

2013

“Reflection and Choice”: A One-Time Experience?

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Recommended Citation

Sanford Levinson, *“Reflection and Choice”: A One-Time Experience?*, 92 Neb. L. Rev. (2014)

Available at: <http://digitalcommons.unl.edu/nlr/vol92/iss2/2>

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“Reflection and Choice”: A One-Time Experience?¹

I am absolutely delighted, as well as obviously honored, to be asked to deliver this year’s lecture honoring the career of former Lincoln native and Nebraska College of Law Dean Roscoe Pound. One could speak of many facets of his career, one of the most important in the first half of the twentieth century. I want to draw a certain inspiration from one of his most famous interventions in public debate, his 1906 address to the American Bar Association on “The Causes of Popular Dissatisfaction with the Administration of Justice.”² I will not be speaking today specifically about the administration of justice, at least in the sense that Pound used it to refer to the justice administered by courts. Much of my recent work has been motivated, however, by “popular dissatisfaction” with the operation of our political system, particularly at the national level.

I began my most recent book, *Framed: America’s Fifty-One Constitutions and the Crisis of Governance*,³ with a litany of quotations from

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1. Prepared for delivery as the annual Roscoe Pound Lecture at the University of Nebraska College of Law on March 7, 2013. I am very grateful for the opportunity to visit the law school and, more particularly, to Professor Richard Duncan for taking the lead in inviting me and to Professor Richard Moberly for taking excellent charge of the mechanics of my visit, including arranging a visit to the Unicameral, where I was able to spend some valuable time with the Speaker. It was, in every way, a banner day, not least because I also had the opportunity to visit the classes taught by Professors Duncan and Eric Berger, as well as to meet several really interesting students at a luncheon arranged through the auspices of Dean Susan Poser. Anyone who wishes to comment on any aspect of this lecture should get in touch with me at slevinson@law.utexas.edu.
2. AM. BAR ASS’N, REPORT OF THE TWENTY-NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 11 (1906) (recounting the proceedings but not reprinting the speech); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1926) (containing Pound’s actual address).
3. SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012).

a variety of pundits and analysts across the political spectrum who describe the contemporary national political system as “dysfunctional” or even, as New York Times columnist Thomas L. Friedman put it, “pathological.”⁴ A variety of recent polls conducted since I finished that book about fourteen months ago certainly suggest a similar and continuing public perception. For example, as I write these remarks at the end of July 2013, a compilation of polls taken throughout the month indicated that approximately 16% of the public “approved” of Congress, while a bit over 76% “disapproved,” a gap of 60%.⁵ As a matter of fact, Congress has generally not enjoyed majority approval since 1998; interestingly enough, the temporary high of over 80% was reached in the halcyon days immediately after September 11, 2001, nearly doubling the approval rate of only 42% in a poll completed on September 10.⁶ Since then, it has literally been downhill so far as the slope of approval is concerned. The current approval rate of nearly 15% is actually a quite dramatic jump, in one sense, from August 2012, when the Gallup Organization noted that the number had reached a “historic low” of 10%.⁷

President Obama does considerably better. According to Gallup, he entered Inauguration Day of 2013 with a 50% rate of approval.⁸ He has lost some support since then, receiving the “approval” of approximately 45% at the end of July. Even the Supreme Court, which traditionally has scored the highest of our three basic institutions in popular approval, is seemingly near historic lows. A Gallup poll taken in mid-July 2013 found a 43% approval rate for the Court, with 46% disapproving.⁹ This represents a slight drop from the 46% approval level (with 45% disapproving) in July 2012, shortly after the Court’s decision upholding the insurance mandate in the case testing the constitutionality of “Obamacare.”¹⁰ One should not overestimate the importance of the relatively small differences among the various polling

4. THOMAS L. FRIEDMAN & MICHAEL MANDELBAUM, *THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND HOW WE CAN COME BACK* 243 (2011) (lamenting the “pathologies of the [American] political system”).

5. See *Congressional Job Approval*, REAL CLEAR POL., http://realclearpolitics.com/epolls/other/congressional_job_approval-903.html (last visited July 29, 2013).

6. See Ariel Edwards-Levy, *Congress Approval Rating Hits All-Time Low in Gallup Poll*, HUFFINGTON POST (Aug. 14, 2012, 6:12 PM), http://www.huffingtonpost.com/2012/08/14/congress-approval-rating-all-time-low-gallup-poll_n_1777207.html.

7. *Id.*

8. *Presidential Approval Ratings—Barack Obama*, GALLUP, <http://www.gallup.com/poll/116479/barack-obama-presidential-job-approval.aspx> (last visited May 20, 2013).

9. Andrew Dugan, *Americans’ Approval of Supreme Court Near All-Time Low*, GALLUP, <http://www.gallup.com/poll/163586/americans-approval-supreme-court-near-time-low.aspx> (last visited Aug. 5, 2013).

10. *Supreme Court*, GALLUP, <http://www.gallup.com/poll/4732/supreme-court.aspx> (last visited May 20, 2013).

agencies, which can depend on a variety of vagaries ranging from basic methodology to the specific days the polls were taken. That being said, it should be difficult for anyone actually devoted to the institutions in question to take much comfort from the data, even if President Obama and members of the Supreme Court can emphasize how much better they are doing, relatively speaking, than Congress.

If one looks at the answers given in April 2013 to the question of how well things are going in the country today, exactly half of the answers say “pretty badly or very badly” while only 7% say “very well.”¹¹ Perhaps one can take comfort in the fact that 7% represents a doubling of the 3% who a month earlier deemed the country doing “very well,” but surely this is cold comfort indeed. Or consider the responses to another Gallup poll asking, “How much of the time do you think you can trust government in Washington to do what is right—just about always, most of the time, or only some of the time?” At least in 2010, only 19% said “always/most of the time,” while 81% offered a more pessimistic answer.¹²

Still, what does one make of this data? I have suggested, for example, not altogether kiddingly, that King George and the British Parliament might have registered better numbers in 1775, but so what, even if that is true? No one believes the United States is even close to a “revolutionary” situation. Indeed, what is most striking is the remarkable docility of the American public. Disruptions by members of the Tea Party of “town meetings” in 2010 brought forth anguished discussion of the demise of “civility,”¹³ though, frankly, they were extraordinarily minor as genuinely radical protests go. And the left is almost completely quiescent; the various “Occupy” movements, after a brief flurry, seem to have faded without leaving any trace in American politics (unlike the Tea Party).¹⁴ I recently organized a major conference at the University of Texas around the question, “Is America Governable?” One’s answer, of course, depends in part on the definition he or she gives to “governability.” If “governability”—or what we might even call the “state of the Union”—is measured by docility and acquiescence to what government does, even if one finds it objectionable or even wretched, then the state of the Union is just fine. One looks around the world and finds, for example, more marching in the

11. *Direction of the Country*, POLLINGREPORT.COM, <http://www.pollingreport.com/right.htm> (last visited May 20, 2013).

12. *Trust in Government*, GALLUP, <http://www.gallup.com/poll/5392/trust-government.aspx> (last visited May 20, 2013).

13. See, e.g., Barbara Ray, *The Demise of Civility One Tennis Game at a Time*, BABS RAY (July 10, 2011), <http://mybarbararay.com/2011/07/10/the-demise-of-civility-one-tennis-game-at-a-time/>.

14. Michael S. Schmidt, *For Occupy Movement, a Challenge to Recapture Momentum*, N.Y. TIMES, Apr. 1, 2012, at A21, available at <http://www.nytimes.com/2012/04/01/us/for-occupy-movement-a-challenge-to-recapture-momentum.html>.

streets or disruptive strikes even in the countries we identify as part of “democratic Western Europe.”¹⁵

But does quiescence equal “popular dissatisfaction” or, perhaps more ominously, simply the belief that nothing can be done? Perhaps we believe, as did Pound,¹⁶ that elemental justice requires that we confront, at least intellectually, the inadequacies of either our system of justice or of the wider political system. Perhaps more cynically, as suggested by Richard Posner’s conservative defense of an at least modestly redistributive welfare state,¹⁷ we might believe that we can’t afford to take the risk that the measured dissatisfaction, if not confronted and alleviated by necessary reforms, will generate much more ominous forms of protest, as well as social and political disruption, even if that is absent today.

So, let me place my own reformist cards on the table. I believe that at least some of our present discontents can be traced directly to the dysfunctionality generated by the Constitution of 1787. Consequently, I strongly favor a new national constitutional convention that could, for the first time in 225 years, subject the Constitution drafted and ratified in 1787–1788 to rigorous review. In calling for a convention—and thinking of the kinds of issues that might be on the table—I take inspiration from the history of the American states, very much including Nebraska. I have come to believe that no one should be allowed to graduate from law school without reading a fine book by John Dinan, a political scientist now teaching at Wake Forest University, titled *The American State Constitutional Tradition*.¹⁸ The point that Dinan makes, and that I incorporate into the title of my own book, is that it is a grievous error to focus exclusively on the single example of the United States Constitution and wholly ignore, as is commonly the case in far too many law schools, the existence of the fifty other *state* constitutions and the lessons they might teach us.¹⁹ Perhaps the most important single lesson, beyond the discovery that there is significant

15. See, e.g., Peter Apps, *Political Risks to Watch in Western Europe in 2011*, REUTERS, <http://in.reuters.com/article/2010/12/22/idINIndia-53720820101222> (“Almost all European countries have seen an increase in strikes, street protests and unrest in the financial crisis—and it looks set to get worse in 2011.”) (last visited July 30, 2013).

16. See *supra* note 2 and accompanying text.

17. See Richard Posner, *Contrived and Natural Inequality*, THE BECKER-POSNER BLOG (Feb. 11, 2013), <http://www.becker-posner-blog.com/2013/02/contrived-and-natural-inequalityposner.html>; Richard Posner, *Income Inequality and Envy*, BECKER-POSNER BLOG (Aug. 22, 2011), <http://www.becker-posner-blog.com/2012/10/luck-wealth-and-implications-for-policy-posner.html> (“Inequality could reach a point at which a relatively small group controlled such a large fraction of the nation’s wealth that a political movement could rally support for dispossessing them of their wealth.”).

18. JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2006).

19. *Id.* at 4.

variation in the way that some of our basic institutions can be organized, is the extent to which state constitutions are far more democratic—and therefore open to change—than is the national Constitution.²⁰ Even a modest encounter with state constitutions immediately challenges any facile notion that “Americans believe” in a single notion of how best to organize government and actually carry out the important norm of achieving government by “consent of the governed.”²¹

Political scientists sometimes refer to the “n-of-1” problem,²² by which they refer to the difficulty of generalizing from single examples. Sometimes, to be sure, that is the best one can do, but one should usually strive to maximize the number of genuinely comparable examples before making confident declarations about what the evidence demonstrates. Nowhere is this problem more exemplified than in the facile comments we often make about “American constitutionalism” because we look exclusively at only one of the constitutional data sets available to us.

Nebraska is of particular importance to me for two reasons. As everyone here knows extremely well, Nebraska has seemingly governed itself quite well for over seventy-five years with only the single Unicameral.²³ I think it is unfortunate that Nebraska remains unique among the American states in doing so. If one takes seriously the notion that a virtue of federalism is that states can become “little laboratories of experimentation,” in Justice Brandeis’s oft-quoted term,²⁴ then one should ask about the actual extent to which states learn from one another and change their own policies or even constitutions in accordance with what has been learned from some other state. Perhaps, of course, the right question is why Nebraska persists in its experiment. Perhaps there are those who argue that the failure of any other state to imitate Nebraska is proof that the decision to adopt the Unicameral was a mistake. My own view, though, is that Nebraska

20. *Id.* at 3.

21. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), available at http://www.archives.gov/exhibits/charters/declaration_transcript.html; see also Christian G. Fritz, *Recovering the Lost Worlds of America’s Written Constitutions*, 68 ALB. L. REV. 261 (2005) (emphasizing far greater importance of active popular sovereignty in state constitutions than in U.S. Constitution).

22. Sharan B. Merriam, *What Can You Tell from an N of 1?: Issues of Validity and Reliability in Quantitative Research*, 4 PACE J. OF LIFELONG LEARNING 51 (1995), available at <http://www.iup.edu/assets/0/347/349/4951/4977/10245/ba91cf95-79a7-4972-8c89-73ad68675bd3.pdf>.

23. See Kim Robak, THE NEBRASKA UNICAMERAL AND ITS LASTING BENEFITS, 76 NEB. L. REV. 791, 792 (1997).

24. See *New State Ice. Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

ought to be treated much more as the “maker” of valuable lessons on how to structure state governments than the “taker” of wisdom from those states that persist in bicameralism. I am also interested in the fact that Nebraska, like only North Dakota in the rest of the Union, requires a *supermajority* on its supreme court—in Nebraska’s cases, five out of seven justices—in order to invalidate as unconstitutional under the Nebraska constitution a law passed by the Unicameral (and, presumably, signed by the governor).²⁵

It is also crucial to realize, as I am sure you all do, that Nebraska did not begin with the Unicameral. Like almost all of the other states—Pennsylvania, Georgia, and Vermont are the exceptions, though all, alas, abandoned their original structures²⁶—it began its existence within the Union with two legislative houses.²⁷ The state abolished its senate only in 1934, as the result of adoption by the citizenry of a constitutional amendment ratified by the Nebraska electorate.²⁸ John Dinan places this development within the context of “particularly unpopular legislative sessions in 1931 and 1933” and the ability of supporters of unicameralism, led by United States Senator George W. Norris, “to secure far more than the required number of signatures to place a unicameralism initiative on the ballot.”²⁹ It appears highly relevant that Nebraska is one of the eighteen states that allow citizens to initiate constitutional change even without legislative acquiescence.³⁰ What this means, by definition, is that the citizenry can sidestep “representative government,” which relies exclusively on elected officials to make judgments about public policy, and instead engage in “direct democracy,”³¹ by which “we the people” become effective policy-makers instead of simply selecting the few “representatives” who are empowered to make policy. One might suggest that former Minnesota Governor Jesse Ventura, who advocated abolishing the Minnesota Senate,³² might have been more successful

25. NEB. CONST. art. V, § 2 (amended 1990) (“No legislative act shall be held unconstitutional except by the concurrence of five judges.”).

26. See the recent testimony of Rutgers’s Professor Alan Tarr to the Pennsylvania legislature on whether that state should return to its original decision. G. Alan Tarr, *Bicameralism or Unicameralism?* (2010), <http://camlaw.rutgers.edu/statecon/publications/bicameralism.pdf>.

27. Robak, *supra* note 23, at 791.

28. NEB. CONST. art. III, § 1 (amended 2000).

29. DINAN, *supra* note 18, at 172.

30. See *supra* note 29 and accompanying text.

31. See, e.g., THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 1* (1989); *REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY* (David Butler & Austin Ranney eds., updated ed. 1994).

32. See Governor Jesse Ventura, *Service, Not Systems*, MINN. HIST. SOC’Y (1999) <http://www.mnhs.org/people/ventura/transcripts/903.pdf> (“To accomplish service, not systems, I am asking for the following: 1. A UNICAMERAL LEGISLATURE

in achieving this quite likely worthwhile goal if Minnesota had emulated Nebraska in allowing citizens to initiate potentially transformative constitutional amendments. Otherwise, of course, Ventura was in effect pleading with senators to vote themselves out of jobs, with predictable lack of success.

Nebraska has had only two constitutions and continues to operate formally under the 1875 constitution, in spite of the fact that it held a full-scale constitutional convention in 1919–1920.³³ That being said, the Nebraska Constitution had been amended 189 times as of 1994, when Houston political scientist Donald Lutz wrote a classic article on the process of constitutional amendment.³⁴ I am well aware that the Nebraska constitution has been amended since then, as with Initiative Measure 416, which was adopted in 2000 and banned legal recognition of same-sex marriage and civil unions.³⁵

For better and worse, Nebraskans have seemingly welcomed the possibility of thinking seriously about how they are governed and of changing constitutional essentials—which the Unicameral would certainly exemplify—if thought to be potentially helpful in achieving whatever purposes that presumably unite Nebraskans in their common political identity. One does not have to embrace every specific decision that Nebraskans have made (I regret the passage of Initiative Measure 416) in order to find attractive, when all is said and done, the ability of Nebraskans to engage in the most solemn task of citizenship. That involves questioning the adequacy of existing structures of government themselves. No less a looming presence, James Madison, quoting the Declaration of Independence, emphasized in his defense of the 1787 constitutional convention the basic right of all Americans to “abolish or alter”³⁶ their governments whenever they determined that they would achieve greater public happiness in doing so. Americans demonstrated this most vividly first in seceding from the British Empire via what we call the American Revolution and then by ruthlessly scrapping the Articles of Confederation in 1787.

to simplify the lawmaking process and force elected officials to be responsive and accountable to their constituents.”).

33. A. B. Winter, *Constitutional Revision in Nebraska: A Brief History and Commentary*, 40 NEB. L. REV. 580, 588–89 (1960–1961).
34. Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 248 (Sanford Levinson ed., 1995).
35. See Katie Lofton & Donald P. Haider-Markel, *The Politics of Same-Sex Marriage Versus the Politics of Civil Rights: A Comparison of Public Opinion and State Voting Patterns*, in *THE POLITICS OF SAME-SEX MARRIAGE* 316, 322–23 (Craig A. Rimmerman & Clyde Wilcox eds., 2007).
36. See *THE FEDERALIST* NO. 40, at 217 (James Madison) (J.R. Pole ed., 2005). See Fritz, *supra* note 21 for the importance of these clauses.

So with these remarks as the introduction that supplies the context within which I am thinking, I come to the significance of my specific title and its emphasis on “reflection and choice.” As important as the Philadelphia Convention was, it did not, in terms of legal fact, give us a new Constitution. All the Framers could do was to *propose* the replacement of the Articles of Confederation.³⁷ Ratification was the prerogative of the delegates chosen by a relatively broad—at least for the time—electorate to attend the state conventions mandated by Article VII of the new Constitution.³⁸ That Article itself was a radical rejection of the requirement in the Articles of Confederation that any amendment be validated by the unanimous consent of the state legislatures. It was just this guarantee, seemingly set out in Article XIII of the Articles of Confederation,³⁹ coupled with their fear that the Convention would “detract even further” from the stature of the Congress established by the Articles, which presumably encouraged Rhode Islanders to refuse to send any delegates at all to Philadelphia.⁴⁰ Rhode Islanders were, of course, absolutely correct about the potential consequences of the Convention but absolutely incorrect that Rhode Islanders would have the opportunity to exercise the veto ostensibly guaranteed them by Article XIII. Perhaps the single most important decision made in Philadelphia is indeed found in Article VII, inasmuch as it rendered irrelevant what Rhode Islanders thought of the new Constitution.

Still, there were the other states to worry about, including all-important states like New York and Virginia, the home states of Alexander Hamilton and John Jay, on the one hand, and James Madison, on the other. They are, of course, the three authors of *The Federalist*, devoted to encouraging possibly wavering delegates to support the new document that emerged from Philadelphia.⁴¹ There was nothing inevitable about ratification; the final New York vote was 30–27,⁴²

37. See Jack Rakove, *The Road to Philadelphia*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 98, 108 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

38. See *The Constitutional Convention of 1787*, EXPLORING CONST. CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/convention1787.html> (last visited Aug. 29, 2013) (providing a link to “The Constitution as Proposed in Philadelphia”).

39. ARTICLES OF CONFEDERATION OF 1781, art. XIII, para. 1, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=131>; see Rakove, *supra* note 37, at 99.

40. See Rakove, *supra* note 37, at 108 (“Two states—including the host, Maryland—balked at appointing delegates precisely because they feared the conference would detract even further from Congress’s stature.”).

41. *THE FEDERALIST* NOS. 2–5, 64 (John Jay), Nos. 1, 6–9, 11–13, 15–36, 52–57, 59–61, 65–85 (Alexander Hamilton), Nos. 10, 14, 18–20, 37–58, 62, 63 (James Madison).

42. PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 345–78, 396 (2010).

and one might well believe that the vote would have been different had the anti-Federalist opponents of the Constitution not been so unwise as to wait until June for their convention, during which New Hampshire became the all-important ninth state to ratify, which under Article VII of the Constitution gave it juridical life.⁴³ Equally important—probably more important as a political matter, given its population and geographical location—was that Virginia quickly followed as the tenth state.⁴⁴

So how did Alexander Hamilton approach his task, which was in effect to sell the Constitution to a potentially skeptical audience? It is worth looking very closely at Hamilton’s very first submission to the public in what we know as *The Federalist*.⁴⁵ Thus he proclaims at the very beginning that all Americans are in effect united by their “unequivocal experience of the inefficacy of the subsisting federal government.”⁴⁶ Later, in *Federalist No. 15*, he will refer to the “imbecil[e]” quality of that government established by the Articles of Confederation in America’s “first” (and largely forgotten) constitution.⁴⁷ One can easily argue, as in effect did James Madison in *Federalist No. 40*, that the most imbecilic feature of the Articles was Article XIII and its grant of an absolute veto to the extremely small state of Rhode Island.⁴⁸

One might still wonder if Hamilton isn’t being somewhat bullying in his tone. Did *all* Americans share the perception that the existing political order was “inefficac[ious]”?⁴⁹ Just as important is determining that even if this were the case, would it necessarily be a term of opprobrium? After all, many defenders of the present American system drafted by the Convention and then ratified afterward find it a feature, and definitely not a bug, that it establishes so many veto points that serve to prevent decision-making by one—or sometimes even several—American institutions alone. Consider in this context Justice Douglas’s evocation of his predecessor Louis Brandeis in the former’s concurrence in the *Steel Seizure Case*⁵⁰ that invalidated President Truman’s seizure of the nation’s steel mills in spite of Truman’s presumably good faith belief that it was necessary to the American war effort then taking place in Korea. “Legislative action may indeed often be cumbersome, time-consuming, and apparently inefficient,”

43. See Gregory E. Maggs, *A Concise Guide to the Federalist Papers As a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 847 (2007).

44. *Id.* at 847.

45. THE FEDERALIST NO. 1, *supra* note 36, at 1 (Alexander Hamilton).

46. *Id.*

47. THE FEDERALIST NO. 15, *supra* note 36, at 75, 78 (Alexander Hamilton).

48. THE FEDERALIST NO. 40, *supra* note 36, at 216 (James Madison).

49. THE FEDERALIST NO. 1, *supra* note 36, at 75 (Alexander Hamilton).

50. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

wrote Justice Douglas.⁵¹ But he then went on to quote from Justice Brandeis's classic dissent in *Myers v. United States*:

The doctrine of the separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.⁵²

So we should understand that *some* degree of inefficiency may be a feature of “*efficacious*” government rather than an index of a bad one. What that degree is may, of course, be difficult, perhaps even impossible, to determine as a practical matter.

There is still the “imbecility” charge, by which Hamilton suggested that the system created under the Articles of Confederation made it impossible, as a practical matter, for the United States to function as an effective government.⁵³ Hamilton was not, incidentally, the only person to use such sharp language. Edmund Randolph, the Governor of Virginia, according to James Madison’s notes of the Philadelphia Convention, exhorted his fellow delegates, on June 16, 1787, to do whatever was necessary to overcome “the imbecility of the existing Confederacy.”⁵⁴ The best proof of this proposition probably involves the raising of revenue,⁵⁵ essential, among other reasons, to pay for protecting the country against a variety of potential opponents. One might also point to the need for a free trade zone within the new country that would prevent the tariff wars that were already taking place depending on the fortuity of the location of seaports and the like. Yet there were certainly those at the time, and some American historians afterward, who disagreed and believed that the United States could have survived and prospered without the drastic changes proposed by the Philadelphians and ratified, sometimes by quite narrow margins, as in New York.⁵⁶

But I assure you that it is not the purpose of this lecture to offer any illumination on that particular controversy. I suspect that Hamilton and his nationalist friends were right about the deficiencies of the

51. *Id.* at 629.

52. *Myers v. United States*, 272 U.S. 52, 293 (1927).

53. THE FEDERALIST NO. 15, *supra* note 36, at 75 (Alexander Hamilton).

54. NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, REPORTED BY JAMES MADISON 127 (Ohio University Press 1966) (1840).

55. See CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION (2005).

56. See, e.g., MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781 (1959); Peter Onuf, *The First Federal Constitution: The Articles of Confederation*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 82 (Leonard W. Levy & Dennis J. Mahoney eds., 1987). Onuf suggests that “[t]he failures of the Articles [were] often exaggerated for rhetorical effect,” even if one agrees that there were sufficient “defects” that justified the Convention. *Id.* at 97.

Confederation. But, from one perspective, it does not matter. Even if one believes that ratification of the Constitution was a mistake, it cannot be undone. So discussions of whether the Constitution should have been ratified in 1788, like those involving, say, the legality of Congress’s annexation of Texas in 1845 or even the legality or illegality of South Carolina’s secession in 1860, are “academic” in the somewhat pejorative sense of that word. One thinks of seminar tables and, ultimately, irrelevance, rather than an issue that must concern us in our thinking today.

The far more important question is whether Hamilton’s remarks not only genuinely resonated within the context of the time and situation during which he was writing, but also resonate with us today, 225 years later. Quite obviously, for his initial readers he is defending the proposed constitution drafted in Philadelphia in what might be called “real time” and arguing, in no uncertain terms, that it is a decided improvement that should be accepted by all thoughtful Americans. But we are *not* that audience. We live in our own time, and the question for us is what *we* get, beyond a purely historical understanding, out of reading Hamilton today.

Perhaps we should wonder why *The Federalist* continues to appear, almost yearly, in brand new editions with new introductions. As the historian Ray Raphael reminds us in his recent book on “constitutional myths,” the essays that comprise *The Federalist* are read, and written about, far more today than was true at the time of their publication.⁵⁷ As he notes, following *Federalist No. 16*, “[N]o essays were printed in more than one paper out of” New York, and no essay after *Federalist No. 23* even “made it across New York’s borders at all,” save for *Federalist No. 38*, which was published in *The Freeman’s Oracle* in Exeter, New Hampshire.⁵⁸ The initial print run of the collected eighty-five essays was 500 copies, “with many of these left unsold.”⁵⁹ To be sure, John Marshall wrote in an 1821 case that “[i]t is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank”⁶⁰ That being said, though, it remains true that the popularity of *The Federalist*, and the explanation for the fact that more than 9,700 articles have been written about it, is a result of developments in the twentieth century and not a reflection of the actual importance of the essays at the time they were written. So it is altogether fitting to ask how we ourselves, today, respond to the arguments and language found in *The Federalist*.

57. See RAY RAPHAEL, *CONSTITUTIONAL MYTHS: WHAT WE GET WRONG AND HOW TO GET IT RIGHT* 106–07 (New Press 2013).

58. *Id.* at 111.

59. *Id.*

60. *Cohens v. Virginia*, 19 U.S. 264, 418 (1821).

In any event, I want to consider the implications of Hamilton's statement, immediately after his initial denunciation of the existing framework of government established by the Articles of Confederation, that

it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, *whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.*⁶¹

No sentence more marks Hamilton (or "Publius," the name under which he presented his arguments) as a child of the Enlightenment. He calls on his readers to join him in engaging in an unsentimental, intellectually ruthless evaluation of their political situation.⁶² One can imagine his hated enemy Thomas Jefferson at least agreeing with the sentiments Hamilton expresses, even if one doubts that Hamilton ever would have suggested the need for a "revolution" every nineteen years, as Jefferson at one point seems to have written.⁶³ In any event, the central question is not the actual views of Alexander Hamilton in historical time, but, rather, whether we, his readers, more than 225 years after the October 27, 1787 publication of Hamilton's essay, believe that it is a *continuing* project of those who take American constitutionalism seriously to subject the United States Constitution to Hamilton's standards of "reflection and choice."

As already suggested by my opening reference to Nebraska's constitutional history, we can ask similar questions, and find decidedly different answers, with regard to America's state constitutions. The principal source for Dinan's illuminating book, *The American State Constitutional Tradition*, after all, is the record of debates held at many of the more than 230 state constitutional conventions that have been held over the past two centuries.⁶⁴ One consequence of these conventions is that the typical American state has had just short of three constitutions in its history; Georgia and Louisiana have had 21 constitutions between them!⁶⁵ So my question, and challenge, is to

61. THE FEDERALIST NO. 1, *supra* note 36, at 1 (Alexander Hamilton) (emphasis added).

62. *Id.*

63. Letter from Thomas Jefferson to William S. Smith Paris (Nov. 13, 1787) (on file with the Library of Congress), available at <http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jeff64.php> ("God forbid we should ever be 20 years without such a rebellion.")

64. See DINAN, *supra* note 18.

65. See *Georgia Constitutions, Georgia Constitution Web Page Table of Contents*, GEORGIAINFO, <http://georgiainfo.galileo.usg.edu/gacontoc.htm> (last visited Aug. 29, 2013); STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM 1 (George Alan Tarr & Robert Forrest Williams eds., 2006) ("Louisiana holds the dubious distinction of having adopted eleven constitutions in less than two centuries.")

ask whether we as contemporary Americans—or perhaps anyone living elsewhere in the world—feel ourselves empowered to make informed and truly reflective choices about what is necessary to “establish [the] good government” that Hamilton proclaimed as the task before us, at least in 1787–1788.⁶⁶ Or do we instead feel ourselves to be trapped by contingencies of “accident and force”—including what political scientists call the path dependence generated by prior choices—that make a hollow mockery of claims to political autonomy? Are any consequences of what Roscoe Pound a century ago labeled “popular dissatisfaction”⁶⁷ traceable to the immovable barriers constituted during the earlier 1787–1788 period of “reflection and choice”?

After all, the American Revolution had been fought in large measure over claims by the British that the Parliament possessed full sovereignty over its North American colonies, and the triumph of the Revolution—and of the vision of government by consent of the governed set out in the Declaration of Independence—was sharply manifested in the first three words of the Preamble to the 1787 Constitution.⁶⁸ “We the People” would have full control over “ordaining” a new political order.⁶⁹ That is just what it means to be a free people, at least in 1787.

But, as already suggested, Hamilton was not offering praise of unfettered *will*, which could simply be completely arbitrary and unjust. Instead, what dignified the American experience, and made it of world-historical importance, is the aspect of *reflection* that precedes choice. Good reasons must be offered to the citizenry at large to be accepted or rejected on the basis of the quality of the arguments made. Thus, Hamilton promises, near the conclusion of his essay, to “frankly acknowledge to you my convictions, and I will freely lay before you the reasons on which they are founded. . . . My arguments will be open to all, and may be judged of by all. They shall at least be offered in a spirit which will not disgrace the cause of truth.”⁷⁰ It is irrelevant, frankly, whether Hamilton always lived up to this promise; he almost certainly did not. But the point is that he thought it important to assert the importance of what we today are inclined to call “deliberative democracy.” We can, more than two centuries later, find Hamilton’s promise deeply inspirational for us today, speaking to what Lincoln called the “better angels of our nature,”⁷¹ whether or not the historical

66. THE FEDERALIST NO. 1, *supra* note 36, at 1 (Alexander Hamilton).

67. AM. BAR ASS’N, *supra* note 2, at 11.

68. U.S. CONST. pmbl.

69. *Id.*

70. THE FEDERALIST NO. 1, *supra* note 36, at 3 (Alexander Hamilton).

71. “We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory . . . will . . . swell . . . when again touched, as surely they will be, by the

Hamilton ever envisioned that people would still be reading him two centuries later for reasons other than specific illumination about the events of 1787–1788. So what might it mean to be inspired by Hamilton today? Concomitantly, what might count as ignoring, or even betraying, the wisdom found in *The Federalist*?

Cynics sometimes refer to would-be democracies emerging from authoritarian backgrounds as adopting a principle of “one person, one vote, one time,” suggesting that the winners will use the power gained by surviving a presumptively legitimate election to entrench themselves in power forever.⁷² So we must ask ourselves if we look at what happened in 1787–1788 as demonstrating only a truly singular episode of government created by “reflection and choice,” with the citizenry thereafter unreflectively accepting what was done then. Or, instead, does it present a model for We the People *throughout* our collective lifetime, which includes emulating the Framers first by asking truly probing questions about the “efficacy”—perhaps even “imbecility”—of the government established by their Constitution and then offering suggested improvements, even if they are quite radical (as was the Constitution relative to the Articles), for contemporary “reflection and choice”?

One can look at the history of the United States since George Washington’s inauguration in 1789 as featuring additional episodes of “reflection and choice.” There have, after all, been some important textual amendments; one illuminating example is the Twelfth Amendment, added in 1803 prior to the presidential election of the next year in response to the realization that the electoral college system established by the Framers in 1787 was unworkable, perhaps even dangerous, once political parties became an established part of the American political order.⁷³ Some amendments are surely more important than others—and one of them, of course, was repealed by a successor amendment⁷⁴—but all were added to the text after at least some public discussion and choice. Still, I think it is accurate to say that few people are now living who can remember such reflection and choice; the last truly significant alteration, after all, was the Twenty-second Amendment, added in 1951 to remove any temptation that a future

better angels of our nature.” Abraham Lincoln, First Inaugural Address (March 4, 1861), *reprinted in* IV THE ABRAHAM LINCOLN ASS’N, THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 271 (Roy P. Basler ed., 1953), *available at* <http://www.abrahamlincolnonline.org/lincoln/speeches/linaug.htm>.

72. *See, e.g.*, Nick Gray, *A Cynical View of Middle East Democracy—One Person, One Vote, One Time?*, COMMENTATOR (Sept. 14, 2012), http://www.thecommentator.com/article/1652/a_cynical_view_of_middle_east_democracy_one_person_one_vote_one_time.

73. *See generally* TADISHA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787–1804 (1994).

74. U.S. CONST. amend. XXI (repealing the Eighteenth Amendment).

President emulate Franklin Delano Roosevelt by running for a third term in office.⁷⁵ There have been five amendments added since then,⁷⁶ but I dare say that only specialists could identify them, and none of them was the result of any genuine national debate. Nor has any had truly measurable impact on the polity in general.

What is required in order to take seriously the possibility of achieving "reflection and choice" today with regard to a discussion of the adequacy of the United States Constitution? Let me suggest the following answers, though they are only the beginning of the inquiry. First, and perhaps most obviously, we must assume that the Constitution *ought* to be subjected to full and fearless critique. One might well hope that it survives the critiques and reinforces what may be a present belief that it is truly splendid, but, at least for the period of "reflection and choice," one will have to suspend any such assumptions and instead take seriously the possibility that we have blinded ourselves to deficiencies, some of them potentially extremely serious. Because the New Hampshire constitution gives the electorate the opportunity every ten years to call a new state convention, there have been seventeen such conventions over its history, but the state still operates under the 1784 constitution, as amended, rather than a brand new constitution.⁷⁷ Presumably one can say this is fairly strong evidence for the proposition that New Hampshireites genuinely like their constitution, precisely because they have so often subjected it to "reflection and choice." Can one so easily say the same thing about constitutions that have never been the object of the kind of systematic reflection that one might well associate with the solemnities of a formal convention? Going back to Socrates, it has often been suggested that only the "examined life" is truly worth living.⁷⁸ Might one say the same thing about a polity, that there is something debased about a reluctance to examine the mechanisms of government that may determine in important respects the potential quality of civic life?

But a second assumption is that "we the people" are in fact *capable* of such an inquiry, so those who embrace the Hamiltonian creed of full candor in argument will be received by an audience consisting of persons who will, even if they ultimately reject those arguments, do so in a spirit of good faith by presenting their own reasons that can equally be subjected to review by potentially critical readers. One might say that there is ample *motive* for a new convention if one links, as I do, the causes of popular dissatisfaction to the deficiencies of the United

75. See U.S. CONST. amend. XXII.

76. See U.S. CONST. amend. XXIII-XXVII.

77. N.H. CONST. pt. II, art. 100.

78. PLATO, *The Apology of Socrates*, in APOLOGY OF SOCRATES AND CRITO 55, 138 n.38(a) (Louis Dyer ed., Boston, Ginn & Co. 1895) ("The unexamined life is not worth living.").

States Constitution itself, but that doesn't resolve the issue of *capacity* to engage in the required degree of scrutiny and analysis. Do we, as a people, actually possess whatever it takes to engage in genuine self-governance, to offer a truly genuine "consent" to what, even at their best, may still be described, at least on occasion, as structures of domination as well as possible liberation? This surely involves a mixture of knowledge and analytic ability, on the one hand, and proper dispositions in behalf of seeking a public interest and capacity for self-discipline and the taming of purely egoistic considerations.

One can scarcely read *The Federalist* as expressing any great faith in what we today might view as "democracy." Still, Hamilton is expressing his faith that there exists among his readers a critical mass of those with the proper disposition and abilities and that it is worth taking the pains to write the essays we know as *The Federalist* in an attempt to engage with them. Although he expresses a certain skepticism (or cynicism) about the motives of at least some opponents of the new Constitution, Hamilton professes to concede that some of its opponents are in good faith, motivated by the same desire he has to serve the public interest.⁷⁹ As such, why shouldn't he expect them to change their minds when presented with arguments that address their concerns and demonstrate why they have little, if any, reason to worry?

Whatever doubts the historical Hamilton might have possessed, he does in *Federalist No. 1* seem to suggest the possibility of an American public that can be trusted to discuss and then decide absolutely basic questions that go to the heart of governance.⁸⁰ Indeed, it would seem paradoxical even to embark on writing *The Federalist*, and to desire its publication in newspapers available to the general public, without at least some measure of faith in the presumptive reading public. Do we think that is possible today? Or are we inclined instead to dismiss it as a quixotic, even potentially dangerous, fantasy?

The capacities and dispositions Hamilton must necessarily be drawing on are especially important in situations like those described by Publius, that is, a perception that adherence to the status quo would in effect take us over the cliff into disaster.⁸¹ After all, it is precisely dire situations that most call for both reflection and choice rather than almost literally thoughtless adherence to conventional

79. See generally THE FEDERALIST NO. 1, *supra* note 36 (Alexander Hamilton) (stating that there are certain classes of men who will either resist all changes that will lessen their power within their own States, will "aggrandize themselves by the confusions of their country, or will flatter themselves with fairer prospects of elevation from the subdivision of the empire into several partial confederacies than from its union under one government" but that "even such men may be actuated by upright intentions . . .").

80. *Id.*

81. *Id.*

wisdom. There would have been no constitutional convention in the first place, one can confidently surmise, if people thought that the Articles were working reasonably well or even merited the response that critics of the status quo often hear from critics: “If it ain’t broken, it doesn’t need fixin’.” This usually means that something has to be at least on the verge of utter collapse before it merits our attention, given both the expense of repair and the inevitable uncertainties that anything new would truly be better. This uncertainty is captured in another adage: “The devil you know is better than the devil you don’t.” This suggests, interestingly enough, that one may regard the status quo as quite devilish but, nonetheless, not sufficiently so to warrant trying a change.

Still, everyone in this audience knows that a new national convention, let alone a radically revised Constitution, is extremely unlikely. Why is that the case? As already suggested, the most satisfying answer would be that Americans have subjected their Constitution to what the Supreme Court might call “strict scrutiny” and have found it to be absolutely splendid, in no need of change (save perhaps for those members of the Tea Party who advocate repealing the Seventeenth Amendment and returning to the plan of the 1787 Constitution in which state legislatures selected members of the Senate). But one can say with confidence that, however satisfying such an answer might be, it is surely not correct. Even those persons one might expect to be especially interested in the Constitution, such as, say, professors of constitutional law, rarely spend any time in their classes or their scholarship on the elemental structures of the Constitution that I have taken to calling the “Constitution of Settlement.” Instead, we obsess, and teach our students to obsess, about a very different Constitution that I now call “the Constitution of Conversation,” precisely because those particular aspects of the Constitution—think, as the paradigm case, of the Equal Protection Clause—are subject to endless conversation and, more to the point, litigation about what exactly they mean at any given time. We know as well that the meanings can change via elections and appointment of new judges committed to different visions of constitutional meaning and possibility. Even political scientists, who might be expected to be more interested in the consequences of formal political structures, have exhibited relatively little interest in close study of basic American institutions. Perhaps more to the point, newspaper editorial pages and op-eds rarely discuss what many readers would no doubt find such boring issues as the value, in the twenty-first century, of the presidential veto (and the desirability of having to procure two-thirds of each house of Congress to override it) or, my particular hobbyhorse, the contribution that Article V makes to the infantilization of our political discussion by discouraging the

very idea of constitutional reform inasmuch as it appears, as a practical matter, impossible.

So one factor that might explain the presence of significant constitutional reform in Nebraska and many other states is simply that their own constitutions, by making it easier, actually create incentives for issue entrepreneurs like George Norris to keep pushing for the Unicameral.⁸² But that isn't a sufficient explanation. One must also take into account the extent to which Americans are taught, in a word that is the keystone of Madison's *Federalist No. 49*, to "venerate" the Constitution, to treat it, even if one is not Mormon, as perhaps graced, as Mormon theology claims, by a Divine presence.⁸³ If, as I have written elsewhere, the Constitution serves as the touchstone of America's "civil religion,"⁸⁴ then criticism of the Constitution, and suggestions that it needs radical revision, is almost literally sacrilegious. We are unable to see the Founders, for example, as truly *human* beings, which means, by definition, that they are capable of error even if we can happily concede that they were men of unusual ability. But even if we believe that they were unusually free from error in responding to the realities of 1787, it would treat them truly as almost science-fiction heroes to believe that they had an ability to see far into the future and, therefore, to create institutions guaranteed to work as well in the twenty-first century as in the eighteenth. Had they been capable of doing that, then perhaps they would have stipulated that Congress could create not only an army and a navy, but also an air force!

Most Nebraskans, I suspect—I have not done the necessary research—are blessedly ignorant of the particular people who framed their state constitution, as I suspect is true of states from Maine to Hawaii. The one exception may be Massachusetts, inasmuch as that document is ascribed to John Adams.⁸⁵ This may help to explain why the Massachusetts constitution is in fact older than the United States Constitution by seven years and, unlike most state constitutions, remains unreplaced even after 233 years.⁸⁶ In any event, "veneration" of state constitutions is in short supply—and I think this is an eminently good thing at least in any political system predicated on a robust notion of "self-governance."

There may be a special irony in the degree to which we have, as a culture, become almost fixated on our glorious Founders and their

82. See Robak, *supra* note 23, at 793.

83. See Ezra Taft Benson, *Our Divine Constitution*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <http://www.lds.org/general-conference/1987/10/our-divine-constitution?lang=eng> (last visited June 30, 2013) (At that time, Benson was the President of the Church of Jesus Christ of Latter Day Saints.).

84. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (Princeton Univ. Press 2d ed. 2011).

85. See Margaret H. Marshall, *Foreword*, 44 BOST. B. J. 4, 4 (2000).

86. *Id.*

handiwork. Not only does it ascribe to them capacities that no humans really have, but, perhaps even more to the point, it requires that we almost willfully blind ourselves to what might be most attractive in their legacy. I have already emphasized one of these legacies—the entreaty by Hamilton in *Federalist No. 1* to think for ourselves, to recognize that it is up to us, using our own faculties of “reflection and choice,” to assess our governmental institutions and, if need be, to change them.⁸⁷

This is captured as well in my favorite among all paragraphs of *The Federalist*, the conclusion of James Madison’s *Federalist No. 14*, where he urges his readers to reject the protests of defenders of the status quo who:

petulantly tell[] you that the form of government recommended for your adoption is a novelty in the political world; that it has never yet had a place in the theories of the wildest projectors; that it rashly attempts what it is impossible to accomplish. . . . 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? . . . Happily for America, happily we trust for the whole human race, they pursued a new and more noble course. They accomplished a revolution which has no parallel in the annals of human society. . . . They formed the design of a great Confederacy, which it is incumbent on their successors to improve and perpetuate.⁸⁸

Madison’s conclusion is a worthy complement to Hamilton’s injunction, in *Federalist No. 1*, to engage in “reflection and choice” with regard to what kind of government America will need in order to attain the great goals enunciated in the Declaration of Independence and then the Preamble to the Constitution.⁸⁹ Both are within the ambit of the Enlightenment, which can be summarized simply by thinking deeply of the implications of Madison’s call for his readers to reject “a blind veneration for antiquity, for custom, or for names.”⁹⁰ The injunction against being blinded by “names,”⁹¹ is presumably a reference to the “genetic fallacy” by which arguments are thought to rest on the prestige of the persons invoked in their favor than on the basis of actual evidence that can be adduced to support them. Instead, he calls on Americans to rely instead on “the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience.”⁹² Perhaps we can even imagine modern-day Madisons and Hamiltons wearing sweatshirts with the motto “Question Authority!” There are worse mottos for a free country.

87. THE FEDERALIST NO. 1, *supra* note 36, at 1 (Alexander Hamilton).

88. THE FEDERALIST NO. 14, *supra* note 36, at 73 (James Madison).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

In conclusion, then, I return once more to Roscoe Pound and his eloquent recognition that there was good reason to be dissatisfied with the operation of our institutions of justice and that we should use our talents of reasoned analysis to diagnosis our condition and suggest cogent remedies.⁹³ I have set out my own diagnosis in two books, *Framed*⁹⁴ and an earlier book, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*,⁹⁵ and they are the proper topic for another lecture. In any event, my deepest concern is not that people might disagree with my particular views, but rather, that we seem unable and unwilling even to engage in a serious discussion of the very possibility that there is anything to talk about with regard to the adequacy of our eighteenth-century Constitution in the twenty-first century. Earlier generations of Americans had such discussions, as occurred even on the national stage a century ago, during the Progressive Era, as well as the many more discussions that occurred on more local stages, including Nebraska's. It is time for us to renew that conversation.

93. See *supra* note 2 and accompanying text.

94. LEVINSON, *supra* note 3.

95. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).