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# Our Heroic Constitution?

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Protest against Trump's Muslim ban at Los Angeles International Airport (January 30, 2017).

## Human Rights Hero

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abortion. Cities and states have used their Tenth Amendment powers to provide pockets of resistance to inhumane immigration policy in sanctuary cities.

The Constitution deserves enormous credit for creating these limits on executive power. But actions implementing the Constitution require human agents. Constitutional guarantees would be nothing but parchment barriers without the commitment of principled federal judges. And federal judges could not exercise their judicial review power without organizations like the American Civil Liberties Union (“Because Freedom Can’t Defend Itself”) bringing lawsuits.

But without the Constitution, the federal judges, the civil liberties lawyers, and the members of the public who have been demonstrating at airports and in the streets would lack a decisive basis for arguing that elections do not confer the authority to undermine our cherished blessings of liberty and equality.

So, I’ve concluded that while my heroes are actually the judges, lawyers, and members of the public who resist affronts to human rights, the Constitution is their superpower.

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of a scoundrel than Smith, her vote simply adds to support for Jones. So, the result of this attitude toward alternative parties and candidates is that a major party has to be only slightly less bad than its rival and its base will fall in line. Regulations that weaken and disadvantage third parties only reinforce the voter’s sense that she really has only two alternatives. Indeed, the two major parties have perhaps never been less popular, at least as evidenced by the number of people who are registered with them. And yet their control over the political system is thoroughly entrenched. Granted, many voters who think of themselves as independents still pretty reliably vote for one party. But it is hard to maintain that such stark limitations on voter options are consistent with robust, active democratic citizenship.

In addition to these structural problems, there is the behavior of particular officials. The current president has a lamentable tendency to dismiss any report that he dislikes as “fake news,” which reinforces the media polarization trend mentioned above. He has also tried to favor news outlets he likes and disadvantage the ones he resents. But he is not the first president to try to control information to enhance his position; his predecessor was criticized for disallowing any independent photographers so that only images from the official (and therefore more flattering) White House photographer would become the visual historical record. More problematically, recent administrations have relied on secrecy and appeals to national security

to shield citizens from discovering what they were up to, and whistleblowers and leakers have been prosecuted and punished. Other elected officials have interfered with freedom of information requests. Secrecy is surely warranted in certain cases, but at times government officials are wrongly suppressing information that citizens need in order to make well-informed democratic decisions and hold their government accountable for its actions.

It is easy to magnify current difficulties and feel that we are at a watershed moment in our nation’s history. But from the broader historical perspective, we have probably never had better conditions for good citizenship, if only for the fact that for much of our nation’s history women and non-whites were legally (and then later quasi-legally) forbidden from voting or exercising their civil rights. Citizens today also have unprecedented access to information and new technologies that enable mass mobilization and coordinated activity. Still, we should not ignore the real barriers that hinder their ability to take part in democratic self-government.

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## Our Heroic Constitution?

By Susan N. Herman

When the ABA Section of Civil Rights and Social Justice invited me to write about the U.S. Constitution as a Human Rights Hero, I must admit that I was ambivalent.

On the one hand, we have become increasingly aware lately of some of our Constitution's deep flaws:

- Article II's Electoral College provision prioritizes states' rights over democratic equality, empowering a president who lost the popular vote to disregard the views of the majority of Americans about what is unacceptable treatment of immigrants, minorities, and the disadvantaged.
- Article I invites the states to put innumerable thumbs on the scales of federal as well as state elections—which many states have in the form of racist felon disenfranchisement statutes, cynical voter ID requirements, voter purges, and manipulation of registration and voting procedures. Once voted into office, a party can lock in its position.

But then, I thought, even the greatest heroes have their imperfections. George Washington and Thomas Jefferson, our



Scene at the Signing of the Constitution of the United States  
PAINTING: HOWARD CHANDLER CHRISTY AND PHOTO: THE INDIAN REPORTER / WIKIMEDIA

revered founders, were slave owners.

And our Constitution is indeed heroically admirable in many respects. It establishes structures that are conducive and probably necessary to human rights flourishing. The Preamble repudiates authoritarian power grabs by positing that “we the people” decide what will secure the blessings of liberty—not our elected leaders. Article VI confirms that the People’s Constitution is the supreme law of the land—not the will of

elected leaders. To prevent the accumulation of too much power in any one branch, the Constitution creates an elaborate system of checks and balances among the three branches of the federal government, including an independent judiciary, and between the federal and state governments.

Donald Trump has been learning through experience that the Constitution sometimes prevents the president from having his way. Federal judges have checked unconstitutional executive policies and actions like the discriminatory travel ban, dehumanization of transgender military personnel, and defiance of the right of a 17-year-old girl in Texas to choose to have an

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