

Levinson and Constitutional Reform: Some Notes

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Sandy Levinson's book *Our Undemocratic Constitution*¹ raises difficult questions about American constitutionalism that deserve to be taken seriously. I hope it will be read and discussed in the patriotic and critical spirit in which it was written. Sandy may have difficulty, however, winning over his audience. In my experience, most people are unwilling to entertain the idea that the Constitution may have fundamental flaws (although they might concede a few "stupidities" or mistakes).² This fall, I had students in my Constitutional Theory seminar read some selections from the book. They tended to view it as a series of complaints about the Constitution, not as a fundamental critique that would move them to advocate reform.

Perhaps the reaction of my students is due to the contrast between the breadth of Sandy's initial claim – "that it is increasingly difficult to construct a theory of democratic constitutionalism, applying our own twenty-first-century norms, that vindicates the Constitution under which we are governed today." (6) – and the specific undemocratic features of the Constitution he critiques. For despite events such as the 2000 presidential election crisis, the American public and my students do not appear dissatisfied with the

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¹ See Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong* (New York: Oxford University Press, 2006). References in parentheses in the text are to page numbers in the book.

² See *Constitutional Stupidities, Constitutional Tragedies*, edited by William N. Eskridge, Jr. and Sanford Levinson (New York: NYU Press, 1998).

specific points Sandy raises about unequal popular representation in the Senate, the operation of the Electoral College, excessive presidential power, life tenure for justices, and the high barrier to constitutional change posed by Article V. (6-7)

Sandy provides some evidence that the public is dissatisfied with American politics. (7-9) But this dissatisfaction might well be related to policy outcomes or the actions of politicians rather than going to questions of constitutional structure. Nevertheless, Sandy concludes his introduction by saying: “*We must recognize that a substantial responsibility for the defects of our polity lies in the Constitution itself.*” (9, emphasis in original) So he identifies two problems: the Constitution is undemocratic and dysfunctional. (9) Not an attractive picture.

Unlike my students, I am quite sympathetic to the project of constitutional reform. I am under no illusions about whether we are going to hold a new constitutional convention. However, thinking about the Constitution from what I call a “design perspective” can be useful as a heuristic device. It can provide new angles for understanding American constitutionalism. And it is in keeping with the founding generation’s belief that governing orders can be critiqued and reformed in a rational way.

To be clearer, a design perspective involves asking whether each significant element in our contemporary constitutional system could be justified *if we were* holding a constitutional convention. If you like, we can imagine that the constitutional convention is an ideal one, with unlimited time for discussion, access to all relevant information, its members perfectly representative of the American public, and so on. But the point is that features of our constitutional order that are normally accepted simply because they are

endorsed by the document are put under critical scrutiny when we adopt a design perspective.

Assuming a design perspective does not necessarily avoid some paradoxes that have plagued various attempts over the years to advocate comprehensive constitutional reform. I think they also affect Sandy's project despite the efforts he makes to mitigate or avoid them.

Consider first what normative lever we would employ were we suddenly cast into the role of a reform-minded delegate at a constitutional convention. Surely we would appeal to some attractive set of normative principles to ground our critique. Thus at the beginning of Sandy's book, he appeals to democratic principles, counting on our allegiance to democracy as a form of government. Given the respect and veneration in which the Constitution is held, however, we can reasonably expect to be challenged no matter how attractive our principles. Are these principles external or internal to our political and constitutional traditions? If external, they are not likely to be persuasive as a basis for critique. If internal, then they are already endorsed and at least fulfilled in part by our founding document. To the extent already accepted constitutional principles can be used to critique our constitutional order, that cuts against any argument that our order stands in need of fundamental reform, at least through a convention or an amendment. It is more likely the principles can be fulfilled through changing the way the document is interpreted.

This is very schematic, so by way of illustration consider the reaction to Sandy's proposal to eliminate the presidential veto. This proposal carries forward one of his themes, that the Constitution is undemocratic in some respects and puts too many

obstacles in the way of needed legislation. Readers of a *New Republic* article³ in which Sandy summarized this proposal responded by reminding him that we live in a republic. Where does the force of this response come from if Sandy is assuming accurately, as I think he should, that we are all democrats? The ready answer is that democracy is only one theme among many in our constitutional order, although perhaps a predominant one. When Sandy's readers cry "republic," everyone conversant with the American constitutional tradition knows what they are talking about. They are invoking ideas such as separation of powers, checks and balances and warning against the dangers of unbridled majority rule.

Our constitutional tradition contains an element of skepticism toward the claims of democratic power. As long as these views persist, constitutional reform founded on democratic claims must first clear some ground. The idea that our constitutional order is a mix of democratic and republican principles must either be debunked (possibly through an analysis of how much that order has changed since the eighteenth century) or, if the view is that republican principles persist in a meaningful way, then those principles must be attacked through a normative critique. Doing so, however, will pose difficult questions about whether it is wise to abandon (or at least substantially modify) the separation of power/checks and balances system and, in addition, will place advocates of a reform in a difficult rhetorical position (as enemies of the republican founding generation).

A second paradox of constitutional reform relates to the need to provide a practical or policy justification. (37) As Sandy argues, surely one reason to consider constitutional reform seriously has to do with the apparent inability of the current

³ Sanford Levinson, *Poison Pen*, *The New Republic*, October 9, 2006.

political system to act on a range of important policy problems. (38) But presumably solutions to these problems are deeply controversial. Would they not have to be justified *seriatim*? Perhaps the political system has not acted because the problems are not as serious as the public supposes or there is no agreement on solutions. Further, if you advocate constitutional reform on the basis that it would make certain policy changes easier, then the desirability of reform becomes hostage to the desirability of those policies. Those who benefit from the status quo now have a wonderful incentive to oppose the reforms.

Ideally, structural or constitutional reforms should be justified by the changes they make to the policy system as a whole. At that point, however, it becomes more difficult to obtain agreement on reforms because of the likelihood of unknown side effects on policy. In other words, if we cannot know in advance what would happen to the policy system once we make structural reforms, then this would count against making reforms. If we know what would happen at the level of policy, then the paradox just described takes hold.

These paradoxes exist because constitutional reform in the contemporary world must address a complex governmental system (imperfectly described by the Constitution itself) that is an ongoing, self-sustaining enterprise. The framers did not have this problem. In the circumstances of the 1780s, there was a credible argument that the government under the Articles of Confederation was literally incompetent to perform essential governmental tasks. It could not levy taxes on its own, for example. It required the unanimous consent of the states to do anything. It appears that the only time we have extensively revised the Constitution is after a revolution (the American Revolution of

1776), or, at least, a quasi-revolution (the Civil War). It seems that absent such order-shattering circumstances, we may be incapable of taking on the task the framers assumed. Reasonable constitutional revision at regular intervals as Jefferson suggested (and Sandy endorses) may well be impossible.

Despite the second paradox, I think Sandy is right to pitch many of his arguments for constitutional reform at the level of policy. A justification founded on basic principles can too easily become mired in a debate over abstractions. But how are we to evade the policy paradox? One strategy that Sandy tries is to highlight the pervasive role that interest group deals play in our current constitutional structure. (25-26, 54-62) This is an important point. The framers certainly could not have foreseen the development of a state so well funded (through the income tax) that representatives could try to ensure their reelection through the earmarking of millions of dollars to their districts. It is the marrying of the interest group state to the structure of representation that is especially troubling from a design perspective. If we were redesigning the Constitution, we would probably try to arrange the appropriations process to minimize this sort of activity.

This argument goes in the right direction because it identifies policies that are in the interest of relatively few people (Sandy cites the Alaskan “bridge to nowhere”) yet impose a cost on everyone. This does not mean the argument would be persuasive. As arguments fly in our hypothetical constitutional convention concerning the undue influence of interest groups, some might remind themselves that they have benefited from legislation that others see as purely interest-based. Suppose, however, there is a class of policies that are literally in no one’s interest. Call these “policy catastrophes.” If there

were such a class and we could link them to problems in our constitutional structure, we might have the kind of argument that truly gets to constitutional fundamentals.

To get a grip on the idea of a policy catastrophe, consider these examples:

- 1) Collapse and government bailout of savings and loan institutions in the 1980s.
- 2) Destruction of the space shuttles Challenger (1986) and Columbia (2003).
- 3) 9/11 terrorist attacks.
- 4) Inundation of New Orleans in 2005 after Hurricane Katrina due to failure of levees and subsequent inadequate government response.

These catastrophes share some characteristics. First, they are all policy outcomes in the sense that they are linked to the pursuit of certain policies by government. Second, no one defends these policy outcomes. While some might question the underlying programs, such as the regulation of banks or the building of space shuttles, no one contests that once government regulates an industry or builds a complex space transportation vehicle, the regulation should be effective and the vehicle should not fail. The savings and loan debacle, for example, cost taxpayers around \$150 billion, a gigantic sum that could have been employed for many other useful purposes. If the debacle could have been avoided through some sort of reform, everyone would presumably be interested in at least investigating that possibility.

You may be waiting for me to link these disasters to some constitutional structure. Before I provide some suggestive leads, let's reflect on the often-presumed pervasive background role that the Constitution plays in our government. My observation is that when policies go well, when government succeeds, the strength and stability of our constitutional system is usually celebrated. Matters seem to be quite different when policies go poorly. In that situation, the somewhat god-like role usually attributed to the Constitution suddenly disappears, replaced by incompetent administrators and feckless politicians. If, however, the Constitution is successful in structuring government action, then we are bound to investigate whether that structure is at fault when policies fail, especially when they fail spectacularly.

Experienced students of government policy know that when policies and program administration goes wrong, there is usually a trail (often long) leading back to Congress. Especially with respect to policies pursued over decades, Congress is still "keystone of the Washington establishment."⁴ If our "homeland security" and intelligence agency structure is fragmented, if key regulations governing the savings and loan industry are loosened, if NASA builds a space shuttle scientists scorned (whose components come from congressional districts scattered across the country), and the Army Corps of Engineers had to stretch a Louisiana flood control project designed to be completed in ten years over decades,⁵ it is usually because members of Congress wanted it that way.

The tendency of members of Congress to think about their own districts and states rather than the national interest is not new. But the advent of the administrative-welfare-

⁴ See Morris P. Fiorina, *Congress: Keystone of the Washington Establishment* 2d ed. (New Haven: Yale University Press, 1989).

⁵ With respect to the causal role of Congress in the Katrina disaster, see Michael Grunwald and Susan B. Glasser, "The Slow Drowning of New Orleans," *Washington Post*, October 9, 2005, at A1.

spending state made an extraordinary difference to the impact members of Congress could have on national policy. At Time 1, the federal government assumed no responsibility for preventing or alleviating the consequences of natural disasters such as floods or earthquakes. Once the government did assume this responsibility at Time 2, it became accountable for its policy decisions. If, however, the structure of Congress involves making public policy “almost as an afterthought,”⁶ then it is difficult to see how future policy disasters might be prevented. To be a bit more precise, if making national policy is a byproduct of what Congress is really doing – funneling money and serving as ombudsman to individual districts and states – we might consider a different structure that would encourage policymaking as such.

Critical analysis of our political system often amounts to high-minded hand-wringing over how the national interest is ignored. But the terrorist attacks of 9/11 and the aftermath of Hurricane Katrina should have demonstrated that this sort of analysis is a practical necessity. When poor policy choices or, more likely, the failure to choose results in the deaths of thousands of citizens and the loss of hundreds of billions of dollars (as has actually happened), the inquiry into the consequences of constitutional structure should not be regarded as theoretical or a parlor game about a constitutional convention most people think we are not going to have.⁷

Presumably there is no such thing as a constitutional structure that will allow us to avoid all policy catastrophes. We are still not the angels that Madison invoked in his

⁶ Fiorina at 68.

⁷ Congress is certainly not the only constitutional institution to be implicated in my list of policy catastrophes. Executive misfeasance or inattention was undoubtedly involved. Widespread assumptions about federalism, about how national and state governments ought to interact, certainly played a role in the failed response to Hurricane Katrina. See Stephen M. Griffin, *Stop Federalism Before It Kills Again: Reflections on Hurricane Katrina*, *St. John’s Journal of Legal Commentary* (forthcoming 2006).

famous argument and our knowledge of the future is limited. But understanding that there might be a link between such catastrophes and constitutional structure might make us more likely to acknowledge that the Constitution is not exogenous to the problems and faults in our political system. The Constitution is not an impartial spectator, so to speak, but a participant with a set of biases, just like everyone else.

Sandy closes his book by lamenting the inflexibility of Article V. (159-66) He generously cites my work for the proposition that if constitutional change is not allowed because of the difficulty of amendment, then it may occur through other means, such as informal constitutional change through the political system and judicial interpretation. (22) Sandy makes the sound argument that there are limits to this sort of informal adaptation. If we want to adopt a parliamentary form of government in which executive officials serve in the legislature, formal change through Article V is the only way to get there. (163-65) This point applies to nearly all the changes Sandy advocates and explains his interest in making change through Article V easier.

An issue related to Sandy's point is whether the inflexibility of Article V has had adverse consequences. Here scholars disagree. It is conceded by many that the U.S. Constitution is one of the more difficult constitutions in the world to amend. But Chris Eisgruber has defended the position that having a relatively inflexible constitution increases the truly democratic character of a political order.⁸ I wish Sandy had said something about Eisgruber's argument, but I will take a stab myself.

Any argument about the costs and benefits of the supermajority barriers to constitutional change in Article V necessarily involves some counterfactual speculation

⁸ See Christopher Eisgruber, *Constitutional Self-Government* (Cambridge: Harvard University Press, 2001).

about what our constitutional history would have looked like had the framers not built the “iron cage” of Article V, as Sandy puts it. (165) But the question is not entirely about the effects of certain procedural changes. Several generations of Americans have absorbed not only the reality that formal constitutional change is quite difficult, but the normative view that it *should* be difficult, that we should not “tinker” with the Constitution. The proposal to make formal change through Article V easier thus concerns our “constitutional culture,” a set of views and understandings about how constitutional change should be made, just as much as it concerns alterations to the text of Article V. (as Sandy notes – see 163)

In today’s world, Americans associate prospective constitutional amendments with efforts to alter rights, such as abortion, gay marriage, and flag burning. Scholars interested in constitutional change believe the main issue lies elsewhere – with the still uncertain constitutional status of the New Deal, the administrative state, and the greatly changed role of the presidency after World War II, the Cold War, and now the “war on terror.” Certainly this issue is compatible with Sandy’s focus on the structural aspects of the Constitution, as opposed to its provisions concerning rights. In my experience, however, the existence of a continuing issue with respect to the constitutional legitimacy of the New Deal (as well as the other items mentioned) has proven hard for most legal scholars to grasp. There is a tendency to see these problems as involving questions of constitutional interpretation, not amendment or legitimacy.

Undermining this common view would require a very long detour into the byways of American political history. But in brief, important elements in American conservative thought never accepted the legitimacy of the New Deal. One of the main reasons, a

concern which remains alive today, was that conservatives believed it was a change of constitutional dimensions that did not take place through formal amendment. President Roosevelt's deliberate decision to treat the changes of the New Deal as matters for the Supreme Court and constitutional interpretation had important consequences that were not foreseen at the time. I should say immediately that it is far from clear that it would have been better, all things considered, for FDR to press a set of amendments on the country. There were many difficult issues involved and the right course of action was not obvious. The point I would stress is that there were costs, no matter what choice FDR made.

Many Americans believe that the Constitution does not cover every contingency and that it does impose meaningful limits on government action. It follows that there may be moments in history in which the only legitimate way to obtain constitutional power is through formal amendment. The failure to ratify the New Deal, as well as other important aspects of the contemporary constitutional system, through amendments has created an ongoing issue within American constitutionalism. Of course, some believe such views are the hobbyhorses of repudiated cranks like Barry Goldwater, but that was before the conservatives who supported Goldwater in 1964 came to power with Ronald Reagan in 1980. Nevertheless, the widespread view that amendments are dangerous has operated to suppress the kind of politics and political discussion that may be necessary to provide a full measure of legitimacy for government action in the post-New Deal state. For me, the democratic cost of an inflexible amendment process is the fundamental issue posed by the infrequency of amendment through Article V.