DEMOCRACY UNCAGED

OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT). Sanford Levinson.[1] Oxford University Press. 2006. Pp. ix + 233. $28.00 (cloth).

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Sanford Levinson's latest book, like his previous work, is charmingly written and delightfully quirky. Aimed primarily at non-lawyers, it is meant to persuade readers that we ought to call a constitutional convention to remedy what he calls the "hard-wired" defects of the Constitution: defects that inhere in the very structure of the constitutional fabric and that therefore cannot be remedied through even the most creative interpretation (pp. 23, 29). The most important of these defects, according to Levinson, are the existence and operation of the Electoral College, other problems surrounding the presidency, allocation of power in the Senate, bicameralism and the resulting opportunity for political minorities to block popular legislation, and the near-impossibility of amending the Constitution. Despite the light tone of most of the book, Levinson is deadly serious: In the course of writing the book, he says, his commitment to remedying our undemocratic, "abusive" Constitution "has moved far from an academic project (in the pejorative sense)" (p. 172). He therefore closes the book with suggestions on how to make a constitutional convention a reality.

Unfortunately, as is often the case with heartfelt visionary projects, his call for a convention suffers from two complementary flaws. He overstates the Constitution's defects and understates the risks of submitting it to a constitutional convention for revision. Reading between the lines, we might fairly attribute

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these flaws to Levinson's underlying motivation: He is guided by his objection to the maneuvers of the Bush administration and his devotion to the governmental ideals of Thomas Jefferson. I address each of his errors in turn.

Let us begin with the Electoral College, which Levinson says "supplies the decisive and overriding reason for rejecting the status quo and supporting a convention" (p. 82). The main thrust of Levinson's critique of our "dreadful system of presidential selection" (p. 81) is that it gives an "indefensible advantage . . . to low population states" (p. 89). According to Levinson, this undemocratic allocation of power causes a variety of ills: (1) Presidents are frequently elected without winning a majority of the popular vote, and occasionally even when they come in second in the popular vote; (2) Voters in states like New York or Texas, which are reliably Democratic and Republican, respectively, might as well throw their votes away because they don't matter; and (3) Presidential candidates ignore all but a few "battleground states."

Of course, most of these problems are not directly attributable to the Electoral College. The ability of a candidate to win the White House with only a plurality of the popular vote is due not to the Electoral College but to our "first-past-the-post" method of determining winners. The other two problems derive from the way that states allocate electors, which is not mandated by the Constitution. States are free to choose how to allocate their electors, and it is only because 48 states have chosen to allocate them on a winner-take-all basis that there exist "safe" states and "battleground" states.[3] If most states divided their electors according to the percentages received by each candidate in the state's popular vote, candidates would fight for every vote in every state—and every vote would count. Alternatively, there is now a movement among the large states to agree to allocate *all* of their electors to whichever candidate wins the national popular vote, which would effectively eliminate all of the problems associated with the Electoral College. And on a deeper level, it is the domination of two—and only two—parties that allows the Electoral College to function in the problematic ways that Levinson describes.[4]

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3. The two states that do not use the winner-take-all method are Maine and Nebraska. See 21-A Maine Rev. Stat. § 805(2); Neb. Rev. Stat. § 32-714.

4. Levinson does note in passing that the Electoral College is not solely responsible for many of the flaws he identifies (*e.g.*, pp. 87–88 (state allocation of electors), 97 (first past the post)). But the concession is meaningless as long as he directs so much of

That leaves two problems with the Electoral College itself (and the back-up of a decision by the House, voting state-by-state, if no candidate gets a majority of electors): The election of a president who *lost* the popular election, and the basic unfairness of giving small states a disproportionate number of electors. The first is indeed a flaw, but Levinson exaggerates its importance. Only four times since 1789 has the Electoral College given the White House to a candidate who did not garner the most popular votes—and three of those were before 1900.[5] Moreover, all but once the popular majority got its revenge four years later, voting for the party (and twice the candidate himself) that had been cheated out of the presidency by the Electoral College.[6] George Bush is the only minority president to win the popular vote the second time around. Levinson's overstated concern with the problem of a minority president, then, might be related to his obvious loathing of Bush.[7] It might be worthwhile to amend the Constitution to eliminate the Electoral College, but one misfire

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his thunder at the Electoral College. He also mentions the movement among states to agree to allocate electors according to the popular vote (p. 97).

5. Levinson would make it five, by adopting the controversial position of a 2005 book that Nixon actually won the popular vote in 1960 (pp. 82–83, 93, relying on GEORGE C. EDWARDS, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA 48–51 (2005)). While that position has the advantage of making Levinson look non-partisan (and doubling the number of Electoral College misfires in the last hundred and twenty years), it is belied by most other sources. Even Edwards recognizes that the "traditional count" puts Kennedy ahead by about 120,000 votes. *Id.* at 65. And if we're going to split hairs, there's another factor to consider. Edwards calculates that Nixon won the popular vote by 58,181 votes. *Id.* at 50. But in 1960, residents of the District of Columbia could not vote for president (the 23rd Amendment was not ratified until 1961). In 1960, the population of D.C. was 763,956. *See* http://www.infoplease.com/ipa/A0922422.html. It is likely that had they been eligible to vote, D.C. voters would have voted overwhelmingly for Kennedy. Thus, it was the undemocratic exclusion of D.C. voters that produced Kennedy's purportedly unfair electoral victory; in a more democratic system, Kennedy would have been the popular winner (as well as the electoral winner).

6. For a brief discussion of the four undisputed minority presidents, *see, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 137–38 (2d ed. 2005) [hereinafter, FARBER & SHERRY, A HISTORY].

7. His hatred of Bush is palpable throughout the book. Almost all of his concrete examples of presidential flaws center on Bush (*e.g.*, pp. 47–48 (managing to lambaste Bush in the course of a critique of the veto power even while acknowledging that at the time of writing Bush had not yet vetoed a single bill); pp. 79–81 (using Bush's actions in the War on Terror as an example of why questions surrounding the presidency are important); pp. 107–08 (citing the Bush administration's reliance on "unwritten prerogative powers" of the executive); pp. 111–12 (using Bush's appointment of John Bolton to criticize recess appointments); p. 116 (arguing that there is "nothing academic" about the possibility of an incompetent president, because "[e]ven if one places the war in Iraq to one side, there is the utter failure of executive branch leadership in the aftermath of Hurricane Katrina")). In discussing the Electoral College, he invites the reader to "[r]eturn once more, *if one has the stomach for it*, to the 2000 Florida election" (p. 90, emphasis added).

in a hundred and twenty years is hardly sufficient justification for Levinson's call to consider junking the entire structure of the Constitution.

So what about the essential unfairness of the Electoral College? By giving each state the same number of electors as its total of Senators and Representatives, the theory goes, the Electoral College advantages small states and disadvantages large ones. It does give small *states* an advantage (at least when combined with a winner-take-all allocation of electors), but does it give disproportionate power to *voters* in small states? The answer, paradoxically, is that it does not. Indeed, it gives voters in large states more power, and voters in small states less, than they would have if we chose the president through a simple nationwide popular vote.

It is tricky to define voting "power," but the most satisfactory way to do so is to focus on the probability that an individual's vote is pivotal: that is, to ask how likely it is that the result would change if the particular voter voted the other way.[8] In the case of the winner-take-all regime under the Electoral College, any individual's voting power is the product of the probability that her vote would change the outcome in the state (call this P) and the probability that a change in the state's electoral votes would change the outcome of the election (call this S). It can be shown mathematically that P is approximately $1/\sqrt{\text{population of voters}}$, and that S is approximately equivalent to the state's voting population.[9] Since states do not differ much in the ratio between total population and voting population,[10] we can simplify the equation

8. This the commonly accepted measure. *See* DAN S. FELSENTHAL & MOSHE MACHOVER, THE MEASUREMENT OF VOTING POWER: THEORY AND PRACTICE, PROBLEMS AND PARADOXES 196 (1998).

9. *See* GUILLERMO OWEN, GAME THEORY 294–303 (3d ed. 1995). For a more accessible discussion, *see* Paul H. Edelman, *Making Votes Count in Local Elections: A Mathematical Appraisal of At-Large Representation*, 4 ELECTION L.J. 258, 266–70 (2005).

10. Using data from the Census Bureau (http://quickfacts.census.gov/qfd/) and the Federal Election Commission (http://www.fec.gov/pubrec/2000presgeresults.htm), one can construct a chart comparing each state's total population to the number of people who voted in any given election. If we do so for the 2000 election, for example, we find that the highest percentage of the total population voted in Maine (51%) and the lowest in Arizona (30%). The average is 39% and the standard deviation is .052 (which means that in approximately 60% of the states, between 34% and 44% of the total population voted (tabulated data on file with author)). EDWARDS, *supra* note 5, at 40, reaches a different result by calculating what percentage of each state's voting-age population actually voted. Since electors are allocated on the basis of total population rather than on the basis of voting-age population, however, his numbers are irrelevant—which suggests that Levinson may be too quick to rely on his data.

by using state populations. Any individual's voting power, then, is

$$P \times S$$

or

$$[1/\sqrt{\text{state population}}] \times \text{state population}$$

or

the square root of the state population

Thus, the larger the population of the state, the *more* voting power each of its citizens has. In short, a majority of the American public (in whom Levinson places so much trust) may be right in failing to abolish the Electoral College.

The Constitution also creates other problems surrounding the presidency, according to Levinson. In particular, he objects to the lack of clear limits on presidential power, the inability to remove a president who is incompetent but not criminal, and the 10-week delay between the election and the inauguration of a new president. The last is essentially trivial, and Levinson devotes only 5 pages to it (pp. 98–103). The others are arguable, but Levinson seems so blinded by his hatred of *this* President that he cannot see any advantages to the current structure.

For example, most constitutional scholars recognize that it is both impossible and unwise to delineate governmental powers so clearly that no ambiguity remains. As John Marshall famously reminded us, "it is a *constitution* we are expounding," and we cannot expect it to be precise in providing for every eventuality.[11] Levinson himself notes that he is "relatively dismissive of ambiguous constitutional provisions" because they do not pose a serious problem (p. 108). So why is he so irate about ambiguities in executive power? Because—he says after describing the infamous John Yoo torture memo and similar arguments as "an open invitation for those who would defend something close to presidential dictatorship" (p. 107)—"[t]he basic problem with the presidency is the possibility that the occupant of the White House is too unconstrained and can all too easily engage in dramatic exertions of power, especially in the realm of foreign policy" (p. 108). It might be that he has a *particular* occupant of the White House and a *particular* foreign policy adventure in mind here.[12] He also dismisses out of hand the possibility that Con-

11. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

12. It is worth noting that Levinson's implicit criticisms of George W. Bush have been explicitly leveled at Thomas Jefferson as well. One noted historian described Jeffer-

gress or the courts might rein in such overzealous exercises of executive power (pp. 107–08), essentially disregarding the checks-and-balances theory on which the entire structure of the Constitution is based.

Levinson presents his case for presidential removal in a section titled "On Malfeasance and Misfeasance: Why Criminal Presidents Present Less of a Threat than 'Merely' Incompetent Ones" (pp. 114–21). He contrasts our system with that of Great Britain, in which an "unpopular" prime minister can be (and often is) "unceremoniously dumped" (p. 116). In the United States, however, we must await the next election: "A noncriminal president is thought to have an unbreakable four-year lease on the White House.... Why in the world should 'We the People' not be able to break the lease and evict a manifestly unsuitable or incompetent president and replace him with someone presumably more able?" (p. 117).

Three things about this argument are worth noticing. First, he subtly elides the differences among "incompetent," "unpopular," and "unsuitable." If he equates the three, that makes George Bush incompetent and therefore appropriately removable. Second, the lease is almost certainly not as unbreakable as he maintains: President Clinton was impeached not because he committed "high crimes [or] misdemeanors" but because he was unpopular with the party in control of the Congress. Wisely or not, the House and Senate respectively retain the power to impeach and convict a president they find truly "unsuitable" (much less "incompetent"), and the judiciary is unlikely to interfere.[13] Interim congressional elections provide a means for the electorate to reject the president's party and thus increase the chances that Congress will at least impede his program and perhaps impeach him. Third, the Framers went round and round on this very question, concerned that a broad power to remove a president—wherever lodged—would make the executive too dependent and thus likely to pander rather than lead. The impeachment clause was their compromise solution.[14] It may not be the best

son's 1807 Embargo of Great Britain (almost uniformly recognized as ineffective in accomplishing its goals and an economic disaster for the United States) as a "stubborn demand for sacrifice in a cause that millions of citizens had become sick of." Eric McKitrick, *The View from Jefferson's Camp*, N.Y. REV. OF BOOKS, Dec. 17, 1970, at 35, 38.

13. *See* Nixon v. United States, 506 U.S. 224 (1993) (impeachment is a political question that should not be resolved by the courts).

14. For the particular debates, *see* FARBER & SHERRY, A HISTORY, *supra* note 6, at 113–15, 125–29, 145–46.

approach, but is it worth risking the rest of the Constitution on the chance that we might improve on their solution?

Turning to the defects of the legislative branch, the allocation of power in the Senate need not detain us long. Levinson points out—as many others have before him—that equal representation in the Senate "makes an absolute shambles of the idea that in the United States the majority of the people rule" (p. 58). Levinson is right that giving each state two Senators is neither fair nor democratic. Few people would defend it (and I am not one of them).[15] The real question, though, is whether this defect warrants the calling of a convention and the potential abandonment of the entire Constitution. It rarely matters, except for the few powers that the Senate alone wields and the exacerbation of the ability of a minority to block legislation. The Senate is also just the manifestation of a deeper problem that Levinson does not address: The very existence of states as independent sovereigns is a historical accident that serves no defensible purpose today. If we equalize representation in the Senate, why not turn the states into administrative divisions of the national government? We are, after all, a single nation, and other nations get along just fine without a federal structure. Levinson's solution does not go far enough, and, as with his attacks on the executive, one wonders whether that is because he has more of a problem with the Senate and its Republican members (the book was written before the 2006 midterm elections) than with its structural make-up.

Finally, Levinson objects to bicameralism and the fact that the Constitution is nearly impossible to amend. They suffer from essentially the same flaw, according to Levinson, which is to make it difficult for majorities to enact their preferences into law. Bicameralism and the presidential veto (which Levinson characterizes as creating a tricameralist system) provide too many "veto points" that allow representatives of a minority of the population to block legislation (pp. 29–49). Similarly, the Article V amendment process is an "iron cage" (p. 165). He accuses the Framers and those who support the Constitution of being "fundamentally fearful of change and . . . willing to pay a high

15. Levinson in fact notes (p. 58) that I have previously attacked the allocation of power in the Senate, in Suzanna Sherry, *Our Unconstitutional Senate*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 95–97 (William N. Eskridge, Jr. & Sanford Levinson eds., NYU Press 1998). But some scholars (even some who live in large states) are willing to defend the Senate. *See* Saikrishna Prakash, *More Democracy, Less Constitution*, 55 DRAKE L. REV. 899 (2007).

price to prevent what they would deem unfortunate changes" (p. 35). Here, as elsewhere in the book, Levinson's biases are showing.

He divides the world into two types of people and asks the reader into which category she falls:

> Is it worth it, in order to deprive your opponents of the opportunity to work their political will, to make it more difficult to pass your own favorite programs? Or, on the contrary, would you rather have a greater likelihood of achieving your own goals even if this means that your opponents would be more likely to succeed if and when they are in power? (p. 38).

But *both* of these questions assume that you have "favorite programs." In other words, both exhibit a pro-big-government and anti-libertarian bias. For some people, the question may not be whether they would like to enact some program, but rather whether as a matter of principle (and maybe pragmatism) they believe that the government should adopt as few programs as possible—or at least that there are not many contexts in which government programs are likely to be an improvement on the status quo.[16] Levinson has no room for such people, and would presumably lump them in with the spiteful sorts who are willing to sacrifice their own goals just to keep their opponents from getting anything.

This anti-libertarian bias may be somewhat hidden, but Levinson is open about his bias in favor of majoritarianism—indeed, it is the underlying premise of the book. And casting his lot with those who would make legislation favored by the majority easier, even when he himself might be in dissent, is just one example. Part of the reason he focuses on "hard-wired" defects is because he objects to the undemocratic underpinnings of the whole Constitution: "The dreadful fact is that none of the great institutions of American politics can plausibly claim to speak for the majority of Americans, even though all assert such claims" (p. 49). But Levinson's majoritarianism raises two serious questions: whether the counter-majoritarian aspects of the Constitution are necessarily flaws, and whether his proposed majoritarian cure is worse than the disease.

On the counter-majoritarian aspects of the Constitution, Levinson is not alone in attacking what he sees as a "democratic

16. For a principled defense of supermajority rules, *see* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002).

deficit" in our constitutional system.[17] It is a truism (but true nevertheless) that the Constitution does not establish a pure majoritarian democracy. The Bill of Rights and a few other provisions place direct limits on the power of popular majorities. Judicial review—contemplated by the Framers even if not explicitly mentioned in the Constitution[18]—offers further protection against the tyranny of the majority. Levinson's critique of the structure of the legislative and executive branches is just a more interesting (but no less misguided) twist on the current academic fervor for "popular constitutionalism": the transfer of power from organs of government to the people themselves.[19]

But does Levinson really want pure majority rule? It seems not. He does not criticize judicial review, and he approves of rights-based limits on government.[20] And to the extent that he approves of the power exercised by administrative agencies (something he does not discuss), he is willing to tolerate quite another large democratic deficit.

What he fails to recognize is that the structural provisions he does attack are part and parcel of the same majority-limiting system as judicial review and the Bill of Rights. The institutions of government are structured to filter majority preferences through more deliberative bodies, in order to preserve stability and to, in Madison's words, "protect the people against the transient impressions into which they themselves might be led."[21] Indeed, Madison and other Federalists believed that a Bill of Rights was unnecessary because the structure of the Constitution itself would prevent Congress from trampling individual rights. So Levinson's argument that the Constitution gives minorities power to influence (and occasionally block) legislation favored by the majority is exactly the point.

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17. *See* Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859 (2007).

18. *See, e.g.*, Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

19. For a description and a critique of popular constitutionalism, *see* DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW (2008). In its most common form, popular constitutionalism is an attack on the Supreme Court and judicial review.

20. On rights, see, *e.g.*, pp. 5, 175; on judicial review, *see* Prakash, *supra* note 15, at 912 ("Professor Levinson's notable failure to call for the elimination of judicial review suggests that he has a rather large soft spot for at least one extremely undemocratic veto point").

21. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 193 (Tues. June 26, 1787) (Ohio University Press 1966).

Leaving aside the inconsistency in Levinson's approach to various undemocratic aspects of the Constitution, he and I part company primarily in how much (or how little) faith we place in government by referendum. The unwavering faith in the wisdom of popular majorities that underlies his attack on the Constitution also gives rise to his proposed solution to the democracy deficit: a constitutional convention and a national referendum to ratify the convention's handiwork. I turn, then, to that solution.

In proposing a constitutional convention, Levinson is aware that it would be essentially uncontrollable and could revise any or all of the Constitution. As he says, many friends with whom he has discussed his proposal, especially liberals, "envision a runaway convention that would tear up the most admirable parts of the Constitution" (p. 174). His response is to assert his faith in the American people:

> I continue to have sufficient faith in the democratic ideal that I believe that most of the public, in a truly serious debate about the Constitution, could be persuaded to support the essential rights that are required for membership in a republican political order (p. 175).

He provides no evidence for this assertion, of course. And immediately after making it, he backtracks. He notes that the fears of his liberal friends are not totally unwarranted, "unhappily acknowledg[ing] that they are drawn from the experiences of the twentieth century and the potential for disaster in certain kinds of pseudodemocratic, demagogic politics from which the United States is certainly not immune" (p. 175). He agrees that "many recent proposals for new amendments are absurd or pernicious" (p. 176). His response to the latter problem, that we should attack *those* proposals "while at the same time proposing other, far more desirable changes" (p. 176), misses two points. First, he is not simply proposing new amendments, but a constitutional convention—and once we have a second convention, it becomes more likely that we will have a third, a fourth, and so on, undermining the stability that has been a hallmark of American government. Second, the proposed amendments are not only pernicious in themselves, they are illustrative of the type of proposals that might come out of a constitutional convention.

And it is not just proposed amendments that should give us pause. As many scholars have shown, the success of direct de-

mocracy at the state level has been mixed at best.[22] In particular—and as one might expect—state constitutional amendments adopted by referendum have been especially intolerant of minority rights.[23] Two common examples are amendments prohibiting gay marriage and amendments prohibiting affirmative action.[24] Both might well end up in any document produced by a constitutional convention. Imposing super-majority requirements (especially for legislation that would raise taxes) is another popular subject for direct democracy, which runs directly contrary to Levinson's critique of "veto points."

Polls are also a predictor of the likely results of a constitutional convention, and they are not encouraging. Polls consistently show that a majority of Americans oppose the constitu-

22. *See, e.g.*, RICHARD J. ELLIS, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA (2002); DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY (2000); THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL (1989); Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293 (2007); Ethan J. Lieb, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903 (2006); Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WISC. L. REV. 17; Cody Hoesly, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191 (2005); Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949 (2005); Sherman J. Clark, *The Character of Direct Democracy*, 13 J. CONTEMP. LEGAL ISSUES 341 (2004); Elizabeth Garrett, *Money, Agenda-Setting, and Direct Democracy*, 77 TEX. L. REV. 1845 (1999); Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998); Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17 (1997); Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990); Cynthia L. Fountaine, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733 (1988).

23. *See, e.g.*, ANTI-GAY RIGHTS: ASSESSING VOTER INITIATIVES (Stephanie L. Witt & Suzanne McCorkle eds., 1997); John C. Brittain, *Direct Democracy by the Majority Can Jeopardize the Civil Rights of Minority or Other Powerless Groups*, 1996 ANN. SURV. AM. L. 441 (1996).

24. Between 1998 and 2007, voters in half the states approved constitutional amendments prohibiting gay marriage. In at least 8 of the 25, the amendment originated with We the People rather than with the legislature. See Alabama Const. Art. I, § 36.03 (approved 2006); Alaska Const. Art. 1, § 25 (approved 1998); Arkansas Const. Amend. 83, § 1 (approved 2004) (initiative); Colorado Const. Art. 2, § 31 (approved 2006) (initiative) Georgia Const. Art. 1, § 4, ¶ I (approved 2004); Idaho Const. § 28 (approved 2006); Kentucky Const. § 233A (approved 2004); Louisiana Const. Art. 12, § 15 (approved 2004); Michigan Const. Art. 1, § 25 (approved 2004) (initiative); Mississippi Const. Art. 14, § 263A (approved 2004); Missouri Const. Art. 1, § 33 (approved 2004); Montana Const. Art. XIII, § 7 (approved 2004) (initiative); Nebraska Const. Art. I, § 29 (approved 2000) (initiative); Nevada Const. Art. 1, § 21 (approved 2002) (initiative); North Dakota Const. Art. 11, § 28 (approved 2004); Ohio Const. Art. XV, § 11 (approved 2004) (initiative); Oklahoma Const. Art. 2, § 35 (approved 2004); Oregon Const. Art. XV, § 5a (approved 2004) (initiative); South Carolina Const. Art. XVII, § 15 (approved 2006); South Dakota Const. Art. 21, § 9 (approved 2006); Tennessee Const. Art. 11, § 18 (approved 2006); Texas Const. Art. 1, § 32 (approved 2005); Utah Const. Art. 1, § 29 (approved 2004); Virginia Const. Art. 1, § 15-A (approved 2006); Wisconsin Const. Art. 13, § 13 (approved 2006).

tional ban on school prayer,[25] believe the United States is a Christian nation,[26] and do not believe in evolution[27]—so the Establishment Clause might be in serious jeopardy under Levinson's proposal. One 2007 poll found that only 60% of Americans agree with the statement "Newspapers should be allowed to freely criticize the U.S. military about its strategy and performance."[28] (Maybe Levinson finds it more comforting than I do that a bare majority of the American public seems to support the core of the First Amendment's free-speech protections.)

I find these snapshots of the American public disturbing, and enough to make me afraid of a constitutional convention. Levinson, I am sure, would accuse me of being Madisonian or Hamiltonian. He describes "most liberals" as "fully Madisonian in being close to terrified of the passions of their fellow citizens" (p. 174), and calls views like mine a "fear of the uncaged beast of American democracy—a view identified more with the quasi-monarchical Hamilton than with the unabashedly democratic Jefferson" (p. 176). And indeed, Levinson acknowledges his own "deep Jeffersonian roots" (p. 225), opening the book with a long quotation from Jefferson and closing it with a paean to his hero:

> If a critical mass does indeed agree that our Constitution is seriously defective, then a campaign would have the potential to capture national attention and forge a new consciousness. . . . Thomas Jefferson would yet live. Who knows where the spirit of critical reflection might lead? Perhaps it would contribute

25. *See* First Amendment Center, *State of the First Amendment 2007: Final Annotated Survey*, http://www.firstamendmentcenter.org/pdf/SOFA2007results.pdf ("First Amendment Center Poll") (Question 25) (Percentage of Americans agreeing with the statement "Teachers and other public school officials should be allowed to lead prayers in public school": 57% (1997), 65% (1999), 65% (2000), 52% (2005), 58% (2007)). See also *id.* (Question 34) (50% of Americans agree, 47% disagree, with statement "A public school teacher should be allowed to use the Bible as a factual text in a history or social studies class"). This poll, which is also cited in notes 26 & 28, also asked about political affiliation, and 30% of respondents said they were Democrats, 28% said they were Republicans, and 26% said they were Independents. *Id.* (Question 49).

26. *See* Pew Forum Surveys: *Many Americans With Mix of Religion and Politics*, http://pewforum.org/docs/index.php?DocID=153 ("Pew poll") (Percentage responding "yes" to the question "Is the U.S. a Christian Nation": 60% (1996), 67% (2002), 71% (2005), 67% (2006)). *See also* First Amendment Center Poll, *supra* note 25 (Question 27) (55% of Americans support the statement "The U.S. Constitution establishes a Christian nation.")

27. *See* Pew Poll, *supra* note 26 (only 26% of Americans believe in evolution through natural selection); *see also* CBSNews.com, *Poll: Majority Reject Evolution*, http://www.cbsnews.com/stories/2005/10/22/opinion/polls/main965223.shtml ("51% of Americans say God created humans in their present form, and another three in 10 say that while humans evolved, God guided the process").

28. *See* First Amendment Center Poll, *supra* note 25 (Question 15).

> to the reinvigoration of the American experiment in government by the people and the construction of a constitution better fitted to meet the demands of our twenty-first-century society (p. 180).

So it comes down to this: Are we better off following the political philosophy of Hamilton (and the early Madison) or that of Jefferson? A full-blown comparison is beyond the scope of a book review, but here are just a few data points: Jefferson's blind adulation of democracy led him to support the French Revolution (which quickly degenerated into the worst kind of tyranny) while Hamilton was an early and famously fiery opponent.[29] Hamilton was a self-made man, rising from an ignoble birth to high office through talent and hard work.[30] For all his democratic oratory, Jefferson was an aristocrat and a petty tyrant, selling his slaves to satisfy his own debts and freeing only five of them (out of more than a hundred) in his will.[31] Jefferson's view of Hamilton illustrates this difference between them: One of Jefferson's sympathetic biographers describes him as having "all the scorn of a Virginian, of the old stock, for the immigrant of doubtful birth, who was almost an alien."[32] As the first Secretary of the Treasury, the commercially minded Hamilton took the new nation's weak, debt-ridden economy and put it on a stable footing.[33] The romantic agrarian Jefferson, by contrast, ran his own estate into the ground and nearly did the same to the national economy.[34] Jefferson was as ardent a defender of

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29. *See, e.g.*, RON CHERNOW, ALEXANDER HAMILTON 316–17, 429–37, 459 (2004).

30. *See id.* at 7–82.

31. *See, e.g.*, DARREN STALOFF, HAMILTON, ADAMS, JEFFERSON: THE POLITICS OF ENLIGHTENMENT AND THE AMERICAN FOUNDING 237–40 (2005) (Jefferson as aristocrat); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 201–04 (1993) (same); JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 147–49 (sale of slaves), 288–90 (failure to free most slaves at his death) (1997); Paul Finkelman, *Jefferson and Slavery: "Treason Against the Hopes of the World," in* JEFFERSONIAN LEGACIES 181 (Peter S. Onuf ed., 1993) (same).

32. GILBERT CHINARD, THOMAS JEFFERSON: THE APOSTLE OF AMERICANISM 270 (1929).

33. *See, e.g.*, David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 794–804 (2001). *See also* STALOFF, *supra* note 31, at 91 (calling Hamilton's financial reports "among the most brilliant government reports in American history").

34. On Jefferson's private descent into bankruptcy, *see, e.g.*, Herbert E. Sloan, PRINCIPLE AND INTEREST: THOMAS JEFFERSON AND THE PROBLEM OF DEBT (1995). On Jefferson's ruin of the national economy, *see, e.g.*, STALOFF, *supra* note 31, at 346–47; *see also id.* at 359–60 (Jefferson's "agrarian idyll threw a web of Romantic rhetoric over the underdeveloped and crude character of southern rural society"); Gordon S. Wood, *The Trials and Tribulations of Thomas Jefferson, in* JEFFERSONIAN LEGACIES 395, 411 (Peter S. Onuf ed., 1993) ("He did indeed want comforts and prosperity for his American farmers, but like some modern liberals he had little or no appreciation of the economic

states rights as Hamilton was a nationalist—and it is therefore somewhat ironic that Levinson would excise from the Constitution some of its most state-friendly components.

In short, Jefferson was a visionary; Hamilton was a realist. As one scholar puts it:

> [I]t was Alexander Hamilton who made the twentieth century "the American century." . . . [T]he foundation of America's superpower status was laid in the early days of the republic, when Alexander Hamilton, who had a vision of American greatness, battled with forces fearful of concentrated political, economic, and military power necessary to achieve greatness. . . . Jefferson was the poet of the American founding, while Hamilton was the nation builder who infused the essential elements of permanence and stability in the American system.[35]

Jeffersonian utopianism may be fine as an aspiration, but when it comes to a functioning government, Hamilton beats him hands down.

Americans are periodically infatuated with Thomas Jefferson and his vision of an idyllic democratic republic of yeoman-farmer statesmen. Legal scholars passed through what Joseph Ellis calls a "Jeffersonian Surge"[36] in the 1980s, focusing on the Jeffersonian idea of civic republicanism.[37] Levinson's attachment to Jefferson is apparently more enduring, and *Our Undemocratic Constitution* is an odd amalgam of that earlier era and today's scholarship on popular constitutionalism, producing a proposal that is as unabashedly optimistic as Jefferson himself was.[38]

And yet, in the end, I can't help but wonder whether Levinson is more Hamiltonian than he lets on. In mid-June 1787, the Constitutional Convention in Philadelphia was deep into its comparison between the Randolph proposal to write a new,

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forces that made such prosperity and comforts possible").

35. Stephen Knott, *"Opposed in Death as in Life": Hamilton and Jefferson in American Memory*, *in* THE MANY FACES OF ALEXANDER HAMILTON: THE LIFE AND LEGACY OF AMERICA'S MOST ELUSIVE FOUNDING FATHER 25–26 (Douglas Ambrose & Robert W.T. Martin eds., 2006).

36. ELLIS, *supra* note 31, at 14.

37. For a survey of legal scholarship on civic republicanism (and its critics), *see* Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 133–45 (1995). As is typical of legal scholars, they were twenty years behind historians, whose veneration of Jefferson had been declining since the 1970s. See ELLIS, *supra* note 31, at 16–19. I must admit that I was an active contributor to the civic republican literature, but I hope my work was tempered with realism.

38. On Jefferson's optimism, *see* CHERNOW, *supra* note 29, at 316–18; Wood, *supra* note 34, at 413.

more nationalist constitution (strongly supported by Madison) and the cautious, less nationalist New Jersey proposal to merely amend the Articles of Confederation. On June 18, Hamilton took the floor and spoke for hours—his remarks run more than 10 pages in Madison's Notes and are the only entry for that day.[39] He "declare[d] himself unfriendly to both plans," and proposed a breathtakingly radical substitute that included abolishing the states altogether, establishing an equivalent to the British House of Lords, and letting the executive serve for life as "an elective Monarch."[40] Given that such a plan had no chance of succeeding, one might speculate that Hamilton's speech was a tactical attempt to make the Randolph plan look moderate. If so, it succeeded: The next day, Madison himself gave an impassioned speech in favor of Randolph's proposal and the Convention voted seven states to three (with one state divided) to reject the New Jersey plan.[41]

If Levinson hopes his radical call to arms will result in a few much-needed (and less radical) amendments, I applaud him. But if he truly believes that we should call a second constitutional convention, he ought to heed Charles Pinckney's warning at the end of the first one: "Nothing but confusion and contrariety could spring from the experiment. . . . Conventions are serious things, and ought not to be repeated."[42]

39. MADISON, *supra* note 21, at 129–39 (Monday June 18, 1787).
40. *Id.* at 129 ("unfriendly"), 136 ("elective Monarch").
41. *Id.* at 140–48 (Tuesday June 19, 1787).
42. *Id.* at 651 (Saturday September 15, 1787).