

**Celebrating the Founders or Celebrating the Constitution:
Reflections on Constitution Day, 2019***

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* An earlier version of these remarks was delivered on September 16, 2019 at Northeastern University as part of its program celebrating Constitution Day. I am very grateful to Costas Panagopoulos for his invitation to deliver the talk and to the *Northeastern University Law Review* for suggesting that it might be published together with some responses. Among other things, of course, this text is longer than what I delivered on September 16 and, therefore, fleshes out some of the arguments I was able only to assert without any elaboration.

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I begin with some law: In 1952, Congress passed a joint resolution designating September 17, the date in 1787 on which the delegates to the Philadelphia Convention did (or as in the case of Edmund Randolph, George Mason, and Elbridge Gerry, did not) sign the text of the document that had been forged in almost four months of disputatious argument, as “Citizenship Day.”¹ Later, in 1956, another joint resolution of Congress “requested that the President proclaim the week beginning September 17 and ending September 23 of each year as ‘Constitution Week.’”² The most recent relevant legislation explicitly wedding “Citizenship Day” with “Constitution Day” was passed in 2004 at the behest of the late West Virginia Senator Robert Byrd.³ Although this legislation states “[t]he civil and educational authorities of States, counties, cities, and towns *are urged* to make plans for the proper observance of Constitution Day and Citizenship Day” in order to instruct citizens of the United States about “their responsibilities and opportunities,”⁴ the use of the word “urge” is misleading. Federal law is now interpreted as *requiring* all educational institutions that receive any federal funds to arrange appropriate ceremonies for the occasion.⁵ So our gathering, on September 16, as it happened, was not entirely the result of a voluntary decision by the university, though I am confident, for some reasons I shall shortly explore, that the decision to invite *me* to deliver these remarks was not similarly coerced by the national government.

1 Joint Resolution of Feb. 29, 1952, Pub. L. No. 261, ch. 49, 66 Stat. 9 (codified as amended at 36 U.S.C. § 106 (2012)). See, though, the description of the Joint Resolution offered in President Trump’s 2019 Proclamation of Citizenship and Constitution Day. Proclamation No. 9929, 84 Fed. Reg. 49629 (Sept. 16, 2019) (incorrectly stating holiday originally designated as “Constitution Day and Citizenship Day”).

2 Proclamation No. 9929, *supra* note 1 (citations omitted) (“The Congress, by joint resolution of February 29, 1952, designated September 17 as ‘Constitution Day and Citizenship Day,’ and by joint resolution of August 2, 1956, requested that the President proclaim the week beginning September 17 and ending September 23 of each year as ‘Constitution Week.’”).

3 *Constitution Day and Citizenship Day*, LIBR. OF CONGRESS, <https://www.loc.gov/law/help/commemorative-observations/constitution-day.php> (last updated Sept. 6, 2019); see Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 111, 118 Stat. 2809, 3344–45 (2005) (codified as amended at 36 U.S.C. § 106 (2012)).

4 § 111, 118 Stat. at 3344–45 (emphasis added).

5 See LIBR. OF CONGRESS, *supra* note 3 (“[E]ach educational institution which receives Federal funds should hold a program for students every September 17th.”).

In any event, Congress presumably desires this day—or week—to be one of celebration. On occasion, presidents have issued suitable proclamations taking note of the solemn occasion. Consider President Obama’s statement in 2009:

The United States Constitution has withstood the test of time for more than two centuries as our Nation’s charter of government and the guarantor of our liberties. Signed in Philadelphia on September 17, 1787, this founding document reflects our core values and enshrines the truths set forth in the Declaration of Independence, that we are each endowed with certain unalienable rights. As the beneficiaries of these rights, all Americans have a solemn obligation to participate in our democracy so that it remains vibrant, strong, and responsive to the needs of our citizens.

To succeed, the democracy established in our Constitution requires the active participation of its citizenry. Each of us has a responsibility to learn about our Constitution and teach younger generations about its contents and history. By fulfilling civic duties, engaging government at the local, State, and Federal level, and volunteering in our communities, individual citizens can better our country and breathe life into the freedoms established in the Constitution.

The right to participate in self-government, and the many other freedoms guaranteed by our Constitution, inspire the dreams and ambitions of many inside and outside our borders. These principles serve as a beacon of hope for Americans and those who seek new lives in the United States. Every day, we welcome new and diverse stories and heritages into the great patch-work of our Nation. United by our devotion to the Constitution and to the civic engagement it inspires, Americans remain committed to the fundamental principles established over two hundred years ago.⁶

Much can be said about President Obama’s proclamation, starting

6 Proclamation No. 8418, 74 Fed. Reg. 48129 (Sept. 21, 2009).

with his assertion that the 1787 Constitution necessarily reflected our “core values,” given both its compromises with slavery and the brutally ironic fact that the promise of “establishing justice” in the magnificent Preamble was interpreted at the time as establishing federal courts that would help reinforce property rights in slaves. There is a reason, after all, that William Lloyd Garrison labeled the Constitution a “covenant with death, and agreement with hell.”⁷

One should also readily understand the fact that Justice Thurgood Marshall delivered a famous—and for some, notorious—speech in 1987 in which he basically distanced himself from the bicentennial celebrations occurring that year and explained that for him, the Constitution worth celebrating began only with the addition of the so-called Reconstruction Amendments.⁸ Marshall reminded us that it is fallacious to say that the 1787 Constitution withstood the test of time for more than two centuries.⁹ Any such assertion requires that we simply avoid recognizing the brute fact of a civil war—or, if one wishes, a “War Between the States”—that killed 750,000 persons and left us with a still-incomplete “Reconstruction” of the Union, if by that one means a genuine regime change that would completely efface the heritage of slavery. I am often reminded of a remark I overheard at a 1987 bicentennial program on the Constitution at the Smithsonian Institution in Washington. The late UCLA historian Joyce Appleby observed a button worn by a prominent fellow historian at the gathering. “Still working after 200 years,” said the button. Appleby’s laconic comment was, “yes, but it was in the shop for eight of those years,” and one wonders if “eight” was not far too generous.

Finally, it is also a notorious truth most recently restated in *Bush v. Gore* that “self-government,” at least if defined as the right to vote, is nowhere enshrined in the Constitution, even though states are prohibited from limiting suffrage, should they choose to estab-

7 See, e.g., Donald Yacovone, “A Covenant with Death and an Agreement with Hell”, MASS. HIST. SOC’Y (July 2005), <https://www.masshist.org/object-of-the-month/objects/a-covenant-with-death-and-an-agreement-with-hell-2005-07-01>.

8 See Thurgood Marshall, *The Constitution’s Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337 (1987); Al Kamen, *Marshall Blasts Celebration of Constitution Bicentennial*, THE WASHINGTON POST, May 7, 1987.

9 See Thurgood Marshall, *supra* note 8, at 1338 (“When contemporary Americans cite ‘The Constitution,’ they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago.”).

lish it, on the grounds of race, sex, age, or ability to pay a poll tax.¹⁰ And, of course, unlike in nearly all of the 50 state constitutions that in fact help comprise the “American constitutional tradition,” (even if they are regrettably ignored both by the public and most legal educators), there is no federal ability of the ostensibly sovereign “We the People” to actually engage in any semblance of direct rule through referenda.

It is, perhaps, unfair to expect presidents, even when they are former professors of constitutional law like President Obama, to think carefully about—or, perhaps, even read at all—the statements that are drafted in their names for such ceremonial occasions. But the highly routinized and ostensibly non-controversial nature of the proclamations can nonetheless illuminate presuppositions that are ingrained and thought, perhaps wrongly, to be unproblematic. One could certainly spend much time on a sentence from President Trump’s 2019 Constitution Day Proclamation that described the Framers as having “designed a Government and a Constitution that could withstand the inevitable demagoguery, passions, and exigencies that would seek to unmake us as a people.”¹¹ Given that he is rightly regarded as the most truly demagogic occupant of the White House in our history and was, shortly after the delivery of this talk, justifiably impeached by the House of Representatives for his reckless indifference to constitutional norms, one might wonder if the drafter of Trump’s proclamation, which one can be confident was not pondered by the President before he signed it, intended to engage in a silent act of subverting his boss. It would truly be more discouraging if the author did not in fact recognize Trump’s demagogic character.

It is, then, no small matter to gather ourselves together, prodded by the national government and the fact that it helps finance this great university, to decide what it means to treat the occasion with the seriousness that it in fact deserves. Although one might be tempted to issue forth what may even be expected ceremonial clichés, that is, for better or, perhaps, for worse, not my own approach. Instead, I want to explain what I am willing to celebrate and what, in contrast, I increasingly wish to question.

The answer to the former is those whom we call the Framers themselves. It is not that I see them as “demigods,” which they were

10 See *Bush v. Gore*, 531 U.S. 98 (2000) (holding Florida’s 2000 election manual recount violated Equal Protection clause).

11 Proclamation No. 9929, *supra* note 1.

sometimes described as being; even less do I see them, as is suggested by Mormon theology, as divinely inspired.¹² Rather, it should be enough to acknowledge that they were truly concerned citizens of a new and extremely vulnerable United States of America—a title itself notable for its ambiguity, depending on whether one inflects “United” or “States”—who were justifiably worried about the prospects of its very survival, given that it was scarcely surrounded by a community of well-wishers. In some ways, I view them as successors to Paul Revere, who gained his own fame by mounting his horse and riding through the dark countryside with a warning to his fellow citizens (and de facto secessionists from the British Empire) that they were about to be attacked by soldiers loyal to King George III (and the entire edifice of British government). Independence had been won, thanks to the bloodshed of those we deem “patriots,” the aid of the French, and the exhaustion of the British. But, as with all startups, success was not assured. The Philadelphia Convention never would have occurred had there not been sufficient, even if not universally shared, agreement that the political system established by our first—and almost completely ignored—constitution, the Articles of Confederation, was, as described by Hamilton in *Federalist No. 15*, an “imbecility.”¹³

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- 12 Utah Senator Mitt Romney alluded to this aspect of his Mormon belief in his remarkable and moving speech to the Senate explaining his decision to vote to convict and, therefore, remove from the presidency, Donald Trump for his abuse of presidential power by delaying necessary military aid to Ukraine, while pressuring the president of that country to engage in a spurious investigation of Joe Biden. See *The New York Times, Full Transcript: Mitt Romney’s Speech Announcing Vote to Convict Trump*, N.Y. TIMES, Feb. 5, 2020, <https://www.nytimes.com/2020/02/05/us/politics/mitt-romney-impeachment-speech-transcript.html> (“I believe that our Constitution was inspired by Providence.”).
- 13 THE FEDERALIST NO. 15, at 30 (Alexander Hamilton) (Roy P. Fairfield ed., Johns Hopkins Univ. Press 2d ed. 1981) (1966). Hamilton began *Federalist No. 1* with a more mild-mannered reference to the “unequivocal experience of the inefficiency of the subsisting federal government.” THE FEDERALIST NO. 1, at 1 (Alexander Hamilton) (Roy P. Fairfield ed., Johns Hopkins Univ. Press 2d ed. 1981) (1966); see also SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL: READING THE FEDERALIST IN THE 21ST CENTURY 9–12 (2015). Hamilton had been preceded in his harsh dismissal of the Confederacy by Virginia Governor Edmund Randolph, who on June 16, had, as recorded by James Madison, “painted in strong colours the imbecility of the existing Confederacy, & the danger of delaying a substantial reform.” *Madison Debates June 16*, THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/debates_616.asp (last visited Feb. 19, 2020).

I am a big fan of Lin-Manuel Miranda's version of Alexander Hamilton and of his musical's repeated iteration of the necessity to "rise up" against those who are oppressing us, or who are simply making the self-government promised by the Declaration of Independence a near-impossibility.¹⁴ President Obama was, I believe, most fully honoring our Framers when he titled his own memoir *The Audacity of Hope*.¹⁵ They were audacious in almost every sense: in the risks they took first in rising up against the British government, and then in effectively scrapping the Articles of Confederation after only six years because they believed the Articles were so clearly inadequate to the maintenance of a new and vibrant country.

Were all of the decisions the Framers made in Philadelphia fully justifiable, even at the time? Of course not! I have already adverted to the various compromises with slavery, and I also take every opportunity I have to denounce the terrible decision to award all states equal voting power in the Senate. James Madison himself denounced that decision as an "evil" in *Federalist No. 62*, but the word was preceded by the all-important adjective "lesser," for he had decided not to walk out of the Convention in protest, as was his initial instinct.¹⁶ Rather, he chose to accept the blunt fact that acquiescence to the demands of Delaware and other small states was simply necessary to the overriding task of replacing the Articles and establishing a far more workable national government. Similar arguments were made by some of the Framers who held no brief for slavery, but recognized that a refusal to compromise would mean the failure of the entire Philadelphia enterprise. Indeed, whether paradoxical or not, President Obama reminded Americans in 2010, following the disastrous losses by Democrats in the midterm elections that year, that the United States is "a big, diverse country . . . in order to get stuff done, we're going to compromise."¹⁷ From one perspective,

14 See ORIGINAL BROADWAY CAST OF HAMILTON, HAMILTON (Atlantic Records 2015).

15 BARACK OBAMA, THE AUDACITY OF HOPE (2006).

16 THE FEDERALIST NO. 62, at 183 (James Madison) (Roy P. Fairfield ed., Johns Hopkins Univ. Press 2d ed. 1981) (1966).

17 President Barack Obama, Press Conference (Dec. 7, 2010) (partial transcript available at Kori Schulman, *President Obama on the Middle Class Tax Cuts and Unemployment Insurance Agreement*, THE WHITE HOUSE: BLOG (Dec. 7, 2010, 4:54 pm), <https://obamawhitehouse.archives.gov/blog/2010/12/07/president-obama-middle-class-tax-cuts-and-unemployment-insurance-agreement-a-good-de>), *quoted and discussed in* SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 42

perhaps the most fundamental lesson of 1787 was, to quote President Obama, that “[t]his country was founded on compromise. I couldn’t go through the front door at this country’s founding. And if we were really thinking about ideal positions, we wouldn’t have a union.”¹⁸

So, a central lesson of the Founding period is, perhaps, that one *must* on occasion make a pact with the devil, what Garrison accurately described as an “agreement with hell,”¹⁹ in order to achieve what are defensible greater purposes. If the alternative really was the disintegration of the fragile United States into two, or perhaps even three, separate countries along the Atlantic Coast with attendant prospects of endless warfare, as was predicted especially in such essays as *Federalist No. 8*,²⁰ then perhaps we should all swallow hard and celebrate the willingness of the Framers to engage in what the Israeli philosopher Avishai Margalit has labeled “rotten compromises.”²¹ We did, after all, ally with Stalin in order to defeat Hitler during World War II, and I tremble to think of what would have happened had we been more pure in our alliances at that time. To over-valorize the Constitution, to view it as the instantiation of all that is good within the American political tradition, may be a disservice to the Framers themselves, none of whom believed that they had achieved some kind of utopian perfection in what was then the brand new practice of constitutional design.

George Washington, after all, had written to his nephew Bushrod (who would later be appointed as a member of the Supreme Court) on November 10, 1787, less than two months after September 17, that even the “warmest friends and best supporters” of the new Constitution “do not contend that it is free from imperfections.”²² It was quite literally the best the delegates in Philadelphia could come up with given constraints of time, climate, and, most importantly, deep political cleavages between small and large states,

(2012) [hereinafter LEVINSON, FRAMED].

18 President Barack Obama, *supra* note 17.

19 Donald Yacovone, *supra* note 7.

20 THE FEDERALIST NO. 8, at 44 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

21 See AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES (2009).

22 Letter of George Washington to Bushrod Washington (Nov. 10, 1787), in THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 83 (Michael Kammen ed., 1986), *quoted in* RESPONDING TO IMPERFECTION 3 (Sanford Levinson ed., 1995).

and slave and free states. The good news conveyed by Washington to his nephew, though, is that future generations who “will have the advantage of experience on their side”²³ can decide what changes are necessary, given that the Constitution itself acknowledges the possibility of amendment in Article V.²⁴ “I do not think,” said the then President of the Convention and later first President of the United States, “we are more inspired, have more wisdom, or possess more virtue, than those who will come after us.”²⁵

So perhaps what we call “Constitution and Citizenship Day” should occasion is not thoughtless praise of our founding document, but, instead, an opportunity to ask ourselves what is required of us if we accept President Obama’s invitation to consider ourselves truly active citizens of our constitutional order who can call on our own lessons of experience and, if need be, become as audacious as the Framers before us. This question calls on us to think more deeply about what exactly we do when we “celebrate” founders and innovators, as I think we should almost certainly do. But it should be obvious that celebrating innovators does not mean continued adherence to their particular innovations.

Consider Crawford Long, who discovered in 1842 that ether would anesthetize patients undergoing surgery.²⁶ There can be little doubt that this was one of the great developments in the history of medicine, no doubt saving many lives and, as much to the point, freeing patients from the prospect of unendurable pain. That there is a museum honoring Crawford Long in Jefferson, Georgia, is completely appropriate. But, and this is the main point, it would be bizarre in the extreme for anyone to argue today, 178 years later, that honoring Crawford Long and what was undoubtedly his own audacity in determining the properties of ether means that any operation today should involve the use of ether. It is, perhaps, the particular fate of inventors and discoverers to know that they are almost inevitably going to be supplanted by later people who, altogether sincerely, view the prior achievements as inspirations for their own willingness to explore new paths and take intellectual risks. The recognition that Einstein supplanted Isaac Newton in important ways does not in the least make Newton less great as a scientist or as an inspiration,

23 *Id.*

24 See U.S. CONST. amend. V.

25 Letter of George Washington to Bushrod Washington, *supra* note 22.

26 See FRANK KELLS BOLAND, *THE FIRST ANESTHETIC: THE STORY OF CRAWFORD LONG* 37–38 (1950).

even if it does mean that Newtonian mechanics have become only a subset of the larger enterprise of physics.

If one accepts this almost banal point with regard to innovators and inventors, whether Crawford Long, Thomas Edison, or the Wright Brothers, why should we be any less hesitant to put the Constitution's Framers in their place? They were necessarily creatures of their own time who could not have been expected to foretell the future. We forgive them for failing to include an air force in the list of armed forces Congress can establish along with an army and a navy because they literally could not have conceived of what we now take for granted. And, as a matter of fact, no sane interpreter of the Constitution treats the absence of an air force in the Constitution's text as grounds for arguing that only an amendment would authorize its creation. The army and navy are treated only as examples of armed forces; if experience teaches that others are "necessary and proper,"²⁷ so to speak, then Congress need not worry about overstepping its bounds, even if one takes seriously the mantra that the Constitution establishes a national government with delimited written and assigned powers. And, as already suggested, we may be willing to forgive the Framers for making quite repugnant compromises in the name of what Oliver Wendell Holmes might aptly describe as the "felt necessities of the time,"²⁸ the reality of which is often more determinative in defining law than is abstract logic or even the teachings of moral philosophy. Michael Walzer, following in the tradition of Machiavelli and Max Weber, has taught us that political leaders must almost inevitably be willing to "dirty" their hands,²⁹ to follow what Weber called the "ethics of responsibility" instead of those of "ultimate ends."³⁰ One is often told that one does not make omelets without breaking eggs. When generalized to politics more broadly, the aphorism takes on far more ominous implications. Political life, including the crafting of constitutions, is not for those who seek moral purity and we are thus in the position of needing to honor, at least at times, those who were willing to dirty their own hands in order to serve the public weal.

27 See U.S. CONST. art. I, § 8.

28 OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

29 See Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160 (1973); see also C.A.J. Coady, *The Problem of Dirty Hands*, STAN. ENCYC. OF PHIL. (Fall 2018), <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=dirty-hands>.

30 See MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77–128 (H.H. Gerth & C. Wright Mills eds., trans., 1948).

However, as already suggested with regard to Crawford Long and his ether, this does not in the least mean that honoring our forbearers requires accepting their own time-bound and politically-constrained conclusions as the last word with respect to conducting our own lives, especially regarding compromises about whose virtues they themselves had well-merited doubts. Even the most devoted “originalists” with regard to our often bitter debates about how best to interpret the Constitution that we have do not argue that “originalism” extends to unquestioning devotion to whatever the Constitution happens to mean. Yale Professor Bill Eskridge and I co-edited a book some 20 years ago called *Constitutional Stupidities, Constitutional Tragedies*, in which various scholars were asked to pick their own candidates for either the stupidest or most tragic feature of the (correctly interpreted) Constitution.³¹ No one turned down our invitation to participate by arguing that the Constitution was in fact perfect, devoid of any stupidity or, concomitantly, without the potential for creating tragedy when correctly interpreted.

I never tire of quoting the conclusion to *Federalist No. 14*, which, though written by Madison, captures the spirit of its other principal author as well, Alexander Hamilton:

Is it not the glory of the people of America, that . . . they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? . . . Happily for America, happily, we trust, for the whole human race, they pursued a new and more noble course. They accomplished a revolution which has no parallel in the annals of human society. They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great Confederacy, which it is incumbent on their successors to improve and perpetuate.³²

One way of understanding this is that it allows us to celebrate Madison and his colleagues precisely for their willingness to

31 See generally CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

32 THE FEDERALIST NO. 14, at 28 (James Madison) (Roy P. Fairfield ed., Johns Hopkins Univ. Press 2d ed. 1981) (1966).

trust “the lessons of their own experience” and to reject entrenched “customs” that no longer fit the circumstances. Our own task as the descendants of the Framers is to do likewise, to realize that “perpetuation” of a system truly dedicated to achieving the goals of the Preamble might require significant “improvement” and concomitant rejection of decisions made long before, whether as honest mistakes—the electoral college—or felt “necessary evils,” like slavery and the Senate.

I have written several books that are quite, even extremely, critical of the Constitution.³³ My wife and I wrote a book together, directed primarily to teenagers and now in its second edition, titled *Fault Lines in the Constitution: The Framers, Their Fights, and the Flaws that Affect Us Today*.³⁴ It is devoted to examining what we believe to be the genuine threats posed to us should there be a shift among the various tectonic plates embedded in the Constitution. These plates threaten, should they shift, political and constitutional earthquakes equivalent in their potentially devastating consequences to more natural cataclysms that can destroy great cities in their aftermaths. It is an unfortunate reality that these fault lines, because they are rarely, if ever, the subject of litigation, are all-too-often simply ignored or denied in terms of their potential importance. Our book, like my prior books, was not meant as an attack on the Framers. I often point out in my frequent criticisms of the Constitution that I rarely, if ever, engage in “founder-bashing.” Although I insisted when visiting the National Constitution Center in Philadelphia, which concludes with a room devoted to life-size statues of all of the delegates to the 1787 Convention, that my wife take my picture with the three who refused to sign the Constitution, I cannot honestly say I know what I would have done back then. We are *all* creatures of our own times and the arguments made even on behalf of terrible compromises cannot simply be brushed aside. What I can do—even at the price of appearing at times to be simply a scold, or even worse, a crank—is in effect bash those of us today who almost resolutely refuse to consider the proposition that the Constitution is significantly defective, much in need of what Hamilton in *Federalist No. 1* called “reflection

33 See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006); LEVINSON, *FRAMED*, *supra* note 17.

34 CYNTHIA LEVINSON & SANFORD LEVINSON, *FAULT LINES IN THE CONSTITUTION* (2017).

and choice” on how to change it for the better.³⁵

So, let me say that when I am asked, as most professors of constitutional law are these days, if the United States is in a “constitutional crisis,” I increasingly answer that the Constitution *itself* is the crisis. Part of the evidence is the fact that overwhelming majorities of Americans across the political spectrum no longer have any genuine esteem for Congress nor a belief that the national government is committed to the “general welfare,” instead of being basically rigged in favor of those with money and influence. The most recent polls suggest that Congress has the approval of at most one in six Americans, with three in five disapproving.³⁶ The same pollsters find that 53% of Americans believe the country is going down the “wrong track,” while only 39% believe it is going in the “right direction.”³⁷ Many reasons could be offered to explain this national malaise. My friend Jack Balkin and I offered our own diagnoses (and disagreements) in a recent book, *Democracy and Dysfunction*.³⁸ Suffice it to say that I located much of the explanation in the sheer fact that the national government was, in some real sense, designed to privilege the status quo by making change immensely difficult. From one perspective, legislative gridlock is a feature and not a bug of the 1787 Constitution. To some degree, it simply does not matter what legislative powers Congress possesses, whether those set out in Article I, Section 8 or added by the Reconstruction Amendments, if the basic structures of the national government make use of those powers inordinately difficult.

Let me acknowledge that on this Constitution Day 2019, I persist in desiring a new constitutional convention as is allowed, incidentally, by the text of Article V, although, typically, it provides nary a clue as to how a new convention would actually be organized.³⁹ That itself is one of the great defects of the Constitution. In any event, I think there are more than enough other defects to keep latter-day Framers fully busy. It took the Philadelphians four months from late May until September 17 to draft the document that went to the state conventions for ratification. I actually envision

35 THE FEDERALIST NO. 1, at 1 (Alexander Hamilton) (Roy P. Fairfield ed., Johns Hopkins Univ. Press 2d ed. 1981) (1966).

36 *Polls: State of the Union*, REALCLEARPOLITICS, https://www.realclearpolitics.com/epolls/latest_polls/state_of_the_union/ (last visited Jan. 6, 2019).

37 *Id.*

38 SANFORD LEVINSON & JACK M. BALKIN, *DEMOCRACY AND DYSFUNCTION* (2019).

39 See U.S. CONST. amend. V.

that a new convention would last for up to two years, given all of the “lessons of experience” that would have to be debated and absorbed, not to mention the time needed to persuade the country before any ratification procedures that the delegates really know what they are doing and deserve public trust regarding their recommendations and conclusions.

Given my earlier writings, I will not rehash all of my arguments about the defects within the existing Constitution. Suffice it to say, one important difference between my first and second books is that in the latter, I reached the conclusion that most people really do not care very much about the “democratic” nature of the Constitution. The central question I address is whether the political system in fact operates to generate a sufficient measure of popular contentment, perhaps even what the Preamble calls “domestic tranquility.”⁴⁰ In my second book, I conclude that the answer to this question is no. The “crisis of governance” does not so much concern the presence or absence of democratic inputs into the governmental process as, instead, the inadequacy of the outputs generated. As I’ve already suggested, that is one of the areas in which there is in fact substantial agreement between the discontented Right and Left, even if they disagree vehemently on what would constitute desired outputs.

I have already made clear my abhorrence of the United States Senate and the fact that it gives an equal say in legislation to Wyoming and California, to Vermont and Texas. With regard to the latter, perhaps it is relevant to say that although my partisan inclinations make me more supportive of Vermont Senators Leahy and Sanders than my home state senators Cornyn and Cruz, it is only the blindest of partisanship that could justify giving the roughly 650,000 residents of Vermont equal representation with roughly twenty eight million Texans. Whatever “one-person/one-vote” might mean, this is surely not it! And, frankly, it is irrelevant if the House of Representatives is more fairly apportioned than the Senate, even when taking gerrymandering into account. The fact is, as Earl Warren recognized in *Reynolds v. Sims*,⁴¹ the very nature of bicameralism is that in order to pass, legislation needs the approval of *both* houses.

40 U.S. CONST. pmb1.

41 See generally *Reynolds v. Sims*, 377 U.S. 533 (1964). This decision invalidated “little federalism” schemes in almost all of the states by which counties with often wildly disparate populations were given equal representation in state senates.

There is a reason that the Senate has often throughout our history been thought of as the graveyard of legislation, especially legislation involving civil rights. For example, Reconstruction, with its valiant attempt to engage in genuine “regime change” in the defeated states of the Confederacy, in some real sense came to an end with the 1890 Senate filibuster that defeated the so-called Lodge Bill. That would have authorized (and in effect mandated) the use of federal force to guarantee free elections in the South, where an ever-more-invigorated white ruling class was doing whatever it could to suppress remaining pockets, often quite important, of African-American suffrage and even election of African-Americans to office.

Let me conclude my remarks originally delivered in September of 2019 not by going through the depressing litany of constitutional problems, but instead by focusing on what has, after all, become the chief constitutional issue of the moment: impeachment.⁴² Much is being written and debated on television and social media about the meaning, for example, of the “high crimes and misdemeanors” that are apparently required by the Constitution before we can, in effect, fire a President.⁴³ Some of our greatest scholars have jumped into this debate and what they have to say is surely worth attending to. That being said, I confess that I have turned into an adamant critic of the Impeachment Clause inasmuch as it has in effect been captured by the legal profession. The consequence is that we do indeed get tied up in quite esoteric arguments about constitutional interpretation and, for some, the mechanisms of impeachment in 18th century Britain. These are interesting questions, to be sure, but I think they have little, if anything, to do with what ought to be the central issue in our conversation: Do we, as a people, have sufficient confidence in Donald Trump’s competence and character to entrust him with the powers of the modern presidency, which would, I assert, have been unimaginable at the time of the nation’s founding?

I believe we would be far better served if the Constitution had a “no-confidence” clause that would, at the very least, comple-

42 As I engage in final revisions, in February 2020, we obviously know how that particular story ended, with a show of stunning cowardice by the Republican majority in the Senate (save for Senator Romney), who fully collaborated with Majority Leader Mitch McConnell’s announced resolve to work hand-in-glove with the Trump defense team. Perhaps that will be the subject of a 2020 Constitution Day address, should I be invited to give one.

43 See U.S. CONST. art. II, § 4.

ment the Impeachment Clause, if not out-and-out supplant it. I have offered in my books suggestions as to how a “no-confidence” system might actually work.⁴⁴ I have even suggested that we might learn from Wisconsin and California, both of which allow their electorates to initiate recalls of governors who have popular legitimacy.⁴⁵ This “worked” in California, which in effect “fired” Gray Davis in 2002.⁴⁶ It “failed” in Wisconsin, where Scott Walker prevailed in 2012 against an attempt to displace him (though he was defeated in his bid for re-election in 2018).⁴⁷ But one might well say that it worked in both states inasmuch as aroused electorates were given the opportunity to weigh in on whether the incumbent governors should remain in office. I am confident that if the Constitution allowed recall, there would already have been an election to determine whether Donald Trump should continue in office. Among other things, incidentally, his prevailing in such an election, should it have occurred, might have served to eliminate the questions about his getting to the Oval Office in the first place only because of the indefensible operation of the Electoral College. It is, to be sure, part of what makes the United States national constitution truly “exceptional,” both among nations of the world and, importantly, the United States itself, once one looks at how states select their governors. But there is no reason to applaud this particular aspect of exceptionalism and many reasons to reject it.

No doubt, this suggestion may strike many readers as some mixture of heretical and simply unwise. The former is suggestive of the degree to which we unwisely “venerate” the Constitution and refuse to submit it to the continuing “reflection and choice” that Hamilton had identified as what was truly most significant about the process by which the Constitution came into being. The second, of course, is completely fair comment. As a matter of fact, I am not

44 See LEVINSON, *FRAMED*, *supra* note 17, at 215–17.

45 *Id.* at 218–19.

46 See, e.g., Katharine Q. Seelye, *THE CALIFORNIA RECALL: THE GOVERNOR; For Gray Davis, Great Fall From the Highest Height*, N.Y. TIMES, Oct. 8, 2003, <https://www.nytimes.com/2003/10/08/us/california-recall-governor-for-gray-davis-great-fall-highest-height.html>.

47 See, e.g., Monica Davey & Jeff Zeleny, *Walker Survives Wisconsin Recall Vote*, N.Y. TIMES, June 5, 2012, <https://www.nytimes.com/2012/06/06/us/politics/walker-survives-wisconsin-recall-effort.html>; Monica Davey, *Tony Evers Wins Wisconsin Governor’s Race; Scott Walker Concedes*, N.Y. TIMES, Nov. 7, 2018, <https://www.nytimes.com/2018/11/07/us/elections-wisconsin-governor-evers-walker.html>.

sure where I would come out on many of the topics I believe merit the kind of discussion they are simply not receiving in a culture that is more inclined to celebrate the Constitution than really to take it seriously by reflecting on its weaknesses as well as its strengths. And perhaps just as importantly, I do not regard all of the defects as equally serious or ominous. For example, I strongly oppose life tenure for Supreme Court justices—there is a good reason that most countries around the world and 49 of the 50 states have rejected it. But, frankly, were I a delegate to the new convention and someone offered me significant revisions of the Senate or, for that matter, Article V itself to make it easier to amend the Constitution in the future, in return for sticking with the life tenure that I in fact oppose, I would take the deal in a second. I might even write an op-ed justifying it as a “lesser evil” against the prospect of no constitutional reform at all! President Obama was correct, for better or worse, about the need to accept sometimes truly painful compromises as part of living in truly pluralistic societies where we must accommodate, at least to some extent, people whose views and values we might find, at best, questionable, and even, at worst, abhorrent.

In any event, I hope that I have complied with the spirit of Constitution Day, especially with regard to the actual model set for us by the Framers, even if, perhaps, I have violated the expectations of at least some of those who voted for Senator Byrd’s legislation in 2004. Even more do I hope that Northeastern will not pay any price for turning over the podium to a critic of the Constitution instead of an endorser of the cheerleading that President Obama, for a variety of reasons, thought it necessary to offer a decade ago and that President Trump, perhaps more predictably, repeated in 2019.