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# THE SHRINKING CONSTITUTION OF SETTLEMENT

SYMPOSIUM DISCUSSION: POZEN

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DRAKE UNIVERSITY LAW SCHOOL

**Audience Member:** So I'm curious about the constitutionality for some of the states to do what they're doing in the national popular vote movement? How can you essentially declare a provision of the Constitution that's so clearly stated without an amendment?

**David Pozen:** I'm smiling because it's a great question. Franita Tolson and I were talking about this last night. She scared me terribly by telling me ingenious theories about why it would be unconstitutional, one being that there's some structural principle that through an interstate compact you can't effectively modify or work around a textually specified institution; another being that it might even violate Section Two of the Fourteenth Amendment, insofar as states that don't sign on for the compact will find their residents' votes effectively diluted or their voters functionally disenfranchised. I would just say these strike me as plausible but untested constitutional concerns that one could have with the interstate vote compact. But it would not be hard to come back with equally plausible counterarguments, including that any interstate compact would have to gain Congress's consent. So this isn't just a series of states going off on their own to do a workaround; you're also getting the blessing of our most democratic federal branch. And, given the broad leeway that the Supreme Court has given states to enter into interstate compacts affecting all manner of things, such as the structure of the federal government and our foreign relations, it seems to me that you could easily defend the opposite position. If there were enough political will for the idea that the national interstate vote compact is essential or else we have a sham democracy, that we just can't keep going with millions of voters siding for one candidate and then the other candidate winning, it seems to me that constitutional law could catch up very quickly. There are good arguments on both sides, but I view it as a close call. And I think the democratic imperative of getting away from our current Electoral College practices cuts strongly in favor of reform.

**Audience Member:** I really thought it fascinating when you mentioned the compact disenfranchising people in the states that do not sign on. Wouldn't it have the potential to disenfranchise people in the states that do sign on? They could vote for candidate *A* but then candidate *B* gets the majority of the popular vote. You're basically telling people of that state, "Well too bad, your votes don't really count."

**Pozen:** Yes, but using that understanding of disenfranchisement, disenfranchisement becomes kind of an uninteresting concept. It's everywhere,

right? It's happening right now. So it's a question of degree. Under an understanding of disenfranchisement as occurring whenever your vote doesn't "really" count, a majority of Americans have been disenfranchised for a long time in any number of elections, including our last presidential one. I think we need to ask a comparative question about which system would lead to more votes counting for more people, and very plausibly, moving to an interstate compact would do better on that score.

**Sanford Levinson:** Frankly, the major value I find to the fair-vote initiative is in generating discussion, but I think the more you examine it, the more problematic it is. In terms of the way you phrased your question, one of the terrible, terrible things about the Electoral College system is that it doesn't award votes to the person who gets the majority. It's first past the post. So, the fair-vote initiative is entirely a response to 2016 where the plurality vote winner didn't win. It says nothing about 1968 and 1992, which are at least as important because Richard Nixon and Bill Clinton got to the White House with 43 percent of the vote. Abraham Lincoln got to the White House with 39.8 percent of the vote, and that triggered the Civil War. And the fear of the initiative just doesn't speak to that at all; the electoral vote, the Electoral College is a system that has to be examined in all of its respects, including the fact that if there is no majority from the College, the House picks the President on a one-state-one-vote system, which under certain scenarios can be a recipe for civil war. And again, the fair-vote really doesn't speak to that at all.

**Pozen:** Sandy, can I ask you a question? I take all of those critiques. The fair-vote proposal strikes me as flawed in a number of ways too. But nonetheless, would you view it as an improvement on the status quo if you were in a position to make the change?

**Levinson:** At that point I would become very much like some of Frank Buckley's economist friends and talk about the problems identified by the theory of the second best; that something that looks like an improvement if you're fixated on only one factor, in this case the elections of 2000 and 2016, could be a disastrous impairment if you look at many other elections. So I am genuinely agnostic about the fair-vote proposal, other than its functioning to initiate a conversation that, to an amazing degree, we haven't

had, even though every poll since 1944 has shown the majority of the public would, in fact, get rid of the Electoral College.

**Jack Balkin:** I just wanted to ask for you to weigh in on ranked-choice voting, which is Ned Foley's suggestion.

**Levinson:** Oh, I'm a big fan of ranked choice.

**Balkin:** Yes, but you could make the same objection about ranked-choice voting, right? It will produce a majority winner in every election.

**Levinson:** Right.

**Balkin:** That's what it's designed to do. As far as you know, are there constitutional problems with states adopting ranked-choice voting on their own?

**Franita Tolson:** I haven't really thought about it but not to my knowledge. I wouldn't think so.

**Balkin:** And you don't need a constitutional compact to do this.

**Tolson:** No, you don't.

**Balkin:** The states could agree that each of them will adopt ranked-choice voting, but basically each state on its own can decide whether it wants to do so.

**Tolson:** Well, that right there is a core problem that we have to sort of think about with the fair-vote proposal. Theoretically, every state could just cancel their elections and award their Electoral College votes to the national popular vote winner. I think as long as that remains an option, then you run into problems where states have it both ways by making the population still feel enfranchised while basically disenfranchising a portion of the population. That was a core problem in *Bush v. Gore*, right? *Bush v. Gore* cannot stand for the proposition that every election technology has to be the same, so everybody's vote counts equally. It was more so the fact that you had an ex post facto change in the election and in the way that the votes were counted. I think the fair-vote initiative presents a very similar problem, and I think that's the distinction.

**Pozen:** If I could just return to the high level for a moment, though, we've now gone into debating the details of these reform proposals to change how the Electoral College works. But just the fact that these proposals are out there, getting serious attention, and getting political support from high levels, supports the general point that I was trying to make, which is that Sandy has said the Electoral College is horrible; it's undemocratic; we're stuck with it; and it's settled. And I'm trying to suggest that, whatever the flaws of this or that particular proposal, it's not so clearly settled. We're at a time when it is conceivable that if we meet here again in 20 years, we'll have a different Electoral College system.

**Miguel Schor:** I love the thesis. It's sort of provocative that the text is not quite as settled as you think. But the question I want to push back on a little bit is whether it's the case that our Constitution looks like the English one since when we drill down to a more granular level, it's open to all sorts of statutes. And as a

result, there's no necessary payoff at writing it down. Isn't that a problem?

**Pozen:** It begins to move us in that direction, that the “writteness” of the U.S. Constitution is less relevant than people think. We're closer to the British than we might like to acknowledge in our reliance on unwritten conventions, such as how to interpret parts of the Constitution and how to structure and run government generally. Where I think we don't get all the way there, and where Sandy's thesis has some bite, is that in our legal culture words aren't meaningless, and it really is hard to creatively work around and reinterpret some relatively crystalline language in the Constitution, such as that the Senate shall be composed of two senators per state. Jack had a brilliant April Fool's joke—or no, it was Solum parodying you! Jack is a famously ingenious textual interpreter, and Solum was spoofing Jack—purporting to introduce Jack's new article in which he had figured out a way to read the two-senators-per-state clause that allowed for something closer to population-based apportionment. It's an empirical question: Just how much constraining work does constitutional text do in any given constitutional culture? It clearly does some in our culture, but if we just observe the degree to which perceptions of textual clarity are themselves informed by social conventions, then we can see that there's some room in the joints. And I worry that hammering on about how stuck we are, how “settled” we are, is a bit of a lost opportunity to engage in a creative process of rethinking and reinterpretation, at least on some provisions, that Sandy would otherwise be the ideal person to lead us in.

**F.H. Buckley:** Let me just make a little point about the Electoral College. The Electoral College problem is that it's just in every parliamentary regime. We think it's American, but it's actually endemic to every constitution. Therefore, it often happens that the winning party in parliament is not the party that gained the majority of votes. And somehow that's never really been a problem in other countries, which I think signals that in those other countries, there's a greater adherence to the rules of the game and less of a desire to get your own way.

**Tolson:** Your comments raise this question in my mind. Is there really a constitutional settlement? It seems like so much of it is dependent upon political culture and what's going on at the time. Before your comments, I hadn't heard about the argument that the meaning of “natural born citizen” was changed by the Fourteenth Amendment, which is really interesting. But I did think about the fact that there was litigation about whether John McCain was a natural born citizen and could be president. And so it seems to me that even when we think about just the very basic structural features, a lot of it is dependent upon political culture and political controversies happening at the time.

**Pozen:** For that reason and the reasons Miguel was getting at, I think the

constitutional order is always simultaneously becoming more and less settled. I focused in my remarks on some things that seem to be becoming less settled, things that previously were taken for granted and no longer are. But at any given time, other things that might have been contested at one period become more settled through political contestation. It was unsettled whether someone who was born abroad and whose parents are both U.S. citizens, such as John McCain or Ted Cruz, would qualify as a natural born citizen. I think what came out of that dispute was that that kind of person can be considered a natural born citizen and run for president. Democratic voters weren't objecting to John McCain on that basis, nor was President Barack Obama. So I think we actually moved toward settlement in that area, even though disputes like that can cut both ways. Some things get firmed up, even as other things get destabilized, and that reflects the essentially political nature of a constitutional perception.

**Levinson:** I think Frank's point is very important, but I think it underscores the fact that there's no single kind of presidential system. I think it's very illuminating that in the United States, for example, presidentialism at the national level is winner take all. That is to say, the President appoints almost everybody. Whereas, gubernatorialism in the United States is not winner take all. The governor in Texas appoints almost nobody, as a matter of fact. And it is very, very common that the attorney general is independent of the governor; I think that's true in 46 or 47 states. It's very common for the attorney general to be of a different political party from the governor. Parliamentary systems have similar variations. My own view is that the U.K. has a particularly indefensible electoral system, so Margaret Thatcher can become the most important peace-time Prime Minister in history with something like 42 or 44 percent of the vote. But in many, many other parliamentary systems, you discover there are multi-party proportional representation systems. So the other critique of parliamentary systems is that, and you see this in Israel right now, the election is simply round one, then you get endless negotiation and cobbling together of some kind of coalition. There are no perfect systems, but I do think that it is very, very important to recognize there are all these variations in so-called presidential systems and all these variations in so-called parliamentary systems, and we strive for a Goldilocks point as to what's just right. But then you discover that all have costs and benefits. What we're not doing, though, is discussing those systems; instead, we obsess on what the Supreme Court is doing, which is really basically useless with regard to the kind of conversation that I want to initiate and that Frank has initiated. We really could have a very valuable conversation back and forth without ever citing a single case of the U.S. Supreme Court.

**Pozen:** I agree.