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Mark Tushnet

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THE WHOLE THING

*Mark Tushnet**

The question seems to me badly posed, for two reasons. It assumes that constitutional provisions “are” something-or-other, which can be laid against the metric by which we measure stupidity. But, as that allusion to *United States v. Butler* suggests, it is no longer clear to many of us that constitutional provisions have such a quality.

Consider for example someone who believes that the metric for stupidity is defined by the degree to which a policy advances the interests of some particular favored group. Perhaps at one time the First Amendment as then interpreted advanced those interests, because the major threats to the political program favored by that group came from government agents. The First Amendment was at that time not a stupid provision.

As time passed, two things happened. (a) The group’s political program changed, so that now the main threats come from non-governmental actors. Even if nothing else occurs, the First Amendment, now less important to the group than before, is “more stupid” than it used to be. Perhaps, though, it does not cross some threshold of stupidity if it is merely less important.

(b) The prevailing interpretation of the First Amendment changed, so that now it provides greater protection for the group’s political adversaries than it did earlier. Now the First Amendment really might be the Constitution’s most stupid provision, depending on how dramatic the changes in interpretation are.

Is that the most helpful way to describe what has happened, though? I can certainly imagine someone taking the position that the First Amendment, properly interpreted, is not stupid at all. For such a person, “the First Amendment” is just fine; the problems arise solely because it has been badly interpreted.

In short, to identify any provision as stupid requires that one have a fairly strong theory of interpretation and interpretive error. It is not clear that such a theory is available.

* Professor of Law, Georgetown University Law Center.

Second, and for me more important, trying to locate a single provision as the most stupid may be misguided. At least I would like the opportunity to answer along these lines: "Most of Article I, much of Article II, a fair chunk of Article III, nearly all of Article VI, and many of the Amendments." It has occurred to me, though, that that answer is equivalent to: "Article V."

My concern is that the basic structure of our national government may be unsuitable for contemporary society. This is only a concern, not a firm conclusion, and in what follows I simply want to indicate lines of thinking that might be productive.

Consider the following propositions drawn from observations by political scientists interested in constitutional structures. Political systems with single member districts in which the candidate who receives a plurality of the vote wins, tend to have two-party systems, while those with multimember districts and proportional representation tend to have multi-party systems.¹ "Electoral laws that turn plurality preferences into legislative majorities are likely to be especially disastrous in highly divided societies."² "[P]arliamentary democracies tend to increase the degrees of freedom that facilitate the momentous tasks of economic and social restructuring facing new democracies as they simultaneously attempt to consolidate their democratic institutions."³

These observations suggest that the arguments for proportional representation and a parliamentary system are stronger than many United States constitutionalists, brought up in a presidential, plurality-winner system, think they are. Of course the particular historical circumstances of the United States may make those arguments unpersuasive. The United States is not a new democracy, for example, for which parliamentarism might be especially suitable. Social divisions in the United States may not be so severe as to require proportional representation as a partial solution. Two-party systems address social division by developing coalitions within the parties rather than through multi-party governing coalitions as in systems with proportional representation; that solution might be appropriate to the degree to social division that exists in the United States.

1. Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* (Methuen, 1954).

2. R. Kent Weaver and Bert A. Rockman, *When and How Do Institutions Matter?*, in R. Kent Weaver and Bert A. Rockman, eds., *Do Institutions Matter?: Government Capabilities in the United States and Abroad* 458 (Brookings Inst., 1993).

3. Alfred Stepan and Cindy Skach, *Constitutional Frameworks and Democratic Consolidation: Parliamentarism versus Presidentialism*, 46 *World Politics* 1, 4 (1993).

The Constitution creates a presidential system. To some degree it conduces to the adoption of plurality-winner electoral systems for Congress, and thereby to the development of a two-party system. Creative constitutional interpretation and statutory design might overcome these apparent obstacles to the adoption of an alternative regime.⁴ Nonetheless, the very weight of the existing electoral and political system may impede creative thinking about institutional, and therefore constitutional, design for the United States.⁵

What is the source of this "weight"? Of course, to some extent, history itself, and the fact that the existing constitutional structures seem to many to be functioning reasonably well. Another source, though, might be the Constitution itself.

The weight of existing structures would be less, though it would not disappear, if it were easier to amend the Constitution. Perhaps some degree of institutional stability is required for a system to warrant the name *constitutional*, which suggests that it should not be too easy to amend all of a constitution's provisions, or perhaps any of its basic institutional prescriptions. There may be room, however, between the desire to avoid creating an amendment process that is too easy to use, and sticking with the present strong super-majority requirements of Article V.⁶

But, if the Constitution were amended to alter the super-majority requirements for its own amendment, could the new process eliminate the equal representation of the states in the Senate?

4. Nothing in the Constitution appears to require that members of the House of Representatives be elected from single-member districts rather than state-wide, for example. Perhaps Congress has the power to prescribe multi-member districts and proportional representation for the House of Representatives, pursuant to its power to "make . . . Regulations" for the "Times, Places, and Manner of holding Elections," Art. I, § 4. But it seems to me awfully difficult to figure out a way to devise a system of proportional representation in the Senate that is compatible with the requirements of (a) equal representation of each state in the Senate, Art. I, § 3 (and Art. V), and (b) the staggered elections for the Senate, Art. I, § 3.

5. No one should have been surprised when politicians elected under a plurality-winner system were uncomfortable with the scholarship of Lani Guinier, which argues for moves in the direction of proportional representation.

6. Akhil Amar's suggestion that the existing Constitution accommodates a mechanism for constitutional amendment outside of Article V indicates that, even here, it might not be proper to call Article V "stupid." Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988).