

Winter 2013

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Recommended Citation

Sanford Levinson, *"Constitutional Myths" and "Democratic Politics": Two Takes on the American Constitution*, 49 *Tulsa L. Rev.* 377 (2013).

Available at: <http://digitalcommons.law.utulsa.edu/tlr/vol49/iss2/13>

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“CONSTITUTIONAL MYTHS” AND “DEMOCRATIC” POLITICS: TWO TAKES ON THE AMERICAN CONSTITUTION

Sanford Levinson *

RAY RAPHAEL, *CONSTITUTIONAL MYTHS: WHAT WE GET WRONG AND HOW TO GET IT RIGHT* (2013). Pp. 336. Hardcover \$26.95.

ANTHONY KING, *THE FOUNDING FATHERS V. THE PEOPLE: PARADOXES OF AMERICAN DEMOCRACY* (2012). Pp. 256. Hardcover \$31.50.

Even in a crowded field, *Constitutional Myths: What We Get Wrong and How to Get It Right*, by Ray Raphael,¹ and *The Founding Fathers v. the People: Paradoxes of American Democracy*, by Anthony King,² are welcome additions to anyone’s shelf (or Kindle), well worth reading and reflecting upon. As their titles suggest, these are books with strong theses, attempting to dispel what has become conventional wisdom about the United States Constitution and its underlying commitments. Both try to place what came out of Philadelphia into the context of political ideas both of the time and, especially in King’s book, subsequent developments in American political thought. It is also worth mentioning that both are quite short. King begins his book by describing it as “an extended essay.”³ Raphael has basically written a set of eight short essays. Both are well written; they would make an interesting joint assignment in a challenging undergraduate or graduate course (or law school seminar).

There is, however, an interesting tension between the two books. Even as Raphael effectively demonstrates that many widely believed current understandings of the Constitution and its Framers are flatly wrong and much in need of correction, he appears to remain an admirer of the document itself. He writes that our “old rules” have “by and large . . . served us well.”⁴ What has gone off track is our understanding of the actual history of the Constitution, including, most importantly, the values underlying its formation and then ratification. More particularly, we tend to forget how much it was the product of a political movement that emphasized the desirability of creating a strong national government with the capacities, including

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1. RAY RAPHAEL, *CONSTITUTIONAL MYTHS: WHAT WE GET WRONG AND HOW TO GET IT RIGHT* (2013).

2. ANTHONY KING, *THE FOUNDING FATHERS V. THE PEOPLE: PARADOXES OF AMERICAN DEMOCRACY* (2012).

3. *Id.* at ix.

4. RAPHAEL, *supra* note 1, at xiii.

those of taxation, to establish itself as a truly functioning country.

Although Raphael presents a withering critique of “originalism” in his final chapter,⁵ he himself could be placed within the camp of at least moderate “originalists” inasmuch as he clearly thinks that it is important that we get our history right. We have as a society been ill-served by persons and movements who have, by adopting certain “myths,” gotten our constitutional history profoundly wrong and are, therefore, misdirecting the contemporary debate about constitutional meaning.

Anthony King, on the other hand, can be described much more as a critic of the Constitution. Or, perhaps more precisely, he is struck by the extent to which Americans accept with apparent equanimity a Constitution that was intended, and continues, to be remarkably “undemocratic” in many fundamental respects, not only when compared (and contrasted) with many constitutions abroad, but even more strikingly, when placed next to many American state constitutions that reflect a far greater commitment to democratic procedures and popular rule. As someone who has written a book entitled *Our Undemocratic Constitution*,⁶ and whose most recent book emphasizes that the United States indeed contains not merely a single constitution but fifty-one—and that all of the fifty state constitutions can be said to be more democratic, many strikingly so, than the national counterpart⁷—I am predisposed to be (and am in fact) extremely receptive to King’s arguments. King amply vindicates the view that “strangers” can often see aspects of a political or social system that “natives” are prone to miss.⁸

What are the “myths” that prevent an accurate understanding of the Constitution?

Raphael focuses on eight such “myths.” The most important, perhaps, is the subject of his first chapter and then again, slightly rephrased, of his fourth.⁹ Thus, his initial “myth” is that “[t]he framers of the Constitution opposed a strong federal government.”¹⁰ A similar myth is that “[t]he framers were guided by clear principles of limited government.”¹¹ The general format of all eight chapters is to concede that all of the “myths” rest on a “kernel of truth,”¹² but he then goes on to demonstrate—and I use the word advisedly—that the kernel of truth is outweighed by much other evidence pointing to a quite different conclusion. To be sure, those who drafted the Constitution were scarcely devotees of “unlimited” government, but, obviously, that condition is met once there is a single limit on governmental power (such as the ability to pass *ex post facto* laws or grant titles of nobility). The problem, from then until now, is to discern the extent of the limits. Consider, after all, the statement of the *Pennsylvania Gazette* on September 5, 1787 (before, of course, anyone knew the

5. *Id.* at 153-75.

6. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

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

8. *See generally* KING, *supra* note 2.

9. *See id.*

10. RAPHAEL, *supra* note 1, at 1.

11. *Id.* at 57.

12. *Id.* at 1-2, 15-16, 36-37, 57-58, 77-78, 103-04, 131-32, 153-54.

actualities of the decisions made at the Convention): "The Year 1776 is celebrated for a revolution in favor of *Liberty*. The year 1787, it is expected, will be celebrated with equal joy, for a revolution in favor of *Government*."¹³ Some of the delegates in Philadelphia undoubtedly wanted a stronger national government than did others, and, as Raphael makes clear, James Madison in particular left the city immensely frustrated over the unwillingness of his colleagues to grant Congress a power to veto any and all state legislation that it thought contrary to the national interest.¹⁴ But Raphael powerfully demonstrates that even those with a weaker vision than Madison's nonetheless, in effect, agreed with the *Gazette* that a far stronger government than that currently existing would be necessary.

There may have been fans of the Articles of Confederation in 1787 America, but they certainly were not well represented in Philadelphia. And even some skeptical delegates like Robert Yates and John Lansing from New York, who chose in effect to stalk out of the Convention rather than try to demonstrate why enhancement of national power was a bad idea, chose to remain faithful to their vow of absolute silence rather than to emulate Paul Revere and spread the word that the Philadelphia Convention had been taken over basically by strong nationalists.¹⁵ In any event, there was general agreement by supporters of the new Constitution that the government created by the Articles of Confederation was barely entitled to the name.

California Speaker of the House Jess Unruh once commented that "[m]oney is the mother's milk of politics."¹⁶ Even more so is money, derived from taxes, the mother's milk of government in general. The national government created by the Articles was notoriously unable to raise any money, not least so because it was without power to tax individuals directly. Instead, the Congress issued "requisitions" to the states, hoping that they would be paid. As Robert Livingston told the New York ratifying convention on June 27, 1788, the requisitions, in fact, were nothing more than "pompous petitions for charity,"¹⁷ no more effective than most contemporary end-of-year appeals arriving in the mail from charities who present sometimes terrible pictures of what can happen should, as is overwhelmingly likely, we fail to contribute. Puppies will die; people will go unfed; and, in the instant case, government will go unfunded. Thus "[i]n the requisition of 1786—the last before the Constitution—Congress mandated that states pay \$3,800,000, but it collected

13. *Id.* at 2.

14. *Id.* at 84-86; Raphael goes on to include a number of other nationalist proposals proffered by Madison, including the power to charter corporations, which were rejected. *See id.* at 99-101.

15. David Robertson, in his recent close study of the compromises that took place during the Convention, divides the delegates into "broad" and "narrow" nationalists, all of whom, though, agreed that continuing under the Articles was basically untenable. *See* DAVID ROBERTSON, *THE ORIGINAL COMPROMISE* (2013).

16. Steven Greenhut, *Arcane Debate Is Animated by What's at Stake: Money*, SAN DIEGO UNION TRIB., Aug. 30, 2013, <http://www.utsandiego.com/news/2013/aug/30/arcane-debate-is-animated-by-whats-at-stake-money/>.

17. CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* 15 (2005) (quoting Robert Livingston, Address to the New York Convention (June 7, 1788)).

only \$663.”¹⁸ The government established by the Articles did not have to be “overthrown,” since it was substantially dying of starvation.

This leads directly to the second “myth,” that “[t]he framers hated taxes.”¹⁹ One does not have to believe that they loved the idea of being taxed. Who does? But one can be quite certain that almost all of the delegates would have subscribed to Oliver Wendell Holmes’s reminder, some 140 years later, that “[t]axes are what we pay for civilized society.”²⁰ Perhaps Holmes should have instead said that taxes are absolutely essential to assuring both the “common defense” and the “general Welfare” that are announced to be among the essential purposes of the new government being designed in Philadelphia. The requisition system had to go. It would be replaced with the most basic power of Congress, set out in the very first clause of Article I, Section 8, to “tax” and then “spend” for these purposes.

Raphael is no fool. He does not deny that there might be unnecessary taxes or that given taxes could be too high, but that is something entirely different from any argument that the framers were neo-libertarians who would have agreed that almost all taxes constitute theft from the pockets of the citizenry. Raphael concludes his chapter on taxes by quoting the Father of our Country, who in his iconic Farewell Address adjured his fellow Americans to “bear in mind that towards the payments of debts there must be revenue; that to have revenue there must be taxes.”²¹ Even if it is true that “no taxes can be devised which are not more or less inconvenient and unpleasant,” George Washington called “for a spirit of acquiescence in the measures for obtaining revenue, which the public exigencies may at any time dictate.”²²

The remaining “myths” are less ideologically fundamental, but, in many ways, just as important insofar as they have contributed to distorted understanding of our past and, therefore, our constitutional present. Were, for example, the Framers “impartial statesmen, above interest-drive politics”?²³ Again, there is a “kernel of truth” to the statement by Thomas Jefferson to John Adams that the persons who drafted the Constitution were unusually able and public-spirited, perhaps even “an assembly of demigods.”²⁴ But the “gods” we should compare them to are those found, say, in *The Iliad*, capable of both grandiosity and remarkable pettiness with regard to protecting their specific domains. The two major compromises, after all, were entirely driven by interest-group politics. This is surely the case with regard to the felt necessity to accommodate slaveowners. But it captures as well Delaware’s threat to

18. *Id.* at 15 (citations omitted).

19. RAPHAEL, *supra* note 1, at 15.

20. *Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). The entire quotation is as follows:

It is true . . . that every exaction of money for an act is a discouragement to the extent of the payment required, but that which in its immediacy is a discouragement may be part of an encouragement when seen in its organic connection with the whole. Taxes are what we pay for civilized society, including the chance to insure.

Id.

21. RAPHAEL, *supra* note 1, at 34 (citation omitted).

22. *Id.* (citation omitted).

23. *Id.* at 35.

24. *Id.*

torpedo the entire project of constitutional reform if delegates from large states—and all states were larger than Delaware—did not submit to its extortionate demand for equal voting power in the Senate. Perhaps Delaware could not have succeeded on its own since it is important that the extortion was demanded as well by New Jersey and Connecticut, among other states. Although tempted to reject the demand, James Madison ultimately acquiesced, but only because the alternative was a failed convention.²⁵ In *Federalist No. 62*, he described equal voting power as a "lesser evil," the greater evil being no constitution at all.²⁶ This scarcely represents a ringing endorsement, especially since those unhappy with the other "great compromise" and its collaboration with slave states whose representation in the House of Representatives (and, therefore, the electoral college) would be enhanced by the three-fifths clause, offered a basically identical argument: Give us what we demand, whether or not you think it is just, or we will bring down the temple. Politics does indeed require the willingness to make often unhappy compromises, and the basis, almost by definition, is far less "high principle" than the belief that getting a deal, whatever the cost, is better than the alternative.

Thus Raphael is clearly correct that:

Downplaying the political nature of our government's creation is well meant but misguided. It creates too much distance between our world and that of the framers. If we see the men who wrote the Constitution as above politics, we cannot see them as models for how we might resolve our differences today.²⁷

This is excellent advice, though there is one problem: Raphael does not speak in his own voice about the actual merits of the two "great compromises." Is it really the case that attaining a new constitution to replace the Articles of Confederation was "worth any price?"²⁸ Perhaps we are willing to give Madison and his colleagues a pass on the Senate, even if we agree with those who believe that that institution has been, over our history, more of a bane than a boon.²⁹ But is this true of slavery as well? Is it a "myth," for example, to suggest that some prices are not worth paying? Might we not have been better off without the Constitution, even if that had led to the creation of two or three independent countries instead of the one "United States" (at least until 1861)?³⁰ It is, perhaps, unfair to be critical of Raphael for not jumping into such potentially bottomless lakes of philosophy and political theory, but no discussion of "politics" and attendant "compromise" can truly avoid them forever. So is it possible that those who refused to compromise and, indeed, refused to sign the proposed Constitution on September 17, 1787, or led the fight thereafter to reject its adoption, are as appropriate potential "models" for our polity today as

25. *Id.* at 83-84.

26. THE FEDERALIST NO. 62 (James Madison).

27. RAPHAEL, *supra* note 1, at 55.

28. See LEVINSON, *supra* note 7, at 33-53.

29. See, e.g., LEVINSON, *supra* note 6, at 49-62.

30. *Id.* at 13-14.

those who swallowed their doubts, whether about the Senate or about slavery, and counseled ratification?

Chapter Five moves on to the myth that “James Madison sired the Constitution.”³¹ Even if one concedes the premise that he was the single most important person at Philadelphia, not least, of course, because he kept such good notes, there is no reason to believe that he “sired” the Constitution or, even more to the point, that he gave the Constitution the unconditional love that one expects from parents. Madison, after all, was decidedly unhappy with certain features of what emerged from Philadelphia. I have already mentioned his description of the Senate only as a “lesser evil.”³² Even more serious was the refusal of his fellow delegates, after repeated attempts, to authorize a wide-ranging power by Congress to “negative *in all cases whatsoever* [Madison’s emphasis] on the legislative acts of the States, as heretofore exercised by the Kingly prerogative . . . Without this defensive power,” Madison insisted, “every positive power that can be given on paper will be evaded [and] defeated.”³³ Raphael tellingly quotes the eminent historian Jack Rakove, who wrote that Madison “viewed all the decisions that had diluted his system not as necessary compromises but as fundamental errors in judgment.”³⁴

To many students, Madison may be best known as one of the co-authors of *The Federalist*, the most famous defense of the Constitution. That naturally leads to the sixth “myth”: “*The Federalist Papers* tell us what the Constitution really means.”³⁵ Whatever one may think of *The Federalist*—Raphael emphasizes that they become denominated *The Federalist Papers* only in the mid-twentieth century³⁶—it is obvious to any well-read historian that they in no serious way describe even the views articulated by Madison and Hamilton in Philadelphia, let alone the collective understandings of delegates from New Hampshire to Georgia, who presented often glaringly different interpretations at the various ratification constitutions that in fact breathed the proposals emanating from Philadelphia into juridical life.³⁷ No doubt many, probably most, readers of *Constitutional Myths* will scarcely count as “well-read historians,” and this chapter, like the one on Madison’s status as “sire” of the Constitution, will undoubtedly be especially valuable for its readers. Moreover, Raphael presents an illuminating history of the publication history of *The Federalist* during the ratification period and thereafter, which only underscores the fact that extraordinarily few Americans actually had the opportunity to read the essays, even if they had the inclination. “Nationally, the readership was exceedingly small.”³⁸ Following *The Federalist No. 23*, only an excerpt from *The Federalist No. 38* was published out-of-state at all, and that sole exception took place “in the *Freeman’s Oracle*,

31. RAPHAEL, *supra* note 1, at 77.

32. THE FEDERALIST NO. 62, *supra* note 26.

33. RAPHAEL, *supra* note 1, at 81.

34. *Id.* at 89 (quoting JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 79 (2007)).

35. RAPHAEL, *supra* note 1, at 103.

36. *Id.* at 106-07.

37. See PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 (2010) (reviewing the history of the ratification conventions in each of the thirteen states).

38. RAPHAEL, *supra* note 1, at 106.

published in Exeter, New Hampshire."³⁹

Even if one believes that *The Federalist* is worth reading, because, after all, Hamilton and Madison (as well as John Jay) were unusually able people whose thoughts are full of wisdom, Raphael notes that the problem is that we must explain why it is the particular Hamilton and Madison writing in late 1787-1788 who are so reliable as guides to wise government.⁴⁰ "[I]f Hamilton was indeed wise and brilliant, when exactly was that so? When he penned his essays as Publius or when he was touting a stronger, more centralized government both before and after that time?"⁴¹

The Federalist No. 84 is noteworthy, among other reasons, for its argument that the lack of a Bill of Rights is not only not a defect of the Philadelphia draft being supported by Publius, but may in fact be a genuine virtue, for it only underscores the theme that that draft establishes only a limited national government. Since no power is granted, say, to limit the press, then it is simply a mistake to assume that Congress could do so through an expansive interpretation of the Necessary and Proper Clause.⁴² This may be Exhibit A for why one should not place unlimited trust in Publius either as constitutional interpreter or as a wise constitutional designer. But it also leads to Raphael's next "myth": "The Founding Fathers gave us the Bill of Rights."⁴³ Hamilton would not have needed to pen *The Federalist No. 84* had that been the case. Instead, as most informed readers presumably know, the Bill of Rights came after the work of the Framers in Philadelphia and, especially in the case of Madison, it required a profound change of mind, provoked both by principle and by Madison's understandable desire to enhance his chances with pro-Bill of Rights constituents in a close race against James Monroe for a seat in the House of Representatives.

Raphael makes the enormously important point that the Bill of Rights, whatever one thinks about what might be termed its "legal necessity" or substantive wisdom, was designed to distract attention from much more fundamental critiques of the Constitution offered by persons suspicious of the far more powerful national government it was designed to create (return to myths one and four).⁴⁴ After all, the remarkably close thirty to twenty-seven vote for ratification of the Constitution in New York was probably influenced by the agreement to ask Congress to call a new Convention, as allowed by Article V, to rectify what were deemed the serious problems. Needless to say, such hopes were dashed, not least by Madison. Raphael describes him as realizing that "[t]he best defense [against unacceptable changes] was a good offense."⁴⁵ Congress needed to seize the initiative and therefore render un-

39. *Id.* at 111.

40. *Id.* at 125-26.

41. *Id.* at 125.

42. *See* U.S. CONST. art. I, § 8, cl. 18. The Necessary and Proper clause states: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

43. RAPHAEL, *supra* note 1, at 131.

44. *See id.* at 131-51.

45. *Id.* at 142.

necessary—or, more to the point, diminish support for—a new convention. “Congress could then pick and choose amendments that did not threaten the basic integrity of the Constitution—a bill of rights, yes; a weakening of congressional taxation, no. Despite his previous opposition to a constitutional enumeration of rights, Madison entertained and then embraced this simple political calculus.”⁴⁶ The Bill of Rights was remarkably unimportant for its first century, playing no genuine role in American constitutionalism. That would most certainly have not been true had any of the basic structures, including the ability to tax, been modified.

All of these “myths” obviously touch on debates over the “original meaning” of the Constitution. As already noted, this is the subject of Raphael’s final chapter, which challenges the “myth” that “[b]y discovering what the framers intended or how the founding generation understood the text, we can determine how each provision of the Constitution must be applied.”⁴⁷ I have no difficulty at all agreeing with him. Originalism, especially as defined by proponents like Justices Scalia and Thomas (in contrast, say, to Jack Balkin’s innovative arguments in *Living Originalism*),⁴⁸ is, I think, basically foolish. It relies on: a) the demonstrably wrong belief that the historical materials speak in a sufficiently clear voice that lets us know exactly what was meant with regard to issues that were controversial even at the time, let alone in our own, very different, day; b) tendentious assumptions as to who precisely count as “the framers” whose views should be privileged, given the literally hundreds, perhaps thousands, of potential candidates who often differed amongst themselves about what exactly had been done in Philadelphia; and then c) that what is often called the “dead hand of the past” should control our lives today. Why?

Raphael’s concluding chapter might be useful for any reader who really has not thought much one way or the other about methods of constitutional interpretation. I am afraid, though, that for everyone else, it will prove the least satisfying chapter, either because, as in my case, it simply corroborates what I already believe, or, for some readers, because he rejects the status of the Constitution as a fundamental “contract” among the citizenry, with attendant duties to be faithful to the meaning of the contract and to change it, if necessary, only through the formal amendment that is allowed by Article V. I hope, though, that even those inclined to dismiss the “mythic” status of “originalism” will read and learn from the prior chapters.

Anthony King on the “Paradoxes of American Democracy”

King has written a set of informed (and very interesting) meditations on some central challenges presented in the views of those we call the “founding fathers” with regard to assumptions we are likely to make in the twenty-first century about the meaning of democratic rule by “the people.” Thus, “[t]he argument of this book is that the political system of the United States is now, and has been for many decades, based on two antithetical principles—principles that not only differ from each

46. *Id.*

47. *Id.* at 153.

48. See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

other but actually come into conflict with each other at almost every point."⁴⁹ On one hand, "the founding fathers' conception of 'constitutional' government" is "characterized by a separation of powers and containing provisions for a wide variety of checks and balances."⁵⁰ But that is countered by what King terms as "'radical democracy,' the idea that in a true democracy the people and only the people should rule and that their preferences and their preferences alone should under all circumstances be decisive."⁵¹ He terms these the two "tectonic plates"⁵² that contend with one another within the American political system.⁵³ One might think that their conflict would occasion frequent political earthquakes; what may be most notable about American politics is their infrequency.

King offers a series of "puzzles" that demand explanation.⁵⁴ The first is something that we probably almost never think about: "the gross restrictions placed on the sorts of people eligible to become president of the United States."⁵⁵ He is referring not only to the well-known exclusion of all non-"natural born citizens" from the presidency, but also to the requirement that the president be at least thirty-five years old.⁵⁶ As he notes, many political systems allow anyone legally entitled to vote to occupy any given political office, subject to the decision of the voters themselves.⁵⁷ Americans drafting the Constitution in 1787 were obviously familiar with the fact that William Pitt, the younger, had become prime minister at the age of twenty-four!⁵⁸ One cannot tax the framers with knowledge of what would come later in the nineteenth or twentieth centuries, but King notes that the "legal gap between the voting age and the age of eligibility for the highest office . . . is usually quite narrow" where it exists at all—"for instance, three years in Australia, Belgium, Ireland and Luxembourg and only two in Austria."⁵⁹ King goes on to suggest that approximately one-third of the citizenry is rendered ineligible to become president because of the various exclusionary rules.⁶⁰ He describes this as a "huge discrepancy" that "is far greater than in any other democratic country."⁶¹ And, of course, the Twenty-second Amendment presents another important limit on the ability of Americans to make an unconstrained choice as to who should lead them.⁶² From

49. KING, *supra* note 2, at 2.

50. *Id.* at 3.

51. *Id.*

52. *Id.* at 130.

53. *Id.* at 130-53.

54. *Id.* at 1-15.

55. *Id.* at 3.

56. *Id.* at 4.

57. *Id.* at 3.

58. *See id.*

59. *Id.*

60. *Id.* at 5.

61. *Id.*

62. The Twenty-second Amendment states, in part:

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.

U.S. CONST. amend. XXII, § 1.

one perspective, of course, this affects only the three currently living Americans (Bill Clinton, George W. Bush, and Barack Obama) who will be prevented from returning to the Oval Office in 2017; from another, it affects each and every one of us within the American polity inasmuch as we might think that the country would in fact benefit from that return.

One might regard this “puzzle” as quite academic, perhaps in the pejorative sense. After all, it perhaps underscores King’s sense of what is strange about the American polity to note that there is no social or political movement committed to changing these clear constraints on democratic choice by eliminating the age restrictions or even making naturalized citizens eligible for the presidency.⁶³ Nor, even (or especially) during the present season of great debate about American immigration policy, is there any attempt to amend the clauses of the Constitution that currently render ineligible naturalized citizens to run for the House or Senate until seven and nine years, respectively, following their joining the American political community.⁶⁴ I have argued elsewhere that this is the most glaring example of “second-class citizenship” inscribed within the national Constitution.⁶⁵ However undemocratic these aspects of the 1787 Constitution might be, they simply raise no genuine problems for almost all Americans themselves.

King’s other “puzzles” are considerably less academic. Thus, he notes the widespread use of mechanisms of “direct democracy,” including referenda, in many American states.⁶⁶ “Referendums,” he writes, “are a central feature of American political life.”⁶⁷ He notes that in 2006 alone, “Arizona held referendums relating to nineteen separate issues, California ten, Colorado fourteen, South Dakota eleven, Nevada ten, Oregon ten, Rhode Island nine, Georgia nine, Louisiana eight and another twenty-eight random scatterings of others. In a number of states, mainly in the West, government by referendum is almost the norm.”⁶⁸ Since then, of course, there have been notable episodes of direct democracy in yet other states like Maine (involving same-sex marriage and voting rights);⁶⁹ Ohio (concerning the rights of public employee unions);⁷⁰ Minnesota (same-sex marriage);⁷¹ the State of Washington (same-sex marriage);⁷² Wisconsin (attempts to recall governor and legisla-

63. Though there was some brief interest in amending the Constitution in order to make Arnold Schwarzenegger eligible to run for the presidency in 2008. *See, e.g.*, Martin Kasindorf, *Should the Constitution be Amended for Arnold*, U.S.A. TODAY (Dec. 3, 2004), http://usatoday30.usatoday.com/news/politicselections/2004-12-02-schwarzenegger-amendment_x.htm.

64. *See* U.S. CONST. art. I, § 2, cl. 2 (requiring a citizen to live in the United States for seven years before running for a House of Representatives position); *see also id.* art. I, § 3, cl. 3 (stating that a citizen must live in the United States for nine years before running for Senator).

65. LEVINSON, *supra* note 6, at 142.

66. KING, *supra* note 2, at 7-8.

67. *Id.* at 7.

68. *Id.*

69. Ben Brumfield, *Voters Approve Same-Sex Marriage for the First Time*, CNN.COM, Nov. 7, 2012, <http://www.cnn.com/2012/11/07/politics/pol-same-sex-marriage/index.html>.

70. Kris Maher & Jack Nicas, *Ohio Voters Reject Public-Union Limits*, WALL ST. J., Nov. 9, 2011, <http://online.wsj.com/article/SB10001424052970204190704577026360072268418.html>.

71. Brumfield, *supra* note 69.

72. *Id.*

tors);⁷³ and Massachusetts (medical marijuana).⁷⁴ It is no coincidence, of course, that all of these episodes occurred within American states. The national Constitution was drafted by people who can be described as militantly opposed to direct participation by the "We the People" in whose name the document ostensibly spoke. James Madison proudly wrote in *The Federalist No. 63* of the Constitution's "total exclusion of the people in their collective capacity from any share" in the actualities of governmental decision-making.⁷⁵

So why did so many states, most of them, as King notes, in the American West, adopt systems of direct democracy at the turn of the twentieth century?⁷⁶ One possibility is simply that popular conceptions of "democracy" had changed over the ensuing century following 1787 and that what Lincoln so memorably called "government by the people," if taken truly seriously, was recognized almost logically to entail far more opportunities for direct participation than was envisioned by those in Philadelphia (or, for that matter, those drafting state constitutions at the end of the eighteenth century). This could help explain the rise not only of referenda and the ability to "recall" public officials, but also of the move toward elected judiciaries in most of the states.⁷⁷ One should not underestimate the potential importance of pure conceptual argument, though what then has to be explained, as King emphasizes, is why there has been no sustained movement to add any direct democracy at the national level (or to expand it in those states that offer only relatively minimal forms of direct democracy) or to elect federal judges.⁷⁸ This brings up the second possible explanation, which relies, in good Holmesian fashion, less on "logic" than on "experience." This makes crucial, for example, the felt levels of dissatisfaction with what is observed to be taking place in state capitols. Thus, King notes that "state legislatures in the U.S. toward the end of the nineteenth century were precisely those bodies that populists and progressives held in the greatest loathing and contempt."⁷⁹ There was a powerful withdrawal of legitimacy from these institutions, reflected in the support of alternative mechanisms of government that allowed "the people" to recapture control of a political system that many saw as increasingly captured by given economic interests and closed to ordinary citizens.

But one can scarcely believe that contemporary Americans are filled with love and admiration for members of Congress. As of mid-July 2013, for example, fewer than one in six Americans, save for one outlier poll, "approved" of Congress.⁸⁰ Concomitantly, the "disapproval" rate ranged from a "low" of 72 percent to a high of 83

73. Colleen McCain Nelson & Douglas Belkin, *Wisconsin Battle in National Eye*, WALL ST. J., Apr. 13, 2012, <http://online.wsj.com/article/SB10001424052702303624004577341953568378704.html>.

74. Alan Duke, *2 States Legalize Pot, But Don't 'Break Out the Cheetos' Yet*, CNN.COM, Nov. 8, 2012, <http://www.cnn.com/2012/11/07/politics/marijuana-legalization/index.html>.

75. LEVINSON, *supra* note 7, at 51 (emphasis added).

76. KING, *supra* note 2, at 158-59.

77. *See id.* at 119-21.

78. *Id.* at 120-21.

79. *Id.* at 125.

80. *Congressional Job Approval*, REALCLEARPOLITICS.COM, http://realclearpolitics.com/epolls/other/congressional_job_approval-903.html (last visited Sept. 18, 2013).

percent.⁸¹ Since then the national government shut down and, not surprisingly, congressional approval plummeted below 10 percent.⁸² Yet there is no call from any mass movement or even mainstream pundits or political leaders for rethinking our exclusive reliance on representative democracy. King is puzzled why that is so.⁸³ Note well that he is not simply asking why the United States has not been more influenced by conceptions of democratic constitutionalism in Europe. One might quickly respond that Europe has nothing to teach the United States because we are, after all, “exceptional.” But this is where King’s emphasis on American states is so important. It simply makes no sense to say that “Americans believe only in representative democracy” when one looks at the practices in so many of the states. Perhaps one might argue that given state constitutions are perfect for those states and that the United States Constitution is perfect for the nation, but, to put it mildly, that argument has not really been made, not to mention that it seems on its face to be wildly implausible. Instead, almost all analysts have chosen simply to ignore the anomaly presented by comparing American state and national constitutional traditions.⁸⁴

King offers other “puzzles” that exemplify his basic question about the limits of democracy in the United States. Why, almost uniquely, is abortion thought to be a question to be decided by (unelected) judges instead of by legislators, as is true throughout Europe?⁸⁵ He concludes his introduction by pointing to the paradox that candidates for the presidency (and many other offices as well) are chosen in bitterly contested primaries, a phenomenon seen in few other countries, but then presidents themselves are finally selected through a truly byzantine process, i.e., the electoral college, which in many ways makes a travesty of democracy.⁸⁶

The rest of the book offers certain answers to these (and other) puzzles.⁸⁷ But the basic answer has to do with the fact, as already suggested, that the Framers simply did not share Lincoln’s professed faith in government by the people.⁸⁸ King grants the proposition that the “1787 Constitution was, by the standards of the contemporary civilized world, many decades ahead of its time”⁸⁹ in rejecting rule by monarchs or other aristocrats and otherwise moving toward what we might recognize as democracy—a word, incidentally, rarely used favorably by people of the era.

81. *Id.*

82. *Id.* (last visited on Nov. 6, 2013).

83. KING, *supra* note 2, at 177-78.

84. See the very important JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2007) for “a comprehensive analysis of the extant state convention debates” and discussion of:

[T]he extent to which state conventions have addressed fundamental questions of the kind that were treated in the federal convention . . . 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.

Id. at 3.

85. KING, *supra* note 2, at 9.

86. *Id.* at 9-13.

87. See generally *id.*

88. *Id.*

89. *Id.* at 62.

"But, simultaneously, it was far from creating arrangements in which the people at large were to be either the sole or the dominant political power. The people were given a place, to be sure, but they were also to be kept in that place."⁹⁰ Subsequent American history, to a significant extent, can be viewed as efforts of many different people(s), often denounced as "uppity" or otherwise unwilling to accept their place in the pre-existing hierarchical social order, to move toward center stage in American politics. Thus, the tectonic plates clashed with one another. Still, "a large proportion of what the founding fathers drafted and signed in 1787 more than two centuries later survives as an abiding and dominant political presence."⁹¹

King expresses more than puzzlement; his final chapter, "Democracy in America," presents "a few foreigner's reflections on the U.S. system, reflections that are prompted in most cases by the grinding, creaking and groaning of our two tectonic plates."⁹² He does not hesitate to describe some aspects of "America's present [political] arrangements . . . as being, at best, unfortunate and, at worst, outrageous."⁹³ Among these is the role played by money in our politics, which, he writes, "strikes foreigners as obscene,"⁹⁴ though he notes as well that most Americans, responding to a variety of polls, have also registered their dismay about such decisions as *Citizens United v. Federal Election Commission*.⁹⁵ He returns once more to his general animus against the various restrictions placed on participation in the electoral system, which, he writes, "strike[] a foreigner . . . as being not only indefensible but a gross violation of the most elementary democratic principles."⁹⁶ And, noting the sheer difficulty placed in the way of amendment by Article V, he suggests that "Americans might at least want to consider whether the present mechanisms for amending the American Constitution are any longer, in a fully-fledged democracy, the appropriate ones."⁹⁷

All of this being said, King offers what may be a rueful recognition that "the overwhelming majority of Americans . . . are nevertheless reasonably content with the system as a whole."⁹⁸ That is a statement of empirical fact.⁹⁹ Somewhat more questionable is his conclusion that "[t]he delicate balance that exists at present between these two bodies of doctrine may not give everyone total satisfaction, but serious efforts to disturb the existing balance could, in themselves, prove disturbing, quite possibly dangerously so."¹⁰⁰ Indeed, the book ends by suggesting that:

[T]he U.S. Constitution serves as one of America's few effective unifiers. It brings together what might otherwise fall or fly apart. It is

90. *Id.* at 62.

91. *Id.* at 68.

92. *Id.* at 177.

93. *Id.* at 194.

94. *Id.* at 195.

95. *Id.* at 195-96; see *Citizens United v. Fed. Election Comm'n*, 588 U.S. 310 (2010).

96. KING, *supra* note 2, at 198.

97. *Id.* at 203.

98. *Id.* at 204.

99. *Id.*

100. *Id.* at 206.

an object of worship because Americans badly need a solid core of institutions and objects which they all feel that they can worship together. As the man said of the U.S. Constitution, "It's what holds us all together."¹⁰¹

This conclusion is congruent with an earlier comment, that "[a]fter more than two hundred years, no one could plausibly maintain that, on any criterion, the American system has been a flop."¹⁰² Well, I suppose it all depends, as Bill Clinton might have put it, what the meaning of "flop" is. Does it count against "the American system" that within seventy-five years it generated a remarkably savage conflict that took, we now know, at least 750,000 lives?¹⁰³ Does it count against the system that by a number of criteria, ranging from quality of education to infant mortality to the prospects for social mobility by someone born outside of America's economic elites, the United States is falling steadily behind many other nations in the world?¹⁰⁴

Ironically, what is missing in this generally worthwhile and interesting book is analysis of the empirical connections between democratic (or undemocratic) modes of decision-making and the substantive decisions themselves. Modes concern inputs into the decision-making process, which are very well identified and criticized by King, but most members of the political order, I think, are most concerned with the actual decisional outputs of the system. Perhaps the role played by money is obscene, but that may, at the end of the day, be an aesthetic judgment, similar to criticizing Americans for the amount of money we spend on athletic events or pet food (or, for that matter, spend on individual works of art instead of donating those millions of dollars to a worthwhile charity). Only if money genuinely distorts the outcomes of American politics in a negative way can it be said to be worth anguishing over. The point is obvious with regard, say, to Arnold Schwarzenegger's ineligibility to become president because he was born in Austria. I easily agree that that is a morally indefensible feature of the 1787 Constitution, and I wish the proposals early in the twenty-first century to amend the Constitution had succeeded. But can any serious person believe that he was "indispensable" to our national flourishing or even that his election, had it been permitted, would have been a net plus instead of possibly a disastrous minus? That a feature of the Constitution is "undemocratic"—even "indefensible" on sound theoretical terms—does not necessarily make it very important to most people whose primary interest is not political theory.

I was led to this conclusion by the response to one of my own earlier books, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We*

101. *Id.* at 207.

102. *Id.* at 178.

103. Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N.Y. TIMES, Apr. 2, 2012, http://www.nytimes.com/2012/04/03/science/civil-war-toll-up-by-20-percent-in-new-estimate.html?pagewanted=all&_r=0.

104. Howard Friedman, *How to Make America Great Again: New Book*, CNBC, June 27, 2012, <http://www.cnbc.com/id/47968003>.

the People Can Correct It).¹⁰⁵ King discusses the book, which calls for a new constitutional convention to ameliorate the undemocratic defects I set out in the Constitution, but he writes as well that "[t]alk of major constitutional change in the U.S. is largely confined to the kinds of people whom the British dismiss as 'the chattering classes'—university professors, journalists, pamphleteers, bloggers and cranks."¹⁰⁶ I might well be viewed as fitting three of these categories: I teach at a major university, I blog frequently on Balkinization, and I have described myself as a "crank" inasmuch as I increasingly do believe that the Constitution constitutes a clear and present danger to our ability to flourish—or perhaps even to survive—as a truly effective political system. Thus the subtitle of my successor book focused far less on the "undemocratic" features of the Constitution—who really cares?—than about the "crisis of governance" the country increasingly faces with regard to the outputs that, for most people, determine legitimacy or the basis of satisfaction in any given political order. A banner event in 2011 was the downgrading of American bonds by Standard & Poor's from AAA to AA status, in the aftermath of bitter conflict between Republicans in Congress and President Obama over increasing the legal debt limit.¹⁰⁷ "The downgrade reflects," said Standard & Poor's, "our view that the effectiveness, stability, and predictability of American policymaking and political institutions have weakened at a time of ongoing fiscal and economic challenges."¹⁰⁸ One wonders if those charged with assessing the "effectiveness, stability, and predictability" of American political behavior could possibly have been heartened by the most recent "debt crisis" in October 2013, where default was avoided almost literally at the last minute. And, of course, the government *did* shut down because of the refusal by the House of Representatives to fund basic national programs in the absence of a willingness to "defund" the President's signature Affordable Care Act.¹⁰⁹

As it happens these days, one can scarcely look around most American states or other countries even within "the West" and feel great encouragement about the capacity of any modern governmental system to meet the challenges that it faces. This is, I should be clear, not a call simply to "lighten up" and accept the deficiencies well identified by King as a given that should not be changed, even quite radically. Still, at the end of the day, his book is far more of a thoughtful and interesting exercise in political theory and comparative analysis of national and state political cultures within the United States than a call to the barricades. Perhaps King, for all of his comparatively gentle criticisms of what he finds in the United States, believes that we will continue to muddle through and to serve both residents within the country and foreigners who, for better or worse, depend on American leadership. If that is in fact his view, I hope it is correct. I fear, however, that it is not.

105. LEVINSON, *supra* note 6.

106. KING, *supra* note 2, at 178.

107. LEVINSON, *supra* note 7, at 2.

108. *Id.* (citing *S&P Downgrades U.S. Debt Rating – Press Release*, WALL ST. J., Aug. 5, 2011, <http://blogs.wsj.com/marketbeat/2011/08/05/sp-downgrades-u-s-debt-rating-press-release/>).

109. Jonathan Weisman, *House G.O.P. Sets New Offensive on Obama Goals*, N.Y. TIMES, July 23, 2013, <http://www.nytimes.com/2013/07/24/us/politics/house-gop-sets-new-offensive-on-obama-goals.html?ref=todayspaper>.