AMENDING CONSTITUTIONAL MYTHS

SYMPOSIUM DISCUSSION: MILLER

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Audience Member: Professor Levinson briefly mentioned the South African constitution in 1994, which was, obviously with the Apartheid, a little bit more of a radical situation than what we're facing today. So that transformation of their constitution came from a significant amount of international pressure, so I wanted to know, from a political scientist's standpoint, if you had any insight as to if there was any possibility or avenue of international pressure to jumpstart this conversation?

Lisa Miller: That's an interesting question. My initial response, I have to be honest, is that could push a lot of Americans in the other direction. Right? "Stay out of our business." But what I do think is helpful is for scholars to do more comparative work, which is what is so wonderful about what folks here are doing, because you do get this lens on the American Constitution and some of its challenges when you look cross-nationally, and particularly when you compare us to other OECD countries, other rich democracies, the democratic deficit becomes quite apparent in the United States.

I'll give you a quick example. When the horrible Sandy Hook shooting occurred, probably some of you were, I don't know, maybe some of you were too young to remember. Some 27 children were murdered and teachers, and there was a proposal to do a few things. One of them was to close the loophole of background checks at gun shows. But nothing happened, Congress was unable to pass the legislation, and a friend of mine who was a visiting scholar from Denmark at the time said, "I have to tell you. If this happened in Denmark and the government did nothing, the government would collapse. There just is no question." And I think that we're just inured to the idea that terrible things happen, and the government does nothing. I'm not presupposing any particular solution here, right? I'm not suggesting that gun control is going to work; I'm just saying that the "nothing" factor in the face of such a tragedy is extraordinary in the democratic world, and I think that the comparative lens allows us to see that more clearly, as some people were pointing out today about New Zealand these days.

Audience Member: So the language surrounding how we understand the Constitution, I think that is a really important conversation, and I think that it's going to be well received in more academic circles, but how do you

bring that conversation to the average American, just the normal, Midwestern, average American, that people tend to think of? How do you engage in that conversation?

Miller: Well, that's interesting. So, this project is part of a book that I'm working on, and I've done some work, actually, tracing some of these terms through history, and it's been really illuminating and interesting, and one of the things that I'm going to do is a survey to see how people think about these terms. But I would actually flip it around. I think that these terms are more commonly used among elites. And I have found a lot of resistance among elites to my argument—people are very attached to these terms. You know, it's funny, so I'm going along, and liberals are nodding at "oh yeah, states' rights, that's terrible. Yeah, government overreach, that's stupid." You know? And then I get to tyranny of the majority, and they're like, "Oh, whoa, whoa, that one's true." Right? So, everyone's got their favorites, but for average Americans, I'm not exactly sure how much these terms resonate. I think that people say them: "Oh, right, checks and balances, that's good." I mean, we certainly learn them in high school. But I think that if understood more clearly how these systems actually work, I think that, in some ways, we can expect more pushback from elites than average Americans. We'll see.

Sanford Levinson: I think that your question is ironic in a sense because you really are on the front lines of the 2020 presidential campaign. I assure you that all the candidates are not going to come to Austin week after week to try to talk to us. That is because of what in a different context could be criticized as the undue role that Iowa and New Hampshire play in the primary process. So, let me kind of be rawly political for a moment, and first of all, generally, I think you should ask every candidate the questions that Professor Miller has suggested and really hold their feet to the fire. I mean, you have this really unique opportunity that almost nobody else in the country does, what becomes rawly political, and I confess that I have been antagonistic now for two election cycles of Bernie Sanders, and I suspect that some of you are less antagonistic than I am for the simple reason that somebody who calls himself a "revolutionary" might be expected to say something intelligent about the formal structure of American politics and how the rigging began in 1787. Instead, he promotes a notion that if only by some magic wand he becomes president, he can make all sorts of things happen. Now, maybe that's true, but only if we develop a much more Caesarish view of the Presidency that I find disturbingly present in Richard's argument, and I think that's where we may be going. That's what was argued a hundred years ago; that within presidentialism is Caesarism. And one doesn't have to talk about Donald Trump. One could talk about Barack

Obama, the politics of hope, and the mass rallies that he had in order to become President in 2008. But it does seem to me, really in all seriousness, that you have a unique opportunity that each and every audience member should use the next time somebody shows up at a Des Moines coffee shop or at a town meeting and asks for questions.

Audience Member: When you were talking about the need for leaders, when they're using their checks and balances to explain their decision, it made me think of a recent event where there was a press conference with Mitch McConnell, and he received the question why the Senate voted on the Green New Deal but was not bringing up H.R.1, and his response was, "Because I decide what we vote on." So, he got the question and in support of your point, he put out there that he was exercising his power, so I'm curious what channels or what would it look like when the leaders are explaining their reasons that they're exercising that power? Because it didn't work there.

Miller: Well, there's no panacea, right? I mean, sure, people can be really transparent, and we can still not have change. But I do think that in the aggregate over time, not just political leaders but people running for office and advocates of various causes, by being more transparent in recognizing that these myths have power behind them and asking what is that power and what's it for could help expose more clearly the purposes of these interests. So, I think that it's great that Mitch McConnell answered the question that way. I think that's exactly correct; he is the Senate majority leader, and he decides what they vote on. That's how it is, and that's probably how it should be. But I think that's not that common. It's just, for some reason I seem really fixated on this House Democrats and checks and balances thing, and it's almost comical if it weren't so serious that they're relying on this term and suing the President, which, fine, maybe that's something they should do. But why not also say: "Listen, the Republicans had two years to do this wall, they don't want a wall either. The American people have a lot of problems. Building a wall is not where they want to spend five billion dollars." And so instead of invoking, "We're going to be the ones to stop this imperial President," why not invoke democratic majorities? And I'm kind of struck by how often that happens, so I think that people could ask more frequently these questions about why you're framing it in this way. States' rights? What does that really mean? What do you really want?

Richard Albert: Yes, thank you. I really appreciate the logic of your argument, Lisa. I was following it quite closely, and I wanted to ask about

the tyranny of the minority because we've been talking about that in my Con Law 1 class at Texas, and I think I'd love your help in evaluating the different kinds of minority tyrannies that are out there. So let me identify four, and we've talked about these four in my class, and I would just love your help in telling my students how we should think about these or how else we might think about these. I've told them how I think about them. One is what Sandy calls, "Tricameralism," the idea that we don't have two branches of the legislature, we have three because the President, she can veto, so that's arguably tyranny of the minority. The second is Article V, right? Where one court or one state can deny three-quarters of the states and what they want, that's the second. Third is the filibuster, or what remains of it, in the Senate right now. And then the fourth is not the power of judicial review, which I guess is an exercise of minority tyranny, but more specifically the power of severability that the Court can exercise. So, I'd just love your thoughts about how we should think about these four in their relation to changing constitutions.

Miller: Well, I would add the Senate. Just the Senate. Because when half of the population has 18 votes in a chamber of 100 people, I don't see how we could call that anything but a minority rule. I'd like to get away from the word *tyranny* because I think that there are people in the world who would object very strongly to anything in the United States looking like tyranny compared to what they're living through. But, just for sort of rhetorical purposes, I do think that we have minority rule in the Senate. I think that the Electoral College is one that I would add as well. I mean, it's certainly something that we think never happens; well, it's happened twice in the last 20 years.

So, I would add to those things, and I think that, I guess the way that I want to think about these institutions is to observe, first of all, and notice how many ways there are for the country as a whole to be governed by a fairly small minority but then also to look at who is that minority because we use the word *minority* in a couple of different ways. We use it often when we talk about constitutional protections to refer to people that we know have historically been disenfranchised, abused, and all kinds of things. But really the system that we have doesn't say anything about which people need special constitutional protection, as I said earlier. What we really have is a system that allows political minorities to rule, and I think today those political minorities are several. Concentrated wealth is certainly one of them, and by that I mean both extremely wealthy individuals but also coordinated wealth, whether it's multinational corporations or other forms of corporate wealth. I also think white nativists are a minority that are exercising

disproportionate influence in American politics given their numbers in the population. And so, I think we need to give names to who is pulling these levers. Because when I talk with my students and say the word *minority*, I mean, this is Rutgers, it's a very diverse campus, so they tend to say, "Yay, protect the minority," which is great, but what if that's not how it works? What if actually many minority rights ultimately have been protected and embraced by majorities? In fact, what we have with minority protection are very powerful people exercising it and maintaining their own political company.

Audience member: One way of thinking about constitutions and rules are in terms of normative arguments, but there are also long-ranging experiments, right, in how political systems work, and so I was thinking about, you have two major constitutional systems, right, one in the United States in the late eighteenth century that really impacts how we talk about the use of the vote to hold people accountable, and we really value these systems of checks. You also have a different system that goes way back in time, but it became more or less modern in mid-1800 in the U.K., that totally discounted institutional checks and individual representation, and they've both had major meltdowns. You've got Brexit, which was basically the Groundhog Day of its day, and the United States hasn't had that high level of, but we have high levels of polarization, so maybe there's something to what the Framers were thinking about. So these were at opposite ends of the spectrum: one system that relies purely upon the election and almost no institutions, you've got one that discounts elections and really wants institutions, so maybe either end of that spectrum, maybe that's the problem.

Miller: I think that's a great point and, you know, I'm self-conscious not to suggest that my larger book project is going to give us explanations for the current state of populist moves and so on, but I will say that institutions really do matter. Look at France. I was living in Britain during the Brexit year, I was at the University of Oxford, and everybody was saying, "Oh, there's the possibility of the trifecta. What if we do Brexit, and then Trump wins, and then the French elect Marine Le Pen?" Well, two of the three happened, but Le Pen didn't become President of France because of their institutions, because they've got to have a second round and somebody has to get a majority vote. So institutions, they really make a difference. I don't know what would've happened in 2016 if the candidates had to campaign across the whole country for the popular vote. Trump still may have won, but the fact that he did not win the vote of a majority of Americans under the system we have and yet still is President is really significant.