

A Tale of Two Signings

from

Our Undemocratic Constitution: Where the Constitution Goes Wrong

(And How We the People Can Correct It)

by Sanford Levinson

Oxford University Press (2006)

In 1987, I went to a marvelous exhibit in Philadelphia commemorating the bicentennial of the drafting there of the U.S. Constitution. The visitor's journey through the exhibit concluded with two scrolls, each with the same two questions: First, "Will You Sign This Constitution?" And then, "If you had been in Independence Hall on September 17, 1787, would you have endorsed the Constitution?" The second question clarifies the antecedent for "this" in the first: It emphasizes that we are being asked to assess the 1787 Constitution. This is no small matter inasmuch, for example, it did not include any of the subsequent amendments, including the Bill of Rights. Moreover, the viewer had been made aware in the course of the exhibit that the 1787 Constitution included several terrible compromises with slavery.

Even in 1987, I tended to regard the original Constitution as what William Lloyd Garrison so memorably called “A Covenant with Death and an Agreement With Hell”¹ because of those compromises. So why did I choose to sign the scroll? As I explained in the final chapter of a 1988 book, *Constitutional Faith*,² I was impressed that Frederick Douglass, the great black abolitionist, after an initial flirtation with Garrison’s rejectionism, endorsed even the antebellum Constitution. He argued that the Constitution, correctly understood, was deeply antislavery at its core.³ The language of the Constitution—including, most important, its magnificent Preamble—allows us to mount a critique of slavery, and much else, from within. I was convinced by Douglass—and many other later writers—that the Constitution offers us a language by which we can protect those rights that we deem to be important. We need not reject the Constitution in order to carry on such a conversation. If the Constitution at the present time is viewed as insufficiently protective of such rights, that is because of the limited imagination of those interpreters with the most political power, including members of the Supreme Court. So I was willing in effect to honor the memory of Douglass and the potential that was—and is—available in our Constitution, and I added my signature to the scroll endorsing the 1787 Constitution.

On July 3, 2004, I was back in Philadelphia, this time to participate in the grand opening of the National Constitution Center. The exhibit culminates in “Signers’ Hall,” which features life-sized (and life-like) statues of each of the delegates to the convention. Many of the delegates appear to be holding animated conversations or, as in the case of Alexander Hamilton, striding forcefully toward George Washington—who quite literally, because of his height, towers over the room. As one

¹ Walter Merrill, *Against Wind and Tide: A Biography of William Lloyd Garrison* (Harvard University Press, 1963), p. 205.

² Sanford Levinson, *Constitutional Faith* (Princeton University Press, 1988).

walks through the hall and brushes against James Madison, Hamilton, and other giants of our history, one can almost feel the remarkable energy that must have impressed itself on those actually in Independence Hall.

As was true in 1987, the visitor is invited to join the signers by adding his or her own signature to the Constitution. Indeed, the center organized a major project during September 2004, cosponsored with the Annenberg Center for Education and Outreach, called “I Signed the Constitution.” Fifty sites in all of the states were available for such a signing. Both the temporary 1987 exhibit and the permanent one at the National Constitution Center leave little doubt about the proper stance that a citizen should take toward our founding document.

This time, however, I rejected the invitation to re-sign the Constitution. I have not changed my mind that the Constitution in many ways offers a rich, even inspiring, language by which to envision and defend a desirable political order. Nor does my decision not to sign the scroll at the National Constitution Center necessarily mean that I would have preferred that the Constitution go down to defeat in the ratification votes of 1787–1788. Rather, I treated the center as asking me about my level of support for the Constitution today and, just as important, whether I wish to encourage my fellow citizens to reaffirm it in a relatively thoughtless manner. As to the first, I realized that I had, between 1987 and 2004, become far more concerned about the inadequacies of the Constitution. As to the second, I think that it is vitally important to engage in a national conversation about its adequacy rather than automatically to assume its fitness for our own times. Why I believe this is in a real sense the topic of this book.

³ See Frederick Douglass, “The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery,” in *Life and Writings of Frederick Douglass*, vol. 2, edited by P. Foner (International Publishers, 1975), pp. 467-480.

My concern is only minimally related to the formal rights protected by the Constitution. Even if, as a practical matter, the Supreme Court reads the Constitution less protectively, with regard to certain rights, than I do, the proper response is not to reject the Constitution but to work within it by trying to persuade fellow Americans to share our views of constitutional possibility and by supporting presidential candidates who will appoint (and get through the Senate) judges who will be more open to better interpretations. Given that much constitutional interpretation occurs outside the courts, one also wants public officials at all levels to share one's own visions of constitutional possibility—as well, of course, as of constitutional constraints. And this is true even for readers who disagree with me on what specific rights are most important. It is always the case that courts are perpetually open to new arguments about rights—whether those of gays and lesbians or of property owners—that reflect the dominant public opinion of the day. Indeed, liberals should acknowledge that even a Supreme Court composed of a majority of political conservatives—a total of seven justices were appointed by Republican presidents—nonetheless broke new ground in protecting gays and lesbians by overturning Texas's prohibition of “homosexual sodomy.”⁴ I applauded that decision; more important is the fact that the public at large, by 2003, also seemed more than willing to accept the Court's views. The country may be clearly divided about gay and lesbian marriage, but relatively few people any longer seem to endorse a constitutional vision that allows the criminalization of such sexual practices as such.

So, what accounts for my change of views since 1987? The brief answer—to be spelled out in the remainder of the book—is that I have become ever more despondent about many structural provisions of the Constitution that place almost insurmountable barriers in the way of any

acceptable notion of democracy. I put it this way to acknowledge that “democracy” is most certainly what political theorists call an “essentially contested concept.” It would be tendentious to claim that there is only one understanding—such as “numerical majorities always prevail”—that is consistent with “democracy.” Liberal constitutionalists, for example, would correctly place certain constraints on what majorities can do to vulnerable minorities.

That being said, I believe that it is increasingly difficult to construct a theory of democratic constitutionalism, applying our own twenty-first-century norms, that vindicates the Constitution under which we are governed today. Our eighteenth-century ancestors had little trouble integrating slavery and the rank subordination of women into their conception of a “republican” political order. That vision of politics is blessedly long behind us, but the Constitution is not. It does not deserve rote support from Americans who properly believe that majority rule, even if tempered by the recognition of minority rights, is integral to “consent of the governed.”

I invite you to ask the following questions by way of preparing yourself to scrutinize the adequacy of today’s Constitution:

1. Even if you support having a Senate in addition to the House of Representatives, do you support as well giving Wyoming the same number of votes as California, which has roughly seventy times the population?
2. Are you comfortable with an Electoral College that, among other things, has regularly placed in the White House candidates who did not get a majority of the popular vote and, in at least two cases over the past fifty years, who did not even come in first in that vote?

⁴ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

3. Are you concerned that the president might have too much power, whether to spy on Americans without any congressional or judicial authorization or to frustrate the will of a majority of both houses of Congress by vetoing legislation with which he disagrees on political grounds?
4. Do you really want justices on the Supreme Court to serve up to four decades and, among other things, to be able to time their resignations to mesh with their own political preferences as to their successors?
5. Do you support the ability of thirteen legislative houses in as many states to block constitutional amendments desired by the overwhelming majority of Americans as well as, possibly, eighty-six out of the ninety-nine legislative houses in the American states?

One might regard these questions as raising only theoretical, perhaps even “aesthetic,” objections to our basic institutional structures if we felt truly satisfied by the outcomes generated by our national political institutions. But this is patently not the case. Consider the results when samples of Americans are asked whether they believe the country is headed in the right or the wrong direction. In April 2005, a full 62 percent of the respondents to a CBS poll indicated that they believed that the country was headed in “the wrong direction.”⁵ A year later, a similar CBS poll found that 71 percent of the respondents said that the country was “on the wrong track.”⁶ One might feel that the country is headed in the wrong direction even if our major political institutions were perceived to be fully competent in addressing major issues, of one thought that we were in fact at the mercy of events—like an oncoming asteroid—simply beyond any human intervention. But surely the sense of dissatisfaction is related for most Americans to a belief that our political institutions are *not* adequately responding to the issues at hand. Any reader can certainly construct her own list of

⁵ See http://www.cbsnews.com/htdocs/CBSNews_polls/poll_0418.pdf.

issues that are not seriously confronted at all—or, if confronted, resolved in totally inadequate ways—by the national government. Serious liberals and conservatives would likely disagree on the particular failings, but both, increasingly, would share an attitude of profound disquiet about the capacity of our institutions to meet the problems confronting us as a society.

To be sure, most Americans seem to approve of their particular members of Congress. The reason for such approval, alas, may be the representatives' success in bringing home federally funded pork, which scarcely relates to the great national and international issues that we might hope that Congress could confront effectively. In any event, we should resist the temptation simply to criticize specific inhabitants of national offices, however easy that is for most of us to do, regardless of political party. An emphasis on the deficiencies of particular officeholders suggests that the cure for what ails us is simply to win some elections and replace those officeholders with presumptively more virtuous officials. But we are deluding ourselves if we believe that winning elections is enough to overcome the deficiencies of the American political system.

Polling data offer some insights, even as we must recognize both that they measure support for particular officials and that support levels go up as well as down. That being said, consider that, as I write these lines in May 2006, a *New York Times*/CBS poll taken between May 4-8, 2006, finds that only 31 percent of the respondents approve of George W. Bush's conduct as President, which ties him with his father, George H. W. Bush, at the low point of his presidency, though he remains ahead of Presidents Nixon and Carter at the low point of their tenures in office.⁷ Yet President

⁶ See David Leonhardt, "For Bush, the Economy Is a Glass Half Empty," *New York Times*, May 7, 2006, Section 4, pp. 1, 3.

⁷ Adam Nagourney and Megan Thee, "Bush's Public Approval at New Low Point," *New York Times*, May 9, 2006, p. 1.

Bush has a *higher* approval rating than Congress. The same poll found that only 23 percent of those responding “said they approve of the job Congress is doing, down from 29 percent in January.”⁸

And another poll, taken earlier, found that Republican congressional leaders were approved by only 33 percent of the respondents, one point less than their Democratic counterparts (34 percent).⁹

Compared to the president and Congress, members of the Supreme Court might feel considerably better. Yet even there, the data are mixed. For example, a May 2005 poll conducted by Quinnipiac University found that only 44 percent of voters approved of the decisions of the Supreme Court, down from 56 percent approval in a March 5, 2003, poll.¹⁰ An analysis of public opinion and the Court during the period of William Rehnquist’s chief justiceship—1986–2005—found a general diminution of support for the Court over those years, though several polls continue to show that the majority of the public retains “confidence” in the Court. Still, according to Wisconsin political science professor Herbert Kritzer, a June 2005 poll by the Pew Research Center for the People and the Press finding that 57 percent of its respondents are favorable to the Court “is at the lowest level since it began, falling under 60 percent for the first time.”¹¹ As John Roberts took the helm of the Supreme Court in September 2005, almost a third of the population (31 percent) expressed “not very much” confidence (25 percent) or “none at all” (6 percent) in the judiciary, even if this was offset by the 55 percent who expressed a “fair amount” of confidence. Only 13 percent had a “great deal” of confidence.¹² Interestingly, Kritzer relates the general drop in support for the Court to “the

⁸ Id.

⁹ See <http://www.sciencedaily.com/upi/?feed=TopNews&article=UPI-1-20060111-19144800-bc-us-pew.xml>.

¹⁰ See <http://www.quinnipiac.edu/x11385.xml?ReleaseID=738>.

¹¹ “The American Public’s Assessment of the Rehnquist Court,” 89 *Judicature* 168, 170 (November-December 2005).

¹² Id. at 174.

general demonization of government, particularly the federal government, that took place over the past 25 years.”¹³

We must recognize that a substantial responsibility for the defects of our polity lies in the Constitution itself. A number of wrong turns were taken at the time of the initial drafting of the Constitution, even if for the best of reasons given the political realities of 1787. Even the most skilled and admirable leaders may not be able to overcome the barriers to effective government constructed by the Constitution. No less a founder than Alexander Hamilton emphasized that “[a]ll observations” critical of certain tendencies in the Constitution “ought to be referred to the composition and structure of the government, not to the nature or extent of its powers.”¹⁴ He is correct. In many ways, we are like the police officer in Poe’s classic *The Purloined Letter*, unable to comprehend the true importance of what is clearly in front of us.

If I am correct that the Constitution is both insufficiently democratic, in a country that professes to believe in democracy, and significantly dysfunctional, in terms of the quality of government that we receive, then it follows that we should no longer express our blind devotion to it. It is not, as Jefferson properly suggested, the equivalent of the Ark of the Covenant. It is a human creation open to criticism and even to rejection. To convince you that you should join me in supporting the call for a new constitutional convention is what this book is about.

¹³ Id. at 175.

¹⁴ Alexander Hamilton, *Federalist*, No. 31.