

### Madison's Hand: Revising the Constitutional Convention

By Mary Sarah Bilder

Harvard University Press, Cambridge, MA., 2015.

384 pages, \$35.00.

Reviewed by Henry S. Cohn

In *Madison's Hand*, Boston College Law School professor Mary Sarah Bilder begins by noting that “James Madison’s record of the Constitutional Convention in Philadelphia in 1787 is the single most important source for the Convention.” *Madison's Hand*, she adds, “is the story of the making of [Madison’s] Notes. It is inevitably also a history of James Madison’s mind, of the politics of the Constitutional Convention, and of the gradual emergence of the Constitution.”

Bilder’s main contribution in *Madison's Hand* is her new evidence, arrived at by analyzing Madison’s handwriting and watermarks on documents, of the extent to which the Notes were not complete at the time the Convention was concluded and the Constitution signed on Sept. 17, 1787. She shows that Madison made both technical and substantive revisions to the Notes, even into the 1830s. After Madison’s death in

1836, Dolley Madison inherited the Notes, but they were not publicly known until they were transcribed and published in 1900 as part of *The Documentary History of the Constitution*. The Notes now rest in two archival storage boxes in a refrigerated vault in the Library of Congress.

Until the publication of *Madison's Hand*, scholars minimized the significance of the revisions that Madison made after the September 1787 adjournment of the Convention. Max Farand, who prepared an edition of the Notes in 1911, remarked that it was difficult to decide in what order the revisions had occurred. Bilder has tried to remedy this situation by presenting the chronological order in which Madison made them.

Bilder begins with a forensic investigation of the Notes. Madison made his entries in long columns—sheets known to specialists as bifolia, of which there are 132. Madison added “slips” to these sheets as he made changes. He bought the sheets for the Notes—“fine English paper by James Whatman”—on his journey to Annapolis, Md., in 1786, while attending the precursor to the Philadelphia convention. He developed his own system of shorthand to initially take down information; then, a few times a week, he would transcribe his rough notes to the sheets that became the Notes themselves.

In both Annapolis and Philadelphia, Madison took his shorthand with a diary in mind that would list events and speakers at meetings. This intended diary evolved, however, into the Notes, with summaries of speeches, information about the delegates’ plans and theories, and Madison’s comments on them.

At the Annapolis convention, Madison wrote a list of “Vices” of the existing government under the Articles of Confederation, emphasizing the “impotence” of the confederation of states. Madison’s list of Vices became the basis of his position at the 1787 Convention at Philadelphia. There he recorded events of the late spring and early summer of 1787, including Edmund Randolph of Virginia’s proposed proportional representation in the Congress for the states, and his own support for this posi-

tion. He also recorded William Patterson’s contrary position supporting the smaller states by creating a unicameral legislative body with each state having one vote, and he gave his response. Madison also indicated in the Notes his support for the notorious 3/5 clause, which provided that the number of representatives in the House of Representatives would be determined by counting “the whole Number of free Persons” and “three fifths of all other Persons.” He came close to Hamilton’s position on strengthening the federal executive and limiting the power of the states, but he did not go as far as Hamilton, who urged the abolition of states. He lost a battle with the delegates to allow the President to veto state legislation. He also provided vivid portraits of his favorite delegates, including George Washington, and expressed his dislike for the aging Benjamin Franklin and his out-of-date political ideas.

Bilder’s earlier chapters setting forth the progress of the Convention do not add a lot to other works of history. *Madison's Hand* begins to break new ground when Bilder writes about the Notes after July 26, 1787, when they became less precise, and after Aug. 21, 1787, when they stop all together, as Madison became overwhelmed, having been assigned as a delegate to various subcommittees. He began using the official Journal of the Convention to review his notes and make changes. Bilder also provides a meaningful account of the period immediately after the Convention when Madison used the Notes to help Hamilton compose the Federalist Papers, still supporting Hamilton’s views in favor of a strong executive.

Thomas Jefferson now enters the picture. He was a close friend of Madison’s and was serving as ambassador to France during the Constitutional Convention. Madison communicated with Jefferson during the convention, and Bilder argues that the original purpose of the Notes was to assist Madison in drafting his frequent letters to Jefferson. After Jefferson’s ambassadorship ended, he borrowed a copy of the Notes from Madison and set his son-in-law John Eppes to the task of making a handwritten

copy for himself.

Madison made many of his changes to the Notes after Jefferson had studied them. Jefferson did not approve of Hamilton's ideas of a strong national executive or his theories to abolish the states. Madison reacted to Jefferson's criticism of Hamilton by changing the Notes to lessen his original support for Hamilton. He also omitted speeches that he had originally placed in the Notes, shortened others, and made technical corrections. He inserted speeches by Charles Pinckney of South Carolina in favor of proportional representation, which had inexplicably been omitted in the original Notes. The later revisions were not always accurate, as Madison made corrections based not on facts but only on dim memories.

The publication of *Madison's Hand* has already had an impact on the study of the Notes and their significance. After a symposium on the Notes and Bilder's book held in November 2015, Yale Law School professor Heather K. Gerken attacked Madison as an unreliable narrator and accused him of making changes to the Notes to conceal responsibility for his mistakes. At the Balkinization blog, she wrote, "I suspect that many will be shocked by Madison's conduct, and these revelations certainly ought to spawn a spirited methodological discussion among originalists. Those who dislike originalism will also be tempted to pounce. The 'read the mind of the Framers' variant of originalism is now passé, but still. If the views of one person are this hard to untangle, how do we gauge the views of a nation? Moreover, the book makes clear there is a gap between original public meaning and the true intent of the Framers, as things were passed for reasons that we might not guess from the text." ☺

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## A Nation of Nations: A Great American Immigration Story

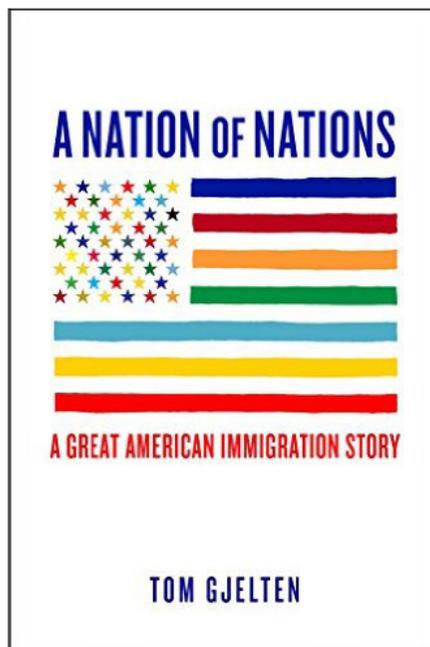
**By Tom Gjelten**

*Simon & Schuster, New York, NY, 2015.*

*405 pages, \$28.00.*

**Reviewed by R. Mark Frey**

It's election season and that means presidential candidates are out meeting and greeting the electorate, selling themselves and their



brand. They push hot buttons and they sling mud to garner interest and to divide the voters as they vie for their respective party's nomination and then run for the presidency. Immigration is again at the fore as we hear some candidates bemoan the presence of foreigners, interlopers, drug dealers, and murderers, all seeking the demise of our country. Some condemn the growing diversity and browning of America, calling for the good old days when America was a Christian nation peopled by Europeans, ideally those from northern Europe. But others speak wistfully about the concept and promise of America as we strive to meet and fulfill the aspirations and principles set forth in our much-venered U.S. Constitution.

Immigration has been a contentious issue throughout our nation's history. Certain sectors of the American public have decried the Other in our midst: those who speak, look, and worship differently from the majority. These sectors have called for limits on immigrants from certain countries. But others see immigrants as reminding us again of our nation's unique and exceptional qualities, replenishing the country, and reviving the great American experiment, as we seek to remake ourselves again and again.

For generations, peoples around the world have brooded over the meaning of America and the great experiment it is. Their answers comprise a wide-ranging set of views from Mark Twain to Maya Angelou and Langston Hughes, Ralph Waldo Emerson and Henry David Thoreau, Alexis de Tocqueville, Amy Tan, Jack Kerouac, Emma

Lazarus, and even Paul Simon, in his song, "America." For Tom Gjelten in *A Nation of Nations*, America's poet, Walt Whitman, best states the meaning of America in *Leaves of Grass*, his paean to America: "The Americans of all nations at any time upon the earth, have probably the fullest poetical nature. The United States themselves are essentially the greatest poem. ... Here is not merely a nation but a teeming nation of nations."

With that, Gjelten takes the reader on a journey exploring immigration and immigrants in the United States. Starting first with his own family's story of migration from Norway, Gjelten notes that, although his family faced struggles, its story was the idealized one of people coming to America from northern Europe. It was a nation of new beginnings, a land rich with opportunities for those willing through self-reliance to carve out lives based on their own merit and achievement rather than on their ancestry.

For others, however, such opportunities were not to be. Gjelten points out that, for many years, our laws gave preference to northern Europeans. In 1790, federal law restricted U.S. citizenship to free white persons, and, a century later, in reaction to the thousands of Chinese male contract laborers who came here to help build our nation's infrastructure, Congress enacted the Chinese Exclusion Act of 1882, which prohibited Chinese immigration.

The crude rhetoric of organizations such as the Immigration Restriction League fueled demands for even more measures to keep the Other out. In 1897, Prescott Hall, co-founder of the league, observed, "Do we want this country to be peopled by British, German, and Scandinavian stock, historically free, energetic, progressive, or by Slav, Latin, and Asiatic races, historically downtrodden, atavistic, and stagnant?"

In 1924, Congress passed the Johnson-Reed Act, restricting immigration through a national origins quota system. Immigrant visas were provided to two percent of the total number of people of each nationality present in the United States at the time of the 1890 national census, resulting in the complete exclusion of Asian immigrants. Passage of the Immigration and Nationality Act of 1952 (the McCarran-Walter Act) continued the national origins quota system but allowed Asians to immigrate here, albeit at a trickle—roughly 2,000 immigrants, with about 100 visas allotted

to each Asian country, and the confounding requirement that their ethnicity rather than nationality be factored into the equation. Thus, a British national with one parent of Chinese ancestry would be counted toward the limited allotment for China, not toward the British nationality quota. Although spouses and children of U.S. citizens were not subject to the quota system, immigration policy in effect continued to favor northern and western Europeans.

In the 1950s, pressure grew to eliminate racial bias in immigration policy, but only after John F. Kennedy became President did the subject gain serious attention. Following Kennedy's assassination, his successor, Lyndon B. Johnson, pushed for passage of legislation envisioned by JFK. Gjelten provides a fascinating glimpse into the behind-the-scenes politics that led to the passage of the Immigration and Nationality Act of 1965 (the Hart-Celler Act), which President Johnson signed at the foot of the Statue of Liberty. This legislation is significant in that it eliminated the national origins quota system and gave preference to immigration based on family connections and skills, opening up the country to immigrants previously underrepresented, from Asia, Africa, the Middle East, and Latin America. As LBJ observed at the signing ceremony, "This system violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man. It has been un-American in the highest sense, because it has been untrue to the faith that brought thousands to these shores even before we were a country. Today, with my signature, this system is abolished."

A new chapter relating to immigrants and the growing diversity of our nation's population began with passage of that 1965 legislation. To be sure, it has not been a smooth process, as Gjelten painstakingly notes in his discussion of first, second, and third generation immigrants in Fairfax County, Va., and their interest in and ability to become engaged in civic affairs, both at the local and national levels. At the same time, Gjelten points to the backlash against immigrants engendered by the Sept. 11 attacks, which often masked a concern about the browning of America.

Such outcries ignore the positive features of an increasingly pluralistic society. For Gjelten, a society that guarantees freedoms while even respecting diversity has much to offer. He approvingly cites political scientist

Robert Putnam's comment "that at the end we shall see that the challenge is best met not by making 'them' like 'us,' but rather by creating a new, more capacious sense of 'we.'"

*A Nation of Nations* offers a rich and insightful introduction to the immigration debate underway in this election season. It provides some sorely needed background, including a review of relevant U.S. history and immigration legislation and policies as well as the personal stories of several immigrant families who arrived from Korea, Bolivia, and Libya after passage of the Immigration and Nationality Act of 1965. We learn about their struggles and triumphs and in the process watch the Other slowly transform into a fellow human being, yet another member of our society. For me, the personal stories were the most telling and compelling in conveying the immigrant experience and the meaning of the great American experiment. ☺

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## Go Set a Watchman: A Novel

By Harper Lee

HarperCollins Publishers, New York, NY, 2015.

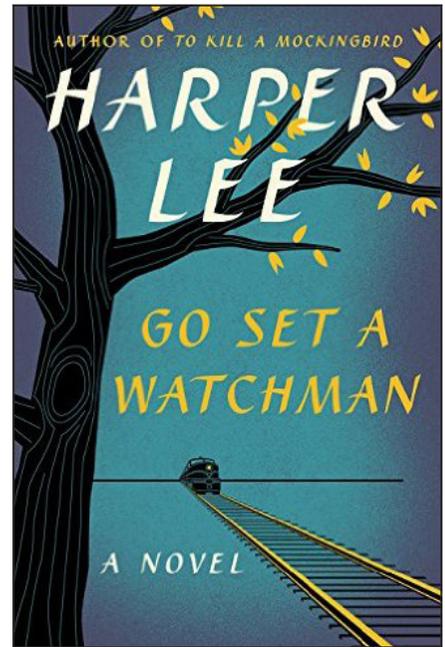
288 pages, \$27.99 (cloth), \$18.99 (paper).

Reviewed by Ryon McCabe

The late Harper Lee's "new" novel, *Go Set a Watchman*, really made me mad!

I am a huge fan of Lee's novel, *To Kill a Mockingbird*. I studied it in high school, college, and law school. I have also read the novel for pleasure at least half a dozen more times in the past 20 or so years since law school. I have even listened to Sissy Spacek's audiobook version, which I highly recommend.

I even have a framed photograph of Atticus Finch, as played by Gregory Peck, hanging on the wall of my law office. It is of



a courtroom scene, with Atticus standing in front of the jury at the Maycomb County Courthouse, with the segregated gallery behind him. I am not alone in my hero worship of Atticus. In 2012, the American Film Institute rated Atticus Finch as the number one movie hero of all time, beating out Superman, Spiderman, Luke Skywalker, and even James Bond.

What makes Atticus so special to millions of us? I can only speak for myself, but my appreciation for Atticus has grown over the years. In high school, *To Kill a Mockingbird* was to me a novel about race. By defending Tom Robinson against false rape charges, Atticus Finch stood alone as the conscience of his community, exposing the flaws and injustices of the racist society in which he lived.

In later readings, *To Kill a Mockingbird* became a novel about law and the practice of law. Atticus was the consummate lawyer's lawyer, trusted by his clients to handle their most important affairs. He demonstrated outstanding courtroom skills. Remember his understated, yet devastating, cross-examination of Bob Ewell. What trial lawyer wouldn't love that?

In more recent readings, *To Kill a Mockingbird* speaks to me about fatherhood. Written from the viewpoint of Atticus' daughter, an eight-year-old named Scout, the book shows Atticus through the eyes of his children. He is a pillar of the community, a member of the state legislature, and a busy trial lawyer, yet he always has time for his children. He reads to them every night and stays at their bedside during sickness.

A strong but humble man, he teaches his children by example. He loves them deeply and they adore him in return.

*To Kill a Mockingbird* takes place during the Great Depression. *Go Set a Watchman* picks up with the same characters in the 1960s. Scout is now 26 years old, unmarried, and living in New York City. She journeys home to Maycomb to visit her father, now 72 years old and living with her Aunt Alexandra. Dear old Calpurnia has retired. Jem is dead (what the heck?). We meet a new character, Henk, a young lawyer in Atticus' office and would-be romantic interest for Scout.

On her visit home, Scout learns that Atticus, the same Atticus who, in the real world, launched a million high school essays on the evils of racism, is actively involved in a Maycomb "Citizens' Council," which is opposing the efforts of the NAACP to desegregate dear old Maycomb County. Atticus even decries the "Yankee" lawyers whom he says will use every "trick at their disposal" to interfere with life in Macomb. Worst of all, Scout learns that Atticus, in his youth, was once a member of the Ku Klux Klan!

What? Atticus was working *against* the NAACP? And a member of the Klan? Yes—sum, all true. If you are like me, this comes as quite a shock. I have a picture of the guy in my office, after all.

The reader's first stage is denial. *Go Set a Watchman* was released amid great controversy. According to some reports, it is not a new novel at all but a *very* rough first draft of what later became *To Kill a Mockingbird*. Smart editors, upon reading *Go Set a Watchman*, allegedly told Harper Lee to keep working and focus more on the flashback scenes when the protagonist was a young girl. Lee kept working, and eventually came up with a masterpiece, *To Kill a Mockingbird*.

Lee said many times during her life that she had written only one novel and that she had no plans for another. Critics have argued, therefore, that *Go Set a Watchman* is nothing more than a money grab, released late in Lee's life. The publishers knew that *To Kill a Mockingbird* fans would flock to this novel with all the eagerness of a Harry Potter fan lining up for book seven.

Does this mean that we should just ignore *Go Set a Watchman* and pretend that its portrayal of Atticus is not real? I am not sure we can do that. As much as we love Atticus Finch, we fans do not own him.

He is Harper Lee's creation. She knows his backstory, and she, not us, has the right to decide whether he ever belonged to the Ku Klux Klan.

After denial comes anger. Scout goes through the same process. She is so emotionally overwhelmed by the discovery of her father's activities that she becomes physically ill. In a climactic scene, she confronts Atticus and calls him a liar and a hypocrite (you tell him, Scout!). She vows to leave Maycomb County forever.

It takes Atticus' brother, Uncle Jack, to calm things down and explain to Scout that her real problem has nothing to do with the NAACP or the Klan. These things are "incidental" to Scout's real problem.

The novel then reveals its true theme: the father-daughter relationship between Atticus and Scout. As Uncle Jack explains to Scout, "every man's watchman is his conscience." He adds:

"You, Miss, born with your own conscience, somewhere along the line fastened it like a barnacle onto your father's. As you grew up, when you were grown, totally unknown to yourself, you confused your father with God."

Uncle Jack says that Scout never saw Atticus "as a man with a man's heart, a man's failings." He concedes this was understandable, given that Atticus "makes so few mistakes, but he makes 'em like all of us." Because Scout adored her father so much and admired him so deeply, she assumed that Atticus' conscience would always coincide with her own, that his opinions would always be her opinions. Scout had become "an emotional cripple," always leaning on Atticus for the right answer.

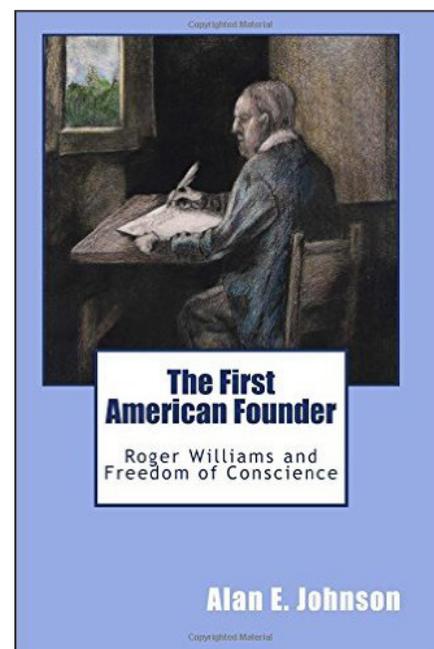
For Scout, the emotional climax of the novel comes not from the discovery that she disagrees with Atticus about the NAACP, but that she disagrees with him about anything at all. In short, she discovers that Atticus is not a perfect being, that he is not God. She needs to set her own "watchman" to guide her conscience and can no longer rely on Atticus.

Wow. Where does that leave the rest of us? Apparently, the top movie hero of all time is not perfect. Atticus Finch is just a human being like the rest of us.

And that brings me to the final stage of grief: acceptance. Like Scout, we need to set our own watchmen. We cannot rely solely on Atticus Finch.

Anybody have a picture of James Bond that I can hang in my office? ☺

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## The First American Founder: Roger Williams and Freedom of Conscience

By Alan E. Johnson

Philosophia Publications, Pittsburgh, PA, 2015.

624 pages, \$23.99.

Reviewed by Neysa M. Slater-Chandler

As writers search for new or different ways to interpret documents and events leading to our nation's founding, Roger Williams may be seeing a resurgence in interest. In fact, this is the second book on Williams that I've reviewed for *The Federal Lawyer* in the past couple of years.

The first was John M. Barry's engaging *Roger Williams and the Creation of the American Soul*, which I reviewed in the April 2014 issue. Having read that book, Alan E. Johnson's *The First American Founder* left me craving a little more of the "American Soul" that Barry uncovered in 2012. This is not to say that Johnson's new book is not worth reading. His background as an attorney is evident in the thoroughness of the material presented and analyzed, and

his work serves as a compendium of important excerpts from early American historical documents.

Johnson spends little time on Williams' early years; the available material may already have been both exploited and debunked by Johnson, Barry, and others. Johnson focuses on setting Williams and his developing belief system in the context of the ecclesiastical history of England and then New England. Many of the early historical accounts of Williams "bristled with hostility," a sentiment that prevailed well into the 20th century. New Englanders will appreciate Johnson's comment that one history "contributed to a Massachusetts historical meme of blaming Williams for everything that went wrong in Massachusetts Bay during his residence there." (Massachusetts lifted its banishment of Williams in 1936, more than 300 years after it imposed it.) Accounts of Williams attributed to supposed witnesses are more than likely based in gossip, showing us that nothing perpetuates itself as does a good story, whether penned on parchment or tapped on Twitter.

Williams was "alone among New England's political and religious leaders" in teaching "that any involvement of government with religion was both Antichristian and inconsistent with peace and rational political theory." Williams also was alone in his advocacy of Native American land rights; however, as principled as he tried to be, "the tragic dimensions of the conflict often resulted in his siding with the English when war actually broke out. ..."

Johnson writes that "Williams's writings created quite a public stir in England during, and for many years after ... they were published" in the 1640s and 1650s. It would be interesting to find out what, if any, influence these writings had on John Locke, a man whom Thomas Jefferson considered one of "the three greatest men that have ever lived" (along with Francis Bacon and Isaac Newton). Johnson ventures that Locke more than likely would have been exposed

to Williams' thinking. Writings and events in America had already started affecting more than just the New World. In another recent work, the award-winning *An Empire on Edge: How Britain Came to Fight America*, Nick Bunker discusses how another story learned by every Rhode Island student, the 1772 burning of HMS Gaspee, was analyzed more in England than in the colonies.

Johnson hits his stride late in the book when he searches for Williams' influence on the founding of America. He analyzes the contents of the libraries of the Founding Fathers for key works that Williams would have influenced. Benjamin Franklin's library contained two of Williams' publications. Stephen Hopkins, whose ancestor arrived in Providence with Williams, was not the rum-muddled slouch whose character provides comic relief in the musical "1776"; rather, he was an intellectual peer and friend of Franklin's from the time of the Albany Congress in 1754 through the First Continental Congress 20 years later. Hopkins' history of Rhode Island credits Williams with "the honor of having been the first legislator in the world; in its latter ages, that fully and effectually provided for and established a free, full, and absolute liberty of conscience."

Johnson seems at his best when he focuses on narrow issues. The appendices on Sir Edward Coke, theocracy in 17th-century New England, land distribution in Providence, and the influence of Williams and Locke are well worth reading. And for those of us who actually read the nearly 200 pages of endnotes, an incredible amount of valuable material is available for further in-depth study.

Johnson's presentation is hampered by a difficult format and layout, and readers may find themselves rereading sections that do not flow easily from one to another. Section headers sometimes substitute for the transitions necessary to move the story and the case presented forward, and some important events are reduced to short paragraphs. For example, Williams was banished from

Massachusetts Bay in 1635. He was given six weeks to pack up and clear out, but Williams was warned to move out sooner, most likely by those who disagreed with him yet still respected him. Although ill, he struck out into the wilds of southeastern New England in the dead of winter, hoping for friendly receptions from the Wampanoag and Narragansett tribes. As a native New Englander, even able to use modern roads, I wouldn't want to walk from Boston to Providence, and that walk is a major part of the myth and the man who became Roger Williams. Although this may seem a laughably short distance to readers in other parts of the country, imagine the distance without roads, through forest, and without adequate cold-weather gear and shoes, and not knowing what reception you will receive at the other end, even if you are one of the few Europeans who speaks the language of the original settlers of this land. But Johnson rushes through this formative event to move on to a dry, although important, discussion of land acquisition.

Those of you who visited Providence for the 2014 FBA convention probably did not realize that you were under the watchful eyes of Roger Williams. Had you ventured not far from the WaterFire venue, you would have seen a statue depicting Williams (although no contemporary likeness of the man exists) in an urban greenspace maintained by the National Park Service as part of the settlement that Williams founded nearly 400 years ago. Celebrated as a "Champion for Religious Freedom," Williams may now be recognized, as Johnson calls him, as "The First American Founder." ☺

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