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## DEBATE

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### DEMOCRACY, POLITICAL IGNORANCE, AND CONSTITUTIONAL REFORM

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In this Debate, Professors Ilya Somin and Sanford Levinson discuss the constitutional implications of a federal government whose “size, scope, and complexity” are far beyond anything that the framers could have possibly imagined and an electorate that is more likely to be able to name the Three Stooges than the three branches of their government. Both professors agree that the situation is problematic for our democratic form of government and that concerted efforts could—and should—be taken to alleviate the problem. As to what those steps should be, they offer two very different solutions.

Professor Somin begins by agreeing with critics of the U.S. Constitution, such as Professor Levinson, that “our present constitutional system has significant flaws.” He worries, however, that constitutional reforms made in the midst of widespread political ignorance carry no guarantee of establishing anything better. Instead, Professor Somin advocates addressing the problem by “reduc[ing] the overweening power of government over society.” Although large-scale reductions are unlikely in the short term, he asserts that the process can begin by “reestablish[ing] constitutional limits on government power that have eroded over the last several decades.”

Professor Levinson argues, however, that a return to a radically smaller republic is simply not plausible and efforts to effect such change are akin to “swimming upstream, perhaps against a waterfall.” We would be better served, he believes, by adapting our Constitution to match the complexity of the modern state. Through an increase in the number of U.S. senators and representatives, a decrease in the time between the election and inauguration of a new President, and a reduction in the “full-life” tenure of Supreme Court Justices, Professor Levinson contends that our Constitution can be adapted to take significant steps toward achieving a “more perfect Union.”

## OPENING STATEMENT

Ilya Somin<sup>†</sup>

In *Federalist No. 62*, James Madison warned that “[i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood.” THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961). Unfortunately, the dangerous state of affairs Madison warned against has come to pass. The size, scope, and complexity of American government have grown so great that it is often impossible for the electorate to acquire enough knowledge to exercise meaningful democratic control.

Critics of the U.S. Constitution have long argued that it isn’t sufficiently democratic. My partner in this exchange, Professor Sanford Levinson is one of the leading modern advocates of this view. I agree with him that our present constitutional system has significant flaws. At the same time, however, I am skeptical that constitutional reform is likely to alleviate the most important factor undermining democracy in our political system: widespread political ignorance exacerbated by the enormous size and scope of modern government. Political ignorance also reduces the chance that we can successfully enact other constitutional reforms that might improve the system without necessarily making it more democratic. The situation is not entirely hopeless, but I am skeptical that radical improvements in the constitutional structure can be achieved in the near future.

## THE POLITICS OF IGNORANCE

Democratic control of American government is severely weakened by widespread political ignorance. Yet even a significantly more attentive public than the one we currently have is unlikely to acquire adequate knowledge of more than a fraction of the government’s wide-ranging activities.

For decades, public opinion researchers have found very low levels of public knowledge on a variety of issues. For example, in a survey taken a few months before the 2004 election, over seventy percent of the public did not realize that Congress had passed President George W. Bush’s prescription drug plan, the largest new federal program in

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decades.<sup>1</sup> Only thirty-two percent know that Social Security is one of the two largest items in the federal budget.<sup>2</sup> More recently, pluralities of the public believed that WMDs had been found in Iraq long after the failure to find them became clear.<sup>3</sup>

The public is also often ignorant of basic structural facts about the political system. A 2006 Zogby poll showed that only forty-two percent can name the three branches of the federal government.<sup>4</sup> Similarly, about half of the public believes that the President has the power to suspend the Constitution,<sup>5</sup> and only twenty-eight percent can name two or more of the five rights protected by the First Amendment.<sup>6</sup>

Not only are citizens often ignorant of basic information, they also routinely do a poor job of evaluating the knowledge that they do have. Studies repeatedly show that voters evaluate political information in much the same way that sports fans evaluate information about their favorite team: they overvalue information that makes their side look good and discount data that cuts the other way.

Public ignorance and irrationality about politics is not accidental or merely the result of stupidity. Political ignorance is in fact rational behavior. Since there is only an infinitesimally small chance that any one vote will affect the outcome of an election, it is rational for most voters to devote little or no time to acquiring information that would improve their chances of picking the right candidate or party. It is also rational for them to be illogical in their evaluation of the knowledge that they do possess. Since there is little incentive to acquire political knowledge purely for the sake of being a better voter, most knowledge is acquired for other reasons, including the pleasure of rooting for one's preferred political "team" or having one's biases

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<sup>1</sup> KAISER FAMILY FOUND., SELECTED FINDINGS ON THE NEW MEDICARE DRUG LAW 5 (2004), <http://www.kff.org/kaiserpolls/upload/Selected-Findings-on-the-New-Medicare-Drug-Law.pdf>.

<sup>2</sup> KAISER FAMILY FOUND., SURVEY OF AMERICANS ON HIV/AIDS 8 (2004), <http://www.kff.org/hiv/aids/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=36560>.

<sup>3</sup> Program on Int'l Pol'y Attitudes, PIPA-Knowledge Networks Poll: Americans on Iraq War and Finding Weapons of Mass Destruction 4 (2003), [http://www.pipa.org/OnlineReports/Iraq/IraqFindWMD\\_May03/IraqFindWMD%20May03%20quaire.pdf](http://www.pipa.org/OnlineReports/Iraq/IraqFindWMD_May03/IraqFindWMD%20May03%20quaire.pdf).

<sup>4</sup> ZOGBY INT'L, ZOGBY POLL: AOL NATIONAL 3 (2006), <http://www.zogby.com/wf-AOL%20National.pdf>.

<sup>5</sup> RICK SHENKMAN, JUST HOW STUPID ARE WE? FACING THE TRUTH ABOUT THE AMERICAN VOTER 24 (2008).

<sup>6</sup> McCormick Tribune Freedom Museum, The Forum for Education and Democracy, Americans' Awareness of First Amendment Freedoms, Mar. 1, 2006, <http://www.forumforeducation.org/node/147>.

confirmed. Unbiased evaluation of evidence gets in the way of these objectives and so most of us don't try very hard to control those biases.

The size and scope of modern government ensures that even a much higher level of knowledge might not be sufficient to ensure democratic control of government. Government spending accounts for some thirty-seven percent of the U.S. GDP, and that figure pre-dates the recent massive bailout and stimulus bills. USGovernmentSpending.com, U.S. Government Spending as Percent of GDP, [http://www.usgovernmentspending.com/us\\_20th\\_century\\_chart.html](http://www.usgovernmentspending.com/us_20th_century_chart.html) (last visited Mar. 15, 2009).

The government also extensively regulates most aspects of our lives. Even a relatively well-informed public is unlikely to know about much more than a fraction of this government activity. Similarly, it is doubtful that most voters actually understand the contents of the recently enacted stimulus bill.

There are many different normative theories of democratic participation, and some demand higher levels of public knowledge than others. But even the relatively undemanding ones require greater knowledge than most of the public possesses. For example, advocates of "retrospective voting" believe that the public merely needs to know enough to toss out incumbents when they are performing badly. But this implies that the public should know which government officials are responsible for what issues and how effective their policies have been relative to the available alternatives. The public usually votes against incumbents during economic downturns and for them in times of prosperity. This heuristic ignores the possibility that a recession would have been even worse under alternative policies or a period of prosperity even better. Simple-minded attribution of the status quo to incumbents leads voters to systematically make foolish mistakes such as voting against incumbent governors in farm states during times when crop production is depressed by weather. Christopher H. Achen & Larry M. Bartels, *Blind Retrospection: Electoral Responses to Drought, Flu, and Shark Attacks 20-29* (Jan. 27, 2004) (unpublished manuscript), *available at* <http://www.international.ucla.edu/media/files/PERG.Achen.pdf>.

#### IMPLICATIONS FOR CONSTITUTIONAL REFORM

The reality of widespread political ignorance and irrationality has important implications for constitutional reform intended to make government more democratic. One is that we are unlikely to greatly strengthen democratic control of government without reducing the

knowledge burden imposed on voters by the size and scope of the modern state.

A second and even more pessimistic implication is that political ignorance might well influence the content of constitutional change for the worse. Under modern conditions, any amendment process would require broad public participation to have legitimacy. This gives political leaders opportunities to manipulate public opinion to approve constitutional change that benefits narrow interest groups at the expense of the general public or otherwise causes more harm than good. Such manipulation is particularly likely in a time of crisis like the present, when the combination of fear and ignorance might lead the public to approve dangerous policies sold as “emergency” measures. Many liberal scholars believe, with some justification, that this is exactly what happened in the case of policies that imposed excessive restrictions on civil liberties in the aftermath of 9/11. In my scholarship on the 1930s, I presented evidence that the economic crisis of the Great Depression allowed political leaders to exploit public ignorance to build support for similarly dubious emergency policies. Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595 (2003). For example, the Agriculture Adjustment Act of 1938, familiar to law students because it was upheld in the famous Supreme Court case of *Wickard v. Filburn*, 317 U.S. 111 (1942), artificially increased food prices at a time when widespread economic hardship had already brought many of the poor to the brink of malnutrition. During World War II, the public overwhelmingly supported President Franklin D. Roosevelt’s decision to intern over 150,000 Japanese-Americans, in part because the public was ignorant of the reality that they posed little or no security threat.

Public ignorance helped ensure the enactment of these dubious emergency policies despite the fact that many of them arguably violated the existing Constitution. Opening the door to large-scale alteration of the Constitution itself could potentially be even more dangerous, since it does away with the admittedly imperfect constraint imposed by judicial review that can sometimes strike down government overreaching as a violation of the current Constitution.

Although the existing Constitution has important shortcomings, there is no guarantee that we will end up with a better one if we open the door to large-scale revision during a time of crisis.

This in turn brings us to the issue of whether the U.S. Constitution should be made easier to amend. One of the most common criticisms of the U.S. Constitution is that it is undemocratic because it

is too difficult to amend. Generally speaking, Article V of the Constitution requires that an amendment have two-thirds support in each house of Congress and also get the support of three quarters of state legislatures. As a practical matter, this makes it almost impossible to enact any major amendment. A small minority can potentially stymie an amendment favored by a large majority. Scholars such as Akhil Amar, Bruce Ackerman, and Professor Levinson have all argued for allowing revisions to the Constitution without going through the Article V process.

I agree with Professor Levinson and other critics that Article V is too restrictive. However, the problem of political ignorance should lead us to tread warily in circumventing it. By requiring a large supermajority for a constitutional amendment, Article V makes it difficult to change the Constitution by manipulating political ignorance during a crisis. In order to pass, an Article V amendment needs to have strong support from the knowledgeable minority of voters as well as from the relatively ignorant majority. We may still wish to change Article V (as I believe we should). But any alternative amendment mechanism should still require a broad supermajority in order to protect against the manipulation of political ignorance, as well as other dangers.

Obviously, these concerns could be set aside if the status quo Constitution were so abysmal that almost any reasonable alternative would be better. However, it is important to remember that the United States remains one of the most successful polities in the world. We have a higher standard of living than any other major nation, and have remained a magnet for immigrants from all over the world. Compared to Western European and Asian democracies, we have been more successful than most in integrating large numbers of people from many different backgrounds into the mainstream of our society. On the foreign policy front, we have successfully overcome the challenge of fascism and communism and—despite the errors of the Bush administration—will likely prevail in the present battle against radical Islamism. I say all this not to excuse the many shortcomings of the U.S. political system but to emphasize that things could be a lot worse, especially in a situation where the content of any radical reform would be heavily influenced by political ignorance.

#### WHAT IS TO BE DONE?

In conclusion, I ask the same question Lenin posed in his eponymous 1902 book. Lenin, too, was frustrated by widespread political

ignorance and believed that the only way forward was to concentrate political power in the hands of a well-informed political elite—the “vanguard” later known as the Communist Party. In our time, some scholars who recognize the dangers of political ignorance advocate far more modest versions of Lenin’s solution, arguing for increasing the authority of expert administrators insulated from the political process. Cass Sunstein and Supreme Court Justice Stephen Breyer are two of the best known.

I am skeptical of the desirability of elite-led governance. Thus, I would prefer to address the problem of political ignorance by reducing the size and scope of government altogether, thereby narrowing the range of decisions that will be influenced by the rational ignorance of voters without at the same time concentrating power in the hands of a small elite. I realize, however, that large-scale reductions in the size of government are unlikely in the near future. We are, in fact, more likely to see continued large-scale expansions of its power.

Thus, I urge a more modest reform program. Where possible, we should work to reestablish constitutional limits on government power that have eroded over the last several decades. For example, it is probably impossible and undesirable to fully roll back the massive regulatory state established since the New Deal. But it may be feasible to modify or overrule decisions such as *Gonzales v. Raich*, 545 U.S. 1 (2005), which give Congress essentially unlimited authority to regulate almost any activity. When the present crisis abates, it may become politically feasible to promote reductions in the size and scope of American government, as occurred in the 1980s and 1990s.

Political ignorance and its impact on democracy are far from the only factors that we must take account of in considering the appropriate role of government in society. But they deserve greater attention than they have received so far.

Even more modestly, advocates of constitutional reform should be aware of the challenges posed by political ignorance and the limits it places on our ability to make the constitution more democratic.

## REBUTTAL

Sanford Levinson<sup>†</sup>

There is obviously much to agree with in Professor Somin's Opening Statement. Begin only with the fact that it is certainly true that modern government is almost infinitely more complex than anything that was likely to be conceivable to the framers of the 1787 Constitution. The ubiquity of the "modern administrative state," for starters, would have been as mysterious a notion as the development of an air force to complement the constitutionally stipulated army and naval forces. When John Adams moved the national government from Philadelphia to Washington in May 1800, there were apparently only about 125 employees for the entire federal government. Anyone who has physically observed the shelf space taken by early copies of the Public Laws of the United States (or, for that matter, of the Supreme Court Reports) knows how much more one can plausibly be said to "need to know" in order to be on top of modern government. Indeed, one need not even compare the present against two centuries ago. The Congress of only a half-century ago was scarcely, if at all, concerned with health, education, or environmental policy, even though that would change soon enough with the arrival of the Kennedy, Johnson, and, lest we forget, the Nixon administrations. And, for what it is worth, we might note as well that the "United States" conceptualized in 1787 included roughly three million people living in territory extending southward from what is now Maine to the southern border of Georgia, and westward to the east bank of the Mississippi River. There are *so* many ways that the modern American polity differs from anything imagined (or even imaginable) in 1787!

Perhaps we should really be debating whether Madison was actually correct in *Federalist Nos. 10* and *14* in defending the possibility of an "extended republic," as against the far smaller (and more homogeneous) vision of republican government held by such eminent political theorists as Montesquieu and, in many ways, Jefferson. After all, when Professor Somin brings up the well-known and much discussed "irrationality" of engaging oneself politically, including paying the significant costs in getting information relevant to having an informed opinion about a complex issue of public policy, he is implicitly agree-

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ing that the “extended” republic simply makes it more and more rational in effect to drop out—to tend one’s garden or pursue other purely “private” interests—rather than participate as literally one among many millions in elections where there is no practical possibility that one’s vote will “matter” in anything other than a civil religious sense involving the satisfaction one takes personally when participating in a civic ritual.

But we live in the world we do, and there is no plausible narrative that has us turning back to an earlier world. We will not return to a smaller republic, whether that be defined simply spatially—i.e., a United States made smaller by the breakup into several separate countries—or by reference to the scope of issues that are viewed as a legitimate part of the political agenda. For good or for ill, the last election, and the present atmosphere of “crisis,” both domestic and international, economic and more conventional national security, assures that ever more governmental regulation—and, therefore, added complexity—is in our future. If we demand anything approaching a sophisticated knowledge of the issues as a condition for the kind of civic deliberation linked with the notion of a “Republican Form of Government” envisioned by the Constitution, we might well be condemned as hopelessly quixotic and utopian.

These are not happy times for anyone who takes seriously the notion of a “Republican Form of Government,” which in the modern world *must* translate into some reasonably robust form of “democracy”—i.e., decision making that in some meaningful sense is traceable to the public in whose name the government acts. After all, the United States, under Presidents of both of the major parties, has declared itself committed to the goal of spreading democracy around the world. The deep undercurrent of Professor Somin’s comments challenge the meaningfulness, or perhaps even wisdom, of this goal given the widespread ignorance that he identifies. And there is surely little reason to have greater optimism about most other countries, even if some specific ones (perhaps Iceland or Sweden) might score significantly higher in relevant public knowledge.

So we must wrestle with the phenomenon of the “widespread political ignorance” that is indeed our present condition. Part of the problem may be general American culture. Former Justice Sandra Day O’Connor has recently complained that “[t]wo-thirds of Americans know at least one of the judges on the Fox TV show *American Idol*, but less than one in ten can name the Chief Justice of the United

States Supreme Court.”<sup>7</sup> She might easily have also cited an August 2006 Zogby Poll that found that three times as many Americans could name two of the Seven Dwarfs as could name an equal number of Supreme Court Justices (seventy-seven percent as against twenty-four percent).<sup>8</sup> Professor Somin notes the Zogby Poll indicating that forty-two percent could name the three main branches of the national government; consider the fact that almost three-quarters of Americans can rattle off the names of the Three Stooges (Larry, Curly, and Moe).<sup>9</sup> Even if one doubts the particular importance of knowing facts like the names of the Justices, one might still be perturbed by the abysmal ignorance about the most basic structural features of our political system.

So what *are* the implications of these facts for anyone who bewails the current state of the American constitutional republic, as I do, and advocates significant structural changes? “One,” says Professor Somin, “is that we are unlikely to greatly strengthen democratic control of government without reducing the knowledge burden imposed on voters by the size and scope of the modern state.” I am reminded here of Madison’s reminder in *Federalist No. 10* that we could eliminate the problem of “faction” by suppressing the “liberty” that inevitably generates “faction”; but, as he says, the cure would be worse than the disease. Thus his concern is with trying to imagine a government that at one and the same time protects liberty and controls the more adverse consequences of the faction that will accompany it. So the challenge facing the modern designer is trying to imagine a more truly democratic (or “Republican Form of”) government in a modern world that will most definitely not reduce the burdens imposed on participants.

Basically, Professor Somin offers a counsel of despair. His condition precedent for even thinking about constitutional change is a radical transformation of American political culture that would seemingly require, for starters, the undoing of the New Deal and returning to the more pristine vision of, say, President Calvin Coolidge. That I disagree with him in his assessment of what would be desirable is beside the point, for there is simply no possibility of the condition being met. So then he concludes, in effect, that because truly radical change is unlikely, we should rather supinely accept the constitutional

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<sup>7</sup> Justice Sandra Day O’Connor, Keynote Address at the Games 4 Change Annual Festival (June 4, 2008), *available at* [http://fora.tv/2008/06/04/Games\\_for\\_Change\\_Sandra\\_Day\\_OConnor](http://fora.tv/2008/06/04/Games_for_Change_Sandra_Day_OConnor).

<sup>8</sup> *More Americans Know Snow White’s Dwarfs Than U.S. Supreme Court Justices*, ZOGBY INT’L, Aug. 15, 2006, <http://www.zogby.com/search/ReadNews.cfm?ID=1208>.

<sup>9</sup> ZOGBY INT’L, ZOGBY POLL: AOL NATIONAL 3 (2006), <http://www.zogby.com/wf-AOL%20National.pdf>.

status quo (in the sense of the set of institutions bequeathed us by the framers), in spite of his acknowledgment of “the many shortcomings of the U.S. political system.” But it’s not so broken that we should take the risks of changing it, given the widespread popular ignorance and concomitant susceptibility to demagogic argument.

But even if one accepts the reality of popular ignorance and the plausibility of the fears expressed by Professor Somin, are we really required to keep *everything* as it is rather than open the Pandora’s Box of constitutional reform at all? My own desires are for extensive change. I would eliminate equal voting power in the Senate tomorrow; there is no justification for two senators from Maine being equal in power to the two senators from California or, for that matter, Texas. Indeed, like Larry Sabato, I would inject into the Senate a more “national” perspective by having at least some number of senators who did not come from geographically delimited areas at all. I recognize, however, that these hopes may be as utopian and quixotic as Professor Somin’s call for returning to the good old days of the 1920s.

But what about more modest changes? Consider the remarkably increased workload facing the modern Congress because of the enhanced agenda over the last half-century. As it happens, the House and Senate assumed their present size in 1959, when Hawaii became the fiftieth state to join the Union. Might it not make very good sense, as advocated by University of Virginia political scientist Larry Sabato, to increase the size of both institutions? Take only the Senate. Even if one is forced to stick with the equal allocation of voting power, however objectionable it may be, why not elect *three* senators from each state rather than two? Wouldn’t that make it at least marginally more likely that there would be at least some senators who would be more knowledgeable than is currently the case about the ever-more complex issues of public policy facing the Senate. One might hesitate to change the size of the House from 435 to, say, 535; even now, there is no possibility for genuine debate in the House, but it is worth asking if the gains of increased membership might outweigh the costs.

Similarly, I see no reason why we might not emulate the framers of the 20th Amendment by shortening the dysfunctional extended hiatus between election and inauguration of a new President. Prior to the 20th Amendment, proposed and adopted in 1933, a new president wasn’t inaugurated until March 4th; the Amendment changed it to January 20th. That’s still too long a hiatus in the world we now live in. To be sure, further shortening at some point would necessarily require us to confront as well the Electoral College, a topic I have de-

bated earlier in this forum with Professors Daniel Lowenstein and John McGinnis. Sanford Levinson, Daniel H. Lowenstein & John McGinnis, *Should We Dispense with the Electoral College?*, Debate, 156 U. PA. L. REV. PENNUMBRA 10 (2007), [http://www.pennumbra.com/debates/pdfs/electoral\\_college.pdf](http://www.pennumbra.com/debates/pdfs/electoral_college.pdf).

Or consider a recent proposal drafted by Professors Paul Carrington of Duke and Roger Cramton of Cornell that would attempt to rein in the “full-life” tenure of Justices of the United States Supreme Court and replace it with de facto eighteen-year terms. Is this proposal, or any of the ones mentioned above, to be ruled off the table of contemporary American politics? Is there *nothing* about the present Constitution that “We the People,” even in our present state of ignorance, rational or otherwise, could not meaningfully address in our hopes to achieve a “more perfect Union”?

I fear that the message of Professor Somin’s essay is that we really should give up on the democratic experiment itself, that it has simply been overtaken by the conjoined events of a too-large and overreaching polity. That is an interesting and important argument, and it may even be correct. But he should then address more fully what sort of government we should realistically aspire to in the twenty-first century in the absence of the radical political and cultural shifts he might have as his first-order preference. I look forward to his reply.

## CLOSING STATEMENT

Ilya Somin

I would like to thank Professor Levinson for his insightful and thought-provoking reply to my initial essay. There are important points of common ground between us. In particular, we seem to agree that widespread political ignorance is a major obstacle to meaningful democratic control over government and that the problem is significantly exacerbated by the size and scope of the modern state, which imposes an enormous knowledge burden on voters. We also agree that the public's knowledge of *The Three Stooges* is far more extensive than their relatively meager understanding of the Constitution and public policy; though Professor Levinson may underestimate the political insights that can be gained from watching *The Three Stooges*. We continue to disagree over the implications of widespread political ignorance for efforts to reform the Constitution to make it more democratic.

In my view, the combination of a crisis atmosphere and widespread political ignorance make it highly likely that any large-scale constitutional change in the near future would cause more harm than good. Professor Levinson apparently believes otherwise. As I hinted in my Opening Statement, I think we can expect better results from pursuing the more modest agenda of strengthening enforcement of limits on government power that are already present in our existing, admittedly flawed Constitution. In the slightly longer term, we might also be able to diminish the danger posed by political ignorance by pursuing incremental reductions in the size of government. By no means do I counsel "despair," as Professor Levinson suggests. Rather, I think we can make modest but real progress if we proceed from a realistic understanding of the constraints that we face.

CAN WE MAKE THE CONSTITUTION MORE DEMOCRATIC WITHOUT  
REDUCING THE SIZE AND SCOPE OF GOVERNMENT?

In my initial essay, I argued that the size, scope, and complexity of modern government make it virtually impossible to impose meaningful democratic control over the state's operations without reducing its size and scope. Professor Levinson seems to disagree, and suggests that we can enhance democracy through other constitutional reforms, while keeping government at roughly its current size.

Some of the ideas he puts forward have merit. For example, I agree that it would be desirable to eliminate life tenure for Supreme Court Justices and replace it with a nonrenewable eighteen-year term (though, unlike Levinson, I believe that this reform would require a constitutional amendment). I fail to see, however, how that would strengthen democratic control of government. Term limits for Supreme Court Justices would in no way reduce the knowledge burden on voters created by the size and scope of the modern state, which spends over thirty-seven percent of American GDP every year and regulates nearly every aspect of life. Perhaps Professor Levinson merely means to suggest that term limits would enable public opinion to have greater leverage over the composition of the Supreme Court, because new Justices would be appointed more often. Maybe so. But the vast scope of modern government has also made the Supreme Court's docket far more complex and varied than it once was. Few voters understand much about the Supreme Court's work beyond a few hot-button issues such as abortion. Professor Levinson is one of many legal scholars who have pointed out that public opinion—as reflected in the judicial confirmation process—tends to focus on a small subset of the Court's work that is often less significant than its impact on other issues. As he points out in his Rebuttal, the public has very little understanding of constitutional law and the other issues addressed by the Court. In fairness, however, even professional legal academics (myself included) rarely have sufficient time and incentive to acquire extensive knowledge of more than a small portion of the work of the modern federal judiciary. Here, as elsewhere, democratic control of government has been weakened by the size and scope of the modern state.

I also support Professor Levinson's proposal to cut back the length of the transition period between the election of a new President and his or her inauguration. This idea has much to recommend it, but it is unlikely to enhance democratic control of government more than marginally.

I don't have a strong opinion either way about Professor Levinson's third proposed reform: increasing the size of the Senate from two senators per state to three. Levinson believes that this will increase the average quality of the Senate's deliberations, and perhaps he is correct. However, the 435-member House of Representatives is already almost three times as large as Professor Levinson's proposed 150-member Senate and there is little if any evidence that it performs significantly better than the Senate as a result. If Professor Levinson is correct about the merits of this proposed reform, it still would not al-

leviate the loss of democratic control facilitated by the expansion of the size and scope of modern government. Even with a bigger Senate, voters would still be electing senators (and representatives) while having little or no knowledge of most of the issues that the senators will be deciding.

On the other hand, I do support the more radical version of Professor Levinson's proposal: altering the composition of the Senate so as to eliminate the requirement that each state have the same number of senators regardless of its size. In my view (and Levinson's), this would reduce the massive agricultural subsidies and pork-barrel spending that now flow to lightly populated states that have disproportionate voting power in the Senate. Unfortunately, however, this proposal has almost no chance of getting enacted as a constitutional amendment; the small states that would be harmed by this reform have more than enough leverage to block it. Indeed, Article V of the Constitution states that no state "shall be deprived of its equal suffrage in the Senate" even if a constitutional amendment mandating that result does get enacted.

#### IMPLICATIONS OF POLITICAL IGNORANCE FOR CONSTITUTIONAL REFORM EFFORTS

In my original essay, I pointed out how the combination of widespread political ignorance and a crisis atmosphere greatly increases the likelihood that constitutional-reform efforts will yield results that make things worse rather than better. In particular, they make it easy for politicians and interest groups to package dangerous changes as "emergency measures." In past crises, such as the Depression, World War II, and the current War on Terror, many harmful policies were enacted in precisely this way. Enacting changes to the Constitution in this way might be even more harmful than enacting new statutes or executive orders, because constitutional amendments are more difficult to reverse.

In his reply, Professor Levinson did not address this part of my argument. Perhaps he will do so in his next essay. In my view, this problem reduces the likelihood that even efforts to enact beneficial changes in the Constitution will bear positive fruit. They too will have to be filtered through a political process infected by fearmongering and widespread voter ignorance. For reasons I laid out in my initial essay, the danger is heightened if we circumvent the supermajority requirements of Article V, as Professor Levinson and some other scholars propose to do.

I do not believe that these dangers automatically discredit all conceivable efforts at constitutional change during the present crisis. They do, however, give us reason for great caution. At the very least, would-be reformers should explain how they intend to enact beneficial reforms while guarding against the effects of fear and political ignorance that might deflect their agenda into more harmful directions.

#### WHAT IS TO BE DONE?

I concluded my original essay with this question, but admittedly gave only a very brief answer to it. The problem I identify is not one that can be fully addressed in the near future. However, I am not as prone to “despair” as Professor Levinson suggests. Though it will not be easy, we can make some limited but meaningful improvements.

As noted in my Opening Statement, we can strengthen efforts to enforce the limits on government power already present in the text of our current, admittedly imperfect, Constitution. Several of the Supreme Court decisions that license nearly unlimited government power in various spheres rest on narrow five-four or six-three majorities. Two good examples that I have written about extensively are *Gonzales v. Raich*, 545 U.S. 1 (2005) (a six-three decision that endorsed unlimited congressional authority to regulate virtually anything under the Commerce Clause, even though the Clause only gives Congress the power to regulate interstate commerce), Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507 (2006), and *Kelo v. City of New London*, 545 U.S. 469 (2005) (a five-four decision that reiterated previous cases giving government the power to condemn property for virtually any reason, despite the Fifth Amendment's requirement that condemnations must be for a “public use”), Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183 (2007). It is not impossible for changes in the composition of the Court to lead to the overruling of these cases and others like them. In recent years, in cases such as *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Supreme Court has begun to restrict unbridled wartime executive power. Similar developments in the Court's jurisprudence on domestic policy issues could also occur. Indeed, the case for strict enforcement of constitutional limits on government power is actually stronger in the domestic policy realm, since domestic policymaking requires less speed and secrecy.

In the longer term, we can also find ways to reduce the size and scope of government through the political process. I agree with Pro-

fessor Levinson that it is unlikely that we can cut government down to the relative size it had back in the 1920s. However, we can potentially make it significantly smaller than it is today. Other democracies have achieved major reductions in the size and scope of government and have been the better for it. For example, Ireland greatly reduced spending, taxation, and regulation during the 1980s and 1990s, as a result of which it went from being one of the poorest nations in Western Europe to having a per capita income almost as high as that of the United States; Ireland even got to the point where its level of economic freedom also roughly equaled our own, despite being far more statist before its reforms. New Zealand achieved similar results during the same time period, ironically under a left-of-center Labour Party government. On a lesser, but still significant, scale, our own federal government's spending declined from 22.1% of GDP in 1992 to 18.4% in 2000 during the Clinton Administration. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009, HISTORICAL TABLES 25 (2008).

Obviously, significant reductions in the size and scope of American government are unlikely over the next few years. To the contrary, we will almost certainly move in the other direction. But constitutional scholars must look beyond the immediate future. As President Obama has recognized, we face a looming fiscal crisis that will likely increase pressure for reductions in federal spending within the next decade. The current binge of government expansion will not continue indefinitely.

Addressing the problems of democracy and political ignorance are not the only considerations involved in deciding how large a role the state should play in our lives. If one believes that today's level of government intervention is essential to provide major benefits that override the harm caused by loss of democratic control, then so be it. But advocates of extensive government should at least provide a coherent explanation for why government can be expected to provide the promised benefits despite the dangers of political ignorance and the absence of meaningful democratic control over its policies. Recognizing the dangers of widespread political ignorance need not make you a libertarian. But it should lead you to be more wary of assigning broad powers to the state than you might be otherwise. And if we want to make our constitutional republic more democratic, we will have to find ways to reduce the overweening power of government over society.

## CLOSING STATEMENT

Sanford Levinson

Once again, my thanks to Professor Somin for an interesting and thoughtful reply. I do think that the nub of our dispute comes down to the issue of “despair.” I certainly do not believe that Professor Somin “counsels” us to despair in the sense of encouraging such a disposition. Indeed, he is an optimist, not despairing at all about the potential for at least alleviating, if not necessarily wholly fixing, the dilemma posed by the widespread political ignorance he identifies and bewails. All we have to do is to rein in the powers of government, particularly, I presume, at the national level. One suspects that he would endorse the general thrust of Richard Epstein’s *Simple Rules for a Complex World*, in which the first simple rule is, more or less, to say “no” to most of what the national government has done at least since the New Deal. I assume as well that he admires, as do I, Randy Barnett’s *Restoring the Lost Constitution*, perhaps the ablest articulation of a more-or-less libertarian reading of the Constitution.

This is not the occasion for a full-scale debate about the merits of libertarianism as either a political philosophy or a specific approach to the Constitution. Although I admire Professor Barnett’s book (and, for that matter, the intellectual provocations of Richard Epstein), it does not mean that I am persuaded. But the far more important point, as suggested in my initial response, is that Professor Somin basically admits that he is swimming upstream, perhaps against a waterfall, in arguing that the cure for what ails us as a political order is to radically limit the powers of the national government to regulate the economy or to provide basic welfare services. That view was decisively rejected in the last election, with consequences that we read about in our daily newspapers (or, for an increasing number of people, online).

Were I a libertarian, I would be in a state of despair at the present political situation precisely because it appears so obvious that the current political zeitgeist is going in the other direction, where even some staunch Republicans find themselves—I believe properly—endorsing the nationalization of major economic institutions. Professor Somin’s nostrum of a diminished role for government is no more likely to be generally accepted—at the present time or, I suspect, for years to come—than my own nostrum of a new constitutional convention that would address whether or not our present Constitution, most of whose truly important parts were drafted in Philadelphia in 1787, is

adequate for our twenty-first-century lives. From the perspective of people who disagree with us, I suspect we are both dismissed—though not necessarily by the very same people—as “cranks,” “utopians,” or “Don Quixotes” who refuse to accept the world as it is, which is one of big (and getting bigger) government and resolute unwillingness to think seriously about the adequacy of the Constitution we live under.

In a forthcoming article to appear in a symposium on the contemporary efficacy of Congress within our political structure, *The Most Disparaged Branch: The Role of Congress in the Twenty-First Century*, 89 B.U. L. REV. (forthcoming Apr. 2009), I take issue with a suggestion by a fellow symposiast, UCLA Professor Barbara Sinclair, that “we need to be hard nosed in our analysis and modest about our proposals.” Barbara Sinclair, *Question: What’s Wrong with Congress? Answer: It’s a Democratic Legislature*, 89 B.U. L. REV. (forthcoming Apr. 2009). I obviously agree that it is desirable to “be hard nosed in our analysis”—what would it mean to embrace “soft nosedness”?—but I disagree strongly that this entails that we must be “modest about our proposals.” What links both Professor Somin and me is that, for better and, no doubt some would assert, for worse, we firmly believe that we are each engaged in hard-nosed thinking about the nature of contemporary politics *and* that what our noses have smelled leads us to be truly “immodest” in our proposals. For some, of course, this last suggestion will evoke Jonathan Swift and his own “immodest proposal” to solve the overpopulation problem in Ireland. I presume that neither Professor Somin nor myself believes that we are writing satire. Each of us is completely serious about our analysis and our proposed rectifications, however much we may disagree with each other. I take great comfort, though, in noting Professor Somin’s agreement with some of my specific proposals. Both of us, I take it, are dismayed by the spirit of complacency that typifies the legal academy when presented with radical critiques and proposals.

Let me confess that I am genuinely torn about the role that rhetorics of “crisis” and “emergency” do, descriptively, and should, normatively, play in the discussion of constitutional reform. I share his fear about the ability particularly of Presidents, charismatic or otherwise, to use such rhetoric as a way of amassing power, whether for the national government in general or the executive branch in particular. For many of us, the administration of George W. Bush is, unlike truth or beauty, all we know, and all we need to know, about the capacity for abusive government and, concomitantly, the importance of adhering to the original mantra of the national government being a govern-

ment “of limited and enumerated powers.” James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), in JAMES MADISON: WRITINGS 480, 485 (Jack Rakove ed., 1999). This explains my own admiration for Justice Scalia’s opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), where he unfashionably took the Habeas Corpus Clause with genuine seriousness, unlike his more “pragmatic” colleagues in the majority. No doubt there should be a major national debate, conducted at the highest possible intellectual level—fat chance!—about the implications of the remarkably transformative visions embraced in President Obama’s first budget and accompanying justifications. That I am exhilarated by having a President who truly wants to succeed (and in many ways supplant) FDR and Lyndon Johnson does not mean that the critiques offered by Professor Somin need not be fully considered and responded to thoughtfully, with at least some instances along the way of concessions to the validity of some of those critiques.

This being said, I think it is also undoubtedly true that dinosaurs like the American government change, if at all, *only* upon the perception of crisis and emergency. No doubt many skilled politicians would agree with Rahm Emanuel’s now-famous comment that “[y]ou never want a serious crisis to go to waste.” Gerald F. Seib, *In Crisis, Opportunity for Obama*, WALL ST. J., Nov. 21, 2008, at A2. Or perhaps one should equally invoke Samuel Johnson’s comment that “when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.” JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 713 (Roger Ingpen ed., 1907) (1791). It is so easy to think of other things when one assumes that the future is rosy or even relatively unthreatening. The prospect of driving off a cliff, on the other hand, might truly clarify the debate. The all-important question is whether we can trust political leaders to identify true crises, as against the stirring up of fear attendant on perception of a crisis for rank and partisan political purposes. Not the least dangerous feature of our political system is that Presidents have a great incentive to scare the public, as a means both of institutional aggrandizement and helping their political party win the next election, which, under our system, is always occurring within a maximum of two years.

The political ignorance that Professor Somin has identified is surely one of the explanations for our remarkably coarsened general political debate. As a rabid Democrat, I tend to focus on such figures as Sarah Palin, “Joe the Plumber,” and Rush Limbaugh as typifying everything that is wrong—perhaps even despair inducing—about our present politics. No doubt Professor Somin would name some people

I am more inclined to treat with the same seriousness that all too many Republicans treat Palin et al. What I am confident of is that it is possible to engage in serious debate with Professor Somin, Professor Epstein, and Professor Barnett, to name only the academics mentioned above, without descending into name calling and irredeemable cheap shots. Whether this is enough to overcome despair I leave to the reader.

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Preferred Citation: Ilya Somin & Sanford Levinson, Debate, *Democracy, Political Ignorance, and Constitutional Reform*, 157 U. PA. L. REV. PENNUMBRA 239 (2009), <http://www.pennumbra.com/debates/pdfs/ConstitutionalReform.pdf>.