MORE DEMOCRACY, LESS CONSTITUTION

*Saikrishna Prakash**

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I. INTRODUCTION

I suspect that most Americans believe that constitutions ought to restrain majorities. There is broad acceptance of freedom of speech, freedom of religion, and equality under the law, even though these freedoms and rights often result in thwarting majority preferences (and even though there are disputes about the content of those rights). Unlike the British, Americans conceive constitutions as documents whose *raison d'etre* is to limit the power of majorities.

Professor Sandy Levinson's stimulating and engaging book, *Our Undemocratic Constitution*,[1] argues that we have too much constitution and too little democracy. More precisely, Levinson argues that we ought to eliminate a number of the federal Constitution's basic features that he

* Herzog Research Professor of Law, University of San Diego School of Law; B.A., Stanford University, 1990; J.D., Yale University, 1993. Thanks to Michael Rappaport for comments on an early draft.

1. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006).

regards as undemocratic. Among other things, Professor Levinson wishes to consign to the ash heap of history the Senate's equal suffrage rule, the Electoral College, the presidential veto, and life tenure for federal judges.

Although I endorse Professor Levinson's call for a constitutional convention, share his Jeffersonian enthusiasm for amending the Constitution, and favor some of his minor amendments, I remain unconvinced by many of his more prominent proposals. As discussed later, I am not so eager to toss aside equal state suffrage in the Senate, bicameralism, or the presidential veto. I think these constitutional features further worthwhile values, even as they undoubtedly restrain majorities.

Professor Levinson's book is interesting not only for what it proposes, but also for what it fails to recommend. The logic of his proposals, resting on the undemocratic features of the constitutional provisions he opposes, suggest far more radical solutions than Professor Levinson countenances. His arguments, based on the primacy of democracy, suggest that we ought to revamp the way we elect House members and end judicial review.[2] At the extreme, his arguments suggest that we ought not to have an American style constitution at all because such constitutions necessarily limit the power of majorities. In short, if democracy is the overarching goal, we need much more democracy and far less—if any—Constitution.

II. THE SMALL STATE "PROBLEM"

One of Professor Levinson's principal concerns is the disproportionate power wielded by small states in our federal system. As is well-known, the Constitution guarantees that each state will have two senators unless a state voluntarily relinquishes its right to equal suffrage in the Senate. Hence, even the least populous states, such as Alaska and Wyoming, receive two percent of the votes in the Senate, even though they lack two percent of the nation's population.[3] Larger states, no matter how amply populated, are limited to two senators. If one shares Professor Levinson's normative claim that representation in a legislature should be apportioned according to population so that each senator represents roughly the same number of people, then the Senate is grossly malapportioned. Citizens in Alaska, Idaho, and Oklahoma receive too much representation, while citizens in California, Texas, and Florida

2. *See id.* at 124–25.

3. *See, e.g.*, *id.* at 51 ("[A]lmost 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.").

receive too little.

This system of disproportionate influence also taints the Electoral College. According to Professor Levinson, smaller states have a greater say in who elects the President, and larger states have too little influence.[4] Once again, this claim is predicated on the plausible (albeit contestable) intuition that a state's influence on the election of the President (assuming that we have an Electoral College at all) should be proportional to the state's population relative to the entire national population.

In Professor Levinson's view, this system of disproportionate influence means that a small minority has a more influential voice than it should. As a result, legislation opposed by a majority of citizens passes because senators and representatives from small states support it, while legislation supported by a majority of the country fails to pass because senators and representatives from small states obstruct it.[5] Finally, presidents who lack a popular majority get elected; nominees who secure a popular majority never become president.[6]

Professor Levinson is really upset by all this. In his mind, the residents of small states are reaping inequitable advantages and benefits resulting from a hard and misbegotten bargain made over two centuries ago.[7] Even though he hails from a large state, I think he would have the same view of equal suffrage even if he were an Alaskan.

I admit to being ambivalent about the power of the small states, but also I have a sense of why one might construct such a system. To better grasp the strengths of such a system we have to think about why anyone from a large state would agree to allocate representatives on a basis other than pure population. A hypothetical might help us see why people would adopt a system that Professor Levinson regards as utterly indefensible.

Imagine a unicameral federal legislature composed of 300 members sent from equipopulous districts. No citizen has a disproportionate ability to lobby a representative or to affect an election outcome. This is Professor Levinson's representational nirvana.

Now suppose Canadian political leaders came to Congress and said:

4. *See id.* at 90 (comparing states' populations with their respective percentages in the Electoral College).

5. *See id.* at 56.

6. *See id.* at 82–83 (providing, as examples, the 1960 and 2000 elections when both Richard Nixon and Al Gore won the plurality vote yet lost the election).

7. *Id.* at 50–62, 89–90.

"We want to join your federation, but we are worried that our distinct voices will be drowned out by your overwhelming population. We would like each of our provinces to have a minimum of fifteen representatives in your unicameral legislature."

Now some Americans might say: "We believe in the bedrock principle of equipopulous districts. Accept that principle or abandon all hope of joining our Union." Those who share Professor Levinson's preferences might even scoff at the audacity of the Canadian's attempt to finagle extra representation. Why should Canadians receive preferential treatment?

But other Americans might have a rather different view. They might fervently believe that the United States would be better off with Canada joining the Union. They might believe that Canadians will add rarely heard or even unique perspectives to our national debate. After all, Canadians are said to be more egalitarian, and many even speak French! Those sympathetic to Canada's demand might say: "We can see why they would be worried about being overwhelmed by the colossus to the south. If this is the price for Canada's accession to the Union, we will pay it."

People made a similar choice over 200 years ago, which was an eminently sensible choice. Imagine the United States composed of Virginia, New York, Pennsylvania, and Massachusetts. Imagine a confederation of states composed of the smaller states. The consequences would be grim—embargoes, trade wars, real wars. Rather than risk the possibility that the Constitution would be defeated, large states agreed to equal state suffrage in the Senate, and agreed to an Electoral College that (from Professor Levinson's perspective) overweighted the influence of small states.

In his book, Professor Levinson notes that equal suffrage was a necessary compromise but asks why we should have to continue to live with the bad deal agreed to by large states a long time ago.[8] He makes a good point—we do not have to live with this compromise. Still, there are a number of reasons why we might want to continue to live with this bargain. First, we might believe that the citizens of smaller states have different perspectives on national issues—perspectives that ought to be given a greater voice. For instance, if we thought that support for family farms was important (think of the Jeffersonian image of the yeoman farmer) and we thought that small states were more supportive of family farms, then we

8. *Id.* at 49 ("It is clause 1 of section 3 [equal suffrage] that should appall most Americans . . . .").

might wish to privilege those who would likely be more effective and enthusiastic advocates for family farms. Second, if we support some level of decentralized decisionmaking and we suppose that the equal suffrage rule helps ensure more decentralized decisionmaking, then we would retain the equal suffrage rule. Indeed, Professor Levinson admits that equal suffrage tempers the tendency to enact national solutions to problems, leaving many problems in the hands of state and local officials.[9] Hence, Professor Levinson suggests that proponents of federalism have reason to support equal Senate suffrage. Third, we might suppose there is great value in retaining institutional arrangements that have the effect of maintaining or shoring up state identity. If we believe state governments serve as a valuable check on the federal government—as has been true at times in our nation's past[10]—we should be wary of changes that undermine the ability of the states to play that role.

Finally, we have to worry that the federal system will unravel. Nothing guarantees the continued existence of the Union. If citizens in the more populous states vote to amend the Constitution by a pure majority vote (as Professor Levinson has suggested they legitimately could do),[11] that unauthorized and muscular process and the decision made pursuant to it will no doubt be viewed by some citizens in smaller states as an aggressive power play designed to force the nationwide majority's will on those who have heretofore expected that constitutional change will occur via the regular amendment process. Aggrieved citizens of the less populous states would likely regard themselves as entirely justified in refusing to recognize the amendment "ratified" by a constitutionally unauthorized nationwide majority vote. The results would not be pretty, as one side sought to bypass the Article V process and the advantages it yields to small states. The other side would cite the evasion of that authorized process as an example of bad faith worthy of being actively resisted. At the extreme, we might see citizens from smaller states revisit their commitments to the rest of the Constitution. They might become more Jeffersonian than Professor Levinson and argue that they do not have to honor any ancient commitments to the Constitution, especially when those who might grumble are the very ones who precipitated the crisis by conspicuously evading the Constitution's amendment procedures.

For whatever reason, Professor Levinson seems blind to these

9. *Id.* at 54.

10. The most notable examples of this were the Virginia and Kentucky Resolves denouncing the Alien and Sedition Acts as unconstitutional.

11. LEVINSON, *supra* note 1, at 177.

arguments. Such concerns and motivations existed at Philadelphia, as evidenced by the many decisions to privilege the states as units. First, the Philadelphia Convention voted on a state-by-state basis, with a majority of states able to determine the content of the proposed constitution. The votes of the state delegations in Philadelphia were not weighted to reflect population; South Carolina and Georgia were each the equals of mighty New York. Second, the Constitution was adopted not by majority vote but by a supermajority of the states. Indeed, the Constitution might have been ratified even over the objections of a majority of the nation.[12] Finally, the Constitution ensured that states were the relevant units for amending the Constitution. Agreement by three-fourths of the states is what matters for ratification of proposed amendments, as expressed by the legislature or popular conventions.[13] The sheer frequency of these decisions that privileged the states as the relevant actors should lead Professor Levinson to reconsider whether there was something quite defensible about looking to states as the relevant decisionmakers.

The simple point is that equal suffrage in the Senate—and the unequal representation that results—is hardly outrageous. Equal state suffrage and the Constitution's other state-centered institutions can be seen as the continued price for continuing the Union, warts and all. Trying to change the equal suffrage rule via Article V or via securing the acceptance of individual states is perfectly acceptable. Trying to circumvent Article V, however, could cause a train wreck of monstrous proportions.

III. WHY TRICAMERALISM MIGHT BE BETTER THAN UNICAMERALISM OR BICAMERALISM

Apart from the iniquitous composition of the Senate, Professor Levinson thinks there are far too many veto points that preclude the enactment of federal law.[14] A due respect for the majority's preferences suggests that we need to reduce or eliminate the obstacles to the enactment of legislation supported by the majority, he argues. To that end, Professor Levinson proposes barring policy-based vetoes of federal legislation,[15] and

12. This might have happened if the citizens of small states favored the Constitution by relatively small margins and if citizens in the bigger states shared Professor Levinson's view that the Constitution illegitimately tilts toward the small states.

13. U.S. CONST. art. V.

14. *See* LEVINSON, *supra* note 1, at 29–35.

15. *Id.* at 46.

he also comes close to advocating the end of the Senate.[16]

In making this claim, Professor Levinson likely subscribes to one of two propositions. First, he might believe that whatever Congress passes (whether it is unicameral or bicameral) necessarily reflects majority sentiments. If a majority did not favor it, Congress would not have passed it. Hence, when Congress passes legislation, it inevitably speaks for the nation's majority. Second, Professor Levinson might eschew any claim that what Congress passes will necessarily reflect majority will. Instead, he might adopt the premise that a unicameral or bicameral Congress is merely more likely to enact laws that mimic the preferences of the majority of the nation than the tricameral process today.

In contrast, the vast majority of the nation may favor legislation that provides some small benefit, but individuals lack the incentive to fight this legislation. First, there are costs of getting involved, and these costs often outweigh the benefits. Second, there is the free rider problem, whereby citizens choose not to act because they wish to free ride on the efforts of others. For similar reasons, the majority may oppose legislation but often fails to vigorously fight against it. Therefore, I doubt Professor Levinson believes the legislation Congress passes actually reflects majority sentiment.

The second belief rests on very shaky assumptions and an untested (and perhaps untestable) empirical claim. To begin with, we have to assume that we can know with some certainty what the majority wants. However, the majority's preferences are likely to cycle over any plausible set of public policy issues. Given the inevitable intransitivity of preferences, ascertaining what the majority wants will often prove impossible.

If we assume away this Arrovian problem, it is still not clear that unicameralism or bicameralism leads to the satisfaction of more majority preferences than our tricameral system. Once we realize that special interest groups have an easier time co-opting a unicameral or bicameral legislature, we may conclude that majority preferences are actually more often thwarted by a one-or two-stage lawmaking process, because smaller groups are able to impose their will more often and pass legislation opposed by the majority. For example, the steel industry that seeks import tariffs has a much easier time capturing a unicameral or bicameral process than it does a tricameral process. One can say the same about those who favor subsidies to farmers or tax cuts for upper income taxpayers—they too

16. *Id.* at 49–62.

will have an easier time securing benefits with a unicameral or bicameral process.

To be sure, a tricameral legislative process runs the risk that the majority will not be able to pass legislation it favors because those who seek concentrated benefits may be able to prevail upon either the other chamber or the Executive. A majority that favors reductions in tariffs will have to prevail upon three chambers to secure these reductions, while the tariff supporters only need to prevail in one chamber. But the relative ease with which majority-favored statutes are blocked in a tricameral process might be more than made up for by the many non-majoritarian statutes that would have been passed in a unicameral or bicameral process.

In the absence of any solid reason to suspect that a unicameral legislature will satisfy majority preferences more often, I am inclined to leave our tricameral system in place. There are enough things worth changing in our Constitution that we need not change something that yields dubious benefits. Another way of framing the question is: Do you wish that more federal legislation was enacted every year or do you wish we had fewer new statutes? Needless to say, the answer to this simple question is hardly obvious.

IV. OUR UNDEMOCRATIC CONSTITUTION (PART II)

Like most Americans, Professor Levinson shares a strong commitment to democracy. His dedication to democracy causes him to champion many radical constitutional changes such as terminating equal suffrage in the Senate and curtailing the veto power. In large measure he supports such changes because the existing constitutional framework obstructs the preferences of majorities.

Not for a moment do I doubt his sincerity. But I am afraid Professor Levinson has not fully internalized all the implications of his passionate embrace of democracy. Though the theme of Professor Levinson's book is why we should change the undemocratic elements of our Constitution, his proposals do not go nearly far enough. There are many more constitutional provisions that we ought to change or even jettison entirely, at least if unleashing democracy is the principal reason for making all the changes he favors. As discussed below, Professor Levinson needs to write a second book and propose a whole host of other sweeping amendments.

A. *The Malapportioned House*

Begin with the House. Although the House might be seen as Professor Levinson's paradigmatic democratic institution, there are unsightly undemocratic warts here as well. Because House seats are apportioned by state, the people of some states have a much larger say in the election of representatives. America has some 300 million people and 435 representatives. That averages roughly 700,000 people per representative. Obviously, any state with fewer than 700,000 people is overrepresented. Such states have one representative all for themselves when they ought to be sharing a representative with citizens of another state. Montana, Alaska, and a few other states are overrepresented in the House—at least if we demand equipopulous districting.

As it turns out, some large states will also have advantages. Consider a scenario of two states, Fortunate State with a population of 7,100,000 and Unlucky State with a population of 6,900,000. In this scenario, one state is allowed ten House members and the other allowed only nine, even though their populations are quite similar. The point is that because we must apportion representatives by states, it is impossible to have equipopulous congressional districts across the nation. As a result, citizens of some states are going to get the short end of the stick. The votes of Fortunate citizens will wield more influence than the votes of Unlucky citizens.

While the malapportionment problem with the House is not as bad as the parallel problem with the Senate, it should trouble Professor Levinson. If we are going to fix the Constitution's undemocratic features, we ought to fix the House malapportionment problem right after fixing the Senate problem. To rid ourselves of this system of disproportionate influence, we need to begin apportioning representatives on an even basis throughout the nation without regard to state borders. We would have to create equipopulous districts of 700,000 people. There would not be an "Alaskan" representative because Alaska would have to be part of a district encompassing parts of another state or states. This would ensure that Alaska does not get more representation in the Congress than the rest of us.

But there is another democratic problem lurking in the background. Even if we have equipopulous districts, some may complain about the resulting party composition of the House. Imagine America with two dominant parties with roughly the same party identification (suppose America is split 45/45 with the remaining 10% affiliated with third parties). However, the residence of the partisans differs dramatically. One, the "Spread-Out Party," has partisans spread equally throughout the country

and another, the "Concentrated Party," has almost all of its partisans in a particular geographic location (say the Northeast).

Assuming most districts are contiguous—every part of a district is touched by another part of the same district—House elections in equipopulous districts will lead to a landslide for the Spread-Out Party even when the overall nationwide vote totals of the two parties are identical. The Concentrated Party will handily win all the Northeast seats. But the Spread-Out Party will mop up all the seats in the rest of the country and secure an unassailable majority in the House, even though on the basis of total votes cast, the parties are indistinguishable.

When discussing the claim that the allocation of House seats was undemocratic because it ensured that there would not be equipopulous districts, Professor Levinson had two responses. First, he said he did not see the need to get rid of the states.[17] But that raises an extraneous issue. One does not need to get rid of the states to draw equipopulous districts for the House and the Senate. The states can continue to govern themselves as they have done for more than two centuries. All one has to do is ignore their boundaries for purposes of federal apportionment of representatives.

Second, Professor Levinson argued that the malapportionment of the House was a small problem not worthy of being corrected.[18] But we need to know far more about the national party vote totals and the representation in the House to know if he is right. We may very well find there are times in the nation's history where the party with the nationwide majority vote did not control the House. We may also find that regional parties should have had higher representation in the House if we use nationwide vote percentages as the indicator of appropriate party strength in the House. Given the longstanding strength of the Democrats in the South during and after Reconstruction, we may well find they were entitled to more representation in the House during those years. And given the dominance of Democrats in the 1960s and 1970s, we may find that Republicans were shortchanged in the House in the 1980s.

Indeed, Professor Levinson repeatedly uses such nationwide vote

17. Sanford Levinson, W. St. John Garwood and W. St. John Garwood, Jr., Centennial Chair in Law, Univ. of Tex. Law Sch., Address at Drake University Law School Constitutional Law Symposium: Our Undemocratic Constitution (Apr. 7, 2007).

18. *Id.*

totals to condemn the Electoral College and the equal suffrage rule.[19] What is good for the Senate and the President should be good for the House as well. Because Professor Levinson highlights the fact that presidents have become elected with less than a majority vote, it is difficult to see how he can dismiss the over representation and under representation of a party in the House. Likewise, because Professor Levinson believes that the party with the highest nationwide Senate vote total should control the Senate, he ought to have the same view when it comes to the House.[20]

Perhaps the best way to solve the problem is to have a nationwide vote for seats in the House, with seats apportioned to parties on the basis of nationwide vote totals. That way, regional parties are not treated unfairly (at least if we use the share of nationwide votes as the baseline). Moreover, parties with shallow nationwide support (think of the Greens or Libertarians) might be able to secure seats in Congress. To be sure, citizens might lose the right to vote for a particular representative and there would be far less attention paid to purely local concerns. However, Levinson favors moves that accomplish the latter and arguably cares more about satisfaction of policy preferences than satisfaction of the desire to elect particular individuals, however satisfying that might be.

Needless to say, these are fairly radical changes in how we elect members of the House. But the charge that particular amendments are radical will not trouble a Jeffersonian, and if we are moving to a more democratic system of representation, Professor Levinson should be all for it.

B. *Veto Points in a Unicameral Congress*

As noted earlier, the democratic ideal that Professor Levinson comes close to embracing is a unicameral assembly with unilateral power to make laws.[21] There is no veto power and perhaps no other chamber. A unicameral process is ideal for there are no constitutional veto points. Professor Levinson presumes that the lack of constitutional veto points

19. *See, e.g.*, LEVINSON, *supra* note 1, at 53 ("[U]sing either official 2000 census data or unofficial 2004 estimates of population, one discovers that Democrats represent states with a total population of roughly 3 million more persons than do Republicans.").

20. Professor Levinson inadvertently proposes a partial solution to this difficulty by advocating the nationwide election of a certain number of House members. But this proposal does not go far enough—there certainly will be variations between nationwide vote totals and representation in the House.

21. LEVINSON, *supra* note 1, at 29–35.

means that majority preferences can be quickly translated into legislation.

But even a unicameral system will have numerous subconstitutional veto points.[22] As political scientists and popular observers are aware, Congress has divided itself into various committees, each with jurisdiction over certain matters. These subject matter committees and their chairs also serve as veto points. Members of committees have disproportionate influence on legislation assigned to their committees and among committee members, and the chair has the most disproportionate influence of all. One reason why civil rights legislation took so long to pass in the middle twentieth century was that committee chairs with jurisdiction over such bills never let them get out of committee.

Apart from the subject matter committees, there is the Rules Committee, which sets the terms of debate for bills on the floor. The Rules Committee can facilitate order by limiting amendments or it can facilitate often messy democracy by assigning an open rule to a bill. The chair of this committee, along with its members, also enjoys a veto of sorts because he can make it rather difficult to pass a bill, even when it is supported by a House majority. Howard W. Smith of Virginia blocked consideration of civil rights bills during the Eisenhower Administration by refusing to have the Rules Committee consider them.[23]

Finally, the party leadership also serves as a check on the preferences of "We the People." Any reader of the *New York Times* or *Washington Post* knows that the leadership conspires to prevent consideration of alternatives and amendments in the House. The party leadership leans on representatives to follow the party line even when that party line runs counter to the wishes of a majority.

Though Professor Levinson spends a good deal of time lamenting the Constitution's veto points, he never says much about these subconstitutional veto points and he proposes no constitutional means of bypassing these many veto points. If he supports the retention of the Senate (notwithstanding his doubts about a bicameral legislative process),

22. Professor Levinson certainly understands that subconstitutional rules thwart majority preferences. *Id.* at 52–53. Indeed, he cites the filibuster rule as a reason to dislike the Senate. The problem with citing the filibuster rule in a discussion about whether to keep the Senate is that the rule is not something inherent in the Senate. The Senate could get rid of this rule and become majoritarian. Moreover, the House could adopt a filibuster rule or a variant of it.

23. *See* Associated Press, *Power Shift*, ALBUQUERQUE TRIB., Apr. 3, 2007, at A4 ("Once in 1957, the Virginia Democrat blocked President Eisenhower's civil rights legislation by saying a barn burned down on his farm and he needed to tend to it.").

the number of subconstitutional veto points is virtually doubled.

Fortunately, an answer to the problem of subconstitutional veto points can be found in the laboratories of democracy—the states. Many states allow citizens to place propositions on the ballot and then permit the voters to make those propositions law. In these circumstances, there is no principal-agent problem, in which the legislator-agent might seek to curry favor with lobbyists and the like. To bypass the veto points likely inherent in any legislative chamber, even a unicameral one, we could create a national initiative process in which "We the People" could periodically decide what laws "We the People" would live under.

Given that Professor Levinson supports the idea of changing the Constitution by nationwide majority vote, he should support the idea of changing federal law by nationwide majority vote. Somewhat uncharacteristically, however, his comments at the Symposium betrayed doubts about the initiative process. He thought the process overburdened the people.[24] In light of his concern about the thwarting of majority preferences and the numerous subconstitutional veto points discussed above, this is an odd stance. It is especially striking that he expressed doubts about initiatives even as he contends that the people can amend the Constitution by majority vote. If the people can be trusted to change the Constitution by majority vote, it would seem to follow that they likewise could be trusted to alter federal statutes.

C. *More Deep-Seated Democratic Deficits*

We have only begun, however, to scratch the surface in our attempt to uncover our Constitution's undemocratic features. Surprisingly, Professor Levinson says very little about one of our Constitution's most undemocratic features—the institution of judicial review. As it is practiced today, judicial review is a relatively opaque process in which judges use supposedly open-textured phrases to strike down legislation that a majority prefers. So even after legislation surmounts all the constitutional veto points that Professor Levinson condemns, the courts may give it the cold shoulder.

To his credit, Professor Levinson does mention the problem.[25] His advice is to elect presidents who will nominate judges that reflect whatever constitutional vision one favors.[26] But this solution will provide very little

24. Levinson, *supra* note 17.
25. LEVINSON, *supra* note 1, at 124–25.
26. *Id.* at 125.

solace to those who believe that judges are substituting their own preferences for those of democratic majorities. As everyone understands, this solution permits the frustration of democratic will for quite a long time. And even when some group attempts to capture the judiciary by consistently capturing the presidency, the appointed judges are free to drift ideologically, thus thwarting the decade long efforts of those who fought to alter the judiciary.

The solution is obvious. If we do away with judicial review—at least as applied to federal legislation—we eliminate one of the most potent veto points on the power of democratic majorities. 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.

Of course the principal democratic failing of our undemocratic Constitution is that it is an American style constitution, meaning that the Constitution purports to restrain democratic majorities from enacting legislation in violation of it. But why should some groups of people (almost all of whom are no longer alive) be able to entrench their preferences in this way?

In a way, Professor Levinson's book title is more redundant than controversial because it is clear that our nation's entire constitutional project is, at its base, undemocratic, at least as Levinson uses the term. Yet he really does not acknowledge this. To be sure, he opposes particular portions of the Constitution on the grounds they are undemocratic, such as presidential term limits and the native citizen requirement.[27] He claims the people should be trusted here and chastises those who do not trust the people to make decisions about whom to elect.[28]

But why does he not say the same about all restraints on federal and state power? Why can we not trust the citizens to elect representatives to do what is right when it comes to freedom of speech, the rights of defendants, and the freedom of religion? I would note that as compared to our veto-ridden, supermajoritarian lawmaking process (the process that Professor Levinson condemns), the Constitution's prohibitions are much more anti-democratic. Notwithstanding tricameralism, sufficient congressional majorities can enact legislation. But no matter how large the majorities in the House and Senate and no matter how much the President favors some legislation, under the Constitution the Congress cannot pass

27. *Id.* at 151–52.
28. *Id.* at 151.

legislation that violates the First Amendment. If our Constitution's anti-democratic features offend us, the Bill of Rights (both the original Article I, Section Ten version and the subsequent first eight amendments) ought to trigger far more ire. Indeed, the entire Constitution ought to invoke our wrath.

Once again, Professor Levinson never opposes these famous and acclaimed anti-majoritarian features. Indeed, he does not even discuss their clearly anti-democratic purposes. I think he fails to discuss them because he does not view them as inconsistent with current conceptions of democracy in the same way the Electoral College and equal state suffrage contradict modern democratic notions. But this begs the question. Once we abandon the unwarranted and excessive reverence for the Constitution—a large part of Professor Levinson's project—everything is up for grabs and we are free to reconsider whether we need freedom of speech or freedom of the press. More modestly, we are free to recalibrate, and if need be, pare back some of the judicially prescribed applications of the various limitations placed on majority sentiment. Does freedom of speech protect simulated child pornography or flag burning? Let the people decide.

Professor Levinson recognizes that a new constitutional convention may throw up proposals that he does not endorse. Indeed, he cites liberals who fear a runaway convention that might modify or eliminate protections for individual liberties.[29] But he needs to do a better job of explaining why he would not favor a bare bones constitution that does no more than create structures designed to mimic majoritarian preferences. If majorities must prevail, as Professor Levinson suggests over and over again, why should majorities not triumph when it comes to bills of attainder and the taking of property? As others remarked at the Symposium, Professor Levinson never explains when the majority should prevail and when it ought to be restrained.

V. CONCLUSION

Professor Levinson's book highlights conflicting impulses that lie within most of us. Many of us share the vague notion that the majority ought to prevail. One imagines that "majority rules" is the rule of bowling clubs, horticultural societies, and neighborhood associations. But we also share the countervailing intuition that sometimes (even many times) the majority ought not prevail. If there are other important interests at stake—

29. *Id.* at 174.

individual rights, separation of powers (often necessary to protect individual rights), federalism (often necessary to ensure localized democracy)—the majority should not run roughshod over these principles.

Professor Levinson's book, it seems to me, focuses too narrowly on democracy and fails to consider the many reasons why we might constrain majorities. Hence, many of his arguments against the Constitution's bedrock institutions rest on the notion that democracy must triumph. But if we are to have an American style constitution at all, considerations of democracy simply cannot have a lot of purchase in the context of what ought to be in and out of a constitution. Otherwise we will be left without a constitution.

Ordinary considerations of policy ought to govern the process of what ought to be in a constitution. Does a unicameral assembly lead to better laws? Are we better off reserving certain powers for the states? And, finally, are we better off making constitutional provisions rather difficult to change via constitutional amendments?

When we ask these questions, some of which Professor Levinson takes up, we will not get sidetracked by somewhat unhelpful claims about a need to eliminate barriers to democracy and the accompanying charges that someone is thwarting democratic reform by opposing certain changes to the Constitution. Though Professor Levinson never makes this latter charge, one can hear it coming. "How can you favor the Electoral College? Don't you support democracy?"

Let me end by celebrating the Jeffersonian in Professor Levinson. I agree with Jefferson and Levinson that we ought to be more willing to change our Constitution. I also agree that it is much too difficult to properly change the Constitution via the amendment process.[30] Finally, I agree that we ought to have a constitutional convention. To borrow from Jefferson, "a little [constitutional] rebellion, now and again, is a good thing."[31]

But count me as a decided skeptic of the notion that much of what ails our republic is a lack of democracy or an excessive frustration of majoritarian will. We have decided to have a constitution in part because of a fear of unbridled democracy. We may choose to modify the Constitution for various reasons, but an unflinching adherence to

30. I would also add that it is entirely too easy to change the Constitution via the vote of five Supreme Court Justices.

31. THE POLITICAL WRITINGS OF THOMAS JEFFERSON 79 (Merrill D. Peterson ed., 1993).

democracy can only lead to the conclusion that the only surefire way to get rid of our undemocratic Constitution is to rid ourselves of our Constitution. This cure seems far worse than the disease.