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Our (Almost) Perfect Constitution.

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OUR (ALMOST) PERFECT CONSTITUTION

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I doubt that we would write the Constitution in quite the same way if we were to undertake the task afresh. Would anyone today actually propose giving the Providence metro area the same representation in one branch of the legislature as half the West Coast? Nor do I doubt that there are details of the Constitution in need of improvement. (Like the sponsors of the symposium, I regard slavery as too obvious a failing to require discussion here). The interesting question is not whether the Constitution might not have been improved here or there. As with any human document, the answer is undoubtedly "yes."[1] But the more significant question is whether changes in the text would produce large practical benefits—or to put it another way, whether any parts of the Constitution (again putting aside slavery) have produced major social harms. On this score, I am quite skeptical.

The individual rights side of the Constitution is probably the easiest to deal with. No doubt each of us can think of individual rights that should ideally be protected in the Constitution but are not mentioned there. Still, it is hard to identify any individual rights that are truly precluded from recognition by the constitutional text. What prevents the judicial recognition of additional individual rights is usually not the text. Instead, it is the same thing that prevents their explicit incorporation into the Constitution: the lack of any strong national consensus in their favor. Liberals must be aware, for example, that the chances of getting the Supreme Court to recognize a constitutional right to welfare are just as small as getting Congress to pass such an amendment, and for roughly the same reason: most people in this country think the idea is nuts. On the other hand, if our society were really prepared to recognize such a right, Professors Michelman

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1. To take perhaps a petty example, the "natural born citizen" clause of Article II, which prevents immigrants from aspiring to the Presidency, has always struck me as an unfortunate expression of nativism.

and Tribe pointed out some years ago how room could be found in the existing text. Thus, if there is an objection regarding the treatment of individual rights, it is not really to anything written in the Constitution, but rather to our constitutional culture.

Much the same can be said about federalism. The extensive transformation of federal-state relations over our history shows just how much leeway the current Constitution allows in this regard. The fundamental decision to encourage some forms of local autonomy seems sound, and so is the equally fundamental decision to establish a unified nation. In the past two centuries, the balance between the two has shifted as our constitutional culture has changed, but most of the important changes have been extra-textual.[2]

This brings us to the separation of powers, the area where the text is in many ways the most explicit. The fundamental decision here was to eschew a parliamentary form of government. At least since Woodrow Wilson, this decision has been roundly criticized in some quarters. It seems less than obvious to me, however, that England or the continental European countries have been better governed on average than the United States.

What about the details of the structure of government? The institution of party government has transformed the Framers' original expectations about how the system would work; here, political culture has turned out to mean more than original intent. Hence, it is especially important in this setting to consider how the system has actually worked rather than merely the words in the document.

The Senate seems most vulnerable to criticism, since it violates the general principle of "one person, one vote," which we otherwise endorse. It is true that in theory a small proportion of the population in strategic geographic locations could gain vastly disproportionate power through the Senate. Yet, this seems to have happened rarely if ever in our history; I cannot off-hand recall any instance of popular outcry against the "malapportionment" of the Senate.

In practice, Senators have not responded solely to the interests of their own states. Presidential elections have played an important role in ameliorating the problem—Senators have an interest in assisting their party to win in those contests, and historically many Senators have themselves been aspiring Presiden-

2. The Reconstruction amendments are the exception that proves the rule. Even there, the critical shift of power to the national government during the Civil War and Reconstruction took place in the political (and ideological) arena.

tial candidates. Hence, Senators have tended to have a somewhat national, rather than purely local, outlook. Also, the longer terms served by Senators have probably encouraged them to take a Burkean view of their function, just as the Framers hoped. On balance, then, the Senate seems to have worked tolerably well. Indeed, if it had not, it quite likely would have suffered the fate of the House of Lords by now.

In short, the imperfections of the original text matter much less than what we have made of the Constitution over two centuries. This conclusion could be considered an extension of the Coase Theorem. Constitutions do matter because they raise the transaction costs of enacting various legal measures. But in the long run, the rules cannot prevent the ultimate political balance of a society from working itself out, through amendments, judicial interpretation, or new institutions such as political parties. In the end, society gets its way; if we dislike the results, we must put most of the blame on our contemporaries rather than the Framers.