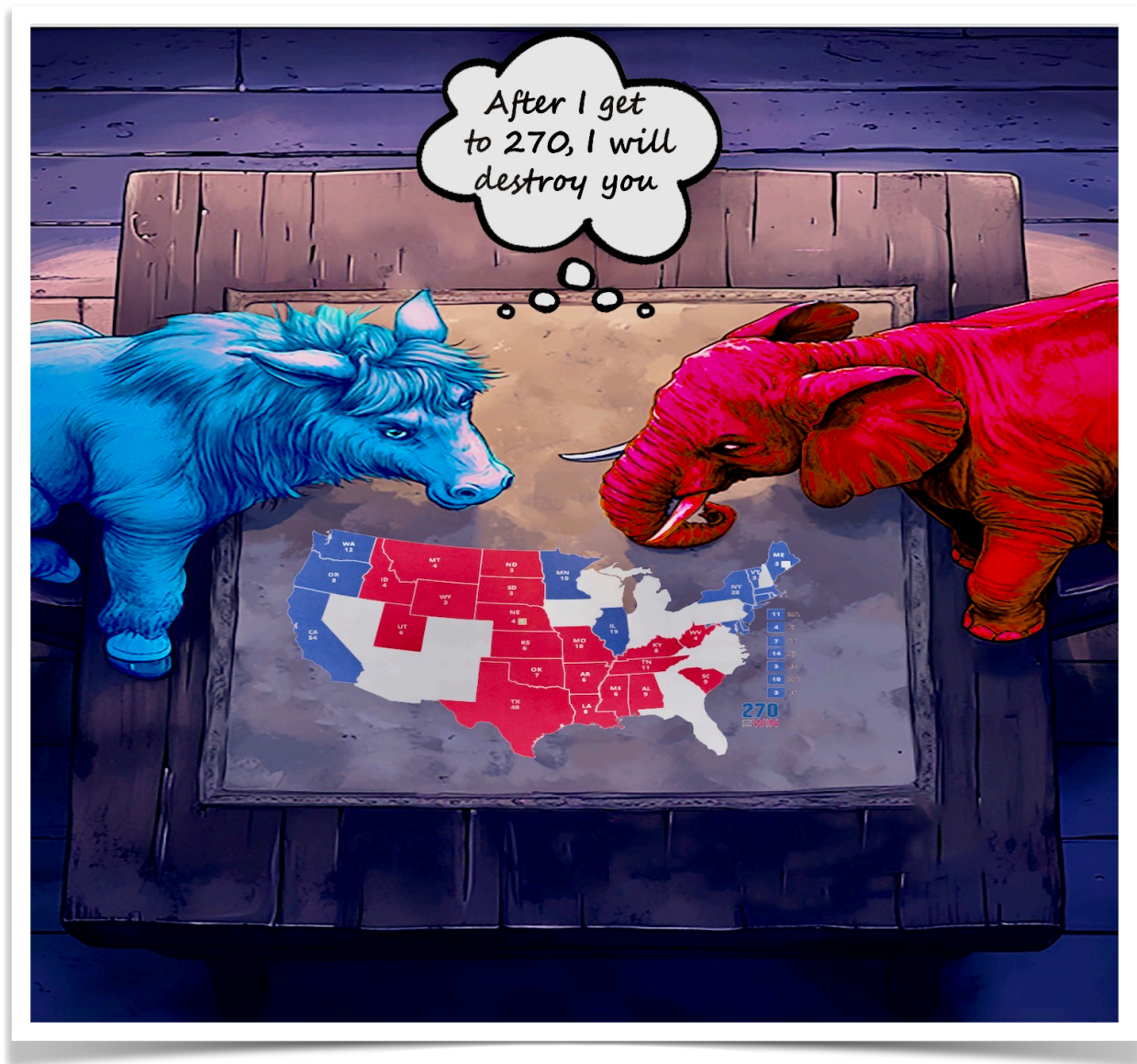


Saving Washington:

Solving Inside the Beltway Problems
With Outside the Beltway Leadership



Russell Blair

This Essay is Dedicated to My Daughter

Caroline Lai Hung Blair

and to my former constituents, willing or otherwise, who I had the privilege of representing in the Hawai'i State House (1974-86) and the Hawai'i State Senate (1986-1993).

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Contents

Introduction: Outside of the Beltway Leadership

Section 1. Ending Congress's Monopoly on Proposing Amendments

- 1.1 Article V: The Congressional Monopoly
- 1.2 Reciprocity: State Initiated Amendments
- 1.3 New Requirements for Future Amendments
- 1.4 Unity on the Article V Amendments and State Process

Section 2. Rescuing Washington From the Homogenization Trap

- 2.1 The First Amendment: Reconsidering *Citizens United v FEC*
- 2.2 The Second Amendment: Respecting Our Diversity
- 2.3 Roe v Dobbs: Making It Sticky

Section 3. Solving Otherwise Intractable Problems

- 3.1 Term Limits: Changing the Engine Oil
- 3.2 A Fiscal Discipline Amendment
- 3.3 Stopping Congressional District Gerrymandering
- 3.4 Single Subject Bills With Honest Titles
- 3.5 Restoring the Supreme Court's Legitimacy

Section 4. Conclusion: A More Robust Federalism

Appendix A: About the Author

Appendix B: Organizations Supporting Constitutional Amendments

Appendix C: Contact Information for Readers to Reach Governors

"But we are deluding ourselves if we believe that winning elections is enough to overcome the deficiencies of the American political system."

S. Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong* (2006)

Introduction: Outside of the Beltway Leadership

Congressional dysfunction is so severe that even some of our most serious problems are not being addressed. Instead, from our political class we get perpetual campaigning, hyper partisanship, and zero-sum politics that preclude the compromises that are essential to a functioning democracy. The upcoming elections are important, at least prophylactically, but the quotation at the top of this page is 18 years old! The last eight elections have done nothing to reverse the underlying trajectory and the ninth will probably be no different. In fact, it is likely to accelerate our democratic decline.

We need to change the system that produced the current situation and is unable to reverse the political dysfunction. Anyone looking for that change to come from inside of the Beltway is delusional. The leadership to make the essential changes and avoid a further decline in civil society will not come from Washington D.C. It must come from the states and will only be fully successful with the collective effort of the states' governors. The National Governors Association (NGA) is the natural source of new leadership. The remedy suggested in Section 1 opens a new pathway for reforms to rehabilitate a system that has nearly stopped working. These reforms are covered in Sections 2 and 3.

"... what country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? "

Thomas Jefferson in an 1878 letter to William S. Smith, John Adams' son-in-law

I have kept this essay short and direct, because it needs to be read widely. The average high school graduate reads 250 words per minute. This essay is a suitable text for anyone old enough to vote. It will take them 30 - 45 minutes to read and understand.

A second reason for brevity is to respect the proposed leadership role of the National Governors Association (NGA). We elected our governors to represent us. If they fail to take remedial action, the accelerating dysfunction at the national level may result in catastrophic institutional failure. Institutional failure, especially a failure to respect the election results, will be followed by disorderly and perhaps chaotic politics and provide an opportunity for authoritarianism from either the left or the right. Forced to choose between political anarchy and political authoritarianism, the latter will prevail.

It is essential to fix our democratic process as soon as possible. This essay describes a way to do that. To my knowledge, there are no similarly comprehensive proposals. Cynicism and pessimism can become a self-fulfilling prophecy of failure. Our current situation cannot be allowed to fester. Reversing Washington's democratic decline requires outside of the Beltway leadership.

"Constitutions say who is in charge. Amendments remind politicians that it is not them. The capacity to change a constitution respects a truth in any democracy that the people hold the ultimate reins of power."

Jeffrey S. Sutton, *Who Decides?: States as Laboratories of Constitutional Experimentation* (2022)

Section 1

Ending Congress's Monopoly on Changes to the U.S. Constitution

Thirty-three proposed amendments to the U. S. Constitution have been submitted to the states for ratification. Twenty-seven were ratified. All of them were initiated by Congress. But, Congress has become dysfunctional and is no longer a viable source for even essential constitutional changes. In addition, Congress has a conflict of interest with respect to any proposal to amend Article V to overturn its monopoly. Congress is overly invested in the failing system.

Elections are not slowing our political decline, they are accelerating it. We need fundamental changes through an updating of our 233-year-old Constitution. Congress will not provided these changes. The only way to overcome Congress's monopoly is with an amendment to Article V. The states, in a bipartisan display of leadership, must force Congress to propose an amendment to Article V. How they can do this is explained in this section.

Once Article V is amended to end the Congressional monopoly, the states can use their new authority to save Congress the from the homogenization trap¹ (Section 2). They can also provide a venue for proponents of other system reforms (Section 3).

Article V

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress

1.1 Article V: The Congressional Monopoly. There are currently two ways to amend the U.S. Constitution: 1) two-thirds of Congress can propose an amendment and any such proposal becomes part of the Constitution when ratified by 38 states, or 2) 34 states can call for a constitutional

¹ The homogenization trap is the tendency for federally initiated changes to use a "one-size-fits-all" solution that does not reflect the diversity of the American people. Homogenization is often counterproductive and frequently prevents solutions that reflect important regional differences in our pluralistic society.

convention and the convention's proposed amendments become part of the Constitution if and when they are ratified by 38 states.²

The crucial point is that the first method gives the power to initiate an amendment to Congress and the second method gives the power to initiate amendments to a convention. Neither gives states the power to proposed amendments. While a convention can be triggered by the states, there is great uncertainty about the degree to which either the states or Congress can influence the process and product of the convention. This has effectively precluded such conventions as an option, because they are perceived to be either too dangerous or doomed to failure. In light of the requirement for ratification by 38 states, fear of a runaway convention is overwrought. The real problem is that a convention could become a partisan brawl that would fail miserably. Such a failure would make matters worse rather than better. The consequence is a congressional monopoly. We need to replace the unused convention model with a process that permits state initiated constitutional amendments - a reciprocity amendment that equalizes the authority of Congress and the states..

" Having witnessed the difficulties and dangers experienced by the first convention which assembled under every propitious circumstance, I should tremble for the results of a second"

James Madison, in a letter to G.L. Tuberville dated November 2, 1788

1.2 Reciprocity: State Initiated Amendments. Because the states have the power to call for a convention, if they act in unison they can tell Congress that the price of avoiding an open convention is for Congress to propose an amendment to Article V that replaces the states' convention calling role with reciprocity between the states and Congress in the power to propose amendments. An example of what this might look like is shown in the following text box.

Citizens Ratify by Referendum. Once the states can propose amendments, it is redundant to have them ratify their amendments. Instead, a states initiated amendment should be ratified by a voter referendum in each state, at each states next general election.³ Voters will be able to directly prevent overreaching or bad judgment by their state's elected officials. Under the current Article V, voter only participate indirectly through their state legislators. Direct participation in amending the U.S. Constitution would create tremendous public interest and dramatically increase citizens

² Pursuant to Article V, at the discretion of Congress, ratification can be either by a state's legislature or by a ratifying convention. The latter was used only for ratification of the 21st amendment, which repealed prohibition.

³ The following example requires only a majority vote for the referendum, but it must be repeated with an intervening election. A few states use this approach.

engagement. Voting levels would skyrocket in those elections which had the ratification of a national constitutional amendment on the ballot.

Example of a Revised Article V

The Congress, by a 60% supermajority of each House, or the sovereign states, by the concurrence of not less than 30 states, may propose amendments to this Constitution. In the case of congressional proposals, ratification shall require the consent of not less than 30 states in accordance with the process adopted in each state for that purpose. In the case of state initiated proposals, ratification shall require the consent of a majority of the voters by consecutive referenda with an intervening election.

1.3 New Requirements for Future Amendments. It has been proposed that Article V be amended to lower the requirement for Congress to proffer constitutional amendments, from 3/4 to 2/3 or 3/5 of its members, and to lower the requirement for state ratification, from 3/4 to either 2/3 or 3/5 of the states. The example given above uses 3/5 for proposing by either method. This is a critical aspect of Article V reform, since desirable or even essential changes will fail if the threshold is too high, either for proposing or ratifying amendments. It is worth considering the experience of the states, which generally allow ratification by a simple majority of voters. As in all matters, I have confidence that the governors will be able to make the right choice.

"We have entered an age of fantasy politics - when candidates from both parties parade promises for a better future before a public that recognizes, somewhere deep down, that it is all really just a show. A ritual. A way to get the blood flowing. No one believes the premises anymore."

L. Lessing, *Republic Lost: The Corruption of Equality and the Steps to End It* (2016 Edition)

Section 1.4 Unity on Article V Amendments and State Procedures. The states, irrespective of which party is dominant, have a common interest in amending Article V to provide for

reciprocity with Congress. The National Governors Association provides a forum for agreement on the language of a revised Article V.⁴

Uniform State Procedures for Article V Proposals. In the case of proposals from Congress, the procedures used for drafting proposals are the same as for its regular business. There is nothing comparable in the case of future proposals from the states. This needs to be addressed. There is a risk of Congressional interference, unless the states uniformly address the procedural issues. Speculatively, for the sake of initiating a discussion, this might begin with the National Governors Association appointing co-chair, one from each of the major parties, and a 48 member committee comprised of the other governors to work out the details.

This committee could both formulate a first draft of the new Article V and a uniform state process for proposing amendments. It could then meet *publicly* with individuals from academia and government who can elaborate on the technical aspect. This would begin the process of educating the public. A second draft would then be created and opened for public comment.

The final agreement could be formalized as a uniform state law or an interstate compact. As soon as the number of states required for a states sponsored amendment under the new Article V concurred, the procedures would become operative. Other states could join at their convenience and hopefully all 50 would join the system. States could also leave and, if the number fell below the requirement for proposing amendments, the ability of the states to propose amendments would be effectively suspended.

I only propose this as a starting point for discussion. Simply starting this process would show commitment and put tremendous pressure on Congress to accept reciprocity and propose an Article V amendment, using the language proposed by the National Governors Association - if for no other reason than to avoid the possibility of an open convention.

⁴ The attached Exhibit B lists some of the organizations interested in specific amendments to the U.S. Constitution. They represent a cross section of the ideological spectrum. If they can put aside their differences long enough to reform the process, everyone will have a future opportunity to argue for their respective proposals under a modified Article V.

"The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security."

James Madison

Section 2

Rescuing Washington From the Homogenization Trap

This section looks at using the new amendment process to resolve three major issues. It does this by moving them, in part, from the federal level to the state level. At the state level, there is no need for a "one size fits all" solution (homogenization trap) that is a defining characteristic of "Washington solutions."

The 1st Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2.1 The 1st Amendment: Reconsidering *Citizens United v FEC*. There is no right more critical to a democracy than freedom of speech. Consequently, when a conflict arises between the 1st Amendment and the functioning of our democracy, the consequences of failing to find the proper balance can be enormous. Regrettably, Supreme Court decisions which conflate money with speech have created such a conflict. A state initiated constitutional amendment could use the state "laboratories of democracy" to avoid the homogenization trap. If the balancing is left to the states, the 50 state laboratories of democracy can experiment with a variety of solutions. That variety will discover an optimal result which can become the model.

Many, possibly most, Americans believe that the case of *Citizens United v FEC*, 558 U.S. 310 (2010) along with several of its predecessors, has allowed money to undermine the legitimacy of elections. Wealthy individuals give millions of dollars to influence the outcome of elections⁵ and they often do so for selfish reasons. They make transactional contributions. *Citizens United* removed all limits on "independent" political expenditures, calling any restriction a violation of the 1st Amendment. Unlimited money from corporations and ultra wealthy individuals, when funneled

⁵ A 2020 report found that, between 2010 and 2020, the 10 largest campaign donors *each* gave an *average* of \$12 million.

through an ostensibly independent organization, became an acceptable way to exert undue influence on both elected officials and candidates.

"[Citizens United] ... obscures the very real injustice and distortion entailed in the phenomena of some people using other people's money to support candidates they have made no decision to support, or to oppose candidates they have made no decision to oppose."

Professor Lawrence Tribe, SCOTUS blog (January 24, 2010).

The potency of the threat to democracy created by *Citizens United* was clearly shown at a recent rally in Atlanta. Presidential candidate Donald Trump, who earlier professed to be against electric vehicles and to favor internal combustion engines, said: "I am for electric cars. I have to be, you know, because Elon Musk endorsed me very strongly." His unfiltered candor is rare for a politician, but the anti-democratic effect of large contributions is universally acknowledged. Contributions from voters are not trivial. However, potential candidates are not taken seriously unless and until they demonstrate a capacity to attract large donors. Incorruptible candidates don't generally attract the early and large donations needed for "credibility." So, they don't even make the first cut.

"The Supreme Court has handed lobbyists a new weapon. A lobbyist can now tell any elected official: if you vote wrong, my company, labor union or interest group will spend unlimited sums explicitly advertising against your election."

D. Kirkpatrick, New York Times Editorial (January 21, 2010).

The threat of money in politics does not begin and end in the campaign season. It continues 365 days a year - every year. Successful candidates are required to beg for contributions throughout their term of office, as they prepare for the next election. Votes in Congress are often subject to one all too common criteria: will this vote upset my biggest donors. In most cases, the incumbent is able to vote the way big donors want without their constituents even being aware of any conflict with the public's interest.

Big donors are often more interested in stopping legislation than in passing legislation. The *status quo* already serves their interests. Incumbents are able to kill legislation on behalf of big donors and, because responsibility is hidden, there are no consequences. Reelection funds will flow from those who appreciate their maintenance of the *status quo*.

"Thursday was a bad day for democracy. The Supreme Court's decision in *Citizens United v. the Federal Election Commission* paves the way for unlimited corporate and union spending in elections, and the drowning out of the average citizen's voice in our public policy debates."

Common Cause President Bob Edgar, *Supreme Court's Campaign Ruling: a Bad Day for Democracy* (January 22, 2010)

A previously mandated end to spending limits, combined with the treatment of money as a form of free speech serves the interests of incumbents, wealthy individuals and corporations. One person one vote has been diluted, if not wholly replaced, by the political privileging of wealth. An unknown number of qualified citizens are prevented from serving their communities. Elected officials are forced to live in a world of constant Pavlovian training to respond to special interests. While there are many who resist some of the time, there are few who resist all of the time.

We cannot expect elected officials to be saints. We must change the environment in which they exist so that the mere mortals elected to Congress can behave ethically. Real democracy will not be possible until the cases from *Buckley v Valeo* to *Citizens United* are replaced by a state led modification of the First Amendment. Members of 16 state legislatures have already called for a constitutional amendment to reverse *Citizens United*. 400 municipalities and three states (California, Illinois and Vermont) have even called for an Article V convention for this purpose. Reciprocity would open an easier path

In the absence of reciprocal state authority to initiate amendments, incumbents in Congress will prevent such a transfer from even being proposed. Since governors are generally term limited and under such circumstances are frequently inclined to run for Congress, they are likely to be more open to a level playing field. The laboratories of the states should be allowed to experiment. I trust my states elected officials to respond appropriately more than I trust Congress or the U.S. Supreme Court.

The 2nd Amendment

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

2.2 The 2nd Amendment: Respecting Our Diversity. The Second Amendment is an enumerated right. The U.S. Supreme Court is therefore free to interpret it. The issue is not the interpretation of the 2nd Amendment, but the application to the States ("incorporation"). The 2nd Amendment was not fully incorporated until the relatively recent case of *McDonald v City of Chicago*, 561 U.S. 742 (2010). Incorporation will only be reversed judicially after a substantial change in the makeup of the Supreme Court and, even then, a decision to disincorporate would be a tough sell. It

would be at least as controversial as the 2010 decision to incorporate the 2nd Amendment, through the 14th Amendment, to the states.

"Might the regulation of weapons generate a different reading in a Supreme Court of the state with a large rural population from one with a large suburban and urban population?... It may be more appropriate to tolerate 51 imperfect solutions rather than to impose one imperfect solution on the country as a whole, particularly when imperfection may be something we have to live with in a certain area."

Jeffrey S. Sutton, *51 Imperfect Solutions* (2018)

Giving authority and responsibility for reasonable gun regulation, short of a ban, to the diverse states would allow the states to reflect their own needs and preferences. Red states could minimize the requirements, perhaps giving urban areas more leeway. Blue states, inversely, could impose stricter requirements, perhaps giving rural areas leeway to impose fewer requirements. Compromise at the state level will not be easy, but it will be possible.⁶ What's right for rural Montana isn't right for Chicago. In *Presser v. Illinois*, 116 U.S. 252 (1886), the U.S. Supreme Court held that, "Unless restrained by their own constitutions, state legislatures may enact statutes to control and regulate all organizations, drilling, and parading of military bodies and associations except those which are authorized by the militia laws of the United States." The Second Amendment only applied to Congress, not the states. *Presser* was only overruled in 2010. We need an amendment to restore *Presser*, or something similar, which worked well for 124 years - much better than *McDonald* has worked for the last 14.

2.3 Roe v Dobbs: Making It Sticky. The reader, at this point, may wonder about the use of the reciprocity provision to detoxify the Roe v Wade - Dobbs v Jackson controversy. Dobbs has already given the authority to regulate abortions to the states, but it remains a big issue. Can the states improve the current situation with a constitutional amendment?

The Supreme Court decision to deflect the abortion issue to the states solved the problem, but only to a degree and only in some jurisdictions. It quarantined the conflict, in its most virulent form, to the purple states. But, because it was the Supreme Court that made the decision, abortion remains the basis for national political conflict. The fighting continues as a battle to influence the composition of the Supreme Court. This keeps the focus national and Congress remains at the center of the fight because of the Senate's role in the confirmation process.

⁶ As the chair of Hawaii's Senate Judiciary Committee, in 1981-82, the author drafted such a compromise. It went as far as the identical provisions in the Constitution of the State of Hawaii and the U.S. Constitution permitted, but the effort drew criticism from both conservatives and liberals. It would have been very useful to have had greater leeway, in order to reflect the very different conditions between highly urbanized O'ahu and the much less urbanized Neighbor Islands.

The potential benefit of the use of a state initiated constitutional amendment is two-fold. First, such an amendment can remove the the Supreme Court from the political equation.⁷ Second, a constitutional amendment is very "sticky." Once done, it will be very hard to reverse. The constitutional amendment will therefore cause the political process in each state to focus on the specific parameters for a legal abortion in that state. Both the Supreme Court and Congress will be relieved of authority and responsibility. At some point, after sufficient debate and political compromises, each state's voters will accept that its state legislature's decisions on specific limitations are broadly tailored to the preferences of the state's citizens. State legislatures are the best venue for finding the equilibrium point and, once that happens, the issue will be substantially detoxified.

⁷ Article 3 Section 2 grants Congress the authority to modify the jurisdiction of the Supreme Court: "...with such Exceptions, and under such Regulations as the Congress shall make." Using this authority to eliminate the judiciary's jurisdiction could actually make matters worse for Congress. There would be constant pressure to repeal the legislation that modified the jurisdiction.

"The visible dysfunction in politics are dismissed as temporary aberrations or explained away, cynically, as the way things always were. The reluctance and evasion are understandable: some unwanted truths are too painful to face."

W. Greider, *Who Will Tell the People: The Betrayal of American Democracy* (1997)

Section 3

Solving Otherwise Intractable Problems

My initial interest was an amendment of Article V to make our federalism more robust and useful. But it quickly expanded to include various proposals for new constitutional provisions being suggested by diverse organizations (Appendix B). For these organizations, adding reciprocity to Article V will increase the chance of their proposals being adopted. Some of these proposals are the topic of this section.

3.1 Term Limits: Changing the Engine Oil. I found legislative service intellectually and emotionally rewarding. There were always new things to be learned, because politics interacts very broadly with society. Each bill was a window into some part of the community. But, as colleagues came and went, it became clear that that no individual legislator was essential or even particularly important. Politics is a team sport with very few superstars. Reasonable term limits will not be disruptive and the loss of seasoned veterans will be offset by the arrival of new talent. Renewal is as important, if not more important, as continuity.⁸ The Governors can set the balance for Congress better than Congress can set it.

At the individual level, term limits are no more a condemnation of the termed out incumbents than a periodic oil change is a repudiation of engine lubrication. We change our engine oil periodically as a proactive and prophylactic measure. We don't wait for the engine to seize up before we change the oil. (Congress has seized up.)

That said, reasonable people can disagree on the length of maximum terms.⁹ That debate is precisely the sort of judgment call that each state can make for its own legislators and that the U.S. Constitution can establish for Congress. Congress, of course, will never propose such an amendment. Where the states have such limits it has usually been the result of a citizens' initiative. There is no citizens' initiative at the federal level, so that is not an option with respect to Congress.

⁸ There is an old joke about political progress occurring "one funeral at a time."

⁹ In 1977, I introduced HB 316 to establish modest term limits for legislators. It provided for a maximum of 12 years in the House and 8 years in the Senate. It didn't even get a hearing. After 12 years in the House, I ran for the Senate, successfully, and served 7 more years. When a reapportionment detached me from my district, I took the opportunity to resign. (I had also just become a father, which was a big factor in the decision).

Given the Congressional conflict of interest, it is necessary for the States to become involved. Once a States' threat to call an open convention forces an Article V amendment, there will be a better way to achieve this and other reforms. To demonstrate their sincerity and commitment, legislators supporting a congressional term limit can support a conforming change to their own state's Constitution. If they already have an onerous state limit, those might even be loosened.

3.2 A Fiscal Discipline Amendment. Twenty-eight states have petitioned Congress for an Article V convention to propose a Balanced Budget Amendment. If these states expanded their goals or formed an alliance to combine their current objective with a proposal to revise *Citizens United*, it would easily reach the 34 state threshold for a convention and might even attract all 50 states.

The usual title is a "balanced budget amendment." That title has the virtue of simplicity, but it is too restrictive. I prefer to call it a "fiscal discipline amendment" or a "fiscal responsibility amendment." A broader title allows for more creative thinking, which will be helpful and perhaps is necessary. For example, an amendment styled as a "fiscal discipline amendment" or "fiscal responsibility amendment" might provide that, before passing any budget bill that adds to the deficit, Congress is required to vote, with a roll call vote, on a separate Resolution which declares that exigent circumstances require adding to the deficit and specifies the nature and extent of those exigent circumstances.

"PWBM estimates that ... financial markets cannot sustain more than the next 20 years of accumulated deficits projected under current U.S. fiscal policy. Forward-looking financial markets are, therefore, effectively betting that future fiscal policy will provide substantial corrective measures ahead of time. If financial markets started to believe otherwise, debt dynamics would "unravel" and become unsustainable much sooner.

When Does Federal Debt Reach Unsustainable Levels? Penn Wharton Budget Model (PWBM), University of Pennsylvania, October 6, 2023

Today, Member of Congress can vote on a bill that adds to the federal deficit and then argue to their constituents that passing the budget was essential. This avoids responsibility. Voting on a preceding resolution would make this lack of accountability impossible. It would be a very strong measure for fiscal prudence. If the rationale were weak, those supporting the resolution would be vulnerable in the next election. As a result, Members of Congress would need to start looking closely at the actual performance and cost/benefit ratios of the government operations which they

are funding, not merely fund them based on inertia and the good intentions that justified their initial establishment.¹⁰

If there is no limit to the extent to which Congress can avoid making hard choices by running deficits in the normal course of business, rather than just in response to exigent circumstances, Congress will perpetually over rely on borrowed money. Congress has "kicked the can down the road" for far too long - especially for the welfare of future generations, whose futures are being mortgaged for current consumption.

Of course, any balanced budget amendment or fiscal responsibility amendment needs to be cognizant of the necessity for deficits in response to exigent circumstances. I trust the governors to show common sense and leadership by providing appropriate language to allow for exigent circumstances in the drafting the amendment.

"For the first time ever, this court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities... The partisan gerrymanders in these cases deprive citizens of the most fundamental of their constitutional rights: the right to participate equally in the political process ... the gerrymanders here debase and dishonor our democracy, turning upside-down the core American idea that all governmental power derives from the people... The majority concedes (really, how could it not?) that gerrymandering is 'incompatible with democratic principles.' ... The practices challenged in these cases imperil our system of government. Part of the court's role in that system is to defend its foundation. None is more important than free and fair elections. With respect but deep sadness, I dissent.

Justice Ellen Kagan, dissenting opinion in *Rucho v Common Cause* 588U.S. 684 (2019)
in which Justices Ginsburg, Breyer and Sotomajor concur

3.3 Stopping Congressional District Gerrymandering. Gerrymandering congressional districts is widely regarded as a primary driver of political polarization at the national level and the exclusion of moderates from Congress. In *Rucho v Common Cause*, the Supreme Court explicitly abdicated its jurisdiction. With five votes, it used the "political question doctrine" to declare that the issue was beyond judicial competence. This generated a very strong response, the tenor of which is captured in the preceding quotation from the dissenting opinion.

Once the problem is properly understood, the solution is simple. The problem is created by the fact that Article 1, Section 4 grants the states the authority to regulate congressional elections. In

¹⁰ It will be hard for Congress to do this without dramatically increasing its independent auditor or inspector general capacity. However, the necessary increase in spending for oversight can pay for itself. In my own experience at the state level, for many years I was the chair of the Consumer Protection and Commerce Committee in both the House and Senate. This gave me the first pass on the budget of the State Office of Consumer Protection. Oversight was inadequate, as neither I nor the Chair of the Finance or Ways and Means Committee had the time or the staff to look beyond the information provided by the Administration. Years later, when I was appointed Director of the State Office of Consumer Protection, I got a much closer look. Although a Democrat and an advocate for stronger consumer protection laws, I was able to cut the budget of the office 30% by adopting a more cost effective approach.

street usage, the states are acting as the "cut-out-man." This role protects those at the top of a conspiracy. The dirty work is outsourced by Congress to the states. It is very convenient way for meddling members of Congress to have plausible deniability.

But, Article 1, Sec. 4 also grants Congress the authority to alter the state regulation or substitute its own regulations. This provides an easy path to a simple solution. The states are complicit in the gerrymandering, but it is a voluntary complicity. The states can simply abstain from further complicity. Article X of the U.S. Constitution prevents Congress from requiring the states to participate. *New York vs United States* 505 U.S. 144 (1992) makes it clear that *each* state has a separate capacity to abstain from further participation in the conspiracy.

Even a single state could initiate the remedial process, but it would be better if several states acted in concert. Specifically, one or more states should pass state legislation which says that their state's reapportionment commission can no longer establish boundaries for congressional districts. In the event that the federal government does not provide updated boundaries for the state's congressional districts, the chief election officer would be statutorily instructed to provide ballots that make the entire state a single, multimember House district.

If only one or two states acted, I would not put it past Congress to try to bribe or coerce them into continuing to do its dirty work. Such a move would backfire spectacularly. The state being bribed or coerced would merely need to publicly explain the situation and its unwillingness to be complicit in the current gerrymandering fiasco. The public would support the state and this support would stimulate similar reforms in other states.

This remedy could be initiated by any state in its 2025 legislative session. This would give Congress five years to respond before the next decennial reapportionment and subsequent redistricting. This is fair warning. The federal government already has the necessary infrastructure and staff. The Census Bureau can begin retooling for a new role with very little difficulty. Part of the "maximum load" staffing that was necessary during the census taking process could be utilized, at the conclusion of the census, to handle reapportionment responsibilities. All Congress would need to do is provide the necessary superstructure of a nonpartisan or bipartisan reapportionment commission.¹¹ The prospect of statewide multimember congressional districts would overwhelm congressional resistance. Since no constitutional amendment is required, this is both an easy and a simple fix. There is no reason for the states not acting, perhaps several states responding to a multi-

¹¹ Congress can consult the many democratic nations that have successfully dealt with reapportionment at the national level. A good place to start would be to consult the ACE Electoral Knowledge Network: www.aceproject.org.

state Governor's initiative. The incentive of being part of the solution instead of part of the problem should provide more than adequate motivation.

"...the Consolidated Appropriations Act of 2021 - which included a Covid-19 relief package - more than 5000 pages... Buried in the bill were provisions for horse racing, approvals for to new Smithsonian museums, and a section on foreign policy regarding Tibet.

Neil Gorsuch, Supreme Court Justice, *Over Ruled: The Human Toll of Too Much Law* (2024)

3.4 Single Subject Bills With Descriptive Titles. Governors will fully appreciate this proposed amendment. They live with these requirements during every legislative session and veto bills which do not comply. Nearly all state constitutions require that bills introduced in the legislature be limited to a single subject and use a descriptive title, rather than a public relations title or an otherwise misleading title. This limits logrolling and other chicanery and promotes transparency. In contrast, Congress uses misleading public relations titles and packs omnibus bills with widely and wildly diverse legislation.

"The clear-title rule requires the subject of each bill to be expressed plainly in its title. The single-subject requirement ensures that each bill enacted by the legislature contains just one subject. The original-purpose requirement requires a final bill to line up with the stated purpose of the original bill. These limitations grew naturally out of a preoccupation of the Jacksonian era, curbing special interests. The US Constitution does not place comparable restrictions on Congress."

Judge Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* (2021)

For example, the Inflation Reduction Act of 2022 contains climate change provisions, allows greater access to Obama care, and sets a 15% minimum tax on corporations that make over \$1 billion in profit. Another example is the Clear Skies Act 2002 which *weakened* the Clean Air Act. A year later the Healthy Forest Initiative increased access to federal lands by timber companies looking to cut down forests. Federal legislators can choose any name they want. Truth in advertising does not apply. If state legislatures can draft and enact legislation on this more honest and transparent basis, there is no reason why Congress cannot do likewise.

3.5 Restoring the Supreme Court's Legitimacy. The legitimacy of the highest court in our judicial system needs to be repaired. The Supreme Court seems, fairly or not, to partake in the general incivility and distaste for compromise that pervades Washington, D.C. This is magnified by the overtly partisan actions of the U.S. Senate during the confirmation process. Article 3, Section 1 needs to be discussed and probably expanded.

Moral Authority. The Supreme Court has embarrassed itself, though it ignores the public outrage by pretending it is capable of policing itself despite overwhelming evidence to the contrary. An enforceable code of ethics, like the one that applies to all other federal judges? Sounds good to

me, but the devil is in the details. Nevertheless, I am confident that the collective wisdom of the Governors could draft a constitutional amendment that is sufficient without being too restrictive. I have no similar confidence in the Supreme Court, especially operating under the current, divisive political pressure.

Term Limits and/or a Mandatory Retirement Age. Most state supreme court justices are subject either to term limits or to a mandatory retirement age. Congress, because of its objection to either term limits or a mandatory retirement age for itself, is not going to propose either for the Supreme Court. A state initiated amendment to Article III is therefore needed.

Regular Vacancies. One advantage of term limits is that it would facilitate staggered vacancies. Once there are term limits, vacancies can be spaced so that one occurred regularly in each odd numbered year. This will make it easier for the Senate to depoliticize the confirmation process. Under this system, a justice appointed in year 1 would be termed out in year 19 - a term limit of 18 years. In the event of a death, disability, or retirement, the replacement justice would serve out the remaining term and could still be eligible for appointment to a full term.

Ending Excessive Senatorial Delay in Confirmation. It has been proposed that the U.S. Constitution be amended to set limits on legislative delay in confirming judicial nominees and, perhaps, any appointee who requires Senate confirmation. After three months, or some other agreeable time, if the Senate has not acted on the nomination, the nominee would be automatically confirmed. Intentional delay has become part of a broken system, a way to limit presidential discretion without openly disclosing the political motivation for the delay or, perhaps, a delay is merely a way for a key senator to obtain an unrelated and undisclosed favor.

Delay in cabinet appointments may impair the ability a new administration to respond to acute problems and challenges - foreign and domestic. There are legitimate national security concerns with the current system. It is also undemocratic, in that it does not acknowledge and respect the voter's choice in the preceding election.

"Not at the margins but at the core: the institution governing us—a democracy—lacks the basic integrity of such an institution: that the people rule... For a democracy to favor the elite over the people is to add insult to suffering. It is to betray the very promise at the core of the institution. It is to reveal, in a word, that the institution has been corrupted."

Lawrence Lessig, *They Don't Represent Us: Reclaiming Our Democracy* (2019)

Section 4

Conclusion: A More Robust Federalism

Since the middle of the 20th century, for a variety of reasons, authority and responsibility has shifted from the states to the national government and the federal remit has expanded dramatically. In the process, important state advantages have been lost, including flexibility and capacity for innovation. States are bribed with federal grants and threatened with the withholding of grant money. The golden rule (the one with the gold writes the rules) is on full display and the result is a top-down homogenization. This worked, until it didn't. State governments were limited in their important role and their capacity to responsibly exercise authority and responsibility atrophied. We now have top-down dysfunction. The solution is to restore some balance to our federalism and allowed the states to solve problems that are less tractable at the national level.

Recognizing Our Diversity. I've lived in six states: Hawaii, California, Florida, Virginia, Maryland and New York. Adding, for example, Texas, Montana and Ohio would have expose me to even more diversity. But I've seen enough to appreciate that we are not and cannot be politically homogenized. Even within the larger states there is great diversity. It takes seven hours to drive from Miami to Tallahassee and the cultural differences are even greater than the distance suggests. The same range of diversity exist between coastal California and its Central Valley - an hour or two away.

"... you could put half of Trump's supporters into what I call the basket of deplorables."

Hillary Clinton, September 9, 2016

Respecting Our Diversity. One of the more shocking things I ever heard in political discourse was a candidate for President of the United States of America, in 2016, refer to one quarter of the nation's population as "a basket of deplorables." What made it shocking was that she was a former United States Senator and her campaign slogan was *Better Together*. Ironically, she represented the Democratic Party, some of whose members claim to *deplore* even micro aggressions. Party loyalists did not bat an eyelash at the broad condescension of their party's nominee in expressing contempt for tens of millions of citizens who disagreed with her - simply because they preferred her policies to those of her opponent. The Republican Party had the same problem with its own divisive candidate. In fact, his divisive rhetoric could fill volumes.

Since 2016, things have gotten much worse. America is split into two combative political tribes that demonize each other. Through the process of gerrymandering and the consequent hyper polarization, the middle of the political spectrum - both moderate and independent voters - is excluded. Politics has become a zero-sum competition and candidates who respect the fact that compromise is necessary for a democracy to function are branded as heretics within each of the major parties. A willingness to compromise is sufficient grounds to warrant their exclusion from nomination to any elective office. These dynamics are antithetical to a functioning democracy .

Closing comment: I ask the Governors to step up and provide the "outside of the Beltway" leadership that is needed to rehabilitate our dysfunctional national government. The best and perhaps the only way to do that begins with amending Article V of the U.S. Constitution to provide reciprocity in the initiation of amendments. Once this is accomplished, state initiated amendments can resolve some of the biggest controversies. The new process will be especially important for resolving problems that have proven to be intractable at the federal level. In many cases, removal to the state level will make them easier to resolve because Congressional conflicts of interest are circumvented or because our diversity can only be respected by avoiding the "one size fits all" requirement of national solutions. Inaction is a recipe for democratic collapse. Please contact your governor's office and let them know how you feel about the ideas expressed in this essay (see Appendix C for contact information).

Appendix A: About the Author

Some of the ideas in the essay will be controversial and all warrant robust discussion and debate. Ideas have (or lack) utility, logic and legitimacy independently of their source. Nonetheless, it is human nature to be curious about the source. This page is an attempt to provide the relevant biographic information and, hopefully, to reduce *ad hominem* distractions.

I was a constitutional law practitioner, but not an academic. As a state legislator, from 1974 to 1993, I proposed several amendments to the Hawai'i State Constitution that were enacted by the legislature and ratified by the voters. In addition, I filed three *pro se* legal challenges to the actions of other elected officials, even when the defendants were friends, over constitutional questions concerning legislative reapportionment, the failure to follow the constitutional requirements for proposing an amendment, and the application of a "resign to run" requirement when an elected official runs for another office in the middle of their term.

As a Honolulu Deputy Prosecuting Attorney in the Appellate Division, I responded to defense appeals. These often alleged violations of a defendant's constitutional rights. Later, as a Honolulu District Court Judge (1995-2001) I ruled on the occasional constitutional arguments that were raised in the cases assigned to me.

As both a legislator and as a lawyer/judge, I gained an appreciation for the crucial role of process in establishing institutional consistency and legitimacy. This essay arose from a very simple insight: fix the process first. Only after the process is optimized will optimal outcomes be possible.



Appendix B: List of Organizations Seeking Constitutional Amendments

ACLU: leadership@ACLU.org
125 Broad Street, 18th Floor, New York, NY 10004

American Enterprise Institute: MediaServices@aei.org
14150 17th Street, NW, Washington, DC 20036

American Sustainable Business Council: blive@bloomberg.net
1401 New York Ave., N.W., Suite 1225
Washington, DC 20005

Brennan Center for Justice: brennancenter@nyu.edu
Brennan Center for Justice, New York University 161 Avenue of
the Americas, 12th floor, New York, New York 10013

Campaign Legal Center: tips@campaignlegal.org
1411 K St. NW, Suite 1400, Washington, DC 20005

Common Cause: dvance@commoncause.org
805 15th Street NW, 8th Floor, Washington, DC 20005

Communications Workers of America (AFL-CIO): comms@cwu-union.org
501 3rd Street NW, Washington, DC 20001

Constitutional Accountability Center: nina@theusconstitution.org
1200 18th Street NW, Suite 501, Washington, D.C. 20036

Convention of States Action: no published email address found
5850 San Felipe, Suite 580, Houston, TX 77057

Demos: media@demos.org
220 Fifth Ave., 2nd Flr., New York, NY 10001

Heritage Foundation: no published email address found
heritage press@heritage.org

Free Speech for People: no published email address found
505 West 38th Street, Unit A4, Austin, TX 78705

Institute for Constitutional Advocacy and Protection: reachICAP@georgetown.edu
600 New Jersey Ave. NW, Washington, DC 20001

Issue One (aka Fund for the Republic): ccombs@issueone.org
11 Dupont Circle, Suite 350, Washington, DC 20036

MapLight: info@maplight.org
2223 Shattuck Avenue, Berkeley, CA 94704

Move to Amend: no published email address found

PO Box 610, Eureka, CA 95502 &
1402 M Street, Eureka, CA 95501

People for the American Way:

1101 15th Street NW, Suite 600, Washington, D.C. 20005

President Biden:

comments@whitehouse.gov

Public Citizen:

obaddar@citizen.org
1600 20th Street, NW, Washington, DC 20009

Senator J.D. Vance

vance.senate.gov/contact
1240 East 9th Street, Room 306, Cleveland, OH 44199

Trump, Donald (Former President):

no published email address found

United 4 the People:

admin@unitedforthepeople.org
402 W Palm Valley Blvd Suite 177, Round Rock, TX 78664

U.S. PIRG (Public Interest Research Group):

communications@publicinterestnetworks.org
294 Washington, St., Suite 500, Boston, MA 02108

Vice President Harris:

vice.president@whitehouse.gov

Appendix C: Contact Information for Readers to Reach Governors

I hope you will be motivated enough to contact your elected officials and ask them to support the ideas and the new constitutional amendment process proposed in this essay. Contacting the Governor of your state is the place to start. If the email address is not current, the website will almost certainly have a form that can be used to submit comments.

Alabama
Governor Kay Ivey
State Capitol N-104
600 Dexter Avenue
Montgomery, AL 36130-2751
Fax:(334)353-0004
Tel:(334)242-7100
email: Please use the website form.
web: governor.alabama.gov

Alaska
Governor Mike Dunleavy
State Capitol
P.O. Box 110001
Juneau, AK 99811
Fax:(907)465-3532
Tel:(907)465-3500
email: governor@gov.state.ak.us
web: governor.alaska.gov

Arizona Governor Katie Hobbs
State Capitol West Wing
1700 W. Washington, 9th Fl.
Phoenix, AZ 85007
Fax:(602)542-1381
Tel:(602)542-4331 11/98
email: azgov@azgov.com
web: az.governor.gov

Arkansas Governor Sarah Huckabee Sanders
250 State Capitol Bldg.
Little Rock, AR 72201
Fax:(501)682-1382
Tel:(501)682-2345
email: info@governor.arkansas.gov
web: governor.arkansas.gov

California Governor Gavin Newsom
State Capitol, 1st Fl.
Sacramento, CA 95814
Fax:(916)558-3160
Tel:(916)445-2841
email: governor@governor.ca.gov
web: gov.ca.gov

Colorado Governor Jared Polis
136 State Capitol Bldg.
Denver, CO 80203-1792
Fax:(303)866-2003
Tel:(303)866-2471
email: Governor.polis@state.co.us
web: colorado.gov/governor

Connecticut Governor Ned Lamont
State Capitol
210 Capitol Ave.
Hartford, CT 06106
Fax:(860)524-7396
Tel:(860)566-4840; (800) 406-1527
email: Please use the website form.
web: portal.ct.gov

Delaware Governor John Carney
Legislative Hall
Dover, DE 19901
Fax:(302)577-3118
Tel:(302)577-3210 11/00
email: jcarney@state.de.us
web: governor.delaware.gov

Florida Governor Ron DeSantis
The Capitol
Tallahassee, FL 32399-0001
Fax:(850)487-0801
Tel:(850)488-7146 11/02
email: Ron.DeSantis@myflorida.com
web: flgov.com

Georgia Governor Brian Kemp
Office of the Governor
206 Washington Street
111 State Capitol
Atlanta, GA 30334
Fax:(404)657-7332
Tel:(404)656-1776

email: georgia.governor@gov.state.ga.us
web: gov.georgia.gov

Hawaii Governor Josh Green
5 State Capitol
Honolulu, HI 96813
Fax:(808)586-0006
Tel:(808)586-0034
email: gov@gov.state.hi.us
web: governor.hawaii.gov

Idaho Governor Brad Little
State Capitol Bldg.
West Wing, 2nd Fl.
P.O. Box 83720
Boise, ID 83720-0034
Fax:(208)334-2175
Tel:(208)334-2100 11/98
email: Please use the website form.
web: gov.idaho.gov

Illinois Governor J.B. Pritzker
207 State Capitol Bldg.
Springfield, IL 62706
Fax:(217)782-3560
Tel:(217)782-0244
email: governor@state.il.us
web: gov.illinois.gov

Indiana Governor Eric Holcomb
206 State House
Indianapolis, IN 46204
Fax:(317)232-3443
Tel:(317)232-4567 11/00
email: Please use the website form.
web: in.gov

Iowa Governor Kim Reynolds
State Capitol Bldg.
Des Moines, IA 50319
Fax:(515)281-6611
(515)281-5211
email: Please use the website form.
web: governor.iowa.gov

Kansas Governor Laura Kelly
Two State Capitol
Topeka, KS 66612-1590
Fax:(913)296-7973

Tel:(913)296-3232
email: Constituent@governor.wpo.state.ks.us
web: governor.kansas.gov

Kentucky Governor Andy Beshear
700 State Capitol
Frankfort, KY 40601
Fax:(502)564-2517
Tel:(502)564-2611 Check
email: governor@mail.state.ky.us
web: governor.kentucky.gov

Louisiana Governor Jeff Landry
State Capitol
P.O. Box 94004
Baton Rouge, LA 70804-9004
Fax:(504)342-0002
Tel:(504)342-7015 Check
email: Please use the website form.
web: gov.louisiana.gov

Maine Governor Janet Mills
State House Station 1
Augusta, ME 04333
Fax:(207)287-1034
Tel:(207)287-3531 11/98
email: governor@state.me.us
web: maine.gov

Maryland Governor Wes Moore
State House
100 State Circle
Annapolis, MD 21401
Fax:(410)974-3275
Tel:(410)974-3901
email: Please use the website form.
web: governor.maryland.gov

Massachusetts Governor Maura Healy
State House
Office of the Governor
Boston, MA 02133
Fax:(617)727-9725
Tel:(617)727-3666
email: GOffice@state.ma.us
web: mass.gov

Michigan Governor Gretchen Whitmer
Olds Plaza

P.O. Box 30013
Lansing, MI 48909
Fax:(517)335-6863
Tel:(517)373-7858
email: Please use the website form.
web: michigan.gov

Minnesota Governor Tim Walz
130 State Capitol
St. Paul, MN 55155
Fax:(612)296-2089
Tel:(612)296-3391
email: tim.walz@state.mn.us
web: mn.gov

Mississippi Governor Tate Reeves
P.O. Box 139
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Fax:(601)359-3741
Tel:(601)359-3100
email: governor@goreeves.ms.gov
web: governorreeves.ms.gov

Missouri Governor Mike Parson
216 State Capitol
P.O. Box 720
Jefferson City, MO 65102
Fax:(573)751-1495
Tel:(573)751-3222 11/00
email: mogov@mail.mo.gov
web: mo.gov

Montana Governor Greg Gianforte
204 State Capitol
Helena, MT 59620
Fax:(406)444-4151
Tel:(406)444-3111
email: Please use the website form.
web: governor.mt.gov

Nebraska Governor PJim Pillen
State Capitol
P.O. Box 94848
Lincoln, NE 68509-4848
Fax:(402)471-6031
Tel:(402)471-2244
email: Please use the website form.
Web: governor.nebraska.gov

Nevada Governor Joe Lombardo
Executive Chambers, Capitol Complex
Carson City, NV 89710
Fax:(702)687-4486
Tel:(702)687-5670
email: governor@govmail.state.nv.us
web: gov.nv.gov

New Hampshire Governor Chris Sununu
208-214 State House
Concord, NH 03301
Fax:(603)271-2130
Tel:(603)271-2121
email: Please use the website form.
web: governor.nh.gov

New Jersey Governor Phil Murphy
State House
Trenton, NJ 08625
Fax:(609)292-5212
Tel:(609)292-6000
email: Please use the website form.
web: nj.gov

New Mexico Governor Michelle Lujan Grisham
State Capitol Bldg.
Santa Fe, NM 87503
Fax:(505)827-3026
Tel:(505)827-3000
email: gov@gov.state.nm.us
web: governor.state.nm.us

New York Governor Kathy Hochul
State Capitol
Albany, NY 12224
Fax:(518)474-3767
Tel:(518)474-8390
email: www.governor.ny.gov/content/governor-contact-form
web: governor.ny.gov

North Carolina Governor Roy Cooper
116 W. Jones St.
Raleigh, NC 27603-8001
Fax:(919)733-2120
Tel:(919)733-4240
email: governor.office@governor.ncmail.net
web: governor.nc.gov

North Dakota Governor Doug Burgum
State Capitol
600 E. Boulevard Ave.
Bismarck, ND 58505-0001
Fax:(701)328-2205
Tel:(701)328-2200
email: governor@state.nd.us
web: governor.nd.gov

Ohio Governor Mike DeWine
Vern Riffe Ctr.
77 S. High St., 30th Fl.
Columbus, OH 43215
Fax:(614)466-9354
Tel:(614)466-3555
email: gofbci@governor.ohio.gov
web: governor.ohio.gov

Oklahoma Governor Kevin Stitt
2300 N. Lincoln Blvd.--Room 212
Oklahoma City, OK 73105
Fax:(405)521-3353
Tel:(405)521-2342
email: Please use the website form.
web: oklahoma.gov

Oregon Governor Tina Kotek
254 State Capitol
Salem, OR 97310
Fax:(503)378-6827
Tel:(503)378-4582
email: Please use the website form.
web: oregon.gov

Pennsylvania Governor John Shapiro
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Harrisburg, PA 17120
Fax:(717)783-4429
Tel:(717)787-2500
email: governor@state.pa.us
web: pa.gov

Rhode Island Governor Daniel McKee
State House
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Tel:(401)277-2080 ext 227
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web: governor.ri.gov

South Carolina Governor Henry McMaster
State House
P.O. Box 11369
Columbia, SC 29211
Fax:(803)734-5167
Tel:(803)734-2100 11/02
email: governor@govoepp.state.sc.us
web: governor.sc.gov

South Dakota Governor Kristi Noem
State Capitol
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Pierre, SD 57501-5070
Fax:(605)773-5844
Tel:(605)773-3212 1
email: sdgov@gov.state.sd.us
web: governor.sd.gov

Tennessee Governor Bill Lee
State Capitol
Nashville, TN 37243-0001
Fax:(615)532-9711
Tel:(615)741-2001
email: bill.lee@state.tn.us
web: tn.gov

Texas Governor Greg Abbott
State Capitol
P.O. Box 12428
Austin, TX 78711 Fax:(512)463-2000
Tel:(512)463-1762 11/98
Tel:(800)252-9600 (Texas callers only)
email: governor@state.tx.us
web: gov.texas.gov

Utah Governor Spencer Cox
210 State Capitol
Salt Lake City, UT 84114
Fax:(801)538-1528
Tel:(801)538-1734
email: governor@utah.gov
web: utah.gov

Vermont Governor Phil Scott
Pavilion Office Bldg.
5th Fl.
109 State St.
Montpelier, VT 05609

Fax:(802)828-3339
Tel:(802)828-3333 11/00
email: pshumlin@state.vt.us
web: governor.vermont.gov

Virginia Governor Glenn Youngkin
State Capitol
Richmond, VA 23219
Fax:(804)371-6351
Tel:(804)786-2211
email: Please use the website form.
web: virginia.gov

Washington Governor Jay Inslee
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P.O. Box 40002
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web: evers.wi.gov

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web: governor.wyo.gov