

Constitutional Dysfunction: Assessing American Institutional Development

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CONSTITUTIONAL DYSFUNCTION: ASSESSING AMERICAN INSTITUTIONAL DEVELOPMENT

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CONSTITUTIONAL DYSFUNCTION: ASSESSING AMERICAN INSTITUTIONAL DEVELOPMENT

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There is a widespread belief among Americans that the nation's political system suffers from dysfunction. It is, therefore, worth asking whether the Constitution has been complicit in contributing to the perceived political dysfunction. Does the United States, in effect, suffer from constitutional dysfunction?

I conclude that political and societal developments subsequent to the Founding have retooled and repurposed American governing institutions, rendering their function antithetical to the original design of the Constitution. The long-term and collective effects of these changes may contribute to contemporary constitutional dysfunction.

At the outset, I discuss general purposes and functions of constitutions. By describing constitutional functionality, we can better grasp the nature of when constitutions work and when they fail to function. As such, we will be best equipped to not only design a metric by which to measure constitutional dysfunction, but to apply this rubric to the American regime. "Chapter Two" will detail the framing of the American Constitution and explore the principles undergirding its creation. "Chapter Three" will cover the so-called "unfounding," the processes and developments which have changed the character of governing institutions. "Chapter Four" will focus on proposed solutions which may be both misguided and potentially problematic. Finally, "Chapter Five" will consider the best approach to addressing American constitutional dysfunction.

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CHAPTER ONE: ANATOMIZING DYSFUNCTION AND DESIGNING A METRIC

A recent survey conducted by Pew Research found that fully 76% of Americans polled believed that their leaders in Washington were unable to address the most important issues facing the nation. Such a failure of governance was viewed as harmful to the welfare of the country by a similar percentage.¹ Similarly, a Gallup poll conducted at the same time showed that a plurality of Americans, around 18%, rated government leadership or lack thereof, as their top concern.² There is a widespread belief among Americans that the nation's political system suffers from dysfunction. It is, therefore, worth asking whether the Constitution has been complicit in contributing to the perceived political dysfunction. Does the United States, in effect, suffer from constitutional dysfunction?

I conclude that political and societal developments subsequent to the Founding have retooled and repurposed American governing institutions, rendering their function antithetical to the original design of the Constitution. The long-term and collective effects of these changes may contribute to contemporary constitutional dysfunction.

It is first useful to discuss the general purposes and functions of constitutions. By describing constitutional functionality, we can better grasp the nature of when constitutions work and when they fail to function. As such, we will be best equipped to not only design a metric by which to measure constitutional dysfunction, but to apply this rubric to the American regime. "Chapter Two" will detail the framing of the American Constitution and the principles undergirding its creation. "Chapter Three" will cover the so-called "unfounding," the processes and developments which have changed the character of governing institutions. "Chapter Four"

¹ "Few See Quick Cure for Nation's Political Divisions," *Pew Research Center*, December 11, 2014, accessed March 7, 2016, URL: <http://www.people-press.org/2014/12/11/few-see-quick-cure-for-nations-political-divisions/>.

² Lydia Saad, "Cluster of Concerns Vie for Top U.S. Problem in 2014," *Gallup*, January 2, 2015, accessed March 7, 2016, URL: <http://www.gallup.com/poll/180398/cluster-concerns-vie-top-problem-2014.aspx>.

will focus on proposed solutions which may be both misguided and potentially problematic. “Chapter Five” will consider the best approach to addressing American constitutional dysfunction.

1.1 Constitutional Purpose and Functionality

Different types of Constitutions exist around the world. While the English Constitution is unwritten, having gradually established a constitutional framework through a series of successive legislative action, constitutions are often written texts codifying laws and other legal stipulations. They are crafted to achieve specific purposes for the nation. At their most basic, they establish a framework for government, specifying the mechanisms and institutions that operate in the state. Constitutions outline these schematics “by establishing the rules for determining who makes the law, setting out the processes by which those governing officials make laws, and limiting the laws those governing officials enact.”³

In order for lawmaking and enforcement bodies to operate, constitutions must identify a proper allocation of authority. To that end, they authorize governing institutions with the requisite degree and type of power, thereby affording legitimacy to their actions. As Graber suggests, “The absence of a constitution would result ... in an anarchic state where no one has any legal authority.” Further, by empowering these bodies, constitutions may, at times “simultaneously ... constrain government,” withholding powers not specifically granted by the text.⁴ However, these limitations may not always have the desired effect of restricting government, especially when their meaning is vague and given to broader interpretation.

³ Mark A. Graber, *A New Introduction to American Constitutionalism*, (New York: Oxford University Press, 2013), 25.

⁴ *Ibid.*, 46.

Additionally, constitutionalism embodies the idea that “ordinary law,” or legislative statutes, ought to remain separate and distinct from the “fundamental law” of the text.⁵ While legislatures may be granted significant powers to decide policy for the nation, they are not permitted to violate the precepts and principles of the constitution, nor alter the text itself. By elevating the fundamental law over the ordinary law, constitutionalism “endeavors to divorce fundamental substantive and procedural decisions about the good from the human impulse to think self-interestedly.”⁶ Thus, constitutions provide long-term security and stability in the face of future uncertainty.

Simply stated, constitutions seek to offer clarity and certainty to the polity, whether it is by ordering the political framework of government, empowering and limiting the powers of that government, or providing a distinction between statutory law and constitutional law. Collectively, these objectives establish effective governing institutions which create and execute laws. In so doing, they offer legitimacy to the regime and assure stability for its institutions.

Although constitutions share general purposes, they must be appropriately tailored to the societies they serve. The peculiarities and particularities of varying nations, as well as nations with varying backgrounds, will demand that each constitution possess a unique character. No single solution could possibly succeed in achieving legitimacy and stability for such widely disparate societies and circumstances. In addition to reflecting their societies, constitutions may serve “to form collective public identities [and] shape a country’s public character.”⁷ By offering “clearly defined aims or goals,” they can “cultivate imagined political communities.”⁸ In other words, constitutions, if framed effectively, can act as a unifying force for its citizens,

⁵ Beau Breslin, *From Words to Worlds: Exploring Constitutional Functionality*, (Baltimore: The Johns Hopkins University Press, 2009), 21.

⁶ *Ibid.*, 20.

⁷ Breslin, *From Words to Worlds*, 4.

⁸ *Ibid.*, 15.

drawing upon the diverse identities and aspirations of its people and strengthening societal cohesion.

To that end, certain nations may find it suitable to include in their constitutions an enumeration of rights deemed so essential they are deserved of particular attention and protection. The Constitution of the United States contains a supplementary Bill of Rights which was approved several years after the Constitution's ratification. It is a list of negative rights, spaces which ought to be removed from the reach of the national government. Oftentimes, polities will adopt constitutions with positive rights, or obligations of the national government to its people. For example, South Africa's constitution enshrines the need for education and health care.⁹ These services require a more active and extensive government.

To achieve these purposes, an effective and functional political system must exist. Therefore, constitutional functionality is, in essence, the degree to which the constitution's general purposes and specific ideals are attained. A constitution "imagines a normative political society ... and then, if successful, it helps to bring about that envisioned community," writes Breslin.¹⁰ Further, constitutional texts may "design the various political institutions of the community in a self-conscious way ... so as to achieve the polity's expressed objectives."¹¹ As such, they outline the processes, mechanisms and objectives in realizing the nation's broader goals.

A functional constitution begets a functional political system. In order to achieve its constitutional purposes, a functional political system must be comprised of vibrant governing branches to provide dependability that they will operate effectively; a commitment on behalf of

⁹ "A Bill of Rights for a New South Africa," *African National Congress: South Africa's National Liberation Movement*, accessed March 7, 2016, URL: <http://www.anc.org.za/show.php?id=231>.

¹⁰ Breslin, *From Words to Worlds*, 47.

¹¹ *Ibid.*, 69.

political actors to a proper balance of powers to ensure the protection of rights, liberties, and other prerogatives of the people; and a guarantee that the fundamental law of the constitution is neither endangered by the statutory decisions of the legislature nor the popular vote of the people, thereby assuring long-term security. Societal cohesion and unity are achieved when the citizenry is engaged and active to ensure their interests are represented and their legitimacy is afforded to the regime, but limited to the extent that stability and durability are secured.

As mentioned, education and health care are important services enshrined in the Bill of Rights of South Africa. Therefore, constitutional functionality is the extent to which these rights, among others, are provided to their people by the state. The Parliament is sanctioned by the constitution with the necessary powers to determine the best policies in distributing these services. Therefore, an operational, coherent, and vigorous legislature is required. Once these services are provided to the nation without impairment, the reliability of and satisfaction for the state is enhanced, thereby strengthening its legitimacy with society and long-term stability.

Having discussed what constitutions are for and how they operate, it is now necessary to examine when they fail to function properly.

1.2 Constitutional Dysfunction

If constitutional functionality is the degree to which the nation's purposes are achieved, then constitutional dysfunction is rooted in the failure of the system to realize its higher goals via constitutionally-sanctioned methods. In other words, the institutions and mechanisms themselves impair the attainment of the constitution's purposes. At times, dysfunction may involve the disruption of institutions *by other factors*, but isolating the purely constitutional aspects can get tricky since certain forces may be extra-constitutional, emanating from other

sectors of the polity. Nonetheless, this is constitutional dysfunction at its most basic. It manifests in different forms, and as such, is subject to vastly different interpretations.

Therefore, to understand constitutional dysfunction, it is worth discussing what it does not involve. One misperception is that the presence and persistence of conflict is emblematic of a constitution's dysfunction. However, constitutions do not eliminate conflict, nor should they. By contrast, they are "supposed to manage conflict in a way that ensures regime stability."¹² As Breslin explains, conflict is spawned in the "absence of clearly defined rules," when uncertainty in the questions of governance arise.¹³ Constitutions should promote "constructive conflict," those debates and discussions which can "advance the promises laid out in the text's preamble," while minimizing "destructive conflict."¹⁴ Therefore, constitutional dialogue, the process of defining and refining the limits of state power and extent of societal protections, strengthens the legitimacy and stability of the constitutional order.

Additionally, it is worth cautioning that the presence of political and institutional conflict is not symptomatic of a constitutional crisis. Graber, minimizing the role of conflict in constitutional crises, argues that such crises "do not occur merely because people disagree, perhaps very strongly, about the meaning of constitutional provisions." Instead, "serious crises are rooted in the constitutional failure to construct politics in ways that create tolerable solutions to constitutional disagreements or to constitute citizens willing to live within constitutional norms."¹⁵ These instruments of conflict management may include providing "incentives" to

¹² Ibid., 90.

¹³ Ibid., 94.

¹⁴ Ibid., 90.

¹⁵ Graber, *American Constitutionalism*, 215.

governing officials “to moderate their demands [or] take into account rival perspectives” on constitutional questions of power allocation.¹⁶

Determining when institutional discord is the result of constitutional defects can be challenging. Breslin advises that “political differences may not be purely constitutional differences,” suggesting that “ongoing battles about the proper management of conflict” are more about “institutional parochialism” than inherent flaws in the constitution.¹⁷ Indeed, as the dynamic nature of governing institutions demonstrates, evolution and development occur through conflict and strife, often independent of changes to the constitutional text. Therefore, it becomes especially important that an accurate distinction between political and constitutional dysfunction be made, for, without a proper diagnosis, one cannot provide an effective prescription.

Constitutional dysfunction is explicitly concerned with provisions of the text that may directly impede the functioning of governing institutions, specifically in attaining the purposes of the text. Similarly, it can escalate into periods when the “boundaries of ordinary politics” are breached.¹⁸ These instances may precipitate a crisis. Sanford Levinson and Jack Balkin argue that certain crises, such as the 1800 presidential election, are the result of constitutional dysfunction as the specific method for electing a president was flawed, leading to the stalemate.¹⁹ However, other crises, such as Watergate and the Clinton impeachment, were more political in nature. As they explain, “Watergate was more a political crisis than a constitutional one. Nevertheless, it could easily have become a constitutional crisis at several points if Nixon had publicly stated (which he never did during his presidency) that he sought deliberately to go

¹⁶ *Ibid.*, 246.

¹⁷ Breslin, *From Words to Worlds*, 96.

¹⁸ Sanford Levinson and Jack M. Balkin, “Constitutional Crises,” *University of Pennsylvania Law Review*, Vol. 157, No. 3, (February, 2009), 738-740, accessed March 7, 2016, URL: <http://www.jstor.org/stable/40380254>.

¹⁹ *Ibid.*, 740.

beyond his powers under the Constitution.” By the same token, the Clinton impeachment was largely a political affair, as well, since “impeachment by itself does not constitute a constitutional crisis.” Rather, it is a constitutionally-sanctioned tool for the Congress to check the executive.²⁰

Examples abound where the distinction between the political and constitutional realms become blurred. In assessing the contemporary American political system, Thomas Mann and Norman Ornstein often conflate political strife with constitutional dysfunction. They argue that the system is not operating effectively, attributing it to a myriad of factors, namely Republican Party extremism, the nature of sensationalist media, Senatorial procedures, and the infusion of money. Empowered by these developments, self-interested political actors have hijacked the governing institutions, in particular Congress, to advance their own good. As a result, gridlock and conflict have arisen and persisted.²¹

While some of these factors, such as money, may present constitutional questions pertaining to the First Amendment, many of these actors and developments are exogenous to the Constitution, having not been sanctioned by the text. Further, Mann and Ornstein assert that political and societal factors have misused and abused governing institutions, but do not describe how those institutions have evolved and developed, nor offer a constitutional rubric by which to measure dysfunction. By contrast, my conclusion is that governing institutions are themselves incapable of fully achieving the goals of the nation through the constitutionally-sanctioned mechanisms. Political and societal movements are implicated, yet only to the degree that they have changed the nature of these institutions and their original constitutional principles.

We may recall that constitutions separate fundamental law from ordinary law, providing the proper methods to do so. When that distinction is breached and the mechanisms are unable

²⁰ Ibid., 712-713.

²¹ Thomas E. Mann and Norman J. Ornstein, *It's Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*, (New York: Basic Books, 2013), 25-30; 31-43; 58-80; 84-91.

to perform effectively in preserving that separation, then the diagnosis is constitutional dysfunction. It has not yet become a constitutional crisis, nor is it a symptom of constitutional failure. These are both phenomena which are related to dysfunction, but occur under somewhat different circumstances.

1.3 Constitutional Crisis and Failure

Constitutional dysfunction may persist for years without resolution. In the face of worsening dysfunction, a constitutional crisis may arise. Constitutional crises present a “potentially decisive turning point in the direction of the constitutional order, a moment at which the order threatens to break down,” the result of which “may lead back to a slightly altered status quo” or constitute “an important transformation in the forms and practices of power.” In certain instances, it could even bring about the replacement of the constitutional regime with a new one. In short, such crises “mark the moments when constitutions threaten to fail” at “mak[ing] politics possible.”²²

As with constitutional dysfunction, constitutional crises may manifest in different ways, shapes, and forms. Levinson and Balkin identify three types of constitutional crises. The first is when a political leader seizes emergency powers to preserve the social order, in effect becoming a dictator.²³ The second crisis arises from an “excessive fidelity to a failing constitution,” when the observance of the text’s stipulations leads to heightened tension and strife. One such example of this form includes the three-fifths rule of slave representation, which determined the results of presidential elections and the composition of the House of Representatives, but

²² Levinson and Balkin, “Constitutional Crises,” 714-715.

²³ *Ibid.*, 721.

contributed to increased instability and tension.²⁴ The third type of crisis is when political actors assert that they have been faithful to the Constitution, but “disagree about what the [text] requires and about who holds the appropriate degree of power.” As Levinson and Balkin add, “each side may claim that *their opponents* are violating the Constitution.” These crises are only resolved “when one side or the other backs down and agrees ... to the practical legality of the new legal status quo.”²⁵ However, in such crises, they warn that certain interested parties may move “outside the ordinary boundaries of politics in an effort to win.”²⁶ As such, the 1800 presidential election deadlock and the 1860-1861 secession crisis were instances where ordinary politics had been breached and extra-constitutional measures were threatened or undertaken.²⁷

In some instances, constitutional crises are resolved both politically and constitutionally. For example, the 1800 election deadlock was broken when James Bayard of Delaware, a Federalist, abstained from voting, allowing the political impasse to end. The constitutional defect was eventually resolved when the 12th Amendment established separate electoral ballots for presidential and vice presidential candidates. When constitutional crises are left unresolved, however, they could lead to constitutional failure.

Constitutional failure is, in essence, about the breakdown of the constitutional order or the inability of the text to remain operable. The Civil War represented the failure of the American Constitution to placate its disparate regions. The text’s protection of slavery contributed to chronic dysfunction in realizing a collective public character. It failed to unify the nation, with the South committed to a different interpretation of slavery. Periodic constitutional crises erupted, but were never fully resolved. Political compromises were strung together, such

²⁴ Ibid., 732-733.

²⁵ Ibid., 738.

²⁶ Ibid., 739.

²⁷ Ibid., 740.

as the Missouri Compromise of 1820 and the Compromise of 1850, but the underlying constitutional remedies were less forthcoming. Societal fragmentation continued unabated, political tensions worsened, and national unity dissolved, culminating in the eruption of war. The constitutional regime broke down as the nation was torn asunder. Similarly, the French Fourth Republic was unable to adequately manage its societal fragmentation and adversarial politics. In fact, such parties as the Communists and the Gaullists outright “rejected the regime.” As such, the pervasive dysfunction rendered an “unstable, ineffective, and immobilist democracy.” Ultimately, the crisis of the Algerian War placed such a “heavy burden” on the system that it was eventually replaced.²⁸

When the constitutional order fails, it “is signified by the breakdown of a political regime established or authorized by a constitution.” As Mark Brandon explains, “The failure of a constitutional order can be unreflective and unselfconscious, perhaps gradual, even almost imperceptible.”²⁹ During the Civil War, the text remained in use, but a contingent of the polity had divorced itself from the order to establish its own constitutional regime. Brandon suggests that the South may not have rejected the constitutional text as much as they sought “to *preserve* it in a new political order,” with an interpretation more faithful to the principles of the document.³⁰

Constitutional failure need not always be accompanied by violence and war. A second iteration of failure is, quite simply, the “discarding, abandoning, or ignoring [of] a particular constitution.” The elimination of one constitution and the reconstitution of a new text may

²⁸ Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, (New Haven: Yale University Press, 1977), 114-117.

²⁹ Mark E. Brandon, “Constitutionalism and Constitutional Failure,” *The Good Society*, Vol. 9, No. 2, (1999), 66, accessed March 7, 2016, URL: <http://www.jstor.org/stable/20710953>.

³⁰ *Ibid.*

involve self-conscious reflection and deliberation.³¹ Indeed, the scrapping of the Articles of Confederation and the drafting of a new constitution in 1787 was achieved with debate and choice rather than violence and bloodshed.

1.4 Conclusion

Constitutions have many purposes. They establish the political framework of the state, set the proper limits on the governing authority, and distinguish ordinary law from fundamental, constitutional law. They must also reflect the needs and circumstances of the nation, as well as forge a collective identity. To that end, specific constitutional goals, such as the US preamble, may be espoused in conjunction with the text. In short, constitutions provide clarity and certainty to the polity to achieve regime legitimacy, institutional stability, and societal unity. Each reinforces the other.

The constitution is functional when its ability to realize the polity's objectives through the proper mechanisms and channels remains unimpeded. However, constitutional dysfunction arises when those mechanisms and channels impair the effective functioning toward the nation's purposes. Persistent and chronic dysfunction could potentially lead to the eruption of constitutional crises. In these instances, actors may turn to extra-constitutional methods, such as seizing emergency powers or taking up arms. When such crises are not resolved politically and constitutionally, then the constitution itself, or the constitutional order, may break down and be transformed.

³¹ Ibid., 65.

CHAPTER TWO: THE FOUNDING

The Founding period was one of great challenge to the American nation. The nascent American state, forged by the conflict with Great Britain, was soon confronted by the excesses and abuses of state assemblies. The politics of liberty, which defined the essence of the Revolution, was left unfettered. With powerful legislatures, weak state executives, and widespread direct democracy, majoritarianism was ascendant. As these popular majorities went unchecked, currencies, property rights, and contracts were increasingly threatened. Emblematic of this turmoil, Shays' Rebellion, a series of uprisings against taxes and debts, erupted in western Massachusetts. Such tendencies, however, were soon to be displaced by a new revolution in 1787, one of order and stability.¹

Several leaders were determined to redress the deficiencies of the Articles of Confederation, the system of government that had hastily been created during the Revolution. The national government consisted of a single legislative body with no executive branch. Members were chosen annually by state legislatures and were subject to their recall. Each state had a single vote. The approval of nine out of thirteen states was required to enact legislation. As such, it was notoriously difficult to collect taxes and raise an army as requisitions depended on the assent of the states.² The Constitution of 1787 was the culmination of several months of debate, discourse, and compromise. While it fell short of perfection, it represents a guideline to good governance. The Framers themselves may not have been perfect, but they understood human imperfections enough to craft a regime which manages the frailties and vices of man. For example, they understood that ambition, while inevitable, could be harnessed for infusing energy

¹ Isaac Kramnick, "Editor's Introduction," in *The Federalist Papers*, ed. Isaac Kramnick (London: Penguin Group, 1987), 16-17.

² *Ibid.*, 18-21.

and vitality into government, thereby ensuring a durable separation of powers. As James Madison argues, “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government.”³

In setting up a Constitution, the Framers listed several purposes of the new regime. Enumerated in the preamble, these words comprise the aspirational goals of the nation:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

In envisioning an ever-improving national community, the preamble has fueled many a reform movement, particularly those committed to providing justice and the blessings of liberty equally to all Americans. Others have stressed the importance of domestic tranquility and the common defense.

While the goals of the preamble are important, they are quite general in their nature. As such, the text specifies the institutions and processes by which to achieve them. These constitutional mechanisms and procedures are undergirded by principles, which were of great value to the Framers. First, legitimacy for the regime was required, and to that end, the Framers established a republican form of government, ensuring that the participation of the citizenry was safeguarded. They found order and stability to be necessary, as well, and therefore pursued limits on majoritarianism through entrenched, insulated branches of government. They sought to

³ James Madison, “Federalist No. 51,” in *The Federalist Papers*, 319.

create vibrant governing institutions with the requisite power and independence to enforce the law, but limited in their scope so as not to endanger the rights and liberties of the people.

Finally, to strengthen societal cohesion, the Framers advocated reverence for the Constitution.

2.1 Regime Legitimacy

Legitimacy for the regime was of utmost concern to the Framers. To ensure the new government commanded the support of the people, they established a representative democracy. A republican form of governance would safeguard a political right deemed essential, the right to vote. In “Federalist No. 52,” Madison declares, “The right of suffrage is very justly regarded as a fundamental article of republican government.”⁴ At that time, suffrage neither extended to slaves nor to certain citizens, such as women. Although limited as it was to white, male landowners, the right to vote nonetheless provided the foundation to the American Republic.

The House of Representatives has embodied the most democratic tendencies of the Constitution, and is, in essence, a majoritarian chamber. States are represented by population, and its members are elected directly by the people. Several Framers had opposed this method of selection. Roger Sherman cautioned that “the people ... should have as little to do as may be about the government. They want information, and are constantly liable to be misled.” Similarly, Elbridge Gerry warned “the people do not want virtue, but are the dupes of pretended patriots.” Despite such opposition, the direct participation of the citizenry prevailed. George Mason believed “it was to be the grand depository of the democratic principle of the government.” Echoing such sentiment, Madison argued “popular election ... as essential to every plan of free government ... He thought, too, that the great fabric to be raised would be

⁴ James Madison, “Federalist No. 52,” in *The Federalist Papers*, 323.

more stable and durable, if it should rest on the solid foundation of the people themselves.”⁵ He further insisted that it “had the additional advantage, of securing better representatives.”⁶

Frequent elections were also deemed necessary for the House of Representatives, as essential as the direct election by the people. In “Federalist No. 52,” Madison implored that the House of Representatives ought to “have an immediate dependence on, and an intimate sympathy with, the people.” To that end, he suggests, “Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.”⁷

The issue of biennial elections was contentious. Many had favored shorter terms. Oliver Ellsworth favored annual elections, suggesting, “The people were fond of frequent elections, and might be safely indulged in one branch of the Legislature.” James Wilson concurred, “This frequency was most familiar and pleasing to the people.” Besides, he did not believe it “necessary for the National Legislature to sit constantly, perhaps not half, perhaps not one-fourth of the year.” Roger Sherman, content with either annual or biennial elections, insisted that representatives “ought to return home and mix with the people.” By remaining at the seat of government, they may lose touch with constituent interests. Others had opposed annual elections on the basis of inconvenience. Edmund Randolph “would have preferred annual to biennial, but for the extent of the United States, and the inconvenience which would result from them to the representatives of the extreme parts of the Empire.” While John Dickinson, who favored triennial elections, noted that the annual election “was borrowed from the ancient usage of

⁵ James Madison, “Debates in the Federal Convention of 1787: Thursday, May 31,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0531-2/>.

⁶ James Madison, “Debates in the Federal Convention of 1787: Wednesday, June 6,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0606-2/>.

⁷ James Madison, “Federalist No. 52,” in *The Federalist Papers*, 323-324.

England, a country much less extensive than ours.”⁸ The Convention ultimately adopted two-year terms for representatives.

The legitimacy of the Senate, the institution devised to represent the interests of states, was assured by its method of selection. The Framers largely agreed that state legislatures should decide. Roger Sherman believed “a due harmony between the [state and national] governments would be maintained.” John Dickinson argued that “a sense of the states would be better collected,” insisting further that state legislatures were best equipped to choose “the most distinguished characters.” George Mason explained that such a method provided added security to states “against encroachments of the National Government . . . And what better means can we provide, than the giving them some share in, or rather to make them a constituent part of, the national establishment?”⁹

Equal representation within the Senate similarly safeguarded states’ clout. While Madison had opposed equal apportionment, he nonetheless conceded that “a government founded on principles more consonant to the wishes of larger States, is not likely to be obtained from the smaller States.” Therefore, a compromise was necessary to attract the support of smaller states, who may have felt overwhelmed by the representation of their larger neighbors in the lower house. Equality in the Senate was “a constitutional recognition of the portion of sovereignty remaining in the individual states,” and it strengthened the station of states in the new federal government. Therefore, Madison argues, large states ought to support equal

⁸ James Madison, “Debates in the Federal Convention of 1787: Thursday, June 21,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0621-2/>.

⁹ James Madison, “Debates in the Federal Convention of 1787: Thursday, June 7,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0607-2/>.

representation as well, “since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic.”¹⁰

2.2 Institutional Stability

The Framers were equally concerned with institutional stability. They wanted to ensure that governing institutions were adequately secure to govern. The overdependence of the national government on state legislatures and frequent elections had rendered those institutions unstable, dooming the regime of the Articles of Confederation. Madison decried “instability [as] one of the great vices of our republics to be remedied.”¹¹ Limiting majoritarianism would maintain and preserve the new constitutional order and its long-term durability. The republican form of government, which had afforded a degree of legitimacy to the Constitution, would similarly serve to insure stability for its institutions.

The Senate, in particular, was established to curb popular tendencies expected from the House of Representatives. As Madison declared at the Convention, “The use of the Senate is to consist in its proceeding with more coolness, with more system, and with more wisdom, than the popular branch.” He stated that a numerous upper house would, in effect, duplicate the lower house. “Enlarge their number,” he argued, “and you communicate to them the vices which they are meant to correct.” He went on to suggest, “The more the representatives of the people, therefore, were multiplied, the more they partook of the infirmities of their constituents, the more liable they became to be divided among themselves, either from their own indiscretions or the artifices of the opposite faction, and of course the less capable of fulfilling their trust.”

¹⁰ James Madison, “Federalist No. 62,” in *The Federalist Papers*, 365.

¹¹ James Madison, “Debates in the Federal Convention of 1787: Tuesday, June 12,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0612-2/>.

Similarly, Elbridge Gerry favored a Senate which, as long as it was selected by state legislatures, would “provide some check in favor of the commercial interest against the landed; without which, oppression will take place; and no free government can last long where that is the case.”¹² Edmund Randolph exclaimed, “The object of this second branch is, to control the democratic branch of the National Legislature. If it be not a firm body, the other branch, being more numerous, and coming immediately from the people, will overwhelm it.”¹³

One method of limiting majoritarianism and guaranteeing a firm, stable body, was by extending senatorial terms. The Framers agreed that Senate terms should be longer than those of their congressional counterparts. Although General Pinckney cautioned that long terms would risk Senators losing touch with their constituent interests, he nonetheless favored four-year terms, not insignificant for the time. Similarly, Roger Sherman declared frequent elections “necessary to preserve the good behavior of rulers.” However, many others argued for a more entrenched Senate. Madison favored a “considerable duration,” specifically seven years, and once more urged the Convention to recognize that, while “every guard to liberty” be preserved, they should all be “equally careful to supply the defects which our own experience had particularly pointed out,” namely unstable institutions. Roger Wilson noted that “The Senate ... ought therefore to be made respectable in the eyes of foreign nations.” He bemoaned the lack of “confidence in the stability or efficacy of our Government” by such foreign powers as Great Britain, and advocated for nine year terms. Gerry “admitted the evils arising from a frequency of elections,” but cautioned that the most pragmatic approach would be four or five years.

¹² James Madison, “Debates in the Federal Convention of 1787: Thursday, June 7,” *Teaching American History: The Constitutional Convention*.

¹³ James Madison, “Debates in the Federal Convention of 1787: Tuesday, June 12,” *Teaching American History: The Constitutional Convention*.

Anything longer “never would be adopted by the people.”¹⁴ Eventually, the Convention adopted a six-year term for Senators, with a third subject to election every two years.

The Framers had similar concerns regarding the executive. They opted to not only entrench the institution with a four-year term, but remove its selection from the people. During the Constitutional Convention, the delegates agreed initially to entrust its selection with the National Legislature, much the way a parliamentary system operates. Although they were not completely comfortable with this arrangement, it was far more preferable than permitting the people the decision. Fear of popular majorities permeated the debate over the election of the executive.

Gouverneur Morris did support popular suffrage for determining the executive. He asserted, “If the people should elect, they will never fail to prefer some man of distinguished character, or services.” Colonel Mason countered, “The extent of the country renders it impossible, that the people can have the requisite capacity to judge of the respective pretensions of the candidates.” Sherman agreed, stating that the people “will never be sufficiently informed of characters, and besides will never give a majority of votes to any one man. They will generally vote for some man in their own State, and the largest State will have the best chance for the appointment.” Charles Pinckney expressed similar concerns, declaring, “An election by the people being liable to the most obvious and striking objections. They will be led by a few active and designing men. The most populous States, by combining in favor of the same individual, will be able to carry their points.” The proposal for an election by the people was

¹⁴ James Madison, “Debates in the Federal Convention of 1787: Tuesday, June 26,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0626-2/>.

defeated 9-1, with Pennsylvania as its sole supporter.¹⁵ Ultimately, the Framers adopted a plan whereby electors chosen by states (initially state legislatures) would decide upon the executive, two-steps removed from popular whims.

In devising a judicial branch, the delegates expressed similar reservations about majorities and instability. To ensure that the Supreme Court was sufficiently isolated from popular currents, the Framers opted to have its members chosen by the executive and approved by the Senate. Further, unlike the other branches whose terms were limited, the Court's judges were granted life tenure under the "standard of good behavior." Alexander Hamilton defends life tenure for Supreme Court judges as an "excellent barrier to the encroachments and oppressions of the representative body," and necessary "to secure a steady, upright, and impartial administration of the laws." In "Federalist No. 78," he argues that the Court's independence and entrenchment from majorities "may be an essential safeguard against the effects of occasional ill humors in the society," without which would witness "unjust and partial laws" that threaten the private property rights of all citizens.¹⁶ Hamilton ties his fears of tyrannical majorities to a proper and impartial adjudication of the law.

Additionally, Hamilton argues that judicial officers require "permanency" because of the extensive task of educating and familiarizing oneself with "a voluminous code of laws." Indeed, he asserts that it "must demand long and laborious study to acquire a competent knowledge of them." As such, "there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges."¹⁷ At the Convention, Madison also highlighted the unique qualifications for judges. In expressing skepticism of permitting a legislative

¹⁵ James Madison, "Debates in the Federal Convention of 1787: Tuesday, July 17," *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0717-2/>.

¹⁶ Alexander Hamilton, "Federalist No. 78," in *The Federalist Papers*, 440-441.

¹⁷ *Ibid.*, 441-442.

appointment, he argued that legislators “were not judges of the requisite qualifications,” noting “the legislative talents, which were very different from those of a Judge, commonly recommended men to the favor of legislative assemblies.”¹⁸

2.3 Effective Governance, Limited Scope

The persistent constitutional dysfunction of the Articles of Confederation in performing essential tasks of governance increasingly frustrated the Framers, especially as periodic crises, such as Shays’ Rebellion, seriously jeopardized the continued adequacy of the government. To remedy these deficiencies, they endeavored to establish capable institutions equipped with the requisite power and energy to effectively govern. Certain powers, such as taxation, creation of an army, and regulation of interstate commerce, were vital to ensuring that the national government became an instrument of effective governance.

In “Federalist No. 30,” Hamilton defends the power of taxation as “an indispensable ingredient in every constitution,” without which “either the people must be subjected to continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and, in a short course of time, perish.” He bemoans the impotence of the Articles of Confederation in requisitioning money from the states as “inconveniences and embarrassments naturally resulting from defective supplies of the public treasury.” To these challenges, he posits, “What substitute can there be imagined for this *ignis fatuus* in finance, but that of permitting the national government to raise its own revenues by the

¹⁸ James Madison, “Debates in the Federal Convention of 1787: Tuesday, June 5,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0605-2/>.

ordinary methods of taxation authorized in every well-ordered constitution of civil government?”¹⁹

Hamilton was perhaps more emphatic arguing for adequate power in the raising of an army for national defense. He declares that once the “federal government [is] entrusted with the care of the common defense . . . there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy that is, in any matter essential to the *formation, direction, or support* of the NATIONAL FORCES.” Once more, he describes the then-existing government as “defective,” insisting “that if we are in earnest about giving the Union energy and duration . . . we must discard the fallacious scheme of quotas and requisitions, as equally impracticable and unjust.” To that end, Hamilton recommends “that the Union ought to be invested with full power to levy troops; to build and equip fleets; and to raise the revenues which will be required for the formation and support of an army and navy.”²⁰

The regulation of interstate commerce was not only an economic power necessary for an effective central government, but important in establishing the national government as an arbiter, of sorts, between competing interests of the states. Without the “enlarged and permanent interest” of a strong union of states vested with regulation of interstate commerce, Madison warns, “We may be assured by past experience . . . that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility.”²¹

The Framers were also conscious of the need for a strong and vibrant executive, one with sufficient independence to effectively carry out and enforce the law. Precisely to ensure that the executive operated capably, the delegates vested all the executive power into a single individual.

¹⁹ Alexander Hamilton, “Federalist No. 30,” in *The Federalist Papers*, 212-214.

²⁰ Alexander Hamilton, “Federalist No. 23,” in *The Federalist Papers*, 185-186.

²¹ James Madison, “Federalist No. 42,” in *The Federalist Papers*, 276.

Several members objected to the concept of a unitary executive. Edmund Randolph “regarded it as the fetus of monarchy,” and “could not see why the great requisites for the executive department, vigor, dispatch, and responsibility, could not be found in three men, as well as in one man.” Roger Wilson countered that, to the contrary, “unity in the Executive ... would be the best safeguard against tyranny,” and would offer the “most energy, dispatch, and responsibility, to the office.” John Rutledge concurred, contending, “A single man would feel the greatest responsibility, and administer the public affairs best.”²² Elbridge Gerry cautioned that a plural executive would prove “extremely inconvenient in many instances, particularly in military matters ... It would be a general with three heads.”²³ The drive for “energy, dispatch, and responsibility” in a single executive carried the day.

The delegates also strived to assure independence for the executive. One method of securing this autonomy was by a proper selection method. The pervasive fear of popular majorities had quickly eliminated election by the people. Although the Framers pegged the executive’s selection to the national legislature, they were not comfortable with this arrangement either. Madison articulated these concerns when he explained, “If it be a fundamental principle of free government that the Legislative, Executive and Judiciary powers should be *separately* exercised, it is equally so that they be *independently* exercised. There is the same, and perhaps greater, reason why the Executive should be independent of the Legislature, than why the Judiciary should.” He went on to argue, “It is essential, then, that the appointment of the Executive should either be drawn from some source, or held by some tenure, that will give him a

²² James Madison, “Debates in the Federal Convention of 1787: Friday, June 1,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0601-2/>.

²³ James Madison, “Debates in the Federal Convention of 1787: Monday, June 4,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0604-2/>.

free agency with regard to the Legislature. This could not be, if he was to be appointable, from time to time, by the Legislature.” Madison feared “intrigues and contentions” would arise “that ought not to be unnecessarily admitted.”²⁴

Others agreed with Madison’s assessment. Gerry believed, “There would be a constant intrigue kept up for the appointment. The Legislature and the candidates would bargain and play into one another’s hands.”²⁵ Gouverneur Morris argued, “One great object of the Executive is, to control the Legislature ... [and] that in every view this indirect dependence on the favor of the Legislature could not be so mischievous as a direct dependence for his appointment.”²⁶ He exclaimed that the executive would “be the mere creature of the Legislature, if appointed and impeachable by that body,” likening it to the “election of a pope by a conclave of cardinals; real merit will rarely be the title to the appointment.” Wilson admitted that the legislature “deserve confidence in some respects,” but should be distrusted where “jealousy was warranted,” and that included executive appointment.²⁷ Randolph asserted that, if the legislature were to select the executive, the latter ought not to be eligible for re-election as it would compromise his independence. “If he should be re-appointable by the legislature, he will be no check on it.”²⁸

The Framers had also understood that effective governing institutions would require strengthening the national government vis-à-vis the states. State legislatures had concerned a number of the delegates, in particular Madison. He had initially opposed permitting the states to

²⁴ James Madison, “Debates in the Federal Convention of 1787: Thursday, July 19,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0719-2/>.

²⁵ James Madison, “Debates in the Federal Convention of 1787: Saturday, June 2,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0602-2/>.

²⁶ James Madison, “Debates in the Federal Convention of 1787: Thursday, July 19,” *Teaching American History: The Constitutional Convention*.

²⁷ James Madison, “Debates in the Federal Convention of 1787: Tuesday, July 17,” *Teaching American History: The Constitutional Convention*.

²⁸ James Madison, “Debates in the Federal Convention of 1787: Thursday, July 19,” *Teaching American History: The Constitutional Convention*.

select their own Senators, arguing, “The great evils complained of were that the State Legislatures run into schemes of paper-money,” and such vices would be adversely transmitted to the national legislature. “Their influence . . . may be expected to promote it.”²⁹ To assuage these reservations, the delegates established mechanisms and procedures to limit the influence of state legislatures.

An early concept which was proposed in the Virginia Plan was that of the Council of Revision. This council would consist of the executive and “a convenient number” of the Supreme Court.³⁰ They would have had the power to veto any act by the national legislature or the state legislatures. Madison contended, “It would . . . be useful to the community at large, as an additional check against a pursuit of those unwise and unjust measures which constituted so great a portion of our calamities.” He remained firmly in favor of checking the powers of legislatures. As he explained, “Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions.” Colonel Mason agreed. He believed the legislature “would still so much resemble that of the individual States, that it must be expected frequently to pass unjust and pernicious laws.”³¹ The Council of Revision would undoubtedly have strengthened the national government to an extent that states may have been unnecessarily shackled to the federal government, weakening the balance of federalism that eventually emerged. Despite this

²⁹ James Madison, “Debates in the Federal Convention of 1787: Thursday, June 7,” *Teaching American History: The Constitutional Convention*.

³⁰ James Madison, “Debates in the Federal Convention of 1787: Tuesday, May 29,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0529-2/>

³¹ James Madison, “Debates in the Federal Convention of 1787: Saturday, July 21,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0721-2/>.

possibility, the Convention ultimately defeated the proposal on the grounds that it violated the principle of separation of powers.

The delegates did unanimously agree to remove the recall provision, which had so hampered the government under the Articles of Confederation. No longer were states permitted the prerogative to recall their federal representatives. Additionally, it was decided that officers of the national government ought to be salaried by the funds of said government. Madison felt it “improper to leave the members of the National Legislature to be provided for by the State Legislatures, because it would create an improper dependence.” Colonel Mason concurred, suggesting that inequality would prevail if left to the states. “The different States would make different provision for their representatives.” He further suspected that it would prove a disincentive for representatives, as the states “might reduce the provision so low, that, as had already happened in choosing delegates to Congress, the question would be, not who were most fit to be chosen, but who were most willing to serve.”³²

It was deemed essential that the Constitution contain an explicit Supremacy Clause, so as to ensure that state legislatures could not nullify national legislation. In “Federalist No. 33,” Hamilton explains:

A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe ... Hence we perceive that the clause which declares the supremacy of the laws of the Union, like the one we have just before

³² James Madison, “Debates in the Federal Convention of 1787: Tuesday, June 12,” *Teaching American History: The Constitutional Convention*.

considered, only declares a truth, which flows immediately and necessarily from the institution of a federal government.³³

In addressing concerns that such supremacy may entitle the national government to usurp the powers of state legislatures, he counters that the supremacy clause only applies “to laws made *pursuant to the Constitution*,” that is, expressly enumerated in the text. All other purviews remain with the states. He suggested that “a law, therefore, laying a tax for the use of the United States would be supreme in its nature, and could not legally be opposed or controlled,” since taxation was reserved for the national government, “yet a law for abrogating or preventing the collection of a tax laid by the authority of the State, (unless upon imports and exports), would not be the supreme law of the land, but a usurpation of power not granted by the Constitution.”³⁴

The Framers were comfortable granting such powers as taxation and regulation of interstate commerce to strong, independent governing institutions whose authority was supreme so long as that authority remained within the purviews prescribed by and “*pursuant to the Constitution*.” The Constitution explicitly delimits each branch. Powers not expressly delegated were to be reserved to the states.

The limited scope and structure of the national government was understood to protect the rights of citizens and the prerogatives of states. The inability of one branch to usurp the authority of another branch guards against undue intrusions of power which may abrogate citizens’ rights, either in the form of a dictator or a tyrannical majority. Indeed, the nature of the Constitution led many Framers to consider a Bill of Rights unnecessary. Hamilton argued extensively against its inclusion. In “Federalist No. 84,” he asserts, “The truth is, after all the

³³ Alexander Hamilton, “Federalist No. 33,” in *The Federalist Papers*, 225.

³⁴ *Ibid.*, 226.

declamation we have heard, that the constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS ... And the proposed constitution, if adopted, will be the bill of rights of the union.” He contends:

Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention, comprehending various precautions for the public security ... Is another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns? This we have seen has also been attended to ... Adverting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention.³⁵

Further, Hadley Arkes argues that the inclusion of a Bill of Rights would presume new powers which had not been delegated to the national government by the Constitution. He explains:

If the Bill of Rights represented a certain reservation of natural rights to the people, the implication would quickly arise that the government may exercise all of those powers which had not been explicitly withheld. The paradoxical result was that this reservation of rights might actually enlarge the total powers of the government. It would remove

³⁵ Alexander Hamilton, “Federalist No. 84,” in *The Federalist Papers*, 477.

from the government the burden of justifying its use of authority in a wide range of cases in which its measures were not explicitly forbidden.³⁶

The Constitution delegates power to the national government, reserving residuary authority to the states and the people. A Bill of Rights inverts this formula, representing a reservation of rights, and, as Arkes suggests, implying more power to the national government than had been granted by the text.

2.4 Societal Cohesion and Unity

The Framers knew that effecting societal cohesion would be important and quite challenging. Societies are especially complex and notoriously difficult to engineer. Therefore, they opted to craft a Constitution which itself was limited and minimally involved in societal affairs. Nonetheless, the effective realization of the preceding constitutional principles goes a long way toward assuring societal unity.

Firstly, representative government may lend legitimacy to the regime. The people maintain an attachment to the national government via their representatives, who safeguard their interests and concerns. Entrenched, strong, and independent institutions may offer effective governance and stability, important considerations for the long-term dependability and reliability of the government. Finally, the limited scope of authority may protect the rights and liberties of the citizens, thereby assuaging any lingering concerns of the capacities of the regime.

When a society has attained legitimacy, trust, and dependability in its institutions, then societal conflict will be more easily managed within the legal and constitutional procedures available. Policy disputes, political disagreements, even outright political conflict will be

³⁶ Hadley Arkes, *Beyond the Constitution*, (Princeton: Princeton University Press, 1990), 60.

transmitted into the appropriate channels. If the above principles are undermined and societies lose faith in their government, then extra-constitutional measures may be threatened, potentially leading to constitutional failure. It is, therefore, important that the constitutional principles are preserved so as to allow the Constitution to continue serving as a mechanism for conflict management.

An effective Constitution can contribute to societal cohesion. It strengthens reverence among the people for their government. Yet, it is also quite cyclical. “Reverence,” according to Breslin, “is part of what gives the constitutional document its principal force.”³⁷ Indeed, as Madison argues, “Frequent appeals would, in a great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability.”³⁸ Strong support from the people can ensure that the Constitution is a workable and useful force for managing conflict, representing interests, and forging a collective public identity.

2.5 Conclusion

While the Framers outlined the nation’s aspirational goals in the preamble of the Constitution, they designed a specific framework of government to achieve them. These institutions and mechanisms are undergirded by several important principles valued highly by the Framers. They included legitimacy for the regime via representative government; institutional stability by way of entrenched governing bodies; and effective governance with strong, independent branches, but limited in their scope so as to protect the rights and liberties of the citizens and powers of the states. The realization of these constitutional principles could

³⁷ Beau Breslin, *From Words to Worlds: Exploring Constitutional Functionality*, (Baltimore: The Johns Hopkins University Press, 2009), 25.

³⁸ James Madison, “Federalist No. 49,” in *The Federalist Papers*, 313-314.

contribute to long-term societal cohesion, which would generate greater reverence for the regime. Such reverence, thereby, ultimately strengthens the force of the Constitution. An inability to achieve these principles may invite extra-constitutional activity, and perhaps even constitutional failure.

CHAPTER THREE: THE UNFOUNDING

Developments since the Founding have profoundly reshaped the landscape of the American political system. Constitutional amendments have altered the structure of government and federalism. Institutional developments have shifted the scope of authority and balance of power. Evolving norms of democracy, rights protection, and states' rights have redefined the concept of citizenship, governance, and the role of the state. On the whole, these developments have supplanted the regime designed by the Framers, which stressed a limited government largely insulated from the people, with one of greater democratic accountability and enlarged scope of authority.

Partly, these developments may be attributed to what Jack Balkin has defined as “ideological drift,” ideas and symbols whose meanings are not fixed, but rather fluid, fluctuating with changing contexts and understandings. He explains that drift may involve either “the content of the idea ... held constant” with “changing political consequences [amid] changing contexts,” or “the content of the idea or symbol changing as the context surrounding it changes.”¹ This may equally apply to governing institutions, as well. Institutions may remain unchanged throughout history, but subject to changing expectations by political actors and society as its role in the polity evolves, or the nature of these institutions may change amid developing contexts and periods.

Ultimately, having defined constitutional dysfunction in “Chapter One” as the degree to which institutions impair the fulfillment of their constitutional purposes via constitutional means, then one can argue that the inability of existing mechanisms and procedures to achieve the principles valued by the Framers, namely regime legitimacy, institutional stability, independent,

¹ Jack M. Balkin, “Ideological Drift and the Struggle Over Meaning,” *Connecticut Law Review*, Vol. 25, (1993), accessed March 7, 2016, URL: <http://www.yale.edu/lawweb/jbalkin/articles/iddrift1.htm>.

but limited branches, and societal cohesion, has, in effect, contributed to constitutional dysfunction.

3.1 The House of Representatives

The House of Representatives was slated to be the most responsive branch, as attested by its biennial elections.² Nonetheless, the two-year term was longer than the single-year terms which were common at the time in state legislatures, and therefore, represented a balance between democratic accountability and institutional stability.³ However, certain political trends have increasingly rendered the office more responsive and perhaps less stable, as measured by the frequency of wave elections, the degree of partisan polarization, and number of primaries.

Wave elections, or “tidal wave congressional elections,” are not novel. The phenomenon has occurred throughout American history, where large margins are claimed by one party, assuring it greater power in Congress. At times, these elections have signaled deep, decisive, and dramatic shifts in the political direction of the nation, an occurrence Walter Dean Burnham defines as “critical realignment.” According to Theodore Rosenof, the “essential conclusion” of Burnham, and his contemporaries, Key and Schattschneider, was that a realignment period “provided opportunities for major developments in public policy. A crisis resulting in electoral upheaval, a perceived mandate from the voters, the momentum of a decisive victory, and the likelihood of enhanced partisan majorities in government all provided the basis for far-reaching changes and innovations in public policy.”⁴

² James Madison, “Federalist No. 52,” in *The Federalist Papers*, ed. Isaac Kramnick (London: Penguin Group, 1987), 323-324.

³ “Biennial Elections,” *History, Art & Archives, United States House of Representatives*, accessed March 7, 2016, URL: <http://history.house.gov/Institution/Origins-Development/Biennial-Elections/>.

⁴ Theodore Rosenof, *Realignment: The Theory that Changed the Way We Think about American Politics*, (Lanham: Rowman & Littlefield Publishers, Inc., 2003), 131.

While wave elections have not always been manifestations of realignment, they were still considered “once-a-generation occurrence[s].” As Walter Shapiro explains, “In 1958 it was the Republican recession; in 1974 it was Watergate; and in 1994 it was Bill Clinton's failed health-care reform proposal.” In many respects, these elections are the antithesis to Speaker Tip O’Neil’s refrain “all politics is local,” for the essence of a wave election is its nationalization of issues. However, the frequency of wave elections has been increasing.⁵ In the last decade, such elections have occurred twice (2006 and 2010), both witnessing a change in party control of the House of Representatives. Wave-like elections, where one party runs the board and sweeps all relevant races, have occurred in 2008 and 2014, but these did not witness especially large margins in the House. Therefore, only the 2006 and 2010 elections had heavily affected the House.

Wave elections may remain manageable for existing branches, even if they continue to become more frequent. However, when they are coupled with party polarization, their effects become particularly jarring for governing institutions. Political parties are increasingly more polarized, aligning closely along ideological contours. Southern conservative Democrats and northern Rockefeller Republicans have ceased to exist. The Democratic Party represents a liberal voting bloc with less in common with the Republican Party’s conservative bloc with each passing election. It is disputed whether or not primaries are responsible.⁶ Others have contended

⁵ Walter Shapiro, “How Midterm ‘Wave’ Elections Are the New Normal,” *Brennan Center for Justice at New York University School of Law*, November 5, 2014, accessed March 7, 2016, URL: <http://www.brennancenter.org/blog/how-mid-term-wave-elections-are-new-normal>.

⁶ Shigeo Hirano, James M. Snyder, Jr., Stephen Daniel Ansolabehere, and John Mark Hansen, “Primary Elections and Partisan Polarization in the U.S. Congress,” *Quarterly Journal of Political Science*, Vol. 5, No. 2 (2010), 188-189, accessed March 7, 2016, DOI: 10.1561/100.00008052.

that wave elections have contributed to the greater prevalence of ideologically purer parties.⁷

Regardless of its causes, party polarization has continued apace, showing few signs of abating.⁸

The significance of polarized parties is that they have dramatically increased the stakes of congressional elections. When the parties had shared a large moderate bloc, an appreciable overlap existed between them. Any change to party control did not permit significant deviation from the center as neither side could afford to lose such support. Today, changes in control of the House present radically different conceptions of government, society, and constitutionalism, with little room for agreement. Party polarization and wave elections have invited *political whiplash*, frequent and dramatic shifts in the ideological and political direction of the nation.⁹

The House of Representatives may not necessarily remain unstable. Years could pass with one party fully in control and few changes to the branch. However, this does not preclude the possibility of additional instability in the future. So long as party polarization continues, any change in control, even in the absence of wave elections, could trigger political whiplash. Such changes may occur more often during periods of social unrest and economic uncertainty.

Additionally, congressional primaries have gained in import in deciding nominees for office.¹⁰ Members are not only subjected to a general election of their constituency in November, but to a primary election of partisan voters several months before. At its most basic, primaries ensure that at least two elections are held during a single congressional term. The Framers wanted a branch that was responsive to the needs and interests of the people, but they

⁷ Amy Walter, "What Wave Elections Have Wrought," *The Cook Political Report*, November 12, 2014, accessed March 7, 2016, URL: <http://cookpolitical.com/story/8083>.

⁸ Drew DeSilver, "The Polarized Congress of Today Has Its Roots in the 1970s," *Pew Research Center*, June 12, 2014, accessed March 7, 2016, URL: <http://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/>.

⁹ Thomas E. Mann and Norman J. Ornstein, *It's Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*, (New York: Basic Books, 2013), 43-51.

¹⁰ Stephen Ansolabehere, Shigeo Hirano, and James Snyder, Jr., "What Did the Direct Primary Do To Party Loyalty in Congress?," (Seminar, Columbia University, March, 2004), 9, accessed March 7, 2016, URL: http://www.columbia.edu/~sh145/papers/primaries_party_loyalty.pdf.

nonetheless opted for two-years, a compromise between overly-responsive annual elections and the stability that comes from added insularity. In light of recent political developments, it is certainly worth considering whether the House has become too responsive.

3.2 The Senate

The Senate was created to represent the interests of states, affording legitimacy to the regime particularly at a time when many had viewed the Constitution as a social contract, a compact of sovereign states.¹¹ As such, state legislatures were vested with the power to select Senators. However, these legislatures were increasingly viewed as corrupt and beholden to business interests, much to the detriment of workers and low-income Americans. The Progressives championed the cause of the downtrodden, promising to achieve an enlarged capacity of the state and greater participation of the citizenry.¹² To that end, they sought to make the Senate more responsive to the people and less dependent on state legislatures. They were eventually successful when, in 1914, the United States ratified the 17th Amendment, stipulating henceforth the direct election of Senators.

The legitimacy of the Constitution rested on a balance between satisfying state interests and the people at large. The former was ensured through the upper chamber, while the latter through the lower chamber. The Civil War and the 14th Amendment fundamentally reshaped the system of Federalism, significantly curtailing state power and ending “compact theory,” as later

¹¹ Herman Belz, “Lincoln, Secession, and Revolution: The Civil War Challenge to the Founding,” in *Constitutionalism in the Approach and Aftermath of the Civil War*, eds. Paul D. Moreno, and Johnathan O’Neill, (New York: Fordham University Press, 2013), 85-87, accessed March 7, 2016, URL: <http://www.jstor.org/stable/j.ctt13wzz7v.7>.

¹² Daniel DiSalvo, *Engines of Change: Party Factions in American Politics, 1868-2010*, (New York: Oxford University Press, 2012), 41; Eric Goldman, *Rendezvous with Destiny: A History of Modern American Reform*, (1952; Chicago: Ivan R. Dee, 2001), 76.

validated by the Supreme Court's ruling in *Texas v. White* in 1868.¹³ Those trends were furthered with the ratification of the 17th Amendment, with the selection of Senators removed from state legislatures and granted to the people. As Mark Levin explains, "The balance of power that had existed between the states and the federal government ... was dealt a critical blow. The long silence of the states had begun."¹⁴

The Senate was also designed to be removed from the popular impulses of society.¹⁵ C.H. Hoebeke asserts that this was partly to "insulate senators against popular pressures to sacrifice the national interest to regional ones." The direct election of Senators rendered the branch "more responsive, by definition less deliberative."¹⁶ While they remain entrenched, with six-year terms, they are less insular than originally envisioned. One of the arguments made at the Convention was that an institution could not be an adequate check on another, while simultaneously owing its selection to it.¹⁷ Popular election of Senators may disrupt this formula. Originally intended as a check on majorities, the Senate has become dependent on it for its own selection.

Historically, the Senate had remained firmer and more stable than the lower branch, with party control changing only five times between 1857, when the current party system emerged, and 1915. The House witnessed control change eight times during the same period. However, since the direct election of Senators, the Senate has become more volatile, changing party control

¹³ "Texas v. White 74 U.S. 700 (1868)," *JUSTIA US Supreme Court* accessed March 7 2016, URL: <https://supreme.justia.com/cases/federal/us/74/700/case.html>.

¹⁴ Mark R. Levin, *The Liberty Amendments: Restoring the American Republic*, (New York: Threshold Editions, 2013), 45.

¹⁵ James Madison, "Debates in the Federal Convention of 1787: Tuesday, June 12," *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0612-2/>.

¹⁶ C.H. Hoebeke, *Road to Mass Democracy: Original Intent and the Seventeenth Amendment*, (Somerset: Transaction Publishers, 2014), 174, ProQuest Ebrary, accessed March 7, 2016.

¹⁷ James Madison, "Debates in the Federal Convention of 1787: Thursday, July 19," *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0719-2/>.

more frequently than the House.¹⁸ The upper house has become exposed to the same forces and dynamics that have plagued the lower house, namely increasingly frequent wave elections, party polarization, and the resulting political whiplash. Having changed party control twice in the last decade, some have suggested it could again in the near future.¹⁹

By providing increased democratic accountability of Senators, the Seventeenth Amendment sought to “reduce the influence of wealthy elites, decrease the role of money in determining Senate election outcomes, and give incumbent senators the incentive to represent their constituents responsively.” However, Wendy Schiller and Charles Stewart conclude that “the direct power to elect their senators has not appreciably increased the Senate’s responsiveness or efficiency,” adding:

In the case of the Senate, before the Seventeenth Amendment, Senate candidates tended to be elite party members who could call on wealthy and influential friends to support their campaigns for office. After the Seventeenth Amendment, the same types of candidates continued to rely on the support of the same wealthy and influential people—
- they just redirected how the resources garnered through this support were aimed.²⁰

Additionally, primaries have subjected Senators, as with House members, to compete in two elections during a single term, one of which is far less representative of the constituency-at-

¹⁸ “Party Divisions of the House of Representatives, 1789-Present,” *United States House of Representatives*, accessed March 7, 2016, URL: <http://history.house.gov/Institution/Party-Divisions/Party-Divisions/>; “Party Division in the Senate, 1789-Present,” *United States Senate*, accessed March 7, 2016, URL: <http://www.senate.gov/history/partydiv.htm>.

¹⁹ Stuart Rothenberg, “First Look: Can Democrats Win the Senate in 2016?,” *Roll Call*, accessed March 7, 2016, URL: <http://blogs.rollcall.com/rothenblog/senate-2016-not-in-the-bag-for-either-party/>.

²⁰ Wendy J. Schiller and Charles Stewart, *Electing the Senate: Indirect Democracy Before the Seventeenth Amendment*, (Princeton: Princeton University Press, 2014), 200; 216, ProQuest Ebrary, accessed March 7, 2016.

large. Therefore, Senators must balance their responsibilities to the office against political considerations for re-election, firstly by appeasing party primary voters and then satisfying constituent voters. In 2016, Senator Richard Shelby, the chairman of the Senate Banking Committee, opted to “halt his committee’s work until later in March,” for, as he explained, “I have a primary, you know.”²¹ Shelby’s fears are not entirely unfounded. Between 1996 and 2012, primaries have claimed the political lives of seven Senators. Historically, more Senatorial primary defeats occurred in earlier periods, such as the late 1940s, late 1960s, and late 1970s, yet these seven represent an uptick in recent years.²² Notwithstanding the likelihood that a Senator has a considerable probability of surviving a primary challenge, the perception of its threat remains great. The Framers had not intended Senators to weigh such considerations. Collectively, these political developments have all rendered the Senate more responsive to popular whim and the people than that for which it was originally designed.

3.3 The Presidency

The Presidency has been subjected to similar democratic trends as the Senate. The institution was originally designed to be entrenched, with four-year terms, and chosen by electors, ensuring that it could adequately check legislative and popular majorities, while exercising sufficient independence to operate effectively.²³ Its method of selection, however, has

²¹ Joshua Green, “Even the Senate Banking Chair Is Slamming Banks in Campaign Ads,” *Bloomberg Politics*, February 12, 2016, accessed March 7, 2016, URL: <http://www.bloomberg.com/politics/articles/2016-02-12/businessweek-wall-street>.

²² Norman J. Ornstein, Thomas E. Mann, Michael J. Malbin, Andrew Rugg, and Raffaella Wakeman, “Vital Statistics on Congress: Chapter 2: Congressional Elections,” *Brookings Institute and the American Enterprise Institute*, July 2013, accessed March 7, 2016, URL: <http://www.brookings.edu/~media/Research/Files/Reports/2013/07/vital-statistics-congress-mann-ornstein/Vital-Statistics-Chapter-2--Congressional-Elections.pdf?la=en>.

²³ James Madison, “Debates in the Federal Convention of 1787: Tuesday, July 17,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0717-2/>; James Madison, “Debates in the Federal

evolved. Initially, presidential electors were chosen by state legislatures. Once states began awarding these electors to the winner of their respective popular votes, the Electoral College became increasingly futile. Since the selection method has not migrated completely to a popular vote election, a mixed system persists. States maintain an appreciable, yet diminished degree of autonomy. The presidential election is largely decided by the popular vote, albeit within 51 individual contests, hence several notable exceptions. Notwithstanding these outliers, the President must “merit the confidence of the people as they exercise the immense powers of their office.”²⁴

No longer insulated from the people, the president, like the Senate, may be unable to check and control the passions of the moment, unless he sacrifices public support. The president has become increasingly reliant on popular opinion and politically safe decisions to govern, lest his programs and policies risk losing Congress or even his own office. Jeffrey Tulis labels this as the “rhetorical president,” arguing, “The doctrine that a president ought to be a popular leader has become an unquestioned remise of our political culture.” Describing these changes as “a profound development in American politics,” Tulis explains that it is also a relatively recent phenomenon, a “twentieth-century invention,” having begun with Theodore Roosevelt and Woodrow Wilson, and, for that matter, explicitly proscribed in earlier periods.²⁵

The rise of primaries has only facilitated these trends. Since 1968, primaries have become more decisive in choosing presidential nominees. At times, these contests tend to be less representative of the nation as a whole, and therefore, appeals to the needs and interests of select

Convention of 1787: Thursday, July 19,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0719-2/>.

²⁴ Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*, (Oxford: Oxford University Press, 2006), 82.

²⁵ Jeffrey Tulis, *The Rhetorical Presidency*, (Princeton: Princeton University Press, 1987), 4-5.

primary voters may provide an unfair advantage to them over citizens in other states.²⁶

Additionally, voting and campaigning consume nearly a year of the presidential term, to say nothing of raising money or building an organization. As primaries have crept earlier in the calendar year, and the so-called “invisible primary” has gained in importance, additional time, attention, and energy must be devoted to election.²⁷

Another dramatic development of the Presidency has been its enormous growth of power and authority. The Framers had wanted an executive which would be independent and strong, but limited in its scope, enforcing the laws passed by the national legislature. However, almost immediately, strong leaders infused greater power and vigor into the executive. President Andrew Jackson wielded the veto countless times and waged war on the Second Bank of the US, actions viewed as tyrannical at the time, if constitutional.

While the Congress has, at times, resisted encroachments, more often than not, they have willingly conceded such authority to the Presidency. Periods of war and crises have witnessed the enlargement of the National Government, and in particular, the Presidency. Since World War II, the president has become intricately involved in the legislative process, economic affairs, and the management of a vast bureaucracy of federal agencies and programs. Robert Higgs argues, “The war left the United States ... a powerful, highly arbitrary, activist government virtually unchecked by the constitutional limitations of checks and balances.”²⁸ Additionally, the president has issued executive orders to alter government policy, either in the absence of

²⁶ William H. Frey, “How Unrepresentative Are the Early Presidential Primary States?,” *Brookings Institution*, February 3, 2016, accessed March 7, 2016, URL: <http://www.brookings.edu/research/opinions/2016/02/03-early-presidential-primary-states-frey>.

²⁷ Alicia Parlapiano and Larry Buchanan, “How Presidential Campaigns Became Two-Year Marathons,” *The New York Times: The Upshot*, April 16, 2015, accessed March 7, 2016, URL: <http://www.nytimes.com/2015/04/17/upshot/how-presidential-campaigns-became-two-year-marathons.html>.

²⁸ Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government*, (1987; Oakland: The Independent Institute, 2012), 233.

congressional action or outright against it.²⁹ As Sanford Levinson suggests, “The present Constitution ... seems to offer an open invitation for those who would defend something close to presidential dictatorship.”³⁰ George Carey describes these developments as “derangement of functions,” explaining that, “The president has emerged over the decades as the ‘chief legislator,’ as the one who sets down the legislative agenda to a far greater extent than the Congressional leadership. In the area of foreign affairs he stands almost alone with what now seems an authority to commit American armed forces at his sole discretion.”³¹ (Carey 628-629)

The expansion of Executive power has, at times, posed risks to such areas as rights protections. Examples abound where presidential action has had harmful effects on civil liberties, such as during World War II, when President Roosevelt interred Japanese-American civilians with the explicit consent of the Supreme Court. Such violations may persist so long as an unchecked executive exercises his authority with impunity and disregard for the Constitution.

3.4 The Supreme Court

The Supreme Court was designed to be insulated and entrenched, with Justices selected by the president and approved by the Senate to serve life tenure. It has withstood attempts to recall or elect their members, grant to them limited terms, or subject their decisions to the judgment of the people. Despite the Court’s continued stability and independence, its role in the political system has dramatically evolved. Originally slated to determine the constitutionality of

²⁹ Alicia Parlapiano and Wilson Andrews, “Limits on Presidents Acting Alone,” *The New York Times*, January 20, 2015, accessed March 7, 2016, URL: <http://www.nytimes.com/interactive/2015/01/20/us/politics/presidential-executive-action.html>.

³⁰ Sanford Levinson, *Our Undemocratic Constitution*, 107.

³¹ George Carey, “Who or What Killed the Philadelphia Convention,” *Tulsa Law Review*, Vol. 36, Issue 3, (Spring, 2001), 628-629, accessed March 7, 2016, URL: <http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2517&context=tlr>.

legislation, the Supreme Court has witnessed its judicial scope expand, dedicating itself to rights protection and becoming, in many respects, the sole arbiter of constitutional issues.

The Court's expanded scope has also ensured that judicial supremacy would prevail over judicial restraint. In the years before the Civil War, departmentalism was strong. Each branch of government had been entitled its own interpretation of the Constitution. States maintained this prerogative as well, as exemplified by the Kentucky and Virginia Resolutions of 1798, where both state legislatures declared the Alien and Sedition Acts to be unconstitutional, and enlisted the reasoned opinion of fellow states.³²

After the Civil War, amendments and political mobilization became the principle method whereby constitutional change could be enacted, but the Court became increasingly important as well. In the wake of a weakened executive and the decline of departmentalism, the Supreme Court began to assert and expand its authority, eventually becoming the prime interpreter of the Constitution, and in many respects, the clearest channel for any constitutional change.

As the Court has become stronger vis-à-vis other governing institutions, and its scope expanded beyond that which it had traditionally exercised, it has issued rulings which have conflicted with state prerogatives and civil liberties. For example, the *Lochner v. New York* (1905) case witnessed the Court overturn state legislation regulating working hours for bakers because it determined the law violated the "liberty of contract," a right which the Justices deemed most essential.³³

³² "Draft of the Kentucky Resolutions, Thomas Jefferson, October 1798," *Teaching American History*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/library/document/draft-of-the-kentucky-resolutions/>; "Virginia Resolution, 1798," *Teaching American History*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/library/document/virginia-resolution/>.

³³ "Lochner v. New York 198 U.S. 45 (1905)," *JUSTIA US Supreme Court*, accessed March 7, 2016, URL: <https://supreme.justia.com/cases/federal/us/198/45/case.html>.

At times, the Court has been accused of prescribing policy recommendations to Congress, in effect, legislating.³⁴ By crafting programmatic legislation, the Court may be co-opting representative institutions in their official capacities to debate issues in a public venue, weakening the republican form of government. Elected officials are intended to be accountable for their support and opposition to policies, yet unelected judges have advanced programs beyond their purview. For example, the Court's decision in *Roe v. Wade* (1973) specified that abortion should remain legal in all but the third trimester of a pregnancy, determining it to be the wisest and most reasonable approach.³⁵

Finally, observers have argued that the Supreme Court has rendered judgments, despite the lack of a national consensus. States have their own particularities and local dispositions. As such, issues, such as religion, speech, morality, and public health had been reserved for states to regulate according to their own norms. However, as the federal government has increasingly co-opted state responsibilities, the Court began to flex its authority, issuing national standards to address unsettled constitutional, political, and social questions. The *Roe v. Wade* decision permitted abortion to be legal nationwide, even though only four states had fully legalized abortion, while another thirteen made available conditional abortion.³⁶ Jeffrey Rosen explains that decision "overturned political compromises that national majorities supported, provoking dramatic political backlashes."³⁷ Similarly, in *Obergefell v. Hodges*, the Court permitted same-sex marriage in all 50 states, while only 37 had legalized the practice, most of which by judicial

³⁴ Bruce G. Peabody, "Legislating From the Bench: A Definition and a Defense," *Lewis & Clark Law Review*, Vol. 11, No. 1, (Spring 2007), 220, accessed March 7, 2016, URL: <http://law.lclark.edu/live/files/9581-lcb111peabodypdf>.

³⁵ "Roe v. Wade 410 U.S. 113 (1973)," *JUSTIA US Supreme Court*, accessed March 7, 2016, URL: <https://supreme.justia.com/cases/federal/us/410/113/case.html>.

³⁶ Sarah Kliff, "Thirteen Charts That Explain How Roe v. Wade Changed Abortion Rights," *The Washington Post Wonkblog*, January 22, 2014, accessed March 7, 2016, URL: <http://www.washingtonpost.com/news/wonkblog/wp/2014/01/22/thirteen-charts-that-explain-how-roe-v-wade-changed-abortion-rights/>.

³⁷ Jeffrey Rosen, "The Day After Roe," *The Atlantic*, June 2006, accessed March 7, 2016, URL: <http://www.theatlantic.com/magazine/archive/2006/06/the-day-after-roe/304882/>.

fiat and not legislative or popular action, a point not lost in Chief Justice John Roberts' dissenting opinion.³⁸ While abortion and same-sex marriage were achieved legally and politically across the nation, their societal acceptance remains challenging. Political institutions have had very limited influence or control over the social discrimination and resistance that has ensued.

The development of the Supreme Court has had the long-term effect on the political engagement of citizens. With political mobilization, representative institutions, and state action all subject to judicial veto, one can argue that the civic responsibilities of society have been passed to the judiciary. This dynamic does not necessarily foster a workable republican regime that can effectively manage societal conflict within the prescribed mechanisms and channels.

3.5 Conclusion

The "Unfounding" period has witnessed the constitutional principles of the Framers become undone. Democratization in the form of primaries and popular elections has rendered the republican form of government increasingly more responsive to the people. It may have also diminished the independence of the Senate and the Presidency, ensuring their greater dependence on public opinion. Institutional development, namely in the form of a more powerful executive and a Supreme Court with an expanded judicial scope, has challenged the balance of powers. In particular, the actions of the Court have, at times, had effects on the legitimacy of representative institutions and degree of societal divisions. With the mechanisms and channels unable to fulfill their constitutional purposes, and citizens losing faith in the legitimacy, dependability, and trust of their institutions, the risks of constitutional dysfunction may necessarily arise.

³⁸ Adam Liptak, "Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide," *The New York Times*, June 26, 2015, accessed March 7, 2016, URL: <http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html>.

CHAPTER FOUR: PROPOSED SOLUTIONS

As gridlock, overly-partisan politics, and impotent institutions have become pervasive, some analysts have sought to link these problems to the Constitution, arguing they are manifestations of constitutional dysfunction. As explained in “Chapter One,” Thomas Mann and Norm Ornstein present a portrait of extensive political dysfunction in the United States, implicating gridlock, political polarization, the filibuster, unlimited campaign contributions, extremist Republican tendencies, and sensationalist media. Unfortunately, their constitutional framework is tenuous. They neither adequately explain how constitutional development may be complicit nor offer a constitutional metric by which to judge the political discord.

In light of these developments, many have offered constitutional solutions to address the perceived dysfunction. Among the suggested remedies include further democratization, outright constitutional disobedience, or a restoration of original principles. While these proposals merit attention, they might not sufficiently resolve the constitutional dysfunction that has materialized, namely the inability of institutions and mechanisms to fulfill their constitutional purposes via constitutional means, often because they either misdiagnose the problem or overcompensate for potential weaknesses.

4.1 Democratic Aspirationalism

The fundamental assumption of democratic aspirationalism is that the Constitution is inherently undemocratic. Robert Dahl has argued for reinterpreting and redefining the Constitution’s purpose, suggesting that it should advance “political equality,” democratic participation, and the protection of “rights, liberties, and opportunities.”¹ Far from eroding the

¹ Robert A. Dahl, *How Democratic Is the American Constitution?*, (New Haven: Yale University Press, 2003), 139.

principles of the Constitution, Dahl argues that democratization has instead made a fairer, more participatory nation, raising the people's expectations and demands of their government. The Constitution, however, has not kept pace with this evolution, remaining a barrier to the fullest realization of democratic ideals. Dahl claims, "The legitimacy of the Constitution ought to derive solely from its utility as an instrument of democratic government."² So long as it fails to promote these principles, he warns, "The beliefs of Americans in [its] legitimacy ... will remain ... in constant tension with their beliefs in the legitimacy of democracy."³

To address these deficiencies, democratic aspirationalists have recommended that the United States enact further democratization, specifically by establishing a more majoritarian government. Mechanisms and procedures should be implemented which better reflect the will of the voters and the sentiment of the people. To that end, several have advocated for adopting a parliamentary system. Frustrated by a lack of vigor in government, Woodrow Wilson had originally favored developing the United States into a parliamentary system. He argued:

Our Constitution, like every other constitution which puts the authority to make laws and the duty of controlling the public expenditure into the hands of a popular assembly, practically sets that assembly to rule the affairs of the nation as supreme overlord. But, by separating it entirely from its executive agencies, it deprives it of the opportunity and means for making its authority complete and convenient.⁴

² Ibid., 39.

³ Ibid.

⁴ Woodrow Wilson, *Congressional Government: A Study in American Politics*, (1885; Mineola: Dover Publications, Inc., 2006), 203.

Wilson bemoaned the “present... federal government” for “lack[ing] strength because its powers are divided ... promptness because its authorities are multiplied ... wieldiness because its processes are roundabout [and] efficiency because its responsibility is indistinct and its action without competent direction.”⁵

James MacGregor Burns similarly advocates for a parliamentary-like political regime. Advancing the notion of a strong executive within the framework of a durable party system, Burns ties together “vigorous presidential leadership, strong programmatic orientation, and strong party foundation plus strong party opposition” to help foster a more efficient, effective, and responsible government. As with Wilson, Burns does not favor separation of powers and divided government, positing that parties should serve to facilitate “teamwork in government.”⁶

Mann and Ornstein agree, on the whole, with adopting a Parliamentary government, and propose that adequate filibuster reform and greater executive oversight and control be enacted.⁷ Further, they conclude, “A Westminster-style parliamentary system provides a much cleaner form of democratic accountability than the American system.”⁸ Dahl concurs, adding that such a system “combines the advantages of district elections with the fairness of proportionality.”⁹

Ultimately, Wilson, Burns, Dahl, and other advocates for a Parliamentary system argue, in essence, for concentrating authority into the national government, particularly the executive, with fewer divided powers so as to allow an efficient and seamless government operation, while ensuring that responsible governing institutions be sufficiently accountable to the people.

⁵ Ibid., 206.

⁶ Thomas E. Cronin, “On the American Presidency: A Conversation with James MacGregor Burns,” *Presidential Studies Quarterly*, Vol. 16, No. 3, (Summer, 1986), 539, accessed March 7, 2016, URL: <http://www.jstor.org/stable/27550357>.

⁷ Thomas E. Mann and Norman J. Ornstein, *It's Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*, (New York: Basic Books, 2013), 170-173; 198-201.

⁸ Ibid., 198.

⁹ Dahl, *How Democratic is the American Constitution?*, 174.

Others have recommended that existing government institutions be preserved, but rendered less entrenched and more responsive, further enlarging democratic accountability. For example, Sanford Levinson believes that an eighteen-year term for Justices of the Supreme Court and all federal judges ought to be applied. It's "the only relatively sure way to limit politically timed resignations ... [and] the only practical way to prevent judges from narcissistically remaining on the bench" beyond their capacities.¹⁰ Such a proposal would represent the first significant reform of the Supreme Court, the sole branch of the national government which has remained deeply entrenched.

Additionally, democratic aspirationalists have expanded the understanding of rights to encompass empowerments from the state. Dahl has tied political and social rights, such as voting, protesting, speech and assembly, to an equal pursuit of opportunity. Chiding the *Buckley v. Valeo* decision, Dahl believes the Justices incorrectly understood the foundations of American democracy. Whereas the Court recognized campaign contributions and expenditures as freedom of speech, itself a First Amendment protection of individuals from unnecessary government restriction, Dahl conceptualizes the regime as "deriv[ing] its legitimacy from the principles of political equality," and, as such, demands a government actively guarantee opportunity and adequate resources for all citizens. As he argues, "Citizens must ... possess the minimal *resources* that are necessary in order to take advantage of the opportunities and to exercise their rights."¹¹

¹⁰ Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*, (Oxford: Oxford University Press, 2006), 138-139.

¹¹ Dahl, *How Democratic is the American Constitution?*, 150-152. Dahl is writing several years prior to *Citizens United v. FEC* (2010), a subsequent Supreme Court case which handled similar subject matter and rendered a similar verdict, namely, recognizing campaign contributions as freedom of speech protections. In these cases, rights are understood to be enjoyed by individual citizens, as liberties free from unnecessary government intrusion.

Unfortunately, it would seem that further democratization may facilitate the trends which have led to constitutional dysfunction. Certain branches of government, such as the Senate and the Presidency, have become institutionally more responsive to popular currents. Establishing a Parliamentary system whereby those checks were abolished would invite a majoritarian-based government. With a government entirely dependent upon the approval of the people to continue governing, it could find it challenging to render politically difficult or unpopular decisions, perhaps undermining its own effectiveness. As Madison warned, there is a “propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.”¹² It is worth considering whether popular, politically-safe decisions are always in the best interest of the nation.

The effects of a parliamentary system on institutional stability also warrant attention. It may be argued that subjecting the entire government to a single election within the span of several years could exacerbate political whiplash. Without the staggered terms of the Senate and the Presidency, incremental, gradual changes to government are lost. Mann and Ornstein concede that constant fluctuations of the electorate have proven problematic. They posit, “Democracy’s most essential power - the ability of the citizenry to ‘throw the bums out’ - proved wholly inadequate to the task of governing effectively.”¹³ As they further explain, “The public is perpetuating the source of its discontent [by] electing a new group of people who are even less inclined to or capable of crafting compromise or solutions to pressing problems.”¹⁴ Madison

¹² James Madison, “Federalist No.62,” in *The Federalist Papers*, ed. Isaac Kramnick (London: Penguin Group, 1987), 366.

¹³ Mann and Ornstein, *It’s Even Worse Than It Looks*, 30.

¹⁴ *Ibid.*, xxii-xxiii.

shared such concerns, determining that a second legislative body was necessary for the stability it offered. As he argued:

The mutability in the public councils arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government. Every new election in the States is found to change one half of the representatives. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success.¹⁵

It is difficult to see how a Parliamentary system resolves some of the drivers of constitutional dysfunction, such as political polarization. In the absence of divided government and Senate rules, such as filibuster, consensus building may become more difficult, particularly for a people as politically divided as in the United States.

Arend Lijphart describes the British system as a “government-versus-opposition model,” shaped by adversarial, rather than coalescent politics, although he explains that the UK has, at times, consulted, even incorporated, minority parties “on critical issues instead of simply outvoting them.”¹⁶ Indeed, the opposition has been institutionalized by shadow cabinets, which provide leadership and policy to parties out of government. However, they do not wield any formal power. The very essence of a parliamentary system is that the Prime Minister, as executive, commands the support of a majority in the Parliament, if not a coalition. Opposition

¹⁵ Madison, “Federalist No. 62,” in *The Federalist Papers*, 367.

¹⁶ Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, (New Haven: Yale University Press, 1977), 25; 111-112.

parties cannot institutionally check the actions of the executive to the extent that they can in the US divided-government model. In the UK, for example, governments have suffered periodic defeats in Parliament, but these tend to be the exceptions to the rule. Many occurred “when the government had either no majority or a very small majority,” while others were “symbolic only,” having little “impact in terms of change of policy.”¹⁷

Further, Lijphart argues that, while the most stable systems are ones with homogenous societies, the UK remains an exception, having governed a diverse and plural society of four nations.¹⁸ Nonetheless, British policy of “devolution,” the ceding of authority to local governments, and the Scottish national movement toward independence, have since challenged the claims of the British regime to rule over peoples beyond the English border.¹⁹

Reforms proposed by Levinson which aim to preserve the existing US system, but uproot entrenched institutions, such as the Supreme Court, may not sufficiently address or resolve the fundamental issue of an expanded judicial scope, either. Instead, it might serve to hasten the Court’s responsiveness to political trends, as well as changes to its composition. In short, greater democratic accountability may not remedy the constitutional dysfunction that has plagued the American system. To the contrary, institutional instability has resulted from overly-accountable institutions.

¹⁷ David Boothroyd, “Government Defeats on the Floor of the House of Commons,” *United Kingdom Election Results*, accessed March 7, 2016, URL: <http://www.election.demon.co.uk/defeats.html>.

¹⁸ Lijphart, *Democracy in Plural Societies*, 112.

¹⁹ Simon Johnson, “Nicola Sturgeon: UK Government ‘Illegitimate’ without Scottish Support,” *The Telegraph*, May 4, 2015, accessed March 7, 2016, URL: <http://www.telegraph.co.uk/news/politics/nicola-sturgeon/11582077/Nicola-Sturgeon-UK-Government-illegitimate-without-Scottish-support.html>.

4.2 Constitutional Disobedience

While many have advocated extensive reforms, they are often within the framework of changing the Constitution. Others, however, have suggested governing institutions exercise outright disobedience to provisions of the text. Louis Michael Seidman believes “our obsession with the Constitution has saddled us with a dysfunctional political system.”²⁰ He finds that constitutional fealty unnecessarily restricts the actions and behavior of the Presidency, Congress, and the Supreme Court. As such, he argues that the contract of the Constitution ought not to bind subsequent generations. “If there is authentic conflict between what an actor wants at two different times,” he asserts, “we need an account for why an earlier decision is wiser, or more just, or better reflects the actor’s actual preferences than a later decision.” Seidman, concluding that the values and principles of the Framers, which are embodied by the Constitution, do not align with those of contemporary Americans, asks, “The framers of the American Constitution understood very little about modern America. Why are their uninformed preferences better than our informed ones?”²¹

Rather, Seidman rejects the limits imposed by the “dead hand” of the Framers, suggesting that a deliberative, “all-things-considered judgment” be decided, and if this “just, or wise, or prudent” option is unconstitutional, then the nation’s governing institutions should opt for it regardless.²² As he explains:

Imagine that after careful study a government official — say, the president or one of the party leaders in Congress — reaches a considered judgment that a particular course of action is best for the country. Suddenly, someone bursts into the room with new

²⁰ Louis Michael Seidman, “Let’s Give Up on the Constitution,” *The New York Times*, December 30, 2012, accessed March 7, 2016, URL: <http://www.nytimes.com/2012/12/31/opinion/lets-give-up-on-the-constitution.html>.

²¹ Louis Michael Seidman, *On Constitutional Disobedience*, (Oxford: Oxford University Press, 2012), 49.

²² *Ibid.*, 15.

information: a group of white propertied men who have been dead for two centuries, knew nothing of our present situation, acted illegally under existing law and thought it was fine to own slaves might have disagreed with this course of action. Is it even remotely rational that the official should change his or her mind because of this divination?²³

For the most part, Seidman believes the path sanctioned by the Constitution would prove sufficient and the most prudent. “We will therefore continue our current practices not because we are compelled to do so but because our all-things-considered judgment is that this is the best way to proceed.”²⁴ Nonetheless, he insists that a continued adherence to the Constitution for its own sake may unduly allow “some people [to] exercise power over other people,” without being obligated to offer a substantive, coherent defense of the status quo. “Instead, they are empowered to say ‘no’ just because of words written on very old parchment.”²⁵ For Seidman, this is “deeply authoritarian,” antithetical to the values of an open and free society, and degrading to the political discourse.²⁶

While abiding by the Constitution might, at times, provide the most prudent judgment, disobedience to certain provisions may offer a better alternative. As Seidman highlights, “It is as old as the Republic.” Instances abound of such disobedience throughout American history, from the discarding of the Articles of Confederation in 1787, to the Alien and Sedition Acts in 1798, to *Brown v. Board of Education*, when Justice Robert Jackson ruled in favor of desegregation, “although he thought it had no basis in the Constitution.”²⁷

²³ Seidman, “Let’s Give Up on the Constitution,” *The New York Times*.

²⁴ Seidman, *On Constitutional Disobedience*, 27.

²⁵ *Ibid.*, 14.

²⁶ *Ibid.*, 28; 141-142.

²⁷ Seidman, “Let’s Give Up on the Constitution,” *The New York Times*.

However, if constitutional disobedience were permitted, it may weaken regime legitimacy and the long-term dependability of the Constitution. The document authorizes the appropriate governing power to specific institutions. Indeed, as Seidman asks, “Without a constitution, how are ‘we’ to express our decision to ... have or not have a Supreme Court? How would ‘we’ decide which institutions were authoritative?” He posits that Americans “may well be ... satisfied with their existing institutions and the results those institutions produce,”²⁸ insisting elsewhere that the “existence of these institutions” would not change, rather “the basis on which they claim legitimacy.”²⁹ However, it might be difficult for distinctly separate governing institutions to survive in the absence of constitutional boundaries. A society which pursues constitutional disobedience may be more prone to momentary passions and urges, shifting the loci of power and authority to those institutions which reflect the immediate interests of the majority class. For example, as democracy took root in the United Kingdom, the powers of the House of Commons grew, while those of the House of Lords were curtailed, as dramatically illustrated by the Parliament Act of 1911.

Further, such developments may endanger the rights of citizens, as well, in particular those who belong to a minority political party, class, or race. Seidman minimizes the risk, claiming, “The only real protection for civil liberties is an engaged and tolerant public willing to respect and defend minority rights.”³⁰ While he is correct to point out that a societal component to tolerance is crucial for a polity to value civil liberties, he neglects to mention that it was the limited nature of the Constitution which was intended to protect rights. Constitutional disobedience may, in effect, create an unlimited constitution.

²⁸ Seidman, *on Constitutional Disobedience*, 27.

²⁹ Seidman, “Let’s Give Up on the Constitution,” *The New York Times*.

³⁰ Seidman, *On Constitutional Disobedience*, 19-20.

4.3 Restoring the Constitution

Democratic aspirationalism and constitutional disobedience share the fundamental assumption that the Framers' values and decisions are inadequate for contemporary Americans. However, several others have argued that, to the contrary, the original design of the Constitution remains pertinent, and advocate for a restoration of these principles. Mark Levin does not believe that "the Constitution, as originally structured, is outdated and outmoded." Rather, he feels the national government has become too strong, the separation of powers unbalanced, and the role of the states greatly diminished. The greatest threat to representative government and society emanates from "the growing authoritarianism of a federal Leviathan."³¹

In redressing these problems, Levin has proposed several amendments to the Constitution. Firstly, these amendments would strengthen states. For Levin, the states provide the foundation for the entire political system, asserting, "*The states* established the American Republic, and, through the Constitution, retained for themselves significant authority to ensure the republic's durability."³² As such, they ought to be empowered to reassert their role in the regime.

Deriding the 17th Amendment, the direct election of Senators, as serving "the interests of the governing masterminds and their disciples," Levin has proposed to repeal it. With state legislatures re-equipped to select their own Senators, he believes bicameralism would be strengthened, ensuring the Senate serve as a "counterweight or check on lawmaking," and fostering "a more rational, reflective, and collaborative legislating process." Repeal, however,

³¹ Mark R. Levin, *The Liberty Amendments: Restoring the American Republic*, (New York: Threshold Editions, 2013), 1.

³² *Ibid.*, 11.

would not go far enough. Levin has further suggested that state legislatures be provided the power to recall a sitting Senator “for any reason.”³³

Additionally, Levin’s amendments would have the effect of controlling and checking the authority of the national government. Some of these proposals serve to strengthen states as well, as with his suggestion that three-fifths of state legislatures wield a veto over federal statutes and regulation, within a two-year period of implementation. As he argues, “Federalism ... is about states serving ... as an essential buffer between the central government and the people, safeguarding the citizen from authoritarianism’s consolidated rule.”³⁴

While the “Leviathan” of national government must be checked, Levin views the insulated and powerful Supreme Court as especially dangerous. To ensure the Court “be independent in its judicial deliberations but not supreme in all matters,” Levin suggests that its Justices be limited to twelve-year terms; a Congressional veto of all judicial opinions by a three-fifths vote; and state veto of judicial decisions by a three-fifths margin. These reforms would “return the Court to its proper foundational role within a republican system of government.”³⁵

Finally, Levin believes that term limits should be applied to members of Congress, as well. This would serve to curb professional politicians, better connect representatives to the citizenry, and render them more responsive to the needs of the people.³⁶

While Levin’s focus on restoring original constitutional principles properly identifies some of the sources of constitutional dysfunction, his remedies may overcompensate for perceived deficiencies. Repeal of the 17th Amendment would strengthen the balance between the states and the federal government, redressing the influence which had been lost since ratification.

³³ Ibid., 47-48.

³⁴ Ibid., 180-181.

³⁵ Ibid., 68-69.

³⁶ Ibid., 21; 30-32.

However, permitting a state recall of Senators for any reason may undermine that balance. This power had been exercised by states under the Articles of Confederation, and was explicitly withheld from the new government at the Convention.³⁷ It would potentially add another dimension of majoritarianism to legislating. With Senators constantly pressured to placate state legislators, their independence may be compromised. Further, as removals or recalls constantly beckon, Senators would, in effect, be subjected to multiple elections during a single term.

Similarly, a state veto over federal statutes would fundamentally invert the formula of federalism and the supremacy of the national government. The Framers had wanted the national government to check the excesses of state legislatures, vesting it with the necessary and proper powers to effectively enforce the law.³⁸ Shackling the federal government to the states may complicate these duties.

Levin's proposal to afford a congressional and state veto over judicial decisions may not differ significantly in form from the amendment process, whereby Congress and state legislatures ratify formal constitutional change. However, it might risk unsettling the Constitution by making changes a routinized aspect of government. Madison had hoped a stable, long-term regime would instill reverence among the people, and therefore, advocated for a gradual, considered approach to change.³⁹ Levin's amendment could lose that sense of caution in its immediacy and regularity of action.

³⁷ James Madison, "Debates in the Federal Convention of 1787: Tuesday, June 12," *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0612-2/>.

³⁸ James Madison, "Debates in the Federal Convention of 1787: Thursday, June 7," *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0607-2/>; James Madison, "Debates in the Federal Convention of 1787: Saturday, July 21," *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0721-2/>.

³⁹ James Madison, "Federalist No. 49," in *The Federalist Papers*, 313-314.

Additionally, the joint congressional-state veto could inject a degree of popular opinion into the decisions of the Supreme Court, in effect, rendering judicial bodies out of representative institutions, which should be concerned with legislating. The Court was intended to be insulated and entrenched so as to preserve its independence, and, therefore, suggested reforms may be more effective limiting judicial scope rather than judicial independence.⁴⁰

Finally, it is important consider the effects of congressional term limits. The House of Representatives was designed to embody the spirit of democracy, ensuring “an immediate dependence on, and intimate sympathy with, the people.”⁴¹ The sentiment of the people is to prevail in matters pertaining to their congressional representation. As such, the best term limit can be made by the decision of the voter. Placing a restriction on that choice may rob constituents of that right.⁴²

Further, the assumption that term limits would counter incumbent advantage, such as name recognition and substantial fundraising prowess, has been called into question. Thomas Mann has not found that term limits would appreciably lead to more competitive House races. Rather, he argues, “a term limit would very likely turn into a floor, with would-be candidates deferring their challenge and awaiting the involuntary retirement of the incumbent,” at which point, “elections would be contested only in open seats, and then only those not safe for one political party or the other.”⁴³

⁴⁰ Alexander Hamilton, “Federalist No. 78,” in *The Federalist Papers*, 440-441.

⁴¹ James Madison, “Federalist No. 52,” in *The Federalist Papers*, 323-324.

⁴² Editorial Board, “The Limits of Term Limits,” *The New York Times*, September 30, 2008, accessed March 7, 2016, URL: <http://www.nytimes.com/2008/10/01/opinion/01wed2.html>.

⁴³ Thomas E. Mann, “The Wrong Medicine: Term Limits Won’t Cure What Ails Congressional Elections,” *The Brookings Review*, Vol. 10, No. 2, (Spring, 1992), 25, accessed March 7, 2016, URL: <http://www.jstor.org/stable/20080291>.

4.4 Conclusion

To address the constitutional dysfunction that has plagued the nation, analysts and scholars have proposed several solutions, each predicated upon widely divergent diagnoses of the source of the problems. Democratic aspirationalists, such as Dahl and Levinson, have criticized the Constitution's undemocratic nature as presenting serious challenges to its legitimacy in an increasingly democratic society. As such, they primarily advocate that institutions be more accountable to the people, while centralizing the loci of power, perhaps in a single legislature as in a Parliamentary system. However, overly accountable institutions have been responsible for much of the institutional instability that has persisted. Others, such as Seidman, believe provisions of the Constitution impede the ability for governing institutions to choose the most appropriate policy. He suggests that constitutional disobedience ought to be considered these decisions conflict with constitutional barriers. However, such an approach may create an unlimited constitution, inviting questions over institutional legitimacy. Still others, such as Levin, have argued for a return to original constitutional principles. While Levin accurately identifies the source of much constitutional dysfunction, several of his proposals may be counterproductive, and ultimately, fall short of restoring constitutional principles. For example, by injecting majoritarianism into the decision-making and shackling the federal government to the states, these amendments may weaken the independence and stability of the national government. My recommended approach weighs these various critiques of the Constitution and seeks to offer substantive proposals that properly diagnose the sources of dysfunction, while presenting sufficient reforms to address it.

CHAPTER FIVE: MANAGING DEMOCRACY: A PATH FORWARD

Having defined constitutional dysfunction in “Chapter One” as the degree to which institutions impair the attainment of constitutional purposes, having explored institutional “drift” in “Chapter Three,” and having assessed the various prescriptions to American constitutional dysfunction in “Chapter Four,” from democratization to a restoration of constitutional principles, it is now useful to consider viable remedies to constitutional dysfunction. The republican form of government provided the cornerstone to regime legitimacy. As such, we can examine how institutions may be reformed so as to restore representative government. This need not entail undoing the democratic revolution, such as repeal of the 17th Amendment, but rather by appropriately managing democracy. To buttress institutional stability, measures could be considered which counteract the effects of frequent wave elections and the ensuing political whiplash, so that branches are durable for the long-term. Further, we might seek to highlight methods which preserve the efficacy and independence of the national government, but ensure a limited scope of power. Finally, we may need to address reforms which strengthen societal cohesion, as well.

5.1 Stabilizing the Congress

The House of Representatives was intended to be the most responsive branch of the national government, hence the two-year terms.¹ However, these were still longer than the annual elections which had predominated in the state legislatures at the time.² Therefore, the two-year term represented a compromise between democratic accountability and institutional

¹ James Madison, “Federalist No. 52,” in *The Federalist Papers*, ed. Isaac Kramnick (London: Penguin Group, 1987), 323-324.

² “Biennial Elections,” *History, Art & Archives, United States House of Representatives*, accessed March 7, 2016, URL: <http://history.house.gov/Institution/Origins-Development/Biennial-Elections/>.

stability. As primaries have gained in import in deciding nominees for office, congressional members have been increasingly subjected to additional elections during their term, arguably rendering the office more democratic.

To rebalance stability, a three-year term for House members may be appropriate. It would counteract the entire year congressmen must devote to campaigning for re-election, offering additional time for legislating and governing. As Larry Sabato argues:

Two years once made sense, with governing consuming three quarters of the time and the reelection campaign one quarter. Those estimates are now reversed, at least for the minority of House members who have competitive contests. And for congressmen in “safe” districts, their natural insecurity about reelection has encouraged them to spend enormous time away from legislating on the all-consuming task of building large war chests, in order to ward off future challengers.³

James Madison concurred. At the Convention, he had argued that a three-year term afforded institutional stability and instilled greater knowledge for representatives.⁴

While lengthening the terms of House of Representatives may stabilize it against successive wave elections and political whiplash, it would not unduly hamstring representative democracy. Even developed parliamentary systems often have terms greater than two years in length. The United Kingdom, which only recently established a five-year term for Parliament,

³ Larry J. Sabato, “Perfecting the Presidency: Ideas for Terms, War-making Powers and More,” *University of Virginia Center for Politics: Sabato’s Crystal Ball*, October 4, 2007, accessed March 7, 2016, URL: <http://www.centerforpolitics.org/crystalball/articles/ljs2007100401/>.

⁴ James Madison, “Debates in the Federal Convention of 1787: Tuesday, June 12,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0612-2/>.

has not had a government shorter than four years since 1974.⁵ Similarly, Germany's governments have usually lasted between three and four years, and not a single one shorter than three since World War II.⁶

The Senate was established to check the decisions of the House of Representatives and popular majorities. To that end, the Framers opted for longer terms of six years, as well as selection by state legislatures. This arrangement was intended to assure the necessary stability and fortitude to withstand the whims of popular opinion, with a focus on the long-term interests of the nation.⁷ However, with the ratification of the 17th Amendment, the ballots of the voters displaced the choice of state legislatures. The Senate was rendered a more democratic institution, "more responsive, by definition less deliberative."⁸ Since 1914, it has actually shifted party control more frequently than the House, and has been subjected to similar wave elections, political whiplash, and partisan primaries as the lower body.⁹ Further, direct election "has not appreciably increased the Senate's responsiveness or efficiency."¹⁰

Restoring the Senate to its original character would entail counterbalancing these democratic developments. Although repeal of the 17th Amendment, as proposed by Mark Levin,

⁵ "General Election Results from 1945-2015," *UK Political Info*, accessed March 7, 2016, URL: <http://www.ukpolitical.info/ByYear.htm>.

⁶ "Results of the Bundestag Elections 1949 to 2009," *The Federal Returning Officer*, 2015, accessed March 7, 2016, URL: http://www.bundeswahlleiter.de/en/bundestagswahlen/fruehere_bundestagswahlen/.

⁷ James Madison, "Debates in the Federal Convention of 1787: Thursday, June 7," *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL:

<http://teachingamericanhistory.org/convention/debates/0607-2/>; James Madison, "Debates in the Federal Convention of 1787: Tuesday, June 12," *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0612-2/>.

⁸ C.H. Hoebeke, *Road to Mass Democracy: Original Intent and the Seventeenth Amendment*, (Somerset: Transaction Publishers, 2014), 174, ProQuest Ebrary, accessed March 7, 2016.

⁹ "Party Divisions of the House of Representatives, 1789-Present," *United States House of Representatives*, accessed March 7, 2016, URL: <http://history.house.gov/Institution/Party-Divisions/Party-Divisions/>; "Party Division in the Senate, 1789-Present," *United States Senate*, accessed March 7, 2016, URL: <http://www.senate.gov/history/partydiv.htm>.

¹⁰ Wendy J. Schiller and Charles Stewart, *Electing the Senate: Indirect Democracy Before the Seventeenth Amendment*, (Princeton: Princeton University Press, 2014), 200, ProQuest Ebrary, accessed March 7, 2016.

may provide a degree of insularity, it would unnecessarily undue the democratic expansion of suffrage. The right to elect a Senator has become understood as vital by many Americans. As Adam Cohen argues, “Repealing the 17th Amendment would prevent the little people — in other words, the voters — from having their say.”¹¹ As such, it may be unwise to revoke it.¹²

Since the method of selecting Senators should remain direct election, then a feasible approach would be to lengthen their terms to nine years. While nine years may appear too long, it must be noted a number of Framers had suggested rather lengthy terms. Madison had originally favored seven years, while Roger Wilson had recommended nine years.¹³ In an age where primaries have subjected members to multiple elections within a given term, and where political whiplash has ravaged the stability of the institution, nine years may counteract the symptoms of an overly-responsive branch. Additionally, if the terms of the House of Representatives are lengthened to three years, then the nine-year Senatorial term preserves the staggered, gradual approach to changing the Senate, with one-third of its members subject to a vote each election.

5.2 Restoring the Presidency

The Framers sought an executive with sufficient independence as to be effective in executing the laws.¹⁴ They decided against entrusting its selection to the National Legislature, nor to the people. Instead, they opted for electors, who originally were chosen by state

¹¹ Adam Cohen, “The Right’s Weird Campaign to End Elections for Senators,” *Time*, November 24, 2010, accessed March 7, 2016, URL: <http://content.time.com/time/nation/article/0,8599,2032910,00.html>.

¹² Matt Bai, “Tea Party’s Push on Senate Election Exposes Limits,” *The New York Times*, June 1, 2010, accessed March 7, 2016, URL: http://www.nytimes.com/2010/06/02/us/politics/02bai.html?_r=1.

¹³ James Madison, “Debates in the Federal Convention of 1787: Tuesday, June 26,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0626-2/>.

¹⁴ James Madison, “Debates in the Federal Convention of 1787: Friday, June 1,” *Teaching American History: The Constitutional Convention*, accessed March 7, 2016, URL: <http://teachingamericanhistory.org/convention/debates/0601-2/>.

legislatures. However, as the Electoral College became a de facto popular vote, and primaries decisive in nominating candidates, presidents have become more dependent upon the people for election, and once in office, they have relied increasingly on popular support to govern, which Jeffrey Tulis describes as the “rhetorical president.”¹⁵

Affording to the president a single, six-year term may restore the necessary independence to govern effectively. This proposal minimizes the number of presidential elections, completely removing re-election entirely. However, it may also be of adequate length to ensure efficacious governance. Larry Sabato, who supports a six-year term, but with an added two-year extension to be awarded by a referendum, explains that a six-year term avoids the “time wasting” and “pressures” of reelection. Instead, a president would be permitted to devote more attention to governing. As Sabato explains, “Without the possibility of reelection, presidents would have no motive to postpone controversial decisions, and their critics would be deprived of the frequently heard complaint that the occupant of the White House took specific actions just to ensure his reelection.” Further, the additional two years allows the president “a chance to follow up on their most important policies,” as well as buttressing “personal relationships with other nations’ leaders.”¹⁶

Bruce Buchanan raises a particular concern with this proposal, asking, “What is to replace public support as the enabling energy of the presidency?” Highlighting the lack of political potency of term-limited presidents, so-called “lame ducks,” he suggests that no viable

¹⁵ Jeffrey Tulis, *The Rhetorical Presidency*, (Princeton: Princeton University Press, 1987), 3-23.

¹⁶ Larry J. Sabato, “Perfecting the Presidency: Ideas for Terms, War-making Powers and More.”

alternative would provide the suitable “empowering vitality” that public support offers when re-election is viable.¹⁷

It should be noted that congressional midterm elections would still remain. The single, six-year term is an approach which strengthens the presidency without weakening the other branches of government. Removing re-election may enhance the role of the Congress. The institutional third-year midterm would offer the most immediate recourse by the people in passing judgment on the president. Representative government, not popular democracy, is strengthened.

Further, a president may be driven to buttress their legacy, much as second-term “lame duck” presidents have done. President Dwight Eisenhower helped establish the American space program during his second term, while working cautiously on stabilizing US-Soviet relations.¹⁸ President Ronald Reagan signed the INF Treaty during his second term, and similarly sought closer ties, both diplomatically and personally, with Mikhail Gorbachev.¹⁹ In addition, presidents might determine that the most viable means of safeguarding their accomplishments is by ensuring that their party maintains control over the White House once they have stepped down, thereby engaging in electoral politics.²⁰

A strong Executive, however, had only been tenable so long as it was limited in scope. If the president is afforded a single, six-year term, thereby restoring its independence, then it is useful to assess how to sufficiently limit executive power. The Framers anticipated that any

¹⁷ Bruce Buchanan, “The Six-Year One Term Presidency: A New Look at an Old Proposal,” *Presidential Studies Quarterly*, Vol. 18, No. 1, (Winter, 1988), 139-140, accessed March 7, 2016, URL: <http://www.jstor.org.proxy.bc.edu/stable/27550538>.

¹⁸ “Presidential Key Events: Dwight Eisenhower,” *University of Virginia Miller Center: American President*, accessed March 7, 2016, URL: <http://millercenter.org/president/eisenhower/key-events>.

¹⁹ “Presidential Key Events: Ronald Reagan,” *University of Virginia Miller Center: American President*, accessed March 7, 2016, URL: <http://millercenter.org/president/reagan/key-events>.

²⁰ Steven G. Calabresi, “Five Myths About Lame-Duck Presidents,” *The Washington Post*, November 28, 2014, accessed March 7, 2016, URL: https://www.washingtonpost.com/opinions/five-myths-about-lame-duck-presidents/2014/11/28/355408be-70fe-11e4-8808-afaa1e3a33ef_story.html.

individual who occupied the office would seek greater power. Indeed, the entire framework for separation of powers was predicated on ambition.²¹ However, it fails to work when other institutions either lack that necessary counterweight, or willingly cede it.

Throughout American history, the powers of the executive have expanded. This has been particularly true during war and crises. Oftentimes, the Congress has willingly acquiesced in the growth of executive authority, outright ceding power.²² This has enabled the President to issue executive orders, either in defiance of Congress, or in their absence. For example, in 1954, President Eisenhower, who was pushing for freer international trade, requested Congress lower the price differential offered to US defensive supply firms. “When Congress refused ... the president issued an executive order reducing the price advantage given to U.S. companies by a considerable margin.”²³

Since congressional action has often, although not entirely, been responsible for the growth of executive power, then it may be necessary for Congress to become more proactive in restoring the balance of power. The debate on where legislative responsibility ends and executive authority begins will almost certainly continue. It represents a healthy political and constitutional struggle between two governing institutions. Therefore, it is worth examining how Congress can reassert itself and reclaim lost authority, such as executive orders. If a president has issued an executive order which establishes new policy in the absence of legislative approval, then the latter may want to consider taking explicit action, even if it supports the program. Such an approach could permit the Congress to serve an integral role in the process.

²¹ James Madison, “Federalist No. 51,” in *The Federalist Papers*, 319.

²² Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government*, (Oakland: The Independent Institute, 2012; 1987), 233.

²³ Aaron Friedberg, *In the Shadow of the Garrison State: America’s Anti-Statism and its Cold War Grand Strategy*, (Princeton: Princeton University Press, 2000), 231.

5.3 Limiting Judicial Scope

The Supreme Court was designed to be insulated and entrenched, with its selection removed from the people and life tenure for all members. The Framers had believed this would assure the requisite independence to exercise the judicial functions of the nation.²⁴ However, an independent Court was only palatable providing that its powers were largely limited in scope. As Hamilton warned, “The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”²⁵ Yet the scope of judicial authority witnessed considerable expansion, particularly in the years following the Civil War. Critics have alleged that the Court has engaged in “judicial activism,” a complex term which Cass Sunstein succinctly defines as “an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government,”²⁶ such as the *Lochner v. New York* (1905) decision.²⁷

In an effort to address such “judicial activism,” it might be beneficial if the Court retain its current arrangement, insulated and entrenched, so as to preserve its independence. Instead of subjecting the Justices to elections, or their decisions to a referendum, needlessly inviting majorities, members could instead practice judicial restraint. An independent Court with limited scope may more faithfully restore the institution to the principles which the Framers had sought.

The judicial philosophy of James Bradley Thayer, a Harvard professor, best encapsulates the understanding behind judicial restraint. Thayer’s writings greatly influenced Justice Felix

²⁴ Alexander Hamilton, “Federalist No. 78,” in *The Federalist Papers*, 440-441.

²⁵ *Ibid.*, 440.

²⁶ Cass R. Sunstein, “Lochner’s Legacy,” *Columbia Law Review*, Vol. 87, No. 5, (Jun., 1987), 874, accessed March 7, 2016, URL: <http://www.jstor.org/stable/1122721>.

²⁷ Keenan D. Kmiec, “The Origin and Current Meanings of Judicial Activism,” *California Law Review*, Vol. 92, No. 5, Article 4, (Oct., 2004), 1445, accessed March 7, 2016, URL: <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1324&context=californialawreview>.

Frankfurter, who readily quoted Thayer in his decisions.²⁸ They believed representative bodies and legislatures served an important role in the polity, and, because they were accountable directly to the people, their decisions had to be respected by the courts. As Thayer had written, “And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people by undertaking a function not its own ... The judiciary ... owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it.”²⁹

The concerns of an expanded judiciary were not limited to their effects on legislatures. Thayer had warned that an expanded judicial scope could have repercussions on society. As Thayer, quoted by Frankfurter in an opinion, explained:

[An expanded judiciary] is always attended with a serious evil, namely that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors ... But I venture to think that the good which came ... from the vigorous thinking that had to be done in the political debates that followed, from the infiltration through every part of the population of sound ideas and sentiments, from the rousing into activity of opposite elements, the enlargement of ideas, the strengthening of moral fiber, and the growth of political experience that came out of it all -- that all this far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature.³⁰

²⁸ H.N. Hirsch, *The Enigma of Felix Frankfurter*, (New York: Basic Books, 1981), 128.

²⁹ “*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), “*JUSTIA U.S. Supreme Court*, accessed March 7, 2016, URL: <https://supreme.justia.com/cases/federal/us/319/624/>.

³⁰ *Ibid.*

Judicial restraint only would not guarantee a limited judiciary. Other institutions, such as the Congress, have responsibilities as well. George Lovell and Scott Lemieux have researched “legislative defaults,” instances where Congress has passed important, yet divisive questions, such as abortion policy, to the judiciary so as not to incur the costs of making unpopular decisions.³¹ Accordingly, the Congress may seek to fulfill its obligations to the people by rendering decisions on these matters, themselves. It offers an opportunity to limit the scope of the judiciary, restore the balance of powers, and strengthen representative government.

5.4 Revisiting the Amendment Process

Amendments have served as one of the principal means by reformers to achieve nationwide success. Prior to the Civil War, amendments were few and far between, yet in the wake of the conflict, their numbers burgeoned. Michael Vorenberg notes that their quality had differed, as well. “These were not simply measures restraining the federal government,” he explains. Rather, the Civil War-Reconstruction era amendments “empowered ... the federal government,” becoming the method by which “to accomplish major social reforms, such as the abolition of slavery, the regulation of marriage ... and the prohibition of alcohol.”³² Additional amendments to the Constitution, however, have fallen off in the last several decades.

Many analysts have criticized the amendment process itself for being too difficult to enact reforms. Louis Michael Seidman dismisses it as “cumbersome,”³³ while Sanford Levinson

³¹ Scott E. Lemieux and George Lovell, “Legislative Defaults: Interbranch Power Sharing and Abortion Politics,” *Polity*, Vol. 42, No. 2, (April 2010), 211-217, accessed March 7, 2016, URL: <http://www.jstor.org/stable/40587522>.

³² Michael Vorenberg, “Bringing the Constitution Back In: Amendment, Innovation, and Popular Democracy During the Civil War Era,” in *The Democratic Experiment: New Directions in American Political History*, ed. Meg Jacobs, William J. Novak, and Julian E. Zelizer, (Princeton: Princeton University Press, 2003), 121-122.

³³ Louis Michael Seidman, *On Constitutional Disobedience*, (Oxford: Oxford University Press, 2012), 17.

laments, “Article V constitutes what may be the most important bars of our constitutional iron cage precisely because it works to make practically impossible needed changes in our polity.”³⁴

Melissa Schwartzberg contends that the existing threshold (two-thirds in both houses of Congress and three-quarters of state legislatures) is unduly prohibitive. She explains, “Bicameralism, as many scholars have noted, is in effect a supermajoritarian device ... Where it already exists, however, there is certainly no need to raise the threshold; it is already supermajoritarian enough.”³⁵

To address these valid concerns, we can consider lowering the threshold for ratifying a constitutional amendment to 60 percent of both houses of Congress and two-thirds of state legislatures. Lowering the bar may foster greater political mobilization and engagement of citizens, thereby further strengthening the legitimacy for constitutional mechanisms. It could also serve to limit the role of the Court in that regard by offering an incentive to citizens to choose the political route over the legal recourse to effecting constitutional change.

Nonetheless, this reform would still retain consensus-building at its core. It is not purely majoritarian, by any means, for it requires greater support than simple majorities. Yet it minimizes the so-called “tyranny of the minority,” the notion that twelve states could hinder a constitutional consensus for change.

Reforming the amendment process must balance the dual challenges of seeking greater civic engagement, which may limit judicial scope, while retaining an incremental approach to altering the Constitution. To reiterate, Madison had hoped a stable, long-term, and durable regime would instill reverence among the people, and therefore, advocated a gradual and

³⁴ Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*, (Oxford: Oxford University Press, 2006), 160.

³⁵ Melissa Schwartzberg, *Counting the Many: The Origins and Limits of Supermajority Rule*, (New York: Cambridge University Press, 2014), 186.

considered approach to change.³⁶ Mark Levin’s proposal, which subjects judicial decisions to a veto of Congress and the state legislatures, may lose that sense of caution in its immediacy and regularity of action.³⁷ It might risk unsettling the Constitution by making changes a routinized aspect of government. Resolving the tension between improving accessibility and fostering patience requires further attention. By researching different methods of constitutional change, and its effects on the regime, society, the courts, and other institutions, we could get a better idea of the most appropriate path forward.

5.5 Society

The limited nature of the Constitution attests to the minimal role the Framers believed the national government should have in societal affairs. Permitting the people to operate, largely unimpeded by the state, while quietly assuring the proper functioning of government, had been the success of the Constitution. As Alexis de Tocqueville observed, “In America, you see written laws; you see their daily execution; everything is in motion around you, and the motor is nowhere to be seen. The hand that runs the social machine escapes at every moment.”³⁸

However, the nation has become increasingly more democratic, while the state has expanded its capabilities and capacities to deliver services, regulate economic activity, and monitor society. As such, it may become essential that citizens are well informed and educated on the topics of governance, namely history, civics, and politics, so as to better understand their nationhood, political processes, constitutional mechanisms, and so forth. Citizens could couple

³⁶ James Madison, “Federalist No. 49,” in *The Federalist Papers*, 313-314.

³⁷ Mark R. Levin, *The Liberty Amendments: Restoring the American Republic*, (New York: Threshold Editions, 2013), 68-69.

³⁸ Alexis de Tocqueville, “Democracy in America: Historical-Critical Edition, Vol. 1 [1835],” *Online Library of Liberty*, accessed March 7, 2016, URL: <http://oll.libertyfund.org/titles/tocqueville-democracy-in-america-historical-critical-edition-vol-1>.

this knowledge with a passion for engagement, getting involved with their communities, their states, and their nation in strengthening the foundations of the polity. Finally, they should consider demonstrating responsibility. If responsibility and maturity are to be desired among lawmakers, then it probably begins with its citizens, particularly by balancing immediate gratification and satisfaction with long-term vigilance, patience, and sacrifice. An educated, active, and responsible citizenry can help to foster a vibrant polity, while assuring the continued stability and strength of the regime.

5.6 Constitutional Discourse

Constitutional discourse has focused much on the inadequacies of the Constitution to serve contemporary Americans. However, it is important for analysts and researchers to reconsider the strengths of the document. The Framers established a government deliberatively, and while their product represented a compromise of interests between North and South, small and large states, and so forth, it was also a framework with specific goals. It might be incumbent upon reformers to fully consider the implications of extensive changes, before rushing to remake the Constitution.

Reconsidering the Constitution could encompass a thorough reassessment of the Framers. They had very real concerns about majorities, both legislative and popular; governments with unlimited powers; and an improper balance between states and the national government. Analysts should determine whether these concerns remain creditable and pertinent to the contemporary American system. One can make the argument that these reservations have much validity and that they should not be dismissed lightly.

Focusing on institutional development, researchers should decide the best approach to resolving the tension between accountable, responsive institutions which are stable and durable; and independent, strong branches which should be limited in scope. Further, they should focus on ensuring that the regime fosters legitimacy and reverence, while strengthening societal cohesion, as well. Several suggestions for reform have been proposed here, but they are by no means exhaustive. In the least, they offer a first step toward addressing the problems of contemporary constitutional dysfunction.