

CRITIC'S NOTEBOOK

The Constitution Is Sacred. Is It Also Dangerous?

One of the biggest threats to America's politics might be the country's founding document.



By Jennifer Szalai

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The United States Constitution is in trouble. After Donald Trump lost the 2020 election, he called for the “termination of all rules, regulations and articles, even those found in the Constitution.” Outraged critics denounced him for threatening a document that is supposed to be “sacrosanct.” By announcing his desire to throw off constitutional constraints in order to satisfy his personal ambitions, Trump was making his authoritarian inclinations abundantly clear.

It's no surprise, then, that liberals charge Trump with being a menace to the Constitution. But his presidency and the prospect of his re-election have also generated another, very different, argument: that Trump owes his political ascent to the Constitution, making him a beneficiary of a document that is essentially antidemocratic and, in this day and age, increasingly dysfunctional.

After all, Trump became president in 2016 after losing the popular vote but winning the Electoral College (Article II). He appointed three justices to the Supreme Court (Article III), two of whom were confirmed by senators representing just 44 percent of the population (Article I). Those three justices helped overturn *Roe v. Wade*, a reversal with which most Americans disagreed. The eminent legal scholar Erwin Chemerinsky, worried about opinion polls showing “a dramatic loss of faith in

democracy,” writes in his new book, “No Democracy Lasts Forever”: “It is important for Americans to see that these failures stem from the Constitution itself.”

Back in 2018, Chemerinsky, the dean of Berkeley’s law school, still seemed to place considerable faith in the Constitution, pleading with fellow progressives in his book “We the People” “not to turn their back on the Constitution and the courts.” By contrast, “No Democracy Lasts Forever” is markedly pessimistic. Asserting that the Constitution, which is famously difficult to amend, has put the country “in grave danger,” Chemerinsky lays out what would need to happen for a new constitutional convention — and, in the book’s more somber moments, he entertains the possibility of secession. West Coast states might form a nation called “Pacifica.” Red states might form their own country. He hopes that any divorce, if it comes, will be peaceful.

The prospect of secession sounds extreme, but in suggesting that the Constitution could hasten the end of American democracy, Chemerinsky is far from alone. The argument that what ails the country’s politics isn’t simply the president, or Congress, or the Supreme Court, but the founding document that presides over all three, has been gaining traction, especially among liberals. Books and op-eds critiquing the Constitution have proliferated. Scholars are arguing that the Constitution has incentivized what Steven Levitsky and Daniel Ziblatt call a “Tyranny of the Minority.”

The anguish is, in some sense, a flip side of veneration. Americans have long assumed that the Constitution could save us; a growing chorus now wonders whether we need to be saved from it.

Born of Compromise — and Contradiction

In 1787, when 55 delegates convened in Philadelphia to revise the Articles of Confederation, they ended up embarking on a project that was much bigger in scope. As Americans are taught in history class, the delegates drafted a new document establishing a national government consisting of three branches —

legislative, judiciary and executive — each functioning as a check on the others. The delegates were all white, and they were all men. But they nevertheless diverged on what they deemed to be an intractable issue: slavery.

Though several states had already passed abolition statutes, nearly half the delegates were slaveholders. The Constitution was thus born of compromise — with the enslavers getting the better end of the deal. To determine representation in the House and the Electoral College, the Three-Fifths Compromise allowed slave states to count three out of every five people held in bondage (none of whom, needless to say, could vote). And the fugitive slave clause stipulated that even when enslaved people escaped to free states they would never be free.



“Washington as Statesman at the Constitutional Convention,” by Junius Brutus Stearns (1810-1885).
Virginia Museum of Fine Arts

Such compromises meant that those who shared overlapping politics could still draw wildly different conclusions from the Constitution. The abolitionist William Garrison considered the compromises so damning as to make the Constitution “a covenant with death” and “an agreement with hell.” But Frederick Douglass maintained the opposite — that slavery in the United States could only be upheld “by claiming that the Constitution does not mean what it says.” As the historian James Oakes put it, Douglass shared Abraham Lincoln’s view, recognizing in the Constitution “the promise of universal freedom.”

A “promise of universal freedom,” yes, but also instructions on how to thwart it. There’s a glaring discrepancy between the soaring words in the Constitution’s preamble — a call to “we the people” that is “a seemingly ringing endorsement for popular governance,” as Chemerinsky puts it — and the distrust of democracy embedded in the rest of the document, reflecting the framers’ inability to conceive of a future when women and Black people would have a right to vote. The legacy of this history is a stubborn ambivalence: Is the Constitution supposed to be a guarantor of human equality? Or, for a society with a profoundly inegalitarian origin story, is the lofty principle just hypocritical cover?

Originalism and Its Discontents

You might think that such disputes would have been laid to rest by a bloody Civil War and the Reconstruction amendments, which outlawed slavery and granted all men the right to vote, regardless of race. Not to mention that the Constitution continued to change in the century after: Senators were to be directly elected; women were granted the right to vote.

But for the last 50 years, the Constitution has appeared frozen in amber. (The last major amendment, in 1971, lowered the voting age to 18.) In reaction to landmark decisions prohibiting segregation and bans on interracial marriage, conservative legal scholars began to champion judicial interpretations that rested on the framers’ intentions, 200 years before.

Originalists, as these scholars call themselves, say they are simply reacting to decades of “overreach” by “activist” judges. Liberal critics counter that interpreting the law according to what the founders (supposedly) wanted amounts to an end run around protecting and promoting a multiracial democracy. The attorney and columnist Madiba K. Dennie argues that originalists’ canny use of apolitical language ensnares liberals into treating originalism as coherent jurisprudence, even when it functions more like an “ideology.” Far from encouraging “judicial restraint,” she writes in “The Originalism Trap,” originalism is much more effective in “restraining judges *from doing good things.*”

Volunteers roll up a banner printed with the preamble to the U.S. Constitution at the Lincoln Memorial in Washington, D.C., in 2010. Chip Somodevilla/Getty Images/Getty Images

It may be a measure of the current crisis that even the conservative scholar Yuval Levin doesn’t think originalism can remedy our constitutional woes. Originalism is by definition preoccupied with what judges do, when the more urgent problem lies with a legislature that is, as he puts it in “American Covenant,” “underactive.” Members of Congress behave “like performers or mere seekers of celebrity,” neglecting to do the hard work of wielding the legislative power entrusted in them by the Constitution.

To anyone who thinks that the Constitution has been tearing us apart, Levin insists that it can bring us together. He argues that precisely *because* the Constitution was a “product of grudging and gradual compromise,” it is especially valuable in our

fractious times. The requirement of supermajorities, which entails “frustrating narrow majorities,” is, he says, a good thing. Members of Congress are supposed to build coalitions, which “tends to make partisans more tolerant, and more tolerable.”

It does? A lot of people looking at Congress today would be hard pressed to find a glimmer of the tolerance Levin so genially prescribes. Even he has to admit that Congress “looks dysfunctional from every angle.” But Levin’s serene insistence that political frustration is healthy instead of corrosive may have something to do with the fact that the Constitution’s “patchwork of compromises” happens to align with his own brand of cautious conservatism. He says that presidential candidates should vie for voters in “the most competitive states, which tend to fall near the ideological middle,” because it “is good for both national unity and the competitiveness of our politics.” He singles out for praise “the peculiar institution of the Electoral College.”

The Consequences of Constitution Worship

The Electoral College, of course, is one of the bargains the framers made in order to reassure the slave states that they could keep their own “peculiar institution.” Abolishing the Electoral College has become a popular refrain among liberals — something that the legal scholar Aziz Rana counts as one of the procedural specifics that consume discussions about constitutional reform. In his bold new book, “The Constitutional Bind,” Rana argues against this tendency to “take our problematic system as a given, and then struggle to patch especially egregious leaks.” Instead of focusing on patchwork measures, he encourages us to think more expansively.

The bind he describes is familiar, if untenable: Americans who are justifiably disenchanted with the Constitution still cling to it in times of duress. “These defenses implicitly suggest that Americans can only effectively protect their bedrock liberties from demagogues by redoubling their commitment to the text.”

“Constitution worship” is so habitual that it’s tempting to assume the veneration was baked into our politics from the very beginning. But Rana situates it historically, showing how it flourished in the 20th century, alongside the country’s global ambitions. Even as the United States pursued imperial projects in places like the Philippines and tolerated racial terror in the Jim Crow South, the Constitution was offered as proof that the country was profoundly committed to liberty and equality — that “its interests are coterminous with the world’s interests.”

Originalism has gathered strength by tapping into this reverence — deploying the authority of the framers in order to pass off originalist interpretation as the epitome of restraint and objectivity. Rana notes that originalism has allowed conservatives to undermine progressive policies while using the soothing language of constitutionalism.

According to this line of argument, the damages of Constitution worship extend to the structure of the political system itself. National politics gets increasingly funneled through the judiciary, with control of the courts — especially the Supreme Court — becoming a way to consolidate power regardless of what the majority of people want. This disempowerment of majorities, combined with political gridlock and institutional paralysis outside the judiciary, fuels popular disaffection. The document that’s supposed to be a bulwark against authoritarianism can end up fostering the widespread cynicism that helps authoritarianism grow.

Rana says that the urge to seek salvation in the Constitution has stunted not only our political behavior but also our understanding of what’s possible. Americans tend to overlook the possibilities of mass democratic politics precisely for this reason — we succumb to the conventional wisdom of Constitution worship, thinking that political progress is a matter of adhering ever more perfectly to the “essence” of the document, when the building of majorities is invariably a more complicated process.

But such complications are often why we have held fast to the Constitution; for a long time, it offered a shared language when we couldn't agree on much else. The historian Linda Colley, who has written critically about the connection between constitutions across the world and imperial expansion, nevertheless concludes that such “frail, paper creations of fallible human beings” can inscribe expectations that governments are at least supposed to live up to — providing something of value, even when violated.

The activist Olga Misik holds a copy of the Russian constitution during a protest in Moscow on Aug. 10, 2019. Nikolay Korzhov/Agence France-Presse — Getty Images

“In a deeply uncertain, shifting, unequal and violent world,” Colley writes in “The Gun, the Ship, and the Pen,” such documents “may be the best we can hope for.” Americans aren't alone in treating a constitution as a source of inspiration and protection. Colley cites Olga Misik, a young pro-democracy activist in Moscow, who in 2019 stood in the street, surrounded by “formidable men in body armor,” and read aloud passages from the Russian Constitution. The police officers “recognized the text from where she was reading — and they did not move in and attack.”

Colley published her book in early 2021. Later that year, Misik was sentenced to two years of home confinement. Her example is a stark illustration of the undeniable power of a constitution — alongside the undeniable power of undemocratic forces determined to have the last word.

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