

## WHAT SHOULD CITIZENS (AS PARTICIPANTS IN A REPUBLICAN FORM OF GOVERNMENT) KNOW ABOUT THE CONSTITUTION?

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### INTRODUCTION: LAWYERS AS “GOOD CITIZENS”

It is probably fair to say that the participants in the splendid symposium on the *Citizen Lawyer* were thinking primarily of the role of lawyers as “good citizens,”<sup>1</sup> including the duty of lawyers truly to take seriously their responsibilities to be concerned with the basic health of our political system.<sup>2</sup> I have no problem at all

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1. See generally Lawrence M. Friedman, *Some Thoughts About Citizen Lawyers*, 50 WM. & MARY L. REV. 1153 (2009) (exploring the many contexts in which one can be a “citizen lawyer”); Robert W. Gordon, *The Citizen Lawyer-A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169 (2009) (exploring the division among lawyers as to the proper scope of public or civic obligations as lawyers); W. Taylor Reveley III, *The Citizen Lawyer*, 50 WM. & MARY L. REV. 1309 (2009) (arguing that lawyers have an “unusually strong” need to be civic minded and to work for the public interest); Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323 (2009) (examining in detail the “special responsibilities” of lawyers as “public citizens”).

2. See generally Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 WM. & MARY L. REV. 1105 (2009) (arguing that judicial accountability best enables judges to serve their roles); Bruce A. Green & Russell G. Pearce, “Public Service Must Begin at Home”: *The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207 (2009) (arguing that the citizen lawyer’s role in society approximates that of a “civics teacher”); James E. Moliterno, *A Golden Age of Civic Involvement: The Client Centered Disadvantage for Lawyers Acting as Public Officials*, 50 WM. & MARY L. REV. 1261 (2009) (examining the struggle that a lawyer faces as an advocate when working as a public official); Edward Rubin, *The Citizen Lawyer and the Administrative State*, 50 WM. & MARY L. REV. 1335 (2009) (exploring the obligation of the citizen lawyer and the content of an effective legal ethics course in an administrative regulatory context); Mark

in sharing this set of concerns. For almost two decades I have chosen<sup>3</sup> to teach courses on “professional responsibility,” and have addressed the tensions that can easily arise between “zealous” commitment to the interests of individual clients and one’s devotion to the common good of the political order.<sup>4</sup> These tensions, incidentally, are almost certainly more likely to be present in ordinary civil lawyers’ practices than they are in criminal lawyers’ practices; civil law practitioners, after all, rarely if ever defend their “zealousness” within the context of protecting clients against deprivation of liberty by a potentially overweening state.<sup>5</sup>

But the potential tension between the ideological interests of a client and what one might believe serves the “public interest” is not the only problem facing anyone who would enter the practice of law. The ever-increasing demands placed on lawyers to work longer hours have led many to note the competition between such demands and those generated by their “private” (especially family) lives.<sup>6</sup> There are, after all, only twenty-four hours in a day, and there are always opportunity costs presented by taking a deposition, on the one hand, or attending a child’s school event, on the other. Unfortunately, what such a comparison leaves out is an

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Tushnet, *Citizen as Lawyer, Lawyer as Citizen*, 50 WM. & MARY L. REV. 1379 (2009) (examining how ordinary people interpret the Constitution, and suggesting guidelines as to how they *should* interpret our founding instrument).

3. I emphasize my own choice to teach the subject inasmuch as I rue the fact that at most law schools courses on “professional responsibility” have a very low status among faculty members and would almost certainly be shunned, were they not compulsory, by most law students. As a matter of fact, I believe that such courses, at least if well conceived, may well be the most important part of one’s legal education insofar as they uniquely confront various tensions that lawyers will inevitably face in their lives.

4. See, e.g., Sanford Levinson, *National Loyalty, Communalism, and the Professional Identity of Lawyers*, 7 YALE J.L. & HUMAN. 49, 69-71 (1995), reprinted in SANFORD LEVINSON, *WRESTLING WITH DIVERSITY* 159, 183-86 (2003).

5. See Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1610 (2005) (noting that civil practice and criminal practice may have inconsistent values in part because “[c]itizens are not settling private disputes; the government is taking coercive action against individual citizens”); Gordon, *supra* note 1, at 1179 (identifying criminal defense against the dangers of an overbearing state as “paradigmatic” of the public benefit of private practice of law).

6. E.g., JEAN E. WALLACE, LAW SCH. ADMISSION COUNCIL, *JUGGLING IT ALL: EXPLORING LAWYERS’ WORK, HOME, AND FAMILY DEMANDS AND COPING STRATEGIES* 1 (2002), available at <http://www.lsacnet.org/research/Lawyers-Coping-Strategies-Work-Home-Family-Demands-1.pdf>.

extremely important third value, which is precisely the duty of anyone who takes citizenship seriously to the fullest extent: to spend *quality time* fulfilling those duties. In any event, it is well worth honoring those attorneys who have led truly commendable lives as engaged citizens and public servants (even if they never spent a day holding formal public office), and trying to encourage younger attorneys to emulate them.

#### I. NONLAWYER CITIZENS AND THEIR KNOWLEDGE OF THE CONSTITUTION

My own interpretation of “citizen lawyer,” however, takes a somewhat different form. Rather than talk about lawyers as good citizens, I want to address instead what knowledge of the legal—and, more particularly, the constitutional—systems we should legitimately expect (and encourage) from our nonlawyer compatriots in the American political community. In part, this reflects a long-term interest of mine in, and in defense of, the capacity of nonlawyer citizens to express themselves cogently on constitutional issues.<sup>7</sup> To use the terminology that I develop in my book *Constitutional Faith*, I am very much attracted by a “protestant” view of the American constitutional order that rejects the declaration of authority by any given institution—including the Supreme Court—to possess the “last word” on what the Constitution means.<sup>8</sup> My conception of the “Republican Form of Government” that lies at the heart of the Constitution’s self-conception<sup>9</sup> requires an active citizenry that is constantly engaged in internal debate over not only the meaning of the Constitution with regard to those clauses that are indeed ambiguous, but also with regard to the adequacy of those parts of the Constitution that are all too clear in their meaning.<sup>10</sup>

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7. See, e.g., SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 27-30 (1988) (delineating a notion of “protestant constitutionalism” that allows all citizens to articulate their own views of what the Constitution—correctly understood—means).

8. *Id.*

9. See U.S. CONST. art. IV, § 4.

10. As to the latter, see SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 5-9 (2006).

Given my interest, it is a happy coincidence that former Justice Sandra Day O'Connor, who gave the keynote address at our "Citizen Lawyer" symposium and serves as Chancellor of the College of William and Mary, has recently expressed her deep concern about deficiencies in the knowledge that many Americans have about the political system set out by the Constitution.<sup>11</sup> She has been especially concerned about what she perceives as attacks on judicial independence, which she believes is an important part of our constitutional order,<sup>12</sup> and she cosponsored a conference in 2006 with Justice Stephen G. Breyer on the state of the American judiciary.<sup>13</sup> "The overwhelming consensus coming out of that conference," she reported, "was that public education is the only long-term solution to preserving ... a robust constitutional democracy."<sup>14</sup> "And," she said, "we have to start with the education of our nation's young people," about whom she expressed special concern.<sup>15</sup> Part of the problem may be general American culture, which might explain why, as she noted, "[t]wo-thirds of Americans know at least one of the judges on the Fox TV show 'American Idol,' but less than 1 in 10 can name the chief justice of the United States Supreme Court."<sup>16</sup> She might have easily also cited an August 2006 Zogby Poll that found that three times as many Americans could name two of the Seven Dwarfs as could name an equal number of Supreme Court justices (77 percent vs. 24 percent),<sup>17</sup> just as almost three quarters of those polled could name Moe, Larry, and Curly,<sup>18</sup> whereas only 42 percent could name the three main branches of the U.S. federal government.<sup>19</sup>

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11. See Seth Schiesel, *Former Justice Promotes Web-Based Civics Lessons*, N.Y. TIMES, June 9, 2008, at E7.

12. See *id.*; see generally Carrington & Cramton, *supra* note 2.

13. Schiesel, *supra* note 11.

14. *Id.*

15. See *id.*

16. *Id.*

17. Brit Hume, *Zogby Poll: Most Americans Can Name Three Stooges, But Not Three Branches of Gov't*, FOX NEWS.COM, Aug. 15, 2006, <http://www.foxnews.com/story/0,2933,208577,00.html> (last visited Feb. 9, 2009).

18. *Id.* How many readers must be reminded that these are the Three Stooges?

19. See *id.* Those readers who believe there are only three branches of the federal government might consider various candidates for appellation as the "fourth branch": the press, see DOUGLAS CATER, *THE FOURTH BRANCH OF GOVERNMENT* vii (1959); administrative agencies, see KEVIN B. SMITH & MICHAEL J. LICARI, *PUBLIC ADMINISTRATIONS: POWER AND*

The former Justice offers an especially interesting insight about an unexpected consequence of the No Child Left Behind Act,<sup>20</sup> a signature achievement of the Bush Administration (whose passage was, of course, supported by Senator Ted Kennedy as well):<sup>21</sup> “One unintended effect of [the Act], which is intended to help fund teaching of science and math to young people, is that it has effectively squeezed out civics education because there is no testing for that anymore and no funding for that.”<sup>22</sup> She notes the remarkable fact that “at least half of the states no longer make the teaching of civics and government a requirement for high school graduation.”<sup>23</sup> This effectly repudiates what historically was “the primary purpose of public schools in America,” which was helping to “produce citizens who have the knowledge and the skills and the values to sustain our republic as a nation, our democratic form of government.”<sup>24</sup>

It is impossible not to share Justice O’Connor’s basic concern. As she laconically puts it, “Knowledge about our government is not handed down through the gene pool. Every generation has to learn it, and we have some work to do.”<sup>25</sup> But, in life as in law, “[g]eneral propositions do not decide concrete cases,”<sup>26</sup> and it is important to consider various possibilities with regard to the kinds of constitutional knowledge that we might be especially eager for our citizens to possess.

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POLITICS IN THE FOURTH BRANCH OF GOVERNMENT xi (2006); lobbyists for “special interests,” see Alex Knott, *The “Fourth Branch” of Government*, ALTERNET, Apr. 8, 2005, <http://www.alternet.org/story/21702/> (last visited Feb. 9, 2009); and private contractors with the federal government, see Scott Shane & Ron Nixon, *U.S. Contractors Becoming a Fourth Branch of Government*, INT’L HERALD TRIB., Feb. 4, 2007, available at <http://www.iht.com/articles/2007/02/04/america/web.0204contract.php>.

20. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

21. Press Release, Office of the Press Secretary, President Signs Landmark Education Bill (Jan. 8, 2002), <http://web.archive.org/web/20020111064851/www.whitehouse.gov/news/releases/2002/01/20020108-1.html> (last visited Mar. 1, 2009).

22. Schiesel, *supra* note 11.

23. *Id.*

24. *Id.*; see also Sanford Levinson & Meira Levinson, “Getting Religion”: Religion, Diversity, and Community in Public and Private Schools, in *SCHOOL CHOICE: THE MORAL DEBATE* 104, 110-11 (Alan Wolfe ed., 2003), reprinted in SANFORD LEVINSON, *WRESTLING WITH DIVERSITY* 94, 103 (2003) (discussing the classical function of “common schools”).

25. Schiesel, *supra* note 11.

26. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

It might be useful in this context to look at what kinds of knowledge the United States expects of those seeking entrance into the American political community as naturalized citizens; they must, after all, take a test on what, at least according to United States Citizenship and Immigration Services (USCIS), an American with an ordinary knowledge of civics must know.<sup>27</sup> The ninety-six questions of the test that was in place until October 2008 are, to put it mildly, something of a grab bag. Eight sample test questions, for instance, inquired about the American flag, including its colors; another question, equally reflecting America's fetishistic relationship with Old Glory, asks who wrote the "Star Spangled Banner."<sup>28</sup> A decent number, however, involved knowledge of the Constitution, especially of its structural aspects.<sup>29</sup> Would-be citizens will thus be expected to know, among other things, that there are no term limits for United States senators; that the President serves for four years and may be reelected once; and that the correct answer to "Who elects the President of the United States?" is, of course, the electoral college<sup>30</sup> and *not* We the People, whose professed wishes may be wholly ignored in determining who gets to the White House.<sup>31</sup>

There is one extremely embarrassing error, however: USCIS's posited "correct answer" to the question "What is the most important right granted to U.S. citizens?" on the test in place until 2008 was "[t]he right to vote,"<sup>32</sup> even though it is a notorious truth of our political system that the United States Constitution does not directly "grant" a right to vote.<sup>33</sup> And the Supreme Court's notorious

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27. See USCIS, Sample U.S. History and Government Questions for the Old Naturalization Test, [http://www.uscis.gov/files/nativedocuments/Flashcard\\_questions.pdf](http://www.uscis.gov/files/nativedocuments/Flashcard_questions.pdf) (last visited Mar. 1, 2009) [hereinafter Old Naturalization Test]. A new version of the test was issued on October 1, 2008. See USCIS, Redesigned (New) Naturalization Test, <http://www.uscis.gov/newtest> (last visited Mar. 1, 2009) [hereinafter New Naturalization Test].

28. Old Naturalization Test, *supra* note 27.

29. See *id.*

30. *Id.*

31. See, e.g., *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (a decision that, of course, Justice O'Connor was seemingly happy to join); see *infra* text accompanying notes 34-35.

32. Old Naturalization Test, *supra* note 27.

33. The Supreme Court in 1875 pronounced itself "unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one ...." *Minor v. Happersett*, 88 U.S. 162, 178 (1875).

per curiam opinion in *Bush v. Gore*,<sup>34</sup> which Justice O'Connor joined without any apparent hesitation, stated, among other things, that "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."<sup>35</sup> One might hope that it would violate the Republican Form of Government Clause<sup>36</sup> if a state decided to make *all* of its offices filled through nonelectoral processes—for example, through the self-perpetuating appointment process seen in the French Academy,<sup>37</sup> or the appointment of a Pope by the College of Cardinals<sup>38</sup>—but it should be clear that, generally speaking, whether public officials are chosen by popular election is a decision to be made by the states, subject, of course, to Equal Protection considerations (and the strictures of the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments).<sup>39</sup> Should the state decide that *no one* can vote for a given office, it is not at all clear that the Constitution would prevent *that*.<sup>40</sup> I moved from a state (New Jersey) that emulates the national government in electing a single "chief executive," who appoints the rest of the Executive Branch<sup>41</sup> (and nominates judges for the Senate to confirm),<sup>42</sup> to a state (Texas) that elects almost every public official (with a major exception in the appointment of the secretary of state).<sup>43</sup> It would surely not violate the Constitution if Texas

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34. 531 U.S. 98 (2000).

35. *Id.* at 104.

36. U.S. CONST. art. IV, § 4.

37. See LOUIS BENOIT-PICARD, *LE PETITE VILLE* 121 (John C. Dawson ed., Ginn & Co. 1913) (1801); *THE WORLD ALMANAC AND BOOK OF FACTS* 792 (1981).

38. 4 *THE CATHOLIC ENCYCLOPEDIA* 192-93 (Charles G. Herbermann et al. eds., 1908).

39. See U.S. CONST. amends. XIV, XV, XIX, XXIV, XXVI; see generally *Bush*, 531 U.S. at 104.

40. Resolution of such questions ultimately depends on what meaning one assigns to the notion of a "Republican Form of Government." U.S. CONST. art. IV, § 4. This is a notoriously underanalyzed concept because of the decision by the United States Supreme Court in *Luther v. Borden*, 48 U.S. 1, 42 (1849), to declare construction of the Clause a "political question" that was therefore nonjusticiable in federal courts.

41. N.J. CONST. art. V, § IV, cl. 2.

42. N.J. CONST. art. VI, § VI, cl. 1.

43. W.W. Norton & Company, *We the People*, 6th ed., Chapter 24: The Texas Executive Branch, Chapter Review, <http://www.wwnorton.com/college/polisci/wtp6e/content/ch24/review.htm> (last visited Mar. 1, 2009).

decided that New Jersey presented a more sensible model, at least in some respects, and turned a half dozen elected offices into appointive ones and eliminated the election of the judiciary entirely. In any event, the new naturalization test that went into effect on October 1, 2008 omits this question, though the new questions and answers on voting still present problems for the careful analyst.<sup>44</sup>

In any event, when we discuss what counts as the civic knowledge that is most important to possess, it is extremely important that we not overemphasize the relevance of what are, after all, only selected sets of facts—what some might correctly dismiss as “factoids,” as might be the case with knowing the name of the Chief Justice and is even more clearly the case with knowing that Francis Scott Key wrote the words to our national anthem.<sup>45</sup> One might, after all, even be able to name all of the nine justices without knowing anything relevant about them or having the slightest ability to understand the consequence of, for instance, having a Supreme Court whose justices serve for life, something that is quite

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44. Thus questions 48 and 49 and the suggested answers are as follows:

48. There are four amendments to the Constitution about who can vote. Describe *one* of them.
- Citizens eighteen (18) and older (can vote).
  - You don't have to pay (a poll tax) to vote.
  - Any citizen can vote. (Women and men can vote.)
  - A male citizen of any race (can vote).
49. What is *one* responsibility that is only for United States citizens?
- serve on a jury
  - vote in a federal election

USCIS, Civics (History and Government) Questions for the Redesigned (New) Naturalization Test, <http://www.uscis.gov/files/native/documents/100q.pdf> (last visited Mar. 1, 2009).

The problems are as follows: First, it is patently untrue that “any citizen can vote.” Indeed, the Court several decades ago cited Section 2 of the Fourteenth Amendment to support its wooden decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974), which upheld California’s exclusion of felons from the franchise. The far better way to phrase the suggested answers would be negatively, for example, that one cannot be deprived of the ballot on grounds of race or gender. Furthermore, voting and serving on a jury are not parallel “responsibilities.” The state can indeed require one to serve on a jury unless the citizen can present a good reason for refusing to serve. Unlike Australia, though, the United States does not go as far as to require anyone to vote. Though one might be critical of one’s fellow citizens for failing to vote—unless, of course, their refusal is principled, based on a sometimes reasonable belief that all of the choices are unacceptable—one cannot say that they have failed to meet any legal obligation.

45. Old Naturalization Test, *supra* note 27.

unusual in the contemporary world.<sup>46</sup> Indeed, it is a telling criticism of what might be termed “standard form” legal education in the United States today that most law students are never directly asked to justify our peculiar devotion to life tenure and to explain why it is that the rest of the world seems to find it utterly unnecessary to preserving decent forms of government that protect their citizens’ rights.

## II. JUSTICE O’CONNOR’S SUGGESTED EDUCATION FOR YOUNG CITIZENS AND ITS INADEQUACIES

Citizens in a constitutional republic must be able to engage in critical reflection about their government, a task far more important than being able to offer rote answers to questions about constitutional formalities. So let us look a bit further at the remedy Justice O’Connor is supporting with regard to the educational deficiencies she helpfully identifies. One explanation for the interest of the *New York Times* in Justice O’Connor’s speech undoubtedly has to do with its venue, a New York conference on digital games tellingly titled “Games for Change.”<sup>47</sup> Thus the headline notes that “Former Justice Promotes Web-Based Civics Lessons.”<sup>48</sup> So what sorts of games—and accompanying lessons to the players—is she supporting?

It is surely no wonder that a former Supreme Court Justice wants to encourage those who log on to the relevant sites to discuss the issues that get to the Supreme Court and might, in addition, be of interest to youngsters. Thus, she says, “We’ll have them arguing real issues, real legal issues, against the computer and against each other.”<sup>49</sup> Not surprisingly, in this context, one of the initial exercises in what has been labeled the “Our Courts” program

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46. See generally REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006). For an extremely helpful table of judicial practices around the world, see TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 50-53 (2003).

47. See Schiesel, *supra* note 11.

48. *Id.*

49. *Id.*

involves whether public schools have the constitutional power to censor students' speech.<sup>50</sup> "I believe," said Justice O'Connor,

that when we learn something, a principle or concept, by doing, by having it happen to us, which you can do by that medium of a computer, and you exercise it and you make an argument and you learn, "Oh yes, that's an argument that prevails," you learn by doing.<sup>51</sup>

One cannot justifiably object to making effective use of the Internet, including digital games, as a tool of stimulation and education about our constitutional system, though one might hope that our formal educational institutions, assuming they are still relevant, will bolster their civics programs and realize that education for effective citizenship is at least as important to a country committed to republican governance as preparation for entry into the economy.<sup>52</sup> Still, this does not answer the question as to what is most important for students to learn.

Traditionally trained lawyers, including judges, share an intellectual deformation—I am tempted to label it an out-and-out pathology—that was certainly reinforced, if not induced, by their legal education. This is the identification of "the Constitution" with those few particular issues about which lawyers litigate and courts, especially the Supreme Court, speak. The fact that relatively little of the Constitution satisfies those criteria becomes irrelevant. It is as if professors charged with teaching "icebergology" taught their students (and believed themselves) that it was sufficient to study and analyze only the small percent of the iceberg that is visible above the sea. Among other things, of course, this would mean that one might graduate as a *summa cum laude* "icebergologist" without ever understanding why the Titanic sank.<sup>53</sup> My current view is that

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50. *See id.*

51. *Id.*

52. Indeed, the principal arguments for a "constitutional right" to education sound stronger when made in the context of a "Republican Form of Government" than when couched simply in economic terms. *See* AMY GUTMANN, *DEMOCRATIC EDUCATION* 104-07 (2d ed. 1999).

53. For information on the iceberg that sank the Titanic, see Titanic-Nautical Society & Resource Center, RMS Titanic Iceberg FAQ, <http://www.titanic-nautical.com/RMS-Titanic-Iceberg-FAQ.php> (last visited Mar. 1, 2009).

American law professors are little better than such benighted professors of “icebergology” inasmuch as they teach their students only about the litigated Constitution and blithely ignore what I have come to believe are its unexamined—and far more important—parts. We must learn to be wary of traditional lawyers, including Supreme Court justices, who falsely claim some special competence in understanding the operations of the American governmental system, for it is all too likely that they have no comprehension of the dangers that may face the American ship of state because of deficiencies in the nonlitigated Constitution.

The fixation on the “litigated Constitution,” as distinguished from what I have come to call the “hard-wired” Constitution that is never the subject of litigation,<sup>54</sup> leads almost anyone with legal training (or ordinary citizens who take guidance from lawyers) to overestimate the importance of courts and judges, for good and for ill. Thus, one may or may not agree with the rather harsh criticisms of judicial overreach offered by Professors Carrington and Cramton in their contribution to this symposium,<sup>55</sup> but I believe that it is a serious mistake to believe that such overreach, even if we concede its occurrence, has much to do with what ails contemporary American politics.

Lawyers are overly fond of quoting Alexis de Tocqueville’s statement that “scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”<sup>56</sup> As Maryland Professor Mark Graber has demonstrated, this was patently false at the time of Tocqueville’s visit to America—most important constitutional issues were resolved by Congress with the Court having remarkably little to say—and is only a little less false today.<sup>57</sup> This point was at the heart of University of Virginia Professor Fred Schauer’s notable Foreword in the *Harvard Law Review*,<sup>58</sup> in which he analyzed copious polling data and

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54. LEVINSON, *supra* note 10, at 142 (introducing numerous “hard-wired” provisions and discussing their ramifications).

55. See generally Carrington & Cramton, *supra* note 2.

56. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 280 (Phillips Bradley ed., Alfred A. Knopf 1945) (1835).

57. Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville’s Thesis Revisited*, 21 CONST. COMMENT. 485, 485-88 (2004).

58. Frederick Schauer, *The Court’s Agenda—and the Nation’s*, 120 HARV. L. REV. 4 (2006).

demonstrated the near-total disconnect between the issues considered most important by the American public and the particular—and often peculiar—issues that constitute the workload of the Supreme Court.<sup>59</sup>

I certainly do not want to argue that the Court deals only with relatively unimportant issues. It is chastening, however, to realize not only how many crucial issues are left unexamined by the Court—for example reform of the ever more dysfunctional system of medical care in America; the best way to extricate our way out of Iraq; a rational energy policy in an age of global warming<sup>60</sup>—but also how limited in effect Supreme Court decisions may be even with regard to what many of us might agree are truly important subjects.<sup>61</sup> Gerald Rosenberg famously argued in 1991 that the Supreme Court represented a “hollow hope” for political reformers (most of them from the left) who believed that judicial decisions could settle deep social or political controversies.<sup>62</sup> Even if one believes that Rosenberg overstated his thesis somewhat, there is no plausible argument that he was fundamentally wrong in attempting to undercut the exaggerated importance that most lawyers and judges assign to the Court.<sup>63</sup> The Court may have chastened the Bush Administration with regard to its treatment of detained “enemy combatants,”<sup>64</sup> but many of the wretches at Guantánamo are spending their sixth year in captivity with no end in sight. Should their fates change, one suspects that it will far more likely result from the 2008 presidential election than from judicial decrees.<sup>65</sup>

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59. *See id.* at 8-9, 11, 14-20, 24-32, 62-64.

60. *See id.* at 14-20.

61. *See id.* at 29-30 (explaining how the public's concern about crime control does not exactly match the Supreme Court's consistent concerns regarding criminal procedure, habeas corpus, prison conditions, and the like).

62. GERALD ROSENBERG, *THE HOLLOW HOPE* 10-21, 336 (1st ed. 1991). Professor Rosenberg has recently published a revised second edition that addresses developments in the past fifteen years.

63. *See id.* at 10, 338.

64. *See, e.g.*, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

65. Notably, however, President Obama has ordered the detention facility at Guantánamo Bay closed within a year. *See* Jeff Zeleny & Elizabeth Bumiller, *Suspects Will Face Justice, Obama Tells Families of Terrorism Victims*, N.Y. TIMES, Feb. 6, 2009, at A11.

Typical American citizens, who are understandably not obsessed with the docket of the Supreme Court, should be asking themselves why it is that their political institutions seem so unresponsive to many of their most pressing concerns. Recently, a collection of polls found that most Americans believed that the country was headed in the wrong direction—a June 2008 Gallup Poll found that an astonishing 84 percent of persons polled held this view; at the same time, there was remarkably little confidence in public leaders.<sup>66</sup> That same month, Gallup announced that “[l]ess than a majority of Americans approve of the job performance of each of the three branches of the federal government, with the Supreme Court rated most positively and Congress least positively. The ratings for all three branches approach the lowest Gallup has measured historically.”<sup>67</sup> By the November 2008 elections, Americans’ “disapproval” of President Bush averaged 69.8% among the polls.<sup>68</sup> Given that the national government, as it headed into the 2008 elections, was divided between a Republican president and a Democratic Congress, it is difficult to give these numbers a simple partisan spin. It is obvious, for example, that millions of Democrats were disaffected from the Democratic Congress, just as President Bush was losing significant support from Republicans. Moreover, the magnitude of the expressed discontent suggests a fundamental withdrawal of confidence from the basic institutions of our political order, including, of course, the Supreme Court, which looks good in its level of support (48 percent)<sup>69</sup> only when compared with the other two branches.

It might be interesting to compare this current level of support for those who ostensibly lead our basic institutions with that for King George III in 1775 or 1776. Similarly, one would be curious to

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66. See the compilation of polls on “Direction of Country,” RealClearPolitics, Direction of Country, [http://www.realclearpolitics.com/epolls/other/direction\\_of\\_country-902.html](http://www.realclearpolitics.com/epolls/other/direction_of_country-902.html) (last visited Feb. 9, 2009). Also see the compilation of polls on “Congressional Job Approval,” RealClearPolitics, Congressional Job Approval, [http://www.realclearpolitics.com/polls/archive/?poll\\_id=18polls](http://www.realclearpolitics.com/polls/archive/?poll_id=18polls) (last visited Feb. 9, 2009).

67. Gallup, Bush, Congress, Supreme Court Near Historical Low Approval, June 16, 2008, <http://www.gallup.com/poll/108010/Bush-Congress-Supreme-Court-Near-Historical-Low-Approval.aspx?version=print> (last visited Mar. 1, 2009).

68. See the compilation of polls on “President Bush Job Approval,” RealClearPolitics, President Bush Job Approval, [http://www.realclearpolitics.com/polls/archive/?poll\\_id=19](http://www.realclearpolitics.com/polls/archive/?poll_id=19) (last visited Feb. 9, 2009).

69. Gallup, *supra* note 67.

know what percentage of the Williamsburg population during that time would have said that the British Empire, of which Virginia was an important part, was “headed in the wrong direction.” It would, of course, be hyperbolic in the extreme to suggest that we are in a “revolutionary situation” in this country, but it may not be hyperbolic to say that a population that has so manifestly lost confidence in its basic institutions can scarcely be described as hopeful about the capacity of these institutions to resolve the problems facing the country.

### III. OUR “BROKEN” POLITICAL SYSTEM<sup>70</sup>

A central trope of the recently concluded 2008 political campaign was the need to “change” or “reform” our “broken” political system. Thus former Senator John Edwards told his audience in Keene, New Hampshire on October 13, 2007, “Here’s the truth: the system in Washington is broken.”<sup>71</sup> A couple of months later, Senator Hillary Clinton told an Iowa audience, “We need a new beginning when it comes to reforming our government.”<sup>72</sup> Their ultimately successful opponent, Barack Obama, highlighted “change” as a central theme of his entire campaign. He won the endorsement of the *Harvard Crimson* because, the editors declared, he has the capacity “to fundamentally alter the way our broken political system functions.”<sup>73</sup>

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70. The ideas and, on occasion, some specific language in this section can also be found in Sanford Levinson, *Adapt U.S. Constitution to 21st Century Reality*, SEATTLE POST-INTELLIGENCER, Mar. 30, 2008, at B9, available at [http://seattlepi.nwsourc.com/opinion/356895\\_focus30.html](http://seattlepi.nwsourc.com/opinion/356895_focus30.html); *Get Me Rewrite! George Washington Didn't Think the Constitution Was Sacrosanct—Why Do We? It's Time for a New Constitutional Convention*, BOSTON GLOBE, Oct. 22, 2006, available at [http://www.boston.com/news/globe/ideas/articles/2006/10/22/get\\_me\\_rewrite?mode=PF](http://www.boston.com/news/globe/ideas/articles/2006/10/22/get_me_rewrite?mode=PF); *Our Broken Constitution: What Many Consider the Greatest American Document is in Reality a Blueprint for Undemocratic Governance*, L.A. TIMES, Oct. 16, 2006. See generally LEVINSON, *supra* note 10.

71. Senator John Edwards, Address by Senator John Edwards on Restoring our Democracy (Oct. 13, 2007), <http://www.johnedwards.com/news/speeches/20071013-restoring-democracy/> (last visited Mar. 1, 2009).

72. Senator Hillary Clinton, Address at the Hillary I Know Event (Dec. 17, 2007), <http://web.archive.org/web/20071218014103/www.hillaryclinton.com/news/speech/view/?id=4763> (last visited Mar. 1, 2009).

73. Editorial, *Obama for Democratic Nominee*, HARV. CRIMSON, Jan. 17, 2008, <http://www.thecrimson.com/article.aspx?ref=521585> (last visited Mar. 1, 2009).

Nor was such rhetoric confined to Democrats. Senator John McCain told visitors to his presidential campaign's website that he "has steadfastly fought to reform this broken system and end the self-serving largesse that defines the current budget process."<sup>74</sup> One of his television ads began "Washington's broken ...."<sup>75</sup> And a major, much-discussed book by Washington-based and well-connected political scientists Norman Ornstein of the American Enterprise Institute and Thomas Mann of the Brookings Institution was entitled *The Broken Branch: How Congress Is Failing America and How To Get It Back on Track*.<sup>76</sup>

As one might expect of political candidates—though one might have expected more from political scientists—the purported way to mend our "broken" system is to elect them to office. Would that it were that easy! The awful truth, unarticulated by *any* major American political figure today, is that much of the fault for our present discontent lies in the U.S. Constitution, a distinctly eighteenth century document that inflicts significant damage upon our twenty-first century reality. There is nothing particularly "radical" in such a view; a century ago, serious discussions of the adequacy of our Constitution were led by no less than Woodrow Wilson and Theodore Roosevelt.<sup>77</sup> In part because of their leadership, the Progressive Era featured, among other things, significant constitutional change between 1913, when the power to elect U.S. senators was transferred from state legislators to the voters directly,<sup>78</sup> and 1920, when women were guaranteed the right to vote.<sup>79</sup>

Needless to say, these changes cannot be attributed to political luminaries alone. In the case of women's suffrage especially, a significant mass movement recognized that desirable political

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74. See Levinson, *supra* note 70.

75. See BROKEN, McCain Campaign Ad, available at [www.youtube.com/watch?v=y1JkmMR8Fek](http://www.youtube.com/watch?v=y1JkmMR8Fek) (last visited Feb. 9, 2009).

76. NORMAN ORNSTEIN & THOMAS MANN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006).

77. WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 4-13 (Transaction Publishers 2002) (1900); Gary Murphy, "Mr. Roosevelt is Guilty": Theodore Roosevelt and the Crusade for Constitutionalism, 1910-1912, 36 J. AM. STUD. 441, 444-47 (2002).

78. U.S. CONST. amend. XVII (ratified 1913).

79. U.S. CONST. amend. XIX (ratified 1920).

change required constitutional change as well.<sup>80</sup> The same, of course, can be said of another constitutional change that took place during that era, Prohibition.<sup>81</sup> That, too, was the product of a large-scale political movement joined by many “progressives” as well as more stereotypical religious zealots.<sup>82</sup> What united these movements with such leaders as Wilson and Roosevelt—and, of course, many lesser known figures—was their joint belief that serious discussion of political reform required identifying potential defects in the Constitution and addressing them. It is this kind of critical spirit that is missing from our contemporary culture, save for those descendants of religious supporters of Prohibition who are dedicated to constitutionalizing their particular values. Thus Mitt Romney and Mike Huckabee, though not John McCain, supported amending the Constitution to ban gay and lesbian marriage, and, in Huckabee’s case, to criminalize abortion as well.<sup>83</sup> To put it mildly though, such amendments, even if one supports them,<sup>84</sup> would do nothing to cure the source of concern about our “broken” political system. Moreover, because of the functional impossibility of amending the Constitution through Article V, with its rigorous supermajority requirements,<sup>85</sup> there is no reason to believe that the supporters of these amendments actually believe that there is any prospect of success.

What is missing from our national discussion—and, I am afraid, from the kind of “civics education” endorsed by Justice O’Connor—is serious consideration of the adequacy of the basic structures

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80. See GRETCHEN RITTER, *THE CONSTITUTION AS A SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER* 52-55, 62-63 (2006).

81. See U.S. CONST. amend XVIII, *repealed by* U.S. CONST. amend. XXI.

82. See Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 12-20 (2006).

83. On Romney’s views, see Bill Sammon, *Romney: “I’m a Conservative Republican,”* DALLAS EXAMINER, Nov. 21, 2006, *available at* [http://www.examiner.com/a-411803~Romney:\\_I\\_m\\_a\\_conservative\\_Republican.html](http://www.examiner.com/a-411803~Romney:_I_m_a_conservative_Republican.html) (noting that Romney claimed Senator McCain to be “disingenuous” on the gay marriage issue). On Huckabee’s views, see TPM Election Central, *Huck: We Need to Amend the Constitution, Bring It in Line with God*, Jan. 15, 2008, [http://tpmelectioncentral.talkingpointsmemo.com/2008/01/huck\\_we\\_need\\_to\\_amend\\_the\\_constitution\\_bring\\_it\\_in\\_line\\_with\\_god.php](http://tpmelectioncentral.talkingpointsmemo.com/2008/01/huck_we_need_to_amend_the_constitution_bring_it_in_line_with_god.php) (last visited Mar. 1, 2009).

84. In the interest of candor, I do not support such amendments.

85. See U.S. CONST. art. V (requiring two-thirds vote in both Houses of Congress or alternatively, a Constitutional Convention approved by two-thirds of state legislatures to even propose an amendment, and three-fourths of state legislatures to ratify an amendment).

within which our government operates. There may have been almost unprecedented excitement over the 2008 Presidential election, but I am afraid supporters of Senator (now President) Obama, who no doubt cheered as well the Democratic gains in the House and Senate, may suffer pangs of disappointment at the limited “change” or “reform” that may ensue in the coming years. One can only wonder what the approval numbers and faith in the American future will be in 2010 or 2012 if it turns out that the 2008 election, for all of its drama and sense of historic transformation, leaves things relatively unchanged, mired in continued political gridlock and “playing to the base” grandstanding that has contributed to the perception of “brokenness” in our system.

Instead, we should be asking ourselves what ostensibly serious agents of “change” and “reform” should have been debated during the election season and should be addressed over the next several years. Constitutional change, after all, comes slowly, and debates must take place not only before mass audiences but also around the kitchen table and our schools or on websites such as those envisioned by Justice O’Connor.<sup>86</sup>

One can begin with the banal but all-important point that achievement of the goals articulated by Senator Obama during the campaign or President Obama following his inauguration will necessitate the cooperation of Congress.<sup>87</sup> Those in thrall to the Constitution as conceived by the legal academy (or the Supreme Court) will know that some policies generate learned debates about Congress’s power under the Commerce or the Tax and Spending Clauses.<sup>88</sup> Those debates, to be sure, can be quite interesting. The two most important things, however, that citizens—including law students—must know about Congress are first, that each house enjoys absolute veto power over any legislation passed by the other house and, second, that small states are grievously overrepresented

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86. Our Courts, About Our Courts, <http://www.ourcourts.org/about-our-courts> (last visited Mar. 1, 2009). See *supra* notes 47-48 and accompanying text.

87. It is this fact that somewhat nullified the almost Talmudic comparisons of the medical plans of Senators Clinton and Obama during their primary contest. No president has the power to wave a magic wand—particularly on an issue so central to the American economy as medical care—and gain approval for whatever policies he or she believes wise. Anyone desiring such results might wish that we had a parliamentary system, but, of course, we do not.

88. See U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. I, § 8, cl. 1.

in the Senate. As to the first, unlike some political systems that allow deadlocks in bicameral legislatures to be broken by a supermajority of the more “popular” house,<sup>89</sup> for instance, the American system leaves such deadlocks constitutionally entrenched. It is also essential to realize how grotesquely far the Senate is from the “one-person/one-vote” standard that we purport to honor in our popular conception of contemporary American democracy. Wyoming, for example, enjoys the same number of votes as California, even though there is over a 7000 percent disparity in the population of the two states.<sup>90</sup> Such disparities have real consequences in some policy domains, the most obvious of which is agriculture, which not only wastes many federal dollars but also makes it far harder for farmers in Africa to prosper.<sup>91</sup>

One might believe that President Obama will enjoy the support of the strongly Democratic Congress and thus be able to implement much of his program. At the time of this writing (November 18, 2008), it is still unclear whether the Democrats will have a “filibuster-proof” majority of 60 in the Senate. If not, then it is still conceivable that an ever-more conservative residue of Republicans in the Senate will be willing to exercise a more or less permanent filibuster in order to block—or at least significantly change—legislation by virtue of the constitutionally dubious (and certainly not constitutionally mandated) practice in the Senate of requiring sixty votes in order to bring bills to the floor for a vote. At least we were saved from the very high probability that a President McCain would have spent much of his term vetoing Democratic legislation and therefore contributing to the alienation of the public that voted, quite overwhelmingly, to change the composition (and, presumably, the policy outcomes) of Congress.<sup>92</sup>

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89. See LEVINSON, *supra* note 7, at 29-33.

90. Compare U.S. Census Bureau, California Quickfacts, <http://quickfacts.census.gov/qfd/states/06000.html> (last visited Mar. 1, 2009) (2006 population of about 36.5 million), with U.S. Census Bureau, Wyoming Quickfacts, <http://quickfacts.census.gov/qfd/states/56000.html> (last visited Mar. 1, 2009) (2006 population of about 500,000).

91. See Todd Moss & Alicia Bannon, *Africa and the Battle Over Agricultural Protectionism*, 21 WORLD POL'Y J. 53 (2004).

92. Such a result is typical of a “divided” government. See, e.g., MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., PRESIDENT CLINTON'S VETOES 2 tbl.1 (Apr. 7, 2004), available at <http://www.rules.house.gov/Archives/98-147.pdf> (showing that all of President Clinton's thirty-seven vetoes came *after* the Republicans gained control of both the House of Representatives and the Senate).

As a matter of fact, we should realize that the presidential veto power, in effect, characterizes an American political system that is significantly *tricameral*.<sup>93</sup> The president, in the words of the late political scientist Clinton Rossiter, has become our “chief legislator,” not only proposing legislation, but also able, in an almost literal sense, to “dispose” of legislation that he dislikes even despite strong (though not two-thirds) support in both houses of Congress.<sup>94</sup>

Any discussion of an ostensibly separation-of-powers system must take this legislative power of the president into account.<sup>95</sup> And, of course, we should also be aware that even the threat of a veto can shape almost any legislation.<sup>96</sup> Thus, a December 2007 dispatch by the Associated Press noted that “Congressional Democrats prepared ... for major concessions on Iraq war funding, children’s health insurance, tax policies, general spending and energy, because they could not overcome vetoes by President Bush.”<sup>97</sup> Members of the House and Senate are far more sensitive to the likelihood of a presidential veto than they are to the prospect that some court might, several years (and almost certainly at least one election cycle) later, invalidate some law they are currently considering.<sup>98</sup>

Critics of a strong judiciary often point to the fact that federal judges in the United States are *unaccountable* to the electorate in a way, for example, that state judges who must run for reelection are not. But consider the fact that presidents in their second terms are equally free of any accountability; the one thing they know from

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93. See Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 585 (2000).

94. See CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* 96-101 (John S. Hopkins Univ. Press 1987) (1956).

95. See, e.g., Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 31, 57-61 (2003).

96. See J. Richard Broughton, *Rethinking the Presidential Veto*, 42 HARV. J. ON LEGIS. 91, 131-32 (2005) (explaining that President Clinton enjoyed involvement in legislation and used his veto power to help shape it); Bill Nichols, *A Clinton Veto Poses Both Risk, Opportunity*, USA TODAY, May 25, 1995, at 4A (“The President, however, doesn’t really want to veto any of those bills, but rather hopes to shape legislation into a form he can accept.”).

97. Charles Babington, *Bush, GOP Prevail on Host of Hill Issues*, THE ASSOCIATED PRESS, Dec. 12, 2007, available at [http://talkingpointsmemo.com/news/2007/12/bush\\_gop\\_prevail\\_on\\_host\\_of\\_hi.php](http://talkingpointsmemo.com/news/2007/12/bush_gop_prevail_on_host_of_hi.php).

98. See SAMUEL KERNELL & HENRY KIM, *PRESIDENTIAL VETO THREAT AS A NEGOTIATING INSTRUMENT WITH THE BICAMERAL CONGRESS* 3 (2006), available at <http://weber.ucsd.edu/~skernell/files/APSA2006aKernellKim.pdf>.

the moment they take their second oath of office is that they will never again have to face the voters with regard to their presidency. Instead, they feel altogether free to trumpet their independence from public opinion. It may well be true that presidents have relatively little unilateral power to bring about significant change in domestic politics, but they have a remarkable power to forestall it by exercising their veto power.<sup>99</sup> We are long overdue for a national discussion of whether we are well served by our peculiar form of government—one that places such a critical power in the hands of a single, fundamentally unaccountable individual.

One should not believe that presidents represent the country as a whole, regardless of how many presidents (and their supporters) might like to describe themselves as tribunes of the entire national population. One must realize that our bizarre system of electing presidents through the Electoral College assures that almost no candidates run truly national campaigns. So even if first term presidents are held accountable because of having to run for reelection, they focus only on a mixture of their “base” and “battle-ground” states, which leads to remarkable pandering to the latter and an almost total disregard for “wrong-color” states.<sup>100</sup>

There is, of course, one area in which the president does have significant powers to bring about change, and that involves foreign and military power. As President Bush famously said, “I hear the voices, and I read the front page, and I know the speculation. But I’m the decider, and I decide what is best,”<sup>101</sup> though, in truth, similar sentiments could have been declared by most of his predecessors. It was Bill Clinton, after all, who sent American troops to Haiti and waged war in the South Balkans with no semblance of congressional authorization or approval by the United Nations.<sup>102</sup>

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99. See SOLLENBERGER, *supra* note 92, at 2 tbl.1 (showing that thirty-five of President Clinton’s thirty-seven exercised vetoes held).

100. Although Senator Obama ran a much more “national” campaign than most recent Democratic candidates, and ultimately carried some states, like Virginia and Indiana, that had not voted Democratic in several decades, it is still the case that he was basically invisible in such Republican “base” states as Texas, or, for that matter, the Democratic “base” state of California. Instead, as with Senator McCain, he spent most of his time during the campaign in repeated visits to states like Pennsylvania, Florida, and Ohio as well as the “new” battlegrounds of Virginia, Colorado, and Indiana.

101. Ed Henry & Barbara Starr, *Bush: “I’m the Decider” on Rumsfeld*, CNN.com, Apr. 18, 2006, <http://www.cnn.com/2006/POLITICS/04/18/rumsfeld/> (last visited Mar. 1, 2009).

102. Blaine Harden & John M. Broder, *Clinton’s Aims: Win the War, Keep the U.S. Voters*

The Bush Administration, though, has also been characterized by its claims that Bush, presumably, like any president, had the inherent power to order torture or to violate any other basic norms in the interest of “national security.”<sup>103</sup> Even if one takes proper umbrage at some of these claims, there is no doubt that presidents must exercise a fair degree of discretionary power in the international realm and must be free to make almost instantaneous decisions should the United States be attacked or threatened with the risk of attack. It is no easy matter to decide how restrictive we want to be when handing the reins of power to a new president.<sup>104</sup>

My own view is that this makes it all the more important that we develop ways of holding presidents accountable for misjudgments that ultimately threaten national security rather than enhance it. It is a remarkable feature of our American system that the Commander-in-Chief can fire generals and admirals in whom he loses confidence, but that the American public has no similar power, acting through Congress, to fire a Commander-in-Chief in whom it has deservedly lost confidence. We should not have to wait until our presidents are exposed as out-and-out criminals in order to evict those from the Oval Office who we do not trust to make wise decisions that literally involve issues of life and death. Indeed, there is the strong argument most political systems engage in serious constitutional reform only after catastrophes. One hopes that the United States will not have to go over a cliff in order to begin creating a Constitution that is fit for twenty-first-century reality.

My central point is that students in civics courses should spend at least as much time learning, and arguing about, the questions posed by the hard-wired structures of American government as they do about censorship of student speech, abortion, or affirmative action. It is not that these latter topics are not fun to talk about, at least to people who like to argue, but what students must realize is that the Constitution is fatally indeterminate with regard to all of these latter issues. The actual decisions of courts will inevitably

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103. See Charlie Savage, *Bush Could Bypass New Torture Ban*, BOSTON GLOBE, Jan. 4, 2006.

104. See Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699 (2006).

reflect the basic predispositions of the judges themselves, who are capable of finding legitimate constitutional arguments for both A and not-A. The hard-wired Constitution is different. Justice Robert Jackson may have legitimately proclaimed the Bill of Rights to be “majestic generalities,”<sup>105</sup> but no rational person would apply this term to the clause that allocates voting power in the Senate or sets out the specific length of a president’s term of office. Changing those aspects of the Constitution would require far more than electing presidents who will nominate judges whose approach to constitutional interpretation are favorable to flexibility and change. It would ultimately require constitutional amendment, and that in turn requires something we most definitely do not have at present, which is a citizenry (or leaders) that is willing to ask tough questions about the adequacy of the Constitution.

As one hopes is obvious, I do not believe that one needs to be a lawyer to ask (or answer) such questions. But inasmuch as lawyers, for better and worse, play perhaps disproportionate roles as civic leaders, including their participation in such civic rituals as giving speeches on “Constitution Day,” it is essential that those institutions devoted to training American lawyers stop identifying the Constitution with only those very small, frequently litigated parts and instead take far more seriously the task of creating “citizen lawyers” fit to play their roles in civic life. To offer such an education would require, for better or worse, some quite fundamental changes in the curricula of law schools, which are only a little easier to achieve than amendment of the Constitution! As with amendment, such change is unlikely to come from the faculty itself, which has a vested interest in maintaining a status quo with what it is familiar and with which the plethora of casebooks agree. Ideally, students will take the lead in demanding necessary changes and forcing, if not the changes themselves, then, at the very least, a long overdue conversation about the cogency of our contemporary approach to teaching the United States Constitution.

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105. *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).