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# A Constitution For Our Generation?

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## A Constitution for Our Generation?

Carol Nackenoff

Thomas Jefferson wrote to James Madison from Paris on September 6, 1789 that “no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct.”<sup>1</sup> Jefferson expressed the view that, not only should each generation be able to choose the laws under which it is governed, but that the power of repeal is in no way equal to the power to choose anew:

It may be said that the succeeding generation exercising in fact the power of repeal, this leaves them as free as if the constitution or law had been expressly limited to 19 years only. In the first place, this objection admits the right, in proposing an equivalent. But the power of repeal is not an equivalent. It might be indeed if every form of government were so perfectly contrived that the will of the majority could always be obtained fairly and without impediment. But this is true of no form. The people cannot assemble themselves; their representation is unequal and vicious. Various checks are opposed to every legislative proposition. Factions get possession of the public councils. Bribery corrupts them. Personal interests lead them astray from the general interests of their constituents; and other impediments arise so as to prove to every practical man that a law of limited duration is much more manageable than one which needs a repeal.<sup>2</sup>

Jefferson understood the difficulty of overcoming entrenched interests. And his remark foreshadowed the difficulty of change through the processes outlined in the Article V amendment clauses—clauses which also prohibit one of the very changes critics such as Robert Dahl and Sanford Levinson have been advocating, namely, that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”<sup>3</sup> Though Jefferson was concerned with the conditions necessary to maintain the kind of citizens who were capable of self-government, he was not afraid of considered political change.<sup>4</sup>

Sanford Levinson strikes a distinctly Jeffersonian posture in *Our Undemocratic Constitution*. Realizing the massive difficulties standing in the way of some of the reforms he urges readers to consider, he nevertheless provokes a wide audience to ask themselves whether the arrangements endorsed in 1787 serve

Americans well today. I assigned this text to undergraduates at Swarthmore this past fall, and it did, indeed, provoke them to think new thoughts and to examine constitutional arrangements anew. Two decades ago, in *Constitutional Faith*, Levinson asked, “Is there anything built into the definition of law (or, more crucially, of the Constitution) that guarantees that it will necessarily be *worthy* of respect?”<sup>5</sup> Blind veneration is not, Levinson argues, the proper basis for respect by citizens in a democracy; examination, critical reflection, and an assessment of performance in light of current conditions and needs is what is necessary. For Levinson, law achieves moral force when it stems from willful desire.<sup>6</sup> Levinson would likely second John Stuart Mill’s insistence that failure to subject beliefs to examination and vigorous defense was unsuitable and even dangerous for enlightened, self-governing people.<sup>7</sup> And indeed, Levinson, like Mill and his enlightenment forefathers that included Jefferson, believes in and desires progress in politics. Civilization follows upon the heels of barbarism, and societies should re-examine and cast off old institutions when the old no longer serve.<sup>8</sup> If we live in a democratic age and the Constitution we inherited is

insufficiently democratic, then we owe it to ourselves, and presumably to future generations, to remove constitutional ‘imperfections’ and ‘stupidities.’

In this highly accessible reflection, *Our Undemocratic Constitution* challenges Americans to propose a constitutional convention in order to make America more democratic and egalitarian. Levinson possesses a real faith that a new constitutional convention, if convened, would alter the Constitution in ways he would consider more democratic. As a Political Scientist, I need to introduce a few cautions. Those who care the most deeply about, and have perhaps already mobilized intensively around, particular constitutional reforms are the ones most likely to invest time and attention in this process. They are likely to have built think-tanks and to have cultivated funding sources to wage their campaigns. The reforms Levinson advocates need to be backed by equally powerful and intense movements. Moreover, current arrangements invest certain actors and interests with benefits they will likely mobilize to protect, and fear of discrete or tangible loss helps mobilize actors far more effectively than hope of a more remote or less tangible gain.<sup>9</sup>

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Might a constitutional convention propose that life begins at conception? That gay marriage become unconstitutional, pre-empting the states? Could a convention bar the federal government from burdening states with unfunded mandates, or require that the federal government balance its annual budgets, just as many states are required by law to do? Might it stipulate that any regulation negatively impacting the value or anticipated revenue from private property constitute a “taking” requiring just compensation? Might a convention strip the federal courts of particular types of jurisdiction, or end the practice of judicial review altogether (and should that bother us)? Could the commerce clause be redefined in a convention so that the reach of the federal government under this clause be drastically curtailed? Might the doctrine of state sovereignty infuse the 10<sup>th</sup> Amendment with new force, perhaps simply beginning the Amendment “the powers not expressly delegated to the United States...?” Might the delegates to a new convention tighten up the necessary and proper clause along the same lines? Could Americans choose to mandate the teaching of creationism in public schools or require school prayer? And is it conceivable that the convention would bar immigration, especially from certain regions, ethnicities, or classes? What might result from a constitutional convention, absent laborious and long-term mobilization, could be frightening for many liberals and progressives, and for others who do not think that a mandated devolution of power from the national government to the states is appropriate (no matter how important local and regional initiatives) in an era of increasing globalization and multilateral decision-making.

Not all of the proposals suggested in *Our Undemocratic Constitution* have the same force or weight. They certainly did not resonate equally with my students—for instance, students failed to get excited over age and residency requirements.<sup>10</sup> Nevertheless, Levinson’s assertions about the ways the Constitution serves to impede the development of democracy are highly provocative. And he surely makes an important assertion for students of American politics: that democratic aspirations meet structural impediments in the United States. If there are reasons why the Constitution discourages citizens or some groups of citizens from feeling invested in the political process, it is a problem for advocates of democracy and civic engagement.

I want to embellish Levinson’s reflection this way: does the Constitution, for one or several reasons, suppress political participation and the quality of democratic deliberation in America? If so, what can and should be done to change these dynamics? Do the changes envisioned require an overhaul of the Constitution? While the last question would appear to require an answer in the affirmative, it is also possible that current arrangements, integrated in the fabric and tradition of our political system, in fact have no sacrosanct constitutional status. Could they then, with political will, be reconstructed in some alternate way?

I want to focus on the system by which we elect the president—a system that Levinson calls dreadful and Byzantine.<sup>11</sup> In 2008, a number of states experienced record turnout in caucuses and primaries, especially Democratic turnout. African Americans and young voters turned out in November in robust numbers, offsetting a decline among some groups of white voters. The upturn in youth voting appeared to extend a modest but discernable trend following a lengthy decline in political participation of young cohorts. Interest in the race was high for reasons extending beyond race. America elected the first black president. Predicted debacles did not materialize (no Ohio 2004 or Florida 2000). So why worry about a system that can work like this?

A trip I made to Kazakhstan in October to speak about the upcoming American elections occasioned further on our own electoral process. I read a report of complaints about the transparency and accountability of elections in Kazakhstan leveled by the Office of Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe [OSCE] so that I could think comparatively about election problems and the kinds of issues that might best engage students and activists there.<sup>12</sup> I also discovered that, in 2004, OSCE observers in Florida had said that they had less access to the polls than in Kazakhstan.<sup>13</sup> Our processes—for indeed, it would be an overstatement even to claim that each state had a single set of rules and procedures—discourage many Americans from participating. As the OSCE report on the 2004 U.S. election notes, with variations even at the county level (ballot design; choice of election technology), “there are a significant number of different legal regimes determining the manner in which elections are conducted.”<sup>14</sup>

In *Bush v. Gore*, the Court asserted that “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.”<sup>15</sup> Since South Carolina was the last state to accord this privilege to voters in 1868, it was surprising to hear the Court’s claim: had not the Constitution been informally amended by practice, so that states could not withdraw this “right”? The fact that there is no federal constitutional right to vote has a variety of other ramifications in the American electoral process. There are many disparities in the likelihood that one’s vote will count, or even in the likelihood that one will even be able to cast a vote. While the Voting Rights Act affords federal protection from a number of recognizable practices that discriminate on the basis of race (or linguistic community), it leaves in place many other kinds of intentional and unintentional barriers to effective voting. As the 2004 OSCE report notes, generally, federal law provides only minimal standards for voter protection and enfranchisement.

The 1993 National Voter Registration Act (Motor Voter) was designed to make voter registration easier by mandating that registration be available at a variety of federal facilities as well as providing for easy enrollment when applicants seek state driver's licenses. The 2002 Help America Vote Act (HAVA) was a bipartisan federal initiative to address problems highlighted by the 2000 election, mandating statewide voter registration databases, providing funds for improvements in election machinery, and introducing provisional ballots throughout the United States, implementation of key provisions left a great deal to state discretion. There were far more carrots than sticks. And what one hand gave, another sought to take away. Every effort to expand access to the franchise seems to mobilize the opposition in the name of protecting the integrity of the political process. Of course there are partisan motives to such claims, because first-time, low-income, or low-information voters have particular (or assumed) characteristics and partisanship. Thus, the Justice Department under President Bush embarked on an assault on voter fraud, targeting individuals for the first time (not just conspiracies). A *New York Times* report indicated that, in five years, there was virtually no evidence of organized efforts to skew elections and that of the hundred or so prosecutions (mostly of Democrats), most involved individuals who misunderstood eligibility rules or mistakenly filled out multiple registration forms. The Justice Department net caught up a few ex-felons who mistakenly believed they were eligible to vote and a few immigrants who filled out proffered voter registration forms when renewing their driver's licenses or who believed that, since they had applied for citizenship, they could fill out a registration form received in the mail (at least one of these persons was deported).<sup>16</sup> Prosecutions and jailings certainly send a message that stand to inhibit participation by those who are, indeed, eligible to vote but where misinformation about eligibility (e.g., unpaid fines and parking tickets) may prevail. The furor over ACORN's highly mobilized voter registration efforts in 2008, resulting in some multiple registrations, masks the fact that there are very few known cases of voters trying to cast ballots in multiple states.

Indiana was one of several states to implement a law requiring a federally or state-issued photo ID for first time voters, and the 2005 Indiana statute appears to be the most stringent of these laws. Opponents contended that elderly citizens and some disabled persons would have trouble obtaining birth certificates that would allow them to obtain a free state-issued photo identification, that many of these same people did not have passports

or driver's licenses, and that casting provisional ballots and then having to travel to produce the required documentation within ten days of the election was a costly burden. Nevertheless, the Supreme Court rejected a facial challenge to the Indiana law in *Crawford v. Marion County Election Board* (2008).<sup>17</sup> Only the dissenting justices (Souter, Ginsberg, and Breyer) thought that the state's interest in passing such a law (ostensibly vote fraud) required some evidence or demonstration when placing such a substantial burden on the right to vote. For the Court's majority, in an opinion penned by Justice Stevens, the state's interest in counting only the votes of eligible voters was held to be obviously legitimate and important.

A federally protected right to vote for president might also help put an end to state practices of long term felony disenfranchisement. Properly articulated, it would help put the federal government imprimatur squarely on the side of fairness and uniformity. It is not merely the case that convicted felons are barred from voting while incarcerated in all but a couple of states; in many states, those paroled or on probation are still denied the right to vote, and in a significant number of states,

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former offenders remain barred from voting for life. As the OSCE notes, it is hard to view some of these restrictions on the franchise as reasonable and proportionate.<sup>18</sup> These ballot restriction measures, some of which date to the aftermath of the Civil War and which again have partisan purposes, were not when instituted and are not now race-neutral practices. Felon disenfranchisement constitutes a kind of civil death that contributes

to the demobilization, depoliticization, and disempowerment of a number of American citizens. We can at least demand that these practices be ended for purposes of federal elections. Here, in part because of the mention of disenfranchisement in connection with crimes in the Fourteenth Amendment and the Court's reading of the equal protection clause in the matter of felon disenfranchisement in *Richardson v. Ramirez*, we probably will want to amend the Constitution to secure this federal protection.

Under Article I §4, Congress retains power to make or alter the "times, places, and manner of holding elections for Senators and Representatives," that are prescribed in each State by the Legislature thereof. There would appear to be adequate constitutional authority for Congress to make uniform federal election processes and provisions ("except as to the Places of chusing Senators,") extending as well to presidential elections, and yet it seems unwilling to do so. We should move to take time, place, and manner power from the states in order to make sure that the

federal constitutional right to vote is equal, fair, and uniform and place this among the powers of Congress. If there is no political will, then citizens should join Sandy Levinson in demanding a constitutional convention that would articulate this federal protection of the right to vote as a component of citizenship in the United States, and that would stipulate what a guaranteed federal right to vote for president and other federal officials should include.

A constitutionally protected federal right to vote as a guarantee pertaining to U.S. citizenship would prompt federal rules under which votes in federal elections are cast, counted, and recounted. The federal government could take over administration of most aspects of federal elections directly. Or, at a minimum, the federal government could hold accountable state actors who fail to provide numerous, well-advertised polling places with sufficient, adequate and reliable equipment and trained poll workers to eliminate multiple hour waits at the polls, and it could furthermore insist on uniform rules for voter identification, provisional ballots, and early voting. A robust rights-based guarantee should lead to more vigorous federal prosecution of vote suppression activities, even if they were not aimed at voters on the basis of race or language minority group. In crafting language for a constitutional revision, it would be wise to make sure that nonstate actors who engage in misinformation and suppression activities would also be subject to federal law.<sup>19</sup> If we came to see this right as one worthy of robust federal protection, we might more easily make federal election days national holidays or experiment with multi-day elections to enhance participation. We should be generous in insuring that federal ballot access for minor parties is not encumbered (e.g., by rules governing nominating petitions). Allowing choice rather than constraining it should be a goal of reforms.

It is important to recognize that the most significant factors depressing voter turnout in the United States are registration-related barriers to voting. If turnout is calculated among those registered to vote, around 86 percent of those registered claim to have voted in 2000 and 89 percent in the 2004 election.<sup>20</sup> Even accounting for the problem of self-reporting in surveys, it is clear that turnout among the registered is robust. It is also clear that a good number of would-be voters are turned away from the polls because voting lists fail to show their names, and rules for counting of provisional ballots are not necessarily going to solve voter list problems. If voters vote in the wrong precinct, or have moved close to election time, all bets are off in a system in which decisions about whether to count such votes are decentralized.<sup>21</sup>

While we are working on equalizing and enhancing participation in the electoral process, we had better join Levinson in proposing elimination of the Electoral College. This institution, for which Levinson constructs ‘parade of horrors’ scenarios (frightening enough to contemplate) does, indeed, distort the

way in which votes count, privileging the voices of voters in states with smaller populations. In this sense, Levinson, like Robert Dahl, is concerned about differential formal weighting of votes, and both recognize the insurmountable obstacle to reform posed by the Senate.<sup>22</sup> Unlike Dahl, Levinson is also concerned with a number of mischiefs that the Electoral College system could produce. But the Electoral College has other consequences worth considering. It has a tendency to depress or distort voter interest and turnout in presidential elections. This should also be of concern to those who seek to facilitate democratic aspirations through a constitutional convention.

Political scientists recognize that citizens are more likely to take an interest in presidential elections and to vote when there is an active campaign going on where they live.<sup>23</sup> The Electoral College system for allocation of the votes that actually matter cause many states and congressional districts to be ignored by campaigns; either a candidate is sure to win, or sure to lose, that state or congressional district.<sup>24</sup> Meanwhile, battleground states and specific counties within those states are lavished with attention from candidates and their surrogates.<sup>25</sup> A relatively small number of states are deluged with media buys and campaign stops, while others might not know a campaign is going on from these indicators.<sup>26</sup> The timing of primaries further privileges some voters. While residents of New Hampshire, who ultimately wield four electoral votes, are overrun with candidates who visit their towns or living rooms during primary season, residents of some states have rarely if ever been courted by candidates.<sup>27</sup> Of course 2008 was an interesting anomaly for the Democrats; since the battle for the nomination extended even beyond the time the last primary and caucus votes were cast, candidates campaigned heavily in closely contested late primary states, and interest in the election among potential Democratic voters remained high. In general, areas where candidates are invisible, where campaign advertisements do not run, and where the election seems remote, participation and electoral turnout are lower.<sup>28</sup> If and when the potential electorate is mobilized, interest in issues and in politics is higher.<sup>29</sup> Because the existence of the Electoral College shapes the strategic behavior of presidential candidates, it also leads to selective mobilization of voters and actually demobilizes many potential voters. I would argue that its effect is undemocratic in this sense as well as the more traditional argument about bean counting.

Under the current system, there is virtually no incentive to mobilize citizens who do not participate, since the object is not to maximize overall vote totals for a candidate but rather to win the state. Contemporary parties are unlikely to seek to mobilize those who do not participate since these nonparticipants do not simply mirror the electorate and they introduce a great deal of uncertainty into election outcomes.<sup>30</sup> It could even be argued that the Electoral College system gives parties and

candidates a disincentive to pay attention to specific interests of African Americans or Latinos because they are unlikely, in most elections, to shift the outcome in the state as a whole.<sup>31</sup> And George C. Edwards has demonstrated that the interests of small states are hardly served by the Electoral College system, since candidates who focus on highly competitive states with large numbers of electoral votes often neglect small states in their time and resource allocation—and also ignore local issues in such states.<sup>32</sup> The political conversation might be altered by elimination of the Electoral College, but there is little if any reason to believe it would be altered for the worse.

When the Electoral College was created as a compromise mechanism during the final days of the Constitutional Convention, it reflected, in part, fears that the populace could not be trusted to make good decisions and would not know candidates outside their own states or regions.<sup>33</sup> The founders did not invent it as a further device to protect state interests, and probably did not envision the current system in which all state electors are expected to vote as a bloc (another informal amendment to the Constitution). As John Roche argues, the framers were pragmatists and the Electoral College “was merely a jerry-rigged improvisation which has subsequently been endowed with a high theoretical content...”<sup>34</sup>

If the Electoral College vanishes, a vote would be a vote wherever it were cast throughout the country. Edwards’s examination of current practices and the manner in which the Electoral College shapes these supports Robert Dahl’s claim that “in a system of direct election where every citizen’s vote is given equal weight, presidential candidates will be even more eager than they are now to win votes wherever they might be available; and the closer they expect the election to be, the more eagerly they will search out those votes.”<sup>35</sup> So long as parties remain reasonably competitive on the national level, they will have an incentive to campaign vigorously across the country under a system of direct election.

## Conclusion

There are a number of other reforms that could enhance interest in public affairs and elections and promote civic engagement in the United States, but my point has been to indicate that a good deal of mileage could likely be obtained by these few strategic reforms. And there is considerable public support for such changes. The Senate, as Levinson knows, is likely to remain the graveyard for these changes, especially because of their perceived impact on the interests of smaller states. For Levinson, the framers’ intent is not sacrosanct. However, what the framers created does function like an iron cage with almost kryptonite-like bars.<sup>36</sup> Is the Constitution, indeed, paralyzing democracy?

Levinson seriously engages the difficulties in calling a new constitutional convention to address democratic defects of our current Constitution and suggests the possible use of Fishkin-type deliberative polling to build a movement for reform.<sup>37</sup> Based on my own experiences with citizen forums, I recognize the value of such guided face-to-face discussions. But the exercises also underline the point that thoughtful democracy requires a great deal of time and investment from citizens. Our political culture tends to downplay obligations of citizenship in its overwhelming emphasis upon individual rights.<sup>38</sup> Moreover, the pace of life in the United States at the dawn of the 21<sup>st</sup> century seems to make time ever more scarce for people ranging from professionals to workers holding down multiple part-time jobs. These tendencies seem to be at war with the considered, careful deliberation that is inclusive of all sorts of citizens and interests that Levinson’s democratic aspirations are founded upon, and must also be addressed in the public sphere. Does my observation mean I believe that change is impossible? I would not go so far. But the change Levinson wants requires creating new citizens in the process—citizens who think and imagine anew.

Our Constitution and the informal amendments we live with have helped to shape us as citizens. Can simple legislation and currently imaginable constitutional amendments help us invigorate democracy and enhance democratic deliberation as a step in the process of change? I believe the generation of a federal constitutional right to vote is one such imaginable and possible step. If we cannot remove the Electoral College by constitutional amendment, there are imaginable and possible reforms proposed by states, including a proposal originating in Maryland in 2007 that would bring electoral votes into alignment with the popular vote, thereby effectively marginalizing the Electoral College.<sup>39</sup> If both of these reforms could be made, there is a chance for significant payoff for the quantity and quality of democratic participation and deliberation in the United States. From there, more may well follow. The agenda is modest, but I can indeed envision it. We may, like Sanford Levinson, share Jeffersonian sensibilities and aspirations, but we are no longer the yeoman farmers Jefferson knew.

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## Endnotes

1. Thomas Jefferson, “Letter to James Madison, Paris, September 6, 1789,” in *The Life and Selected Writings of Thomas Jefferson*, edited and with an introduction by Adrienne Koch and William Peden (New York: The Modern Library, 1944).

2. Jefferson, "Letter to James Madison, Paris, September 6, 1789."
3. Constitution of the United States of America, Article V.
4. Jefferson, *Notes on Virginia*, Query XIX; Jefferson, Postscript to "Letter to James Madison, Paris, December 20, 1787." In *The Life and Selected Writings of Thomas Jefferson*.
5. Sanford Levinson, *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1988), 54.
6. See Levinson's discussion of this theme in connection with Thomas Jefferson in *Constitutional Faith*, 64.
7. John Stuart Mill, *On Liberty*.
8. Levinson, *Constitutional Faith*, 9, drawing upon Jefferson's July 12, 1816 letter to Samuel Kercheval.
9. See Mancur Olson, Jr., *The Logic of Collective Action* (Cambridge, MA: Harvard University Press, 1965) and James Q. Wilson, *Political Organizations* (Princeton, NJ: Princeton University Press, 1973).
10. Of course Levinson did not intend a monopoly on new proposals for reform.
11. Levinson, *Our Undemocratic Constitution*, 81, 83.
12. Progress Review: Kazakhstan's OSCE Commitments on Democracy and Rule of Law in Light of Kazakhstan's Upcoming OSCE Chairmanship (September, 2008), available at <http://www.freedomhouse.org/uploads/KazakhstanProgressReview.pdf>
13. "International observers are an unknown concept in U.S. federal and state law," notes the OSCE/ODIHR Election Observation Mission Final Report on the November 2, 2004 Election in the United States (p. 11). Accessed at [http://194.8.63.155/documents/odihr/2005/03/13658\\_en.pdf](http://194.8.63.155/documents/odihr/2005/03/13658_en.pdf). Richard S. Katz, *Political Institutions in the United States* (New York: Oxford, 2007).
14. OSCE/ODIHR Election Mission Final Report, November 2, 2004 Elections, United States of America, p. 7. Accessed at [http://www.osce.org/documents/odihr/2005/03/13658\\_en.pdf](http://www.osce.org/documents/odihr/2005/03/13658_en.pdf)
15. *Bush v. Gore*, 531 U.S. 98, 104 (2000), citing U.S. Constitution, Art. 11, §1.
16. Eric Lipton and Ian Urbina, "In 5-Year Effort, Scant Evidence of Voter Fraud," *New York Times*, April 12, 2007, A1.
17. *Crawford v. Marion County Election Board* 2008 U.S. LEXIS 3846; (07–21)
18. OSCE/ODIHR Election Mission Final Report, November 2, 2004 Elections, United States of America, p. 11. Accessed at [http://www.osce.org/documents/odihr/2005/03/13658\\_en.pdf](http://www.osce.org/documents/odihr/2005/03/13658_en.pdf).
19. The former appears to have happened in South Carolina in 2004; the latter appears to have happened in Virginia and in many other states in 2006. See Alex Koppelman and Lauren Shell, "The GOP's Dirty Deeds of 2006," *Salon* (November 21, 2006); National Network for Election Reform at <http://www.nationalcampaignforfairelections.org/page/-/Deceptive%20Practices%20Network%20Issue%20Paper.pdf>
20. See the Census Bureau press release at <http://www.census.gov/Press-Release/www/releases/archives/voting/004986.html>
21. I even saw a couple of cases on my campus this November where absentee voters were not offered provisional ballots when told in writing that their names were not appearing on the voter rolls—in a 2008 battleground state fairly well known for throwing up high bars to voting.
22. Robert Dahl, *How Democratic Is the American Constitution?* (New Haven: Yale, 2002), 81–89.
23. See, for example Thomas Patterson, *The Vanishing Voter* (New York: Knopf, 2002), 142–44.
24. See Dahl, *How Democratic is the American Constitution?*, 83, 85.
25. See Levinson, *Our Undemocratic Constitution*, 87–89.
26. Levinson, *Our Undemocratic Constitution*, 88.
27. See George C. Edwards, *Why the Electoral College is Bad for America* (New Haven: Yale, 2004), especially Chapters 5 and 6.
28. See David Hill and Seth C. McKee, "The Electoral College, Mobilization, and Turnout in the 2000 Presidential Election," 33 *American Politics Research* 700–725 (2005). See also "The Shrinking Battleground," a report from FairVote at [http://fairvote.org/media/perp/Shrinking\\_Battleground\\_Final.pdf](http://fairvote.org/media/perp/Shrinking_Battleground_Final.pdf). Accessed 4/24/2007.
29. Steven J. Rosenstone and John Mark Hansen, *Mobilization, Participation and Democracy in America* (Longman Classics, 2002) have richly demonstrated that citizens participate in electoral activities when mobilized. But often they are not asked, and this is often quite deliberate.
30. Frances Fox Piven and Richard A. Cloward, *Why Americans Don't Vote* (New York: Pantheon, 1988). See the discussion of felony disenfranchisement below. Piven and Cloward argue that historic efforts by reformers in the Progressive Era to demobilize African-American and immigrant working class voters in the late nineteenth and early twentieth centuries shaped the character of nonvoting.
31. George C. Edwards, *Why the Electoral College is Bad for America* (New Haven: Yale, 2004), 99.
32. Edwards, Ch. 5.
33. Hamilton's argument in *Federalist* 68 concerning the information and discernment of electors reflects some delegate views in Farrand *Records of the Federal Convention*, including Mason, Sherman and Gerry that the people would not have adequate knowledge of the potential candidates for president. See Max Farrand, *Records of the Federal Convention* (New Haven: Yale University Press, 1937, 1966) and [http://thomas.loc.gov/home/histdox/fed\\_68.html](http://thomas.loc.gov/home/histdox/fed_68.html). There were other fears about intrigue and cabal if legislatures selected the president; some delegates wanted direct election by the people.
34. John P. Roche, "The Founding Fathers: A Reform Caucus in Action," edited and reprinted in Samuel Kernell and Steven S. Smith, *Principles and Practice of American Politics*, 2nd ed. (Washington: C.Q. Press, 2004), 63. Originally appeared under same title in *American Political Science Review* 55 (December 1961).
35. Robert Dahl, *How Democratic Is the American Constitution?*, 85.
36. Levinson, *Our Undemocratic Constitution*, 165.
37. I, too, have had the opportunity to participate in a series of citizen issue forums in 1996 sponsored by the Philadelphia Inquirer and based, at least loosely, on Fishkin's deliberative polling. I was similarly impressed by the thoughtfulness and constructiveness of the process, although it underscores that democratic deliberation is time consuming.
38. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, 1991).
39. In 2007, Maryland became the first state to sign an interstate compact that would obligate each state that signed to cast all its electoral votes for the presidential candidate winning the national popular vote. See John Wagner, "O'Malley Turns 105 Bills into Law; Md Becomes First to Approve Change in Electoral College System," *Washington Post*, April 11, 2007, B2.