

Unsettling the Settled: Challenging the Great and Not-So-Great Compromises in the Constitution

FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE.

By Sanford Levinson. New York, New York: Oxford University Press, 2012. 448 pages. \$29.95.

Reviewed by Robert F. Williams*

Sandy Levinson has, once again, written an extremely interesting and provocative book. It follows rather directly from his 2006 *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*,¹ continuing his “loving criticism”² of the American federal Constitution. Levinson’s overall thesis is that the United States Constitution was framed in an atmosphere of national crisis, resulting in a number of compromises as to governmental structures that were understandable at the time but which may have become dysfunctional and in need of change after several centuries of operation.³ He points to the tremendous growth of the American territory and population, together with the unanticipated rise of political parties, as providing a partial explanation for the current “crisis in governance” that he describes in the book.⁴ He contends that we are trapped, or “framed,” by the view that federal governmental structures that are entrenched in the Constitution cannot (and should not) be changed.⁵ He asks “whether fears that made sense in 1787 need control us today.”⁶

Levinson reviews the “crisis in governance” at both the national and state levels. He describes the “gridlock” in Washington, D.C., in areas such as major policy initiatives, approval of judicial nominations, ratification of

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

2. SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 32 (2012) [hereinafter LEVINSON, *FRAMED*]; see also Sanford Levinson, *Introduction: Imperfection and Amendability*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 3* (Sanford Levinson ed., 1995) [hereinafter Levinson, *Introduction*] (contending that the Constitution is imperfect).

3. LEVINSON, *FRAMED*, *supra* note 2, at 12, 34–40.

4. *Id.* at 7, 9.

5. *Id.* at 8.

6. *Id.* at 215.

treaties, etc.⁷ Further, he reminds us of the dysfunction and possible “ungovernability” of states like California.⁸ He acknowledges that not all problems arise from the provisions of the formal federal and state constitutions themselves, but contends that the “settled” provisions of these constitutions may, in fact, be the root of a number of these problems.⁹

This book, as Professor Levinson proudly notes, is unusual for several reasons. First, its focus is on the provisions of the federal Constitution that are “settled” and therefore not subject to academic debate or analysis, or to judicial interpretation and litigation.¹⁰ Almost the entire focus of American constitutional law, in both political science and law, is on the great questions of interpretation of the Constitution, with very little attention to its clear provisions, such as the date on which the President will be inaugurated. Levinson refers to these “settled” (and, for the most part, unquestioned and accepted) provisions as the “Constitution of Settlement.”¹¹ By contrast, he refers to the open-textured provisions of the Constitution, subject to scholarly debate and judicial interpretation, as the “Constitution of Conversation.”¹² He breaks with almost all American constitutional law scholarship by only considering the former:

This book is far more concerned with analogues to the Inauguration Day Clause than to the Equal Protection Clause. Though their meaning is indisputable, there is nothing trivial about such clauses. In fact, they may better explain the failures of our political system and fears about governability than the “magnificent generalities” explain its successes. . . .

. . . .

. . . Indeed, this book is predicated on the proposition that almost *all* of the Constitution of Settlement is very much worth talking about by anyone interested in the practicalities of American government[.] However, the nature of the discourse about the Constitution of Settlement is quite different from that generated by the Constitution of Conversation. The latter involves constitutional *meaning*; the former involves the *wisdom* of clear constitutional commands.¹³

Secondly, Professor Levinson includes in his analysis recurring references to the constitutions of the fifty American *states*. Today, most “constitutional law” study and scholarship retains an exclusive focus on the

7. *Id.* at 1–5.

8. *Id.* at 4–5.

9. *Id.* at 5–7 (“But the formalities can make a real difference.”).

10. *Id.* at 19, 25–26.

11. *Id.* at 19.

12. *Id.*; *see id.* at 6 (“This book is very much about constitutional *structures*, and not, for example, about constitutional *rights*.”).

13. *Id.* at 19, 23; *see also id.* at 354 (“One lesson is that constitutions of settlement do not necessarily settle, once and for all, the issue under examination.”); *id.* at 146–47, 357–58 (contending that the Constitution cannot and should not “settle” issues for every generation).

federal Constitution.¹⁴ Further, he regularly refers to the constitutions of other countries as shedding light on choices reflected in our federal Constitution, the most obvious being their use of a parliamentary rather than a presidential system.

This book is extremely important and useful for a variety of reasons. First, it provides a clear and understandable analysis of the original reasons (often compromises) for many of the structural and seemingly noncontroversial provisions of the Constitution. Levinson refers to the *Federalist Papers* (which often adverted to *state* constitutions), the arguments of the Anti-Federalists, and the debates at the state ratifying conventions. Then, he places these provisions in modern context. He describes the current serious defects in many of the structural arrangements by reference to actual, fairly recent events, as well as to interesting and troubling hypotheticals about things that might happen in the future. Levinson has therefore provided a fascinating review of the theory behind and the actual operation of our Constitution of Settlement.

Levinson dissects most of the compromises in the original Constitution arising from the familiar small-state/large-state clash as well as the North/South, slave-state/free-state conflict. In a chapter on compromise itself (Chapter 2), Levinson notes that compromise is necessary in most aspects of life and is certainly necessary, as Edmund Burke, James Madison, and others recognized, in constitution making, both federal and state.¹⁵ But some compromises are so “rotten”¹⁶ as “to establish or maintain an inhuman regime . . . of cruelty and humiliation, that is, a regime that does not treat humans as humans.”¹⁷ Levinson questions whether the constitutional compromises surrounding slavery were “worth it,” particularly from the point of view of the slaves themselves.¹⁸ Most people assume that we would not have had a federal Constitution, at least not in 1787, without (1) the “Great Compromise” where the House of Representatives was based on population (including the “3/5 Compromise” which gave the slave states greater representation in the House; that influence spilled over into the Electoral College, thereby gaining a greater say for the southern states in who would become President and, among other things, appoint Supreme Court Justices)¹⁹ and the Senate was based on equal votes for the states; and (2) the continuation of slavery.²⁰ The slavery question is a very important question,

14. LEVINSON, FRAMED, *supra* note 2, at 28–29; ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 1 (2009); Sanford Levinson, *America’s “Other Constitutions”*: The Importance of State Constitutions for Our Law and Politics, 45 TULSA L. REV. 813, 813 (2010).

15. LEVINSON, FRAMED, *supra* note 2, at 33, 40.

16. *Id.* at 43 (citing AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES (2009)).

17. *Id.* at 44 (quoting MARGALIT, *supra* note 16, at 2).

18. *Id.* at 51.

19. *Id.* at 37–38.

20. *Id.* at 38–40.

albeit academic today. But even asking the question may move readers to let their reverence and veneration for the federal Constitution slip a bit to consider whether the current dysfunction of some of these compromise provisions is “worth it” today.

Levinson shines his analytical light on, among other “settled” provisions, the clauses specifying the date of inauguration,²¹ state control of elections,²² eligibility for public office,²³ bicameralism (with particular criticism of the Senate),²⁴ the presidential veto,²⁵ the Electoral College,²⁶ the presidential as opposed to parliamentary system,²⁷ the unitary Executive²⁸—including powers such as pardoning,²⁹ making treaties,³⁰ etc.—length of presidential terms,³¹ the role of the Vice President,³² impeachment (only for misconduct and not for incompetence),³³ divided government,³⁴ the independent judiciary³⁵ (including methods of selection and judicial review), federalism,³⁶ methods of amendment,³⁷ and emergency powers.³⁸ It is the *wisdom* of these provisions today in which Professor Levinson is interested. He admits that readers might disagree with him as to the actual negative consequences of these provisions (“*empirical* assumptions”), or whether these consequences are “desirable or undesirable” (“*normative* arguments”).³⁹

Surprisingly, a number of these “settled” provisions turn out to be problematic under Levinson’s critical eye. Just a few examples will indicate the fresh look that he provides for many of the provisions we all take for granted. For example, returning to the Inauguration Day Clause, this results in a several-month “lame duck” period for either a defeated president or one who has served his or her second term—longer than the same period for state governors.⁴⁰ During this period presidents have issued many questionable

21. *Id.* at 22–24.

22. *Id.* at 100–02.

23. *Id.* at 117–19.

24. *Id.* at 142–44.

25. *Id.* at 164–73.

26. *Id.* at 178–83.

27. *Id.* at 175–78.

28. *Id.* at 239–44.

29. *Id.* at 194–201.

30. *Id.* at 201–02.

31. *Id.* at 209–13.

32. *Id.* at 221–28.

33. *Id.* at 213–19.

34. *Id.* at 229–33.

35. *Id.* at 245–48.

36. *Id.* ch. 14.

37. *Id.* at 331–36.

38. *Id.* at 208, 374–83.

39. *Id.* at 7.

40. *Id.* at 22–25.

pardons of convicted criminals, initiated substantial administrative rule-making processes or repeals, and taken a number of other actions which do not take place in, for example, a number of European countries where transitions of power are quite swift.⁴¹ The American bicameral system, with each house having an absolute veto over lawmaking, is one of the undemocratic features of the United States Constitution that has already been pointed out by Professor Levinson.⁴² This situation is exacerbated by the structure of the Senate, which with equal votes for each state, permits “the smallest twenty-six states, which together have approximately 17 percent of the national population, [to] elect a majority of the Senate.”⁴³ The presidential veto, of course, is also undemocratic, and Levinson criticizes it for permitting the veto of legislation enacted by both houses based on the policy preference of the President rather than only on constitutional considerations.⁴⁴ He contrasts the federal Constitution’s single Executive official, the President, with a number of the state constitutions that provide for a “plural” executive, where a number of officers other than the Governor are elected on a statewide basis.⁴⁵ He notes that “forty-eight of the fifty states do *not* give their governors the authority to name the attorney general, perhaps the most important single executive branch official in terms of providing potential oversight of the executive branch with regard to criminal conduct.”⁴⁶ Levinson also points out that the federal unitary Executive, which gives the President “the power to appoint all executive branch officials,” “lends a winner-take-all partisan character to presidential elections.”⁴⁷ Many of us recognize this when we tell our friends that it is important not simply to vote for a President whom one likes, but to remember that the President who is elected will also likely appoint members of his or her party all the way down to postmaster.

The much-maligned Electoral College, of course, does not escape Levinson’s criticism, where he describes the process of choosing the President as “quite [a] spectacularly different process [than that for choosing] any state governor, all of whom are elected in statewide popular elections.”⁴⁸ Levinson notes further the Electoral College’s potential for nonmajority-elected presidents, the possibility of “so-called faithless electors who . . . reject their party’s candidate in favor of their own idiosyncratic choices,” and the “winner-take-all” problem of state electors and “the one state, one vote

41. *Id.* at 24–25.

42. LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 1, at 30–38.

43. LEVINSON, FRAMED, *supra* note 2, at 150.

44. *Id.* at 164.

45. *Id.* at 240.

46. *Id.*

47. *Id.* at 243.

48. *Id.* at 178.

process by which the House breaks deadlocks.”⁴⁹ The conclusion that Professor Levinson reaches concerning the Electoral College represents a major theme in this book:

At the end of the day, the electoral college, perhaps like the specific day the Constitution specifies for the inauguration of a new president, simply exemplifies the importance of *path dependence*, the inertial force possessed by past decisions whether or not we believe they make much sense for us today. One can well doubt that “We the People” would maintain the electoral college if the U.S. Constitution were as easy to amend as most state constitutions. That it persists tells us almost nothing about actual public opinion and much about the difficulty of formal amendment.⁵⁰

The federal Constitution has, of course, endured with very few amendments since its ratification in 1789. That record, Levinson notes, is far beyond the average length of duration for national constitutions.⁵¹ This is a consequence of the reality that the federal Constitution is the most difficult in the world to amend, let alone revise, and is generally a revered and venerated document.⁵² The “last truly significant change to the Constitution” was in 1951, limiting presidents to two terms.⁵³ A constitution under which formal change is extremely difficult leads to more change by interpretative methods, either by the judiciary or through “constitutional moments”⁵⁴ accomplished by the Legislative and Executive Branches, with the possible acquiescence of the judiciary. State constitutions, by contrast, are much easier to amend and therefore, as Dr. Alan Tarr has observed, state constitutional change has occurred more often (*too* often, some would say) through formal amendment and revision mechanisms.⁵⁵

Professor Levinson points out that the evolution of the structures of state government, made possible through the availability of formal change, has permitted the states to reevaluate, modify, and improve their governmental structures.⁵⁶ As Dr. John Dinan has noted, this availability of

49. *Id.* at 188. Some states have taken it upon themselves to try to deal with the “non-majority elected president” problem. See *888-Word Interstate Compact*, NAT’L POPULAR VOTE, <http://www.nationalpopularvote.com/pages/misc/888wordcompact.php>. See generally Robert W. Bennett, *Possibilities and Problems in the National Popular Vote Movement*, 7 ELECTION L.J. 181 (2008) (reviewing JOHN R. KOZA ET AL., *EVERY VOTE EQUAL* (1 ed., 8th prtg. 2006), and assessing the “State-Based Plan for Electing the President by National Popular Vote”).

50. LEVINSON, *FRAMED*, *supra* note 2, at 190; see also *id.* at 127 (describing Madison’s lack of confidence in the ability of ordinary Americans to “exercise genuine political autonomy”).

51. *Id.* at 335–37 (citing ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009)).

52. *Id.*

53. *Id.* at 210. Levinson notes that this settled provision bars even exceptional presidents from serving more than two terms. *Id.* at 212.

54. *Id.* at 339.

55. G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 23–28 (1998); WILLIAMS, *supra* note 14, at 25, 82–83.

56. LEVINSON, *FRAMED*, *supra* note 2, at 336.

formal change enabled the people of the states to have an actual constitutional conversation about unsettling governmental structures that had been seemingly settled by earlier generations.⁵⁷ This kind of conversation has been virtually impossible, with minor exceptions, at the federal level.

Some caution, however, should be exercised in looking to state constitutional arrangements as models for our federal Constitution.⁵⁸ This is because the American state constitutions function within the overall federal constitutional structure, and are to some extent limited by that structure. Furthermore, state constitutions operate with respect to subnational polities, rather than a single national polity. As a consequence, at least in the United States, state constitutions' origins, functions, form, and substance all differ from the federal model.⁵⁹ American state constitutions draw their essence from the people themselves, who exercise forms of popular sovereignty in adopting, amending, and revising state constitutions, and further in actually participating in constitutional government through their approval at the polls of matters such as the assumption of debt and the approval of gambling programs.⁶⁰ Further, the voices of nonelite people such as women,⁶¹ African Americans, Native Americans, Latinos, plaintiffs, union members, and prison reformers, as well as those of opponents of abortion and same-sex marriage have been heard, and sometimes have prevailed, in the processes of state constitutional change.⁶²

State constitutions, in contrast to the federal Constitution's *grants* of power to a limited federal government (albeit one expanded through judicial decision and the practice of "constitutional moments"), function primarily to *limit* the residual power the states retained at the time the United States Constitution was ratified.⁶³ This different function leads to a differing form and content for the state constitutions. For example, they contain long articles on taxation and finance, education, natural resources, etc.,⁶⁴ which are the matters that were retained for state competency. In addition, the state constitutions contain much in the way of policy pronouncements that could be relegated to ordinary statutes within the competence of state legislatures. Consequently, care should be taken when looking to state constitutions as substantive models for the federal Constitution. Further, the matters that will

57. JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 5 (2006) ("[S]tate constitution makers' departures from the federal model are primarily attributable to the flexibility of state amendment processes and the resulting opportunities to benefit from institutional knowledge and experience throughout American history . . ."); WILLIAMS, *supra* note 14, at 25, 82–83; LEVINSON, *FRAMED*, *supra* note 2, at 8, 14.

58. LEVINSON, *FRAMED*, *supra* note 2, at 14, 26.

59. WILLIAMS, *supra* note 14, at 15–36.

60. *Id.* at 31.

61. *Id.* at 34–36.

62. *Id.* at 34–35.

63. *Id.* at 27, 249–55.

64. *See, e.g.*, TEX. CONST. art. VII ("Education"); TEX. CONST. art. VIII ("Taxation and Revenue").

arise in any process of amendment or revision of the federal Constitution will differ materially from those that will arise in the parallel state constitutional processes.⁶⁵

Having issued that note of caution, however, state constitutional arrangements (which are much less “settled” than federal constitutional arrangements) such as an elected judiciary,⁶⁶ term limits, a plural executive, and direct democracy, are matters that, despite one’s view of them as policy matters, do not seem dependent on the differences between state and federal constitutions. This is particularly true for the mechanisms of change, through amendment or revision, of state constitutions. Those do not necessarily have to differ because they are subnational rather than national.⁶⁷ Of course one of the criticisms of state constitutions is that they are too easy to amend or revise.⁶⁸

There is always a tension in constitutions between rigidity and ease of change. Thomas Jefferson supported the idea of easily amended constitutions with review every generation.⁶⁹ James Madison, by contrast, supported more permanent constitutions.⁷⁰ As I have said, “If state constitutional revision is too difficult, constitutionalism overwhelms democracy; if it is too easy, democracy overwhelms constitutionalism. It is difficult to achieve exactly the right balance, and this point might change over time.”⁷¹ If many states (and they vary significantly) are too far toward the democratic end of the continuum, then it seems like the federal constitutional system (at least according to Article V) may be too far toward the “constitutionalism” end.

65. See generally 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM (G. Alan Tarr & Robert F. Williams eds., 2006) (describing how traditionally, amendments to state constitutions concern local issues like state revenue rather than national issues). However, recently a number of *national* issues such as same-sex marriage, labor law, health reform, and others have been reflected in *state* constitutional amendments placed on the ballot in some states. Robert F. Williams, *Why State Constitutions Matter*, 45 NEW ENG. L. REV. 901, 903 (2011).

66. WILLIAMS, *supra* note 14, at 290.

67. But see Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1599–600 (2010) (contending that substate constitutions tend to be easier to amend than federal constitutions).

68. See, e.g., James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 818–22 (1992) (enumerating a number of apparently frivolous state constitutional provisions and linking their existence with the relative ease of amending state constitutions). But see WILLIAMS, *supra* note 14, at 25 (“Because of their relative ease of amendment, state constitutions could be modified through trial and error over the years concerning matters that, for all practical purposes, remain frozen in the federal Constitution.”).

69. LEVINSON, FRAMED, *supra* note 2, at 61; WILLIAMS, *supra* note 14, at 363. Levinson reveals that he has discovered his “inner Jefferson.” LEVINSON, FRAMED, *supra* note 2, at 396.

70. WILLIAMS, *supra* note 14, at 363.

71. *Id.*

In the face of the reality that the federal Constitution is virtually unamendable, because of the restrictive requirements of Article V,⁷² Professor Levinson makes a radical proposal: Do not follow Article V!⁷³ He invokes the crisis atmosphere of the 1780s, analogous to today's crisis in governance at the state and federal levels, which of course led the Framers of the federal Constitution to engage in a "runaway constitutional convention" in violation of the instructions from Congress and the amendment mechanisms of the Articles of Confederation.⁷⁴ He describes the issue facing the Framers in 1787:

The fate of the country was at stake, and one should hardly feel obliged to conform to a provision of the existing constitution [the requirement of unanimity to amend the Articles] that if followed in its clear, unequivocal, and semantically undebatable meaning would doom the enterprise of what Madison and others viewed as absolutely necessary constitutional revision.⁷⁵

Again, what interests Levinson is not debate over the *meaning* of the Constitution's settled provisions but rather an assessment of their *wisdom* in current times. If the consequences of these settled provisions are bad enough, he suggests a process to change them even if it defies the seemingly settled provisions of Article V. This is serious stuff.

An instructive process took place at the state constitutional level where conflicts arose over whether the rules laid down in the first state constitutions for their amendment and revision actually had to be followed, or rather whether the people in the exercise of their revolutionary popular sovereignty could make extralegal but binding changes in their constitutions.⁷⁶ Dr. Christian Fritz explained:

All Americans agreed that the people created government. They differed over when that collective sovereign might be recognized as having exercised its authority. Some recognized a multitude of ways, none of them exclusive, in which the people could express their will. In their expansive view, the people could use the formal procedures articulated in a constitution to amend or dissolve that document. Such procedures were not indispensable and the people's will could be recognized in other ways. On the other hand, some took a more

72. LEVINSON, FRAMED, *supra* note 2, at 11. Actually, the provisions of Article V are a bit less clear than most of us have thought. *See generally* RESPONDING TO IMPERFECTION, *supra* note 2 (discussing the difficulties with the interpretation of Article V in a number of essays). Also, Levinson is not alone in suggesting that the formal requirements of Article V be "side-stepped." LEVINSON, FRAMED, *supra* note 2, at 343–44.

73. LEVINSON, FRAMED, *supra* note 2, at 343–44.

74. *Id.* at 347–58.

75. *Id.* at 354.

76. *See generally* CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR (2008) (tracing America's post-Revolution political and constitutional history and the struggle to adopt and implement a collective sovereignty by "the people").

constrained view. For them the sovereign spoke only in conformity with procedures it set forth in advance. That was the exclusive way in which the sovereign's voice would be recognized and heard.

The implications of this divide about when the sovereign had spoken were significant. For instance, one implication was whether the people of a past generation could bind a future one. If the people were, in fact, sovereign, their hands could not be tied and their sovereignty limited by an earlier generation. During this period, many Americans believed that a constitution's expression of fundamental rights and requirements for revisions could not dictate those terms to future generations. The unborn sovereign people of a later period were at liberty—just as the revolutionary generation had been—to express their sovereign will. Thus, each generation of American sovereigns would govern in its own way.⁷⁷

The necessity of following the “rules laid down” ultimately has won out at the state constitutional level, but there were a number of examples of extralegal successes.⁷⁸ At the federal level as well, obedience to the rules laid down in Article V has been assumed; that point of view is rejected here by Professor Levinson.

Levinson proposes an unlimited federal constitutional convention, with the delegates chosen at random and compensated adequately, with their proposed revisions being submitted to the people at a national referendum.⁷⁹ A similar, although not extralegal (because it was a proposed two-step process, with authorization first provided through an amendment to the state constitution), approach was recently explored in California, but had to be abandoned when fundraising failed to support the necessary steps of amending the state constitution to implement the idea.⁸⁰

Levinson points out that the Constitutional Convention's secrecy made it easier to reach compromise than it would be now, when instant news coverage would bring instant pressure and compromise has become less supported.⁸¹ Also, compromise must often be accomplished in “real time,”⁸² with the actors being able to assess the actual partisan impact of their concessions. For this reason, Levinson wisely suggests a Rawlsian “veil of

77. *Id.* at 293.

78. *Id.* at 285–88; *see also* LEVINSON, FRAMED, *supra* note 2, at 358 (pointing to Fritz's conclusion that carrying out state constitutional change “even if contrary to established constitutional procedures—is one of the hallmarks of American constitutionalism” (quoting Christian G. Fritz, *Recovering the Lost Worlds of America's Written Constitutions*, 68 ALB. L. REV. 261, 262 (2005))).

79. LEVINSON, FRAMED, *supra* note 2, at 391–92.

80. Evan Halper & Anthony York, *California Constitutional Convention Push Fizzles*, L.A. TIMES, Feb. 13, 2010, <http://articles.latimes.com/2010/feb/13/local/la-me-constitutional-convention-2010feb13>. *See generally* Symposium, *Rebooting California: Initiatives, Conventions & Government Reform*, 44 LOY. L.A. L. REV. 393 (2011).

81. LEVINSON, FRAMED, *supra* note 2, at 49–50.

82. *Id.* at 26, 34.

ignorance,”⁸³ or “original position,” approach, where any federal constitutional changes are delayed to the point where there is no clear partisan advantage that can be discerned.⁸⁴

Professor Levinson’s proposal is radical because it is “extralegal” and beyond the “rules laid down” in Article V of the federal Constitution. It also raises the fears of those who oppose even a constitutional convention within the terms of Article V, not only because they fear what such a convention might propose, but also because they fear a “runaway” convention like that in 1787. These are widespread and deeply held concerns. For that reason, Professor Levinson might have delved even further into the state constitutional experience with the processes of amendment and revision. For example, a number of states have provided in their constitutions for an automatic, periodic vote on whether to call a state constitutional convention.⁸⁵ Article V could be amended to provide for this or some variant of it.

In fact, my colleague Alan Tarr and I have pointed out that there is an extremely wide range of state constitutional amendment and revision procedures that have been or could be used in the states to accomplish needed constitutional change.⁸⁶ New approaches had to be, and have been, developed at the state level to deal with the problem of state constitutional rigidity. A number of these approaches could be tailored to fit a perceived need for change in the federal Constitution without the fear of a runaway convention. For example, several states have utilized a “two-step process” to achieve needed amendment or revision in their state constitutions.⁸⁷ The first, more moderate step is to formally change the “rules laid down” by initially following the established process for a constitutional amendment that authorizes a new, even one-time, process for amendment or revision of the state constitution.⁸⁸ Why not consider this approach, now, at the federal

83. *Id.* at 33–34.

84. *Id.* at 26, 33–34.

85. See generally John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to Their Passage*, 71 MONT. L. REV. 395 (2010) (discussing the fourteen states that provide for a mandatory convention referendum device in their constitutions and examining the constitutional referendums held in Iowa, Alaska, Missouri, New Hampshire, Rhode Island, Connecticut, Hawaii, and Illinois).

86. See generally 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM, *supra* note 65 (analyzing the political obstacles to state constitutional reform through case studies of reform efforts in Alabama, California, Colorado, Florida, New York, and Virginia); G. Alan Tarr & Robert F. Williams, *Foreword: Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075 (2005) (encouraging state constitutional reformers to take advantage of the numerous available options for reforming their constitutions); Robert F. Williams, *Should the Oregon Constitution Be Revised, and If So, How Should It Be Accomplished?*, 87 OR. L. REV. 867 (2008) [hereinafter Williams, *Oregon*] (examining the Oregon Constitution and efforts to revise it and discussing state constitution revision generally).

87. WILLIAMS, *supra* note 14, at 380.

88. *Id.*

level? For example, in Michigan, a 1960 first-step amendment eased the requirements for calling a constitutional convention, leading to the successful 1961–1962 Constitutional Convention.⁸⁹ A similar first-step amendment was adopted in 1950 in Illinois, leading to that state’s well-regarded 1970 Constitution.⁹⁰ Texas amended its constitution to authorize the Legislature to sit as a constitutional convention for one time only.⁹¹ Although the convention’s proposals failed to get the necessary votes to be proposed to the voting public,⁹² this was an innovative mechanism. New York used, albeit unsuccessfully, a Temporary Commission that proposed (based on the federal military base closing commission) “a unique action-producing alternative to a state constitutional convention,” where the Governor and legislature were urged to act on proposed constitutional amendments and statutes by a date certain.⁹³

Again, one of the fears about federal constitutional amendment and revision concerns the legal ability to limit a federal constitutional convention. The experience in the states over the years, however, has indicated that limited state constitutional conventions have been successful in taking “hot button” topics off of the table, and those limits have been seen as legally enforceable.⁹⁴ An initial step at the federal level could be to propose an amendment to Article V that clearly provides for a legally enforceable limited constitutional convention, whether on a one-time basis (in response to a perceived crisis or to limit opposition), with its use limited to periodic intervals, or as a permanent amendment to Article V. This would have to be drafted with care, providing a mechanism for determining and enforcing such limitations, processes for choosing delegates,⁹⁵ etc. In the states, the objective of a limited convention has been achieved by submitting not only the question whether to have a constitutional convention, but also how such a convention should be limited, to the voters themselves. In this way, the limitations are seen as emanating from the people themselves when they vote to call a constitutional convention, therefore binding their delegates.⁹⁶ A similar mechanism could be included in such a limited constitutional convention amendment to Article V, thereby eliminating the possibility of a runaway convention. This two-step approach would solidify the legality of new federal amendment or revision procedures by actually changing the

89. Williams, *Oregon*, *supra* note 86, at 882.

90. *Id.* at 884–85. The Florida Legislature successfully proposed an entirely revised constitution in 1967. *Id.* at 891.

91. *Id.* at 888.

92. *Id.* at 888–89.

93. Tarr & Williams, *supra* note 86, at 1095; Williams, *Oregon*, *supra* note 86, at 894.

94. Tarr & Williams, *supra* note 86, at 1085–92.

95. See generally Richard Briffault, *Electing Delegates to a State Constitutional Convention: Some Legal and Policy Issues*, 36 RUTGERS L.J. 1125 (2005) (addressing constitutional requirements for delegate selection and considering alternative delegate selection methods).

96. Tarr & Williams, *supra* note 86, at 1087–88.

“rules laid down” prospectively, before the new procedures are utilized. Then, the second stage would not be extralegal and could be carried out in a much more moderate and less uncertain process than an unlimited federal constitutional convention. An appointed constitutional commission, described below as a matter of state constitutional practice, could make important preparatory recommendations and provide background research and training for the delegates to such a limited federal constitutional convention.

There are a variety of additional techniques that have been developed or suggested in the state constitutional context that might be tailored for use at the federal level. For example, amendments have been proposed with “sunset” provisions limiting their length of effectiveness, shifting the burden to those who want to continue them at their point of expiration from those who want to eliminate them.⁹⁷ There is, of course, already federal precedent for this in the clause prohibiting Congress from banning the international slave trade until a date certain.⁹⁸ Professor Levinson’s suggestion of delaying the effective dates of changes, so that partisan advantage cannot be weighed,⁹⁹ is also very important. A variation on the sunset approach would be constitutional amendments that, after a period of time, may be changed by less onerous amendment procedures or even by statute, possibly by supermajority.¹⁰⁰

During the last century, states have had much success with the use of constitutional *commissions*, which are appointed bodies of experts who prepare proposed changes to the state constitutions and submit them to state legislatures.¹⁰¹ This commission mechanism, not included in state constitutional amendment and revision procedures, has been developed in the states as an alternative to (or sometimes in preparation for) constitutional conventions, because they cost much less, rely on expertise, and report back to the legislative branch, which can thereby maintain control of the submission of state constitutional amendments or revisions to the electorate.¹⁰² Commissions have been criticized, on the other hand, because they do not rely on the involvement of elected delegates the way constitutional conventions do, and therefore have been described as undemocratic.¹⁰³ Despite these drawbacks, the commission mechanism that has been developed successfully in the states could certainly be adapted for

97. *Id.* at 1113–14.

98. U.S. CONST. art. I, § 9, cl. 1.

99. LEVINSON, FRAMED, *supra* note 2, at 26–27.

100. Tarr & Williams, *supra* note 86, at 1114–15.

101. *Id.* at 1094–100.

102. *See id.* at 1094–95 (characterizing commissions as providing expert opinions while preserving ultimate authority with the legislature).

103. *Id.* at 1099.

use at the federal level. This would be a moderate approach and would not require an amendment to Article V or operate in defiance of it.

Almost all state constitutional commissions have operated without any formal change to the “rules laid down” for state constitutional amendment or revision. This is an unnecessary step because the commissions’ proposed amendments or revisions are submitted to the legislative branch for its consideration pursuant to the formal processes of state constitutional change that are already in place.¹⁰⁴ So, the use of an appointed commission, broadly representative but utilizing expertise, might be able to examine some of the “settled” provisions of the federal Constitution that Professor Levinson describes as dysfunctional and contributing to the current gridlock in our federal government. Compromise would be necessary here, as it is in all constitution making. Thinking of constitutional commissions somewhat differently, one could be utilized to advise Congress on how to propose an amendment or amendments to Article V that would authorize limited constitutional conventions, what the limits should be, and how to make such limits legally enforceable. A commission was used recently in New Jersey for this purpose.¹⁰⁵

One of the keys to the success of state constitutional revision has been moderation.¹⁰⁶ State constitutional conventions and commissions that have attempted to do too much, or to accomplish radical change, have often ended in failure.¹⁰⁷ Therefore, any proposed method of amendment or revision of the federal Constitution should aim for moderation. Some improvement is better than none. Levinson recognizes that “the best works as an enemy of the good.”¹⁰⁸ It may be that reasonable and moderate adjustments to some of the “settled” provisions of the federal Constitution, such as the Inauguration Clause (probably not two Senators, per state), would not be nearly as controversial as proposed changes to other parts of the Constitution of Conversation. A limited federal constitutional convention, or constitutional commission, might be structured to focus only on the Constitution of Settlement and not be permitted to consider the more controversial Constitution of Conversation.

104. The one exception to this is Florida, where the state constitution creates two appointed commissions that meet periodically and can submit their proposed revisions directly to the voters. Rebecca Mae Salokar, *Constitutional Revision in Florida: Planning, Politics, Policy, and Publicity*, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM, *supra* note 65, at 19, 19; Robert F. Williams, *The Florida Constitution Revision Commission in Historic and National Context*, 50 FLA. L. REV. 215, 220 (1998); Robert F. Williams, *Foreword: Is Constitutional Revision Success Worth Its Popular Sovereignty Price?*, 52 FLA. L. REV. 249, 252 (2000); Williams, *Oregon*, *supra* note 86, at 891–93.

105. Tarr & Williams, *supra* note 86, at 1104–05; *see also* Williams, *Oregon*, *supra* note 86, at 884 (describing similar use of a commission in Illinois).

106. WILLIAMS, *supra* note 14, at 378.

107. Salokar, *supra* note 104, at 39–40; Williams, *Oregon*, *supra* note 86, at 892.

108. LEVINSON, FRAMED, *supra* note 2, at 391.

A careful evaluation of the defects in the Constitution of Settlement, described by Professor Levinson, must consider whether the individual defects could be remedied by a series of unrelated amendments, or rather the defects are so interrelated as to render the federal Constitution incoherent and in need of more extensive revision rather than mere amendment. Alan Tarr noted that:

Of course, it is possible to introduce significant constitutional reform without calling a convention or adopting a new constitution—amendments proposed by constitutional commissions, by initiative, or by state legislatures may also produce constitutional reform. But in thinking about constitutional reform, it is important to distinguish it from the ordinary constitutional change that is so prevalent in the states. Any alteration of a state constitution, no matter how technical or minor, qualifies as constitutional change. In contrast, constitutional reform involves a more fundamental reconsideration of constitutional foundations. It introduces changes of considerable breadth and impact, changes that substantially affect the operation of state government or the public policy of the state. The replacement of one constitution by another obviously qualifies as constitutional reform. So too may major constitutional amendments or interconnected sets of amendments. However, most constitutional change in the states does not qualify.¹⁰⁹

Many people, as Levinson acknowledges, “are basically terrified” of a federal constitutional convention.¹¹⁰ This fear also now manifests itself at the state constitutional level, where political scientists Gerald Benjamin and Thomas Gais have observed what they call “conventionphobia.”¹¹¹ Calls for state constitutional conventions are now routinely defeated by the voters. I have said:

109. G. Alan Tarr, *Introduction* to 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM, *supra* note 65, at 1, 2 (footnote omitted). As Bruce Cain has noted:

In theory, constitutional revision should be more comprehensive and qualitatively more significant than a constitutional amendment. But what if revision occurs increasingly through amendment: What is gained and what is lost? The most important advantage should lie in the ability of a Revision Commission to consider how all the pieces fit together. Where the amendment process is piecemeal and sequential, the revision process affords the opportunity to logically relate proposals to goals, and to make the entire package of proposal[s] coherent.

Bruce E. Cain, *Constitutional Revision in California: The Triumph of Amendment over Revision*, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM, *supra* note 65, at 59, 64.

110. LEVINSON, FRAMED, *supra* note 2, at 392.

111. Gerald Benjamin & Thomas Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL'Y SYMP. 53, 69–70 (1996); Thomas Gais & Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform*, 68 TEMPLE L. REV. 1291, 1303–05 (1995).

The public seems to view a constitutional convention as political business as usual by the “government industry.” Constitutional conventions seem to have lost their *legitimacy* in the public mind. At the time many states’ original constitutions were drafted, the politicians and special interests were afraid of the *people* acting through constitutional conventions. Now, by contrast, the people are afraid of *politicians and special interests* acting through constitutional conventions.¹¹²

This is certainly an attitude that will provide additional resistance to Professor Levinson’s proposal, but which might not reject more moderate approaches out of hand.

Sandy Levinson has made important, and often convincing, criticisms of provisions of our Constitution that are not often debated. His proposed remedy, however, is radical, and in many people’s view, dangerous to our federal constitutional system. For readers who agree with some of his criticisms, but worry about an extralegal, unlimited federal constitutional convention (or even a legal convention under Article V), the lessons learned from state constitutional amendment processes may be much more practical, moderate, and comforting.

Those seriously seeking to resolve at least some of the difficulties we currently experience because of the “settled” provisions of the federal Constitution would be wise to pick and choose among the lessons from the states to develop realistic possibilities for moderate change at the federal constitutional level. After all, despite the fact that most people think our Constitution has served us very well, it seems clear now that it could certainly be improved upon. Possibly now is the time that Article V should be made (“framed”) to serve us rather than us having to serve (be “framed” by) Article V.

112. WILLIAMS, *supra* note 14, at 388 (footnote omitted).