

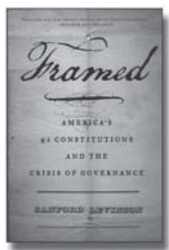
Book Reviews

Framed: America's 51 Constitutions and the Crisis of Governance

by Sanford Levinson
437 pp.; \$24.95
Oxford University Press, 2013
198 Madison Ave., New York, NY 10016
(212) 726-6000; www.oup.com

Reviewed by Frederic H. Marienthal

Frederic H. Marienthal is a partner of Kutak Rock LLP in Denver, where for more than thirty-one years he has enthusiastically represented clients in public finance transactions—(303) 297-2400, frederic.marienthal@kutakrock.com.



Countless movies are set in a post-apocalyptic dystopian world. In how many of those movies is the new ruling civilization governed by a constitution that resembles our current U.S. constitutional framework? My guess is not very many. Between 1946 and 2006, 729 constitutions were adopted around the globe. The U.S. Constitution was rarely used as a model.¹ U.S. Supreme Court Justice Ruth Bader Ginsburg informed an audience in 2012 that “I would not look to the U.S.

Constitution if I were drafting a constitution in the year 2012.”² *Framed: America's 51 Constitutions and the Crisis of Governance*, by Sanford Levinson, explains why the U.S. Constitution may need to be replaced and why it would not be a good model to use if you were charged with drafting a new constitution today or in a future world.

Framed has been reviewed and commented on by many people. I particularly appreciated Lawrence Friedman’s distillation of the core elements of the book.³ Levinson does not dwell on what he labels the “Constitution of Conversation.” These are the provisions of the U.S. Constitution, such as the commerce clause and the due process clause, whose meaning is subject to endless debate among law school professors, commentators, judges, lawyers, and members of the public.

Framed focuses on the provisions of the U.S. Constitution about whose meaning there is rarely any discussion. Levinson labels these provisions the “Constitution of Settlement.” These are the constitutional provisions that “appear to be sufficiently obvious in their meaning that they require no adjudication at all.” It is this lack of debate over legal meaning that makes understanding the dictates and implications of the Constitution of Settlement so critical for Levinson. In his view, the Constitution of Settlement is essentially responsible for the current crisis of governance and gridlock in the United States.

The major thrust of *Framed* is “that there is a connection between the perceived deficiencies of contemporary government and formal constitutions.” Levinson posits that the rules embraced by the Constitution of Settlement have created and stimulated the dysfunction that pervades national politics in the United States today.

Levinson joins a cadre of writers who criticize the U.S. Constitution. Hendrik Hertzberg of *The New Yorker*—in his analysis and review of Robert A. Dahl’s *How Democratic Is the American Constitution?*⁴—categorized this genre of endeavor as follows:

Treating the Constitution as imperfect is not new. The angrier abolitionists saw it, in William Lloyd Garrison’s words, as “a covenant with death and an agreement with hell.” Walter Bagehot (and a

prominent American admirer of his, Professor Woodrow Wilson) thought it deeply flawed. Charles A. Beard considered it mainly an instrument for the protection of property rights, an analysis that he did not intend as a compliment. Academic paint balls have splattered the parchment with some regularity. But in the public square the Constitution is beyond criticism. The American civic religion affords it Biblical or Koranic status, even to the point of seeing it as divinely inspired. It’s the flag in prose. It’s something to be venerated. It’s something to be preserved, protected, and defended, as the President swears by God to do. In the proper place (a marble temple in Washington), at the proper times (the first Monday in October, *et seq.*), and by the proper people (nine men and women in priestly robes), it is to be interpreted, like the entrails of a goat. But the Constitution of the United States is emphatically not something to be debunked, especially in the afterglow of sole-superpower triumphalism.⁵

Hertzberg’s colleague Jeffrey Toobin also concurred with the public’s opinion of the U.S. Constitution when he wrote that “everyone loves the Constitution.”⁶

Levinson points to certain state constitutions as positive examples, because they have been subject to amendment and adjustment to stay up to date and relevant. As a Coloradan, I am skeptical that a dynamic constitution produces good results. Many of the amendments to our Colorado Constitution have produced unintended consequences and negative results (the TABOR Amendment is a notorious example).

Reading *Framed* provoked frustration in me. For better or for worse, we are saddled with our U.S. Constitution. As a pragmatist and a realist, I do not believe there is the political will or desire to convene a constitutional convention or adopt massive amendments that would correct or readjust the U.S. Constitution.⁷ If I had been in Independence Hall on September 17, 1787, I would have signed the U.S. Constitution. If asked, I would sign it again today as it is currently written. I also do not believe that the U.S. Constitution is the driver of the gridlock we are currently encountering. The lack of campaign finance reform is the culprit for that.

Framed is the perfect book to read while taking constitutional law in law school. The book offers an analysis of certain structures that are contained in the U.S. Constitution and compares and contrasts those structures to similar provisions that are contained in state and foreign governing documents. I enjoyed working my way through this thought-provoking book.

Notes

1. See Law and Versteeg, “The Declining Influence of the United States Constitution,” 87 *New York University L.Rev.* 762 (2012). Parliamentary models have been used more prevalently.

2. *Id.* at 764.

3. Friedman, “Book Review, Sanford Levinson—*Framed: America's 51 Constitutions and the Crisis of Governance*,” 63 *J. of Legal Education* 2 (Nov. 2013).

4. Dahl, *How Democratic Is the American Constitution?* (Yale University Press, 2001).

5. Hertzberg, “Framed Up: What the Constitution Gets Wrong,” *The New Yorker* (July 29, 2002).

6. Toobin, “Our Broken Constitution: Everyone agrees that government isn’t working. Are the founders to blame?” *The New Yorker* (Dec. 9, 2013). The article opens with this quote from President Barack Obama’s *The Audacity of Hope* (Vintage, 2008): “Conservative or liberal, we are all constitutionalists.”

7. See Seitz-Ward, “The U.S. Needs a New Constitution—Here’s How to Write It,” *The Atlantic* (Nov. 2, 2013); Stevens, “Should We have a New Constitutional Convention?” *The New York Review of Books* (Oct. 11, 2012).