

PARLOR GAME

*Philip Bobbitt**

The Constitution is not perfect. Indeed I don't know what 'perfection' is in a constitution, since it is an instrument for human hands and thus must bear within its possibilities all the potential for misuse that comes with the user. What I am sure of is that 'perfection' does not mean 'never needs to be amended,' since one important part of the Constitution is its provision for amendment (although I am inclined to believe that few of the amendments to the U.S. constitution were actually necessary.)

That said, a competition to find the "stupidest provision of the Constitution" is, to my mind, about the most vapid essay contest to come along since MTV listeners were asked to suggest names for a new litter of puppies owned by a heavy metal performer. As anyone who has been around dogs knows, their names have to do with their individual natures, and the relationships they have with each other, and with their masters. Naming them in the abstract is idle, a parlor game maybe, or perhaps appropriate to cats (whose character, if they have any, is opaque to humans.)

The Constitution functions as an organic whole. All the forms of argument—historical, textual, structural, ethical, prudential, doctrinal—entirely depend on this principle. One cannot begin to construe correctly the "commander-in-chief power" without bearing in mind the Congress's power to appropriate money for the armed forces; nor can one adequately construe in any concrete case, the Congress' power to declare war without squaring it with the Executive's power to deploy troops where he, and he alone, thinks best. Remove one part of the Constitution and you change another. In a mature democracy these relationships are sufficiently complicated and well-developed that any particular change is likely to have a number of unanticipated consequences, including, often enough, a result conflicting with the campaign by which the amendment was secured in the first place.

* Baker & Botts Professor of Law, The University of Texas Law School.

Designer politics is a seminar pastime, like political science generally, that is only interesting to the extent that the question of design is isolatable from the many overlapping functions of any political instrument. The strategy behind a Kantian veil of ignorance is not any lack of awareness of the complexity of moral decisions, but rather the recognition that moral decisions are so very complicated that only by isolating a feature in strict laboratory conditions can we arrive at a general thesis. But to the extent a constitutional question is isolatable, it is a little absurd. Suppose one of the contributors to this symposium should propose the provision of a Senate as the worst provision. The question 'Should we have a Senate' was once put to me as a 'constitutional question' by my friend Levinson, an organizer of this collection of papers. Behind a veil of ignorance, unknowing as to what person one might become or what position in society one might have and therefore unprejudiced to favor any particular group or station, one might well argue that popular majoritarianism is so manifestly an equitable principle that any departure from it is a mistake; or, similarly, behind this veil one might also argue that the protection of minority points of view can justify such a departure, the likelihood of being a part of some political minority being high in a pluralistic society. Then, I suppose, the focus shifts to empirical evidence, if such is really possible on these matters, to establish whether or not the Senate is in fact protective of the particular minorities with whom the questioner has sympathy.

But in the law we do not live behind such a veil, and to pretend otherwise—in order to get clarity and consistency in our principles—is to abdicate the actual responsibilities we do have. 'Should we have a Senate' is a question like then-Governor Reagan's question, "Are you better off now than you were four years ago," used to such powerful effect against President Carter. Of course this was an irrelevant rhetorical thrust: The question ought to have been, 'Are you better off now than you would have been if Gerald Ford had been elected?' since neither President Carter nor anyone else can hold time still. Their achievements must be measured against what would otherwise have been, but is not, and not against what can never have been but once was. The real question for law therefore, since law—unlike political science—does not live without air and the environment of reality, is: Would we or would the Constitution be better off if, for the last 200 years we had had no Senate? The short answer has to be that "we" wouldn't be at all, better or worse, since the price of the adoption of the Constitution was the inclusion of the Sen-

ate. Indeed its enshrinement in the Constitution is the only unamendable part of the document.

There are, of course, artlessly drafted provisions—the 25th amendment, for example, that enabled a discredited President Nixon to name his successor—and there are provisions that, no matter how carefully drafted have been so construed as to render them useless—the privileges and immunities clause of the 14th amendment, for example. But that doesn't make them (nor were their hopeful ratifiers) stupid, and it certainly does not show we would have been better off had they not been adopted.

Rather the reformer must show not only that a possible world without the egregious provision exists in which things are better than they are at present, but also that it is possible to actualize such a world in which the system of constitutional interpretation we use remains legitimate. Because that system has made use of the constitution as a whole, it is not easy to simply begin removing parts that appear inconsequential or offensive without risking the de-legitimation of the system of interpretation itself. Some amendments—women's suffrage, for example—fit easily within the whole because they are consistent with its premises as defined in the Declaration of Independence. For such purposes, Article V exists. Does that mean that a particularly stupid provision was replaced? Or does it mean that the provision for change in the constitution worked precisely as it should?

When I read that new democracies are being advised by Americans on constitutional matters such as the size of their parliaments, bicameral v. unicameral bodies, presidential v. parliamentary rule, the optimum number of political parties, the criteria for admitting particular parties to participation, the threshold showing by a party to achieve parliamentary participation, the relative strength of the branches, and so forth, I wince. The answers to these allegedly 'technical' questions will provide the structure that will guarantee the rights of the people so newly freed. Because they don't have 'right' answers in the abstract, they don't have stupid answers either. The correctness lies in the adherence on which they can rely—which is entirely a matter of the cultural history and idiosyncrasies of the country—and on the willingness of the citizen to use them for worthy goals.

The stupidest provisions of the Constitution are those that haven't been adopted—whether their supporters portray the Constitution as an unworkable anachronism or the institutions set up by the Constitution as dysfunctional. The success of the American constitutional enterprise does not require, I think, cor-

rection, nor profit from supercilious condescension. It needs faith and, if the word is not inappropriate, reverence, as well as modesty before the grave tasks the Constitution sets for us.