

AMERICAN DEMOCRACY: A MODEL
OXYMORON, OR WHO KNEW THE
CONSTITUTION ENSHRINED
AFFIRMATIVE ACTION FOR STATES?

HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?

By Robert A. Dahl.¹ New Haven, CT: Yale University Press.
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“How democratic is the American constitution?” Dahl asks. Well, in 2000, for the fourth time in our history, the presidential candidate with the most votes lost. And for the second time in our history, the Supreme Court—the deliberately non-democratic branch of our government—decided the election.³ Within six months after the election, few seemed terribly bothered by the election’s outcome. Indeed, only a tiny majority of Americans said in 2001 that they wanted to replace the Electoral College with direct, popular election of the president⁴—*down* from seventy-seven percent who wanted to abolish it in 1988.⁵ (That’s right: *more* people wanted to abolish the electoral college in 1988, when George H.W. Bush thrashed Michael Dukakis, than after the 2000 election.) We also seem to love our constitution. Seventy-one percent of Americans said in 1991 that

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3. The first time was in 1876 in the Hayes/Tilden election. Florida was at the center of that contested election as well. Five justices of the Supreme Court along with five Senators and five members of the House made up the Electoral Commission that resolved the disputed state election results in Florida, Oregon, South Carolina, and Louisiana. 7 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877 (Supplement) xv (1988).

4. See R. Michael Alvarez, et al., American Opinion on Election Reform, May 10, 2001, available at <http://survey.caltech.edu/reform4.pdf> at 3 (reporting that only 52% of respondents supported replacing the electoral college with direct election of the president).

5. See <http://www.ncpa.org/oped/bartlett/nov2000.html> (referencing 1988 ABC/Washington Post Poll).

“they strongly agreed with the statement that they were proud of the Constitution” (p. 122). How can this be so when our system doesn’t seem to be terribly democratic?

According to Robert Dahl, the failure of democracy in the 2000 election was not just a freak occurrence or a surprise outcome of an otherwise well-functioning—though idiosyncratic—democratic system that happens every century or so, like earthquakes on the East Coast. Rather, the 2000 election was simply the most egregious outcome of what Dahl contends are fundamental democratic failures in our constitutional scheme. These defects make us the *least* democratic of the world’s representative democracies, which provokes Dahl to ask why we have any obligation at all to follow our constitution.

WHAT OBLIGATES US TO FOLLOW A CONSTITUTION
DRAFTED AND RATIFIED BY A BUNCH OF OLD,
DEAD, WHITE, MALE PROPERTY OWNERS?

Social contract theory has a hard time explaining Americans’ present-day obligations, and Dahl finds social contract theory implausible as a general matter (p. 2). Even at the time of the Constitution’s adoption, Dahl rightly points out that social contract theory runs into problems: voters were all-white and all-male, which calls into question the extent to which the Constitution (and the governmental action taken pursuant to it) could then legitimately bind all Americans on any social contract theory.

Perhaps our common commitment to the principle of majority rule legitimizes our system. We seem to believe majority rule is *the* legitimate method for political decisionmaking. No lesser a light than James Madison said, “[T]he vital principle of republican government is the *lex majoris partis*, the will of the majority”⁶ (p. 37). And if the furor in 1993 over Lani Guinier’s proposal that we implement proportional voting schemes to enhance minority representation was any indication, we are incredibly hostile to alternatives. From the outrage over her nomination to head the Civil Rights Division of the Justice Department,⁷ one would have thought that she’d suggested means testing for Social Security.

6. THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 409 (Marvin Meyers ed., 1973).

7. See, e.g., Richard L. Berke, *More People View Clinton As Liberal As He Seeks Center*, N.Y. TIMES, June 6, 1993, § 1, at 1 (commenting on polls taken after the “uproar

As it turns out, however, our system deviates from the principle of majority rule almost more than it follows it. Most of our elections for national office require a candidate only to earn a plurality, not a majority, of the votes cast to win election. (This rule is sometimes called "first past the post.") In fact, in a third of our presidential elections, the winner was elected by a plurality, rather than a majority, of voters (p. 80). It is hard to say whether a plurality winner is actually the one whom a majority of voters prefers. Had we held a run-off in the 1992 presidential election (which Bill Clinton won by a plurality) it is difficult to know whether a majority of first-round Perot voters would have preferred Clinton to Bush.

The Electoral College dashes any remaining claim presidential elections have to being majoritarian.⁸ States are assigned electoral votes based on the number of Representatives and Senators each state has. Less populous states have disproportionate electoral power because every state has at least one representative and two senators regardless of population. On a per capita basis, a Wyoming voter (the least populous state) has almost four times the electoral clout as a Californian (p. 81), and the "ten smallest states each choose two to three times as many electors as they would if a state's electors were strictly in proportion to its population" (pp. 81-82). Combined with the fact that 48 states grant all of their electoral votes to the plurality winner, it's hardly surprising that the candidate with the most popular votes has lost in four elections. The only surprising thing is that it hasn't happened more frequently.⁹

Lucky for us, majority rule has little to do with democracy or legitimacy, according to Dahl (p. 37). It is neither necessary nor sufficient for democracy to exist. Democracy doesn't require that the majority rule because majority voting schemes do not necessarily reflect combined voters' preferences when there are

over his nomination of Lani Guinier to be the justice department's civil rights chief and his withdrawal of the nomination," and noting that 47 percent of Americans polled "said he did the right thing" while "65 percent of that group said Mr. Clinton was wrong to nominate Ms. Guinier in the first place").

8. We have tried to democratize a system for electing the president that had been purposefully designed by the framers to insulate the presidential election (and by extension, the president himself) from popular democratic forces. Ironically, by the 1804 election of Thomas Jefferson over John Adams, the electoral system was failing to deliver on its original purpose of keeping popular politics out of the selection of the president. But it should not surprise us that a system that was designed to be nondemocratic and insulated from popular politics will occasionally fail to reflect popular sentiment.

9. If the Plains states continue to depopulate, it may happen more frequently in the future.

more than two candidates.¹⁰ Indeed, Arrow's Theorem suggests that there are no voting schemes that can produce results that accurately reflect individual preferences.¹¹ So a rule that the majority wins may be more one of convenience or convention. Majority rule is not a sufficient condition for democracy because a majority could rule autocratically by passing legislation that prevents minorities from voting.¹²

Dahl proposes instead that the legitimacy of any constitutional scheme depends on its "utility as an *instrument of democratic government*" (p. 39). This criterion needs clarification: how do we measure how well the Constitution serves us? According to Dahl, the answer is the extent to which our government is "democratic."¹³ That hardly helps, because one still needs to know what democracy *is* and have some way to measure whether a government is more or less democratic. Dahl spends little time (too little time) defining democracy in *How Democratic Is the American Constitution?*, perhaps because he covered that topic extensively in his book *On Democracy*, which, like this book, he wrote for a general audience.¹⁴ Because this is a crucial step in his argument, it is worth examining his definition of this term more closely.¹⁵

10. A quick illustration. Let's say there are three people running for dog catcher, Pluto, Mickey, and Goofy. If none of these candidates receives an absolute majority of the vote, the election rules provide that there will be a run-off between the top two vote-getters. For simplicity's sake, let's say that there are three groups of voters who have the following preferences and comprise a certain segment of the population.

Voting group 1 (29% of the population) Pluto>Mickey>Goofy

Voting group 2 (31% of the population) Mickey>Pluto>Goofy

Voting group 3 (40% of the population) Goofy>Pluto>Mickey

At the election, no one wins an absolute majority, and Pluto, with only 29% of the vote, is eliminated. In the run-off, Mickey faces Goofy and wins with 60% of the vote because the voters who initially voted for Pluto switch to Mickey. If we add up the voters' preference intensities, however, Pluto should have won the election because most voters preferred Pluto to Mickey. Because people behave strategically in response to the anticipated behavior of others, however, designing a voting system that actually reflects these preference intensities may well be impossible.

11. For elegant summaries of Arrow's Theorem, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 38-40 (1991) and Daniel A. Farber, *From Plastic Trees to Arrow's Theorem*, 1986 U. ILL. L. REV. 337.

12. See GIOVANNI SARTORI, *DEMOCRATIC THEORY* 19 (1962).

13. "I am going to suggest that we begin to view our American Constitution as nothing more or less than a set of basic institutions and practices designed to the best of our abilities for the purpose of attaining democratic values" (p. 3).

14. ROBERT A. DAHL, *ON DEMOCRACY* (1998).

15. One might object that Dahl's criticism of our constitution is misplaced because we are a republic, not a popular democracy. Thus, to point out that our system falls short on measures of democracy simply states the trivially obvious. Dahl replies that it is the distinctions between a democracy and a republic that are trivial. In both kinds of systems, the value of political equality plays a central role. Organizing ourselves into a representa-

Defining democracy is no easy task. Giovanni Sartori has argued persuasively that trying to define democracy as an abstract concept produces nothing much more illuminating than statements like “democracy is the rule of the people.”¹⁶ Definitions of “democracy” and “democratic” may be best approached sidewise—by considering why democracy is sought as an ideal.¹⁷ According to Dahl, democracy is appealing because we accept as a fundamental moral principle that “the good of every human being” ought to be considered “as *intrinsically* equal to that of any other.”¹⁸ By extension, governments “must” when making decisions “give equal consideration to the good and interests of every person bound by those decisions.”¹⁹ Skepticism that specially qualified guardians could be entrusted with the power of considering the good and interests of each person and implementing policies that fulfill the general good leads us to this prudential conclusion: Citizens of a state should treat each other for political purposes *as if* each were equally qualified to participate—“directly or indirectly through their elected representatives”—in “making the policies, rules, laws, or other decisions that citizens are expected (or required) to obey” (p. 136). A belief in the moral equality of each human therefore leads to the adoption of the principle that Dahl refers to as “political equality”²⁰ (p. 135). A political system in which the people govern themselves according the principle of political equality is therefore a democratic one.

Putting political equality into practice requires commitment to several other principles.²¹ First, democracy requires equality in voting, with each citizen’s preference taken equally into account. Second, democracy must enable citizens to participate effectively in government. That is, each citizen should have adequate, equal opportunities for expressing her preferences. Third,

tive republic is a way of achieving democracy’s upsides on a large scale, while buffering ourselves against some of democracy’s downsides.

16. See SARTORI, *supra* note 12, at 17.

17. Cf. *id.* at viii (stating that his “concern [is] with the ideas and/or ideals that produce and preserve a democratic system”); *id.* at 225 (arguing that a “word like democracy acquires a definite, helpful, and usable meaning only if we remember that it is an abbreviation summarizing the acquisitions and values of a civilization”).

18. DAHL, *supra* note 14, at 65.

19. *Id.*

20. Moral skeptics need not be put off by Dahl’s line of argument, for skepticism yields the same conclusion: because what is right and good cannot be proved or disproved with certainty, each citizen’s opinions on matters should be considered to have equal weight, for any other rule requires us to reject skepticism

21. DAHL, *supra* note 14, at 84-86.

citizens should be able to act on enlightened understanding, which means that they ought to have sufficient time and opportunity to form considered judgments about policy preferences. Fourth, citizens should have final control of the political agenda. Citizens may delegate authority to others who make decisions in nondemocratic ways (such as regulatory agencies). But citizens must retain control over those decisionmakers' agenda. Finally, a democracy must allow all permanent residents to become citizens and participate fully in the democracy.²² The first condition is how political equality manifests itself in operation, and it is a prerequisite for all of the other conditions to exist.

Dahl's criticism of the American constitution centers on the Constitution's failure to ensure political equality and indeed on its enshrinement of institutions designed to ensure voter *inequality*. These antidemocratic institutions, Dahl argues, were adopted for reasons that have no relevance for us today, and thus have no claim to legitimacy.

How has our constitution enshrined the principle of voter *inequality*? Well, as already noted, in presidential elections, citizens in small states have a greater say on a per-capita-basis in who becomes president than citizens of larger states (Appendix B, Figure 2, "Unequal Representation in the Electoral College"). Most dramatically, however, the Senate gives each state an equal voice in Congress regardless of its population. This too distorts democracy by giving states with small populations power completely disproportionate to their numbers—Wyoming's 493,782 people have two Senators, the same as California's thirty-four million people (p. 50).²³ The Senate's composition is insulated from the democratic process as well. The Constitution guarantees that no state will be stripped of its equal representation in the Senate without its consent, which no state will ever give.

Our constitution creates a government with other undemocratic features as well. The Constitution created the Supreme Court as an unelected body with life tenure, but it did not clearly define what the judiciary's powers would be. Justice John Mar-

22. *Id.*

23. Because each state has at least one representative in the House, there is a smaller bias in favor of residents of small states in that house of congress as well. A citizen in Wyoming has 132% of the voting power of a California citizen in the House of Representatives. (One member of the House for Wyoming's 494,000 citizens compared to one representative for every 651,377 California citizens) (derived by author from 2000 Census data.)

shall helpfully stepped in to fill that breach. Finally, the Constitution granted Congress only limited powers. This too checks democracy by artificially limiting the scope of the people's power as expressed through their congressional representatives.²⁴ The Constitution used to be even less democratic, of course, and most constitutional amendments in the last 150 years have sought to cure the most obvious defects—securing universal suffrage regardless of race, sex, or wealth,²⁵ and ensuring the direct election of Senators.

AMERICAN PRAGMATISM: ARE WE AT LEAST UNDEMOCRATIC IN A USEFUL WAY?

In short, our federal government isn't terribly democratic at all. Indeed, Dahl argues that the American system is the least democratic when compared to the other longstanding democracies in the world.²⁶ Implicitly conceding that no governmental scheme can be perfectly democratic, Dahl argues our government might still claim legitimacy if it provides a useful governmental framework. He proposes five criteria for judging a system's utility. First, a constitution must help maintain a stable government. Citizens cannot govern themselves if the country constantly threatens to fly apart or if the military poses a credi-

24. Things used to be much worse, and Dahl catalogs the nondemocratic elements of the Constitution as it was originally adopted. Originally, the Constitution allowed slavery, did not empower Congress to forbid it, made the fugitive slave laws part of the constitution itself, and gave slave states an electoral advantage in the House and in the Electoral College by adding 3/5 of every slave to a state's population (pp. 15-20). The Framers did not even debate this final point. Clinton Rossiter argues that representation in the Congress of 1783 had apportioned representatives according to the 3/5 rule, and consequently, "most northern delegates must have realized . . . that [the 3/5 rule] would be the minimum price of Southern acceptance." CLINTON ROSSITER, *1787: THE GRAND CONVENTION* 173 (1966).

25. It took five constitutional amendments to provide the constitutional basis for universal suffrage: the Thirteenth Amendment (1865) banned slavery, the Fifteenth Amendment (1870) declared that the right to vote could not be denied because of race; the Nineteenth Amendment (1920!) guaranteed women the right to vote, the Twenty-Fourth Amendment (1964) banned poll taxes, and the Twenty-Sixth Amendment (1971) extended the right to vote to persons eighteen and over. But as we all know, the constitution was not enough to guarantee African Americans' right to vote; "nearly two centuries" elapsed "before a president and Congress could overcome the effective veto of a minority of states in order to pass" the Voting Rights Act in 1965 "to guarantee the voting rights of African Americans" (p. 16).

26. Dahl compares us to twenty-two other countries that have continuously had a democratic government since at least 1950 (Appendix B Table 1). They are Australia, Austria, Belgium, Canada, Costa Rica, Denmark, Finland, France, Germany, Iceland, Ireland, Israel, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, and the United States. Dahl does not include India because Indira Gandhi's 1975 coup interrupted its democratic rule.

ble danger to civil government. Second, a constitution must protect fundamental democratic rights, by which Dahl means basic civil liberties like freedom of speech and of the press (p. 97). Citizens must have these liberties to understand and weigh in on political issues (Dahl's "enlightened understanding") and to have some influence over the political agenda. Third, it must ensure democratic fairness among citizens—that is, it should count each citizen's concerns as equal.²⁷ Fourth, it must help form democratic consensus. Fifth, it must create a government embodying these characteristics that can also solve problems effectively.

Unfortunately, Dahl isn't able to draw many conclusions about how our constitution, or any other constitution for that matter, makes government more or less useful. The world's oldest twenty-two democracies have been stable enough that Dahl cannot say whether a particular constitutional scheme makes democratic governments more or less stable. Instead, stable governments look to be possible within a broad range of constitutional arrangements (pp. 93-94). Nor is he comfortable with saying that particular kinds of constitutions protect democratic rights like freedom of the speech and press better than others. Instead, Dahl attributes different levels of protection of rights and liberties to "national histories, political cultures, and perceptions of internal and strategic threats to survival" (p. 99). He thinks that the protection of civil liberties depends wholly "on the beliefs and culture shared by its political, legal, and cultural elites and by the citizens to whom these elites are responsive" (p. 99).

It is also hard to say whether particular constitutional structures make governments more or less able to solve problems, mostly because it's hard to measure how good or bad a government is at problem solving (pp. 116-18). The only evidence that Dahl points to is that divided government—when the legislative majority is of a different party than the executive—stacks the deck against drafting and passing important legislation (p. 111). Over the last century, we have usually had divided government, but most of the major waves of legislative change—the New Deal, the Great Society programs, and the civil rights laws of the 1960s—have generally all occurred during periods of united government. (The one exception, the Reagan tax cuts of 1981, was

27. DAHL, *supra* note 14, at 65. This principle of political equality is a supplement to the more general moral principle that "[w]e ought to regard the good of every human being as *intrinsically* equal to that of any other." *Id.*

passed when Republicans controlled the Senate and the Presidency but the Democrats still held the House.) But the fact that divided government makes sweeping legislative change very difficult doesn't really address Dahl's criterion. We would still need to know whether our constitutional structure makes it more likely that we will have divided government, whether during periods of divided government a majority wants some problem fixed that the federal government does not address, and whether the legislation passed during periods of unified government actually alleviate the problems they are designed to fix. Unfortunately, Dahl doesn't ask these questions, much less answer them. And if sweeping change contradicted democratic requirements, such as with anti-sedition laws in World War I, or the USA Patriot Act, one would hardly say the ability to pass legislation made the government more democratic.

Dahl can draw conclusions with regard to two of his criteria. First, he argues persuasively (and for the intuitive position) that our first-past-the-post system for determining the winner of congressional and presidential elections does not promote consensus as well as proportional representation systems (pp. 104-05). In proportional representation systems, governments formed by parties that do not have an absolute majority in the legislature have to work with other parties to get legislation through (p. 107). Interestingly, too, Dahl presents evidence that voters on the losing side in proportional representation systems (those who voted for nongoverning parties) reported greater satisfaction with how their democracy worked than voters in majoritarian or first-past-the-post systems who came out on the losing end (pp. 107-09).

This argument may be one of the most interesting and useful parts of the book. As our country becomes less homogeneous and more diverse, we may want to consider proportional representation more seriously. Dahl shows that we can—consistent with democratic principles—consider proportional representation alternatives to majority (or, if we're being accurate, *plurality*) rule. The major substantive argument against proportional representation—that it tends to cement minority group preferences and thus impede the development of consensus—does not seem to hold much water in light of his evidence about high levels of consensus in proportional representation systems.

Dahl's central conclusion and criticism, however, is that our constitution flouts the principle of political equality or democratic fairness (pp. 99-100). Had our institutions of political ine-

quality, such as the Senate, ever served a use (and Dahl is skeptical about that), Dahl is adamant that they have none now. Out of the twenty-two democracies he surveys, we have the one with the most unequal representation, largely due to the principle of equal representation of the states in the Senate and Electoral College. Even among democracies with federal systems, we still stand out on this score (p. 49).

Dahl is quite right that there's no *principled* reason that our constitution sacrifices individual political equality for equal state representation. The Senate is a creature of political necessity, not of principle. The delegates to the Constitutional Convention knew exactly what they were sacrificing, and it horrified many of them. Dahl quotes Alexander Hamilton who inveighed against giving states equal representation:

As states are a collection of individual men which ought we to respect most, the rights of the people composing them, or the artificial beings resulting from the composition. Nothing could be more preposterous or absurd than to sacrifice the former to the latter. It has been sd. that if the smaller States renounce their *equality*, they renounce at the same time their *liberty*. The truth is it is a contest for power, not for liberty. Will the men composing the small States be less free than those composing the larger (p. 13-14).²⁸

Given the serious, substantive objections to equal state representation, why did the delegates permanently enshrine it in our constitution?

Because they had to. The small states²⁹ absolutely refused to consider a constitutional system that did not give them equal representation in the legislature.³⁰ States and their citizens, it seems, became accustomed to voting on matters concerning the

28. Citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 466 (Max Farrand ed., 1966).

29. The most ardent proponents of equal state representation were New Jersey, Delaware, Connecticut, and New York. Yes, New York was a *smallish* state in the 1780s, less than half the size of Virginia, and smaller than North Carolina. Its leaders (with the significant exception of Alexander Hamilton) also worried about conceding power to the federal government and thought that equal state representation would help limit the federal government's powers. See ROSSITER, *supra* note 24, at 93.

30. The opposition to creating a legislature that was elected on a purely per capita basis actually ran much more broadly than these four states. Rhode Island refused to send a delegation to the Constitutional Convention, and New Hampshire's delegates missed the critical votes on the design of the federal legislature. Rossiter asserts quite reasonably that these states would have been loath to ratify a constitution without some provision for equal state representation in the federal legislature. ROSSITER, *supra* note 24, at 189.

states collectively *as* states. Small states, moreover, feared that without a guarantee of equal representation, Virginia's representatives would have a free hand to run the federal government. (On this score, the Senate didn't precisely save them from Virginia's power, as four of the first five presidents were Virginians.) It's possible too that Virginia's alacrity in introducing the first proposal for the Constitution heightened the small states' anxiety. (Virginia had proposed a bicameral national legislature in which representation in both houses would be per capita *and* representation would be based on both the free and slave population.)³¹

Even without Virginia's piggy proposal, the small states would never have agreed to a legislature elected on a purely per capita basis, because they did not have to. The small states held the entire convention in a classic hold-out situation. Members of the Constitutional Convention *wanted* a constitution that citizens in every state would ratify, and they *needed* a constitution that at least three-quarters of the states would. The Senate's composition and the constitutional guarantee that no state could be deprived of its equal vote in the Senate were the "rent" the small states exacted.

In Dahl's eyes, for political inequality to be a legitimate part of a democratic system it must protect some bona fide interest from attack by a democratic majority. I take this principle to apply more generally to any deviations from his five criteria of democracy within any system claiming to be democratic. An example of a justifiable deviation is Germany's ban of the Nazi party. This ban certainly limits Germans' associational and free speech rights, but it made perfect pragmatic sense for that country as it tried to forge a democracy in the shadow of the Third Reich.

With regard to our violations of the principle of political equality, Dahl thinks small states have no valid claim to special protection. In the first place, they never had any real "need to be protected from federal laws passed by congressional majorities that would violate their rights and interests" (p. 50).³² He is surely right that residents of small states have little in common other than their lack of population, and it is true that the two smallest states, Delaware and Rhode Island, had few (if any) common substantive interests.

31. *Id.* at 169-70.

32. "Why . . . geographical location [should] endow a citizen or group of citizens with special rights and interests" leaves Dahl "baffled" (p. 52).

If states did have common interests,³³ a principled justification for equal state representation would still have to explain why the people of these states deserve to speak in a disproportionately loud voice in the national legislature. The only *possible* justification for the Senate's composition I can think of—to give state governments representation in the national legislature³⁴—disappeared when the Seventeenth Amendment secured direct election of Senators. This “democratization” of the Senate has ironically decreased its “*utility* as an instrument of democratic government,” to use Dahl’s terminology. Now the Senate is just a more exclusive and less democratic version of the House.

As a native of California, I have great sympathy for Dahl’s arguments for political equality. I can’t fault his reasoning or his conclusion that equal representation of states at the expense of individual representation has no principled basis. Nevertheless, Dahl’s argument misses a fundamental point. The United States simply would never have existed but for this constitutional compromise. The United States was created out of former colonies that had been governed independently of one another; representatives of these independent state governments drafted the Constitution. The Constitutional Convention asked all states to give up some of their independence to the federal government. The small states felt as though they had compromised as much as they could—and perhaps more than their constituents would consent to—by agreeing to per capita representation in the House and to the supremacy of the federal government. Clinton Rossiter explains:

The Great Compromise [of equal representation of states in the Senate] was a confirmation of the states as states, as communities that had never been and never would be sovereign nations, and yet always had been and still meant to be discrete, self-conscious, indestructible units of political and social organization. It was also a confirmation of the Union as a union, as a nation that was more than a tight confederacy of sovereignties that shared a common destiny, and yet less than a consolidation of malleable components. . . . Dr. Johnson of Connecticut, went to the root of the matter with the help of George Mason by reminding Paterson that America was, for many purposes, “one political society” composed of individu-

33. In fact, today the smallest states—Alaska, Montana, North and South Dakota, and Wyoming—have a lot of common interests. All are predominately rural, frontier states, and four of them neighbor each other and have cattle-ranching as a major industry.

34. For example, to prevent the federal government from saddling the states with unfunded mandates.

als, and by reminding Madison that the states, too, were political societies with "interests" all their own.³⁵

Dahl spends little time discussing the history behind the Constitution's compromises, which is understandable—his project, after all, is assessing the Constitution's *current* legitimacy as a governing document. Ultimately, however, this narrow focus compromises this book's analysis. His emphasis on current justifications at the expense of historical justifications causes him to overlook what is probably the reason why we hold our constitution, with all of its flaws, in such high esteem and why there is little pressure to change its fundamentals.

This nation almost did not happen because of the dispute over power between the large and the small states.³⁶ The small states considered the Senate's composition to be a deal breaker. Had we not compromised this aspect of individual equality for equal state representation, we would never have become the world's first modern democracy.³⁷ We also could not have remained a loose confederation of states. The delegates to the convention all agreed that the Articles of Confederation were completely unworkable and had to go. Had the convention failed, what is now the United States likely would have become independent state governments, or three nations or confederacies, perhaps with the New England states, the mid-Atlantic states, and the Southern states each banding together. One hesitates to roam in the realm of counterfactuals, but one thing

35. ROSSITER, *supra* note 24, at 193.

36. Clinton Rossiter relates an incident late in the Constitutional Convention. Edmund Randolph, a Virginia delegate, was exasperated that the convention was about to compromise the principle of equal representation of individuals in favor of equal representation of states in the Senate (and not coincidentally, also dilute the power of residents of large states in the legislature) by the narrowest of margins: five votes for the compromise, four against, and one abstention. He moved that the convention adjourn so that the "large states might consider the steps proper to be taken in the present solemn crisis of the business, and that the small states might also deliberate on the means of conciliation." William Paterson of New Jersey, one of the strongest supporters of equal state representation, agreed, perhaps with too much alacrity and vehemence. He concurred "that it was high time for the Convention to adjourn," the rule requiring the delegates to keep the discussion secret should "be rescinded, and our constituents should be consulted." The small states, he said, would not join in union with the others unless the constitution guaranteed equality of the states. "If Mr. Randolph would reduce to form his motion for an adjournment sine die [a complete adjournment of the convention], [Mr. Paterson] would second it with all his heart." *Id.* at 194. The next day, the large states largely conceded this issue. *Id.* at 196.

37. This statement certainly proves too much. The continued existence of slavery was also a precondition to union, but that fact was not a reason to retain those provisions in the constitution. The Civil War did not exact too high a price to banish slavery from our Constitution and country.

seems safe to hazard. United, and with an assist from John Marshall, the states created the world's first "free trade zone," which Europe has envied, emulated, and still struggles to achieve. The fact that our farming regions could sell their crops without duties to industrial regions (and vice versa) and labor could move freely to wherever demand for workers was greatest meant that we became one of the most prosperous nations on earth. Because trade among citizens of different states (both in labor and goods) was so easy and cheap, we could take advantage of Ricardo's principle of comparative advantage, with different areas of the country specializing in the commercial activity each was best at.³⁸

Were we to begin anew, I am skeptical that we would have the political will to fashion a different constitution that is significantly more democratic or egalitarian. States continue to be an important organizing feature in our country, and it is hard to imagine that two hundred years into our history as a country that people would favor a radical reorganization of the basic federal structure of our government. Dahl also fails to convince me that the costs involved in fashioning a completely new (and surely imperfect in new and unexpected ways) constitution to cure existing defects would be worth the candle. So long as we are committed to remaining one united country, any new constitution would run into the same kinds of coordination problems that the framers faced with the first—though of course with different state players. One can imagine, for example, that California, Texas, New York, and Florida would insist on constitutional provisions that favored them as large states. As the sixth largest economy in the world and the largest agricultural producer in the United States, California could demand on provisions that favored it backed up with a credible threat of independence.

Dahl could have spent more time considering the less obvious ways that our constitution might actually enhance democracy. One obvious possibility is that by implicitly reserving broad powers to the states, the federal constitution leaves room for more participatory democracy on a broad range of subjects at the state level. Where Congress does not legislate or cannot legislate, the states have plenary authority to do so. All state governments have legislatures that are elected entirely on a per cap-

38. See DAVID RICARDO, *ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* (Dutton 1965 (1911)).

ita basis,³⁹ and the Constitution ensures that they will be “republican” governments. As citizens’ ability to influence policies is inversely related to the size of the government, citizens necessarily have more access, power, and influence at the state level than at the national level. States may thus compensate for some of the democratic flaws of the federal government’s design.

Dahl’s inattention to states means that he overlooks that states may function as “polyarchic” institutions in our federal system. In other works, Dahl has stressed that “polyarchic” institutions are an essential feature of a large-scale functioning democracy. These institutions are organizations formed by individuals around particular political or social interests. Political parties are the most obvious examples of polyarchic institutions, but so are interest groups like the Sierra Club and labor unions and community organizations like churches. These institutions are important because they act as mediators between government institutions and individuals, giving members information about policies and communicating members’ wants to government institutions. In a large-scale democracy, like ours, these polyarchic institutions are essential because individuals quite simply lack the time, resources, and interest necessary to be experts on all political matters (and it would be exceedingly inefficient for each individual to do so). Polyarchic institutions also channel and concentrate the power of their individual members, which enable these groups and their members to gain some leverage in and access to the political process over issues important to them.⁴⁰

While Americans today probably do not feel as intensely loyal to their home states as the Framers did, identification with one’s home state is an important part of most Americans’ identity. States, too, have distinct cultures and economic structures, and those differences affect both the kinds of policies that individuals support and the kinds of policies that actually work at the state level. While the principle of equal representation of states may be non-democratic in one sense, it has likely supported the evolution of states into institutions that can act as intermediaries between individuals and the federal government.

39. Thanks to *Baker v. Carr*, 369 U.S. 186 (1961) and *Reynolds v. Sims*, 377 U.S. 533 (1964).

40. Ronald A. Dahl, *Polyarchy, Participation, and Opposition in DEMOCRACY: A READER* 124 (Ricardo Blaug & John Schwarzmantel eds., 2001).

WHERE CAN WE GO FROM HERE?

Eighth grade civics class taught us all that amending the Constitution is extraordinarily difficult. Amending the Constitution to cure the political inequality defects that Dahl identifies is practically impossible. Constitutional amendments to repeal the Electoral College predictably die in the Senate shy of the two-thirds supermajority (p. 87-88), which makes the likelihood that three-quarters of the states would ratify such an amendment zero. The Senate's composition is not going to change, either.

Dahl expresses pessimism that nonconstitutional changes to the Electoral College would be any more popular. His main suggestion is that states could adopt either the Nebraska or the Maine model (p. 86-87). In those states, electors are appointed by district, with each district having one electoral vote. The two remaining electoral votes go to the highest (plurality) vote getter in the state. Dahl points out that early in our history, many states selected electors in this manner. It has only been in this century that most states have instituted the first-past-the-post winner-takes-all rule.

The Nebraska/Maine Model presents several advantages over the winner-takes-all rule that could make it attractive to a number of states. First, states that changed to a per district electoral system would be less likely to be considered "safe" states—states that one presidential candidate is nearly certain to win. Our three largest states are "safe" states. California and New York have voted for Democrats for president by large majorities in 1992, 1996, and 2000. Texas has been a "safe" state for Republicans for a couple of decades now. The existence of "safe" states means that Republican presidential candidates haven't really bothered to campaign in California or New York—they visited these states rarely and did not run many advertisements. And Democrats haven't really bothered with Texas. That our three largest states are "safe" means that presidential candidates didn't have to play to more than a *third* of our population during the campaign. In a game for the most electoral votes, candidates predictably spend their resources where they have a real chance losing or winning by a small majority (or plurality). More than presidential-candidate face-time is at stake. Candidates make campaign promises to their allies in key, contested states in return for their vocal and active support during the election and in getting out the vote. Florida has gotten many goodies and policy concessions over the past three years from

the Bush administration.⁴¹ We persist in irrational policies such as the trade embargo with Cuba because Cuban refugees are an important bloc in an important state; if they had instead immigrated to Arkansas, we would have been smoking Havana cigars and vacationing in Cuba years ago.⁴² Some of the smallest states (which theoretically benefit from the electoral college system) are the safest. The five states with only three electors each (the minimum possible number), Alaska, Montana, North Dakota, South Dakota, and Wyoming, have all been “safe” Republican states since at least the 1970s. Hawaii, with four electoral votes, has traditionally been a safe state for Democrats.

Candidates predictably expend few resources on these states during the elections (unless there was a contested senate seat, as there was in 2000 in South Dakota for Tom Daschle’s seat). Changing to the Nebraska/Maine process does not ameliorate the Electoral College’s basic political inequality, for small states still have a disproportionately large vote in the College itself. But any change from winner-take-all systems enhances democracy—winner-take-all systems discourage third-parties from forming, and in safe states winner-take-all reduces voters’ incentives to vote.

Dahl overlooks another change that we could make that would make our elections for nationwide office more democratic. Perhaps the least “democratic” method for determining winners is the first-past-the-post rule, according to which the candidate with the plurality of the vote wins an office or the state’s electoral votes. All states award their electoral votes to the plurality winner, and most states use the same rule to determine winners for seats in Congress. There is an important practical reason for having a first-past-the-post rule. Runoffs are impossible in presidential elections as the Constitution provides

41. Blaine Harden, *National and State Politics Help Protect a Swamp*, N.Y. TIMES, Apr. 3, 2002, at A1 (stating that the Bush administration backed the National Park Service plan to restrict access to off-road vehicles in the Everglades to sway “green” voters to vote for President Bush in 2004); Elisabeth Bumiller & Carl Hulse, *U.S. May Buy Back Florida Oil Rights*, N.Y. TIMES, May 30, 2002, at A1 (reporting that the federal government would buy oil and gas rights to the Everglades and to Florida panhandle beaches in order to protect three wildlife preserves in Florida as part of the Bush administration’s bid to help Jeb Bush win reelection as Florida’s governor).

42. See, e.g., Christopher Marquis & Eric Schmitt, *Bush Faces Pressure from Congress to Alter Cuba Policy*, N.Y. TIMES, May 20, 2002, at A4 (reporting that President Bush intended to toughen restrictions on trade and travel to Cuba as part of a strategy to court Cuban voters seen as crucial to his election in 2000, despite calls from some leaders in Congress to ease restrictions).

that elections will take place on one day. And for other nationwide races, run-offs are expensive and cumbersome.

Technology, however, makes automatic or instant run-off voting (IRV) systems possible. Australia has successfully implemented such a system to elect its Lower House, and the Republic of Ireland uses IRV in its presidential elections. Under such a system, voters rank candidates in order of preference, and in the first vote, each voter's first preference is tallied. If no candidate wins an absolute majority according to the first ranking, then all candidates save the top two vote-getters are dropped, and those candidates' votes go to their supporters' second preference. This is a change that does not favor or disadvantage small or large states; it also does not advantage or disadvantage early or late adopters. This fact makes it a possible, practical method for making our elections more democratic, and possibly more exciting (which could help voter turnout.)

COULDA, SHOULDA, WOULD A?

This book risks being a desultory coulda-shoulda-woulda nag. One unlikely event saves it. The war in Iraq. Ultimately, Dahl's message seems to this reader to be that constitutions are culturally, geographically, and historically contingent documents, and democracies come in at least thirty-one flavors. Any country that holds its own constitution out as a model for other countries does no one any favors. As we help to build a new Iraq and advise Iraqis as they write a new constitution, we should keep this message in mind. It could be a mistake, for example, to insist on a presidential democracy for Iraq as opposed to a parliamentary system. Iraq's history presents ample reasons to be suspicious of investing authority in one individual over executive functions like law enforcement and the military. At the least, Iraqis might have a particular resistance to viewing such political arrangements as trustworthy and legitimate. On the other hand, evidence that Iraq's judiciary had something of an ethos of judicial independence⁴³ could mean that our unusual system of judicial review might work well. Additionally, Iraq's ethnic and religious divisions make Dahl's discussion about when constitutions may legitimately sacrifice democratic ideals like political equality quite topical. Dahl points out that a political system can protect

43. See Richard Coughlin, *In Iraq A Judicial System Worth Saving*, N.Y. TIMES, July 26, 2003, at A13. But see Bernard Weinraub, *Aftereffects: Law: U.S. Seeks Solid Core to Fix Iraq's Broken Legal System*, N.Y. TIMES, Apr. 27, 2003, § 1, at 24.

a minority's interests without employing our approach of giving a minority (in our case, small states) an equal voice on all issues. A constitution can protect minority interests on particular subjects (like free exercise of religion or free association) by completely insulating those interests from majority rule (our Bill of Rights' approach). A constitution that provides for proportional representation might also protect a minority's interests by requiring a supermajority in order to pass laws in particular subject areas to ensure that minorities consent to regulation in that area. This latter approach has the advantage of flexibility, as the contours of a minority's particular interests and concerns may change over time. Proportional representation could also, as Dahl discusses, have the corollary advantage of promoting functional working relationships among ethnic and religious groups.

In the final analysis, we can be proud of our constitution, but Dahl gives us a number of cogent reasons to feel humble about it. At the very least, as a country that likes to think of itself as a beacon of democracy to the rest of the world (and hopefully as a transmitter of democracy to Iraq), we ought to resist the temptation to generalize the universal from our particulars.