FRAMED

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AMERICA'S

FIFTY–ONE CONSTITUTIONS

AND THE

CRISIS OF GOVERNANCE

SANFORD LEVINSON

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For Jack Balkin and Mark Graber,
cherished friends and colleagues

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Introduction

I. CONNECTING THE DOTS

This book is the result of many years of reflection. But it—especially the title—also is a response to contemporary American politics. The most basic question that can one can ask about any political system is whether it is capable of governing effectively, even if one recognizes that there will be different criteria of "effectiveness." As the manuscript moved toward publication, the Minnesota stat government was shut down for three weeks because of the inability of its divided state government to reach agreement on a budget.[1] In 2009, a similar budget crisis in California led to the nation's larges state being unable to pay its public employees and other creditors for several weeks; instead they wer offered the equivalent of IOUs. In 2012, the unwillingness of two Republicans in the California Assembly to support a plea by Democratic Governor Jerry Brown to allow a public referendum on retaining some taxes that were scheduled to expire led to what many regarded as the decimation of th once-vaunted public education system in that state.[2] (It takes two-thirds of the legislature to place an issue on the ballot, and "only" a majority of the legislature was willing to place the issue before the electorate.) In some ways even more dramatic, because it goes to the heart of what one ordinarily thinks of as a basic attribute of government, is the possibility that the civil justice system in San Francisco will be functionally shut down because of drastic cuts in the judiciary's budget.[3]

The U.S. government shut down briefly but notably in 1995, as the result of seemingly irreconcilable differences between then Speaker of the House Newt Gingrich and President Clinton. Another shutdown in December 2010 was averted only by an almost literally last-minute compromis between President Obama and Speaker of the House John Boehner. A shutdown almost occurred at th end of September 2011, and almost everyone expects similar episodes to recur prior to the 2012 election and, perhaps well afterward if, for example, President Obama is reelected and Republicans retain the majority in the House of Representatives and gain control of the Senate. But the major national political issue in the summer of 2011 was whether the United States would default on its debts because of congressional unwillingness to increase the national debt limit. Such default, it was widely (but not unanimously) agreed, would be calamitous for the American and—quite likely—the world economy.[4] This crisis, too, was averted at the last minute because of almost torturous compromises generated by a sufficiently bipartisan agreement that default would have unacceptable consequences.

This, however, did not prevent the decision by Standard & Poor's to downgrade American debt from AAA to AA status. Among the company's rationales for doing so was the following: "The downgrade reflects 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."[5]

The S&P analysis reflects the widespread view that the American political system has become profoundly dysfunctional. As the distinguished British writer Timothy Garton Ash wrote on August 3 2011, "A couple of years back, it was still vaguely original to describe America's political system as dysfunctional. Now the word is on every commentator's lips."[6] Nor is this perception confined to eli commentators. One need only look at national polling data to realize the profound dissatisfaction tha most Americans have with their government. Whether they are of the left, right, or center, they believe that there are unmet needs that our national and state institutions are failing to adequately confront, even if they disagree about what decisions should be made. A *New York Times* article on September 16, 2011, titled "Approval of Congress Matches Record Low,"[7] reported that only 12 percent of the American public indicated "approval" of Congress, a number reached earlier in Augus 2008. The week before a different poll had found a similar 12 percent approval rate while 87 percent disapproved, a full 75 percent difference.[8] Such numbers constitute a "bipartisan" rejection of what i a democratic system of government must surely be the most important single institution, the elected legislature. Analyzing responses to a somewhat broader question, the Gallup organization reported o September 26, 2011, that "Americans Express Historic Negativity Toward U.S. Government," noting that 81 percent of those polled were "dissatisfied" with the way the country is being governed.[9] Perhaps most shocking was an August 2011 Rasmussen poll finding that only 17 percent of those surveyed said that the present national government actually possesses the consent of the governed.[10]

The Gallup organization reports that trust in America's basic institutions is at historic lows. The most trusted governmental institution is the military; over three-quarters of the public has a "great deal" or "quite a lot" of confidence in our armed forces. At the other end of the spectrum is Congress about which only a total of 12 percent are willing to express confidence. Four times as many respondents—a full 48 percent—described their confidence level as "very little or none." The presidency as an institution has the significant confidence of only slightly more than one-third of the public, 1 percent less than those with "very little or none." Even the U.S. Supreme Court must includ the 41 percent who have "some" confidence to achieve a confidence level over 75 percent. If one add those with "some" confidence, we find an overall 94 percent confidence level in the military.[11]

Would so few Americans have "approved of" or had confidence in the British Parliament or King George III had similar polls been taken in 1775?[12] Would three-quarters of all the colonists disapproved? It is impossible to answer these questions with any precision, but we do know that the numbers of Americans who strongly "disapproved" of those British institutions (including the British Redcoats) were sufficient to generate a violent secessionist movement within the British Empire that had monumental consequences.

No doubt it is hyperbolic to think that we are truly in an analogous situation today. But perhaps one should take seriously the comments of *Washington Post* columnist E. J. Dionne in his 2011 Four of July column on the Tea Party's rise in contemporary American politics. "Whether they intend it o not," writes Dionne, "their name suggests they believe that the current elected government in Washington is as illegitimate as was a distant, unelected monarchy … And it hints that methods outside the normal political channels are justified in confronting such oppression."[13] Consider the

comments of Republican candidate Sharron Angle in her 2010 bid to represent Nevada in the U.S. Senate:

> Our Founding Fathers, they put that Second Amendment in there for a good reason, and that was for the people to protect themselves against a tyrannical government. In fact, Thomas Jefferson said it's good for a country to have a revolution every 20 years. I hope that's not where we're going, but you know, if this Congress keeps going the way it is, people are really looking toward those Second Amendment remedies [suggested by the "right to keep and bear arms"].[14]

Remarkable changes have occurred in polities across the world over the past generation with the development of mass social movements protesting the perceived failures of established political orders. Can we be absolutely certain that "American exceptionalism" inoculates our own political system against such political movements? (We did, after all, have our own exceptionally bloody secessionist movement between 1861 and 1865.)

Many Tea Partiers proclaim the virtues of local and state government, but one can wonder if Americans are really significantly more contented with their political institutions closer to home. Thus, the widely respected Field Poll in California found in September 2010 that approval of the California legislature was at a "record low,"[15] with only one in ten Californians expressing approval of the state legislature. A Marist poll conducted in New York following the November 2010 elections discovered that "71% say the way things are done in Albany need major changes, and another 11% believe government in Albany is broken and beyond repair."[16] It remains to be seen whether the governors elected in 2010 in both states, Jerry Brown and Andrew Cuomo, will be able to generate a greater degree of confidence from the residents in the overall structures of government, whether or n they earn high degrees of personal approval for their actions as governors. Even with the recent constitutional change that eliminates the need for a two-thirds vote to approve a budget, California h immense difficulty coming to basic budgetary decisions because of the continuing importance of the unrepealed two-thirds majority requirement for tax increases. The California that once seemed to be the beacon for America's bright future seems to have become more of a dystopia.

Public discontent is mirrored, and perhaps encouraged, by what can be found in mainstream journalistic commentary. *Newsweek*, for example, published a "viewpoint" essay in January 2010 titled "America the Ungovernable."[17] In 2009, the distinguished magazine *The Economist* labeled California "the ungovernable state," focusing on both its formal requirements for passing budget or tax legislation and on the crucial role played by a freewheeling process of popular initiative and referendum that, by definition, takes key decisions out of the hands of elected public officials.[18] Such referenda have amended the state constitution to both limit taxes and mandate expensive state policies,[19] a recipe for political breakdown.

A major premise of this book is that there is a connection between the perceived deficiencies of contemporary government and formal constitutions. This is especially true of the interplay between American national politics and the U.S. Constitution, but it is also true with regard to many state constitutions. To take the easiest case, almost no one believes that one can discuss California's problems without paying attention to the particularities of its state constitution, even if one

acknowledges as well the importance of California's diverse political cultures, dramatically changing demographics, and the sheer size of its population.[20] Similarly, one can readily assign multiple cause to the present conditions in the United States and the consequent unhappiness and discontent of a larg majority of its citizens. It may well be the case that these causes, in the language of modern political science, explain more of the "variance" between acceptable and unacceptable governance than do defects in constitutional structures.

But that does not render constitutions irrelevant unless they explain nothing at all, which is wildl implausible. And if this were true, then it logically follows that it is a mistake to credit the U.S. Constitution for what has gone well in American history, although doing so continues to be a commo trope of American political analysts. All too typical are Thomas L. Friedman and Michael Mandelbaum, the authors of *That Used To Be Us: How American Fell behind in the World It Invented and How We Can Come Back,* who blithely assert that "for America's remarkable history, the Constitution deserves a large share of the credit."[21] Maybe yes, maybe no. But unless we believe that we have a perfect Constitution, one that generates only gains for the country and never imposes any losses, we should be prepared to pay equal attention to what may be the less-happy aspects of our constitutions, both national and state.

This book is very much about constitutional *structures,* and not, for example, about constitutional *rights.* A question hovering over it is the actual importance of such structures. Does it matter to the overall health of our political order that we have a presidential system of government, and not, like Great Britain or Canada, a parliamentary system in which the legislature is supreme? Is it truly significant in our presidential government that the president has the power to negate congressional handiwork simply by issuing a veto, which he may frequently exercise if Congress is controlled by th opposition party? How important is it that presidents can pardon even those who have not yet been convicted of felonies? Does it matter that Nebraska has only one legislative house, whereas its neighbors uniformly have two? Does the manner by which judges are selected—whether by election appointment—or their tenure upon joining a court explain their actions upon taking the bench and therefore the quality of perceived justice (or injustice)?

One might think that these are simply rhetorical questions, but political scientists have been sharply divided for decades about the fundamental importance of constitutions, including their structural provisions. What is really important, many political scientists argue, is the underlying *political culture* of a given society, or its economic situation, its demography—is it ethnically and religiously divided or more homogeneous?—and the like. Adherents of this position, like Friedman and Mendelbaum, argue that if America is ungovernable, we should look beyond our formal institutional structures both for diagnosis and cure. We may "only" need to reform our educational institutions or be more attentive to the implications of immigration, leaving constitutional structures intact to solve our problems.

But the formalities can make a real difference. The distinguished political scientist David Mayhe has written that "the plain language of the Constitution may still be an unsurpassed guide to U.S. legislative behavior."[22] This sentence is worth deep reflection. It suggests that the basic institutional structures set out in the 1787 document help to determine the actual behavior—that is, the outcomes of most concern to members of the American political community—of legislators today and thus

indirectly help to account for the levels of satisfaction or dissatisfaction felt by Americans assessing that behavior. Political scientists have become highly attentive to the "incentives" and "disincentives" created by particular political structures and how they help to shape the behavior of "rational" individuals seeking to gain their short- or long-term objectives.

There are, therefore, two basic ways to respond to the arguments of this book. One is to challenge the *empirical* assumptions, whether regarding a particular provision or the overall significance of any given American constitution, whether national or state. A second is to challenge the *normative* arguments that will also appear. We may agree, for example, on the empirical consequences of the U.S. Senate or the election of presidents by an electoral college but disagree profoundly on whether these consequences are desirable or undesirable.

Even if we believe that constitutions explain only relatively limited aspects of our lives together members of various American communities, it may be the case that changing our constitutions, as difficult as it is, is easier than changing the other aspects of American society that undoubtedly play important roles in explaining both our triumphs and our tragedies. One might well, for example, emphasize the importance of the sheer size of the modern United States, in population or in territory, or its quite stunning cultural and religious diversity, or the implications of a global economy for retaining a traditionally strong manufacturing base. All these factors present their own challenges, including whether or not they are genuinely changeable. We can, though, at least in theory, imagine changing aspects of our constitutional realities.

Nothing in this book should be read to suggest that a "good constitution" is the cure to whatever ails a society or that a "bad constitution" is necessarily a harbinger of doom. It may be that other, non constitutional factors are going so well that latent deficiencies in the Constitution don't matter. One might compare this situation to carrying in one's body a virus (or genetic defect) that remains dormant if one eats well, exercises, and gets ample sleep. But what if conditions arise where one doesn't (or can't)? At what point do latent diseases suddenly manifest themselves, causing serious, perhaps even fatal, damage to individual bodies—or the body politic? Do the survivors mutter to one another that the catastrophe could have been avoided by even relatively minor changes?

We regularly refer, with admiration, to the Framers of the U.S. Constitution. The very idea of a "frame" suggests a certain rigidity, whether one is thinking of a work of art or a constitution. It is fanciful, though, to believe that a frame that "worked" at one point in time will remain efficacious for all time. With art, we can talk simply about changed tastes; with constitutions we must address the extent to which a "framing document" fulfills the ends to which a society imagines itself devoted. Chapter 3 demonstrates that these ends are most likely to be set out in a *preamble* to the constitution, and that what follows the preamble are best viewed simply as proposed *means* to those ends. Frames may be necessary, but they can become problematic, even dangerous, if they remain unchanged in the light of new circumstances.

As will be seen throughout this book, state constitutions have often been transformed through amendment or, quite often, are replaced by a new constitution when they are deemed outmoded. Many analysts of California's situation take note of its state constitution—and, in some cases, the attendant need for a new constitutional convention to reform it. At the national level, however, critical analysts focus almost exclusively on the deficiencies of leadership or in the character of one's political

adversaries, on an inchoate "political culture," or on the particular problems posed by campaign finance or partisan gerrymandering in the drawing of legislative districts. Again, all of these may wel be worth discussing. But there is a refusal to "connect the dots" between the workings of our political system and the political structures that were adopted in 1787–1788—and left basically unamended ever since.

I return to Thomas Friedman because by any account he is one of the most influential columnists in the world today. He repeatedly decries "the failure of our political system to unite, even in a crisis to produce the policy responses America needs to thrive in the 21st century."[23] His new book with Michael Mandelbaum is highly critical of our political system, calling it "*paralyzed*"[24] and "incapab or addressing [vital challenges] at the speed and scale we need."[25] The authors offer a vigorous critique of the "pathologies of the political system," including an "extreme polarization," particularly in Congress, generated at least in part by the corrupting role played by money in politics (and the nee for an elected official to spend literally most of his or her time raising campaign contributions), and the rise of a hyperfragmented contemporary media.[26] California, which was formerly the instantiatio of the "American dream," has now lost that status, perhaps most dramatically with the dramatic decline of its educational system. As they note, whereas California in 1980 was spending approximately 10 percent of its general revenue on higher education and 3 percent on prisons, "today nearly 11 percent goes to prisons and 8 percent to higher education."[27] They agree with *The Economists'* 2009 diagnosis: "the state has become virtually ungovernable."[28]

Friedman and Mandelbaum deserve credit for recognizing the failures of our political system, bu they seem oblivious to the possibility that the U.S. Constitution, like its California counterpart, helps to explain that failure. Their final chapter, which flamboyantly calls for "shock therapy" to help correct our political "pathologies" includes the dismaying assertion that the country does not "need fundamental changes to its system of government, a system that has served it well for more than two centuries and has proven equal to task of coping with a series of major challenges."[29] Friedman, a deserved winner of multiple Pulitzer Prizes, would surely be more acute if asked to analyze, say, Iraq or Egyptian politics and the interplay between constitutional forms and political possibilities. But tha theme is totally absent from his columns and his new book. Instead, his and Mandelbaum's "solution to our political pathologies is to call for an independent third-party candidate for the presidency in 2012 who could shake up the American political system the way other losing insurgent candidates, including Teddy Roosevelt, George W. Wallace, and Ross Perot, did in 1912, 1968, and 1992.[30] They completely ignore the implications of the fact that we elect our presidents in a most peculiar manner, as dictated by the U.S. Constitution. I'm referring, of course, to the electoral college, which renders the popular vote irrelevant and generates campaign strategies aimed at a relatively few "battleground states.[31] Their suggestion would make great sense in either France or the state of Georgia, both of which in their presidential or gubernatorial elections require runoffs between the two highest vote-getters (assuming neither garnered an initial majority). That, alas, is not the way we elect presidents the United States, a basic bit of American civics ignored by these authors, and neither seems to recognize at all the degree to which the U.S. Constitution, like its California counterpart, helps to explain that failure or our current crisis of governance.

The conservative columnist David Brooks has written that the "British political system is basicall functional while the American system is not." He notes that the "British political system gives the majority party much greater power than any party could hope to have in the U.S., but cultural norms make the political debate less moralistic and less absolutist." Thus, Brooks concludes, "We America have no right to feel smug or superior."[32] Two months later, in the heat of the debt limit debate, he lamented the unwillingness of the Republican Party to accept what were quite astounding compromises offered by President Obama because they would require relatively slight tax increases. He noted the role that anti-tax zealot Grover Norquist plays in the contemporary Republican Party. "He enforces rigid ultimatums that make governance, or even thinking, impossible." But Brooks goes on to mention other aspects of contemporary politics, including the rise of "talk-radio jocks" who "portray politics as a cataclysmic, Manichaean struggle. A series of compromises that steadily advance conservative aims would muddy their story lines and be death to their ratings." He also denounced "political celebrities, who are marvelously uninterested in actually producing results," an "permanent campaigners" who are devoted only to winning the next election and not to actually passing laws that might benefit the country.[33] It is easy enough for me to agree with Brooks's often insightful diagnoses even if I do not share his general politics. But Brooks has never chosen to write on the mechanics of the American constitutional order, preferring instead to focus on political cultur or the dynamics of "leadership." He did not, for example, suggest that America take seriously what is desirable about British political institutions and think of changing our own accordingly.

More probing, though certainly no less depressing, is the complaint by longtime political analyst Bill Schneider that "hyperpartisanship is making American government dysfunctional."[34] Many othe countries suffer less from this problem because "when a party has a strong majority and unified control of government, it implements its program, passes laws, and makes changes." But that is not the case in the United States. The "U.S. system of government was designed with checks and balance separation of powers, and federal-state divisions. It was designed to make government as weak and a difficult as possible." In addition, there are "extra-constitutional rules, such as the filibuster, which has come to require a normal working majority of 60 votes in the Senate." Thus government in America, certainly at the national level, requires "the kind of consensus that usually comes out of a crisis, namely, an overwhelming sense of public urgency." But no such consensus is close to emergin regarding "the country's economic crisis, or the health care crisis, or the environmental crisis. Instea each crisis has deepened the partisan divide and made government more dysfunctional." In some cas there is no agreement that there even is a crisis that must be confronted, and if there is such agreement, there are deep ideological divides on how best to address it. With his reference to the design of the U.S. government, Schneider at least suggests that we ask if we are well served by the eighteenth-century institutions within which our politics take place.

E. J. Dionne has written, "I've reached the point where I'd abolish the Senate if I could. It is more profoundly undemocratic than it was when the Founders created it and less genuinely deliberative."[35] *New Yorker* writer Hendrik Hertzberg (a former speechwriter for Jimmy Carter) has moved far closer to connecting the dots. Hertzberg wrote a laudatory review in 2002 of Robert Dahl's *How Democratic Is the U.S. Constitution?* agreeing with Dahl that the answer is "not nearly enough."[36] More recently, in January 2011, he wrote that

> the biggest obstacles to energetic, coherent action are systemic. Our ungainly eighteenth-century legislative mechanism, drowning in twenty-first-century campaign cash, is shot through with veto points. We have three separately elected "governments" (House, Senate, Presidency), all of which must agree for anything big to happen. Our two-year election cycle leaves little time for long-acting changes to ripen and be judged fairly. That basic structure has its pluses as well as its minuses, of course. Anyway, we're stuck with it.[37]

Hertzberg has also been a longtime critic of the electoral college and its vagaries.[38] Still, perhaps the most important sentence in the quotation above is the last one, for he is indirectly noting (as Dahl had emphasized) that the U.S. Constitution is functionally impossible to amend (this is the subject of Chapter 15). It therefore may appear fruitless to expend much energy on constitutional reform, even if one can intellectually connect the dots.

The most dramatic example of dot connecting among the punditry is probably Fareed Zakaria, who in March 2011 wrote a remarkable cover story for *Time* magazine titled "Are America's Best Days behind Us?"[39] He lamented that "at the very moment that our political system has broken down, one hears only encomiums to it, the Constitution and the perfect Republic that it created. Now, as an immigrant, I love the special and, yes, exceptional nature of American democracy. I believe that the Constitution was one of the wonders of the world—in the 18th century. But today we face the reality of a system that has become creaky." *Creaky* is an odd word in this context, but Zakaria recognizes the problem caused by attempting to govern ourselves under a Constitution that can all too accurately be described as a relic of times long past.

A crucial question throughout this book, directed to readers in the second decade of the 21st century, is whether we continue to share the assumptions that underlay the U.S. Constitution in 1787. If not, why do we remain so devoted to a Constitution based on them? No one should believe that there are "perfect" constitutions waiting to be written. There are not. As Chapter 2 emphasizes, *all* constitutions necessarily involve tradeoffs and compromises. Nothing in this book should be taken to indicate otherwise. I may be quixotic in calling for rethinking, and perhaps changing, some basic features of our constitutions, both state and national. However, I do not view this as being utopian, which might suggest that there is a Platonic form of the one best constitution that we should identify and then adopt. To err is human, after all. But some errors and tradeoffs are worse than others; some compromises, indeed rotten rather than merely unfortunate. It may be, as James Madison argued with regard to equal representation in the U.S. Senate, that one must accept lesser evils. Yet evils they remain, and one should always be willing to ask how necessary it is to accept them and their consequences in our own contemporary world, so distant from the world in which these compromises were indeed explicable and, given exigencies of the moment, perhaps defensible. But times change.

This book is not intended to denigrate those who wrote our national or state constitutions. They were, with some exceptions, honorable persons genuinely trying to do the best they could. If I denigrate anyone in what follows, it is ourselves, for refusing to ask the probing questions the Framers were willing to ask about the adequacy of their own institutions. In the opening paragraph of *The Federalist,* Alexander Hamilton wrote that "it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are

really capable or not of establishing good government from reflection and choice."[40] The pride we take in our "founding" (and Founders) comes from a belief that such "reflection and choice" did indeed characterize the deliberations in Philadelphia and the ratification conventions thereafter. As Framers, they were not trying "to frame us" in the pejorative sense. (It would therefore have been a mistake to title this book "We Wuz Framed," which would analogize Madison and his associates to rogue police.) But Framers they were, generating a host of rigid structures with real consequences. One cannot believe that even the admirable deliberations that generated these structures were sufficient for all time. The Framers did not believe that, and neither should we.

As a matter of fact, there are some Americans who are, at least in their own way, connecting the dots. Among these are members of the so-called Tea Party, some of whom are vociferous proponents of at least two constitutional amendments. In June 2010, the Idaho Republican Party adopted a platform that advocates repeal of the Seventeenth Amendment, which provides that senators be popularly elected rather than appointed by their state legislatures.[41] Texas Governor and presidential candidate Rick Perry has also endorsed repeal.[42] An unsuccessful Utah Republican candidate for his party's Senate nomination explained his support of such a repeal: "We traded senators who represent rights of states for senators who represent the rights of special interest groups."[43] One may or may no accept the second half of his proposition, but it is hard to refute the argument that elected senators ar less likely to care about the abstract "rights of states" and the prerogatives of state governments than senators appointed by state officials. To expect otherwise is to believe that voters happen to share tha passion, an empirically dubious proposition.

Similarly, Randy Barnett, a noted law professor from Georgetown with a large following among Tea Party devotees, has proposed what he calls a Repeal Amendment that would give two-thirds of th state legislatures the right to invalidate any federal legislation.[44] I think that both proposals deserve emphatic rejection, but I have a grudging respect for their proponents, who at least realize that there indeed a connection between political structures and the outcomes they support. The proper response to such proposals is not to denounce the very idea of constitutional change, an attitude best expressed in a well-known essay by former Stanford Law School Dean Kathleen Sullivan dismissing all such suggestions as "constitutional amendmentitis"[45]—as if the very proposal of constitutional amendments constituted a disease. Instead of confronting proposed amendments on their merits, too many liberals have emulated Sullivan by condemning the very possibility of amendment. This comes dangerously close to suggesting that we have a basically "perfect Constitution" that should be worshipped rather than subjected to tough-minded analysis.

Moreover, a major theme of this book is that any consideration of American constitutionalism must pay ample attention to America's other fifty constitutions, those of the states. These constitutions are also the result of reflection and choice. Not only have they been far more frequently amended than their national counterpart, but many states have out-and-out replaced existing constitutions with new documents thought more conducive to facing the challenges of a new time. Even if one would not wish to emulate Georgia and Louisiana, which together have had almost two dozen constitutions, one might still believe that there is something to learn from the willingness of states to reflect on the adequacy of their existing constitutions and to do something about perceived

deficiencies, in contrast to the all too rarely reflected-upon U.S. Constitution.

Americans should pay special heed to James Madison's ringing conclusion to *Federalist* 14:

> Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? … Had no important step been taken by the leaders of the Revolution for which a precedent could not be discovered, no government established of which an exact model did not present itself, the people of the United States might, at this moment … must at best have been laboring under the weight of some of those forms which have crushed the liberties of the rest of mankind. Happily for America, happily, we trust, for the whole human race, they pursued a new and more noble course … They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great Confederacy, which *it is incumbent on their successors to improve and perpetuate.* (emphasis added)

We best honor the founding generation by forthrightly confronting the "lessons of experience" an accepting Madison's mandate to view the national Constitution and its state analogues as works in progress. We must therefore use our critical intelligence to "improve" them if they are to perpetuate themselves through time and, even more importantly, prove friends rather than enemies to achieving the great purposes most inspiringly set out in the Preamble to the national Constitution. This is especially important if we really are facing great challenges, even "emergencies," and if we have goo reason to wonder whether our institutions are up to these challenges. We must connect the dots, even if that leads us to ask fundamentally critical questions about the Constitution we have been taught since childhood to venerate.

II. WHY IS THIS BOOK DIFFERENT FROM MOST OTHER BOOKS ABOUT THE CONSTITUTION?

Connecting the dots requires writing a book that is considerably different from almost all other book on American constitutionalism, and not only because it is more critical, both implicitly and explicitly than the norm. Most such books, for example, focus almost obsessively on great interpretive debates attached to what Justice Robert Jackson once termed the "magnificent generalities" of the Due Proce Clause of the Fourteenth Amendment.[46] Less upliftingly, he also refers to "the cryptic words of the Fourteenth Amendment."[47] Whether magnificent or cryptic, the words of the Fourteenth Amendment —and much else in the Constitution—are scarcely obvious in their meaning. It is not surprising, then that many books have been written on the Fourteenth Amendment itself, let alone other parts of the Constitution that also beg for "interpretation." What unites many of those books, however bitterly they may differ, is the authors' claims that they have discerned the one true approach to constitutiona interpretation. Whether one agrees or not, many of these books are certainly worth reading.[48] This book, however, focuses on other issues connected with the Constitution and is, I hope, worth reading for different reasons.

Because the history of American constitutionalism, especially at the national level, involves so much changing interpretation (along with the occasional formal amendment), books usually have a

historical focus congruent with an emphasis on change. That, after all, is what history is about. One can lament changes or applaud them, but any understanding of the general powers of Congress over our 225-year history will necessarily involve an immersion in important changes that have structured this history. And, especially if the books are written by fellow members of the legal academy, they ar likely to feature many cases decided by the U.S. Supreme Court. Again, for reasons to be explained more fully below, this is not such a book.

Finally, most people (and too many academics) believe that one understands all one needs to kno about American constitutionalism by exclusive study of a single Constitution, the U.S. Constitution drafted in 1787 and ratified in 1787–1788. I do not. In order to understand why there are serious questions about the contemporary national government's capacity to govern, one does have to understand that particular constitution. As suggested above, however, if one is also interested in understanding the travails of many of our states, including the shutdown of the government of Minnesota or the chaotic government of California, the national Constitution will provide little help; knowledge of state constitutions is essential.

The inspiration for the title of this section is the opening of the Passover Seder, celebrating the Exodus from Egypt and the foundations of Jewish political identity. The youngest child chants the Four Questions, asking why Jews distinguish the Seder meal from all other dinners during the rest of the year. The Seder service is a self-conscious attempt to instill in youngsters the habit of not only connecting with the past but also of asking often critical questions about the answers given to the various questions. As Americans, we too are connected in complicated ways to those who forged new political identities, generated by an exodus from the traditions established as members of the British colonial empire and the forging (and "framing") of new understandings of political reality. We are most aware of the new *national* identity that was established and of the document, the U.S. Constitution, that signified it, not least by its opening invocation of "We the People." But there was also a spate of constitution-drafting within the states that had declared their independence from Grea Britain in 1776. All of these developments required asking—and offering provisional answers to—profound questions about the nature of politics. Many of these questions continue to roil us today. They are not merely of theoretical interest, but arise within the context of fears about the very governability of contemporary America, whether at the national or state level.

So, the four questions underlying this book are as follows:

1. Most other books on constitutional law accept the Constitution as a given, while passionately debating exactly what certain passages of the document mean. So why does this book generally ignore such questions of constitutional "meaning" or constitutional "interpretation"?
2. Books on American constitutional law often (and properly) take an intensely *historical* approac insofar as their central goal is to understand the *changes* in constitutional understanding over time. So why is *stasis,* rather than *change,* the principal focus of this book?
3. Most American books on constitutional law focus exclusively on the federal Constitution. Why should we pay as much attention to the other fifty state constitutions that also make up "American constitutionalism"?
4. Finally, most books about American constitutionalism talk almost incessantly about the role of courts. Why does this book present only a relatively limited discussion of the role of courts (ar judges) and almost no discussion of judicial opinions?

III. THE FOUR ANSWERS

A. Why does this book not focus on constitutional "meaning"?

There is a deceptively easy answer to this question. Debates about meaning generally arise only when there is a genuine controversy about how best to interpret a constitutional provision or practice. This does not mean that documents about which there is no controversy have no meaning. It is simply that if the meaning is clear to all the participants in a given conversation, the conversation shifts direction. The new discussion might well focus on the *wisdom* of the text in question, which is a very different question from its semantic meaning.

Consider two pieces of text from the U.S. Constitution. The first is the Inauguration Day Clause, which appears in the Twentieth Amendment. If you want to find out when an elected president takes office, this amendment tells you with great precision: "The terms of the President and Vice President shall end at noon on the 20th day of January … and the terms of their successors shall then begin." It would be odd if someone seriously asked, "What does the Constitution *mean* by January 20?" Take another example that applies directly to younger readers of this book, the "age qualification" clauses of the Constitution that disqualify even "natural born citizens" from serving in the House of Representatives, Senate, or the presidency until they turn twenty-five, thirty, or thirty-five, respectively. (A "naturalized citizen" may have to wait considerably longer to serve in Congress and will *never* be eligible to be president.) One can debate at length about the *wisdom* of these clauses, but there is no need to debate what they mean save in the most highly theoretical academic seminars that, for better or worse, have no genuine connection with "ordinary interpretation."

Contrast these examples with the Fourteenth Amendment, by which "all persons" are guaranteed "the equal protection of the laws" and the right not to be denied "due process of law." No one could seriously say that reading the text is sufficient to know what "equal protection" or "due process" means. That is, after all, why Justice Jackson could so easily describe the language as a "generality," whether magnificent or cryptic. Similarly, Robert Bork once described another notably cryptic passage of the Constitution, the Ninth Amendment, as an "inkblot." (Even the meaning of "persons" is less than self-evident, as revealed in contemporary debates about abortion or the protection to be accorded those "artificial persons" called corporations.)

Anyone who believes that the Equal Protection Clause requires only the application of a singular concept of equality should confront a fine book tellingly titled *Equalities*,[49] which identifies no fewer than 108 logically defensible theories of equality (and the text of the Constitution provides no practical help in determining which one of these is the best meaning). So perhaps we can place the Inauguration Day Clause at one end of a spectrum of constitutional clarity and the Equal Protection Clause at the other. The Inauguration Day Clause is scarcely "magnificent" (or even "cryptic"), and there is nothing "general" about it.

This book is far more concerned with analogues to the Inauguration Day Clause than to the Equal Protection Clause. Though their meaning is indisputable, there is nothing trivial about such clauses. I

fact, they may better explain the failures of our political system and fears about governability than th "magnificent generalities" explain its successes. The two ends of the spectrum might be called the *Constitution of Settlement* as against the *Constitution of Conversation.* It is the very point of the former to foreclose conversations about meaning. Most other books on constitutional law deal only with the latter. This book is different because it focuses on the former.

What explains the existence of *both* these aspects within any given constitution? To answer this question, we should ask the most general of all possible questions: What do constitutions do? What i their point? Not surprisingly, there are a number of things that constitutions can be said to do. One extremely important function of a constitution is to *settle* basic political disputes by adopting decidedly nonabstract and noninspiring language that gives a clear and determinate answer to what otherwise might be disputed. However, this is certainly not *all* that constitutions do. They can also express the highest—and most abstract—aspirations of a society. This might be the function of our Preamble, the subject of Chapter 3. The Constitution also includes clauses (like the Equal Protection Clause) that serve as goads to sometimes endless—and often acrimonious—conversations. But if any given constitution generated *only* conversations, however interesting they might be, it would be an abject failure.

Some skeptics believe that it is a mistake to expect constitutions firmly to settle anything of grea importance. Among the political realities, for example, is the necessity of compromise, the topic of Chapter 2. One common tactic of compromise is to "kick the can down the street."[50] One can do this either by adopting ambiguous language that is acceptable to both sides because it lacks clear meanin or by remaining resolutely silent about an issue that might be too volatile. (Think, in this regard, of secession.)

But Madison, in *Federalist* 37, expresses considerable skepticism about the possibilities of perfe clarity even in the best of circumstances. Even the "continued and combined labors of the most enlightened legislatures and jurists," he observed, have failed to provide the "delineat[ion]" we migh hope for with regard to "different codes of laws and different tribunals of justice." Instead, "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." We must be aware of the inherent limits of language. We are therefore faced with "unavoidable inaccuracy … according to the complexity and novelty of the objects defined." He concludes the paragraph with a truly stunning sentence: "When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which is communicated." If the Almighty cannot be altogether clear, then why should we expect anything better from ordinary human beings? It would surely require the ultimate in delusions of grandeur. Madison does offer the possibility that disputes can be "liquidated" after sufficient conversation produces a consensus on meaning, though one wonders if such "liquidation" and settlement will ever occur with regard to the Fourteenth Amendment.

Perhaps, however, Madison was slightly exaggerating. One does not have to be a fundamentalist t believe that parts of the Bible have quite clear meanings. For example, while teaching at Harvard in 2009 I did not hold class on Monday, September 28, which was Yom Kippur, the Day of Atonement

for even minimally observant Jews like myself. Why the 28th? Given that Harvard no longer schedules Saturday classes, why could the holiday not be observed on the previous Saturday, September 26th? Why put up with the frequent inconvenience to both me and my students caused by Jewish holidays falling on class days? Yom Kippur could be treated the way the United States treated Lincoln's and Washington's birthdays, combining them into a holiday called "Presidents Day," alway celebrated, to public joy, on Mondays to create long weekends. The answer is easy: Leviticus 23:27 states that "the tenth day of this seventh month" of the Jewish calendar will forever after be the Day Atonement. Beginning with a clear (perhaps too clear) text, practices have developed over what is no thousands of years, so that the date of Yom Kippur is as settled as, say, Inauguration Day. No doubt there are other examples as well. So perhaps we could even speak of the "Bible of Conversation"—th Ten Commandments or the parables of Jesus, for starters—and the "Bible of Settlement."

The Jewish calendar, like the Muslim or Chinese calendars, is a lunar one and is therefore differe from the Christian calendar under which we generally operate, which is based on the earth's revolution around the sun. This could lead to some interesting tests of interpretation. The U.S. Constitution requires that the president be at least thirty-five. But it doesn't explicitly tell us under which calendar system, at least until one reads the very end of the Constitution declaring that it was signed in Philadelphia on September 17, "in the year of our Lord" 1787. But even if we use this as a conclusive determination that the Constitution is referring to the solar calendar, there is the fact that the Christian community was for several centuries divided as to how that calendar actually functione The traditional Julian calendar was succeeded by the reformed calendar introduced by Pope Gregory XIII in 1582 and adopted by most countries in the ensuing centuries. However, Protestant Great Britain (and therefore the American colonies) did not adopt the new calendar system until 1752, at which time it was necessary to correct the still-existing Julian calendar by eleven days. Thus Wednesday, September 2, 1752, was followed by Thursday, September 14, 1752. This meant also tha George Washington's birthday suddenly shifted from February 11 to February 22. In any event, we treat the Gregorian form of the solar calendar as the "settled" way to measure age in the United State so any claims based on alternative calendars would be rejected. This excursion into calendar systems illustrates the point that "settlement" often requires more than mere text; one must look to cultural assumptions underlying the bare-bones words in a document. Once one acknowledges the force of these underlying assumptions, though, conversation about "meaning" ceases with regard to texts of th Constitution of Settlement.

Many political scientists have emphasized that constitutions, if they are "to work," must ultimately be "self-enforcing," which means that members of the relevant community will voluntaril adhere to constitutional commands because such obedience is viewed as conducive to achieving mutually beneficial ends, including stability. What legal philosophers describe as "formal rules" are often conducive to achieving such stability.[51] Just imagine what would happen if there were genuine controversy as to when a newly elected president took office. Self-enforcement is no doubt easier if language appears to be "clear," at least within the operative assumptions of the relevant community. can also be achieved, though, when most people agree that constitutional conversations will be brought to a close by the decision of a particular person or institution. In our system, that role is ofte assigned to (or eagerly embraced by) the U.S. Supreme Court. As already suggested, though, this boo

is far less interested in the roles played by such "ultimate decisionmakers," not least because their decisions are often vigorously contested, as is the case with the Supreme Court. Most of the self-enforcing provisions appear to be sufficiently obvious in their meaning that they require no adjudication at all; anyone disregarding the clear meaning would be engaging at the same instance in radical disobedience, perhaps even revolution.

So, return again to the Inauguration Day Clause as a paradigmatic example of "settlement." We know what day a president takes office (or is allowed to continue in office after a completed first term) simply by reading the Twentieth Amendment. A quick search on the Internet allows us to determine that the president elected in 2204—assuming the United States still exists and the Constitution has not been amended—will be inaugurated on Sunday, January 20, 2205, though it is possible that the inauguration celebrations will be delayed until Monday if a monstrous blizzard shut down Washington (or if the United States has become so Christian in its public culture that it is thought unsuitable to have public celebrations on Sunday). But no one should believe that such a dela will have the slightest legal effect, for the presidency will have changed hands at noon the day before That's just what the Constitution says!

Everyone should be aware that the Twentieth Amendment came along fairly late in our constitutional history, in 1933. So when were presidents inaugurated before then? The answer is March 4. Does the text of the Constitution give us that answer? Not quite. But the reason that all presidents who took office after George Washington were inaugurated on March 4 *does* follow from text that establishes the presidential term as four years, and not one day more or less. The last Congress operating under the Articles of Confederation, which the new Constitution supplanted, determined that the new government would begin operating—with all officers presumably taking the oaths of office—on the "first Wednesday of March 1789," which was March 4. As it happened, the new government scarcely got up and running with maximum efficiency, and George Washington did not take his oath of office until April 29, 1789. But he did take his second oath of office on March 4, 1793, not least because the terms of office of all representatives and one-third of the Senate expired a noon on the 4th (given that the Constitution establishes a two-year term for members of the House ar that the terms of one-third of the Senate expire at the same time). Even if one can argue about whethe Washington's term really began on March 4, 1789, or only when he actually took the oath of office fo the first time on April 29,[52] the Twelfth Amendment, added to the Constitution in 1803, in effect specified March 4 as Inauguration Day.[53] So it follows that any merely legislative change would automatically violate the Constitution by either shortening or lengthening the mandated four-year term. As a matter of fact, the Twentieth Amendment establishing January 20 as Inauguration Day operated to reduce Franklin Roosevelt's first term of office by roughly six weeks; his second term began on January 20, 1937, though he had initially been inaugurated, prior to the Twentieth Amendment, on March 4, 1933.

No doubt many readers view Inauguration Day as a minor aspect of the Constitution, perhaps because lawyers never argue about its meaning or threaten to bring litigation changing the time at which a newly elected president will take office. To be sure, many of the examples in the remainder o the book may grip the reader more. But it is a mistake to believe that there is no interesting conversation to be had about the Inauguration Day Clause. Indeed, this book is predicated on the

proposition that almost *all* of the Constitution of Settlement is very much worth talking about by anyone interested in the practicalities of American government However, the nature of the discourse about the Constitution of Settlement is quite different from that generated by the Constitution of Conversation. The latter involves constitutional *meaning;* the former involves the *wisdom* of clear constitutional commands.

One might well believe that in the twenty-first century January 20 is as defective a day for inaugurating new presidents as the twentieth-century supporters of the Twentieth Amendment thoug March 4 was. The outgoing incumbent continues to possess all the legal authority of the office, including the ability to issue pardons to persons convicted of violating federal law. But the incoming president, who has no legal authority, may possess a great deal of political authority, especially if he or she received a majority of the popular vote (in addition to the majority of electoral votes). Things get even more complicated if the incoming president was elected on what might be termed a "repudiationist" platform vis-à-vis the incumbent.

The most dramatic illustrations of this phenomenon under the old regime occurred when Thomas Jefferson replaced the defeated and widely unpopular John Adams (1800–1801), Abraham Lincoln took over from the slavery-supporting James Buchanan (1860–1861), and Franklin D. Roosevelt trounced Herbert Hoover during the Great Depression (1932–1933). In all cases, basically a full five months separated the election from the inauguration of the successor. In the post-Twentieth-Amendment world things have gotten better, but perhaps not enough to lull us into complacence. Mo readers of this book personally experienced during the winter of 2008–2009 the phenomenon of a soundly repudiated (even by the candidate of his own party) incumbent sitting in office and a president-elect, elected while the United States suffered through the greatest economic crisis of the past seventy-five years, possessing not a scintilla of legal authority until January 20. Older readers may recall that Richard Nixon had to wait to succeed Lyndon Johnson in 1969; Jimmy Carter, to succeed Gerald Ford in 1977; and—perhaps most notably—Ronald Reagan, to replace Jimmy Carter in 1981.

At one level—that is, ascertaining constitutional *meaning*—it really doesn't matter whether one applauds Inauguration Day or considers it a reprehensible feature of the Constitution. It is simply there, a settled feature unless a further amendment gives us a different—and perhaps more desirable- system than the one we have now. But we can still vigorously debate whether the Constitution *should* be amended, which requires arguing about whether we are well served by this feature of the Constitution.

In such a debate, it might prove illuminating to look at the quite different decisions of a variety o foreign countries and the fifty American states with regard to inaugurating their political leaders. Most notable, perhaps, is the practice in Great Britain of the incumbent prime minister leaving 10 Downing Street the day after the election, promptly replaced by the victorious candidate. There is no notion of a "transition period" in that country because the premise of the British parliamentary syste is that the out-of-power party always contains a "shadow cabinet," ready to take over at a moment's notice. No American state has adopted a parliamentary system; all emulate the national government by having a governor chosen independently of the legislature. Still, no state waits as long as the national government to install its new leader. In 2010, for example, both Alaska and Hawaii