

ON THE INEVITABILITY OF “CONSTITUTIONAL DESIGN”

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I am delighted to have been given the opportunity to offer some brief comments on the fascinating essay *Against Design*.¹ It is a long and rich piece raising many questions, and I emphasize that this comment is both brief and therefore necessarily insufficient as anything approaching a complete response. But I obviously hope that even these truncated remarks will help further an important conversation prompted by the four authors.

In reading their essay, one obviously thinks of a tradition of particularly English political thought identified most prominently with Edmund Burke and then, in the 20th century, with Michael Oakeshott, as well as the thought of the Austrian economist and theorist Friedrich Hayek,² cited early and prominently by the authors. Oakeshott, the least well known of the three, wrote an important book, *Rationalism in Politics*;³ it was, in effect, a full-throated attack on the very idea that the complexities of a political order could ever be captured by an overarching theory that, importantly, would allow one to engage in the self-conscious design of ostensibly transformative policies secure in the knowledge that one could know their likely consequences.⁴ It is this spirit that is well captured by the authors’ own rather confident declaration that “in all, the complexities associated with design—given heterogeneous and evolving actors, interests and motivations, incentives, social interaction, adaptive behavior and learning—make rational design and planning impossible.”⁵ With regard to such social planning, then, the authors’ message is almost literally “don’t even think of it.” Grand interventions are unlikely to be successful, and the belief that they might be is the opiate not of the masses, as Marx described religions counseling passivity in the face of oppression,⁶ but, rather, the opiate of overly confident intellectuals seduced

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1. Caryn Devins et al., *Against Design*, 47 ARIZ. ST. L.J. 609 (2015).

2. *Id.* at 613 nn.8–10.

3. MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* (1947).

4. *See generally id.*

5. *See Devins et al., supra* note 1, at 615.

6. Karl Marx, *A Contribution to the Critique of Hegel’s Philosophy of Right: Introduction*, MARXISTS.ORG, <https://www.marxists.org/archive/marx/works/1843/critique-hpr/intro.htm> (last visited Mar. 4, 2016).

by the prospect of helping society by using their formidable intellectual capabilities to redesign existing socio-political orders.

As it happens, my own interests in recent years have shifted quite sharply from what the legal professoriate calls “constitutional interpretation”—i.e., the process by which we assign meaning to the often cryptic words of the United States (or, for that matter, any other) Constitution—to the quite different enterprise of “constitutional design.” More to the point, in my 2012 book *Framed: America’s 51 Constitutions and the Crisis of Governance*, I distinguish sharply between what I call the “Constitution of Conversation” and the “Constitution of Settlement.”⁷ The first is basically that part of the Constitution that law professors deign to teach because it is the subject of vigorous litigation before the judiciary. (Think of the powers of Congress under Article I, Section 8, the Fourteenth Amendment, or the Bill of Rights.) We can argue vigorously if there is one best way to ascertain the meanings of these clauses, but the one thing we can be absolutely certain of is that these meanings have changed throughout our history,⁸ for good or for ill, and that they will undoubtedly change again in the future as the result of presidential elections and appointments (and confirmations) of new justices who will reflect ongoing transformations of the zeitgeist. These changes will, incidentally, also certainly be reflected in the vast domain of “the Constitution outside the courts,” where important decisions must be made by persons ranging from Presidents to local sheriffs about the operative meanings of the Commander-in-Chief Clause or what constitutes the “reasonable” use of deadly force when engaging with suspected criminals.⁹

As David Strauss has recently argued, one can probably best understand the actualities of the Constitution of Conversation by viewing it through the lens of traditional common-law methods.¹⁰ Precedent-based prudentialism is more important, at least in describing the actual history of American constitutional development, than slavish adherence to the icons of text, structures, or original intent/expectations (however specifically defined).¹¹

7. SANFORD LEVINSON, *FRAMED: AMERICA’S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 19 (2012).

8. See, e.g., Devins et al., *supra* note 1, at 631–35.

9. Mark V. Tushnet, *The Constitution Outside the Courts: A Preliminary Inquiry*, 26 VAL. U. L. REV. 437, 437–39 (1992); see also William M. Treanor, *The War Powers Outside the Courts*, 81 IND. L.J. 1333, 1333–44 (2006); Benjamin C. Zipursky, *Tempering Supremacy*, 73 FORDHAM L. REV. 1463, 1468–73 (2005).

10. See David A. Strauss, *Foreword: Does the Constitution Mean What it Says?*, 129 HARV. L. REV. 1, 4–5 (2015). The authors seem to be quite “Straussian” (David, rather than Leo) in making their own primary focus “judicial interpretations . . . the doctrines that give [constitutional provisions] life and meaning in specific situations.” Devins et al., *supra* note 1, at 630.

11. Strauss, *supra* note 10, at 4–5.

He is, I believe, substantially correct, and part of the appeal of his argument is not only that it conforms relatively well to the actual history of the litigated Constitution, but also that it rejects the emphasis on rigid “theories of interpretation,” with their own overtones of rationalism, in favor of paying due heed to the messier, but ultimately more satisfying, incrementalism of common law methodology. It is no coincidence that the most famous (even if unread) American exposition of the common law in America is that of Oliver Wendell Holmes;¹² he literally began his 1881 masterwork *The Common Law* with the thunderous declaration that

the life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law . . . cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.¹³

But the Constitution of Settlement ill-fits this paean to practicality, which I assume resonates with the authors of *Against Design*. However, *that* Constitution, however much it generates profound questions about the “wisdom” of its commands,¹⁴ generates few truly compelling questions about “meaning.” There is, indeed, much of the “book of mathematics” about it, including, but not limited to, the specific assignment of two (and not merely an equal number of) senators to each state;¹⁵ the percentages required to override presidential vetoes,¹⁶ ratify treaties,¹⁷ or convict a president who has been impeached by the House;¹⁸ or the formidable, and, as a practical matter, fundamentally unattainable even greater supermajority necessary to amend the Constitution.¹⁹ Fortunately, formal amendment has not, as Strauss emphasizes, been necessary to keep the Constitution of Conversation up to date;²⁰ all one needs is a combination of clever lawyering and receptive adjudicators. But the Constitution of Settlement is another matter. It establishes the basic institutional structures under which we conduct our

12. OLIVER WENDELL HOLMES, *THE COMMON LAW* (1881), http://www.gutenberg.org/files/2449/2449-h/2449-h.htm#link2H_4_0001.

13. *Id.* at 1.

14. LEVINSON, *supra* note 7, at 23.

15. U.S. CONST. art. I, § 3.

16. U.S. CONST. art. I, § 7.

17. U.S. CONST. art. II, § 2.

18. U.S. CONST. art. I, § 3.

19. U.S. CONST. art. V.

20. *See* Strauss, *supra* note 10, at 14–15.

politics, and there has been astonishingly little change since they were proposed and adopted in 1787–88. To be sure, there have been some important structural amendments—the Twelfth, Seventeenth, Twentieth, and Twenty-Second Amendments all made significant changes. But, obviously, the last of these was adopted more than sixty years ago,²¹ and there is no serious discussion, at least among “mainstream” politicians or pundits, of the possibility that we might display some of the same courage to assess whether changes are needed in our basic institutions as was present in earlier times.

I do in fact believe that many of our present institutions ill-serve us. If one, for example, believes, as I now do, that presidents have too dominant a power in crafting (or blocking) legislation because they can veto legislation secure in the belief that it is highly unlikely that two-thirds majorities necessary to override the veto will be obtained in both the House and the Senate, then a formal constitutional amendment is necessary to reduce the vote. Even more ominous, of course, is the fact that there is no way of “firing” a president in whom we have lost confidence with regard to basic issues of war and peace—and concomitant life and death—unless the president is guilty not only of appalling misjudgment but also of a “high crime and misdemeanor” qualifying him or her for impeachment. I also believe that it has become almost criminally unwise, albeit constitutionally required, to continue a discredited president in office until January 20 following an election clearly conveying a popular desire for a new direction in leadership. In all of these cases, formal amendment would ultimately be required, not to mention the ultimate joker in the deck, which is the necessity of formal amendment to make it easier to escape the present constraints of Article V by making it easier to amend the Constitution.

These attributes of the United States Constitution, designed at the Philadelphia Convention of 1787,²² essentially define and delimit the basic structures of the American government more than 225 years later. My own view, spelled out in two books, is that these design features, whatever their possible defensibility in 1787, basically constitute a clear-and-present danger to us today.²³ They make their own contribution to creating a dangerously dysfunctional political system where most people, regardless of political party, justifiably have little confidence in the ability of the national

21. U.S. CONST. amend. XXII.

22. George Anastaplo, *The Constitution at Two Hundred: Explorations*, 22 TEX. TECH L. REV. 967, 970–72 (1991).

23. LEVINSON, *supra* note 7; SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2008) [hereinafter LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*]; *see also* SANFORD LEVINSON, *AN ARGUMENT OPEN TO ALL: READING THE FEDERALIST IN THE 21ST CENTURY* (2015).

government to confront adequately the problems facing us as a nation. I therefore strongly support a new constitutional convention that might be able to draft a constitution more fitting to our 21st century “experience.”²⁴

But, then, this sets up an obvious tension with regard to the authors’ animus “against design.” It is one thing to endorse a “loose-fitting” constitution²⁵ with regard to the Constitution of Conversation that will, for better or worse, be interpreted as Strauss describes and, therefore, prove quite malleable. After all, it was no less a titan of American constitutional interpretation than Chief Justice John Marshall who reminded us that perhaps the most basic feature of the Constitution was that it was “intended to endure,” which meant, as a practical matter, that it necessarily had to be “adapted to the various crises of human affairs.”²⁶ No recipe for undue rigidity there!

As already noted, the Constitution of Settlement is quite different. “Adaptation” through clever lawyering seems fruitless.²⁷ Not even the cleverest lawyer is likely to persuade a court that simply because the United States Senate fails any plausible 21st century of democratic legitimacy, it is therefore unconstitutional. Ditto with regard to the other examples proffered above of the “mathematical constitution.” But, then, the question is squarely presented about the task of a convention: would it be to replace these badly designed features of the Constitution with presumably better designed alternatives, on the one hand, or to reject the blandishments of “design” entirely and place our security instead in the hands of more classically English tacit understandings and unwritten “conventions”? I confess that I see no alternative to adopting some version of the first option.

Can we, for example, really imagine—assuming that we stick with a presidentialist “checks-and-balances” system in the first place—declaring that the president will be inaugurated at a “reasonable time” and will serve a term of a “reasonable length,” along with senators and representatives who are also elected to serve terms of “reasonable length”? Even if one agrees that the president has too much sway over Congress because of the two-thirds veto override, would our preference once again be for “a reasonable expression by Congress” or, instead, would we want to specify, say, that only three-fifths or an absolute majority of each house of Congress assembled

24. LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 23, at 173.

25. See Adrian Vermeule, *Publius as an Exportable Good*, NEW RAMBLER REV. (Dec. 3, 2015), <http://newramblerreview.com/book-reviews/law/publius-as-an-exportable-good>.

26. See *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

27. See Sanford Levinson, *Reflections on What Constitutes ‘a Constitution’: The Importance of ‘Constitutions of Settlement’ and the Potential Irrelevance of Herculean Lawyering*, in PHILOSOPHICAL FOUNDATIONS OF LAW (David Dyzenhaus ed., forthcoming April 2016).

together would be sufficient to override? Indeed, if the Convention really decided to scrutinize carefully the entire system of government established by its 1787 counterpart, it would obviously have to confront the basic issues posed by bicameralism, and resolution of these issues would seemingly require adoption of some quite rigid rules. Whatever the circumstances necessary for informal systems based on tacit conventions and understandings to operate—which one suspects includes a high degree of social and cultural homogeneity—it is impossible to believe that they are present in today’s United States or, for that matter, in almost any country in the world faced with the practicalities of “designing” a constitution. It is one thing to tell such “designers” that they ought to be well aware of the cautions set out by the authors; it is quite another to say that all rigidities ought to be rejected in the light of the inevitable limits on human reason.

Still, one can believe that the results of the new convention, just as should have been the case with the 1787 handiwork, should be reasonably easy to amend. After all, it was not only Holmes but also, and perhaps more importantly, Publius, who in *The Federalist*, emphasized the importance of learning from the “lessons of experience.”²⁸ A central motif of *The Federalist*, set out in the opening essay, is that Americans are capable of engaging in “reflection and choice” with regard to designing their political system.²⁹ Perhaps the most inspiring evocation of this capacity comes at the conclusion of *Federalist 14*, where Publius writes:

Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?³⁰

But the central question is whether the lesson of experience is that suggested by the authors, which is the inability of ordinary human beings to engage in rationalist “design” at all, or, rather, whether we should be aware of the potential limits that are always a part of any decision we might make and, therefore, adopt, as part of the design process itself, a reasonably flexible method of self-correction that we call amendment? That being said, it is obvious, as the authors certainly realize, that amendment processes

28. Sanford Levinson, *Contemporary Lessons from the Federalist Papers*, PHILLY.COM (Dec. 13, 2015, 1:08 AM), http://www.philly.com/philly/opinion/20151213_Contemporary_lessons_from__The_Federalist_Papers_.html.

29. THE FEDERALIST NO. 1 (Alexander Hamilton).

30. THE FEDERALIST NO. 14, at 71–72 (James Madison) (Lawrence Goldman ed., 2008).

themselves are highly designed, with inevitable costs and benefits attached to one process over another.³¹ A final point is worth making, especially about such things as what one might expect in constitutional conventions or similar occasions devoted to close examination of constitutional possibilities. One ought not overestimate the role of “rationality” even in what might appear to be the most meticulous design process. The authors’ description of the Constitution as “thoughtfully designed in furtherance of certain objectives . . .” and, therefore, the “result of logical reasoning from the known axioms of human behavior, used to engineer superior means to achieve those stated ends”³² misses the obvious fact, which I am sure they are well aware of, that the handiwork of the Philadelphia Convention was the product of often contentious and even bitter compromises among distinctly competing views.³³ Publius, for example, made no attempt to defend the equal allocation of voting power in the Senate on “principled” grounds; rather, it was a compromise necessary to attain the primary objective, which was agreement on a Constitution that would allow the thirteen states³⁴—only eleven of whom in fact had ratified the Constitution by the time George Washington was inaugurated in 1789³⁵—to unite in a far stronger government that would allow, among other things, a far stronger defense against a variety of enemies who did not wish the new country well.³⁶ The Senate was a “lesser evil” than the presumptively greater evil of no constitution at all, and one could make the identical argument with regard to the various compromises made with regard to slavery.

As I have argued at length elsewhere, the Constitution was the product not of some kind of idealized “deliberative process” dominated by “logical reasoning” (though on occasion that might have been present), but at least as much of hard-driving “bargaining” and deal-making based far more on the rational assessment of threats issued by the parties, for example, to torpedo the Convention simply by walking out.³⁷ The result of these processes were, and would be in the future, a significant number of rigid rules relating at least to the establishment and operation of our most basic institutions, and these rules, inasmuch as they almost by definition are attempts to limit future possibilities, present all of the dilemmas emphasized by the authors.

31. Devins et al., *supra* note 1, at 617.

32. *Id.* at 619.

33. Derek A. Webb, *The Original Meaning of Civility: Democratic Deliberation at the Philadelphia Constitutional Convention*, 64 S.C. L. REV. 183, 216 (2012).

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

35. *February 04, 1789: First U.S. President Elected*, HISTORY, <http://www.history.com/this-day-in-history/first-u-s-president-elected> (last visited Mar. 4, 2016).

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

37. LEVINSON, *supra* note 7, at 33–53.

In any event, I presume that the authors cannot really be arguing that *all* design is impossible; specific designs may be decidedly unwise, but that does not negate the fact that designs are inescapable. I presume that what they really want to do is make us aware of the limits on rationality and the necessity to build into our designs mechanisms of self-correction. As indicated at the outset, much more could be said about the rich analysis offered by our four authors; their argument that any traditional notions of the “rule of law” have been “upended” by the contemporary realities of the American legal order, easily merits additional discussion. They attractively note that “[h]ow to generate a constitutional order of ‘meta-institutions’ is a deep problem about which we know very little.”³⁸ This, however, is not the occasion for further elaboration of such issues. I am content to limit these remarks to the challenges presented by the most formal features of any outcome of what we will continue to refer to as “constitutional design.”³⁹

38. Devins, *supra* note 1, at 673.

39. See *e.g.*, COMPARATIVE CONSTITUTIONAL DESIGN (Tom Ginsburg ed., Cambridge Univ. Press 2014).