upon and seized from, rearranging prior histories of federal and state constitutional usages. "[H]ard cases . . . make . . . law."[8] We should not be surprised if the common field therefore looks a lot like a jumble or heap, simply an accumulation of efforts, and that the individual efforts themselves, the cases or lines or projects—even if they purport to declare visions of a whole—are most of the time our principal focus. American constitutional law of whatever sort, in its parts or taken as whole, may not presuppose anything like a worked out sense of the overall, of an idea of a regime, its integrity, or its sufficiently autonomous, sufficiently elaborated content.

I begin by sketching topics Robert Williams develops in detail, most importantly the unease that he maps infiltrating the project of state

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6. *E.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E. 2d 941 (Mass. 203). As Professor Rossi notes in his review, Professor Williams, surprisingly, discusses these cases only in passing. *See* Rossi, *supra* note 1, at 1148.

7. *See, e.g.*, Abbott v. Burke, 20 A.3d 1018, (N.J. 2011); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).

8. N. Secs. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

constitutional elaboration of individual rights. I move next to a close study of my own, addressing a sequence of federal and state judicial opinions considering Florida's statute prohibiting adoption of children by otherwise eligible, homosexual couples. Initially, the sequence appears to suggest that Florida constitutional law provided a resource that federal law did not. State judges took hold of a vocabulary their federal colleagues had not located, a way to frame scrutiny of the adoption exclusion that made clear the statute's constitutional invalidity.

It's more complicated, I argue: the Florida effort appropriates (even if nearly invisibly) constitutional figurings formerly important in federal constitutional law but now nearly invisible there. This exercise in "taking over" is not a simple matter. Federal constitutional resources are treated as though they are themselves the stuff of state law (the question of whether federal courts today make use of these resources becomes irrelevant). Appropriation is not a forced, foreign transplanting. We observe a complexly knit heterogeneity we only sometimes acknowledge to be part of American constitutional law. The uncertainties inhabiting and inhibiting state constitutional law-making—brought to light by Robert Williams's mappings—in context recede, revealing conjunctions that appear to be fundamental but nonetheless bespoke, keyed importantly to the matter at hand. In particular, in the instance I study here, I note the apparent role of the United States Fourteenth Amendment as a presence *within* Florida law, as itself *part*, not an external constraint and also not simply a source of terminology, but a kind of *constitutional prompt*, a recurring call to attention.

I. THE WILLIAMS CHALLENGE

The four chapters in part one of *The Law of American Constitutions* depict state constitutions as distinctive, separately identifiable legal phenomena. Robert Williams briefly characterizes the form, content, quality, and political resonances typical to state constitutions; sketches pre-federal history and later developments; and identifies the several constraints that federal law sets. The four chapters in part three explore the state constitutional law of separation of powers, highlighting differences as against federal approaches. The single chapter that Williams marks as part four addresses interpretive questions, "with a specific focus on those that arise from the unique nature of state constitutions."[9] The final two chapters address modern state constitutional revision, noting the differences in

9. WILLIAMS, *supra* note 1, at 311.

approaches among the states that have taken the matter seriously in the twentieth century.

None of this would surprise Thomas Cooley, we might think, whose *Constitutional Limitations* famously helped shape thinking about state constitutional law across the latter part of the nineteenth century.[10] But I have omitted so far any mention of the second part of Robert Williams's book: "Rights Guarantees Under State Constitutions: The New Judicial Federalism." These three chapters show something new—new not only set against Cooley's treatise, but also vis-à-vis Justice Brennan's argument in 1977 urging judges and lawyers to seize state constitutional law in service of a strong individual rights jurisprudence. Cooley and Brennan might have disagreed about the specific content of "constitutional limitations."[11] But both thought that the effort to identify and elaborate "constitutional limitations" securing individual rights was a primary part of the agenda of any body of constitutional law. Williams shows that in more recent years, however, once past the initial "thrill of discovery,"[12] "backlash"[13] triggered "the long hard task"[14] of "state and federal constitutional dialogue"[15]—a nicely diplomatic way of noting that "in . . . the clear majority of cases,"[16] state courts these days refuse to develop independent state constitutional law of individual rights and instead follow federal law.

This refusal, it appears, expresses itself in three ways. State judges frame sequencing rules that work to limit the circumstances in which the question of whether to develop independent state constitutional law of individual rights may be seen as properly arising.[17] They develop second-order criteria for thinking about whether state constitutional law independent of federal constitutional law is a good idea.[18] Or judges (sometimes state constitutional drafters do this too) affirmatively embrace "lockstepping," simply preclude the possibility of deviating from federal understandings of

10. *See generally* THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1972) (reprint of 1868 first edition).

11. Not always, of course: in his torts treatise Cooley outlined, for example, something very much like the actual malice test that Brennan later put to work in his most famous opinion. *See* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 217–21 (1st ed. 1880); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 n.20 (1964) (citing post-Cooley 7th edition of Cooley's constitutional treatise).

12. WILLIAMS, *supra* note 1, at 119.

13. *Id.* at 127.

14. *Id.* at 130.

15. *Id.* at 131.

16. *Id.* at 194.

17. *See id.* at 140–46.

18. *See id.* at 146–77.

individual rights.[19] It is all, we might think, a strange combination of Prufrock ("do I dare to eat a peach"), and Ulysses and the Sirens. Professor Williams is careful and tactful. He describes the forms of hesitancy in considerable detail, the variations from state to state, the reactions in the commentary—in all, he takes it intensely seriously as a mode of thought. But he also allows himself to note at one point: "It is substance, not form, that counts most."[20] And it is clear that Williams thinks that the so-called "criteria" cases verge repeatedly on category error: "At its core, the criteria approach is based on a notion that interpretation of the [F]ederal Constitution can somehow authoritatively set the meaning for similar provisions of state constitutions."[21] His discussion of "lockstepping" includes a wonderful image Williams borrows from former U.S. Supreme Court Justice David Souter, writing in his state supreme court days: "A state's constitutional provisions need not, and should not, be reduced to a 'row of shadows' through too *much* reliance on federal precedent."[22]

State constitutions, we don't doubt, exist. And there is plainly a lot of state constitutional law, articulated all over the place, sometimes more or less uniformly across the entire set of constitutions, and sometimes divergently. It's not clear, however, when or why particular state constitutions become associated with substantial bodies of constitutional law. Professor Williams shows that interference with efforts to articulate state constitutional law are both frequent and at least sometimes inexplicable within state constitutional terms *per se*.

Perhaps he looks too closely. We might conceive of the work of articulating constitutional norms as a project in common, a shared effort involving federal and state participants alike—*Gelpcke v. Dubuque* reborn.[23] Institutional actors in particular jurisdictions, however, may bring to the common project their own conceptions of their own limits and modes of approach, even as each also takes into account—sometimes accepting and sometimes rejecting—the contributions of other actors. The overall result could be the pattern that Williams discerns: a series of starts and stops evident in the work of particular state courts nonetheless contributing to the overall effort of building constitutional law generally through their intermittent exercises in elaborating state constitutional law. Viewed as

19. *See id.* at 193–232.

20. *Id.* at 144.

21. *Id.* at 170.

22. *Id.* at 228 (quoting State v. Bradberry, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring) (emphasis added)).

23. *See* Gelpcke v. City of Dubuque, 68 U.S. 175, 205-07 (1863); James Bradley Thayer, *The Case of Gelpcke v. Dubuque*, 4 HARV. L. REV. 311, 317-19 (1891).

simply momentary perturbations in the overall interplay, the cases that Williams cites appear to be of much less concern. James Gardner and Jim Rossi sketch a version of this tack at the outset of their important new book:

> Different institutional strengths and capacities of the state and national judiciaries, distinctive local or regional experiences, variations in the nationwide distribution of public opinion or culturally informed preferences, and many other kinds of variability can introduce path-dependent divergences in the development and elaboration of even the most fundamentally shared constitutional norms. Consequently, the best way to think about the regime of dual enforcement of constitutional norms is that it institutionalizes a kind of permanent and highly complex conversation among many actors, each situated somewhat differently from all the others, and each therefore approaching the project of constitutional elaboration from a potentially distinct vantage point.[24]

At first glance, it may appear that they propose a way of thinking not too different from ideas outlined by Paul Kahn nearly two decades earlier:

> State constitutional texts are best thought of as multiple efforts to articulate a common aspiration for constitutional governance.
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> . . . .
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> Of course, different courts can and will reach different conclusions about the meaning of . . . constitutional values. Agreement is no more to be expected of courts than of individuals. Conflict over the meaning of common values, however, does not imply that each community has hold of a unique or separate constitutional truth.
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> . . . Different state understandings of constitutional norms should . . . be seen as different insights into a common object of interpretation.[25]

There is in fact a fundamental shift in perspective. Gardner and Rossi suppose, it seems, that because of "path-dependent divergences," "fundamentally shared constitutional norms" do not establish themselves in a clear cut way, only "permanent and highly complex conversation among many actors," each "approaching the project of constitutional elaboration from a potentially distinct vantage point."[26] It is conversation *in other*

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24. James A. Gardner & Jim Rossi, *Dual Enforcement of Constitutional Norms*, *in*, NEW FRONTIERS OF STATE CONSTITUTIONAL LAW 10 (2011).

25. Kahn, *supra* note 3, at 1160, 1161, 1162.

26. *See supra* note 24 and accompanying text.

words, in which participants often talk past each other. The new perspective treats courts as institutions first and therefore stresses "[d]ifferent institutional strengths and capacities" and the like. Substantive agreement or disagreement is really not the point (Gardner and Rossi are agnostics in this regard).[27] Institutional interplay is what we are supposed to see. Thus, Paul Kahn's "common object" and "common aspiration" become mirages.[28]

This mountain top realism, however, raises disorienting questions of its own. Path dependency and the like imply points of departure possessed of some content, some capacity to point out a direction of travel. Even if paths followed viewed on high, are accidents of a sort, Gardner and Rossi hold that "actions . . . are better than they would be without the conversation."[29] Presumably, "better" here means better from the perspective of officials themselves. Where do the norms interior to constitutional law conversation come from? Are there pure forms as it were, that officials understand themselves to perceive, thus also perceiving complicating institutional factors as akin to noise or static? Or are officials thoroughgoing institutionalists, framing their own courses exclusively or largely within their sense of the parameters of office? "Paths" may in fact be patternless viewed externally, but the internal counterpart still seems to requite an account of its own terms, however chimerical the terms look to be from outside and above—terms within which judges, lawyers, and critics think and write.

It might be better to proceed precisely oppositely, affirmatively embrace state constitutional law as "a parochial, state-specific matter."[30] We may be able to recover—immediately within the constitutional law of particular states, even if only sometimes—the complexities of particular textual settings, often-tragic histories, and collections of judicial improvisations. We might find these accumulations, at least on occasion, to be themselves rich

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27. For a penetrating and important discussion precisely associating institutional differences and alternate perspectives regarding the substantive reach of constitutional law, in an essay included in Professors Gardner and Rossi's book, see Helen Hershkoff, *State Common Law and the Dual Enforcement of Constitutional Norms*, in GARDNER & ROSSI, *supra* note 24, at 151-72.

28. Gardner and Rossi's book includes a very brief sketch by Dean Sager of an account of the development of substantive propositions in system-level terms assigning an initial creative role to state constitutional law and a consolidating role for federal law. Lawrence G. Sager, *Cool Federalism and the Life Cycle of Moral Progress*, *in* GARDNER & ROSSI, *supra* note 24, at 15-24. Professor Gardner's own separate contribution contends—more or less oppositely—that state constitutional law cannot acquire sufficient content without drawing on federal law although federal law itself is self-sufficient. James A. Gardner, *Why Federalism and Constitutional Positivism Don't Mix*, *in* GARDNER & ROSSI, *supra* note 24, at 39-59. Both of these essays warrant closer attention than I can give here.

29. GARDNER & ROSSI, *supra* note 24, at 11.

30. WILLIAMS, *supra* note 1, at 8.

enough to sustain strong arguments, to sustain therefore a sufficiently pointed constitutional law. The threshold superstructures of the sort that worry Professor Williams might be reconceived, along the way, not as barriers to formulation of constitutional law but as markers of matters not apt (for whatever reason) for constitutional development within the given regime. In some instances, thoroughgoing inquiry into the stuff of state constitutional law may turn out to implicate and bring to bear federal constitutional resources. Federal preoccupations are notably put to work *as state law*: arrangements inside out or upside down as it were, amalgams suggestive of originary stresses seized and put to use rather than repressed.

II. JUDICIAL RESOLUTION OF THE FLORIDA GAY ADOPTION CONTROVERSY

A recent, widely noticed sequence of federal and Florida opinions offers a glimpse of these possibilities concretely realized.

Deciding *Lofton v. Department of Children and Family Services* in January of 2004, a unanimous panel of the United States Court of Appeals for the Eleventh Circuit upheld, under federal constitutional law, the Florida statute prohibiting otherwise-qualified homosexual couples from adopting children.[31] In July of the same year, twelve Circuit judges, splitting evenly, denied en banc review.[32] Judge Barkett dissented. She stressed the antipathy to homosexual couples that she took to be fundamental to the statute: "[T]he classification at issue . . . exudes animus,"[33] she asserted, undercutting any claim that the Florida law rested on a constitutionally required rational basis.[34] Two colleagues joined this part of Barkett's en banc dissenting opinion.[35] Three others, writing very briefly, thought that the rational-basis question warranted en banc review, but notably did not draw attention to the possibility of statutory antipathy.[36] Judge Birch (the author of the panel opinion), specially concurring in the denial of en banc review, contended that it was enough if there was "an arguably rational basis"[37] for the statutory exclusion, in this instance supplied by the idea that the challenged statute aimed at "placing adoptive children in the *mainstream* of American family

31. Lofton v. Dep't of Children & Family Servs. (*Lofton I*), 358 F.3d 804 (11th Cir. 2004).

32. Lofton v. Dep't of Children & Family Servs. (*Lofton II*), 377 F.3d 1275 (11th Cir. 2004) (en banc).

33. *Id.* at 1292 (Barkett, J., dissenting).

34. Judge Barkett developed her argument at length. *See id.* at 1291–1303.

35. *Id.* at 1290 (Anderson, J., dissenting). Judge Barkett had also analyzed the case in substantive due process terms. *Id.* at 1303–13 (Barkett, J., dissenting).

36. *Id.* at 1313 (Marcus, J., dissenting).

37. *Id.* at 1276 (Birch, J., concurring).

life."[38] Birch conceded that "the actual legislative history" might support Judge Barkett's finding of animus, but asserted that it was enough for constitutional purposes if "there exists some 'conceivable' rational basis."[39]

In late 2008, however, a Miami–Dade Circuit Court judge concluded that the statutory exclusion was unconstitutional.[40] Judge Lederman framed her analysis as a matter of Florida constitutional law, but also cited federal decisions prominently, indeed sometimes writing as though she were following Judge Birch in *Lofton*:

> States are not required to convince the courts of the correctness of their legislative judgments. Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.[41]

Lederman nonetheless noted *Lofton* was decided "nearly five years ago," and now, given "consensus based on widely accepted results of respected studies by qualified experts," reconsideration in 2008 was "ripe."[42]

Judge Lederman reviewed at considerable length an authoritatively presented and carefully developed record of plaintiff-presented testimony, only weakly countered by state witnesses, as well as a substantial list of stipulations showing the parties in agreement on the overall structure of Florida law and administrative practice (including a policy recognizing homosexual couples as eligible foster parents), and the notable virtues of the plaintiffs as would-be parents.[43] She concluded in addition that the statutory exclusion of otherwise-qualifying gay couples as eligible adoptive parents was inconsistent with a state statutory obligation, explicitly declared, "to provide all dependent children with a stable and permanent home."[44] "The Florida Supreme Court recently reestablished the child's right to permanency doctrine and confirmed that adoption is the highest and preferred form of

38. *Id.*

39. *Id.* at 1278–79.

40. *In re* Adoption of Doe, 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008).

41. *Id.* at *27. Judge Lederman also agreed with the original *Lofton* panel that the "matter does not involve a fundamental right or a suspect class and is thus reviewed under the rational basis test." *Id.* (citing *Lofton I*, 358 F.3d at 818).

42. *Id.*

43. *Id.* at *1–21.

44. *Id.* at *21.

permanency."[45] "The exclusion causes some children to be deprived of a permanent placement with a family that is best suited to meet their needs."[46]

Judge Lederman's constitutional inquiry as such was strikingly brief and matter of fact. Taking up the state's asserted defenses of the exclusion law one-by-one—stressing the "well established and accepted consensus in the field that there is no optimal gender combination of parents"—she quickly declared that the failure "to offer any reasonable, credible evidence" showed the statute to be "no longer rationally related" to suggested government concerns.[47] A "public morality" defense failed, in particular, given Florida's acknowledgement that "homosexuals may be lawful foster parents."[48]

The Lederman opinion is a persuasive effort within its own terms. But "its own terms" are not so straightforward. Rational basis inquiries are often thought to be easy matters for defenders of legislation, requiring little if any record support, none or not much concern for careful drafting—it is enough that statutory groupings or exclusions might conceivably serve some proper legislative purpose. This was, we have already seen, the perspective that Judge Birch had brought to bear in the federal *Lofton* case, and the perspective that Judge Lederman's own formulation of the constitutional test might have seemed to suggest.

Notably, the Third District Court of Appeal opinion that Judge Cope released last September took a markedly different tack.[49] Cope's opinion shows little, if any, interest in federal law, relying instead on Florida Supreme Court opinions to word the relevant test. This is the introductory formulation:

> Under the rational basis test, "a court must uphold a statute if the classification bears a rational relationship to a legitimate governmental objective" The classification must be "based *on a real difference* which is reasonably related to the subject and purpose of the regulation."[50]

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45. *Id.* at *23.

46. *Id.* at *25.

47. *Id.* at *28.

48. *Id.* at *29.

49. Fla. Dep't of Children & Families v. *In re* Adoption of X.X.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010). Judge Salter's concurring opinion emphasized the strength of the family grouping in the case at hand and subsequent legislative and administrative actions contrary to the premises of the adoption exclusion. *See id.* at 96–99 (Salter, J., concurring).

50. *Adoption of X.X.G.*, 45 So. 3d at 83 (citations omitted) (quoting Warren v. State Farm Mut. Auto Ins. Co., 899 So. 2d 1090, 1095 (Fla. 2005); State v. Leicht, 402 So. 2d 1153, 1155 (Fla. 1981)) (alterations in original).

This is the reiteration, placed in the opinion just before the conclusion that the statutory exclusion is unconstitutional:

> In conclusion on the equal protection issue, the legislature is allowed to make classifications when it enacts statutes. As a general proposition, a classification will be upheld even if another classification or no classification might appear more reasonable. The classifications must, however, be based on a *real* difference which is reasonably related to the subject and purpose of the regulation. The reason for the equal protection clause was to assure that there would be no second class citizens.[51]

"Real difference" looks to be a test that might make the results of a trial record relevant and otherwise justify a hard look at both legislative premises and likely accomplishments—precisely the investigation both Judges Lederman and Cope undertook.[52] The Third District opinion, as we can see, presents this revised formulation as if it simply explains what "rational relationship" means within Florida constitutional law, a definition already established in opinions of the Florida Supreme Court.[53]

A close look at the cases that Judge Cope mentioned, however, shows a not quite so fully resolved state of affairs. The opinion in *Warren v. State Farm Mutual Automobile Insurance Co.* appears to regard its "rational relationship" standard as looking to what "it was reasonable for the Legislature to believe"[54]—a version of the "conceivable rational basis"

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51. *Adoption of X.X.G.*, 45 So. 3d at 91 (citations omitted) (internal quotation marks omitted) (citing *Leicht*, 402 So. 2d at 1155; Osterndorf v. Turner, 426 So. 2d 539, 545–46 (Fla. 1982)).

52. Judge Cope drew upon the testimony and the stipulations in the circuit court proceeding and reached conclusions much like those of Judge Lederman concerning the failure of the state's defense of the statutory exclusion to find sufficient footing in the record. *See Adoption of X.X.G.*, 45 So. 3d at 81-82, 87-91, 92-96. He did not address Judge Lederman's discussion of the statutory right to permanent placement. *See id.* at 84-85; *see also id.* at 83 n.5.

53. The Florida Supreme Court plainly left the door open, however. Judge Cope's opinion highlights the supreme court's brief per curiam opinion in *Cox v. Florida Department of Health and Rehab. Services*, 656 So.2d 902 (Fla. 1995), conclusorily quashing a grant of summary judgment in favor of HRS in an earlier challenge to the adoption ban because "[a] more complete record is necessary to determine this issue" – that is, the application of "the rational-basis standard for equal protection under . . . the Florida Constitution." *Id.* at 903; *see Adoption of X.X.G.*, 45 So. 3d at 83-84. *Cox* invoked *Vildibill v. Johnson*, 492 So. 1047 (Fla. 1986), with seemingly at best only weak support for factual investigation: "Appellees have failed to supply, and this Court has failed to find, any justification or state interest . . ." *id.* at 1050. Judge Cope's opinion in *Adoption of X.X.G.*, thus, is better read not as *following* from *Cox* but as an effort to supply the analysis *missing* in *Cox*.

54. Warren v. State Farm Mut. Auto. Ins. Co., 899 So. 2d 1090, 1095 (Fla. 2005).

formula that Judge Birch stated as the federal standard in *Lofton II*.[55] *State v. Leicht* indeed includes the "real difference" wording in its summary of constitutional criteria, although the Florida Supreme Court thought that the law at issue there was easily defended and thus the court, not surprisingly, left the implications of the formula unexplored.[56] The supreme court did point to its 1964 decision in *Finlayson v. Conner*, which equated "real difference" and "practical basis," and which undertook what appears to be an independent if quick common sense assessment of the challenged statute in upholding it.[57] *Finlayson* declared that "[n]umerous cases" supported the "principle," citing a digest.[58]

III. THE SURPRISINGLY FEDERAL UNDERPINNINGS OF THE FLORIDA INQUIRY

The most extended discussion of "real difference" I have found in the recent decisions of the Florida Supreme Court occurs in *Bourassa v. State*.[59] In his dissent there, Justice Adkins objected to the majority's refusal to hear a challenge to inclusion of marijuana in a list of criminally prohibited drugs, notwithstanding a well-developed record suggesting that marijuana was plainly different as a matter of fact from the other drugs listed:

> Florida and Federal courts have long since agreed a law creating classifications without a rational basis denies equal protection. The Federal "rational basis" test has been articulated in a number of ways. For one test, the Supreme Court has said a statutory discrimination will be upheld if any state of facts may reasonably be conceived to justify it. As another test, the court has said a classification must rest upon a difference having a fair and substantial relation to the law's objective. *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920). . . .
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> Florida courts' articulation of the "rational basis" test[,] . . . although varyingly phrased, is most closely analogous to the requirements of *Royster Guano Co.* Both tests require more than a hypothetical rational basis for classification. This court has interpreted the Florida Constitution to require a "valid and substantial reason for classifications." The requirement has also

55. *See Lofton II*, 377 F.3d 1275, 1276, 1277-78 (11th Cir. 2004) (en banc) (Birch, J., concurring), *quoting Lofton I*, 358 F.3d 804, 817-18 (11th Cir. 2004) (panel opinion).

56. *Leicht*, 402 So. 2d at 1154–55.

57. *Id.* (citing Finlayson v. Conner, 167 So. 2d 569, 571 (Fla. 1964)).

58. *Id.*

59. 366 So. 2d 12 (Fla. 1978) (per curiam).

> been termed one for "reasonable justification," or "a just, fair and practical basis" for classification "based on a real difference which is reasonably related to the subject and purpose of the regulation." To determine the rationality of a law the court must look at the purpose the law serves, the facts involved, the impact of the law upon citizens and the relationship between the law and these factors.[60]

It is indeed easy to glimpse an origin of "real difference" in *Royster Guano*. A tax classification controversy, Justice Pitney there associates the idea that a "ground of difference" must have "a fair and substantial relation to the object of the legislation" with the idea that a classification cannot "appear to be altogether illusory."[61] Justice Brandeis dissents, however: "I can conceive of a reason for differentiating" in the way that the legislation had and therefore "the classification is not illusory."[62] He seems to understand "real difference" as simply the opposite of "altogether illusory," as a test functionally closer to the now-mainstream "conceivable basis" federal formula. *Royster Guano* shows "real difference" usage as itself encapsulating the alternative approaches to judicial scrutiny we are also led to notice *via* Judge Cope's initial juxtaposition of passages from *Warren* and *Leicht*.

This tension in United States Supreme Court formulations was not resolved until about mid-way through the twentieth century. In the well-known case, *Railway Express Agency v. New York*[63]— putting at issue a New York City ordinance exempting owner-advertising from an otherwise general ban on truck advertising—Justice Jackson explicitly rejected the "conceivable basis" approach: "The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free."[64] He upheld the exemption

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60. *Id.* at 14 (Adkins, J., dissenting) (citations omitted). Among the Florida cases that Justice Adkins cites, the most apt appears to be *State v. Lee*, 356 So.2d 276 (Fla. 1978), framing its own approach in terms borrowed from a 1929 United States Supreme Court decision, *Ohio Oil Co. v. Conway*, 281 U.S. 146 (1929). *See Lee*, 356 So.2d at 279. *Conway*, it turns out, relies on the same *Royster Guano* formula invoked in *Bourassa* by Justice Adkins. *See Conway*, 281 U.S. at 160.

61. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

62. *Id.* at 418 (Brandeis, J., dissenting). Justice Holmes agreed with Justice Brandeis. *Id.* at 417.

63. Ry. Express Agency v. New York, 336 U.S. 106 (1949).

64. *Id.* at 115 (Jackson, J., concurring).

> because there is a real difference between doing in self-interest and doing for hire, so that it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price. "Real" is a matter of usage. Certainly the presence of absence of hire has been the hook by which much highway regulation has been supported."[65]

But Jackson wrote only for himself. Justice Douglas, writing for a majority of seven,[66] followed the "conceivable basis" approach, framing the test especially emphatically in burden of proof terms:

> The local authorities may well have concluded that those who advertised their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case.[67]

It is the Douglas opinion in *Railway Express*—and not Jackson's—that sets the form for federal equal protection analysis in terms that Judge Birch would understand as well-settled over a half-century later in *Lofton*.[68]

Importantly, however, the movement away from the majority approach in *Royster Guano* was not straightforward. The most thought-provoking elaboration of the real difference formula—for present purposes, certainly—has its beginning in (of all places) Justice Brandeis's dissent in that case, the dissent that we have already seen is also a *locus classicus* of the conceivable basis test. Brandeis states an approach to Fourteenth Amendment equal protection analysis generally: "[T]he amendment forbids merely inequality which is the result of clearly arbitrary action and, particularly, of action attributable to hostile discrimination against particular persons or classes."[69] This summary condenses (and cites) a synthesis framed by Justice Bradley,

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65. *Id.*

66. Justice Rutledge "acquiesce[d] in the Court's opinion and judgment, *dubitante* on the question of equal protection of the laws." *Id.* at 111.

67. *Id.* at 110 (majority opinion).

68. Justice Jackson, later writing for a unanimous Supreme Court in *Walters v. City of St. Louis*, 347 U.S. 231 (1954), another tax classification case, began his equal protection inquiry by insisting that "classification rest on real and not feigned differences," *id.* at 237, but immediately juxtaposed that requirement with statements that "the distinction have some relevance to . . . purpose," *id.*, and not "be wholly arbitrary," *id.*, concluding that "every presumption in . . . favor" of the challenged classification "is indulged," *id.* at 238 (summarizing Justice Douglas's test more or less).

69. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 418 (1920) (Brandeis, J., dissenting).

writing for the Supreme Court in *Bell's Gap Railroad* very near the end of his long judicial career:

> All . . . regulations . . . so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition.[70]

Bradley's targeting of "hostile discriminations against particular persons and classes" echoes and also generalizes (however mutedly) the concerns and commitments he associated with the idea of "the equal protection of the laws" a quarter-century earlier. Set against the backdrop of the Colfax massacre,[71] his circuit opinion in *United States v. Cruikshank* included this dramatic declaration:

> The war of race, whether it assumes the dimensions of civil strife or domestic violence, whether carried on in a guerrilla of predatory form, or by private combinations, or even by private outrage or intimidation, is subject to the jurisdiction of the government of the United States; and when any atrocity is committed which may be assigned to this cause it may be punished by the laws and in the courts of the United States; but any outrages, atrocities, or conspiracies, whether against the colored race or the white race, which do not flow from this cause, but spring from the ordinary felonious or criminal intent which prompts to such unlawful acts, are not within the jurisdiction of the United States, but within the sole jurisdiction of the states, unless, indeed, the state, by its laws, denies to any particular race equality of

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70. Bell's Gap R. Co. v. Pennsylvania, 134 U.S. 232, 237 (1890). The other two decisions that Justice Brandeis cites in *Royster Guano* do not characterize Equal Protection Clause obligations in terms similar to those used by Justice Bradley. The gist of Bradley's proposition, however, was not unique to him. Justice Field wrote, for example: "The inhibition . . . was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation." Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 188-89 (1888). Field's influential opinion in *Barbier v. Connolly*, 113 U.S. 27 (1884), however, did not make a similar point. *See id.* at 31–32.

71. Regarding the events at Colfax, Louisiana, see, LEEANNA KEITH, THE COLFAX MASSACRE (2008); NICHOLAS LEMANN, REDEMPTION 3-29 (2006).

> rights, in which case the government of the United States may furnish remedy and redress to the fullest extent and in the most direct manner.[72]

Bell's Gap reads the equal protection guarantee as extending beyond detrimental racial differentiations, an extension already well-established in 1890, but also implicitly treats the "war of race" as archetype, it is easy to think, as illustrative of a worrisome antipathy—"civil war," as it were, pointedly marking the conjunction of "unusual" state law and "hostile discrimination." Bradley thus also provocatively foreshadows an important element in present-day federal equal protection law, precisely prefiguring Justice Kennedy's opinion in *Romer v. Evans*,[73] famously discerning a similar conjunction: *Romer* like *Bell's Gap* carries forward a Reconstruction Equal Protection Clause.[74]

Justice Brandeis returned to the question of the content of equal protection requirements a few years after *Royster Guano* in his dissent in *Quaker City Cab Co. v, Pennsylvania*,[75] again citing *Bell's Gap*, but this time appearing to link Bradley's preoccupations and the "real difference" test:

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72. United States v. Cruikshank, 25 F. Cas. 707, 714 (C.C.D. La. 1874), *aff'd*, 92 U.S. 542 (1875). Justice Bradley, we know, avoided actually acting on his statement in the case at hand—seemingly an especially apt occasion, see, for example, the accounts cited previously. *See supra* note 71. Chief Justice Waite's Supreme Court opinion notably included no passage akin to Bradley's below. On *Cruikshank*, see generally CHARLES LANE, THE DAY FREEDOM DIED (2008).

73. 517 U.S. 620 (1996). "[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634.

74. I do not mean to suggest that there was some single Reconstruction era understanding of the import of the Fourteenth Amendment. The amendment emerged in a period of great political controversy that divided the so-called "North" even as the "North"/"South" polarity also persisted. Nor do I want to suggest that Justice Bradley was in some sense a defining figure jurisprudentially within the period. But because his own ambivalence—his own failure of nerve, we might think—is so evident in *Cruikshank* and in later cases, strong statements like the general formulation in *Cruikshank* possess a distinctive ring of authenticity, as expressive of wider felt apprehensions and commitments Bradley could not deny, even if he honored them in the breach and not the observance. For challenging discussion of *Cruikshank*, in many respects the starting point for much current thinking, see ROBER J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION 142–51, 174–88 (1st ed. 1985). Pamela Brandwein means to displace Kaczorowski's reading. *See* PAMELA BRANDWEIN, REHTINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 87-128 (2011). Notably, neither Professors Brandwein nor Kaczorowski makes much of the passage from Justice Bradley's opinion that I have quoted above. There is still, I think, more to learn by engaging *Cruikshank*.

75. 277 U.S. 389, 403–12 (1928) (Brandeis, J., dissenting).

> We call that action reasonable which an informed, intelligent, justminded, civilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike, that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state, and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote, or negligible.[76]

The idea of the "informed, intelligent, justminded, civilized man" is basic in Brandeis's thinking, we know. His opinion in *Whitney v. California*,[77] decided just the year before *Quaker City Cab*, famously grounded constitutional protection of free speech as a programmatic effort to foster a clear thinking democratic politics supplanting popular prejudice—a politics of "courageous, selfreliant men, with confidence in the power of free and fearless reasoning applied through processes of popular government . . . ."[78] The initial sentence in *Quaker City Cab* listing preconditions of reasonableness, it appears, is of a piece with *Whitney*, identifying circumstances—if holding fully—in which Bradley's worries about "[t]he

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76. *Id.* at 406 (citing Bell's Gap R. Co. v. Pennsylvania, 134 U.S. 232, 237 (1890)).

77. 274 U.S. 357 (1927).

78. *Id.* at 377 (Brandeis, J., concurring). "Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears." *Id.* at 376. The idea that freedom of speech is a governmental regime regulating democratic politics is, of course, the organizing theme of the central paragraph of the Brandeis opinion in *Whitney*:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; . . . that public discussion is a political duty; and that this should be the fundamental principle of the American government.

Id. at 375. On this and surrounding passages in *Whitney* as evocative of a theory of both free speech and more generally self-government, see Vincent Blasi, *The First Amendment and the Idea of Civil Courange: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653 (1988). Professor Blasi identifies the trace here of Brandeis's admiration of the political culture of classical Athens, *see id.* at 680-82; *see also* MICHEL FOUCAULT, THE GOVERNMENT OF SELF AND OTHERS 154–59 (Arnold I. Davidson ed., Graham Burchell trans., Palgrove Macmillan 2010) (2008) (discussing Greek conception of *parresia*).

war of race" in particular and "hostile discriminations" in general would be manifestly absent.[79] The real difference inquiry takes place within this context, fixed by these thresholds.

Quaker City Cab itself struck Brandeis as an easy case. The tax there distinguished between corporate and natural persons. "The difference between a business carried on in corporate form and the same business carried on by natural persons is, of course, a real and important one."[80] Tellingly, he thought, "Congress has repeatedly discriminated against incorporated concerns and in favor of the unincorporated."[81] But what if the applicability of the premise of clear thinking were in doubt, if the possibility of "hostile discrimination" were not so obviously beside the point? It is not difficult to suppose that the real difference inquiry—Brandeis's version—might then provide the point of departure for a harder look, a closer check as reassurance. The *Quaker City Cab* formulation appears to recognize the possibility of considerable rigor, developing a threefold elaboration, at hand (it seems) for testing the bona fides of defenses of reasonableness in harder cases. Brandeis, we may think, suggests a line of thinking that bears some resemblance to Justice Stone's famous "footnote four" effort a decade later, in *United States v. Carolene Products Co.*[82] Indeed, law clerk Louis Lusky, in his first draft of Stone's footnote, wrote in startlingly direct Brandeisian terms, sharply distinguishing "unreasoning" from "rational" political processes (terms also evocative of Justice Bradley's "war of race"):

> It may be too that when a statute is directed at a religious, . . . at a national, . . . or a racial minority, . . . the usual corrective processes will be hampered to an intolerable extent by unreasoning prejudice on the part of the majority which cannot be expected to yield to rational argument in the political form.[83]

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79. Indeed, the *Whitney* opinion, at the point that Brandeis acknowledges the limit of his own analysis, seems to recall Bradley in *Cruikshank*, concerned to defend federal intervention (and to limit it) given racial civil war: "[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. . . . Only an emergency can justify repression." *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

80. *Quaker City Cab*, 277 U.S. at 406.

81. *Id.* at 407. The focus on familiar legal usage is not dissimilar from Justice Jackson's approach in *Railway Express*, see *supra* text accompanying notes 64–65, or Justice Kennedy's analysis in *Romer*, see *supra* note 73.

82. 304 U.S. 144, 152 n.4 (1938).

83. LOUIS LUSKY, Appendix, in OUR NINE TRIBUNES 185 (1993). Justice Stone replaced the last part, in his own initial draft, with a more subdued formula: "The special conditions

It is not a long step from Justice Brandeis's dissent in *Quaker City Cab* to Judge Cope's Florida analysis. It is also not difficult to recall the Cope opinion's concluding quotation from *Ostendorf*: "The reason for the equal protection clause was to assure that there would be no second class citizens."[84] This sentence in one respect appears out of nowhere. We are in position now, however, to recognize its own Reconstruction overtone, its reiteration of a proposition Justice Bradley and his contemporaries would have treated as a familiar recourse and point of departure in their own controversies.[85] We may want to think of the *Ostendorf* quotation as a carefully tactful response to (and an acknowledgement of) concern prompted by the Anita Bryant-fueled frenzy that set the scene, we may remember, within which the Florida adoption exclusion had become law.[86] Cope's close look acquires basis. It is not as though the adroitly pitched homophobic Bryant campaign is itself somehow the decisive constitutional fact—*itself* decisive, the reason for the adoption exclusion's invalidation.[87] Rather, it becomes a reason for threshold concern on Brandeis's model, a reason to look for countering reassurance more closely than might otherwise have been the case, via the "real difference" inquiry in any event already generally pertinent.

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obtaining in such situations, which tend seriously to curtail the operation of those political processes which are normally exerted to protect minorities may call for a correspondingly more searching judicial scrutiny." *Id.* at 186. Lusky in turn responded, adding an introductory phrase to Stone' sentence, in effect defining "special conditions," but still a weaker version of his own first try: "Prejudice against discrete and insular minorities may be a [~~The~~] . . . ." *Id.*

84. Ostendorf v. Turner, 426 So. 2d 539, 545–46 (Fla. 1982).

85. We might also recall the first sentence of Justice Kennedy's opinion in *Romer*, and its evocation of Justice Harlan's dissent in *Plessy v. Ferguson*: "One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither know nor tolerates classes among its citizens.'" *Romer*, 517 U.S. at 623, *quoting* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

86. For a careful and detailed recounting in 2005, prominently and provocatively retrieving Anita Bryant and her campaign on the high church occasion of a Dunwody Lecture at the University of Florida, see William N. Eskridge, Jr., *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1014-18, 1020–24, 1058–61 (2005).

87. Judge Barkett, dissenting in the *Lofton II* en banc decision, dwelt at length on both the Bryant campaign and its echoes in the Florida Legislature, seeing these goings-on as joint evidence of unconstitutional animus under *Romer*. *See Lofton II*, 377 F.3d 1275, 1301-03 (11th Cir. 2004) (en banc) (Barkett, J., dissenting).

IV. THE FOURTEENTH AMENDMENT TEMPLATE (I)

Neither Judge Lederman nor Judge Cope worries at all about whether to model Florida constitutional law on its federal counterpart. Lederman treats the pertinent Florida and federal law as interchangeable. Cope reads Florida law as already well-settled by the state supreme court, as though whatever hard choices there might be had already been made. We know—and we know that Judges Lederman and Cope knew—that the adoption exclusion question need not be thought of as easy. The Eleventh Circuit *Lofton* opinions together had already established this much—even if not much else.

Both of the Florida opinions are in fact creative efforts.

I have largely ignored the most thought-provoking aspects of Judge Lederman's work. She demands, in effect, that her readers treat as central the rigorously-presented record of expert testimony and stipulations. In this way, she not so implicitly depicts the constitutional question as first and foremost a question of fact, as resolving the case in advance (as it were) of any controversies with regard to choice of constitutional formulas. And she inserts, right before her brief constitutional analysis *per se*, an extended, daringly free-standing demonstration of the irreconcilable conflict between legislative rejection of the idea of gay adoptive parents and the surrounding statutory scheme and its premises. Again, as in her presentation of the record, Lederman plainly fixes a perspective within which the exclusion appears to be simply pointless—and in this instance again leaving to her readers the work, whether easy or hard, of identifying apt analytics.[88]

If Judge Cope's work is more pertinent here, it is because he is, in contrast, very much interested in fixing the framework, and therefore establishing in particular that careful reading of the record in the case is indeed appropriate. To this end, his opinion presents itself as an easy-to-accept accumulation of Florida constitutional commonplaces. As we have seen, however, the juxtaposed Florida Supreme Court opinions translate Cope's own discussion into a wider context, within which alternate state judicial formulations appear to be no longer so straightforwardly equivalent—and in which, more surprisingly, what we begin thinking is Florida constitutional law increasingly appears to be a taking over of federal law. The federal law is not, it is clear, the current state of the art. But it is, we can see, distinctively federal, caught up in the great, widely known controversies of the first third or so of the twentieth century. Matters in

88. In a work in progress I suggest that Judge Lederman's statutory discussion is especially significant if set within a somewhat remodeled account of federal equal protection analysis.

question indeed run further back, well into the nineteenth century, back to Fourteenth Amendment readings easy to link to initial Reconstruction, and thus quintessential federal concerns. It is only in this wider and longer unfolding, we realize, that the "real difference" terminology that Judge Cope puts to work so persuasively in his opinion finds its needed distinctive footing. Justices Brandeis and Bradley become his colleagues.

There is, of course, nothing necessarily remarkable about a state court deciding a case at hand to choose "to rely on federal precedents as it would on the precedents of all other jurisdictions," insofar as "the federal cases are being used only for the purpose of guidance."[89] But here we meet something different. Judge Cope's opinion—the point of focus for present purposes—refers immediately only to other Florida judicial opinions, but these references in turn are part of a larger set of decisions framing state constitutional law through use of a term that appears to originate in federal constitutional law, even if not in recent judicial interpretation. In addition, the term in question—"real difference"—appears to acquire at least a part of its force (I argue anyway) from the distinctive setting in which the pertinent federal constitutional provision was initially a response. This is not, therefore, a circumstance we would associate with a constitutional law equivalent of "general common law"—state and federal judges are not independently selecting from (or adding to) some common stock of ideas in a real sense separate from or anterior to the law of any given regime, subject only to modifications necessary to fit the common ideas within jurisdiction idiosyncrasies. It is also not straightforwardly state law, autonomously responding to particulars of state history and politics, for example.

No intermediate body of constitutional choice of law emerges, of the sort that Professor Williams criticized as difficult to situate or justify. Why would state judges, if they take matters seriously, put to work within state constitutional law terms associated with older federal law strongly shaped by distinctively federal constitutional contexts? Writing forty years ago, in his *tour de force* critique of substantive due process notions showing up in Oregon decisions, Hans Linde declared: "In practice, courts and opposing counsel should scrutinize any 'due process' citation earlier than volume 300 of the United States Reports with extreme skepticism."[90] Why shouldn't something like the same stricture apply in Florida in 2010, in state judicial opinions borrowing federal equal protection vocabulary? To be sure, in the Oregon cases that prompted Linde, the state courts appeared to be applying

89. Michigan v. Long, 463 U.S. 1032, 1041 (1983).

90. Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 185 (1970). In the same article, Professor Linde characterizes state judicial practice as relying on "an episodic aberration of the distant past." *Id.* at 164.

federal law as such—and Linde supposed, as the United States Supreme Court pronounced a few years later in *Oregon v. Hass*[91] and reiterated subsequently: "[W]hen a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than this Court has imposed."[92] In Florida, of course, the "matter" is formally a matter of state constitutional law. The United States Supreme Court concedes: "A state court may, of course, apply a more stringent standard of review as a matter of state law under the State's equivalent to the Equal Protection . . . Clause[]."[93] But in Florida the "more stringent standard of review" is genetically federal (as it were) even as it is also "a matter of state law."

This is too abstract.

One answer at least may come into view by way of considering another anomalous usage found in Florida constitutional opinions. Judges often refer to "the Florida equal protection clause."[94] There is literally no such clause. Article I, section 2 of the Florida Constitution provides: "All natural persons, female and male alike, are equal before the law and have inalienable rights . . . ."[95] This provision, although amended, is at bottom a 1968 composite, combining the 1868 Reconstruction constitution's emphasis on equal persons and inalienable rights (obviously borrowing from the Declaration of Independence) and the 1885 replacement constitution's substitution of the seemingly more substantively agnostic "equal before the law" language.[96] Like its predecessors, the 1968 constitutional language plainly does not include the key Fourteenth Amendment phrase "protection of the law." Why would state judges insist that they are in the business, as a matter of state constitutional law, of elaborating and enforcing "equal protection of the laws" if that requirement is distinctive to the United States Constitution?[97]

"Equal protection of the laws" is an obligation that the Fourteenth Amendment imposes on state governments in the second sentence of section one—following the first sentence dictate that all state residents are equally

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91. 420 U.S. 714 (1975).

92. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461 n.6 (1981) (citing *Hass*, 420 U.S. at 719).

93. *Id.*

94. *E.g.*, Schreiner v. McKenzie TankLines, Inc., 432 So. 2d 567, 569 (Fla. 1983).

95. FLA. CONST. art. I, § 2.

96. *See* Patrick O. Gudridge, *Florida Constitutional Theory (For Clifford Alloway)*, 48 U. MIAMI L. REV. 809, 889–93 (1994).

97. The phenomenon is not unique to Florida. Robert Williams shows in considerable detail that state courts all over the United States tie—or purport to tie—state constitutional law to federal equal protection thinking notwithstanding manifest differences in state and federal constitutional texts. WILLIAMS, *supra* note 1, at 216–24.

state citizens (if they are United States citizens). Against the backdrop of the initial post-Civil War crisis—Black Codes in essence racially differentiating categories of status and citizenship, emergent insurgent terrorism directed against former slaves and their allies, etc.—it is hardly surprising that the Fourteenth Amendment, the principle constitutional response to the crisis, incorporated a federal definition of state citizenship and specified the governmental duty to protect ordinarily supposed to be owed to citizens, or indeed all residents in most respects.[98] State governments were thus identified, as a matter of federal constitutional law, as potentially both problems and solutions, potentially incompletely organized and subject to seizure by private, sometimes violent or otherwise illegal agendas.[99] State officials therefore assumed a federal obligation in their ordinary course of work to show their acknowledgement of federal responsibilities. This is not a matter, we all know, that is simply a passage in nineteenth century constitutional history. Mid-twentieth century resistance to *Brown v. Board of Education* is only one especially obvious later parallel.[100] We all remember decisions like *Cooper v. Aaron* and *Walker v. Birmingham* and their attendant complexities.[101]

In Florida, opposition to *Brown*, among its multiple forms, included a prominent judicial involvement, the result of repeated pronouncements by Glenn Terrell, a brilliant and widely popular "log cabin Florida" throwback, chief justice of the Florida Supreme Court through some of the period, an insistent and provocative defender of racial segregation and sharp critic of the United States Supreme Court.[102] Merely wary in 1954,[103] Terrell had by

98. For pertinent precursors, see, for example, Citizenship, 10 Op. Att'y. Gen. 382, 388 (1862); Brief for Plaintiff in Error at 6–7, Scott v. Sandford, 60 U.S. 393 (1857), *reprinted in* 3 PHILIP B. KURLAND & GERHARD CASPER, LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 184-85 (1978). *See also* 2 JOSEPH STORY, COMMNETARIES ON THE CONSTITUTION OF THE UNITED STATES 654 (4th ed. 1873) (notes and additions by Thomas M. Cooley).

99. *See infra* pp. 958–60, 962–64.

100. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 385–442 (2004).

101. *See* Patrick O. Gudridge, *Emergency, Legality, Sovereignty: Birmingham, 1963*, *in* SOVEREIGNTY, EMERGENCY, LEGALITY 72–119 (Austin Sarat ed., 2010).

102. On Justice Terrell as cult figure, see Susan Yancey, *'The People's Judge'*, 33 FLA. B.J. 1138 (1959) (high school senior's winning essay in Florida Historical Society contest) and THE JUDICIAL SAYINGS OF JUSTICE GLENN TERRELL (M. Lewis Hall ed., 1964). Regarding Terrell's opposition to *Brown v. Board of Education*, see, for example, *id.* at 137–39, and Glenn Terrell, *States' Rights—The Law of the Land*, 32 FLA. B.J. 458 (1958) (book review).

103. Writing for a unanimous Florida Supreme Court in 1954, upholding school bonds issued to fund construction of segregated schools, Justice Terrell concluded that *Brown* by itself did not dramatically change circumstances:

1957, in the famous in Florida case *State* ex rel. *Hawkins v. Board of Control*, crossed over, in passages writing in ways that, while carefully avoiding direct confrontation, not so subtly suggested grounds for outright opposition to *Brown*, in terms now startling and disturbing:

> Some anthropologists and historians much better informed than I am point out that segregation is as old as the hills. The Egyptians practiced it on the Israelites; the Greeks did likewise for the barbarians; the Romans segregated the Syrians; the Chinese segregated all foreigners; segregation is said to have produced the caste system in India and Hitler practiced it in his Germany, but no one ever discovered that it was in violation of due process until recently and to do so some of the same historians point out that the Supreme Court abandoned the Constitution, precedent and common sense and fortified its decision solely with the writings of Gunner Myrdal, a Scandinavian sociologist. What he knew about constitutional law we are not told nor have we been able to learn.[104]

Hitler as precedent?

> Such is in part the predicate on which the states are resisting integration. They contend that since the Supreme Court has tortured the Constitution, ... they have a right to torture the court's decision. Whatever substance there may be to this contention, it is certain that forced integration is not the answer to the question. It is a challenge to freedom of action that is contrary to every democratic precept. It is certain that attempts at integration by court order have engendered more strife, tension, hatred and disorder than can be compensated for in generations of attempt on the part of those who are forward looking and want to do so. They have done more to break down

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> The moral attitude of the white population in the affected states will have infinitely more to do with correcting the alleged vices of segregation than any court decision. At least one-fourth of the population of the country is involved, and it is utter folly to contend that desegregation or any other new and untried philosophy will taken root and grow before a sympathetic feeling for it is established. Intangible barriers dissolve under sympathetic understanding and trained leadership much more readily than they do under court orders.

Bd. of Pub. Instruction v. State, 75 So.2d 832, 837 (Fla. 1954).

104. State *ex rel.* Hawkins v. Bd. of Control, 93 So.2d 354, 360-61 (Fla. 1957) (Terrell, C.J., concurring). In a similar vein, see Glenn Terrell, Book Review, 32 FLA. B.J. 458 (July, 1958).

> progress and destroy good feeling and understanding between the races than anything that has taken place since emancipation. [105]

It is therefore not surprising, indeed in an important sense precisely appropriate, if Florida judges later on appear to take seriously acknowledgements of federal obligations as integral elements in state lawmaking, including constitutional drafting and interpretation. I do not mean to posit some sort of radical conversion circa 1968—some mass shift by Florida judges and lawyers away from resistance to segregation towards support of the civil rights movement. Anders Walker has stressed the complexity of the political landscape in states like Florida in the post-*Brown* era, in which civil rights supporters and ardent "massive resistance" racial segregationists collided not only with each other, but with determined "moderates" for much of the period aimed at preserving as much racial segregation as possible, but also committed precisely *not* to break with federal law, to identify and pursue opportunities that the United States Supreme Court and federal officials afforded for slowing change, and to monitor and control closely *both* civil rights workers and segregationist extremists.[106] The "moderate" impulse, it is easy to suggest, might readily carry forward into the post-segregation era, with acknowledgement of federal law now becoming a ready resource or setting for state judicial or other official action, along the way relegating figures like Glenn Terrell to the margins, to an increasingly "prior" legal culture. The repeated references to "the Florida equal protection clause" might be one manifestation. The deeper willingness to appropriate federal understandings of "the equal protection of the laws" to inform the elaboration of state constitutional criteria would seem to be of a piece. This is especially fitting, we might think, within the context of judicial review of the statutory preclusion of adoption by homosexual couples, Florida law enacted within an antagonized political environment too redolent of Reconstruction worry.[107]

V. THE FOURTEENTH AMENDMENT TEMPLATE (II)

As readers of Robert Williams, what should we make of all this?

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105. *Hawkins*, 93 So.2d at 361.

106. ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS (2009). On circumstances in Florida, see *id.* at 85-116.

107. *See supra* note 86.

I have been arguing against the main current of contemporary writing about state constitutional law that Professor Williams's book shows off in one of its highest and best forms. "State constitutional law" is—or is depicted as—an entirely general phenomenon, either truly nationwide or nearly so in important parts of its content, or in any case considered comparatively, with developments in particular states ordinarily explored vis-à-vis each other. But there is still much to be learned, I think, from "parochial, state-specific" study.[108] Important movements of ideas at work within constitutional law sometimes become apparent only given close attention to genealogy, or recurring instabilities, or the possibility of periods of crisis, no doubt all *inter alia*. This requires, almost always, close attention to particular places and times, cases and controversies. As here, moreover, we may want to think about *both* state and federal constitutional law, and we need therefore to consider the roles each may play within the development of the other, a double *renvoi* that is an exercise now twice "parochial." I have also tried, however, to respond to Robert Williams's critique—his own unease in view of the unease that state constitutional law, considered generally, exhibits regarding the idea of independent, autonomous rights jurisprudence. If noticing Justices Brandeis and Bradley—their distinctive efforts—adds anything, it is because their formulations and the historical moments in the process addressed and expressed somehow evoke pressing constitutional inquiries in other, later particular settings. This is a peculiar sort of action at a distance, we might think. Conjunctions of ideas formed at different points in time within one constitutional regime are understood as formative within still another context and time, within another regime as well.

If it is not simply an oddity, this trajectory, or rather, the possibility of this trajectory, needs accounting, a way of tracing its vector. Consider, therefore, this too summary gloss:

The Fourteenth Amendment reacts to—is mustered into—an already present post-Civil War war, an insurgent reassertion of a status quo ante absent only the full formal trappings of chattel slavery.[109] Doubt about the

108. WILLIAMS, *supra* note 1, at 8.

109. *See* PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION 16–20 (1999); HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION 16–20 (2001). On Black Codes and related legal manifestations, see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 199–210 (1988). The charge that the Committee of Fifteen (the joint congressional committee responsible for drafting the Fourteenth Amendment) gave to its investigative subcommittees tersely summarizes framer concerns at the outset:

> [S]ub-committees . . . [shall] be appointed to examine and report upon the present condition of the States composing the late so-called Confederate States of America . .

bona fides of the agendas of state-selected officials becomes the Amendment's overarching theme—in three particulars tied precisely to continuities in policies that might be pursued by officials associated with the former Confederacy,[110] but also more generally, expressed in terms reiterating the risks that officials would ignore commitments owing to populations: their status as equally citizens of the United States and therefore equally state citizens; the concomitants of national citizenship; their claims to due process of law and the equal protection of the laws. Eric Foner writes: "The Fourteenth Amendment can only be understood as a whole . . . interven[ing] directly in Southern politics, seeking to conjure into being a new political leadership that would respect the principle of equality before the law."[111] However immediate and limited in time and place the initial constitutional program, we can see, its worries are addressed in substantial part in ways that formally generalize and extend forward in time the Amendment's originating preoccupations. The initial accumulation of concerns is in itself remarkable; it inserts into the Constitution a recurring, complex suspicion as to the allegiance of state-selected officials and therefore a recurring question as well about the propriety of state government. This departure from usual notions of comity and relative institutional autonomy characteristic of American federalism is both sharp and still part of ordinary constitutional law: the Fourteenth Amendment is different., we are quite sure[112]

. what may be the present legal position of the freedmen in the respective States; in what manner the so-called ordinances of secession have been treated; whether the validity of debts contracted for the support of the rebellion is acknowledged; and generally as to all evidence, documentary or otherwise, of the present loyalty or disloyalty upon the part of the people or government of said states.

BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 47 (1914) (committee action dating from January 12, 1866).

It is altogether plausible to argue, moreover, that the proposal and installation of the Fourteenth Amendment in important ways sharpens this politics in the very process of confronting it. For the classic account, see MICHAEL PERMAN, REUNION WITHOUT COMPROMISE 234–65, 337–47 (1973).

110. The second, third, and fourth sections reduced allocated seats in Congress if (as expected) legislatures in formerly Confederate states denied black citizens suffrage; denied opportunity for federal or state office to individuals who were officially active in Confederate government and had previously taken oaths to support the United States Constitution; and barred payment of Confederate debt.

111. FONER, *supra* note 109, at 259.

112. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("[T]he substantive provisions of the Fourteenth Amendment . . . themselves embody significant limitations on state authority."); *accord, e.g.*, United States v. Georgia, 546 U.S. 151, 158-59 (2006); *Ex parte* Virginia, 100 U.S. 339, 346 (1880).

* * * * *

For purposes of thinking about the content of state constitutional law, uses of the Fourteenth Amendment and its originating, Reconstruction-worried context require a template, a sufficient sense of concomitants. Propositions Chief Justice Chase marched across *Texas v. White*[113] meet this need, I think—in sum an analytical history, written at the height of Reconstruction commitment, work of one of the most-accomplished legal and political figures of the time, declaring constitutional premises easily associated with the text of the Fourteenth Amendment.[114] Not often studied,[115] Chase's formulations warrant quoting at length:

> The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state.[116]
>
> . . . .
>
> [T]he principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government.
>
> . . . .
>
> . . . [A] plain distinction is made between a State and the government of a State.[117]
>
> . . . .
>
> . . . [T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all of its provisions, looks to an indestructible Union, composed of indestructible States.[118]
>
> . . . .
>
> . . . The obligations of allegiance to the State, and of obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while

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113. 74 U.S. 700 (1868). For opposing assumptions, see *id.* at 737–41 (Grier, J., dissenting).

114. Because *White* involved matters in part preceding adoption of the Fourteenth Amendment Chief Justice Chase framed his discussion in constitutionally quite general terms.

115. *But see* Charlton C. Copeland, Ex Parte Young: *Sovereignty, Immunity, and the Constitutional Structure of American Federalism*, 40 U. TOL. L. REV. 843, 867–72 (2009).

116. *White*, 74 U.S. at 720.

117. *Id.* at 721.

118. *Id.* at 725.

> these obligations are performed, are essentially different from those which arise when they are disregarded and set at nought. And the same must necessarily be true of the obligations and relations of States and citizens to the Union. . . . All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.[119]
>
> . . . .
>
> The new freemen necessarily became part of the people, and the people still constituted the State; for States, like individuals, retain their identity, though changed to some extent in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guaranty.[120]
>
> . . . But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State.[121]

Government of the people, by the people, for the people? Chief Justice Chase understands "the people of the State" to *be sovereign*—"constitute the State"—but to be also at times a *threat*—"refusing to recognize their constitutional obligations, assum[ing] the character of enemies." *Constitutional obligations?* If its people define a state—and not the state's governing institutions, processes, and office-holders—it is the populace therefore who owe each other (together the state) duties of allegiance. *Because a state is at bottom simply a population, it is easy to understand all persons resident as undifferentiated, equally sovereign, to be treated therefore as equals.* "The new freemen necessarily became part of the people, and the people . . . constituted the State . . . ." It is this inclusion, fundamentally, that gives rise "to the new conditions created by emancipation" dictating constitutional "amendments as would conform its provisions."

Why? "Adequate security to the people of the State"—protection given allegiance—is within Chase's vocabulary the same thing as tying together

119. *Id.* at 727.
120. *Id.* at 728–29.
121. *Id.* at 729.

"the preservation of the States" and "the maintenance of their governments." The States are the people of the States—the implication follows therefore that "the preservation of the [people]" must be in some sense chronically at risk: the point of constitutional adjustment becomes "[a]dequate security." *At risk from whom?* Again, it must be people of the State themselves, at war against other members of the same populace, in "rebellion," in breach of the duties of allegiance they owe each other: civil war. *This is a matter of concern to the federal government as well as state governments.* Chase need not pause to elaborate his logic: State citizens are at the same time federal citizens, "the people of the [United States]" equally "constitute the [United States]."[122] Chase's propositions, we can therefore see, subsume matters in dispute in 1868 within conclusions established or confirmed by the Civil War—and also map readily onto all or almost all of the particulars of the five sections of the Fourteenth Amendment. Pointedly, within the states, "the maintenance of their governments" acquires a distinctive constitutional framing. Governments appear as not themselves sovereign, rather simply instruments, in play across competing contingencies, resources of authority ("color of law") or force or other means, in either civil war contesting the equal status of the populace across the board or alternatively projects precisely grounded in conceptions of general good or equal acknowledgement. Testing the pertinence of these opposed possibilities vis-à-vis each other becomes the Fourteenth Amendment task in chief, and as a result, the concern of both the federal government and constitutionally-responsible state officials themselves.

I read Chief Justice Chase, therefore, as engineering a repeating, cumulating underscoring of precariousness: depicting state governments and the federal government as simply mechanisms, creatures of populations—and then recognizing popular sovereignty, which ought to become the foundation of political authority, as itself faulted and fragile, always at risk of fracture—civil war. "Democracy and distrust," indeed! Chase's complex of alternatives and interplays describes precisely *not* a "machine that would go of itself," rather a sometimes nightmarish constitutional Calder mobile, which through its movements, among its possible delineations, maps occasions of crisis, therefore revealing to persons perceiving the mobile's play reason for unease, and senses of foreboding and urgency. Chase's construction, we might think, "agitate[s] the law from within, to something

122. It follows just as readily, again given the twice-fundamentality of the people, who constitute both the States and the United States, that "the maintenance of" federal government also might become part of the business of state governments.

like a chronic state of emergency within the domain of law itself."[123] But it also includes within its range of movements a second possibility, of constitutional provisions positioning as off-sets: as governing forms warding off or countering risks of crisis the overall interplay may bring to attention. Much in the Fourteenth Amendment, we easily see, might be thought of in this way, as a *post-bellum* "anti-emergency constitution."[124] For example, section one takes out of fracturing political debate the question of citizenship, mandating equal citizenship; obliges state officials and governments to respect federally-granted privileges and immunities across the board; and maintain legal regimes within which even-handed commitments to principles of due process and equal protection are apparent.[125]

It is not hard to glimpse Chief Justice Chase's template in the background at points in Justice Bradley's formulations – in his sense of crisis and urgency in *Cruikshank* occasioned by the possibility of the "war of race," and reset later within purportedly ordinary parameters of equal protection inquiry. Chase's possibilities remain evident in Justice Brandeis's equal protection synthesis in *Quaker City Cab*. The markers of concern are pretty much the same. It is only another short step, we have already seen, to Judge Cope's use of the "real difference" rubric in Florida in 2010.

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123. ERIC L. SANTNER, THE ROYAL REMAINS: THE PEOPLE'S TWO BODIES AND THE ENDGAMES OF SOVEREIGNTY 9 (2011) (characterizing Michel Foucault account).

124. *See generally* Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004).

125. Charlton Copeland puts *Texas v. White* to work somewhat differently:

> [T]he national government must respect the status of the states in the federal system, and the states must respect the status of the national government. Respect for the perpetual nature of the federal relationship obligates the states to remain committed to their connection with the national government. Similarly, national respect for the states requires that the national government recognizes state independence, whose legitimacy is derived from the states' status as separate political communities in the federal system, even as constitutional obligations remain binding on state and national actors alike.

Copeland, *supra* note 115, at 874. In this article and in forthcoming work, Copeland works out a "relational conception of federalism" within which "[t]he Constitution's supremacy" is recognized simultaneously with respect for "the status of both the state and federal governments as distinct political communities." *Id.* at 873. He sees this triune conjunction—John Donne's "Batter my heart, three-person'd God"—as delineated in conceptions of "political community, the authority of which is measured by its accountability to the people," protected the Constitution. *Id.* at 874. My account, it should be obvious, is less magisterial and triumphal.

This easy progression should not mislead, however. Not all invocations of the Fourteenth Amendment—or the Equal Protection Clause in particular—match up. Consider, for example, the California constitutional amendment at issue in *Crawford v. Board of Education*:

> [N]othing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the [Fourteenth] Amendment to the United States Constitution with respect to the use of public school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of public school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the [Fourteenth] Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the [Fourteenth] Amendment of the United States Constitution.[126]

The United States Supreme Court, addressing a federal challenge to the amendment, treated the case as confounding: "It would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it."[127]

Viewed as state constitutional law, however, as a lockstep mechanism of the sort that Robert Williams catalogues, the California provision becomes not only analyzable, but importantly more provocative than the federal Supreme Court apparently understood it to be. The amendment is not simply a cross-reference or citation to the Fourteenth Amendment. It is also designedly a response to and revision of prior California constitutional law. In this instance, the constitutional change is not only (maybe not even primarily) substantive: it is also institutional or structural. The keys are the instructions directly addressed to "court[s] of this state," even more so the repeated references to "any public entity, board, or official," and to "any obligation or responsibility."

126. Crawford v. Bd. of Educ., 458 U.S. 527, 532 n.6 (1982).
127. *Id.* at 535.

In 1976 in the course of the *Crawford* litigation itself,[128] the California Supreme Court, expanding on its *Jackson* decision over a decade earlier,[129] declared that "school boards in this state bear a constitutional obligation to attempt to alleviate school segregation, regardless of its cause."[130] The *Crawford* opinion characterized this duty broadly, reflecting its skepticism regarding the usefulness of the distinction between de jure and de facto school segregation prominent in federal law. But the California *Crawford* decision departed from federal practice in a second important way. Responsibility was primarily administrative—state courts were to defer to school boards: "[S]o long as a local school board initiates and implements reasonably feasible steps to alleviate school segregation in its district, and so long as such steps produce meaningful progress . . . we do not believe the judiciary should intervene. . . ."[131]

The constitutional amendment drafted in response to the state *Crawford* opinion, substituting "federal court" understanding of Fourteenth Amendment equal protection requirements, not only transplanted *substantive* federal law—notably, the de jure/de facto distinction called into question by the California Supreme Court—it also executed an *institutional* transformation, shifting primary jurisdiction from school boards to courts. To be sure, the amendment directly addresses state courts, instructing them to mimic federal courts. But because the California Supreme Court had previously put in place a version of administrative law, a regime acknowledging substantial discretion on the part of school boards, the new constitutional command requiring conformity to federal judicial practice, a regime of close judicial supervision itself closely regulated, was institutionally transformative. School boards were no longer to act as though independent, as possessed of respected discretion. They were instead to take cues from courts with regard to both impetus ("specific violation") and remedy, a mimicry all the more artificial and thus confining because the model courts would ultimately be federal rather than state.

The *Crawford* amendment thus was precisely an act in opposition—we might think today—to "federalism all the way down," Heather Gerken's eloquent description and defense of institutional plurality and de-emphasized sovereignty, within states as well as across, multiplying opportunities for groups and views figuring as minorities in larger settings to take hold in

128. Crawford v. Bd. of Educ., 551 P.2d 28 (Cal. 1976).
129. Jackson v. Pasadena City Sch. Dist., 382 P.2d 878 (Cal. 1963).
130. *Crawford*, 551 P.2d at 36; *Jackson*, 382 P.2d at 882.
131. *Crawford*, 551 P.2d at 45.

narrower contexts.[132] The inclusion of explicitly federal law inside state law worked to limit debate as a matter of California politics, leaving officials and constituents alike in the role of passive spectators, watching and waiting for the outcomes of federal judicial contests. Equally clear, the amendment's use of federal law—unlike, say, Judge Cope's in Florida—does not fit well with the *Texas v. White* template. The federal transplant's initial invocation of the Fourteenth Amendment Equal Protection Clause might be taken to be a Reconstruction-like pledge of allegiance. The subsequent passages—plainly drafted to be functionally central—nonetheless mark institutional arrangements as primary, decisively rearranging the relationship of California judicial and administrative regimes by training the California courts to federal judicial practice. It is not at all easy, as a result, to read the wholesale incorporation of federal judicial assessment of the equal protection implications of "school assignment and pupil transportation"—remedial procedures included—as addressing in any clear way Chief Justice Chase's concern that popular sovereignty might be at the same time fundamental constitutionally and fundamentally divisive.

The institutional politics that the language of the *Crawford* amendment reveals—read against the background of the California Supreme Court's work—suggests, rather, that treating the amendment as an expression of equal protection fealty is too simple. The question of why federal law should be put to work within state law in this unusual way in this particular setting may be readily regarded as more troubling than the United States Supreme Court treated it in 1982. *Crawford*, indeed, precisely raises Justice Bradley's worry about the conjunction of the legally "unusual" and constitutionally suspect "hostility – or, to put the point in more up to date terms, *Crawford* may look to us as a lot like *Romer* before *Romer*.[133]

* * * * *

The larger question remains: Why should we regard the *Texas v. White* template as salient, why should glimpses of its premises and preoccupations in the work of state court judges (for example) add force to their arguments or conclusions? In *Crawford* itself, this question was beside the point. The lockstep formula there was a product of constitutional amendment and not adjudicative choice, as in the cases Robert Williams discusses.[134] But in circumstances in which alternative readings of state provisions are indeed

132. *See generally* Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

133. *See supra* p. 948.

134. *See supra* p. 936.

under consideration, the appeal of Fourteenth Amendment footing for interpretations of state constitutional provisions is straightforward: the "legitimacy questions"[135] that Professor Williams suggests prompts judicial reluctance surely diminish if state judges can link their work with federal constitutional concerns.

The *Texas v. White* template may be only one among a larger set of characterizations within which we might recognize alternative conceptions of the Fourteenth Amendment. Why prefer Chief Justice Chase's sense of things? Indeed, why opt to treat as relevant the Fourteenth Amendment?[136] Chase depicts a state of affairs in which (we have seen) government is incompletely organized, at risk of becoming caught up in "civil wars," conflicts within the populace in which the premise of "equal citizenship" is under assault as a matter of both fact and perception. This is, we might think, a rather old-fashioned worry. But suppose we see recurrence of Bradley's "war of race," in whatever contemporary form, as chronic—and maybe especially if we see other modes of social division as also tending to mutate forcefully (again, in whatever form), becoming assertions and impositions of outright, persisting hierarchies? We might therefore want to attend to the fragility of government, take note of its tendency to serve as an at-hand mechanism, as a more or less readily adaptable project in the making. This is distinctively Fourteenth Amendment work—as Chase (and Brandeis and sometimes Bradley) understood it—and we can easily see versions of this same concern implicit in the efforts of federal and state judges who are our own contemporaries. The work, notably, is both profound and pointed, strongly prompted and strongly limited simultaneously: apt in circumstances in which Fourteenth Amendment "civil war" worries hold, circumstances defined in Brandeis's map of reason and unreason, therefore only sometimes salient, dormant in conditions otherwise. It is not so much therefore a matter of co-existing or superseding characterizations—rather, really, a matter of alternate constitutional universes.

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135. WILLIAMS, *supra* note 1, at 185. Professor Williams's extended discussion is important, challenging, and well-done. *See id.* at 137–85.

136. Professor Gerken's essay provocatively explores a version of this question at length. *See* Gerken, *supra* note 132, at 48–59.