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Has the Obama Presidency Vitiating the “Dysfunctional Constitution” Thesis?

SANFORD LEVINSON*

The title I was given by the organizers of this symposium, and very happily accepted, was: “Has the Obama Presidency Vitiating the ‘Dysfunctional Constitution’ Thesis?” I presume I was invited because I did indeed publish a book in 2006 called *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*. It would be disingenuous to deny that some of my arguments were motivated by my particular unhappiness with the presidency of George W. Bush, so an obvious question is the extent to which my sometimes caustic criticisms of the Constitution would survive the 2008 election, which not only saw Barack Obama replace Bush, but also provided him with a Democratic House of Representatives and Senate.

Before proceeding to the full-scale answer to the above question, I think it is relevant to tell you an interesting story about the title of my book. The initial title that I sent to my editor at the Oxford University Press was *Our Broken Constitution*. She informed me that Oxford could probably publish only one “Broken” book a year, and Norman Ornstein and Tom Mann, two distinguished political scientists located, respectively, at the American Enterprise Institute and the Brookings Institution, had submitted a fine manuscript that was published under the title *The Broken Branch*.¹ The branch in question is the U.S. Congress in general and the Senate in particular. So, I had to look for another title. Certainly one word that came to mind was “dysfunctional,” but that might lead people to think that they were going to get a book on political psychology.

But, I believe, the Constitution is not only broken and dysfunctional, it is also patently undemocratic, so we fixed on the title *Our Undemocratic Constitution*. I discovered, though, that choosing that title had a very

* W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law, University of Texas Law School, Professor of Government, University of Texas at Austin. This is a revised version of a “keynote” luncheon talk that I gave during the excellent symposium whose more formal presentations are gathered together in this issue. I have retained the informal (i.e., lightly footnoted) style of the talk; however, in addition to cleaning up some grammatical errors and the like, I have also added several paragraphs and taken advantage of knowing what happened between the time of my talk and the final preparation of this version in April 2011. I am very grateful to the students who invited me to participate in what was an excellent symposium.

¹ THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006).

interesting implication, as revealed in some of the responses I received. Quite a few people have come up to me, either literally at conferences or after talks I have delivered or, more metaphorically, by e-mail, and asked me—sometimes in a kindly manner, other times quite condescendingly—whether I realize that we are a *republic*, not a *democracy*? Presumably, I was engaging in the equivalent of criticizing the game of soccer because it does not allow for the tackling of whoever holds the ball. If I want the latter, then I should be playing (or watching) football; soccer, however, is played under different rules. The American “constitution game” similarly is republican (whatever precisely that means) and not democratic (ditto).

One might, of course, make this simply as a descriptive point, in the same way that one can correctly distinguish between soccer and (American) football. But, almost invariably, my interlocutors were engaging in normative argument, suggesting that we *ought* to remain a republic and, therefore, rejecting my various democratic heresies. As a result, I have been left wondering how many Americans actually believe in “democracy,” at least if we offer as a basic (though surely not complete) criterion that temporal majorities be allowed to make decisions about important areas of public policy—unless, perhaps, they are viewed as touching such “fundamental interests” as to be exempt from ordinary political processes.

It is correct to note that the founding generation had no use for democracy as that term was used in the eighteenth century. They were indeed republicans, and the John Birch slogan from the 1960s, “We’re a republic, not a democracy, and let’s keep it that way,” is—I have discovered in part from responding to people about the book—alive and well even among people who would never for a million years imagine themselves as sympathetic to the particular politics of the rabidly right-wing John Birch Society, which thought, among other things, that Dwight D. Eisenhower was a Communist. But the notion that a “Republican Form of Government”—a phrase, after all, found in Article IV of the Constitution²—is far better than a “Democratic Form of Government”—a phrase found nowhere in our most sacred national text—has great purchase on the American political consciousness.

Note that this argument invites us to travel down the road of political theory, where we have to offer plausible definitions of terms like “democratic” and “republican” forms of government and, then, even more important, make arguments as to why one of them is better, in terms of abstract political principles—whether “equality,” “human dignity,” or whatever. And some critics of my book have suggested, altogether correctly, I am afraid, that I did not live up to what is demanded of a

² U.S. CONST. art. IV, § 4.

normative political theorist asked to offer abstract justifications of one form of government over another. Perhaps I asked for that criticism by my choice of title. If, on the other hand, I had stuck with "broken" or "dysfunctional" as the modifier of "Constitution," then the real thrust of my argument would have been less normative political theory and, instead, directed more at asking my readers about the actual levels of satisfaction they are experiencing from our contemporary national government. Public opinion polling data suggested then—and now—that levels of satisfaction are remarkably low.³

The two arguments ultimately are joined if one asks the basic question about the frequency with which democracy, or democratic forms of government, necessarily will produce good outcomes (or, more to the point, consistently *better* outcomes) than alternative forms of government. The eighteenth century, for example, had a number of benevolent despots—Frederick the Great probably being the most prominent of them—who did pretty good jobs for their people. (That is one of the reasons, after all, that Frederick was called "the Great," as was Czar Peter in Russia.) And it is a terrible truth that not *all* dictators have been terrible in terms of what they have brought about for people they were sincerely trying to serve.

Moreover, democratic systems can indeed be problematic—a point that Americans are taught to think about from the third grade on. It is predictable that any discussion of majoritarian democracy will provoke someone, within five minutes, to place into the discussion the dreaded "tyranny of the majority" and, therefore, the (good) reasons that majorities must be controlled lest they oppress vulnerable minorities. Rarely will the response be the simple observation that barriers to majority rule may well as often lock in a "tyranny of a particular minority" that benefits from a particular status quo that is made impervious to majoritarian change.

In any event, it is true that I deeply believe that the U.S. Constitution is strikingly—and indefensibly—undemocratic. This is true if one compares it with the post-World War II constitutions that now structure political life in most of the Western countries with which we often identify. But, as is well-known, there is often great hostility—emanating especially from admirers of Justice Antonin Scalia—expressed when one looks outside American shores for insight about the American constitutional system. So, increasingly, I now focus my teaching and writing not only on the constitutions of, say, Germany, Spain, and Sweden, but, instead, on the fifty state constitutions within the United States. What one discovers is

³ See Jeffrey M. Jones, *U.S. Satisfaction with Gov't, Morality, Economy Down Since '08*, GALLUP, Jan. 24, 2011, <http://www.gallup.com/poll/145760/satisfaction-gov-morality-economy-down.aspx> (observing that satisfaction with the U.S. system of government and how it works and with the size and power of the federal government have seen marked declines since 2002).

that the U.S. Constitution is the most undemocratic constitution of the fifty-one constitutions that structure aspects of the American political system, which, to put it mildly, is not meant as a compliment.

Indeed, if there is one message I am trying to convey to audiences these days, especially at admirable symposia like this one, it is that all law students and law professors, and citizens in general, should spend far more time and intellectual energy than is now the case on what can be learned from the “other” constitution that almost all of them, save for residents of the District of Columbia, live under. And then I invite everyone to engage in the following intellectual exercise. As individuals grasp the almost inevitable profound differences between their state constitution and the national one, the obvious question that must be answered is this: which is better? If it is true, as Justice Louis Brandeis famously suggested, that the defense of American federalism is that states can serve as little laboratories of experimentation,⁴ then is it possible that we can learn from various states that there are better ways to structure the polity than were imposed on us by the Framers and Ratifiers in 1787 and 1788? Or, on the contrary, perhaps we wish to criticize each and every state constitution that differs in any interesting way from the national template. A final possibility, of course, is to say that one’s state constitution *and* the national Constitution are both perfect as they are, however contradictory in important ways, because state and national constitutions have entirely different functions and, therefore, must be evaluated by reference to entirely different criteria. Perhaps that is true, but one would like to see this implausible argument spelled out.

Consider one of the most stunning differences between forty-nine of the fifty state constitutions—Delaware is the exception—and the national Constitution. The U.S. Constitution, though it professes to speak in the name of “We the People,” does not include a scintilla of “direct democracy” by which the *demos* can make decisions for themselves. Instead, the 1787 Constitution under which we live today is exclusively committed to “representative democracy,” by which all decisions, fundamental or otherwise, are made by intermediaries, some elected and some appointed by people we elect.

The most common manifestation of such “direct democracy” is the requirement that the electorate ratify all proposed amendments to state constitutions, unlike the requirement of Article V of the national Constitution, which places such responsibility in the hands of state legislatures or special conventions that might well, of course, be selected

⁴ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social economic experiments without risk to the rest of the country.”).

by the electorate, but would ultimately not be further accountable to the voters.⁵ Contrast this with Article XII of the Connecticut Constitution, as amended in 1974, which requires such popular approval.⁶ Even more interesting, in many ways, is Article XIII of that constitution.⁷ (That constitution was, incidentally, adopted by the people of Connecticut in 1965.⁸ Another difference between states and the nation at large is that most states have been willing not only to amend what are viewed as inadequate constitutions, but to replace them.)

Article XIII first authorizes the general assembly to call a new constitutional convention whenever it wishes, so long as two-thirds of each House votes to do so.⁹ What is really interesting, though, is Section 2 of Article XIII:

The question "[s]hall there be a Constitutional Convention to amend or revise the Constitution of the State?" shall be submitted to all the electors of the state at the general election held on the Tuesday after the first Monday in November in the even-numbered year next succeeding the expiration of a period of twenty years from the date of convening of the last convention called to revise or amend the constitution of the state, including the Constitutional Convention of 1965, or next succeeding the expiration of a period of twenty years from the date of submission of such a question to all electors of the state, whichever date shall last occur. If a majority of the electors voting on the question shall signify "yes[.]" the general assembly shall provide for such convention as provided in Section 3 of this article.¹⁰

Connecticut is one of fourteen states that have such provisions in their constitutions. In 2010, Montana, Iowa, Michigan, and Maryland all gave their voters the opportunity to call a new state constitutional convention.¹¹ Though these proposals were soundly rejected in the first three of the

⁵ See U.S. CONST. art. V (stating that proposed Amendments to the Constitution "shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof").

⁶ See CONN. CONST. art. XII (discussing the procedure for adopting a proposed amendment as part of the Connecticut Constitution).

⁷ *Id.* art. XIII.

⁸ See *id.* art. XIV ("This proposed constitution, submitted by the Constitutional Convention of 1965, shall become the constitution of the state of Connecticut upon approval by the people and proclamation by the governor as provided by law."); see also EDWARD C. SEMBOR, AN INTRODUCTION TO CONNECTICUT STATE AND LOCAL GOVERNMENT 22 (2003) (noting that the Connecticut Constitutional Convention of 1965 resulted in extensive revisions to the state's previous constitution).

⁹ CONN. CONST. art. XIII, § 1.

¹⁰ *Id.* art. XIII, § 2.

¹¹ See, e.g., Jessica Anderson, *Voters To Decide on Calling Convention*, BALTIMORE SUN, Oct. 25, 2010, at 2A.

states, in Maryland, a majority of the voters who voted one way or the other on the convention proposition supported calling a new convention.¹² For better or worse, the Maryland Constitution requires that such proposals receive the approval of a majority of the overall electorate.¹³ Perhaps not surprisingly, a number of people who voted in the gubernatorial election left their ballots blank as they moved down the ballot to the convention proposal, so the fifty-four percent majority did not in fact translate into the required “constitutional majority.”¹⁴ So, apparently, there will be no new constitutional convention. In 2012, Ohio will have a convention proposal on its ballot, courtesy of the Ohio Constitution, and it will be interesting to see whether the voters of that notable “battleground” state will in fact take any great interest in, and perhaps even support, the possibility of a new constitutional convention.

Almost everyone is familiar with the operation of the initiative and referendum in California, which many analysts offer as a reason for the basic breakdown of government in the Golden State. But consider Maine, which is usually thought of, rightly or not, as a fairly boring and dull state (perhaps like Switzerland, which also relies a great deal on popular referenda). Maine also has an initiative and referendum possibility, not to initiate legislation, but to override legislation passed by the Maine legislature and signed by the Governor.¹⁵ Given my own political views, I regret that fifty-three percent of the Maine electorate were able in 2009 to invalidate a law recognizing same-sex marriage that had been passed by the Maine legislature and signed by the Governor,¹⁶ but the more important point is that, for better or worse, the people of Maine are given voice in their own governance that is totally absent at the national level.

John Dinan, a political scientist at Wake Forest University, has written a superb book titled *The American State Constitutional Tradition*.¹⁷ A key

¹² For a summary and analysis of Maryland’s 2010 referendum voting results, see J.H. Snider, Editorial, *Give Marylanders the Constitutional Convention They Voted For*, WASH. POST, Nov. 14, 2010, at C05. For a full analysis of the constitution convention voting results from all four states, see “Automatic Convention Question Certified for the 2010 Ballot,” BALLOTEDIA, http://www.ballotpedia.org/wiki/index.php/Category:Automatic_convention_question_certified_for_the_2010_ballot (last visited Mar. 28, 2011).

¹³ MD. CONST. art. XIV, § 1.

¹⁴ See Snider, *supra* note 12 (“Now that the referendum has received [fifty-four] percent of the vote, the governor should be held accountable for that promise [to convene a constitutional convention]. Even though more people voted for this referendum than against it, a con-con probably will not be called automatically, thwarting the will of the people. That’s because a quirky rule written into Maryland’s constitution essentially counts blank votes on this question as no votes.”).

¹⁵ ME. REV. STAT. ANN. tit. 21-A §§ 901–06 (2008).

¹⁶ See *November 3, 2009 General Election Tabulations*, ME. BUREAU OF CORPS., ELECTIONS & COMM’NS, <http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html> (last visited Mar. 28, 2011) (reporting that 300,848 people voted “yes” and 267,828 voted “no” to the question “[d]o you want to reject the new law that lets same-sex couples marry and allows individuals and religious groups to refuse to perform these marriages?” (internal quotation marks omitted)).

¹⁷ JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2006).

point is that one perceives a strikingly different “American people” when studying state constitutions than if one remains fixated exclusively on the national Constitution.¹⁸ That the U.S. Constitution was written by people who did not want “We, the collective People” ever to play any role in government is not evidence for the proposition that Americans in general share this view as to their incapacity to engage in some measure of direct governance. Indeed, it should be obvious that “We the People” have overwhelmingly rejected such a view, as demonstrated by the many state constitutions that have been written (and rewritten) over the past 200 years.

Still, it is important to distinguish between the “political theory” critique of the U.S. Constitution and critiques based more on our actual experience as citizens living under that Constitution. I believe that Aaron Bruhl made the comment in his own excellent presentation that one really cannot discuss most of these issues that we are grappling with without exposing his or her own politics.¹⁹ Who says that the national government is broken? After all, people want different things out of Congress and the national government. So who says it is dysfunctional?

I assure you, it is not everybody. David Mayhew, who is a very, very distinguished political scientist at Yale University, wrote a well-known book on divided government arguing that things are just hunky dory in our present political system.²⁰ For proof, he presents a list of legislation that passed in divided governments, defined as the Democrats or Republicans controlling different branches of government, whether the House of Representatives, Senate, or Presidency.²¹ I certainly do not deny that the legislation passed. Rather, I would argue that our present political system all too frequently produces significantly defective legislation because of the structure of government established by the 1787 Constitution. And, we discovered between 2009 and 2011 that it was totally insufficient for the Democratic Party ostensibly to have won control of both Houses of Congress and the White House, given the pernicious operation of the filibuster, which gave effective decision-making power to a minority of the Senate. The Patient Protection and Affordable Care Act²² that passed at

¹⁸ See, e.g., *id.* at 3 (“In fact, as I will argue, state conventions have been a forum for reconsidering, and ultimately revising or rejecting, a number of governing principles and institutions that were adopted by the federal convention of 1787 and that have remained relatively unchanged at the national level.”).

¹⁹ See generally Aaron-Andrew P. Bruhl, *The Senate: Out of Order*, 43 CONN. L. REV. 1041 (2011).

²⁰ See DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–1990*, at 198 (1991) (“There is no end of taking steps to reform American political institutions But . . . it would probably be a mistake to channel such concern into ‘party government’ schemes. . . . [I]t does not seem to make all that much difference whether party control of the American government happens to be unified or divided.”).

²¹ See *id.* at 52–73 (comparing significant congressional enactments from 1946 to 1990 and distinguishing those that occurred under divided versus unified party control).

²² Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in scattered sections of 42 U.S.C.).

the behest of the Obama Administration has few warm admirers, even if one is, in fact, happy that it passed, as I am. And that is also true with regard to the Financial Regulation Bill.²³ Both are notable examples of legislative “sausage” that includes a number of contaminants whose addition was necessary to getting sufficient votes for passage. Perhaps Mayhew is as pleased with those statutes as he was with earlier legislation passed under divided government. But, from my perspective, such an assessment has nothing at all to do with his formidable strengths as a political scientist. Instead, it is a political judgment made by somebody whose politics are ultimately more conservative than mine.

There are, I should certainly acknowledge, people who will talk about our broken national government, whose politics are way to the right of mine, collectively known in contemporary politics as the Tea Party. I find it interesting—and absolutely dismaying—that the one group of people today talking about constitutional amendment is from only one side of the political spectrum, while political liberals seem to suggest that it is almost blasphemous to suggest *any* changes to the Constitution. I frankly wish there were many, many more people talking about constitutional amendment. I should acknowledge flat out that I have become something of a crank on this point, for over the last four years every doubt that I have had about the Constitution has only deepened. I think that the Constitution is, in many ways, a clear and present danger to our collective futures. I therefore have a degree of emotional sympathy for, even if rarely a scintilla of agreement with, some of the Tea Party people, because they are smart enough to make a connection between formal constitutional structures that are never taught in law school and the actual outcomes of our political institutions.

I have also become something of a crank about the way we purport to teach Constitutional Law in law schools. Unfortunately, for most students (and their professors, of course), this reduces to what is litigated, either now or in the past, before the U.S. Supreme Court. And if it is not litigated, we are simply not interested in it. The hardwired structural stuff that we are looking at today is not litigated. This was adverted to by two of the panelists; both speakers noted that even if you could imagine litigating the filibuster, the Court should dodge it.²⁴ But at least one can *imagine* litigating the filibuster. It is far less imaginable that one could litigate the even more pernicious grant, courtesy of Article I, of the same number of senators to Wyoming as to California, with seventy times the

²³ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of 12 U.S.C.).

²⁴ Both speakers discuss this issue in greater detail in articles based on their symposium contributions. See generally Bruhl, *supra* note 19; Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003 (2011).

former's population.

Perhaps my homeliest example is Inauguration Day, which I think is a stupid time to inaugurate a new President, not because of cold weather in Washington, but, rather, because of the eleven-week hiatus between Election Day and inauguration. What this means is that the United States regularly does not have a functioning government during times of crisis: the Secession winter of 1860, the Depression winter of 1932, the whatever-you-want-to-call-it winter of 2008. It would be useful if we had in the White House somebody with defined legal authority and political legitimacy, rather than, with some regularity, splitting those two apart. But, again, nobody is going to run to any court and say, "because it is really, really stupid to wait eleven weeks, therefore you should order the Chief Justice to give the oath of office to either Ronald Reagan or Barack Obama."

I do not mean to be making a partisan point—for that matter, Richard Nixon, in 1968, may have deserved to take his oath of office well before January 20. But simply because it makes sense to speed up inauguration does not mean that it would be thinkable to do so via litigation or that a statute establishing an earlier inauguration day would not be properly termed unconstitutional by any court. But, quite obviously, this should not stop us, whether as professors or students, from discussing whether we are well-served by this particular constitutionally-compelled norm.

The Tea Party, as I have already suggested, has figured out that the Seventeenth Amendment is really quite important, even if, I am fairly confident, it is almost never taught in law schools because there is nothing to litigate about. Before the Seventeenth Amendment, state legislatures chose Senators, although, as a matter of practice, rather than formal law, a lot of states had already turned that decision over, *de facto*, to some sort of popular election. And the Seventeenth Amendment, which formalizes that practice, does make a difference! There are, for example, some people who defend the Senate as having something to do with federalism, and it is arguable that that was true up to the Seventeenth Amendment. If you believe in certain rational-choice models of politics, then you would think that Senators who wanted to keep their jobs would be attentive to protecting the interests of state governmental institutions, *qua* state governmental institutions. Once the Seventeenth Amendment becomes a part of our politics, that tie with federalism is broken, and the modern U.S. Senate becomes simply an affirmative action program, of an unusually unattractive sort, for the residents of small states. It has nothing to do whatsoever with preserving the institutional autonomy of state governments.

I do not share the Tea Party's devotion to federalism, at least when defined as strong constitutional guarantees for state autonomy. But the Tea Party has figured out that if one does want to clip the wings, at least a bit,

of what is often described as an overweening national government, and to reinvigorate state institutions, then maybe it would not be a bad idea to return to legislative election of Senators. What would be even better, if that is your view, is to emulate Germany, where the *Bundesrat* is composed of state officials, and where there is much more genuine representation of the states in the German higher house and much more of a plausible way of protecting the Lander in Germany.²⁵

One of my deep regrets about people who oppose the Tea Party is that instead of saying that the Seventeenth Amendment is a good thing, and it would be very good to amend the Constitution in lots of other ways, to make it better, the far too common response is to retreat to Madisonian veneration of how wonderful the Constitution is, and how wacky it is for anybody to propose any amendments to the Constitution in the twenty-first century. So I would at least give half a cheer to some of the people in the Tea Party, who are willing to address the linkage between constitutional forms and a vision of government. More of us should engage in similar conversations.

So let me at last answer the question originally assigned me: Has the Obama Presidency vitiated the “Dysfunctional Constitution” thesis? I think the correct answer is no; indeed, hell no! The “Dysfunctional Constitution” thesis, in part, is based on the awfulness of the Senate and the ability of the Senate to block legislation. We have seen an overwhelming exercise of this power in the last two years, and there is no reason to believe that the Congress elected in 2010 will prove any more functional. I gave a lecture in Cambridge on November 3, 2010, the day after Election Day, very shortly after this symposium. My title was “Why Elections Are Less Important Than You Think They Are.”²⁶ No one can seriously believe that the results of the 2010 national elections will generate significant new legislation that could be described as “liberal” or “conservative” or that might even be described as “centrist” (whether adequate or not). We will have two more years of terminal gridlock. In January 2011, for example, the House of Representatives voted to repeal the Obama healthcare legislation,²⁷ with nary a chance that the Senate or the President will agree. The federal government almost shut down in April as the result of an inability to agree on a budget that would fund the government, though that was averted by what was almost literally a last-

²⁵ See Ezra Klein, *Political Systems of Nations: Germany*, WASH. POST, Mar. 1, 2010, available at http://voices.washingtonpost.com/ezra-klein/2010/03/political_systems_of_nations_g.html.

²⁶ Sanford Levinson, Lecture at the WGBH and Cambridge Forum (Nov. 3, 2010), available at <http://forum-network.org/lecture/renewing-democracy-how-much-do-elections-matter>.

²⁷ H.R. 2, 112th Cong. (2011); David M. Herszenhorn & Robert Pear, *As Vowed, House Votes To Repeal Health Care Law*, N.Y. TIMES, Jan. 20, 2011, at A1.

minute compromise.²⁸ Serious observers even find themselves wondering if the House will vote to raise the debt limit of the United States, given that a refusal to do so would almost undoubtedly generate a worldwide financial crisis and do serious damage to the American economy.²⁹

To be sure, it is difficult, as I write in April 2011, to avoid conceding that elections do indeed have consequences, including the November 2010 "shellacking," in Barack Obama's term, suffered by Democrats. That being said, it very much remains to be seen whether the consequences include passage of any major legislation confronting the broad range of problems (including, for that matter, the hyped-up problem of the extent of the national deficit) that almost any rational observer must believe is confronting the nation today. Even in the highly unlikely event that the House and Senate might agree on any such legislation, there remains the highly important problem of whether President Obama, himself faced with daunting challenges for re-election in 2012, would sign it (since the vote for such legislation in the Senate, given the reality of the current House, would undoubtedly be the united Republican caucus plus a few "defecting Democrats" concerned far more about their own electoral futures than President Obama's).

As a matter of fact, what surprised me most when writing my book was the antipathy that I ended up feeling toward the presidential policy veto, which is not the same thing as a veto based on constitutional grounds. I have concluded, however, that there is no good reason for the President to be able to countermand the collective will of Congress, especially given all of the remarkable obstacles in the way of getting a bill through Congress. I think it was Professor Bruhl who mentioned, very briefly, bicameralism. I am actually not opposed to bicameralism. I think we are far too big a country to govern ourselves plausibly with one legislative house. But there are very different forms of bicameralism. Most countries around the world have ways of breaking legislative deadlocks. It is usually the more popular house that can ultimately break a deadlock, usually by supermajority vote.

We, of course, have a system where each house has a death-grip veto over the other house, even before you get to the presidential veto. We have

²⁸ For the predicted shutdown, see for example, Carl Hulse, *Budget Impasse Increasing Risk of U.S. Shutdown*, N.Y. TIMES, Mar. 26, 2011, at A1. On the compromise, see for example, Carl Hulse, *Budget Deal to Cut \$38 Billion Averts Shutdown*, N.Y. TIMES, Apr. 9, 2011, at A1.

²⁹ See, e.g., Jim Puzzanghera, *Failure To Raise U.S. Debt Ceiling Would Have "Unthinkable" Consequences, Treasury Secretary Geithner Warns Congress*, L.A. TIMES, Jan. 6, 2011, available at http://latimesblogs.latimes.com/money_co/2011/01/debt-ceiling-raise-obama-geithner-congress-republicans-bonds-default.html; see also Jackie Calmes, *Both Sides Are Braced for Debt-Limit Debate*, Feb. 12, 2011, available at <http://query.nytimes.com/gst/fullpage.html?res=9C02E7D9163AF931A25751C0A9679D8B63&&scp=3&sq=John%20Boehner%20on%20consequences%20of%20refusing%20to%20increase%20debt%20limit&st=cse>; Ben White, *Wall Street Executives Warn John Boehner on Debt Limit*, POLITICO.COM (Apr. 13, 2011 11:28 AM), <http://www.politico.com/news/stories/0411/53094.html>.

a Constitution that is almost promiscuous in its assignment of what political scientists call “veto points” and concomitantly wary about actually allowing political majorities to rule. I will not go into the most obvious pathology of the Senate, which is the equal voting membership. James Madison denounced it as a necessary evil. What made it necessary is that, like slavery, it was the price that, in fact, had to be paid in order to get a Constitution. The slavery compromise was evil, in a way that the Senate compromise was just terrible. But in terms of any contemporary normative theory, I think it is impossible to defend the Senate, and I am very happy to be able to wave the Madisonian banner. After all, once an “evil” is no longer “necessary,” then one should strive to eliminate it.

But even if one accepts the present allocation of power in the Senate, there are two other features of the contemporary Congress that I think contribute to the dysfunctionality of our system (and, therefore, of the Obama Administration). Larry Sabato, a political scientist at the University of Virginia, has argued, altogether correctly, that Congress is just too small.³⁰ After all, we have not had an increase in the membership of Congress since 1959. With regard to the Senate, that is when it reached its present number of 100, upon Hawaii’s admission to the Union as a state. Consider, though, that our population was then 180 million people; today, it is about 310 million people. It is remarkable how little Congress had to do fifty years ago compared to what it does now. Congress in 1959 was not concerned about education or health policy. It was not concerned about comprehensive energy policy or climate change. Now, all of those things are on Congress’s agenda, and many more, with no greater a workforce. If you were producing widgets, it would have been irrational not to hire new people as the demands on the workforce increased, unless, of course, there were remarkable increases in productivity per worker. But even if you were able to speed up the production line in order to maximize profits, at some point you would have run into the “there-are-only-twenty-four-hours-in-the-day” phenomenon, and you would have had to go out and hire some people.

So even if one wants to stick with the egregious and indefensible equal representation principle of the Senate, I would give each state three or four Senators. Just do the math. The Senate *does* have very important roles to play with regard to holding hearings, whether *ex ante* prior to the passage of legislation or *ex post* to assess the actual consequences of the legislation; seriously thinking of who should be confirmed, or rejected, as cabinet officials, judges, or the Director of National Intelligence; ratifying treaties; or devoting significant time to contemplating what kinds of constitutional amendments might be desirable. I am not, of course, including the

³⁰ Larry Sabato, *Expand the House of Representatives*, DEMOCRACY, Spring 2008, at 15, 15–17.

obsessive concern with raising money in the era of "permanent campaigns," where the six-year term no longer operates to allow Senators to be statesmen or stateswomen for four years and then partisans in their election cycle. I do not believe that Senators as a group are stupid or evil; rather, each and every Senator has way too much to do.

I do think that one of the consequences of our failure to think structurally is that we personalize politics. We have heroes and villains. We say, "things would be better if only Barack Obama gave more speeches," or "things would be better if only John McCain had been elected," or "if Mitch McConnell weren't so committed to Obama's political destruction," or "if Harry Reid were a more accommodating majority leader of the Senate." Recently, since the shootings in Tucson, we have been treated to many speeches and columns on the importance of "civil discourse."³¹

However, to the extent that you really accept the premises of a structural analysis like my own, at some level these contingencies fade in terms of their importance. I certainly do not want to say that they do not matter at all. I do believe that it mattered that Obama beat McCain, and, therefore, that we have something that can meaningfully be described as "the Obama Administration." But it mattered much less than many of us believed in November 2008 would be the case, precisely because whoever enters the Oval Office plays the hand not only that contemporary events, but also the Constitution itself, have dealt Presidents.

I have already gone on too long, but let me mention one thing that disturbs me about the Obama Presidency; I borrow this analysis, in part, from Yale Law School Professor Bruce Ackerman, who may be even more alarmist than I am about what is happening to the American system of government.³² One of the panelists at the symposium adverted to this fact that if the Senate stops engaging in a timely consent function, then there are only two possibilities. One is that you literally do not have people appointed to fill certain positions, which is happening particularly in the federal judiciary. The other, however, is to engage in end runs and to increase the number of Czars and Special Assistants to bulk up the White House Counsel's Office and the like. I agree that this is not good for a

³¹ E.g., Allen G. Breed, *National Institute for Civil Discourse To Open at University of Arizona*, HUFFINGTON POST (Feb. 21, 2011, 3:32 PM), http://www.huffingtonpost.com/2011/02/21/national-institute-for-civil-discourse_n_825825.html?view=print; Hans Nichols & Drew Armstrong, *Obama Calls for Civility Over Conflict in Shooting Aftermath*, BLOOMBERG, Jan. 13, 2011, available at <http://www.bloomberg.com/news/print/2011-01-13/obama-warns-against-pointing-fingers-in-memorial-after-arizona-shooting.html>.

³² See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 3 (2010) ("The pathologies of the existing system are too dangerous to ignore. . . . We must ask whether something is seriously wrong—very seriously wrong—with the tradition of government that we have inherited.").

“Republican Form of Government.”³³

I am personally thrilled that Elizabeth Warren has gone into the Obama Administration, but I am decidedly unthrilled that she went into the Administration through the route of being appointed as a non-confirmable Executive Assistant rather than being nominated, and therefore being made subject to Senate confirmation. She is filling an extremely important position in which she will play a leading role in rewriting rules for the entire financial services industry as it relates to consumer protection. There are good reasons why one might want the Senate to interrogate her and to be able to call her to testify.

But one of the lovely things that Presidents get, at least from their perspective, by going the Executive Assistant route, is that these appointees are not subject to subpoenas. They cannot be made to testify. The Secretaries of State or Defense appear before Congress all the time, but not the National Security Advisor, just as Secretary of the Treasury Timothy Geithner was often subjected to congressional oversight, but never Larry Summers, the former Chief Economic Adviser. It is an open question, of course, as to Geithner’s and Summers’s relative importance in making economic policy, for good or for ill, over the past two years.

If Congress becomes even more dysfunctional, as is predictable, then we will see an ever more powerful presidency that will rely for legal advice on people without a semblance of independence. Every law student knows that federal courts do not issue advisory opinions. That may be good or bad; interestingly enough, a number of states do allow their highest courts to issue advisory opinions regarding, say, proposed legislation.³⁴ But law students are likely to be ignorant, because they are not taught, of the crucial role played by the Office of Legal Counsel within the Department of Justice, or the ever-expanding White House Counsel’s Office. None of these lawyers, whose basic job is to issue advisory opinions, has more than a semblance of institutional independence.³⁵ They are, in effect, employees at will, dependent on remaining in the good graces of the President or political officials appointed by the President. Thus the only thing we can rely on is Madisonian civic republican virtue—an overriding commitment to the “rule of law” or the “public interest”—which demands that Presidents appoint to the Office of Legal Counsel and

³³ See Bruhl, *supra* note 19, at 1052–53 (“If the confirmations process is gridlocked, the President can circumvent the constitutionally prescribed appointments process with more aggressive use of recess appointments and non-confirmed White House czars.” (footnotes omitted)).

³⁴ See James R. Rogers & Georg Vanberg, *Judicial Advisory Opinions and Legislative Outcomes in Comparative Perspective*, 46 AM. J. POL. SCI. 379, 380–81 (2002) (listing states that authorize their highest courts to issue advisory opinions).

³⁵ The OLC includes a number of “career attorneys,” who may well be covered by Civil Service Law protections. However, it is the case that opinions of the OLC must ultimately be signed by the head of the OLC, who is very much a political appointee subject to presidential control.

to the White House Counsel people who will always be willing to look the President in the eye and say, "No, you can't do what you want to do."

Maybe that happens on occasion, but I do not think that fits a very plausible model of politics. And we do know that Jack Goldsmith, who briefly served as head of the Office of Legal Counsel during the administration of George W. Bush, basically was fired. He left voluntarily, but the door out of the administration was eagerly opened for him by Vice President Cheney's close assistant David Addington. Goldsmith, who is no liberal, did believe that there were limits to executive power, and that was not what the Bush Administration—and especially Addington or Cheney—wanted to hear. It very much remains to be seen if the Obama Administration is significantly more eager to hear that there are genuine limits on what it can do, especially with regard to foreign and military policy. The Obama Administration seems uninterested in engaging in torture, but far more than the Bush Administration it is using drone aircraft to fire on presumed enemies of the United States, including citizens of the United States, in a number of countries with which we are not at war, which raises a plethora of serious issues of its own. Indeed, as I write on March 29, the United States is involved in a war with Libya begun without the slightest formal consultation with Congress, justified by the President as being "in the national security and foreign policy interests of the United States" and initiated "pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executiveon."³⁶ If one believes that our political system has become dangerously out of kilter with regard to presidential autonomy in the realm of foreign and military policy, then the Obama Administration, even if one regards it as being preferable in its policy decisions to that of the Bush Administration it replaced, scarcely is providing much in the way to alleviate such beliefs.

All of this said, let me conclude by offering my candidate for the very worst feature of our national Constitution. That feature is the near inability to amend that Constitution, as a practical matter. This, of course, is not true with regard to state constitutions. What that means is that any suggestion of the desirability of national-level constitutional amendment basically reveals that one is quixotic, a flake, or a crank, but very definitely *not* someone who is truly knowledgeable about the way the American system of government works. Because if you know anything about the American system of government, it is that it is functionally impossible to amend. This stifles any serious discussion about what a functional or democratic, or unbroken, Constitution might look like in the twenty-first

³⁶ Letter from President Barack Obama to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Mar. 21, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>.

century.

Alas, Barack Obama, for all sorts of reasons, has no incentive at all to emulate Woodrow Wilson and Teddy Roosevelt by suggesting that we have a decidedly imperfect constitutional system that requires significant amendment. Surely someone so intelligent as Obama must realize that he has no chance of achieving his dreams for transformative change (“that we can believe in”) within the constraints of the present American political structures. Perhaps Obama’s reticence is encouraged by the fact that Wilson and Roosevelt have become demonized figures in the historiography of Glenn Beck and other Tea Party would-be historians. But an interesting thing—and I like what Glenn Beck hates—is that during the so-called Progressive Era, people of Wilson’s and Roosevelt’s stature, as well as a lot less well-known figures, were actually addressing the important question of whether the Constitution, as we moved into the twentieth century, was serving us well. That is why we got, incidentally, the Sixteenth, Seventeenth, Eighteenth, and Nineteenth Amendments. Perhaps the Eighteenth Amendment exemplifies the lack of wisdom of constitutional amendment, but it was not at all a dumb idea, except insofar as it was unenforceable in practice. But anyone who denies that the free availability of alcohol generates significant social costs is, well, in denial.

In any event, this whole tradition of serious constitutional analysis and critique appears to be dead, precisely because every sophisticate knows it is impossible to change the U.S. Constitution. So we therefore try to figure out so-called “workarounds”—like non-confirmable appointments—or to pretend that the filibuster is the worst thing about the Senate. Unfortunately, it is not. This would be a far, far better world if curing the filibuster would give us a Senate we really would be proud of.

But let me offer my final “takeaway point”: there really are lots of clauses in the Constitution that are extremely interesting and important, yet, because they are so obvious in their meaning, members of the legal professoriate do not bother teaching them. We therefore disable our students—who are likely, as Tocqueville recognized 175 years ago, to serve important roles as civic leaders, perhaps even as Presidents—from doing something that should be demanded of such leaders, which is to use their intelligence to engage in thoughtful assessment of our fundamental institutions instead of assuming, literally without discussion, that they serve us well in the twenty-first century. They do not.