

FRAMED UP

by HENDRIK HERTZBERG

What the Constitution gets wrong.

Robert A. Dahl, whose new book's title asks the question "How Democratic Is the American Constitution?", is not a crank. He is the Sterling Professor Emeritus of Political Science at Yale, and he is about as covered with honors as a scholar can be. He is a member of the National Academy of Sciences, the American Philosophical Society, and the American Academy of Arts and Sciences; a corresponding fellow of the British Academy; a recipient of the Talcott Parsons Prize, the Woodrow Wilson Foundation Award, and the James Madison Award of the American Political Science Association, of which he is a past president. He is the author of twenty-three books and textbooks, several of which are considered definitive landmarks in the field. His peers revere him. He has been called "the premier democratic theorist of our time" by Fred I. Greenstein, of Princeton; "the premier analyst of democratic theory and democratic institutions writing today" by James S. Fishkin, of the University of Texas; and "the foremost political theorist of this generation" by Theodore J. Lowi, of Cornell. Robert Dahl is eighty-six years old. He knows what he is talking about. And he thinks that the Constitution has got something the matter with it.

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. The few critics to have spoken up in recent years—Daniel Lazare, the author of a pathbreaking 1996 book, "The Frozen Republic: How the Constitution Is Paralyzing Democracy," is one—have tended to be isolated and uncredentialed. Against this background, Dahl's apostasy merits attention.

"How Democratic Is the American Constitution?" falls somewhere between a little book and a big pamphlet—a hundred and sixty airy pages of text, with large type and wide margins. It has been adapted from a lecture series that Dahl gave shortly before the most recent Presidential election. Perhaps because it was written to be spoken, it is conversational, informal, and relaxed. Dahl's premise is that the Constitution ought to be judged by "democratic standards"—that is, by whether it is "the best that we can design for enabling politically equal citizens to govern themselves under laws and government policies that have been adopted and are maintained with their rational consent." And his purpose "is not so much to suggest changes in the existing constitution as to encourage us to change the way we think about it." That premise is more controversial, and that purpose less modest, than either of them may sound.

Dahl's main points form an argument that goes roughly like this. Wise and great though the framers were, their vision was circumscribed by what they knew, what they mistakenly thought they knew, and what they lived too soon to have any way of knowing. Even within those limits, they were hobbled by the political necessities of a particular moment, which forced them to swallow provisions to which the most eminent among them were strongly (and rightly) opposed. Later, in the nineteenth and twentieth centuries, an explosion of democratic theory, experience, and practice yielded up an abundance of new democratic norms and mechanisms. A few of these (such as the direct popular election of senators) were incorporated into the formal Constitution, and a few more (such as the idea of competing political parties and the practice of allowing citizens to vote for Presidential electors) were jury-rigged into the informal constitutional structure. But many others were not, and, despite American power, the American system has not been a model for other democracies. Although it's difficult to separate constitutional systems from other factors affecting national well-being, there is no reason to believe that the American system does a better job than the democratic alternatives, and quite a few reasons to believe that it does a worse one.

The most blatantly undemocratic feature of the document that the framers adopted in Philadelphia in 1787 was its acceptance—indeed, its enshrinement—of slavery, which in its American form was as vicious and repugnant as any institution ever devised by man. Article I, Section 9 forbade Congress to forbid the slave trade (or, as the framers shamefacedly put it, "the Migration or Importation of such Persons as any of the States now existing shall think proper to admit") until 1808—twenty long years! Article IV, Section 2 made the citizens of the "free" states complicit in the crime by obliging them to return any runaway "Person held to Service or Labour in one State" to "the Party to whom such Service or Labour may be due," even if slavery itself was unlawful within the state to which the brave wretch had managed to escape. Most notoriously, under Article I, Section 2, a state's allotment of seats in the House of Representatives (and, by

extension, its Presidential electors) was determined by counting not only "free Persons" but also "three fifths of all other Persons." This was simply diabolical, because to the insult of defining a person held in bondage as three-fifths of a human being it added the injury of using that definition to augment the political power of that person's oppressors.

It took the deaths of seven hundred thousand soldiers to cleanse the Constitution of these obscenities. Though Dahl does not emphasize the point, the Civil War—the bloodiest war in recorded history up to that period—represented a catastrophic failure of the Constitution itself. The political institutions it created had proved incapable of solving the nation's greatest problem. In the war, North and South both claimed to be the true inheritors of the founding generation. The South probably had the better of the argument, but the North won the fight and, with it, the point. The victors saw no great need to overhaul the document in whose name they had triumphed. So the Reconstruction amendments were substantive, not structural. The Thirteenth Amendment abolishes slavery (and, for the first time in the Constitution's text, drops the "such Persons" circumlocutions and finally uses the brutal word). The Fourteenth extends to all "the equal protection of the laws." And the Fifteenth guarantees the right to vote regardless of "race, color, or previous condition of servitude." But nothing was done to alter the political institutions that in 1860 had held four million people—one American in eight—in bondage and that, for the next century and, arguably, more, denied millions of their "free" descendants both equal protection and the franchise.

Even so grotesque and obvious an injustice as apartheid in the public schools was beyond the ability of the national government to correct. And when, after ninety years, formal, official school segregation was outlawed the deed was not done by the elected representatives of the people. It was done through the exercise of unelected, unaccountable, unchecked, quasi-legislative judicial power—one of the numerous features of the American constitutional system that the framers had no idea they were creating. The framers wanted an independent judiciary, for sure. They seem to have wanted some sort of judicial review, especially of state laws or actions that might impinge on the authority of the national government. And the language of the Bill of Rights—"Congress shall make no law respecting an establishment of religion," and so on— suggests that, even though the framers did not explicitly authorize the Supreme Court to overturn acts of Congress or Presidential edicts that infringed upon guaranteed civil liberties, they would not have been scandalized by the Court's doing just that. But no one anticipated that the Court would gather unto itself what Dahl calls "the power to make policy decisions that affect the lives and welfare of millions of Americans." The framers did not create that power; the Court itself seized it, gradually and over time. What the framers did create, by establishing a government profoundly at odds with

itself and often helpless against the veto power of determined minorities, was the power vacuum into which the Court was drawn. Somebody had to do something about school segregation, after all; it was a patent injustice and an international embarrassment, most Americans opposed it, and sooner or later it would have led to serious civil disorder. But at least the substance of *Brown v. Board of Education* (as opposed to the power behind it) was democratic. Could one say the same of *Dred Scott v. Sandford*, *Buckley v. Valeo*, or *Bush v. Gore*?

Once slavery was removed, the most undemocratic remaining provision of the Constitution was, and is, the composition of the Senate—its so-called equality of representation, whereby each state gets two senators regardless of population. This is often referred to as a "concession" to the small states, but in truth it was more like surrender to blackmail. The small states saw it as a deal-breaker, and they would brook no compromise. Dahl notes that Gunning Bedford, Jr., of Delaware, told his fellow-delegates to the Constitutional Convention that, unless the big states yielded, "the small ones will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice." The Senate was formed less by rational argument than by threats of treason and war.

You've probably never heard of Gunning Bedford, Jr. (I hadn't, until Dahl introduced me to him.) When it came to the composition of the Senate, though, the Gunning Bedford types exerted far more influence than James Madison or Alexander Hamilton, who were then left holding the bag. It was Madison and Hamilton, along with John Jay, who got the assignment of defending every last detail of the various Philadelphia compromises in the series of long op-ed pieces later collected as "The Federalist" and treasured to this day by columnists and speechwriters composing encomiums to the providential perfection of the framers' handiwork. Dahl points out, amiably but sharply, that the Federalist Papers were an exercise in spin. "If we employ a dictionary definition of propaganda as 'information or ideas methodically spread to promote or injure a cause, nation, etc.,' then the Federalist Papers were surely propaganda," he writes. Madison and Hamilton had a job to do. It was a perfectly honorable job, but it obliged them to defend things they did not believe in. Madison had been the Constitutional Convention's most passionate advocate of giving the big states more senators than the small ones. Hamilton had been almost as adamant. "As states are a collection of individual men," he harangued his fellow-delegates, "which ought we to respect most, the rights of the people composing them, or of the artificial beings resulting from the composition? Nothing could be more preposterous or absurd than to sacrifice the former to the latter. It has been said that if the smaller states renounce their equality, they renounce at the same time their liberty. The truth is it is a contest for power, not for

liberty. Will the men composing the small states be less free than those composing the larger?"

Even if it were true that the condition of being a citizen of a state with a small population entails such grievous disadvantages that, to correct for them, the very votes of such citizens must be assigned a greater weight than the votes of other Americans, how much is enough? Are the special needs of people who live in small states—people who can, after all, escape their condition by moving somewhere else—greater than the special needs of people who are short, or people who are disabled, or (more to the point of American history) people who are black? Here's a little thought experiment, inspired by Dahl's reflections. Imagine, if you can, that African-Americans were represented "fairly" in the Senate. They would then have twelve senators instead of, at present, zero, since black folk make up twelve per cent of the population. Now imagine that the descendants of slaves were afforded the compensatory treatment to which the Constitution entitles the residents of small states. Suppose, in other words, that African-Americans had as many senators to represent them as the Constitution allots to the twelve per cent of Americans who live in the least populous states. There would be forty-four black senators. How's that for affirmative action?

Dahl is content, in this little book, to point out the grotesqueness of the Senate in the light of elementary democratic principles. There have been large historical consequences, too. At the moment, admittedly, the Senate is not a particularly unpopular institution. In contrast to the House, the Senate has many members who are widely known, so it has a human face. Liberals like the way the Senate derailed President Bush's plan to turn the Alaska wilderness into an oil patch. Conservatives like the way it thwarted President Clinton's health-care proposal. But, as these examples suggest, the Senate is essentially a graveyard. Its record, especially over the past century and a half, makes disheartening reading. A partial list of the measures that—despite being favored by the sitting President, an apparent majority of the people, and, in most cases, the House of Representatives to boot—have been done to death in the Senate would include bills to authorize federal action against the disenfranchisement of blacks, to ban violence against strikers by private police forces, to punish lynching, to lower tariffs, to extend relief to the unemployed, to outlaw the poll tax, to provide aid to education, and (under Presidents Truman, Nixon, and Carter as well as Clinton) to provide something like the kind of health coverage that is standard in the rest of the developed world. The rejection of the Versailles treaty and the League of Nations after the First World War and then of preparedness on the eve of the Second are only the best known of the Senate's many acts of foreign-policy sabotage, which have continued down to the present, with its refusal to ratify international instruments on genocide, nuclear testing, and human rights.

Some will take all this as proof that the system has worked exactly as the framers planned. But, to believe that, one must believe that the framers were heartless, brainless reactionaries. They were not. They were practical, public-spirited men who preferred the lessons of experience to the dictates of theory. Unfortunately, since no one had ever before tried making a republic like the American one, there was very little experimental information to guide the designers. A generation later, Dahl thinks, they might have come to different decisions.

An obscure provision of Article V of the Constitution, which outlines the amending process, provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." On its face, this appears to mean that an amendment changing the composition of the Senate would have to be ratified by every single state. Dahl writes, "In effect, those fifteen words end all possibility of amending the Constitution in order to reduce the unequal representation of citizens in the Senate." I'm not so sure. In theory, one can imagine a Senate with, say, one senator from each state, plus fifty more elected at large. That would preserve the "equal Suffrage" of the states, while providing, for a change, a bit of equal suffrage for actual people. Anyway, what if those fifteen words were themselves amended out of the Constitution? The idea that a constitutional amendment might itself be unconstitutional is probably too audacious even for the Supreme Court.

It will never come to that, alas. The amending process alone is enough to insure that the two-senators-per-state rule is forever safe. That process (which was designed, at least in part, to protect slavery) requires the assent of three-fourths of the states. The politicians of the smaller states (and to a much lesser but discernible extent the citizens thereof) would have much to lose from a democratized Senate. So what if the thirty-seven largest states—representing ninety-five per cent of the nation's population—ratify an amendment? To kill it, all the thirteen smallest have to do is nothing.

The Presidency is another aspect of the constitutional system that has turned out to be quite unlike what the framers envisioned. Parliamentary democracy was not even considered, because it hadn't been invented yet. (The British system of an executive beholden to a legislative majority, rather than to a monarch, did not fully take shape until the early eighteen-thirties.) Still, as Dahl notes, the framers came close to devising something akin to it: not once but three times, the Constitutional Convention voted to have the Chief Magistrate chosen by Congress outright. In the end, the delegates, remembering their Montesquieu, drew back—but only partly. The electoral college, they thought, would be a kind of nominating convention. If no candidate had an outright majority—and the framers assumed that this would be normal once George Washington had passed from the scene—the House would choose among the top five, later reduced

to the top three, with each state delegation casting one vote. So the President would owe his job to Congress, even if Congress, having installed him, could remove him only with the greatest difficulty.

The convention gave the job of picking electors to the state legislatures—or, more precisely, to "each State," which would do the appointing "in such Manner as the Legislature thereof may direct." This, Dahl writes, opened a huge democratic opportunity in the following century, as one state legislature after another, under public pressure, yielded the power to choose electors to the voters. But this power is on loan only, as we learned in 2000, when the Florida legislature made clear its intention to name its own slate of electors if the recount went forth and came out the wrong way.

Just as the Fourth of July orators say, America has been an inspiration to peoples struggling for democracy. But, when it comes to actually designing the machinery, the American model has had no takers—not among successful democracies, at any rate. (The Philippines, Liberia, and some Latin-American countries, which have copied us, are not good advertisements.) Dahl surveys the twenty-two countries that have governed themselves democratically without interruption since 1950. Only six, including the United States, are federal, and in every case "federalism was not so much a free choice as a self-evident necessity imposed by history." Only four, all of them federal, have strong bicameralism. Only the United States, the United Kingdom, Canada, and France do not use one of the many variants of proportional representation, a nineteenth-century invention. We get bad marks in "democratic fairness" and "encouraging consensus." In "accountability," we're flunking. "Where are we to place responsibility for the conduct of our government?" Dahl asks. He goes on:

When we go to the polls, whom can we hold accountable for the successes and failures of national policies? The president? The House? The Senate? The unelected Supreme Court? Or, given our federal system, the states, where governments are, in their complexity, a microcosm of the national government? . . . I, for one, am inclined to think that compared with the political systems of the other advanced democratic countries, ours is among the most opaque, complex, confusing, and difficult to understand.

In short, if our system "fails to ensure the fairness promised by the proportional vision, it also fails to provide the clear accountability promised by the majoritarian vision." Nor is that all. In so-called consensual democracies, polls show, voters who are on the losing side of an election are almost as satisfied with the political system as the winners—and both are more satisfied than citizens of majoritarian regimes like ours. Also: "When the United States is ranked with other established democracies on such matters as the rate of incarceration, the ratio of poor to rich, economic growth, social expenditures, energy efficiency, foreign aid and the like, its performance is something less than impressive."

On the other hand, we do as well as anyone in maintaining civil liberties—thanks mainly to the Bill of Rights, one part of the Constitution with which Dahl doesn't have a beef. And, although Dahl doesn't mention this, we seem to be getting straight A's in world domination.

As a practical matter, we probably won't be able to change our constitutional system in any truly significant way. But we can, as Dahl suggests, change the way we think about it. If we worshipped the framers a little less, we might respect ourselves a little more. If we kept in mind the ways in which our constitutional arrangements distort our democracy and hobble our politics, we might gain a deeper, more useful understanding of the sources of our various national discontents. If we didn't assume that the system was perfect, we wouldn't assume that everything we don't like is the fault of bad people. We'd judge our politicians more shrewdly, and more charitably, if we reminded ourselves regularly of the constraints that the system imposes on them. We'd be less tempted by lazy moralism.

Our constitutional system is loaded with perverse incentives. To take a current example of how this plays out, many liberals feel exasperation, or even contempt, for what they regard as the timidity of the Democratic opposition to President Bush. Why, they wonder, isn't the Democratic congressional leadership full-throatedly demanding stronger environmental regulation, meaningful gun control, and tax policies that don't simply bloat the rich? It's not as if these positions were politically unpopular—all of them, polls show, are supported by solid majorities of the American public. But solid majorities of the American public don't have much to do with who wins American congressional elections. This fall, control of the House and the Senate will be decided in a dozen districts and a half-dozen states, and in those districts and states the issues don't necessarily cut the way they do in the country at large. So Democrats stick to Social Security and Medicare, Republicans stick to terrorism and "compassionate conservatism," and the general public wonders why "the issues" aren't being "addressed."

"My reflections lead me to a measured pessimism about the prospects for greater democratization of the American Constitution," Dahl writes. He sees little or no chance for the kinds of changes to which his analysis logically points. He does see some unspecified hope in "a gradually expanding discussion that begins in scholarly circles, moves outward to the media and intellectuals more generally, and after some years begins to engage a wider public"—specifically, a discussion of how our system stacks up against the performance of constitutional systems in other advanced democracies and against democratic principles. Our understanding of those principles will evolve indefinitely. "So, too," he writes in his final sentence, "will the implications of those

principles for our democratic political system, and its Constitution, under which we Americans freely choose to live."

Dahl can be forgiven this one little flourish of sentimentality. As he knows very well—and has written a book to prove—our system is a lot less democratic than it should be. We didn't choose it; it was here when we arrived. We just have to live with it. Better we should do so with our eyes open