Book Review

Sanford Levinson, *Framed: America's 51 Constitutions and the Crisis of Governance*. New York: Oxford University Press, 2012, pp. 437, $29.95 (cloth).

Reviewed by Lawrence Friedman

In the 2012 season finale of the television show *Political Animals*, the secretary of state, Elaine Barrish (Sigourney Weaver), learns that the vice president, Fred Collier (Dylan Baker), has asked the chief justice of the United States Supreme Court to administer the oath of office after Air Force One—with the president on board—goes down in French waters. Barrish, trained as a lawyer, is incredulous; why, she asks, is Collier not adhering to the Twenty-fifth Amendment to the United States Constitution? An advisor wonders aloud about the amendment and she explains—for his benefit and ours—the constitutional procedure by which the vice president may inform congressional leaders that, with the support of a majority of the cabinet, he or she is assuming the powers of the presidency because the president has become incapacitated.[1] Barrish proceeds to persuade Collier that he should adhere to this procedure, secure the cabinet's support, and not risk a constitutional crisis that would cloud his presumed tenure in office.

Perhaps needless to say, these scenes are like candy to a constitutional law professor. This is the stuff we rarely address in the basic con law course taught in most American law schools, the majority of which focuses on what Sanford Levinson, in *Framed: America's 51 Constitutions and the Crisis of Governance*, calls the "Constitution of Conversation"—those provisions of the U.S. Constitution, such as the commerce clause and the due process clause, whose textual meaning is subject to seemingly endless debate among commentators, judges, lawyers and members of the public. *Framed* focuses instead on the provisions about which there is rarely any real debate about textual meaning—what Levinson calls the "Constitution of Settlement," those self-enforcing constitutional provisions that "appear to be sufficiently obvious in their meaning that they require no adjudication at all" (22).

It is this lack of debate over legal meaning that makes understanding the dictates and implications of the Constitution of Settlement so critical for

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1. *See* U.S. Const., amend XXV, § 4.

Levinson. In his view, the Constitution of Settlement is essentially responsible for the current crisis of governance in the United States; the "major premise" of *Framed* is "that there is a connection between the perceived deficiencies of contemporary government and formal constitutions" (5). Levinson argues that the rules embraced by the Constitution of Settlement have led to the dysfunction that describes national politics in the United States today, with a federal government equipped to do little more than lurch from crisis to crisis between bouts of partisan bickering. To make matters worse, the institutional deficiencies at the federal level created by the Constitution of Settlement are effectively immune to change, given that the courts rarely have occasion to address them and amending the constitution is close to impossible.

To illustrate the force the Constitution of Settlement exerts on our politics and governance at the federal level, consider again the Twenty-fifth Amendment, the provision concerning presidential succession that became a plot point in *Political Animals*. The amendment exemplifies the central theme of *Framed*: the Constitution of Settlement forces some options and curtails others without accounting for the needs and exigencies of modern governance. Its framers designed the amendment to address the "Kennedy problem"—that is, what might have happened if President John F. Kennedy "had survived for six weeks while slipping in and out of consciousness" (219). And the procedure outlined in the amendment seems adequate: should a president be shot and wounded in such a way that he loses consciousness, we know how to keep the office of the president running. But the amendment tells us nothing about a situation in which, say, a president suffers from a progressive mental illness, like Alzheimer's disease. As Levinson notes, President Ronald Reagan likely was afflicted with that disease "no later than sometime in his second term in office," yet "there was never a hint of recourse to the Twenty-fifth Amendment, which suggests that it will take something truly extraordinary for the amendment to take on real life, as it were" (220).

Levinson's point is not that the meaning of the Twenty-fifth Amendment is in any way unclear. Rather, he is arguing that its utility is fairly limited, neglecting as it does to take account of the ways in which a president is most likely to become disabled while in office and require removal. The amendment simply does not contemplate circumstances beyond its settled meaning. And we can't place the blame for this one on the framers of the original Constitution—the amendment was ratified in 1967, by which time the possible means by which a President could become unfit for office surely included more than the risk of an assassin's bullet.

The Twenty-fifth is not the only constitutional amendment concerning the executive branch that gets Levinson's attention in *Framed*. He asks: what if it would be a good idea for a particular president to stick around beyond two terms of four years apiece? The problem is not the term limitation per se "but instead that [the amendment] admits of no potential exceptions" (212). And, partly as a result of the Twenty-second amendment, the time in which a president can influence the direction of at least domestic policy has been reduced to about

two years—until the first major congressional election of his first term. "Sooner or later," the journalist Ryan Lizza has concluded, "every reelected president confronts the frustration lurking in a second term: reelection to power does not necessarily grant more of it."[2] Further, as Levinson observes, "even if one likes the Twenty-second Amendment as a valuable protection against demagogues, it might be even better if, for example, Congress could suspend the amendment by a two-thirds vote when 'the national interest requires it'" (212).

Levinson argues, moreover, that just as the Constitution of Settlement forecloses possibilities for responsible governance, it serves to thwart basic democratic impulses. Consider in this regard the method by which we choose our presidents. The Electoral College represents the framers' "strong preference for representative government over any kind of direct decisionmaking by the people" (179). They determined it would be better for the chief executive to be elected, as Alexander Hamilton explained, not by the people but by "[a] small number of persons, selected by their fellow citizens from the general mass, [who] will be most likely to possess the information and discernment requisite to so complicated an investigation."[3]

Hamilton's is not the only explanation for the Electoral College. Relying upon the work of Akhil Amar,[4] Levinson explains that, in 1787—a time when organized political parties did not exist as they do today—there was an information problem which recommended a system that turned on the popular election of local elites to serve as presidential electors. Further, direct election of the president by the people would have eliminated the benefit to the slave states that secured their commitment to the new constitution: the Three-fifths Compromise, which increased these states' populations and therefore their representation in Congress, not only "gave slaveowners extra influence in the House of Representatives," but "a bonus when choosing the president," which became a "Jim Crow" bonus after the Civil War (183).

Regardless of its origins and intended function, the Electoral College undeniably diminishes the scope of American democracy. The mechanism of choosing the president through the college gives to states the power to determine the method by which electors will be selected, and the states in the late 18th century—like most today—were guided by partisan interest. "Among other things," Levinson writes, the Electoral College created "an incentive [for states] to adopt the winner-take-all method of allocating electoral votes, lest they in effect lose clout in the final vote by more accurately reflecting the actual distribution of the local citizenry's preferences" (183).

2. Ryan Lizza, The Second Term: What would Obama do if reelected?, The New Yorker, June 18, 2012, at 46.

3. The Federalist No. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., The New American Library 1961).

4. *See* Akhil Reed Amar, America's Constitution: A Biography (Random House 2005).

It should come as no surprise, moreover, that the Electoral College is in its way a very peculiar institution. Levinson notes that "no foreign country chooses its presidents in such a byzantine way" and, closer to home, "all American states elect their governors by direct vote of the people" (189). In this respect, as in many others, Levinson seeks to contrast the decisions of the framers of the original constitution with the decisions of the framers of the 50 other constitutions that fill out the subtitle of *Framed*. He believes we can learn a great deal from the varied structural and institutional choices reflected in the state constitutions, and takes seriously the notion that these documents should be accorded respect both as constitutions and as alternative models of constitutional democracy.[5]

The direct election of chief executives is just one example of state constitutional difference; throughout *Framed* Levinson discusses other ways in which state governments differ from their federal counterpart. For instance, in most states the attorney general is independent of the governor: more than 40 states elect their attorneys general, in a few the state legislature selects the attorney general, and Tennessee Supreme Court appoints that state's attorney general. And "even though New Jersey attorneys general are appointed by the governor," Levinson notes, "they do not, unlike other executive branch officials in that state, serve at the pleasure of the chief executive. Once appointed, the attorney general is entitled to remain in office for the term of the governor" (240). What most state constitutions create, then, is the possibility of tension between a governor and an attorney general–and, of course, of additional oversight. This is so even when the two come from the same party, should the attorney general harbor gubernatorial ambitions. The relationship between presidents and the attorneys general they have appointed, on the other hand, appears to create incentives for the latter "to subordinate their independent judgment to the political imperatives of the White House" (240-41).

Framed's analysis of the Constitution of Settlement is not limited to questions about the constitutional configuration of and limitations on the executive branch. Levinson is convinced that the framers of the original constitution thoroughly boxed us in. For instance, "[w]e have a constitution filled with veto points, and among the most important of these is the ability of … [the] Senate to kill any and all legislation it finds unacceptable" (47). Thus the very accountability mechanisms that the Constitution of Settlement firmly establishes also "may assure the near inability to make decisions at all about important issues of public policy" (50). And, to make matters worse, the phenomenal rise of political parties, which the framers of the original

5. Levinson also considers foreign constitutional precedent to be worthy of attention, but his comparative constitutional analysis relies most heavily on state constitutions: "[W]e should regard as an intellectual scandal," he writes, "the systematic disregard of the rich array of American state constitutions and the lessons they might teach us, for good or for ill" (389). *See also* Sanford Levinson, America's "Other Constitutions": The Importance of State Constitutions for Our Law and Politics, 45 Tulsa L. Rev. 813, 822 (2011) (arguing that law teachers should "recognize that we are collectively disserving our students … if we fail to inform them of the potential relevance of state constitutions to their practices").

constitution could scarcely have contemplated, has made the institutional structures they designed into nearly-perfect machines for preserving the status quo. There is more—much more—in *Framed* dissecting the Constitution of Settlement, but these examples convey the breadth of Levinson's criticism.

Assuming Levinson is right about the Constitution of Settlement—and he does score some points—what can be done? Elections are probably not the answer: he demonstrates that, thanks to the provisions in the Constitution of Settlement that dictate how our representatives shall be elected, the weight of an individual's vote is more a function of geography than equity, "determined by whether you happen to live in a district composed overwhelmingly of adult retirees or in a bedroom suburb where half the population is too young to vote" (108). In this way national elections are distorted, according more power to some citizens and less to others depending upon factors—like where one chooses to live—that most of us would probably regard as illegitimate. As Levinson argued in an earlier book, *Our Undemocratic Constitution*,[6] ordinary politics cannot solve the larger problems of governance that the Constitution of Settlement creates; he accordingly repeats in *Framed* the call for a "new constitutional convention, one that could engage in a comprehensive overview of the U.S. Constitution and the utility of its many provisions to 21st century Americans" (391).

Mindful of the "discussions with family and friends" that revealed doubts about the prospect of a new constitutional convention, Levinson anticipates most readers will reflexively reject such a proposal, if only because "they are basically terrified of what might happen if their fellow citizens, however selected, actually embarked on serious reflection about the Constitution with the possibility of changing it should they find it inadequate" (392). He could be right about this, yet it's worth noting (and Levinson does) that such anxiety does not prevent many citizens from participating in the processes of state constitutional change—49 states, after all, have adopted some means through which citizens can effect constitutional change and nearly every state election brings with it proposals for new amendments. As in so many other areas, the difficulty in amending the U.S. Constitution makes it an outlier among the 51 American constitutions.

Another serious obstacle to a new federal constitutional convention is complacency among the citizenry—the view that no constitutional change is necessary because our political-governmental system, despite its many idiosyncrasies, works just fine most of the time. The power of Levinson's book as a call to action—to persuade readers that modern problems of governance in the United States may be traced to constitutional decisions the framers necessarily tailored to the needs of 1787—depends upon readers sharing in the belief that there are indeed problems of governance that we should be addressing, and soon. If you don't believe that contemporary American politics, at least at the federal level, has become unremittingly dysfunctional,

6. Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How the People Can Correct It) (Oxford Univ. Press 2006).

you're likely not going to be supportive of a proposal for a new constitutional convention.

That the prospect of a new federal constitutional convention seems so remote may help to explain why the public and the commentariat focus much of their attention, much of the time, on the Constitution of Conversation. In the constitutional provisions that embrace some of the framers' highest aspirations—for due process, equality, and the freedom of expression—lay a world of interpretive possibility unavailable in the Constitution of Settlement. This possibility for change underlies, for example, the popularity of efforts to address the U.S. Supreme Court's decision in the *Citizens United* case,[7] involving the limits government can place on corporate political speech. That decision has become a symbol of the corrosive influence of money on politics and, because it springs from the Constitution of Conversation, many people believe something can be done about it: free speech being a contestable proposition, there are more than a few avenues for doctrinal evolution available to a future Supreme Court concerned about the effects of uncabined corporate political speech.

This is not to say that convincing the Court to reconsider *Citizens United* should be seen as a simple task—except, perhaps, as compared to convincing a majority of Americans that a new constitutional convention is in order. Our faith in and allegiance to the constitution of 1787 knows no bounds. Partisan political fighting and the constraints imposed by the Constitution of Settlement have been set aside in recent memory only in the face of national emergencies—the attacks of September 11 and the financial crisis of 2008, both of which required immediate action by the federal government—and even then in relatively limited fashion. Support for a new constitutional convention might not take hold absent a disaster of such magnitude that it makes transparent the cramped ability of our federal government actually to govern. Only in that unfortunate circumstance are we likely to appreciate Levinson's counsel: to revisit the deal to which the framers of the original constitution agreed and take a good look at the other 50 American constitutions, to see what lessons we can learn from the laboratories of democracy that together comprise the United States.

7. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).