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## HOW I LOST MY CONSTITUTIONAL FAITH

SANFORD LEVINSON\*

### INTRODUCTION

What follows is the revised text of a lecture delivered at the 92nd St. Y in New York City on April 26, 2012, under the title “How I Lost My Constitutional Faith.” It is obviously linked, in many ways, to the themes raised by Jack Balkin in his splendid book *Constitutional Redemption*.<sup>1</sup> This, of course, is not altogether surprising inasmuch as Jack was kind enough to dedicate his book to me in part on the basis of the contribution to his own thought of some of the ideas in my 1988 book, *Constitutional Faith*; that book was brought out in a new edition by the Princeton University Press in 2011 with a new afterword that touches on some of the themes developed below.<sup>2</sup>

There are many aspects of Jack’s book that are worth elaborating, and the other essays in this symposium certainly do so, though, just as certainly, they don’t exhaust everything that might be said. I suppose that the Essay that follows is linked most importantly to Jack’s emphasis that a constitution, if it is truly to structure the political life of the United States, must be “our” Constitution, in the sense that even as we recognize its inevitable imperfections, we still feel a measure of genuine veneration for it.<sup>3</sup> Moreover, the imperfections can ultimately be overcome by a “redemptive” project that requires fulfillment of what is *best* within the Constitution.<sup>4</sup> No revolutionary transformation—or, perhaps, even significant formal amendment—may be necessary.

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1. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011) [hereinafter BALKIN, *CONSTITUTIONAL REDEMPTION*].

2. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 245–56 (rev. ed. 2011) (1988).

3. See BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 1, at 79 (“Even if one does not put one’s faith in the rule of law, one might still have faith that the particular set of legal institutions called the American Constitution is destined to work itself pure over time.”).

4. See *id.* at 29 (“In every generation it is given to us to redeem the promises of the Declaration and the Constitution in ever new ways.”).

Jack may be considerably more devoted to the Constitution than I currently am. As H.W. Perry suggests in his own essay,<sup>5</sup> I may be in the position of calling for a truly basic (structural) “reformation,” albeit one based on the admirable vision set out in the Preamble, while Jack perhaps believes that the constitutional church can be adequately changed from within without radically changing the structures in which our dysfunctional political system operates. Both of us agree, though, that redemption, however defined, can be achieved by commitment to its immanent possibilities. Mark Graber, in his own valuable contribution,<sup>6</sup> suggests that both Jack and myself may be too “prophetic” inasmuch as we focus on only selective aspects of the Constitution—e.g., the striving for (perfect?) justice—and downplay the equally important emphasis on a vision of “domestic tranquility” that may require honoring quite rotten compromises made with people of fundamentally differing views regarding the meaning of justice. In any event, this Essay is designed not only to offer one way of approaching *Constitutional Redemption*, but also to serve as the next exchange in the ongoing conversations with the co-dedicatees of my recent book *Framed*, my invaluable friend, sometime colleague, and happily frequent co-author Jack Balkin, and my equally invaluable friend and interlocutor Mark Graber.

#### HOW I LOST MY CONSTITUTIONAL FAITH

Consider two recent comments about American politics and the Constitution. The first is the conclusion of Tom Friedman’s column in the *New York Times* on April 22, 2012, one of many in which he expresses great concern about the health of our political system.<sup>7</sup> He began by asking what some readers no doubt found an inflammatory question: “Does America need an Arab Spring?”<sup>8</sup> His answer is basically yes. “We can’t be great,” concluded Friedman, “as long as we remain a vetocracy rather than a democracy. Our deformed political system—with a Congress that’s become a forum for legalized bribery—is now truly holding us back.”<sup>9</sup> A “vetocracy” allows what some would call “special interests” to prevent the passage of legislation both

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5. H.W. Perry, Jr., *Constitutional Faith, Constitutional Redemption, and Political Science: Can Faith and Political Science Coexist?*, 71 MD. L. REV. 1098 (2012).

6. Mark A. Graber, *Redeeming and Living With Evil*, 71 MD. L. REV. 1073 (2012).

7. Thomas L. Friedman, Op-Ed., *Down with Everything*, N.Y. TIMES, Apr. 22, 2012, at SR11, available at <http://www.nytimes.com/2012/04/22/opinion/sunday/friedman-down-with-everything.html>.

8. *Id.*

9. *Id.*

supported by majorities of the electorate and in fact conducive to some notion of the “public interest.” A major point of this Essay is to suggest that the United States Constitution increasingly constitutes a clear and present danger to our polity, in part, but not only, because of its “vetocratic” aspects.

It is, therefore, appropriate that the second statement was delivered by Justice Ruth Bader Ginsburg in January when she was visiting Egypt and speaking to students there. Asked by the English-speaking interviewer whether she thought Egypt should use the constitutions of other countries as a model, Justice Ginsburg said Egyptians should be “aided by all constitution-writing that has gone on since the end of World War II.”<sup>10</sup> That is innocent enough. What inflamed many conservative pundits in the United States was her additional comment:

I would not look to the U.S. Constitution if I were drafting a constitution in the year 2012. I might look at the Constitution of South Africa. That was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights, had an independent judiciary. . . . It really is, I think, a great piece of work that was done. Much more recent than the U.S. Constitution.<sup>11</sup>

She is absolutely correct. The United States Constitution has increasingly become an anti-model for those drafting constitutions in recent years, and it is important to understand why—and, perhaps, to ask what they know that we seem unwilling even to consider.

I have a particular lens through which I view statements like Friedman’s and Ginsburg’s. In 1986–87 I wrote a book called *Constitutional Faith*.<sup>12</sup> It was, in some sense, an extended meditation on Barbara Jordan’s famous statement, speaking to the nation from her position as a member of the committee considering the impeachment of Richard Nixon in 1974: “My faith in the Constitution is whole, it is complete, it is total. And I am not going to sit here and be an idle spectator to the diminution, the subversion, the destruction, of the Constitution.”<sup>13</sup> Using Balkin’s terminology, there was no doubt

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10. Ariane de Vogue, *Ginsburg Likes S. Africa as Model for Egypt*, ABC NEWS (Feb. 3, 2012, 11:33 AM), <http://abcnews.go.com/blogs/politics/2012/02/ginsburg-likes-s-africa-as-model-for-egypt/>. The Supreme Court has not released a transcript of Justice Ginsburg’s remarks, but the full video of her speech and interview with Egyptian television is available at <http://www.youtube.com/watch?v=vzog2QWiVaA>, and excerpts of the transcript are available at [http://www.memritv.org/clip\\_transcript/en/3295.htm](http://www.memritv.org/clip_transcript/en/3295.htm).

11. De Vogue, *supra* note 10.

12. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

13. BARBARA JORDAN, *SPEAKING THE TRUTH WITH ELOQUENT THUNDER* 27 (Max Sherman ed., 2007).

whatsoever that for Rep. Jordan, the United States Constitution was most certainly *her* Constitution, and that she saw within it the path toward overcoming its degradation by President Nixon.

I was interested in the use of religious language to describe one's relationship to what is, after all, a secular document. What does it mean to express such a total "faith in the Constitution," and why would one have it? Why would it not be regarded as a form of idolatry, attributing divine-like status to a document written by decidedly imperfect men and creating an obviously non-divine, highly imperfect political order? (Think only of what Israeli philosopher Avishai Margalit has termed the "rotten compromises" regarding slavery,<sup>14</sup> a reality of our constitutional history that Rep. Jordan was clearly aware of.) But an important aspect of American political culture *is* the expression of "constitutional faith" as the core of American civil religion. What made Justice Ginsburg's statement so shocking to some was the degree to which she seemed to be engaging in heresy. She seems not only to be suggesting that constitution-drafters in other countries basically ignore the United States Constitution, but also implying that she herself regards the Constitution as less admirable than the South African constitution drafted in 1994.

Exaggerated notions of "constitutional faith" have scarcely disappeared from our contemporary discourse. One finds it most notably in many members of the so-called Tea Party, at least some of whom view the Constitution as touched with divinity. A November 2009 article in the *New York Times Magazine* about Dick Armey, the former majority leader of the House Republicans who has become a major organizer of the Tea Party, described Armey's reverence for the Constitution.<sup>15</sup> For him it is "something like a sacred religious text, written by Christian believers, possibly divinely inspired and intended to be read in the most literal way. It contains solutions to any civic problem faced by modern Americans."<sup>16</sup> "What should be your guide?" asked Armey in one speech. "The Constitution. This ain't no thinkin' thing."<sup>17</sup> One could easily understand why Samuel G. Freedman, who writes a regular column on religion for the *New York Times*, wrote, very shortly after Election Day in November 2010, of the "religious

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14. See AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES 1–2 (2009) (arguing that rotten political compromises, such as agreements to establish or maintain an inhuman regime, should not be allowed, even for the sake of peace).

15. Michael Sokolove, *The Outsider's Insider*, N.Y. TIMES MAGAZINE, Nov. 8, 2009, at 24, available at <http://www.nytimes.com/2009/11/08/magazine/08Armey-t.html>.

16. *Id.*

17. *Id.*

fervor for [the] Constitution”<sup>18</sup> found in many devotees of the Tea Party. He quoted James Manship, an ordained minister as well as a veteran of the United States Navy, who spoke of the Constitution in terms of “divine providence, intuitive intervention, or something like that,” and said, “God’s words, the concept of godly government, are woven into the warp and woof of the fabric of our nation and this Constitution. It’s rightly called the ‘Miracle in Philadelphia.’”<sup>19</sup> Not by coincidence, *Miracle at Philadelphia* is the hagiographic treatment of the Convention by Catherine Drinker Bowen that has remained in print, readily available, ever since its publication in 1966.<sup>20</sup> The title feeds a perception that the Constitution was written by “demigods,” perhaps even taking advantage of providential intervention.

For what it is worth, this view of the Constitution is basically held by the Mormon Church. The former President of the Church of Jesus Christ of Latter Day Saints, Ezra Taft Benson (who had been Secretary of Agriculture under President Eisenhower), delivered a talk in 1987 on “Our Divine Constitution.”<sup>21</sup> Citing relevant Mormon foundational documents, he said,

“I established the Constitution of this land,” said the Lord, “by the hands of wise men whom I raised up unto this very purpose.”

For centuries the Lord kept America hidden in the hollow of His hand until the time was right to unveil her for her destiny in the last days. “It is wisdom that this land should be kept as yet from the knowledge of other nations,” said Lehi, “for behold, many nations would overrun the land, that there would be no place for an inheritance.”

In the Lord’s due time His Spirit “wrought upon” Columbus, the pilgrims, the Puritans, and others to come to America. They testified of God’s intervention in their behalf. The Book of Mormon records that they humbled “themselves before the Lord; and the power of the Lord was with them.”

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18. Samuel G. Freedman, *Tea Party Rooted in Religious Fervor for Constitution*, N.Y. TIMES, Nov. 6, 2010, at A17, available at <http://www.nytimes.com/2010/11/06/us/politics/06religion.html>.

19. *Id.*

20. CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* (1966).

21. Ezra Taft Benson, *Our Divine Constitution*, ENSIGN, Nov. 1987, at 4, available at [http://www.lds.org/ldsorg/v/index.jsp?vgnextoid=2354fccf2b7db010VgnVCM1000004d82620aRCRD&locale=0&sourceId=632e79356427b010VgnVCM1000004d82620a\\_&hideNav=1](http://www.lds.org/ldsorg/v/index.jsp?vgnextoid=2354fccf2b7db010VgnVCM1000004d82620aRCRD&locale=0&sourceId=632e79356427b010VgnVCM1000004d82620a_&hideNav=1).

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Our Father in Heaven planned the coming forth of the Founding Fathers and their form of government as the necessary great prologue leading to the restoration of the gospel. Recall what our Savior Jesus Christ said nearly two thousand years ago when He visited this promised land: “For it is wisdom in the Father that they should be established in this land, and be set up as a free people by the power of the Father, that these things might come forth.” America, the land of liberty, was to be the Lord’s latter-day base of operations for His restored church.<sup>22</sup>

If Mitt Romney rejects this view of the Constitution, he certainly has not said so. And, it is worth noting, this is “constitutional redemptionism” on steroids.

Such “constitutional faith” obviously requires rejecting the image of the Founding articulated a hundred years ago by Charles Beard, who viewed the Convention as a gathering of creditors and other property owners eager to protect their property against frustrated debtors.<sup>23</sup> But it also requires equal rejection even of the label offered by political scientist John Roche, that it was a “reform caucus in action,” with attendant grubby compromises.<sup>24</sup> The most important such compromises involved slavery and what Madison termed the necessary “evil” of providing small states with representation in the Senate equal to their significantly larger neighbors.<sup>25</sup>

It should, therefore, occasion no surprise that in early 2011 Harvard history professor Jill Lepore titled a piece in the *New Yorker* “The Commandments: The Constitution and its worshippers.”<sup>26</sup> If one “worships” the Constitution, then to express significant doubts about the value of the Constitution, as I most certainly do, is not only mistaken (which perhaps it is), but also blasphemous. Instead, one can find even in a left-wing magazine like the *Nation* an attack on “Tea Party Constitutionalism” that concludes, “Ordinary Americans love the Constitution as least as much as far-right ideologues. It’s our Constitution too. It’s time to take it back.”<sup>27</sup>

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22. *Id.* (citations omitted).

23. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (rev. ed. 1986) (1913).

24. John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799 (1961).

25. See THE FEDERALIST NO. 62 (James Madison).

26. Jill Lepore, *The Commandments: The Constitution and Its Worshippers*, NEW YORKER, Jan. 17, 2011, at 70.

27. Garrett Epps, *Stealing the Constitution*, NATION, Feb. 7, 2011, at 17, available at <http://www.thenation.com/article/157904/stealing-constitution>.

We should consider the possibility that that “love” is misplaced. I believe that it is basically delusionary to “love” the Constitution—or to express particular faith in its current instantiation—unless one benefits mightily from the status quo it tends to entrench and self-servingly wishes to keep it that way. Otherwise, we’re all like deluded spouses who accept being battered as simply part of what the trials and tribulations of marriage/politics are all about. Ordinary Americans should learn that it is far past time to dispense with mindless love and time instead to engage in cold-blooded analysis, in which we ask a form of “what has the Constitution done for us lately?”

Balkin is not in fact naïve in his embrace of the Constitution. He is fully aware of the tragic aspects of American history within which the Constitution is embedded and, indeed, to which it mightily contributed, including slavery. Balkin is light years away from those described by Thomas Jefferson as “men [who] look at constitutions with sanctimonious reverence and deem them like the ark of the covenant, too sacred to be touched.”<sup>28</sup> Instead, Balkin, both in *Constitutional Redemption* and his other 2011 book *Living Originalism*, clearly believes in a more dynamic conception of the Constitution and presumably agrees with Jefferson that “institutions”—and the Constitutions that frame them—“must advance . . . and keep pace with the times.”<sup>29</sup> After all, as Jefferson observed, “We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.”<sup>30</sup>

Still, it might fairly be said that the author of *Constitutional Faith*, twenty-five years ago, not only described the phenomenon but also professed at least some degree of the faith himself. After all, I concluded that book by setting up a highly concrete personal dilemma: will I add my own signature to the Constitution that was “on offer,” as it were, at the conclusion of the visit to the 1987 bicentennial exhibit in Philadelphia?<sup>31</sup> Every visitor was invited to emulate the Framers by adding his or her own signature to an endless scroll. My answer, after some reflection, was yes.<sup>32</sup> The reason is quite simple: The reservations I had about the Constitution in 1987 concerned the degree to which the Constitution adequately protected certain important rights

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28. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 10 THE WRITINGS OF THOMAS JEFFERSON 37, 42 (Paul Leicester Ford ed., 1899), available at <http://etext.virginia.edu/etcbin/toccer-new2?id=JefLett.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=244&division=div1>.

29. *Id.*

30. *Id.*

31. LEVINSON, *supra* note 12, at 180.

32. *Id.* at 191–92.



and, of course, protected slavery. William Lloyd Garrison had described the Constitution as a “covenant with death and an agreement with hell.”<sup>33</sup> Why should one affirm such a document? The answer for me in 1987 was that Frederick Douglass, with Garrison the greatest abolitionist of his time, had broken with Garrison and declared that the Constitution, properly understood, was actually anti-slavery rather than pro-slavery.<sup>34</sup> I decided that if the Constitution was good enough for Douglass, it should be good enough for me, however strained Douglass’s argument might be to conventionally well-trained lawyers.<sup>35</sup>

But a book I published in 2006 began with the same dilemma and a different conclusion.<sup>36</sup> The new National Constitution Center in Philadelphia also invites its visitors to reaffirm the Constitution by adding their signatures to a similar scroll, and I demurred and refused to do so in 2003, when the Center had its opening. Why? The answer is that in the intervening fifteen years, I became convinced that the rights provisions of the Constitution, however important, are in fact secondary to the parts of the Constitution that too often are ignored, whether by the legal academy or, for that matter, by most citizens. These are the parts that actually constitute the political system under which we live; they detail the operations of our basic institutions and thus create the sclerotic political system that Friedman almost obsessively denounces.<sup>37</sup>

Another way of putting this is to say that the Constitution to which I was willing to affix my signature in 1987—and to accept as “my Constitution”—was what I have taken to calling in my most recent

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33. Garrison used the phrase in a resolution he introduced before the Massachusetts Anti-Slavery Society in 1843: “That the compact which exists between the North and South is ‘a covenant with death, and an agreement with hell’—involving both parties in atrocious criminality; and should be immediately annulled.” WALTER M. MERRILL, *AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON* 205 (1963).

34. LEVINSON, *supra* note 12, at 192.

35. Balkin and I discuss Douglass’s speech setting out his theory of “anti-slavery constitutionalism” in *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998). It also appears in the casebook of which he and I are two of the co-editors, with the intention, of course, that it be taught to, and discussed by, students being initiated into the modes of constitutional argument. *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 253–57 (Paul Brest et al. eds., 5th ed. 2006).

36. *See* SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006) [hereinafter LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*].

37. *See supra* text accompanying notes 7–9.

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work “the Constitution of Conversation.”<sup>38</sup> Consider only the “majestic generalities,” to quote Justice Robert Jackson, that characterize the specific clauses of the United States Constitution that are the almost exclusive focus of lawyers, legal academics, and popular writers on the Constitution. The best example is the Equal Protection Clause of the Fourteenth Amendment that was added at the conclusion of the conflagration of civil war.<sup>39</sup> But the unamended Constitution also has more than enough texts that generate endless conversation about meaning, including, perhaps most prominently, Article I, Section 8, ostensibly detailing the powers of Congress, an obvious subject of great interest these days with regard to Congress’s power to invoke the Commerce Clause to justify the Affordable Care Act.

Still, the first thing that most people think of when they hear the word “constitution” is *rights* and the degree to which the Constitution—or courts interpreting the Constitution—in fact protect what one deems to be important rights. Much of this can easily be understood as a response to the struggles of World War II and then the Cold War afterward, which were defined, simplistically or not, as the epic conflict between a culture that recognized the centrality of rights and totalitarian systems that by definition subordinated rights to the political interests of those in power. This, indeed, is how Justice Ginsburg thinks of constitutions, for what impresses her about the South African constitution is its far greater acknowledgment than our own of the importance of international human rights.<sup>40</sup>

Rights are not self-defining. What I liked about the Constitution, and defined as my own “constitutional faith” circa 1987, was the invitation to endless conversation about the nature of the American constitutional project, particularly as set out in the Preamble, which I continue to find inspiring and the source—along with the Republican Form of Government Clause—of whatever redemptive vision might be contained within the 1787 Constitution. Much of this endless conversation involves the Bill of Rights, technically not a part of the original Constitution but added almost immediately afterward as fulfillment of the original “deal” made with some opponents of the Constitution, who centered their opposition on the lack of such explicit protection

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38. See SANFORD LEVINSON, *FRAMED: AMERICA’S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 23, 30 (2012) (stating that the Constitution of Conversation “involves constitutional *meaning*”).

39. U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

40. See *supra* notes 10–11 and accompanying text.

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of what were perceived as basic rights. If one's primary concern about the Constitution is the set of rights that it either guarantees or, at least, allows states and the United States to recognize, then I continue to believe that there is almost nothing in the Constitution that overtly invalidates the achievement of any plausible set of rights, whether one thinks of such things as a right to same-sex marriage or to universal medical care.

To be sure, these rights may conflict, and we may well be politically divided with regard to the rights we actually support, but that is very different from pounding the table and saying that the Constitution simply won't allow recognizing one's favorite right or requires honoring some right that one regards as in fact awful. So if rights continued to be my principal concern, I would continue to have (relatively little) hesitation in re-signing the Constitution, even if I bewailed the unwillingness of one or another court, including the Supreme Court, to adopt my own favorite understanding of what rights are protected by the Constitution. So I continue to follow the maxim, with regard to rights, that if the unamended Constitution was good enough for Frederick Douglass, then it's good enough for me. Thus my current worries about the Constitution—and my unwillingness fully to embrace it as “my” Constitution—have little to do with the formal protection by the Constitution of whatever may be my favorite rights.

Instead, I want to concentrate on what I am now labeling the “Constitution of Settlement,” which is altogether different from the Constitution of Conversation. It is considerably more important in explaining the nature of the American political system—and its contemporary dysfunctionality that should worry every American. The “majestic generalities” actually do relatively little to determine the specific courses taken by our polity with regard to the issues that most Americans care about with greatest intensity. As University of Virginia law professor Frederick Schauer demonstrated in an important article in the *Harvard Law Review*, Gallup Poll after Gallup Poll has indicated that most Americans are worried far more, depending on the time a particular poll was taken, about the economy, the threats posed by terrorism, the state of American education, the deficit, and similar problems than about, say, the free-speech rights of high school students or even affirmative action, same-sex marriage, abortion, or gun rights.<sup>41</sup>

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41. Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4 (2006).

The judiciary, when ostensibly “interpreting” the Constitution, has remarkably little to say, when all is said and done, about the first set of issues, save for interpreting statutes passed by Congress. Even if the Supreme Court invalidates part or all of the Affordable Care Act, all one can say with confidence is that the American political system will have even greater opportunities to demonstrate its basic dysfunctionality. No one, after all, expects (or wants) the Court to issue a set of policies that it believes might fix our problematic and perhaps even bankruptcy-inducing medical care system.

If one wants to understand why we have the medical care, environmental, agricultural, or energy policies that we do, for example, one has to understand the way the American political system operates, *not* the arcana of what the Constitution “means” to well-trained lawyers. What is most important about the Constitution is like the purloined letter for Edgar Allan Poe:<sup>42</sup> It is there in clear sight, raising no problems as to disputed “meaning” but many, if only we would look, about *wisdom*. These structural provisions of the Constitution, for better and, I believe, very much for worse, make it nearly impossible to pass legislation that truly addresses the major problems of our time. Rather than recall an old-fashioned civics lesson in “how do bills become laws?”, it is far better to ask “why do most bills have no chance of being seriously considered, let alone becoming law?” Many factors surely go into explaining our complex system. I do not deny the importance of the corrosive role of money in elections<sup>43</sup> or the rise of talk radio and cable news, not to mention the development of a polarized party system that is near-unprecedented in our politics.<sup>44</sup> My own contribution to this discussion, though, is to suggest, indeed to insist, that the Constitution of Settlement deserves far more attention than it receives. It is the Constitution of Settlement that comprises those aspects of the Constitution that are remarkably nondynamic, that are *not*, as a matter of actual practice, amenable to the sometimes dazzling (or, to their opponents, dismaying) feats of “interpretation,” perhaps by adopting the method of “living originalism” that can ena-

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42. EDGAR ALLEN POE, *THE PURLOINED LETTER* (Philadelphia, Hart 1844).

43. *See, e.g.*, Jane Mayer, *State for Sale: Art Pope's Conquest of North Carolina*, *NEW YORKER*, Oct. 10, 2011, at 90 (noting that since *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), “an individual donor, particularly one with access to corporate funds, can play a significant, and sometimes decisive, role” in an election).

44. *See, e.g.*, Thomas E. Mann & Norman J. Ornstein, *Let's Just Say It: The Republicans Are the Problem*, *WASH. POST*, April 27, 2012 (“We have been studying Washington politics and Congress for more than 40 years, and never have we seen them this dysfunctional.”), available at [http://www.washingtonpost.com/opinions/lets-just-say-it-the-republicans-are-the-problem/2012/04/27/gIQAxCVUIT\\_story.html](http://www.washingtonpost.com/opinions/lets-just-say-it-the-republicans-are-the-problem/2012/04/27/gIQAxCVUIT_story.html).

ble the necessary adjustment of seeming constitutional verities to the demands of changing circumstances.<sup>45</sup> It is the Constitution of Settlement that creates the “vetogates” that Friedman laments (though, alas, does not truly confront).<sup>46</sup>

Consider only our form of bicameralism that, unlike many around the world, gives each house of Congress what I sometimes call a “death-ray veto” over anything passed by the other house. They must agree on every dotted “i” and crossed “t” if a bill is to become a law. But that’s not the end of the story. A president who may well have taken office without the support of a majority of the electorate has the ability to negate any law that does overcome the formidable hurdles to passage set out by the Constitution. Roughly 95 percent of the over 2,250 vetoes in our history have been upheld, given the difficulty of procuring a two-thirds vote in each House that is necessary to override a presidential veto.<sup>47</sup> And, as we are seeing with the Supreme Court’s consideration of the Affordable Care Act,<sup>48</sup> even passage by Congress and the signature of the President may not be enough, should a bare majority of five of the Justices—all, of course, readily identifiable as conservative Republicans—feel empowered to exercise their own veto power, which can be overcome only by constitutional amendment.<sup>49</sup> That runs into the brute fact that the United States Constitution establishes overall the most difficult-to-amend constitution in the entire world, with its requirement that a proposal must be approved by two-thirds of each House of Congress and then ratified

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45. See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

46. See Friedman, *supra* note 7 (noting the frequency with which senatorial holds are being used to block executive branch appointments and how the use of filibuster has become common practice). James Fallows of *The Atlantic*, among others, has been waging a crusade to call attention to the increased use of the filibuster. See, e.g., James Fallows, *The Unspeakable F-Word, Government Style*, THEATLANTIC.COM (Apr. 18, 2012, 1:02 PM), <http://www.theatlantic.com/politics/archive/2012/04/the-unspeakable-f-word-government-style/256051/> (“To my mind, the drastic recent lurch toward supermajority requirements for everything is deeply destructive, no matter which party is exerting this minority-blocking role.”); see also Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 CONN. L. REV. 1041 (2011) (arguing that the modern use of the filibuster has rendered the Senate essentially broken).

47. LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*, *supra* note 36, at 40.

48. *Florida v. U.S. Dep’t of Health and Human Servs.*, 648 F.3d 1245 (11th Cir. 2011), *argued*, No. 11-398 (S. Ct. Mar. 26, 2012).

49. By the time this Essay is published, readers will have the answer. For what it is worth, my own prediction, as of May 21, 2012, is that the Court will in fact uphold the Act, whether because of Chief Justice Roberts’s and Justice Kennedy’s fidelity to well-established precedent or because of a prudential judgment, particularly by the Chief Justice, that a 5-4 decision striking it down would do immense damage to the Court’s institutional reputation and perhaps even tarnish its legitimacy among significant elements of the American polity.

by three-fourths of the fifty states.<sup>50</sup> And, inasmuch as forty-nine of the fifty states are themselves bicameral, this means that it is necessary to get the support of at least seventy-five separate state legislative houses (assuming one of the ratifying states is Nebraska) in order to ratify an amendment, while an amendment fails, as did the Equal Rights Amendment in the 1970s,<sup>51</sup> should its opponents garner support in only thirteen houses in separate states.

In many ways, my own personal mantra regarding the Constitution, as of 2012, is taken from Chief Justice John Marshall's famous opinion in *McCulloch v. Maryland*<sup>52</sup> and his reminder that "we must never forget, that it is a *Constitution* we are expounding."<sup>53</sup> Justice Felix Frankfurter once wrote that this was "the single most important utterance in the literature of constitutional law—most important because most comprehensive and comprehending."<sup>54</sup> I confess that I was long mystified by what seemed clear hyperbole even from Frankfurter. I have come to believe, though, that what justifies Frankfurter's otherwise irrational exuberance is what follows several paragraphs later, when Chief Justice Marshall sets out what is most important about the legal documents we call constitutions. He emphasizes that the United States Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."<sup>55</sup> The point is that John Marshall recognized that the United States Constitution *had* to be a "living Constitution" (a term that, of course, he did not use) if it was to achieve the most fundamental purpose of "endur[ing] for ages to come." In this belief, he was a faithful disciple of his despised adversary Thomas Jefferson and his emphasis on institutions "keep[ing] pace with the times."<sup>56</sup> Such adaptation is surely an important part of our constitutional history. This is presumably what Oliver Wendell Holmes meant by emphasizing that "the life of the law" was "experience" or what he called "[t]he felt necessities of the time"<sup>57</sup> rather than responses to the ostensible

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50. U.S. CONST. art. V.

51. For a history of the Equal Rights Amendment, see RENEE FEINBERG, *THE EQUAL RIGHTS AMENDMENT* (1986).

52. 17 U.S. (4 Wheat.) 316 (1819).

53. *Id.* at 407.

54. Felix Frankfurter, *John Marshall and the Judicial Function*, in FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 534 (Philip B. Kurland ed., 1970).

55. *McCulloch*, 17 U.S. (4 Wheat.) at 415.

56. *See supra* note 28.

57. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown & Co. 1945) (1881) ("The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with

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demands of cold “logic.” But no one should believe that our constitutional history consists only of such happy (or, if one is opposed, unhappy) adaptation as part of the continuing conversation about constitutional meaning.

It is vital that we recognize the *static*, decidedly nonadaptive aspects of our constitutional history, imposed by the Constitution of Settlement, which has proved remarkably impervious to adaptation. Thus, for every “majestic generality” like Equal Protection of the Laws, there are clear textual commands controlling the distribution of power in the United States Senate (each state gets an identical two votes);<sup>58</sup> the way we select our president (the Electoral College);<sup>59</sup> when we inaugurate the winner (January 20, thanks to the Twentieth Amendment);<sup>60</sup> and how long he or she serves (exactly four years, not one day more or less, save for the possibility of impeachment, death, or resignation).<sup>61</sup> Worst of all, from my perspective, may be Article V, the Amendment Clause. By making it functionally impossible to amend the Constitution with regard to anything controversial, Article V stultifies, indeed infantilizes, our politics both directly and indirectly. Directly, it makes it extremely difficult, if not impossible, to engage in fundamental adaptations that would allow us to respond adequately to the challenges facing us as a society. The indirect effect is to make discussion of constitutional change almost unavoidably sound quixotic (or worse) precisely because almost any sober analyst knows that the possibility of achieving such change is close to zero.

This is why I began my 2006 book, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*, by detailing my reasons for refusing to sign the scroll in Philadelphia. Many of those reasons, as suggested by the book’s title, related to the fact that the United States Constitution is in many ways remarkably undemocratic, not only when compared to almost any constitution written around the world since the end of World War II, but also when compared to the fifty *state* constitutions within the United States.

The United States, under both Democratic and Republican presidents, declares its support for what I have come to call the “democracy project” around the world. We should reflect far more than we do

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their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”).

58. U.S. CONST. art. I, § 3.

59. U.S. CONST. art. II, § 1.

60. U.S. CONST. amend. XX.

61. U.S. CONST. art. II, § 1.

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on the fact that the United States, at least so far as the national government is concerned, scarcely meets the twenty-first century criteria of democratic rule. This is why Friedman could seriously suggest that the United States might need its own “springtime” of democracy.<sup>62</sup>

That being said, I have also come to believe that most Americans are in fact indifferent to the democratic bona fides of their national government. I was reminded by many critics that the United States was never intended to be a “democracy” and that I was making a basic category mistake in criticizing it for failing to be one. Many people who would never dream of associating with the John Birch Society were happy to repeat some version of its motto—“America is a republic, not a democracy, and let’s keep it that way.” So the fact that I lost my own faith because of the failure of the United States Constitution to be sufficiently democratic may mean only that I am too “academic” in my approach to the Constitution and insufficiently appreciative of its benefits. After all, Barack Obama, as a candidate in 2008, said of the Constitution that “it’s worked pretty well for over 200 years,”<sup>63</sup> which, among other things, requires ignoring a brutal civil war that killed, according to the latest estimates, 750,000 Americans.<sup>64</sup> More to the point, that war was fundamentally caused by the Constitution itself, whose emphasis on exclusively geographically-based representation in the House and Senate helped to assure the creation, in the 1850s, of a Union (or what Lincoln called the “House”) divided against itself that could indeed not stand.<sup>65</sup> I would like to think that then-candidate Obama was simply engaging in opportunistic rhetoric, given that almost literally the last thing he could afford to be perceived as was a critic of our sacred foundational text. But perhaps he even meant what he said, which would be more discouraging (though, alas, fully congruent with the way American constitutional law is taught in our leading law schools like Harvard).

So forget the fact that the Constitution is woefully undemocratic. Instead, we should be aware that the Constitution of Settlement in-

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62. Friedman, *supra* note 7.

63. Peter Nicholas, *Obama’s Message Gets a Lot Louder*, L.A. TIMES, Sept. 11, 2008, at A10. In fairness, Obama was defending habeas corpus against attacks by vice presidential candidate Sarah Palin.

64. See Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N.Y. TIMES, Apr. 2, 2012, at D1 (reporting that credible new research, using Census data, estimates that 750,000 Americans died in the Civil War, up from previous estimates of 618,000), available at <http://www.nytimes.com/2012/04/03/science/civil-war-toll-up-by-20-percent-in-new-estimate.html?pagewanted=all>.

65. See especially MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).



creasingly constitutes a clear and present danger to our polity precisely because of the role it plays in leading most Americans, altogether correctly, to have less and less confidence in their basic national institutions of governance. How many readers, for example, agree with the majority of polled Americans that the country is going in the wrong direction and that the political system is proving inadequate to engage in necessary turns of course, whatever your own major issues of concern might be? Twenty-five years ago, I wrote that “[m]y refusal to sign the Constitution would require a much deeper alienation from American life and politics than I can genuinely feel (or, indeed, have ever felt).”<sup>66</sup> I would not really describe myself in 2012 as alienated from American life. But how can any thinking person *not* be fundamentally alienated from important aspects of our contemporary politics that seem designed to create a sense of inefficacy and irrelevance, unless one is supported by one or another billionaire with special access to the levers of power?

Obviously, there is no agreement on what particular turns of policy might help to alleviate the sense of America going in the wrong direction. Members of the Tea Party have quite different agendas from, say, the 2008 supporters of President Obama who were looking for “Change We Can Believe In.” But the point is that remarkably few people these days look at the contemporary United States government, which is structured by the Constitution, with any genuine affection. An averaging of polls conducted in late April–early May 2012 reveals that only 14 percent of Americans “approve” of Congress, while a full 78 percent “disapprove.”<sup>67</sup> This actually represents a slight uptick in approval, given that a *New York Times* article on September 16, 2011, was headlined “Approval of Congress Matches Record Low” of 12 percent.<sup>68</sup> Similarly, the Gallup organization reported during the same month that “Americans Express Historic Negativity Toward U.S. Government,” noting that 81 percent of those polled were “dissatisfied” with the way the country is being governed.<sup>69</sup> Perhaps most shocking was an August 2011 Rasmussen poll finding that only 17

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66. LEVINSON, *supra* note 12, at 192.

67. See *Congressional Job Approval*, REAL CLEAR POLITICS (a rolling average of polls on Congressional approval), [http://www.realclearpolitics.com/epolls/other/congressional\\_job\\_approval-903.html](http://www.realclearpolitics.com/epolls/other/congressional_job_approval-903.html) (last viewed May 14, 2012).

68. Allison Kopicki, *Approval of Congress Matches Record Low*, N.Y. TIMES (Sept. 16, 2011, 7 AM), <http://thecaucus.blogs.nytimes.com/2011/09/16/approval-of-congress-matches-record-low/>.

69. Lydia Saad, *Americans Express Historic Negativity Toward U.S. Government*, GALLUP (Sept. 26, 2011), <http://www.gallup.com/poll/149678/americans-express-historic-negativity-toward-government.aspx>.

percent of those surveyed said that the present national government actually possesses the consent of the governed.<sup>70</sup>

Americans are currently remarkably distrustful of their basic institutions, save, for better or worse, the military, which enjoys the significant confidence of 78 percent of the public.<sup>71</sup> One wonders if so few Americans, had we been able to poll them in 1776, would have expressed approval of or confidence in the British Parliament of King George III. Many colonists gave their lives to defend His Majesty's realm against those they thought were treasonous revolutionaries, and many more became refugees from what had been their homeland by moving to Canada and elsewhere.

Expressions about the “dysfunctionality” or even “pathology” of the American political system have become a staple of contemporary punditry. Even Standard & Poor's, when downgrading American debt from AAA to AA status last year, wrote that “the downgrade reflects our view that the effectiveness, stability, and predictability of American policymaking and political institutions have weakened at a time of ongoing fiscal and economic challenges.”<sup>72</sup> What is missing, though, is an ability to “connect the dots” between our “institutions” and the Constitution that created them.

So after praising Friedman for his diagnosis of America's parlous condition, let me offer some severe criticism of his advice for overcoming that condition. In Friedman's recent best-seller, co-authored with Michael Mandelbaum, *That Used to Be Us: How America Fell Behind in the World It Invented and How We Can Come Back*, we find the statement that “[F]or America's remarkable history the Constitution deserves a large share of the credit.”<sup>73</sup> Although Friedman and Mandelbaum call for “shock therapy” to alleviate what they call the

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70. *New Low: 17% Say U.S. Government Has Consent of the Governed*, RASMUSSEN REPORTS (Aug. 7, 2011), [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/august\\_2011/new\\_low\\_17\\_say\\_u\\_s\\_government\\_has\\_consent\\_of\\_the\\_governed](http://www.rasmussenreports.com/public_content/politics/general_politics/august_2011/new_low_17_say_u_s_government_has_consent_of_the_governed).

71. *Confidence in Institutions*, GALLUP (June 9–12, 2011), <http://www.gallup.com/poll/1597/confidence-institutions.aspx> (finding that 78 percent of Americans have “a great deal” or “quite a lot” of confidence in the military, while a remaining 16 percent have at least “some” confidence). Contrast this with Congress, in which only 6 percent of the public has “a great deal” of confidence, while another 6 percent musters “quite a lot” of confidence. To be sure, another 40 percent have “some” confidence in Congress, but this still leaves Congress a full 42 points behind the military, whereas the gap is 66 points if one looks only at the “great deal” and “quite a lot” measures.

72. *United States of America Long-Term Rating Lowered to 'AA+' Due to Political Risks, Rising Debt Burden; Outlook Negative*, STANDARD & POOR'S (Aug. 5 2011, 20:13 EST), <http://www.standardandpoors.com/ratings/articles/en/us/?assetID=1245316529563>.

73. THOMAS L. FRIEDMAN & MICHAEL MANDELBAUM, *THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND HOW WE CAN COME BACK* 33 (2011).

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“pathologies” of contemporary American politics, they also write that the country does not “need fundamental changes to its system of government, a system that has served it well for more than two centuries and has proven equal to task of coping with a series of major challenges.”<sup>74</sup>

These benign assertions exemplify a totally unreflective “constitutional faith” that ignores even the possibility that the Constitution, whatever its acknowledged benefits, might have significant costs as well. Instead, we are invited to imagine that the Constitution of 1787, left remarkably unchanged since then with regard to our basic institutional structures, is essentially perfect. Friedman is often extremely incisive when he writes of the difficulties posed by their respective constitutions for such countries as Egypt, Lebanon, Iraq, Afghanistan, or Turkey.<sup>75</sup> It is only when he turns to his own country that his acuity seems to disappear in favor of general denunciations of our political system as if it had nothing to do with the Constitution that gave it form.

Justice Ginsburg is the better guide, though it is essential to supplement her emphasis on rights, however understandable given her own background as perhaps the leading legal advocate for women’s rights in our history. Would that she had also reminded her Egyptian listeners to be wary of the structural provision of the Constitution of Settlement. Perhaps the greatest irony is that some of the Framers might have applauded Justice Ginsburg’s critical spirit (and, thus, I even hope, my own critiques of their handiwork). They were more clearheaded, in many ways, than many of us today with regard to the merits (and demerits) of the Constitution. Begin with the fact that they ruthlessly dispensed with our first constitution, the Articles of Confederation, because it was viewed as thoroughly dysfunctional. Indeed, Alexander Hamilton in *The Federalist* No. 15 referred to the “imbecility” of the political system given us by the Articles.<sup>76</sup> One may not have to go quite that far in describing our contemporary polity, but Hamilton’s language should, at the least, be bracing with regard to the way a genuine patriot responded to what he viewed as the crisis of American government in 1787. I never fail to be inspired by the

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74. *Id.* at 331.

75. *See, e.g.*, Thomas L. Friedman, Op-Ed., *Getting to Know You . . .*, N.Y. TIMES, Jan. 15, 2012, at SR11 (stating that “for Egypt to have a democratic revolution—a real change in the power structure and institutions—all these newly empowered parties will have to find a way to work together to produce a new constitution and a new president”).

76. THE FEDERALIST NO. 15 (Alexander Hamilton).

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closing words of James Madison in The Federalist No. 14, where he described as

the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, 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 . . . Had no important step been taken by the leaders of the Revolution for which a precedent could not be discovered, no government established of which an exact model did not present itself, the people of the United States might, at this moment have been numbered among the melancholy victims of misguided councils, must at best have been laboring under the weight of some of those forms which have crushed the liberties of the rest of mankind.<sup>77</sup>

For all of Madison's emphasis on the importance of ratifying the document that emerged from Philadelphia, he emphasized as well that "it is incumbent on their successors to improve and perpetuate" it.<sup>78</sup> Almost none of the critics of contemporary American politics, like Friedman, are even willing to consider what we might do to "improve" the Constitution.

So, whatever my status as a member of the "constitutional faith community" in 1987, I am quite confident that I have left that particular church (or temple). I suppose, if one wishes to continue using the kinds of religious terminology that structured *Constitutional Faith*, that I have become a proponent of quite radical "reformation." I believe we can achieve the promise of American constitutionalism as set out in the Preamble, which *does* deserve our commitment, only by substantially changing the institutions that systematically work against the possibility of actually achieving the goals the Preamble sets out. Even if this is not the occasion for the symbolic nailing of my own "95 theses" specifying the particularities of my critique of the Constitution, I share some of the impulses that led Martin Luther to act as he did in sparking an earlier Reformation.

I confess that my fondest hope—which I realize is likely to be unrealized—is that Americans come to recognize the need for a new constitutional convention that could, over a period of perhaps two years, give adequate study and thought to what kinds of institutions

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77. THE FEDERALIST NO. 14 (James Madison).

78. *Id.*

are truly needed in the twenty-first century if we are to endure as a society that we want our children and, for many of us, grandchildren to inherit and inhabit. Is such a call for a new convention “un-American”? Were we talking about “the other 50 constitutions,” whose importance I think we should recognize far more than we do, we would realize that the answer is a decided “No.” Constitutional change is as American as apple pie, at least if we look at the states. Maryland, for example, is one of fourteen states whose constitutions specify that the electorate will be given the opportunity at stated intervals, usually twenty years, to vote on whether to have a new state constitutional convention.<sup>79</sup> Interestingly enough, a majority of Marylanders who voted on the issue in 2010 supported a new convention, but apparently a majority of the entire electorate is required,<sup>80</sup> and enough Marylanders who voted in the gubernatorial contest blanked their ballots with regard to the convention to turn the 54 percent majority of actual voters into only a 48 percent plurality of the entire electorate that turned out to vote in November 2010.<sup>81</sup>

Ohio will be voting on whether to have a new state constitutional convention this November,<sup>82</sup> as did Montana, Iowa, Michigan, and Maryland in 2010. There have been over 225 such state constitutional conventions in our history;<sup>83</sup> most of the states have in fact replaced earlier constitutions with ones they believed were more suited to new times. I strongly hope that Ohioans will vote for a new convention, not least because they could demonstrate to the country that it is in fact possible to conduct such a fundamental inquiry into the adequacy of the existing constitution, its second, dating back to 1851 (albeit with over 150 amendments since then).

What I discover, from talking with my closest friends and family, as well as academic colleagues, students, and even strangers to whom I sometimes give talks like the one from which this Essay is derived, is that most people are horrified by the prospect of a new convention, whether at the state *or*, especially, the national level. The reason, I be-

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79. MD. CONST. art. XIV, § 2.

80. *See id.* (noting that a “majority of voters at such election” is required for a convention to be approved).

81. In counting the entire electorate, 48 percent were in favor of a constitutional convention, 40 percent opposed, and 12 percent abstained. *See 2010 General Election Official Results*, MARYLAND STATE BOARD OF ELECTIONS (Dec. 1, 2010, 4:26 PM), [http://www.elections.state.md.us/elections/2010/results/General/StateQuestions\\_question\\_1.html](http://www.elections.state.md.us/elections/2010/results/General/StateQuestions_question_1.html).

82. OHIO CONST. art. XVI, § 3.

83. JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 7 (2006) (stating there have been 233 state constitutional conventions between 1776 and 2005).

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lieve, is that most people in the United States today basically do not trust their fellow citizens. We are increasingly likely to view them as ominous strangers who would, given half a chance, fundamentally change the country for the worse. The left has this image of those in the Tea Party, and, as I discovered at a gathering at the Harvard Law School co-sponsored by the Law School and the Tea Party Patriots, Tea Partiers are equally convinced that the left would inevitably take over a convention and further destroy the country as the right imagines it to be.

One's response to this Essay might well take a different form from what I expect if readers were willing to say that our present institutions are working just fine and merit approval that is unaccountably lacking among the overwhelming majority of contemporary Americans. But, frankly, that is not the case.<sup>84</sup> Instead, I suspect that the case against me boils down to a version of "it isn't *so* broken that it needs to be fixed through the extraordinarily scary process of a new constitutional convention."

I beg to disagree. I believe that the Constitution has saddled us with a fundamentally defective political system. I take cold comfort in the title of a new book by two Washington insiders, Thomas Mann of the Brookings Institution and Norman Ornstein of the American Enterprise Institute, *It's Even Worse than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*.<sup>85</sup> This is a successor to their earlier book, *The Broken Branch*, about Congress.<sup>86</sup>

A good friend who is a distinguished psychiatrist once told me that there can sometimes be great benefits to the psychological mechanism of denial. I am sure that is often the case, especially about things we cannot really fix. There is a certain logic, perhaps, to thinking that *if things can't be fixed, then they are not really broken*, since the alternative is too awful to contemplate. Perhaps the worst thing about our political system is that the sheer stumbling blocks placed in the way of remedying its dysfunctions tempt us to conclude that things really aren't so bad after all. We've muddled through in the

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84. See *Confidence in Institutions*, GALLUP (June 9–12, 2011) (finding that 37 percent of Americans have confidence in the Supreme Court, 35 percent have confidence in the presidency, and 12 percent have confidence in Congress), <http://www.gallup.com/poll/1597/confidence-institutions.aspx>.

85. THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012).

86. THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006).

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past—with only one civil war that killed almost 3 percent of the entire population—and we’ll do so in the future.

But not even the United States Constitution is *completely* impervious to change, at least if an aroused citizenry demands, in the spirit of Thomas Jefferson, a new suit of clothes better suited to an age of global warming. For better *and* for worse, the Tea Party has provided a model of engaged citizenship, which includes, for all of their exaggerated reverence for the Constitution, calls for constitutional amendment. I have no hesitation in opposing their particular suggestions, including, for example, repealing the Seventeenth Amendment and returning to the selection of senators by state legislatures.<sup>87</sup> But I commend them for in fact being willing and able to “connect the dots” and realizing that there may be some relationship between the institutions constructed by the Constitution and the actualities of American politics. To condemn Tea Partiers for the very suggestion that our sacred Constitution might need some changes is to manifest the worst kind of “constitutional faith.” It betrays not only what is best in our own political heritage, but, even worse, condemns those who will come after us to ever greater alienation from a political system they rightly view as unable to respond to the great challenges of our times.

I concluded my latest book, *Framed*,<sup>88</sup> with acknowledgments. After mentioning many people who directly contributed to the ideas and writing of the book, I mentioned my three grandchildren, Rebecca, Ella, and the recently-born Sarah. None made a direct contribution, but all “deserve recognition, nonetheless, as splendid people. Moreover, they are truly the source of my passion concerning what I call in the title the ‘crisis of governance’ in contemporary America and the role played, if only marginally, by the fifty-one constitutions within the United States in making it more difficult to resolve the problems that will dominate their futures. They deserve better.”<sup>89</sup> *All* of our families—as well as the strangers with whom we are connected as fellow citizens and inhabitants of the United States, not to mention strangers around the world who are affected by decisions made (or not made) by the United States government—deserve better.

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87. See, e.g., Todd Zywicki, *Repeal the Seventeenth Amendment*, NATIONAL REVIEW ONLINE (Nov. 10, 2010, 5:00 PM), <http://www.nationalreview.com/articles/252825/repeal-seventeenth-amendment-todd-zywicki#> (explaining Tea Party arguments for repealing the Seventeenth Amendment).

88. SANFORD LEVINSON, *FRAMED: AMERICA’S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012).

89. *Id.* at 400.