

HOW THE UNITED STATES CONSTITUTION CONTRIBUTES TO THE DEMOCRATIC DEFICIT IN AMERICA*

*Sanford Levinson***

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** W. St. John Garwood & W. St. John Garwood, Jr., Centennial Chair in Law, University of Texas Law School; A.B., Duke University, 1962; Ph.D., Harvard University, 1969; J.D., Stanford University, 1973.

I. INTRODUCTION

The term “democratic deficit” has become a staple in contemporary political analysis. A democratic deficit occurs when ostensibly democratic organizations or institutions in fact fall short of fulfilling what are believed to be the principles of democracy. There are more than 500,000 hits that come up when one uses Google to search for “democratic deficit”—revealing that it is especially pervasive in discussions of the European Union and the general project of European integration. The perception of such a deficit is thought by some analysts to explain the rejection by French and Dutch voters in 2005 of the proposed European Constitution.¹

Discussions of a democratic deficit may focus on the normative desirability of popular control over decisions that affect the public, quite independent of the quality of the decisions reached under the presumptively “undemocratic” system. Instead, however, they may emphasize the unfortunate deficiencies of decisions that are reached under conditions that flunk one’s own theory of democracy. One can see both of these notions set out in what may have been the first use of the term—a 1977 manifesto on European politics, with its first chapter titled *The Democratic Deficit*. The chapter begins as follows:

Looking at Europe today, it is clear that there is throughout our continent a “malaise,” a sense of alienation and a lack of confidence in the ability of the economic and political system to solve our problems Be it in the dole queue, in schools and universities, in underprivileged regions, in the neighbourhood of a proposed nuclear power station, at the place of work, in a migrant workers’ ghetto, or on the proposed route of a highway, people are fighting arbitrary decisions taken without regard to their needs and without them having participated in the making of a decision that affects their own lives.²

The paragraph begins with a reference to the possibility—and claimed reality—of alienation, which can refer simply to the belief that important decisions are beyond one’s control. That this may be so is not itself

1. Craig Whitlock, *Dutch Reject European Charter*, WASH. POST, June 2, 2005, at A1.

2. JEF Manifesto (1977), available at <http://www.federalunion.org.uk/archives/democraticdeficit.shtml>.

evidence for the proposition that the decisions were wrong, however. Though there are good reasons to be wary of “benevolent despotism,” that term nonetheless captures the possibility that a Platonic philosopher-king could in fact make decisions that pay full regard to one’s (legitimate) needs even if there is no participation on the part of the general citizenry. Parents, for example, often make such claims with regard to their authority to make decisions on behalf of their children. The decided unhappiness of children being treated like children does not necessarily demonstrate the lack of wisdom in placing decisional authority in the hands of parents and denying the child a vote in the decision (even if one might hope that a wise parent would at least be willing to listen to the child). Or, perhaps even more to the point, it may be that a condition of living in a modern state in which decisions increasingly require levels of expertise unlikely to be held by more than a fraction of the society is just such an increasing sense of alienation, mixed with hope that the “experts” know what they are doing.

A decidedly different critique of the democratic deficit would emphasize the actual policy outcomes of a given polity and a complaint that such decisions are also being made without regard to one’s actual needs because the lack of sufficiently democratic procedures removes any particular incentive on the part of decisionmakers to pay attention to given citizens or any particular fear that one will be held accountable in future elections. Certainly many children would rightly deny that their parents are necessarily willing to subordinate parental interests to undeniable needs of their children. Claims in the past of “virtual representation,” by which some, whether slave owners, husbands, or property owners, exercised their authority purportedly on behalf of their slaves, wives, or workers, have been properly discredited. Concomitantly, many critics of the modern administrative state point to the extent to which administrative agencies are captured by the interests they ostensibly oversee or otherwise deviate from idealized models of expert administration.

If one believes in what Justice Breyer has recently called “active liberty,”³ then living in a state of alienated distance from governing institutions is a source of dissatisfaction because of the basic lack of self-determination. Additionally, if decisions do not even pass a plausible test of benevolence, then one might be even more unhappy.

There is in fact an interesting debate going on about the extent of the

3. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

democratic deficit in Europe,⁴ and I am confident that I do not possess enough relevant knowledge to adjudicate the contending claims. Frankly, my primary interest is not the state of contemporary European politics. I am, for better and possibly for worse, far more parochial in these remarks, focusing on our own country. We should confront the extent to which the United States itself suffers from a significant democratic deficit that presents an increasing threat to our own political health.

I am not original in this claim. Some analysts have already used the term democratic deficit with regard to the unseemly and often corrupting role played by money in our electoral process—a factor of contemporary politics emphasized by former Governor Vilsack in his regrettable withdrawal from the presidential race.⁵ The money primary that takes place in the year prior to the Iowa caucuses plays a seemingly determinative role in dictating who will survive to visit Iowa voters. Beyond this, there is even cause for concern about the ability of our political system simply to count votes accurately. No one could come out of the 2000 and 2004 elections with unalloyed confidence that we are meeting even this most basic test of democratic self-government. Even if one believes that the 2000 election was not stolen by Republican operatives, it is clear beyond doubt that the way the election was conducted—whether we refer to ballot design, placement of voting precincts, or use of outmoded voting machines—fell short of what we as Americans have come to expect. Some of these deficiencies could be observed in the 2004 election as well, specifically in the determinative battleground state of Ohio.

Other analysts focus on the degree to which the partisan gerrymandering of legislative districts in effect allows ostensible representatives to choose their voters rather than the other way around.⁶ As someone whose permanent residence is Austin, Texas, and whose primary affiliation is the University of Texas Law School, I scarcely disagree with those who condemn the iniquitous consequences of partisan gerrymandering.⁷ Many years ago, Sam Issacharoff and Alex Aleinikoff

4. See, e.g., Andrew Moravcsik, *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*, 40 J. COMMON MARKET STUD. 603, 604 (2002) (taking severe issue with proponents of the democratic deficit argument).

5. Jeff Zeleny, *Ending Bid for Presidency, Vilsack Cites Fund-Raising*, N.Y. TIMES, Feb. 24, 2007, at A10 (“So much of this process now is about perception and money, . . .”) (quoting former Governor Tom Vilsack).

6. See generally Michael Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL’Y 443 (2005).

7. See *id.*

criticized the pathologies of our system of legislative districting. “In a democratic society,” they write, “the purpose of voting is to allow the electors to select their governors.”⁸ Yet we have constructed—and the courts tolerate—a system by which “the governors and their political agents are permitted to select their electors . . . [and] incumbent office holders and their political agents choose what configuration of voters best suits their political agendas.”⁹ It is certainly worth noting, and not only to flatter my hosts at Drake, that Iowa has demonstrated the possibility of successfully relying on an independent commission to draw political boundary lines.

I certainly do not disagree that campaign financing, partisan gerrymandering, and the potential of election-day chaos present significant problems for anyone concerned about the future of American democracy. They are all serious concerns and should be confronted by anyone who cares about the future of our society. But even if all of these problems were solved by the wave of a magic wand, we would have to confront the degree to which the American democratic deficit would remain—precisely because some of its most serious aspects are functions of the Constitution itself. Thus, however desirable, the reform of campaign finance and, especially, the demise of partisan gerrymandering would do relatively little to overcome the obstacles that the Constitution itself creates with regard to the creation of an effectively functioning democracy.

In my recent book, *Our Undemocratic Constitution*,¹⁰ I note that the New York Constitution (one of fourteen state constitutions with similar provisions) invites the New York electorate every twenty years to answer “yea” or “nay” to the question: “Shall there be a convention to revise the constitution and amend the same?”¹¹ The New York Constitution also sets out procedures for holding the convention, should the electorate vote in the affirmative.¹²

Imagine that the United States Constitution contained such a sensible provision, and, therefore, we had the same opportunity as New Yorkers to trigger a national discussion of the adequacy of the Constitution.¹³ I would

8. E.g., T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Limits After Shaw v. Reno*, 92 MICH. L. REV. 588, 588 (1993).

9. *Id.*

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

11. *Id.* at 12.

12. *Id.*

13. We might also imagine ourselves in the positions of the Dutch, French,

advocate voting “yes” for an opportunity to call a new national convention authorized to consider whether the Constitution is adequately protective of what we would like to believe is our national commitment to democratic self-government.

The remarks that follow outline my case for an affirmative vote. Some of the arguments, of course, replicate what is already in my book, but I also try to offer responses to criticisms that have been presented to me since its publication. Perhaps I should note right now that I have received far less criticism for my substantive critique than for my answer to the implicit question in the parenthetical portion of my title: (*How We the People Can Correct [the Constitution]*). That answer was a call for a new convention. I will not claim that every reader or reviewer has agreed with all of my critique, but the most vociferous criticisms I have heard have almost all involved my support for a new convention.

In any event, we can divide the ensuing discussion into two quite different questions. First, is the redesign of the United States Constitution desirable? And second, is there a tolerable procedure that would enable an acceptable outcome to be achieved? After all, even if one agrees that there are “devilish” aspects of the current Constitution, it is not irrational to proclaim that the devil one knows might be better than the devil one does not. The fear of opening Pandora’s box is connected with contemplating—and even more, actually bringing about—significant constitutional transformations.

Before I turn to explaining why I believe that it is highly desirable to redesign our Constitution, I should emphasize that it is not at all part of my project to engage in “Founder-bashing.” Those who wrote our Constitution were, with remarkably few exceptions, honorable men, except, of course, for their commitment to collaborating in the creation of what the historian Don Fehrenbacher has called a “slaveholders’ republic.”¹⁴ For better or worse, though, that collaboration, on the part of most northerners, was less likely to reflect positive approval of slavery than a reluctant concession that compromising with slavery was necessary to achieve the national “peace pact”¹⁵ necessary to achieve national unity and,

Iraqi, Kenyan, and most recently, Thai citizens who in the last few years have had the opportunity to offer “up or down” votes on proffered constitutions, in the case of the first two, the draft of the European Constitution, in the latter instances, the draft of the national constitutions.

14. DON FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY* (2001).

15. See DAVID C. HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE*

therefore, an effective defense against the possibility of war. In any event, one might believe that *that* republic came to an end in 1865 with the Civil War and its aftermath. One need not deny that our Constitution is surely better than it once was, but the so-called Reconstruction Amendments or other changes do not negate the fact that the legacy left to us by the Founders, whatever its appropriateness for its time, ill serves us today as we continue to live under a system adopted 220 years ago during a sweltering Philadelphia summer. Other decisions were reached—including other decisions to engage in what many, including James Madison, viewed as unpalatable compromises, such as equal representation in the Senate—that, however explicable in 1787, impose continuing costs on us today that we should feel no obligation to continue bearing.

Indeed, if truth be known, I want to invoke the Founders themselves for the legitimacy of my critical project, and I hope that readers will not regard this simply as a version of “the devil quoting Scripture.” I begin my book by quoting extensively from Thomas Jefferson, who emphasizes that

laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. 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 . . . Each generation is as independent as the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of [our] happiness.¹⁶

Jefferson is regarded by many as a revolutionary hothead, prone to sensationalist statements. Moreover, he was present neither in Philadelphia nor at the Williamsburg ratification convention. So let me turn to the considerably more sober, but no less esteemed, Founders.

“Is it not the glory of the people of America,” Madison wrote in *The Federalist* No. 14, “that . . . they have not suffered a blind veneration for antiquity [or] for custom . . . to overrule the suggestions of their own good

AMERICAN FOUNDING (2003).

16. LEVINSON, *supra* note 10, at ix (quoting Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *THE PORTABLE THOMAS JEFFERSON 1397–1402* (Merrill D. Peterson ed., 1979)).

sense, the knowledge of their own situation, and the lessons of their own experience?”¹⁷ The father of our country, and the president of the Philadelphia Convention, George Washington, wrote his nephew shortly after the Convention and concluded “[t]he warmest friends and the best supporters the Constitution has, do not contend that it is free from imperfections . . .”¹⁸ Washington noted:

[T]he People (for it is with them to Judge) can as they will have the advantage of experience on their Side, decide with as much propriety on the alterations and amendments which are necessary I do not think we are more inspired, have more wisdom, or possess more virtue, than those who will come after us.¹⁹

One should listen to these worthy ancestors closely and heed their words. It is time for a long overdue national conversation about the “lessons” of our experience with the current Constitution. And, for those worried about such things, we can do so with the blessing of our own Founders, part of whose genuine greatness was their willingness to topple idols of the time and recognize the possible limits of their own handiwork.

What follows consists of two parts. The first part sets out what lawyers might call my prosecutorial “bill of particulars” against the Constitution. Quite frankly, the six chapters in my book that set out this bill were remarkably easy to write. Once one becomes willing to accept the possibility that our Constitution is imperfect, the imperfections become almost glaringly obvious. Perhaps it is analogous to the moment after one falls out of love or suffers a similar disillusionment with someone who had been a close friend. What once appeared to be charming quirks take on new and ominous meanings. The ground that one tended to ignore moves toward center stage as the formerly dominant figure loses hold over one’s imagination or emotions. So one way of describing this Part of my Article is as a demonstration that the Constitution is a false friend not worthy of the love we are encouraged to feel toward it.

Far harder to write was the final chapter, which attempted to set out potential actions that Americans who accept my critical arguments could

17. THE FEDERALIST NO. 14, at 66–67 (James Madison) (Buccaneer Books 1992).

18. Letter from George Washington to Bushrod Washington (Nov. 10, 1787) in THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 83 (Michael Kammen ed., 1986).

19. *Id.*

take to rectify the situation. I cannot say that even now I am at all so confident of my arguments here as I am with regard to the bill of particulars. In any event, how to remedy the defects of the Constitution will be the focus of my concluding remarks.

II. THE BILL OF PARTICULARS

I turn then to the first, and easier part, which elaborates on some of the significant defects in the Constitution that make their own contribution to the fact that over two-thirds of the public are “dissatisfied with the way things are going in the United States at this time.”²⁰ Moreover, a strong majority of Americans has basically lost confidence in our basic institutions. *Newsweek*, for example, reported in May that “George W. Bush now has the worst approval rating [28%] of an American president in a generation.”²¹ A Gallup Poll around the same time offered slightly better news for the President (33%), but indicated that only 29% of the American public approved of Congress.²² Journalist Benjamin Wittes has written of a “looming legitimacy crisis” vis-à-vis the Supreme Court inasmuch as it garners only 51% approval in the most recent polls.²³ Many of our fellow citizens ask: “What is the point of engaging in politics?”—and their question must be answered if American democracy is to survive.

And no one should believe that better results in elections, as much as they are to be hoped for, would in fact cure our national malaise. Indeed, it might well contribute to its deepening as one realizes how little connection there may be between winning elections and affecting genuine changes in American public policy. Leaders may lead, and followers may place them in office, only to be met with the stumbling blocks erected by the Constitution. It is never a bad idea to paraphrase Shakespeare, and in this instance, I would suggest that many of the faults of the American political system are certainly not in the stars or even so much in ourselves or our leaders, but rather in our Constitution.²⁴

20. See *NEWSWEEK*, May 5, 2007, available at <http://www.msnbc.msn.com/id/18491981/site/newsweek>.

21. Marcus Mabry, *NEWSWEEK*, *The Elephant in the Room*, May 8, 2007, available at <http://www.msnbc.msn.com/id/18505030/site/newsweek/>.

22. Joseph Carroll, *The Gallup Poll, Congress Approval Down to 29%; Bush Approval Steady at 33%*, May 15, 2007, available at <http://www.galluppoll.com/content?ci=27589&pg=1>.

23. See Benjamin Wittes, *NEW REPUBLIC*, *The Supreme Court's Looming Legitimacy Crisis*, (June 25, 2007), <http://www.tnr.com/doc.mhtml?i=w070625&s=wittes062507>.

24. WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 1, sc. 2.

The easiest way of setting out the bill of particulars is by asking a series of questions, which I confess I find to be somewhat rhetorical, admitting of only one plausible answer.

A. Allocation of Power in the United States Senate

Even if you support the reasonableness of having a Senate in addition to the House of Representatives, do you really support giving Wyoming the same number of votes as California, which has roughly seventy times the population? Can a country ostensibly committed to the principle of one-person-one-vote justify such a system of political representation at the national level, which would be unconstitutional at the state or local government level, merely because of the exigencies of political compromise in 1787? Incidentally, do you support a system of bicameralism whereby each house in effect enjoys an absolute veto over legislation passed by the other in that there is no mechanism by which, for example, the House of Representatives can necessarily triumph if sixty-percent of its members vote for a piece of legislation that the Senate has rejected? Of course, the majority in the Senate rejecting the legislation in question may well represent a minority of the national population, given the advantages that small-population states enjoy in the Senate.

B. The Electoral College

Are you comfortable with an Electoral College that, among other things, has regularly placed candidates in the White House who did not get a majority of the popular vote and, in two cases over the past fifty years (Kennedy and George W. Bush), who did not even come in first in that vote? Since World War II alone, Presidents Truman, Kennedy, Nixon (1968), Clinton, and George W. Bush (2000) were all elected without receiving fifty percent of the popular vote.²⁵ Also consider the fact that a swing of relatively few votes in 1948 and 1968 could have easily thrown the election into the House of Representatives, given the presence of strong regional candidates who won over three dozen electoral votes themselves.²⁶ Do you believe that deadlocks in the Electoral College should be decided in the House on a one-state-one-vote basis, so that Vermont's or Wyoming's one representative has as much power in choosing our president as do California's fifty-three representatives or Texas' thirty-two

25. Nat'l Archive & Records Admin., U.S. Electoral College Historical Election Results, <http://www.archives.gov/federal-register/electoral-college/votes/index.html> (last visited Aug. 6, 2007).

26. *See id.*

representatives?

C. The Countermajoritarianism of the Policy-Based Presidential Veto

Is the country unequivocally benefited by a system whereby a president can frustrate the will of a majority of both houses of Congress by vetoing legislation with which he disagrees only on political—and not on constitutional—grounds? American law professors endlessly obsess about the “countermajoritarian” difficulty ostensibly posed by the fact that the Supreme Court has, over our 220-year history, invalidated approximately 165 federal laws, most of them of relatively little importance.²⁷ United States presidents, on the other hand, have vetoed over 2,500 laws.²⁸ Even if one applies an eighty percent unimportance discount rate to these vetoes, that still leaves 500 presumptively important vetoes. And, of course, the very threat of a veto directly shapes much ongoing legislation, as can be seen simply by reading the daily newspapers. I regard it, incidentally, as an “occupational pathology” of the legal professoriate that there is so much attention paid to judicial review and basically no attention at all given to the far more important presidential veto power. Students simply do not learn what they should about the most basic features of our system of government and their consequences. Furthermore, to the extent that lay citizens rely on lawyers to offer sound guidance as to the health of our legal system, the regrettable professor-induced ignorance on the part of the legal profession helps to prevent a long overdue public discussion.

D. Being Stuck with an Incompetent President

Is it a desirable feature of the Constitution that it in effect makes it “better” to have a criminal as President, rather than an incompetent as President inasmuch as the Constitution provides language, through the impeachment clause, to rid the country of a criminal but leaves the public

27. There is no single canonical list of Supreme Court invalidations of federal laws. A 2002 Library of Congress compilation of “Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of The United State” lists 158 such events. See THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 2119–59 (2004). Another widely respected compilation lists 162 such cases up to 2002. See LEE EPSTEIN ET. AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS, 163–66 (3d ed. 2003). There have, of course, been additional such cases since 2002. That said, the estimate of 165 seems to be an acceptable estimate. Nothing would change in my argument if the true figure turned out to be 175 or even 200.

28. Kevin Kosar, CRS Report for Congress, Regular Vetoes and Pocket Vetoes: An Overview 1 (2007), <http://www.senate.gov/reference/resources/pdf/RS22188.pdf> (noting that presidents have exercised their veto authority 2,553 times).

at the tender mercies of an incompetent president until the conclusion of his or her fixed term of office? Perhaps we can learn something valuable from parliamentary countries that have some mechanism by which sufficient loss of confidence in the nation's primary political leader can lead to the termination of his or her tenure in office. It is not even necessary for governments to topple; it may be enough if the ruling party within such a system comes to the conclusion that their leader is no longer serving the country—or party interests in being re-elected—well enough to deserve continuation in office. The most dramatic example of this point is surely Margaret Thatcher, who was ruthlessly driven from office when the British Conservative Party decided that she had become a potential albatross.²⁹

One need not defend criminality in order to believe that non-criminal and altogether sincere presidents can, through basic failures in judgment, threaten the lives of American citizens and others more than someone who violates even important criminal laws. There is, indeed, something quite bizarre in our willingness to accept the risk of continued decisionmaking by clearly incapable presidents at the same time that we are willing to sacrifice significant civil liberties because of the potential risk that even a single terrorist might gain entry into the United States.³⁰ Should a rational person be as worried about the reality of an incompetent presidency as by the possibility of someone the United States labels a terrorist sneaking into the country?

It is also worth asking about the extent to which our complacent acceptance of our fixed-term presidency is made more explicable by the insights of cognitive psychology, which suggests that we falsely endow with virtue the things we believe we cannot change rather than realize their potential dangers. It has been suggested, for example, that many women stay with battering spouses because they cannot genuinely envision an alternative, perhaps because they have been told that divorce is

29. See, e.g., BBC On This Day, 22 November 1990, *Thatcher Quits as Prime Minister*, http://news.bbc.co.uk/onthisday/hi/dates/stories/november/22/newsid_2549000/2549189.stm (last visited Aug. 23, 2007).

30. Consider, for example, the fact that 20,000 international travelers were delayed admission to the Los Angeles International Airport because of a computer malfunction that made it impossible to check their names against lists of potential terrorists. "The vast majority of people do not pose a security threat, [said a spokesperson for the United States Customs,] but it only takes one. Obviously a lot of innocent folks have been detained, and it is regrettable." See Ari Bloomekatz, Ron-Gong Lin II, & Deborah Schoch, *14 Hours Later, LAX Clears Last Stranded Passengers*, L.A. TIMES, Aug. 12, 2007, <http://travel.latimes.com/articles/la-me-lax13aug13>.

unthinkable or immoral. To the extent that we feel trapped within our Constitution because of the inability to envision the possibility of real changes, we have every incentive to love it and hope for the best or, perhaps, as is the case with many trapped women, to become clinically depressed because of a perception that nothing can be done. It is, of course, often rational to engage in denial with regard to potential threats that cannot be eliminated. Regardless of how rational the response is, it does not eliminate the threat. The theological Reinhold Niebuhr's famous "serenity prayer" begins with the call "God grant me the serenity to accept the things I cannot change;" though it immediately goes on to add "[and] courage to change the things I can; and wisdom to know the difference."³¹ We are, I am afraid, without such necessary courage, instead trapped in a false serenity that the threats of presidential incompetence either are not that great or are simply impervious to correction.

E. The Delayed Exit of Electorally Repudiated Presidents

Does it make sense that a sitting president rejected by the electorate upon a bid for re-election over the past generation, this has included Gerald Ford, Jimmy Carter, and George H.W. Bush, maintains all of the legal powers of the presidency for a full ten weeks beyond election day and is fully capable of making policy decisions that may drastically affect the future of the United States or, indeed, the world? Imagine what might happen at the end of 2008 if a Democratic candidate strongly committed to ending the Iraq War is elected even as George W. Bush, sincerely committed to the importance of continuing the war, continues to be Commander in Chief. One is tempted to say that no serious country would countenance such a possibility, but, of course, that is an altogether likely scenario facing the country (and the brave men and women who have been deployed by their Commander in Chief to Iraq).

One might contrast our approach with Great Britain, where a new prime minister replaces a defeated incumbent the very next day. In addition, it is worth noting that the inauguration hiatus means that in effect Americans vote for an almost monarchical chief of state who has de facto carte blanche authority to name whomever he or she wishes to cabinet positions. This procedure differs from those countries in which the electorate has a good sense of who will be, for example, the equivalent of secretaries of state, defense, or treasury, or serve in the crucial office of attorney general. We had the good sense at least to move up Inauguration

31. Reinhold Niebuhr, *The Serenity Prayer*, available at <http://www.cptryon.org/prayer/special/serenity.html>.

Day from March 4 to January 20,³² but we should realize that in the twenty-first century, January 20 is far closer, both literally and metaphorically, to March 4 than to the first Tuesday in November—assuming that we know the identity of the next president then, which returns us to considering the deficiencies of the Electoral College.

F. *Life Tenure and Supreme Court*

Do you really want Justices on the Supreme Court to serve up to four decades or time their resignations to mesh with their own political preferences as to their successors? Almost no other country has genuine life tenure because the laws in those countries either mandate retirement ages or have specific terms, ranging from nine to fifteen years.

G. *The Inability to Respond Effectively to Catastrophic Losses Members of the House and Senate*

Are you comfortable knowing that a catastrophic attack on Congress that disables a majority of senators and members of the House of Representatives would, because of rather obscure provisions of the Constitution, effectively leave us without the ability to replenish Congress in the time of greatest need? The Seventeenth Amendment allows governors immediately to appoint replacements for *dead* senators, but it says nothing at all about merely disabled ones.³³ If there is only one such disabled senator, like Tim Johnson of South Dakota, then the Senate is not significantly affected. But if there were dozens of such senators, it would create a genuine political and constitutional crisis. Tension also exists because the Constitution requires that *every* representative be elected.³⁴ This is surely a worthy aspiration, but should it apply even if, for example, one hundred representatives were killed or disabled in a catastrophic event?

H. *The Functional Impossibility of Constitutional Amendment*

Finally, with regard to the possibility of rectifying these various imperfections, do you support the ability of thirteen state legislative houses to block constitutional amendments desired by the overwhelming majority of Americans as well as, possibly, eighty-six out of the ninety-nine legislative houses in the American states? The United States Constitution

32. See U.S. CONST. amend. XX.

33. U.S. CONST. amend. XVII.

34. *Id.*

is in fact one of the most difficult currently operating constitutions to amend in the entire world.³⁵ Is this something that we should really be proud of?

As already noted, my own view is that these questions generate singular answers. I am inclined to say that only if you answer affirmatively to most of the prior questions can you truly be an unequivocally proud supporter of our Constitution who should without hesitation cast a vote in a national referendum to retain it without even considering the possibility of corrective changes. My book includes additional features that should give one pause before endorsing the present Constitution, but none of them alone would justify voting for a new convention in the same way that these eight aspects of the Constitution, especially taken together, suggest. Among these, for example, is the disqualification of most law students from running for national office because they are too young. This is nothing less than second-class citizenship, even if one agrees, as a political matter, that one generally would prefer to vote for more experienced candidates. The question is why the Constitution should make that determination for us.

It should go without saying, incidentally, that I am not arguing that all of the examples that I mention are equal in weight. The hiatus between the election and inauguration is a genuine defect, as is the disqualification of most law students from running for the presidency, the Senate, and, in some cases, the House of Representatives, but it would be extreme to say that any of these would justify supporting a new constitutional convention. The central point is that if you share my own negative response to all, or even some, of the issues I highlight, then you are well on the road to recognizing that our Constitution is a distinctly imperfect Constitution and that we should, as Jefferson and many other luminaries suggested, spend less time celebrating our Constitution and more time asking if it is indeed serving us well.

III. WHAT CAN BE DONE?

As already suggested, the really difficult task is not criticizing the Constitution but, rather, suggesting feasible ways of responding to its many

35. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 261 (Sanford Levinson ed., 1995). At the time of Lutz's article, the United States, with its 5.10 "index of difficulty" was second only to Yugoslavia, but there is no longer a Yugoslav constitution with which to compare our own, and the United States can claim the dubious honor of being in first place among operating constitutions of the world. *Id.*

imperfections. The Constitution obviously contemplates its own amendment, but, just as obviously, Article V of the Constitution in effect makes amendment almost impossible by the difficulties placed in its path.

Article V does offer the alternative of a new constitutional convention, which Congress must call upon the petition of two-thirds of the states.³⁶ As a matter of fact, I favor the calling of a new convention, but I recognize that it is distinctly unrealistic to believe that thirty-four states will agree to a full scale convention. One explanation is simple: it is extremely unlikely that the fourteen smallest states would tolerate proposals for revision of the Senate, or the Electoral College, which both benefit small states.

One might note that Article V requires unanimous consent for any changes to the allocation of votes in the Senate,³⁷ so why should the small states fear a new convention? Let me be absolutely frank: A new convention could only take place if vast numbers of Americans agreed that basic structural reform is both necessary and proper. Given that reality, I very much hope that the new convention would, like its predecessor in Philadelphia, ultimately choose to ignore this egregious unanimity feature of the present Constitution just as the Philadelphians ruthlessly ignored Article XIII of the Articles of Confederation, which required similar unanimity of all of the states in order to amend the Articles.³⁸ Adherence to Article XIII would have guaranteed the failure of the whole project because of the ability (and overwhelmingly likelihood) of Rhode Island's vetoing any proposed changes. Fortunately, Rhode Island did not even send delegates to Philadelphia, perhaps because they had unwarranted confidence that they could always prevent any suggested change at the ratification. The Framers took care of this possibility by writing, in Article VII of the Constitution, that it would be enough if it was ratified by only nine states.³⁹ This explains why there were only eleven states in the Union on April 30, 1789, when George Washington took the oath of office as the first President of the United States of America. Thanks to Article VII, it simply did not matter that neither Rhode Island nor North Carolina had yet assented to the new document.

Just as delegates to the 1787 convention were irate over the irresponsibility of certain states, in particular Rhode Island, I would expect

36. U.S. CONST. art. V.

37. *Id.*

38. ARTICLES OF CONFEDERATION art. XIII.

39. U.S. CONST. art VII.

delegates to a new convention to be equally unhappy over the consequences of our present Senate. In the modern “tax-and-spend” national government, the organization of the Senate assures that highly-populated states will receive far less in federal revenues than lightly-populated states, especially in the Rocky Mountains and upper-Midwest. Perhaps the best example is the almost lunatic way that Homeland Security aid is allocated. Wyoming, for example, receives seven times the per capita support from Homeland Security as New York, North Dakota six times as much as California.⁴⁰ Much publicity was given to the “bridge-to-nowhere” Congress approved for Alaska in 2005.⁴¹ Less publicity was given to the fact that such indefensible boondoggles are directly traceable to the Constitution’s allocation of voting power in the Senate.

The kind of change that the United States needs will come only if the public mobilizes itself behind the possibility of a new convention and, in effect, forces Congress to call a new one, even in the absence of state petitions. This will obviously not happen in a day or even in years. Only if serious discussions and political mobilization begin now will it be thinkable to rise to the example of our courageous and visionary Founders and craft a Constitution that is suitable for the twenty-first century.

IV. CONCLUSION

I conclude with some observations on two very common reactions to my proposal. One expresses fear at the possibility of awakening the slumbering giant that is “We the People” and actually taking popular sovereignty seriously enough to contemplate the possibility of a genuine national conversation—and subsequent ratification campaign—about the adequacy of our Constitution. A second, and linked, response is to point out that the United States is not in fact committed to “democracy,” but instead is a “republic.” There is a reason, after all, why the term “democracy” does not appear in the document, whereas Article IV does guarantee each state a “Republican Form of Government.”⁴²

I begin with the latter point. At one level, of course, everyone who makes the argument that the United States is not committed to a democracy is absolutely correct. The Founders were in fact committed to some version of a “Republican Form of Government” and not what we

40. LEVINSON, *supra* note 10, at 57.

41. See, e.g., William Yardley, *Alaskan Bridge Projects Resist Earmarks Purge*, N.Y. TIMES, Mar. 6, 2007, at A13.

42. U.S. CONST. art. IV, § 4.

would today recognize as a modern democracy. It is worth pointing out that the eighteenth century version of republican government was, among other things, both racist and patriarchal: only white men—indeed, propertied white men to boot, and frequently only Protestant, propertied white men—were invited into the republican experiment. Everyone else was pretty much an outside onlooker.

This is, to be sure, a bit of an exaggeration. Women actually voted in New Jersey until 1807,⁴³ and many white working men participated in the voting for the ratification conventions. That said, it is anachronistic to describe those who wrote the Constitution as committed to modern notions of democracy. Most glaringly, for most of them there was nothing inconsistent about chattel slavery and republican government. Indeed, the slaves provided the opportunities for leisure on the part of members of the white ruling class (at least in the South), who could therefore devote their energies to political rule. Similar arguments, of course, supported keeping women in their place within a separate sphere of hearth and home even as men served their quite different roles of civic leadership.

It would, of course, be manifestly unfair to accuse contemporary partisans of “republican” (as distinguished from “democratic”) government of supporting such outmoded and rejected institutions as slavery or the subordination of women. Still, I do wonder whether some of my more critical interlocutors—who seem unable to say anything much beyond the point that we were never intended to be a “democracy”—are not mired in the same kind of blind worship of tradition that led earlier generations, in the name of what were undoubtedly their own sincere commitments to “republican government,” to oppose such fundamental changes as the abolition of slavery, the lifting of racial and gender bars to the suffrage, or the turning over of election of United States senators to the populace instead of keeping it in the hands of state legislators, as originally provided.

I do not rule out the possibility that my particular suggestions for eliminating the presidential veto, the Electoral College, the equal vote allocation of power in the Senate, etc., are not only debatable, but even out-and-out bad. That said, I am absolutely confident that it simply does not help to be reminded that “we are a republic, and not a democracy,” unless one has a quite robust theory of precisely how it is that the anti-democratic (meaning anti-majoritarian) features of our Constitution serve

43. See The City University of New York, Voting Rights and Citizenship: Women’s Suffrage, http://www1.cuny.edu/portal_ur/content/voting_cal/women_suffrage.html (last visited Aug. 6, 2007).

important public values beyond simply making it difficult for the majority to rule.

Indeed, if one believes that it is highly desirable that one should place a plethora of barriers (often somewhat mindlessly described, without further analysis, as “checks and balances”) in the way of majority rule that go well beyond simply protecting the rights of vulnerable minorities, then perhaps this calls into some doubt whether we should really be describing ourselves as a democracy at all.

I suggest, then, this final act of imagination: you have been invited to consult with a new country trying to draft a constitution. They describe themselves as devoted to democratic values.

Do you try to talk them out of that commitment? And, whatever your answer, would you suggest that the hard-wired structural features of our own Constitution—in contrast to what Madison described as the “parchment barriers” protecting rights,⁴⁴ as in the Bill of Rights—offer a good model for this other country? To the extent that you would correctly veer away from presenting our own Constitution as a model, then it is certainly worth asking what besides blind faith would suggest that it is altogether adequate to our own situation.

I end, though, by returning to the first criticism I have received from many people, including friends and family. Is it not just too dangerous to contemplate turning over our Constitution to the judgment of our fellow Americans, who are, I think, often imagined to be basically ignorant louts who would deprive us of our liberties if given the chance. Such responses make me despair the very possibility of maintaining what is best in the American democratic experiment, which indeed involves some measure of genuine faith in popular judgment. Is that not what we mean, after all, by self-government? If we believe that the United States—with its high literacy rates, its well-developed civil society, its economic success, and its ideological devotion to tolerance and democratic governance—cannot actually hope to *practice* self-government, 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—the proclamation that “here, the people rule.” 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.’”⁴⁵ It is a great slogan. But do we really

44. THE FEDERALIST NO. 48, at 250 (James Madison) (Buccaneer Books 1992).

45. Michael Lind, *Do the People Rule?*, WILSON Q., Winter 2002, at 40; see

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?

also RICHARD D. PARKER, "HERE THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994).