

# When Americans Think About Constitutional Reform Some Data and Reflections<sup>1</sup>

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## I. IN LOVE WITH STATE CONSTITUTIONS

We begin with true banalities: most Americans—and, for that matter, perhaps even most foreigners as well—are aware that there is something called the United States Constitution. It is also the case that most Americans—though here there is increasing reason to believe that this is *not* true of most people around the world<sup>2</sup>—approve of the Constitution, perhaps “venerate” or even “love” it.<sup>3</sup> That has often been asserted, particularly by Levinson in his book *Constitutional Faith*,<sup>4</sup> but the evidence was necessarily impressionistic.<sup>5</sup>

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<sup>2</sup>See David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 762 (2012).

<sup>3</sup>See Nicholas O. Stephanopoulos & Mila Versteeg, *The Contours of Constitutional Approval 1* (Aug. 18, 2015) (unpublished manuscript), [http://ssrn.com/abstract\\_id=2646773](http://ssrn.com/abstract_id=2646773) [<https://perma.cc/SN77-PBJM>].

<sup>4</sup>See generally SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988) (discussing a person’s devotion to the Constitution as the center of one’s political life).

<sup>5</sup>See, e.g., Jeffrey Toobin, *Our Broken Constitution*, NEW YORKER (Dec. 9, 2013), <http://www.newyorker.com/magazine/2013/12/09/our-broken-constitution> [<https://perma.cc/A2J7-LG8J>] (noting that both sides of the political spectrum “love” the Constitution, a fact that may be the “single point of consensus in this heated political moment”).

Fortunately, professors Stephanopoulos and Versteeg have analyzed a recent national poll to provide interesting empirical evidence of what has been asserted.<sup>6</sup> Thus, the poll demonstrates that “Americans strongly back their federal Constitution.”<sup>7</sup> The average approval score by recipients, out of a possible 10, was 7.8; more impressive, at least from one perspective, is the fact that “its median score is even higher at 9.”<sup>8</sup> Indeed, a full 20% of the respondents gave the Constitution the maximum score of ten, while only one-in-twenty Americans rated it at level five or below.<sup>9</sup> Levinson notes that in spite of his work asserting the important presence of “constitutional veneration” as part of American political culture, he himself distinctly *disapproves* of the U.S. Constitution and would probably give it a rating of somewhere between three and four.<sup>10</sup>

Still, there is other empirical data that at least suggests the possibility that we, in fact, *overestimate* the degree of veneration among the public in general.<sup>11</sup> During the Bicentennial period surrounding 1987, a variety of polls were taken that indicate at least a measure of public ambivalence.<sup>12</sup> Thus, when a Newsweek/Gallup poll in May asked 812 Americans “Do you believe that after 200 years the Constitution is still basically sound and meets the needs of our country, or do you think the Constitution is in need of some basic changes or amendments?” only 53% answered “basically sound,” while the remainder declared that it needed changes or amendment; interestingly enough, the poll did not indicate that any of their respondents had “no opinion” or were otherwise indifferent.<sup>13</sup> An ABC News/Washington Post poll a month earlier asked 1,509 respondents if they believed that it “is a good idea or a bad idea” to have “a Constitutional convention to change the U.S. Constitution.”<sup>14</sup> While 71% declared that it was a bad idea, it may be at least

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<sup>6</sup> See Stephanopoulos & Versteeg, *supra* note 3, at 15–20.

<sup>7</sup> *Id.* at 20.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Indeed, Levinson wrote a book detailing some of his disapproval with the U.S. Constitution. See generally SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006) (asserting that the American Constitution includes too many provisions that lead to an unjust and ineffective government).

<sup>11</sup> See Arthur M. Schlesinger, Jr., *The Constitution and Presidential Leadership*, 47 MD. L. REV. 54, 54 (1987) (recounting recent polling and noting that many Americans have only “the dimmest idea what is in [the Constitution]”); see also Gerard J. Fitzpatrick, *Constitution Deserves Continuing Scrutiny*, PHILLY.COM (Sept. 17, 1987), [http://articles.philly.com/1987-09-17/news/26210305\\_1\\_constitution-sacred-document-bicentennial](http://articles.philly.com/1987-09-17/news/26210305_1_constitution-sacred-document-bicentennial) [<https://perma.cc/X6BC-S5L5>] (summarizing the results of a “national poll” on the constitution, which suggests the populace did not understand the document and characterizing Americans as being “complacent” towards the document).

<sup>12</sup> See *supra* note 11.

<sup>13</sup> Gallup/Newsweek Poll, Question No. 8 (May 1987) (poll data available at <http://ropercenter.cornell.edu/ipoll-database>, Dataset No. USAIPOSPGONEW1987-87120).

<sup>14</sup> ABC/Washington Post Poll, Question 1 (Apr. 1987) (poll data available at <http://ropercenter.cornell.edu/ipoll-database>, Dataset No. USABCWASH1987-7021).

noteworthy that 24% responded that it was a good idea.<sup>15</sup> The Hearst Corporation informed 1,004 Americans in October and November of 1986 that:

The U.S. Constitution states that a special Constitutional Convention may be called to consider amending that document when two-thirds of the states request it. Do you think a Constitutional Convention should be assembled in 1987, the bicentennial anniversary of the Constitution, to consider amendments dealing with contemporary issues such as prayer in public schools, abortion, freedom of the press, and other matters?<sup>16</sup>

Quite astonishingly, 61% answered “yes” and only 34% said “no.”<sup>17</sup> The question is certainly not a model of terse clarity, even assuming there were no other methodological problems with regard to assembling the sample.<sup>18</sup> Again, it seems noteworthy (and perhaps curious) that only 5% did not offer a confident opinion one way or the other.<sup>19</sup> Contrast this with a Roper Report in October 1985: after priming 1,998 respondents that some people feared a “runaway convention,” it found that 33% supported a new convention, 37% opposed it, and 30% did not know where they stood.<sup>20</sup>

To be sure, all of these polls were taken more than a quarter-century ago, and it is possible that the level of overall public veneration of the Constitution has increased over that time. However, given the general discontent that many feel with the American political system—almost no one in 2015 is arguing that it is “morning in America,” in contrast with the famous theme of the highly successful re-election campaign of President Reagan in 1984<sup>21</sup>—it would be interesting indeed if veneration has increased even as overall satisfaction with the system created by the Constitution has decreased. Or perhaps the contemporary polls are measuring the success of, say, those Tea Party activists

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<sup>15</sup> *Id.*

<sup>16</sup> THE HEARST CORP., *THE AMERICAN PUBLIC’S KNOWLEDGE OF THE U.S. CONSTITUTION: A NATIONAL SURVEY OF PUBLIC AWARENESS AND PERSONAL OPINION* 33, 37 (1987).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 38.

<sup>19</sup> *Id.* at 33, 37.

<sup>20</sup> Roper Report No. 85-10, Question 90 (Oct. 1985) (poll data available at <http://ropercenter.cornell.edu/ipoll-database>, Dataset No. USRPRR1985-10). It is at least worth mentioning one earlier poll. On at least three occasions in the 1930s and 1940s, Roper and Fortune Magazine asked whether the Constitution “should be thoroughly revised to make it fit present day needs.” Five percent of respondents answering this question in December 1939 believed that “[t]he systems of private capitalism and democracy are breaking down and we might as well accept the fact that sooner or later we will have to have a new form of government.” See Roper/Fortune Survey, Question 1 (Dec. 1939) (poll data available at <http://ropercenter.cornell.edu/ipoll-database>, Dataset No. USRFOR1939-013).

<sup>21</sup> “*Morning in America*,” USHISTORY.ORG, <http://www.ushistory.org/us/59a.asp> [<https://perma.cc/B5YK-PPJ6>].

who assert both that our polity is in a desperate state *and* that the answer to our problems is to return to honoring the 1787 Constitution as intended by the Framers.<sup>22</sup>

But our topic in this Symposium is not the United States Constitution, but, rather, the fifty state constitutions.<sup>23</sup> So perhaps we should begin by contemplating the 1991 survey cited by Alan Tarr indicating that “52 percent of respondents knew that their state had its own constitution, 11 percent believed that it did not, and 37 percent did not know or gave no answer.”<sup>24</sup> One can easily wonder, of course, how much information even those who knew of the existence of their own state’s constitution had about its specifics. Given the well-demonstrated ignorance of basic details of the U.S. Constitution,<sup>25</sup> it would be astonishing if many citizens of Ohio, say, were familiar with the details of the 122-page Ohio Constitution<sup>26</sup> conveniently made available to the attendants at the Symposium. Indeed, a common critique—fair or not—of state constitutions is that they are too long and too detailed,<sup>27</sup> in contrast with what Marshall in *McCulloch v. Maryland* described, admirably, as the “great outline[]”<sup>28</sup>—with details presumably to be filled in later—drafted in Philadelphia and ratified in 1787–1788.<sup>29</sup> It is worth noting, however, that the “great outline” approach stands as an exception to global trends in constitutionalism.<sup>30</sup> In their study of constitutional epidemiology, Zachary Elkins, Tom Ginsburg, and James Melton find that more detailed national constitutions tend to last longer.<sup>31</sup> Moreover, an audacious recent article by Versteeg and Emily Zackin has noted that American state constitutions are in fact quite similar in length and detail to

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<sup>22</sup> See, for example, the “constitutionalist” views expressed by someone like Glenn Beck, who published an edition of *The Federalist* “translated,” as it were, into twenty-first century English. GLENN BECK & JOSHUA CHARLES, *THE ORIGINAL ARGUMENT: THE FEDERALISTS’ CASE FOR THE CONSTITUTION, ADAPTED FOR THE 21ST CENTURY*, at xxxii (2011).

<sup>23</sup> Jeffrey S. Sutton, Foreword, *State Constitutions in the United States Federal System*, 77 OHIO ST. L.J. 195 (2016).

<sup>24</sup> G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 2 n.4 (1998).

<sup>25</sup> Press Release, Constitutional Ctr., National Survey: More Teens Can Name Three Stooges than Can Name Three Branches of Government (Sept. 2, 1998), <http://constitutioncenter.org/media/files/survey-1999-stooges.pdf> [<https://perma.cc/FY5V-QTWW>].

<sup>26</sup> See OHIO CONST. (available at <http://www.ocmc.ohio.gov/ocmc/docs/Constitution.pdf> [<https://perma.cc/FGV3-UZAQ>]).

<sup>27</sup> See TARR, *supra* note 24, at 9–11.

<sup>28</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

<sup>29</sup> See H.R. DOC. NO. 110-50, at vi (2007).

<sup>30</sup> See Jose Luis Cordeiro, *Constitutions Around the World: A View from Latin America* 6–8 (Institute of Developing Economies, Discussion Paper No. 164, 2008), <http://www.ide.go.jp/English/Publish/Download/Dp/pdf/164.pdf> [<https://perma.cc/2B3A-MA5U>].

<sup>31</sup> ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 86–88 (2009).

most national constitutions elsewhere.<sup>32</sup> Even if we grant the premise that the national constitution is “exceptional,” there is no reason to confuse that singular constitution with “American constitutionalism” more generally.

Stephanopoulos and Versteeg determined that the overall level of approval of state constitutions was lower than that of its United States counterpart.<sup>33</sup> Still, they found that the “average approval score” of respondents’ own state constitution was 6.7 out of 10 and the median score 8.<sup>34</sup> One might still regard this as quite impressive. Interestingly enough, the primary predictor of such approval was *not* knowledge of specifics or the congruence between one’s own constitutional vision and the actualities of the state constitution.<sup>35</sup> Indeed, yet another essay by Versteeg has shown that constitutions may well reflect more the views of the political elites who drafted them than the preferences of the median citizen.<sup>36</sup> In any event, what apparently explains approval—and perhaps even such “veneration” as might exist—is one’s overall pride (patriotism) regarding one’s own state.<sup>37</sup> Proud Ohioans, or residents of any other state, are presumably likely to believe, without actually examining the evidence, that their state has a fine constitution.<sup>38</sup>

Perhaps this level of support helps to explain what we believe to be an important and dismaying statistic: over the past twenty years *no* electorate in the country has demanded a new constitutional convention with regard to the state’s own constitution. There is good reason to expect otherwise. Fourteen states contain provisions by which their electorates can vote at stipulated intervals to have a new constitutional convention that would presumably assess the merits of the state constitution regarding present challenges and likely future problems in their constitutions.<sup>39</sup> It appears that Oklahoma may not in fact have complied with its constitution in this regard since 1970, the last time the electorate was offered the opportunity to call a new convention,<sup>40</sup>

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<sup>32</sup> Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1705 (2014).

<sup>33</sup> See Stephanopoulos & Versteeg, *supra* note 3, at 20.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 26–28.

<sup>36</sup> Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L.J. 1133, 1174 (2014).

<sup>37</sup> Stephanopoulos & Versteeg, *supra* note 3, at 28, 44.

<sup>38</sup> See *id.* In fact, the statistical meaningfulness of this finding is dubious, at best. If we assume that most respondents do not have much knowledge of state constitutions, when asked how much they support their state constitution, their answer is likely to be influenced by how proud they are of their state. Thus, you have an independent variable pride being used to explain a dependent variable, which is an iteration of pride.

<sup>39</sup> ALASKA CONST. art. XIII, § 3; CONN. CONST. art. XIII, § 3; FLA. CONST. art. XI, § 4; HAW. CONST. art. XVII, § 2; ILL. CONST. art. XIV, § 1; MD. CONST. art. XIV, § 2; MICH. CONST. art. XII, § 3; MO. CONST. art. XII, § 3(a); MONT. CONST. art. XIV, § 2; N.H. CONST. pt. 2, art. 100(c); N.Y. CONST. art. XIX, § 2; OHIO CONST. art. XVI, § 3; OKLA. CONST. art. XXIV, § 2; R.I. CONST. art. XIV, § 2; see also *infra* Table 1.

<sup>40</sup> An advisory opinion issued by then-Attorney General G.T. Blankenship holds, “[t]he . . . requirement of Article XXIV, Section 2 of the Oklahoma Constitution is that a

but the other thirteen states have had elections on the constitutionally compelled calendar.<sup>41</sup>

Levinson has written elsewhere of his admiration for these constitutions and his deep wish that the United States Constitution contained such a

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law providing for a convention be submitted, to the people for their approval or rejection at least once every twenty years.” Okla. Op. Att’y Gen. No. 70-125 (1970). Because the convention referendum has been interpreted to require legislative action for its creation, the failure of the Oklahoma Legislature to pass such a law in 1990 and 2010 (or any time in between) explains the lack of subsequent referenda. *Id.*

<sup>41</sup>See *Constitutional Conventions on the Ballot: By Year*, BALLOTPEDIA, [https://ballotpedia.org/Constitutional\\_conventions\\_on\\_the\\_ballot#tab=By\\_year](https://ballotpedia.org/Constitutional_conventions_on_the_ballot#tab=By_year) [<https://perma.cc/52PU-53VD>]; see also, e.g., *State of Alaska 2012 General Election, November 6, 2012, Official Results*, ALASKA DIVISION ELECTIONS (Nov. 28, 2012), <http://www.elections.alaska.gov/results/12GENR/data/results.htm> [<https://perma.cc/KF6P-C43B>]; Conn. Sec’y of State, *Statement of Vote, General Election, November 4, 2008*, at 100–03 (Nov. 26, 2008), [http://www.sots.ct.gov/sots/lib/sots/electionservices/statementofvote\\_pdfs/2008\\_sov.pdf](http://www.sots.ct.gov/sots/lib/sots/electionservices/statementofvote_pdfs/2008_sov.pdf) [<https://perma.cc/9572-CR3J>]; *Revision and Amendment of the Hawaii State Constitution*, HAWAII OFF. ELECTIONS, <http://elections.hawaii.gov/resources/revision-and-amendment-of-the-hawaii-state-constitution/> [<https://perma.cc/GV8S-2WWR>]; *Statewide Question Totals: General Election, 11/4/2008*, ILL. BOARD ELECTIONS, <http://www.elections.il.gov/electioninformation/StateQTotals.aspx?id=22> [<https://perma.cc/7H8U-33J3>]; Iowa Secretary of State, *Official Results Report: 2010 General Election held Tuesday, November 2nd 2010*, at 6–10, <https://sos.iowa.gov/elections/pdf/2010/ballotquestionsorr.pdf> [<https://perma.cc/QU9H-W79U>]; *2010 Michigan Election Results*, MICH. SECR’Y ST., <http://miboecfr.nictusa.com/election/results/10GEN/> [<https://perma.cc/GU6Z-3KKZ>] (last updated Dec. 9, 2015); *Official 2010 Gubernatorial General Election Results for All State Questions*, MD. BOARD ELECTIONS, [http://www.elections.state.md.us/elections/2010/results/General/gen\\_detail\\_qresults\\_2010\\_2\\_0001S-.html](http://www.elections.state.md.us/elections/2010/results/General/gen_detail_qresults_2010_2_0001S-.html) [<https://perma.cc/P9FC-Q93K>] [hereinafter *Maryland 2010 Election Results*]; DAVID C. VALENTINE, MO. LEGISLATIVE ACAD., *CONSTITUTIONAL AMENDMENTS, STATUTORY REVISION AND REFERENDA SUBMITTED TO THE VOTERS BY THE GENERAL ASSEMBLY OR BY INITIATIVE PETITION, 1910–2010* (Dec. 2010), [https://web.archive.org/web/20140502223410/http://ipp.missouri.edu/files/ipp/attachments/19-2010\\_constitutional\\_amendments.pdf](https://web.archive.org/web/20140502223410/http://ipp.missouri.edu/files/ipp/attachments/19-2010_constitutional_amendments.pdf) [<https://perma.cc/Y8LQ-6EBM>]; Mont. Sec’y of State, *1972–Present Historical Constitutional Initiatives and Constitutional Amendments*, <http://sos.mt.gov/Elections/forms/history/constitutionalmeasureslist2012.pdf> [<https://perma.cc/FH4L-XN2Y>] (last updated Feb. 26, 2013); *Constitutional Amendment Questions—2012 General Election*, N.H. SECRETARY ST., <http://sos.nh.gov/2012ConConGen.aspx> [<https://perma.cc/LA43-R2FA>]; N.Y. Bd. of Elections, *November 4, 1997 General Election, Question Number, Constitutional Convention*, [http://www.elections.ny.gov/NYSBOE/elections/1997/quest1\\_97.pdf](http://www.elections.ny.gov/NYSBOE/elections/1997/quest1_97.pdf) [<https://perma.cc/TLM6-4NZX>]; *State Issue 1: Constitutional Convention: November 6, 2012*, OHIO SECRETARY ST., <http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2012Results/20121106Issue1.aspx> [<https://perma.cc/BQW2-UR9C>] [hereinafter *Ohio 2012 Election Results*]; *2014 General Election: Question 3 - Constitutional Convention*, R.I. BOARD ELECTIONS, [http://www.ri.gov/election/results/2014/general\\_election/](http://www.ri.gov/election/results/2014/general_election/) [<https://perma.cc/KG5A-4U7X>] (last updated Dec. 3, 2014).

provision.<sup>42</sup> At the very least, even if one is not out-and-out proud of the fact (as demonstrated in John Dinan's invaluable book *The American State Constitutional Tradition*) that there have been over 230 state constitutional conventions in our national history,<sup>43</sup> it is an extremely interesting piece of empirical evidence about the actualities of American state constitutionalism. At one time, it was certainly possible to suggest that Americans, at least when identifying themselves as citizens of their home states, *loved* conventions, given the sheer numbers.<sup>44</sup> To be sure, some states loved conventions more than other states: the flinty, independent citizens of New Hampshire lead the pack with seventeen such conventions.<sup>45</sup> Interestingly enough, New Hampshire has never formally replaced its 1784 Constitution, though, of course, it has been amended aplenty.<sup>46</sup> Maine apparently has never held a convention since drafting its original constitution in 1820.<sup>47</sup> But, as one might expect in a polity where the fifty American states average nearly three constitutions each,<sup>48</sup> most states have indeed experienced the reality of state constitutional conventions even after the initial constitution was up and running.

But consider the record since 1997—when New York conducted its last every-twenty-years vote—within these thirteen states: each rejected the possibility of holding a new convention.<sup>49</sup> However, Maryland's rejection should receive an asterisk. A majority of voters in 2010 who cast ballots on the issue voted in favor of a new convention, but the Maryland Constitution has been interpreted as requiring a majority of those voting in the overall election rather than simply a majority of those who chose to vote on the convention itself.<sup>50</sup> Too many Marylanders blanked their ballots regarding the convention to achieve what might be called the “constitutional majority.”<sup>51</sup>

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<sup>42</sup> LEVINSON, *supra* note 10, at 12. This book is organized around the conceit that Americans had the option to vote for a *national* convention and suggests that they should vote “yes.”

<sup>43</sup> JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 9 (2006).

<sup>44</sup> Of the 233 state constitutional conventions held in American history, 144 occurred during the nineteenth century. See G. Alan Tarr, *Popular Constitutionalism in State and Nation*, 77 OHIO ST. L.J. 237, 267 (2016).

<sup>45</sup> DINAN, *supra* note 43, at 11.

<sup>46</sup> *Id.* at 11–12. See generally N.H. CONST.

<sup>47</sup> DINAN, *supra* note 43, at 295 n.9.

<sup>48</sup> William Dawes Blake, *Judicial Independence in the American States* 106 (Aug. 2013) (unpublished Ph.D. dissertation, The University of Texas at Austin) (on file with The University of Texas Library).

<sup>49</sup> See *supra* note 41.

<sup>50</sup> See Daniel Leaderman, *Judge Nixes Question 7 Challenge*, SOMDNEWS (Jan. 22, 2013), [http://www.somdnews.com/archive/news/judge-nixes-question-challenge/article\\_e286f24d-847f-5cf0-8fc3-af3a143f5e10.html](http://www.somdnews.com/archive/news/judge-nixes-question-challenge/article_e286f24d-847f-5cf0-8fc3-af3a143f5e10.html) [https://perma.cc/64H8-DLKE] (describing a failed legal challenge of Maryland's requirement that more than a simple majority of votes cast is needed to call a convention). This is not a self-evident interpretation of the relevant constitutional provision, which states that Marylanders must be given an opportunity every twenty years to vote on whether or not to have a new constitutional convention. MD.

Ohio is one of these thirteen states.<sup>52</sup> It, too, is on a twenty-year cycle,<sup>53</sup> and in 2012, only 31.9% of the electorate (approximately 1.5 million voters) supported a new state convention.<sup>54</sup> It is worth pointing out that this was the smallest such percentage of voters among the thirteen states.<sup>55</sup> As one might imagine, Maryland achieved the highest percentage, with 48.1% of the overall electorate (according to their election rules) supporting a new convention, though 44.9% of Rhode Islanders in 2014 agreed that a new convention should be called; coming in third and fourth place, respectively, were the 41.5% of Montanans in 2010 and the 40.6% of the Connecticut electorate in 2012.<sup>56</sup> Other percentages ranged from the 37% of New Yorkers in 1997 to the 32.8% of Illinoisans in 2008,<sup>57</sup> though that state requires a 60% approval rate to trigger a new constitutional convention.<sup>58</sup>

## II. ANALYZING STATE CONVENTION CALL REFERENDA

So what should one make of these statistics? We might begin with the most basic question: are they reliable measures of an educated public opinion? Or is it possible, for example, that the response of voters depends to some significant extent on the precise phrasing of the question they are asked to vote upon? Similarly, even if it is possible that a vote accurately measures the distribution of public opinion on the day it is conducted, might there be significant differences in the turnout of voters—and, therefore, the public opinion registered in the votes—depending on *when* the election is held? Thus we proceed to examine whether support for state constitutional revisions varies based on who is asked, how the question is phrased, and how often these referenda appear on the ballot. We were able to find results of the most recent referenda in all fourteen states by searching the websites of the various secretaries of state. This data is displayed in Table 1.

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CONST. art. XIV, § 2 (“[I]f a majority of voters at such election or elections shall vote for a Convention, the General Assembly, at its next session, shall provide by Law for the assembling of such convention, and for the election of Delegates thereto.”).

<sup>51</sup> *Maryland 2010 Election Results*, *supra* note 41.

<sup>52</sup> *See supra* notes 39, 41 and accompanying text.

<sup>53</sup> OHIO CONST. art. XVI, § 3; *see also* Steven H. Steinglass, *Constitutional Revision: Ohio Style*, 77 OHIO ST. L.J. 281, 297 (2016).

<sup>54</sup> *Ohio 2012 Election Results*, *supra* note 41.

<sup>55</sup> *See infra* Table 1.

<sup>56</sup> *See infra* Table 1.

<sup>57</sup> *See infra* Table 1.

<sup>58</sup> ILL. CONST. art. XIV, § 1.



Table 1: *Summary of Convention Call Referenda*

State	Most Recent	Voting Yes	Rolloff	Specific Language	Years Between Ballot Referral
Alaska	2012	33.4%	10.6%	No	10
Connecticut	2008	40.6%	13.2%	Yes	20
Hawaii	2008	34.1%	4.9%	No	10
Illinois	2008	32.8%	17.8%	Yes	20
Iowa	2010	32.8%	14.7%	No	10
Maryland <sup>59</sup>	2010	48.1%	19.1%	Yes	20
Michigan	2010	33.4%	9.9%	Yes	16
Missouri	2002	34.5%	12.2%	No	20
Montana	2010	41.5%	7.5%	Yes	20
New Hampshire	2012	36.0%	15.7%	No	10
New York	1997	37.0%	40.3%	No	20
Ohio	2012	31.9%	14.5%	Yes	20
Oklahoma <sup>60</sup>	1970	23.7%		Yes	20
Rhode Island	2014	44.9%	5.9%	No	10

Our theory is rather straightforward. If voters confront a ballot question that is ambiguous or otherwise problematic in its meaning, the fallback—or default—position is simply to maintain the status quo, which in this case would be resistance to the prospect of a new constitutional convention. One can do this by voting “no.” But it is also possible, and indeed likely, that many voters will simply choose to leave the ballot blank. Political scientists refer to the percentage of voters who skip a particular part of the ballot as *rolloff*.<sup>61</sup> While ballot rolloff tends to be high for all ballot measures,<sup>62</sup> rolloff appears to be even higher on convention referenda. Two of the fourteen referenda listed in Table 1 were the only statewide referenda on the ballot that year. In nine of the remaining twelve elections, rolloff for the convention referenda was higher than the average rolloff for all other ballot questions at the same election. The average rolloff on the convention questions was 14%, while the average rolloff

<sup>59</sup>The percent yes votes displayed in Table 1 do not take into account requirements for double majorities that are present in Maryland. *See supra* note 50 and accompanying text.

<sup>60</sup>The 1970 convention ballot measure in Oklahoma was conducted during a March special election and was the only item on the ballot. H.J.R. 1004, 32nd Leg., 2d Reg. Sess. (Okla. 1970). To measure rolloff we used turnout statistics provided in state election results to form the baseline. As such, there is no way to calculate voter rolloff.

<sup>61</sup>*See, e.g.,* Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 19 (2003).

<sup>62</sup>Shauna Reilly & Sean Richey, *Ballot Question Readability and Roll-Off: The Impact of Language Complexity*, 64 POL. RES. Q. 59, 59 (2011).

for the other ballot measures in the same election was 12.6%, which is a statistically meaningful disparity.<sup>63</sup>

We contend potential voters go through a *two-stage process* when confronting ballot questions such as calling a new constitutional convention. First, they have to decide whether they wish to cast a vote at all; only if that decision is affirmative must they go on to decide which option (yes or no) to select. Here we are interested in explaining two phenomena: voter rolloff and support for referenda designed to bring about a new convention. Regression analysis allows for a systematic statistical evaluation of relationships between variables. In statistical terms, rolloff and convention support serve as our dependent variables. We analyze whether support for these referenda varies across three independent variables:

- (1) Was the referendum in question on the ballot in a presidential election year or a so-called “off year,” when overall turnout is likely to be smaller and somewhat different in composition?<sup>64</sup>
- (2) Did the ballot proposal clearly explain what was being voted upon, as against leaving voters possibly confused as to what precisely they were being asked to support?
- (3) How often are such proposals on the ballot? That is, how many years elapse in different states before the Constitution requires that the question be resubmitted to the voters for their consideration?

#### A. *Referendum Timing: Presidential Elections Compared to Off Years*

Unsurprisingly, it is well established that voter turnout is higher in presidential election years, but what type of voters only come to the polls every four years, in contrast to more frequent voters?<sup>65</sup> If there are no significant differences among these voter cohorts, then the distribution of views on relevant issues, in this case the desirability of a new convention, ought not to be different. However, according to the Pew Research Center, to assume lack of difference would be a mistake.<sup>66</sup> Americans who vote intermittently are less likely to be knowledgeable about the candidates and less

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<sup>63</sup> A difference of means *t*-test indicates that the disparity in rolloff between convention referenda and other referenda is statistically significant at the  $p < 0.05$  level. THOMAS H. WONNACOTT & RONALD J. WONNACOTT, *INTRODUCTORY STATISTICS* 291–97 (5th ed. 1990).

<sup>64</sup> See THOM FILE, U.S. CENSUS BUREAU, *WHO VOTES? CONGRESSIONAL ELECTIONS AND THE AMERICAN ELECTORATE: 1978–2014*, at 3 (July 2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p20-577.pdf> [<https://perma.cc/GB3S-GP9B>].

<sup>65</sup> We assume very few voters in fact stay home during presidential years and come out only during the off years. See *id.* at 3–5.

<sup>66</sup> See *Who Votes, Who Doesn't, and Why*, PEW RESEARCH CTR.: U.S. PRESS & POL'Y (Oct. 18, 2006), <http://www.people-press.org/2006/10/18/who-votes-who-doesnt-and-why> [<https://perma.cc/P24F-BUAQ>].

interested in local politics than consistent voters.<sup>67</sup> In other words, these voters who show up only once every four years are almost certainly less likely to realize that their state has a constitution, that its details might be quite important in explaining actual governmental behavior, or why a constitutional convention may be a good idea. Thus, because intermittent voters make up a larger percentage of the electorate in presidential election years, we hypothesize that support for convention calls will be lower than when these referenda are scheduled in off year elections. We also predict rolloff will be higher in presidential election years compared to off year elections.

Six referenda on state constitutional conventions occurred during presidential election years, and the remaining seven occurred in off year elections, mostly during mid-term elections.<sup>68</sup> On average, the ballot questions conducted in presidential years received 34.9% support, while an average of 40.7% of voters supported these referenda in off year elections. Voter rolloff, somewhat surprisingly is lower during presidential years (12.7% on average) compared to off year elections (16.2% on average). However, before we confirm or reject our hypotheses, we must ask whether these differences across election years are meaningful or statistical anomalies? The regression analysis will answer these questions for us.

#### B. *Ballot Language: What Does the Ballot Ask Voters?*

Ballot language is the only information source that all voters are guaranteed to be exposed to. It is also the last piece of information voters will encounter before casting their ballot. In most states, elected officials are responsible for writing ballot language, creating an opportunity to advance their political agenda. Disputes over the fairness of ballot language often end up in court.<sup>69</sup> Survey experiments in political science indicate the way a ballot question is worded can affect how citizens perceive the issue.<sup>70</sup> Even when a ballot question is quite complicated, interest group endorsements greatly assist voters in identifying their position.<sup>71</sup>

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<sup>67</sup> *See id.*

<sup>68</sup> *See supra* Table 1. States holding referendum during presidential elections include Alaska, Connecticut, Hawaii, Illinois, New Hampshire, and Ohio. States holding referendum in off years include Iowa, Maryland, Michigan, Missouri, Montana, New York, and Rhode Island. *See supra* Table 1.

<sup>69</sup> *See List of Ballot Measure Lawsuits in 2012*, BALLOTPEDIA, [http://ballotpedia.org/List\\_of\\_ballot\\_measure\\_lawsuits\\_in\\_2012](http://ballotpedia.org/List_of_ballot_measure_lawsuits_in_2012) [<https://perma.cc/FSW9-VBD3>].

<sup>70</sup> Craig M. Burnett & Vladimir Kogan, *When Does Ballot Language Influence Voter Choices? Evidence from a Survey Experiment*, 32 POL. COMM. 109, 109 (2015).

<sup>71</sup> *See generally* Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994).

Frequently, constitutional convention referenda do not generate much interest group activity.<sup>72</sup> The National Institute on Money in State Politics has tracked money raised for and against ballot initiatives since 2008. There were no issue committees formed to advocate for or against eight of the eleven convention referenda during that timeframe, and the other three did not generate significant spending either. Convention supporters in Connecticut, Illinois, and Michigan spent a combined \$166,000 while convention opponents spent a combined \$2.5 million.<sup>73</sup> Even in an election environment with little to no campaign spending, ballot language still provides voters with useable information. A political science study of three different California ballot propositions revealed a large majority of voters learn at least one fact about a ballot measure from the ballot language itself.<sup>74</sup> The study, based on an exit poll, also found no statistically significant difference in the amount of knowledge voters reported about a proposition that generated no campaign spending and a set of propositions on which proponents and opponents spent a combined \$134 million.<sup>75</sup>

Fortunately for our research agenda, it turns out that the questions on the various state ballots were worded in interestingly different ways. Some states use very specific language. For example, Connecticut voters confronted the following language at the polls in 2008: “Shall there be a Constitutional Convention to amend or revise the Constitution of the State?”<sup>76</sup> Marylanders received even more detailed instructions and information in 2010:

Should a constitutional convention be called for the purpose of changing the Maryland Constitution?

Under Article XIV, Section 2 of the Maryland Constitution the General Assembly is required to ask the voters every 20 years whether a constitutional convention should be called for the purpose of altering the Maryland Constitution.<sup>77</sup>

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<sup>72</sup>In 2010, when the question was on the ballot in Montana, Levinson was surprised to discover, while attending breakfast at a conference on the Constitution in Washington, D.C., sponsored by the very conservative Hillsdale College, that his table-mates, almost all from Montana, were seemingly unaware that they would shortly have the opportunity to vote yay or nay on a new convention in their home state.

<sup>73</sup>*Ballot Measures*, NAT'L INST. ON MONEY ST. POL., <http://www.followthemoney.org/our-data/ballot-measures/> [<https://perma.cc/QQD6-NK9Y>] (searching for Constitutional Convention as subject for each year from 2002–2014).

<sup>74</sup>Craig M. Burnett, *Does Campaign Spending Help Voters Learn About Ballot Measures?*, 32 ELECTORAL STUD. 78, 88 (2013).

<sup>75</sup>*Id.* at 87.

<sup>76</sup>State of Conn. Official Ballot, Watertown, Conn., State Election (Nov. 4, 2008), [http://www.watertownct.org/filestorage/3928/SAMPLE\\_BALLOT\\_FOR\\_08.pdf](http://www.watertownct.org/filestorage/3928/SAMPLE_BALLOT_FOR_08.pdf) [<https://perma.cc/265Q-6G6C>].

<sup>77</sup>2010 *General Election Ballot Questions, Statewide Questions, Question 1, Constitutional Question, Maryland Constitutional Convention*, MD. BOARD ELECTIONS,

Ohio's ballot language starts off somewhat vaguely, but eventually provides voters with specific information.<sup>78</sup> The ballot measure quotes from Article XVI, Section 3 of the Ohio Constitution, which contains the language, "Shall there be a convention to revise, alter, or amend the constitution."<sup>79</sup> However, the ballot language concludes, in large bold print, with different language, "Shall there be a convention to revise, alter, or amend the *Ohio* Constitution?"<sup>80</sup>

By contrast, Rhode Islanders confronted the following ballot language in 2014: "Shall there be a convention to amend or revise *the Constitution*?"<sup>81</sup> All but the most knowledgeable voters could surely be forgiven if they were uncertain whether they were being asked to support a new *national* constitutional convention or instead a far more modest *state* convention. Ambiguous language, similar to this Rhode Island ballot measure, can be found on the ballots of seven of the thirteen states that conducted periodic convention calls as required by their state constitutions. On average, ballot questions with language that specifically mentions the call is for a *state* constitutional convention receive 36.1% support, while less clearly worded ballot questions receive on average 36.3% support. Rolloff when the ballot is worded specifically is 13.7% on average, compared to 14.9% when the ballot is nonspecific.

Again, we hypothesize that when voters encounter a referendum whose language they do not understand, their preference becomes maintaining the status quo—either by voting "no" or by not voting on this question. This bias toward the status quo might be especially important for those voters who mistakenly believe that they are being asked to support a new *national* constitutional convention. Given the amount of worship our Founding Fathers receive in public school curricula and in modern political discourse,<sup>82</sup> voting for a national constitutional convention may seem like the equivalent of voting no on apple pie, baseball, and Chevrolet all at once.

### C. *How Often?: The Impact of Referenda Frequency*

We also examine whether the practice of voting on convention calls is more ingrained in some states than others. For over a century, political

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[http://www.elections.state.md.us/elections/2010/ballot\\_questions.html#state1](http://www.elections.state.md.us/elections/2010/ballot_questions.html#state1) [<https://perma.cc/Z2BZ-CQHF>].

<sup>78</sup> See Official General Election Ballot, Warren County, General Election, November 6, 2012, <http://www.voterfind.com/warrenoh/data/20121106G/0001%20%201X.pdf?635642044113587989> [<https://perma.cc/QLS5-R6VE>] [hereinafter Ohio 2012 Ballot].

<sup>79</sup> See *id.*; OHIO CONST. art. XVI, § 3.

<sup>80</sup> Ohio 2012 Ballot, *supra* note 78 (emphasis added).

<sup>81</sup> Official Election Ballot, State of Rhode Island, Town of East Greenwich, Tuesday, November 4, 2014 (emphasis added), <http://www.eastgreenwichri.com/Portals/0/Uploads/Documents/Board%20of%20Canvassers/2014SampleBallots/0901sample%20ballot.pdf> [<https://perma.cc/3WAE-NHQL>].

<sup>82</sup> See Stephanopoulos & Versteeg, *supra* note 3, at 1–2 and accompanying text.

scientists have hypothesized that direct democracy serves an educative function. Writing in 1912, Harvard political scientist William Munro observed, “[b]y means of the initiative, a spirit of legislative enterprise is promoted among the voters; men are encouraged to formulate political ideas of their own and to press these upon public attention.”<sup>83</sup> More recently, empirical political science has supported this theory. Citizens in states with more frequent use of the initiative exhibit higher levels of internal efficacy; that is, they “are more likely to see themselves as having resources and skills that allow them to influence what government does.”<sup>84</sup> Exposure to more initiatives on a single election ballot increases both political knowledge and interest in politics amongst voters.<sup>85</sup>

Constitutional convention referenda appear on the ballots of these thirteen states at different frequencies. As Table 1 indicates, some states refer these questions to the ballot once every ten years, others, like Ohio, wait 20 years to have a new referendum.<sup>86</sup> We predict that when the time between ballot referrals is lower, more voters will remember voting on a convention call the last time around. Greater familiarity with voting on constitutional conventions should reduce rolloff and increase support for the referenda. When a convention for a call appears on the ballot once every ten years, voter rolloff averages 10.4%, and voter support averages 36.5%.<sup>87</sup> When the period between ballot referrals is greater than 10 years, voter rolloff averages 16.8%, and voter support averages 38.3%.<sup>88</sup>

#### D. Analyzing the Data: Regression Analysis

We test the strength of these statistical relationships between our three independent variables and two dependent variables through multivariate regression. To capture the two-stage nature of this decision-making process, we employ seemingly unrelated regression analysis.<sup>89</sup> Table 2 presents the results of our models. The first two columns of Table 2 report which dependent variable is being tested in relation to a set of independent variables.

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<sup>83</sup> WILLIAM BENNETT MUNRO, *THE INITIATIVE, REFERENDUM AND RECALL* 20–21 (1912).

<sup>84</sup> Shaun Bowler & Todd Donovan, *Democracy, Institutions and Attitudes About Citizen Influence on Government*, 32 *BRIT. J. POL. SCI.* 371, 372 (2002).

<sup>85</sup> *See id.*

<sup>86</sup> States with ten years between referenda are Alaska, Hawaii, Iowa, New Hampshire, and Rhode Island. States with twenty years between referenda are Connecticut, Illinois, Maryland, Missouri, Montana, New York, Ohio, and Oklahoma. Michigan is a bit of an odd duck, with referenda occurring every sixteen years. *See supra* Table 1.

<sup>87</sup> *See supra* Table 1.

<sup>88</sup> *See supra* Table 1.

<sup>89</sup> This statistical technique allows for correlated error terms across the equations for each dependent variable. *See generally* Denzil G. Fiebig, *Seemingly Unrelated Regression*, in *A COMPANION TO THEORETICAL ECONOMETRICS* 101 (Badi H. Baltagi ed., 2001).

The remaining columns report the regression coefficient, standard error, and *p*-value for each independent variable.

Each model also contains an  $R^2$  statistic, which measures the percentage of the variation in the values of the dependent variable accounted for in the regression model. An  $R^2$  of zero means that the regression model does not explain any of the variability in the dependent variable. For example, a model with an  $R^2$  of zero would not provide any information as to why Ohio's convention call received 31.9% compared to the 44.9% support in Rhode Island.<sup>90</sup> An  $R^2$  of 1 indicates the model predicts perfectly; it fits every data point in the sample. Very high  $R^2$  scores almost never occur in social science research because human subjects are not nearly as predictable as, say, atomic particles.

Table 2: *Seemingly Unrelated Regression Model of Convention Call Referenda*

DV	IV	$\beta$	S.E.	<i>p</i>
Rolloff	Presidential Election	-0.039	0.036	0.267
	Specific Language	-0.116	0.048	0.016
	Referral Interval	0.016	0.005	0.002
	Constant	-0.030	0.072	0.682
Observations: 13, $R^2$ : 0.450				
Support	Presidential Election	-0.056	0.030	0.057
	Specific Language	0.017	0.040	0.665
	Referral Interval	0.001	0.004	0.801
	Constant	0.381	0.060	0.001
Observations: 13, $R^2$ : 0.261				

Regression coefficients allow for making predictions of how each independent variable affects the dependent variable. Specifically, the coefficient represents how much the dependent variable changes with a one-unit change in an independent variable. For example, the coefficient for the Referral Interval in the Rolloff model is 0.016. This means that a one-year increase in the number of years between ballot referrals tends to increase the amount of voter rolloff by 1.6%.

The standard error measures how far each regression coefficient in our sample is from the "true" population value. In other words, a standard error is helpful in assessing whether the relationship between an independent and dependent variable is accurate or simply a fluke generated by this sample. The likelihood that there is no real relationship between variables is represented by the *p*-value. Returning to the effect of Referral Interval on Rolloff, the *p*-value is 0.002. This means the probability that this coefficient is a false positive is only 0.002. Put differently, we can state with 99.8% confidence that we have

<sup>90</sup> See *supra* Table 1.

identified a statistically significant relationship between these two variables. It is scientific convention that only statistical relationships that have  $p$ -values < 0.05 are considered statistically significant, although this assumption is frequently relaxed to  $p < 0.10$ .<sup>91</sup>

The first dependent variable analyzed is the percentage of voters who did not cast a vote on a constitutional convention ballot question. The  $R^2$  score of 0.450 indicates the model fits the data very well. Two of the three variables achieved conventional levels of statistical significance. Ballots that specifically mention a convention would amend the state constitution achieve rolloff rates 11.6% lower than states with unspecific ballot language. Why any secretary of state would not want voters to understand what they were considering in a ballot measure is astonishing. Our results suggest these omissions have meaningful consequences.

As mentioned above, every additional year in-between ballot referrals increases rolloff by 1.6%, on average. Thus, the difference between states that schedule their ballot referrals every decade compared to once every twenty years is quite meaningful, as the former schedule tends to reduce rolloff by 16%. It appears from our data that voters become conditioned to voting on constitutional conventions. When these questions appear on the ballot more frequently, more voters understand the issue well enough to cast a vote.

The presidential election year variable did not achieve statistical significance; moreover, the coefficient was not in the predicted direction. In other words, our theory predicted higher levels of rolloff in presidential election years (because of the presumptive increase in less knowledgeable voters) which means we would expect the coefficient to be a positive number. Instead, the model produced a coefficient of -0.039, which suggests rolloff might be lower in presidential election years. However, the  $p$ -value of 0.267 indicates we cannot state with enough confidence that rolloff is *actually* lower in presidential election years.

The bottom portion of Table 2 displays the analysis of the second dependent variable, the percentage support for convention call referenda. The  $R^2$  of 0.261, while not as strong as the rolloff model, still indicates a good fit. Only the presidential election year variable achieved statistical significance and only at the  $p < 0.10$  level. The results suggest voter support for convention calls is 5.6% lower in presidential election years. Perhaps those who turn out in presidential years feel more inclined to register their opinions, rather than leave ballot blank, but, when confronted with an issue about which they have no informed views, they vote "no."

Circling back to the Buckeye State, Ohioans vote on a convention call once every twenty years and always during a presidential election year.<sup>92</sup> Had this question been scheduled in 2014 instead of 2010, the measure would likely have received 5.6% more support. While this extra support would not

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<sup>91</sup> WONNACOTT & WONNACOTT, *supra* note 63, at 317.

<sup>92</sup> See *supra* Table 1.



push the referendum over the 50% line, it would have made the vote significantly closer. Also, if the Ohio Constitution placed a convention call on the ballot once every ten years, our model suggests voter rolloff would have been nearly eliminated.

### III. THE END OF THE AGE OF CONVENTIONS?

In any event, the central question, once we determine the empirical data, is whether we should be pleased or dismayed that the age of conventions, even at the state level, has seemingly come to an end. Professor Tarr notes that the 19th century saw 144 such conventions, and the 20th century another 64.<sup>93</sup> Fifteen years into the 21st century we have seen nary a one, and there are no apparent prospects for such a convention.<sup>94</sup> However, the next scheduled vote will occur in New York in 2017, and that might be particularly interesting inasmuch as there is widespread discontent with the current New York system of government; moreover, since becoming independent of the United Kingdom, New York has had nine conventions and four constitutions.<sup>95</sup>

Even in 1997, the incumbent Governor Mario Cuomo was one of many supporting the referendum that would have triggered a new convention.<sup>96</sup>

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<sup>93</sup> Tarr, *supra* note 44, at 267.

<sup>94</sup> It should be noted, though, that the American territory of American Samoa *did* hold a constitutional convention in 2010. Sarah Wheaton, *An American Concept, Carried Out in Samoan Style*, N.Y. TIMES (June 24, 2010), <http://www.nytimes.com/2010/06/25/us/25samoa.html> [<https://perma.cc/5EEZ-75X9>]. Although the convention discussed the issue of Samoan autonomy, it settled on a more limited set of proposed amendments. *Id.* The proposed amendments were defeated in a referendum by a vote of 7,660–3,257. Associated Press, *Faleomavaega Wins 12th Election to Congress*, KPUA (Nov. 4, 2010), <http://www.kpua.net/news.php?id=21505> [<https://perma.cc/QHV2-QUBX>]. Many Samoans criticized election officials for bundling all thirty-four proposed amendments into a single question, rather than allowing voters to decide on an amendment-by-amendment basis. *Id.* By including controversial provisions alongside ones with broad public support, an “all-or-nothing” approach to constitutional revision creates a strong incentive for voters to reject the entire package. Elmer E. Cornwell Jr. et al., *State Constitutional Conventions: Delegates, Roll Calls, and Issues*, 14 MIDWEST J. POL. SCI. 105, 127 (1970). In fact, elites opposed to constitutional change frequently use this to their advantage. For example, Rhode Island Republicans who strongly opposed the constitution that had been proposed by a convention that met from 1964–1968 fought to include a provision creating a state lottery. *Id.* at 106, 127. Opponents of the proposed amendments that resulted from New York’s 1967 constitutional convention included a provision lifting a ban on public funding of parochial schools, while the inclusion of strong racial nondiscrimination language was used to defeat the amendments proposed a 1967–68 convention in Maryland. *Id.* at 127–28. On the other hand, when the Connecticut, Hawaii, and Illinois presented controversial items on the ballot separately, the remainder of the proposed amendments from the conventions in those states passed. Jay S. Goodman et al., *Public Responses to State Constitutional Revision*, 17 AM. J. POL. SCI. 571, 573 tbl.1, 574 (1973).

<sup>95</sup> DINAN, *supra* note 43, at 11.

<sup>96</sup> See Richard Perez-Pena, *Constitution Is Stealth Issue of 1997, Attracting Strong Feelings*, N.Y. TIMES (Sept. 27, 1997), <http://www.nytimes.com/1997/09/27/nyregion/>

Consider a key paragraph in a 1997 story in *The New York Times* story on the coming referendum:

Those who want a convention, including Mr. Cuomo, think the timing could not be better. With record late state budgets year after year, partisan polarization in state government and this year's bruising rent fight, there is a widespread sense that Albany is broken, and that a radical fix may be in order. Polls show that while most New Yorkers are not even aware that they will be voting on the matter in five weeks, when they are told of the choice, a great majority favor a convention.<sup>97</sup>

What is striking is how much this paragraph resonates today. If Mario Cuomo's son Andrew, the current New York governor, ends up supporting a new convention in 2017, then the paragraph could probably be republished without change! The proposal did not pass, in 1997,<sup>98</sup> however, perhaps because "fear" of a convention triumphed over "hope" about what it might attain. Things did not get better, however, as illustrated by the title of a 2009 article in *The New York Times*: "As Voter Disgust With Albany Rises, So Do Calls for a New Constitution."<sup>99</sup> Will 2017 bring about a new convention and, possibly, a revised New York constitution? One can already find a website "clearinghouse" of information on the upcoming vote, featuring a quotation from Governor Andrew Cuomo: "A new constitutional convention could be the vehicle for critical reforms to our State government."<sup>100</sup> It would not be surprising, therefore, if he advises an affirmative vote come 2017. Already, though, New York State United Teachers appears to be mobilizing opposition to any such convention, based on the premise that the consequences would potentially be quite radical.<sup>101</sup> For what it's worth, an article in a Long Island weekly referred in its title to the "fierce 2017 political storm" that is already "brewing" concerning the referendum.<sup>102</sup> The author notes that the 1977 referendum was vehemently opposed by political conservatives afraid of what liberals might do, whereas by 1997, "the strongest opponent was the AFL-CIO, which worried that uncontrolled delegates might gut rights and

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constitution-is-stealth-issue-of-1997-attracting-strong-feelings.html [https://perma.cc/C7AG-ENK4].

<sup>97</sup> *Id.*

<sup>98</sup> See *supra* Table 1.

<sup>99</sup> Nicholas Confessore, *As Voter Disgust with Albany Rises, so Do Calls for a New Constitution*, N.Y. TIMES (Aug. 23, 2009), <http://www.nytimes.com/2009/08/24/nyregion/24convention.html> [https://perma.cc/VT33-DGTW].

<sup>100</sup> N.Y. ST. CONST. CONVENTION CLEARINGHOUSE, <http://www.newyorkconcon.info/> [https://perma.cc/M366-GTTN].

<sup>101</sup> TRS: *The 2017 Constitutional Convention Vote—What You Should Know*, NYSUT (Mar. 10, 2015), <http://www.nysut.org/news/nysut-united/issues/2015/march-2015/trs-the-2017-constitutional-convention-vote-what-you-should-know> [https://perma.cc/4NHJ-WU5D].

<sup>102</sup> See Michael A. Miller, *A Fierce 2017 Political Storm Is Brewing*, LONG ISLAND WKLY. (Sept. 30, 2014), <http://www.longislandweekly.com/a-fierce-2017-political-storm-is-brewing/> [https://perma.cc/LCS6-DA89].

pensions.”<sup>103</sup> This only underscores the point that actual constitutions are never written behind veils of ignorance. It is always the case that voters—and politicians deciding what positions to take—have their own surmises about potential winners and losers and decide accordingly.

In any event, 2017 will present yet another test of the propositions underlying this paper. What will New York voters do, and why? One possibility is that reflective citizens will in fact decide that they support the current constitution without potential changes. Another, though, is opposition to a convention based on the fact that any constitutional change would have to go through the current public officials of New York State, the very persons who are the object of popular mistrust. Levinson has many times referred to what he has labeled “Roche’s dictum,” which he heard the late political scientist John P. Roche invoke at a meeting of the American Political Science Association in the 1960s: “Power corrupts but the prospect of losing power corrupts absolutely.”<sup>104</sup> That is, if officials have gained their offices, and the prerogatives thereof, through the existing political system, why would one expect them to be open to the possibility of radical change? This speaks more to the futility of a convention, which would no doubt be very costly without producing any real change. This is precisely why it is crucial to have the possibility of a citizen-called (and, presumably, dominated) constitutional convention that offers an alternative to having to place a monopoly of decision-making authority in the hands of current office holders. But, of course, a third possibility that might explain a vote against a new convention is fear of those who might end up exercising power, however they are chosen.

It might be worth mentioning in this context the Ohio Constitutional Modernization Commission established by the state legislature in 2011,<sup>105</sup> whose Senior Advisor, Steven Steinglass, was a valuable participant in the Symposium.<sup>106</sup> One need not denigrate any member of the Commission in order to suggest that its composition is highly likely to be more representative of political elites, including, of course, current public officials, than would be the case if a popularly mandated convention had been called by the Ohio electorate in 2012.<sup>107</sup> It certainly seems altogether likely that the establishment of the Commission in 2011 was viewed as a way of discouraging any popular movement that might organize itself around the 2012 referendum. The implicit message of the Commission, whatever it ends up recommending in 2021, a full ten years after its establishment, is that ordinary Ohioans need not concern themselves with the adequacy of their constitution. Whether this confidence in the Commission—and concern about the likely judgment of ordinary

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<sup>103</sup> *Id.*

<sup>104</sup> LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION* 238 (1991).

<sup>105</sup> See generally OHIO CONST. MODERNIZATION COMMISSION, <http://www.ocmc.ohio.gov/ocmc/home> [https://perma.cc/A53N-FV39].

<sup>106</sup> See generally Steinglass, *supra* note 53.

<sup>107</sup> See Versteeg, *supra* note 36, at 1174.

Ohioans—is merited we leave up to those who know more about Ohio than we do.

Much food for thought is provided by the voting record in New Hampshire over what is now five election cycles. That is, although the state once had such popular votes every seven years, the period between elections was increased to ten years by constitutional amendment in 1964 (an amendment itself the product of one of that state's seventeen conventions over the decades).<sup>108</sup> There were, therefore, referenda in 1972 and every ten years after regarding calling a new convention, with the results summarized in Table 3.

Table 3: *New Hampshire Constitutional Convention Referenda*

Year	Yes Vote (%)
1972 <sup>109</sup>	56.9
1982 <sup>110</sup>	52.3
1992 <sup>111</sup>	49.2
2002 <sup>112</sup>	49.1
2012 <sup>113</sup>	36.0

Three things are immediately noticeable: First, as is obvious, the electorate in 1972 and 1982 voted for new conventions. Second, no convention has been held since 1982 because of rejection of that possibility by the electorate. But, third, the margins of the 1992 and 2002 elections are quite different from that of the 2012 vote. One might reasonably describe the two earlier votes as close to statistical ties; were they ordinary polls, they would come within the margins of error. Were a second poll taken (or election held) even shortly after the first one, there is at least a one-third probability that the result would be

<sup>108</sup> N.H. CONST. pt. 2, art. 100(c).

<sup>109</sup> See *New Hampshire Constitutional Convention (1972)*, BALLOTPEDIA, [http://ballotpedia.org/New\\_Hampshire\\_Constitutional\\_Convention\\_\(1972\)](http://ballotpedia.org/New_Hampshire_Constitutional_Convention_(1972)) [<https://perma.cc/H6QU-J7UC>].

<sup>110</sup> See *New Hampshire Constitutional Convention (1982)*, BALLOTPEDIA, [http://ballotpedia.org/New\\_Hampshire\\_Constitutional\\_Convention\\_\(1982\)](http://ballotpedia.org/New_Hampshire_Constitutional_Convention_(1982)) [<https://perma.cc/SSW7-M92F>].

<sup>111</sup> See *New Hampshire Constitutional Convention, Question 1 (1992)*, BALLOTPEDIA, [http://ballotpedia.org/New\\_Hampshire\\_Constitutional\\_Convention,\\_Question\\_1\\_\(1992\)](http://ballotpedia.org/New_Hampshire_Constitutional_Convention,_Question_1_(1992)) [<https://perma.cc/R555-7YV4>].

<sup>112</sup> See *State of New Hampshire, Elections Division, State General Election — November 5, 2002*, N.H. SECRETARY ST., <https://www.sos.nh.gov/general2002/conconsum.htm> [<https://perma.cc/DQ48-GHBL>]; see also John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to Their Passage*, 71 MONT. L. REV. 395, 408 (2010).

<sup>113</sup> See *New Hampshire Constitutional Convention Question (2012)*, BALLOTPEDIA, [http://ballotpedia.org/New\\_Hampshire\\_Constitutional\\_Convention\\_Question\\_\(2012\)](http://ballotpedia.org/New_Hampshire_Constitutional_Convention_Question_(2012)) [<https://perma.cc/8ZGJ-7QBS>].

different. That is surely not the case in 2012, when close to two-thirds of the electorate indicated a desire to preserve the status quo (or simply to leave any amendment in the hands of the legislature, as allowed also by the very important amendments proposed by the 1964 convention and then ratified by the people of New Hampshire). Again, one can wonder what explains this change. One possibility remains a markedly greater satisfaction by New Hampshire residents in 2012 than in earlier years regarding their state constitutional. We confess to some doubt about this as a very robust explanation, though it must also be admitted that there is very little polling data, in any of the states, dealing with such questions.<sup>114</sup>

We want to suggest another, more ominous, possibility, which is simply that even in New Hampshire, a state famous for the degree of citizen involvement in politics—just think of the New Hampshire presidential primaries<sup>115</sup>—there is increasing mistrust of one New Hampshireer by another. This might simply be linked to the generally increasing level of polarization in American politics;<sup>116</sup> but it may also be a function of population growth in the Granite State. Thus, the 2010 population was approximately 1.32 million persons, as compared with 1.23 million in 2000,<sup>117</sup> 1.11 million in 1990,<sup>118</sup> and 921,000 in 1980.<sup>119</sup> The absolute numbers are obviously not very high, but, as University of New Hampshire demographer Ken Johnson has noted: “New Hampshire has always benefited from a significant inflow of people coming to it.”<sup>120</sup> What this may mean is that the number and percentage of relative “strangers” has been increasing and with it, during a period as well of

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<sup>114</sup> *But see* William D. Blake & Sanford V. Levinson, *Popular Constitutionalism as Political Behavior* (unpublished manuscript) (on file with author) (demonstrating that Rhode Islanders upset with the state’s governance and economic performance were more likely to favor a 2014 constitutional convention referendum); William D. Blake & Sanford V. Levinson, *The Limits of Veneration: Public Support for a New Constitutional Convention 25* (Oct. 2, 2015) (unpublished manuscript), <http://ssrn.com/abstract=2668891> [<https://perma.cc/4BA5-66K7>].

<sup>115</sup> A record 542,459 ballots were cast in the state in the 2016 presidential primaries, approximately half the voting population in the state. *See* Garry Rayno, *Record Turnout for Presidential Primary with 542,459 Votes Cast*, N.H. UNION LEADER (Feb. 19, 2016), <http://www.unionleader.com/Record-turnout-for-Presidential-Primary> [<https://perma.cc/5N9W-S23H>].

<sup>116</sup> *See generally* Nolan McCarty, *What We Know and Do Not Know About Our Polarized Politics*, in *POLITICAL POLARIZATION IN AMERICAN POLITICS 1* (Daniel J. Hopkins & John Sides eds., 2015) (discussing broadly the causes and effects of party polarization).

<sup>117</sup> U.S. Census Bureau, *Resident Population and Apportionment of the U.S. House of Representatives: New Hampshire*, <https://www.census.gov/dmd/www/resapport/states/new-hampshire.pdf> [<https://perma.cc/2MLL-7BUD>].

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *NH Growth Slows as Population Ages*, WMUR (June 13, 2012), <http://www.wmur.com/special-reports/NH-growth-slows-as-population-ages/14804392> [<https://perma.cc/5PP9-ALEY>].

polarization, a greater unwillingness to trust constitutional reform to the potential “contamination” of these newcomers with their possibly alien ideas.

Support of sorts is provided for this surmise by the response of listeners to a “Constitution Day” talk given by Levinson in Concord, New Hampshire, on September 17, 2015. A distinguished senior federal judge reminisced that forty years ago, when he was still active in New Hampshire politics before being appointed to the bench, he could genuinely believe that he knew “every” New Hampshire lawyer and major public official (or potential public official), regardless of political party. That provided the basis for a certain kind of political culture. It may be, however, a thing of the past because there are “too many people” to allow the kinds of relationships that once were typical of the state. And one measure of this change in culture, we want to suggest, perhaps as a basis for further research, is that the kind of civic trust necessary to accept a constitutional convention where “dire necessity” does not require one is evaporating. If that surmise has any purchase for New Hampshire, just imagine how much more likely it is to explain the views of voters in far larger states. From this perspective, perhaps what really cries out for explanation is the willingness of a full 48% of those who turned out for the Maryland election in 2010 to support a new convention in that state.<sup>121</sup>

#### IV. CONCLUSION: ON “REPUBLICAN GOVERNMENT” AND CANARIES IN COAL MINES

Might one regard the diminishing frequency of state constitutional conventions as simply one more piece of evidence that the hope expressed by the U.S. Constitution regarding the maintenance of a “Republican Form of Government” is, in fact, illusory? This dour conclusion might follow if one regards as a prerequisite of civic republicanism the willingness of engaged voters to treat their state constitutions as truly serious documents requiring recurrent assessment and updating to allow them, as John Marshall put it so eloquently in *McCulloch v. Maryland*, to adapt “to the various *crises* of human affairs.”<sup>122</sup> To be sure, the national Constitution, whatever its invocation of “Republican Form of Government” in Article IV, is almost stunningly hostile to the idea of actual participation in governance by the ordinary citizen.<sup>123</sup> As Publius explains in *The Federalist No. 63*, the “true distinction” of the proposed constitutional order lies “‘in the total exclusion of the people in their collective capacity from any share’ in actual policy making, except insofar as representatives are attentive to public opinion.”<sup>124</sup>

State constitutions, however, embrace a very different attitude towards mass political action. Among the fifty states, only Delaware emulates the

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<sup>121</sup> See *supra* Table 1.

<sup>122</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

<sup>123</sup> See LEVINSON, *supra* note 10, at 164–65.

<sup>124</sup> See SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL: READING *THE FEDERALIST* IN THE 21ST CENTURY 240 (2015) (quoting *THE FEDERALIST* NO. 63).

national Constitution in excluding the voters from both the initiative and referendum processes.<sup>125</sup> The remaining forty-nine all acknowledge some role for direct democracy.<sup>126</sup> This can range from the relatively minimal requirement, as in Texas, that the electorate approve any constitutional amendments proposed by the state legislature,<sup>127</sup> to the maximalist system of California, where the voters can use the initiative and referendum even to amend the state constitution without any legislative participation.<sup>128</sup> Ohio,<sup>129</sup> like Maine,<sup>130</sup> very importantly allows the electorate to engage in what Levinson has termed “citizen review”<sup>131</sup> (in contrast to “judicial review”), where legislation passed by the legislature and signed by the governor can nonetheless be overridden by a popular vote, as was done, of course, in 2011 with regard to legislation affecting the rights of Ohio’s public employees.<sup>132</sup> One might use the outcome of the legislative-override referendum as evidence for the proposition that Ohio’s voters are fully capable of thinking for themselves, which makes it all the more interesting that they voted so overwhelmingly against a new state convention.<sup>133</sup>

One might analyze such statistics as we have brought forth as evidence for the proposition that Ohioans, like most Americans across the country, it appears, indeed affirmatively like their state constitutions and see no reason to engage in a thorough examination of the kind one might expect in a constitutional convention. Perhaps at least mild support for this conclusion is provided by the material in the Stephanopoulos and Versteeg article.<sup>134</sup> Such optimism, though, seems at least questionable if one thinks of the satisfaction with state constitutions measured by Stephanopoulos and Versteeg as a grade.<sup>135</sup> The median score was an 8 out of 10<sup>136</sup>—a solid “B” in many gradebooks. And yet, in every recent convention referenda, at least 30% of voters thought their state constitution was failing so badly it needed an

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<sup>125</sup> See DEL. CONST. art. XVI.

<sup>126</sup> Either through legislative amendments, ballot initiative amendments, or the discussed constitutional conventions. See *Amending State Constitutions*, BALLOTPEDIA, [http://ballotpedia.org/Amending\\_state\\_constitutions](http://ballotpedia.org/Amending_state_constitutions) [<https://perma.cc/CY3L-Z5HX>].

<sup>127</sup> TEX. CONST. art. XVII, § 1.

<sup>128</sup> CAL. CONST. art. XVIII, § 3.

<sup>129</sup> OHIO CONST. art. II, § 1c.

<sup>130</sup> ME. CONST. art. IV, pt. 3, § 17, cl. 1.

<sup>131</sup> See LEVINSON, *supra* note 4, at 53.

<sup>132</sup> Kris Maher & Jack Nicas, *Ohio Voters Reject Public-Union Limits*, WALL STREET J. (Nov. 9, 2011), <http://www.wsj.com/articles/SB10001424052970204190704577026360072268418> [<https://perma.cc/6Z3U-MBPG>].

<sup>133</sup> See *supra* Table 1.

<sup>134</sup> Stephanopoulos & Versteeg, *supra* note 3, at 2 (indicating high average levels of public support for the U.S. and state constitutions). While their study does not consider how support for the U.S. and state constitutions affects the public’s willingness to engage in constitutional revision, we consider this implication more than plausible.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

opportunity for change.<sup>137</sup> So why would one believe that the results in the thirteen states under examination indicate such a contented social order? One can look at a variety of other data detailing the decline in confidence in American governing institutions, where trust levels are even lower than for state and local institutions.<sup>138</sup> Or, concomitantly, one might look at answers to the all-important general question about whether the country is moving in the right or wrong direction.<sup>139</sup> We scarcely seem to be living in a new Era of Good Feelings full of trust in government and esteem for its leaders.

Ohio serves as a proxy for the larger concern with the dearth of state constitutional conventions. What deterred another 20% of the Ohioans from joining the 31.9% who voted for a constitutional convention?<sup>140</sup> One answer, as already indicated, is overall contentment with the constitutional status quo in the states. Another is the confidence that the Ohio Constitutional Modernization Commission will, in fact, produce, even if not until 2021, the kinds of improvements that are needed. We suggest, though, that another possibility is that most Americans no longer feel sufficient trust in their fellow citizens to trust them with the responsibility of engaging in what Publius, in *Federalist 1*, called “reflection and choice” about how we are to be governed.<sup>141</sup> This opening essay of *The Federalist* captures the Enlightenment belief that government *by*, as well as simply *for* the people was genuinely possible.<sup>142</sup> All of us were being asked to reflect about the adequacy of the government established by the Articles of Confederation—which, for the record, Publius regarded as an “imbecility”—and, therefore, the desirability of supplanting them with the new Constitution drafted in Philadelphia.<sup>143</sup>

When it comes to state constitutional change, perhaps most Americans believe that the time for such conscious “reflection and choice” has passed. That was then and now is now, and most contemporary Americans may be

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<sup>137</sup> See *supra* Table 1.

<sup>138</sup> In 1972, Gallup found 70% of Americans had either a great deal or fair amount of “trust and confidence” in the “federal government in Washington when it comes to handling Domestic problems.” *Trust in Government*, GALLUP, <http://www.gallup.com/poll/5392/trust-government.aspx> [<https://perma.cc/R9V8-MJJS>]. By 2015, that percentage had shrunk to 38%. *Id.* Congress has fared even worse. In 1972, 71% of Americans had either a great deal or fair amount of “trust and confidence” in the “legislative branch, consisting of the U.S. Senate and House of Representatives.” *Id.* Only 32% of Americans felt the same way in 2015. *Id.* State governments have fared better, with 63% of respondents indicating a great deal or fair amount of “trust and confidence” in state government “when it comes to handling state problems.” *Id.* In 2015, the figure was 58%. *Id.*

<sup>139</sup> Justin McCarthy, *Americans’ Satisfaction with Direction of U.S. Wanes*, GALLUP (May 18, 2015), <http://www.gallup.com/poll/183248/americans-satisfaction-direction-wanes.aspx> [<https://perma.cc/FXJ8-QEY9>] (indicating only 26% of Americans are satisfied with the direction the country is going).

<sup>140</sup> See *supra* Table 1.

<sup>141</sup> LEVINSON, *supra* note 124, at 9–12.

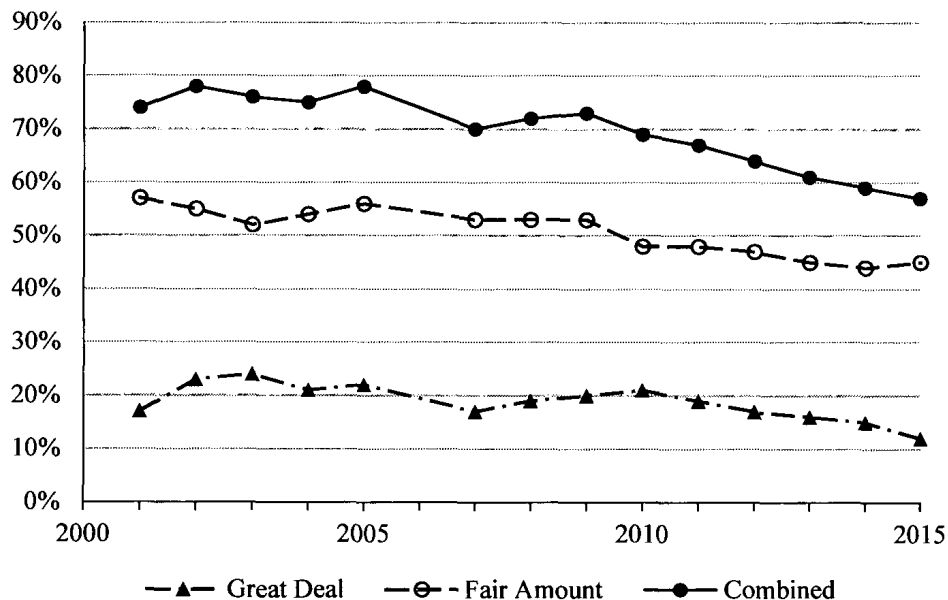
<sup>142</sup> See *id.*

<sup>143</sup> *Id.* at 9.



frightened to death of the capacity of their fellow citizens—especially if they increasingly tend to be viewed as possibly villainous Others—to engage in genuine “reflection” and, therefore, to make trustworthy “choices.” The creeping doubt and cynicism about public life is not just limited to governing institutions or individual political leaders. The American people appear to be losing faith in themselves. Figure 1 displays how survey respondents have answered a recurring Gallup question, and, from a democratic theory perspective, the trend is not positive. In 2015, when asked, “[H]ow much trust and confidence do you have in the American people as a whole when it comes to making judgments under our democratic system . . . ?” only 57% of respondents said they had a great deal or fair amount.<sup>144</sup> In 2001, when Gallup asked this question for the first time, 74% of respondents indicated a great deal or fair amount of trust in the American people.<sup>145</sup> What makes this earlier figure all the more impressive is that the poll was taken (just) before September 11.<sup>146</sup>

Figure 1: *Gallup Measure of “Trust and Confidence in the American People”*<sup>147</sup>



Thus when it comes to state constitutional change, better the devil we know than the potential devils we might get, as the saying goes. Especially if

<sup>144</sup> *Trust in Government*, *supra* note 138.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* The 2001 Gallup poll on trust in the American people was administered from September 7–10. *Id.*

<sup>147</sup> *Id.*

we regard those doing the redesigning as devilish themselves. But the point is that this maxim condemns one to live in a “devilish” world because of the fear that things would be likely to get even worse if we attempted to engage in collective action to change the status quo. One might, of course, try to confine this discussion simply to the proposals for new constitutional conventions. But if the ultimate reason for the inability to achieve majority support is fear of what might happen, we wonder if this raises important questions for the health of our wider democratic political order. Perhaps we should view the convention referenda as the equivalent of the fabled “canary in the coal mine,” providing indications of the decreasing faith in the possibility of a flourishing democratic government.