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

SYMPOSIUM DISCUSSION: TOLSON

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Audience member: Professor Tolson, you discussed the current Court's lack of respect for precedent. When do you think it is appropriate for the Supreme Court to overturn longstanding precedents?

Franita Tolson: That's a great question. I do think it's within the Court's power to revisit its decisions, but I do think it has to be somewhat principled about it. So, for example, revisiting *Plessy v. Ferguson* in *Brown v. Board of Education* made sense, right? So just in terms of where the country was and the direction the country was moving in, it made sense. I'm not as certain that it's principled when you have a situation such as *Citizens United v. Federal Election Committee*. This issue is very polarizing to the U.S. public, and the prevailing precedent at that point was only, I think, 19 years old. So, I think the Court has to be more careful in areas where it's more contested because even though our sense is that the Court should not always be responsive to popular will, I don't think that's realistic. Because it does have to worry about its legitimacy. And it is viewed as the institution that is counter to Congress and the President, right, that they are a check on them. So I think because the Court has sort of this legitimacy concern, it has to be more principled in revisiting precedents, and I'm not sure that's taking place, especially if you read the *Shelby County v. Holder* decision. I mean, the Chief Justice hides the ball about the standard of review, right? He's not entirely transparent about the status of a long-standing precedent such as *South Carolina v. Katzenbach*. So given that, you know, just a lack of a sort of principled reflection on whether a precedent should be overturned, I think that it's concerning.

Audience member: Professor Tolson, could you elaborate on what you mean by "blowing the dust off of Article V" and what measures that would produce?

Tolson: I just meant in terms of time. We haven't used Article V since 1992, and so "blowing the dust off" meant in the sense that maybe we need to start having more formal constitutional amendments. In part because we have, and maybe we're wrong for this, and this is the thing I struggle with in writing my conference, we have looked to the Court as the institution that is supposed to bend the Constitution to sort of reflect where we are in our political culture, and we've done

that for a long time. We've done that for 50 years. And I think in that way, Article V has kind of languished because we haven't used it to formally amend the Constitution. But because the Court is going in a direction that I think is dangerous to our constitutional order, maybe we do need to start thinking about Article V as a mechanism, especially if there are precedents that we care about. We need to use Article V to memorialize decisions rather than allow the Court to overturn or hollow out precedents. Of course, that's not satisfactory to Sandy, who thinks that we need to just throw everything in the trash, but I think given our polarization, that is a reasonable sort of approach.

Leah Litman: So I have a question. Your comments talk about the relative perception of the Court now versus in prior times and also reflect a degree of faith in the capacity of the Supreme Court as an institution to make positive changes for our democracy and protect important substantive rights. And I guess I was curious to hear more about why you have that faith? Because I also want that Court to exist, but there are people who look back over the last 200 years and think the Court has never really been a progressive force for democracy whether it is intervening against labor or undermining Congress's powers to enforce the Civil Rights Amendments immediately after the Civil War. So is the Court as an institution capable of performing this sort of function that you envision?

Tolson: Yeah, we've seen it. And so, to be clear with you, maybe my faith is displaced, just in the sense that the Court hasn't earned the respect that I give it. I hate to say it like that, but I mean, I teach election law, so cases such as *Harper v. Virginia Board of Elections*, *Baker v. Carr*, and *Reynolds v. Sims* are cases that give me faith that the Court is capable of being the institution that I think it could be. And even if, you know, in recent decades, the Court has been moving away from a more progressive view of the Constitution, there's still sort of these bright spots, right, where, you know, the Court shows it can be the institution that I think it could be. So, no, I haven't totally lost faith, but I also understand that my faith is displaced, I give them more faith than they probably deserve.

Sanford Levinson: I don't want to junk everything in the Constitution. What I do want is a very serious conversation that we've really not had for 235 years about whether the decisions made in 1787 are serving us today, whether today is 1860 or 1912. The 1912 election is my favorite presidential election because both Teddy Roosevelt and Woodrow Wilson were serious constitutional reformers. Howard Taft was the leading defender of the old order, whereas today, you have no serious discussion about the Constitution. I think one of the central questions that a constitutional convention would consider and that can't be resolved through ordinary politics or clever workarounds is whether the presidential system itself serves us well in the twenty-first century. You know, I would be happy to bash President Donald Trump for the rest of the day, but it is important to recognize that

Trump hasn't come out of nowhere and that the history of U.S. politics since World War II has been the steady aggrandizement of executive power.

We went into Korea as a unilateral decision of the modest man from Missouri, Harry Truman, without a scintilla of congressional authorization, and you can march through every single president since Truman to find very, very dicey executive decisions. Although it's very hard these days, especially with what's happening in London, to have any regard for the parliamentary system either, this is the kind of conversation about basic constitutional design, not about clever workarounds. And I do think it's a huge mistake, which I myself have made too often, to personalize our politics and to say "if only we could get rid of the ignorant demagogue Donald Trump, then everything would be alright." That's just false. It really doesn't matter where you are on the political spectrum. If you focus on heroes and villains rather than on the structures that allow heroes and villains to either work their will or to be stymied in their will, you're really missing the importance of constitutional design.

Jack Balkin: This is a wonderful way of seeing what a debate over constitutional reform is about. So just take what Sandy said. There are different issues that you might be worried about—for example, a powerful executive branch. Some of those problems will respond to fixes in constitutional doctrine and statutory reforms and some won't.

Here's one that might. Suppose you're worried about the President being able to unilaterally shift income from some programs over to border wall construction. Suppose you're worried about the President's ability to detain families at the border, separate children from parents, and put children in cages. Suppose you're worried about the President's ability unilaterally to commit U.S. forces abroad under various pretexts, leading to all sorts of foreign policy disasters. If those are your concerns, each of them could be fixed by changing some combination of constitutional doctrine and ordinary statutes, especially those statutes that create justiciability and standing. For example, the reason why the President is able to move money around in what appears to be a clear violation of the constitutional text is because, right now, nobody has standing to challenge what he's doing. Standing doctrine involves a gatekeeping function, and the Supreme Court has employed this function in such a way as to protect the President. That isn't required by our Constitution. It's not required by the constitutional text. Similarly, many aspects of presidential power over our foreign policy are not required by the constitutional text; they are the result of various accretions in power through practice, and by the lethargy and political cowardice of members of Congress.

But Sandy might respond to everything I've just said, saying, "Yes, but what

made Congress cowardly?" Is there something about the way in which we've designed our system of government that gives incentives for presidents to amass more and more power and gives incentives for Congress to play the role of the coward when it comes to difficult questions of foreign policy? That's his central question.

Yet we might ask: Is there anything in our system that might be remedied by an Article V amendment and that will fix constitutional meaning in ways that will not be disturbed by an unreliable Supreme Court or an unreliable president?

This second question arises once we realize an Article V amendment may be unavailing in some cases. President Franklin Roosevelt faced a very difficult question in the '30s: should he respond to the old Court through a constitutional amendment, or should he try just to replace the judges? He eventually concluded that if he pursued an Article V amendment, a Court that was hostile to the basic purpose of the amendment would ultimately make the amendment irrelevant and ineffective. And so he decided to try to reform the courts.

Now, that was his decision in the '30s. It might or might not be the right answer today. Constitutional amendments facing hostile political environments and a hostile Court may turn out to be no more than words on paper. One could say that about the Reconstruction Amendments, which remained under-enforced for a very long period of time.