

2011

So Much to Rewrite, So Little Time....

Sanford Levinson

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Levinson, Sanford, "So Much to Rewrite, So Little Time...." (2011). *Constitutional Commentary*. 985.
<https://scholarship.law.umn.edu/concomm/985>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

SO MUCH TO REWRITE, SO LITTLE TIME

*Sanford Levinson**

Like other participants in this symposium, I've been charged with answering the following question: "If you were rewriting the U.S. Constitution, what would it say?" I am faced with a dilemma: I have written a book, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*,¹ outlining my many criticisms of the Constitution, and nothing in the now-almost-five years since original publication has diminished my belief that the Constitution imposes on us a dangerously dysfunctional political order that presents a clear and present danger to our collective future. If anything, as my language may suggest to some readers, my loss of "faith" in the Constitution has become ever stronger, and I, therefore, have become something of a crank on the point.

I have also become somewhat crankish regarding what our students learn from us about constitutions in the United States. I think we in the legal academy (and I use the personal pronoun advisedly) generally do a dreadful job of teaching American constitutionalism to our students because we have reduced that subject almost exclusively to a set of issues that are (or have been) litigated before the United States Supreme Court. Moreover, we systematically ignore the fact that all Americans, other than those living in the District of Columbia, live under *two* constitutions, not only the national constitution.² State constitutions, to put it mildly, have their own interest for anyone interested in comparative constitutionalism, ranging from interestingly different ways of organizing basic institutions—e.g.,

* W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin.

1. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

2. See Sanford Levinson, *America's "Other Constitutions": The Importance of State Constitutions for our Law and Politics*, 45 *TULSA L. REV.* 575 (2011).

the predominance of decidedly non-unitary executives in the states or elected judiciaries—to the presence of guarantees of “positive rights.”³ Most important, in many ways, is the rejection in almost all the states of the Founders’ antipathy to even a hint of direct democracy.

All of those issues should be brought to our students’ attention in ways that I fear is not now the case. I have argued elsewhere that there is no real justification for the common practice in American law schools of requiring students to take constitutional law unless it is to prepare them to be better *citizens* and potential civic leaders. It is quite unlikely that their legal practices will ever involve constitutional law (save for those students who go into the practice of criminal law and therefore must know the constitutional aspects of criminal procedure, a topic that is almost universally *not* covered in the required courses).⁴ As citizens—and, even more, as potential leaders—our students should be informed that the Constitution is, for better, and I think, very much for worse, far more than what is commonly presented in their law school courses.

When talking in October 2010 with a group of Chinese students visiting Harvard, I somewhat surprised them by suggesting that the main thing that foreign students (and constitutional drafters) can learn from the United States is what *not* to do. What might be genuinely attractive about the Constitution, including its protection of certain rights, can be found, in the modern world, in almost all constitutions, not to mention the fact that most modern constitutions also include guarantees of positive rights that are left unmentioned in the national constitution (though not, as already noted, in American state constitutions). Indeed, almost no modern country *has* looked to the United States for inspiration; for altogether good reason, constitution drafters abroad are far more likely to look at France, Germany, Canada, Spain, and, since 1996, South Africa. There have, to be sure, been some desirable amendments to the Constitution since 1788, but, frankly, none of them comes close to curing the basic *structural* failures of the original document, what I have come to call the “hard-wired” features that most professors never bother discussing with their students because they are never subject to litigation. These include, but

3. See Sanford Levinson, *Courts as Participants in “Dialogue”: A View from American States*, 57 KAN. L. REV. 791 (2011).

4. Sanford Levinson, *Our Schizoid Approach to the United States Constitution: Competing Narratives of Constitutional Dynamism and Stasis*, 84 IND. L.J. 1337 (2009).

are not limited to, bicameralism—including the particularity that each house has a death-dealing veto over legislation passed in the other house; the presidential veto that, because of its onerous requirements for override, turns us functionally into a tricameral political system; the fixed presidential term; and an amendment procedure that establishes the U.S. Constitution as the hardest-to-amend in the entire world (in marked contrast, I should note, to almost all American state constitutions).⁵ These structures have become the unchallengeable—because so thoughtlessly accepted—ground against which we attempt to paint our political futures.

As I wrote in my book, Madisonian “veneration” has triumphed with a vengeance,⁶ so much so that we reject the much wiser Madisonian imperative, set out most eloquently in *Federalist* 14,⁷ to learn from the lessons of experience or, if one prefers Hamilton, to accept the duty, as he set out in the very first *Federalist*, to engage in “reflection and choice” when deciding how we want to organize our political lives.⁸ Instead, we are living in an ultra-Burkean society that often seems to be organized around a truly remarkable kind of ancestor worship—extending well beyond the persons of the ancestors to the handiwork they created—that would amaze any anthropologists stumbling upon it in what used to be called a “primitive” society. Both masses—think only of the Tea Party—and elites seem to unite around the notion that we are lucky to have the Constitution we do, even if, needless to say, there is often bitter conflict about exactly what it means. My own emphasis on the “hard-wired” Constitution, incidentally, allows me to forego almost all “interpretive” disputes, since there is no serious argument about the “meaning” of most of these particular provisions, even if, as I want to suggest, there should be far more concern than is common expressed about their *wisdom*.

5. See Donald Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 261 (Sanford Levinson ed., 1995) (noting that at the time, the United States came in second in degree of difficulty to the Yugoslav Constitution, which, of course, is no longer operative).

6. LEVINSON, *supra* note 1, at 16–19. See also Sanford Levinson, “Veneration” and *Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 *TEX. TECH L. REV.* 2443 (1990).

7. THE FEDERALIST NO. 14 (James Madison), available at <http://thomas.loc.gov/home/histdox/fedpapers.html>.

8. THE FEDERALIST NO. 1 (Alexander Hamilton), available at <http://thomas.loc.gov/home/histdox/fedpapers.html>.

The Chinese students asked me if there is *any* feature of the original Constitution that I admire, and I quickly answered “the Preamble,” which does indeed set out a thoroughly admirable set of ends to which we should be devoted as a polity. The problem is that what comes after the Preamble has made it remarkably difficult to actually attain those ends. I am exempting from my critique “assignments of power,” as in Article 1, Section 8, or “limitations on power,” as in Article I, Sections 9 or 10, or, of course, the Bill of Rights. As Madison suggested, these are by and large “parchment barriers”⁹ that explain relatively little about the ensuing history of American constitutional development. This may well be true as well of the “Reconstruction Amendments,” which utterly failed for almost a full century to bring about the “regime change” that was so necessary (and altogether proper) following the catastrophe in which 600,000 Americans died for what Lincoln (with somewhat limited accuracy) called a “new birth of freedom.” Instead, the “slavery bonus” of the 3/5 compromise in the 1787 Constitution was succeeded by an even more ample “segregation bonus” in which the former slaves now counted as full human beings for purposes of representation, but rarely, whatever the 15th Amendment might suggest to the contrary, were allowed to vote. The Constitution is surely better with those Amendments than without, but no one should overestimate their empirical importance in actually explaining the contours of American history. One can scarcely describe as a “parchment barrier,” however, Article I, Section 3, which establishes the Senate and its absolutely egregious assignment of equal voting power to each state. It has had immeasurably more impact on our polity than, say, the Fourteenth Amendment.

As a result of returning to undergraduate teaching and preparing lectures for undergraduate courses at the University of Texas and Harvard, I am currently writing a book that will constitute a very extensive response to Professor Hasday’s question. Even then, however, I will refrain from offering a full answer inasmuch as I continue very strongly to believe that a new constitutional convention is badly needed, and that, inevitably, what would come out of such a convention would reflect both changes of mind on the part of participants after deliberative discussion as well as necessary compromises

9. See THE FEDERALIST NO. 48 (James Madison), available at <http://thomas.loc.gov/home/histdox/fedpapers.html>.

2011]

SO MUCH TO REWRITE

519

resulting from hard bargaining among conflicting groups.¹⁰ The one thing I am absolutely confident of is that no one will appoint me to be the sole rewriter of our very defective Constitution.

So the question for me is to have a rough rank order of deficiencies, which, almost by definition, also establishes potential items for compromise. Thus, for example, I strongly believe that life tenure for Supreme Court justices is an idea whose time has long gone.¹¹ There are several rationales, all of them favoring limits: a) the simple need for new blood and new ideas; b) the unfortunate fact that many justices over our history, including, most recently, Chief Justice Rehnquist, have simply been unable to exercise self-discipline and to retire when faced with debilitating illness at an old age; or c) the unseemly spectacle of justices “hanging on” until a president is elected from their own party who can therefore name a politically congruent successor. I would therefore certainly rewrite the Constitution to get rid of life tenure and substitute in its stead single 18-year terms, with no possibility of reappointment. Because of the contingency that we have a nine-person supreme court, such a system would create vacancies every two years and make it impossible for even a two-term president to name a majority of its membership. A political party would have to be successful in three consecutive presidential elections (as well, of course, as control the Senate) in order to capture the Court. But I do not, by any means, believe that this is the worst feature of our Constitution; indeed, I’d be a far happier person if I thought that were the case. So if proponents of life tenure, however mistaken, were to offer a deal by which I would drop my opposition to continuing that practice in return for their agreeing, say, to adopt new principles of representation in the Senate or to eliminate the electoral college, I’d accept the deal in a nano-second.

So let me suggest, very briefly, what I currently believe are some of the most awful features of a generally defective Constitution very much in need of rewriting. I do not mean to rank order them; indeed, on different days, and different political contexts, I would rank them differently. I am confident, though, that any serious discussion of the Constitution and its potential rewriting would have to grapple (at least) with these:

10. See Sanford Levinson, *Compromise and Constitutionalism*, 38 PEPP. L. REV. 821 (2011).

11. See generally REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Paul Carrington & Roger C. Cramton eds., 2006).

1. Equal representation in the Senate. Even those who generally like the Senate are hard pressed to offer any cogent defense for the principle, given that it is in the original Constitution only because Madison and others who were correctly revolted by the idea decided to submit to the extortionate demands of Delaware and other small states rather than risk the collapse of the constitution-drafting enterprise itself. The “principle” of equal representation has no more respectable a pedigree than do the various compromises with slave interests. All were arguably “necessary” (I dare not say “proper”) in order to achieve the over-riding aim of achieving national unity and preventing the collapse of the United States into three separate countries along the Atlantic coast. Thus, Madison refers in Federalist 62 to the principle of equal representation as a “lesser evil” and offers nothing further by way of a defense. Successor generations are in no way required to feel even a scintilla of obligation to adhere to such compromises once the objective situation makes that no longer “necessary.” Were Delaware and other small states to threaten, during the next constitutional convention, to secede, let them. Why exactly should we care, unlike the situation in 1787, when the loss of Delaware and other small states would have been catastrophic? The fact is, of course, that Delaware and other similar states—Alaska may be an exception—could not offer a credible threat to secede. If truth be known, they would be lucky to preserve their statehood at all.
2. But one shouldn’t stop with making the allocation of power in the Senate more proportional. The fact is that there is no good reason for the Senate to be organized along state geographical lines at all. That’s what the House of Representatives is for. One of the truly dreadful features of the American system of government is that no one other than Presidents (and, because of the electoral college, this is only partially true even of them), has any genuine incentive to think in terms of what Madison and others imbued with the ideology of civic republicanism referred to as the “common interest” or “national good.” Both Houses of Congress are full of dedicated anti-cosmopolitans who organize their political lives around pandering to their extremely limited

2011]

SO MUCH TO REWRITE

521

constituencies. (See, for example, former South Dakota Sen. Tom Daschle's faithful service to Citicorp, which brilliantly relocated its Citicard operations to that state and therefore in effect bought a senator as well as cheaper labor. It was Daschle who helped shepherd through the Senate the truly awful bankruptcy bill that is causing grief to many Americans today.) I have no objection to one House being organized on such a principle, even if Madison might rightly have viewed this as a capitulation to a politics of "faction," but there is no reason for doing that with both.

The Senate, if it survives—and I do believe that the United States is much too large to function with only one legislative body and the inevitable distortions that a single house brings—should be composed of members elected from entirely different constituencies. There could, for example, be nationwide elections based on proportional representation by party, which would assure that dispersed groups (who, ironically, may be worse off than "discrete and insular minorities" who congregate in particular areas) might actually be able to gain representation that an exclusively geographical principle of selection now makes near impossible. This could easily generate several new parties, which itself would be a benefit. There is no reason to believe that the two-party duopoly, itself partly a creation of the particular structures created by the Constitution, has served the country particularly well. Many countries around the world function quite well with multi-party systems. To be sure, this would, by definition, increase the probability that an occasional "extreme" party could in fact be represented, but this would, I believe, be a relatively cheap price to pay in return for the added representation of many groups who are marginalized by the vagaries of an exclusively geographically-oriented system of representation. Australia, for example, organizes its Senate on the same principle of equal representation as ours, but the twelve state senators are elected on the basis of proportional representation, which, as one would predict, produces greater diversity in the Australian senate than the single-member district Australian House.

As Virginia professor Larry Sabato has suggested,¹² one might also make *ex officio* senators of all former presidents and vice-presidents, retired members of the Supreme Court, former heads of the Joint Chiefs of Staff, former heads of the Federal Reserve, and the like, in order to provide important perspectives that are likely to be lacking.

3. My rewritten Constitution might well dispense with the President in favor of a parliamentary system, though I confess that I do not have settled views on this. One of the reasons I support a convention is that I would very much want to hear what people have to say, since there are obvious strengths and weaknesses in both presidential and parliamentary systems. Moreover, one must be careful to recognize that there are in fact varieties of each system, so that it is a fundamental error to essentialize either of them. The character of a given presidential system may depend importantly on the extent to which the chief executive is, for example, able to appoint all members of the executive branch (unlike, say, forty-eight of the fifty governors in the United States, who participate in decidedly non-unitary executive branches);¹³ whether the president has a veto power that can be relatively easily overridden by the legislature; the particular term of office enjoyed by the chief executive; or, whatever the length of the term, whether the President is allowed to run for repeated re-election. I *am* confident, though, that any acceptable presidential system within the United States must have a procedure for a solemn vote of “no confidence,” by, say, 2/3 of Congress meeting together as a single body, presumably reflecting the basic loss of faith in the President’s judgment and capacity for minimally wise decisions. (I would not rule out adoption of a direct-democracy “recall” system.) In the modern world, it is dreadfully fallacious to believe that we can blithely put up with an incompetent president for a substantial amount of time until the next election. It is not only that our enemies are always looking for weaknesses; it is also that great structural forces, whether one thinks of the

12. See LARRY SABATO, *A MORE PERFECT CONSTITUTION: 23 PROPOSALS TO REVITALIZE OUR CONSTITUTION AND MAKE AMERICA A FAIRER COUNTRY* (2007).

13. See Jacob Gersen, *Unbundled Powers*, 96 VA. L. REV. 301 (2010).

globalized economy, natural disasters, or public health emergencies, may call for highly freighted decisions, and, to put it mildly, the public is entitled to have in office someone in whom they (or at least 1/3+1) feel a requisite degree of confidence.

4. If we retained a presidential system, my rewritten constitution would have a very different inauguration day, very much closer to the election itself. It is vitally important that we have, as much as possible, a government that combines legal authority with political legitimacy. Our hiatus between election and inauguration guarantees that with some frequency we lack this most elemental political good. Of course, any significant moving up of inauguration day would ultimately require getting rid of the electoral college, but that's a feature, not a bug.

Even if we retrain the dreadful electoral college, though, surely we would want to change the consequence of an electoral college deadlock (i.e., the failure of a candidate to gain a majority of electoral votes), which is to have the House of Representatives make the choice from the top three candidates on a *one state/one vote* basis. In debating the electoral college over the years, I have not yet found anyone who is willing to defend this aspect of the "electoral college system."¹⁴ Usually the response is something to the effect that "it hasn't happened since 1824" and, therefore, won't happen again. To put it mildly, this is an unconvincing argument, not least because the shifts of a relatively small number of votes in both 1948 and 1968, when Strom Thurmond and George Wallace, respectively, won 39 and 47 electoral votes, might well have required the House to choose between Truman and Dewey or Nixon and Humphrey (since it is inconceivable that they would have chosen Thurmond or Wallace). Surely the events of the past several years, whether one thinks of force-five hurricanes hitting major American cities or the near-collapse of the world economic order, should make us

14. See, e.g., Sanford Levinson, John McGinnis & Dan Lowenstein, Debate, *Should we Dispense with the Electoral College?*, 156 U. PA. L. REV. PENNUMBRA 10 (2007), <http://www.pennumbra.com/debates/debate.php?did=8> (showing that neither Professor McGinnis nor Professor Lowenstein was willing to defend the "electoral college system" in its totality).

skeptical of “since the odds are low, we shouldn’t worry at all” forms of argument.

5. My rewritten Constitution would eliminate what George Mason on September 15, 1787, apparently described to his colleagues in Philadelphia as “that unnecessary (and dangerous) officer the Vice-President.”¹⁵ If one believes that it is highly desirable to have a designated “president-in-waiting,” then, at the very least, the selection of the vice-president should be postponed until the inauguration of the new president, at which time he or she would nominate someone, under the procedures set out in the 25th Amendment, to fill that office upon the confirmation by both houses of Congress. This would assure, presumably, at least minimally competent and experienced vice-presidents in whom the country would have confidence to take the helm at what would necessarily be a time of anxiety, in contrast to, say, Spiro Agnew, Dan Quayle, Sarah Palin, or, for that matter, Geraldine Ferraro or John Edwards. Those members of Congress who debated the all-too-rarely-studied Twelfth Amendment recognized that changing the basic way that we elected the President and Vice-President—i.e., to create two “separate tracks” that involved a *de facto* recognition of the creation of a party system with a primary candidate running for the presidency and a “running mate” who would get the number two office—would create a great incentive for the presidential candidate to choose a running mate not on the basis of who would be best for the country, but, rather, who might help provide key votes to win the election itself. Such skeptics were, of course, entirely correct. Perhaps we should count ourselves lucky in the number of competent vice presidents we *have* had, but there is no reason to rely on such luck (anymore than we should rely on the electoral college always producing a majority winner). I would also allow for votes of no confidence in congressionally-confirmed vice-presidents. Just consider Dick Cheney, after all, who on paper represented an altogether plausible choice by George W. Bush in 2000. Whatever reasons there might be to reject a “no-

15. See 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 at 639 (Max Farrand ed., 1966), available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.hp%3Ftitle=1786&layout=html#chapter_96199.

2011]

SO MUCH TO REWRITE

525

- confidence” vote in the President scarcely seem applicable to the Vice-President, who, notoriously, has no constitutionally assigned responsibilities other than to serve as President of the Senate.
6. My rewritten Constitution would address the subject of “emergency powers” in a way that is simply lacking in the current document. Almost every other contemporary constitution provides a better model than does our own. We might study with special care, for example, the South African Constitution. In any event, we should realize that suspension of habeas corpus, however relevant to invasions or insurrections, is really likely to be quite beside the point with regard to economic emergencies, natural disasters, or pandemics.¹⁶
 7. Finally, I would rewrite the Constitution to allow a significantly easier amendment process. I would also spell out some of the procedures for a new convention, inasmuch as the Framers were almost criminally negligent in this regard. I would, for example, select delegates to the convention by a national lottery among the voting-eligible citizenry, minimally stratified to make sure of regional diversity. They would be paid, for up to two years, the salaries received by senators, with guaranteed sufficient funding to hold hearings literally all over the world, as well as all over the United States, of course, on the issues they would necessarily confront. One consequence of the near-draconian Article V, which makes it functionally impossible to amend the Constitution with regard to any half-way controversial issue (especially if it negatively affects even thirteen of the fifty states), is that it serves to make symposia like this appear to most people like a pointless academic exercise rather than a serious discussion about truly possible changes.

These by no means conclude my possible list of potential changes in our Constitution. Would we really wish to retain the bar on naturalized citizens from becoming President, or require newly naturalized citizens to wait seven and nine years, respectively, before being eligible to serve in the House or the

16. See generally, Jack M. Balkin & Sanford Levinson, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789 (2010).

Senate? Do we necessarily want to continue the bar on members of Congress serving in the Executive Branch, or to continue to require every member of the House of Representatives to face a re-election campaign that increasingly begins almost literally within a year or so of taking the oath of office? (Perhaps we could have four-year staggered terms, with half of the House facing re-election in each election cycle.) The topics of discussion are almost literally endless.

But I take it that I have given an adequate taste of the kinds of inquiries that I believe are vitally important for law professors to initiate not only among themselves—i.e., the readers of *Constitutional Commentary*—but also, and more importantly, among their students. In any event, I am deeply grateful to Professor Hasday and the editors of *Constitutional Commentary* for organizing this symposium, which I, at least, view as an act of high citizenship and not merely a form of academic entertainment.