LEVINSON AND BALKIN ARE BOTH RIGHT?: ARTICLE V, THE SUPREME COURT, AND THE COST OF POLITICAL DYSFUNCTION

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I am very happy to comment on this wonderful book. My short commentary tries to find common ground between Sandy and Jack, but my comments will also consider the implications of their arguments for our courts. I do not think that they go far enough in recognizing what the spate of recent judicial appointments and the ultra-conservative turn in the Supreme Court's case law signal about the state of our politics and, more importantly, our democracy.

As an initial matter, I am sympathetic to Jack's argument that our current dysfunction can be attributed to our politics and also to Sandy's argument that the constitutional structure is to blame. But there are important differences in their views. Importantly, they conceive of *dysfunction* differently—is it, as Jack contends, an instance of constitutional rot in which our politics are in transition, or is Sandy right that we are currently in the midst of a constitutional crisis In some ways, their disagreement is temporal rather than substantive. Jack is undoubtedly correct that there has to be some reflection, time, and patience before we pull the trigger of formal constitutional reform. But Sandy is also correct that the time for reflection and patience has passed because our situation has crossed the line from constitutional rot into constitutional crisis.

Nonetheless, the differences in their views matter from a normative perspective. Jack takes a more cautionary approach in describing the state of our politics, and his refusal to view our current situation as a crisis means that his prescriptions are much more conservative than Sandy's recommendations. In his view, caution is warranted because of the ease with which one can confuse dysfunction with sustained policy losses, confusion that blurs the line between constitutional crisis and constitutional rot. According to Jack, there is always a cohort of policy losers who believe we are in a state of dysfunction, misattributing their losses to the hard-wired Constitution rather than to politics. For him, our politics are in a state of decay that will be corrected once there is meaningful regime change.

The prospect of eventual correction does not mean that the constitutional structure is not also to blame for our woes. Sandy has rightly noted that the time

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has come for meaningful constitutional reform and that we are, in fact, in a crisis of legitimacy. It is our politics, our institutions, and our Constitution that are the causes of our current crisis, and these factors cannot be neatly delineated such that we can easily blame our dysfunction on our politics. While political rot is undeniably a factor, Sandy is also correct that the constitutional structure has facilitated the demagoguery and dysfunction that has accompanied the election of President Donald Trump.

Despite agreeing with their basic sentiments, I think our political situation may be even more dire than Jack and Sandy give voice to in *Democracy and Dysfunction* (which is saying a lot given the title of the book). To say that we are in a *crisis* means more than just public officials violating the law or remaining faithful to the law when doing so is disastrous. It means more than the inability to translate the preferences of the people into meaningful policy. I also think our current situation is deeper than what or who we should blame for our dysfunction.

In thinking about whether we have reached crisis, I, unlike Jack, do not assume we have ever had a healthy democracy or republic against which dysfunction can be gauged. I believe our status quo is constitutional rot, which supports Sandy's contention that our basic system is undemocratic, but my position goes beyond structural defects such as the Senate and the Electoral College. For most of our history, various stakeholders could not participate in our democracy, making it difficult to discern any real notion of the popular will. Even when there is progress, people are left behind. For example, the ratification of the Nineteenth Amendment did not enfranchise African American women. Women who married non-U.S. citizens lost their citizenship status in some states, and by implication, they lost their right to vote. With the rise of the carceral state, African American and Hispanic men have lost their right to vote in huge numbers, a pattern that obviously continues to this day. This disenfranchisement of so many makes the democracy argument difficult to make, and since at least 1980, the country has been moving toward an oligarchy in which there is little or no interest in the public good, as republicanism requires. Instead, elections have become an unending cycle in which representatives must continuously raise money and cannot adopt policies for the good of the public without fear of angering their rich overlords. Thus, the real question is whether we have crossed the line from our usual posture of constitutional rot into a constitutional crisis.

The loss of the judiciary, to me, is the clearest example that we have crossed this line. Regardless of who has the better argument between Jack and Sandy, one of the main reasons that this conversation about the state of our democracy is necessary is because the alternative channel of constitutional change that the American people have relied on in lieu of Article V—the federal courts and, in particular, the Supreme Court—has been closed since January 2017. With

President Trump's election, the elevation of two new Supreme Court justices, and many lower court appointments, the channels of constitutional change will no longer run through the courts. The loss of the courts as neutral arbiters is further confirmation that we have entered a constitutional crisis. Until recently, the Supreme Court had played an important role in sustaining an eighteenth-century document that was, at times, ill-suited to resolve modern-day controversies.

Now, the Court is complicit in solidifying the political power of a regime in decline, a problem that might not be resolved by simply amending the Constitution. Unified government under the Republicans did not result in secession as Sandy feared, but it did reveal that the country was being governed by a faction (not a political party), one that was intent on ignoring the troubling actions of its standard-bearer in order to get tax cuts and install adherents on the courts. Because the Republican Party is a faction, however, that meant the party had difficulty getting anything done legislatively other than tax cuts. And the choice to put judges on the Court who will back up this faction functionally means that progressive, or even moderate constitutional change, will not be forthcoming. If anything, this is the perfect opportunity for the Court to finish undoing the gains of the last five decades, minimal as they have been, since the end of the Warren Court.

Indeed, in his August 29th e-mail to Sandy, Jack notes how the Supreme Court has helped prop up the floundering Republican Party through its decisions. Even more importantly, the elevation of conservative judges who will serve for many decades reveals a new problem. The Court's failure to adhere to existing precedent in important cases has allowed it to reshape the Constitution into a much more conservative document. Precedent is the one thing that used to convince people across the political spectrum that judges are not completely lawless, giving the Court the specter of legitimacy. But the loss of the Court as a somewhat-neutral arbiter (and public opinion polls suggest the Supreme Court is viewed much less favorably now than it was in the past) means that we have officially entered a period of constitutional crisis.

As both Sandy and Jack recognize, the courts have often been the centers of constitutional reform, particularly in domestic matters, and their decisions allow the Constitution to bend to accommodate upheavals in our political and constitutional order. Cases such as *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Grutter v. Bollinger*, for example, seemed to reaffirm the Court's independence and were enough to sustain progressives at a time when abortion and affirmative action were consistently under attack from the political branches at both the state and federal levels. In contrast, it is difficult to think of any case that is safe from the reach of the Roberts Court. As Jack points out, whether President Trump remains a demagogue or ends up a dictator depends on the support of the judiciary. Arguably, the groundwork for this support was laid

long ago and has continued well into this Administration. This Court has supported some of the Administration's most important goals: upholding the travel ban at issue in *Hawaii v. Trump* and deciding *Barr v. East Bay Sanctuary Covenant*, which allowed the Administration to limit the circumstances in which immigrants can apply for asylum. And even when there are departures from the Administration's agenda, such as in *Department of Commerce v. New York*, which held that the Secretary of Commerce violated the Administrative Procedure Act by lying about his reasons for including a citizenship question on the census, the stakes arguably aren't as high as the cases where the Administration is able to walk away with a win. The President has generally viewed and indeed has said that the Court is an ally. Additionally, we have entered a period where no precedent is sacred, eliminating the comfort blanket that sustains us during periods in which an administration is hostile to individual rights.

There are, of course, some notable examples of this phenomenon. *Shelby County v. Holder*, which invalidated the preclearance provisions of the Voting Rights Act, is probably the most famous. After *Shelby County*, what of *South Carolina v. Katzenbach* and its very broad reading of Congress's authority to enforce the Reconstruction Amendments? The *Shelby County* Court wasn't clear about the standard of review that it applied in invalidating the coverage for the preclearance provisions of the Voting Rights Act, and it is scary to think about what the *Shelby County* decision portends for congressional authority to do something more than just adopt tax cuts. And of course, there is *Citizens United v. Federal Election Commission*, which rejected political-spending restrictions on corporations as a violation of the First Amendment, and *Janus v. AFSCME*, which held that the collection of union fees from nonmembers was a violation of the First Amendment. Both of these cases overturned important precedents, further suggesting stare decisis is not as binding as it used to be. When the courts have become complacent and there is no real check on the political branches, then it might be too risky to wait out President Trump to see whether his Administration is the sign of a regime on its last legs.

As Sandy argues, the power of the Executive has substantially increased in recent decades, allowing presidents to act unilaterally and without traditional checks in the area of foreign affairs. And as the Trump Administration shrinks the administrative state, there is writing on the wall to suggest that there will be some, but not enough, judicial pushback with respect to domestic matters. To the extent that any hope for a constitutional vision that is not completely countermajoritarian is fading, Sandy is right that the time has come for meaningful constitutional reform. Because there is no longer any such thing as precedent, Article V stands to become the only way that the "Constitution of Conversation" can ever be settled in any meaningful way.

When a demagogue has the support of the one institution to which the people used to look for smoothing out the dysfunction and eliminating some of the rot—then all hands should be on deck. To quote Sandy's favorite line from *McCulloch v. Maryland*, "The constitution to survive must 'be adapted to the various crises of human affairs.'" I am skeptical, however, that the Constitution can endure when the courts interpret our most important document to justify and promote a crisis rather than address it.