

## Maryland Law Review

---

Volume 67 | Issue 1

Article 18

---

# Afterword: Do We Really Believe Any Longer in the Possibility of “Government from Reflection and Choice”? a Dour Meditation on Our Present Situation

Sanford Levinson

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

Sanford Levinson, *Afterword: Do We Really Believe Any Longer in the Possibility of “Government from Reflection and Choice”? a Dour Meditation on Our Present Situation*, 67 Md. L. Rev. 281 (2007)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol67/iss1/18>

This Conference is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

**AFTERWORD: DO WE REALLY BELIEVE ANY LONGER IN THE  
POSSIBILITY OF “GOVERNMENT FROM REFLECTION AND  
CHOICE”? A DOUR MEDITATION ON  
OUR PRESENT SITUATION**

SANFORD LEVINSON\*

What is the most important message that we can learn in 2007 from those who crafted our distinctly eighteenth-century Constitution? The answer, I believe, can be found in the very first paragraph of *Federalist* No. 1, where Publius, in this case Alexander Hamilton, writes:

[I]t seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.<sup>1</sup>

He was, after all, trying to defend a document drafted in Philadelphia by persons who felt themselves empowered (even if not necessarily authorized) to go far beyond their initial mandate and audaciously to draft a brand-new constitution to supplant, rather than simply modify, the Articles of Confederation.<sup>2</sup> Even more audacious, perhaps, was the Framers' decision to ignore—or, perhaps more accurately, to violate—Article XIII of those Articles, which required that any amendment achieve the unanimous assent of each state legislature.<sup>3</sup> Article VII of the new Constitution required ratification not by legislatures, but by conventions that were chosen in the most demo-

---

Copyright © 2007 by Sanford Levinson.

\* W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin. As always, I am grateful to Mark Graber for his energies in organizing the Maryland Constitutional Law Schmooze at the University of Maryland School of Law, and for his responses to an earlier draft of these comments.

1. THE FEDERALIST NO. 1, at 1 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

2. E.g., Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1047–48 (1988).

3. U.S. ARTICLES OF CONFEDERATION, art. XIII, reprinted in MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 211, 213 (1913); see, e.g., Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1017 n.6 (1984) (articulating arguments against the legality of the Constitutional Convention's decision making).

cratic election ever held up to that time.<sup>4</sup> More important even than this is that life would be breathed into the Philadelphia document if only nine—and not all thirteen—ratification conventions assented to the new Constitution.<sup>5</sup> Thus these ratification conventions were given the opportunity, which they clearly took, to ponder the draft Constitution and to decide for themselves whether it should be accepted.

As is well known, in several states, including the state that provoked the writing of *The Federalist* itself, New York, the debate was settled by extremely close votes. The New York vote was 30 to 27; a switch of two pro votes would have doomed the Constitution not only in New York, but also, given the geographic location of the Empire State, probably in the rest of the country, even though the required nine acceptances had already taken place.<sup>6</sup>

The emphasis on—and the reality of—“reflection and choice” surely marks the American constitutional project as importantly linked with the Enlightenment, with its faith in the possibilities of reasoned argument to demonstrate the inadequacy of existing institutions and the need for their replacement. The circumstances of the drafting—as well, for that matter, as the concession embodied in Article V of the Constitution that the document might indeed be imperfect and require later amendment<sup>7</sup>—speak to the assumption that Americans can be masters of their political fate rather than mere victims of “accident and force.”

Even more striking in this regard is the remarkable paragraph in *Federalist* No. 14 where Publius (this time James Madison) defends the possibility of the “extended republic” against the criticisms of such distinguished political philosophers as Montesquieu.<sup>8</sup> For my purposes, more important than the substantive argument is Madison’s description of the American people and their proper posture with regard to considering any and all political arguments:

But why is the experiment of an extended republic to be rejected merely because it may comprise what is new? Is it not the glory of the people of America that, whilst they have paid

---

4. See Amar, *supra* note 2, at 1049 (noting that Article VII called for a majority vote by a popular convention of the people of each state for ratification).

5. U.S. CONST. art. VII.

6. Clarence E. Miner, *The Ratification of the Federal Constitution by the State of New York*, 94 ECON. & PUB. L. 367, 485 (1921).

7. See generally RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995) (containing a collection of essays aimed at exploring the possibilities and implications of constitutional amendment under the current U.S. Constitution’s amendment scheme).

8. THE FEDERALIST NO. 14 (James Madison), *supra* note 1, at 67–73.

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. 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.*<sup>9</sup>

In my book, *Our Undemocratic Constitution*,<sup>10</sup> I am harshly critical of Madison for promoting an almost mindless “veneration” of the Constitution, as distinguished from his friend Thomas Jefferson, who argued for the desirability of frequent conventions to consider potential defects in the document.<sup>11</sup> Madison complained that “as every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in a great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability.”<sup>12</sup> In a new *Afterword* to be published in the paperback edition of my book, I note that Madison is in fact a more complex—or perhaps schizoid—figure, inasmuch as the almost Burkean tone of *Federalist* No. 49 is more than counterbalanced by the almost aggressively rationalist argument of his earlier writings in *The Federalist*. It should be clear that I prefer the earlier Madison.

Finally, it is worth noting the canonical statement of John Marshall, in what is almost certainly the single most important opinion during not only his Chief Justiceship, but also, perhaps, in our entire history: “We must never forget,” Marshall thundered, “that it is a *Con-*

---

9. *Id.* at 72-73 (emphasis added).

10. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006).

11. *Id.* at 43.

12. *THE FEDERALIST* NO. 49 (James Madison), *supra* note 1, at 282.

*stitution* we are expounding . . . , a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs.”<sup>13</sup> There are obviously all sorts of ways to adapt our Constitution to these “various crises,” ranging from imaginative interpretations of the existing text to self-conscious decisions, mimicking the behavior of the Framers themselves, to forge new texts based on new understandings of our political situations.

In talking about constitutions—and especially about the United States Constitution—one is necessarily addressing some of the most fundamental questions of politics, both theoretical and practical. Constitutions, after all, have a point: to produce “good government.” The criteria for what counts as such a government, in our case, are presumably set out in the magnificent Preamble of the Constitution.<sup>14</sup> The assumption instantiated in the history of the formation of the Constitution is that we should be able, as political creatures, to engage in reflective conversation with our fellow citizens about what sorts of institutions are conducive to those goals and to liberate ourselves from callow attachment to conventional wisdom, whether provided by unexamined and overly venerated customs and traditions or by linkage with the great names with whom the institutions are associated. The Constitution, as a work of all-too-human men (and, of course, the gendered term is absolutely accurate in this case), is necessarily imperfect, and it should be our goal to improve it, as Marshall said, to adapt it upon recognition of possible inadequacies in successfully meeting the inevitable “crises of human affairs.”

Indeed, part of the “reflection and choice” that occurred in 1787 was precisely to enter into compromises that could scarcely be defended, either at the time or today, as primarily achieving the values set out in the Preamble. Most notoriously, the “blessings of liberty” were scarcely accorded to those held in chattel slavery.<sup>15</sup> Abigail Adams, in her unsuccessful plea to her husband to “remember the Ladies,”<sup>16</sup> was speaking on behalf of another group deprived of such liberties, albeit not so severely as blacks held in bondage. And, of course, what is often called the “Great Compromise” involved what Madison considered to be the outrageous extortion by small states of

---

13. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819) (emphasis added).

14. U.S. CONST. pmbi.

15. *Id.*

16. Letter from Abigail Adams to John Adams (March 31, 1776), in *THE BOOK OF ABIGAIL AND JOHN: SELECTED LETTERS OF THE ADAMS FAMILY* 121 (L.H. Butterfield et al. eds, 1975).

equal representation in the Senate.<sup>17</sup> He ultimately acquiesced, just as anti-slavery delegates acquiesced to various boons given slaveowners and slave states, because in each case the alternative was perceived as no Constitution at all.<sup>18</sup>

For all but a few delegates, that would have been a far worse outcome than the Constitution whose very flaws, from one perspective or another, in fact made possible the gaining of thirty-nine signatures on September 17, 1787, and the ratifications, ultimately, of the thirteen states that comprised the United States of America at the time. I dare say that none of the thirty-nine believed that the Constitution was perfect. It sufficed that the Constitution was “good enough” given the exigencies of the moment, which included, perhaps above all, the necessity of establishing a “peace pact” among the states to ensure a unified defense against the many potential enemies of the fledgling nation.<sup>19</sup>

It is no secret that I believe that our eighteenth-century Constitution is very much in need of repair. And what needs repairing is what I have taken to calling the “hard-wired” Constitution. The hard-wired Constitution is never litigated and, therefore, not subject to the kinds of interpretive controversies (and dynamic changes) that give meaning to what Robert Jackson correctly dubs the “majestic generalities” of the Constitution.<sup>20</sup> Nor, for that matter, have the Constitution’s hard-wired structures been significantly affected by the “constitutional moments” or other similar developments that Bruce Ackerman and Stephen Griffin have correctly discerned as an important part of our constitutional history.<sup>21</sup> I believe that to a truly astonishing degree,

---

17. See, e.g., JACK N. RAKOVE, ORIGINAL MEANINGS 66–70 (1996) (discussing the debate over states’ representation in the Senate and Madison’s arguments during the debate).

18. *Id.* at 58, 70.

19. See generally DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING (2003) (discussing the political and historic context of the Founding and arguing that advocates viewed ratification of the Constitution as imperative to avoiding war).

20. See, e.g., Robert H. Jackson, Associate Justice of the Supreme Court of the United States, The Law Above Nations, Address Before the Inter-American Bar Association (Nov. 20, 1942), in 37 AM. J. INT’L L. 297, 300 (1943). The most obvious such “generality” is the Fourteenth Amendment, but I am also happy to include within this term the Bill of Rights and, for that matter, Article I, Section 8, inasmuch as this last set of provisions was (falsely) thought to establish a truly meaningful political reality of a national government whose power was to be limited by reference to its “assigned” powers. U.S. CONST. art. I, § 8. This vision of strict separation of powers, of course, did not survive the New Deal (and, had one vote switched in *Hammer v. Dagenhart*, 247 U.S. (3 Wheat.) 251 (1918), it would not have survived the innovations of the Wilson Administration).

21. See generally BRUCE A. ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS (1998) (cataloguing and analyzing three specific moments of constitutional change in the U.S.: the

our most fundamental institutions would be readily recognizable by any member of the Philadelphia convention magically transported to our own time.

This last fact helps to explain why my own interests have increasingly turned away from constitutional interpretation and toward reflection on what most people—entirely incorrectly—believe are boring “civics course” aspects of our Constitution (typified for many by a pedantic lesson on how a bill becomes—or, far more likely, never has a prayer of becoming—a law, and the like). However, I believe that the study of the Constitution’s hard-wired structures is of supreme importance for those who would understand why so many Americans, on all sides of the political spectrum, are increasingly dependent about the future of our country and have little confidence in those who are in charge of our most basic political institutions.<sup>22</sup>

For those who are interested, there are both a book-length elaboration,<sup>23</sup> and a shorter, article-length version<sup>24</sup> of my arguments, and there is no real need to rehearse them here. Some of my arguments are discussed in the contributions to this excellent Symposium. Moreover, since the “Schmooze” that generated this Symposium, University of Virginia political scientist Larry Sabato has published *A More Perfect Constitution: 23 Proposals To Revitalize Our Constitution and Make America a Fairer Country*,<sup>25</sup> which not only describes some aspects of the Constitution as “archaic” and “failing America in some vital ways,”<sup>26</sup> but also

Founding, Reconstruction, and the New Deal); Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115 (1999) (analyzing Ackerman’s three constitutional moments and arguing as to their significance for constitutional theory).

22. As of November 1, 2007, only 25.6% of those polled believe the United States is headed in the right direction. 69.5% think it is headed in the wrong direction, with the remaining 5% presumably being uncertain. Overall approval of Congress is a staggering 23.5%, though, interestingly enough, there is marginally higher approval for both the Democratic (32.9%) and Republican (27.3%) members of Congress. President Bush currently logs a 33.1% approval rate, which actually represents a slight uptick in his rating. Political Arithmetik, <http://politicalarithmetik.blogspot.com/2007/05/right-direction-or-wrong-track.html> (last visited Nov. 19, 2007).

23. LEVINSON, *supra* note 10.

24. Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859 (2007); Sanford Levinson, *Afterword*, 55 DRAKE L. REV. 1009 (2007); Sanford Levinson, *Get me rewrite! George Washington didn’t think the Constitution was sacrosanct—why do we? It’s time for a new constitutional convention*, B. GLOBE, Oct. 22, 2006, (Ideas), at 1–2, available at [http://www.boston.com/news/globe/ideas/articles/2006/10/22/get\\_me\\_rewrite?mode=PF](http://www.boston.com/news/globe/ideas/articles/2006/10/22/get_me_rewrite?mode=PF).

25. LARRY J. SABATO, *A MORE PERFECT CONSTITUTION* (2007); see also Sanford Levinson, *Two Books Debate Brilliance and Disasters of the Constitution*, AUST. AM.-STATEMAN, Oct. 14, 2007, available at <http://www.statesman.com/life/content/life/stories/books/10/14/1014constitution.html> (reviewing LARRY J. SABATO, *A MORE PERFECT CONSTITUTION* (2007)).

26. SABATO, *supra* note 25, at 1.

goes on to advocate a new constitutional convention as a means of making it more truly relevant to our twenty-first century realities.

It is certainly gratifying to have at least one distinguished ally in this effort to generate the first national constitutional convention since 1787.<sup>27</sup> However, I concede that we stand, relatively speaking, in splendid isolation even among our fellow academics—let alone practicing pundits and politicians. There are certainly no contemporary analogues to such early-twentieth-century figures as Woodrow Wilson and Theodore Roosevelt, who were willing to speak of the possibility of fundamental constitutional change from the commanding heights of political power. Nor are there analogues to lesser, albeit still significant, leaders like Robert LaFollette.<sup>28</sup> The spirit of Madison's *Federalist* No. 49 has clearly prevailed over the robust self-confidence displayed in *Federalist* No. 14.<sup>29</sup> Moreover, speaking only from my own experiences, I can testify that if it feels like swimming against the current even to suggest that there are significant deficiencies in the Constitution—a document that I myself identified in my first book, *Constitutional Faith*, as the linchpin of the American “civil religion”<sup>30</sup>—it becomes more like swimming up a waterfall to suggest that the cure for what ails us lies through the path of a new constitutional convention.

It is, of course, possible that Sabato and I are simply mistaken and that the Constitution in fact deserves the veneration that it continues to receive from most Americans. But, aside from completely self-serving explanations for why I reject that account, I think it worth noting that in speaking to various audiences over the past year, usually, but not always, in academic settings, I have rarely heard them declare that the Constitution is without imperfection. How many people, after all, are willing to defend each and every one of the following features of our Constitution that continue in important ways to structure our contemporary polity and the sense of political possibility:

- 1) The Electoral College;
- 2) the distribution of voting power in the Senate;
- 3) the presidential veto, which serves, in effect, to turn us into a tricameral system of government where one of the “houses” is the White House, inhabited by a single individual

---

27. There have been 233 state constitutional conventions over the course of our history. See JOHN DINEEN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 7 (2006).

28. See generally NANCY C. UNGER, *FIGHTING BOB LAFOLLETTE: THE RIGHTEOUS REFORMER* (2000).

29. See *THE FEDERALIST* NOS. 14, 49 (James Madison), *supra* note 1, at 67–73, 281–85.

30. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1989).



who can negate substantial majorities of the House and the Senate with regard to potential solutions to national problems;

4) the fixed presidential term that, in effect, makes it impossible to remove presidents (and commanders in chief) in whom the country has lost confidence concerning issues of war and peace, life and death;

5) life tenure for Supreme Court justices; and

6) the near impossibility of Article V amendment?

These are only the most glaring defects. I assure you there are others.

But even if there is at least modest concession from many that the Constitution could be improved, there is almost visceral horror at the possibility of a new constitutional convention. Many people—including, perhaps, most readers of this Symposium—imagine such a convention would be constituted by some combination of fools and mountebanks. Why, indeed, would any rational person look to such a convention for cogent correction of constitutional inadequacies? Isn't it all too likely that it would simply make things worse?

One can't rule out such possibilities, of course. All of us know that unintended consequences of even the best-motivated actions can often leave us in an overall worse situation. As Albert Hirschman has pointed out, though, the insistence that unintended consequences will almost always be baleful and efface intended social improvement is one of the standard tropes of what he terms the politically conservative "rhetoric of reaction."<sup>31</sup> In any event, there is a reason why people often conclude that the devil we know is preferable to the (possibility of) the devil we do not, or why the same people may insist that something be demonstrably and absolutely broken before any effort be made to fix it.<sup>32</sup>

Reliance on such homely maxims, for me, is answerable at least in part by evoking Madison's own statements in *Federalist* No. 14 (though, to be sure, one must first believe that the Constitution indeed is significantly defective).<sup>33</sup> But I believe that something deeper is involved in the rejection of the very possibility of a new convention. I am fearful that that something is fear—perhaps even contempt—of our fellow

---

31. See generally ALBERT O. HIRSCHMAN, *RHETORIC OF REACTION: PERVERSITY, FUTILITY, AND JEOPARDY* (1991).

32. In this context, see generally THOMAS MANN & NORMAN ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006) (analyzing Congress's attitude toward institutional reform).

33. THE FEDERALIST NO. 14 (James Madison), *supra* note 1, at 67–73.

citizens that casts a deep shadow over what we might like to think is one of the most important aspects of our constitutionalism: the linkage with a project of self-governance.

Description of the full project of American constitutionalism requires attention not only to the substantive goals articulated in the Preamble, but also to the decisive statement of Abraham Lincoln that the ultimate justification for memorializing the thousands who perished at Gettysburg was our adherence to the proposition “that government of the people, *by the people*, for the people, shall not perish from the earth.”<sup>34</sup> I have italicized the middle term precisely because it most definitively differentiates what most of us would define as a “democratic” (or, for that matter, “civic-republican”) form of government from, say, a “benevolent despotism” that might well be committed to “government for the people” (and even, to some extent “of the people” if, for example, one identifies the rulers with the national aspirations of a *ethnos*). “Government by the people,” on the other hand, seems to presuppose a process of self-determination, or what Justice Breyer recently embraced as the principle of “active liberty.”<sup>35</sup>

Basic free-speech theory accepts the proposition that genuine self-determination must tolerate the possibility that our most basic institutions be open to criticism.<sup>36</sup> But, of course, to say that critical speech is protected, however desirable that is in a society predicated on autonomy, says nothing about whether it will in fact occur or, even more to the point, be taken seriously and acted upon. The question, then, is not whether Sabato and I are free to cast whatever aspersions on the Constitution we wish, but, rather, whether any listeners might in fact be persuaded to act on our advice. Such action will require, as already suggested, not only agreement with our diagnosis—the Constitution is in some respects a threat to, rather than a protection of, our most basic commitments—but also a trust in any particular group of people who might be empowered to do something about it. It is just this sense of trust that seems almost altogether lacking.

One problem with a new convention, which I simply ignore in these brief remarks, is how it would be organized after the delegates were selected. For example, would votes be by states or individuals? Concomitantly, would decisions be made by a majority (of states or individuals) or supermajority of voters? But there is, obviously, a prior

---

34. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 734 (Roy P. Basler ed., 2001) (emphasis added).

35. See generally STEPHEN G. BREYER, ACTIVE LIBERTY (2005).

36. See, e.g., Robert Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1990).

question that has to be considered: how the delegates to any convention are to be chosen and whether we would have a sufficient degree of confidence in them, however chosen, to trust them with the task of reconsidering the contemporary adequacy of the document drafted in 1787.

Consider three possible answers to the question of selection (independent of the organizational questions mentioned above): delegates might be chosen by election, by appointment, or, my own current favorite, by a structured process of random selection (structured only to make sure that there is regional variation in those selected at random based on a national sample).

I readily concede that both elections and appointments by existing political bodies present problems. It is altogether rational to fear that elections would turn into a circus led by single-issue groups who would zealously reject the structural and procedural concerns that underlie my own critique and instead try to capture the convention in order to write their own substantive hobbyhorses into the proposed draft of a revised Constitution. (One can easily think of abortion, affirmative action, school prayer, firearms, or limitations on the taxing power, as such “hot-button” issues). Even without the potential domination of single-issue zealots, there would also be the problem of the inevitable role that money would play in the selection process, and the justified fear that participation in the convention could in effect be bought by those who wanted to protect their private interests. As for appointed delegates, an equally understandable fear is that the appointing authorities will take care to name people resistant to any boat rocking that might challenge the power of those doing the appointing.

So I would wish us to return to ancient Athens<sup>37</sup> (or to the American process of selecting juries or, in the late 1960s, draft selection), and select the delegates through a national lottery. This would create a nation-wide “citizen jury” of, say, 700 to 750 citizens. The selection mechanism could make sure that those who would be charged with the task of scrutinizing the Constitution and suggesting changes would represent a wide geographic cross section of the population.

I would make the term of the new convention two years and pay each delegate a yearly salary equal to that received by a United States Senator or member of the Supreme Court, in recognition of the extreme importance of their responsibilities. This would also have the

---

37. See generally PAUL WOODRUFF, *FIRST DEMOCRACY* (2005) (analyzing democracy in the context of the first democracy: ancient Athens).

considerable virtue of making it possible for persons of modest means to participate in such a convention.

I would also give the convention a generous budget to hold hearings throughout the country and solicit reports by experts in various areas. Delegates would be encouraged to travel abroad to observe how other countries have resolved those issues that are bound to come up (though I would equally encourage delegates to take close looks at American state constitutions in order to see how different they can be from one another).

At the end of the two years—and, of course, I presume that the proceedings of the Convention would be covered by the popular media and become the subject of national conversations—the delegates would submit their proposed changes for ratification. (Incidentally, in order to dampen any incentives to demagoguery, I would prohibit any of the delegates from running for election to a national-level position, including membership in the House or Senate (assuming, of course, these bodies are retained), until at least five years after the adoption of the new Constitution or set of constitutional amendments).

Why, incidentally, look to a convention and not to Congress for this national conversation and set of proposals? The principal answer is altogether obvious: *Congress is just too busy to take the time and make the effort to do what we would justifiably expect of those charged with engaging in a truly systematic review of the adequacy of the Constitution.* As Sabato points out, the “workforce” of Representatives and Senators has not changed in almost fifty years, since the admission of Hawaii to the Union in 1959.<sup>38</sup> The United States in 1960 had a population of approximately 178 million people; as of November 2007 our population is estimated to be more than 303 million.<sup>39</sup> The same number of 100 senators and 435 representatives are being asked to consider the legislative needs of a country that has grown by approximately two-thirds in the past half-century. And, of course, this doesn’t begin to take account of added complexities generated by international developments, the growth of new forms of technology, and the like. It requires no disrespect for Congress to say that they need to “hire” others to engage in the task of reexamining our constitutional system, and that is precisely what a convention is. But, of course, a convention cannot be defended without a sufficient respect for the persons likely to be delegates.

---

38. See SABATO, *supra* note 25.

39. See U.S. Census Bureau, <http://www.census.gov>.

I note that several students in a seminar I conducted on my book dismissed the possibility of random selection because of their belief that most people are “idiots” who could not be trusted to engage in deliberation and decision making as to what kinds of constitutional changes are desirable. (They had no more confidence, incidentally, in elections or appointments.) I found myself in the uncharacteristic position of favorably quoting William F. Buckley’s famous comment, “I would sooner live in a society governed by the first two thousand names in the Boston telephone directory than in a society governed by the two thousand faculty members of Harvard University.” I disagree with his particular sample set; I would personally prefer two thousand Americans picked at random in a national sample. It is also all too likely that Buckley, not known as a populist, was expressing more his revulsion for the presumed politics of the Harvard faculty than his esteem for the great unwashed. But that likely disesteem is precisely what makes suspect Buckley’s identification as a democrat. Do we, at the end of the day, share that aversion? Are we really willing to disdain and dismiss as terminally naïve those who really take “government by the people” with consummate seriousness?

If one shares the belief of my students that most of their fellow citizens within the American political community are likely to be “idiots,” then I believe that the only rational conclusion is to give up on the project of “government by the people” and simply accept one or another version of full-scale elite rule with as little popular accountability as is possible to forestall revolution. There are those, of course, who say that this is just what the Constitution has managed to create, though it is a bit hard for me to believe that a true elitist would be an unequivocal fan of the American Constitution. It is obvious, after all, that the Constitution has not come close to acting as Madison had suggested in would in *Federalist* No. 10, i.e., as a “filter” making sure that leaders of sufficient public “virtue” would be selected by the populace to govern them.<sup>40</sup>

A common response to my call for a new convention is to ask if I’m not afraid of a runaway conclave that would, say, repeal the Bill of Rights or declare us to be a theocracy. The answer is that I am not, for two quite different reasons. The first is that I am confident that any such “runaway” convention would doom its project to failure. Whether the mode of ratification be popular national referendum (my own preference, though this would obviously require an end run around Article V), or state-by-state legislative response (or state con-

---

40. THE FEDERALIST NO. 10 (James Madison), *supra* note 1, at 45, 50–51.

ventions), as required by Article V, it is exceedingly unlikely that a “runaway” convention would represent enough of the country to succeed. Here it is useful to look at the experience of state constitutional conventions, of which there have been literally dozens over our history. The most common explanation for the failure of such conventions is their “capture” by a particular interest group that is then rejected by the population at large when asked to ratify the convention’s (and interest group’s) handiwork.

But the more important response is that I am not so fearful of my fellow Americans, even in these parlous times, as are most of those who appear to be quivering with fright at the idea of a new convention. Part of the reason is that I have myself observed one of James Fishkin’s “deliberative polls,” from which I draw my support for a randomly selected group of delegates.<sup>41</sup> His first such gathering was held in Austin, Texas in 1996, and it was moving indeed to see very different people—I think in particular of an elderly white-haired conservative from upstate Michigan and an African-American single mother on welfare from New Orleans—actually make human and intellectual contact with one another as they were discussing what might constitute a sensible policy of public welfare. And Fishkin has subsequently conducted such polls—I might prefer the term “deliberative assemblies”—literally all over the world, including Australia, Bulgaria, and China, to use only the first three letters of the alphabet.<sup>42</sup> All rely on the proposition that ordinary people can reflect on important issues if treated with dignity and supplied with relevant information.

Whether the United States is truly committed to a twenty-first-century notion of democracy, whether this means simply a principle of one person, one vote (most spectacularly violated by the Senate, the Electoral College, the presidential veto, and the procedures for constitutional amendment set out in Article V), or a more complex notion of genuine self-determination and government by the people, is an issue of world-wide—and not just local—importance. For better or worse, the United States has committed itself to the spread of democracy around the world. Democracy, at least when we are chastising other countries for lacking it, is presumed to be a “good thing.” But this requires not only some clarity in what we mean by democracy, which is stunningly lacking in contemporary debate; but it also re-

---

41. See generally JAMES FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* (1991) (developing the deliberative poll model).

42. See The Center for Deliberative Democracy, *Deliberative Polling*, <http://cdd.stanford.edu/polls/>.

quires—whatever one’s answer to the definitional question—some degree of genuine faith in popular rule.

The United States has very high literacy rates and a well-developed civil society, not to mention a generally successful economy and an ideological devotion to tolerance and democratic governance. If we reject the possibility that even the United States can actually *practice* self-government—including a once-every-220-year reflection on the adequacy of our framework of governance—then we should have the good grace to admit that we have lost faith in what most people have found most admirable about the United States. Michael Lind has noted that “[p]residents as diverse as William McKinley, Gerald Ford, and Jimmy Carter have spoken the simple words: ‘Here the people rule.’”<sup>43</sup> It is a great slogan. But do we really believe in it enough to take our chances on talking with our fellow Americans about how best to forge a common future together, including creating a Constitution adequate for the twenty-first century? Or do we really believe that the very last time that slogan had operative importance was 1787, when, of course, a laughably—or, more accurately, lamentably—constricted portion of the population was represented?

---

43. Michael Lind, *Do the People Rule?*, 26 WILSON Q. 40 (2002), available at [http://www.newamerica.net/publications/articles/2002/do\\_the\\_people\\_rule](http://www.newamerica.net/publications/articles/2002/do_the_people_rule); see also RICHARD D. PARKER, “HERE THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO (1994).