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MORE PERFECT
CONSTITUTION

WHY THE CONSTITUTION

MUST BE REVISED:

IDEAS TO INSPIRE A NEW GENERATION

LARRY J.
SABATO

“Without a public discussion of proposals like this, too many American citizens will be unable to understand the virtues and problems of our Constitution and how it might be improved.”—*NEW YORK TIMES*

To the memory of Thomas Jefferson,
who wrote to James Madison on January 30, 1787:
“I hold it that a little rebellion now and then is a good thing,
and as necessary in the political world as storms in the physical.”

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“As Sabato navigates through his literary renovation of the three branches of government, the reader can’t help but hold out hope that maybe someday, some of these sweeping changes could actually bring the nation’s government out of its intellectual quagmire . . . his lively, conversational tone and compelling examples make the reader a more than willing student for this updated civics lesson.”

—*The Hill*

“It’s tempting to blame the nation’s problems on one or two people in particular, or to make the blame far too general, attaching it, say, to the collective gullibility of half of the voting public. Does anyone else suspect that something more intrinsic might be wrong? One person who does is the political pundit Larry J. Sabato, [whose] book calls for a new federal Constitutional Convention. Here is optimism lightly tempered by realism, but optimism nonetheless.”

—*American Scholar*

“Sabato, founder of the Center for Politics at the University of Virginia, ventures bravely into the controversial waters of constitutional reform . . . While there’s room for skepticism and unintended consequences in some of his suggestions, Sabato makes strong, cogent arguments.”

—*Publishers Weekly*

“Sabato takes on the most sacred of American political cows, the U.S. Constitution . . . [His] thought-provoking book provides insights for an important debate.”

—*Booklist*

“It would give me singular pleasure to see [this principle] first announced to the world in a law of the U. States, and always kept in view as a salutary restraint on living generations from unjust or unnecessary burdens on their successors.”

—**James Madison**, responding to Jefferson’s
letter from New York, February 4, 1790

“The warmest friends to and the best supporters of the Constitution, do not contend that it is free from imperfections; but these were not to be avoided, and they are convinced if evils are likely to flow from them, that the remedy must come thereafter; for in the *present moment*, it is not to be obtained. And as there is a Constitutional door open for it, I think the people (for it is with them to judge) can as they will have the advantage of experience on their side, decide with as much propriety on the alterations and amendments which shall be found necessary, as ourselves; I do not think we are more

inspired, have more wisdom, or possess more virtue, than those who will come after us.”

—**George Washington**, in a letter to Bushrod
Washington, November 9, 1787

“That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety . . . and, when any government shall be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.”

—**George Mason**, in Article One of Virginia’s
original Constitution, 1776

“I hold it that a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical.”

—**Thomas Jefferson**, in a letter to James Madison,
January 30, 1787

CONTENTS

Preamble	1
CHAPTER ONE CREATING A CAPITAL CONGRESS	19
Reforming the Senate	23
Reforming the House	32
Congressional Term Limits: Extreme or Mainstream?	41
Balancing the Budget: Setting the Stage for a Great Convention Debate	54
Continuity of Government: Preparing for the Unthinkable	69
CHAPTER TWO PERFECTING THE PRESIDENCY	76
The Presidential Term of Choice	80
The Six-Year Term	84
The Alternative: A Presidential Confirmation Election	87
A Lengthened House Term (and Changes in the Senate Term)	93
War-Making Limits: Presidential Downsizing	97
Item Veto	101
Fairness for All: Making the Presidency Possible for Americans Who Are Not “Natural-Born”	104
CHAPTER THREE THE NEW COURTS: SUPREME BUT NOT ETERNAL	108
The Error of Lifetime Tenure	110
Fixed Terms	115
Not-So-Early Retirement	116
A Balanced Bench	117
Power of the Purse	118

CONTENTS

CHAPTER FOUR	POLITICS: AMERICA'S MISSING	
	CONSTITUTIONAL LINK	121
	Of Parties, Presidential Politics, and the Quadrennial Orgy	123
	The Regional Lottery Plan for the New Constitution	131
	The Electoral College: Mend It, Don't End It	134
	Adding Some Political Rules of the Game for the Twenty-first Century	152
CHAPTER FIVE	A CITIZENSHIP OF SERVICE: ASKING WHAT WE	
	CAN DO FOR OUR COUNTRY . . . AND OURSELVES	154
	An American History of Service: Military Calls and Civilian Supplements	157
	The Case for Universal National Service (UNS)	166
	Universal National Service and America's Future	176
CHAPTER SIX	VOX POPULI: WHAT DO THE PEOPLE THINK	
	OF CONSTITUTIONAL CHANGE?	179
	The Caution Light Blinks Steadily	181
	Dissatisfaction with the Status Quo	183
	Look Who's Talking	186
	Appendix: Rasmussen Poll on the Proposed New Constitution	190
CHAPTER SEVEN	CALLING THE TWENTY-FIRST-CENTURY	
	CONSTITUTIONAL CONVENTION	198
	The Founders' Daring—and Our Timidity	199
	The Legal Netherworld Surrounding a New Convention	202
	Setting the Ground Rules Prior to the Convention	205
	Calling the Convention	211
	After the Convention: Ratification and Its Aftermath	216
CONCLUSION	GETTING THERE FROM HERE	221
AFTERWORD		233
APPENDIX	UNITED STATES CONSTITUTION AND AMENDMENTS	237
	Acknowledgments	261
	Notes	263
	Selected Bibliography	327
	Index	335

PREAMBLE

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

—*Preamble to the United States Constitution*

MOST OF US grew up memorizing and venerating these words. Their historic import is obvious. A great nation came into being once they were ratified. Each phrase is clear, the meaning eternal. These great American goals of Union, Justice, Tranquility, Defense, Welfare, and Liberty have also been revised and extended in law and practice by each succeeding generation. Yet this is not true for critical parts of the Constitution itself, whose basic structures and systems have largely remained untouched. We need to apply the ageless values contained in the Preamble to the new demands of a very different country than the one that existed in the founders' world. I have written this book to begin a discussion with you about why and how we must do so, and about the potent possibilities of such action.

Americans care deeply about fairness and equity, for themselves and for others, and we have made impressive strides since the founding of the Republic. Yet that historic progress, which has affected our daily lives for the better, is being eroded and impeded by archaic parts of the original United States Constitution, and the situation is getting worse with each passing year. The Constitution is failing America in some vital ways. The time is now to begin a generational process of moderate, well-considered change to remedy these inequalities. The time is now to form a more perfect Union by creating a more

perfect Constitution. Beginning with local, state, and national mock conventions, and Internet-assisted debate, we can start the dialogue of reform.

I want to begin by asking you some important questions.

Do you believe that Congress is often inadequate as a representative body, that your views on the pressing issues of our time—from health care to the environment to tax fairness—find insufficient voice in the legislature while well-connected lobbyists and moneyed groups grab all the goodies they want, year after year? Most Americans do. There are various causes, but one important one is the Constitution, which does little to prevent core abuses such as partisan redistricting and the stacked deck of incumbency—the ills that can lead Congress, whichever party is in control, to ignore your interests while serving special interests. The permanent, dominant elites—the congressmen-for-life, the senators who are never seriously challenged for reelection, the lifetime judges who are often out of touch with changing popular sentiments, and the well-heeled lobbyists who frequently protect the “haves” at the expense of the “have-nots”—have skillfully used constitutional shortfall and silence to build a system that delivers for themselves, not average citizens. They have been aided by the Constitution’s dictates for the Senate (two senators per state, regardless of size), a body now so unrepresentative of America’s population that a mere 17 percent of the voters install a majority of senators. No one wants a “tyranny of the majority,” where 51 percent of the voters run roughshod over the rights of the other 49 percent, but we have now achieved the opposite, equally distasteful extreme, a tyranny of a small minority. Unquestionably, this structural reality impedes progress.

Are you among the millions of Americans concerned about how the Iraq War has been waged? Probably many of you were equally unhappy with the Vietnam War. Some unpopular wars are begun by Republican presidents, and others by Democratic presidents, but the personalities and parties may be less revealing than one major contradiction embedded in the Constitution itself: the confused muddle of war-making powers uneasily divided between president and Congress. The president is the commander in chief, but the Congress declares war, a jumble that has been exploited by a series of executives to expand their supremacy at the expense of legislative accountability (too often with the acquiescence of Congress). Some constitutional sorting-out is long overdue.

Are you pleased with the Electoral College and the way it chooses your presidents, or do you hold your breath every four years on election eve, wondering if the popular majority will actually get the chief executive of its choice?

Even before November, are you pleased that two highly unrepresentative, presumptive small states, Iowa and New Hampshire, have the lion's share of power in picking the party nominees, one of whom will control the White House and likely owe them to a greater degree than the other 98.6 percent of America's population?¹ No doubt you are, if you are from the Hawkeye State or the Granite State, but if you reside in one of the other forty-eight, you probably realize the unfairness of this tilted system—an imbalance that has its roots in the Constitution's total absence of guidance on political parties and presidential selection. How about the permanent campaign—are you content that the battles for high office go on forever, elevate political necessity over sound public policy for a ridiculously large portion of the terms of presidents and members of Congress, and cost a king's ransom to conduct, discouraging those without access to huge sums from running for office? We may well be able to do something about all these deficiencies by means of a constitutional reevaluation of term lengths for top officials, the structure of the campaign season, and the rules for campaign finance. It is time to stop consenting to the consequences of predictable electoral flaws and turn instead to creative reforms that can restore trust and encourage the honest efforts of many legislators.

Do you believe it is just and evenhanded that 14.4 million American citizens are automatically and irrevocably barred from holding the presidency simply because they had the "misfortune" to be born outside the United States—because they are immigrants or their mothers simply were outside U.S. territory at the moment of their birth?² This may appear to be a small matter, but it is not. As Americans, we take pride in saying that here, any mother's son or daughter can grow up to be president, but it's not true. Immigrants built the country, and except for the descendants of Native Americans, we are all the offspring of immigrants. The constitutional ban on non-native-born presidents is a potent, disturbing symbol of change too long delayed—one of the best examples of outmoded design that must be abolished in order for the nation to fully realize its promise.

Are you a parent or grandparent who watches the mounting national debt—now on track toward \$10 trillion—and realizes that your children and grandchildren will have to pay the piper? The government's fiscal recklessness can be traced to another constitutional flaw of omission, a requirement for a balanced federal budget.

How about the distribution of citizenship's greatest demands? Does it bother you that the burdens of service—especially in the military—fall on a relative handful of citizens, disproportionately poor and lower middle class,

while many Americans contribute little beyond taxes to the nation's welfare? Look to the Constitution—at what is in its text and at what is absent from it. Maybe at long last we should add a constitutional Bill of Responsibilities to match the Bill of Rights. We could stress the obligations and duties of citizenship as much as the rights and liberties conferred upon all our people. We could make sure that everyone, regardless of status and wealth, contributes his or her fair share of service and sacrifice. One naturally wonders whether the Iraq War would have been as eagerly prosecuted had the children of congressmen and presidents been among the ones designated to fight it.

It is not that the founders botched the original Constitution, except for the tragic enshrinement of slavery as a fundamental element of American political life.³ To the contrary, the Constitution's brilliance and originality have inspired millions around the globe to seek a better society where they live. Much of the Constitution's superstructure needs no fundamental fix, including the separation of powers into three branches, the system of checks and balances (with a few exceptions), and the Bill of Rights. The fault is not with these basics, and it is important to stress one fundamental truth from the outset: The framers of the Constitution did not fail us. Our forefathers designed the best possible system that could be achieved at that moment in time. The wiser heads in Philadelphia understood that some of the necessary compromises in the Constitution were flawed, and that some aspects of the new nation—especially the evil institution of slavery—contradicted the very notion of human equality expressed in the text. Yet the Constitution of 1787 reached the pinnacle of equity in the world's history to that time. The framers left it to us, and expected of us, that we would continue at regular intervals to perfect their work. As you will see throughout this book, some of the most beloved framers said so repeatedly in their lives, yet we have overlooked their wisdom. Instead, we have preferred to assume perfection in the original Constitution, sometimes viewing it as a sacred text. Especially in the modern day, the excuse used by those opposed is that that reform is too dangerous, and they have elected to avoid the hard, necessary work of creating a more perfect Constitution.

In fits and starts earlier generations were more inclined to rise to the challenge, mainly through a handful of decisive constitutional amendments passed in the wake of the Civil War, during the Progressive era of the early 1900s, and during the tumult of the 1960s. But over time, these admirable efforts have proven to be inadequate to the demands of twenty-first-century America. The inequities in our system have grown grotesque in some cases, and the vital

structures of government have developed rust and creaks. Our response has been the opposite of the founders'. When the Articles of Confederation proved insufficient in the mid-1780s, they were bold and embraced change in the form of the Constitution. We avoid change—even a robust discussion of it—and prefer insufficient tinkering to the substantial reframing that is required. This book is an attempt to alter America's political ossification.

MY PERSONAL JOURNEY

I come to this subject as an admirer of the magnificent achievements of the nation's founders and the Constitution's framers. I live and write among the purplish shadows cast by Thomas Jefferson's Pavilion IV, on the East Lawn at Jefferson's beloved University of Virginia, near his own home at Monticello. For thirty-seven years I have been a student and faculty member at UVA's "academical village," and I consider myself a Jeffersonian in many respects. How could anyone not be inspired by these surroundings, with every step drenched in history?

Like almost all Americans, I also grew up believing in the Constitution—every bit of it. But having chosen American politics as my primary passion in life, over decades of daily thinking about the issues that confronted the nation, I gradually began to see that parts of the system were no longer working very well, that the day-to-day, incremental political process was inadequate to fix the root causes of the system's dysfunction. In this, I was encouraged by the bright young people in my classrooms, who asked good questions, pointed out wrongs that needed righting, and were unwilling to accept "that's how we've always done it" as the final, correct answer. Students wondered, as did I, why the Congress couldn't assert itself more when presidents waged unsuccessful wars. They pointed to the accumulated evidence of corruption in Congress, year after year, and argued it suggested something beyond the imperfectability of man. They were repulsed by the way the nation conducted elections for the White House, the House of Representatives, and the Senate. Students listened respectfully to a sitting Supreme Court justice tell them in class that the courts were designed to be baldly "undemocratic,"⁴ but they wondered whether the tenured-for-life judiciary had become too insulated.

Bit by bit, in response to superb student critiques as well as my own—and the public's—growing doubts, I began to construct an alternate universe for parts of the American system. The ideas comprising this universe are at the heart of this book.

By no means are my proposed reforms a repudiation of the founders' principles. The heart of their Constitution (individual liberty, the separation of powers, and federalism) is untouched in these pages. Yet it's worth remembering that the Philadelphia framers were operating in something of a pressure-packed vacuum. They were attempting to build a system that had never existed in this form before, and to do it with dispatch. Much of what they built was pure jerry-rigged experimentation. Moreover, they recognized this and fully expected that future generations of Americans would rework their designs to fit both actual practice and the needs of new times.

Instead, I believe that Washington, Madison, and Jefferson would be the first to insist that the words that ended up in the Constitution are not the final word, and they would encourage us to start thinking about constructive changes in the constitutional framework. (Indeed, as the reader will see, several of the reforms proposed in this book are derived from Madison's initial ideas that were rejected at the original Constitutional Convention. Others have been inspired by Jefferson's warnings about topics omitted from the Constitution.) At the very least, we'll be better off for having thought carefully about the Constitution. More people may even read it! Chief Justice John Roberts recently commented, "Nobody reads [the Constitution]. We talk about it a lot. We have cases about it. But to actually sit down and read it doesn't happen that often—and that is a very rewarding exercise."⁵ (To assist the reader as the text is discussed throughout this book, the Constitution and its twenty-seven amendments are printed in full in an appendix at the back.)

Jefferson was especially and justifiably proud of his authorship of the Declaration of Independence, the first of three accomplishments he designated for his tombstone.⁶ He also enormously admired the constitutional handiwork of his friend and political ally James Madison, who lived just down the road in Orange County, Virginia, and who became his favored successor as president of the United States. With all due honor to the many other founders who contributed to the fundamental documents of state, it is crystal clear that Jefferson's Declaration and Madison's Constitution essentially created the governmental philosophy and system we recognize and revere today.

Many today resist any substantial change in structure for the United States. They say the inspired founding design must remain unaltered, save for the occasional tweak to accommodate a national desire to strengthen the presidential line of succession (the Twenty-fifth Amendment) or extend the vote to eighteen- to twenty-year-olds (the Twenty-sixth Amendment). After all, the

nation has survived and prospered for 220 years under a Constitution that has been amended only twenty-seven times. Even that is an exaggeration, since the first ten amendments (the Bill of Rights) were attached to the ratified Constitution; the Twenty-first Amendment simply repealed the ill-advised Eighteenth (Prohibition); and several other amendments are relatively minor in impact.

These arguments should not be casually dismissed, yet they can be convincingly refuted. Few will deny that a country that ceases to have an ongoing discussion about change will not adapt successfully over time to ever-changing conditions. Also, a society that stops trying to invent the better mousetrap will cede the spark of innovation—a key to political and economic prosperity—to other nations. A people who permit their government to become rigid and inflexible will suffer, sooner or later. A governing class that grows too comfortable with the status quo that often benefits it will be the ruination of the common good. And the foremost exponent of these beliefs was none other than Thomas Jefferson.

In a letter to Madison from his Paris post as ambassador to France, two years after the Constitutional Convention first met, Jefferson wrote these memorable words on September 6, 1789.

On similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, and consequently may govern them as they please. But persons and property make the sum of the objects of government. The constitution and the laws of their predecessors extinguished them, in their natural course, with those whose will gave them being. This could preserve that being till it ceased to be itself, and no longer. *Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right.*⁷ (Emphasis added.)

Through these powerful sentiments, which Madison himself—“a Constitution-maker but not a Constitution-idolater”⁸—supported, Jefferson lives and speaks to us today. No doubt he did not literally mean that a Constitution or a statute must vanish automatically every nineteen years (then, the length of a generation). Rather, he challenged posterity to take nothing he and his brethren had created as sacrosanct. Later in life, after retirement to Monticello, he penned a more considered version of his advice in a letter to a friend,

Samuel Kercheval, on July 12, 1816: "I know, also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."

At our considerable peril, the American institutions of government have not "advanced and kept pace with the times," and in the nation's interests, we must take a serious, energetic look at reforming them.⁹ In each chapter to come, on the presidency, the Congress, the courts, the political process, and a Bill of Responsibilities, I will suggest some ideas that fit today's country. I will also suggest how these changes should be enacted and made effective by arguing the case that we should employ the one major constitutional provision never before used: a national Constitutional Convention.¹⁰

Only Americans who are well versed in the law know that the framers gave us two separate methods to change the Constitution. By the first method, outlined in Article V, two thirds of both houses of Congress must approve a constitutional amendment, forwarding it to the states for ratification. Only when three quarters of the state legislatures (currently, thirty-eight of the fifty) assent to the amendment does it become part of the Constitution. This process depends first and foremost on the Congress, obviously, and some framers wanted to ensure that states and citizens would have recourse if Congress proved obstinate on, say, a proposed amendment affecting its own organization, behavior, or pay. Therefore, a second method was included in Article V. Two thirds of the state legislatures (currently thirty-four) can petition Congress to call a convention for the purpose of proposing amendments, and Congress is obliged to do so. Three quarters of the states would still have to ratify any amendments resulting from the convention. It seems clear that the second, untried method would suit our purposes better today.

First, Congress has proven to be a dependable graveyard for constitutional reform. More than three thousand amendments have been proposed in Congress over the last forty years, with a grand total of six sent to the states for their consideration—and none at all since 1978.¹¹ While many of the amendments may have been bad ideas or poorly conceived, surely more than six were worthy of deliberation in the states. By comparison to Congress, state legislatures are probably more responsive to grassroots movements of citizens, being closer to the people and insulated from many of the paralyzing forces that make progress difficult in Washington, D.C. (For example, no state capital can rival, or would want to rival, Washington in the number of

influential lobbyists maneuvering in the corridors of power.) Moreover, some of the reforms proposed in this book affect Congress in particular. Few powerful and hidebound institutions like Congress willingly reform themselves. Finally, Congress would likely be loath to propose multiple amendments for simultaneous submission to the states, while a convention is designed to do just that. This is a crucial distinction, since the American system is an interdependent whole, and effective reform must come as a package that concurrently reframes each of the three branches of the federal government. Constitutional change via Congress will almost certainly be incremental at best, while reform via convention has a much better chance of being comprehensive.

Many of our nation's most prominent elites will resist such an approach. These beneficiaries of the current system in government—officeholders, bureaucrats, and supplicants of all sorts—are concentrated in the District of Columbia “Beltway,” where the status quo has delivered a comfortable life of privilege and power. Some sincerely and others conveniently believe that a Constitutional Convention would become “runaway” and enact destructive changes from the far right or left. I believe these dangers are greatly exaggerated, and a convention may be precisely the device needed to open up a closed system, to seize back for the people the ability to define their destiny.

Critics may already have sensed a whiff of one of their most scorned movements. Populism has had a decidedly mixed history in American life, having sometimes promoted the evil of racism; yet on other occasions, it has encouraged progressive citizen involvement and good goals, from a clean environment to consumer protectionism.¹² Enlightened populism, by energizing the citizenry, can overcome inertia that has lasted for generations. Today, we require creative adaptation of our system to the needs of a continental country now exceeding 300 million people in an age of advanced technology that was undreamed of by the founders. The Internet provides the welcome mechanism needed for widespread citizen participation, both to stimulate creative discussions about constitutional change and then to help organize mock constitutional conventions throughout the country, which can eventually lead to the real thing. The ideas in this book must first take root among community leaders, opinion shapers, and ordinary citizens in every part of America in a deliberative process.

Whatever the origin of reform, change will not come easily. Some of the reforms proposed in this book will be highly controversial. Others will be merely obvious—almost consensual and commonsensical. No one will agree

with all of them, and a vigorous debate is guaranteed. That debate has raged in my own mind over the many years that I have spent formulating these ideas.

A NEW CONVERSATION ABOUT TIMELESS AMERICAN VALUES

My purpose in writing this book is to start a creative conversation—the kind of discussion Jefferson thought would happen naturally every couple of decades. Thoughtful people of every persuasion, political party, and place today can be enlisted for the task of improving the system.

It is not just “a system,” of course, but the basis of our daily civic life. You and I are directly affected by whether Congress is well run, and whether our representatives and senators look out more for our interests or moneyed interests. The kind of health care we receive, the quality of the air and water we breathe and drink, the excellence of the education we get, the types of taxes levied on us, and the choice of wars in which we engage are all products, in part, of the rules for government and politics to which we assent. I will demonstrate throughout the book that we all have a vital stake and an essential role to play in the subject of constitutional reform; this is not an airy debate to be left to legislators, journalists, and intellectuals.

As the saying goes, now is the time for all good men and women to come to the aid of their country. It’s time for a little rebellion, precisely as Jefferson advocated in this book’s dedication to him. At the very least, our minds will be stretched by new ideas, and we may appreciate our unique system all the more.

The founders’ values when they wrote the Constitution should remain our guiding stars, refined by the experiences we have acquired as a nation over the centuries. These principles and standards are idealism, pragmatism, fairness, and a focus on the needs of the present and future, rather than overly relying on the past.

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Idealism. Some statesmen in other established nations probably saw this as naïve, but Jefferson insisted that “every human mind feels pleasure in doing good to another,”¹³ and therefore in the United States, “the care of human life and happiness, and not their destruction, is the first and only object of good government.”¹⁴ Abraham Lincoln defined more than his hopes for a post-Civil War nation when he urged “malice for none, charity for all.” John F. Kennedy

will always be remembered for his stirring inaugural address in which he told his fellow Americans, “Ask not what your country can do for you, but what you can do for your country.” Ronald Reagan referred often to America as “that shining city on a hill.” From its beginnings, America has responded to the clarion call of idealism, and has defined itself, almost apart from other nations, as a land of true democracy and liberty, of equality and opportunity for all, of relatively unfettered pursuit of happiness. Of course, these ideals began as the province of a few, but over time, they have become far more inclusive. And it is our intense belief in their reality that drives us to participate in so many good works—and yes, some questionable adventures—both foreign and domestic, whether it is to respond to the needs of tsunami victims or to volunteer time and money at home for community needs or to “spread democracy” to the world. Constitution-revising without the motivation of idealism would be an empty endeavor, sure to disappoint and, even more, to fail. From our deep well of idealism must come the inspiration for the task at hand.



Pragmatism. For all our rhetorical emphasis on ideals, we have more often been directed—and our ideals reasonably tempered—by practicality. Pragmatism is the true genius of the American people. Unlike the citizens of some societies that have had less successful experiments with democracy, we Americans have always been able to separate clearly our eventual goals from our immediate ability to get to them. In other words, except for the small, extremist elements on right and left, we are generally willing to settle for incremental progress toward our goals. Occasionally, as in the crisis of the Great Depression in the 1930s or the civil rights movement of the 1960s, we will insist on massive change and improvement in a short time. In most other situations, from environmental policy to feminism to economic opportunity, Americans are content with gradualism, whatever the hypercharged rhetoric of the day’s politics.

There are two consequences of this view that affect constitutional change. First, Americans are overwhelmingly centrists, gathered around the middle of the ideological spectrum, from moderate-conservative to moderate-liberal. Any fair reading of academic survey research or the news media’s opinion polling would lead one to conclude that at least two thirds, and arguably three quarters, of the American people are pragmatic, practical centrists—willing to split the difference on most issues and eager for rational compromise, lest this