

TEMPLATES OF AMERICAN DEMOCRACY FOR THE 21ST CENTURY: THE IMPORTANCE OF LOOKING AT AMERICAN STATE CONSTITUTIONS

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I am grateful to the Federalist Society for giving me these two opportunities to discuss the need for significant constitutional reform. First at its annual student gathering—this year, delightfully, in my hometown of Austin, Texas—and now in *The Harvard Journal of Law & Public Policy*. I begin this essay by looking at the title of the session in Austin: “Unique Aspects of American Democracy: Structural Bugs or Features?” I believe this title illuminates the difficulties we often face when discussing “American democracy.” I have increasingly become a vociferous critic of American legal education in this regard, for a deceptively simple reason: We—that is, the professoriate at America’s “leading” law schools charged with teaching “constitutional law”—fixate exclusively on only one of the fifty-one constitutions within the United States. That one is, of course, the 1787 United States Constitution. It is, to be sure, a topic of great interest, but however interpreted, it presents only an extraordinarily partial, and even misleading, picture of the entirety of “American constitutionalism.” Even more, study of only the United States Constitution limits the possibilities inherent in the notion of

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“American democracy.” That is especially true regarding the possibility of changing, by amendment or otherwise, the structures of the constitutional system themselves.

Whatever my views in the abstract are about American federalism—I suspect that I am more committed than many members of the Federalist Society to the virtues of the “consolidated” national government that I believe was by and large envisioned by a critical mass of the delegates to the Philadelphia Convention, including, most certainly, James Madison and Alexander Hamilton—I believe that the state constitutions are enormously interesting and remarkably different from the United States Constitution. And, in some important respects, state constitutions are significantly *better* than the 1787 Constitution. I published a book in 2006 called *Our Undemocratic Constitution* that I think established, beyond a reasonable doubt, that the United States Constitution drafted in 1787 does not meet the tests posed by any plausible twenty-first-century theory of democracy. Most, if not all, of the other fifty constitutions do meet those tests.

Perhaps the most important evidence for this proposition is that the 1787 Constitution has *not* truly served as the prototype for the state constitutions drafted afterwards. Obviously, states adopted some features that we associate with the national Constitution, including (save for courageous Nebraska) bicameralism and a gubernatorial, separation-of-powers system instead of one or another version of parliamentary government. But in many other respects, states broke with the federal template. For example, almost all the states have rejected the strong unitary executive in favor of what Harvard Law Professor Jacob Gersen has called the “unbundled executive.”¹ This departure is clearest regarding the separation between governors and state attorneys general (AGs). Most states elect each, and with some frequency the governor and attorney

1. Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1386 (2008).

general come from different political parties. Even if they belong to the same party, AGs will often view themselves as potential candidates for governor and will scarcely operate under the thumb of their ostensibly gubernatorial superior. Texas is probably the clearest case of the almost exuberant rejection of the unitary executive; among department heads, the governor gets to name only the relatively insignificant secretary of state. Even the lieutenant governor, as devotees of Texas politics are well aware, runs independently. But Texas is not truly “exceptional” in this regard.

Texas, like many other states, elects its judges—again perhaps to an exuberant degree.² Going back to the 1832 Mississippi Constitution and the far more influential 1846 New York Constitution, the people—or, at least, the relevant electorate—of those states expressed their fears that judges would become the faithful servants of the appointing governors and their political friends.³ Mississippi and New York’s solution was for the people at large to select their judges.⁴ Even states that have rejected popular election often constrain gubernatorial discretion to appoint judges. For example, the so-called “Missouri Plan” limits gubernatorial appointees to candidates presented by an ostensibly independent commission.⁵ In New Jersey, gubernatorial appointees (confirmed by the state senate) must run for retention after seven years.⁶ In California, judges get twelve years before having to face the electorate.⁷ These models for selecting judges are obviously different than the model presented

2. TEX. CONST. of 1876, art. V, § 1.

3. Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 9 AM. BAR FOUND. RSCH. J. 345, 346-448 (1984); Madison B. McClellan, *Merit Appointment Versus Popular Election: A Reformer’s Guide to Judicial Selection Methods in Florida*, 43 FLA. L. REV. 529, 534 (1991).

4. MISS. CONST. of 1832, art. IV, §§ 2, 11; N.Y. CONST. of 1846, art. VI, § 12.

5. *Nonpartisan Court Plan*, MO. CTS., <https://www.courts.mo.gov/page.jsp?id=297> [<https://perma.cc/T2KV-4QEN>].

6. *About NJ Government*, OFF. SITE STATE N.J., <https://www.nj.gov/nj/gov/understand> [<https://perma.cc/Z6HX-YGDW>].

7. CAL. CONST. of 1879, art. VI, § 16.

by the U.S. Constitution. The U.S. Constitution provides for what many people across party and ideological lines consider indefensible and what I am tempted to call “full-life tenure” for federal judges.⁸ One can certainly argue at length about which model is more congruent with given theories of “democratic” control, assuming of course that one believes an “independent judiciary” should be accountable to the *demos* at all. But there is no reason to assume that the federal model necessarily makes better sense than the model presented by any given state, even if one believes that Texas is *too* exuberant in its system of electing judges.⁹

Whatever one’s abstract theory of democracy, though, I think it fair to assert that state constitutions are, generally speaking, far more “democratic” than their federal counterpart.¹⁰ Part of the reason for this is that only a few of the Founding Fathers were proponents of democracy.¹¹ This is a major theme of a splendid recent article by Professors Jessica Bulman-Pozen and Miriam Seifter tellingly titled *State Constitutional Rights and Democratic Proportionality*.¹² As they write: “Democratic self-rule lies at the ‘heart’ of the state constitutional project. These constitutions are oriented around majoritarian democracy in a way the federal Constitution is not”¹³ With regard to our federal Constitution, many of the Framers agreed with Elbridge Gerry that one of the problems facing the nascent, and possibly failing, new country was an excess of

8. U.S. CONST. art. III, § 1.

9. Texas has two courts of last resort—one criminal and the other civil. The judges of both courts of last resort must run for re-election, on a partisan basis, every six years. See TEX. CONST. art. V, §§ 2, 4.

10. John Kincaid, *State Constitutions in the Federal System*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 21 (1988).

11. Dora Mekouar, *Today’s Democracy Isn’t Exactly What Wealthy US Founding Fathers Envisioned*, VOICE OF AM. (Jan. 24, 2021, 7:00 AM), https://www.voanews.com/a/usa_all-about-america_todays-democracy-isnt-exactly-what-wealthy-us-founding-fathers-envisioned/6201097.html [<https://perma.cc/8G8X-G8YJ>].

12. See Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855 (2023).

13. *Id.* at 1873–74 (citation omitted).

democracy.¹⁴ They believed that this excess was typified by, for example, Shays's Rebellion in western Massachusetts in 1786.¹⁵ The reason that the Constitution (and most of the Framers) spoke of a "republican form of government" was because at the time very few persons were willing to embrace the identity of being a "democrat" and exhibit requisite faith in popular rule.¹⁶ That would change, of course. Even by the beginning of the nineteenth century, "democracy" began its march from a term of opprobrium to a commitment to be embraced. "Popular sovereignty," a major theme of American political thought beginning with the Declaration of Independence and, presumably, enshrined in the opening words of the Preamble to the U.S. Constitution, was taken far more seriously in the states than it was by the fearful Framers in Philadelphia.¹⁷

Madison devoted a key paragraph in *Federalist* 63 to the proud demonstration that "the people" would play no role whatsoever in the actual process of decision-making.¹⁸ Their role would be confined to selecting purported "representatives" who would make the decisions in their stead.¹⁹ Notoriously, presidents would be selected by special "electors" who could be trusted to identify those fit to be president or vice president rather than by the general

14. For an excellent overview of the shift of the use of "democracy" from a term of relative opprobrium to one embraced as fundamental to American political identity, see Morton J. Horowitz *Foreword: The Constitution of Change Legal Fundamentalism without Fundamentalism*, 107 HARV. L. REV. 30 (1993). See also JAMES T. KLOPPENBERG, *TOWARD DEMOCRACY: THE STRUGGLE FOR SELF-RULE IN EUROPEAN AND AMERICAN THOUGHT* (2016).

15. Summary of THE FEDERALIST NO. 55, NAT'L CONST. CTR., <https://constitution-center.org/the-constitution/historic-document-library/detail/james-madison-federalist-no-55-1788> [<https://perma.cc/G7PJ-WZ58>] (last visited Jan. 30, 2024) ("Following Shays' Rebellion in Massachusetts, Madison and his allies pushed for a new Constitution that might address the dangers of excessive democracy, including mob violence.").

16. Marci A. Hamilton, *Power, Responsibility, and Republican Democracy*, 93 MICH. L. REV. 1539, 1540 (1995).

17. See generally Joshua Miller, *The Ghostly Body Politic: The Federalist Papers and Popular Sovereignty*, 16 POL. THEORY 99 (1988).

18. THE FEDERALIST NO. 63, at 384 (James Madison) (Clinton Rossiter ed., 1961).

19. *Id.*

public.²⁰ One can certainly wonder if a constitution so indifferent to “democracy” could have been ratified by, say, the 1820s. During the 1820s the country was undergoing what would be called the “Jacksonian revolution” that displaced the model of elite non-partisan leadership envisioned (or fantasized) by the Founders with a far more robust model of popular government—at least so long as one confined the notion of the relevant public to white males.²¹

One way that state constitutions *did* track the federal Constitution, of course, was that almost all state constitutions mimicked national bicameralism by creating an “upper house” and a “lower house.” The upper house, usually called the senate, was decidedly less “representative” of the electorate in general than its “lower” counterpart. Most state constitutions adopted so-called “little federalism,” with which I grew up in North Carolina seven decades ago. My home county of about 30,000 people had the same one senator in the North Carolina legislature that Mecklenburg County (where Charlotte is located), which I think had only 200,000 people or so at the time, had. That disparity no longer exists, in large part because of *Reynolds v. Sims*.²² Boldly declaring that the Constitution was committed to some notion of “majority rule” and even “effective representation,” the *Reynolds* Court invalidated the model of so-called “little federalism.”²³ The model simply does not exist anymore, I think much for the better.

I don’t like how North Carolina politics have gone recently, not least because of the obscenity of ruthless partisan gerrymandering, but there’s no doubt that the North Carolina Constitution, in many ways, is far more democratic than the U.S. Constitution. And I think that’s true as you march through all the states.

20. THE FEDERALIST NO. 68, *supra* note 18, at 411 (Alexander Hamilton).

21. See, e.g., GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS’ CONSTITUTION, 1780S–1830S 214–21 (2019).

22. 377 U.S. 533 (1964).

23. *Id.* at 565–66.

I think that one of the deficiencies of legal education is that we don't set you to arguing about whether the Texas Constitution or the Alabama Constitution or the California Constitution—the constitution of wherever you might happen to live—is interestingly different from the U.S. Constitution and which is better. It's also worth noting that the odds are that the state you live in has had multiple constitutions. Each of the fifty states has had just short of three constitutions over its history. Montana's most recent constitution came along in 1972, as did Illinois's. New Jersey's was ratified in 1948. And, even if not entirely supplanted, the odds are truly overwhelming that your state constitutions have been amended far more frequently than the national constitution. Some people consider that a bug; I, of course, consider frequent amendment to be far more of a feature. The two oldest constitutions in the United States are those of Massachusetts and New Hampshire, dating back to 1780 and 1784, respectively. Yet both have been amended literally dozens of times, as distinguished from the national Constitution, which has not been formally amended in the lifetime of anyone under thirty, and if one goes back to the 26th amendment, in the past half-century.

I'm a big fan of *The Federalist Papers*, which I'm quite convinced nobody reads any longer. I'd be very curious—genuinely curious—how many of you in The Federalist Society, where James Madison is your avatar, have actually read *The Federalist Papers* and under what conditions you read them. Were you assigned them, or do you feel they are part of your general education whether or not they are assigned? But it is an important feature of state constitutions that they live up far, far more than the national Constitution does to the injunction of Alexander Hamilton in what is literally the first paragraph of *Federalist 1*, that We the People should engage in “reflection and choice” about how we are to be governed. Indeed, it is worth quoting his sentence in full:

It has been frequently remarked 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.²⁴

I want to argue that we should treat the 1787 Convention and ratifying conventions, for all their impressive display of “reflection and choice,” as also constituting important examples of “accident and force.” Think only of the fact that few members of the American public, including even most of those accepted as “citizens,” could participate in the actual deliberations and therefore exercise any genuine choice. And, even more obviously, there were literally hundreds of thousands of residents who were not accepted, even at the most formal level, as citizens entitled to so-called “virtual representation,” such as enslaved persons and members of Indigenous Nations. The all-important compromises with regard to slavery, for example, exemplified “force” far more than a conclusion that, when all is said and done, slavery was an admirable system that deserved to be protected. And, of course, elimination of chattel slavery at the national level required a brutal war that killed 750,000 people, whereas abolition occurred in many states relatively peacefully under state constitutional auspices.

My favorite state constitutions—there are thirteen or fourteen depending on how you count Oklahoma (which doesn’t obey its own constitution in this regard)—are the ones that require that the citizenry of the states be given the opportunity to vote up or down on calling a new state constitutional convention.²⁵ These elections usually occur at intervals of ten to twenty years. John Dinan, the author of an essential book, *The American State Constitutional Tradition*,

24. THE FEDERALIST NO. 1, *supra* note 18, at 27 (Alexander Hamilton).

25. J.H. Snider, *Does the World Really Belong to the Living? The Decline of the Constitutional Convention in New York and Other US States, 1776-2015*, 6 AM. POL. THOUGHT 256, 268 (2017).

builds his study around the records of the more than 230 state conventions that have taken place over our history.²⁶ My favorite state in this regard is New Hampshire, which has had seventeen state constitutional conventions over the past two centuries, even as it has formally stuck with its 1784 constitution.²⁷ I really, really wish we had that at the national level, but we don't. And that turns me to looking, in particular, at two of *The Federalist Papers* that I'm quite confident are not assigned or read. I've done an informal poll among a number of teachers, including legal academics, political scientists, and historians, and I think it's a safe surmise that *The Federalist Papers*, for most students, let alone "general readers," have been reduced to the greatest hits of Numbers 10, 51, and 78. Anything beyond that is icing on the cake.²⁸

But it does seem to me that everybody ought to read Numbers 62 and 63—both written, as it happens, by James Madison.²⁹ In Number 62, Madison calls the Senate and its equal allocation of voting power to each state an "evil."³⁰ He was right. He said, though, that the "lesser evil" of the Senate must be preferred to the far greater evil of Delaware and other small states walking from the convention and not getting a constitution at all.³¹

Identical logic, it should be noted, supported capitulation to the demands for protections of slavery. Gouverneur Morris made an eloquent speech denouncing the slave trade, which would be protected for twenty years under the Constitution; but he then ended up accepting it because, he, too, believed that without compromise

26. JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2006).

27. Snider, *supra* note 25, at 278.

28. See Sanford Levinson, *Constructing a Modern Canon for The Federalist*, 1 J. AM. CONST. HIST. 313, 313–335 (2023), <https://jach.law.wisc.edu/levinson-constructing-a-modern-canon-for-the-federalist> [<https://perma.cc/YD3-CQHD>].

29. THE FEDERALIST NOS. 62, 63, *supra* note 18, at 376, 384 (James Madison).

30. THE FEDERALIST NO. 62, *supra* note 18, at 376 (James Madison).

31. *Id.*

the constitutional project might well be doomed.³² So at least some of the “deliberation” and “choice” was carried out at the equivalent of gunpoint.³³ Philadelphia was not an example of the careful consideration and acceptance of ideas because of their substantive goodness. It was a rough-and-tough exercise in bargaining. The “force” that Delaware threatened, even if it was “exit” rather than the actually taking up arms, was sufficient to generate the Senate, much like threats by South Carolina regarding slavery.³⁴

To be sure, I’m not a Founder basher. It may have made sense in 1787 to submit to the demands of Delaware and other small states like New Jersey and Connecticut (and Rhode Island if they had bothered to send a delegate to Philadelphia). If you believed that a constitution was needed to prevent a fragile United States from being attacked by countries and indigenous tribes, you, too, would have acquiesced. Is the same true regarding slavery, the Three-Fifths Compromise, the Fugitive Slave Clause, or the protection of the international slave trade until 1808?³⁵ Is it enough to note that the Constitution never formally acknowledges “property in man?”³⁶ Or must we pay attention not only to original public meaning, but also, and more importantly, the actual acts of Congress, like the Fugitive Slave Law of 1793?³⁷

I’ve already alluded to *Federalist* 63 and its dismissal of a direct role for the people in governance.³⁸ “The true distinction between”

32. *Notes on the Debates in the Federal Convention, July 11, 1787*, THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/debates_711.asp [https://perma.cc/FU44-ASX9].

33. THE FEDERALIST NO. 1, *supra* note 18, at 27 (Alexander Hamilton).

34. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970) (explaining the power of parties to leave a negotiation).

35. U.S. CONST. art. I, §§ 2, 9; *id.* art. IV, § 2.

36. See SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING* (2018).

37. Fugitive Slave Law of 1793, ch. 7, 1 Stat. 302, *invalidated by* U.S. CONST. amend. XIII.

38. THE FEDERALIST NO. 63, *supra* note 18, at 384–85 (James Madison).

the “democratic systems of ancient Greece and the American governments,” it says, “lies IN THE TOTAL EXCLUSION OF THE PEOPLE, IN THEIR COLLECTIVE CAPACITY, from any share” in actual governance.³⁹ The emphasis is Madison’s, not mine. For him, this exclusion was most definitely a feature to be proclaimed from the rooftops and presumably accepted by “the people” themselves.⁴⁰ Whatever notion of “popular sovereignty” underlies the national Constitution, the “sovereign people” are presumably envisioned as becoming what Thomas Hobbes described as a “sleeping sovereign,” left comatose after their initial act of *authorization* of a decidedly undemocratic governmental structure.⁴¹ According to Bulman-Pozen and Seifter, though, *state* citizens always envisioned themselves as “stand[ing] apart from their representatives,” zealously preserving “popular self-rule”⁴² by accepting the invitation set out in the Declaration of Independence to “alter or abolish” existing systems that were deemed inadequate to that purpose.⁴³

But James Madison, perhaps, is just like most practicing politicians, not entirely consistent on any given issue. He changed his views over time, sometimes, perhaps, for reasons of political opportunism, other times because he was learning the bitter lessons of experience.⁴⁴ But what is so dismaying, with regard to the national Constitution, is that we don’t seem genuinely interested in learning the lessons of experience that Madison, like Hamilton, so eloquently invoked throughout *The Federalist*. The Amendment Clause⁴⁵ is itself testimony to the fact that they did not believe that they had written a perfect document in 1787 that would never be

39. *Id.* (emphasis in original).

40. *Id.*

41. THOMAS HOBBS, DE CIVE 41 (R. Royston ed., 1651).

42. Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1878 (2023).

43. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

44. See, e.g., NOAH FELDMAN, THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT 487 (2017).

45. U.S. CONST. art. V.

subject to continued “reflection and choice.”⁴⁶ Even though I am critical of the Amendment Clause for creating too many hurdles to amendment, unlike most state constitutions’ simpler processes, one should at least recognize that the Founders *did* envision the possibility of amendment.

My favorite single paragraph in all of *The Federalist* is in *Federalist* 14.⁴⁷ It reads:

Hearken not to the voice which petulantly tells you that the form of government recommended for your adoption is a novelty in the political world; that it has never yet had a place in the theories of the wildest projectors; that it rashly attempts what it is impossible to accomplish . . . But why is the experiment of an extended republic to be rejected, merely because it may comprise what is new? Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? . . . Had no important step been taken by the leaders of the Revolution for which a precedent could not be discovered, no government established of which an exact model did not present itself, the people of the United States might, at this moment have been numbered among the melancholy victims of misguided councils, must at best have been laboring under the weight of some of those forms which have crushed the liberties of the rest of mankind. Happily for America, happily, we trust, for the whole human race, they pursued a new and more noble course. They accomplished a revolution which has no parallel in the annals of human society. They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great Confederacy, *which it is incumbent on their successors to improve and perpetuate.*⁴⁸

46. THE FEDERALIST NO. 1, *supra* note 18, at 27 (Alexander Hamilton).

47. THE FEDERALIST NO. 14, *supra* note 18 (James Madison).

48. *Id.* at 99–100.

So, the lesson I take from both Hamilton and Madison is the importance of asking ourselves what is working well and what, sadly, is not. What sort of “evil” compromises that made sense in 1787 might not make sense today? Or what sort of entirely sensible solutions that might have made sense in 1787, such as the electoral college, might not make so much sense today?

If you look at state constitutions, you find that they are constantly being updated. In addition to the multiple state conventions that have occurred, many states allow their electorates to engage in so-called “initiatives and referenda” to do end runs around what they might accurately perceive as sclerotic legislatures committed only to maintaining an unsatisfactory—or worse—status quo. Many of my colleagues—I think, incorrectly—believe that it demonstrates what is wrong about state constitutions—that they have so many amendments and, even more particularly, that the *demos* view themselves as having a role to play in deciding what might be desirable constitutional change. There are dumb amendments, and there are good amendments. But it seems to me that one of the things state constitutions reveal is the ability of legislators, or the electorate in general, to engage in reflection and choice and to keep updating their state constitutions so they will serve their respective states better.

I mentioned my deep admiration of Nebraska’s 1934 decision to eliminate its senate and adopt a unicameral legislature. There is no reason whatsoever to believe that Nebraska has paid a cost, in terms of any important values, in rejecting bicameralism. Similarly, I thought that former Minnesota Governor Jesse Ventura, a “maverick” elected as an independent, was correct in suggesting that Minnesota would also benefit from eliminating its senate. But it continues to exist. Why? Surely, one reason is that Minnesota lacks the initiative and referendum that allowed the citizenry of Nebraska to take the decision into their own hands. It is a reality of American federalism that many states feature a truly “awakened”

(whether or not “woke”) electorate who believe that they indeed have the final say, as suggested by the Declaration of Independence, on how they wish to be governed.

We are estopped from doing that at the national level. One reason is cultural. We train our students—assuming they have not already been sufficiently socialized in secondary schools—to believe that the U.S. Constitution is super-duper special and that it is sacrilegious to suggest that it might have some grievous flaws. Alas, Madison can be quoted for this as well. In *Federalist* 49, attacking his friend Thomas Jefferson and his call for frequent conventions and reassessment of the Constitution, Madison proclaimed the importance of “veneration” and suggested that the 1787 Convention was an almost literally once-in-a-millennium occurrence, never to be repeated.⁴⁹ He obviously could not have known that there would be approximately 235 state constitutional conventions in the ensuing two centuries.

But, of course, even if we adopted a far more rational stance toward the Constitution, and subjected it to hard-nosed “reflection” that might suggest the necessity for making new choices to get us through the problems of the 21st century, we would come up against the problem that Article V offers so few genuine options, unlike many state constitutions. Professor Lori Ringhand, in her own comments in Austin, mentioned in passing the importance of initiatives and referenda.⁵⁰ Eighteen states allow for initiatives and referenda as mechanisms of achieving reform of their constitutions themselves.⁵¹ So I think this is something extremely important to learn from American state constitutions. We should ask and vigorously debate whether Madison was correct in proclaiming that we

49. THE FEDERALIST NO. 49, *supra* note 18, at 314 (James Madison).

50. Federalist Society, *Panel III: Unique Aspects of American Democracy [2023 Student Symposium]*, YOUTUBE, at 29:55 (Mar. 4, 2023), <https://www.youtube.com/watch?v=g4TIJLtaTao> [<https://perma.cc/2E9C-BA7M>].

51. *Initiated Constitutional Amendment*, BALLOTPEDIA, https://ballotpedia.org/Initiated_constitutional_amendment [<https://perma.cc/9YPT-UZ7E>].

are well served by an exclusive reliance on representative democracy.⁵² Might we not in fact be better off with some mix of representative democracy coupled with the ability of the *demos* to do end runs around a sclerotic legislature, a gridlocked legislature, a legislature that is plausibly viewed, wherever you are on the ideological spectrum, as simply unable to rise to meet the challenges of the day? While many states offer ways of responding to that, we do not have them at the national level in the United States.

It is time to conclude, but not before offering a perhaps surprising shout-out to Texas Governor Greg Abbott. In 2016, Governor Abbott submitted what he called the Texas Plan, accompanied by a ninety-page brief, on why we need a new constitutional convention.⁵³ And he proposed nine significant constitutional amendments.⁵⁴ Not surprisingly to anyone who knows my own political views, I do not agree with all of Governor Abbott's proposals. I probably, at the end of the day, do not agree with any of them. But some of them I certainly do agree are worth serious discussion. I am open minded on them. But what I really applaud Governor Abbott for doing is suggesting that we really should think about the possibility of holding a new constitutional convention and debating how to revise the Constitution in light of contemporary needs. He might begin his ninety pages by affirming the grandeur of the original document, but for me the takeaway is that he affirms the desirability of engaging in our own "reflection and choice."⁵⁵ I agree with him. I strongly support a new constitutional convention, and I have a variety of my own proposals on that. For whatever reasons, Governor Abbott has not returned to his attempt to be a modern "re-founder," perhaps because he received no genuine public

52. THE FEDERALIST NO. 63, *supra* note 18 (James Madison).

53. OFF. TEX. GOVERNOR, RESTORING THE RULE OF LAW WITH STATES LEADING THE WAY (2016), https://gov.texas.gov/uploads/files/press/Restoring_The_Rule_Of_Law_01082016.pdf [<https://perma.cc/K59W-EJU6>].

54. *Id.* at 4.

55. THE FEDERALIST NO. 1, *supra* note 18, at 27 (Alexander Hamilton).

support from his fellow Republicans. Democrats, I believe unwisely, have generally adopted the policy of circling the wagons and proclaiming the wonderfulness of the Constitution instead of conceding that it has many aspects that may in fact contribute to the widespread perception of a dysfunctional and even illegitimate national government.

A final point: One of the things I would love to see a constitutional convention do is to repeal the 1842 Congressional Act that requires single-member districts in the House of Representatives.⁵⁶ I think that provision is at least as important as gerrymandering in destroying our democracy. Note that it's "merely" a congressional statute. It could be repealed, but all of us know it will not because incumbents are not going to vote away that which has placed them in political power. Just as the members of the Minnesota Senate were not about to vote themselves out of their own jobs or sinecures, so it is impossible, practically speaking, to imagine members of the House of Representatives, whatever their political party, deciding that, for example, the House in all states with more than, say, five representatives should be elected from multi-member districts with a process of proportional representation. Texas could easily be divided into six districts of six or seven representatives each, and proportional representation would assure that some Republicans would be elected from the largely blue large cities and some Democrats (or even Libertarians) elected from other parts of the state.

Unfortunately, only a national-level constitutional convention could break what is sometimes called the "two-party duopoly" over the House. However, if the United States nationally were like California (or many other states), I could stand at a street corner and ask you to sign a petition to repeal the 1842 Act. Our entire constitutional order might be transformed inasmuch as ordinary people might be taught, in effect, that they have some genuine

56. Apportionment Act of 1842, ch. 47, § 2, 5 Stat. 491 (current version at 2 U.S.C. § 2a).

capacity to engage in “reflection and choice” about governance, quite independent of the particular choices they might make. Perhaps they would decide that the status quo is in fact preferable to changes that I (or Governor Abbott) might prefer. That, at least, might be said to involve genuine “consent by the governed” in a way that feeling trapped in what I sometimes call the “iron cage” of the 1787 Constitution (including the procedures of Article V) does not.

So these are my views on why one ought not to focus entirely on the U.S. Constitution as the instantiation of American democracy, whether one is a member of the Federalist Society or, as I am, a supporter of the American Constitution Society. All of us have a stake in constructing a constitution for the twenty-first century that might leave us anything other than sullen or hopeless about the capacity of the national government to respond to the challenges facing us. It is long past time for *all* of us to engage with one another about what sorts of constitutional reforms might be truly conducive to what the Declaration of Independence calls our collective “pursuit of happiness.” We might even settle for establishing a governmental system that elicits the support and confidence of a majority of Americans. That would be strikingly different from the present moment (October 2023), when the House of Representatives is without a Speaker and totally unable to function and when a hefty super-majority of the country believes that it is headed in the wrong direction.⁵⁷ Believing that venerating the 1787 Constitution, even as amended, will provide a cure, however understandable in terms of the role of the Constitution as American myth and symbol, is decidedly not the path to a cure for our deep national ills.

57. See *Direction of Country Polls*, REAL CLEAR POLITICS, https://www.realclearpolitics.com/epolls/other/direction_of_country-902.html [<https://perma.cc/W6Y6-EQRM>].