

**COMMENTS BY A CANTANKEROUS CRANK ON
“CONSTITUTIONAL THEORY,” THE SUPREME COURT, AND
THE LEGAL ACADEMY**

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I am of an age—and perhaps temperament—when even good friends might legitimately describe me as cantankerous and something of a crank. I am estopped to deny that, because it is largely true. But I want to emphasize that the display of these traits is not in the least meant as a critique of the interesting and challenging papers presented us by Professors Foley and Ringhand.¹ As is true of everything I’ve read previously by them, I have been illuminated by what they have to say, and I am sure that will be true as well for anyone reading their essays. But I do want to take full advantage of the title of our particular panel, “Constitutional Theory and American Democracy.” This invites a move away from ordinary doctrinal analysis of voting-law cases, whether at the state or federal level, and instead to reflect on far broader questions about the nature both of “constitutional theory” and what we might mean by “American (or any other) democracy.” Thus, this rather long—and perhaps cranky—Essay, which frankly takes advantage of some of their own isolated comments in order to connect with certain longstanding fixations (or hobbyhorses) of mine about the inadequacies of “legal education.” A major one has become the following: By so relentlessly focusing on the handiwork of the Supreme Court, our students too often gain a distorted view of both “constitutional theory” and “American democracy.”

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1. These comments were prepared for a panel on “Constitutional Theory and American Democracy” with Professors Edward Foley, Lori Ringhand, and Victoria Nourse. Professors Foley and Ringhand presented drafts of their essays. See Edward B. Foley, *“The Real Preference of Voters”: Madison’s Idea of a Top Three Election and the Present Necessity of Reform*, 2025 WIS. L. REV. 401; Lori A. Ringhand, *The Regulation of Presidential Elections*, 2025 WIS. L. REV. 509. Professor Nourse presented an early version of her article “American Legal Revolution.” Victoria F. Nourse, *American Legal Revolution*, 72 UCLA L. REV. (forthcoming 2025).

All three panelists appear to agree that what we know as “American democracy” is facing severe challenges (and challengers). Many of us, including myself, would emphasize the particular dangers presented by Donald J. Trump and his return to the White House. As I submit the final version of this Essay in spring 2025, all of us obviously are all too well aware of what happened in November (including in the ostensible “battleground” state of Wisconsin). Though some—though I suspect relatively few readers of this Symposium—are delighted with the result, I am confident that I am typical of most of its actual audience in feeling ever-heightened anxiety and trepidation about the country’s future. I do think it important to say, though, that those of us who *are* justifiably worried about the future of the American constitutional order should not believe that Trump’s defeat would have been enough to save our political system from the challenges facing it. Pessimists may believe that it was a *necessary* condition, but only an optimist looking through the rosiest of tinted glasses would believe that it would have also been a *sufficient* one.

In a far-off time almost two decades ago, though not in a distant galaxy, I published *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*.² There I set out the argument that the Constitution of 1787, even as infrequently amended thereafter, could not pass any plausible twenty-first century test of constituting a truly “democratic” political order. But one might note the somewhat optimistic subtitle that suggested that “We the People” could in fact organize to correct these deficiencies. That was truly a different time. No one then could even imagine that a major political party would deliberately nominate a pathological liar and demagogue for the presidency, let alone that he would be elected (thanks to the vagaries of the Electoral College, of course) and enjoy the enormous powers of the modern presidency.

The response to that book persuaded me *not* that most people disagreed with me about the nature of the Constitution, but, rather, that they basically didn’t care. That is, as with sausage, the only real test was the satisfaction of the consumer with the product. Even during the distinctly non-halcyon days of the Bush Administration and the then-early days of the Iraq and Afghanistan wars, most people seemed relatively satisfied with—or, at least, not seething with anger about—the actual outputs of the American national political system. This may underscore the fact that most voters care far more about *domestic* political issues than about what is going on abroad, unless it clearly effects their everyday lives (as was possibly the case with the Vietnam War, especially when the draft still operated). George W. Bush, with the aid of Massachusetts Democratic Senator Ted Kennedy, did in fact pass some

2. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2008).

major domestic legislation.³ John Kerry gracefully accepted a close defeat in the 2004 election.⁴ And, for what it is worth, many Democrats, including Hillary Clinton and Joe Biden, were among the seventy-seven Senators who voted to authorize President Bush to go to war in Iraq, whatever their later doubts.⁵

Even more to the point, whatever one thought of Bush and his Vice President, Dick Cheney—and I was certainly no admirer of either—no one thought for a single moment that either would try to hang on to power beyond January 20, 2009. Dick Cheney might have had, from my perspective, dreadful political views about the war in Iraq and the propriety of torture, but he was also, and remains, a dedicated constitutionalist in what many would describe as the most fundamental sense: to respect the results of the American electoral process and to cede power to the political opposition, if need be, gracefully even if not happily. That dedication, we have learned, is true of his daughter as well, and that fact speaks well for him as a parent in comparison to Donald Trump and his own children. Both Bush and Cheney attended the inauguration of Barack Obama and Joe Biden as President and Vice President. Cheney actually arrived in a wheelchair, having injured his back; he could have been forgiven had he chosen to remain home recovering.⁶ Since then, the Obamas and the Bushes appear to have established a genuinely cordial relationship, as was famously true of George H. W. Bush and the man who defeated him, Bill Clinton.⁷ We'd like to think of that as the "American way." We no longer live in that country. No one in 2006 was writing books assessing the possibility of civil war within the United States because of the depth of polarization and the perceived inability of the political system to resolve the bitter disputes underlying the polarization.⁸

3. Sheryl Gay Stolberg, *Bush and Kennedy Nurture Common Ground on Legislative Goals*, N.Y. TIMES (July 4, 2007), <https://www.nytimes.com/2007/07/04/washington/04allies.html>.

4. *John Kerry Concession Speech*, C-SPAN (Nov. 2, 2004), <https://www.c-span.org/program/news-conference/john-kerry-concession-speech/137732>.

5. Katie Glueck & Thomas Kaplan, *Joe Biden's Vote for War*, N.Y. TIMES (Jan. 12, 2020), <https://www.nytimes.com/2020/01/12/us/politics/joe-biden-iraq-war.html>.

6. Andrew Clark, *Obama Inauguration: George Bush - The Man Who Was No Longer President*, GUARDIAN (Jan. 20, 2009), <https://www.theguardian.com/world/2009/jan/20/obama-inauguration-george-bush> [<https://perma.cc/3E8N-HKP2>].

7. *The Exclusive Fraternity: President Clinton's Relationship with Former Presidents*, CLINTON DIGITAL LIBR., <https://web.archive.org/web/20250125084926/https://clinton.presidentiallibraries.us/exclusive-fraternity>.

8. See, e.g., STEPHEN MARCHE, *THE NEXT CIVIL WAR: DISPATCHES FROM THE AMERICAN FUTURE* (2022) (journalistic account); BARBARA F. WALTER, *HOW CIVIL WARS START: AND HOW TO STOP THEM* (2022) (scholarly account). Both garnered reviews that included the magic phrase "required reading."

Were the problem only Donald J. Trump, then the answer is simple: Defeat him or, as regrettably happened, as he returns to the White House; oppose him and take comfort in the fact that both age and the Twenty-Second Amendment assure that he will not be President four years from now. But, alas, I believe that I was fundamentally correct in 2006 in describing the Constitution as indefensibly “undemocratic” and a genuine threat to the American future. The problem, as it were, is that it then appeared to be “only” a political theory argument that might interest some other academics but not ordinary people who had more important things to do than muse about the issues important to academic political theorists or even “constitutional theorists.” So that brings me to a book that I published in 2012, *Framed: America’s 51 Constitutions and the Crisis of Governance*.⁹ The subtitle is a reference, among other things, to a number of polls indicating that more and more Americans were not so content with the sausage after all, that there was significant dissatisfaction with the way the American political system was operating. An overwhelming percentage of the country had little confidence in Congress and believed that the country was headed in the wrong direction. The year 2012 also saw the publication of an important book by Thomas Mann and Norman Ornstein, two long-time Washington insiders who had earlier in 2006 published *The Broken Branch*, about the increasingly dysfunctional U.S. Congress.¹⁰ The new book was titled, ominously, *It’s Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*.¹¹ I believe I’m correct that their book, although it received some “public” discussion, got little, if any, more attention than my own book from the legal academy. Perhaps reflecting their status (and blinkers) as Washington insiders—Mann is affiliated with the Brookings Institution, Ornstein with the American Enterprise Institute¹²—they did not directly argue that “the American constitutional system” needed any significant changes. What was called for, in effect, was a more virtuous leadership class that would turn down the political temperatures and learn to work better with their political opponents.¹³

There was, unfortunately, little that was unusual about the limits of their otherwise probing critique. Those who teach “constitutional law” within the legal academy or ponder the American constitutional system

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

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

11. 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).

12. *Id.* at 258–59.

13. MANN & ORNSTEIN, *supra* note 11.

from the perspective of political science, as is true of Mann and Ornstein, are, with few notable exceptions, remarkably uninterested in addressing deep structural problems instantiated in the U.S. Constitution.¹⁴ Why might this be the case, in addition to the fact that such confrontation is likely to induce unhappiness and even anxiety, especially if we also conclude that there is fact no cure for what ails us? That is, perhaps we would learn only that we're in the position of having to hope that an asteroid heading for earth misses us; the prospect of successful intervention by a dynamic American President similar to Harrison Ford or Tom Cruise, or by a united "world community" is so clearly a fantasy, similar to the Marvel superheroes that are polluting our popular culture. Political scientists often rely on the valuable notion of "path dependence," which means, simply put, that choices made at time X, when there were genuine alternative possibilities, become locked in and make difficult, or even impossible, the shift to attractive alternatives that might well have earlier carried the day under slightly different circumstances. Maturity is thought to mean accepting what the ancient Greeks labeled "necessity" and to forego attempts to change what in fact is impermeable to significant modification. There is, I think, a reason that many people today appear to be rediscovering the austerity of stoicism.

Perhaps better constitutions are imaginable, but most people appear to regard it as foolish to think that they might in fact replace the status quo. One is thought to be utopian or, even worse, quixotic, as in madly tilting at windmills, to suggest otherwise. Donald Rumsfeld notably reminded us that we fight wars with the armies we have, not the armies we wish we had.¹⁵ So it is we conduct our politics within the constitution

14. I elaborated this critique in my otherwise admiring review of Steven Levitsky and Daniel Ziblatt's important book *How Democracies Die*. Sanford Levinson, *Democracy in Peril*, DEMOCRACY (2018), <https://democracyjournal.org/magazine/48/democracy-in-peril/> [<https://perma.cc/AJS9-9RGA>] (reviewing STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018)). They were, in that book, remarkably uninterested in the possibility that at least a partial explanation might be design deficiencies in a country's formal political system. See *id.* However, their more recent book, *Tyranny of The Minority: Why American Democracy Reached the Breaking Point*, emphasizes the significant costs of the multiplicity of "veto points" in the American political system that give undue weight to the wishes of well-located political factions, many of them interested primarily in preservation of the status quo or rolling back a variety of reforms. STEPHEN LEVITSKY & DANIEL ZIBLATT, *TYRANNY OF THE MINORITY* (2023). The latter, it should be noted, are particularly well-represented in the President Trump's new cabinet (not to mention Elon Musk).

15. Younger readers might be unfamiliar with George W. Bush's Secretary of Defense, who notably attempted to fend off some critics of the Bush Administration's war against Iraq by stating: "You go to war with the army you have, not the army you might want or wish to have at a later time." Eric Schmidt, *Iraq-Bound Troops Confront Rumsfeld over Lack of Armor*, N.Y. Times (Dec. 8, 2004), <https://www.nytimes.com/2004/12/08/international/middleeast/iraqbound-troops-confront-rumsfeld-over-lack->

we have, whatever its inadequacies, rather than the one we might wish to have. Maturity is signified by acceptance of that fate rather than railing at it.

So I begin with Professor Ringhand's essay, which focuses on a very particular feature of the Constitution that we operate under: Although there are certainly national offices, there are, as a constitutional matter, no "national elections." That is, *all* elections in the United States are carried out under the aegis of one or another of the American states or territories. Over a quarter of a century ago, Yale Professor William Eskridge and I co-edited a book, *Constitutional Stupidities, Constitutional Tragedies*. The first part of the book was composed of short essays written by a number of eminent legal academics who were invited to select what they thought was the "stupidest" feature of the Constitution. Jeffrey Rosen, then as now a Professor at The George Washington Law School but also, now, President of the National Constitutional Center in Philadelphia, labeled as "stupidest" the assignment of conducting elections to the states.¹⁶ It is true, of course, that the "Election Clause" in Article I gives Congress certain powers to regulate elections, but, empirically, Congress rarely uses this power. It is all too happy to leave the vagaries of elections up to the states.

This, of course, has a variety of potentially ominous consequences, beginning with the grim fact that many states simply do not appear to want to spend the money required to operate a truly functioning, confidence-inducing modern election system. This point was vigorously made over fifteen years ago, in 2009, by Yale Law School Dean Heather Gerken in a book tellingly titled *The Democracy Index: Why Our Election System is Failing and How to Fix It*.¹⁷ It is ever-more failing us, and there is no genuine move to fix it, in part because of what all of us have learned to call congressional gridlock, coupled with the fact that more and more states appear to be controlled, politically, by political coalitions whose only interest is creating an electoral system in their own state that maximizes the power of their own party. Wisconsin, of course, is exhibit A for this proposition, though, alas, it certainly doesn't stand alone.

of.html. Rumsfeld's comment, made in response to an American soldier in Iraq complaining about the inadequacy of armored protection provided on military trucks, is quoted and discussed in a number of letters to the *New York Times*. Opinion, *Rumsfeld and 'the Army You Have'* (6 Letters), N.Y. TIMES (Dec. 12, 2004), <https://www.nytimes.com/2004/12/10/opinion/rumsfeld-and-the-army-you-have-6-letters.html>.

16. See Jeffrey Rosen, *Divided Suffrage*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 81 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998); Jeffrey Rosen, AM. CONST. CTR., <https://constitutioncenter.org/about/board-of-trustees/jeffrey-rosen> [<https://perma.cc/QLY3-KRKR>].

17. HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009).

Too many of our state governments vindicate the caustic critique of American federalism that James Madison—whose name was frequently invoked at the Madison conference—presented in *Federalist 10*. A principal, and oft-ignored, takeaway from that famous essay is that states are basically cesspools of “factions,” defined by Madison as groups antagonistic to the “public good.”¹⁸ The relatively small size of states allows these factions—*i.e.*, groups committed to their own selfish interests rather than a “common good” or “public interest”—to take over state government with relative ease and to use their power to entrench their own rule.¹⁹ Only an “extensive republic[],” Madison argued, could genuinely fend off the ravages of factional politics.²⁰ I devoted several chapters in *Framed* to noting the ways in which Madison, though correct about state politics, turned out to be an unreliable guide to politics in the “extended republic,” not least because he naively appeared to believe that there would be no national political parties that would themselves illustrate the problems posed by “factions.”²¹ But one can agree that state governments can easily become liable to takeover by particular partisan factions, whether Democratic or Republican, and that the constitutional assignment of power over elections generates a giant incentive to use it to try to entrench themselves in office basically by rigging the electoral process against those who might wish to displace them. Partisan gerrymandering is the best-known, most often discussed example of factional politics, but, of course, there are many other potential examples, including attempts, subtle or otherwise, to suppress the vote of those deemed political adversaries.

There are, to be sure, some limits on what factions can do, imposed by the Fourteenth Amendment and by some of the relatively rare legislation passed under Congress’s Election Clause or Article 5 of the Fourteenth Amendment powers. But, as Professor Ringhand points out, the Supreme Court, to put it mildly, has not indicated any interest at all in giving either the Constitution or relevant statutes capacious readings that might clip the power of factions within states.²² Instead, the Court has, after weeping some crocodile tears about the threat of partisan gerrymandering, ruled that there is literally nothing it can do about it.²³ Earlier, in *Shelby County*,²⁴ Chief Justice John Roberts, who as a young lawyer in the Reagan Administration indicated his distaste and disdain

18. THE FEDERALIST NO. 10, at 49, 50 (James Madison) (Ian Shapiro ed., 2009).

19. *Id.* at 53.

20. *Id.* at 51.

21. LEVINSON, *FRAMED*, *supra* note 9.

22. Lori A. Ringhand, *The Regulation of Presidential Electors*, 2025 WIS. L. REV. 509.

23. *See Rucho v. Common Cause*, 588 U.S. 684 (2019).

24. *Shelby County v. Holder*, 570 U.S. 529 (2013).

for the Voting Rights Act of 1965,²⁵ appeared to take great pleasure in writing a majority opinion that basically gutted what many have termed the most important single statute, with regard to creating a more genuine “law of democracy,” ever passed by Congress.²⁶ Some states are undoubtedly committed to a more inclusive notion of democracy. But the point is that the Court today operates under a version of Senator Stephen A. Douglas’s notion of “popular sovereignty.”²⁷ For him that meant that the Constitution was indifferent to slavery; it was up to the electorate of a given state to decide whether or not the enslavement of other human beings was part of its domestic law.²⁸ The modern analogue is that each state can decide how “democratic” or “undemocratic” it wishes its voting system to be (subject to a few, but not enough, constraints), while the Court has extraordinary little to say about the choices made at the state level.

With regard to such travesties of “the law of democracy” as partisan gerrymandering, one might believe that at least a partial solution might be achieved if only the Court modified its particular doctrines and offered “better” interpretations of the Constitution. I certainly agree that is the case. But, just as I don’t believe that the defeat of Donald Trump would be sufficient to cure the patent deficiencies of the American constitutional system, it is, therefore, vitally important to emphasize the limits even of “better” interpretations of the existing U.S. Constitution, however much they would be welcomed.

In the course of her remarks, Professor Nourse delivered a vigorous attack on originalism that I substantially agree with, especially with regard to its purported use by the current majority of the Supreme Court for *constitutional* interpretation. I am a proud “non-originalist,” a “purposivist” who believes that originalism as a “theory of interpretation” is similar to what Jeremy Bentham said of the theory of natural rights—“nonsense on stilts.”²⁹ I subscribe to the description offered by my friend and former colleague, Mitchell Berman, that “originalism is bunk”³⁰ if it is taken to mean that it provides a royal, even exclusive, road to understanding the Constitution. This is different, incidentally, from denying that there might be useful lessons to learn

25. See Ari Berman, *Inside John Roberts’ Decades-Long Crusade Against the Voting Rights Act*, POLITICO MAG. (Aug. 10, 2015), <https://www.politico.com/magazine/story/2015/08/john-roberts-voting-rights-act-121222/>.

26. See *id.*

27. See *The Little Giant*, LIBR. CONG., <https://www.loc.gov/item/today-in-history/april-23/> [<https://perma.cc/T2XM-8DZV>].

28. *Id.*

29. See JEREMY BENTHAM, *ANARCHICAL FALLACIES* (1796).

30. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U L. REV. 1 (2009) (defining “originalism” as *exclusive* reliance on historical materials for interpretation of the Constitution today).

from knowing history. It appears to me obvious that one should be knowledgeable about history and learn valuable lessons from that study. These lessons can be both positive and negative. Some of what was done in the past should be emulated because, after all, those making the decisions, whether “Framers” or others, “got it right,” and we should be grateful for the wisdom they displayed. But they also made mistakes, some of them grievous. They were, after all, human, and, we are told “to err is human.” Indeed, one of the strongest messages conveyed by many of those we venerate as “Founders” is that we should think for ourselves and learn “the lessons of [our] own experience.”³¹

I suppose there are some “anti-originalists” who might argue that we should simply ignore anything said and done in Philadelphia or any other forum prior to last week, but that is as absurd as arguing, as Robert Bork notably did, that reliance on history—what he termed the “original intent” of those who wrote the Constitution—is the *only* legitimate method of interpreting the Constitution.³² As Jonathan Gienapp demonstrates in a marvelous new book, such a position, even if suitably modified by the epicycle of “original public meaning” to replace “original understanding of those who wrote the documents,” rests on indefensible notions of historical analysis and, therefore, the ways that language actually works in any functioning legal system, including our own.³³ There is a reason that no one with professional training as a historian takes “originalism” seriously. But even if we could overcome those basic methodological historiographic critiques, the question would remain why, normatively, it makes sense to be ruled by the dead hand of the past, especially if, to put it mildly, there were only a necessarily limited, and wildly unrepresentative, number of hands crafting the document that is supposed to rule us.

But, as a matter of fact, I do not engage in “founder bashing.” Whatever their limitations, they were doing the best they could to resolve truly difficult political challenges that threatened to destroy the viability of the fledgling United States of America, then governed by the Articles of Confederation. Alexander Hamilton in *Federalist 15* described as “imbecil[ic]”³⁴ the government under which the country was trying to operate; it required a radical restructuring and the engagement by all members of the relevant public—even if we correctly believe today that it was far too truncated—in what Hamilton described in *Federalist 1* as

31. See, for example, the eloquent last paragraph of Madison’s *Federalist 14*. THE FEDERALIST NO. 14, *supra* note 18, at 71 (James Madison).

32. See ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW 10 (1984).

33. See generally JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE (2024).

34. THE FEDERALIST NO. 15, *supra* note 18, at 73 (Alexander Hamilton).

“reflection and choice” about how best to govern ourselves.³⁵ *That* is the most important lesson taught to us by the Framers, and it is one, I am sad to say, that I think we simply ignore in favor of an unjustified “veneration” for the Constitution and a decided unwillingness to engage in any serious “reflection” about the need for possibly radical revision.³⁶

That being said, I think it is a profound error to suggest that the contemporary crisis of “American democracy” rests primarily on a mistaken theory of “constitutional interpretation”; as welcome as the repudiation of originalism might be, that would not in fact serve as the cure for what surely ails us. I would be much less cantankerous if I thought that were the case. Perhaps the most important point of my two books mentioned earlier, and a third, co-authored with my wife Cynthia Levinson, *Fault Lines in the Constitution*, is that the fundamental threats posed by the Constitution—its “fault lines” that portend future earthquakes and tsunamis—cannot be alleviated by adopting a better method of interpretation.³⁷ It would be comforting to believe that that were the case. But *the Constitution itself is the crisis, much in need of drastic amendment*.³⁸ And I further believe that we are in desperate need of a new constitutional convention to bring such change about.

Most people I know, including my co-author wife, disagree with me. It is not that she shares the all-too-common “reverence” for the existing Constitution that turns it into the foundation of what I long ago labeled American civic religion and “constitutional faith.”³⁹ She argues instead that as a political culture, we are in no shape to have the kind of national conversation necessary for a productive constitutional convention. She is far less afraid of a “runaway convention” than of the prospect that we would be at each other’s throats when disputing how a convention would even be organized in the first place. Who would choose the delegates, would there be any limits on their potential agendas, and what would the voting rules be with regard to adopting proposals for change? And, as an extra issue, would they be empowered to emulate the Philadelphians in 1787 and simply ignore the constraints of Article V by changing the ratification rules, as the Framers did with regard to Article XIII? All of these are good arguments, unfortunately. There is in fact no good reason to believe that a new convention would serve as a model of

35. THE FEDERALIST NO. 1, *supra* note 18, at 7 (Alexander Hamilton).

36. This is a major theme of the important recent book by Aziz Rana. *See* AZIZ RANA, *THE CONSTITUTIONAL BIND: HOW AMERICANS CAME TO IDOLIZE A DOCUMENT THAT FAILS THEM* (2024).

37. CYNTHIA LEVINSON & SANFORD LEVINSON, *FAULT LINES IN THE CONSTITUTION* (2020).

38. *See* Sanford Levinson, *The Constitution Is the Crisis*, ATLANTIC (Oct. 1, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/the-constitution-is-the-crisis/598435/>.

39. *See* SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (2d rev. ed. 2011).

civility and concord. Her reasons are far more substantial than are those who fear a “runaway convention.” Still, I fear that sticking with the Constitution as is helps to assure that the political earthquakes and subsequent tsunamis are far more likely to take place.

The reason for my crankiness is simple, even simplistic: I have come to believe that the most important parts of the Constitution are not what Justice Robert Jackson called “the majestic generalities”⁴⁰ that are indeed subject to endless interpretive dispute and, therefore, de facto development and modification over time. I have termed these parts of the Constitution, which are the obsessive focus of legal education, “the Constitution of Conversation.”⁴¹ The contrast term is what I label “the Constitution of Settlement,”⁴² which refers not to the “law working itself pure” through “interpretation,” but, rather, those aspects of the Constitution, almost all of them referring to *structures* rather than *rights*, that appear functionally to be written in stone and impervious to genuine conversation and dispute about their meaning. The study of “American constitutional development” is alive and well as a field of legal history, and its subject matter goes well beyond the infrequent formal amendment of the national Constitution. Indeed, University of Chicago Law Professor David Strauss has gone so far as to argue that Article V is basically irrelevant because we have figured out ways, analogous to common-law development, to modify the Constitution.⁴³

There is much to learn from Strauss, but, unfortunately, like most legal academics he ignores the parts of the document—the Constitution of Settlement—that have not lent themselves to interpretive dispute and change without amendment. They raise “only” questions of wisdom regarding constitutional design, and legal academics, with some honorable exceptions, have almost no interest in such questions. We fixate, like Pavlovian dogs, on what is subject to litigation and, even more certainly, on what the members of the Supreme Court deem worthy of their august interest. Perhaps one ought not to be so condemnatory of this fact, given the peculiar role of legal academics as, first and foremost, hired to train students to be practicing lawyers, *not* to be detached analysts of the legal system.

As someone who is the co-editor of a casebook on constitutional law, I can testify to the pressures all of us are under to focus on relatively recent Supreme Court cases, particularly if one fears, as I do, that some of them threaten our collective future. Moreover, I am also all too well aware of the brute fact that even if we include what casebooks sometimes

40. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

41. See LEVINSON, FRAMED, *supra* note 9, at 19.

42. *Id.*

43. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

describe as “other materials,” actual classroom teachers, inevitably faced with the problems of adjusting their syllabi to the grim actualities of the limited time available—not to mention the likely interests of their students—will, albeit reluctantly, ignore those “other materials” in favor of opinions by the Justices.

What this means, however, is that many critically important parts of the Constitution are altogether immune from litigation and thus effectively absent from the musings of the Justices. That in turn assures that they will be absent as well on the radar screens of most persons charged with teaching “constitutional law,” whether or not they also describe themselves as “constitutional theorists.” So in some ways, I now describe my own approach to the U.S. Constitution as including a significant amount of “mindless textualism.” I deeply wish that the legal academy would pay far more attention to the parts of the Constitution that are deemed to have such “clear meanings” that even the most brilliant Dworkinian lawyer or judge, trying to emulate his hero Hercules, could not gainsay their meaning.⁴⁴ “Conversation” becomes beside the point.

I indicated before that I fully agree with the need for “prudence” in interpreting texts and on paying full heed to the likely “purposes” underlying any and all texts, whether constitutions or statutes. But even those people like myself, fellow travelers of critical legal studies and its emphasis on the “indeterminacy” of legal texts, have to recognize that there are, at least pragmatically, de facto limits on our interpretive freedom. Those are the textual “fault lines.” One need not go down the rabbit hole of linguistic theory to determine what actually accounts for the perception of determinate meaning of such concepts as “2,” “January 20,” or “3/4,” in order to recognize that almost no one will be willing to accord “interpreters” of those terms the same degree of freedom that might be present when giving meaning, say, to notions of “equal protection of the laws” or “interstate commerce.” I do not have time to go through the full litany of examples of the fetters that might be felt with regard to certain constitutional language, but let me mention several that are most relevant to our discussions in Madison among adepts in American election law and, beyond that, those concerned about maintaining democracy in America.

The first is the dreadful allocation of equal voting power in the Senate, which James Madison in *Federalist* 62 correctly described as an

44. See Sanford Levinson, *Dworkin, Fish, and Radically Defective Constitutions*, in *NEW ESSAYS ON THE FISH-DWORKIN DEBATE* 317–42 (Thomas Bustamante & Margaret Martin eds., 2023); Sanford Levinson, *Reflections on What Constitutes ‘a Constitution’: The Importance of ‘Constitutions of Settlement’ and the Potential Irrelevance of Herculean Lawyering*, in *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW* 75 (David Dyzenhaus & Malcom Thorburn eds., 2016).

“evil.”⁴⁵ He was correct, just as were those who pronounced as “evil” the compromises with slavery that also characterize the Constitution of 1787. But, in both cases, acceptance of these compromises, however “evil,” were viewed as “necessary and proper,” so to speak, because the alternative, in 1787, would have been no Constitution at all and the likely disintegration of the purported United States of America into two or three separate countries along the Atlantic Ocean that would almost undoubtedly emulate the European story of perpetual warfare against one another (including European allies of one part against another). As Akhil Reed Amar has emphasized,⁴⁶ “geopolitics,” at least as much as an abstract dedication to the goals like liberty or justice, was driving those who feared for the American future in the absence of transformative constitutional change. This is clear, incidentally, to readers of the opening essays of *The Federalist*, which emphasize the necessity of unity and a far stronger national government in order to withstand the various threats to the United States from countries decidedly antagonistic to the new country in town.

What the Israeli philosopher Avishai Margalit has called a “rotten compromise,”⁴⁷ as with slavery, was, perhaps, defensible, *if* one shared the belief that the overriding goal—or, to use contemporary language, “compelling interest”—was to replace the fraying, “imbecilic” system established by the Articles of Confederation and, therefore, to save the precarious assemblage called the United States of America. *That*, as noted, is the relentless theme of the early essays of *The Federalist*. But would even that be sufficient to justify truly “rotten” compromises, which Margalit defines as acquiescence in the dehumanization and degradation of others to achieve one’s goals?⁴⁸ In addition, one presumably would have to agree that the creation of a truly United States would be a sufficient good for the world at large—and not only the settlers of the “New World,” in order to justify a “rotten compromise,” just as, for example, according to Margalit, the defeat of Hitler’s Germany was of sufficient importance to justify the alliance with the tyrannical Stalinist regime.⁴⁹

In any event, what some of the Constitution’s opponents correctly called a “consolidated” government was necessary not simply to protect American liberty (which, of course, included the liberty to enslave others), but to preserve the independence so dearly won in the bloody

45. THE FEDERALIST NO. 62, *supra* note 18, at 206 (James Madison).

46. See, e.g., Akhil Reed Amar, *The Year that Changed Everything*, ATLANTIC (May 4, 2021), <https://www.theatlantic.com/ideas/archive/1857/11/what-made-the-constitution/618756/>.

47. AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISE (2009).

48. See *id.* at 2.

49. See *id.* at 183.

secession from the British Empire.⁵⁰ So we were stuck in 1787 with the insidious compromises concerning both slavery and the allocation of power in the Senate. One of them, as a formal matter, was undone, after the loss of 750,000 lives, by the Thirteenth Amendment. The other plagues us even today, and we accept as an undiscussed given—the equivalent of the ocean that fish are forced to swim in that includes sharks and other dangerous predators—that Wyoming gets the same two votes as California, even though the population of the Golden State is seventy times that of Wyoming. That’s the operational meaning of path dependence.

And, of course, there is also the topic of most direct interest to many of us today, the Electoral College. As a “non-basher of Founders,” I’m willing to defend the proposition that the Electoral College made a certain amount of sense in 1787. But the appeal of the Electoral College quickly faded as a given of the political system. As Jill Lepore emphasizes in a forthcoming book on constitutional amendments, there have been more amendments suggested to reform or eliminate the Electoral College than concerning any other part of the Constitution.⁵¹ As early as 1823, James Madison, famously averse to Thomas Jefferson’s suggestion that the adequacy of the Constitution should be subject to frequent examination, agreed.⁵² Mark Graber has recently noted that Robert Dale Owen suggested that a valuable way of “reconstructing” the destroyed Union would include eliminating the Electoral College.⁵³ He obviously failed. But calls for reform have never been completely stilled. The House passed, and the Senate seemed on the verge of agreeing to, a proposed amendment in 1969 that would have freed us of this terrible way of selecting Presidents. As Alex Keyssar heartbreakingly demonstrated in his own book with the plaintive title *Why Do We Still Have the Electoral*

50. Another cranky idiosyncrasy of mine is to insist that what is usually called “The American Revolution” is better classified as a secession from the British Empire. See Sanford Levinson, *Are (American) Secessionists Necessarily Revolutionaries?* 81 MD. L. REV. 217 (2021). “Revolutionaries,” I argue, wish to capture an existing central government, which in 1776 would have meant London. That was obviously not the case with Washington and those advocating what we today might call a struggle for “national liberation.” They wanted the freedom to exit an existing framework of politics while leaving King George III, tyrant though he might be, firmly in control of the government in London.

51. See JILL LEPORE, *THE PHILOSOPHY OF AMENDMENT AND THE PATTERN OF AMERICAN HISTORY* (forthcoming Sept. 2025) (on file with author).

52. See ALEXANDER KEYSSAR, *WHY DO WE STILL HAVE THE ELECTORAL COLLEGE?* 89–91 (2020).

53. Graber, who is writing a pathbreaking book on the history of the Reconstruction Amendments, notes that Owens’s suggestions received widespread newspaper coverage, including, among many others, “A Republican Form of Government” in the *Vermont Journal* on December 2, 1865, and the *Chicago Tribune* on December 1, 1865. Email from Mark Graber to Sanford Levinson, March 4, 2025, 5:53 AM.

College?, the House bill was defeated by a filibuster in the Senate led by two white supremacist senators, the South Carolina Republican Strom Thurmond and the North Carolina Democrat Sam Ervin (who, of course, later became an American hero with regard to his chairing of the Watergate Committee that exposed the perfidies of the Nixon Administration).⁵⁴ 1969 turned out to be high-water mark for efforts at reform. Quite remarkably, even after the fiascos of 2000 and 2016, not a single prominent political “leader” spent an iota of political capital in any effort to junk the Electoral College. Even in the 2024 campaign, which took place after this Symposium, vice-presidential candidate Tim Walz was seemingly forced to walk back his suggestion, during his unsuccessful campaign with Kamala Harris, that the issue demanded attention.⁵⁵

Why is that? It’s surely not because the American people, let alone anyone interested in constitutional design, approves of the Electoral College *system*. I emphasize the noun because the Electoral College includes not only the assignment of votes to the American states and the distortions attendant on that decision. It also provides for a “contingent election” should no candidate achieve the requisite majority of electoral votes to be elected. In that case, the House of Representatives, voting on a one-state, one-vote basis, would choose the President.⁵⁶ The single representative from Wyoming (or Vermont) would have more power than an evenly divided fifty-four representative delegation from California, which would have to abstain. But, of course, even if California *did* participate, its one vote would be the equal of Wyoming’s!

Every poll taken since 1944 reveals that a majority of respondents rejects the Electoral College system—for most probably without any knowledge of the “contingent election” feature.⁵⁷ Why do we still have it? The answer lies in perhaps the most truly terrible feature of the Constitution, Article V, which conveys to most contemporary students of the Constitution, whether or not “constitutional theorists,” a Dantean

54. The sad story is told in KEYSSAR, *supra* note 52, at 227–52. When visiting my class on “Reforming the United States Constitution” at the Harvard Law School in September 2024, Professor Lepore noted that some of the opposition to the 1969 amendment came from the NAACP, which believed that the location of the “African-American vote” in certain key Northern “battleground states” like New York and Illinois provided important political clout that would be lost in a single nationwide popular vote. Politics does indeed generate strange bedfellows! The arguments of both Southern white supremacists and the NAACP made sense in 1969, given their perceptions of their own political interests.

55. See Aaron Pellis, *Walz Backs off Comment that Electoral College Should Go: ‘My position Is the Campaign’s Position,’* CNN, <https://www.cnn.com/2024/10/10/politics/tim-walz-electoral-college/index.html> [https://perma.cc/XS2R-DCTF] (Oct. 10, 2024, 9:00 PM).

56. U.S. CONST. art II, § 3.

57. See LEVINSON, FRAMED, *supra* note 9, at 188.

message of “abandon all hope, ye who enter here.” We are condemned to a political hell because the Framers, in 1787, even while reforming the even more indefensible Articles of Confederation in this regard, inflicted on the future a constitution that most analysts describe as the most difficult-to-amend constitution in the entire world—and, I would point out, in the United States itself inasmuch as every single one of the fifty state constitutions that are also generally ignored by a blinkered legal academy allow easier amendment than the sclerotic document of 1787.⁵⁸ Many, of course, allow “the people” to take reform in their own hands via procedures of “direct democracy,” including the initiative and referendum. Madison, on the other hand, was unduly proud, in *Federalist* 63, of the fact that there is not a scintilla of an iota of direct democracy in the national constitution; everything, without exception, is done through “representatives.”

That means, of course, that the nature of “representative” government is the key issue in American national politics. So let me ride another hobbyhorse of mine, crankily or not. In his impassioned 1964 dissent in *Reynolds v. Sims*,⁵⁹ Justice Harlan objected that “the Fourteenth Amendment does not impose this political tenet [of equal population] on the States or authorize this Court to do so.”⁶⁰ Though the word was not in common use sixty years ago, Justice Harlan’s argument was a precursor of the “originalism” professed by the majority of Justices on the current Supreme Court. For a non-originalist like myself, that is not a serious problem. But there *is* another issue that I find even more important with regard to thinking about the implications of the Court’s purported doctrines summarized in the term “one-person/one-vote.” That is the ineluctable tension between “the equal population rule” as actually implemented by the Court, on the one hand, and the seeming description, in Chief Justice Warren’s majority opinion itself, of the modern American system of representative democracy as requiring both “majority rule” and “fair and effective representation.”⁶¹

Over two decades ago, at a similar symposium at the University of North Carolina School of Law, I submitted an essay, “One Person, One Vote: A Mantra in Need of Meaning.”⁶² I could write the identical essay today, alas, only more crankily, precisely because two further decades have elapsed without anything resembling coherent opinions by the apex

58. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (Sanford Levinson ed., 1995).

59. 377 U.S. 533 (1964).

60. *Id.* at 590 (Harlan, J., dissenting).

61. *Id.* at 565, 566.

62. Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269 (2002).

Court. I will also take the liberty of citing a second, more recent, essay of mine, “The Pedagogy of ‘Equality,’” in which my central point can cantankerously be summarized as saying that courses that assign only Supreme Court opinions on the general topic of “equality” or, even more certainly, the specific topics surrounding voting, are likely in effect to make you dumber rather than smarter if you have any interest other than brief writing and its necessity to take Supreme Court opinions with exaggerated seriousness.⁶³

The only possible defense—what criminal law theorists might call an “excuse” rather than a “justification”—of the Court’s inadequacies is that, after all, its members were all trained at law schools that made no serious attempt to include within their curricula adequately deep examination of the difficulties surrounding such essential (and essentially contested) concepts as “equality” or “democracy” or, for that matter, “representation.” How many of them (or their clerks), for example, are likely to have read Hanna Pitkin’s classic book *The Concept of Representation*?⁶⁴ Even more telling, I believe, is that what I regard as the best single essay about the implications of “equal voting,” by Jonathan Still in the journal *Ethics*,⁶⁵ remains uncited by the Court and, I strongly suspect, unassigned at any law school. Among other things, it argues that only proportional representation (as against the reliance on single-member districts mandated by Congress) would achieve the stated goals in *Reynolds*.⁶⁶ There may be good reasons for rejecting proportional representation, but the Court has never deigned to offer a serious discussion of the issues raised.⁶⁷ I note for the record that Nicholas Stephanopoulos, in his own contribution to this Symposium, makes a strong case for proportional representation.⁶⁸ Good for him! But will such desirable changes come about through “interpretation” of the present Constitution or, instead, through open, amendatory change that, practically speaking, could be achieved only via a national convention not controlled by Congress or by state legislators who prosper under the present system.

I think it is fitting, incidentally, to note that the academic obsession with abstract theories of “constitutional interpretation” requires paying

63. Sanford Levinson, *The Pedagogy of “Equality,”* 23 J. CONTEMP. LEGAL ISSUES 283 (2022).

64. HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* (1967).

65. Jonathan W. Still, *Political Equality and Election Systems*, 91 ETHICS 375 (1981).

66. *Id.* at 385.

67. See Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won’t It Go Away?* 33 UCLA L. REV. 257, 257 n.1 (1985).

68. Nicholas O. Stephanopoulos, *Ranked-List Proportional Representation*, 2025 WIS. L. REV. 561.

suitable attention to the person regarded as the most influential academic jurisprude of the late twentieth century, Ronald Dworkin. It was he, after all, who emphasized that the central task of constitutional theorists is to “take rights seriously,” which meant, practically speaking, ignoring the structural provisions of the Constitution.⁶⁹ He also posited that one should imagine legal interpretation as filtered through the eyes of a fictive single judge “Hercules” who, through diligent study of all relevant legal materials, would deduce the singular “right answer” to any and all legal conundrums.⁷⁰ As he valorized his fictive model of judicial conduct, he exhibited a certain disdain for the grubbiness of politics, which would inevitably involve compromise and deviation from philosophical principles. The judiciary should be “the forum of principle,” standing above other merely “political” institutions, in its interpretive purity.⁷¹ “Policies” or “goals” should be no part of its concern unless they were mandated by the Constitution itself. Prudential reasoning was not part of the Dworkinian plan.

My own view is that the current majority is in its own way the most “Dworkinian” Court in our history. That is not because they share Professor Dworkin’s liberal values, which they certainly do not. Rather, they appear to believe that their task is to ascertain uniquely correct answers, through the interpretive lens of “originalism” or, increasingly, “traditionalism,” and then apply them with sublime indifference to the consequences for the actual lives of Americans or the operation of our political institutions. *Dobbs*⁷² and *Bruen*,⁷³ dealing, respectively, with abortion and guns, are the most obvious example of a crazed form of conservative neo-Dworkinianism, but one can also point, say, to the “major questions doctrine.”⁷⁴ That doctrine makes a lot of sense if one presumes a truly functioning Congress; however, in the world correctly described by Mann and Ornstein,⁷⁵ it is a recipe for further disaster with regard to fending off the clear and present dangers presented by climate change.

Ineluctably connected with the notion of democracy is the mysterious notion of “popular sovereignty.” It is the most important single political idea of the past four hundred years, beginning with the work of Thomas Hobbes in *The Leviathan*, who at once valorizes the demos, with regard to authorizing the Leviathan state initially, and then quickly puts that sovereign to sleep, as it were, while leaving the

69. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1979).

70. *Id.*

71. *Id.*

72. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

73. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

74. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

75. *See supra* notes 10–13 and accompanying text.

authorized government in complete charge.⁷⁶ To put it mildly, just as is true with the broader notion of “sovereignty,”⁷⁷ the notion of “popular sovereignty” also contains a minefield of problems. Many of them have been elaborated by generations of political theorists, but a fine introduction can be found in the late Yale historian Edmund Morgan’s 1991 book *Inventing the People: The Rise of Popular Sovereignty in England and America*. So let me simply address two of them, which should interest all who describe themselves as “constitutional theorists.” The first is who, exactly, constitute “the people”?⁷⁸

The Declaration of Independence implausibly refers in its first sentence to the notion that there is “one people” who are, as Lin-Manuel Miranda would later put it, “rising up” against the British tyranny.⁷⁹ That was almost certainly not the case. Thomas Jefferson simply asserts the presumed fact rather than offering the slightest evidence for its truth. Similarly, the Constitution would later begin with the immortal words “We the People” without providing any clue as to what exactly that meant. The Framers certainly didn’t speak for all of “the people” who happened to live within the political territory denominated the United States of America. Consider only the many members of various Indigenous Nations, let alone the hundreds of thousands of enslaved persons. Indeed, the original text notoriously ignored the question as to how someone would necessarily be recognized as a “citizen” of the United States, save for those “naturalized” under whatever legislation Congress chose to pass. And, of course, the initial legislation passed in 1790 to give content to that congressional power immediately made clear that Congress wished a “whites only” country.

Roger Taney, in *Dred Scott*,⁸⁰ would notoriously say that no enslaved person—or even the free descendant of an enslaved person—was part of the American political community, even if they obviously lived within the United States. We are rightly repelled today by that description of “who we are” (or are not) as the “American people,” but it is whistling past the graveyard to pretend that Taney was unequivocally

76. See RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY* (2016). My own reflections can be found at Sanford Levinson, *Wrestling with Popular Sovereignty*, *MONTRÉAL REV.*, (Apr. 2017), <http://www.themontrealreview.com/2009/The-Sleeping-Sovereign-the-invention-of-modern-democracy.php/> [<https://perma.cc/SSN7-69RP>].

77. See DON HERZOG, *SOVEREIGNTY, R.I.P.* (2020).

78. See Jack M. Balkin & Sanford Levinson, *The Problem of “Popular” Sovereignty*, 5 *LIBERTIES* (2024), <https://libertiesjournal.com/articles/the-problem-of-popular-sovereignty/> [<https://perma.cc/27Y9-WPE5>].

79. See LIN-MANUEL MIRANDA, *My Shot, on HAMILTON: AN AMERICAN MUSICAL* (Original Broadway Cast Recording) (Warner Music 2015).

80. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

wrong in interpreting what William Lloyd Garrison, after all, described as a “covenant with death and an agreement with hell.”⁸¹ *Dred Scott*, I submit, is not demonstrably “worse” as an exercise in “constitutional interpretation” than is Joseph Story’s opinion in *Prigg v. Pennsylvania*.⁸² Some courses teach *Dred Scott*, but, I suspect, only to denounce it as what Charles Evans Hughes would later call a “self-inflicted wound,”⁸³ without genuine discussion of what might in fact be said in Taney’s behalf. A recent brief poll of my students at the Harvard Law School, where a statue of Joseph Story guards the entrance to the Law School library, indicated that none of their courses included *Prigg*. It is ideologically easier, if one is determined to promote “veneration” for the Constitution, to denounce Taney as a “judge on a rampage” than to credit the possibility that he was actually interpreting a grievously flawed Constitution, designed to maintain what Lincoln would later call a “house divided,” that included dreadful compromises relying on conscientious judges for their enforcement.⁸⁴ In 1842, the year of *Prigg*, Story wrote to a friend, “You know full well that I have ever been opposed to slavery. But I take my standard of duty as a judge from the Constitution.”⁸⁵ Is Story wrong? One might view Story in *Prigg* as saying simply that a deal is a deal. The price of achieving the Constitution in 1787 was to accommodate enslavers. *Dred Scott* is often viewed as the entry point of “originalism” into American constitutional law, but, as a matter of fact, one can make a similar argument with regard to *Prigg*. Those accused of being fugitive slaves had precious few, if any, rights that the Constitution protects. Indeed, the point of *Prigg* was to declare unconstitutional state “freedom laws” that, if enforced, might limit the ravages of the Fugitive Slave Law of 1793. If enslaved persons do in fact have any rights that others are “bound to respect,” they are certainly not elucidated in *Prigg*,

81. “A Covenant with Death and an Agreement with Hell,” MASS. HIST. SOC’Y (July 2005), <https://www.masshist.org/object-of-the-month/objects/a-covenant-with-death-and-an-agreement-with-hell-2005-07-01> [https://perma.cc/Z5Q3-JR3P].

82. 41 U.S. 539 (1842). See Sanford Levinson, *Is Dred Scott Really the Worst Opinion of All Time? Why Prigg Is Worse than Dred Scott (But Is Likely To Stay Out of the “Anti-Canon”)*, 125 HARV. L. REV. F. 23 (2011).

83. Melvin I. Urofsky, *Dred Scott Decision*, BRITANNICA, <https://www.britannica.com/event/Dred-Scott-decision#ref315149> (Feb. 27, 2025).

84. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006). Among other things, Graber argues that *Dred Scott* is defensible under any and all current theories of “constitutional interpretation.” This does not mean that Graber believes it is “correctly decided,” because it can be attacked under any and all current theories. The point, rather, is that one’s favorite theory of “constitutional interpretation” will not guarantee what I have sometimes called “happy endings.” One must in effect choose how to apply one’s favorite theory rather than to proclaim that it left one with no choice in the matter. *Id.* at 3.

85. ROBERT COVER, *JUSTICE ACCUSED* 119 (1975). See also Sanford Levinson & Mark Graber, *Justice Accused at 45: Reflections on Robert Cover’s Masterwork*, 37 TOURO L. REV. 1851, 1862 (2022).

which focused only on the rights of purported “masters” to regain their legal property.⁸⁶

Assuming, though, that we can come, even today, to a complete agreement on who “the people” are—does it include, for example those who are not themselves American citizens and “merely” legal resident of the United States, let alone the dreaded “undocumented aliens” who are the subject of Donald Trump’s wrath⁸⁷—we must also address what actual powers “we the people” possess under a theory of “popular sovereignty.” Again, there is not a single line in the U.S. Reports that is truly helpful for anyone deeply interested in the problem.

Evenwel v. Abbott,⁸⁸ which arose from my own state of Texas, challenged the state legislature’s inclusion of noncitizens when calculating the number of representatives that would be assigned to the various legislative districts in the Texas State House and Senate.⁸⁹ The challenge elicited a remarkably wooden opinion from the late Justice Ruth Bader Ginsburg that basically boiled down to the proposition that because the basis of “representation” had always been the entire populace, independent of legal status, then Texas was privileged to continue adopting that standard when apportioning seats in its state legislature. (On behalf of the Court, she read the Constitution as requiring what might be called “status indifference” when computing the denominators for representation in the House of Representatives.) Justice Samuel Alito wrote a capable sophomore-level concurrence spotting the truly complex issues involved when constructing the denominator, but basically letting it go at that.⁹⁰ One might well expect the subject to return to the Court when a state accepts Justice Alito’s invitation to construct a more restrictive denominator and thus limit the presumptive “representation” of noncitizens. In upholding such a decision, Justice Alito would no doubt draw on history and tradition for inspiration, whatever the accuracy of his reading of either.

I believe that “originalism” is profoundly anti-democratic inasmuch as it privileges the dead hand of the past. As Adrian Vermeule argues, it is a form of mindless positivism inasmuch as it ignores any considerations of “the common good” or what might simply identify as the “purposes” of the constitutional enterprise.⁹¹ But any constitutional theorists must still wrestle with the degree to which living Americans are entirely free of the dead hand. Are “we” free to ignore any and all parts of the Constitution—which, I repeat, I might well find deeply objectionable—

86. *Prigg*, 41 U.S. at 541.

87. *See, e.g., Evenwel v. Abbott*, 578 U.S. 54 (2016).

88. 578 U.S. 54 (2016).

89. *Id.* at 57.

90. *Id.* at 92.

91. *See* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

in the name of the “living hand”? Or, on the contrary, must we admit, perhaps reluctantly, that our own hands are tied by the necessity to recognize as binding, until formally amended, the parts of the text that appear to admit of no ambiguity?

As the National Constitution Center reminds us James Madison, when introducing his suggestions for what we now call The Bill of Rights, proposed that the additions begin with the following reminder: “That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.”⁹² This, of course, echoed the mighty line in the Declaration of Independence justifying the American secessionist uprising against the British crown: “[I]t is the Right of the People to alter or to abolish [existing forms of government], and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”⁹³ The Philadelphia Convention provided one possible illustration of what this meant by its flagrant ignoring of the constraint provided by the amendment provision of the Articles of Confederation, Article XIII, which required the unanimous consent of the state legislatures of the then-thirteen members of the Union. In what is perhaps the most important of the eighty-five *Federalist Papers*, *Federalist* 40—though, sadly, it is almost never assigned to students—Madison justified this disregard of existing law by pointing to the “exigencies” facing the country and the consequent necessity to ignore the rigid “forms” of the law in favor of acting substantively to do what was necessary to respond to the situation.⁹⁴

So, one way of imagining our present situation is to ask whether the United States now is faced with such “exigencies” or “emergencies” as to justify breaking through existing legal forms, including, most obviously, those set out in Article V that functionally render amendment nearly impossible. All political theorists are familiar with the contrast between the so-called *constituent power* and the *constituted power* that is traced to the constituent power. One may believe, as I do, that the Senate is indeed “evil” and that even the delay of inauguration of a new President until January 20, as required by the Twentieth Amendment, is a mixture of stupidity and potential danger. But does that license us to ignore them or to support the constitutionality of congressional legislation that would award additional seats in the Senate to all large states and move up inauguration, after abolishing the Electoral College, to, say,

92. NCC Staff, *On This Day: James Madison Introduces the Bill of Rights*, NAT'L CONST. CNTR. (June 8, 2023), <https://constitutioncenter.org/blog/on-this-day-james-madison-introduces-the-bill-of-rights> [https://perma.cc/D9C8-2QA4].

93. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

94. THE FEDERALIST NO. 40, *supra* note 18, at 198, 203 (James Madison).

December 1? (Indeed, is it even clear that Congress has the power to admit the District of Columbia to statehood—and therefore grant it two Senators—without going through the almost certainly fruitless procedures set out in Article V?) If we have reservations at least to some of these proposals, then I think that reflects the fact that we do believe that decisions made in 1787, even if indefensible in today’s world, nonetheless control our fate, and that, of course, includes the process of amendment as set out in Article V itself. There is something truly frightening about adopting in full the near-insouciance about legal limitations set out in *Federalist 40*, even if one believes, as I do, that that may also be the most important single lesson taught us by those we call, and many revere, as “the Framers.”

So that brings me to Professor Foley’s excellent paper, in which he presents a dazzling interpretation of what James Madison might well be taken to mean in his question to achieve “the real preference of the voters.”⁹⁵ No one in the country has thought longer and harder than Professor Foley about such problems, and his proposals for a reformed process of choosing our President are obviously well worth taking with consummate seriousness. But, as he himself emphasizes at the very outset of his paper, we must ask ourselves “what does it mean to have a democracy in the United States?” Yet he goes on, only a page later, to note that the Supreme Court, while positing the importance of “electoral equality” as a constitutional norm, has “floundered” with regard to explaining what it actually might mean (and, concomitantly, why the rest of us should necessarily agree with whatever it says about the matter).⁹⁶ He particularly notes that the Court “was unable to explain coherently” in its 2019 decision upholding ruthless partisan gerrymandering—something that Wisconsinites are particularly familiar with—why that was consistent with the norm.⁹⁷ Perhaps one should read *Rucho v. Common Cause* simply as a statement that the Court is wholly without the institutional capacity to correct a clear constitutional wrong—so much for the exaggerated promise of *Marbury v. Madison* that for every deprivation of a right there will be an adequate legal remedy. That would be consistent with the Court’s opinion in the 1903 case of *Giles v. Harris*,⁹⁸ where the majority in effect admitted that Alabama was in open defiance of the Fifteenth Amendment but stated, in an opinion by Justice Holmes, that there was nothing it could really be expected to do.⁹⁹ That should certainly interest “constitutional theorists” who continue to rely

95. Edward B. Foley, “The Real Preference of Voters”: Madison’s Idea of a Top Three Election and The Present Necessity of Reform, 2025 WIS. L. REV. 401.

96. *Id.* at 535.

97. *Id.*

98. 189 U.S. 475 (1903).

99. *Id.* at 488.

on the judiciary to serve as “the palladium of liberty” or to “take rights seriously.”

So the sad question to address to Professor Foley is what exactly he expects to happen after the publication of his essay and the forthcoming, undoubtedly excellent book that it will be part of. (A similar question, of course, can be directed at Professor Stephanopoulos.) What has turned me into a crank is precisely the fact that no significant political leader, especially associated with “the left,” however loosely defined, has been willing to suggest that constitutional reform may be required in order to achieve the inspiring vision set out in the Preamble to the Constitution. It is a strength of Professor Foley’s proposals that they would not in fact require constitutional amendment in the same way that even moving Inauguration Day up to January 15 from January 20 would. Getting rid of the exclusive reliance on single-member districts, as Professor Stephanopoulos emphasizes, also needs no constitutional amendment given that at the national level it is the result of an 1842 Act of Congress reaffirmed in 1969.¹⁰⁰ But hell will freeze over before the House adopts any “corrective” legislation that would so completely disrupt the institutional status quo.

But that only forces us to confront the ominous questions raised by Mann and Ornstein back in 2008 and then 2012, let alone other more recent books, with suitably ominous titles, published by Steven Levitsky and Daniel Ziblatt¹⁰¹ or, most recently, by University of California, Berkley Law School Dean Erwin Chemerinsky.¹⁰² Is Congress so irretrievably broken—and our political parties so fundamentally incapable of genuine governance—that even Professor Foley, a far more “moderate” figure than I am, inevitably appears to be utopian in his hopes for genuine reform? He is far less cantankerous and cranky, but will that mean that he will be any more effective in his role as another Paul Revere summoning us to save our democracy?

I will conclude by quoting, as I often do, what I call “Roche’s dictum,” named after the 1960s political scientist John P. Roche. Although I cannot find written proof, I would swear under oath that I heard him say, at a meeting of the American Political Science Association sometime in the 1960s, that “power corrupts, and *the prospect of losing power corrupts absolutely*.” I think he is correct. One might well view the current majority on the Supreme Court as self-aggrandizing in the service of retaining power against what they fear is an oncoming liberal

100. Stephanopoulos, *supra* note 68, at 586.

101. See LEVITSKY & ZIBLATT, *supra* note 14.

102. ERWIN CHEMERINSKY, NO DEMOCRACY LASTS FOREVER: HOW THE CONSTITUTION THREATENS THE UNITED STATES (2024).

onslaught. This would conform with Ran Hirschl's cautions about "juristocracy."¹⁰³

Still, the most fundamental corruption in the present political order has little to do with the failure of judges to adopt a better way of interpreting the Constitution, though I happily agree that it would be highly desirable for them to do so. But alleviation of many of our discontents requires comprehensive congressional legislation and not only interpretations of existing statutes by members of the administrative state (whose powers, of course, are being clipped by the current Court). Is it likely that Congress will in fact summon up the political energies and will to act or will it continue to be "the broken branch" whose members are far more skilled in political posturing and, ultimately, gaining political contributions from those benefitting from the status quo or amassing fortunes as lobbyists or cable news commentators, than acting as genuine legislators?

Sixty years ago a great University of Wisconsin political scientist, Murray Edelman, wrote a book on *The Symbolic Uses of Politics*, about the all-important differences between posturing—pandering to one's constituents by suggesting that proffered legislation would in fact address their actual concerns—and achieving genuine, perhaps costly and controversial, change that might put one's political career at stake.¹⁰⁴ At that time, ironically or not, Lyndon Johnson had the political skills, and the Democratic Party had the votes, to pass transformative legislation that certainly went far beyond posturing and symbolism. But that is not the world we live in today. As of the end of February 2025, a hefty majority of the country "disapproves" of Congress, which means, almost by definition, that they despair of the possibility that Congress will in fact respond to whatever the respondents believe are the most important problems facing the country.¹⁰⁵ It is, no doubt, this disillusionment with Congress that helps to explain popular support for ever-greater exercises of presidential power and for the demagoguery of Donald J. ("I alone can fix it") Trump.¹⁰⁶

One can hope that there will be some kind of happy political ending, that Presidents and legislators alike will recognize that a number of

103. See RAN HIRSCHL, *TOWARDS JURISTOCRACY* (2007).

104. MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964).

105. *Congressional Job Approval*, REALCLEAR POLLING, <https://www.realclearpolling.com/polls/approval/congressional/approval-rating> [<https://perma.cc/M2EX-5XXE>] (aggregating polls taken between December 5, 2024, and February 25, 2025).

106. See, e.g., Yoni Appelbaum, 'I Alone Can Fix It,' ATLANTIC, (July 21, 2016), <https://www.theatlantic.com/politics/archive/2016/07/trump-rnc-speech-alone-fix-it/492557/>; see also CAROL LEONNIG & PHILIP RUCKER, *I ALONE CAN FIX IT: DONALD J. TRUMP'S CATASTROPHIC FINAL YEAR* (2021). One can only wonder what the Pulitzer Prize-winning journalists think of the beginning of Trump's second term as President.

political asteroids are in fact heading our way and that legislation might help avoid catastrophes. But who can be truly optimistic that that will be the case, given both a degraded political culture and a sclerotic set of formal political institutions? And can one have any confidence that the legal academy, mired as it is in focusing almost exclusively on the handiwork of the Supreme Court, will offer truly cogent diagnoses or treatment plans for our ills? I can only hope that my cantankerous crankiness in fact is blinding me to the prospects for a better future for my grandchildren.