

# Restoring Democracy in a Multiracial Society. Comments on Steven Levitsky’s “The Third Founding: The Rise of Multiracial Democracy and the Authoritarian Reaction Against It”

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*In this brief Essay, I present six comments to Steven Levitsky’s lecture. I suggest that the author (1) clarify some of the basic concepts he uses in his text, particularly the concept of democracy; (2) not confuse the problems of democracy with the problems of constitutionalism; (3) take more centrally into account the problem imposed on our democracies by the existence of profound political and social inequalities; (4) extend and specify some of the institutional reforms he suggests in his text, particularly related to the Senate; (5) pay attention to the structural nature of the problems that are presently affecting the American political system; and (6) review his proposal to reinvigorate majority rule, in light of his defense of a multiracial democracy.*

I. Concepts.....	2024
II. Constitutionalism and Democracy.....	2026
III. Self-Government and Equality.....	2028
IV. Checks and Balances.....	2030
V. Political Elitism and America’s Bipartidism.....	2031
VI. Majority Rule in a Multiracial Democracy.....	2032
Conclusion.....	2033

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It is a real honor for me to be able to comment on Steven Levitsky's presentation. Professor Levitsky is one of the greatest political thinkers of our time. I admire both his intellectual capacity and his honest political commitment. In the brief commentary that follows, I will make six points. Some are aimed at strengthening his views, and some are a more critical in character.

Part I of this Essay argues that the political notions Professor Levitsky raised in his presentation require conceptual clarification. The proceeding Sections supplement his arguments on several topics raised in his speech. Part II argues we should neither confuse nor conflate the problems of democracy with the problems of constitutionalism. Part III suggests that Professor Levitsky could consider, along with the problems of "multiracial democracy" that he examines in his text, other pressing "dramas" of the time, such as social and political inequalities. Part IV seeks to extend and deepen some of the reforms Professor Levitsky proposed in relation to the Senate. Part V urges the author to explore the structural problems affecting the American political system, beyond those posed by the current authoritarian drift of the Republican Party. Part VI questions Professor Levitsky's decision to uphold the value of a multiracial democracy, while proposing to strengthen and increase the incidence of majority rule.

## I.

### CONCEPTS

I would like to make a call for the conceptual clarification of some of the main political notions that Professor Levitsky introduced in his presentation: democracy, minority veto, counter-majoritarian mechanisms, and majoritarianism. On occasion, I got the impression that Professor Levitsky used these concepts indistinctly, as if they all pointed in the same direction. Yet, in spite of their similarities, the following are all different propositions: (1) we do not want our democracy to be undermined; (2) given that we care about the health of our democracy, we have to avoid or eliminate certain counter-majoritarian devices; (3) certain counter-majoritarian devices impose a minority veto; (4) in our democracy, we do not want this kind of minority veto and that is why we need to restore a certain form of majoritarianism.

All the mentioned ideas may mean different things in different contexts and may consequently be related and distinguished in different manners. Certain counter-majoritarian mechanisms may strengthen, rather than undermine democracy;<sup>1</sup> certain minority vetoes may be crucial to better preserve the rights of certain unpopular and politically feasible groups in multiracial democracies such as the ones that Professor Levitsky praises.

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1. CONSTITUTIONALISM AND DEMOCRACY (Jon Elster & Rune Slagstad eds., 1988) (for example, judicial supervision of the procedural rules of democracy and safeguards to freedom of expression are counter majoritarian devices that help strengthen democracies).

Within the frame of this first discussion about concepts, I would encourage Professor Levitsky to clarify, and possibly re-think, his conception of democracy.<sup>2</sup> It seems clear to me that Steven endorses a certain Schumpeterian understanding of democracy.<sup>3</sup> As applied to the United States, this particular Schumpeterian approach seems unduly focused on the two main political parties' performance, their proper functioning, and the importance of ensuring a fair competence between the two. Of course, all these are crucial objectives that probably represent necessary conditions for ensuring the health of democracy in America.

Now, the problem with this approach is that it is based on a too-narrow view about democracy. Personally, I defend a broader and stronger notion of democracy, understanding democracy as an instance of a "conversation among equals."<sup>4</sup> But here I am not asking Professor Levitsky to endorse my favorite notion of democracy. What I would stress is that my own approach, as well as many other common-sensical approaches to democracy,<sup>5</sup> would go far beyond a fair political competence between two political parties. These different approaches would pay attention to the levels of citizens' participation in politics, political mobilization, social protests, and more. They would examine the health of our constitutional democracies by considering the opportunities that the institutional system offers to the individual citizens to take part in the common affairs. Probably, all these approaches would conclude that the American democracy is in bad shape, even if it were the case that the two main political parties disputed power in a totally fair way.

Moreover, restoring the fair competence between the Republican and Democratic party should not be sufficient to restore proper functioning of a multiracial democracy. Most of the evils that affect our multiracial democracies (inequality, discrimination, police violence, etc.) would still be present even if we succeeded in, say, "democratizing" the Republican party.

Additionally, during his final lecture, Professor Levitsky references the importance of citizens' mobilization and activism. He suggests those activities that could help us "cure" the evils that currently affect our multiracial democracy. I welcome Professor Levitsky's claim in this respect, which I also find enormously important. However, if what we now want is to encourage popular activism, then we would all need to say something more about *political motivations*. More precisely: why would people want to mobilize, and also

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2. See David Collier & Steven Levitsky, *Democracy with Adjectives: Conceptual Innovation in Comparative Research*, 49 *WORLD POL.* 430, 430–51 (1997).

3. By a Schumpeterian understanding of democracy, I mean a conception of democracy like the one advanced by the Austrian economist Joseph Schumpeter. Schumpeter proposed a minimalist understanding of democracy, where democracy was seen as a mechanism for competition between political parties, which functioned like an economic market.

4. ROBERTO GARGARELLA, *THE LAW AS A CONVERSATION AMONG EQUALS* xv (2022).

5. See, e.g., ADAM PRZEWORSKI, *DEMOCRACY AND THE LIMITS OF SELF-GOVERNMENT* (2010); ROBERT DAHL, *ON DEMOCRACY* (2020).

mobilize in the direction that we prefer? Certainly, they will not mobilize just because we say so or encourage them to become active in politics. So, instead of just stating something like “let’s mobilize!” or “we need people to participate more actively in politics!” we need to be a little more precise about how we get “from here to there.” As Jon Elster would put it, we would need to think more carefully about the “micro-mechanisms” of political activism.<sup>6</sup>

## II.

### CONSTITUTIONALISM AND DEMOCRACY

The second point that I want to raise concerns the relationship between constitutionalism and democracy and, more precisely, the demands that democracy makes to constitutionalism. Specifically, we should neither confuse nor conflate the problems of democracy with the problems of constitutionalism, as if they were identical.

This is important to Professor Levitsky’s project because even if we managed to “cure” all the institutional evils that Steven denounces, our representative institutions would still be insensitive to the diversity of “voices” that characterize our multiracial democracies and would therefore have problems processing and eventually satisfying those demands.<sup>7</sup>

In times of presidential abuses and “democratic erosion,” constitutionalism is going through serious problems. We all know the threatening stories about constitutional systems that are “eroded from within” to the point of being hollowed out and political leaders that gradually “dismantle” the system of “checks and balances,” promoting the “slow death” of our constitutional democracies. These are terrible, extremely serious problems.

But these are problems that should not be confused with the specific difficulties that affect the character of our democracies, generating political alienation, citizens’ disengagement, and a collective sense of disempowerment. Political philosopher Charles Taylor has recently described these situations as “part of a wider phenomenon of disconnect between the needs and aspirations of ordinary people and our system of representative democracy.”<sup>8</sup> We should pay particular attention to the problems affecting our multiracial democracies, which differ from those that affect our system of “checks and balances.”

To understand what I am saying, imagine that one day, miraculously, we managed to restore the old machinery of “checks and balances,” putting an end

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6. Jon Elster, *The Political Psychology of Constitution Making*, in CONSTITUENT ASSEMBLIES 207, 208 (Jon Elster, Roberto Gargarella, Vatsal Naresh & Bjørn Erik Rasch eds., 2018).

7. See Steven Levitsky, *The Third Founding: The Rise of Multiracial Democracy and the Authoritarian Reaction Against It*, 110 CALIF. L. REV. 1991 (2022). Especially notable are his references to institutional problems such as filibusters, malapportionment, judicial appointments that are independent of the social demands of the time, etc.

8. CHARLES TAYLOR, PATRIZIA NANZ & MADELEINE BEAUBIEN TAYLOR, RECONSTRUCTING DEMOCRACY: HOW CITIZENS ARE BUILDING FROM THE GROUND UP 12 (2020).

to the widespread abusive practices of the executive branch, blocking it from future dismantling of control mechanisms, and so on. Even if we magically managed to achieve those ambitious goals, a central part of our problem of “democratic erosion” would remain fundamentally intact. On the one hand, people would continue to feel alienated from power and disconnected from democracy.

This is because the problems posed by the crisis of constitutionalism differ significantly from those posed by the crisis of democracy. In other words, people do not feel politically alienated because, for example, judges have lost control of the executive, legislators are too deferential to it, or there are too few limits on presidential power. “We the People” feel removed from politics because we have very few opportunities to participate meaningfully in the political life of our communities.<sup>9</sup> Others take control over our affairs, telling us which direction the policies that matter most to us will take.

Surely, the “phenomenon of disconnect between the needs and aspirations of ordinary people” and our institutional system recognize different causes, but here, I am interested in mentioning just one of them, which is the Constitution itself, as Professor Levitsky properly suggests in his lectures. I submit that our constitutional structure’s central institutions have remained basically intact from their creation to the present day, while “we,” as a society, have radically changed. It is in the mismatch between what our institutions help us or allow us to do and what “we” the citizens—the People—now reasonably expect and demand of them. The mismatch has expanded to the breaking point between the institutions and practices of our constitutional structure on one side and what we consider reasonable democratic expectations and demands on the other. We are confronted by the dissonance between constitutional structure and democratic pretensions.<sup>10</sup> The original bias of democratic distrust that was translated or

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9. See generally *id.* (arguing that communities lack financial means, political influence, and resources to effectively respond to social challenges).

10. Although long time has passed, I see that there are certain resemblances between my view on “democratic dissonances,” and what Samuel Huntington and other experts maintained, decades ago. In fact, during the 1960s, Samuel Huntington, together with Michael Crozier and others, published the famous *Trilateral Commission’s Report on the Governability of Democracies*, where they described the emergence of an increasing gulf between social expectations and demands and the capacity of the institutional system for satisfying those claims. The political system—they maintained—had become “overloaded” by demands from the citizenry. In their view, a “democratic surge” in the 1960s raised the level of popular expectations and demands on the government, which tended to undermine the governmental authority and put the whole democratic system in crisis. MICHAEL CROZIER, SAMUEL HUNTINGTON & JOJI WATANUKI, *THE CRISIS OF DEMOCRACY* 12, 60 (1975). Curiously or not, most of those studies concluded by suggesting the need of limiting democracy as the only reasonable “cure” to the problem of an “overloaded” institutional system. *Id.* at 113. See also ROBERT DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (2008); SAMUEL HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* (1975). Schumpeter, as we know, proposed what was deemed an “elitist” model of democracy in which citizens voted for the purpose of selecting competing elites. SCHUMPETER, *supra*. This was, for him, the only reasonable response to be offered in the face of a popular opinion that was, for him, easily manipulated or manufactured—in the face of citizens that seemed unable to make intelligent political decisions.

“injected” into the institutions when they were molded during the “founding moment” has spread deeply, reaching a severe degree.

To summarize, the U.S. Constitution (as well as most Latin American Constitutions) was written in order to serve societies that no longer exist. They follow an “obsolete political sociology,” in which we lived in small and pretty homogeneous societies rather than in radically multicultural ones. Additionally, it was based on theoretical assumptions that we no longer share or directly repudiate: An “elitist political philosophy,” according to which the political and legal elite could achieve and implement the “rational” decisions that the people at large would be unable to find.<sup>11</sup>

For such reasons, the representative system seems condemned to failure: it is structurally unable to “capture” the diversity of voices and demands existing in society. Let me illustrate the point: in a “simple” society, composed of few and internally homogeneous groups (say, the rich and the poor, the big landowners and the small proprietors, or the creditors and the debtors) it would be reasonable to expect the “incorporation” of the entire society through the political system through the two chambers of Congress. In this way, the rich with their common interests, for example, would be incorporated into the Upper House, while the poor, with their homogeneous interests, would come to integrate the Lower House. But what about a multicultural society, composed of thousands of groups that are internally heterogeneous? How would we manage, in those social and institutional conditions, to facilitate the expression of all the different existing voices and demands?

### III.

#### SELF-GOVERNMENT AND EQUALITY

The third point I want to raise concerns self-government, and it starts from a claim that Professor Levitsky made in his presentations when he exclaimed, “Jefferson was right!” For Professor Levitsky, Jefferson was right in his demand for a constitutional reform. I agree. However, I want to supplement this assertion and explain why Jefferson’s approach is correct.

We do need to change a constitutional structure that became a “tight-fitting suit” that is preventing our democracies from expanding and flourishing. In his

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Similarly, Huntington and his colleagues urged moderation in the level of demands. For them, “the effective operation of a democratic political system” required “some measure of apathy and noninvolvement on the part of some individuals or groups[.]” CROZIER, HUNTINGTON & WATANUKI, *supra*, at 114. Herein, and mainly focusing our attention on constitutional matters, I shall argue for opposite solutions, which I shall base on opposite foundations (mainly, on confidence rather than distrust of democracy). More specifically, I shall advocate for the adoption of profound constitutional changes, which would be required in order to honor our shared democratic commitments. The point is that, in spite of the substantive changes that emerged in the last decades, in terms of democratic conscience/awareness, our Constitutions remained basically untouched in what concerns their organization of powers, and most counter-majoritarian devices are still in place.

11. See generally GARGARELLA, *supra* note 4.

final lecture, Professor Levitsky revises his call for a constitutional reform by presenting a more skeptical position (“Would it really be possible, under present conditions, to promote a substantive constitutional reform?”). I would advise Professor Levitsky not to give up with that claim: part of our problems have their origin in our constitutions, which were written for societies that are not there anymore and based on ideas and assumptions that we presently reject or repudiate. And we need serious, respectable, and influential academics, like Professor Levitsky, explaining to us why this reform is important.

However, it is critical to explain why and in what sense was Jefferson right. In my view, Jefferson was right to link collective self-government and constitutional reform. In Jefferson’s words, “the earth belongs to the living”<sup>12</sup> and each generation has the right to have its own Constitution. For this view, it would be wrong for one generation to bind the next one and prevent it to organize itself as it wished. I tend to fully agree with these ideas. Now, Jefferson said something more about this initiative, and I want to examine it (although it is not my idea to condemn Jefferson for things that he said two hundred years ago). In a famous letter to James Madison, written from Paris on September 6th, 1789, Jefferson said that each generation had to have its own Constitution. Moreover, he urged to change the Constitution every nineteen years, after calculating that generations renewed after that time.<sup>13</sup>

My problem is not so much with the idea of generations renovating every nineteen or twenty-five or fifty years, but with the criteria for changing the Constitution, particularly when our goal is to honor the ideal of self-government. Clearly, we cannot demand a society to change its Constitution after nineteen years in the name of that same society’s self-government. That would be like Ulysses commanding his sailors, and also future sailors, to always tie the hands of the Captain, when confronting the chant of the sirens. But then: when should the Constitution be changed?

The Argentine nineteenth century jurist Juan Bautista Alberdi had an interesting response to this query. He suggested to periodically adjust the Constitution according to the “dramas” or “tragedies” of the time. From that standpoint, Alberdi defended Latin American earliest constitutions from their numerous critics. For him, those constitutions represented an important effort to address the main “drama” of their time, namely the crisis of independence, as evidenced by their concentration on political and military powers in the executive branch. He stated:

All the Constitutions enacted in South America during the war of independence were complete expressions of the needs that dominated their time. That need consisted in putting an end to the political power exercised by Europe in America, which began during the conquest and continued during the time of colonialism . . . Independence and external

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12. THOMAS JEFFERSON, POLITICAL WRITINGS 599 (1999).

13. *Id.* at 107–09.

freedom were the vital interests that concerned the legislators of the time. They were rights: they understood the needs of their time, and they knew what to do.<sup>14</sup>

In other words, Alberdi praised the first American constitutionalists because they understood the need for, first and foremost, independence. Consequently, he asked his contemporaries to consider the needs of the new era, the “dramas” that they needed to resolve. Naturally, he also offered an answer. Alberdi declared: “At that time, what was required was to consolidate independence through the material and moral enhancement of our peoples. The main goals of that time were political goals: today we need to concern ourselves with the economic goals.”<sup>15</sup>

What was needed, therefore—in his personal opinion—was to populate the country in order to confront the drama of the “desert.” This involved promoting immigration to provide an adequate labor force, developing commerce with other nations, and establishing legal frameworks for contractual obligations that, together, would lead to economic development.<sup>16</sup>

So, adopting an Alberdian view about constitutional change, the question that I would pose to Professor Levitsky is: why change our Constitutions today? What is the “drama” you think the U.S. Constitution needs to address?

It seems to me that Professor Levitsky has a clear and interesting answer in this respect. For him, the U.S. Constitution needs to be changed to address one particular and crucial “drama”: the drama posed by a “multiracial democracy” that seems to find no proper place within the existing constitutional structure. I think that Professor Levitsky’s answer is attractive, and—at least in part—I agree with him. I would suggest him, however, to consider other pressing “dramas,” which a future constitutional reform should also address. I would begin by considering the “drama” of social and political inequality, which I think could and should play a more decisive role in Professor Levitsky’s presentation.

#### IV.

##### CHECKS AND BALANCES

In my view, the U.S. Constitution can properly be reconstructed according to the Alberdian approach. In that respect, one could reasonably claim that the Constitution was written to address two of the most serious “dramas” of the time, namely the “drama” of factions and the “drama” of the “Articles of Confederation.” These ideas appear clearly in the *Federalist Papers*, particularly in *Federalist Paper* number ten, where James Madison showed his profound concerns about the country’s institutional disorganization, which left it at the

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14. JUAN BAUTISTA ALBERDI, BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACIÓN POLÍTICA DE LA REPÚBLICA ARGENTINA 26 (1981) (emphasis added).

15. *Id.* at 123.

16. *See generally id.*



mercy of “factions.”<sup>17</sup> Those were, in fact, the assumption that gave title to the paper: “The Union as a Safeguard Against Domestic Faction and Insurrection.”<sup>18</sup>

Almost every feature and every institution of the U.S. Constitution can be explained from that perspective and in line with those two “dramas”—the Senate included. The Senate is one of Professor Levitsky’s primary concerns, and for good reason. The Senate adopted its present shape and composition to check the “hasty” and irrational decisions of the House, and at the same time as a concession that was made to the demands of the federal States, some of which threatened disintegration or secession.<sup>19</sup> So, from minute one in the United States, we got a Senate that fundamentally responded to the needs and demands of the different States. Fine for the time.

Now, the association between the Senate and the representation of the States is not and should not be taken as necessary or as a given fact. The Senate was so designed to address the “dramas” of the time (factionalism and federalism), but it is not a “truth” derived from the “nature” of constitutions that things should be like that. In fact, the history of constitutionalism tells us something very different. Just as an illustration: the members of the Senate, during the Roman Republic, were neither elected by the people nor related to the different provinces or regions. Rather, they were appointed by the consuls first, and later by the censors. The composition of the second Chamber of the 1795 Revolutionary Constitution in France—namely, the *Council of the Ancients*—depended on the age, rather than the geographical origin of its members.<sup>20</sup> The Upper House in England—the *House of Lords*—never responded to the demands of the different regions.

So, if we still want to reform the Constitution, and if we recognize the particular and serious problems derived from the organization of the Senate, why not re-think its composition according to the “dramas” of our time? More precisely, why not to arrange its composition, say, according to the demands of our present multiracial democracies?

## V.

### POLITICAL ELITISM AND AMERICA’S BIPARTIDISM

My impression is that Professor Levitsky put too much attention (and too much of the “blame”) on the Republican Party and its authoritarian derive. After listening to him and learning about the collection of political and social disasters caused by the Republican party, I couldn’t help but share his political concerns. However, after some reflection, I tend to at least partially resist his approach for principled and strategic reasons. In my opinion, the political problems that affect

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17. THE FEDERALIST NO. 10 (James Madison).

18. THE FEDERALIST NO. 9 (Alexander Hamilton).

19. GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC (1998).

20. See generally PIERRE BODINEAU & MICHEL VERPEAUX, HISTOIRE CONSTITUTIONNELLE DE LA FRANCE (2000).

America's democracy involve the Republican and the Democratic party, and the U.S. representative system in general. They have to do with a widespread sense of "political alienation" and political disempowerment.

So, I think it is both wrong and politically inconvenient to put all the blame on the side of the Republican party, even when all the evils that Professor Levitsky denounced seem true to me. However, when the Democratic party seems unable to properly represent its constituency, and much less to properly express the demands of a multiracial democracy, it seems wrong to just fault the Republican party for the present state of representative democracy in the United States. Again, we are facing structural problems. These are problems that are seriously affecting our representative institutions and go well beyond the (sometimes crazy) misbehavior that seems common among leaders of the Republican party. If this is the case, why then alienate adherents of the Republican party by blaming their party for structural problems that largely transcend America's party system? This is why I think (not wanting to sound ironic or disrespectful to Professor Levitsky) that we should not confuse the demands of democracy with the demands of the Democratic party. Let's focus on the structural problems affecting our constitutional democracies and see what we can do (if anything) to restore its democratic character. The problems that we are facing are much larger than the Republican party.

## VI.

### MAJORITY RULE IN A MULTIRACIAL DEMOCRACY

For me, it is somehow surprising that Professor Levitsky wants to maintain multiracial democracy and majority rule at the same time. This is to say, why advocate for a multiracial democracy while making a call for a more majoritarian democracy?

First, democracy is and should be considered to be a system that largely transcends majority rule: democracy is not just voting. Democracy requires social inclusion, social discussion, encounters, angry or passionate exchanges, debates about the nuances of each legislative proposal, and more.<sup>21</sup> So, majority rule is necessary. The "restoration" of the power of majority rule is also crucial under present conditions. But it is not sufficient, and it is far from enough for our common purposes. Second, and more significant, in the context of a multiracial democracy, minorities certainly have multiple political, social, and institutional demands to make. However, it is not clear to me that the demand for majoritarianism figures or should figure among their priorities. Perhaps the contrary.

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21. CARLOS SANTIAGO NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* (1996); OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996).

Think, for instance, about this example: we are living in a multiracial democracy, where we find Spanish minorities, Chinese minorities, Japanese minorities, and Italian minorities, and at one point we start debating about language rights, given that society has only English as its official language. In the context of such multiracial democracy, and amid a political discussion of language rights, I am not sure that our different ethnic and racial minorities will require first to restore the value of majority rule. In those conditions, simple majority rule would tend to hide or undermine, rather than favor or strengthen, the demands of minority groups.

What all these groups need is something different, such as to get together in collective and multicultural forums, be able present and discuss their views to the members of other groups, and find ways to accommodate their diverse interests. Of course, to state this does not in any manner deny the importance of restoring majority rule. What I am simply saying is that, after carefully listening to Professor Levitsky's presentations, I found odd that he so strongly advocated for majority rule in the name of a multiracial democracy.

#### CONCLUSION

In this brief article, I presented six comments related to Steven Levitsky's lecture, "The Third Founding." My comments were aimed, in some cases, at suggesting the introduction of changes—that could strengthen his own position—to his work and, in other cases, at objecting to some of his observations. In brief, I suggested that the author (1) specify some of the basic concepts used in his text, and particularly the concept of democracy; (2) not confuse the problems of democracy with the problems of constitutionalism; (3) take more centrally into account the problem posed by the existence of profound political and social inequalities; (4) extend and specify some of the institutional reforms he suggests in his text—in particular, in relation to the Senate; (5) pay attention to the structural nature of the problems affecting the American political system; and (6) review his proposal to reinvigorate majority rule in light of his defense of a multiracial democracy. These were some of the comments that I wanted to present to Professor Levitsky. Now, I just want to congratulate him again and tell him how honored I felt to have the opportunity to reflect on his work.