

“Is the United States Constitution Sufficiently Democratic:
How Would We Know and Do We Really Care?”¹

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I have been writing now for more than a decade on the insufficiently democratic nature of the United States Constitution, including a book published in 2006 with the explicit title *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*. A later book, published in 2012, continued the argument, though as indicated by the title, *Framed: America’s 51 Constitutions and the Crisis of Governance*, I have also become interested in America’s *state* constitutions. It is, I believe, clear beyond reasonable doubt that each and every one of the 50 state constitutions is considerably more democratic than is the United States Constitution, even as amended, albeit infrequently and insufficiently, over the past 225 years. At the same time, I have focused on the increasing discontent expressed by Americans across the political spectrum about the actual operation of our political system.

An obvious question, however, particularly with regard to the first book, concerns the metrics by which one assesses the extent to which the United States Constitution merits the designation “democratic” or “undemocratic.” The words have become almost textbook examples of what political philosophers call “essentially contested concepts,” meaning not only that reasonable people can and have, for a very long time, disagreed about the metrics, but also, and just as important, that the terms have taken on a *normative* as well as more detached *analytic* valence. At least since the mid-19th century, “democracy” and “democratic” have, with some exceptions, been thought to be complimentary terms, whereas “undemocratic”—or, even more obviously, “oligarchic” or “tyrannical”—has been a term of opprobrium. There is a reason, after

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all, that some notable tyrannies in the past century have styled themselves “democratic” or “peoples” republics.

Interestingly enough, as suggested by my reference to the mid-19th century, earlier ages were distinctly less taken by the notion of “democracy,” however defined. As I noted at some length in *Framed*, there is a reason that the 1787 Constitution guarantees to states a *Republican Form of Government* and not a “democratic” one. Though there were some notable exceptions among the Framers—such as Philadelphia’s James Wilson—few of them would have described themselves as “democrats.” As Morton Horwitz has noted, the Supreme Court did not begin using the term to describe the American experiment until the 20th century. Still, there can be little doubt that in our own time “democracy” is thought to be desirable. Almost a century ago, Woodrow Wilson defined American entrance into World War I as an effort to “make the world safe for democracy” and, since then, American presidents of both parties have committed the United States to what I have called “the democracy project.” In one of his first trips abroad after becoming President in January, 2009, President Obama told a student in Strasburg, France that “we should be promoting democracy everywhere we can.” To the extent that he has subsequently been criticized, it is more often for being insufficiently militant in that project, especially following the “Arab Spring,” rather than for potentially dangerous delusions of grandeur. Only reactionaries would suggest these days that it may be as important to “make democracy safe for the world” as the converse.

In any event, agreeing on the metrics by which we determine whether a given country is or is not “democratic” is no easy task. Even more delicate than simply a binary opposition of “democratic” and “undemocratic” is an ordinal ranking by which we compare the extent of one presumptively “democratic” country’s democracy with that of another also “democratic” polity.

Let me begin, though, with what surely has to be one tempting, even if not necessarily overriding, metric, the actual ability of voting majorities—or of majorities of the entire population, which may of course generate quite different conclusions—to translate their policy preferences into laws passed and enforced by government. For anyone fully conscious of the 1960s, the current decade of the 20-teens is rich with golden anniversaries. 2013 is, for example, the 50th anniversary of the Supreme Court’s enunciation, in the 1963 case *Wesberry v. Sanders*, of the “one-person/one-vote” doctrine that, for better and perhaps for worse, transformed the way we elect all state legislative institutions and the United States House of Representatives.

Wesberry, which concerned congressional districts, was succeeded the following year by *Reynolds v. Sims*, which struck down mal-apportioned state legislatures throughout the American states. It is surely worth at least a brief look at the terms used by Chief Justice Warren in *Reynolds*, which he personally believed to be the single most important one of his tenure as Chief Justice, including *Brown v. Board of Education*.

For the Court, Warren defined “representative government” as “grounded” on the notion that “a majority of the people of a State could elect a majority of that State’s legislators.” He refers as well to “the democratic ideals of equality and majority rule, which,” he asserts, have “served this Nation so well in the past.” There is something more than a bit odd about this assertion, inasmuch as the case before him instantiates the extent to which the American political system up to that time, at both the national and state levels, had rather systematically *resisted* the notions of “equality and majority rule” in the name of other values—and political interests—that were thought to be more important. (We shall, for example, presently look at the most spectacular deviation from these ostensible “democratic ideals,” the United States Senate.) Be that as it may, he also writes of the Constitution as requiring “self-government through the

medium of elected representatives of the people, and each and every citizen has an inalienable right *to full and effective participation* in the political processes of his State's legislative bodies.”

In a political order predicated on the affiliation of otherwise isolated individuals with social movements or political parties, it is certainly plausible to identify “effective participation” with the belief, and reality, that one will win an election if one’s party gains a majority of the vote. It cannot suffice, for example, to be told only that one has an individual vote that counts “equally” with all other individual votes . Among other things, that restricted notion of voting equality would make the outcome of an election almost literally irrelevant, since the “democratic ideals” would be defined only by the ability to cast an “equal vote” that is in fact counted. We must also decide what it means to “win an election.”

That, too, is no easy task. Surely winning an election must mean something more than the ability of the ostensible winners to occupy seats in some political institution. As anyone who has ever participated in an election for high-school student council or, indeed, “student-“ or even “faculty-government” within university settings, becoming a member does not in the least mean that one is gaining as well any genuine decision-making authority with regard to the kinds of issues that matter most to students or faculty. Retained powers of principals, deans, provosts, presidents, and regents almost limit any “self-governance” by the elected representatives . This suggests that we should include in our standard for “winning elections” the actual probabilities that the result will be visible and important changes in public policy presumptively supported by the relevant electorate or the people elected to office.

This emphasis on majority rule was central to Warren’s explanation of his rejection of what was once known as “little federalism,” by which states emulated the United States Senate by, for example, giving each county the same representation in the state Senate. This was true,

for example, in North Carolina, where I grew up in Henderson County, which, with approximately 30,000 people, had the same one senator as did Mecklenburg County, where Charlotte is located, which at that time had a population of around 200,000. One would be surprised if Warren, a former governor of California, was enamored of any analogy to the United States Senate. Although California had “only” somewhat more than 10 million people in 1950 (receiving thirty seats in the House of Representatives), its voting power in the Senate was equal to that of Wyoming, with its approximately 290,000 population, a ratio of almost 35-1 (as against the 70-1 ratio in 2013). Warren, one suspects, would have agreed with James Madison’s description of equal voting power in the Senate, in Federalist 62, as a “lesser evil,” the greater evil being the breakdown of the effort to achieve a new constitutional order should the small states like Delaware carry out their well-articulated threat to walk out of the Convention—and perhaps even seek alliance with another country in the international system—should their extortionate demands to equal voting power not be met. As Warren put it, “a compromise between the larger and smaller States on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation.” Perhaps this is an instance where avoiding an abortion was worth it, but a “lesser evil” is still an “evil.” It scarcely provides an inspiration for later constitutional designers, save for the broader issue about the necessity to make unattractive—even what Israeli philosopher Avishai Margalit calls “rotten”—compromises in order to achieve the end of gaining acquiescence to a particular constitution.

“The right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens,” wrote Warren, would, if confined to only one house of a bicameral state legislature, “amount to little if States could effectively submerge the equal population principle in the apportionment of seats in the other house.” Warren, with his deep experience in

California politics, well knew that in “little-federalism” states, political majorities, whatever their apparent state-wide success with regard, say, to electing a governor and a majority of the “lower house,” “might be almost as effectively thwarted as if neither house were apportioned on a population basis. Deadlock between the two bodies might result in compromise and concession on some issues. But, in all too many cases, the more probable result would be *frustration of the majority will* through minority veto in the house not apportioned on a population basis, stemming directly from the failure to accord adequate overall legislative representation to all of the State's citizens on a nondiscriminatory basis” (emphasis added). It should be obvious, incidentally, that the “compromise[s] and concession[s]” that might be elicited are almost undoubtedly differ from what would be the case if the minority benefitting from mal-apportionment did not have the degree of power assigned them by the apportionment rules. This, after all, is exactly what happened in the Philadelphia Convention, to Madison's intense dismay.

So one way of determining the degree to which the United States Constitution is “democratic” or not is simply to assess the extent to which it systematically sets up veto points in the way of a majority's achieving its policy goals. Another way of putting this is to ask if elections “really matter” with regard to moving the dinosaur that is the national government, especially if we compare the American national election systems—and I use the plural advisedly—with not only a host of possible foreign countries who have wisely rejected our reliance on a byzantine system of separated institutions and multiple checks and balances, but also many American states, even if none has chosen a parliamentary model. Though most celebrants of the United States Constitution prefer to emphasize the degree to which it offers direct protection of certain rights, in keeping with the post-World War II linkage between

“constitutionalism” and “rights-protection,” it is absolutely crucial to recognize that at least as important—I am strongly tempted to argue *more* important—is the set of institutions established by constitutions to structure the basic conduct of politics and, therefore, to determine, as a practical matter, the prospects for success of any given political agendas.

From my current perspective, the most significant feature of the United States Constitution is its establishment of multiple veto points that function as often fatal roadblocks to any proposed changes in the polity. This begins, as Warren suggests, with the specific form of national-level bicameralism; thanks to *Reynolds*, that is altogether different from the bicameralism found in 49 of the 50 states, even if one wishes, as I do, that more of these states would emulate Nebraska by adopting unicameralism. After all, one might well answer in the negative to the question posed by Alan Tarr, perhaps the most distinguished scholar of American state constitutions, in his 2010 testimony to the Pennsylvania legislators: Are there “good reasons, other than tradition and familiarity for bicameralism in the American states?”² As it happens, I personally think the answer is yes, especially in states at least as large as Pennsylvania, though I think there is no good reason for a bicameralism in which the so-called upper houses mimic so closely, when all is said and done, the lower ones in terms of mechanisms of election. Imagine, for example, that the second house is chosen through a robust system of proportional representation, while the first one is selected by conventional single-member districts, or, my own favorite notion these days, the membership of the second house were chosen by an Athenian or Venetian-style lottery system, thus omitting election entirely and relying on statistics to provide at least as “representative” cross-section of the public as is generated by the contemporary electoral process. But, of course, I digress, and I should return to the subject at hand, the United States Constitution.

² <http://camlaw.rutgers.edu/statecon/publications/bicameralism.pdf>

We all know that it isn't enough to prevail in both the United States House of Representatives and the United States Senate, as happened, say, in the 2006 elections with regard to the Democratic Party. There is still the hurdle of the presidential veto, especially if the President is a member of the other party, as was most certainly the case between 2007-2009. The most dramatic form of the veto, of course, is the actual negation of legislation supported by majorities of both houses. But the very existence of the presidential veto gives presidents significant bargaining power in the shaping of legislation itself. I now regularly refer to the United States as having a *tricameral* legislature, precisely because of the power of presidents in this regard. One reason for the president's power is the presumptive ability of the president to prevail against legislative opposition, given the requirement established by the 1787 Constitution that each of the two houses present 2/3 majorities to override a veto. Even among presidential (or gubernatorial) systems throughout the world and within the United States, the presidential veto is unusually strong because of the barriers to a successful override.

A common justification of the presidential veto is that the president is entitled to speak for the nation because of his having been nationally elected. That is often a tendentious claim, given that any assessment requires grappling with the egregious electoral college. All of us are familiar with the fact, as in 2000, that the electoral college may crown the candidate who comes in second in the national popular vote, which, as a constitutional matter, is utterly irrelevant. This is the major explanation of the fact that candidates of both parties pay basically no attention to getting out the vote in what have come to be called "non-battleground" states. As someone who splits his time between Massachusetts and Texas, I can bear witness to the fact that residents of those states had far less direct knowledge that the United States was electing a president last fall than did residents of Pennsylvania, though even Pennsylvanians surely saw less of Barack

Obama and Mitt Romney than did the residents of Ohio. There were certainly those last November who were predicting a re-run of 2000, so that narrow Romney victories in Ohio, Wisconsin, Virginia, and Florida would quite literally more than offset significant Obama margins in New York, Illinois, or California.

The possibility of such electoral vote losses by popular vote front-runners is certainly not a plus of the electoral college. However, I regard as equally problematic the fact that it regularly sends to the White House persons who, even if they came in first-past-the-post in the popular vote, received far short of a majority of the vote. The most important example in our history is surely Abraham Lincoln, who gained office with 39.8% of the national vote, with the conflagration of war as the consequence. Those who condemn secessionists because they rejected the “democratic process” that chose Lincoln have, I want to suggest, a peculiar definition of “democracy.” Less freighted, but worth bookending, were the 1968 and 1992 elections of Richard Nixon and Bill Clinton, respectively, each of whom gained office respectively, with approximately 43% of the popular vote. We do not even have to go outside the United States—say, to France—to discover that many modern political systems avoid this possibility by having runoffs between the two top candidates, so that the winner can always make a plausible argument to have been chosen by “the majority.” Georgia, for example, has runoffs to select its public officials, including governors and senators. Interestingly enough, though Texas has no such system in general elections, so that Rick Perry was re-elected in 2006 with 30% of the vote, runoff systems *are* used in party primaries, which helps to explain why Ted Cruz is now the United States senator from Texas.

There is at least one other distinction worth noting between the United States Constitution and many state constitutions in our quest to apply the majoritarian metric: The

national Constitution was created by men who were, to put it gently, skeptical about the capacity of ordinary Americans to engage in what some might define as genuine “self-governance,” that is, making decisions about important political matters themselves rather than through representatives designated to do the job. Whatever the proclamation of the Constitution’s being “ordained” by “We the People,” the national government, almost uniquely among the 51 constitutional systems within the United States—Delaware is the one exception—is committed to the exclusivity of *representative democracy* and therefore excludes the slightest scintilla of *direct democracy*, with significant consequences for the national polity.

Consider just two implications of the rejection of direct democracy. As everyone knows, if one objects to legislation passed by Congress and signed by the President, or perhaps passed by override of the President’s veto, there are only two basic responses (beyond, of course, hoping for implicit “civil disobedience” by relevant public officials who will simply ignore the legislation in question). One response is to begin organizing for the next election in an effort to vote the rascals out and hope that their replacements will repeal the offending legislation. Aside from already-mentioned problems of apportionment of voting power, an additional power even in impeccably designed districts is that a voter will almost invariably have to choose among less-than-perfect candidates. Some will have “wrong” views on some issues that one cares about even while holding “correct” views about others. What if, for example, one hopes for the repeal of *two* pieces of legislation, one supported and the other opposed by each of two candidates? Whomever one votes for may proclaim a misleading “mandate,” upon election, by claiming that his or her supporters approve even the most prominently discussed positions of the candidate, let alone all of the ones that garnered relatively little public attention.

Only the fanatical “single-issue” voter brackets out all but the one overwhelmingly salient issue, but even in that case, one has to find many other such fanatics in order to assure that an elected representative will really care. As many political scientists have demonstrated, “interpreting” the meaning of elections, whether for individual candidates or the candidates as an aggregate, is often little more reliable, if at all, than careful study of tea leaves. But, of course, even if single-issue voters are unusually successful, they often discover that it is as difficult to *repeal* legislation as it is to pass it in the first place. Imagine, for example, that Republicans regained the Senate in 2012, as many observers expected them to do prior to certain disastrous nominations that led to the Democrats actually picking up seats. So long as President Obama would have won anyway, one can be absolutely confident that he would have successfully vetoed any Republican attempts to repeal the Affordable Care Act. This is why elections have limited impact at the national level, at least so long as one aspires either to the passage or repeal of legislation. The only people entitled to be optimistic—perhaps they are the roughly 15% of the populace who describe themselves as “approving” Congress—are those who prefer maintaining the status quo to taking the risk that legislation of any kind might in fact be adopted.

If one gives up on elections as a mechanism guaranteeing the ability to repeal objectionable legislation that managed to survive the veto points in the way of passage, then the other response, especially in the United States, is to race off to the nearest courthouse and to complain that the legislation in question is unconstitutional. I will not take up your valuable time by discussing the extent to which judicial review is “counter-majoritarian,” the well-known term coined by the late Alexander Bickel that has itself been subjected to withering criticism, much of which I’m sympathetic with. But it has always been especially problematic to figure out why the judiciary should be able to set aside *national* legislation, in contrast to *state* legislation, save for a

very limited set of occasions. Justice Holmes notably declared that the nation could well survive the elimination of judicial review of national legislation even as he thought it important that the Court could continue to monitor state legislation. Even if one disagrees with Holmes—and I confess I am uncertain about my own views on the matter—it is important to realize that, as an empirical matter, the Court has only rarely invalidated significant national legislation.

One reason I do not teach *Marbury v. Madison* and spend a perhaps inordinate amount of time on *McCulloch v. Maryland* is that the latter is, in every way, more important. The Court played its essential function of legitimizing what many at the time viewed as questionable acts by the national government and, of course, equally delegitimated Maryland's attempt to engage in what Heather Gerken has aptly labeled “uncooperative federalism.” It is true, of course, that the contemporary conservative majority of the Supreme Court has been far more prone to invalidate national legislation than were earlier courts, though even Chief Justice Roberts ultimately flinched at the prospect of negating the most important piece of federal social legislation in the past four decades. Still, assume that the law one doesn’t like is simply stupid, even pernicious in many ways, albeit not unconstitutional, whether measured by existing judicial doctrine or even by one’s favorite constitutional theory. After all, no one, liberal *or* conservative, believes that it is enough to identify a law as stupid or even pernicious in order to know that it is unconstitutional. George Mason, speaking to his colleagues in the Philadelphia convention on July 21, 1787, assumed that judges would have the power to “declare an unconstitutional law void.” But he also reminded his colleagues that “with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity, as Judges to give it a free course.” This simply echoed the like statement of Pennsylvania’s own James Wilson that same day: “Laws may be unjust, may be

unwise, may be dangerous, may be destructive, and yet may not be so unconstitutional as to justify the Judges in refusal to give them effect.” We should always remember, in this context, that Oliver Wendell Holmes helped to form the constitutional consciousness of many Progressives and New Dealers when he wrote, in his canonical *Lochner* dissent, that “[i]t is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical....”

So there is good reason to be wary of either elections *or* judicial review to protect Americans against the consequences of unwise legislation that is on the books. This is why I have become a fan of what I have to call “citizen review” as an alternative to “judicial review” or to the election process as a mechanism for relieving us of unwanted legislation. This process has been manifested most recently in Maine and Ohio. Section 17 of Article IV of the Maine Constitution, aptly titled “Proceedings for people's veto,” provides that petitions signed by no fewer than 10% of numbers of voters in the previous gubernatorial election trigger a referendum by the general electorate as to whether a bill passed by the legislature (and, almost certainly, signed by the governor) will in fact take effect. A similar provision in the Ohio Constitution allows appeal to the electorate. 53 percent of the Maine electorate in 2009 overrode a law legalizing same-sex marriage that had received both legislative and gubernatorial approval; two years later, a majority voted to override a law widely viewed as making it more difficult for people to vote in Maine elections. In Ohio, a law restricting the power of public employee unions was successfully overturned by popular referendum. Given my own politics, I am tempted to say that two out of three isn’t bad!

I invite you to consider whether we would have been better off, all things considered, in 2011-2012 had “Obamacare” been subjected to a national referendum, deciding whether the bill would live or die, instead of being taken before the federal judiciary. Instead, we were treated to the spectacle of lawyers shouting at one another and changing almost no minds in the process, with the ultimate result being the 5-4 decision upholding the central aspect of the legislation, the so-called “mandate.” I am quite confident that Chief Justice Roberts’s opinion upholding the mandate on “tax clause” grounds while rejecting its legitimacy under the Commerce Clause is treated with disdain by at least 75% of those who study constitutional law for a living. After all, it was, in effect, rejected by eight of his nine colleagues.

My real point, though, is that many states, because of their adoption of procedures allowing “direct democracy,” have a “safety valve” against the particular kinds of veto points generated by representative democracy, whether one focuses either on initial passage of legislation or the repeal of such legislation as does pass. It is worth mentioning the special problem posed by the almost certain opposition of representatives to particular changes that would challenge their entrenched power, as with proposals at the state level to eliminate bicameralism. I have on more than one occasion quoted the emendation by political scientist John P. Roche of Lord Acton’s famous comment about power and cooption. “Power corrupts,” said Roche, “and the prospect of losing power corrupts absolutely.” Former Minnesota governor Jesse Ventura sensibly urged Minnesotans to eliminate their senate, both because it hindered the passage of necessary legislation and simply cost the state a considerable amount of money for no good reason. Not surprisingly Ventura, almost always described as a “maverick” inasmuch as he won his office with a minority of the total vote by running as an independent in a multi-candidate election that did not allow a run-off, failed in his efforts. Perhaps one

explanation, in addition to Ventura's lack of political skills, is the simple fact that Minnesota, unlike Nebraska and seventeen other states, has no provision for citizen initiatives and referenda that would have allowed Ventura and his supporters to do an end-run around recalcitrant state senators, as ultimately happened in Nebraska.

I don't want to take much more of your time going over the undemocratic features of the United States Constitution, not least because I've devoted two books to this task. Those books have emphasized the likely consequences—I use that adjective in order to recognize that complex problems of causal analysis are involved—of the formal structures drafted in Philadelphia, ratified in 1787-88, and left remarkably unchanged thereafter. I will conclude this section of my remarks by mentioning one final clause that I find particularly egregious, Article V, which sets out the procedures for amending the Constitution. It is not only that these procedures add up to making the United States Constitution perhaps the most difficult to amend constitution in the entire world. The only reason for the “perhaps,” incidentally, is that some states, such as Iowa, require that amendments be proposed by successive legislatures before being submitted to the voters for popular ratification. This makes impossible the rapid proposal and approval found with regard to several national amendments, including, for example, the 17th Amendment ending legislative election for senators and the 21st amendment repealing prohibition, both proposed and ratified within approximately a single year. And some constitutions, most famously Germany's, have so-called “eternity” clauses that prohibit certain specific kinds of amendments and, therefore, apparently license constitutional courts to invalidate even constitutional amendments themselves should they run afoul of such clauses.

So let me review the bidding, as it were: I think it is beyond argument not only that the United States Constitution fails a primary test of 20th and 21st century “democracy,” but also, and

just as importantly, that that is far less the case with regard to America's state constitutions and the systems of government they establish (or "constitute"). I have become insistent—perhaps even crankish—in arguing that we must stop identifying "American constitutionalism" exclusively with the atypical United States Constitution. I am a big fan of John Dinan's book *The American State Constitutional Tradition*, which draws on the constitutional developments of America's state constitutions and the significant differences between and among them, on the one hand, and the 1787 Constitution, on the other. (I have, for example, not discussed the implications of the fact that most state judges are, in one way or another, accountable to state electorates.)

We are left with two primary questions, though. Does it really matter to most Americans that the United States Constitution is so strikingly undemocratic? I have come to the conclusion that the answer is no. A common reaction to my earlier book—recall its title, *Our Undemocratic Constitution*—was to be told, sometimes quite condescendingly, that I simply misunderstood American constitutionalism (at least when it is defined by the United States Constitution). The demigods who framed the Constitution explicitly established, I was told, a "republic," not a "democracy," and we should keep it that way. I have no doubt that few, if any, of these respondents could even identify the John Birch Society or its founder Robert Welch, but they adopted its motto, developed during the 1950s as part of a broader argument that Dwight Eisenhower was a communist sympathizer inasmuch as he basically accepted the legitimacy of the New Deal. Indeed, I have come to the further conclusion that most Americans, whatever their use of the term "republican" in this context, are far from "civic republicans" with regard to the importance of actually turning aside from one's private pursuits to participate in politics. I

suspect that a “benevolent despotism” that genuinely “delivered the requisite material goods” would garner far more approval than does the present Congress.

It is well beyond the scope of this paper to offer a full analysis of the rejection of a participation-oriented civic republicanism. We might, however, ask ourselves if we today share Hamilton’s and Madison’s seeming confidence in 1787 of a perhaps endlessly “extended republic.” The Constitution was drafted, and defended, to establish a national polity of approximately 4-5 million persons, most of whom were denied any participatory role in national politics. And the country extended only to the east bank of the Mississippi River and from what is now Maine to the present southern border of Georgia. California alone has approximately eight times the entire population of the United States—and it is only about 12% of the total population today, which is at least 60 times the initial population at its origin, not to mention the expansion of the country into the mid-Pacific and, depending on one’s view of Puerto Rico, the mid-Caribbean. Economists relish pointing out that it is basically irrational for any given individual to vote, let alone to expend even further energies in civic governance. Free riding is the “rational choice.”

My second remaining question, however, is entirely relevant to this paper: How do we account for the fact that what Dinan calls the “American state constitutional tradition” has had so little impact on the “tradition” linked with the national Constitution? Federalism is often praised as offering “little laboratories of experimentation,” which, presumably, the rest of the country could learn from. What, apparently, has so little been learned from the development and history of American state government?

One response, of course, is simply to say that they are such fundamentally different enterprises that there is just nothing to be learned from state practices. (Is the same true with

regard to learning in the other direction?) From this perspective, it is foolish to ask students, as I often do, to compare, say, the California or Texas constitutions, on the one hand, with the United States Constitution, on the other, and then to indicate which they prefer, with regard to some specific issues of constitutional design, and why. Perhaps this is like asking them to compare even their favorite piece of music with their favorite food. They are two radically different domains of life. I confess I find this answer wholly unpersuasive. Even if one concedes that there are some significant differences in the purposes and domains of the United States Constitution and that of a particular state—think, for example, of the particular “national security” responsibilities of the national government, with its plethora of armed forces, or the unique ability of the national government to inflate the currency by printing money—that scarcely explains, without more, the fact that 48 of the 50 states have rejected the “unitary executive,” particularly with regard to giving state governors the power to appoint attorneys general. And I have already indicted my own willingness at least to contemplate the possibility that we would be better off with at least milder forms of direct democracy, such as that found in Maine, than with the exclusive reliance on representative democracy foisted upon us by the delegates to the Philadelphia Convention.

Let me conclude, then, by offering two other hypotheses for discussion. One involves popular *consciousness*; the other, our inadequate public *education*. As to the first, I return to a central theme of my first book, *Constitutional Faith*, which emphasized the singular role that the United States Constitution plays in American civil religion. As one might well expect with religious symbols, it is often treated with the “veneration” that James Madison notably called for in *Federalist 49*, devoted to rebutting the arguments made by Thomas Jefferson in favor of frequent conventions that might subject the Constitution to continuing scrutiny and assessment

by “We the People.” In a recent lecture delivered at the University of Nebraska Law School, I focused on *Federalist* 1, written by Alexander Hamilton. He emphasizes that “it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether *societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.*” The title of my talk was “Reflection and Choice”: a One-Time Experience?” That is, do we treat the initial *Federalist* as only a historical document, interesting to us, if at all, as an artifact of late-18th-century political thought, or can it/should it speak to us today in 2013. Do we view ourselves as empowered to engage in genuine “reflection” about the adequacy of our Constitution and the possible relationship between its proclivity to establish so many veto points and the malaise about our political system that seems so endemic to contemporary American politics, regardless of one’s place on the political spectrum? And, if one agrees with my “reflections” about the dysfunctionalities of our constitutional order, do we feel empowered as well to engage in a genuine “choice” about reforming it and emulating those who acted in Independence Hall? Both Hamilton and Madison spoke of the necessity of paying due attention to the “lessons of experience,” even if they required rejecting “tradition” and established ways of doing things. Do we pay suitable attention to such lessons, or do we settle instead for what I am sometimes tempted to describe as mindless veneration of the Framers’ handiwork?

Whatever else may be said of America’s state constitutions, one can be quite confident that few, if any, are treated even with great respect, let alone veneration. The one exception may be Massachusetts, explained perhaps by the fact that the 1780 Constitution, the oldest continuing constitution in the United States, was substantially drafted by John Adams. I am confident,

though, that the trigger for the copious literature on Adams, like the other Founding Fathers, has almost nothing to do with that particular aspect of his remarkable career. Most Americans, I suspect, are ignorant of the fact that their states even have constitutions of their own. Indeed, far more to the point, I don't have to engage in sheer speculation in order to note that almost no "leading" law school makes its students aware of the fact that the American constitutional tradition is in fact far more complex than one would think, at least if one takes our state constitutions and their history into account. Instead, "American constitutionalism" is identified exclusively with the national Constitution, and students can graduate and embark on careers of distinction—perhaps even becoming presidents or chief justices—without once engaging in systematic reflection on the differences among our various constitutions.

Consciousness is, at least to some extent, a function of education. Much has been written about recently about the absolutely dismal status of what used to be called "civic education" in America. Let me suggest, though, that the "solution" is not simply to intensify the presentation of material about the national Constitution. I have, in recent years, offered "reading courses" at the Harvard Law School on comparative national and state constitutions in the United States, and I have discovered that almost no students were ever properly introduced to their state constitutions in the course of their education. "Comparative constitutional law," in most law schools and, I suspect, political science departments, is synonymous with the placement of *national* constitutions, whether France's or South Africa's, next to one another, including that of the United States, with concomitant attention to what similarities and differences one might find. In law schools, I regret to say that comparisons or contrasts most often involve *rights* and not the different *structures*, which I fear are treated as far less interesting. One must also concede that there are extraordinarily important, and difficult, questions of causality linked to structural

analysis that may be absent if one looks only at the debates about different political and social values surrounding, say, hate speech, abortion, or affirmative action in various countries.

When comparing different countries, and even states, it is always tempting to rely simply on “culturalist” assumptions that diminish perhaps to the vanishing point the relevance of institutions. In the half-century since I arrived at graduate school, political science has remained divided between those who emphasize “political culture” or economic resources and thus dismiss as “epiphenomenal” those on the “other side,” who believe that formal institutions genuinely matter, that the outcomes of the debates in Philadelphia were of enduring importance in explaining subsequent American history, for good and, all too often, for ill. I certainly do not want to be interpreted as arguing that institutions explain 100% of the variance between any given polities. That would be extraordinarily foolish. Perhaps institutions explain “only” 10%. But there are times when that may be enough, given other factors admittedly traceable to cultural or economic aspects of the polity, to explain why one system will “go over the cliff,” fiscal or otherwise, while another manages to veer toward a safer outcome.

In any event, I remain willing to continue playing my self-assigned role of critic of the United States Constitution. I would like to think that I am Paul Revere, telling my fellow Americans that it is time to confront the potential menace posed to us by the deficiencies in the Constitution that, left unexamined and unchanged, will increasingly prove to be a clear and present danger to our own future and that of our ancestors (not to mention people around the world who are necessarily affected by decisions made and unmade by those who claim to govern the United States). It is, of course, possible, even if one grants the possibility that I am correct in my analysis, that I am Cassandra, the truth of whose prophecies was entirely irrelevant, whether one explains this by the consciousness of her audience or the whimsy of Greek gods who took

malign pleasure in making sure that no one listened to her. The final possibility, of course, is that I am Chicken Little, whose warnings are simply the result of an excited, perhaps hysterical, consciousness of my own, so that the correct response is simply to lighten up, stop worrying, and be happy, secure in the knowledge, after all, that God does indeed take care of children and the United States. Would that were true!