ANNALS OF LAW

OUR BROKEN CONSTITUTION

Everyone agrees that government isn't working. Are the founders to blame?

BY JEFFREY TOOBIN

If there is a single point of consensus in this heated political moment, it's that everyone loves the Constitution. "Conservative or liberal, we are all constitutionalists," Barack Obama wrote, in "The Audacity of Hope." Ted Cruz, the junior senator from Texas, who emerged as a principal antagonist of the President's during the government shutdown, has often said much the same thing. The Founding Fathers, Cruz said, "fought and bled for freedom and then crafted the most miraculous political document ever conceived, our Constitution."

These homages are more than rhetorical tropes. Most politicians consider the validity of the Constitution off limits as a subject for debate. The Constitution, and the structure of government that it established, provides the backdrop, but never the subject, for every controversy. Obama, who taught constitutional law for more than a decade at the University of Chicago Law School, wrote, "The outlines of Madison's constitutional architecture are so familiar that even schoolchildren can recite them: not only rule of law and representative government, not just a bill of rights, but also the separation of the national government into three coequal branches, a bicameral Congress, and a concept of federalism that preserved authority in state governments, all of it designed to diffuse power, check factions, balance interests, and prevent tyranny by either the few or the many."

It's often noted that the United States is governed by the world's oldest written constitution that is still in use. This is usually stated as praise, though most other products of the eighteenth century, like horse-borne travel and leech-based medical treatment, have been replaced by improved models. (Thomas Jefferson believed that any constitution should expire after nineteen years: "If it be enforced longer, it is an act of force and not of right.")

Outside Washington, discontent with the founding document is bipartisan and widespread. In many ways, the contemporary debate reflects the framers' arguments, more than two centuries ago. How insulated should elected officials be from the demands of the people? How should power be divided among the federal and the state governments? What rights of the individual must be protected against the claims of the government? The Constitution offers only contingent answers to these questions. Indeed, in recent years particularly, it's become clear that politicians and voters, as well as judges, can play crucial roles in defining the contemporary meaning of the Constitution. The critics have the advantage of having seen the Constitution in action. On the left and the right, they are asking whether the pervasive dysfunction in Washington is in spite of the Constitution or because of it.

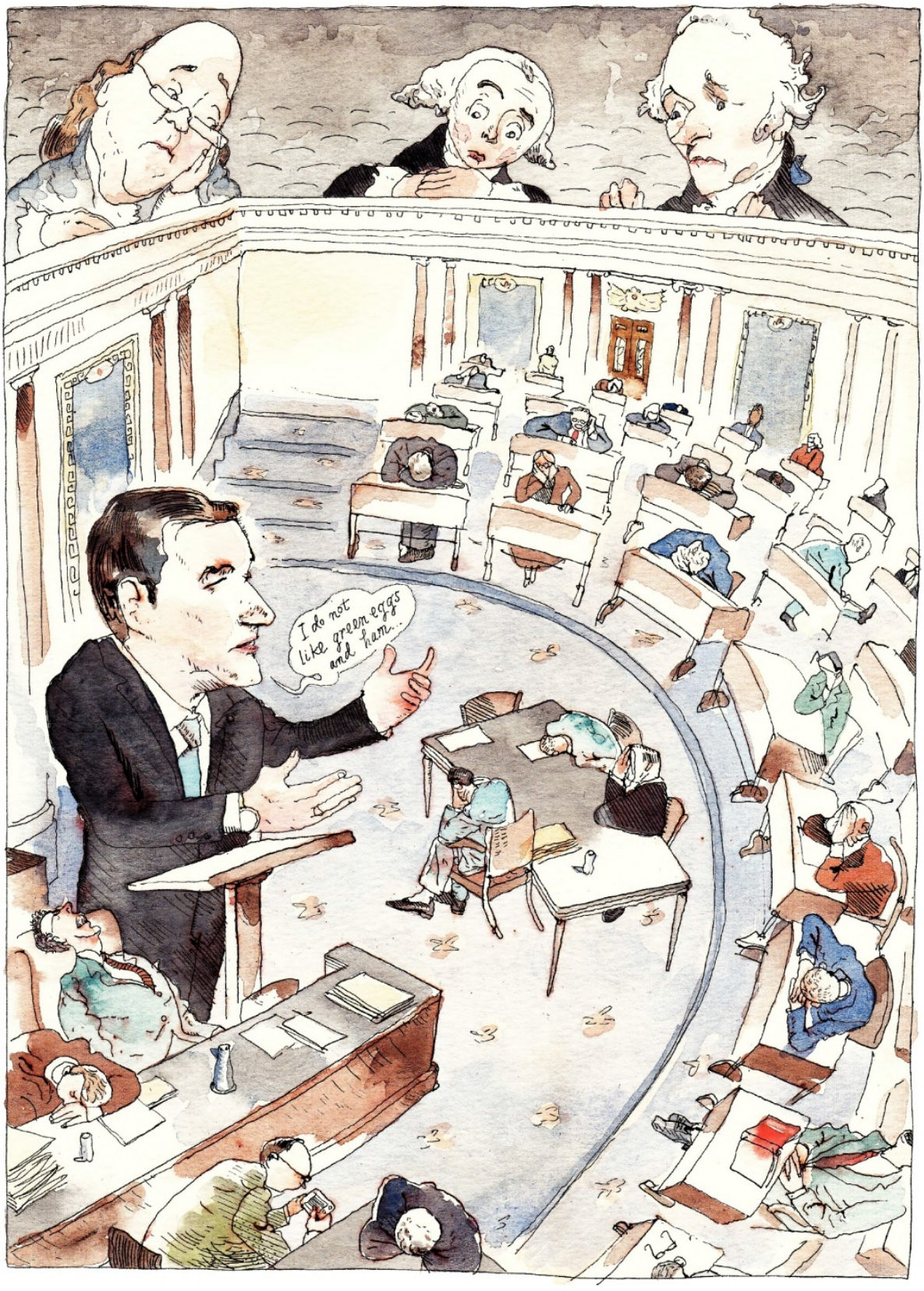
In 1987, Philadelphia hosted the national celebration of the two-hundredth anniversary of the signing of the Constitution. There were parades and an exhibit called "Miracle at Philadelphia." To foster viewer participation, the exhibit culminated with two scrolls, each bearing a question: first, "Will you sign this Constitution?" And, second, "If you had been in Independence Hall on September 17, 1787, would you have endorsed this Constitution?" Sanford Levinson, a professor of law at the University of Texas at Austin, made his way through the exhibit and struggled with the decision of whether to add his name to the scrolls.

Now seventy-two, Levinson is white-haired and cherubic, with an air of perpetual amusement. Seated in his office at Harvard Law School, where he is a visiting professor, Levinson described his dilemma. "I thought long and hard," he said. "If you look at the Constitution, you see that it was drafted by people who were not little-'d' democrats." This was most evident in what Levinson has called "the brooding omnipresence of American history—race and, more precisely, slavery." Implicitly but unmistakably, the 1787 Constitution allowed for the continuation of slavery. Women could not vote; in many places, only property owners could. The Bill of Rights, with its explicit defense of individual rights, did not become part of the Constitution until 1791.

Still, Levinson signed. He recalled that Frederick Douglass, the great abolitionist, ultimately supported the Constitution, with all its flaws, because he saw in it the "potential to mount a critique of slavery, and much else, from within." Levinson remembered, too, the words of Representative Barbara Jordan, the African-American from Texas, who served on the House Judiciary Committee during its impeachment investigation of Richard Nixon, in 1974. "My faith in the Constitution is whole; it is complete; it is total," Jordan said. Levinson concluded, "If it was good enough for them, it was good enough for me."

In 2003, Levinson returned to Philadelphia for the opening of the National Constitution Center, the sprawling museum and exhibition hall dedicated to celebrating the document. Visitors were again invited to pass judgment on the work of the founders. Indeed, the center organized a travelling nationwide project called "I Signed the Constitution," which purported to put visitors in the place of the delegates in 1787.

This time, Levinson didn't sign. "Between 1987 and 2003, I became less concerned about inputs and more concerned about the outputs," he told me. "In 1987, I thought a lot about the procedures that were used to set up the Constitution—whether they were democratic or not. At that time, I used to



Some critics consider the creation of the Senate, which acts as a brake on legislation, the original sin of the Constitution.

ILLUSTRATION BY BARRY BLITT

think, Well, what's the difference if it works? But I came to see that the system just does not work anymore. The outputs fail. It's not a government that can solve problems." Levinson elaborated on his misgivings in a 2006 book, "Our Undemocratic Constitution," which laid out a comprehensive critique.

The Constitution, Levinson wrote, places "almost insurmountable barriers in the way of any acceptable notion of democracy." He acknowledged that the worst aspects of the eighteenth-century Constitution—the institutionalization of race and gender discrimination—had been corrected through the amendment process. Still, he wrote, "the constitution is both insufficiently democratic, in a country that professes to believe in democracy, *and* significantly dysfunctional, in terms of the quality of government that we receive." In the past decade, Levinson has become the unofficial spokesman for progressive critics of the Constitution.

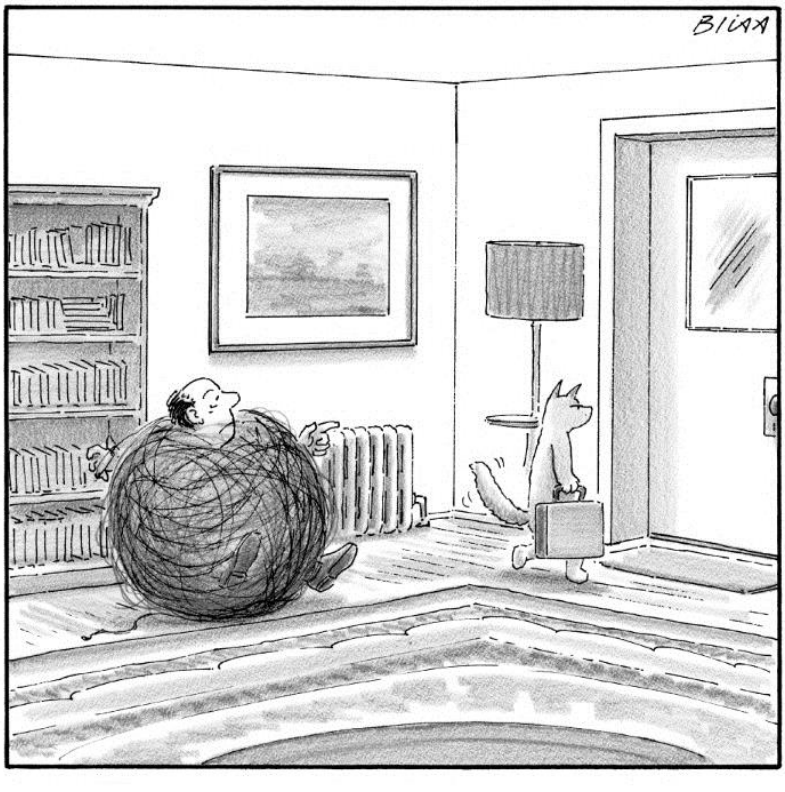
The core challenge of the Constitutional Convention was to persuade the representatives of the states to surrender some of the power they possessed under the Articles of Confederation, which had produced a weak and ineffectual national government. The delegates devoted most of their attention to the rights of states, not of individuals. This led to a debate about just how democratic the new government would be. "The framers were motivated by both democracy and élitism," Akhil Reed Amar, a professor at Yale Law School and the author of "America's Constitution: A Biography" (2005), told me. "The framers didn't trust ordinary people to make every decision. So you had Congress made up of a very small number of people. And their terms were longer than their counterparts in the state legislatures under the Articles, so they had some freedom to act outside of public pressure."

Both struggles—state vs. federal power, democracy vs. élitism—came together in the fight over the creation of the Senate. Federalists like Virginia's James Madison and New York's Alexander Hamilton, who were from larger states, insisted that the government existed to serve people, not the artificial entities known as states. Hamilton went so far as to consider the abolition of states altogether, with all power to be vested in the national government. Less radically, Madison pressed for a legislature based solely on proportional representation; the number of legislators would reflect the number of people in the state, not the state itself. As Hamilton wrote later, in Federalist No. 22:

> Every idea of proportion and every rule of fair representation conspire to condemn a principle, which gives to Rhode Island an equal weight in the scale of power with Massachusetts, or Connecticut, or New York; and to Delaware an equal voice in the national deliberations with Pennsylvania, or Virginia, or North Carolina. Its operation contradicts the fundamental maxim of republican government, which requires that the sense of the majority should prevail.

Several times during the summer of 1787, the Convention nearly collapsed as the small states refused to yield the powers they enjoyed under the Articles. Prodded by Benjamin Franklin, the éminence grise of the Convention, Connecticut's delegates, led by Roger Sherman, came up with the compromise that saved the young Republic. There would be two bodies in Congress—one based on proportional representation (the House of Representatives) and the other based on states (the Senate). "As an additional sop to the states, the Constitution said that senators would be chosen by state legislators, not voters," Amar said. "That was designed to make sure that the federal government would be responsive to the needs of the states."

In creating the national legislature, the delegates had to address the issue of slavery. Although slaves weren't citizens and couldn't vote, the Southern states wanted them to be included in the calculation of the over-all population, in order to boost the region's representation in the House. The North thought that the slaves should not count at all. In a way, the negotiated solution reflected the shameful reality that slaves in the United States were judged less than fully human. The standoff led to a notorious compromise: for purposes of apportioning seats in the House, each slave would count as three-fifths of a person. As the University of Pennsylvania historian Richard Beeman noted, in "Plain, Honest Men," his 2009 account of the Convention, the debate over the three-fifths rule took place with "a near-total



absence of anything resembling a moral dimension."

Progressive critics of the Constitution object to the compromises that favored the states' rights and the élitist side of the debate. "The process that produced the Senate is understandable," Levinson told me, "but the end result is indefensible." The distortion created by small states having an equal number of senators has dramatically worsened over the centuries. In 1787, when the Constitution was drafted, the largest state, Virginia, had about eleven times as many people as the smallest, Delaware. Today, California has roughly seventy times more people than Wyoming. To Levinson, the creation of the Senate was the original sin of the Constitution. The most obvious offense was that the power reserved to the slave states insured the survival of slavery. It took the Civil War to end it, and the Thirteenth, Fourteenth, and Fifteenth Amendments to overrule the three-fifths compromise.

The Senate continued to reflect its anti-democratic structure long after the Civil War. Through most of its history, it has been a graveyard for legislation, even after the Seventeenth Amendment, ratified in 1913, established the direct election of senators. Its primary function has been to stop bills, which are often supported by a popularly elected President and House members, from becoming law. In theory, the senatorial veto is available to both political parties, but a Senate in which less populated states wield disproportionate influence is fundamentally conservative in nature. In simple terms, in a world where progressives want government to change things and conservatives favor the status quo, a legislative body that makes legislating difficult will be a conservative force. The Senate blocked ratification of the League of Nations treaty after the First World War, civil-rights laws after the Second World War, and the Clinton health-care reform in the nineteen-nineties. "You've basically always had two parties in the country where one wants change and the other is more supportive of the status quo," Noah Feldman, a professor at Harvard Law School, said. "The Senate is an institution that stops change. That's how it's designed, and that is always going to hurt that party that wants change, the activist party. Today, that's the Democrats."

This, in a way, is the story of the Obama Administration. Obama was elected twice, both times by comfortable margins in the popular vote and by landslides in the electoral college. Though he will spend eight years in office, his tenure as the actual leader of the national government lasted about a year and a half. On July 7, 2009, Al Franken was seated, after a recount, as

the sixtieth Democratic senator. (Sixty votes are needed to overcome a filibuster.) Between that time and the end of 2010, Obama pushed through Congress health-care reform (the Affordable Care Act), financial reform (the Dodd-Frank legislation), a bailout of the automobile industry, a repeal of "don't ask, don't tell" in the military, and the ratification of an arms-control treaty with Russia. The President also won the confirmation of two Justices to the Supreme Court. In the midterm elections of 2010, Obama's party lost control of the House and fell below the filibuster threshold in the Senate.

Since then, Obama has failed to accomplish almost anything in Congress. Following his second Inauguration, the President embraced a gun-control bill that had universal background checks as its centerpiece. Even though polls showed that roughly ninety per cent of the public supported the idea, the legislation died in the Senate. (The less populated, more rural states are the ones most fiercely opposed to gun control.) A similarly large percentage of the public supports comprehensive immigration reform. That bill passed in the Senate but appears doomed in the House. Obama even failed to persuade Congress to fulfill its basic obligation to pay the bills and keep the government open. The shutdown, which lasted sixteen days, ended in a ceasefire, but the threat of closure and default will return early next year.

Levinson and his allies believe that the Constitution mandated a kind of institutional paralysis that allowed Obama to do too little. Another leading revisionist, arguably more influential than Levinson or any other law professor, draws the opposite conclusion: the Constitution allowed Obama to get away with too much.

Bald, bearded, and professorial at fifty-six, Mark Levin seems an unlikely media star. After serving in Ronald Reagan's Justice Department, he went on to lead a small conservative public-interest law firm, the Landmark Legal Foundation. Stints on Rush Limbaugh's radio program led to an offer, in 2003, to host his own nightly show on WABC, in New York. Levin (pronounced "le-*vinn*") doesn't have Limbaugh's raucous humor and he doesn't cheerlead for Republicans in the manner of Sean Hannity, but he has become the country's most widely followed commenter on the Constitution. His show is in the top five nationally (drawing more than seven million weekly listeners), and his books sell hundreds of thousands of copies. In "Men in Black: How the Supreme Court Is Destroying America," "Liberty and Tyranny: A Conservative Manifesto," and "The Liberty Amendments: Restoring the American Republic," Levin lays out a comprehensive critique of what he sees as the modern desecration of the Constitution.

Levin calls himself a "constitutionalist," which he has turned from a generic term (Obama used it in his book) into an ideological one. Like many conservatives, he is an originalist, holding that the Constitution's meaning was set and fixed by the framers. But Levin combines originalism with a kind of apocalyptic fatalism, a belief that the nation has gone so drastically off course that the damage may be irredeemable. "I think in many respects that we are in a post-constitutional era," Levin told me. "It's difficult to think of our current federal government—so ubiquitous in our lives, with its tentacles into everything—as consistent with what we understand to be the real meaning of the Constitution. The system that the framers set up was a good one, but it's not one we're living under."

Levin's prominence is bound up

with the Tea Party movement. When Republicans took control of the House in 2011, their first act was to stage a public reading of the Constitution (except the parts about slavery). Tea Party Republicans speak obsessively about how contemporary politicians, especially President Obama, violate the strictures of the Constitution. Levin assails the Affordable Care Act as the epitome of all that is wrong with modern American government. When a lower court struck down the law, in 2011, Levin said, "It is a great day for the rule of law and the citizenry." (The law was later upheld by the Supreme Court.)

Levin's constitutionalism has a distinctly populist edge. For him and the Tea Party as a whole, the meaning of the Constitution can be understood by any ordinary citizen, not just a small priesthood of lawyers and judges. As Theda Skocpol and Vanessa Williamson wrote, in "The Tea Party and the Remaking of Republican Conservatism" (2012), "A persistent refrain in Tea Party circles is the scorn for politicians who fail to show suitable reverence for, and detailed mastery of, America's founding documents"—documents that "are immediately accessible and obviously clear [and] can be understood by each person without the aid of expertise of intermediaries."

Levin has proposed a series of Liberty Amendments, most of which reflect well-known aspects of the Tea Party agenda. He wants to set term limits on members of Congress, limit federal spending and taxes, and allow three-fifths of the states to overrule any federal legislation. He also wants to repeal the Seventeenth Amendment and return the election of senators to state legislators, rather than to voters. "The original purpose of the Senate was to give state legislators a say in the national government, and that's gone," Levin told me. "State legislators are closer to the people, and they should have more of a voice in how the federal government runs." In any case, "The Senate is not supposed to be democratic. The framers did not want the popular vote to control everything. I do not understand a mind-set with some of these professors who, on the one hand, seem to argue for the greatest expansion of democracy possible and, on the other, rely on the smallest majority possible—five Justices on the Supreme Court. Do you trust the plebiscite mentality or the judicial-supremacy mentality?"

Levin has a pre-Civil War conception of federal power, roughly akin to that of the great states' rights advocate of the era, John C. Calhoun. Above all, Levin would like to curb the power of the federal government. The Supreme Court would exist mostly to police the federal government, keeping it from overstepping its authority. (Liberals generally embrace a vigorous role for the Supreme Court as a defender of individual rights against the intrusions of the state.) Levin's ideas are shared well beyond the realm of talk radio. Steven Calabresi, a professor of law at Northwestern University and a co-founder of the Federalist Society, a conservative lawyers' group, proposed to me that half the Justices on the Supreme Court be selected by the current method of Presidential appointment and Senate confirmation, and the other half by a vote of the fifty state governors. "I would also allow Congress, by a two-thirds vote of both houses, to override Supreme Court decisions in the same way in which it can override Presidential vetoes," Calabresi said.

Randy Barnett, a professor at Georgetown University Law Center, was a principal architect of the lawsuit challenging the Affordable Care Act, on the ground that Congress exceeded its powers under Article I of the Constitution. He has an elaborate proposal that advances the interests of states. A few years before Levin devised his Liberty Amendments, Barnett created a Bill of Federalism—ten constitutional amendments that would, among other things, give more power to the states. The Levin and Barnett proposals have much in common. Barnett calls for eliminating the federal income tax; prohibiting the imposition of

PUSHING THE DEAD CHEVY

I'm trying to remember the name of the mountain
where the monkeys lived and how it looked
from the window of the train. Seasonal bonfires stacked
and burning in the shape of the Chinese character for "luck."
And perfect, in the time that remains, the corpse pose,
also maybe the frog and the wheel and the boat.
While visualizing the goldfish in the bowl on our table—
O O O, her perpetual look of surprise.
Like me are you surprised to find yourself
in this chair / bus station / room by the sea?
Walking in some city on uneven pavement wearing clogs.
Wondering whatever happened to long summer nights
listening to Dylan's bootlegged sessions complete
with barking dog. Whatever happened to the dogs,
the string of cars with bad batteries and the hills
we rolled them down waiting for the engine to kick in.
As always the paper lantern hung in the garden stands for
that which is unblemished in us.
And the wind blowing west to east across the river
has cornered the market on endurance.
Queen Anne's lace grown chest high gone flagrant.
Beware the urge to haul everything you own
to the top of a mountain in order to hurl it.
Like the pink tint your white socks turned
in the wash, something was there in the background
waiting to be spoken and now isn't.

—*Maya Janson*

unfunded mandates on the states; and allowing half of the states (provided that they represent half of the national population) to rescind any federal law. Notably, Barnett proposes an amendment that would effectively ratify the Supreme Court's decision in the Citizens United case, which struck down a key portion of the McCain-Feingold campaign-finance law. That provision, according to Barnett's draft, states, "The freedom of speech and press includes any contribution to political campaigns or to candidates for public office."

There is perhaps a populist symbiosis between Sanford Levinson's progressive critique of the Constitution and Levin's and Barnett's conservative vision. Both posit that substantial majorities of the states should be able to override congressional actions. "There are two groups of people who are thinking about amending the Constitution," Barnett said. "Sandy and his group don't like the form of government that the Constitution provides. They want to change the Constitution to affect the situation in Washington so that it's easier to get things done. They are majoritarians. They want a Western European parliamentary system, where a new government comes in and can pass its program right away. They are happy to abuse political minorities, depending on who is out of power at any given time. Majority rule is the only form of checks and balances they feel is justified, so the majority can do whatever it wants. The effect of that thinking is that California and New York get to run the country. That's what the results of these policies are—to screw the people in the middle of the country. The minority can't fight back. They always lose. That's just a dangerous system.

"What's motivating me is completely different," Barnett went on. "We established a republican form of government that is *not* majoritarian. Legitimacy does not come from numbers—it comes from individual rights."

Levinson told me, "Randy is basically right—I don't like our form of government. I do think the republican form of government imagined by Madison and his friends was extraordinarily fearful of any kind of rule by the people. They really didn't have any confidence in citizens. But what Randy finds himself defending is a veto by small, basically rural states, who ought not be subjected to majority rule by people who live in cities. This is one of the great American fault lines."

The debate between law professors can seem abstract, but their disagreements play out in contemporary Washington, especially in the Senate. The career of Orrin Hatch, Republican of Utah, offers a partial refutation to the theorists on both sides, who insist that the Constitution defines the Senate in a specific way. Hatch's long tenure suggests that the Constitution allows the Senate to evolve in keeping with the demands of its members—for better or for worse.

Hatch was first elected to the Senate in 1976, which makes him the second most senior member of the body. (Patrick Leahy, of Vermont, is the most senior.) Hatch maintains a hideaway office in the Capitol, just steps from the Senate floor. It used to be Ted Kennedy's—a room that is said to have once been Jefferson's library. On the wall of Hatch's hideaway is a painting by Kennedy of the family compound in Hyannis Port. He inscribed it to Hatch with the words "We'll leave the light on at the compound for you any time."

"We fought like hell," Hatch told me, "but we loved each other."

Hatch arrived in the Senate as a kind of advance guard for the Reagan revolution—a small-government, Western-style conservative. He first made his mark leading the fight against Jimmy Carter's labor-reform bill, in 1978, killing a piece of legislation, widely expected to pass, that would have made it easier for unions to organize workers. Later, alternately as the chairman and as the ranking minority member of the Judiciary Committee, Hatch was a fierce advocate for Republican judicial nominees. His support of Clarence Thomas and his denunciation of Anita Hill, in 1991—he accused her of cribbing her accusations against Thomas from "The Exorcist"—remain his defining moment in the public mind.

At the same time, Hatch became an accomplished legislator, adept at building partnerships with unlikely allies. The seventies and eighties were also a kind of golden age in the Senate, where ideological adversaries figured out ways to make common cause. Hatch and Kennedy together passed the Ryan White CARE Act, which dealt with AIDS, in 1990, and the State Children's Health Insurance Program, in 1997. More informally, they steered many contested nominations of judges and others through the Senate. In other words, Hatch has played both roles in the Senate—as a partisan obstructionist

"And remember those goofy old movies that showed everyone in the twenty-first century wearing the same unisex outfit?"

and a consensus-seeking deal-maker.

As befitting a senator from one of the less populated states, Hatch has always been a zealous defender of the provisions of the Constitution that preserve states' rights. "If you didn't have the Senate, then the large states would control everything," Hatch told me when I met with him earlier this fall. "If you look at the red states, we have at least a significant ability in the Senate to force more compromise and more getting along, and that has happened time after time." From the beginning of his Senate career, Hatch also opposed plans (supported by Richard Nixon, among others) to abolish the electoral college and decide Presidential elections by popular vote. "You would not have any real representation of the people who are basically in the middle of the country," he said. "The difference between states matters, because there are different people in each state, different economies, different natural resources. If it was just the large states, we'd be dominated completely.

"The Senate was never designed to be like the House," Hatch said. "In the House, if you can get fifty per cent plus one, you can pass anything. In the Senate, you have to make a real case. You are going to need sixty votes to get it passed. Here there shouldn't be a plethora of bills going through all the time." He invoked the famous metaphor, attributed to George Washington, that calls the Senate the saucer into which boiling water is poured to cool. "This has never been a democracy," Hatch said. "This is a representative republic with heightened democratic principles." After a pause, he added, "I never called it that before, but I think it's right."

The sixty-vote threshold to break Senate filibusters was soon to be challenged by the Democrats. The Constitution makes no reference to filibusters, and over the years there were periodic arguments (and some lawsuits) asserting that filibusters are unconstitutional, as a violation of the norm of majority rule. These cases foundered against Article I, Section 5, of the Constitution, which says that each house of Congress "may determine the Rules of its Proceedings." Thus, judges have said, if the Senate wants filibusters, it can have them.

When Hatch arrived in the Senate, filibusters were rare, and were used mostly against major legislation. During Obama's Presidency, the number of filibusters has grown dramatically: Democrats have had to file for cloture—that is, to stop filibusters—about twice as often as Republicans did during their early years in the majority when George W. Bush was President. Approximately half of all the filibusters in American history against Presidential nominations have taken place during Obama's Presidency.

Hatch pointed out that it was the Democrats who first began to abuse the filibuster, when they were in the minority. "It's wonderful for them to be moaning and groaning," he told me. "But it's sour grapes. They started this crap."

Hatch acknowledged that the poisonous political atmosphere within the Republican Party has also contributed to the breakdown in the Senate. For twelve years, his junior colleague from Utah was Robert Bennett, who was less well known nationally than Hatch but every bit as conservative. "Bob was a good senator and good friend," Hatch said. But, in 2010, Mike Lee, who was a law clerk to Samuel Alito, and who is affiliated with the Tea Party movement, castigated Bennett as a moderate and defeated him for the Republican nomination. "I hated to see it happen," Hatch said, and his disdain for his junior colleague is difficult to hide. Today, Lee is best known as Ted Cruz's unofficial deputy in the shutdown struggle, a fight that appalled Hatch. "I am never going to be a fan of the shutdown. That is not the

way to run the government," he said. "If they wanted to shut the government down, they have to show me that there is an endgame where it is a justifiable, or winning, fight. But there wasn't a way. I don't believe in feckless fights."

The paralysis of the Senate has reverberated through the entire government. One of the most important Supreme Court cases of the coming year, National Labor Relations Board v. Noel Canning, presents an almost perfect distillation of everything that's wrong with contemporary Washington—and with the Constitution. The dispute features the excessive power of the Senate, the pervasiveness of filibusters, and the dubious authority of an eighteenth-century document being used in circumstances that are completely different from those for which it was designed.

The delegates in Philadelphia gave the President the power to appoint many senior federal officials, but such appointments were subject to confirmation by a majority of the Senate. This presented a problem at a time when Congress was in session only about six months a year, and the representatives had no way of showing up on short notice. So the framers came up with a way for the President to keep the government running, including making appointments when Congress was out of session. With little debate, the delegates included a provision in Article II, which defines the powers of the executive branch, stating, "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Recess appointments, as they are known, give the President the power to bypass the Senate to fill certain jobs, but only for a limited time, until the end of the current congressional session.

For two centuries, Presidents exercised the power to make recess appointments rarely, and usually with little controversy. But, as relations between the Senate and the White House became more contentious, Presidents began to do it more often. Bill Clinton made a hundred and thirty-nine recess appointments; George W. Bush made a hundred and seventy-one. But neither of them faced the kind of obstruction that Obama has encountered during his four-plus years in office. In an effort to lower the temperature of his disputes with Congress, Obama initially resisted using recess appointments, but he picked up the pace in 2010. Although he has made only thirty-two in total, his adversaries launched an unprecedented legal counter-offensive against him.

Republicans in the Senate were

particularly reluctant to approve Obama's choices for the National Labor Relations Board, a body for which the G.O.P. has minimal regard. For members of this and other agencies, Republicans did not vote the nominees down—they didn't have fifty-one votes. Rather, they used filibusters to prevent the full Senate from considering them at all. In the instance of the N.L.R.B., Obama responded by making recess appointments to fill a quorum at the board. In a fairly routine case from 2010, the board filed an unfair-labor-practice charge against Noel Canning, a soda bottler in Washington State, for improperly withdrawing a contract offer to the union representing its workers. The company charged that the action was invalid, because it was made by board members who had been given unconstitutional recess appointments.

In a decision handed down earlier this year, the United States Court of Appeals for the D.C. Circuit sided with the company, striking down the board's judgment in the case. Indeed, the court said that all actions taken by a broad swath of recess appointees—literally hundreds of rulings—were unconstitutional. The case has the potential to undo the work of any number of independent agencies whose members were installed through recess appointments. Among them are the Equal Employment Opportunity Commission and the recently created Consumer Financial Protection Bureau. The Supreme Court will hear the case later this term.

Why, in an era of jet travel, should Congress have recesses at all? How can the words of delegates in Philadelphia about recesses illuminate an issue that they could not possibly have anticipated? Even accepting the structure that the framers devised, how can the Senate simply refuse to act on a President's appointments, as the current Republican minority has done so often? How can the actions of forty senators prevent an administrative agency from functioning at all? And how (as the D.C. Circuit ruled) can the President remain powerless in the face of this kind of obstruction?

This fall, the strife became intolerable to a majority of senators. The trigger was a Republican filibuster of three Obama nominees to the D.C. Circuit, which, thanks to cases like Noel Canning, is generally regarded as the second most important in the country. Recently elected Democratic senators, who had known only a Senate paralyzed by filibusters, became more aggressive in wanting to do something about it. "I think the Constitution was very wise in terms of allowing for super-majorities in certain situations, like the ratification of treaties," Tom Udall, the first-term New Mexico Democrat, told me. "But it's supposed to be a cooling saucer, not a deep freeze. We have six-year terms, and have only a third of us up every two years. That insulates us from being a hot-headed legislature. But the system is being abused. We can't accomplish anything. It's been turned on its head. It's not the tyranny of the majority—it's the tyranny of the minority."

"Just saying, most parents mark their kid's height against the wall with a pencil."

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The Republicans' refusal to allow a vote on the D.C. circuit nominees galvanized even veteran Senate Democrats to join in the effort to limit filibusters. On November 21st, the Senate enacted the so-called "nuclear option," which allowed a simple majority of members to end debate on Presidential nominees (except those to the Supreme Court). "I think this was a big victory for democracy," Udall told me after the change in the Senate rules. "What we've done is return to what the Constitution says—that we operate around here by majority rule."

Still, filibusters on legislation are unaffected by the new rule, so the legislative agenda of the President (or his successors) may remain moribund. Small-state senators still exercise disproportionate power. "Two senators to a state is part of the basic document, and we all should have the basic ability to work on behalf of the country," Udall said. Or as Al Franken, the Minnesota Democrat, said, "The framers made a deal to get the votes of the smaller states, and that's our Constitution. And there are things that were particular to the time, and that's carried through. Do I say to Mike Enzi and John Barrasso"—the two senators from Wyoming—" 'It's ridiculous that you're here'? No, I don't. Not exactly," Franken said. "The Constitution has lasted a long time. It's done pretty well."

During the shutdown crisis, it became apparent that the House of Representatives—the founders' nod to proportional representation—had, in its own way, become dysfunctional as well. Richard Posner, a professor at the University of Chicago Law School and a federal appeals-court judge appointed by Ronald Reagan, thinks that

the Constitution is not to blame for the country's political stalemate. Rather, it's the irrationality of an influential wing of the contemporary Republican Party. "If a country allows itself to get into deep economic trouble, that is going to unsettle the political system," Posner told me. "That's what happened in the thirties, with the Depression, and it's happening now. People get very upset, and they become vulnerable to extremist appeals. That's what's happened to the Republican Party in the House of Representatives." Akhil Amar agrees. "One half of one of our two great political parties has gone bonkers," he said. "That's the problem. Not the Constitution."

The modern Republican Party asserts itself most clearly in the House, where partisan redistricting has transformed the political calculus for most members of that body. And the Supreme Court has said that that is just fine under the Constitution.

Article I says that members of the House shall be "chosen every second Year by the People of the several States," but it doesn't say how they should be chosen. "Congress passed a law in 1842 that said members had to be chosen from single-member districts," Pamela Karlan, a professor at Stanford Law School, said. "But Congress could pass a law tomorrow to move to a system of proportional representation, or some other system." By one method, voters could elect House members from statewide slates of candidates.

The system of single-member districts generally suits incumbents. Drawing district lines has always been a deeply political undertaking, because elected officials in every age cultivate a strong instinct for self-preservation. In 1811, Elbridge Gerry, the governor of Massachusetts, sculpted districts in such a way that one looked like a salamander—a process that gave rise to the term "gerrymander." With the help of computer software, the art of gerrymandering has evolved into a science. After the 2000 census, which cost the state of Pennsylvania two seats because of population loss, Republicans carved up the districts so that the G.O.P., which had formerly held ten congressional seats to the Democrats' eleven, held a twelve-to-seven advantage, even though the over-all statewide partisan breakdown was basically unchanged. A group of Democratic voters challenged the Republican plan, arguing that the new congressional map deprived them of equal protection of the laws, in violation of the Fourteenth Amendment.

The case, Vieth v. Jubelirer, went to the Supreme Court in 2004, and the Justices handed down one of the most important (if least known) decisions of the decade. The Justices refused to strike down the Pennsylvania map, embraced the right of political parties to gerrymander for partisan gain, and, in a fundamental sense, guaranteed the polarized House of Representatives that has become so familiar. In Vieth, the Court was badly splintered. Antonin Scalia wrote the lead opinion, declaring that "political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line. We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold." Scalia said that the plaintiffs sought "a right to proportional representation. But the Constitution contains no such principle. It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers." Besides, Scalia said, even if there had been a violation of Democrats' right to vote, there was no way the Court could design a remedy that election experts could agree on.

After the 2010 census, Republicans parlayed their landslides in that year's elections to draw favorable lines in several states where they had new majorities. In Pennsylvania, which lost another seat, Democrats still enjoy an advantage in party registration, but Republicans now have a thirteen-to-five advantage in House seats. Democrats made similar efforts in states where they controlled the process, especially in Maryland and Illinois. Over all, though, Republicans played the game much better. In 2012, House Democratic candidates across the country won about half a million more votes than their Republican opponents, but the G.O.P. emerged with thirty-three more seats than the Democrats.

It is true, as scholars like Nolan McCarty, of Princeton, have argued, that partisan redistricting does not account for all the polarization in the House. In recent years, Americans have tended to live near their political allies more than in the past. Thus, any district lines would tend to clump like-minded voters together. But there is no doubt that state legislators devoted painstaking attention to designing districts for the sole purpose of taking partisan advantage. As a result, incumbents in the House, especially Republicans, fear primaries more than general elections, and thus take pains to avoid being caught in the act of bipartisanship. What has followed is rancor, extremism, and stalemate.

The Constitution may be amended, but the process is arduous. According to Article V, any amendment must receive the endorsement of two-thirds of the House and the Senate and three-quarters of the state legislatures. Article V also limits any change in the makeup of the Senate. It affirms that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." To Levinson, the difficulty of the amendment process is one of the document's critical defects. "You have a situation where legislators representing less than one-tenth of the population of the country can stop any amendment," he said. "That's completely undemocratic."

Still, like Mark Levin and Randy Barnett on the right, Democrats have long had their own favored constitutional amendments. In the sixties and seventies, there were attempts to memorialize the welfare state in the Constitution, with guarantees of rights to food, shelter, and health care. The Equal Rights Amendment, guaranteeing equal treatment of the sexes, fell just short of ratification, in 1982. More recently, some academics, like Noah Feldman, at Harvard, have entertained the possibility of creating a right to education; others, like Jamal Greene, a professor at Columbia Law School, advocate a

repeal of the Second Amendment right to bear arms. In Congress, a number of senators, including Tom Udall and Al Franken, have proposed a constitutional amendment to overturn the Citizens United decision and allow legislators once again to regulate campaign contributions and expenditures. (One of Barnett's proposed amendments would do the opposite, protecting Citizens United from being overruled by a future Supreme Court.)

None of these amendments are likely to become law. "It *should* be difficult to amend the Constitution," Amar said. "You should have to obtain a very broad consensus before you pass an amendment. I agree with Sandy Levinson that the Constitution could be better. But you have to remember that it could also be worse. We've had proposed amendments to stop flag burning, and to ban same-sex marriage, and that's when I was glad it was difficult to amend. There have been only twenty-seven amendments, and twenty-six of them are good. Prohibition was bad, and it was overturned." For partisans on the left and the right, it's tempting to see constitutional amendments as shortcuts to political gain. But the difficulty of the process makes that impossible. Political change leads to constitutional amendments; amendments do not lead to political change.

The Constitution can and often does change without being formally amended. This is the real lesson of the past decade or so. Levin and his Tea Party followers have shown that agitation about the Constitution can serve a conservative political agenda. In everything from television advertisements to law-review articles, they made the case that the Second Amendment protects an individual's right to bear arms—a concept that the Supreme Court emphatically rejected in the past. In 1939, the Court said that the amendment concerned only "the preservation or efficiency of a well regulated militia." But, in time, the Court came around to a different view. Conservatives also came within a whisker of success in their constitutional arguments against Obamacare.

There is nothing inherently conservative about the honorable and long-held idea that citizens can understand, and even change, the meaning of the Constitution. Liberals, despite themselves, have proved the same point. Plessy v. Ferguson (1896), which condoned racial segregation, gave way to Brown v. Board of Education (1954), which ended it. As recently as 1986, the Court dismissed the idea that the Constitution protected gay people from discrimination as, "at best, facetious." Today, that principle is enshrined in the bedrock of constitutional law. And the Court's decisions have accomplished most, if not all, of what the Equal Rights Amendment was supposed to do for women's rights. Judicial appointments played a role, but more important was the demand from an engaged populace. Under pressure from voters, individual states expand (or limit) the rights to own firearms, to obtain abortions, and to marry someone of the same gender. Within broad limits, the Constitution invites these sorts of local experiment.

Moments after the Senate passed the filibuster reform last month, President Obama expressed his appreciation, but decried the tactics that made the change necessary. "Today's pattern of obstruction, it just isn't normal," he said. "It's not what our founders envisioned." Obama was engaging in the politician's customary absolution of the founders: the virtues of the system are all due to them; the defects are all due to us. This seems wrong on both counts. The compromises, misjudgments, and failures of the men in Philadelphia haunt us still today. But the founders also left just enough room between the lines to allow for a continuing reinvention of their work. On some occasions, as with race and gender discrimination, the Constitution is renewed and improved in courtrooms; on others, as with the Senate's recent act of self-improvement, the government finds ways to repair itself. In all events, the roots of these changes are the same. The Preamble to the Constitution says nothing about judges or politicians. It invokes what should be the true and ultimate authority in American government: We the People. ♦