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# Our Undemocratic Constitution: Where the U.S. Constitution Goes Wrong (And How We the People Can Correct It)

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 Response by Barney Frank and Robert C. Post

This presentation was given on October 30, 2006, at the House of the Academy.

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**Sanford Levinson**

Looking ahead to the forthcoming election, I know that I, and many others, anticipate a changing of the guard, but I'm not sure how important such a change may be in terms of enacting new legislative programs. Why am I not more optimistic? One reason is related to the internal rule of the Senate called the

filibuster; another centers on the undemocratic nature of the Senate. Let's take what is, at least according to the Iowa prediction market, the most likely outcome next Tuesday – a Democratic House and a very slimly Republican-controlled Senate. Would that mean a majority of the American public had voted to keep the Senate in Republican hands? No, not at all. Over the last three election cycles, three million more Americans have voted Democratic in races for the Senate than have voted Republican. But the Senate is not a little “d” democratic body. It allocates power on the basis of each state having an equal vote, so there is a preposterous overrepresentation of small states, meaning not only Vermont but also the upper Midwest and the Rocky Mountain states. Roughly 5 percent of the population has roughly 25 percent of the vote. In our bicameral system, even if one assumes optimistically that the Democrats have working control of the House and could pass some of the legislation that Barney Frank, or my friend Texas Representative Lloyd

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Doggett, might support, the Senate has absolute veto power.

But let's take the better case for some of us (I'm not assuming all of us) that the Democrats get both the House and the Senate. That would, presumably, increase to some degree (putting the filibuster to one side, since it is not part of what I call the hardwired Constitution, but simply a rule of the Senate) the probability of passing some of that legislation. But then, of course, the president can veto it. One of the arguments I make in my book, *Our Undemocratic Constitution*, is that we don't have merely a bicameral system; because of the presidential veto, we have a functioning tricameral system, where the third house of the legislature consists of one person, or the institutionalized presidency, who can, with a stroke of the pen, make it next to impossible for legislation to pass. Next to impossible doesn't mean impossible. But of 2,501 presidential vetoes in our history, roughly 5 percent have been overridden – a 95 percent success rate in blocking legislation. The only national president who has a better success rate is the president of Cyprus, who has an absolute veto.

Many of my colleagues in the legal academy have contributed to chopping down forests in discussing the so-called counter-majoritarian difficulty, that is, the ability of courts – the federal courts are the central obsession of most law schools – to declare primarily federal legislation unconstitutional. In our entire history, approximately 165 acts have been declared unconstitutional by the U.S. Supreme Court. Most of them were of no great importance, but many presidential vetoes were extraordinary important. It's also the case that the threat to veto shapes legislation in a way that the abstract possibility of a federal court declaring a law unconstitutional some years from now does not seem able to do. Unfortunately, the very best example of this is the recent Military Commissions Act; in this instance, Arlen Specter, for example, said that although the parts of the act dealing with habeas were flagrantly un-

constitutional, they didn't stop him from voting for it. That feeling is relatively common, whereas the veto threat has much more teeth.

These are among the problems with the Constitution that I call the 'hardwired problems.' One of the central theses of my book is that the hardwired parts of the Constitution tend rather systematically to be ignored in most legal education, precisely because we are obsessed with what is litigated before the courts. Equal membership in the Senate is not going to be litigated; the presidential veto, except for some fairly exotic aspects dealing with the so-called pocket veto, will not be litigated; the Electoral College will not be litigated. A political scientist at the University of Houston, Donald Lutz, has determined that the United States Constitution is the most difficult constitution to amend in the world – so none of these things will go before the courts.

Life tenure for Supreme Court justices has also turned out to be a grievous error in at least two different ways. First, I see no good reason that members of the Supreme Court should serve for twenty-five, thirty-five, or even forty years. Second, and even worse, is the ability of Supreme Court justices to time their resignations in order to enable the right president with the right politics to pick their successors. This tactic has been used to favor both Republicans and Democrats. It seems to me that there's no particularly good reason to cherish a system that behaves this way. Most countries around the world have term limits for members of their highest courts, usually called constitutional courts. My own recommendation would be a single eighteen-year term for Supreme Court justices. Eighteen neatly divides by nine, meaning there would be a new appointment every two years. I believe this would also diminish the present acrimony that surrounds any new appointment to the Supreme Court, at least a bit.

Now, there are many state constitutions that recognize the possibility of their own imperfection. Indeed, the president of the Constitutional Convention and a member of the American Academy, George Washington, wrote these words to his nephew Bushrod just two months after the Convention:

The warmest friends and the best supporters the Constitution has do not contend that it is free from imperfections. I do not think we are more inspired, have more wisdom or possess more virtue than those who will come after us.

Washington was right. But this very sensible and admirable attitude has tended to lose out historically to a very different view, promoted particularly by James Madison, which contends that we should venerate the Constitution and that we should not, in fact, subject it to the lessons of experience or engage in real scrutiny as to how well it is serving us.

I discovered as I was writing this book that I'm much more Jeffersonian than I had thought. It was Thomas Jefferson who, indeed, not only recommended frequent revolutions, which I'm not quite willing to sign on to, but more to the point supported the idea of frequent conventions to examine the adequacy of our institutions. From my perspective, altogether unfortunately, most people tend to agree with the James Madison who wrote the 49th Federalist Paper and said, in effect: 'Look, we were extraordinarily lucky; all of the stars aligned in the summer of 1787 to get us this constitution. It would just be disastrous if we reopened the issue. Instead, teach people to venerate it.'

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Whatever else one can say about the adequacy of American civics education, constitutional veneration is part and parcel of what children learn in our public and private schools – people really do believe that we have a great constitution. I am not arguing that there aren't aspects of the Constitution that are indeed great. But there are also aspects of the Constitution, some of which I've touched on, that contribute in their own way to making ours a dysfunctional political system, in which it is extraordinarily difficult to pass innovative legislative programs, precisely because there are so many veto points throughout – the absolute bicameralism; the presidential veto.

Let me say one word about the Electoral College. Following the 1968 election debacle,

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the House passed a proposed amendment in 1969 to abolish the Electoral College; the Senate vetoed it. One of the defenses of the veto was, 'Well, at least the president represents the majority of the American public.' Unfortunately, that's false. Because of the way the Electoral College operates, we have regularly, since World War II, sent to the White House presidents who did not have a majority of the popular vote. Some you might like; some you might not. They include Harry Truman, John F. Kennedy, Richard Nixon in 1968, Bill Clinton in both of his elections, and, very notably, George W. Bush in 2000.

But even those presidents who manage to put together a majority compose it out of a very peculiar kind of politicking: the emphasis is almost exclusively on large battleground states. My wife and I split our time between Massachusetts and Texas. In terms of reading newspapers, watching television, and the like, we would have had no idea presidential elections were going on in 2000 and 2004, because, for obvious reasons, neither of the candidates thought it worth their while to visit Massachusetts or Texas or to have campaign advertisements in those states. But it's not only Massachusetts and Texas. It's also California, New York, Illinois. One would have thought, in 2000, that the most important political issues facing us were prescription drugs for the elderly and maintaining the boycott against Cuba. In the immediate past election, one might have thought the most important issue facing us as a nation was the security of the steelworkers in Ohio.

So not only does the Electoral College fail to guarantee presidents who can plausibly claim to be the tribunes of the people, but it also makes the president, in a curious sense, as much of a local official as any senator. It's simply that the locality is a larger locality—the safe base states plus some privileged battleground states. It seems to me that Congress in many ways better represents a col-

lective voice of the people (putting to one side for the moment partisan gerrymandering, which is a monstrosity but is certainly not constitutionally required).

Some state constitutions acknowledge their own imperfection and offer the electorate, at intervals, the opportunity to vote for a new constitutional convention. In New York, for example, voters get an opportunity every twenty years to call for a new constitutional convention. I built my book around the conceit that the creators of the U.S. Constitution were wise enough to build in a provision like that one, allowing for the possibility of rational reflection about whether we are well served. The book makes the case that, if given that opportunity, one ought to vote for a new constitutional convention as a way of grappling with these issues, in part because it is unlikely, to the point of impossibility, that these kinds of changes would ever happen through congressional proposals. One literally cannot imagine the Senate and the representatives of small states agreeing to the loss of their own power.

In speaking to friends, family, and others, I have discovered that most people are scared to death of the idea of a new constitutional convention. A lot of people agree with the diagnosis, but believe that the cure is beyond possible acceptance. If one is truly scared of the idea of the national convention and the politics leading up to it, then consider this: it would take an extended time anyway. I'm not going to be able to wave a magic wand and call a convention into being tomorrow, or next year, or even by 2010.

But if one is basically fearful of taking one's chances with one's fellow citizens on basic issues of American politics, then much more than the Constitution is in trouble. This fear bespeaks a rejection of all that is admirable in the Jeffersonian legacy. There are things that are distinctly unadmirable in that legacy, but what is admirable is a certain trust in popular democracy. I don't think I'm flagrantly naive about the problems attached to populism and popular democracy. But the fear that is widely expressed, particularly by people who view themselves as progressive, is extremely ominous not only in terms of the future of the United States as a democracy, but also in terms of achieving progressive political programs. I don't know how you do it without convincing people of the desirability of these programs and without a political system that can effectuate such desires instead of frustrate them.



## Barney Frank

I agree with most of the criticisms that Sandy makes of the Constitution. I don't think anyone ever thought the bicameral solution was a good idea. It was a political deal between small states and big states. Nobody was for that compromise; it was just what you needed to do to get through the process.

I would love to make some of the changes Sandy suggests. The most important one to me is the Electoral College. The fact that most people's votes don't count is an absolute disaster. It has very distorting effects on what happens in our country. I also think nonre-

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newable term limits for members of the Supreme Court are a good idea. In Yiddish, eighteen is the symbol for life. So you'd be substituting life for lifetime appointments.

However, I differ with Sandy in two respects. He's certainly right: it is fear of public reaction, particularly to changes to individual liberties, that is a deterrent to holding a new constitutional convention. But I also think that having one would make less of a difference than Sandy thinks it will. His analysis of our system, while a legitimate analysis of its mechanics, leaves out the political situation. For example, politics is capable of overcoming the presidential veto. In fact, when

## *Politics is capable of overcoming the presidential veto.*

the Republicans controlled Congress for much of Bill Clinton's years, they forced him to agree to some legislation: welfare reform and the defense of marriage act, for example. He could have vetoed them, but he was afraid of the political consequences.

The fact is that politics does cut through. Obviously, the notion of two senators per state is ludicrous by any theory other than 'that's what the deal was to pass the Constitution.' But my impression is that political opinion works in such a way that the actual differences between the House and the Senate over time have been far less than one might expect. Also, it has not always been the case that the House has traditionally been more liberal and progressive, while the Senate has held it back. There have been times in our history when the orientations were flipped.

I would like to add that another factor contributing to the undemocratic nature of the Senate is the staggered term. Having only one-third up for election at a time is a restraint on democracy. If the entire U.S. Senate were up for reelection this year instead of only one-third, I would be a much happier person.

Second, I would be interested, Sandy, to hear your response to the phrase in the Constitution that says that no state shall be deprived of its equal representation without its permission. If you had a constitutional convention, could you knock out that piece when the very Constitution that empowered the constitutional convention would appear to make that piece not amendable? Do you think that's binding, or do we just ignore it? If that phrase holds – and I'd love to ignore it – then it seems to me that the whole idea of holding constitutional conventions is in some trouble.

I would throw in another flaw in the Constitution. One of the central distinctions in the Constitution no longer makes any sense: the distinction between interstate and intrastate commerce. That made sense when you thought electricity came from a kite, and it took you a long time to get anywhere. Now, geography doesn't mean anything, and there really is no distinction between interstate/intrastate commerce. So that part of the Constitution is about as relevant as whether or not we are allowed to issue Letters of Marque and Reprisal.

I would love to get rid of the Senate. I mean that seriously. I've long been an advocate of unicameralism; I think we are overchecked and overbalanced. It is also the case that most people's views of governmental mechanics at any given time are overwhelmingly influenced by what they think the outcome will be. There are very few neutral principles there. The liberals fell in love with the filibuster. When many of us were growing up, it was generally reserved for great occasions. But now the filibuster has become the norm, and we need sixty votes to pass just about anything.

It would certainly be good to get rid of the Electoral College. Because each state has two senators, and because the number of electoral votes a state has is based on the number of representatives and senators it has, nearly 20 percent of the population is not represented in the Electoral College. For instance, the number of citizens per electoral vote is much greater in California than it is in Delaware.

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But the undemocratic nature of these institutions makes less difference than Sandy's analysis might lead one to believe. Political opinion makes itself felt throughout the system. I would be interested to see the difference between House and Senate votes over time, particularly since we started electing senators directly. Before the direct election of senators, you'd have too many differences. I think the answer is that there have been many fewer disparities than the structural analysis suggests, because political opinion does force itself on both bodies.

The power of the presidential veto, in fact, can also be easily overstated. I was just leafing through the section in Sandy's book where he talks about the excessive powers of the presidency. After twenty-six years in the House, I'm completely convinced that the problem we have with regard to the powers of the presidency is not presidential overreaching but congressional dereliction of

duty. That is certainly the case in foreign policy and elsewhere.

In summary, although I agree on both the Electoral College and the Senate, there is a technical problem that I had hoped you would address about how to get around the provision in the Constitution that says that even if you had a constitutional convention, you couldn't deprive each state of its equal representation. And it says equal representation; it doesn't say at least two senators. We couldn't, for instance, increase the number of senators from California to twenty-seven and keep Vermont at two.

I also believe that the reason we don't have better, more progressive legislation has more to do with the structure of public opinion than the structure of the government. I agree with you on the structural issues, but the problems we have in achieving certain outcomes are much more political, in the broadest sense, than they are structural.



**Robert C. Post**

Sandy Levinson is one of the nation's best and most imaginative constitutional scholars. So when *he* says that the Constitution has gone sadly awry, we had better sit up and take notice.

Although Sandy's book is packed with analysis and observations, I think his ultimate target is not any specific defect of our Constitution, but rather the way in which custom, veneration, and sheer complacency have turned our Constitution into an "iron cage with regard to our imagination." He is most deeply moved because the defects of our Constitution – what he calls, appropriating the language of psychology, the "abuses" of the Con-

stitution – have become invisible to us. We cannot experience them, and so we cannot be moved to correct them.

Sandy's book has two parts. The first details defects in the Constitution; the second recommends a remedy for these defects. Sandy lists seven "truly grievous defects" that he believes are "sufficiently" serious "to warrant significant revision and repair." Five of these defects include: the democratically maldistributed allocation of power in the Senate; excessive presidential power; the Electoral College; the hiatus between the electoral loss of a sitting president and the inauguration of a successor; and the functional impossibility of amending the Constitution with regard to anything truly significant.

The most controversial aspect of this book no doubt is the remedy that Sandy suggests to fix these defects. He calls for "a new constitutional convention that would feel itself legitimately empowered, and psychologically free, to do what the framers of 1787 did, which was to look at all existing constitutions as well as the lessons derived from their own experiences." Sandy wants to redesign the machine from the ground up.

Most of us are scared to death about the possibility of a constitutional convention. When we look at the Congress that just passed the Detainee Treatment Act of 2006 (DTA) withdrawing federal jurisdiction over habeas petitions by Guantanamo detainees, and stripping legal aliens in the United States of important rights they have enjoyed since the creation of the Republic, we thank God that we have the Constitution that we do. We fear that a constitutional convention would focus on prohibiting flag burning and same sex marriage, rather than on the serious structural reforms that Sandy suggests.

Sandy, to his credit, has anticipated this apprehension, which he calls a "fear of the uncaged beast of American democracy – a view identified far more with the quasi-monarchical Hamilton than with the unabashedly democratic Jefferson." The metaphor of the "cage" does a great deal of work in Sandy's book. Because Sandy seeks to liberate us from the "iron cage" of our imaginative preconceptions, he urges us not to fear the uncaged beast:

I continue to have sufficient faith in the democratic ideal that I believe that most of the public, in a truly serious debate about the Constitution, could be persuaded to support the essential rights that are re-

quired for membership in a republican political order. If one does not have this degree of democratic faith, then it is very difficult to know why one would prate about the importance of democracy and encourage foreign countries, many of which lack the level of mass education and literacy of our own, to join us in the democratic experiment. It would be highly ironic if constitutional faith at bottom were synonymous with an utter lack of faith in the democratic potential of our fellow Americans. (Levinson, *Our Undemocratic Constitution*, 175)

Sandy has posed a forceful challenge to those of us who are reluctant even to contemplate a constitutional convention – and I should say that includes just about everybody I have talked to about this book.

### *Most of us are scared to death about the possibility of a constitutional convention.*

Because there is some risk associated with a constitutional convention, we can only decide whether to hold one if we conduct some crude form of a cost-benefit analysis. We must ask whether the potential benefits that could result from a convention will likely outweigh its potential risks, and whether these same benefits can be secured in ways that do not pose the degree of risk we anticipate arising from a convention. I do not believe that some of the defects that Sandy explicates can be remedied only by a constitutional convention. For example, the hiatus in power between when a new president is elected in November and when he takes office in January can be reduced by a constitutional amendment. I see no reason whatever why such an amendment cannot be passed, if the nation agrees that in fact this hiatus poses a truly grievous defect. Since Sandy believes that this is a truly grievous defect, it must follow that it is also false to say that it is impossible to amend the Constitution with regard to anything truly significant.

Similarly, I do not believe that the "excessive presidential power" that Sandy analyzes is an issue of constitutional design. This danger persists in every powerful constitutional state, and in the United States the danger it poses depends upon the ebb and flow of deep and contingent political forces, such as wheth-

er the Congress and the President are of the same or different parties, whether the President is popular, or whether there is a crisis. I am not convinced that a constitutional convention could ever cabin this beast, which seems to be rooted in the development of an administrative state that must defend itself under conditions of rapid, far-ranging, and lethal military technology deployed in circumstances of global insecurity.

I do agree, however, that at least two of the defects that Sandy has listed – the Senate and the Electoral College – will never be repaired by constitutional amendment, because small states and battleground states have too great an interest in maintaining the present arrangement. So the question arises whether the damage inflicted by these two defects are so severe as to warrant taking the risk of a constitutional convention.

At precisely this point in his argument, Sandy's thinking takes a very interesting turn. On the one hand, he tells us that these defects are terrible because they interfere with the transparent, unitary transmission of majority will into governmental policy. On the other hand, he tells us that we should not fear the risks of a constitutional convention because we should embrace the unitary expression of majority will that would emerge from a constitutional convention. Sandy explicitly appeals to an ideal of democracy in which an aroused national majority can more or less efficiently translate its preferences into public policy. At root, then, is the question of whether Sandy is correct to equate democracy with an omnipotent national majority.

This is, of course, a hugely complicated problem, which I cannot address here. Suffice it to say that although we have always believed that the will of the people is the ultimate source of political legitimacy, we have also always been ambivalent about simple majoritarianism, precisely because we believe that popular will is subject to certain well-known deformities, including passion, fickleness, demagoguery, inconsistency, and superficiality. In American constitutional law, therefore, we have always struggled to appeal, so to speak, from Philip drunk to Philip sober, from the people who are immediately and passionately aroused to the people who are thoughtfully committed.

And we have always realized that different forms of decision-making procedures bring out very different qualities of public deliberation. Some procedures, like referenda in Cal-

ifornia, bring out the worst in majoritarian policymaking. Other procedures can bring out greater care and consideration. From this perspective it is not enough to say, as Sandy does, that a convention is democratic and that we must trust democracy. We must ask instead what kind of decision-making procedure is a constitutional convention, and whether it will bring out the best or the worst expression of a popular will.

This point goes to the risks of a constitutional convention. But it also applies to our assessment of the gravity of the defects that Sandy has identified. Sandy assumes that any deviation from the pure and transparent expression of the will of a national majority is a serious defect. He seems to imagine that a country like England is the implicit model of a true democracy. In England the parliament sits as a more or less continual constitutional convention – there is no written constitution and there is no judicial review (putting aside EU law). There is no geographical maldistribution that functions, like our Senate, to check the will of a national majority.

In effect Sandy asks why we can't be more like the English. One answer might be that we differ from the English because their lawmaking has always taken place within the context of very strong and constraining traditions, so that the exuberance of majoritarian preferences have always been chilled by the damp air of ancient customs. In America, as a new land, we have never had the benefit of these traditions. We have been a land of nutty idealists and fierce entrepreneurs, and our lawmakers, in response to these forces, have been free to go literally anywhere. Perhaps we have evolved the checks and balances of the Senate and of bicameralism in order to slow down our governmental decision-making so as to make it more thoughtful.

Another answer might be that in twentieth-century England, government policy has always been implemented by a strong, spirited, and professional bureaucratic corps of officials, who have been more or less nonpolitical. Whatever policy Parliament enacted was always filtered through the operational expertise of this professional bureaucratic corps. America does not possess a comparable administrative elite. Our bureaucracy is mostly politicized. If Congress goes off the rails, there is no administrative counterweight to tone down and diminish the excess.

These considerations might have led us to be less tolerant of simple majoritarian decision-making than our English counterparts, because the danger that such majoritarianism might run amuck was greater in America. Throughout his book Sandy makes much of the fact that lawmaking is so much harder here than in parliamentary democracies like England – laws in the United States have to be passed by both Houses of Congress, they can be vetoed by the President, etc. But the question of whether lawmaking is too hard or too easy has to be assessed in light of all the risks of pathological majoritarianism, and Sandy does not do this.

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Sandy's main indictment of the Senate is not that it delays legislation, but that it distorts majority will by over-representing under-populated states. He writes that "Almost a full quarter of the Senate is elected by twelve states whose total population, approximately 14 million, is less than 5% of the total U.S. population." This is pretty bad, and I strongly doubt that anyone now would agree to such a fundamental distortion of representation if they were to design the Constitution from scratch. I agree with Sandy that *this* problem will not be cured by any foreseeable constitutional amendment.

But if the remedy in view is a constitutional convention, which carries its own significant constitutional risks, the question is the extent of damage caused by this misrepresentation. Sandy argues that this misrepresentation causes a maldistribution of resources – that income is transferred from big states to small states, and he attributes this to the Senate. This may well be true; I am not a political scientist, and so I cannot judge. But I would want evidence that establishes the causal connection that Sandy assumes. I would want to know how other federalist entities, like Canada, Germany, or the EU, distribute

resources. Is there a similar maldistribution of resources, even though there is not a similar misrepresentation? In the United States before the 1960s, virtually all states had legislatures with upper houses that were malapportioned in the same way as the Senate. The Supreme Court ended this malapportionment by ruling that states had to apportion legislatures based upon the principle of one-man-one-vote. I would like to know whether states before this constitutional revolution maldistributed resources in the same way as now apparently happens in the Congress. I would need to see, in short, a strong causal case before I would risk a constitutional convention in order to avoid these damages.

There remains, however, Sandy's very strong normative point, which persists independently of any specific, contingent empirical consequences: Why should we continue to live under such a horrible system of misrepresentation? I don't want to defend this system, but I do want to point out an important complexity that I'm not sure Sandy has fully considered.

Sandy unself-consciously equates democracy with majoritarianism. He assumes that we exercise the privilege of self-government whenever a majority exercises its will. But this assumption masks a very great difficulty. If I am in the minority, why should I consider the decision of the majority to be *my* decision? I did not vote for President Bush, and I have opposed his policies. In what way does he "represent" me or my will? The answer has to be that in some respect I identify with the authority exercised by a majority, even if I am opposed to its policies. This suggests that every democracy must presuppose some institutional unit of identification, which I believe must have the right to represent me even if I happen to disagree with the policies adopted by a temporary majority that controls the decisions of the unit.

This notion of identifying with an institutional unit is extremely complicated. In 1787 we formed a common nation – the United States – but the people of the United States nevertheless did not identify with the national government as a majoritarian unit of decision-making for all purposes. They identified with the national government only for *some* purposes, like foreign affairs or the regulation of coastal navigation. The limited identification with the national government persisted long after the Civil War.

## *The history of American federalism is a history of growing identification with the federal government as a proper unit of majoritarian decision-making for all purposes.*

In 1919, for example, the nation adopted the 18th Amendment establishing Prohibition. It is nevertheless plain that inhabitants of wet states, like New York, viewed prohibition as a regional imposition by dry states. To quote one representative comment from the era: "The Marylander is quite willing to yield even respect and obedience to a law he believes oppressive, provided it was passed by his own people, but his innate sense of independence resents the effort of Kansans to impose a law on him through what he believes to be a smug piece of sanctimonious humbuggery." Even though the 18th Amendment had been ratified by 46 states, and even though the Volstead Act enforcing it had been enacted in the Congress of the United States, citizens in wet states like New York or Massachusetts did not view prohibition as an act of their own self-governance. They viewed it as a form of domestic imperialism, of red states stepping on blue states.

The history of American federalism is a history of growing identification with the federal government as a proper unit of majoritarian decision-making for all purposes. Turning points were the Civil War, the New Deal, and World War II. This suggests that identification with the federal government should not be taken for granted. We need to ask how it occurs. It is plain that in the course of our history it has not happened merely because the federal government has unproblematically represented the will of a national majority. The composition of the Senate ensured that different national regions, with different value frameworks, would buy into the federal government as *their* government. Sandy's proposal in effect tells us that this is not necessary in the twenty-first century, and that what even now persists as a quarrel between red states and blue states is irrelevant to the creation of national democratic legitimation. We will identify with the enactments of the national government, re-

gardless of whether our regional state interests have disproportionate influence.

Whether Sandy is correct about this proposal is a fundamental normative challenge posed by his thought-provoking book.

### **Sanford Levinson:**

Just one quick response to Barney's altogether accurate reference to Article V, which does serve as an ace of trumps against eliminating equal membership in the Senate. I try very deliberately – both because I believe it and also, frankly, as an effort to make it appear a reasonable book – to stay within existing constitutional conventions of change, even if I argue that there needs to be radical change. Article V does allow for the possibility of a convention, but as Barney points out, it does not seem to allow for eliminating equal membership. At that point, I would invoke the framers, who flagrantly ignored the Articles of Confederation, particularly Article XIII, which said that you need the advice and consent of all the states in order to have an amendment.

Now, again, I'm assuming that this is not waving the magic wand. I'm also assuming that if there is a scintilla of reality to the proposals in the book, then it would come through an extensive political movement, at which time a convention, assuming it's viewed as legitimate, could say the ratification rule will be a popular referendum. At that point, it would put Article V on the shelf – there's no way to get around it.

### **Barney Frank:**

Are you suggesting then that your constitutional convention could ignore Article V but could not change the Bill of Rights?

If we could just deal with the Electoral College and the Senate, and exclude the Bill of Rights from revision, I'd be willing to take on the task of rewriting the Constitution. But I do not think the Fifth Amendment's self-incrimination provision has a chance of surviving if we held a constitutional convention. I'm not sure where we'd be on search and seizure either; and at this point, I'm not sure what we would get on separation of church and state, even on the phrase in the Constitution that says there shall be no religious test for holding office.

Even though I agree that the Electoral College is a terrible idea, I think, Sandy, you ex-

aggerated its antidemocratic effects. You mentioned all these presidents who didn't get a majority, but only one of them, George W. Bush, actually got fewer votes than his main opponent. If it's undemocratic that Harry Truman and Bill Clinton and Richard Nixon won with pluralities, then so are a lot of gubernatorial and mayoral elections. As you know, the principle that you have to get an absolute majority only held in America during that period when Southerners didn't want the black vote to count, and they had runoffs only so that no black could have a major impact.

As I was listening to Professor Post, I calculated the partisan breakdown of those twelve states that you said have 25 percent of the Senate. It's twelve to twelve. And after this election, given Rhode Island, it may be thirteen Democrat and eleven Republican. It's hard to argue that those small states have been a block to progressivism, because if you take into account the partisan breakdown of those twelve smaller states as of next week, they're going to be Democrat by a narrow amount.

I think more damage would be done by a substantial diminution of the Bill of Rights than good would be done by changing the Electoral College. In my mind, that's the trade-off.

### **Sanford Levinson:**

I want to pick up on another point that Barney made earlier, that is, the collapsed distinction between interstate and intrastate commerce. He's absolutely correct: by and large, that's become a working part of American constitutional law since the New Deal. The current Supreme Court has tried to revive a little bit of protection of federalism, but it's not really going anywhere because, at the end of the day, what Barney says is right. If you fear a strong centralized government, then that fight was lost during the New Deal, and it appears increasingly clear that the New Deal understanding of national power is not going to be reversed by the courts. The question now is, what will an empowered national government do? In the case of the various veto points that block certain kinds of legislation, is deciding against getting rid of them simply a matter of doing the risk analysis on whether the legislation being blocked would impose on our liberties rather than make the country better?

### Barney Frank:

Sandy, are there major public policies that you would have liked to have seen adopted that you think were frustrated by the existence of too many veto points? To be honest, I can't think of any. I think it's more the lack of political will. I'd like to see something done about health care and something done about global warming, but it does not seem to me that in any case it's been the existence of multiple veto points that has stopped us. If we had your constitution, what do you think would be different about public policy today?

### Sanford Levinson:

Let me answer that after just a very short dodge – that I don't have in my mind a full-scale version of my Constitution. What I really want is a conversation about the inadequacies of the current Constitution and what a better constitution might be. A more direct answer – and this goes to the point about unicameral parliamentarianism and the way the United Kingdom does it, which I confess to having mixed feelings about – is that one of the really profound moments in contemporary American politics was when Bill Kristol

wrote his 1993 letter saying that enacting medical-care reform would be fatal to the interests of the Republican Party, because of what that would do to its electoral prospects in the future. Republicans had a vested party interest in preventing it, and they succeeded in blocking this legislation – with the help of the mistakes that Bill Clinton made – even though at that point the Democrats held both houses of Congress. ■

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