

Larry Sabato Doesn't Understand the Constitution

October 19, 2007

Matt A. Mayer

In an opinion piece in the Los Angeles Times on October 10, 2007, University of Virginia Professor Larry Sabato argues for scrapping our Constitution and replacing it with a new one. He couldn't be more wrong.

In support of his call to redo the Constitution, Sabato trots out a quote from Thomas Jefferson positing that a constitution is only good for nineteen years. The quote comes from a letter Jefferson sent to James Madison on September 6, 1789. In his response, Madison raised several fundamental flaws to Jefferson's (and Sabato's) reasoning. The one most applicable to our times is this one: "Would not such a periodical revision engender pernicious factions that might not otherwise come into existence, and agitate the public mind more frequently and more violently than might be expedient?" Does Sabato really believe that in 50-50 America, we would have any chance at compromising on a new constitution? After all, each side will try to inject its own solution to the "intractable challenges" that Sabato laments.

Even if we could, does Sabato really think we should throw-out the Constitution every nineteen years? If not, why rely upon Jefferson's quote other than to get the kind of constitution he and the liberal-progressives would prefer? While Sabato only wants to change a few provisions, others will aim to change the parts Sabato thinks are okay. Such a process would wreak havoc on one of the strongest aspects of our Republic – the predictability and stability surrounding our rule of law (not to mention treaties). With the rule of law susceptible to changes every nineteen years, there would be little basis for investors to trust our financial markets, for people to feel secure in their property, and, most critically, for the people to feel secure in their rights. Jefferson was one of our greatest Founding Fathers and a brilliant man, but let us not forget that he was still only a man – susceptible like all of us to bad ideas.

The four "horribles" that Sabato cites as reasons we need to ditch the Constitution are largely baseless. First, Sabato calls for the need to restore "the war powers balance." Under the Constitution, the crisis for which Sabato seeks to undo 220 years of history can be dealt with quite simply – the Congress has the power of the purse so can refuse to fund a war it has not authorized, which would force the Commander in Chief to end the war. Now, that would take courage, which most politicians today lack, but an absence of political courage should never be the reason we undo the foundation of our country.

Next, Sabato wants to end the "second-class citizenship" that he thinks exists because the Constitution requires the President to be a natural born American. At

our current population count of 300 million, given that there are four former or current presidents still alive and roughly twenty more elections until the youngest alive today would presumably be dead, at best, twenty-four Americans out of 300 million will become President. It is such a small fraction that it isn't worth noting what the odds of becoming President are for anyone alive today. The point is that it really isn't that big of a deal and certainly is an enormous overstatement to say that the Constitution creates two tiers of citizenship based on odds worse than playing the lottery.

Then, Sabato raises the bogeyman of the Electoral College to argue for giving larger states even more electors "so that a candidate who loses the popular vote can no longer become president." Factually, out of the fifty-five elections we have had since 1789, only on three occasions (1876, 1888, and 2000) has the winner of the Electoral College not also been the winner of the popular vote, which means it has happened in less than 6% of our presidential elections and only once in the last 120 years. That certainly doesn't qualify as a crisis.

Sabato's fictional crisis also fails to understand the purpose served by the Electoral College. When the Founding Fathers constructed our system of government, they carefully inserted many checks and balances against factions. Because America is a republic, not a direct democracy, the Founding Fathers sought to ensure that the elected federal government represented the various interests outside of Washington. The House of Representatives, being popularly elected by the people, served to protect the interests of the people within their congressional districts, and districts were allotted to states by population totals. The Founding Fathers felt that the small house districts would serve as a check on the ability of local factions to gain control of the levers of the federal government to enact bad laws or oppress opponents.

In contrast to the House of Representatives, the Senate was made-up of two senators from every state who were elected by the state legislatures. The senators' primary role was to represent the interests of their states (which might, at times, be in conflict with the majority of people of the states). The fundamental reason why senators were elected by state legislatures was because that process guaranteed that the senators would fight in Washington for the interests of the states (more on that later). The equality of representation among the states served as a check so that larger states could not exert undue influence over the smaller states (which could be done in the house due to the allocation of seats by population).

The President was elected in a manner that gave both the people and the states a role in his election and he served to represent America writ large (both the people in America and the states that make-up America). Specifically, the people vote for electors in each state who are then certified by the state to support the candidate who received the most votes in the Electoral College process. This dual representation means that there will be times, rare as they have been, where the majority interest of the states overrides the majority interest of the people in order

to further weaken the ability of a faction to control the Presidency. The last thing we need to do is further disenfranchise the states by totaling removing them from having any say in any of the elected federal branches.

Finally, Sabato raises what I think is the most significant issue in America today given the impact it has on our system of government; namely, that the Senate is not a very representative body. Sabato is right, but for the wrong reason. The Senate does not represent the interest it was designed to represent – the interest of the states. With the passage of the 17th Amendment in 1913 during the Progressive Era, senators were elected popularly by the people, which disconnected them from being accountable to state legislatures. Not surprisingly, both the era of unfunded mandates and the massive expansion of the federal government during the New Deal and the Great Society Eras began soon thereafter – especially given that the passage of the federal income tax under the 16th Amendment in the same year provided for the means to fund the activities of the expanding federal government.

When states lost their check to rein in recalcitrant senators who voted for legislation that would grow federal power at the expense of state power or for legislation that would pose an unfunded mandate on the states, senators could support legislation that proved popular despite the short or long-term consequences of the legislation on the states. A recent example is the passage of the Real ID Act that requires states to add federal requirements to their driver's license without receiving federal funds to adopt those requirements. Estimates put the price tag of the Real ID Act for states at over \$11 billion.

In order to return to the constitutional structure wisely put in place by the Founding Fathers so that states have a voice and a check on Washington's zeal for power, instead of scrapping the whole Constitution, we should repeal the 17th Amendment. The advantages of such a change are numerous. First, and most critically, it will revive our federalist system. Given the fact that over the last thirty-five years, several efforts were made to shrink the size of the federal government and all of those efforts failed, the principle of federalism appears mortally wounded. When senators are once again elected by state legislatures, the states will have a powerful check on the ability of Washington to expand its power and levy unfunded mandates on the states.

Next, such a move will place a far greater emphasis on which party controls the state legislature, thereby elevating the importance of state and local political races. This change will create a strong incentive for greater accountability to the voters. Such a change also will create more of an incentive for state and local governments to integrate statewide on activities and initiatives so that their senators can represent more effectively their interests in Washington. In a post-9/11 environment, such regional collaboration attains a higher level of urgency.

Most critically, with the states able to move power out of Washington, the creative vibrancy in Justice Louis Brandeis' "laboratories of democracy" will compete to solve the "intractable challenges" in America today. After all, it wasn't Washington that first reformed welfare; it was Wisconsin. It wasn't Washington that first reformed education; it was Florida. It wasn't Washington that first reformed health care; it was Massachusetts. Americans rightfully identify that Washington's power over their lives is too pervasive. A Democracy Corps poll reports that 57% of Americans believe that government makes it harder for them to get ahead and 83% believe that if government has more money it will waste it. If we just get the power out of Washington, which is not possible without giving the states back their check on Washington, then the states will solve our tough issues.

Contrary to Sabato's view, we don't need a new constitution. History itself has demonstrated that a constitution can survive well beyond Jefferson's nineteen-year limit. Just as the Progressives argued for a living constitution that they could interpret "according to the Darwinian principle," those who seek to throw-out the Constitution today believe that the Constitution prevents their kind of "progress" from happening. Good. That is just what the Founding Fathers intended, and Larry Sabato knows it.

Copyright © Townhall.com