

Gridlock Is Good, So Why Complain?

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The only thing wrong with University of Texas at Austin law professor Sanford Levinson's new essay on the U.S. Constitution is his most basic premise: that government should do stuff.

That's where he misses the point of the Founding Fathers.

"Our vaunted system of 'separation of powers' and 'checks and balances' — a legacy of the founders' mistrust of 'factions' — means that we rarely have anything that can truly be described as a "government," he wrote in the New York Times on Monday. "Save for those rare instances when one party has hefty control over four branches — the House of Representatives, the Senate, the White House and the Supreme Court — gridlock threatens."

How awful!

"What was truly admirable about the framers was their willingness to critique, indeed junk, the Articles of Confederation," he explains. "One need not believe that the Constitution of 1787 should be discarded in quite the same way to accept that we are long overdue for a serious discussion about its own role in creating the depressed (and depressing) state of American politics."

Yet the title of his piece is "Our Imbecilic Constitution."

He doesn't get it. The framers of the Constitution liked gridlock. They saw it as our protection from the kind of tyranny the American Revolution threw off.

Justice Antonin Scalia gets it.

"I hear Americans saying this nowadays, and there's a lot of it going around," Scalia told the Senate Judiciary Committee last fall. "They talk about a dysfunctional government because there's disagreement ... and

the Framers would have said, ‘Yes! That’s exactly the way we set it up. We wanted this to be power contradicting power because the main ill besetting us ... is an excess of legislation ... This is 1787; he didn’t know what an excess of legislation was.’

In fact, Scalia says we should learn to love gridlock.

“Unless Americans can appreciate that and learn to love the separation of powers, which means learning to love the gridlock which the Framers believed would be the main protector of minorities, (we lose) the main protection,” he said. “If a bill is about to pass that really comes down hard on some minority (and) they think it’s terribly unfair, it doesn’t take much to throw a monkey wrench into this complex system. Americans should appreciate that; they should learn to love the gridlock. It’s there so the legislation that does get out is good legislation.”

Levinson disagrees. He advocates “radical reform” that would remove some important safeguards. For example, the president could be given the power to appoint dozens of members of Congress — thus ending gridlock.

That way, he said “presidents would be judged on actual programs, instead of hollow rhetoric.” The problem, of course, is that “programs” mean government activism, something that doesn’t need more encouragement.

“If enhanced presidential power seems too scary, then the solution might lie in reducing, if not eliminating, the president’s power to veto legislation,” he said.

And even the Supreme Court could be reined in by eliminating judicial review of laws (something he claims Justice Oliver Wendell Holmes Jr. supported).

As the Cato Institute’s Roger Pilon observes, “As compared to the rest of the world, our Constitution has stood the test of time fairly well. The problems we now have did not arise from abiding by its limitations but just the opposite.”

The two most recent (and best) examples of how gridlock is good tell the whole story — the stimulus act and health care reform. In both cases,

lawmakers passed the bills without even reading them.

Something about the process was imbecilic. But it wasn't the Constitution.