
**WHAT ARE WE TO DO ABOUT DYSFUNCTION?
REFLECTIONS ON STRUCTURAL CONSTITUTIONAL
CHANGE AND THE IRRELEVANCE OF CLEVER
LAWYERING**

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The central topic of this Symposium is the “political dysfunction” that, for many – though not all – of us characterizes the contemporary American political system. Indeed, at the present time it has become almost a cliché of political analysis across the political spectrum that the national government, particularly Congress, has become seriously dysfunctional. Consider the source of the following comment: “I saw most of Congress as uncivil, incompetent at fulfilling their basic constitutional responsibilities (such as timely appropriations), micromanagerial, parochial, hypocritical, egotistical, thin-skinned and prone to put self (and re-election) before country.”¹ Though one might believe that it might come from someone identified either with the ideological right or left, it was actually written by Robert Gates, who served as Secretary of Defense in both the George W. Bush and Barack H. Obama Administrations. Similarly, it was the relatively moderate Republican Senator George Vukovich, explaining why he was retiring from that body after twelve years, who declared, “I think we have to blow up the place.”² No doubt he did not mean to be taken literally, but it nonetheless captures dramatically his sense of alienation from the Senate.

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¹ Michael Gerson, *It's the Policy, Not the Book*, WASH. POST, Jan. 17, 2014, at A15.

² Dana Milbank, *A Mainstream Republican's Glum Farewell*, WASH. POST, Dec. 7, 2010, at A2. More recently, John Dingell, announcing his retirement after serving thirty terms in the House of Representatives, declared that “I find serving in the House to be obnoxious.” Carl Hulse & Ashley Parker, *At 87, the Longest-Serving Member of Congress Says Enough Is Enough*, N.Y. TIMES, Feb. 25, 2014, at A16. The story goes on to quote David Goldstone, a former Republican staff member who is now director of government affairs for the National Resources Defense Council:

The truly distressing thing about these folks leaving is that they're the ones who know how to negotiate, know how to legislate, know how to get things done. . . . Congress is increasingly left with people who not only don't know how to do those things; they don't know that they can be done.

Id.

As I write these remarks at the beginning of March 2014, the summation of polls taken in January and February reveals that more than four in five Americans “disapprove” of the Congress of the United States.³ Just as relevant is that approximately sixty-three percent believe that the country is heading in the wrong direction.⁴ Who really believes that the national government is capable of responding sufficiently to whatever any given reader might believe are the central challenges facing the country today? To be sure, different challenges will be identified, depending on one’s place along the political spectrum, but what unites both Tea Party and remnants of the various “occupy” movements is the belief that Washington is incapable of taking effective action. Elections are increasingly dismissed as near irrelevant inasmuch as their primary function seems to be rearranging deck chairs on the Titanic rather than enabling the creation of a “government” capable of taking decisive actions.

Rightly or wrongly, there appear to be ever-fewer observers who find my friend Shep Melnick’s “not to worry” analysis compelling, even if he is undoubtedly correct that it is a mistake to view the government, broadly defined, as incapable of taking action with regard to at least some important matters.⁵ One problem, though, with simply counting up numbers of bills passed, even up to 2010, when the Obama Administration was able to pass its signature Affordable Care Act, is that such analyses ignore almost completely the *quality* of the legislation that is passed, which to many political scientists seems beyond their job description. With regard to the Affordable Care Act in particular, almost everyone, regardless of ideological position, agrees that it is a truly flawed piece of legislation.⁶ Those who support it, as I do, explain that it was “the best” that could emerge from Congress given the ruthless use of the filibuster by the Republican minority in the Senate, itself a product of the belief that it was essential to deprive a Democratic President, who would almost certainly run for re-election, of anything that could be sold to the electorate as an “accomplishment.” This meant that the legislation was ultimately passed through use of a “reconciliation” procedure that prevented

³ *Congressional Job Approval*, REAL CLEAR POL., http://www.realclearpolitics.com/epolls/other/congressional_job_approval-903.html (last visited Mar. 4, 2014), *archived at* <http://perma.cc/A4G-KK29> (finding that eighty-one percent of Americans disapproved of Congress’s job performance as of February 24, 2014).

⁴ *Direction of Country*, REAL CLEAR POL., http://www.realclearpolitics.com/epolls/other/direction_of_country-902.html (last visited Mar. 4, 2014), *archived at* <http://perma.cc/7ULC-5UPD> (finding that 63.2% of Americans believed the country was on the “wrong track” as of February 22, 2014).

⁵ R. Shep Melnick, *The Conventional Misdiagnosis: Why “Gridlock” Is Not Our Central Problem and Constitutional Revision Is Not the Solution*, 94 B.U. L. REV. 767 (2014) (arguing that “the constantly repeated ‘gridlock’ meme misdiagnoses our contemporary ills and as a result suggests reforms that are likely to worsen our political health”).

⁶ *See, e.g.*, Editorial, *Health-Care Design Flaws*, WASH. POST, Dec. 14, 2013, at A18.

intelligent amendments from being offered at the time of final passage by the Senate.

Still, diagnosis of the problem scarcely provides a self-evident solution. More particularly, even if one agrees that something has gone dangerously amiss in the American constitutional order, the central question is the one so memorably asked by Lenin: “What is to be done?”⁷ His question was surely the correct one, but his own solution to the problems posed by early-twentieth-century dysfunctionality in Russia turned out to be an utter disaster, which only underscores the point that diagnosis is not enough. What *are* the causes of our present discontents and, concomitantly, what might begin alleviating them?

It is obvious that the causes, to the extent we can identify them at all, are multiple. Indeed, a never-ending debate, from the time I entered graduate school in political science a full half-century ago, is the relative importance of political culture, on the one hand, and institutions, on the other – not to mention other key variables ranging from the state of the economy to the challenges posed by various demographics of any given population. There is something deeply resonant about the presence of Sidney Verba at this splendid Symposium, inasmuch as his book with Gabriel Almond, *The Civic Culture*, became the central text for those who basically denigrated the importance of institutional structures in favor of looking instead at the cultural values and enacted behaviors of different countries, such as participation in a variety of civic organizations.⁸ One could certainly infer from at least some influential political scientists of the period that a healthy civic culture could operate under practically any constitutional structure, whereas a truly deficient one could not be saved even by the ostensibly best-designed one. Robert Putnam is probably the best-known contemporary political scientist who continues to emphasize the crucial role played by political culture.⁹ The obsession with constitutions and “constitutional law” was treated as the professional deformation of legal academics even as it has come close to disappearing from most major departments of political science, including, notably, Harvard’s.

It is therefore not enough to argue against Professor Melnick that the American political system is fundamentally broken. Obviously, if one thinks it is not, then it does not need fixing, but to perceive it as broken does not begin to explain either why that is the case or what might be done to fix it. Surely

⁷ See V. I. LENIN, *WHAT IS TO BE DONE?* (S.V. Utechin ed., S.V. & Patricia Utechin trans., 1963).

⁸ See GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE* (1963).

⁹ See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 347 (2000) (suggesting that “moralistic” states with “merit systems governing the hiring of governmental employees” tend to be less corrupt); ROBERT D. PUTNAM ET AL., *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 167 (1993) (“Success in overcoming dilemmas of collective action and the self-defeating opportunism that they spawn depends on the broader social context Voluntary cooperation is easier in a community that has inherited a substantial stock of social capital, in the form of norms of reciprocity and networks of civic engagement.”).

those who emphasize the importance of noninstitutional aspects of the American gestalt are correct. Talk radio, cable news, and the decline of what we had come to think of in the mid-twentieth century as the “traditional” mainstream media have surely played their own part, not to mention the role played by the ever-increasing ability to fund candidacies and engage in often ruthlessly negative advertising, ostensibly without the cooperation of the candidate who will benefit from such advertising, against targeted candidates.¹⁰ And, of course, there is a legion of critics of the “polarization” in American politics that is more pronounced than at any time since the outbreak of civil war in 1861.¹¹ I am more than willing to believe that these and other factors explain at least eighty percent – perhaps even more – of the dysfunctionality. That being said (and conceded) I continue to believe that at least some of the explanation lies in particular features of the United States Constitution.

It may well be true that these features would be relatively unimportant were other aspects of the American social and political order functioning better (however one defines that). One can often defer fixing a car’s only somewhat-defective brakes if, for example, the terrain is generally flat; when one arrives at a steep hill, one side of which is a cliff going down to the ocean, however, the driver (and passengers) may well regret putting off the what now seem like necessary repairs. My own view is that the Constitution is long overdue for a “trip to the shop,” as it were, for a variety of what I believe to be highly desirable, and in some cases perhaps absolutely necessary, repairs. Let me elaborate on both of these points.

First, as to what might be termed “blaming the Constitution.” I have now written two books¹² setting out what might be termed my “bill of particulars” with regard to the multiple deficiencies of the 1787 Constitution that, to an almost astonishing extent, continues to structure our polity. Only five

¹⁰ See, e.g., LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS – AND A PLAN TO STOP IT* 120-21 (2011) (discussing methods of campaign financing and their ability to distort policy).

¹¹ MICKEY EDWARDS, *THE PARTIES VERSUS THE PEOPLE: HOW TO TURN REPUBLICANS AND DEMOCRATS INTO AMERICANS*, at xiii (2012) (“To the extent that to be polarized is to inhabit the extreme reaches of a viewpoint, it is clear that the greater degree of polarization . . . the harder it will be to come together in the national interest.”); see, e.g., 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* 130 (2012) (“The extreme and asymmetric partisan polarization that has evolved over several decades, initially reflecting increasing ideological differences but then extending well beyond issues that ordinarily divide the parties to advance strategic electoral interests, fits uneasily with a set of governing institutions that puts up substantial barriers to majority rule.”).

¹² SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 385-93 (2012) (suggesting that the Constitution’s dysfunction renders America “ungovernable”); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 167 (2006) [hereinafter LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*] (“[O]ur Constitution is sufficiently defective to warrant significant revision and repair.”).

amendments touch on basic structures – the Twelfth, Seventeenth, Twentieth, Twenty-Second, and Twenty-Fifth Amendments; even if one concedes the genuine importance of the Seventeenth and Twenty-Second Amendments, it is hard to describe either of them as truly transformative. Most states moved to a de facto popular election of senators even before the Seventeenth Amendment required popular elections, and the two-term limit for Presidents could be described as an unwritten convention of our constitutional order that, when transgressed by President Franklin Delano Roosevelt, was changed into a decidedly written limitation. But the decisions made in Philadelphia in 1787 to adopt bicameralism (or, indeed, with the presidential veto, tricameralism); to give small states outrageously disproportionate power in the Senate; to reject nationwide popular election of the President in favor of the byzantine electoral college; to adopt particular fixed terms for all federal elected officials; and to burden formal constitutional amendment with a variety of near-insurmountable hurdles, certainly continue to establish the setting within which our polity operates.¹³

In my first book, *Our Undemocratic Constitution*, I establish, at least to my satisfaction, that these features of the Constitution violate almost any plausible twenty-first century notion about “democracy” and the requirements of a “democratic” political system.¹⁴ But I have also been convinced, in part because of the response to that book, that most people really do not care about the democratic bona fides of the United States Constitution. The discussion about “democracy” is treated as a basically academic exercise, in the pejorative sense of “academic,” focusing exclusively on *inputs* into the policymaking process, whereas most people really care far more about *outputs*. Who cares if legislation is created through a process equivalent to sausage making if the sausage itself is tasty and, perhaps, even nutritious? There may be no necessary connection between government *by* the people and government *for* the people. If one can get the latter without the burdens of actually having to participate in the time-consuming activities linked especially with a civic republican conception of political life, then all the better, at least from one perspective of political liberalism. Tending one’s own garden and pursuing one’s own private dreams of commercial “success” take precedence over concern for the public weal.¹⁵ Public well-being can safely be left to political elites and others who,

¹³ In a recent colloquy with Harvard Law School Professor Vicki Jackson, who argued that it is a mistake to suggest that it is, as a practical matter, “impossible” to amend the U.S. Constitution, I agreed that “impossible” may be too strong a term, but that one might still view Article V as the equivalent of Mount Everest. That is, a highly skilled mountaineer can in fact get to the top, but, all too often, only at the risk of his or her life. Even if one replaces Mount Everest with Mount McKinley, Mount Kilimanjaro, or a Swiss Alp, we are still talking about something decidedly different from Pike’s Peak, where one can now simply drive to the top.

¹⁴ See LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*, *supra* note 12.

¹⁵ See, e.g., STEPHEN L. ELKIN, *RECONSTRUCTING THE COMMERCIAL REPUBLIC* 7 (2006) (advocating for a “republican government . . . combined with a business enterprise system

for whatever idiosyncratic reasons, really care about what Madison and others referred to as “public happiness.”¹⁶

As indicated by the subtitle’s reference to our “crisis of governance,” my next book shifts its emphasis from a simple demonstration that the Constitution is undemocratic – even in important ways antidemocratic – to an argument that its institutional structures help to account for the remarkably widespread discontent about the outputs generated by the national government. Still, as already suggested, how does one demonstrate that it is the Constitution, and not other features of the American political order, that has led us to our own particular winter of discontents? And even if one agrees that the Constitution bears *some* responsibility, the vital question is “how much”?

Given that the claim about constitutional significance is ultimately an *empirical* one, the all-important question becomes: Who bears the burden of proof? All lawyers know that many cases are won or lost the moment one answers that question. One of the realities of American political culture is that there is what I regard as a ridiculous and unfounded “veneration” for the United States Constitution that leads to a wild overestimation of its affirmative importance in our national history. We take largely on faith our widespread belief that the Constitution is not only significant, but also, with rare exceptions, good. It may be worth contrasting this with our similar faith that the Articles of Confederation were very bad indeed, sufficiently so that the delegates in Philadelphia in 1787 were amply justified not only in going well beyond the authority given them by Congress merely to “revise” the Articles, but, more importantly, also to ignore the seemingly stringent requirement of Article XIII that any amendment of the Articles be agreed to by the unanimous consent of all thirteen state legislatures. Perhaps the Articles really were terrible and merited their dismissive treatment, but I dare say that most of us have scarcely delved into a full empirical examination of whether the admitted problems of the mid-1780s were caused exclusively, or even substantially, by the Articles or, instead, by other aspects of American social and political reality. And, even if one admits, as seems altogether plausible, that the Articles were defective, did repair necessitate ruthlessly scrapping them and replacing them with brand new structures? Perhaps the answer to this is yes as well, which is fine with me. The real point is that we should at least consider the possibility that 225 years later, the United States Constitution has itself become fundamentally defective and warrants some of the same unsentimental scrutiny that the Articles received from those we now describe (and often revere) as the Framers of our political system.

But, especially for those few of us who advocate a new constitutional convention, the central question is surely: Why is a convention needed instead of relying on what we can now describe as “traditional” modes of quasi-

that has a substantial private component” in order to achieve Americans’ aspirational republic).

¹⁶ See, e.g., THE FEDERALIST NO. 14, at 99 (James Madison) (Clinton Rossiter ed., 2003).

amendatory change outside the boundaries of Article V?¹⁷ There are many examples of what may well be regarded as non–Article V constitutional amendments; consider only the implications of the Supreme Court’s ruling in *Baker v. Carr*¹⁸ and then, even more so, *Reynolds v. Sims*,¹⁹ that took from states what had been regarded as their traditional power to set the boundaries of legislative districts in whatever manner they wished. So it is easily possible that one might concede that aspects of the American constitutional system are broken, but still believe that nothing so drastic as a constitutional convention – or, possibly, even an Article V constitutional amendment – is necessary to fix it. My colleague Lucas Powe has recently referred to the October 1963 term of the Supreme Court as “the second American Constitutional Convention.”²⁰

So let me proceed to this second part of my remarks – defending the necessity of a constitutional convention – in an indirect manner, by reflecting on a posthumous piece by Professor Ronald Dworkin, recently published in the *New York Review of Books* under the title “Law from the Inside Out.”²¹ In it Dworkin offers, among other things, a brief overview of his own career.²² It was obviously an unusually illustrious one, celebrated at an earlier iteration of one of these Boston University School of Law symposia.²³ We will no doubt be assessing the strengths and weaknesses of Dworkin’s approach to constitutional interpretation for many years to come. One important question is

¹⁷ See, e.g., Bruce Ackerman, *Higher Lawmaking*, in RESPONDING TO IMPERFECTION 63, 86 (Sanford Levinson ed., 1995) (“[H]ad they chose to play punctiliously by the rules of Article V, Reconstruction Republicans and New Deal Democrats confronted the clear and present danger that their long and successful struggle . . . for fundamental change would be stifled by legalistic nitpicking.”); see also 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 7 (1991) (arguing that “constitutional politics” is a “series of political movements”); STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM 27-28 (1996) (discussing changes to the Constitution made outside of the Article V context); Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change*, in RESPONDING TO IMPERFECTION, *supra*, at 13, 36 (arguing that limiting constitutional amendments to Article V is “simply wrong”).

¹⁸ 369 U.S. 186, 237 (1962) (concluding that equal protection claims arising out of state redistricting “present a justiciable constitutional cause of action”).

¹⁹ 377 U.S. 533, 566-67 (1964) (“Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.”).

²⁰ L.A. Powe, Jr., *October Term 1963: “The Second American Constitutional Convention,”* 38 J. SUPREME CT. HIST. 194, 194 (2013).

²¹ Ronald Dworkin, *Law from the Inside Out*, N.Y. REV. BOOKS, Nov. 7, 2013, at 54, 54-55 (discussing Professor Dworkin’s career and synthesizing aspects of his value-driven interpretative theory).

²² *Id.*

²³ See Justice for Hedgehogs: *A Conference on Ronald Dworkin’s Forthcoming Book*, 90 B.U. L. REV. 465 (2010).

the extent to which a sufficiently inspired Herculean judge could at least transform, and perhaps even amend, existing constitutions through dazzling feats of interpretive prowess.

I want to set the stage for my own further remarks by focusing on one aspect of Dworkin's self-description. Not to put too fine a point on it, I view it as exemplifying a basic deficiency, perhaps even a pathology, in the way that legal academics have come to define the field of "constitutional law" and, concomitantly, teach the subject to their students. More particularly, I want to argue that the fixation on "constitutional interpretation," whether one is justice- or common-good-seeking like Jim Fleming or Sot Barber or a full-throated originalist like Gary Lawson (or any variety of interpreter in between), makes it difficult, if not impossible, to appreciate the full dimensions of the subject we address on this panel. First, though, let me offer Dworkin's description of his own career:

When I left Wall Street to join a law school faculty, I took up a branch of law – constitutional law – that is in the United States of immediate and capital political importance. Our Constitution sets out individual rights that it declares immune from government violation. That means that even a democratically elected parliament, representing a majority opinion, has no legal power to abridge the rights the Constitution declares. But it declares these individual rights in very abstract language, often in the language of abstract moral principle. It declares, for example, that government shall not deny the freedom of speech, or impose cruel punishments, or deprive anyone of life, liberty, or property without due process or law, or of the equal protection of the law.

The Supreme Court has the final word on how these abstract clauses will be interpreted, and a great many of the most consequential political decisions taken in the United States over its history were decisions of that Court. The terrible Civil War was in part provoked by the Supreme Court's decision that slaves were property and had no constitutional rights; racial justice was severely damaged, after that war, by the Court's decision that racially segregated public schools and other facilities did not deny equal protection of the law; a good deal of Franklin Roosevelt's progressive economic legislation was declared unconstitutional because it invaded property rights and so denied due process. These were the bad decisions that everyone now regrets. There have been very good decisions, too: in 1954 the Court, reversing its earlier bad decision, declared that segregated schools were inherently unequal

It is therefore a crucial question how courts should interpret the abstract constitutional language: What makes a particular reading of that language correct or incorrect?²⁴

²⁴ Dworkin, *supra* note 21, at 54.

There is so much that could be said about these brief excerpts. Dworkin's assignment to the United States Supreme Court of "the final word on how these abstract clauses will be interpreted" is debatable on both empirical and normative grounds, not to mention in tension with some of his own writing on civil disobedience.²⁵ But this juriscentric view of "constitutional law" is of course congruent with his remarkably Court-focused overview of American history. In no serious sense was the Civil War provoked by *Dred Scott's* reaffirmation of the basic point of *Prigg v. Pennsylvania*,²⁶ that slaves were property with no constitutional rights of their own; to be sure, it did not help that Justice Taney's opinion appeared to reject the possibility of Senator Stephen A. Douglas's notion of "popular sovereignty" that would allow settlers in a territory, even before statehood, to bar slavery. *That* feature of *Dred Scott* may have helped lead to the split within the Democratic Party that enabled President Lincoln's election with only 39.8% of the popular vote, though it receives far less attention than the Court's notorious exclusion of blacks from the American political community. The Court's egregious decision in *Plessy* confirmed the return of white hegemony in the South that was the meaning of the Compromise of 1877 and its aftermath; it could scarcely have been a surprise to anyone familiar with Supreme Court jurisprudence of the time.²⁷ And so on. It may be unfair, though, to assess Dworkin's talents as an historian inasmuch as he never claimed to be one. Fortunately, for our purposes, all of this is irrelevant.

What *is* relevant is Dworkin's identification of the United States Constitution – and perhaps of *any* constitution – with declarations of individual rights that are ostensibly protected against governmental override. I suspect that for most people today, this just *is* what constitutions are about. *All* constitutions worth the name are basically *liberal* constitutions. Besides making it difficult to know what to do with illiberal constitutions,²⁸ this also invites confusion about even liberal constitutions inasmuch as we identify only one part of such constitutions as their whole. It also elides determining what may be most important about written constitutions. It is a cliché that one does

²⁵ See, e.g., SANFORD LEVINSON, CONSTITUTIONAL FAITH 46-47 (1988) (discussing Dworkin as a "constitutional protestant").

²⁶ 41 U.S. 539, 574 (1842) (reasoning that the Constitution forbids states from "discharg[ing] a bonâ fide fugitive from labour from that service which he owes under the laws of the state from whence he fled").

²⁷ See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 16 (2004) ("The little that is known about the racial views of the justices on the *Plessy* Court suggests little deviation from dominant public opinion.").

²⁸ See, e.g., CONSTITUTIONS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Alberto Simpser eds., 2014) (comprising a collection of articles examining constitutions in authoritarian regimes); Li-Ann Thio, *Constitutionalism in Illiberal Polities*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 133, 138-47 (Michel Rosenfeld & András Sajó eds., 2012) (examining "illiberal constitutionalisms").

not need a written constitution in order to partake of “constitutionalism,” and one obvious question is: What is gained by writing things down instead of relying on unwritten conventions? Can the answer really lie in the importance of specifying the existence of “individual rights” – or for that matter, even of “states rights” in a strongly federal constitutional order?

It is not, to be sure, that the United States Constitution – like almost all modern constitutions – is lacking in such declarations, but they do not constitute the entirety of what is important about constitutions, especially if we are interested in the degree to which specific constitutions are functional or dysfunctional with regard to announced objectives. I have recently offered the pragmatic distinction, with regard to the United States Constitution, between what I call the “Constitution of Conversation” and the “Constitution of Settlement.” Dworkin’s Constitution just *is* the Constitution of Conversation, that is, the “abstract” language that generates the obsession with developing techniques of “constitutional interpretation” that can distinguish between “correct or incorrect” views of the document and, presumably, lead even those who are disappointed in the specific result to agree that it represents a “correct” view of the law. If they have a beef, that is, it is with the imperfect law rather than with the impersonal agents of the law who are faithfully interpreting and enforcing it. Whether this conception of the judge as “faithful agent” really makes sense has been, of course, the central question of American constitutional theory at least since Oliver Wendell Holmes’s lectures on the common law and then his lecture, delivered in 1897 at the Boston University School of Law, on “The Path of the Law.”²⁹

It would be foolish to dismiss the reality and importance of the Constitution of Conversation. I want to insist, however, on the at least equal importance of the accompanying Constitution of Settlement, about which, to my knowledge, Ronald Dworkin never had anything to say. That Constitution consists of a variety of what are widely thought to be intellectually unchallenging sentences or clauses establishing basic institutional structures. My own view is that the Constitution of Settlement is more important than the Constitution of Conversation if we want to understand the operating realities of any of our given constitutional orders throughout our history. In our own time, I believe that it is the Constitution of Settlement that helps to account for the dysfunctionality of the American political system and, therefore, of the accompanying discontent and alienation from the system. The central question before us though, is whether the Constitution makes it more or less likely that these discontents will continue to erode further a basic trust that the national government is capable of responding adequately to *any* of the basic challenges facing the country – and, therefore, will likely move us ever farther from the goals enunciated in the Preamble, not to mention receiving what we might

²⁹ O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) (arguing that law is “nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court”).

have thought were the protections guaranteed by the liberal provisions of the Bill of Rights.

If, as I believe, those structure *do* play some explanatory role in our discontents, then I believe that the Dworkinian enterprise of clever, even brilliant, lawyering dedicated to mining constitutional abstractions is almost entirely irrelevant and, indeed, detrimental to the extent that it encourages us to fixate on such lawyering. The questions posed by the Constitution of Settlement are *not* ones of “meaning” that require interpretive facility. Save in the realm of the highest of high theory seminars, the clauses of the Constitution of Settlement appear impervious to “interpretation” precisely because they are close to “self-evident” in their meaning. What part of “two senators,” “two years,” “four years,” “six years,” “January 20,” “two-thirds,” or “three-quarters” do we not understand or, more to the point, put into intellectual play? To be sure, these clauses very much *do* invite debate, but the debate involves not their “meaning,” but rather their *wisdom*. Are we as a political order well served by particular elements of the Constitution of Settlement, and if the answer is, as I believe is the case, a resounding negative, then what is to be done? Do we put our minds as lawyers to crafting arguments that say aspects of the Constitution are themselves “unconstitutional” (because, say, they violate any cogent twenty-first-century notion of a Republican Form of Government or make far more difficult the Preamble’s directive that we “establish Justice”)? Or must we instead speak as citizens and suggest that the Constitution must be formally amended, with all of the difficulties that entails inasmuch as the worst single provision of the Constitution of Settlement almost certainly is Article V itself?

James Madison famously dismissed many of the provisions to which Ronald Dworkin devoted much of his writing as “parchment barriers,” precisely because, when push came to shove, they would *not* withstand the pressures of significant political movements.³⁰ That obviously was the meaning of the Philadelphia Convention itself, in which Article XIII was rendered irrelevant. It may be worth noting as well that Article XIII was negated *not* by clever lawyerly argument about its meaning, but, rather, by appeals to the “exigencies” of the current (1787) situation and the duty in effect to ignore the rules laid down.

Returning, though, to Herculean lawyering, we should recognize the fact, regrettable to some of us and pleasing to at least some other readers, that Dworkin was more often than not in dissent, as it were, from opinions of the United States Supreme Court, including, notably, *Citizens United v. FEC*.³¹

³⁰ See, e.g., THE FEDERALIST NO. 48, *supra* note 16, at 305 (James Madison) (“Will it be sufficient to mark, with precision, the boundaries of these departments in the constitution of government, and to trust to these parchment barriers against the encroaching spirit of power?”).

³¹ 558 U.S. 310, 319 (2010) (“The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech

The dismaying reality is that through most of its history the Court has been more than happy to legitimize the agendas of Presidents and Congresses rather than to stand firmly against them in the name of the ostensibly one-true meaning of the Constitution. This is surely the message of what remains the single most important decision – and opinion – of the Court in our entire history, which is *McCulloch v. Maryland*.³² Why would one expect a judiciary chosen by political elites with their own agendas to stand firm against them? Or to take a slightly different tack, why would one expect a judiciary that has an acute sense of its own institutional interests to pick fights that it either could not win or where “winning” might appear to be Pyrrhic? This may be one of the meanings of the *Sebelius* decision itself, in which the Court indeed legitimized, even if only by the margin of a single vote, President Obama’s signature legislative accomplishment. The Constitution of Conversation, whether we are referring to the Bill of Rights or the panoply of issues raised by the assignment of powers to Congress in Article I, Section 8, can be (and *has* been) made to mean practically anything. The explanation of any given decision or set of decisions, especially at the level of the Supreme Court, inevitably lies in a mixture of the “high constitutional politics” of the given adjudicators plus the implications of recent elections for the ability of Presidents to engage in what Jack Balkin and I have called “partisan entrenchment” within the judiciary.³³ It is possible that theories of interpretation may help to explain opinions of given judges, especially if they are writing lone dissents or concurrences, but they hardly offer much help in explaining decisions more broadly, given the patent disagreement among judges about preferred techniques of interpretation. One does not have to denigrate the integrity of judges in order to explain why important sections of any given constitution can be described as “parchment barriers” unlikely to generate much felt need for formal constitutional amendment when the arrival on the bench of Herculean judges would be at least equally effective.

What cannot so easily be dismissed as “parchment barriers,” however, are the clauses that constitute the Constitution of Settlement. Lawyerly cleverness seems irrelevant. Perhaps this helps to explain why we as law professors do such a dismal job of teaching the United States Constitution as a complete text. We spend basically all of our time on the Constitution of Conversation and ignore almost completely the Constitution of Settlement, perhaps because we do not want to admit that our presumptive skills in “thinking like lawyers” are beside the point.

altogether.”).

³² 17 U.S. (1 Wheat.) 316, 425, 436-37 (1819) (holding that Congress may establish a national bank that Maryland may not tax).

³³ See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066 (2001) (“The most important factor in understanding how constitutional revolutions occur, and indeed, how judicial review works, particularly in the twentieth century, is a phenomenon we call partisan entrenchment.”).

But if the ordinary skill set of lawyers – and law professors – is irrelevant, then to whom should we turn for insight? It is tempting to suggest that the answer is political scientists, who have been studying constitutionalism in all of its forms since the time of Aristotle. The problem is that one scarcely finds anything resembling consensus on the issues one might be most interested in as one turns from Dworkinian questions of “constitutional interpretation” to questions instead of “constitutional design.” How truly important is it, for example, that a given country has chosen a convoluted system of “checks and balances,” including an independently elected presidency, over a parliamentary regime? For a while the late Yale political scientist Juan Linz expressed a certain kind of conventional wisdom in suggesting that presidentialism was far more apt than parliamentarianism to lead to dictatorship or military coups, but then Jose Antonio Cheibub, using highly sophisticated multiple regression analysis, seemed to demonstrate that Linz had considerably exaggerated the connection.³⁴ Does it really matter that Nebraska, within the United States, has liberated itself from the convention of bicameralism and opted instead for “The Unicameral?”³⁵ How important is it that almost none of the states within the United States have opted for a “unitary executive” or that, perhaps as a kind of compensation, they have granted their governors considerably stronger veto power than that granted to the President of the United States? Indeed it is worth asking how much the oft-derided Weimar Constitution of Germany during the interwar years, including its famous Article 48 allowing the invocation of “emergency powers,” really helps to account for the catastrophe that befell that country. Perhaps as with the Articles of Confederation we overestimate its defects, but again the question is how one would actually carry on such arguments about the actual importance of any given constitution.

All of these questions call for deeply empirical investigation. And there are competing conclusions that might be demonstrated. The first is that constitutional structures either do not matter at all *or* that we simply do not know with any real confidence what the consequences are. In both cases the conclusion might be some version of “it does not seem to be broken – or, even if it is, we cannot tell exactly what caused it – so probably the safest thing to do is to relax and do nothing.” Perhaps this is the best way to interpret Professor Melnick’s presentation. The second possibility of course is that a given structure might be significant in explaining our political unhappiness and that, ideally, it should be substantially modified or perhaps even excised.

But what if the latter is the conclusion reached about Article V itself (as I personally believe)? Many people *have* reached that conclusion, and this, as much as anything, explains the desire to create a theory that explains “informal

³⁴ See JOSÉ ANTONIO CHEIBUB, PRESIDENTIALISM, PARLIAMENTARISM, AND DEMOCRACY 112 (2007) (refuting the “Linzian view of presidentialism”).

³⁵ See Michael Kelly, ‘The Unicameral’ – Nebraska-Born, Though Not Spread, OMAHA (Feb. 16, 2014, 12:30 AM), <http://www.omaha.com/article/20140216/NEWS/140219012>, archived at <http://perma.cc/5MK-JLWD>.

amendment” outside the boundaries of Article V. To the extent this has occurred – as I believe it surely has – then we are saved, or so the most optimistic rendering of “informal amendment” would suggest. But I believe that informal amendment, however described, works only within the ambit of the Constitution of Conversation. For the Constitution of Settlement, it is, to borrow Gerald Rosenberg’s phrase, a hollow hope.³⁶ The dragon of Article V must be slain, but how? My own hope is that a new constitutional convention could do to Article V what the Framers in Philadelphia did to Article XIII of the Articles of Confederation, with its requirement that proposed amendments receive the unanimous assent of all state legislatures, which is to ruthlessly ignore it and then depend on what James Madison in *Federalist No. 40* called the “approbation” of the public to accept the legitimacy of the new regime (including its new amendment rule).³⁷ I realize that most people, including my family and friends, are basically appalled by this suggestion. And I am substantially persuaded by Mark Graber’s excellent essay that any such “Levinsonian convention” would first have to “bell the cat” – a notoriously difficult, perhaps even impossible, enterprise – in order to be effective.³⁸ Optimism, therefore, scarcely seems to be merited. Thus we are left with the hope that our constitutional structures really are not so important after all and/or with the belief that God really does take special care of children and of the United States of America.

³⁶ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

³⁷ See *THE FEDERALIST NO. 40* (James Madison).

³⁸ Mark Graber, *Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order*, 94 B.U. L. REV. 611 (2014).