Stop hunting snarks and win elections

In the wake of President Trump's capture of the federal judiciary, and the prospect of an enduring 6–3 conservative majority at the U.S. Supreme Court, liberal voices have proposed several plans to radically revise our system of government. Among these ideas are abolishing the Electoral College, expanding the nation's high court, and calling a convention to rewrite the federal constitution. All of those options are impractical or undesirable, and creative solutions like this are snark hunts that distract from winning elections. The political process, not judicial intervention, should be the primary means of enacting a policy agenda, because political policy-making is far superior to radical plans that at best will leave us with watered-down compromises — and at worst could further entrench existing structural problems.

With a few notable exceptions (such as same sex marriage), liberal wins in the U.S. Supreme Court have declined since the Warren Court era. So much so that rather than concerning progressive ideas of individual liberty, many modern federal law conflicts now flow from the aggrandizement of executive power at Congress's expense, which in turn compels liberals to look to federal courts to uphold or reverse executive actions. Several of the U.S. Supreme Court's most significant recent decisions have been challenges to executive action — DACA, the ban on Muslim immigrants, the contraceptive mandate, and the border wall.

This does not mean that federal courts are closed to liberal causes, only that the battleground has shifted. Liberal parties now are less concerned with constitutional liberty than with competing visions of executive and administrative policymaking. This shifting judicial battleground does not make attempts to recapture the federal bench futile — winning elections and appointing more liberal judges can be pursued simultaneously. But it does compel renewed focus on the political process because majorities control appointments. Even if the courts were open to liberal causes, courtroom wins have at most an indirect effect on policy, again showing why politics is primary and judicial remedies are secondary. Progressives need to reinvigorate the true levers of policy-making — city councils, state legislatures, and Congress —

to achieve the ends they have long pursued in the courts. And to pull these levers, they need to win elections.

A legislative solution to a policy problem is always preferable because the legislature is by design the policy-making branch of government. Congress has exclusive power to make federal laws and set policy.[1] Similarly, California's legislature has broad powers to adopt laws and set state policies.[2] Seeking redress in court necessarily means that one's policy agenda failed to garner a legislative majority — or that the legislative route was so inhospitable as to be not worth the effort. Political wins could grant the majority power to make structural changes that enhance their policies' staying power; there is both an argument for this and historical precedent. Even so, you're only in a position to make those changes if you first win the political contest.

This is why the recent liberal proposals for extreme plans are a distraction from the primary mission of winning elections. Schemes to pack the U.S. Supreme Court, abolish the Electoral College, and call a constitutional convention all suffer from the same three problems: they are uninspiring campaign slogans; they are only possible after winning elections; and they have serious legal concerns.

Take for example the constitutional convention proposal, which is the most problematic and the least likely to succeed. The legal problems and the potential consequences, along with the difficulty of calling a convention, explain why (despite some attempts to call one) the nation has held only its founding convention, and California has held only two (one in 1849 in advance of statehood, the other in 1878–79). And all of the risks posed by a convention are exacerbated when the country is divided into political camps of nearly equal strength, as it is now.

The federal and California convention-calling procedures are well-known, if little-used — but not for lack of effort. Article V requires "the application of the legislatures of two-thirds of the several states" to call a convention.[3] Around 30 states (there are varying tallies) have pending calls for an Article V convention of the states, just shy of the 34 states required. And California Constitution Article XVIII, section 2 requires two-thirds of the legislature to propose a convention for electorate approval by majority vote. California's legislature mustered the required majority

and proposed a convention five times since 1879. The voters rejected the first four proposals in 1898 1914, 1920, and 1930, and when the voters approved the fifth request in 1934 the legislature never convened the convention.[4] That has not stopped calls for a California convention or for federal constitutional change.[5]

In general, calling either a national or a California constitutional convention would be a disaster — with our society so polarized, little good is likely to result. Everything in the present U.S. and California constitutions is a compromise, and similar compromises will be required to secure a new federal or state constitution. The current tally of red and blue states will not create a liberal majority among federal convention delegates, which bodes ill for achieving blue-state goals in a new constitution. The situation in California is similar. Dean Erwin Chemerinsky argues that a state convention could make things worse: with a blank slate to write on, a new convention could reduce or eliminate existing constitutional liberties. That's not conjecture, because the California electorate has already done so by initiative: reducing equal protection rights with Proposition 8, and reducing due process rights with Proposition 66. And while the courts have at least some control over initiatives, they possess far less power to rein in a state convention's reductions of state constitutional rights. And there we are again, relying on the judiciary to save liberal policies.

Aside from the existing legal convention processes, some even propose that citizens could hold a "people's convention" if the federal and state constitutional avenues prove inadequate or inaccessible.[6] The concept is that citizens could gather together, write a proposed constitution, publish it, and either hold a voice vote of the citizenry (probably by social media) or place it on the ballot (with California's initiative process). This extra-legal proposal suffers from dubious legal validity, given the exclusive convention-calling procedures in both the federal and the California constitutions, plus all the dangers associated with a lawful convention.[7]

Replacing or revising either the federal or the California constitution should not be lightly done. The all-too-prescient concerns about factionalism and mob rule of the nation's founders should be equally concerning today. And both the legal and extra-legal convention ideas are at best secondary solutions to the problem of being unable to pass legislation. That's also true of proposals to expand the high court's

membership, or to abolish the Electoral College. Structural solutions to political problems are a concession of inability to win political contests. Winning elections is the primary way of enacting favorable legislation, so liberals should focus on the political process to make their policy preferences into law.

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[1] *Patchak v. Zinke* (2018) at 904–05 (the legislative power is the power to make law); *M'Culloch v. Maryland* (1819) 17 U.S. 316, 353 (constitution expressly gives Congress the power to make all laws); *Youngstown Sheet & Tube Co. v. Sawyer* (1952) at 588 (power of Congress to adopt public policies is beyond question, as Congress has exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution in the federal government).

[2] *Green v. Ralee Engineering Co*. (1998) at 19 (aside from constitutional policy, the legislature is vested with the responsibility to declare the public policy of the state). Because California's high court has some minor policy-making functions, there are some state-law exceptions to this general rule. See, e.g., *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) at 731 ("[W]hen the matter at issue involves minimum standards for engaging in the practice of law, it is this court and not the legislature which is final policy maker").

[3] The opinion in *Howard Jarvis Taxpayers Assn. v. Padilla* (2016) provides a useful and brief summary of state legislature efforts to motivate federal constitutional amendments.

[4] Unnumbered concurrent Senate resolution No. 4, adopted March 22, 1897, failed at the November 8, 1898 general election; 1914 Proposition 1 (call) and Proposition 12 (methods) both rejected; 1920 Proposition 10 rejected; 1930 Proposition 23 rejected; 1934 Proposition 8 approved.

[5] See, e.g., Constitutional Convention Act of 2010; Federal Constitutional Convention Initiative of 2018 and the Legislative Analyst's Office analysis; *Bramberg*

v. Jones (1999) (invalidating initiative that instructed state legislators to propose a federal constitutional amendment); Call for a Balanced Federal Budget of 1984; *American Federation of Labor v. Eu* (1984) (removing from the ballot a measure that would have required California's legislature to adopt a resolution urging Congress to submit a constitutional amendment to states).

[6] The Black Panther Party held a people's convention in 1970. There are recent examples of calls to do this. See, e.g., "It's time we establish a People's Constitutional Convention" and https://thepeoplesconvention.org/.

[7] Two U.S. Supreme Court decisions suggest that in delegating amendment powers to Congress through Article V, the people relinquished all claims to authority for altering, updating, and rewriting the federal constitution by other means, such as by an extra-legal popular convention. *Hawke v. Smith* (1920); *United States v. Sprague* (1931). California Supreme Court authority consistently holds that the California constitution's convention-calling procedures are exclusive. *Legislature v. Eu* (1991) at 506 (revising the state constitution may be accomplished only by convening a constitutional convention and obtaining popular ratification, or by legislative submission of the measure to the voters); *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) at 221 (a constitutional revision may be adopted only after the convening of a constitutional convention and popular ratification or by legislative submission to the people).