

FOREWORD

*Mark S. Kende**

The American public is dissatisfied with its national government. The President and Congress have recently received low poll ratings.¹ The United States Supreme Court, which usually ranks high, dropped a startling fifteen percent in public esteem after its most recent term.² One hears accusations that we have an activist Supreme Court, a dishonest President, a “do nothing” Congress, and that we should “throw the rascals out.” It is no accident that politicians seeking national office campaign as Washington outsiders. Professor Sandy Levinson, however, thinks the problem is more “hard wired” than this rhetoric suggests.³

* Professor of Law, James Madison Chair in Constitutional Law, Director of the Drake University Constitutional Law Center; B.A., Yale University, 1982; J.D., University of Chicago, 1986.

1. For example, a *Newsweek* poll at the beginning of August 2007 showed President Bush receiving an approval rating of 29% and a disapproval rating of 63% — a 34% disparity. See Polling Report.com, President Bush-Overall Job Rating, <http://www.pollingreport.com/BushJob.htm> (last visited Aug. 21, 2007). Moreover, an NBC/*Wall Street Journal* poll at the end of July 2007 showed Congress receiving an approval rating of 24% and a disapproval rating of 63% — a 39% disparity. See PollingReport.com, Congress-Job Rating, <http://www.pollingreport.com/CongJob.htm> (last visited Aug. 21, 2007).

2. According to a recent study by the Pew Research Center,

The Supreme Court is viewed favorably by 57% of Americans, down sharply from a high of 72% in January. This represents the lowest favorability rating for the court since June 2005. Even in the midst of the contentious debate over the October 2005 nomination of Harriet Miers to replace Justice Sandra Day O'Connor, favorability ratings were five points higher than they are today.

Pew Research Ctr., *A Summer of Discontent in Washington, Evaluating the Supreme Court*, <http://people-press.org/reports/display.php3?PageID=1172> (last visited Aug. 21, 2007).

3. Professor Levinson is not alone. See also ROBERT DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2003).

His characteristically thought-provoking book, *Our Undemocratic Constitution*, argues that numerous provisions in the United States Constitution thwart democracy and preclude progress on national problems. In Spring 2007, the Drake Constitutional Law Center and the *Drake Law Review* hosted a Symposium in which the speakers discussed and critiqued this thesis.

Drake Law School was honored that former Iowa Governor and presidential candidate, Tom Vilsack, delivered the keynote address. He subsequently participated in debates with several prominent constitutional scholars. This introduction summarizes each speaker's arguments. This law review issue contains their completed articles.

Governor Vilsack initially explained how his political career gave him a different perspective than the academic presenters. Regarding the Symposium topic, he examined some historical problems that have arisen regarding presidential succession. Next, he described how the public has embraced Iowa's computer-based legislative apportionment process, unlike the more polarizing mechanisms used in other states. Of course, the United States Constitution gives states significant power on redistricting. He also explained that as governor, the Iowa constitution was "his friend" in some cases, but not in others, which is typical of democracy. One of his administration's most important achievements, in promoting democracy, was restoration of the franchise to convicted felons who had served their time.

Professor Levinson followed. He provided a "bill of particulars" showing the Constitution's democracy deficit. In particular, he criticized the following features: each state having two Senators; the Electoral College; the existence of presidential and legislative veto points (committees, the other chamber); the absence of provisions for removing an incompetent president; the lame duck period where an outgoing president still can make important decisions; life tenure for federal judges; the absence of a constitutional process for replacing disabled legislators; and the difficulty of amending the Constitution. Interestingly, he took the phrase "democracy deficit" from debates over the proposed European Constitution, that was rejected by voters in France and the Netherlands. Professor Levinson's solution is to hold a constitutional convention, even if that means doing so without the constitutionally required support by the states. Only such a dramatic measure can shake up a system that solves few problems, is beholden to powerful monied interests, and creates a disillusioned and apathetic electorate.

Professor Heather Gerken's response was: "Not so fast." She argued that constitutional change already takes place through judicial decisionmaking and through public mobilization that amount to an informal amendment process. She listed the various constitutional scholars who describe such an informal process, including Bruce Ackerman's famous theory of historical "constitutional moments."⁴ This informal process has democratic advantages because it makes the Constitution a highly contested document. In other words, people fight over its meaning. She admits the Constitution's restrictive amendment process is responsible for use of these other avenues of change. She used a hydraulics metaphor, however, to argue that we would lose the pressure creating this beneficial democratic contestation if the amendment restrictions were loosened. She linked our informal processes to England's constitutionalism without a text, and said Professor Levinson was sounding rather French in his desire for constitutional change to take place more formally.

Professor Saikrishna Prakash explained that there are good reasons why we do not have a pure majoritarian democracy or a unicameral legislature. For example, there are benefits to having large states and small states join together because each state has unique features. The large states, however, must protect the small ones against rampant majoritarianism. Moreover, powerful monied interests may find it easier to "capture" a unicameral legislature. In addition, Professor Levinson essentially omitted discussion of judicial review's undemocratic nature, or the fact that House members represent districts of unequal sizes. Professor Prakash says that the system was wisely designed to have some undemocratic features.

Professor Donald Horowitz focused on comparative federalism. He acknowledged that federalism made it more difficult for a national government to enact policies reflecting a grand majoritarian perspective. However, "our federalism," or variations thereof, has helped build democracies all over the world. For example, many countries have horrible ethnic and religious conflicts. A federal system can reduce these conflicts by allowing useful divisions of governmental authority. He also points out the weaknesses of federalism in certain cases. His major argument, though, is that the benefits of federalism should not be ignored in the name of pure democracy. It is certainly no coincidence that several presidential

4. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

candidates advocate the “soft partitioning” of Iraq as the way to moderate that country’s ethnic and religious conflicts. Interestingly, Professor Horowitz thinks this approach to Iraq would be mistaken.⁵

Lastly, Professors Somin and Devins argue that we should not be so sanguine about increasing democracy. First, we need to clarify what kind of democracy we want. Deliberative democracy is different from Joseph Schumpeter’s minimalist democracy.⁶ Second, given numerous studies that show widespread voter ignorance about key political issues, and even about how the government is structured, we should be careful asking for more democracy lest we receive it. Moreover, they argue that voter ignorance is largely rational for a variety of reasons. Thus, we need to develop various measures to cure this ignorance. Otherwise more democracy may cause an increase in irrational policymaking, which nobody wants, especially if these new proposals are made in the midst of crises. The high threshold for constitutional amendments may not be so bad after all.

One final point: This Symposium would not have been possible without the support of the distinguished Des Moines, Iowa law firm of Belin, Lamson, McCormick, Zumbach, Flynn. On behalf of Drake University, Drake Law School, the Drake Constitutional Law Center, and the *Drake Law Review*, we wish to thank the firm for its generosity and for its distinguished service to the community.

5. Donald L. Horowitz, *Unifying Iraq, Partition Is the Path to More War—Multiple Wars, in Fact*, WSJ.COM, OPINION J., June 19, 2007, <http://www.opinionjournal.com/forms/printThis.html?id=110010228>.

6. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (3d ed. 1950).