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Sotirios A. Barber

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SANFORD LEVINSON AND THE PROSPECTS FOR CONSTITUTIONAL REFORM

Sotirios A. Barber *

SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNMENT* (2012). Pp. 448. Hardcover \$29.95.

Sanford Levinson's recent book, *Framed: America's 51 Constitutions and the Crisis of Government*, strengthens his reputation as post New Deal America's preeminent advocate of constitutional reform.¹ Actually, that is putting it modestly. In his dust jacket testimonial for the book, Lawrence Lessig calls Levinson not a reformer, but a revolutionary, indeed, "America's greatest revolutionary constitutionalist."² It would be hard to dispute Lessig's assessment, though Levinson himself might, for he hedges on whether revolution is what he seeks. "This book *is* a call, if not to revolution, [then] at least to active citizenship," says Levinson.³ Yet by active citizenship Levinson means active concern not for private goods, but for a healthy democracy, which is a public good, born apparently of a sense of obligation to "our loved ones," to "our fellow members of the American political community," and even to "persons around the world who inevitably pay costs for the dysfunctionalities of American government."⁴ It would be hard to dispute Lessig's appraisal of Levinson because turning Americans toward active citizenship as Levinson conceives it would be revolutionary enough for anyone.

Levinson's appeal to his readers' obligations to others should remind readers of another revolutionary at another time of constitutional dysfunction. I refer to the time when the Articles of Confederation had collapsed and Alexander Hamilton opened *The Federalist* with an appeal to the "patriotism" and the "philanthropy" of his readers and a summons to show the world that mankind was able to rise above "accident and force" and "establish[] good government from reflection and choice."⁵ The most remarkable feature of Levinson's most remarkable book is his effort to place himself and his readers in the positions of the founding fathers and the founding generation.⁶ This is not a book for litigators and judges, actors who take the stage after lawmakers have had their mo-

* Professor of Political Science, University of Notre Dame.

1. SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012).
2. *Id.*, reviewed by Lawrence Lessig, *Editorial Reviews*, AMAZON.COM, <http://www.amazon.com/Framed-Americas-Constitutions-Crisis-Governance/dp/0199890757>.
3. LEVINSON, *supra* note 1, at 391.
4. *See id.*
5. *The Federalist No. 1* (Alexander Hamilton), in *THE FEDERALIST 3* (Jacob E. Cooke ed., 1961).
6. *See* LEVINSON, *supra* note 1, at 75-76, 342-44, 358, 391-92.

ment; it is a book for would-be lawmakers, supreme-law makers. Unfortunately for everyone, too much has changed since the founding, and though lightning could strike, Levinson's ambitions for himself and the country seem altogether beyond the practical imagination.

Levinson thinks about governmental dysfunction in our day as the authors of *The Federalist* thought about it in their day: cultural forces play a part, but so does the nation's arrangement of offices and powers, and it is the latter upon which constitution makers and reformers should concentrate.⁷ Of the latter the most consequential for the quality of governmental action are not the contested standards usually couched in constitutional rights (like "equal protection" and "due process") but the normally uncontroversial structural provisions by which the public recognizes the principal offices and officers of government and their functions and relationships. Examples of the latter would be rules defining the composition, functions, and procedures of the Electoral College, the houses of Congress, and the presidency. Levinson sees the contestable standards of the Bill of Rights and the Civil War Amendments as belonging to the "Constitution of Conversation" and the less controversial structural norms as making up the "Constitution of Settlement."⁸ He concentrates on the latter, the Constitution's "hard-wired structures," because he thinks they are chiefly responsible for the current governmental dysfunction.⁹ This focus on the Constitution's normally uncontroversial provisions pushes problems of constitutional meaning to the background, and Levinson's chief concern in *Framed* is not what the Constitution means, but whether it works—whether it establishes a government that "fulfills the ends to which a society imagines itself devoted."¹⁰ "[T]hese ends are most likely to be set out in a *preamble* to [a] constitution, and that what follows the preamble are best viewed simply as proposed *means* to those ends."¹¹ As means, the constitutional provisions that frame a government "may be necessary," but they can also become "dangerous, if they remain unchanged" when "new circumstances" render them dysfunctional to the ends that justify their existence.¹² In this essentially instrumental or ends-oriented understanding of the Constitution's basic normative character, Levinson follows the authors of *The Federalist*.¹³

Levinson is like the framers in yet another way. He knows that Americans are not so exceptional that they can learn nothing from the experience of other nations. Indeed, it was the histories of "the petty Republics of Greece and Italy" and the American states under the Articles that led Hamilton and Madison to reject the public philosophy of the revolutionary period: the small republic and weak government tenets of classical republicanism.¹⁴ In the months preceding the convening of the Philadelphia convention in May

7. *Id.* at 6-7; *The Federalist No. 7* (James Madison), in *THE FEDERALIST*, *supra* note 5, at 57.

8. LEVINSON, *supra* note 1, at 27.

9. *Id.* at 17, 19-25; *The Federalist No. 83* (Alexander Hamilton), in *THE FEDERALIST*, *supra* note 5, at 578-79.

10. LEVINSON, *supra* note 1, at 8.

11. *Id.*

12. *Id.* at 8, 55, 115-16, 280, 285, 316, 355-57.

13. See generally SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* 35-39 (2007) (interpreting *The Federalist* in an ends-oriented manner).

14. *The Federalist No. 1* (Alexander Hamilton), in *THE FEDERALIST*, *supra* note 5, at 5-6; *The Federalist No. 7* (Alexander Hamilton), in *THE FEDERALIST*, *supra* note 5, at 36-43; *The Federalist No. 9* (Alexander

of 1787, Madison examined almost two hundred books on the constitutions of other nations, ancient and modern, that Jefferson had sent from Paris. The results of Madison's investigation are evident throughout *The Federalist*, especially in numbers eighteen through twenty.¹⁵ Levinson follows suit by examining the constitutions and constitutional experiences of at least twenty foreign nations and the fifty-one American states for clues as to what electoral and decisional structures might work better than America's "broken" systems.¹⁶ Levinson's basic strategy is to compare American institutions with those of other nations, seek the historical reasons behind the former, ask whether those reasons make sense today, survey alternative forms if old forms no longer work, and urge his fellow citizens to consider reform.

An example of Levinson's approach involves Congress's impeachment power. Why, he asks, should we today be limited to impeaching a president for one or another species of "misconduct"?¹⁷ Should not "simple incompetence or bad judgment be enough" to remove a president, say, "through a vote of no confidence"?¹⁸ What discussion of this matter occurred at the Philadelphia convention seemed concerned for preserving presidential independence from overbearing legislatures of the kind that had frequently swamped executive power in the states under the Articles.¹⁹ But, Levinson asks, why should we fear overbearing legislatures in our era of "imperial" and "plebiscitary" executives?²⁰ In answering this question we might look at Germany, Israel, and other parliamentary states for various no-confidence devices. We might also examine the recall provisions of California, Wisconsin, and other American states. The value of executive accountability should impel us to this inquiry. The demanding criteria of the present impeachment process make chances for impeachment and conviction so miniscule that they remove fear of impeachment as a guarantor of presidential accountability.²¹ And election to a second and final term removes fear of the electorate as an instrument of presidential accountability.²² For accountability's sake, therefore, we should either broaden the criteria of impeachment, relax the process, or seek supplementary means, like removal by a no-confidence mechanism of some sort.²³

Another example is the Electoral College. Partly to avoid demagoguery and the tumult of unfiltered popular elections, but mostly to compensate for the public's poor information on aught but local politicians in an age without organized national parties and national news media, the framers invented this unique institution.²⁴ And so the "obvious

Hamilton), in *THE FEDERALIST*, *supra* note 5, at 51-52; *The Federalist No. 15* (Alexander Hamilton), in *THE FEDERALIST*, *supra* note 5, at 91-98; *The Federalist No. 10* (James Madison), in *THE FEDERALIST*, *supra* note 5, at 56-57, 62-64; *The Federalist No. 15* (James Madison), in *THE FEDERALIST*, *supra* note 5, at 91-98; see also HERBERT J. STORING, *What the Anti-Federalists Were For*, in *THE COMPLETE ANTI-FEDERALIST* 1, 15-17 (1981).

15. See *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 69-70 (Marvin Meyers ed., 1973).

16. LEVINSON, *supra* note 1, at 29, 153.

17. *Id.* at 214.

18. *Id.*

19. *Id.* at 214-15.

20. *Id.* at 215.

21. *Id.* at 217.

22. *Id.*

23. *Id.* at 216-18.

24. *Id.* at 178-79.

question,” made more pressing by the vast distance between the independent electors of character that the framers expected and the undistinguished party operatives who presently serve as electors, is why assume that ordinary Americans are less capable to choose a president than members of the Electoral College.²⁵ This question having no compelling answer, Levinson proceeds to describe ways to mitigate the chances for electing candidates who fail to win the popular vote.²⁶

Levinson accords similar treatment to every major constitutional structure, including federalism, the practice of elections, the amending process, the executive veto, and bicameralism at both the national and state levels.²⁷ He describes several of these institutions (the apportionment of the Senate and the Electoral College) as partially the products of compromises at the founding that were either immoral (like slavery)²⁸ or rationally indefensible (like the notion of state autonomy associated with the dominant conception of American federalism).²⁹ His treatment of these topics often rises to courageous heights, as when he urges his readers to reopen Clinton Rossiter’s proposal for a “constitutional dictatorship” on the Roman model,³⁰ and when he effectively calls upon his fellow citizens to bypass an unworkable amending process and “do whatever we can” to change unworkable structures.³¹

One can doubt that *Framed* will have an impact on the thinking of the nation’s politicians, including the politicians who wear judicial robes; Levinson and the scholarly community generally have no way to persuade people who will not listen. With other recent books of its genre,³² *Framed* could, and should, inspire a movement within the field of constitutional thought. The utter hopelessness of constitutional reform is but one expression of the country’s profound need for it, and it is long past time for constitutional scholarship to say so as a field, in the way that the field of biology argues for the theory of evolution over “creation science” and climatology warns of man-made global warming. The question for this essay is whether Levinson can lead such movement. It is not yet clear that he can. Though Levinson is our era’s leading apostle of constitutional reform, he may not appreciate the full implications of his position and the scope of the task ahead.

As we have seen, Levinson is less interested in what the Constitution means than in whether the Constitution works, that is, whether government under the Constitution works to achieve social results that justify his personal fidelity to the Constitution (a question of his first book)³³ and the nation’s fidelity to the Constitution (the question of

25. *Id.* at 181.

26. *Id.* at 179-90.

27. *See generally id.*

28. *Id.* at 36-38, 44, 183-84.

29. *Id.* at 291-92, 302-03, 308-10, 328-29.

30. *Id.* at 370-81.

31. *Id.* at 358.

32. *See* IS THE AMERICAN CONSTITUTION OBSOLETE? (Thomas E. Main ed., 2013); LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011); THOMAS E. MANN & NORMAN J. ORENSTEIN, IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2012); ALAN WOLFE, DOES AMERICAN DEMOCRACY STILL WORK? (2007).

33. SANFORD LEVINSON, CONSTITUTIONAL FAITH 191-94 (1988).

Framed).³⁴ Whether the Constitution works depends on what the Constitution is supposed to do. In *Framed*, Levinson seems to believe that the Constitution is meant to establish a government that makes reasonable progress toward constitutional ends (the common defense, the general welfare, etc.) in a way that can regularly secure the approval of the nation's people. This position yields a two-part test of constitutional success: a democratic test and a substantive test. Constitutional government must do the right thing and regularly secure popular approval for doing the right thing. Each part of this test marks a necessary condition for attributing success. Fail either part of the test, and constitutional government itself fails. Levinson's second monograph (to which *Framed* is a sequel)³⁵ found that the Constitution failed the democratic test, and one would have expected his third monograph to ask the substantive question: is constitutional government in America, democratic or not, progressing toward a social state of affairs that reasonable people would find attractive?

Levinson seems to know that constitutional theorists must eventually address this last question; they must elaborate and defend a substantive theory of constitutional ends. Such a theory would enable Levinson to conclude, for example, that the rise of the Religious Right, the continuing segregation of the public schools, the return of racially motivated voter suppression, legalized bribery of elected politicians, the widening income gap and its negative consequences for upward mobility, and the failure to face the challenge of global warming all undermine essential constitutional commitments like equal opportunity and a secular public reasonableness. Though Levinson's ends-oriented approach to the Constitution invites conclusions of this kind, inherited intellectual baggage holds him back.

That Levinson recognizes the need for a substantive theory of constitutional ends is evident in his criticism of David Mayhew's assessment of divided government.³⁶ Mayhew and others argue that the volume of congressional output during periods of divided government (different parties occupying the presidency and at least one house of Congress) undermines the widespread view that the multiple veto points of the American system make for dysfunctional government.³⁷ Levinson responds that one cannot judge the government's performance simply by comparing the number of laws passed under different party alignments; one must also assess the quality of those acts as compared to alternatives that Congress rejected or failed to consider.³⁸ Levinson's best example is the prescription drug benefit that President Bush pushed through Congress in 2004.³⁹ Levinson refuses to count this measure as a success without first deciding whether it adequately addresses the needs of the elderly or "whether it [has] operated primarily as a gigantic

34. See generally LEVINSON, *supra* note 1.

35. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 25-139 (2006).

36. *Id.* at 234-36.

37. DAVID MAYHEW, *PARTIES AND POLICIES: HOW THE AMERICAN GOVERNMENT WORKS* 94-136 (2008); R. Shep Melnick, *Does the Constitution Encourage Gridlock*, in *IS THE AMERICAN CONSTITUTION OBSOLETE?*, *supra* note 32, at 135, 139-142.

38. See LEVINSON, *supra* note 1, at 234-35.

39. Sanford Levinson, *Thinking about Gridlock*, in *IS THE AMERICAN CONSTITUTION OBSOLETE?*, *supra* note 32, at 121, 124.

corporate welfare program to politically well-connected ‘big pharma.’”⁴⁰ Mere passage of the bill is a scientific question; chalk one up for Congress. Assessing the act is a value judgment “that doesn’t fit easily with the notion of value-free social science” that Mayhew represents.⁴¹ Levinson thus recognizes that talk of constitutional dysfunction and reform cannot rationally occur within the value-free metaethics of mainstream social science.

Yet inconsistency with normative constitutional discourse is hardly enough to sink a given metaethics, for normative discourse may proceed from a false assumption, the possibility of approachable moral truth. For Levinson’s enterprise to be intellectually meaningful, he should confront the central tenet of value-free social science, namely, that reason cannot decide between conflicting value judgments or that normative propositions lack truth value. Only if value judgments can be true in some objective sense can Levinson say that corporate welfare for “big pharma” at the expense of the elderly should not count as a legislative success. But Levinson seems unprepared to say that welfare for “big pharma” at the elders’ expense is wrong. He says instead, in standard value-free fashion, that whether legislation meets the nation’s needs “requires the application of one’s own political views.”⁴² Value free or value laden, this statement is wrong as a matter of standard logic. Standing alone, “one’s own political views” cannot be a reason for concluding that something is right or wrong. Consider two different propositions: (1) “I feel that shortchanging the elderly to benefit big pharma is wrong.” and (2) “Shortchanging the elderly to benefit ‘big pharma’ is wrong.” The first proposition describes “one’s own political views” and, as such, invites no quarrel (except maybe from a psychiatrist who believes the speaker is repressing his true feelings). My personal political view would supply no basis for denying the fact that you disagreed. The second proposition, shortchanging the elderly is wrong, purports to describe not just my belief, but a fact independent of my belief; it claims, in effect, that something is wrong and would be wrong whether I agreed or not. The second proposition thus purports to describe a moral reality; and like all accounts of reality, it calls for evidence in its defense.

By evidence I mean not statements of what we believe, but evidence of what actually is—or at least what all rational creatures similarly situated would believe if they could think straight. That we have good reason to believe such evidence exists is the now the well-defended claim of a major school of present-day moral philosophy, Cornell or “technical” moral realism.⁴³ Though moral realism has its critics, its status as a leading school of contemporary metaethics is sufficient to impart intellectual respectability to socially relevant constitutional commentary of the kind that Levinson’s writings represent. By ignoring this development, Levinson straddles fences and lands in awkward places. Despite his criticism of value-free social science, he frames value words like

40. *Id.*

41. *Id.*

42. LEVINSON, *supra* note 1, at 235.

43. For an overview of moral realism tailored for legal scholars, see Michael S. Moore, *Moral Reality*, 1982 WIS. L. REV. 1061 (1982); Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992). See also DAVID O. BRINK, *MORAL REALISM AND THE FOUNDATION OF ETHICS* (1989); RUSS SHAFER-LANDAU, *MORAL REALISM: A DEFENCE* (2003).

good, bad, public interest, and virtue in scare quotes throughout the book⁴⁴ At one point he recognizes that while presidents and other administrators must have authority that the law cannot fully structure, this does not mean “no difference” between presidents who exercise discretion and “iconic twentieth-century dictators like Adolph Hitler and Josef Stalin.”⁴⁵ Yet at another point Levinson wonders whether there is “a truly shared baseline for determining what is ‘tyrannical’ or ‘non-tyrannical’”⁴⁶ At one point in his discussion of defensible compromises and “rotten . . . compromise[s]”⁴⁷ he approves Lincoln’s refusal to compromise on slavery in the territories.⁴⁸ At another point, however, he defends Stephen Douglas’s criticism of Lincoln for promising that as president he would appoint to the Supreme Court Republicans who opposed slavery in the territories.⁴⁹ Douglas called Lincoln’s promise “a proposition to make [the Supreme Court] the corrupt, unscrupulous tool of a political party.”⁵⁰ Levinson further says that whatever one thinks of Douglas’s position on slavery, his challenge to Lincoln was “a very powerful one.”⁵¹ Yet the power of Douglas’s challenge is far from clear. It might have been a powerful challenge had slavery’s extension been a question about which judges should have remained neutral. But Lincoln condemned neutrality on this question; indeed, non-neutrality on this question was the leading point of Lincoln’s political career.

By implicitly questioning Lincoln on this point, one wonders whether Levinson believes that judges should remain neutral on any and all moral questions, a proposition no one can believe because of its self-contradictory nature. Lincoln believed the Republicans were right about slavery not because they were Republicans, but because slavery was wrong—that no reflective person would govern another like himself without the other’s consent, and that this made slavery wrong. If judges should remain neutral on a given moral question just because political parties line up differently on the question, then it is hard to see how constitutional scholars could, in reason’s name, condemn a policy of exploiting old folks for big pharma’s benefit, not to mention other current wrongs like the income gap that is killing upward mobility; legalized bribery that has substituted oligarchic calculation for what was left of public reason; global warming that will kill our agriculture, our coasts, our economy, and our people – all in the silly name of “limited government,” which no one really believes in when it comes to ends that they want government to pursue.⁵²

If Levinson thinks reason counsels detachment, neutrality, or non-partisanship on all moral questions, then one must wonder why he wrote *Framed*. Despite himself, Levinson appreciates this point. When he doubts that there is a “shared baseline” for distin-

44. See, e.g., LEVINSON, *supra* note 1, at 7, 80, 108, 114, 145, 155, 166.

45. *Id.* at 373.

46. *Id.* at 326.

47. *Id.* at 44.

48. *Id.* at 45.

49. *Id.* at 260-61.

50. *Id.*

51. *Id.* at 261.

52. See SOTIRIOS A. BARBER, WELFARE AND THE CONSTITUTION, 106-17 (2003) (arguing that limited government ought to mean government limited chiefly by ends (security, prosperity, or comprehensively, the people’s welfare) that can be defended publically on the basis of common human experiences, not privileged “revelations” or self-serving “interests”).

guishing tyranny from non-tyranny, he recognizes that the (alleged) absence of such a baseline “raises yet other problems when trying to assess *any* political institutions for their propensity to achieve the ‘public good.’”⁵³ Indeed. But what is *Framed* if not an assessment of our institutions as instrumental to the public good? The “other problems when trying to assess *any* political institutions” include the philosophic status of value judgments.⁵⁴ Since Levinson is undecided about whether value judgments have truth value, should he not have resolved this issue for himself before submitting *Framed* to his publisher?

Levinson’s problem with value judgments also affects his understanding of the scope of constitutional reform. He clearly wants to emphasize constitutional ends and to assess institutional performance in terms of constitutional ends.⁵⁵ At the same time, he conceives constitutional ends as “essentially contested concept[s],” by which he means terms about which “there [are] no single widely shared notion[s]” beyond the belief that they are “good thing[s].”⁵⁶ And though he says at one point that these terms invite “endless debate,” he is not willing to say that they are meaningless or refer to no part of reality.⁵⁷ On the contrary, he notes that “[e]veryone agrees that justice is important, and almost everyone in the modern world applauds the notion of democracy.”⁵⁸ He also mentions that “millions (including some famous philosophers) believe in the reality of the common good or justice.”⁵⁹ Combining these disparate thoughts, in a way that Levinson never gets around to, would support Ronald Dworkin’s account of good-faith moral disputation as back-and-forth testing of competing “conceptions” of general “concepts” in an effort to rise above initial prejudices and arrive at “right answers.”⁶⁰ Or the effort might support a realist account of moral disputation as a dialectical attempt to substitute truth for opinion about the demands of justice and other goods, conceived as real goods, about which anyone can err.⁶¹ In either case, the disputants-in-good-faith would display a sense of their fallibility and a desire not to assert themselves, but to do the right thing.

A non-skeptical concern for constitutional ends thus segues into a concern for the attitudes and the character of a people. As I noted at the beginning of this essay, Levinson himself concludes *Framed* with a call for what amounts to the patriotism and philanthropy of his readers that is identical in substance to the opening summons of *The Federalist*.⁶² Yet Levinson, again like *The Federalist*, seems to think that the requisite attitudes and dispositions will simply materialize and maintain themselves as byproducts of institutional performance, not as the results of deliberate governmental efforts. Notwithstanding the vaunted ends-orientation of *Framed*, it devotes far more space to the undemocratic characteristics of America’s governments than to the quality of their policy outputs.

53. LEVINSON, *supra* note 1, at 326.

54. *Id.*

55. *Id.* at 8, 14-15, 55-57, 59, 114-16, 285, 316, 355-57.

56. *Id.* at 82.

57. *Id.* at 58.

58. *Id.*

59. *Id.* at 93.

60. RONALD DWORIN, TAKING RIGHTS SERIOUSLY 104-05, 134-35 (1977).

61. SOTIRIOS A. BARBER, THE CONSTITUTION OF JUDICIAL POWER 60-61, 213-15 (1993).

62. LEVINSON, *supra* note 1, at 391.

While *Framed* is truly “both wider and deeper” than *Our Undemocratic Constitution*, both books are part of the same discussion.⁶³ Both assume that a government that is more democratic and more efficient will do a better job of approximating constitutional ends—a better job of improving the lives of more Americans in ways that can earn the admiration of Jefferson’s “candid world.” Both books culminate in the call for a national constitutional convention. *Framed* proposes a two-year, plenary constitutional convention to conduct a “comprehensive overview” of the nation’s constitution and propose needed reforms.⁶⁴ Delegates would be selected by lottery from each state proportionate to the state’s population, in order to prevent a takeover of the convention by well-financed “single-issue zealots.”⁶⁵ To make service by “the less well off” possible, delegates would receive the salary of a Supreme Court Justice or a U.S. senator, together with a budget to enable them to hold hearings “all over the United States and the world.”⁶⁶

Levinson says “probably most” readers will reject this proposal.⁶⁷ This is surely the grandmother of all understatements. For the very convening of such a convention would implicitly abolish the states as what the right-wing Justices of the Rehnquist and Roberts Courts have called “separate and independent sovereigns.”⁶⁸ Since there is no chance of Congress calling such a convention, a convention would have to be called by some process external to Article V and paid for by some process external to congressional appropriations. Levinson is talking revolution here, pure and simple, which modern technology and economic interdependency would make far less feasible and bearable than the revolutions of the 18th century.

A final problem with Levinson’s position is his faith that “ordinary Americans” are up to the intellectual and moral exertions and the material sacrifices that wholesale constitutional reform would require in an era of ungovernable technological, economic, and social change.⁶⁹ One wonders what on earth might support this faith. What makes Levinson think that “ordinary Americans” care enough for their fellow citizens and their impact on the world—like their impact on oil consumption and greenhouse emissions? What makes him think they can possibly become sufficiently informed about modern government and a high-tech, global economy with instant global communication, whose channels are open to virtually everyone with something to say, however false and destructive? How could Levinson possibly respond to Madison’s argument in the 49th Federalist that trusting constitutional repair to popular majorities is trusting “the spirit of pre-existing parties” and the “passions . . . of the public” in a process that should be governed by “the reason of the public alone”⁷⁰

Levinson’s faith is all the more puzzling in view of his singling out Alan Wolfe as the nation’s leading public intellectual.⁷¹ Given Wolfe’s assessment of the competence

63. *Id.* at 396.

64. *Id.* at 391.

65. *Id.* at 391-92.

66. *Id.* at 391.

67. *Id.* at 392.

68. *See, e.g., Nat’l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603 (2012).

69. LEVINSON, *supra* note 1, at 392.

70. *The Federalist No. 49* (Alexander Hamilton), in *THE FEDERALIST*, *supra* note 5, at 342-43.

71. LEVINSON, *supra* note 1, at 399.

and the attitude of the American public—partly extreme, partly cynical about and indifferent to politics; uninformed; easily manipulated by ruthlessly determined ideologues “who appeal to their vanity rather than speak to their needs”; “uneas[y] with the process of democracy itself”; and unlikely to “demand[] reforms that would restore their faith in democracy”⁷²—one can wonder how Levinson can regard Wolfe so highly and still have faith that a movement of “ordinary Americans” can affect any meaningful constitutional reform.

Levinson thus leaves the reader with questions about his understanding of the Constitution as a whole, his view of the meaningfulness of constitutional values, how his reform proposal might get off the ground, and his faith in the American people. He also leaves the reader with a sense that *Framed* is something of a career-culminating *magnum opus*. Constitutionlists everywhere should hope that this is not so.

72. WOLFE, *supra* note 32, at 24-49.