

COMMENTARY

PLAYING CARDS IN A HURRICANE: PARTY REFORM IN AN AGE OF POLARIZATION

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ABSTRACT

In his Frankel Lecture, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, Sam Issacharoff suggests that legal changes have systematically disabled the leadership of political parties from exercising sway over their candidates. As a result, party leaders cannot create the necessary incentives for moderation, and office holders are being swept away from the center by the gales of polarization.

This Commentary suggests that, at bottom, Issacharoff isn't asking the right question. His Lecture asks how we can reduce the effects of polarization, when the real question may be whether we can. It's possible that legal changes contributed to rising levels of polarization, but it's also possible that the two phenomena occurred simultaneously or, at the very least, that the latter matters a good deal more than the former. Issacharoff offers a cheerful tale—give more power to the party leaders, and they'll rein in the extremists. But there are at least two other possible endings to his story. The first is that even an empowered leadership structure simply can't exercise enough control over its members to make a difference. The second is that it is possible for the leadership to exercise control over its members, but that shift will only ensure that the leadership is targeted by the same forces now pushing candidates to the extremes. If the DNC has more power, extremists will target the DNC, and the results will be little different.

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Issacharoff, in short, wants to give the party leaders a better hand to play. But it doesn't matter how many trump cards you hold if you are playing in a hurricane.

COMMENTARY

Sam Issacharoff's talk demonstrates why he is revered within our field. He is both one of election law's founding parents and one of its most insightful commentators. Sam has generated countless ideas in the field he helped found, all of them delivered with panache. His ideas haven't just influenced the field; they have given it shape and form. When we teach, when we write, when we research, we are traveling the intellectual roads that Sam helped map.

I should also say how many of us in the younger generation are grateful to him for his mentorship and support. Mind you, Sam definitely falls in the "tough love" side of the mentoring scale. He once summarized his comments on a junior's paper as follows: "Wrong on the facts, wrong on the law, wrong on the policy. You might wonder what is right about this paper. There's something, but the author doesn't know what it is." That sounds tough, and it was. But it perfectly embodied Sam as a mentor. He respects younger scholars enough not to pull his punches. You know where he stands, which means his praise—while hard-won—is that much more valuable. And I should note that a generous soul lurks beneath Sam's tough exterior. Sam worked very hard a few years later to help that very same young scholar lateral to a better school. Even now, he's keeping a watchful eye over one of my students, purely out of the goodness of his heart.

This paper is extraordinarily Issacharoff-like.¹ One of Sam's signature moves is to use the insights of private law to illuminate election law. Indeed, Sam's *Politics as Markets*, coauthored with Rick Pildes—which I view as the finest article written in the field—does exactly that, leveraging the insights of antitrust to identify the appropriate conditions of judicial intervention.² Relying on two scholars of the 1930s—V.O. Key and Ronald Coase—he explains the current bereft state of the party leadership using a "make or buy" analogy.³ It's easy to imagine extensions of Sam's insights. For instance, I can see how the analogy helps in identifying which kinds of activities can be safely outsourced,

1. Samuel Issacharoff, *Outsourcing Politics: Political Parties and the Theory of the Firm*, 54 HOUS. L. REV. 845 (2017).

2. See generally Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

3. Issacharoff, *supra* note 1, at 851–61.

especially when thinking about more recent work on the benefits of team production and the nature of assets.⁴ Transaction costs, after all, aren't the only factor influencing the make-or-buy choice.⁵ Firms also choose to "make" rather than "buy" essential parts of the product in order to avoid holdout problems. Now think about the Koch brothers' efforts to create voter lists—an essential part of politicking—and ask yourself whether the GOP should view those activities as a threat or a favor.⁶

In the spirit of Issacharoff—Sam would be absolutely insulted if I pulled my punches—I want to ask whether the reforms that emerge naturally from Sam's argument are likely to succeed. To be fair to Sam, he doesn't insist that changing the law can put the genie back into the bottle, so, like Bob Bauer, I do worry about "shadow boxing."⁷ But Sam plainly thinks that changes in the law weakened the parties, so I think it's fair to assume that he thinks changes in the law can strengthen them as well, even if we can't return to square one. Put more succinctly, Sam is worried about how many trump cards party leaders have in their hand under the current law. My worry is that it's not clear that cards matter when you are playing your game in a hurricane. Is it possible that Sam is right on the facts, right on the law, and right on the policy but ultimately answering the wrong question?

Sometimes academics can be passive aggressive. When they raise "questions," they really mean "attacks." That is decidedly not my intention. In *Gertrude and Claudius*, John Updike's brilliant retelling of *Hamlet*, he described the king as all answers, no questions.⁸ Here I am just the opposite. I'm not sure if Sam is wrong. But I'm not sure he is right, either.

To be sure, Sam's claim is deeply intuitive. He thinks that legal changes have systematically disabled the party leadership

4. See, e.g., Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 777–81, 791–95 (1972); Benjamin Klein, Robert G. Crawford, & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. LAW & ECON. 297, 298–99, 325 (1978).

5. Issacharoff, *supra* note 1, at 851–53; see also B. G. Dale & M. T. Cunningham, *The Importance of Factors Other Than Cost Considerations in Make or Buy Decisions*, 4 INT'L J. OPERATIONS & PRODUCTION MGMT., no. 3, 1984, at 43; Harry Gross, *Make or Buy Decision in Growing Firms*, 41 ACCT. REV. 745 (1966).

6. For an analysis of these worries, see Jon Ward, *The Koch Brothers and the Republican Party Go To War—With Each Other*, YAHOO! (June 11, 2015), <https://www.yahoo.com/news/the-koch-brothers-and-the-republican-party-go-to-121193159491.html> [https://perma.cc/5AW3-9V8F].

7. Robert F. Bauer, White House Counsel under President Barack Obama, Commentary at the University of Houston Law Center Houston Law Review's Annual Frankel Lecture: The Parties' Struggles in the Political "Market": Can Regulation Solve This Problem—Should It, and if so, How? (Nov. 4, 2016).

8. JOHN UPDIKE, *GERTRUDE AND CLAUDIUS* 59 (2000).

from exercising sway over its candidates.⁹ As a result, party leaders cannot create the necessary incentives for moderation, and office holders are being swept away from the center by the gales of polarization.¹⁰ The parties are getting “fragmented,” to use the metaphor Rick Pildes has put forward and Issacharoff adopts.¹¹ That seems right on the facts. It’s plainly true that parties have played a moderating role in the past, it’s plainly true that they have fewer tools to do so today, and it’s plainly true that office holders are now being pushed to extremes.¹² Issacharoff’s argument also seems right on the law—changes in the legal regime have surely affected what kind of power the leadership wields over its members.¹³ And it seems right on the policy—we are on the verge of a complete breakdown in Congress precisely because office holders are so polarized.¹⁴

I nonetheless worry that, at bottom, Issacharoff isn’t asking the right question. As John Hart Ely pointed out of Alexander Bickel, “No answer is what the wrong question begets.”¹⁵ Sam’s paper asks *how* we can reduce the effects of polarization, when the real question may be *whether* we can.¹⁶ It’s possible that legal changes contributed to rising levels of polarization; but it’s also possible that the two phenomena occurred simultaneously or, at the very least, that the latter matters a good deal more than the former. I take it that Bob Bauer—who suggests that Issacharoff ought to focus on what is, not on what ought to be—may harbor some of the same worries.¹⁷ Sam, who is usually quite cynical

9. Issacharoff, *supra* note 1, at 875–79.

10. *See id.* at 848–55.

11. *Id.* at 848 & n.2; Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 830 (2014).

12. *See generally* Issacharoff, *supra* note 1.

13. *Id.* at 858–59.

14. *See id.* at 856.

15. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 72 (1980).

16. Others have asked similar questions. *See, e.g.*, Hans J.G. Hassell, *The Party’s Primary: Party Elites’ Control of Nominations for the US House and Senate 191* (2016) (unpublished manuscript) (on file with Cornell College at <http://people.cornellcollege.edu/hassell/Scholarly%20Work/The%20Party's%20Primary%20Manuscript.pdf> [<https://perma.cc/WBR8-TLP7>]) (“Do parties always prefer more moderate candidates, or is the preference for more moderate candidates merely the result of the current network of individuals that surround the party apparatus? If it is the latter, we should be more cautious about investing more responsibility in parties. Given more strength, battles for the direction of the country would become battles waged almost exclusively within the parties as policy demanders attempt to gain control of the party organization to use to their advantage. Party organizations are not immune to capture by different groups within the party who then use them to pursue their policy agendas.”).

17. *See* Robert F. Bauer, *The Parties’ Struggles in the Political “Market”: Can Regulation Solve This Problem—Should It, and if so, How?*, 54 HOUS. L. REV. 881, 886 (2017).

about reform proposals, offers an uncharacteristically cheerful tale. Give more power to the party leaders, he tells us, and they'll rein in the extremists. But there are at least two other possible endings to Sam's story. The first is that even an empowered leadership structure simply can't exercise enough control over its members to make a difference.¹⁸ The second is that it *is* possible for the leadership to exercise control over its members, but that shift will only ensure that the leadership is targeted by the same forces now pushing candidates to the extremes. To make the point more concretely, if the DNC has more power, extremists will target the DNC. If state parties hold greater sway over nominations, they will become sites of political contestation. And the results will be little different.

Let me begin by noting that I don't doubt that, on average, the party leadership has more incentives to moderate than individual candidates. But will those incentives be enough in a world as polarized as ours? The evidence is thin. Even the work of La Raja and Schaffner,¹⁹ on which Sam primarily relies,²⁰ has been heavily criticized for its methodology and because it runs against the results of other studies.²¹ Moreover, the study necessarily tries to capture what's occurring now. As I will argue, the harder question is whether changes in the law will change the incentives of party leaders going forward.²²

Perhaps it's not surprising that there's so little evidence that party leaders today (and, more importantly, tomorrow) can be forces of moderation. Party leaders may have the same incentives for moderation as party leaders of the past, but they are presiding over quite different parties these days. Donors function

18. That is, absent draconian measures, the leadership will lack enough power to make a difference. We could, of course, deploy draconian measures, but it's not clear the game would be worth the candle.

19. RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, *CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL* 2–5 (2015).

20. Issacharoff, *supra* note 1, at 862.

21. See, e.g., David Schultz, *Money, Equality and Political Polarization in American Politics: Hasen's Plutocrats United and La Raja and Schaffner's Campaign Finance and Political Polarization*, 15 *ELECTION L.J.* 263 (2016) (book review) (challenging La Raja and Schaffner's methodology and the generalizability of their study); Lee Drutman, *The Debate over State Polarization and Campaign Finance Laws Continues*, BROOKINGS INST. (July 16, 2015), <https://www.brookings.edu/blog/fixgov/2015/07/16/the-debate-over-state-polarization-and-campaign-finance-laws-continues/> [<https://perma.cc/Y39V-DPET>] (challenging La Raja and Schaffner's methodology and arguing their conclusions are inconsistent with other studies).

22. *Infra* notes 37–39.

differently.²³ Seats are won differently.²⁴ Candidates are terrified of being primaried.²⁵ And polarization hasn't just infected donors and party activists, but voters themselves.²⁶

Moreover, the forces driving fragmentation are powerful. Political scientists don't agree about why we've polarized, but no one has identified a source of polarization that would be easy to remedy. Let me name just a few of the leading candidates:²⁷ The media environment has changed fundamentally.²⁸ Deep and persistent economic inequality may also be driving the changes we see.²⁹ The parties have realigned themselves with ideological groupings outside of politics.³⁰ The donors and party activists who fuel party activities are themselves highly polarized.³¹ At the very least, these forces run so deep that they are affecting democracies everywhere, which makes it very hard to attribute them to any particular feature of American democracy, let alone any particular feature of party regulation.³² Moreover, the effects of these shifts are ubiquitous. Party activists and, more importantly, party donors have become more ideological and more extreme.³³ And the mere threat of being "primaried" has sent even moderate Republicans lurching to the right or simply fleeing politics altogether.³⁴ We may even be seeing the same phenomenon emerging on the Democratic side, with Bernie Sanders's unexpectedly strong run at the presidential nomination forcing Hillary Clinton to the left.

Given the power of the forces at work, there are two worries you might have about Issacharoff's proposals—two worries that

23. See Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531, 601–02 (2016).

24. David Schleicher, *Things Aren't Going That Well Over There Either: Party Polarization and Election Law in Comparative Perspective*, 2015 U. CHI. LEGAL F. 433, 454–55 (2015).

25. See Michael Tomasky, *Moderate Republicans, Unite!*, N.Y. TIMES (Sept. 2, 2016), <https://www.nytimes.com/2016/09/04/opinion/sunday/moderate-republicans-unite.html?smid=tw-share>; see also Lexington, *The Centre Cannot Hold*, ECONOMIST (Jan. 14, 2016), <http://www.economist.com/news/united-states/21688393-two-moderate-members-congress-explain-why-they-are-leaving-centre-cannot-hold> [<https://perma.cc/T2HT-RS9L>].

26. Schleicher, *supra* note 24, at 454–55.

27. For surveys of the extant research on the causes of polarization, see Michael J. Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 15, 15–38 (Nathaniel Persily ed., 2015).

28. *Id.* at 34–35.

29. See *id.* at 31–32.

30. Schleicher, *supra* note 24, at 451–52 (citing HANS NOEL, POLITICAL IDEOLOGIES AND POLITICAL PARTIES IN AMERICA (2013)).

31. *Id.* at 453.

32. *Id.* at 471–74.

33. See *id.* at 451–53.

34. See sources cited *supra* note 25.

make me wonder whether the real question we should be asking is not *how* to reduce polarization but *whether* we can. The first worry is that strengthening the hand of party leaders won't be enough to overcome the enormous forces of polarization.³⁵ Candidates might very well like to make a deal with party leaders, but not if the deal costs them their seats. Bob Bauer even suggests that, as a result, the party leadership may ultimately be forced to cave and fund candidates despite their extreme positions.³⁶ Put differently, Issacharoff wants to give the party leaders a better hand to play, but it doesn't matter how many trump cards you hold if you are playing in a hurricane.

The other alternative scenario is that Sam's reforms *will* work—they *will* succeed in giving the party leadership sufficient power over its members to control their behavior. You might think "mission accomplished," right? Surely if the party leadership can control its members, we'll see more moderate behavior. But institutional reform can have unexpected consequences, a lesson which Sam's own work has long taught us.

Here's the worry: If party leaders become more powerful, they will become crucial targets for anyone seeking to control the party. They will become crucial targets, in other words, for the same polarized activists and donors who are busily focusing their efforts on candidates right now.³⁷ If the DCCC or the RNC or the House leadership gain enough power to control candidates, those sites will become ground zero for the fight. Sam's frame explains why donors and activists are now focused on candidates, not the party leadership. But it doesn't show that the party leadership can't be a target as well. For Sam's plan to work, we have to believe that the party leadership will be immune to the forces that have polarized everyone else. Again, this isn't to say that Sam is wrong

35. I take it that Bob Bauer worries about this problem as well. He suggests that there may not be enough political goodies we can offer candidates these days to get them to moderate. See Bauer, *supra* note 17, at 888–89, 892.

36. *Id.* at 889.

37. See Kang, *supra* note 23, at 601 ("The party leadership, through their party committees, would draw their new revenue from the same donor class that has funded the proliferation of outside groups in campaign finance and any resulting polarization from this decentralization of party politics."); Schultz, *supra* note 21, at 270 ("Thus, allowing parties to take more money will only polarize them more as they become entrenched by special interest money."); Hassell, *supra* note 16, at 219 ("[W]hile the current political system with its out of control polarization would benefit from the strengthening of political parties, this tactic may not necessarily be the antidote to polarization that many hope. A party is the product of the groups and interests that have a stake in it and are connected to it. As parties come to incorporate these views, or as certain groups and individuals rise to power within the organization, these organizations can then be mobilized to advance the political and ideological preferences of those individuals and groups. Empowering parties seems, perhaps unsurprisingly, to empower those who control the institution.").

in thinking that party leaders have more incentives to moderate than their members. I simply wonder whether those incentives will be enough.

To understand the source of this worry, you have to remember that parties—unlike firms—are themselves sites of contestation. The more power that resides inside the official party structure, the more likely it is that party leaders will become targets of the same polarizing forces now targeting party candidates. Right now, the NRA and the Koch brothers exercise more control over the House Republicans than John Boehner ever did, precisely for the reasons that Sam describes. But if the party leadership become the target, that's where donors and activists will aim their fire.

Even in today's world—where the easiest path to influence is through independent spending and pressuring candidates—the party leadership have hardly been immune to the forces of polarization. On the GOP side, for instance, for every Boehner trying for compromise, there is an Eric Cantor rallying the troops against it.³⁸ Mitch McConnell and Newt Gingrich are hardly poster children of moderation. To be sure, they are far more likely to compromise than Ted Cruz or just about any other member of the Tea Party. But the question we need to ask ourselves isn't whether today's leadership is less polarized than the party's candidates, but whether the leadership will become *more* polarized when ideological activists and donors concentrate their fire on party leaders. Right now, you can control the House without controlling John Boehner or Paul Ryan. But if the only way to control the House is to control the GOP leadership . . . well, you can see where I'm going. On this view, the Cruzes of the world won't become more like the McConnells. Instead, the McConnells will turn into Cruzes.

Voters and party activists aren't going to make the path to moderation any easier. Turning to the Democrats, note what happened when Democratic leaders pushed for the moderate, establishment-oriented candidate in the Sanders-Clinton race (precisely what Issacharoff expects party leaders to do). The reaction was sufficiently strong that the head of the DNC was forced to resign.³⁹ Similarly, as Sam notes, GOP leaders have themselves been unable to step in to steer their party in a

38. And even Cantor got primaried. David Nather, Sarah Wheaton & Alex Inestadt, *Accidental Tea Party Leader*, POLITICO (June 12, 2014, 6:35 PM), <http://www.politico.com/story/2014/06/dave-brat-eric-cantor-virginia-107804> [<https://perma.cc/LP6F-Q4YW>].

39. Jonathan Martin & Alan Rappeport, *Debbie Wasserman Schultz to Resign D.N.C. Post*, N.Y. TIMES (July 24, 2016), <https://www.nytimes.com/2016/07/25/us/politics/debbie-wasserman-schultz-dnc-wikileaks-emails.html?smid=tw-share>.

moderate direction.⁴⁰ If any candidate should have induced the GOP leadership to step in, it's Trump. And yet the GOP leadership remains paralyzed.

To make this even more concrete, think about the mainstay reform advocated by those who worry about the ideological influence donors exercise through what I've called the "shadow parties": the Super PACs and 501(c)(4)s.⁴¹ If we leveled the fundraising playing field between the official parties and the shadow parties, is there any reason to think that the donors won't seek the same deals inside the party as they now seek outside of it?⁴² Deregulation could theoretically strengthen the parties, but it could also turn them into shadow parties. The official parties, then, would look a lot like today's Super PACs and 501(c)(4)s— beholden to a small number of wealthy donors and ideologically driven activists.⁴³ It's hard to see why the results would be much different.

I guess we could ban the shadow parties altogether, thereby ensuring that all the money is funneled through the parties. Surely that would help some, as the parties are likely to be less efficient means for translating money into policy than the Super PACs and (c)(4)s. But still. If the parties pay attention to their donors, their donors will push them to the extremes. And if the donors don't, voters and activists might, as the anti-establishment bias seems to be becoming more pronounced with every election. As I said, it's a different kind of party than the one V.O. Key was writing about.

Note that I'm offering a very different conception of the party than Sam supplies, one that aligns not with Key's work from the 1930s, but the work of the UCLA School during the last few years.⁴⁴ The UCLA School depicts parties as a loose collection of

40. Issacharoff, *supra* note 1, at 861.

41. Heather K. Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQUETTE L. REV. 903, 918 (2014); *see also* Joseph Fishkin & Heather K. Gerken, *The Party's Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175.

42. Michael Kang has made exactly this point. Kang, *supra* note 23, at 603 ("Whatever the role of campaign finance law in setting political responsiveness, the additional removal of restrictions on party campaign finance may just accelerate the effects of Super PACs and other forms of deregulation in multiplying the political capacity of the very rich and their polarizing tendencies."); *see also* Drutman, *supra* note 21 ("La Raja and Shaffner seem to envision parties being run by hard-headed pragmatists who can determine outcomes with money alone. They seem to assume that if parties can get billionaires to fund them, this will enable party leaders to support more moderate candidates. They seem to ignore that the billionaires may have a few ideas of their own about how they think government should be run (see, e.g., [North Carolina]).").

43. *See* Fishkin & Gerken, *supra* note 41, at 189, 212–13.

44. Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands*

networked interests (the party writ large) and deemphasizes the sort of party leadership structure Key contemplated (the party writ small).⁴⁵ On this view, the GOP has not been, to use Sam's phrase, "capture[d] by outsiders."⁴⁶ Instead, those "outsiders" are insiders to the party writ large even if they are not part of the party's formal structure.⁴⁷ What Sam sees as a hostile takeover instead looks more like a conventional interparty battle. The battle is just happening in a different part of the party system. The party writ large is highly polarized, and it's not clear that the party writ small can do much about that fact.⁴⁸

While this argument doesn't align with Sam's picture of the party, it does align with his argument about the hydraulics of campaign finance, especially if you overlay Michael Kang's observation that money follows power.⁴⁹ Even if the party leadership have more reasons than do individual candidates to resist the partisan tide pulling them away from the shores of moderation, everything depends on how strong that tide is. That's why, as I noted early on, my fear about Sam's paper is that the real question isn't *how* to moderate the parties, but *whether* we can—whether that tide is just too strong.

Needless to say, these questions matter enormously for any reform agenda. If we can't moderate the party, then we should think about adapting our institutions to our politics rather than changing our politics to fit our institutions. In this respect, Bob Bauer's paper and mine complement one another. Both Bob and I are skeptical that legal reform can substantially reduce polarization.⁵⁰ I want to think about how to make governance work in a highly polarized environment, and he wants to think about how to make parties work in a highly polarized environment.⁵¹

As I said when I began, the questions I have about Sam's paper are just that—questions. We cannot know for certain whether Sam is right or wrong because we don't have a handy parallel universe to run the experiment. Given the complexities of polarization's sources and the complex interaction between politics

and Nominations in American Politics, 10 PERSP. ON POL. 571 (2012).

45. *Id.* at 591.

46. Issacharoff, *supra* note 1, at 847.

47. See Gerken, *supra* note 41, at 920 ("These shadow parties are so tied to the candidate and the parties that politicians can take advantage of everything the formal party structure has to offer . . .").

48. See Kang, *supra* note 23, at 596–97.

49. See generally Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999). See also Kang, *supra* note 23, at 563–64.

50. Bauer, *supra* note 17, at 899.

51. Compare Gerken, *supra* note 41, at 919, with Bauer, *supra* note 17, at 908.

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and institutional design, we all should be the opposite of Updike's king—all questions and no answers.⁵² But that, it seems to me, is a luxury we cannot afford. The problems we face are dire, and Sam's paper is an effort to engage with those problems in a serious way. Better yet, it's an effort to provide a better frame for all of us to engage. I don't know whether Sam's paper is right, but it is pragmatic and scholarly and smart. Those are fine qualities—the finest of qualities, actually—and qualities I have always, always associated with Sam.

52. UPDIKE, *supra* note 8, at 59.