THE JURISPRUDENCE OF ANTI-EROSION

SYMPOSIUM DISCUSSION: GINSBURG

APRIL 14, 2018

DRAKE UNIVERSITY LAW SCHOOL

David Stebenne: I just have a couple comments, things to think about, and if you want to respond to them, that would be great. One issue has to deal with what to do when legislative bodies become dysfunctional. In other words, the U.S. government must function. It must accomplish things, so even under President Obama, who was a believer in Congress and came from Congress, when Congress became dysfunctional, he began issuing even more executive orders in order for the work of the government to get done. So one issue is, to what extent is the growth in the power of the Executive the result of Congress increasingly being unable to do its job, rather than the result of Presidential aggrandizement? The second thing has to do with the issues of constitutional amendment. While it is true that many constitutions in the world are too easy to amend, and that creates all kinds of problems; there's a lot of thinking that the American Constitution is too hard to amend. The clearest example is that we can't seem to fix our system of Presidential elections. We continue in the twenty-first century to choose Presidents who don't get as many votes as the other person. This is viewed everywhere else in the world as crazy and illegitimate and is having very problematic consequences. So one could make an argument that while what Professor Ginsburg has to say about constitutional amendments elsewhere is absolutely true, in the American context it's the opposite problem. And then the third thing—the notion that courts should do a lot is attractive to members of the bench and the bar, but most people beyond these walls view the Judiciary as the least democratic branch of the American government. They don't run for office mostly, especially those nine in Washington, and so having the courts do more is potentially a very undemocratic approach to protecting democracy, at least in the minds of much of the American citizenry.

Tom Ginsburg: Great, so three excellent points. So yes, there's been a secular growth in the executive power in many democracies. It's something structural about the nature of information; there's something in our era. And that's fine; I understand that. One thing I'm quite skeptical of, though, is this idea of a unitary executive, which is often debated in American

constitutional circles and actually quite relevant today when you think about the President's power to fire people in the Department of Justice, for example. I think that is a fetishizing of executive power, which has grave risks, given the secular pressures for more and more executive power. If Congress isn't going to do it, well then we need other mechanisms to ensure accountability. We need to disperse power in various ways, and that's exactly what I think the Founding Fathers would have said if they could come back and see where we were. I think they would come up with a different design and recognize the failures of legislatures. And ours is not the only one. All over the world, they're not popular.

On amendment, yes, I've done a lot of work on amendments around the world. I agree with you, ours is too hard. I'm quite partial to a system they use in Scandinavia where you have a proposal for a constitutional amendment and then an intervening election and then the approval of that amendment. And that's nice because if its minor amendments—and they're usually minor in that part of the world—they just sail right through. There's no problem, there's just a little temporal delay. But if it's a major amendment which is going to change the structure of the government in a way that might lead to erosion, well then you can make that a political issue, and the people can have their say, even though it's not a referendum system—which generally are pretty bad. I'm from California; it's a disaster. But that way at least the people can have some voice, and it's a check on abuses of amendment. So I would like an easier mechanism, so I'm with you there.

In terms of the courts, though, I think where this Article, which I'm going to submit to the *Drake Law Review*, will go is to say courts should think about protecting democracy as a part of their mission. And this doesn't mean stepping in and making the substantive decisions. It means protecting the processes and the integrity of the institutions which function in a democracy. Professor Kende has written a lot on South Africa, where there is just a lot of great stuff this year, where the Constitutional Court and the public protector ombudsmen essentially got Jacob Zuma to leave office, but they didn't kick him out. They said, "Look, you've got to pay back the money that you spent on your house." To Congress, which was controlled by his party, they said you've got to come up with a process for removing Presidents who violate the law, and these things are legally required. And eventually the ANC said, "Yeah, this guy really is a losing proposition." The courts did not say he had to leave. They incentivized the ANC to do the right thing and imposed some political costs, and I think that we can repeat that with regard to kind of policy decisions. Courts should not substitute their own role; we have many examples around the world—believe me. We have crazy

constitutional courts that are deciding all kinds of very detailed things. India may be the most activist in the world. But there is a scope for a jurisprudence which is in between doing nothing and dominating.

John Reitz: Well, I'm just going to push a little bit more on the elitism point that David brought up. And I have to say I'm an elitist myself so I have sympathy, and you've explained you're not saying it's elitist. Your focus is on the courts for very good reason, but I just want to push you a little bit. That search is surely only part of solution to our problem. What can we do in the larger polity to engender support for democracy that seems to be in a lot of ways the toughest problem?

Ginsburg: Well, if you really want to think about one single thing that has led us to where we are, it's our education system. And our civic education system. Most Americans support the First Amendment. A third of people can't name what's in it—any one of the freedoms in the First Amendment. A third of people cannot name all three branches of government of the United States. Most Americans could not pass the citizenship test, which maybe some of you have had to pass to become citizens, and I can't understand why that would be good for anybody. Why we don't as a nation, on both sides of the aisle, rally, mobilize for civic education? Because it's not outside of our power. It's only outside of our power if we choose not to do it. So to me that's really the solution. I hate the word elitism. I'm not sure it's a valid term. I think it's an epithet these days.

Audience Member: You spoke a lot about the internal pressures on the democracy, and so what I'm wondering is when you describe these innate only democracies, I wonder if they exert a sort of general pressure to reduce the cultural influence of democratic norms. For example, and I think this goes a little bit to what we do as a policy, when you can look at the same world in Russia and Turkey, those are democracies and look at what they do. I think it has a general depressive effect on our democracy. And I'm wondering if we are able to inoculate ourselves against that?

Ginsburg: Well, the first thing is to understand, and it doesn't matter what political theorist you're reading (I happen to be reading Hayek right now), freedom is the freedom to make mistakes. It is. Democracy is not going to get the right answer all the time. It's definitely not. It's part of the design that we're going to make some errors but the point is that the magnitude of those errors is reduced. People say, "Well look at autocracies that are doing better. Look at Singapore. Look at China. But then you also have to look at the Pol Pots and the Stalins and such. I think there's an easy normative case to be made for democracy. Now the question is what do we

do in an international context where these ideas are flowing across borders, and we're actually . . . as we see, it's the interest of some autocracies to promote autocracy—the Great Belt and Road Initiative perhaps. It's in the interest, or it used be in the interest, of democracies to promote democracy. That's what we've been doing. And essentially where we are now—and this has had very concrete affects—is we've given up on that. It's not our business to promote democracy, and we're stopping the funding for a lot of these programs and that has had significant consequences in a lot of countries. I was originally an Asianist. I spend a lot of time in East Asia. You know the Thai military? The Americans are not going to criticize whatever they do. Hun Sen just banned all the opposition parties or the main opposition party in Cambodia. Why? China. He has much closer relations to China than us, and he pays literally no price for doing that. So if you're in a world where there's two competing systems arguing about which is the best and one stops talking, well the other one is going to advance, so I think the failure of the United States now to speak up for democracy around the world is having bad effects with consequences which will eventually have backlash for ourselves.

Audience Member: You mentioned Chicago, and this is what got me thinking about the confirmed neo-Nazis on the ballot which we've all seen. I lived in two countries, Germany and Austria, which have their own history, and now in Austria whenever a center right chancellor is elected that pinpoint by implication means that a full blown neo-Nazi is a coalition partner. In Germany, the most recently, the EFD is now the leader of the official opposition in Parliament, and my question is: number one, can you give any insight as to what you think the triggers for those things are? Whether that's political in nature? Whether that's just simply the momentum of the traditional leadership structure's failing the population? But then second, is there anything that we can take away from that? And then third, what does a person in a liberal democracy that is nonetheless producing illiberal results do? And those are two great examples of countries with great qualities of life with structures we would all recognize, which nonetheless are not even creeping over problems if they were embracing it wholeheartedly.

Ginsburg: It's a great question. Well, you know you talk about far right politicians, and the example was given about Germany and Austria where we now have far right politicians. In Austria, I think, they will be part of the governing coalition no matter what and the upcoming election, and so what should one do about that? And I'll start to give my answer. Which first of all, I'd like to point out that shows the failure of the militant democracy

approach—that it hasn't inoculated these societies from the sentiments or from actual parties. You know, I think as a matter of constitutional design, we have to think what kind of system allows that? We talk a lot about presidentialism and parliamentarism, and my own intuition is that parliamentary systems maybe are better at getting those voices out early, but also better at squelching them as happened in the Netherlands last year. That is where all the other parties say, "No, this guy is out of bounds, we will not form a coalition with you." But as you say, that hasn't happened in Austria. And so that is obviously a terrible example. What should one do? Well, obviously, it's the same solution for us. I've talked a lot about institutional design and I've talked a lot about courts and these elite institutions at the end of the day. The only thing that can actually save democracy is democracy. There's no substitute for mobilization and voting and organizing. All the things I'm talking about are just sort of speed bumps in the road to try to prevent that bad outcome from materializing. I think Austria, by the way, also illustrates the regional nature of what's going on in Hungary and the other Austrian Hungarian empire countries are all slipping back. Why would we not expect Austria?

Audience Member: Do you mind if I ask a follow-up? Particularly with Germany. If you look at the last, I guess, 13 years or so of the coziness between the two conventional parties, in Austria that structure existed from 1955 up until 2000 where your options really were limited, and that structure was beyond control. It makes me wonder if although anyone votes for the EFD, for the Freedom Party, is out of respects for their own vote. I've got to think that those political dynamics—the extra constitutional relationships that politicians choose that lead exactly to that result.

Ginsburg: So, the question pointed out that these countries were governed for long periods by kind of grand coalitions where the center right and center left get together, and that leaves everyone else out. Thus, there's not actually much political choice in terms of the options presented. We have the same dynamic here. People talk about political cartels in the United States where third parties can't get a foothold on the ballot largely because the two main parties have things locked up. If you think about the Federal Election Commission, all these things which are essentially two-party-run administrative devices, two parties is enough according to our jurisprudence, and I think that is also problematic. But I don't have a magic answer for what one should do. I mean it's a matter of trying to get those parties to shift to one's preferences. Parties by their nature are always aggregating lots of complicated interests and never perfectly reflect any single person's set of policy positions. I think the greater danger that we face

is just the decline of parties in general. Just the same way we see decline of legislatures. People's affiliation in an era of social media is not really with parties as associations and that is a very deep problem. We don't know what democracy would look like without political parties on any kind of mass scale.

Audience Member: You said the only way you protect democracy is democracy itself. Yet the United States seems to have lackluster voting turnouts as well as highly polarized voting. Australia has mandatory voting. Is that something you'd see as beneficial to democracy or perhaps more damaging?

Ginsburg: Personally, and now I'm out of the scope of my expertise. I don't think mandatory voting fits very well with American culture, political culture, or libertarianism, where we have a streak of that, and so what I would like to see is a very simple fix. How about just a national holiday on that day and people can go and vote? We make it as difficult as possible to vote. I would also like to see some kind of national commission where trying to come up with common standards. We have had just outrageous voter suppression in this country, and we have a myth about voter fraud of people double voting, which just doesn't happen. It's one of these things that you see on the media that's absolutely partisan and fake. And so, I would like to see some kind of commission to say what the standards are. How do people get registered? Can we come up with common norms among the states about administration toward the goal of getting actual participation? That's all you can do. You can't force people to vote. Australia does it and it's not that successful.

Audience Member: Your defenses of constitutional defenses against the eroding of the Constitution was a vigorous defense of freedom of speech. I'm wondering with the hate groups having violent demonstrations and the mantra of free speech that justified these types of demonstrations, at a minimum, cause great cost to communities to protect themselves with limited resources. Not only that, but there are many examples of weaponizing social media to verbally attack and actually threaten individuals. I was wondering if you have any thoughts of a balance for that.

Ginsburg: It's not my area. I recognize the problem, but I think we've always had the problem in this country. And I think there must be fixes for social media and the online space that could be done. If they can get people to do copyright takedowns, they surely can screen the most hateful speech or make people at least not be able to speak anonymously. If you're in a certain context, right, where you have to own up to the type of speech you're

engaged in. Well then I think that might go a long way, but then social media is just a kind of a challenge shall we say. In the sense that with the old model of democracy you elected one party or the other, they governed for a particular time; they went back to the polls—accountability every two or four years. Well now we're in a world where every minute is an electoral campaign essentially. There's no in between. And more broadly, every minute is an embodiment of our social conflicts, which are then fired up. My colleague Eric Posner has "Twenty Theses about Twitter" where I think he calls it a hate machine, or something like that, he just really doesn't think it's very valuable for our democracy. So that's a bigger set of problems than I can answer.

Audience Member: You kind of made the argument that the rest of the world is highly skeptical of our electoral process, especially for President, and the biggest push back we see against any kind of system with the popular vote is obviously geographical concerns. Do we have sufficient safeguards with the Constitution in the Tenth Amendment if we in fact adopt a direct popular vote for the presidency?

Ginsburg: Actually it was John Reitz who mentioned the Electoral College. I might think better of it than he does, but one virtue of the Electoral College is that it protects minority geographic interests, right? For a political party to win the presidency, it has to compete all over the country. You can't just have a party in the Northeast running the rest of us, right? So, that's a virtue. How can we protect those interests, those genuine interests, if we were to revise the system? I think you could have a double-majority system, as works in several countries—ethnically divided societies where you have to win a national majority and then a certain percentage in a certain number of districts. So you could imagine you could only win the Presidency if you got a certain number of states and a national majority. If you don't win that on the first round, then you have run-offs and such to try to get someone who can command a majority. So there are ways to do it outside the Electoral College. It was something they came up with. They didn't spend any time thinking about it. It was almost an accident, so there's a lot of ways to do a better job, in fact, without allowing minority-elected Presidents, which most Americans obviously can't understand either.

Audience Member: You were talking about bureaucratic rule of law and mutual administration of policies, lowering the stakes of elections. I think that's a great idea. Some people characterize that as a deep state and draw conspiracy theories with people's pictures and pieces of string hampering the policy prerogatives of single party controlled government. My question is—and I think this is a great institutional

chapter—is this something that can be made politically popular? Is there an American tradition that we can appeal to for nonpartisan, institutional control of bureaucracies? And then if it were politically popular and if there were the energy to enact reforms to protect bureaucratic rule of law below the Constitutional level, what kind of protections would we prioritize while we have that political will?

Ginsburg: We hear talk about the deep states. And it's true Americans are skeptical of bureaucracy, we always have been. And at the same time, we want the things bureaucracy gives us.

So we're schizophrenic, right? We want protection from bad things but we don't want bureaucracy, we're appropriately skeptical. I mean technocracy is an ideal, and technocratic insulation only works if there's some political-type of accountability at the top, so you do need mechanisms. I do think it's part of our tradition. I don't know how many of you students have taken Administrative Law, but it's full of structures—complicated, scheme-specific structures—to ensure that the values of the mediocratic civil service, the values of technocracy are kind of balanced with democracy. What would we do? Well one thing I would do is end the Holman Rule that I mentioned before allowing single persons to be singled out by Congress. I would increase the ability of Inspectors General—insulate Inspectors General. They do a pretty good job by the way, I think in most administrative agencies. They are internal investigators in each agency that look at malfeasance I would think about how to safeguard information in the administrative state from destruction. I have in mind a case that's going on in Wisconsin now. The prosecutors are so afraid of this case to going to the Wisconsin Supreme Court that they actually took their evidence on campaign finance violations by Scott Walker and gave it to the federal district court to hold. The district court isn't doing anything with them, but they are just sitting on the documents. That kind of insulation about information I think we could make more robust. At the same time, you need accountability, and I would like to see a more robust freedom of information law, as I said. So I think all of these advance the values of a kind of technocratic rule of law that would serve our democracy better.