

Winter 2007

# Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)

Michael C. Dorf  
*Cornell Law School*, [michaeldorf@cornell.edu](mailto:michaeldorf@cornell.edu)

Follow this and additional works at: <http://scholarship.law.cornell.edu/facpub>

 Part of the [Constitutional Law Commons](#), and the [Politics Commons](#)

---

## Recommended Citation

Dorf, Michael C., "Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)" (2007). *Cornell Law Faculty Publications*. Paper 123.  
<http://scholarship.law.cornell.edu/facpub/123>

This Book Review is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

Dense, stimulating, and packed with insights, the book is fine for specialists and can be handled by graduate and upper-division undergraduate students. While the author has more confidence in assessing the “strategic personality” of opponents than is warranted, and sees proliferation and terrorism as urgent problems yet leans toward strategies he admits may work badly or too slowly, these are minor drawbacks in a book that illuminates the heart of contemporary American national security policy.

PATRICK M. MORGAN  
*University of California, Irvine*

**Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)** by Sanford Levinson. *New York, Oxford University Press, 2006. 181 pp. \$28.00.*

Sanford Levinson is shocked to find that the American Constitution is undemocratic. Features like federalism and separation of powers are, upon close inspection, little more than obstructions to effective majority rule. Whatever sense our institutions made in the eighteenth century, they serve no defensible purpose today.

In lively and accessible prose, Levinson offers cogent arguments as to why the key structural features of the Constitution—especially representation on a two-senators-for-every-state basis and the electoral college—cannot be reconciled with democratic principles, given population ratios like those of California, Texas, or New York to those of Wyoming, Vermont, or North Dakota.

Some of the defects catalogued by Levinson could be fixed by amendment. For example, the rules governing the filling of House and Senate vacancies appear to assume that such vacancies will occur only sporadically. In the event of a terrorist attack or other catastrophe that caused wholesale death or incapacitation, there would be no functioning Congress for weeks or even months, during which time the executive would probably assume emergency powers. Levinson accordingly endorses an amendment to empower states to temporarily replace their representatives and senators by means other than election.

Creative solutions can be found to other problems without resort to constitutional amendment. For instance, Levinson touts a movement that would commit states with a majority of electoral votes to assigning their electors to the winner of the national popular vote. If embodied in an enforceable interstate compact approved by Congress, such an agreement would render the electoral college a meaningless formality.

Likewise, Levinson prefers fixed terms for Supreme Court justices to our current system of life tenure. He approvingly cites the analysis of Steven G. Calabresi and James Lindgren (“Term Limits for the Supreme Court: Life

Tenure Reconsidered” in Paul Carrington and Roger C. Cramton, eds., *Reforming the Court: Term Limits for Supreme Court Justices*, Durham, North Carolina: Carolina Academic Press, 2006, pp. 15–98), who argue that justices can be made to serve fixed terms without amending the Constitution; after their terms are finished, justices would become lower federal court judges if they chose not to retire.

Yet there is no sub-constitutional fix for Levinson’s core problem, the enormous over-representation of the residents of small states in the national government. Worse, constitutional amendment is impossible as a practical matter because, by the terms of Article V, any amendment requires the concurrence of three-fourths of the states, and one that tinkers with the Senate, requires unanimity.

Levinson strives to avoid offering a counsel of despair, and thus in his concluding chapter, he approves Akhil Reed Amar’s suggestion that the Constitution permits a national referendum to ratify amendments proposed by a constitutional convention, even though Article V describes no such procedure. Amar’s idea cannot be taken literally. There would be little point in specifying supermajority or unanimity requirements for amendments if those requirements could be circumvented by an unnamed majoritarian procedure. At most, Amar shows that the people retain the moral right, not the legal right, to bypass Article V.

Levinson’s main target throughout the book is unthinking worship of the Constitution we have, and he consistently hits that target. Yet, he also discounts what he deems elitist fears that the old Constitution could be replaced by something far worse.

Moreover, Levinson may unwittingly exacerbate what he regards as one of the Constitution’s most dangerous features. The president, he says, “is too unconstrained and can all too easily engage in dramatic exertions of power, especially in the realm of foreign policy” (p. 108). As Levinson continually notes, however, constraint comes not only from text, but also from popular understanding. By urging the circumvention of so fundamental a provision as Article V, Levinson gives comfort to those who would free the president of whatever bounds can plausibly be found in the old Constitution.

MICHAEL C. DORF  
*Columbia University*

**Strategic Selection: Presidential Nomination of Supreme Court Justices from Herbert Hoover Through George W. Bush** by *Christine L. Nemacheck*. Charlottesville, University of Virginia Press, 2007. 187 pp. \$35.00.

By the time Potter Stewart announced his retirement from the U.S. Supreme Court in June of 1981, the administration of Ronald Reagan had compiled