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## LEVINSON AND CONSTITUTIONAL REFORM: SOME NOTES

STEPHEN M. GRIFFIN\*

Sanford Levinson's book, *Our Undemocratic Constitution*, raises difficult questions about American constitutionalism that deserve to be taken seriously.<sup>1</sup> I hope it will be read and discussed in the patriotic and critical spirit in which it was written. But Levinson may have difficulty winning over his audience. In my experience, most people are unwilling to entertain the idea that the U.S. Constitution may have fundamental flaws (although they might concede a few "stupidities" or mistakes).<sup>2</sup> In fall 2006, I had students in my Constitutional Theory seminar read some selections from the book. They tended to view it as a series of complaints about the Constitution, not as a fundamental critique that would move them to advocate reform.

Perhaps the students' reaction is due to the contrast between the breadth of Levinson's initial claim—"that it is increasingly difficult to construct a theory of democratic constitutionalism, applying our own twenty-first-century norms, that vindicates the Constitution under which we are governed today"<sup>3</sup>—and the specific undemocratic features of the Constitution that he critiques. For, despite events such as the 2000 presidential election crisis, the American public (and my students) do not appear dissatisfied with the specific points Levinson makes concerning unequal popular representation in the Senate, the operation of the Electoral College, excessive presidential power (although this may be changing), life tenure for justices, and the high barrier to constitutional change posed by Article V of the Constitution.<sup>4</sup>

Levinson provides some evidence that the public is dissatisfied with American politics;<sup>5</sup> however, this dissatisfaction may be related to poor policy outcomes or the misdeeds of politicians rather than to the

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

2. See William N. Eskridge, Jr. & Sanford Levinson, *Introduction to CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 1-2* (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (defining a "stupid provision" of the Constitution as one that is both nonsensical and harmful for today's polity).

3. LEVINSON, *supra* note 1, at 6 (emphasis omitted).

4. *Id.* at 6-7.

5. *Id.* at 7 (noting, for example, that a 2005 CBS poll found that seventy-one percent of Americans believed that our country was "on the wrong track").

structure of the Constitution. Nevertheless, Levinson concludes his book's introduction by saying: "We must recognize that a substantial responsibility for the defects of our polity lies in the Constitution itself."<sup>6</sup> Levinson then identifies two problems: the Constitution is undemocratic *and* dysfunctional.<sup>7</sup> This is not an attractive picture.

Unlike my students, I am quite sympathetic to the project of constitutional reform. While I am under no illusions about whether we are going to hold a new constitutional convention, thinking about the Constitution from what I call a "design perspective" can be useful as a heuristic device. It can provide new angles for understanding American constitutionalism, and it is in keeping with the founding generation's belief that governing orders can be critiqued and reformed in a rational way.

A design perspective involves asking whether each significant element in our contemporary constitutional system could be justified *if we were* holding a constitutional convention. We can imagine that the constitutional convention is an ideal one, with unlimited time for discussion, access to all relevant information, its members perfectly representative of the American public, and so on. The point is that when we adopt a design perspective, features of our constitutional order that are normally accepted simply because they are endorsed by the document itself are put under critical scrutiny.

A design perspective does not necessarily avoid the paradoxes that have plagued various attempts over the years to advocate comprehensive constitutional reform. But it may illuminate them. These paradoxes apply to Levinson's project, despite his efforts to mitigate or avoid them.

Consider first what normative perspective we would employ were we suddenly cast into the role of a reform-minded delegate at a constitutional convention. Surely we would appeal to some attractive set of normative principles to ground our critique of the existing order. Levinson appeals to democratic principles, counting on our allegiance to democracy as a form of government.<sup>8</sup> Given the respect and veneration in which the Constitution is held, however, as reformers we can reasonably expect to be challenged no matter how attractive our principles. Are these principles external or internal to our political and constitutional traditions? If external, then they are not likely to be persuasive as a basis for critique. If internal, then they are already

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6. *Id.* at 9 (emphasis omitted).

7. *Id.*

8. *Id.* at 6–9.

endorsed and fulfilled at least in part by our founding document. To the extent that accepted constitutional principles can be used to critique the operation of our political system, this cuts against the position that the Constitution stands in need of fundamental reform, at least through a convention or an amendment.

By way of illustration, consider the reaction to Levinson's proposal to eliminate the presidential veto. This proposal carries forward one of his themes, that the Constitution is undemocratic in some respects and puts too many obstacles in the way of needed legislation.<sup>9</sup> Readers of a *New Republic* article in which Levinson summarized this proposal<sup>10</sup> responded angrily to his idea, invoking republican principles.<sup>11</sup> Where does the force of this response come from if Levinson is assuming accurately, as I think he is, that we are all democrats? The ready answer is that democracy is only one theme among many in our constitutional order, although perhaps a predominant one.<sup>12</sup> When Levinson's readers cry "republic," everyone conversant with the American constitutional tradition knows what they are talking about—principles such as separation of powers, checks and balances, and the dangers of unbridled majority rule.<sup>13</sup>

Our constitutional tradition contains an element of skepticism toward claims of democratic authority. As long as these views persist, constitutional reform founded on democratic principles must first clear some ground. The idea that our constitutional order is a mix of democratic and republican principles must either be debunked (possibly through an analysis of how much that order has changed since the eighteenth century), or, if the view is that republican principles persist in a meaningful way, then those principles must be attacked through a normative critique. Such a critique will pose difficult questions about whether it is wise to abandon (or at least substantially

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9. *Id.* at 25–77 (arguing that the Constitution supports an undemocratic legislative process).

10. Sanford Levinson, *Against the Veto: Poison Pen*, NEW REPUB., Oct. 9, 2006, at 12.

11. See, e.g., Joatsimeon, *It's non-democratic, and a good thing too*, Online user comments to Levinson, *supra* note 10, [http://www.tnr.com/doc\\_posts.mhtml?i=20061009&s=levinson100906](http://www.tnr.com/doc_posts.mhtml?i=20061009&s=levinson100906) (May 2, 2007) ("The US [sic] government is not supposed to be a majoritarian democracy; it's a federal republic, replete with limitations on the actions of national majorities.").

12. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 5–7 (1980).

13. See, e.g., Claudiusmarcellus, *Makes no sense*, Online user comment to Levinson, *supra* note 10, [http://www.tnr.com/doc\\_posts.mhtml?i=20061009&s=levinson100906](http://www.tnr.com/doc_posts.mhtml?i=20061009&s=levinson100906) (Oct. 5, 2006) (suggesting that the presidential veto is a method to protect minority rights); Lewstherin, *Sanford Levinson, you speak nonsense*, Online user comment to Levinson, *supra* note 10, [http://www.tnr.com/doc\\_posts.mhtml?i=20061009&s=levinson100906](http://www.tnr.com/doc_posts.mhtml?i=20061009&s=levinson100906) (Oct. 5, 2006) (noting that an executive check on the legislative branch promotes a healthy, functioning Democracy).

modify) the separation of powers and checks and balances system, as well as place advocates of reform in a difficult rhetorical position (as opponents of the republican founding generation).

A second paradox of constitutional reform relates to the need to provide a practical or policy justification for any proposed change.<sup>14</sup> As Levinson argues, one reason to seriously consider constitutional reform has to do with the apparent inability of the current political system to act on a range of important policy problems.<sup>15</sup> On the other hand, solutions to these problems are deeply controversial. Would the solutions not have to be justified seriatim? Perhaps the political system has not acted because the problems are not as serious as the public supposes, or there is no agreement on solutions. Further, if constitutional reform is advocated because it would make certain policy changes easier, then the desirability of reform becomes hostage to the desirability of those policies, and those who benefit from the status quo have a wonderful incentive to oppose the reforms.

Structural or constitutional reforms should be justified by the difference they make in how government operates; however, the use of such justifications makes it more difficult to obtain agreement on reforms because of the likelihood of unknown side effects on policy. In other words, if we cannot know in advance the policy outcomes of structural reforms, there is a strong incentive to leave the status quo alone. If we do know what might happen at the level of policy, then the paradox described above takes hold.

These paradoxes exist because constitutional reform in the contemporary world must address a complex governmental system (imperfectly described by the Constitution itself) that is an ongoing, self-sustaining enterprise. The Framers did not have this problem. In the circumstances of the 1780s, there was a credible argument that the federal government under the Articles of Confederation was literally incompetent to perform essential governmental tasks.<sup>16</sup> The only times we have extensively revised the Constitution were after a revolution (the American Revolution of 1776), or a quasi-revolution (the Civil War).<sup>17</sup> It seems that absent such order-shattering circumstances, we may be incapable of taking on the task the Framers as-

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14. See LEVINSON, *supra* note 1, at 37 (recognizing that any changes to the procedure of government are inherently a function of the reformer's political views).

15. *Id.* at 7–8.

16. See Jack N. Rakove, *The Road to Philadelphia, 1781–1787*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 98, 98–101 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (explaining the many flaws of the Articles of Confederation).

17. See U.S. CONST. amends. XIII–XV.

sumed. Thus, reasonable constitutional revision at regular intervals, as Jefferson suggested (and Levinson endorses), is probably impossible.<sup>18</sup>

Despite the second paradox, I think Levinson is right to pitch many of his arguments for constitutional reform at the level of policy. A justification founded on basic principles can too easily become mired in a debate over abstractions. How are we to evade the policy paradox? One strategy undertaken by Levinson is to highlight the pervasive role that interest group deals play in our current constitutional structure.<sup>19</sup> This is an important point. The Framers certainly could not have foreseen the development of a state so well funded (through the income tax) that representatives could try to ensure their reelection through the earmarking of millions of dollars to their districts. It is the marrying of the interest group state to the structure of representation that is especially troubling from a design perspective. If we were redesigning the Constitution, we would probably try to arrange the appropriations process to minimize this sort of activity.

This argument goes in the right direction because it identifies policies that benefit relatively few people yet impose a cost on everyone.<sup>20</sup> This does not mean that such an argument is persuasive. As arguments fly in our hypothetical constitutional convention concerning the undue influence of interest groups, some might remind themselves that they have benefited from legislation that others see as purely interest-based. Suppose, however, there is a class of policies that are literally in no one's interest. Call these "policy catastrophes." If there were such a class, and we could link them to problems in our constitutional structure, then we might have the kind of argument that truly gets to constitutional fundamentals.

To get a grip on the idea of a policy catastrophe, consider these examples:

1. The collapse and government bailout of savings and loan institutions in the 1980s;
2. The destruction of the NASA space shuttles Challenger (1986) and Columbia (2003);
3. The 9/11 terrorist attacks; and

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18. See STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 38–39 (1996) (describing the obstacles President Roosevelt faced when he tried to amend the Constitution in 1936).

19. See, e.g., LEVINSON, *supra* note 1, at 25–26 (noting that Congress passed a highway spending bill in 2005 that appropriated \$453 million for two unnecessary bridges to sparsely populated areas in Alaska).

20. *Id.*

4. The flooding of New Orleans in 2005 after Hurricane Katrina due to failure of the flood-control system.

These catastrophes share some characteristics. First, they are all policy outcomes in that they are linked to the pursuit of certain policies by government. Second, no one defends these policy outcomes. While some might question the underlying programs, such as the regulation of banks or the building of space shuttles, no one contests that once government regulates an industry, or builds a complex space transportation vehicle, the regulation should be effective and the vehicle should not fail. The savings and loan debacle, for example, cost taxpayers at least \$150 billion, a gigantic sum that could have been employed for many other useful purposes.<sup>21</sup> If the debacle could have been avoided through some sort of structural reform, everyone would presumably be interested in at least investigating that possibility.

You may be waiting for me to link these disasters to some constitutional structure. Before I provide some suggestive leads, we should reflect on the often-presumed pervasive background role that the Constitution plays in our government. My observation is that when policies go well—when government succeeds—the strength and stability of our constitutional system is usually celebrated. Matters seem to be quite different when policies go poorly. In that situation, the somewhat God-like role usually attributed to the Constitution suddenly disappears, replaced by incompetent administrators and feckless politicians. However, if the Constitution structures government action, then we are bound to investigate whether that structure is at fault when policies fail, especially when they fail spectacularly.

Experienced students of government know that when policies go wrong, there is usually a trail (often long) leading back to Congress. Congress is still the “keystone of the Washington establishment,” especially with respect to policies pursued over several decades.<sup>22</sup> If our homeland security and intelligence agency structures are fragmented, if key regulations governing the savings and loan industry are loosened,<sup>23</sup> if NASA builds a space shuttle that scientists scorn (whose components come from congressional districts scattered across the

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21. See STEPHEN PIZZO ET AL., *INSIDE JOB: THE LOOTING OF AMERICA'S SAVINGS & LOANS* 486 (1991).

22. MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 4 (2d ed. 1989) (“The Congress created the establishment, sustains it, and most likely will continue to sustain and even expand it.”).

23. With respect to Congress's responsibility for the savings and loan disaster, see generally BROOKS JACKSON, *HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS* 167–293 (1988) (discussing how the savings and loan lobby funded the elections of multiple congressmen).

country),<sup>24</sup> and if the Army Corps of Engineers had to stretch over decades a Louisiana flood-control project that was designed to be completed in ten years,<sup>25</sup> it is usually because members of Congress wanted it that way.

The tendency of members of Congress to think about their own districts and states rather than the national interest is not new. But the advent of the interest group state made an extraordinary difference to the level of impact that individual members of Congress have on national policy. In the eighteenth century, the federal government assumed no responsibility for preventing or alleviating the consequences of natural disasters such as floods or earthquakes.<sup>26</sup> Once the government assumed this responsibility in the twentieth century,<sup>27</sup> it accordingly became accountable for its policy decisions. If the structure of Congress involves making public policy “almost as an afterthought,”<sup>28</sup> then it is difficult to see how future policy disasters might be prevented. To be a bit more precise, if making national policy is a byproduct of what Congress is really doing—funneling money and serving as an ombudsman to citizens and states<sup>29</sup>—we might consider a different structure that would encourage national policy-making as such.

Critical analysis of our political system often amounts to high-minded handwringing over how the national interest is ignored.<sup>30</sup> The terrorist attacks of 9/11 and the aftermath of Hurricane Katrina should have demonstrated that a serious analysis of our policy choices is a practical necessity. When poor policy choices, or, more likely, the

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24. Robin McKie, *Shuttle a deathtrap, says astronaut*, THE OBSERVER, Jan. 22, 2006, at 36, available at <http://www.guardian.co.uk/science/2006/jan/22/spaceexploration.theobserver>.

25. With respect to the causal role of Congress in the Katrina disaster, see Michael Grunwald & Susan B. Glasser, *The Slow Drowning of New Orleans*, WASH. POST, Oct. 9, 2005, at A1.

26. See, e.g., JOHN M. BARRY, RISING TIDE: THE GREAT MISSISSIPPI FLOOD OF 1927 AND HOW IT CHANGED AMERICA 369 (1997) (quoting President Grover Cleveland’s declaration that the federal government has no “warrant in the Constitution . . . to indulge a benevolent and charitable sentiment through the appropriation of public funds . . . [for] relief of individual suffering which is in no manner properly related to the public service”); see also Stephen M. Griffin, *Stop Federalism Before It Kills Again: Reflections on Hurricane Katrina*, 21 ST. JOHN’S J. LEGAL COMMENT. 527, 535–36 (2007) (“[I]t took many decades and repeated disasters to convince national officials . . . that the federal government had a role to play in alleviating the effects of natural disasters.”).

27. Griffin, *supra* note 26, at 536 (explaining that the federal government increased federal assistance for natural disasters in the twentieth century).

28. FIORINA, *supra* note 22, at 68.

29. *Id.* at 68–69.

30. GRIFFIN, *supra* note 18, at 201–03.

failure to choose, result in the deaths of thousands of citizens and the loss of hundreds of billions of dollars, the inquiry into the consequences of constitutional structure and the suggestion of another constitutional convention to reexamine that structure should not be regarded as theoretical.<sup>31</sup>

Presumably there is no such thing as a constitutional structure that will allow us to avoid all policy catastrophes. We are still not the “angels” that Madison invoked in his famous argument, and our knowledge of the future is limited.<sup>32</sup> But understanding that there is a link between such catastrophes and the constitutional structure might force us to acknowledge that the Constitution is not exogenous to the problems and faults in our political system. The Constitution is not an impartial spectator, so to speak, but a participant with a set of biases.

Levinson closes his book by lamenting the inflexibility of Article V.<sup>33</sup> He generously cites my work for the proposition that if constitutional change is not allowed because of the difficulty of amendment, then it may occur through other means such as informal constitutional change through the political system and judicial interpretation.<sup>34</sup> However, Levinson makes the sound point that there are limits to this sort of informal adaptation.<sup>35</sup> For example, if we want to adopt a parliamentary form of government in which executive officials serve in the legislature, formal change through Article V is the only way to get there.<sup>36</sup> This point applies to nearly all of the changes that Levinson advocates, and explains his interest in making change through Article V easier.

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31. Congress is certainly not the only constitutional institution to be implicated by policy catastrophes. Executive misfeasance or inattention undoubtedly contributed to those catastrophes. Specifically, widespread assumptions about federalism, in particular about how national and state governments ought to interact, certainly played a role in the failed response to Hurricane Katrina. See Griffin, *supra* note 26, at 527–35 (explaining how federal, state, and local jurisdictions failed to work together to rebuild New Orleans after Hurricane Katrina).

32. THE FEDERALIST NO. 51, at 290 (James Madison) (Clinton Rossiter ed., 1999) (“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”).

33. LEVINSON, *supra* note 1, at 160 (“Article V constitutes what may be the most important bars of our constitutional iron cage precisely because it works to make practically impossible needed changes in our polity.”).

34. *Id.* at 22 (“One scholar has aptly described this as a process of ‘constitutional change off-the-books.’”) (quoting Stephen M. Griffin, *The Nominee Is . . . Article V*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra* note 2, at 52).

35. See *id.* (arguing that informal amendments are unlikely to change the basic structure of the American political system).

36. See *id.* at 164–65 (noting the limits of informal change).

An issue related to Levinson's point is whether the inflexibility of Article V has had adverse consequences in the past. Here scholars disagree. It is conceded by many that the U.S. Constitution is one of the most difficult constitutions in the world to amend.<sup>37</sup> Chris Eisgruber has defended the position that having a relatively inflexible constitution increases the truly democratic character of a political order.<sup>38</sup> I wish Levinson had said something about Eisgruber's argument, but I will take a stab myself.

Any argument about the costs and benefits of the supermajority barriers to constitutional change in Article V necessarily involves some counterfactual speculation about what our constitutional history would have looked like had the Framers not built the "iron cage" of Article V.<sup>39</sup> The question is not entirely about the effects of certain procedural changes. Several generations of Americans have absorbed not only the reality that formal constitutional change is quite difficult, but the normative view that it *should* be difficult—that we should not "tinker" with the Constitution.<sup>40</sup> The proposal to make formal change through Article V easier also concerns our "constitutional culture," or, our set of views and understandings about how constitutional change should be accomplished.<sup>41</sup>

In today's world, Americans associate constitutional change with proposed amendments that alter rights, such as abortion, gay marriage, and flag burning. Scholars interested in constitutional change believe the main issue lies elsewhere—with the still uncertain constitutional status of the New Deal, the administrative state, and the greatly changed role of the presidency after World War II, the Cold War, and now the War on Terror.<sup>42</sup> Certainly this issue is compatible with Levinson's focus on the structural aspects of the Constitution, as opposed to its provisions concerning rights. In my experience, however, the existence of a continuing issue with respect to the constitutional legitimacy of the New Deal (as well as the other items mentioned) has

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37. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 362 (1994) (finding that the U.S. Constitution is the second most difficult constitution to amend).

38. See CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 11 (2001) (contending that our inflexible Constitution is a practical procedural device for implementing democracy).

39. LEVINSON, *supra* note 1, at 165 ("Article V constitutes an iron cage with regard to changing some of the most important aspects of our political system.").

40. GRIFFIN, *supra* note 18, at 30.

41. *Id.* at 26–28 (discussing the various methods of constitutional change).

42. See, e.g., *id.* at 46 (examining the New Deal legislation and finding a consensus among constitutional scholars that the period brought fundamental constitutional change).

proven hard for most legal scholars to grasp. There is a tendency to see these problems as involving questions of constitutional interpretation, not amendment or legitimacy.<sup>43</sup>

Undermining this common view would require a very long detour into the byways of American political history. In brief, important elements in American conservatism never accepted the legitimacy of the New Deal.<sup>44</sup> One of the main reasons—a concern which remains alive today—was that conservatives believed it was a change of constitutional dimensions that did not take place through formal amendment.<sup>45</sup> President Roosevelt's deliberate decision to treat the changes of the New Deal as matters for the Supreme Court and constitutional interpretation had important consequences that were not foreseen at the time.<sup>46</sup> I should say immediately that it is far from clear that it would have been better, all things considered, for Roosevelt to press a set of amendments on the country. There were many difficult issues involved and the right course of action was not patently obvious. The point I stress is that there were costs no matter what choice Roosevelt made.

Many Americans believe that the Constitution does not cover every contingency and that it does impose meaningful limits on government action. It follows that there may be moments in history in which the only legitimate way to obtain constitutional power is through formal amendment. The failure to ratify the New Deal, as well as other important aspects of the contemporary constitutional system, through the amendment process has created an ongoing conflict within American constitutionalism.<sup>47</sup> Of course, some believe such views are the hobbyhorses of repudiated cranks like Barry Goldwater, but that was before the conservatives who supported Goldwater in 1964 came to power with Ronald Reagan in 1980. Nevertheless, the

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43. *Id.* at 45.

44. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.").

45. See *id.* at 1233 (arguing that the post-New Deal administrative state violates the Constitution in multiple ways); see also Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 448 (1987) (noting that the New Deal "altered the constitutional system in ways so fundamental as to suggest that something akin to a constitutional amendment had taken place").

46. GRIFFIN, *supra* note 18, at 43 (explaining how the New Deal led to a "constitutional crisis" after the Supreme Court struck some of the legislation).

47. *Id.* at 56 (noting that the lack of constitutional amendments has led Americans to falsely believe that the Constitution is "a machine that would go of itself[,] without any amendments).

widespread view in our constitutional culture that amendments are dangerous has operated to suppress the kind of politics that may be necessary to provide a full measure of legitimacy for government action in the post-New Deal state.<sup>48</sup> For me, the democratic cost of an inflexible amendment process is the fundamental issue posed by the difficulty of changing the Constitution through Article V.

I hope my discussion illustrates that the issues posed by constitutional reform are some of the most difficult in American constitutionalism. The most rewarding aspect of Levinson's many scholarly contributions to our understanding of the Constitution is the nature of the genuine and deep questions he forces us to ask and answer.

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48. *Id.* at 30 (explaining that most Americans believe that it is dangerous to alter the Constitution).