

Janie B. Cheaney

Unpopular law

Our "terse and old"—but effective—Constitution has fallen out of fashion

HOW'S THIS FOR AN AD CAMPAIGN: Dad, in the employment office, anxiously scans the pages of a yellowed document searching for the right to a job. At school, Sis gets dissed for her outdated "We the people" jeans (so 18th century!) while Junior texts James Madison in history class: *Dude! Y no guaranTD phone upgr8!* In the family kitchen, little Suzie sobs about sexual harassment at school while her mother tears off a sheet from the Bill of Rights roll and discovers it's too skimpy to soak up the tears.

Mom, can we get a new constitution?

The muttering has gone on for some time but broke into the open last month when Supreme Court Justice Ruth Bader Ginsberg suggested, in a visit to Egypt of all places, that the document she has sworn to uphold is approaching its sell-by date (see Quotables, Feb. 25). "I would not look to the U.S. Constitution if I were drafting a constitution in the year 2012." Other models might better serve, such as South Africa's: "That was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights [and] had an independent judiciary."

It may be the first time a justice has actually said this, though the Court has been stretching the document for at least 80 years. Ginsburg's comments indicate that the elastic is shot, a notion seconded by Adam Liptak on the front page of *The New York Times*: "We the People' Loses Appeal With People Around the World."

Liptak makes a devastating case, or at least he thinks so. Nobody wants to model their sparkly new constitution on ours because it's "terse and old," with "relatively few rights," and is notoriously difficult to change. "Other nations routinely trade in their constitutions wholesale, replacing them on average every 19 years." He quotes no less a Founding Father than Thomas Jefferson, who famously declared that "the earth belongs always to the living generation," who shouldn't be bound by the fusty conventions of the old.

Jefferson, given his mood, can be quoted in support of almost any radical idea, and he did not draft the Constitution. John Adams was not part of that process either, but his pamphlet, *Thoughts on Government*, had been read and discussed for years. Other American statesmen—James Madison, Alexander Hamilton, Benjamin Franklin—had a

grasp of political theory that makes the pundits of today look like third-graders, and they had begun theorizing long before 1787.

Far from an idealized document, our Constitution was constructed from reams of practical experience, accumulated by 13 former colonies that had been governing themselves for 12 years or more. The delegates arrived in Philadelphia with well-tested theories of what worked and what didn't, and they hammered out their differences with pragmatic compromise. Their experience, combined with learning drawn from the deep well of philosophy, history, and the Bible, produced a document that has been called a "miracle" by sober-minded historians.

By contrast, the stylish South African Constitution, the Canadian Charter of Rights, and the European Convention of Human Rights (all admired by Justice Ginsberg) are based on the latest popularity contests. Adam Liptak even says so: "These days, the overlap between the rights guaranteed by the Constitution and those most popular around the world is spotty."

He fails to distinguish between natural and positive rights: what the state should protect (life, liberty, and property) and what the state must provide (food, education, and healthcare—to name a few). Natural rights are necessarily limited; positive rights are bound to expand and step on each other. Just ask columnist Mark Steyn, whose right of free speech was steamrolled in Canada by Muslims who objected to something he wrote.

The fact that the Constitution has lasted all these years should tell us something: It works. Though far from perfect, and stretched out of recognition in places, it is still a guide that's based on enduring truth, not the latest Utopia reboot. With a little tightening, it would be good as new.