

Book Review

Of Cabbages and Kings: A Review of *Our Undemocratic Constitution* by Sanford Levinson*

OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT). By Sanford Levinson.† New York, NY: Oxford University Press, 2006. Pp. 233. \$28.00.

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Professor Levinson hopes that by publishing his concise, 233-page book, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*,¹ he will generate thought and action in support of a referendum by Americans requesting Congress to call a constitutional convention empowered to draft a new constitution for submission to the electorate.² Professor Levinson opens his book by making clear his support for the goals stated in the Preamble of the United States Constitution,³ that is, “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”⁴ However, he has constructed an extensive critique of many constitutional provisions that were drafted by the Framers to implement the Preamble’s stated goals but that, he says, are unfit for our government today. He

* The title of this Review is based in part upon the famous passage in Lewis Carroll’s poem *The Walrus and the Carpenter*, which provides, “‘The time has come,’ the Walrus said, ‘To talk of many things: Of shoes—and ships—and sealing-wax—Of cabbages—and kings—And why the sea is boiling hot—And whether pigs have wings.’” LEWIS CARROLL, *Through the Looking-Glass and What Alice Found There*, in THE ANNOTATED ALICE: THE DEFINITIVE EDITION 129, 185 (Martin Gardner ed., W.W. Norton & Co. 2000) (1872).

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1. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

2. *See id.* at 12 (“In the next six chapters, I hope to convince you that, as patriotic Americans truly committed to the deepest principles of the Constitution, we should vote . . . [to] trigger a new convention.”).

3. *See id.* at 4 (discussing the 1787 Constitution’s “magnificent Preamble”).

4. *Id.* at 12–13 (quoting U.S. CONST. pmb.).

expresses this in his subtitle: *Where the Constitution Goes Wrong (and How We the People Can Correct It)*.

Professor Levinson's concerns appear based in part on some outcomes of our current constitutional structure and processes with which he finds fault, such as the election of President George W. Bush in 2000 by operation of the electoral college, rather than by majority vote of the people.⁵ More importantly, his concerns appear to be based on the fact that the existing Constitution does not comply with a general principle he considers fundamental for a democracy: government in accord with what the people want, as expressed in election returns, assuming a very broad electorate, with each person's vote counting the same. Examples violating that principle abound in his book. For example, California and Wyoming both have two senators, and yet California has almost seventy times the population of Wyoming.⁶ Levinson's basic majoritarian principle encompasses support not only for protection of the right to vote but also for the rights-protective clauses of the Constitution, such as the Bill of Rights, which he says are "required for membership in a republican political order."⁷

For the Constitution to comply with his basic principle, Levinson says it would be necessary to repair many clauses of the Constitution so that:

1. if bicameralism continues, the allocation of power in the Senate takes better account of population;⁸
2. current-age, duration-of-citizenship, and residence requirements to be a member of Congress are altered to expand the number of persons eligible to serve;⁹
3. the electoral college is abandoned in favor of nationwide, direct voting for the president;¹⁰
4. a newly elected president takes office shortly after the election;¹¹
5. presidential power is more limited, and it is easier to remove an incompetent president, but the limit on two terms should be removed, as should the "natural-born" requirement;¹²
6. life tenure for Supreme Court Justices is abandoned;¹³
7. the amending process is simplified to make it easier to change the Constitution;¹⁴ and

5. *See id.* at 82–83.

6. *Id.* at 50–52.

7. *Id.* at 175.

8. *Id.* at 50–51.

9. *Id.* at 142–50.

10. *Id.* at 97.

11. *Id.* at 98–101.

12. *Id.* at 116–21, 152–57.

13. *Id.* at 127.

14. *Id.* at 159–66.

8. provisions are added to deal with the problem of the continuity of government following a catastrophic terrorist attack.¹⁵

According to Levinson, these proposed changes would tend to ensure that the small states do not have an excessive influence in the Senate;¹⁶ that the president feels a greater need to pay attention to the public;¹⁷ that the perceptions of the Justices are framed more on the basis of contemporary events;¹⁸ and, as a consequence, that federal policy making would conform more closely to the desires of a current majority of all the people.¹⁹

This Review of Levinson's book is divided into three main parts. In Part I, assuming the wisdom of Professor Levinson's basic principle that the goal should be to promote democracy—as Levinson defines it—and ignoring any real-world problems with adoption of his proposals in practice, Professor Levinson's proposals are examined on their own terms. In Part II, consideration is given to the likely, or unlikely, probability that Levinson's proposals for constitutional change will be adopted in practice. In Part III, the wisdom of Professor Levinson's goal to promote democracy—as he defines it—is discussed. A brief conclusion follows, which suggests a follow-up book that Professor Levinson might write.

I. Professor Levinson's Basic Proposals

Professor Levinson's book is well organized, well written, in an engaging style, and graced by copious examples that add weight to his thesis by depicting inappropriate or unfortunate things that have happened or might happen under our existing Constitution. Levinson supports his position with many references to factual circumstances suggesting that in terms of democracy's basic majoritarian principle, the Constitution is undemocratic. For example, "almost a full quarter of the Senate is elected by twelve states whose total population, approximately 14 million, is less than 5 percent of the total U.S. population."²⁰ Thus, majority rule within the Senate has little to do with measuring national majority sentiment, and the small states have been substantially advantaged over all other states in per-capita terms with regard to enjoying the benefits of federally financed programs.²¹

Majoritarian failures also plague the election of the president. Democratic candidate Al Gore in 2000—like Democratic candidates Andrew Jackson in 1824, Samuel Tilden in 1876, and Grover Cleveland in 1888—

15. *Id.* at 69–75.

16. *See id.* at 50–51.

17. *Id.* at 117–21.

18. *See id.* at 134–36.

19. *See id.* at 6–9.

20. *Id.* at 51.

21. *See id.* at 57, 56–57 (citing, for example, the allocation of "homeland security" funding, under which "[e]ach resident of Wyoming receives exactly seven times the per capita funding received by residents of New York, \$37.94 as against \$5.42").

received more votes than were received by opponents, but failed to become president.²² Instead, because of the electoral college, John Quincy Adams became president following the 1824 election; Rutherford B. Hayes became president following the 1876 election; Benjamin Harrison became president following the 1888 election; and George W. Bush became president following the 2000 election.²³ Depending on how the popular vote is counted, in 1960 Richard Nixon may also have received more popular votes than the winner in the electoral college, John F. Kennedy.²⁴ In 1960, the Democratic slate of electoral candidates in Alabama won the popular vote, but of these candidates, only five were committed to vote for Kennedy, while the other six were uncommitted.²⁵ They eventually voted for Virginia Senator Harry Byrd, a southern Dixiecrat.²⁶ If all of the popular votes in Alabama for the Democratic slate of electoral-college candidates were allocated to Kennedy, then he received more popular votes in the nation than did Richard Nixon.²⁷ If only five-elevenths of the votes in Alabama were allocated to Kennedy, then Nixon would have received more popular votes in the 1960 election.²⁸

Levinson notes other provisions in the Constitution that provide opportunities for decisions to be made that are contrary to the popular will or that do not allow the popular will, as manifested in an election, to be carried out. For example, there is a ten-week hiatus between presidential elections and the inauguration of the president, during which time a repudiated president may represent the United States in any number of delicate international negotiations.²⁹ The current impeachment provisions do not allow the nation to replace an incompetent president.³⁰ Giving life tenure to federal judges allows them to use political considerations in timing their retirement.³¹

Some of the problems identified by Levinson, such as the qualification clauses for members of Congress³² and the president³³ and life tenure during

22. GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA 45 (2004).

23. *Id.*

24. *See id.* (stating that Nixon won the popular vote by a margin of 48,181 votes); *id.* at 45 n.b (explaining that in this calculation, five-elevenths of the Alabama Democratic vote was assigned to Kennedy).

25. *Id.* at 49.

26. *Id.* at 64.

27. *Id.* at 49 tbl.2.3.

28. *Id.* Levinson adopts the view of the 1960 election giving Kennedy only five-elevenths of the Alabama vote, and thus, he concludes that Nixon received more popular votes. *See* LEVINSON, *supra* note 1, at 82–83, 92–93.

29. *See* LEVINSON, *supra* note 1, at 99–100, 98–101 (“We . . . are stuck with knights who have been thrown off their horses, at least politically speaking, but who can continue to exercise formal legal power and, consequently, to make mischief for their successors.”).

30. *Id.* at 114–21.

31. *Id.* at 136–38.

32. *See id.* at 142–50 (discussing the implications of the qualifications imposed on members of Congress).

“good Behaviour” for Article III federal judges,³⁴ do not appear in practice to have much effect on the overall political dynamics of the country. Similarly, the concern with a repudiated president possibly representing the United States in delicate international negotiations in a manner that creates later serious political problems³⁵ seems far-fetched. Most newly elected presidents need some time to make decisions on Cabinet nominations and other appointments to the administration, and ten weeks is not an inordinately long time for that to occur. It is unclear that the examples of possibly “incompetent” presidents given by Levinson—Andrew Johnson, Herbert Hoover, Bill Clinton, and George W. Bush³⁶—would have deserved removal from office even if there were a provision making it easier to effectuate such a removal than the current impeachment process or removal for incapacity under the Twenty-Fifth Amendment.

More significant are Levinson’s proposals to abandon the electoral college in favor of direct presidential election³⁷ and to make easier any future amendment of the Constitution.³⁸ Regarding direct election, the most obvious consequence of adopting Levinson’s proposal would be a pressing need for dramatically increased fund-raising in presidential elections. Currently, candidates can concentrate their spending on the twenty or so “swing states” that determine presidential outcomes. As Levinson indicates, under a direct-election scheme, additional campaign spending would be necessary in large-population states like California and New York, typically Democratic strongholds, or Texas, a Republican stronghold, because each additional vote in those states would matter in the overall election total.³⁹ It is unclear that dramatically increasing the need for campaign spending in such large states during presidential elections would well serve the overall democratic process.

Regarding making future amendment easier, Professor Levinson acknowledges that the debate relates to the contrasting ideas of Thomas Jefferson and James Madison.⁴⁰ Jefferson proposed the doctrine that because “the earth belongs in usufruct to the living,” each new generation has the right to make for itself a new constitution.⁴¹ Madison counseled against such a doctrine, saying that too frequent appeals to the people to “new-model”

33. *See id.* at 150–52 (discussing the seemingly antidemocratic restrictions on who might qualify to run for president).

34. *Id.* at 125 (quoting U.S. CONST. art. III, § 1); *see also id.* at 135–39 (discussing alternatives to lifetime tenure for the Judiciary).

35. *See supra* note 29 and accompanying text.

36. *See id.* at 118–21.

37. *See id.* at 81–97.

38. *See id.* at 159–66.

39. *See id.* at 88–89.

40. *See id.* at 17–20.

41. WILLARD STERNE RANDALL, THOMAS JEFFERSON: A LIFE 486 (1993) (quoting a letter from Jefferson to Madison).

government would “in great measure deprive the government of that veneration, which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability.”⁴² Madison also said that a frequent reference of constitutional questions to the decision of the whole society raised the “danger of disturbing the public tranquility by interesting too strongly the public passions.”⁴³

Levinson supports Jefferson’s approach by saying that although the Jeffersonian tradition of constitutional critique had to contend vigorously with Madisonian veneration prior to World War II, most scholars since that time have preferred Jefferson’s approach.⁴⁴ Even before World War II, Levinson notes, Woodrow Wilson called for a more parliamentary mode of government,⁴⁵ as did Rexford Guy Tugwell, a member of President Roosevelt’s “Brain Trust” during the 1930s, who advocated “drafting a new constitution adequate to the new times.”⁴⁶ The “legal realists” of the 1930s and 1940s also questioned the validity of conventional constitutional wisdom.⁴⁷ Their impact on the debate was countered by the nation’s victory over fascist tyranny in World War II and by the decision in 1954 in *Brown v. Board of Education*,⁴⁸ which generated support for the Constitution in all respects.⁴⁹ But this, Levinson says, was a mistake, much as when a battered wife continues to profess the “essential goodness” of her abusive husband.⁵⁰ The nation should face the “abusive” features of the Constitution, says Levinson, rather than remain in a “state of denial.”⁵¹ For many persons, however, Madison’s views on the importance of protecting constitutional principles from short-term democratic majority interests have greater wisdom.⁵²

42. DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 301 (1994) (quoting *THE FEDERALIST* NO. 49, at 340 (James Madison) (Jacob E. Cooke ed., 1961)) (contrasting Madison’s views to those of Thomas Jefferson).

43. *Id.* (quoting *THE FEDERALIST* NO. 49 (James Madison), *supra* note 42, at 340).

44. *See* LEVINSON, *supra* note 1, at 19–20.

45. *See id.* at 19.

46. *Id.* at 20, 19–20.

47. *Id.* at 19–20.

48. 347 U.S. 483 (1954).

49. *See* LEVINSON, *supra* note 1, at 20.

50. *Id.*

51. *Id.*

52. *See generally* DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 43 n.7 (1989) (criticizing Garry Wills’s reading of *The Federalist* number 49, “which essentially presents Madison as an antidemocratic authoritarian,” as “grossly distorted and misleading”); Jack Rakove, *Should There Be a Tricentennial of the Constitution?*, 6 *ELECTION L.J.* 308, 311 (2007) (reviewing LEVINSON, *supra* note 1) (“A specter haunts *Our Undemocratic Constitution*, the specter of James Madison’s famous discussion in *Federalist* 49–50 against the dangers of interesting the people too strongly in decisions about the meaning of the Constitution. . . . [T]he veneration and stability aspects of Madison’s critique still merit consideration.”).

Most of the problems Levinson identifies could be dealt with by ordinary constitutional amendments, such as an amendment changing the qualification clauses for members of Congress and the president, or repealing life tenure during “good Behaviour” for Article III federal judges. However, the most “abusive” of the provisions, the state-based structure of the Senate, which gives Wyoming the same number of senators as California, cannot be removed by an ordinary amendment. The reason is that Article V of the Constitution, relating to amendments, provides that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”⁵³ Levinson argues that this provision could only be changed by a new constitutional convention, and if the attempt were made to correct this malapportionment in a new convention, that convention might as well also be concerned with the other undemocratic provisions that he has identified.⁵⁴

On the merits, Levinson’s argument, though artfully constructed, is incomplete in that it does not include in its reasoning an analysis of what is likely to happen should a new constitutional convention actually be created by any of the alternative methods that might be used for electing delegates or determining how votes are to be counted. For example, would each state have one vote, as in the 1787 Convention, or would representatives of various groups be identified by population or special interest?

It is possible, of course, that a new constitutional convention would address each of the issues identified by Professor Levinson and deal with them in a reasoned manner, as he thinks appropriate.⁵⁵ For such an outcome to occur, however, a liberal, progressive perspective, which he admits to supporting,⁵⁶ would have to permeate the convention and have such voting power that it need not enter into significant compromises with positions held by conservative delegates who might oppose some or all of the repairs noted above. And once the doors were opened, there would be a multitude of special interests who would seek favorable clauses in the new constitution, such as requiring a balanced budget or opposition to same-sex marriage or abortion. And if there were a proposal to deprive a state of its current suffrage in the Senate, there likely would be a lawsuit questioning whether any new constitution could have that effect.

As a fallback position, which Professor Levinson attributes to Stanford University Professor James Fishkin, whom Levinson calls “perhaps the most creative political theorist of our time,”⁵⁷ scientifically selected, random samples of people could be brought together to deliberate for a period of several days about an important political issue.⁵⁸ If done well, Levinson says, such

53. U.S. CONST. art. V.

54. See LEVINSON, *supra* note 1, at 62, 174–78.

55. See *id.* at 177–78.

56. See *id.* at 128 (describing himself as one of the “political liberals”).

57. *Id.* at 178.

58. *Id.* at 179.

deliberative polls would get serious attention from the American media.⁵⁹ The next step would be to organize a national referendum conducted by private persons and well-regarded organizations.⁶⁰ If considerable publicity were given to the deliberative polls and to the national referendum, it might give impetus to an agenda for selective amendments or on which an ultimate constitutional convention could be focused.⁶¹

Levinson's concluding hope is that the spirit of critical reflection that might be generated by such a process perhaps could "contribute 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."⁶² In contrast to Levinson's hopes, experience with commissions—such as the months-long deliberations that produced the Baker–Hamilton *Iraq Study Group Report*⁶³ and Ted Koppel's conducting a number of "town-hall meetings" on extended versions of ABC's program *Nightline*⁶⁴—perhaps suggests how much impact such "deliberations" would have on long-term American politics. Likely, not very much.

II. The Unlikelihood that Any of Professor Levinson's Proposals Will Be Adopted in Practice

Regarding the impact of the book, it is likely to stimulate some academic discussion and some interest in the media. However, it is not likely to result in a new constitutional convention. This is so for a number of reasons: (1) Levinson's arguments tread on the interests of small states, who are in a position to block the call; (2) in the contemporary political climate, the proposal can be seen to promote the interests of the "Blue States," many of which have large populations, and thus, will be opposed by the Republican Party, based in the "Red States"; (3) it threatens the interests of long-serving federal politicians who have ascended to positions of power in Congress; and (4) the nation's concerns are focused on the war in Iraq and the broader threat of terrorism, as well as long-standing nonconstitutional issues such as health care and adequate funding of Medicaid, Medicare, and Social Security.⁶⁵

59. *See id.*

60. *Id.* at 179–80.

61. *Id.* at 180.

62. *Id.*

63. *See* JAMES A. BAKER, III ET AL., *THE IRAQ STUDY GROUP REPORT* (2006), available at http://www.usip.org/isg/iraq_study_group_report/report/1206/iraq_study_group_report.pdf (assessing the contemporary situation in Iraq and recommending political and military strategies for continuing U.S. action).

64. *E.g.*, *Nightline: Ready or Not: Lessons from the Storms* (ABC television broadcast Oct. 28, 2005); *Nightline: Why Now?* (ABC television broadcast Mar. 4, 2003).

65. One reviewer has predicted that "[i]n a time of heightened partisanship, Professor Levinson's passionate call to improve our constitutional democracy will appeal to both Red and Blue America." Book Note, 120 HARV. L. REV. 660, 660 (2006) (reviewing LEVINSON, *supra* note 1). For all of the reasons given above, this prediction is not likely to prevail.

Levinson is not the first to call for a second constitutional convention. Judge Malcom R. Wilkey made a similar call in 1995.⁶⁶ Judge Wilkey's primary concerns were less closely related to the structure of the federal government and its processes and more with failings in how modern American politics in constitutionally valid ways had brought about gridlock, near-perpetual incumbency, and the unaccountability of our representatives to the electorate.⁶⁷ Those problems also remain salient today, yet Judge Wilkey's call for a constitutional convention provoked no serious political discussion or support, then or now.⁶⁸

For all of these reasons, the calling of a full-scale constitutional convention seems quite unlikely. Professor Levinson may have more success in encouraging amendments that can be made pursuant to existing requirements of Article V that do not deprive any state, without its consent, of equal suffrage in the Senate, but that is unlikely too. Even the proposal to eliminate the electoral college runs up against political considerations regarding the effect that would have upon campaign financing.⁶⁹ In addition, such a change would dilute the strength of small states, whose electoral votes are enhanced beyond their population size, because each state's electoral votes are based on the number of senators and House members in that state.⁷⁰ Thus, small-population states like Wyoming, North and South Dakota, and Delaware have three electoral votes,⁷¹ rather than just the one electoral vote they would receive if electoral votes were based on population size. The political considerations regarding campaign financing and the fact that currently more of the small-population states (particularly in the Plains and West) predictably vote Republican⁷² make it easier for Republican candidates to win the presidency through the electoral college rather than by direct popular vote. Therefore, no constitutional amendment along those lines is likely, though understandably Levinson's more liberal or progressive predisposition bemoans this fact of current presidential politics.

66. See MALCOM R. WILKEY, IS IT TIME FOR A SECOND CONSTITUTIONAL CONVENTION? (1995).

67. See *id.* at 19–37.

68. For a review, see Charles D. Kelso & R. Randall Kelso, *Politics and the Constitution: A Review of Judge Malcolm Wilkey's Call for a Second Constitutional Convention*, 27 PAC. L.J. 1213 (1996). There has been virtually no discussion of Wilkey's proposal since 1996.

69. See, e.g., Editorial, *System for Electing U.S. Presidents Needs Change*, AUSTIN AM.-STATESMAN, June 2, 2004, at A12 ("The down side [of changing or eliminating the electoral-college system], of course, would be that the cost of campaigning would go up, because it's more expensive to advertise in 50 states than in 17.").

70. See U.S. CONST. art. II, § 1, cl. 2.

71. Federal Election Commission, Electoral Votes, <http://www.fec.gov/pages/elecvote.htm> (last updated Oct. 3, 2003).

72. See, e.g., Michael Gaster, Cosma Shalizi & Mark Newman, Election Result Maps, <http://www.cscs.umich.edu/~crshalizi/election/> (last updated Nov. 17, 2004) (presenting various types of maps depicting the results of the 2004 election).

III. The Wisdom of Professor Levinson's Basic Principle: Democracy Versus Liberty

In all societies that have developed beyond the stage of being ruled by emperors and kings whose power is unfettered by any democratic institutions, there is a need to consider what restraints should exist on the power of democratic majorities. In such societies, there is always a tension between the demands of democracy and the demands of liberty—the need to protect individual rights, including those of minorities. Levinson acknowledges this tension,⁷³ but he makes no serious effort to evaluate the impact of his views on where the lines should be drawn or if the lines should change as a democracy matures. As discussed below, the choice that must ultimately be made in advanced societies regarding majority rule and individual or minority rights is between rational principles of justice versus either self-interested interest-group politics or following the customs and traditions of society.

This is so because support for rational principles of liberty and equality is not an inevitable concomitant of democracy. While the two have some connections, in that liberal democracies tend to support liberty and equality, there is no necessary, absolute connection between the two. As can be seen from fledgling democracies like those in Iran or Iraq, support for democracy is not always the same as support for reasoned elaboration of the principles of liberty, equality, and freedom.

Regarding this matter, it is relevant to consider how various individuals, and thus ultimately societies throughout history, have developed their concepts of moral reasoning and justice. Harvard University Professor Lawrence Kohlberg observed that individuals can go through six stages of moral reasoning.⁷⁴ Under one view of the proper social order—what Professor Kohlberg called the fifth stage of moral reasoning—one adopts rules that are the product of group choice, and values are relative to that group. Under such a view,

What is right is being aware of the fact that people hold a variety of values and opinions, that most values and rules are relative to one's group. These "relative" rules should usually be upheld, however, in the interest of impartiality and because they are the social contract. Some nonrelative values and rights such as life, and liberty, however, must be upheld . . . regardless of majority opinion.

73. See LEVINSON, *supra* note 1, at 174–76.

74. 1 LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT* 17–20, app. at 409–12 (1981). Professor Kohlberg was a professor of psychology in the Graduate School of Education at Harvard University and founded its Center for Moral Education. Catherine Walsh, *Reconstructing Larry: Assessing the Legacy of Lawrence Kohlberg*, ED. MAG., Oct. 1, 2000, http://www.gse.harvard.edu/news/features/larry10012000_page1.html.

. . . [L]aws and duties [should] be based on rational calculation of overall utility: “the greatest good for the greatest number.”⁷⁵

Under another view of the proper social order—Kohlberg’s sixth stage of moral reasoning—what is right are universal principles of ethics based upon reason, leading to equal respect and dignity for each individual in society. Kohlberg noted,

This stage assumes guidance by universal ethical principles that all humanity should follow.

. . . Particular laws or social agreements are usually valid because they rest on such principles. . . . Principles are universal principles of justice: the equality of human rights and respect for the dignity of human beings as individuals

The reason for doing right is that, as a rational person, one has seen the validity of principles and has become committed to them.⁷⁶

Under such a vision, the protection of individual rights to liberty and equality is paramount. Thus, at Stage 6, a pluralistic democratic society is viewed not as an end in itself, as it is at Stage 5, but rather as the best means by which to ensure that society protects and advances the set of Stage 6 universal principles of justice. In short, the protection of liberty and equality for all individuals, and not any outcome of a democratic process, is what is critical.

The Stage 6 view of government is reflected in the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness” and that “to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”⁷⁷ As President George W. Bush stated in a 2003 speech to the National Endowment for Democracy:

We believe that liberty is the design of nature; we believe that liberty is the direction of history. We believe that human fulfillment and excellence come in the responsible exercise of liberty. And we believe that freedom—the freedom we prize—is not for us alone; it is the right and the capacity of all mankind.⁷⁸

From a Kohlbergian perspective, the approach to moral and constitutional reasoning advanced by the many contemporary proponents of “deliberative democracy”—an approach that Levinson indicates is consistent with his basic principle of democratic governance⁷⁹—represents a Stage 5 approach to the nature of law and society. Its proponents, such as Professors

75. KOHLBERG, *supra* note 74, app. at 411–12.

76. *Id.* app. at 412.

77. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

78. George W. Bush, President George W. Bush Envisions the “Age of Liberty” (Nov. 6, 2003), in *LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY* 578, 587 (William Safire ed., 2004).

79. See LEVINSON, *supra* note 1, at 179 (suggesting that deliberative democracy is “what the Constitution means by a ‘republican form of government.’” (quoting U.S. CONST. art. IV, § 4, cl.1)).

Amy Gutmann and Dennis Thompson in *Democracy and Disagreement*,⁸⁰ do not adopt the Stage 6 view that rational principles of justice can be determined on their own, separate from a political process of deliberation by members in society. Proponents of deliberative democracy do reflect the foundational Stage 6 premise that rational thought is not self-centered or egotistic, and thus individuals in society are entitled to equal concern and respect.⁸¹ Thus, under deliberative democracy, each citizen must reject self-interest in favor of deliberating in a good-faith manner based on trying to achieve the common good for society in general, and every member of society is entitled to participate equally in that debate. However, reflecting Richard Rorty's embrace of Stage 5 value relativity,⁸² the proponents of deliberative democracy require each individual to reason in a way that justifications for actions could be accepted by individuals having different value beliefs, which are viewed as equally appropriate for individuals to have.⁸³

As stated by Professors Amy Gutmann and Dennis Thompson:

We do not begin with a common morality, a substantial set of the principles or values that we assume we share, and then apply it to decisions and policies. Nor, for that matter, do we end with such a morality. Rather, the principles and values with which we live are provisional, formed and continually revised in the process of making and responding to moral claims in public life.⁸⁴

It has been noted by Professor Miriam Galston that legal scholars as diverse as Bruce Ackerman, Mark Tushnet, Robin West, Frank Michelman, Suzanna Sherry, and Cass Sunstein all share an interest in deliberative accounts of public constitutional decision making,⁸⁵ as do Professors Christopher Eisgruber and James Fleming.⁸⁶

The proponents of deliberative democracy reject a view of "constitutional democracy," at least where the underlying principles of that

80. See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 16, 12–18 (1996) ("Actual deliberation has an important advantage over hypothetical agreement: it encourages citizens to . . . listen[] to one another's moral claims rather than concluding . . . that their fellow citizens *would* agree with them on all matters of justice if they were all living in an ideal society.").

81. See *id.* at 25 (identifying reciprocity as the most important characteristic of political discourse supporting the possibility of resolution of moral disagreement).

82. See generally Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEXAS L. REV. 523, 557–66 (1996) (discussing Rorty's approach, among others).

83. See GUTMANN & THOMPSON, *supra* note 80, at 12–21, 24–26.

84. *Id.* at 26.

85. See Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329, 333–34 nn.14–15 (1994) (citing the named authors).

86. See generally Christopher L. Eisgruber, *Dimensions of Democracy*, 71 FORDHAM L. REV. 1723 (2003) (advocating a deliberative theory of democracy in which majority rule is limited); James E. Fleming, *Securing Deliberative Democracy*, 72 FORDHAM L. REV. 1435 (2004) (outlining a constitutional constructivism that fits within a Rawlsian framework of basic liberties to preserve a deliberative democracy).

democracy reflect only the concrete customs and traditions of the members of society. Professors Gutmann and Thompson note that “[c]onstitutionalists [must] decide what *form* of majority rule is the most justifiable” and that this form should not be merely the customs and traditions of the dominant forces in society.⁸⁷ Such a constitutional democracy is based on constitutional arrangements where members of society—in practice the leaders and elites—design institutions, divide offices, and strike a political bargain that protects their divergent interests.⁸⁸

This kind of constitutional democracy is based either on what Professor Lawrence Kohlberg called his Stage 3 level of moral reasoning based on customs of local communities in that society or the Stage 4 level of moral reasoning based on traditions of society in general.⁸⁹ As has been noted about Stage 3,

[There is a] fusion of fact and norm; when the [individual] first begins to cognize how an actor ought to act rather than how he does act, he has not yet clearly differentiated the two. What is morally right to do, then, tends to be defined in terms of what most people or most occupants of a particular role do in fact do.⁹⁰

Thus, as Kohlberg stated, at Stage 3 the conventional morality of one’s peers, friends, and those with whom one interpersonally interacts are of primary importance.⁹¹

Kohlberg’s fourth stage is the stage of individuals following the rules of society simply because they are society’s rules. At Stage 4,

The right is doing one’s duty in society, upholding the social order, and maintaining the welfare of society or the group. . . . What is right is fulfilling the actual duties to which one has agreed. . . . A person at this stage takes the viewpoint of the system, which defines roles and rules. He or she considers individual relations in terms of place in the system.⁹²

Thus, at Stage 4, the individual “progresses towards a more balanced or equilibrated system of moral judgment: the diffuse norms of Stage 3 become ‘hardened’ into concrete laws and rules which specifically define right action

87. GUTMANN & THOMPSON, *supra* note 80, at 34.

88. The Constitutional Convention in 1787 is an example of such a process. On such constitutional arrangements, see generally MICHAEL WALZER, ON TOLERATION 22–26 (1997), which highlights the differences between a consociation, where coexisting groups negotiate a constitutional agreement that preserves group autonomy, and a nation-state, where a single dominant group seeks to perpetuate its own history and culture in constitutional arrangements.

89. See KOHLBERG, *supra* note 74, app. at 410–11 (describing two of six stages of moral judgment).

90. Deanna Kuhn et al., *The Development of Formal Operations in Logical and Moral Judgment*, 95 GEN. PSYCHOL. MONOGRAPHS 97, 139 (1977).

91. See KOHLBERG, *supra* note 74, app. at 410.

92. *Id.* app. at 410–11.

and which apply equally to all actors.”⁹³ Nevertheless, because this stage is also reflective of concrete operational thought, there remains a fusion of fact and norm. Thus, “the value of a system of moral rules or laws is not differentiated from the value of maintaining those rules or laws. The rightness of a given system of laws is taken for granted, and the maintenance of law accordingly becomes an end in itself.”⁹⁴

As Professors Gutmann and Thompson indicate in their book *Democracy and Disagreement*, it is likely that persons engaged in a process of deliberative democracy, with the constraints imposed by nonegocentric, good-faith deliberation, can reach conclusions on some matters, but consensus on many ultimate issues may not emerge from such a deliberative process.⁹⁵ This Stage 5 obsession with deliberative process can appear puzzling to individuals who approach questions of morality from Stage 6’s premises, which lie behind the Declaration of Independence. As Professor Laurence Tribe has noted:

The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid. If that . . . is correct, it leaves us with a puzzle: why do thoughtful judges and scholars continue to put forth process-perfecting theories as though such theories could banish divisive controversies over substantive values from the realm of constitutional discourse . . . ?⁹⁶

Without a “common morality” at the “end” of such a Stage 5 process,⁹⁷ resolution of moral issues will ultimately have to come from adopting either the customs-and-traditions approach of Stages 3 and 4 or the rational principles of justice of Stage 6, assuming one rejects, as is typical for a democracy, the predemocratic stages of Kohlberg’s Stages 1 and 2. At Stages 1 and 2, right is defined more in terms of self-interest.⁹⁸

93. Kuhn et al., *supra* note 90, at 139.

94. *Id.* at 140–41.

95. See GUTMANN & THOMPSON, *supra* note 80, at 26.

96. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064–65 (1980).

97. See *supra* text accompanying note 84.

98. Kohlberg notes that at Stage 1, “[r]ight is literal obedience to rules and authority, avoiding punishment, and not doing physical harm . . . [or] physical damage to people and property. . . . This stage takes an egocentric point of view. . . . Actions are judged in terms of physical consequences rather than in terms of psychological interests of others.” KOHLBERG, *supra* note 74, app. at 409. At Stage 2,

What is right is following rules when it is to someone’s immediate interest. Right is acting to meet one’s own interests and needs and letting others do the same. Right is also what is fair; that is, what is an equal exchange, a deal, an agreement.

The reason for doing right is to serve one’s own needs or interests in a world where one must recognize that other people have their interests, too.

Id.

For all of these reasons, at the end of the day, the choice one must make in any society is between rational principles of justice versus either self-interested interest-group politics or customs and traditions of society. From this perspective, it is unclear whether Levinson's proposals to advance deliberative democracy would serve to advance Stage 6 protection of liberty and equality—what Ronald Dworkin has called “equal concern and respect”⁹⁹ and the Bible calls “love [of] neighbor as thyself”¹⁰⁰—or instead would make it easier for democratic majorities to impose traditional customary prejudices or the self-interest of dominant majority groups on other members of society. This is particularly so because even in advanced Western industrialized democracies, a significant percentage of reasonably well-educated persons reason at the Stages 3 and 4 levels of concrete customary and traditional moral notions,¹⁰¹ rather than at the Stage 6 level of moral reasoning. Advancing Stage 6 values might better come about through reasoned elaboration of the law by political leaders and Supreme Court Justices committed to rational principles of liberty and equality, rather than amending the Constitution to provide for increased direct-majoritarian rule as proposed by Professor Levinson.

IV. Conclusion

Without regard to the wisdom of his proposals, the likelihood of any constitutional convention along the lines proposed by Professor Levinson is remote. None of the constitutional changes he proposes is likely to be adopted in any foreseeable future. Thus, debate or worry about their wisdom, as a practical matter, is a mere academic exercise devoid of likely real-world impact. Given this political reality, a more valuable book might take the concerns that Professor Levinson has about the undemocratic nature of the current system and discuss what could be done within the framework of the current Constitution to ameliorate the impact of those flaws. Given Professor Levinson's talented and creative mind, that book might well be worthy of generating heated, and critically important, debate.

As an example of such alternative thinking, while a constitutional amendment to abolish the electoral college is unlikely, states on their own under the current Constitution can determine how the electoral-college votes in their state are allocated.¹⁰² Thus, under the current Constitution, a state

99. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 272–73 (1977) (“Government must not only treat people with concern and respect, but with equal concern and respect.”).

100. *Mark* 12:31.

101. See Paul T. Wangerin, *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education*, 62 *TUL. L. REV.* 1237, 1274–75 (1988) (“[S]tandardized tests of moral development, of which several exist, indicate that most college age students fall somewhere between Kohlberg's stages three and four.”).

102. See U.S. CONST. art. II, § 1 (“Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives . . .”).

could decide that its electoral-college votes would be allocated based on which candidate won the majority of votes in the nation, rather than the majority of votes in that state. If a group of states with a combined number of at least 270 electoral votes (the number needed to have a majority of electoral-college votes) all voted to make that change as a matter of state law, then the winner of the presidential election under the electoral-college system would always be the candidate who won the nation's popular vote. The State of Maryland has passed such a proposal, which is slated to take effect only if other states with at least 270 combined electoral votes pass a similar proposal.¹⁰³

As a matter of practical politics, such a change would only require enough states to total 270 electoral votes to adopt that view, rather than requiring two-thirds of the House and Senate and three-fourths of the states to ratify a constitutional amendment or two-thirds of the states to call for a constitutional convention and three-fourths of the states to ratify amendments proposed at that convention. While the concerns about the impact that moving to direct election of the president would have on campaign financing, discussed above in Part II, probably mean even this proposal is unlikely to be adopted, it is certainly more likely to be adopted than making such a change through a constitutional-amendment process.

Professor Levinson seems to think such a change could only be made effective as a compact among states, which would require the consent of Congress.¹⁰⁴ But it is unclear that this is so. Each state has the authority on its own to determine how to allocate electoral-college votes, so each state presumably can do that without having to make that decision as part of an interstate compact.

Similar to the problems identified by Professor Levinson, there are a number of other problems that some persons see with the existing United States Constitution that are also not likely to be solved by constitutional amendments. For example, some persons are concerned about the Fourteenth Amendment's Citizenship Clause, which grants citizenship to all persons "born or naturalized in the United States,"¹⁰⁵ including the children of illegal aliens born in the United States. Similarly, some persons do not like the fact that under the text of the Census Clause, the census done every ten years is supposed to count all "persons" living in each state, whether or not each person is a legal or illegal resident, and that House of Representatives seats are based upon such a census calculation.¹⁰⁶ This gives states like California and New York, with larger populations of illegal aliens

103. *Maryland Sidesteps Electoral College*, MSNBC, Apr. 11, 2007, <http://www.msnbc.msn.com/id/18053715>.

104. See LEVINSON, *supra* note 1, at 97.

105. U.S. CONST. amend. XIV, § 1.

106. *Id.* art. I, § 2, cl. 3.

than other states, more representation in Congress than they would otherwise have.

On the other hand, some persons no doubt think it unjust that residents of the District of Columbia do not have two senators or one full-voting member of the House of Representatives, even though more United States citizens reside in the District of Columbia than reside in the State of Wyoming.¹⁰⁷ And some persons may even think it unfair that territories of the United States, like Puerto Rico, Guam, or the United States Virgin Islands, do not have full-voting-member rights, even in the House of Representatives.¹⁰⁸

All of these results, however, are determined by clear, specific text in the United States Constitution and are not likely to be replaced by any constitutional amendment. On each, there are split interests among the base of the Democratic and Republican Parties, making quite unlikely the garnering of the two-thirds majority in either the House or Senate to amend these provisions. With regard to each of these provisions, as for the problems identified by Professor Levinson, the practical French might say, “C’est la vie.” (Of course, some have accused the French of having a tendency to surrender too soon.) Phrased in another way, and based on the reference to Lewis Carroll’s poem *The Walrus and the Carpenter* in the title of this Review, the Walrus may wish to talk of “cabbages” and “kings,” but constitutional change, such as that proposed by Professor Levinson, may come about only if, and when, “the sea is boiling hot” and “pigs have wings.”¹⁰⁹ Even under the most pessimistic scenarios of global warming, the sea is not likely to get boiling hot anytime soon.

107. See U.S. CENSUS BUREAU, UNITED STATES: 2000: SUMMARY POPULATION AND HOUSING CHARACTERISTICS PART 1, at 2 tbl.1 (2002), available at <http://www.census.gov/prod/cen2000/phc-1-1-pt1.pdf> (listing the population in 2000 of Wyoming and the District of Columbia as 493,782 and 572,059, respectively).

108. See U.S. CONST. art. I, § 2 (“The House of Representatives shall be composed of Members chosen . . . by the People of the several States . . .” (emphasis added)).

109. *Supra* note *.