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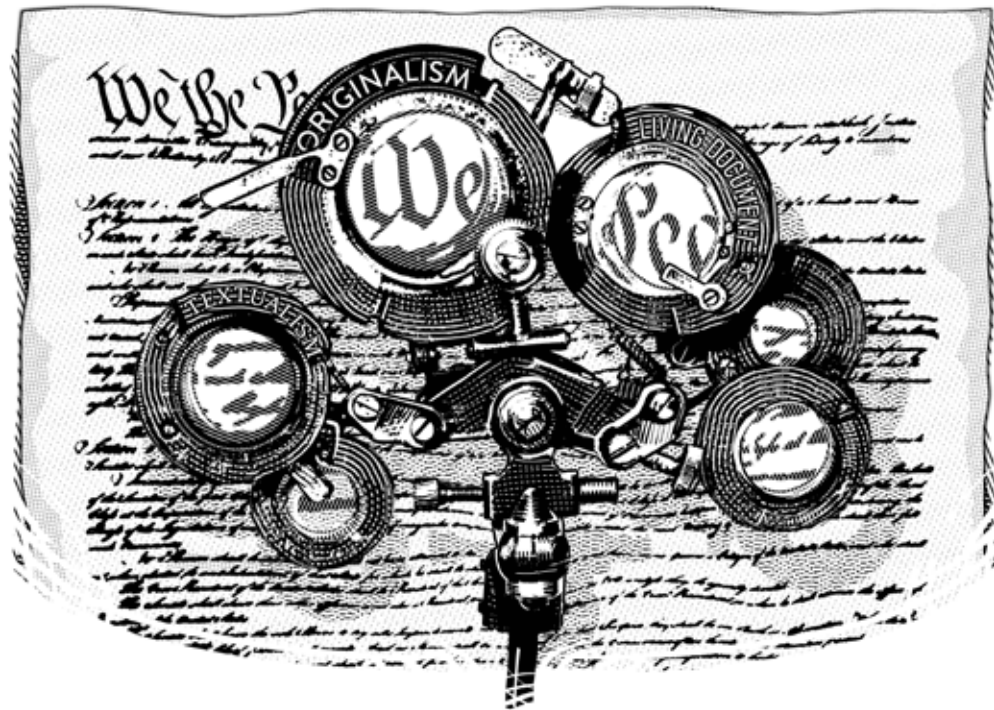
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THE ROOTS OF EQUALITY

Born Equal: Remaking America's Constitution, 1840–1920, by Akhil Reed Amar.
Basic Books, 736 pages, \$40



AKHIL REED AMAR IS ONE OF THE RARE legal academics who are willing to use the term “originalism” without dismissing the concept out-of-hand, although he will (I suspect) be the first to add that he has his own very idiosyncratic take on what the term can mean. It is originalism’s flexibility that informs his newest volume, *Born Equal: Remaking America’s Constitution, 1840–1920*, the second installment of a trilogy on the history of constitutional interpretation he began in 2021 with *The Words that Made Us: America’s Constitutional Conversation, 1760–1840*. This newest extension of Amar’s survey moves from the waning of the founders’ generation, through the Civil War years, and up to the adoption of the 19th Amendment. It is a story told in his inimitably raffish and colloquial style, and it tracks the emerging centrality of equality in American law, and the two dominant impulses equality encouraged: emancipation and citizenship for American slaves and voting rights for women.

That centrality is a story unto itself. In 1776, the Declaration of Independence announced what it identified as a self-evident truth, that all men are created equal. But it did not provide any further explication of what that equality involved, and so it was left

to succeeding generations of American jurists and politicians to work through the statement’s implications. There is, in fact, an echo of that uncertainty in Amar’s title: *Born Equal*. The hasty reader may assume that the two phrases—*born equal* and *created equal*—are interchangeable, and Amar himself occasionally lapses into speaking of the two as synonyms. That “[a]ll were born equally free,” he writes at one point, was a “God-given principle...which variously declared that all men were created equal, were born equal, or were naturally equal (that is, equal at birth).” But in the end, to be *created equal* implies something distinct, perhaps unique to the 18th century, from being *born equal*, which may reflect more of the long shadow of Romanticism. What Amar finds in the development of American ideas of equality looks over time increasingly like “birth equality,” a species of equality that Amar believes was integral to the abolition of slavery, and which “continued its forward if at times indirect march” inevitably to the 19th Amendment.

THERE IS, OF COURSE, A GREAT DEAL OF distance between people who are created equal—in other words, the product of an intentionality who therefore can be said to possess certain rational and non-happen-

stance elements known as rights—and those who are born equal, which is the direction toward which European ideas were moving in the age of Marx and Darwin. *Created equal* speaks of a universe of law and design which is self-evident in its operation; being *born equal* requires, at some logical point, the application of political and social force to rebalance what nature or circumstance refuses to support. Pressed into one sentence, that might be what the 19th century was all about.

Amar himself does not address the distinction between created equal and born equal until the postscript. By that point, it is the simple fact of birth that makes individuals equal, and equal in such a way as to require the laws to ensure that equality. Hence, Amar concludes that “babies born in America under the American flag are born equal citizens,” which is legally true and a fact of the 14th Amendment, but for Amar this means “whether or not their parents are citizens or even lawfully in America” (emphasis in the original). Taken one step further, he wonders whether it could be said that the mere fact of birth transcends citizenship itself. “How, if at all,” he asks, “should the birth-equality proposition apply to those born beyond the US perimeter?” Should the fact of birth *anywhere* entitle each person to a status for which

citizenship in a particular place is secondary? Thirty years ago in *The Revolt of the Elites and the Betrayal of Democracy* (1995), Christopher Lasch insisted that “[i]t is citizenship that confers equality, not equality that creates a right to citizenship.” Amar’s review of constitutional jurisprudence over the century embraced by *Born Equal* asks us to wonder whether that jurisprudence has marched in exactly the opposite direction from Lasch.

AS THE STERLING PROFESSOR OF LAW and Political Science at Yale University, Amar contends that the fine points of constitutional interpretation are usually “not understood by most leading historians,” and especially when it comes to debates over originalism. “Leading historians” are especially tone-deaf (by Amar’s reckoning) to the fact that Abraham Lincoln “was his generation’s best originalist,” a “key fact largely unnoticed by historians today.”

We should be more than a little touchy about dismissing historians. If anything, historians are likely to be even stricter originalists than the originalists, since we are liable to be the first to question the use of a trope—originalist—which is itself anachronistic. After all, the label “originalist” only surfaced in that form for the first time in the 1980s, and is at best what legal scholar and lexicographer Bryan Garner calls a “retronym.” Since then, it has developed into a number of not-always-harmonious forms, and it has not quite shucked off a sense of being obedient to precedents that may not turn out to be healthy ones. For example, it would be a legitimate originalist understanding of Article I, section 9 of the Constitution to say that the banning of the transatlantic slave trade was meant to be a long-term solution to slavery by drying up the source of slave imports. That was a misjudgment we had to learn about the hard way and had to correct in the 13th Amendment.

Criticizing the application of the term “originalist” to an earlier time might matter more but for the fact that Amar again waits until the postscript to define the term itself as “explicating the Constitution’s text and structure in light of its original aims and purposes,” which is a definition worth applauding. True, it will set textualists on edge, since Amar’s definition will strike them as a straitjacket that forbids discovering meaning in the Constitution apart from strict historical citation, and it will certainly be the despair of every overeager jurist enamored of the “living Constitution.”

On the other hand, as Amar is eager to demonstrate, that does not make the discovery of early originalism a eureka moment. *Ev-*

eryone who took the trouble to write anything about the Constitution before 1861—even the detestable Chief Justice Roger Taney in *Dred Scott v. Sandford* (1857)—considered himself an originalist in Amar’s use of the term. And he is certainly correct in describing Lincoln in that fashion, since Lincoln’s determined use of the history of the Constitutional Convention and the first federal Congress in his February 1860 Cooper Union speech was as forthright an invocation of original intent as one could devise. Lincoln’s review of “the Fathers” simply assumed that a proper reading would demonstrate that “in their understanding, no line dividing local from federal authority, nor anything else, properly forbade the Federal Government to control as to slavery in federal territory.”

STILL, GIVEN THE COUNTERVAILING power of the “living constitution” idea, with which constitutional jurisprudence has been burdened for the century that followed hard on the heels of Amar’s narrative, one is grateful for the author’s willingness not to be spooked out of using the word “originalist” in describing the reverence all but a handful of 19th-century American politicians displayed toward the Constitution. Even that handful were intent on showing that their departures from the Constitution were at least justified by the logic of their desperately creative interpretations of the document’s silences on secession, race, and sex. “[A]ntebellum America revealed itself as an unabashedly *originalist* land,” Amar writes, “a fledgling country fiercely proud of its *origins*” and “almost idolatrous in its founding worship.”

After all, Amar reminds us that every president from George Washington to Lincoln won his election by reminding “his fellow Americans of their origins as people as embodied in the 1776 Declaration and the 1787 Constitution,” and every one of them up till Martin Van Buren could boast of a role of some sort in the Revolution or at least a direct lineal relationship to a signer of the Declaration or the Constitution. Even opposition to slavery had to confine itself to variants of originalist appeals to the Constitution, such as Salmon Chase’s “Freedom National” argument. “Every man” who can read “the debates of the framers of the Constitution for himself,” Chase asserted, must “come to the conclusion” that nowhere is “property in slaves...recognized in that instrument.... Not only is there no recognition, but there is careful avoidance of recognition of property in man. Whenever and wherever slaves are referred to in the Constitution, they are always mentioned as *persons*.” It was when the most furious op-

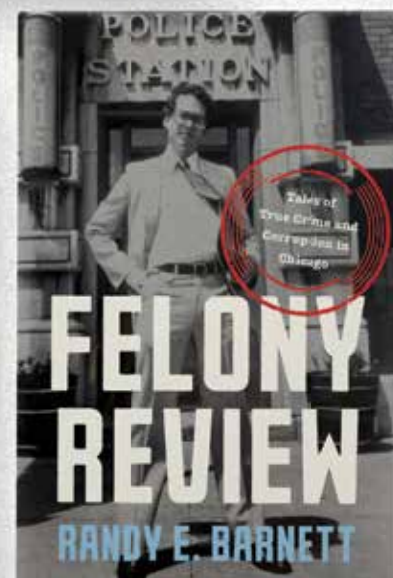
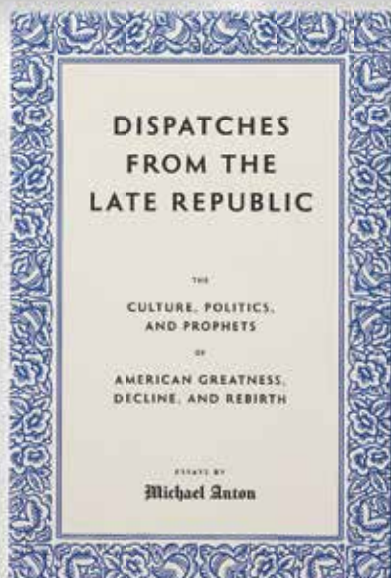
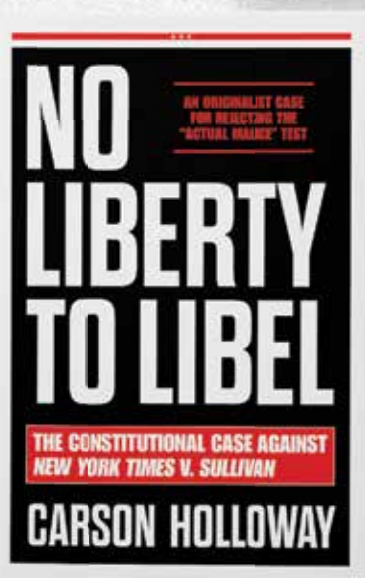
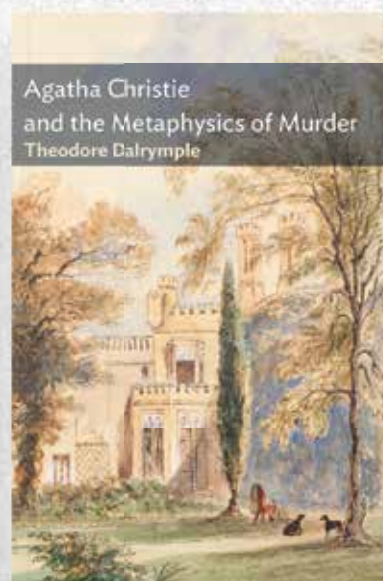
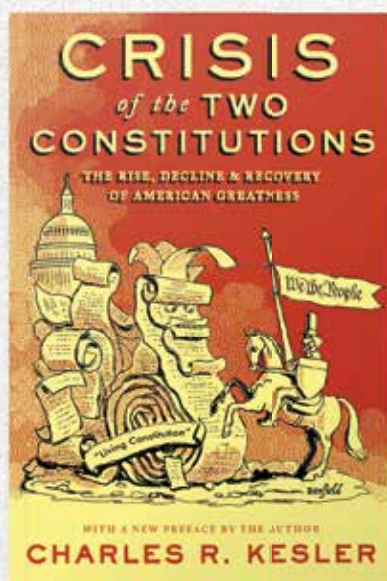
ponents of slavery damned the Constitution as a compact with hell that they immediately wrote themselves out of any worthwhile political leverage over the “peculiar institution”—as William Bowditch did in 1849 in *Slavery and the Constitution*, as William Lloyd Garrison did when he publicly burned a copy of the Constitution at Framingham in 1854, and as Wendell Phillips did after publishing *The Constitution a Pro-Slavery Compact* in 1856.

IT IS ONE OF THE GREAT STRENGTHS OF the central chapters of *Born Equal* that Amar can show with telling fidelity and blazingly lively prose exactly how even the woebegone defenders of slavery were condemned to a self-defeating struggle to squeeze from the Constitution their justifications for slavery’s defense. Theirs was an originalism of such desperation that it makes the word fail on the lips. No one knew better than John C. Calhoun that slavery had usurped the central place in the politics of the slave states when he admitted that “what is called slavery is in reality a political institution, essential to the peace, safety, and prosperity of those States of the Union in which it exists.” But even he felt compelled to pass off this sleight-of-hand as an act of deference to “maintaining free government.”

And no one knew better than Southern secessionists that the Constitution was never made to allow for secession. They had the testimony of the founders themselves—of James Madison writing that “the Constitution requires an adoption *in toto*, and *for ever*” and that “[t]his idea of reserving right to withdraw was...worse than a rejection”—because Amar shows how newspapers across the country printed these quotations over and over again in 1860. But such was the weight of originalism on their souls, that the secessionists could not simply fling the Constitution away and hope that their people would follow them. Oh, no; they invented preposterous arguments like that of Confederate attorney general Thomas Hill Watts who maintained that a state “might, as a matter of right, secede, according to its will and pleasure, though every constitutional provision remained intact and unbroken.”

In his eagerness to indict the Confederate secessionists on originalist grounds, Amar may evince a little too much optimism in dealing with Lincoln’s originalism. Nothing in *Born Equal* should be more pleasing for Lincolnians to read than the praise Amar heaps on Lincoln as an originalist, and withal, as “America’s greatest nineteenth-century constitutionalist.” And it is, in a backhanded way, a tribute to the power that originalist interpretations had for Americans of Lincoln’s

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generation that a man with no formal legal education and a lifetime of work in business law could step into his First Inaugural (and his July 4, 1861, special message to Congress) with a sophisticated constitutional riposte to secession as anarchy rather than liberty.

BUT EVEN FOR UNAPOLOGETIC LINCOLNIANS like myself, this should not efface the troubling fact that Lincoln, once he had been elected and found himself plunged into being a war president on a continental scale, occasionally zig-zagged in and around constitutional issues. His claim, in the early months of his administration, that the suspension clause for habeas corpus could be activated unilaterally by the president was an argument from absence (the suspension provision does not specify *who* may or must suspend habeas protections, but the provision is found in Article I, section 9 among the other powers of Congress). Absence does not, especially in constitutional law, make the heart grow fonder, and even Lincoln bowed to Congress's authority in 1863 to set conditions to habeas suspensions.

The increasing use of military tribunals by Union generals to try the cases of civilians even in areas where the civil courts were open poses another problem, which was only compounded in the case of *ex parte Vallandigham* (1864) when Lincoln insisted that the tribunals "are constitutional wherever the public safety does require them," which could include "places to which they may prevent the rebellion extending, as in those where it may be already prevailing." This meant, essentially, *anywhere* he designated such a threat to exist, and at any time. But far more troubling was the conclusion he reached in the same case, that "the constitution is not in its application in all respects the same, in cases of Rebellion or invasion, involving the public Safety, as it is in times of profound peace and public security." This was a conclusion decisively plowed under by the Supreme Court in *ex parte Milligan* two years later, with an opinion written by Lincoln's friend and appointee, David Davis. And it does not help matters to be reminded of Lincoln's role in the military suppression of *The Chicago Times* in 1863 and Manton Marble's *New York World* and William Prime's *New York Journal of Commerce* in 1864. It might be true that both of the latter papers had published false bulletins about an impending renewal of conscription for the Union army, and had done so "for stock jobbing and gold gambling purposes." But sending a file of soldiers to shut down a newspaper was "an outrage of the gravest character upon the freedom of person and the rights of prop-

erty, which are the pillars of public liberty," as the *Harrisburg Patriot-News* put it.

THESE EXAMPLES OF HIGH-HANDEDNESS stimulate the hate-Lincoln carpet-chewers to their usual froths of rage. But they also create real difficulties in assessing Lincoln's "originalism." One factor which lowers the credibility of the hate-Lincoln crowd is the realization that these violations of peacetime jurisprudence were, as historian Mark Neely has shown, comparatively few against the backdrop of a continent-wide civil war. Another is Lincoln's habit of heading in the other direction, as when he rebuffed Salmon Chase's urging in September 1863, that he extend the Emancipation Proclamation (which was based on Lincoln's presumed "war powers" as the commander-in-chief) to the four slave states still loyal to the Union. "Would I not thus give up all footing upon constitution or law?" he replied, "Would I not thus be in the boundless field of absolutism?"

Lincoln, along with everyone else in 1861, was improvising in a constitutional vacuum in which originalism gave no clear direction.

What Lincoln struggled with was the conundrum every originalist dreads, and that is the situation or person who creates an existential challenge which the Constitution simply does not address—like civil war. Amar is correct when he denounces the fiction of secession as the "War of Southern Treason." But it was precisely because the founders had never dreamt that the Constitution could be challenged on so tremendous a scale as the secessions of 1860-61, that nothing beyond the simple allowance for habeas suspension and the federalization of the state militia (Article I, section 8) was written into the document. There was even a question in the 1790s as to how effectively it provided for suppressing something as comparatively minor as the Whiskey Rebellion, which required congressional statutes on the mobilization of the state militia before George Washington could ride out on his last campaign to disperse western Pennsylvania's insurrection of the tippy. And the description of treason (in Article III, section 3) proved so vague that it could not con-

vict Aaron Burr in 1807, and could not be used for a federal prosecution of John Brown in 1859. Lincoln, along with everyone else in 1861, was improvising in a constitutional vacuum in which originalism gave no clear direction. The wonder is that he navigated Scylla and Charybdis as well as he did, something for which I am no less grateful than Amar.

LINCOLN MUST CERTAINLY OCCUPY A central place in any history of the Constitution. That has not left much room in *Born Equal* for many others. There is no mention of Henry St. George Tucker's 1843 *Lectures on Constitutional Law* (whose comments on equality point in a very different direction than Amar's), Chancellor Kent's 1826-30 *Commentaries on American Law* (whose second volume has direct commentary on women's rights), George Ticknor Curtis's *History of the Origin, Formation and Adoption of the Constitution of the United States* (1854), and only one substantive reference to Joseph Story (although it focusses on Story's 1816 opinion in *Martin v. Hunter's Lessee* rather than his later three-volume *Commentaries on the Constitution*).

On other points, there is an occasional and indisputably cheerful overreach in some aspects of Amar's narrative. For example, he describes his own tenth chapter as "the best short treatment ever of the Lincoln-Douglas debates." And perhaps it is. Nevertheless, it is still true that he miscounts the 1858 election returns (Republican legislative candidates in the Illinois lower house scored 51.9% of the votes cast, as opposed to 45.3% won by Douglas, not the 49-to-48% Amar reports). I do not say this merely to be cranky: if it had not been for the misapportionment of Illinois legislative votes, Lincoln would have scored the political upset of the century over Douglas. I think, too, that it would have been useful to recognize economic as well as purely constitutional issues in the emergence of birth equality in Lincoln's century. Unionists, over and over again, insisted that their great object in the war was the removal of an old economic inequality "which confers on one race the fatal privilege of idleness at [the] expense of forced drudgery imposed upon another race." It was their goal to "vindicate the rights and privileges of the laboring classes of our country, against...monarchists and aristocrats" and contend "for the democracy of free labor." *Born Equal* is a book about political history, but it is not asking too much to connect constitutional with economic history, especially in the context of a decades-long political controversy about an unequal system of labor.

There are also some moments in *Born Equal* when the historian may have been of some use to the law professor. Amar recites the oft-

repeated claim that “in 1860, Lincoln’s name would not be allowed to appear on the presidential ballot” in the slave states. Of course it wouldn’t, because there was no such thing as a “presidential ballot” in 1860 for voters to respond to. (In the mid-19th century, parties sometimes sent representatives to the polling stations where ballots could be picked up before being placed in the ballot box or recorded with the voting clerk. Lincoln’s name makes no showing in states like Alabama or Mississippi because election judges simply refused to report any votes for him.)

LIKEWISE, AMAR DESCRIBES (AS MANY others do) the condemnation of the three-fifths clause as a “capitulation” in the Constitution that gave the slave states in 1787 “extra credit” on election days. But at the time of the first national election in 1788, *all* of the states retained legalized slavery except Massachusetts. And since the Constitutional Convention had to make its own apportionment of seats in the House of Representatives without the benefit of a census (which would not be taken until 1790), the three-fifths clause didn’t even apply through the first Washington Administration. Even in the 19th century, as historian Michael Conlin reports, the three-fifths clause “gave the South little joy in the

Electoral College,” since the percentage of free-state electors increased (from 1796 to 1860) from 52.9% to 60% while the percentage of Southern electors shrank from 47.1% to 40%.

And it is not clear why Amar believes that the women who appeared in the *Harper’s* sketch of the gallery in Chicago’s Wigwam (the venue for the Republican national convention in May 1860) “generally favored Lincoln” because “many had seen him up close and had witnessed firsthand his extraordinary human decency.” Surely, a generous sentiment, and for all I know, a correct one. But there is nothing in the notes (even in the one brief article about the Wigwam by Harold Holzer that Amar cites) which indicates any headcount of the gallery occupants, much less a polling of those who had been impressed with Lincoln’s “decency.”

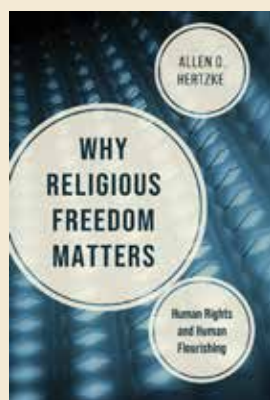
BORN EQUAL IS A BRILLIANTLY WRITTEN book in which the brilliant writing sometimes runs a little too far ahead of the substance. But the most fundamental question will remain the swapping-out of the Declaration’s “created equal” for “born equal,” and whether we have actually gained everything we think we have by making the swap. The first is the gift of a Creator who endows his creatures with a hardwiring of specific rights which the recipients instinctively recog-

nize as part of their consciousness, and which they will risk everything to defend, whether a government wishes to recognize them or not. The second is a fleeting product of birth which endows the newborn with nothing of his own, but surrounds him with a society which may (or may not) bestow on him a range of privileges as it sees fit. It is the kind of equality which Hannah Arendt criticized when she objected that those who are “born equal” exist in “absolute difference and distinction from each other,” and “mere administration” becomes the “adequate form” of society.

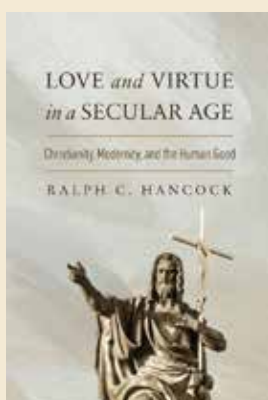
Ideally, American law is a blend of both: natural rights alongside positive laws, with the latter brought as close into harmony with the former as possible. If in the application of the Constitution, we have increasingly shifted from valorizing the first to applying the second, it will become a question worth asking—and, I hope, by Akhil Amar in the next volume of his trilogy—whether we have exchanged nature for social artifice, and free thought for conformity.

Allen C. Guelzo is professor of humanities at the University of Florida’s Hamilton School of Classical and Civic Education, and, most recently, the co-author (with James Hankins) of *The Golden Thread: A History of the Western Tradition* (Encounter Books).

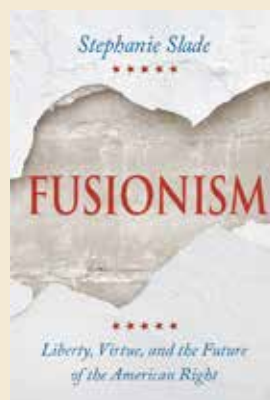
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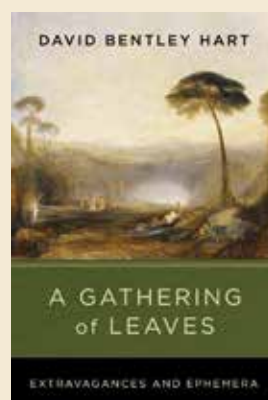
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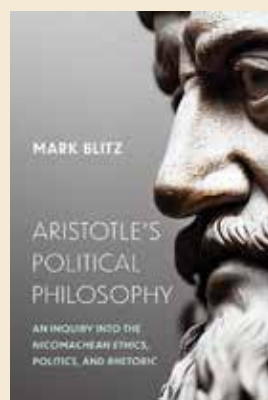
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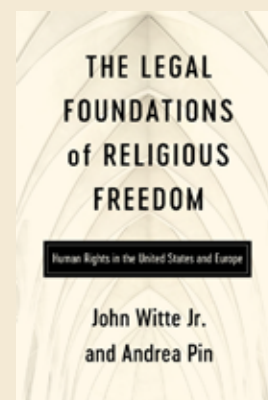
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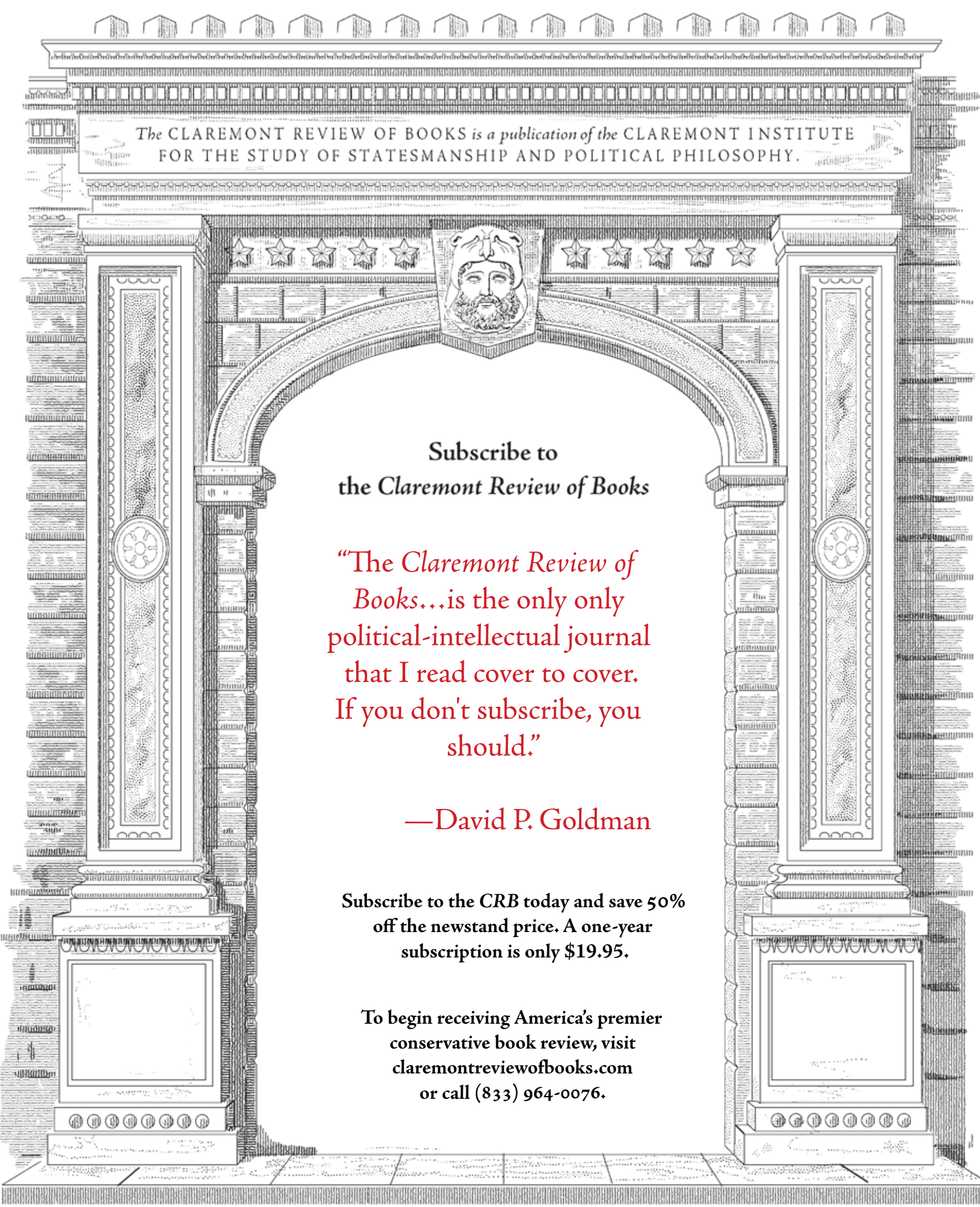
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