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Ohio Northern University
Law Review

Kormendy Lecture Series

Who, If Anyone, Really Trusts “We The People”?¹

SANFORD LEVINSON²

INTRODUCTION: *OUR UNDEMOCRATIC CONSTITUTION* AS TITLE AND TOPIC

In 2006 I published a book with the title *Our Undemocratic Constitution: Where Our Constitution Goes Wrong (and How We the People Can Correct It)*.³ As a matter of fact, that was not the first title I submitted to the Oxford University Press. Instead, I had suggested the title *Our Broken Constitution*, given my general argument that the United States Constitution has generated a dangerously dysfunctional form of politics in our country and that much of the anger directed in recent years at politicians in both of the major political parties would be better directed at the Constitution that makes it functionally impossible for any party, even if it notionally controls both houses of Congress and the White House, to govern effectively. But, I was informed, the use of “broken” in the title was precluded by the fact that Oxford was also publishing that year the very important book *The Broken Branch*,⁴ a critique of Congress written by two

1. Delivered as the Kormendy Lecture at the Pettit College of Law, Ohio Northern University, on October 28, 2010. I am extremely grateful to everyone at the Pettit College of Law for their many acts of hospitality, including, especially, Michael Lewis and Scott Gerber, who picked me up and then returned me to the Columbus airport, as well as provided good company and conversation. Although the lecture took place a week before the November elections, I have felt free to update some of my remarks to take post-lecture events into account.

2. W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin; Visiting Professor of Law and Government, Harvard University, Fall 2010.

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

4. THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006).

veteran political scientists based in Washington, Norman Ornstein, located at the American Enterprise Institute, and Thomas Mann, who is at the Brookings Institution. So *Our Undemocratic Constitution* it became!

There is, I have come to believe, an important difference between the two titles. You may or may not agree with me that the Constitution has generated a “broken” polity, but it is clear that that conversation requires us first to declare what it is we think that the national government should be doing in the twenty-first century and then whether it is in fact coming close to fulfilling whatever we think its projects should be. And, if it is not, to what degree is that “shortfall” attributable, at least in some significant respects, to the Constitution itself? That is, the argument is basically about constitutional *functioning*. If we think the Constitution is functioning well in terms of producing certain outputs based on whatever goals we have in mind, then, frankly, we might not care particularly whether it is particularly democratic or undemocratic. There is, after all, a long tradition in political theory of benevolent monarchy or even benevolent despotism, which, by definition, refers to wise rulers who have a talent for serving their subject populations well. It is not hard to believe that many Americans prefer engagement in sports or other aspects of popular culture to participation in politics, including even the relatively simple task of voting,⁵ and that they would be perfectly happy to forego even the opportunity to vote in return for a government that provided a sufficient level of goods and services to leave them generally contented. And many people would, no doubt, say that that would be a perfectly rational decision.

If, on the other hand, one puts up front the *democratic* status of the Constitution, then that generates a quite different conversation, one less about functioning and more about the philosophy of governmental process itself, independent of outcomes. Not only is it not clear that most, let alone all, people actually wish to live the kind of engaged life required of the “democratic citizen,” but there may also be no particular reason to believe that democratic government, assuming we know exactly what we mean by such a term, will necessarily prove satisfying in terms of outputs. So one response to the “democratic critique” of the Constitution is: “So what?” After all, as I have been told, “if it ain’t broke, don’t fix it,” which takes us back to the implications of my initial proposed title. Moreover, even at the level of political theory, one ultimately must address what is so desirable

5. Only roughly two in five registered voters bothered to participate in the 2010 elections, which riveted political junkies and swept out of office many long-time incumbents. On turnout, see Matthew Daly, *Voter Turnout Increases from Last Midterm in 2006*, ASSOCIATED PRESS, Nov. 3, 2010.

about democracy, especially when compared with alternative forms of government.

Thus, I perhaps should have been less surprised than I was by the fact that a common response to my book was to be reminded by many readers—some condescendingly, some very politely—that the Constitution was never intended to be democratic, that I was truly missing the point of the Constitution and, therefore, that I was evaluating it inappropriately. The project of those who wrote the Constitution, after all, was to create the conditions for what is referred to obliquely in Article IV as a “Republican Form of Government” whose maintenance, indeed, is “guaranteed” to every state in the Union.⁶ Although, for whatever reason, no such guarantee is specified with regard to the national government, one might well believe that the entire Constitution was thought to instantiate whatever constitutes a “Republican Form of Government.” In this sense, it literally “went without saying” that the national government of the United States should be “republican.”

In any event, this critique, coupled with the obvious truth that the Constitution speaks in the name of Republicanism, and most definitely not in the name of Democracy, has caused me to ask the question that I have taken as the title for my remarks: “Who, if Anyone, Really Trusts ‘We the People?’” especially if such trust would require the embrace of a robust twenty-first century form of “democratic rule.” But, at the same time, one must also try to figure out what a twenty-first century notion of a “Republican Form of Government” might be and the degree to which it is congruent or in tension with democracy.

II. ON A REPUBLICAN FORM OF GOVERNMENT

A basic problem is that the Constitution provides no canonical definition as to what constitutes such a “Republican Form of Government.” As with so many clauses of the Constitution, it would help considerably if we had a “table of definitions” that might pretend to give concrete and specific meaning to what Justice Robert Jackson termed the “majestic generalities” of that document, of which the notion of “Republican Form of Government” is surely one. Consider the comments of John Adams to his cousin Samuel in an October 18, 1790 letter on the principles of American

6. U.S. CONST. art. IV, § 4.

government.⁷ “I am very willing,” wrote the sitting Vice President, who of course would succeed Washington as our second President,

to agree with you in fancying, that in the greatest improvements of society, government will be in the republican form. It is a fixed principle with me, that all good government is and must be republican. But, at the same time, your candor will agree with me, that there is not in lexicography a more fraudulent word. Whenever I use the word republic with approbation, I mean a government in which the people have collectively, or by representation, an essential share in the sovereignty.⁸

However, he quickly goes on to assert that at least some so-called “republican” systems “are much worse” and others “very little better, than the monarchical form in France before the late revolution,” and, he says, “the simple monarchical form” of government will be rightly preferred over such ostensibly “republican” ones.⁹ So, he asks, “Are we not, my friend, in danger of rendering the word *republican* unpopular in this country by an indiscreet, indeterminate, and equivocal use of it?” What adds to the confusion is that if one believes that nothing in the 1787 Constitution violates the premises of “republican government,” then that must mean, at the very least, that it is congruent with chattel slavery and the denial of the right to vote to most citizens, including all women (save for New Jersey, at least until 1807) and many insufficiently propertied whites, let alone free blacks whose status was unclear (and who were allowed to vote in some colonies and then states).¹⁰ Indeed, it would appear congruent with giving slaveholding states significant extra representation in the House of Representatives (and, therefore, the electoral college) because of the three-fifths compromise that counted slaves toward representation even though, quite obviously, not only did they not enjoy the right to vote but also they lacked any semblance even of “virtual representation” that was claimed to be present with regard to the mothers, wives, sisters, and daughters who were also denied the suffrage.

One might say, of course, that a “republican” form of government at least—and at most?—must be something quite different from the particular

7. Letter from John Adams to Samuel Adams (Oct. 18, 1790), available at <http://www.themoralliberal.com/2010/10/06/democratic-thinker-samuel-and-john-adams-on-govt-letter-3/> (last visited Mar. 7, 2011).

8. *Id.*

9. *Id.*

10. See ALEXANDER KEYSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 303 (Appendix: State Suffrage Laws, 1775-1920) (rev. ed. 2009).

kind of monarchy overthrown by the Americans during the Revolution, which, like most monarchies, relied on inheritance as the basis of kingship. Even if, as a matter of fact, the British parliament was quite willing to breach that principle in favor, say, of looking to William of Orange to replace the discredited King James II—rightly suspected of being Catholic—¹¹or, in the eighteenth century, looking to the German House of Hanover to take the kingship,¹² there was never any suggestion that the king (or queen) should be chosen in a popular election. But, of course, there are many ways to reject (and replace) a monarch, not to mention that “not being a monarchy” is a minimalist requirement—especially in the twenty-first century—of “republicanism.”

Indeed, it is certainly not a sufficient condition of establishing a government as “republican” (else dictators who rise to power by overthrowing monarchs could claim that title), nor might it even be a necessary condition. After all, there are many countries in the world today—beginning, of course, with Great Britain, but including, as well, Denmark, Sweden, Spain, and Norway—that continue to be formal monarchies but, at the same time, would be described by most analysts as instantiating almost all attributes of what we might mean in the modern world by a “republican form of government.” In none of these countries do the monarchs retain any significant measure of genuine political power, and, as parliamentary systems, they are especially sensitive to the opinions of the voting public. The function of the respective monarchs is to serve as apolitical “heads of state,” not remotely as “heads of government.” Still, the task facing the Framers in 1787 was to give the notion of “republican government” some concrete meaning, both in the design of our basic, hard-wired institutions in 1787 and then during the great debates afterward about the desirability of that institutional structure.

This is where it becomes important to acknowledge that those who framed the United States Constitution never once referred to themselves as engaged in establishing a “democracy.” As Madison argued in Federalist 10, “[D]emocracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have, in general, been as short in their lives as they have been violent in their deaths.”¹³ *And listen to Alexander Hamilton, in his major speech to the Philadelphia convention on June 19, 1787:*

11. See MAURICE ASHLEY, *THE GLORIOUS REVOLUTION OF 1688* (1966).

12. See Act of Settlement, 1701, 12 & 13 Will III, c. 2 (Eng.) available at <http://australianpolitics.com/democracy-and-politics/act-of-settlement-1701> (last visited Mar. 7, 2011).

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

All communities divide themselves into the few and the many. The first are the rich and well born, the other the mass of the people. The voice of the people has been said to be the voice of God; and however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right. Give therefore to the first class a distinct, permanent share in the government. They will check the unsteadiness of the second[.]¹⁴

Hamilton is especially well known, of course, for describing “the people,” in contrast with his his adversary Thomas Jefferson, as “a great beast.”¹⁵ *Many of Madison’s and Hamilton’s fellow political thinkers (and doers) expressed equally dismal notions of “democracy.” Thus, John Adams wrote another letter in 1814—well after his own service as President—that, “Remember, democracy never lasts long. It soon wastes, exhausts, and murders itself. There never was a democracy yet that did not commit suicide.”*¹⁶ His son, John Quincy Adams, who of course became President himself in 1825, opined in an 1839 speech celebrating the fiftieth anniversary of Washington’s own inauguration as President, that “the experience of all former ages had shown that of all human governments, democracy was the most unstable, fluctuating and short-lived[.]”¹⁷ Given the pervasiveness of such views, why would one expect at that time the rhetorical embrace of “democracy” that is typical in the twenty-first century? A key question though, even given the different rhetorical tropes of our two ages, when the term “republican form of government” to some sounds antiquated as against the acceptance of the language of “democracy,” is whether we have any firm notion of how the two terms genuinely differ in their implications and which, in fact, we truly prefer even in our own time.

If, for example, one means by “democracy” the relatively unimpeded ability of political parties that gain the support of electoral majorities to work their will—perhaps within the limits of certain substantive

14. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed. 1911), available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=1057&layout=html#chapter_95808 (notes of Robert Yates).

15. DAVID SAVILLE MUZZEY, AN AMERICAN HISTORY 192 (1911).

16. JOHN ADAMS, VI *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 484 (Charles Francis Adams ed., 1850).

17. JOHN QUINCY ADAMS, *THE JUBILEE OF THE CONSTITUTION. A DISCOURSE DELIVERED AT THE REQUEST OF THE NEW YORK HISTORICAL SOCIETY, IN THE CITY OF NEW YORK ON TUESDAY, THE 30TH OF APRIL 1839; BEING THE FIFTIETH ANNIVERSARY OF THE INAUGURATION OF GEORGE WASHINGTON AS PRESIDENT OF THE UNITED STATES, ON THURSDAY, THE 30TH OF APRIL, 1789* 53 (1839).

constitutional norms—one might note that all five of the modern monarchies that I mentioned earlier—Great Britain, Spain, Norway, Sweden, and Denmark—can easily be said to be considerably more “democratic” than the modern United States. But what exactly does one learn from this observation? At the very least, then, any discussion of the Constitution necessarily requires that we wrestle with our own beliefs about “republicanism” and “democracy.” As already noted, my own book is titled *Our Undemocratic Constitution*, and this is obviously not intended to be a compliment. I strongly believe that the Constitution is basically indefensible with regard to what have become widely accepted twenty-first century criteria for identifying a political system as “democratic.” Think only, for example, of the maxim “one person/one vote” and then think of the United States Senate, which gives California and Wyoming the same representation even though California has seventy times the population. That is only the most glaring example; there are many, many others. But one response is, again, so what?

Although the first three words of the Preamble may be “We the People,” it is a fundamental mistake to infer from this that “the People” should actually rule in any relatively uncomplicated sense. As Gordon Wood, probably our leading historian of the early Republic, has written, “The Federalists of the 1790s . . . believed in popular sovereignty and republican government, but they did not believe that ordinary people had a direct role to play in ruling the society.”¹⁸ Nor did they embrace a politics by which those who were chosen to rule paid all that much attention to the specific wishes of the ostensible electorate, as, for example, by accepting “instructions” from them with regard to how they should vote on controversial legislation. One of the most basic lessons of American history is that this Federalist vision of the polity—which one might well describe as basically faithful to the views held by most members of the Philadelphia Convention in 1787—scarcely survived even a generation. The theme of Wood’s magisterial history of the early Republic is its defeat by the far more democratic vision attached to the name Thomas Jefferson (slaveholder that he was), even if we today would be properly attentive to the limited conception of democracy held at the time—again, just think of the women, to paraphrase Abigail Adams’s famous and fruitless reminder to her husband in 1776. But it is a mistake to view such triumph of democracy as may have occurred in the nineteenth or twentieth centuries as equivalent to an embrace of what most political theorists in the twenty-first century would define as “democratic government.” Moreover, there is a certain irony in

18. GORDON S. WOOD, *EMPIRE OF LIBERTY* 276 (2009).

the propensity of contemporary populist movements, such as the Tea Party, to almost worship the 1787 Constitution and its Framers, given that both expressed basic contempt for the very notion of populist politics in favor of elite rule.

It is certainly true that many of the post-Bill of Rights Amendments deal particularly with expanding the suffrage. The Fifteenth Amendment, of course, forbids denial of the ballot because of race, the Nineteenth because of sex. The Twenty-fourth eliminates the poll tax in state elections, and the Twenty-sixth guarantees the vote to anyone over eighteen. One might also mention in this context the Twenty-third Amendment, which gives to the otherwise unrepresented District of Columbia three votes in the electoral college for the Presidency. These are all important additions to the Constitution and they should not be scoffed at. That being said, it is also important to note that the vote is only one aspect, however important, of democracy and, for that matter, one should recall that there is almost no substantive right to vote that is protected by the Constitution, as the Supreme Court (notoriously) reminded us in *Bush v. Gore*: “The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College.”¹⁹ Unless the Seventeenth Amendment is repealed, there *is*, presumably, a right of the citizenry to choose its senators along with representatives as set out in Article I, but that’s about it. A state like Texas, which chooses a plethora of executive and judicial officials by popular election, could presumably change its mind tomorrow and shift to, say, appointment by the governor, with no legislative consent, without violating the United States Constitution.

More to the point, from my perspective, is that amendments since 1787 have scarcely changed the fundamental political structures that were designed to make it very difficult indeed to engage in effective governance and to pass controversial legislation. The one exception, perhaps, is the oft-ignored but completely admirable Twentieth Amendment, which changed the date on which newly elected Congresses convened from what had become a truly lunatic thirteen months after the November elections to the very beginning of January following the elections. The Amendment also valuably moved up Inauguration Day from March 4 to January 20, though my own view is that we are still left with a most unfortunate hiatus between election and inauguration of a new President.

19. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

To a remarkable degree, then, I have discovered that those who most enthusiastically defend the American Constitution against critics like myself do so in the name of “republicanism” and seem almost disdainful of those of us—fortunately, I am not absolutely alone in my critique of the Constitution—who would prefer a more democratic set of political structures going well beyond simply allowing people to vote for members of a basically static set of political institutions. Though, for the record, one can note that we still have a way to go even with regard to voting rights, as evidenced by the widespread disenfranchisement in many states of convicted felons.

To be sure, though, there is also what I regard as a deep incoherence in some of the arguments that we hear articulated today about what kind of Constitution would best serve us. Thus, I was struck—perhaps the better word is “amazed”—when reading a comment in the *New York Times* by George Nash, a prominent and sympathetic historian of American conservatism, that “[l]ike America’s Founders, conservatives in 2010 prefer a government of and by, and not just for, the people.”²⁰ As already suggested, I believe this is demonstrably wrong inasmuch as those designing the Constitution, including Madison, were fundamentally fearful of rule “by the people.” But it also is contradicted by the commitment of at least some “conservatives in 2010”—including, apparently, at least one candidate for the House of Representatives from Ohio—who support repeal of the Seventeenth Amendment, which transferred selection of members of the United States Senate from state legislatures to the general electorate.²¹ To be sure, the Seventeenth Amendment *did* constitute an important rejection of one aspect of the original Constitution, and there can be no serious doubt that it has had the consequence of weakening the commitment of Congress to preserving the autonomy of state government. But there can also be no serious doubt that supporters of the Amendment in 1913 believed that it was an important step in making the United States a more “democratic form of government” and, of course, that this was desirable.

This debate, whether specifically about the Seventeenth Amendment or more generally about how truly democratic we wish our government to be, has obvious consequences for our assessment of the current practices of the American system of government and the multitude of what I regard as problematic features should we actually be committed to achieving a more

20. George H. Nash, *The Obama Connection*, N.Y. TIMES, Oct. 10, 2010, <http://www.nytimes.com/roomfordebate/2010/10/10/hating-woodrow-wilson/an-outcry-against-government-from-above>.

21. Felecia Sonmez, *The 17th Amendment resurfaces as a Campaign Issue*, WASH. POST, Oct. 11, 2010, <http://voices.washingtonpost.com/thefix/house/the-17th-amendment-resurfaces.html>.

democratic form of government. We could and should talk about aspects of our government ranging from (but not limited to) the electoral college, the presidential veto, judicial review, life tenure of federal judges, the Senate, and the fact that Article V makes the United States Constitution the most difficult to amend constitution in the entire world, with, I believe, distinctly negative consequences. I believe, therefore, that the burden of persuasion is very much on anyone who would actually defend the democratic bona fides, in 2010, of the Constitution even if one happily agrees, say, with Yale Law Professor Akhil Reed Amar that when drafted in 1787 the Constitution indeed set new standards for a world that had only barely begun to take seriously the possibility of alternatives to monarchical or aristocratic rule.²²

I know that many Americans are hesitant even to compare the United States Constitution with foreign constitutions, especially if the comparison is used to criticize our own Constitution as defective. So consider what is certainly the interesting and may be the far more important point: *The United States Constitution is not only among the most undemocratic in the modern West, but is also the most undemocratic of the fifty-one constitutions that in fact operate within the United States today.* No American state operates under a constitution that is as systematically undemocratic as is the United States Constitution.

I have come to believe that one of the major deficiencies in the way students learn about American constitutionalism is that they do not learn—because we in the legal academy rarely teach them—that American *state* constitutions are both truly important and intellectually extremely interesting. They have become, relatively speaking, “invisible” in our basically exclusive emphasis on the United States Constitution. This is unfortunate for many reasons; not least is that perhaps the major lesson state constitutions teach is that “We the People” —when drafting state constitutions—have quite consistently chosen a distinctly more democratic form of government than that existing at the national level. And, presumably, these state-level governments do *not* constitute a violation of the Republican Form of Government Clause or one would expect Congress, even if not the courts, to step in and try to correct their “unRepublican” features.

III. A BRIEF LOOK AT SOME FEATURES OF STATE CONSTITUTIONS

There are many interesting features of state constitutions and there is certainly not time to offer a comprehensive overview of the fifty examples throughout the United States. It is worth beginning by noting that even with

22. See AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 14-21 (2005).

regard to the forms of *representative democracy* at the state level, the selection mechanisms are far more democratic than is the case at the national level. After all, the 1787 Constitution provided for the direct election only of members of the House of Representatives. This is precisely why the Seventeenth Amendment is so important: It does establish direct election of the Senate as well. But the President, of course, is still not directly elected by the American people in general. Instead, we vote only for electors who cast their votes on a state-by-state basis with all sorts of ramifications, ranging from the fact that our presidents with some frequency fail to have received a majority of the popular vote (and occasionally do not even come in first in the popular vote, as happened, notably, in 2000) to the fact that candidates place inordinate attention on those relatively few “battleground” states (which often include Ohio) and basically ignore states, however large, whose voters can be taken for granted, either affirmatively or negatively. This means, among other things, that there is no particular concern about “getting out the vote” in these safely predictable states, as all the attention on election day is focused on those states where a relatively few votes could spell the difference between victory and defeat, especially inasmuch as electoral votes, by being awarded on a winner-take-all basis, instantly make the losing voters irrelevant as would not be the case, for example, if electoral votes were awarded on a proportional basis.

In any event, no state operates under the kind of undemocratic system found at the national level. At least since 1964, both houses of those forty-nine states that remain bicameral—Nebraska, of course, is the glorious exception—operate under the rubric of “one person/one vote,” totally unlike the United States Senate. Governors are elected directly, not indirectly through the byzantine system of an electoral college whose origins, at least in part, come from a desire in effect to reward slave states with extra representation not only in the House of Representatives but also when choosing Presidents. I note with interest that the Ohio Constitution, like the national one, does place a two-term limit on governors, which could be viewed as a restriction on democracy.

Highly controversial, of course, is the fact that most judges in the United States—who are, after all, state and not federal officials—are elected, including, most certainly, in Ohio. Former Justice Sandra Day O’Connor, like most lawyers—and, certainly, almost all foreigners—is appalled by an elected judiciary and is strongly campaigning for its replacement by an appointive one.²³ Interestingly enough, at least several political scientists who have studied the matter find no discernable

23. John Schwartz, *Effort Begun to End Voting for Judges*, N.Y. TIMES, Dec. 24, 2009.

differences between appointed and elected judges, not least because everyone recognizes that the appointment process for federal judges is saturated in politics. I confess that I am not entirely convinced. Still, it is naïve to believe that moving toward an appointing system would do anything much more than provide a cover for a highly political process.

Most important, both symbolically and often in reality, is that almost all state constitutions include some element of *direct democracy*, which it is fair to say Madison and most of his colleagues loathed. After all, there is not a scintilla of direct democracy in the United States Constitution. Even the Constitution itself was ratified *not* by “we the people” in referenda—a procedure found, with regard to constitutional amendments, in all the American states besides Delaware—but rather, as required by Article VII, by *conventions*. To be sure, the delegates were chosen in popular elections, but the ultimate decision was made by the representatives, not by the people themselves. Most state constitutions are like Ohio’s, which requires that amendments to the state constitution be submitted to the electorate for their approval or disapproval.

Many states, of course, go well beyond that, by allowing popular initiative and referenda or—as in Maine—a vote, upon petitions, by the general electorate regarding statutes passed by the legislature and signed by the governor. Thus, we have seen in the past two years Proposition 8 in California that amended the California constitution to overturn a state supreme court decision interpreting the California Constitution to require same-sex marriage and a vote in Maine in which 53% of the public voted to overturn a state statute that would have legalized such marriages.²⁴ For better and worse, such possibilities are precluded at the national level of politics, where anyone seeking legislation—including, of course, the repeal of existing laws on the books—must confront the often Everest-like challenges of getting sufficient approval both in the House and the Senate and then the President’s signature instead of a veto. Whatever the sea change in the House of Representatives in the 2010 elections, for example, no serious person believes there is any serious possibility that the Affordable Care Act of 2010 will in fact be repealed given Senate control by Democrats and, of course, the President’s possession of the veto power.

There is one other feature of Ohio’s Constitution that is worth mention in this context. Like thirteen other states, Ohio allows the electorate, at stated intervals, to vote whether or not to call a new constitutional convention to consider the adequacy of the state constitution for the future.

24. Michael A. Lindenberger, *Gay-Marriage Activists Look Ahead After Maine Defeat*, TIME, Nov. 4, 2009, <http://www.time.com/time/nation/article/0,8599,1934432,00.html>.

The next such election in Ohio will occur in 2012. Similar elections occurred in November 2010 in Montana, Michigan, Iowa, and Maryland. Alas, from my perspective, the voters of the first three states sharply rejected the holding of new conventions, though 54% of the Maryland voters who took a position on the issue did in fact support a new convention. Maryland requires the support of a majority of the *entire* electorate, as measured by the largest number voting for any official (almost always the governor, of course,) and, by that metric, the 54% of those registering their opinion did not constitute the constitutionally required majority. Still, as John Dinan demonstrates in his extremely interesting book *The American State Constitutional Tradition*, there have been more than 225 state constitutional conventions in our 220 year history.²⁵ Over the same period of time, of course, there has not been a single national convention following the Philadelphia Convention in 1787. I think this is something to be strongly regretted, that part of democracy is a willingness to confront, with suitable regularity, whether or not one’s institutions are still functioning adequately in inevitably changed circumstances. This does not necessarily mean that we *should* change constitutional forms with frequency. Indeed, the very best news, in some ways, would be that a convention called in Ohio for 2013 would come to the informed conclusion that the state constitution does *not* need any significant change. I don’t know enough about Ohio’s Constitution to have an informed opinion about whether change or stasis is more desirable. But I am strongly committed to the validity of Alexander Hamilton’s statement, in the very first *Federalist*, that the key question before the American public at the time was “to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice[.]”²⁶ Surely, this cannot mean a one-time only experience of “reflection and choice,” unless we believe, entirely implausibly, that choices made in 1787— within the context of a world very different than our own—necessarily are best for us today.

This requires no disdain for the Framers nor, incidentally, does it require taking a position on how the Constitution ought to be interpreted. I am well aware that I am on the home turf of Scott Gerber, a leading proponent of “originalism” as the best way to interpret the Constitution. I happen to disagree, but it is really beside the point, for my own interests have turned significantly away from *constitutional interpretation*—which by definition is referring always and exclusively to a constitution that

25. JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 1 (2006).

26. *THE FEDERALIST* NO. 1 (Alexander Hamilton).

already exists—to *constitutional design*, in which we are invited—as would occur should Ohio decide to have a new state convention—to reflect on what kind of constitution we really want given our basic political aims and values.

IV. DOES AMERICAN SUPPORT FOR THE INTERNATIONAL “DEMOCRACY PROJECT” ENTAIL ASKING IF THE UNITED STATES CONSTITUTION ITSELF PASSES MUSTER?

My argument has obvious implications for our evaluation of both the United States and state constitutions. But we should realize that it has important implications as well for the way the United States currently presents itself to the world and ostensibly conducts its foreign policies. Consider the fact that most Presidents over the past century, of both political parties, have embraced, to one degree or another, what might well be called “the democracy project.” Woodrow Wilson justified American entrance into World War I in 1917 by reference to making the “world safe for democracy.”²⁷ We can do a fast forward to perhaps the most “Wilsonian” chief executive since the former Princeton President, George W. Bush. One of his favorite authors after all was the former Russian dissident—now Israeli politician—Natan Sharansky, the author of a best-selling book (in part because of President Bush’s enthusiastic endorsement), *The Case for Democracy*.²⁸ Both of the current American wars in Afghanistan and Iraq were justified, at least in part, by their ostensible contribution to creating more “democratic” systems in those two countries. And the election of Barack Obama has not fundamentally changed this reality. Thus, in one of his first foreign travels following his inauguration, President Obama told a student questioner in France in April 2009 that, “We spend so much time talking about democracy—and obviously we should be promoting democracy everywhere we can.”²⁹ This was treated, one might say, as a “self-evident truth.” Interestingly enough, he went on to say,

But democracy, a well-functioning society that promotes liberty and equality and fraternity, a well-functioning society does not just depend on going to the ballot box. It also means that you’re not going to be shaken down by police because the police aren’t getting

27. President Woodrow Wilson, Address to Joint Session of Congress (Apr. 2, 1917), available at <http://historymatters.gmu.edu/d/4943/>.

28. Zev Chafets, *Natan Sharansky: Bush’s Favorite Author*, TIME, Apr. 10, 2005, <http://www.time.com/time/magazine/article/0,9171,1047430,00.html>.

29. *Obama Holds Town Hall in Strasbourg, France, In Obama’s Own Words*, WASH. POST, Apr. 3, 2009, available at <http://projects.washingtonpost.com/obama-speeches/speech/123/>.

properly paid. It also means that if you want to start a business, you don't have to pay a bribe. I mean, there are a whole host of other factors that people need to—need to recognize in building a civil society that allows a country to be successful. And hopefully that will—that approach will be reflected not just in my administration's policies but in the policies that are pursued by international agencies around the world.³⁰

At the very least then, “democracy” is a remarkably complex notion, and perhaps we should paraphrase Adams's advice with regard to “republicanism” and simply stop using the word. It is very much what political philosophers call an essentially contested concept, for one will readily discover that there is no single widely shared accepted notion of the term. The only thing that does seem to be agreed on, with some exceptions across the world, is that democracy is a “good thing.”

But is it? If one believes that the Constitution is worth embracing, even “venerating,” precisely because of the many limits it puts on the practical possibilities of rule by “we the people,” then that would, at the least, suggest that the United States should be somewhat more nuanced with regard to “the democracy project” that structures the public rhetoric of American foreign policy. Perhaps it would be just too confusing to most people if we retitled it “the republican form of government project.” But we should acknowledge the possibility that there is indeed a difference between “democratic” and “republican” government, at least if we wish to understand the particular political vision captured in the 1787 Constitution under which we continue to live. We should make our determinations as to what we wish to embrace in the Twenty-first century, whatever might have been the case over two centuries ago. Otherwise, our rhetoric may confuse not only various foreigners, but even members of our own political community who falsely believe that American constitutionalism coincides with any particularly robust notion of “democracy.”

Since delivering this lecture in October 2010, the Obama Administration—I think it can be safely said—did not cover itself with glory (or even particular coherence) in its response to the extraordinary display of “direct democracy” in Egypt, which successfully drove from office an American-supported autocrat who had ruthlessly ruled Egypt for some thirty years while receiving billions of dollars in aid throughout the period (in part as a reward for signing and adhering to the Camp David Accords in 1977). No doubt at least some Americans agreed with the Vice President of Egypt

30. *Id.*

who called into question the readiness of his countrymen for “democracy,” even if it would have been awkward had the Administration agreed with him publicly. I do not doubt, of course, that many other Americans were thrilled by the awakening of the Egyptian people and their casting off a latter-day Pharaoh. But perhaps we should acknowledge that what was going on in the streets of Cairo might have implications for the United States in a far deeper sense than simply raising added complexities for the conduct of American foreign policy.

So the answer to my title question is mixed: With regard to the national constitution, it is difficult, perhaps even impossible, to define the United States as a country that believes in a very robust notion of democracy, either at home or, one may wonder as well, abroad. But if we look at American state constitutions, we get a quite different answer, for there are certainly some such constitutions that are as democratic as any in the world and, of course, some might even say too democratic at least with regard to the frequent use of procedures for initiatives and referendums especially to amend the constitution. After all, one definition of a constitution is precisely that it sets up quite significant barriers between itself and ordinary legislation, and participants in the system, including courts, of course, are expected to honor the difference and to discipline their desires by reference to overriding constitutional norms. If those norms turn out to be changeable simply by gaining a majority vote of the electorate, then we seem to be closer to pure majoritarianism than to classical constitutionalism.

Fortunately, we don’t have to decide at this moment between those conflicting visions. The point is that there is an important dialogue to be held about the conflicting visions of state and national constitutions. We are depriving ourselves of the opportunity for a productive dialogue insofar as we continue to focus exclusively on the United States Constitution and assume, without discussion, that we don’t have to confront the meanings, in our own time, of such basic terms as democratic or republican constitutionalism. Such debates are not in the least “merely” theoretical, for our answer to the profound issues that we must necessarily confront have quite practical implications, both at home or abroad.