
ARTICLE V AFTER 230 YEARS: TIME FOR A TUNE-UP

SYMPOSIUM DISCUSSION: LEVINSON

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Audience Member: You left off rather provocatively right where you said there are lots of provisions of the Constitution that are taking us over the cliff. What are they?

Sanford Levinson: This is also a coming attraction for our return visit in September. Okay, marching very, very quickly to do with Article I: U.S. Senate and the strength of the presidential veto power. Law professors love to talk about the countermajoritarian difficulty with regard to judicial review, by which five justices can in effect invalidate legislation passed by Congress (and, most often, signed by the President). But, as a practical matter, far, far more important as an example of countermajoritarianism is the presidential veto itself, which turns us into a de facto tricameral—and not only bicameral—legislative system because of the ability of a single President to render irrelevant the passage of legislation that can surmount the considerable hurdles established by the Constitution with regard to passage of legislation by the Congress of the United States. A most recent example obviously is Donald Trump’s vetoing the overrunning of the emergency declaration by which he arbitrarily transferred funds allocated for other purposes to building his “wall” on the Mexican border. I think that should raise serious qualms in the mind of anyone who believes in what the Constitution labels a republican form of government, where an individual impetuous president can arbitrarily declare an emergency and then use his veto power to prevent effective congressional restraint. Congress, under the original Emergency Act of 1976, Congress could in fact have overturned such presidential decisions without running into the veto power, but, alas, thanks to the U.S. Supreme Court’s decision in the *Chadha* case in 1982, this so-called “legislative veto” of certain executive action was ruled unconstitutional, thereby effectively giving the President immense new powers during purported emergencies.

Article II would be far better if it provided a procedure by which we could fire a president in whom we had justifiably lost confidence because of demonstrated defects in character and judgment. You don’t need to go all the way to the parliamentary system to get that. Regarding Article III, I think it’s almost crazy in the twenty-first century to continue to have life

tenure for Supreme Court justices. I think a single, nonrenewable, 18-year term would be enough to provide for the judicial independence we desire. Article V obviously needs revision inasmuch as it makes amendment nearly impossible, but those are a taste of some of the issues. Only the Electoral College seems to be the topic of any public discussion at all, but everyone knows that that low-hanging fruit is in fact not going to be picked because of the difficulty of amendment. The House in fact passed an Electoral College amendment in 1969. It was supported, although it wasn't legally required, by Richard Nixon, and it failed because, as you might easily predict, the Senate, itself an insult to any notion of majority rule, beat it back. There's been no serious effort of a constitutional amendment since then, and there will be no serious effort to add a constitutional amendment in the next several years.

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Levinson: Here is my "workaround" with regard to changing the stranglehold that that an indefensibly apportioned Senate has on our public life. Article V effectively prohibits changing the equal apportionment rule itself. But we *could* use Article V to amend Article I and simply restrict the power of the Senate to, say, confirming ambassadors to foreign countries. Because in fact I do support bicameralism, because I think we're way too large to be governed by a single house. I would then advocate an amendment creating a brand new institution that would be legitimately portioned to which we would assign the remaining powers now held by the present Senate. I recognize that this is academic fantasy, but it's fun to think about.

Audience Member: One of the things that I find the most terrifying about the idea of amending the Constitution is that the things that seem to be most at the top of the list of many people would be things that would undermine many of the equal rights decisions that the Supreme Court has made over the years. And you seem to be talking more about procedural type of amendments so, is there a way to only say procedural amendments and not sort of overturning particular substantive amendments?

Levinson: Well, in a way I think there is a way of limiting what the new convention would in fact do, especially if the impetus for calling a convention was a recognition that our formal structures do not serve us well. So if you say, "Look. James Madison was right." Rights revisions ultimately are parchment barriers, and, as a matter of brute fact, we don't have to amend the Constitution to get rid of (or, for that matter, add) many of your favorite rights. That really depends, in large measure, on who is appointed to the federal judiciary, which in turn is a function of who wins elections to the White House and Senate. The reason we have semester-long courses on the

Fourteenth Amendment or the First Amendment and not on the Veto Clause, say, is because there is constant variation in what Robert Jackson called the “majestic generalities” of the Constitution mean to different generations of judges. But we don’t have similar constant conversation or debate about what the Veto Clause means. It means you need two-thirds to pass Congress. That’s it! And so on and so forth with other structural provisions that are in fact ignored.

Why are they ignored? In part it’s because law professors are not interested in talking about the Veto Clause or the allocation of voting power in the Senate because they are not litigated. They don’t raise any issues of “interpretation,” as distinguished from wisdom. But that’s a different sort of issue that we rarely if ever raise with our students.

But there’s another reason I’m rather complacent about the prospects of a “runaway convention” that would repeal your favorite set of rights. Whatever a convention proposed ultimately would have to go through the states to ratify. Although I’m quite despairing at times about the American future, I simply don’t believe that supermajorities of the country are ready to repeal basic rights. There’s no evidence for that. Some liberal progressives seem to believe that there really is popular support for repealing the First Amendment, which I think is false. People on the right believe that the Second Amendment hangs by a thread, which I also think is demonstrably false. In any case, if a convention really did start focusing on amending rights, all we would do is yell at one another and nothing would happen. Whereas, the conversation that we need to have is on the structural revisions, which I view as the clear and present danger to our survival as a constitutional order. I don’t view any of the rights revisions as being the source of our basic dysfunctionality.

Audience Member: You argue that Article V was the buy-in or investment piece to create the Constitution. I wonder what you consider would be the modern element or buy-in for today for us to make such adjustments to the Constitution?

Levinson: That’s a very good question. You look at polling data, and you discover—I don’t know what it is today, though you can look it up on Real Clear Politics—but Congress varies between about 10–15 percent with regard to popular approval. The much more important data point with regard to your question is direction of the country, where a hefty majority believe the country is going the wrong direction. As an academic rather than someone that thinks this is an immediate possibility, I’m genuinely curious

as to when any of the secessionist movements that are actually present around the country would become politically serious rather than kind of a joke. Look at Scotland, look at a number of other places around the world where secessionism is almost literally deadly serious. The U.K.'s attempt to secede from the European Union is, of course, the most dramatic current example. One thing that might lead to a serious secessionist movement in what I call *Pacifica*—the American West Coast—is a belief that the national government just isn't working. And people there may ask, "Well why isn't it working?" One reason is that national elections are, to some extent, somewhat meaningless in terms of creating a government that can pass programs; elections seem mainly to create the conditions for continued gridlock and acrimony. The American states, incidentally, are very different—for better and maybe for worse depending upon your own politics. Republicans can take over Wisconsin and pass a program. Democrats can capture California with supermajorities and pass programs. In Iowa you have had governments, again I'm sure there is difference of opinion on the virtue of these governments, but you have governments and then you can throw the rascals out in the next election if you don't like what they've done.

At the national level, you've got elections, and then you can't even repeal Obamacare even with Republicans controlling everything. If I were a Republican, I'd be furious. I'm not a Republican. As a Democrat, I look at what Democrats were able to accomplish in the two years that Democrats controlled both houses of Congress and the Presidency. Obamacare and Dodd-Frank aren't nothing, but it's not all that much, given the needs of the country. So it might mean that the more effective government would be what I'm getting behind, and that would require modifying some of the things that I've mentioned, but it also might require modifying Article V because in a number of ways, you can't get a truly more effective government now having the base that we had a hundred years ago.

A century ago, we were willing to address certain structural problems. You had the Seventeenth Amendment, which was certainly an important amendment that said that legislatures would no longer appoint senators; senators will be popularly elected. I'm also a big, big fan of the Twentieth Amendment, which is something else that most law students (and citizens) are simply unaware of. It moved Inauguration Day up from March 4th to January 20th. I'd move it up even more. That would probably require a constitutional amendment inasmuch as that might also require getting rid of the Electoral College (which would be fine with me). The Twentieth Amendment also cut down significantly on lame-duck legislatures by

starting the new Congresses at the very beginning of January. Most people regard this as dull and boring, but it's in fact extraordinarily important. And people actually thought about such things in 1933, and we don't in 2019. When people think today about the Constitution, the only thing they think about is rights, and I think that is a huge, huge mistake.

Audience Member: Could you remark on restructuring the structures of the Constitution with looking elsewhere in the world, would that have some merit?

Levinson: Oh sure. Ruth Ginsberg got in a lot of trouble in, I think it was 2011 or 2012, for giving a speech in Cairo, and she told the students there—this was at the height of the Arab Spring, when they were thinking of genuinely being able to write a new and effective constitution in Egypt—that they should study the South African constitution drafted in 1994 and basically ignore the U.S. Constitution because it is simply too old. Although she was criticized by some, part of American exceptionalism is our veneration for the Constitution of 1787; other countries don't have that kind of veneration for their constitutions, and so they update their constitutions much, much more unemotionally than we do. This is, incidentally, one of the reasons I'm a big fan of looking at American states and not only at the national Constitution. If you look at foreign countries, you're going to run into Justice Scalia and the view that we don't have anything to learn from what foreigners do. Okay, so let's look at Iowa, let's look at California, let's look at Texas, let's look at 50 other constitutions of the United States. You discover wide variations. Iowa is especially interesting because of the two-legislature rule. That is to say, you can't amend your own constitution here unless two successive legislatures agree on the amendment. I know very little about Iowa politics, but I suspect that is the reason that you didn't overrule the supreme court's decision on same-sex marriage, unlike California, which did overrule their state supreme court's decision because California allows popular initiative even with constitutional amendments. So you have a whole menu of possibilities that are very much worth discussing.

I would be hesitant, especially since I think we're coming to the very end of time, to say that I have a single favorite constitutional "model" because I think inevitably there's something to be said for or against almost any system. Still, more than most academics, I do support some forms of direct democracy and the ability of the electorate to rise up, if you will, against sclerotic legislatures. I'm a big fan of Nebraska getting rid of its senate in 1934. I think that no state smaller than New Zealand, which operates just wonderfully under a single house of representatives, needs a

state senate, but quite obviously you're not going to get that in most states, especially if senators have to vote themselves out of a job. So when Jesse Ventura, the maverick who was elected governor with a minority of the vote in a three-way race just north of here in Minnesota, he suggested that Minnesota should get rid of its state senate. He was absolutely right, but Minnesota still has a senate. Whereas if Minnesota has an initiative referendum, I suspect the senate there might be a thing of the past.

I'm very well-aware of all the arguments against popular referendum, especially where state constitutions are concerned. What you can do is think of so-called tiered constitutions. If you're really concerned that certain rights could be voted away in referenda, you could emulate Germany and say, "Well, certain parts of the constitution are to be unamendable." So, for many people in this room, the favorite candidate would be the First Amendment, other people might say the Second Amendment, but in either case you'd be saying "don't even think of touching this." And as Professor Kay has suggested, we have an eternity clause in effect with regard to equal voting power of the Senate because it takes unanimity to get rid of it, and the Dakotas will never, ever give up their unjustified four votes in the Senate. But with regard to most of the structural provisions, there's no need to protect them with the same zeal that we would protect our favorite rights. In 1787 they weren't thinking this way, and I don't want to bash them for not thinking that way. They were making it up as they went along, and one can praise them for getting a lot of things right, in the sense the United States did get up and running for several decades, before we disintegrated and killed 750,000 people between 1861-1865. A number of foreign systems do have tiered constitutions, and I don't know any reason that the Electoral College should take the same degree of difficulty to amend as a freedom of religion, say.