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FORUM

Curricula and Complacency: A Response to Professor Levinson

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Back when my friend Sandy Levinson and I were both on the Texas law faculty, the assistant dean for communications proposed a promotional tour featuring Professor Levinson's book Our Undemocratic Constitution and my recently published piece in this journal, The Constitution Outside the Constitution. The plan was that Levinson would say the Constitution is bad, and I would add that it isn't really even the Constitution. In the event, we did not get to take our show on the road, so I'm grateful for the present opportunity to address the intersection of our respective projects. To the extent that criticism emerges from his many kind comments, Levinson's main complaints have to do with "complacency" about both the law school curriculum and the merits of the canonical Constitution. The point is a fair one. As will become evident, I am even more "complacent" than Levinson gives me credit for. The question is whether such complacency can be defended.

Take the curriculum first. Professor Levinson seems to want to put our jobs in jeopardy by doubting that "there is a justification" for "requir[ing] . . . students to take constitutional law." But I dispute his assertion that "few students will practice 'constitutional law.'" I have argued that much of the law that "constitutes" our government—that creates governmental institutions, defines their jurisdiction and processes, and confers individual rights against government action—is "ordinary" law in the form of statutes, regulations, conventions, and practices. All of our students will interact with this law in the course of their lives as lawyers. Most students will not be involved in a Commerce Clause challenge to a federal statute like United States v. Lopez, but most will have to trace the statutory boundaries of federal power in litigating or advising on issues of preemption or agency authority. Many may never pursue discrimination claims under the Equal Protection Clause, but they may well pursue statutory equality claims under Title VII or the Americans with Disabilities Act. And students working as legislative staffers or lobbyists may rarely bump up against Article I's lawmaking requirements, but they must surely navigate the committee structures, deliberative procedures, and voting rules that make up our extra-canonical lawmaking constitution. Levinson would no doubt say that I have simply avoided his point by changing the definition of "Constitutional Law." But one reason to make that change is to recover the relevance of our subject.

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It makes a difference to think of these more prosaic and pervasive endeavors as part of "Constitutional Law." The problem is not simply that one cannot really understand the canonical structures—for example, Article I's bicameralism and presentment requirements—without knowing something about the extra-canonical structures that have grown up around them. More importantly, these extra-canonical structures and rights should be understood as implementing entrenched constitutional values such as federalism, separation of powers, and individual liberty. Federalism values are relevant, for instance, when construing the extent to which a statute preempts state law—even absent dispute that a broad reading of the statute would fit within the Commerce Power. Students' understanding of "ordinary" laws will be enhanced if they see those laws as playing a role within a constitutional structure.

Does this mean that I think that students "have a woefully inadequate understanding of the operative Constitution as it functionally exists in 2008"? Not really. Many constitutive statutes, regulations, and practices are covered in other courses, and there is an increasing tendency to cover particular areas—such as election law and foreign relations law—in ways that integrate the canonical Constitution side-by-side with extra-canonical features. Integrated consideration of the legislative and regulatory institutions of the administrative state, exemplified by new first-year courses at Vanderbilt and Harvard, is likely to be salutary. On the current state of the constitutional law curriculum, then, I am even more complacent than Levinson suggests.

Professor Levinson's more fundamental objection is that I am too complacent about the canonical Constitution itself, which he sees as badly needing an overhaul. At least some of his criticisms are surely well taken. My recent attempt to explain the Electoral College to my 10-year-old son Michael, for instance, reduced the poor kid to tears because, at some level, the institution simply cannot be made to make sense. But I confess that I don't lie awake at night worrying about the Electoral College. For starters, I take seriously Edmund Burke's warning that institutional "reform" may have unintended consequences, and I thus need a great deal of evidence before endorsing basic changes. I am far more inclined to worry about the erosion of the canonical Constitution—for example, through the steady migration of power from the states to the national government or from the Congress to the President.

One reason for complacency is that I see the canonical Constitution as less of an "iron cage" than Professor Levinson does, even with respect to some of the features that he identifies as unchangeable without a formal amendment. Like my friends Lynn Baker and Sam Dinkin, Levinson worries about the malapportionment of the Senate. I am less convinced than they that numerical population is the only value worthy of representation, but, even if it is, the effects of malapportionment can be mitigated through any number of changes to ordinary law. For example, the filibuster currently exacerbates malapportionment by making it even easier for a coalition of small states to block legislation, but the filibuster can be eliminated simply by changing the Senate's rules. The most easily demonstrated impact of malapportionment is the disproportionate diversion of federal funds to smaller states, but that might be mitigated through earmark reform.

The same thing is true of many complaints about presidential elections. Individual states can lessen the impact of the Electoral College by choosing to divide their electors in proportion to the popular vote within the state. Or, the disconnect between the electoral and popular votes could be eliminated entirely through the proposed National Popular Vote Interstate Compact. Professor Levinson also does not like the "10-week hiatus

between . . . the repudiation of a sitting president . . . and the inauguration of his or her successor." But only the inauguration date is set in constitutional stone; the election date is set by federal statute. Want a shorter hiatus? Move back the election—by ordinary legislation.

I do not mean to take a firm position on whether something like the Popular Vote Compact is constitutional, much less on whether it would be a good idea. The point is simply that Professor Levinson's "iron cage" may well be more permeable than he thinks. Recognizing the critical role of the "Constitution Outside the Constitution" may help us identify solutions that are far easier to implement than his cri de coeur for a Constitutional Convention. Moreover as my friend (and evidently fellow Burkean) Heather Gerken has suggested, there are advantages to the incremental process of "informal"—or extra-canonical—amendment. For one thing, we may not be sufficiently confident in our fixes for the problems Levinson identifies to risk replacing our current cage with a new one, also made out of iron. And if the proposal is not simply for amendments to cure particular ills but also an easier method of amendment, that may in turn undermine those constitutional fixtures—such as certain individual rights—that we do want to have kryptonite-like properties.

Far better to make sure we have exhausted the potential of extra-canonical change before risking the perils of more fundamental restructuring. The counsel of complacency is also the counsel of caution.

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