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The Constitution and Its Critics

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Taking another look at America's fundamental document

IN PLANNING A freshman undergraduate curriculum with colleagues recently, the question arose as to what type of understanding we wanted to impart to our students about the Constitution. Should the goal be to achieve a critical understanding of the Constitution or, since most students take only a single course that covers the document, is a basic understanding all that is to be expected? Is there, then, some practical way to impart a critical understanding of the Constitution in just a very few classes? It turns out there is: Assign the students Sanford Levinson's *Our Undemocratic Constitution* (2006), or Robert Dahl's *How Democratic is the American Constitution?* (2001). Daniel Lazare's *The Frozen Republic: How the Constitution is Paralyzing Democracy* (1996) could also serve this purpose.

The alleged defects of the Constitution that these books point to are wide-ranging and can be classified into various categories. Some problems — such as slavery, the disenfranchisement of women and blacks, and the election of senators by state legislatures — are historical in nature. Dahl in particular spends a fair amount of time on these issues. Other defects can be deemed trivial. For example, Levinson laments the age limitations that bar relative youngsters from being representatives, senators, and presidents. Another category contains problems that are current and well known; its main member is the Electoral College. But at the heart of these works are two other types of supposed constitutional defects. The first type are very real but not as widely appreciated as they should be, such as equal state representation in the Senate. They raise the question of whether there is any realistic chance of reform. The second type are supposed defects that turn out to be nothing less than the entire structure of separation of powers and checks and balances. Levinson and the other authors are all more or less critical of bicameralism, the presidential veto, and judicial review; the analysis of these institutions is what makes these books especially interesting though sometimes wrongheaded.

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Dahl and Lazare judge the Constitution harshly for compromising in various ways with slavery. The three-fifths compromise in Article I, Section 2, the provision for a fugitive slave law in Article IV, Section 2, and the moratorium on the banning of the slave trade until 1808 in Article V all come in for strong criticism. In one sense, one can hardly disagree. Still, the authors' critique of these compromises suffers somewhat from 20/20 hindsight. For example, there is no mention in these works of the Constitution's sedulous refusal to refer to slavery directly; the words "slave" and "slavery" never appear. It was partly on this basis that Frederick Douglas argued that the Constitution was an anti-slavery document. Also relevant to the question of the Founders' thinking about slavery is Madison's discussion of the three-fifths clause in *Federalist* No. 54, in which he argues that slavery is based on law, not nature, thereby establishing the premise that slavery could, as a matter of law, be abolished when sectional compromise among the states was no longer necessary.

Other topics are, today, debated more frequently. The Electoral College is one that seems to be an



easy target for the Constitution's critics. Among the perverse outcomes attributed to the Electoral College the presidential election of 2000 is only the most recent and prominent. While it is certainly regrettable to have a system in which the popular vote is not necessarily determinative, Arthur Schlesinger Jr. makes a good case in *War and the American Presidency* (2004) that the Electoral College does have certain virtues. It discourages the formation of minor parties, and prevents the election of candidates who lack broad support, since no party without a regional base can win electoral votes. The Electoral College also makes close and disputed elections more manageable since most likely the votes of only one or a few states would need to be recounted. The question is how to reform the Electoral College while retaining its good features, while overcoming the opposition of the small states. Schlesinger has an answer here: The "national bonus plan," which would create a "national pool of 102 new electoral votes" that would be awarded to the winner of the popular vote. "This national bonus would balance the existing state bonus of two electoral votes already conferred by the Constitution regardless of population," Schlesinger writes. "The reform would virtually guarantee that the popular vote winner would also be the electoral-vote winner."

By this scheme the most obvious flaw in the Constitution can be mended without fundamentally altering the document.

CONGRESS AND THE SEPARATION OF POWERS

EQUAL REPRESENTATION OF all states in the Senate seems to most trouble the critics of the Constitution. Levinson and the other authors make a convincing case that this malapportionment and its effects simply cannot be justified. Consider just how malapportioned the Senate is: The ratio of over-representation of the least populous state — Wyoming — to the most populous state — California — is 70 to 1. This is the extreme case. Levinson points out that the two-senator apportionment means that Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming all have only one representative in the House and therefore twice the number of senators that they do representatives. Together these states have about 4.8 million residents represented in the Senate with 14 senators, while the state of Minnesota, with approximately the same population, is represented by only two. Five other states — Hawaii, Idaho, Maine, New Hampshire, and Rhode Island — each have only two representatives. The upshot is that 25 percent of the Senate is elected by twelve states that contain five percent of the total U.S. population.

Levinson especially makes a strong case — based considerably on a book entitled *Sizing up the Senate: The Unequal Consequences of Equal Representation* by Frances E. Lee and Bruce I. Oppenheimer — that the malapportionment of the Senate has great impact on policy decisions. Levinson reports that Lee and Oppenheimer's model "predicts that the smallest states will receive about \$120 per capita [in overall federal spending] while the largest states receive only \$82." Or, put another way, the model shows that if states were represented on a "one person, one vote" basis they would receive \$139 in federal expenditures, but a state as overrepresented as Wyoming would receive \$209 while a state as underrepresented as California would receive only \$132.

Nor is unfair distribution of federal money the only way in which equal state representation in the Senate has an impact. Senators from small states represent a more homogeneous electorate than large state senators and thus the politics of small states are easier to manage. One small-state senator interviewed by Lee and Oppenheimer said: "There's a commonality of interest in a small state, you can focus on three or four main issues . . . you can run for the U.S. Congress saying you are going to represent the _____ industry totally and not do anything else." Small-state senators spend less time on fund raising and more time on constituent service and on achieving legislative objectives than do large-state senators. Partly for that reason, small-state electorates are more satisfied with their senators than are the voters of large states, according to findings on senator job



performance by Lee and Oppenheimer. Small-state Senate races are also less competitive, allowing for a wider margin of victory.

The case against equal representation in the Senate is strong. Daniel Patrick Moynihan thought so.

Levinson's book and the other books discussed here do a convincing job of refuting the traditional arguments in favor of equal representation in the Senate, despite its apparent unfairness. For example, the defense of equal representation based on the alleged need to protect small states from the tyranny of larger states does not hold up to examination: The large states have never shown any tendency to tyrannize the small. Indeed the only time when the states divided into interest groups based on size was during the debate over Senate representation at the Constitutional Convention. The argument that the Senate is supposed to reflect the federalist nature of the country by representing the states themselves is correct as far as it goes but does not justify the gross malapportionment of the current Senate. According to Lee and Oppenheimer other countries with federalist systems and bicameral legislatures do not grant full equality to the federal units in either house. The U.S. Senate is by far the most malapportioned legislature in the modern, democratic world. The Senate could continue its function as a forum for the states' interests if the states were represented proportionally.

Thus the case against equal representation in the Senate is strong. No less of an authority than Senator Daniel Patrick Moynihan thought so. Towards the end of his career, Lee and Oppenheimer tell us, Moynihan wrote, "Sometime in the next century the United States is going to have to address the question of apportionment in the Senate. Already we have seven states with two senators and one representative. The Senate is beginning to look like the pre-reform British House of Commons." What can be done about it? This question applies to many of the recommendations made by Levinson and the other authors. It is enough to say now that the cause of reapportionment of the Senate looks almost lost, since equal state representation of the Senate is the only provision of the Constitution not susceptible to amendment under Article V, which prohibits changing the number of senators states may have.

Separation of powers — defined as an executive who is chosen independently of the legislature — is not the main concern for Levinson and Dahl. Despite his own preference for a parliamentary system, Dahl acknowledges in *How Democratic Is the American Constitution?* that "For better or worse, we Americans are stuck with a presidential system," and Levinson doesn't specifically reject presidentialism per se. Lazare is explicitly hostile to separation of powers. As he writes in *The Frozen Republic*, he wants the House of Representatives to be the "whole show, which means that in addition to passing legislation, it would have the job of executing it." Much of Levinson's and Dahl's criticism is directed, rather, at checks and balances, which James Q. Wilson and John J. Dilulio define as "a system of *separate* institutions that *share* powers." That is, as Madison famously argued in *Federalist* No. 51, checks and balances are provisions of the Constitution that are designed to keep the branches of government truly separated. Aspects of the Constitution that are central to separation of powers include the bicameral Congress, the presidential veto, and judicial review. To a lesser or greater extent — lesser in Levinson's case, much greater in that of Lazare — these key features of checks and balances all come in for criticism by these authors.

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One can concede the case against equal state representation in the Senate and still maintain that a second branch to the legislature is essential to the constitutional scheme. Levinson admits as much when, in calling for a new constitutional convention in *Our Undemocratic Constitution*, he writes “I can well imagine urging its members to retain the general structure of bicameralism even as they engage in the necessary reform of the specifics of our particular version of bicameralism.” Dahl is more skeptical of the merits of second legislative chambers. He notes that “Nebraska, Norway, Sweden, and Denmark seem to do quite nicely without them” and asks, “Exactly whom and whose interests is a second chamber supposed to represent?” Dahl rejects the argument that a second chamber should represent the interests of the federal units and quotes with approval Hamilton’s observation that “As states are a collection of individual men which ought we to respect most, the rights of people composing them or the artificial beings resulting from the composition. Nothing could be more preposterous than to sacrifice the former to the latter.” Lazare will have nothing to do with such lukewarm criticism and hopes that an “all powerful House” would “abolish the Senate or reduce it to a largely ceremonial body a la the House of Lords.” But perhaps no author directed such vituperation at bicameralism as Richard Rosenfeld who, in a *Harper’s* article entitled “What Democracy?: The Case for Abolishing the United States Senate,” pours scorn on the idea that the upper chamber is supposed to act as a check on the lower, asking us to consider the occasions when the House was right about a bill and the “unrepresentative” Senate was wrong. “If as a matter of experiment,” Rosenfeld writes, “we were to allow a roll of the dice, the chirp of a parakeet or a phase of the moon to veto the decisions of the House of Representatives, there would be times when the dice, the bird, or the moon would be right and the House of Representatives would be wrong . . . Would our response be to turn the dice, the bird, or the moon into a permanent part of the government?”

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Can a case be made, then, for a more proportioned Senate? We have to go back to the original logic of checks and balances. The peculiar way the American Constitution maintains separation of powers as a functioning reality is to have the three branches overlap by giving each some power over the others, so making the branches as coequal in power as is possible. The famous passage from the *Federalist* No. 51 explains that “it is not possible to give each department an equal power of self-defense in a republican government, the legislative authority necessarily predominates.” The remedy is to divide the legislature into different branches, while “the weakness of the executive may require, on the other hand, that it should be fortified,” including giving the president the conditional power to veto acts of the legislature. And, of course, since *Marbury v. Madison* judicial review has been the power that fortified the judiciary. Thus bicameralism, the presidential veto, and judicial review are the bedrock foundation of checks and balances and hence of the Constitution.

Here then is at least part of the argument for a bicameral Congress. A unicameral legislature would completely overwhelm the executive and complete the politicization of administration that already is a constant threat to good government. Compare the extensive list of powers that are granted to Congress in Article 1, Section 8, which is topped off with the open-ended “necessary and proper” clause. Next to these the powers of the president are already few. Certainly he has considerable power as commander in chief of the armed forces. Most of his other powers are sharply limited and subject to Senate approval.

It is important to maintain the legislative and executive branches as close to coequal forces because at stake is control over the bureaucracy. Parliamentary systems center control of the bureaucracy in the hands of the prime minister and make lobbying the legislature to influence the bureaucracy very difficult. In their tome *Do Institutions Matter?* Weaver and Rockman write, “In parliamentary systems



centralization of legislative power presumably decreases the alternatives open to interest groups and party discipline makes appeals to individual legislators an almost hopeless strategy in terms of changing policy outcomes.” If a citizen doesn’t like what the bureaucracy is doing, there is no sense, in a country with a parliament, in lobbying your MP. If the parliamentarian of your district is in the minority, he can not help you; if he is in the majority he most likely won’t want to help you because effective party discipline means he must back his party’s policies as they are implemented by the bureaucracy. In a separation-of-powers system citizens can and do successfully bring their complaints with the bureaucracy to the legislature.

Under our Constitution, Congress has at least as much control over the bureaucracy as the president, if not more. In his authoritative volume, *Bureaucracy: What Government Agencies Do and Why They Do It*, published in 1989, James Q. Wilson writes:

Virtually every political scientist who has studied the matter agrees that Congress possesses, in Herbert Kaufman’s words an “awesome arsenal” of weapons it can use against agencies: legislation, appropriations, hearings, investigations, personal interventions, and “friendly advice” that is ignored at an executive’s peril.

It is this behemoth of organizational and political capacity that critics and skeptics of bicameralism wish to fortify still more by unifying it and so doing away with its last internal constraint.

THE PRESIDENCY

NOR IS THAT all. While the Constitution’s critics consider enhancing the powers of Congress with unicameralism, they would sharply limit those of the president in various ways. Lazare would demote the president to “semi-figurehead status.” Levinson is much more moderate but still asks, “Is the presidential veto a desirable part of our political system? It does, after all, exemplify just one more antimajoritarian feature of our Constitution that serves to make it ever harder to pass legislation departing from the status quo.” Levinson ends up allowing the president a “Constitution-based” veto, which he thinks is a necessary consequence of the president taking the oath to “preserve, protect and defend the Constitution.” But he objects to the president having a policy-based veto. Levinson writes that once a president has the power to veto a bill simply because he regards it as unwise or ineffective, and without any claim that the bill is unconstitutional, then “At that point the president in effect becomes a one-person third legislative chamber, able with the stroke of a pen to negate the views of at least a few hundred members of Congress.”

But there are deeper reasons for Levinson’s desire to cut back on the president’s power. The first is the objection to what Dahl calls the “myth of the presidential mandate: that by winning a majority of the popular (and presumably electoral) votes the president has gained a ‘mandate’ to carry out whatever he had proposed during the campaign.” Levinson agrees. He points out that for various reasons many presidents — he names George W. Bush, Gerald Ford, Harry Truman, John F. Kennedy, Richard Nixon, and Bill Clinton — simply did not receive the majority of the popular vote that is the most plausible basis for the claim of a mandate. The constitutional critics discussed here are in agreement that in general the aura of power and prestige that surrounds the American president needs to be dimmed a bit. Levinson is distressed by the practice of playing “Hail to the Chief” when the president makes a public appearance, finding the custom more suitable to a monarchy. He objects to what he sees as a presidency that combines the functions of chief of state and chief of government, which are separated in most other modern democracies. Dahl sees the role of president as “the equivalent of a monarch and prime minister rolled into one, and wonders “whether the presidency that has emerged is appropriate for a modern democratic country like ours.”



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One may wonder whether a very strong presidency is appropriate for a modern democracy. But it is more certain that the current veto power is indispensable if a strong presidency is desired. In *The Presidential Veto: Touchstone of the American Presidency* (1983), Robert J. Spitzer argues that “the application and rise of the presidential veto is symptomatic of the rise of the modern strong presidency.” One could go further and say that one of the features of a strong presidency of any type would be the full veto, that is, a veto that can be policy-based as well as constitutionally-based. Hamilton’s defense of the veto in *Federalist* No. 73 implies that the veto can be used on both constitutional and policy grounds. Hamilton argues that a prerequisite of an energetic presidency is “competent powers” granted to the president to defend himself and to increase the chances “in favor of the community” against the chance of “passing bad laws” either because of haste, mistake, or design.

The concern about “bad laws” certainly sounds like a policy-based veto. But it is potentially misleading to think of the first use — to enable the executive to defend himself — as a constitutionally-based veto. Levinson argues for a constitutionally-based veto on the ground that “Presidents do, after all, take a solemn oath to ‘preserve, protect and defend the constitution,’ and, as a formal matter, it is hard to square the oath with a duty to sign what they believe to be unconstitutional legislation.” But Hamilton does not cite the oath as the source of the president’s veto power, but rather to enable the executive to “defend himself.” But against whom? The answer is Congress. In an apparent reference to the defense of separation of powers in *Federalist* No. 51, Hamilton explains the need to keep the legislature and executive close to coequal powers, making his well-known reference to the insufficiency of a parchment delineation of government branches, recognizing the need to furnish each department with “constitutional arms for its own defense.”

THE SEPARATION’S UTILITY

IN SHORT, THE constitutional critics once again turn out to be unenthusiastic about separation of powers. This is so even though these authors don’t say a great deal about separation of powers per se. The term itself comes up only in passing in Lazare, but the upshot of his analysis is that he is against it. He sees it as a system in which “a move by one element in any one direction would be almost immediately offset by a counter move by one or both” of the other branches “in the opposite direction.” The result, Lazare writes, “was a counter democratic system dedicated to the virtues of staying put in the face of rising popular pressure.”

Dahl and Levinson also mention the term “separation of powers” only in passing, but as we have seen in substance they are at least skeptical of its value. Those, such as the present author, who regard separation of powers as an indispensable part of the American political order will find themselves skeptical of these criticisms.

The case that Madison makes for the separation of powers, which appears in *Federalist* 51, is that it is “essential to the preservation of liberty.” However, Madison’s case rests on a definition of tyranny that is hard to accept in the 21st century, one that claims that the “accumulation of all powers” in one body “may justly be pronounced the very definition of tyranny,” as he expressed in *Federalist* No. 47, the first in a string of five papers on separation of powers.

By this definition the modern United Kingdom, and most other parliamentary systems, would count as tyrannies. Whatever one thinks of the relative merits of parliamentary and separation-of-powers



systems, few people today would argue that countries with parliamentary systems are by virtue of that fact tyrannies. One need not be nearly as convinced of the irrelevance of the Founders' wisdom as these authors are in order to admit that that on this point at least Madison was wrong. What good, then, is separation of powers if not as a barrier to tyranny?

The question of what difference separation of powers makes has been answered by economists Torsten Persson and Guido Tabellini in their theoretical work, *Political Economics: Explaining Economic Policy* and in their empirical study *The Economic Effects of Constitutions*. These authors report that in theory, separation of power in "the presidential-congressional regime produces smaller government with less waste" as well as less redistribution and low spending on public goods. Voters are able to "discipline" politicians, who must compete more keenly with each other, a process that moderates the tax burden, according to Persson and Tabellini. The parliamentary system, the two authors tell us in *Political Economics*, leads us to larger government and more spending on public goods, more waste and taxation. In their other book, the authors make these same points in a rather different form, arguing that checks and balances hold abuses of power in check, unlike in parliamentary systems, where "the greater concentration of powers in parliamentary regimes, [makes] it . . . easier for politicians to collude with each other at the voters' expense."

What do the data say about all this theory? Persson and Tabellini looked at two data sets. For cross-sectional analysis they used data on 85 democracies during the 1990s. To study changes over time they developed a panel set of data that tracks 60 countries over the period 1960-98. They found the data strongly support predictions regarding the size of government. "Presidentialism reduces the overall size of government by about 5% of GDP," they write in *The Economic Effects of Constitutions*. "Compared to that in parliamentary regimes, government spending in presidential democracies is also much less persistent. . . . Unconditionally, presidential democracies do have lower spending than parliamentary democracies . . . as well as smaller deficits. The data analyses also show that the size of welfare programs is about 2 percent lower in presidential systems than in parliamentary ones.

The American separation-of-powers system probably results in a smaller government and in particular a smaller welfare state than we would otherwise have. If one is in favor of a larger government, then separation of powers is a problem; otherwise, it is not. One can make a case for either preference. The important point is that the size of government is very much an issue when we are considering the consequences of forms of government, and it ought to have been dealt with directly in the books under review.

DEMOCRACY OR REPUBLIC?

WE COME DOWN then to the matter of value judgments. We need to be clear about what the values are against which we are judging the Constitution. Dahl is admirably frank about what value he embraces: "I am going to suggest that we begin to view our American Constitution as nothing more or less than a set of basic institutions and practices designed to the best of our abilities for the purpose of attaining democratic values."

For Dahl the only relevant value is democracy. The titles of Lazare's and Levinson's books show that democracy is a very prominent value for them, too. Yet they do not explicitly indicate a single, overriding value as Dahl does, which is for the best. It is a mistake to identify any one value as all important. It is not at all clear that the values against which one might judge a constitution — why not liberty, justice, good government, etc.? — can all be boiled down to a single master value. So we ought to say that of course democracy is relevant, but what else is relevant? Why should not our preferences concerning size of government be relevant? Perhaps value judgments concerning size of governments don't have quite the same elemental ring that democracy, justice, liberty, and some



other terms do. But the issue we come to is why not trade off democracy against other values and what would those other values be? And is there any value function against which the Constitution would fare better than it does by the solely or very predominantly democratic value function that these authors bring to bear?

An obvious candidate for such a counterbalancing value is republicanism. The point is that for the Founders republicanism was, if not the sole political value, at least a very prominent one. And of course it is well known that the *Federalist Papers* do not try to establish the democratic bona fides of the Constitution but rather seek to demonstrate “*The conformity of the proposed Constitution to the true principles of republican government,*” as expressed in *Federalist* No. 1 (italics in the original). Democracy, rarely coming up in the *Federalist Papers*, usually appears in the context of “pure democracy,” i.e., direct democracy without intermediate representation. Why not then judge the Constitution, at least partly, against the value it was designed to reflect, republicanism, rather than against democracy alone?

Levinson and Dahl have immediate answers to this question. Levinson denies that republicanism is relevant today, pointing out that the Founders’ vision of “republican” order included slavery and the “rank subordination of women” and concludes, “*That vision of politics is blessedly long behind us but the Constitution is not*” (italics in the original). Dahl goes further and argues that, certain appearances to the contrary, the Founders did not understand themselves as applying republican rather than democratic values. He writes:

Some readers may argue that the Founding Fathers . . . intended to create a republic, not a democracy. From this premise, according to a not uncommon belief among Americans, it follows that the United States is not a democracy but a republic. Although this belief is sometimes supported on the authority of a principle architect of the Constitution, James Madison, it is for reasons I explain . . . mistaken.

One can understand why Dahl wants to make this argument. If the Founders were trying to create a republic, then republican, not democratic, values would seem to be the relevant measure. However his case is not convincing. Dahl himself acknowledges that in *Federalist* No. 10 Madison famously distinguishes, in the following passage, between republics and democracies:

The two great points of difference between a democracy and a republic are: first the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of the country, over which the latter may be extended.

This seems like as clear a distinction as there possibly can be, but Dahl disagrees. He points out, correctly, that “during the eighteenth century the terms ‘democracy’ and ‘republic’ were used rather interchangeably in both common and philosophical usage.” But this doesn’t prove that the terms were interchangeable for Madison in the *Federalist Papers*. Thus, to prove so, Dahl quotes from *Federalist* No. 39 as follows:

We may define a republic to be...a government which derives its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, or for a limited period, or during good behavior.

Dahl then comments on this passage:

By defining a republic as a government which derives all its powers “directly or indirectly



from the great body of the people,” Madison now seems to be contradicting the distinction he had drawn in *Federalist* No. 10.

Dahl seems to think that Madison’s use of the word “directly” refers to a situation in which the people themselves make the laws, and the word “indirectly” refers to governments in which there is representation. If this were so then Madison would indeed be contradicting the distinction he drew in *Federalist* No. 10, thus blurring the distinction between a republic and a democracy. But consider how Madison uses the words “directly” and “indirectly” just a few lines later in *Federalist* No. 39:

It is *sufficient* for such a government (i.e. a republic) that the persons administering it be appointed, either directly or indirectly by the people . . . The House of Representatives . . . is elected immediately by the great body of the people. The Senate . . . derives its appointment indirectly from the people. The President is indirectly derived from the choice of the people. Even the judges . . . will . . . be the choice, though a remote choice, of the people themselves. (Italics in the original.)

In this context, Madison’s use of the word “directly” has nothing to do with direct democracy. Government officials are chosen directly when they are elected immediately by the people themselves, as is the case in the House of Representatives. And the term “indirectly” does not refer to delegation of lawmaking to representatives of the people. Government officials are chosen indirectly when they are appointed by other officials who *have* been the immediate choice of the people, as is the case with senators, who are chosen by elected officials in the state legislature.

The point is that in these passages Madison is consistent in making a distinction between democracy and republicanism. The broader point is that this father of the Constitution is perfectly clear that the Constitution is supposed to be a republic, not a democracy. Indeed, elsewhere in *Federalist* No. 39 Madison asks, “Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility.”

In short even the text Dahl chooses to site demonstrates that the Founders set out to create a republic, not a democracy.

Is it, then, fair to judge a republic against democratic principles? Of course, Levinson argues that there must be something wrong with republican principles since they were compatible with slavery and the subjugation of women. But the fact that the Founders addressed some evils and not others doesn’t prove their principles were wrong. And in any case the point being made here is not that 18th-century republicanism, warts and all, should be the sole value against which the Constitution ought to be measured. A republicanism purged, in so far as possible, of its earlier flaws and *balanced with other values*, including 20th-century democracy, is what is being suggested here.

Just what is republicanism and how does it vindicate the Constitution in a way that the value of democracy does not? The literature on republicanism and the Constitution is very extensive but we can make some basic points here. Michael J. Sandel in *Democracy’s Discontent* (1996), defines republicanism as follows:

Central to republican theory is the idea that liberty depends on sharing in self-government . . . It means deliberating with fellow citizens about the common good and helping to shape the destiny of the political community . . . It requires a knowledge of public affairs and also a sense of belonging, a concern for the whole, a moral bond with the community whose fate is at stake. To share in self-rule therefore requires that citizens possess, or come to acquire, certain qualities of character or civic virtues . . .



The republican conception of freedom, unlike the liberal conception, requires a formative politics that cultivates in citizens the qualities of character self-government requires.

There is considerable debate on the question to what degree is the Constitution a republican document. I agree with those authors who argue that the Constitution is mostly a liberal document, firmly rooted in the Lockean tradition. But I agree with Sandel's reading that the Constitution also has republican features. Analytically disentangling the liberal and republican features is difficult. Sometimes the same feature is capable of both a liberal and a republican justification. Consider, for example, representation, as opposed to direct democracy. None of the Constitution's critics, or anyone else, will object to representation on democratic grounds. Democratic values accept, or perhaps require, representative government in all cases where direct democracy is impractical. But representation is capable of a republican defense too. Madison in *Federalist* No. 10 makes the "scheme of representation" the defining characteristic of a republic. As such, representation does more than simply make democracy possible in situations where it would otherwise be impractical. The effect of representation, Madison tells us in *Federalist* No. 10, "is . . . to refine and enlarge the public views by passing them through the medium of a chosen body of citizens," whose wisdom, patriotism and "love of justice" will discern the best interest of the country.

Here we have a republican defense of one aspect of the Constitution, representation, which is not available to liberal thought, concerned as it is with democratic equality. Representation inculcates virtue, if not among the people at large, then at least among the political class. Representation makes self-government possible not simply by being a practical alternative to pure democracy, but by helping to check the dangers of faction.

Of course representation is not a controversial feature for the constitutional critics. It can be defended on democratic grounds and so perhaps doesn't need also a republican justification. But a republican defense of other features of the Constitution that are less defensible on democratic grounds can be made. All of the features of the Constitution that are designed to enhance self-government by introducing a space between the people's immediate desires and government's action, a space in which statesmanship and public spirit can flourish, can be defended on republican grounds.

A republican case for the presidency, and for a strong presidency, can be made. Recall that Lazare would reduce the president to a figurehead. Levinson would weaken the office by curbing the president's veto power and by making presidents subject to confidence votes of the Congress. Dahl writes that the presidency is "an office with no equivalent in other of the other established democracies," with an "impossible mix of roles" that usually makes for disappointing presidencies. Are their concerns justified? Hamilton explains in *Federalist* No. 71 that while the "sense of the community should govern the conduct" of those entrusted with the management of their affairs, "it does not require an unqualified compliance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests."

How fair is it to say that that the authors under discussion here want to make the president servile? Lazare stands guilty as charged. Levinson and Dahl are less extreme. They to want to reform, but not debilitate, the presidency. The point here is that any such reform involves a tradeoff. A more democratic presidency might well be a less republican and less energetic presidency.

A REFORM CONVERSATION WORTH HAVING

A MORE OR LESS weakened presidency is one part of the critics' agenda. Another part of that agenda, as we saw, is a more or less strengthened legislature. These two proposals add up to



an undermining of the checks and balances system. It is important to understand that the checks and balances system, while it is open to a democratic critique, is also capable of a republican defense. Separation of powers divides the government in several decision points. Different interests organize themselves in order to influence any of those points. In this way separation of powers divides society up into a multiplicity of interests or factions, a point made by Madison in *Federalist* No. 51, in which he writes that while all authority in the republic “will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority will be in little danger from interested combinations of the majority.” Here we have a democratic defense of separation of powers: decentralizing government and society safeguards individual rights. Later in the same paper Madison gives separation of powers a republican defense, arguing that the in the “extended republic of the United States” with its many and varied groups, a “coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the common good.”

How fair is it to say that that the authors under discussion here want to make the president servile?

No doubt the Constitution’s critics would simply deny that our contemporary politics produces the public good often enough. All of them see our decentralized constitutional system as in fact resulting in hyper-fragmentation more conducive to demagoguery and bullying. No one can deny they have a point. Levinson discusses the potentially over-fragmenting effect separation of powers can have in a section entitled “The Special Problem of Divided Government: How Separate Do We Want Our Institutions to Be?” Here he presents James L. Sundquist’s argument that “the Constitution fundamentally discourages the likelihood of creating an effective government.” This is especially the case, these authors argue, when the Congress and the presidency are in the hands of opposed parties. The possibility of such a disposition of power is small in a parliamentary system since the majority in the legislature almost always picks one of its own to be the executive. Thus separation of powers promotes, not deliberation on the public good, but gridlock. Or so goes the argument.

However some recent literature has argued that “gridlock is a myth.” In *The New Politics of Public Policy*, edited by Landy and Levine, the contributors contend that the combination of a fragmented institutional framework, divided government, a highly competitive political environment, and the rights revolution encouraged policy entrepreneurs of various types to compete with each other to have the best claim to popular political ideas, leading to nonincremental changes in such areas as the environment, education, taxation, and immigration.

The American constitutional system, both its written and informal parts, has developed processes that are capable of harnessing fragmentation to achieve significant change. Levinson acknowledges this possibility by accepting that “One might well offer . . . evidence that the perceived necessity of change will triumph one way or another. If the Constitution is thought to be too inflexible in allowing formal change, then other, more informal methods will be developed.”

Let’s take a look at the practical political effects of these criticisms. Dahl is clear-eyed on this matter: “My reflections lead me to a measured pessimism about the prospects for greater democratization of the American Constitution.” He sees the likelihood of reducing “inequality” in the Senate as “virtually zero.” Certainly the chances for the “democratic *coup d’etat*” by the House of Representatives fancifully envisioned by Lazare are small. Levinson is more realistic when he tries to convince the reader to vote for a new constitutional convention to consider the changes he proposes. But he is not convincing when he argues that such a convention could declare the ordinary method of amending the Constitution void and simply specify that a national referendum is all that is needed. Of course the



authors are all aware that amending the Constitution is very difficult.

After reading these books this defender of the Constitution wishes the chances for reform were not so small. The critics are convincing on the matter of Senate representation, and it is a weakness of our Constitution that apparently nothing can be done about the matter. And some other suggestions in these books that do not undermine the separation-of-powers system — for example the suggestions that naturalized citizens be eligible for the presidency and that Supreme Court justices serve a fixed eighteen-year term — deserve serious attention. Dahl writes of “the possibility . . . of a gradually expanding discussion that begins in scholarly circles, moves outward to the media and intellectuals more generally and after some years begins to engage a wider public.” The discussion is worth having for the greater understanding it can generate.

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