
THE CASE FOR PRESIDENTIAL ILLEGALITY IN CONSTITUTIONAL AMENDMENT

SYMPOSIUM DISCUSSION: ALBERT

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DRAKE UNIVERSITY LAW SCHOOL

Sanford Levinson: What if the President simply said that either she would want to sign any bill passed by the House and supported by Senators representing a majority of the country, and would then order the bureaucracy to enforce that bill as law, and then, presumably, we'd go to the Supreme Court. Would that be any less legitimate than your proposal?

Richard Albert: I think that would be less legitimate because it's not as radically democratic and as unconventional as a referendum is in this particular tradition and in this particular time. But of course, I'm a student, a fan, of H.L.A. Hart and the rule of recognition, and so if political elites, if legal elites, recognize that move, which is clearly illegal, if they recognize that move as proper, and they acquiesce to it, if they approve it, then it would have to be seen as legitimate. Not legal, but legitimate. But I still think less legitimate than the radical expression of popular will through a referendum.

Now, you mentioned the courts, Sandy. I think that raises an interesting question both for your proposal and for the one that I advanced today, which is what happens when someone challenges the constitutionality of your move or the referendal move? If it goes to the Court, it's quite likely the Court would say, "Listen, this is a political question. You guys take care of it yourselves." That's what the Court has said in the past. That's the latest precedent that we have on the U.S. Supreme Court pronouncing, in any way, on a constitutional amendment. Now, maybe the Court would revisit that; it's quite possible. But, that's the current posture that the Court takes on constitutional amendment at the federal level. At the state level, it's a different world. At the state level, it's a different world entirely because you have state supreme courts that have invalidated duly passed constitutional amendments. So an amendment is procedurally perfect, yet it's challenged as being unconstitutional nonetheless. And a state court can say, "no," some state courts can say, "yeah, it's unconstitutional," and of course, around the world that's true as well but not here. Not in this country at the federal level.

Audience Member: When I think of a referendum, I think of Brexit, and it seems that if you compare the Constitutional Convention that we had to the Brexit debate, it was not the kind of robust and informed debate that

needed to be had in order to legitimate the results or to provide even a good result, let's say, that could be followed going forward. And so, you've spoken about popular legitimacy but, I mean, what makes the Constitutional Convention that we had in any way "popular"? It was just another group of elites that were debating, I think very usefully and productively, a question, and necessarily, but when we think of a referendum these days, we think of everyone going out and voting on whatever fake news they've got that's influencing their opinion. So, this question of what's going to be popular and what's going to be legitimate, I think, is probably going to be most important and problematic.

Albert: Which is why I mentioned two criteria that would go into the design of a referendum. One is that it should be an informed decision; that's clear. Now, how you get that is a different question, and we could discuss that through design—institutions that we could turn to to ensure, or maybe not ensure but to best ensure as we can, an informed vote. So how do you do that? Well, you can fund both or all sides at equal amounts. If we really care about that, we will allocate some monies to do this. You can give equal time on television, public broadcasters, and even private broadcasters; you can do that. So there are ways that we can shape an informed vote.

The second criterion is a confirmatory vote. So, I've long written about this: the idea that getting the view of the people on one day, on a matter of this transformative significance, is just not adequate. What you want to do is to have an important choice, yes by the people, I don't think that there's any higher source of authority, but to make sure that it's a durable choice, so you test it, so that if at time one the vote is yes, then you have a subsequent vote later on. Now, we can figure out what the right interim is: it might be 3 months, it might be 6, it might be 12. We can figure that out, but the point is that you need a confirmatory vote. And then, I think you made a second point—your second question was about the "popularity" of the conventions at the Founding. Everything is relative. Everything is relative. So, relative to what we do today in the world, the conventions were not representative, they were not popular, they were woefully behind. But relative to what was known at the time, that was an extraordinary, extraordinary achievement of this American tradition of constitutional change, extraordinary. People were still excluded, people who look like me were excluded, people who look like you were excluded and all of your colleagues, and many of your colleagues, many of your students, but still, relative to the time, it was an extraordinary achievement.

Audience Member: One of the questions that I have about the referendum is about the separation of powers. Could you address how that would be considered in this situation?

Albert: Well, the way that I'm proposing is that the ultimate separation of powers is two levels. So, you know of the vertical separation of powers, which is federalism, right? States are subordinate to the federal government. This is a design of the U.S. Constitution; it wasn't the case under the Articles, but that's the new world after the U.S. Constitution. The vertical separation of powers that I'm talking about here is the constituted organs of government subordinate to the people. So that's the separation of powers that I think trumps all. Now, it can't be the case that what the people say, anything the people say, always must govern. It has to be an informed vote. We have to give the people, you, me, the tools to understand the stakes of the choices that we have to make. But once that's clear, once that hurdle is clear, then I don't think there's any justifiable basis to gainsay what the people have said in an informed vote.

Audience Member: What are the tools that you think the public needs? I'm coming at this from the perspective that we have a system right now where late-night talk shows humorize society's lack of knowledge on constitutional history, on American history, and we even have an educational system that ignores the significance of social studies classes where we learn about constitutional issues or even supports the idea that "no one fails social studies." So, I'm wondering what element you think, or what tools you think the political or legislative elite would not have in their toolbox? What tools do you think the public would need to get behind such a radical change?

Albert: This is a generational project, and I hope that it will be your generational project. This is, I think, the key question, and it can't be something that we answer in parallel with the holding of the referendum. This has to be something that begins in public education, in elementary school, and that is spread through all of education until the end of high school and beyond, right? We have to create the idea of a public citizen. Right now, you are all, in this country, private citizens, right? People who care about their own thing, and that's understandable. You want to put food on the table for your family, you want to send your kids to school and make sure they're safe and healthy, but that's not a public-oriented view of citizenship. And that's the result of the decline of discourse in this country. It's a result of many, many things, but I think that, to answer your question,

we have to begin not at the point of the design of a referendum. That's something that we have to begin today, through the referendum in 20 years.

Audience Member: In terms of recent history, two of the last three U.S. presidents have been elected without securing a majority of the popular vote, and that's been accepted. We've seen both of those people at least serve in office. What kind of entry do you think that it'd take in a public referendum to get the public to finally accept the popular vote as an acceptable means of picking something that's going to dictate what the rest of the country does?

Albert: You just have to do it. Someone has to pick the question and do it. I don't think it has to rise to that level of crisis, however. I think a president, a charismatic president, who has the audacity to try and do something like this in the face of an obstructive Congress, that has to also be the case. In the face of a recognized need for some change, because it's just not possible following the strictures of Article V, that's what will get this done. But I'm not optimistic that this will happen. I'm just trying to make clear that this tool exists, and it's not a radical tool, insofar as it's consistent with the history of this country, and the Founding is not the only point either.

Lisa Miller: Yes, thank you Richard, that was very interesting and provocative. What I like about it is that something we don't talk about very much is that presidential elections are really the only time in our political process that we have a national conversation about who we are and what we want and what the future should look like. And, really, when you think about congressional elections, they're on a much smaller scale, so national elections have a certain legitimacy. I mean, notwithstanding the problem that you raise, which is a very serious problem, but President Obama did win in 2008 by 10 million votes. So, there's a legitimacy from presidential elections that I think one could make more of, in other words. So, I guess I'm curious if part of the idea is that presidents are uniquely situated to do this?

Albert: Yes, yes absolutely. There is no role, by the way, for the President in a constitutional amendment in Article V. Nowhere is the President mentioned, which to me is odd; it's odd because she or he is the only person with any kind of national mandate. It's not a direct national mandate, though some of you, perhaps, think it should be, but it's nonetheless a national mandate. But there's no role for her in the whole process of doing the most important thing that one can do to the Constitution, which is to update it. Now, that does not mean that presidents in American history have not taken a role in amendment because they have.

So, for example, there's the famous Corwin Amendment. Do you know of the Corwin Amendment? Have they taught—well, you don't talk about the amendment in your class, but I should say that you students in the room are very lucky to have Professors Schor and Kende as your professors because they are really quite extraordinary colleagues, and I have had the benefit of their counsel and their wisdom. So I don't think that I want to be a student again, but if I could go back, I might choose these two. But, the Corwin Amendment is an amendment that was proposed in 1860 by a representative from Ohio as a way to reassure the South, as a way to keep the South in the Union, as a way to prevent the Civil War. And this amendment is actually very interesting. It's an amendment that nonetheless to this day remains ratifiable, by the way. So the amendment says the following, I'm going to paraphrase obviously, but it says the following. It says: Congress shall have no power to interfere with the domestic institutions, the internal affairs of the state. It's very interesting what that means. That's code, by the way. That's code for slavery. "Domestic Institutions." "Internal Affairs." Okay, so, it's proposed. It's 1860 by the way. It's proposed. It's ratified by three states. Now, what that means is that it had to be proposed by Congress, two-thirds of Congress agrees that this is an important thing to do. It's then only ratified by three states. The best part of the amendment I haven't even told you yet: the best part of the amendment is that the amendment made itself unamendable. It said: this amendment cannot be amended. It's a forever part of the Constitution. There's no such thing today in your Constitution.

Now, there were two things that were unamendable, but they expired in 1808. So some countries around the world, they make some very laudable, praiseworthy, positive things, in some people's view, unamendable, you can't change it. Germany makes human dignity unamendable. Sounds like a good thing. If you believe in secularism, Turkey makes secularism unamendable. That might be a good thing in your view. Namibia makes its entire menu of rights and liberties unamendable. Brazil makes federalism unamendable. Republicanism is unamendable in Italy and France. Okay, not bad things. This country makes something unamendable until the year 1808: the international slave trade. Talk about reading, seeing, peering into the soul of the Constitution through Article V. That's in the text of Article V by the way. So the Corwin Amendment proposed to make itself unamendable to give the states this unamendable right to do whatever they wanted in their states. So three states ratified, and then there was a campaign going on because it was 1860, right? Lincoln campaigns on the amendment. There's no role for the President in Article V. He campaigns on the amendment. His

first Inaugural Address urges the ratification of the amendment. This is your president, by the way, urging the ratification of the amendment. Eventually, the Civil War erupts, and then Lincoln leads the adoption of the Thirteenth Amendment, and what does he do? There's no role for the President in Article V, what does he do? He insists on signing the proposal that's submitted to the states to abolish slavery. So, there have been instances where presidents have had a role, namely Lincoln, and I think what I'm proposing here is not unique in the world because we see this happen around the world. This has happened, I think, most prominently in France where the President has broken through the log jam created by the Parliament to go directly to the people. But I think it's consistent with the American tradition of popular sovereignty, at least what you aspire to be. And so I think that even though it would be illegal, it might still be seen as legitimate.

Audience Member: I'm wondering how we could get to a popular referendum, and voting multiple times in having that second confirmation vote, when we have mass amounts of people who are disenfranchised or who simply choose not to vote. And maybe the education aspect, as you said, that starts in elementary school, maybe that's the right way to do it, but do we maybe need to deal with the egg before we get to the chicken?

Albert: Absolutely, yes, it's very important to deal with all of those issues first. So, what I'm proposing assumes that we're in a world where we can do that well. But that's the hardest rock to lift, right, is to build a society that cares about all of this stuff because I don't think that you do now. Not everyone, and there are people who care, they care about it intensely, they go to bed thinking about it, they wake up thinking about it, but that's not the median American. But I think that it's important for the success of this country, and it's not a homogenous country, so you have serious challenges. If it were homogeneous, it might be easier. It'd be a lot easier in fact, but because it's a heterogeneous society, you have to have something that holds you together, and what's interesting, maybe ironic, is that it's your Constitution. That's what holds you together. The problem, however, is that you interpret it differently, and you don't play by its own rules when you have judges rewriting it, effectively, when they act as the court of last resort and tell you what this word means on this day, and then five years later it means something else.

So you're not playing by your own rules, and so the referendum idea is still consistent. It's even more consistent given the Founding, given the use of informal amendment by courts, but your question, I think, maybe these are the two most important things that you would have to address in order to maybe improve civil discourse here, politics, but also I think, for the

country in the future. I want to close, and I don't know if there are any more questions, but I want to close with an encouragement, which is to read a very provocative paper by a professor at Boston University Law School, Gary Lawson, and it's one of my favorite papers, it really is, in which he argues that this country is really five countries in one, and that would really be the way to fix your problems, to break up into your five countries, your four or five countries, and just do your own thing. Now, my response to Professor Lawson, however, is that that's not possible because people in these five different countries, in this one country, you have universalizing instincts. You don't have particularistic instincts. It's not a "live and let live." You want others to see the world as you yourself see it and you yourself live it because you think you are right. So his idea just wouldn't work because you'd have five countries, but then you'd begin the march toward conquering others, right? You'd begin the march toward war. So I just don't think it's a good idea, but there's a kernel of truth there, which is that this country is really a community of communities. It's a people of peoples, and that's really the root of the current impasse in Article V. It's the root of all of the problems that you're dealing with today.