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Speech

The Brennan Lecture:

Rebuilding State Legislatures as Instruments of Self-Government

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Thank you so much for welcoming me to the Oklahoma City University School of Law to give the William J. Brennan lecture this year. I want to thank Andy Spiropolous for the invitation to speak tonight, and to everyone at OCU Law School who helped to organize my visit, especially Kelli Hildreth. It has been wonderful to spend time with everyone here over the past day.

I consider Justice Brennan to be a great defender of the courts and their role in modern society. His dissenting opinion in an administrative law case, *CFTC v. Schor*, resisted the encroachment of the administrative state into the power of the judiciary.[[2]](#footnote-3) It’s one of my favorite opinions in administrative law.

I’m especially happy to be giving this talk because of the purpose of this lecture series, to explore timely issues in state constitutional law. Justice Brennan’s famous article on state constitutionalism proclaimed that “state courts no less than federal courts are and ought to be the guardians of our liberties.”[[3]](#footnote-4) He is justly praised for emphasizing the role that state institutions play in our political system.[[4]](#footnote-5)

Today, the study of state governments is sadly neglected in America. Citizens spend more time thinking about a distant government in Washington D.C.—one that probably affects their lives to a lesser extent than what goes on in their state capital.[[5]](#footnote-6) Scholars tend to neglect the important role that states play in representing and serving communities. In doing so, we miss both an important part of the picture of governance in America, and an opportunity to improve self-government in our country.

So, I want to adapt Justice Brennan’s point about state courts, but modify it slightly. Just as state courts are guardians of our liberties—no less than federal courts—state *legislatures* are and ought to be instruments of self-government no less than the U.S. Congress.

I want to focus on state legislatures tonight, and their role in the future of self-government. Like many, I’m increasingly concerned about the toxicity, dysfunction, and gridlock in American politics today.[[6]](#footnote-7) Yet in the midst of this dysfunction, I see opportunities for restoring healthy and civil political debate, and improving government’s ability to represent the people it serves. The most promising way forward is for us to focus on the proper role of state governments in a self-governing republic, and to strengthen state legislatures as important places for deliberation.

First, I want to trace the current state of self-government in America, focusing especially on the dramatic increase in polarization, and the corresponding decrease in deliberation occurring in our national legislature. In doing this, I will explain how and why we got to this point by shifting our attention and power to the national government, and to executives rather than legislatures.

Second, and more constructively, I will discuss what we are learning—perhaps “relearning”—about the role of state legislatures in our federal republic. There is a lot more deliberation happening in our state legislatures than is commonly believed.[[7]](#footnote-8) But I will argue for increasing the capacity and professionalism of state legislatures, and explore the ways in which we might accomplish that goal.

**The Current State of Self-Government**

We can summarize the current state of self-government in America rather easily and briefly. Americans do not feel like they are self-governing.[[8]](#footnote-9) They do not generally feel like their government is responsive to their wishes and needs.[[9]](#footnote-10)

Public opinion polls are increasingly unreliable in the age of cell phones, so they must be taken with a grain of salt. Nevertheless, the data confirms the picture that our eyes and ears tell us: the overwhelming feeling people have about the national government is distrust, anger, and frustration.[[10]](#footnote-11) Only twenty-four percent of Americans trust Washington to do the right thing all or most of the time.[[11]](#footnote-12) Sixty-nine percent say they are frustrated or angry at the federal government.[[12]](#footnote-13) On October 19, 2022, Ballotpedia’s “Number of the Day” was sixty-one percent.[[13]](#footnote-14) That’s the percent of people who would vote to replace the entire United States Congress if given the choice to keep or replace all the members.

This sentiment is not confined to one party. More than forty percent of those who voted for Joe Biden think it may be time to split up America.[[14]](#footnote-15) Over fifty percent of Trump’s voters believe the same.[[15]](#footnote-16) This is not a pretty picture. A large portion of Americans do not want to live under the rules made by their fellow citizens. They feel like that kind of government will not represent them.

Why do Americans feel this way about their national government? After all, we still hold elections, and majorities who win those elections are able to accomplish at least some of what they promise on the campaign trail. It is true, of course, that the Constitution and the rules of the Senate place roadblocks in the way of hasty legislation. As James Madison explained in *The Federalist*, the Senate exists to prevent “mutability in the public councils, arising from a rapid succession of new members,” thus avoiding “a continual change even of good measures.”[[16]](#footnote-17) In other words, part of the reason the Senate exists is to slow down the changes in laws, and to reduce the government’s responsiveness to public opinion.

Alexander Hamilton echoed Madison’s sentiments in his own contributions to *The Federalist*. As he argued, “[i]t is a just observation that the people commonly intend the public good . . . . . But their good sense would despise the adulator, who should pretend that they always reason right about the means of promoting it.”[[17]](#footnote-18) Therefore the Constitution’s Framers did not trust the liberties of the people to a “pure democracy.” Instead, they established a republic which filters public opinion through the “medium” of representatives who could “refine and enlarge the public views.”[[18]](#footnote-19)

The Constitution’s roadblocks slow down the process of enacting laws, so that temporary passions have time to cool off, leaving only sound reasons in favor of the laws that survive the legislative gauntlet. The downside to this cooling off process, of course, is that the people may see government as unresponsive to changes in public opinion. This may be part of the cause of the current disillusionment with American government today.

**Decline of States and Legislatures**

But these constitutional roadblocks, in my view, are not the primary reason why Americans are so frustrated with a government they think is unresponsive and dysfunctional. There are two deeper causes for that. Both of these causes stem from massive differences between the way the Constitution was designed and how it actually functions today.

The Constitution was designed to place most of the deliberation about politics in the states and localities. In a passage so often quoted it has become almost trite, James Madison proclaimed in *Federalist* number 45 that “the powers delegated by the . . . Constitution to the federal government are few and defined,” while “those which are to remain in the State governments are numerous and indefinite.”[[19]](#footnote-20)

Most decisions were intended to be made by governments at a level closer to the people, namely the states and localities, where it was easier to represent constituents and to find areas of agreement and common ground. And further, most of the decisions in the states would be made by legislatures, with representatives close to the people and able to deliberate together before making laws. The result? People were actually able to speak to their representatives and ensure their representative was voicing the concerns of the people, as opposed to campaigning, performing on social media, or fundraising.

The Framers of the Constitution believed in this division of sovereignty because they believed that we would pay most attention to the state governments, not the national government. In *Federalist* number 17 Alexander Hamilton explained that the state governments will be “the immediate and visible guardian of life and property . . . . This great cement of society” will make citizens much more attached to the state governments than the national government.[[20]](#footnote-21) By contrast, Hamilton believed that the national government’s authority, “falling less immediately under the observation of the mass of the citizens, the benefits derived from it will chiefly be perceived and attended to by speculative men.”[[21]](#footnote-22)

What a difference a few centuries make! Instead of focusing on the tangible and immediate benefits that state governments provide, citizens seem exclusively concerned with national affairs. At the same time that our attention has shifted to the national government, which is more distant and much more pluralistic, it has also shifted from legislatures to executives. This has led to two problems.

The first problem is that our country is too big, and too varied in its interests and views, for a single government to represent all of it. This was something that many understood from the beginning. The Anti-Federalists, those who opposed the Constitution, believed that only small republics were viable.[[22]](#footnote-23)

In his first essay, the Anti-Federalist writer “Brutus” argued that only small republics can remain truly self-governing. “In a republic,” he proclaimed, “the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions, and the representatives of one part will be continually striving against those of the other.”[[23]](#footnote-24) Sounds familiar, right?

The Federalists responded to this objection by taking it seriously, not by ignoring it. They reassured the Anti-Federalists that only some decisions would be made by the national government. The states, where the people’s needs were truly felt, would retain most of the power. As James Madison put it in *Federalist 10*, “[t]he federal Constitution forms a happy combination . . . the great and aggregate interests being referred to the national, the local and particular to the State legislatures.”[[24]](#footnote-25) Our local interests, they reassured us, would remain at the level of government closest to us.

In other words, the Federalists agreed that if *all* decisions were made by the national government, it would lead to the continual conflict that Brutus feared. One half of the country would always be angry at the decisions made by the other half. So, the Framers’ solution was to decentralize decisions to the communities where sentiments and views were shared.

Much of this decentralization remains in place. As one recent study notes, “[n]early 20 percent of the American economy is directly regulated by states.”[[25]](#footnote-26) State governments affect insurance, land use, transportation, education, health care, basic criminal justice, and taxes. But we spend too little of our time in these arenas and focus too much on national politics. This increases the kind of perpetual conflict, and the erosion of self-government, the Anti-Federalists feared.

The second reason for the decline of self-government is that executives have taken over many of the functions performed by legislatures. This has reduced the pluralistic diversity of interests, represented in the legislature by many different representatives.

The costs to bargaining, compromising, and building consensus have been significant. One person cannot represent all of the views and interests across an entire state, even relatively small states. Instead of promoting deliberation on the floor of a legislature, where different points of view can be aired publicly and compromises can be made among shifting coalitions, decision-making increasingly centralizes in a single person.

Of course, when one person has the power to make decisions, the election of that person takes on enormous consequences. Close to half of the people, who didn’t vote for the winner, will feel as if they aren’t represented. Consolidating power in the hands of a single person makes elections feel like winner-take-all. Whoever wins the executive branch runs the show. The party that loses has to oppose and fight, hoping to gain power in the next election. This is a recipe not for compromise, or consensus, but for animosity.

In short, just as Anti-Federalists would have predicted, the more we centralize and consolidate decision-making, the less we will feel like the government represents us. And that feeling is driving a lot of the pathologies we see in politics today. Part of the solution is to look to the states and the legislatures, and to strengthen their ability to represent us effectively.[[26]](#footnote-27)

**Strengthening Our State Legislatures**

Thus far I’ve relied on basic Anti-Federalist insights in explaining our current predicament. Anti-Federalists insisted that representatives had to be close to the people, both in proximity and in ratio of representatives to constituents, for self-government to function effectively.[[27]](#footnote-28) They would have easily predicted the current distrust of “the Establishment.”

But the Anti-Federalists got one thing badly wrong. While they were right to diagnose the problems with creating a large country with so many clashing interests and opinions, they were wrong to suggest that amateur legislators were the best antidote to faction and conflict.

Many people today continue to adopt the Anti-Federalist mindset in thinking about state legislatures. They idealize the citizen-legislator, who sets aside their pitchfork and leaves the family farm to serve a term or two in the state capital before returning to private life.

Such people should be admired as individuals, of course. But a legislature composed of amateurs poses serious problems. Political scientists are beginning to understand the benefits that come from increasing legislative professionalism and capacity.[[28]](#footnote-29)

What ingredients contribute to a professional legislature? Most studies break legislative professionalism or capacity into three factors. First, legislatures that hold longer and more frequent sessions have greater capacity. Most state legislatures are in session for only a few months per year.[[29]](#footnote-30) But in the states with longer sessions, members gain more time to study the issues, conduct committee hearings, and deliberate on the floor. They also spend more time together, increasing trust and the space where bargaining and compromise can occur. Second, legislatures that have adequate staff resources have greater capacity.[[30]](#footnote-31) They are able to learn more about the intricacies of state programs and laws, and to follow developments in their state’s government. Third, legislatures have greater capacity when they compensate their legislators adequately.[[31]](#footnote-32) The members in these legislatures do not have to work a second job to make ends meet. They can spend their time on their primary jobs as legislators.

In addition, adequate compensation helps to attract talented legislators and keep them in office. This allows them to develop expertise and gain experience, and to become effective advocates of their constituents’ interests. California pays its legislators over $110,000 per year, New York legislators make six figures, and Pennsylvania legislators make upwards of $90,000. Only twelve states total, though, pay their legislators more than $50,000.[[32]](#footnote-33) New Mexico’s legislators receive a salary of zero.[[33]](#footnote-34) Thus there is an enormous gap across states in terms of legislator compensation.

The leading measures of state legislative capacity revolve around these three factors: session length, staff, and legislator pay.[[34]](#footnote-35) In the legislative capacity rankings, several states consistently appear at the top of the list: California, New York, Pennsylvania, and Michigan, the state where I reside.[[35]](#footnote-36) Several states typically appear at the bottom: Wyoming, the Dakotas, Montana, and Utah.[[36]](#footnote-37) Oklahoma is in the middle of the pack; it has the 22nd most professional state legislature.[[37]](#footnote-38)

It’s tempting to look at the results and think that ideology or partisanship is the key factor that determines the level of professionalism. But the main factor seems to be culture and geography. The most professional legislatures are in states that were formed longer ago, and that are more densely populated.[[38]](#footnote-39) The least professional legislatures are from states with more of a frontier culture.[[39]](#footnote-40)

Over the past several decades, as one study explains, some state legislatures have emerged from “horse and buggy, 18th century anachronisms” to well-run and professional institutions.[[40]](#footnote-41) There was a reform period between the 1960s and the 1980s in which several of the state legislatures were reformed in this way. Nevertheless, most state legislatures still lack the capacity they need to be effective.

The National Conference of State Legislatures categorizes state legislatures into Green, Gray, and Gold.[[41]](#footnote-42) Members in Green legislatures spend eighty to one-hundred percent of a full-time job on their legislative work, and they have full-time and well-compensated staff. In the Gray and Gold categories, staff resources are much lower, and legislators spend only half to two-thirds of a full-time job on their work.

Only ten states fall into the Green category: Alaska, California, Hawaii, Illinois, Massachusetts, Michigan, New York, Ohio, Pennsylvania, and Wisconsin.[[42]](#footnote-43) Aside from Alaska and Hawaii, these states tend to be older and more highly populated. The other states have yet to catch up.

Increasing the capacity and professionalism of state legislatures would make them more effective institutions for self-government. Sometimes fiscal and other conservatives balk at increasing the professionalism of state legislatures. They fear the creation of a state “establishment.” Again, this is especially true in the Rocky Mountain region, where the old notions of frontier legislatures are still powerful and resistant to professional legislators.

The problem with this view is that, in most states, an executive establishment already exists. To oppose strengthening the legislature is to make that establishment less accountable to the elected representatives. When legislators in a majority of states have no paid staffers and have little time to develop experience in being an effective legislator, it is easier for lobbyists or the executive branch to influence them. A study in 2000 found five registered state lobbyists for every legislator.[[43]](#footnote-44) Since 1980, governors have been spending more terms in office, and their staff support has exploded. Oversight, in this environment, will range from ineffective to nonexistent.

**The Effects of Legislative Capacity**

Empirical research has shown that legislative professionalism has profound, and—in my view—healthy consequences for self-government. In my time remaining I would like to highlight three of these effects.

*Closer to Constituents*

First, representatives in legislatures with greater professionalism tend to be more attentive to the concerns of their constituents.[[44]](#footnote-45) They are in closer contact with their constituents and better know their interests and views. Their own views are more closely aligned with their constituents’. In short, professional legislatures more closely align, and are more closely connected, with the people they are representing.[[45]](#footnote-46)

Related to this point, research shows that power tends to be more dispersed among many members in professional legislatures. This makes sense. Providing more salary and staff to individual members helps to empower them. As a result, rank-and-file members have more of a say in these states.[[46]](#footnote-47) Committee chairs and party leaders do not call all of the shots in these state legislatures. Thus, in more professional state legislatures more voices are heard, collecting a truer representation of the people.

*Less Partisan/Majoritarian*

Second, members of professionalized legislatures tend to act more independently of their party leaders than in amateur legislatures. They collaborate with other members to a greater extent—even those of the opposite party.

However, this effect varies significantly, depending on the state. This is because factors other than professionalism have considerable influence on partisan polarization and bipartisanship in the legislative process. Some state legislatures are very different than the United States Congress in this area, while others look a lot like Congress. Two leading theories in political science help to explain this.

Focusing mostly on Congress, scholars have developed a theory called “conditional party government.”[[47]](#footnote-48) This theory says that the majority party’s refusal to allow minority participation is conditional.[[48]](#footnote-49) The majority party will only shut out the minority if two things are true: first, there is a significant ideological gap between the two parties, and second, the majority party is ideologically homogeneous and therefore agrees internally on what it wants to accomplish. If the parties are not that far apart ideologically, or they have a lot of internal dissention, the majority party cannot just jam its agenda through the legislative process.

A second theory—called the “competition thesis”—compliments the conditional party government theory.[[49]](#footnote-50) That theory says that when a legislature is closely balanced between the two major parties, polarization actually *increases*. This is counterintuitive. It would seem that a closely divided legislature would encourage the two parties to work together, to move to the middle where the voters seem to be. But in fact, the opposite occurs. This is because when party competition is tight, the majority’s first priority is to secure and increase its majority. To do that, it shuts the minority party out of the process, so that the minority cannot run in the next election on “wins” it has just achieved. And the majority promotes its own agenda, so that it can run on a positive record to keep its majority in the next election. Conversely, when a majority party feels safe, those electoral considerations matter less, and the secure majority allows the minority to participate more meaningfully in the process. But, parties look very different at the state level compared to the national level. Members of a party who are elected at the state level can often define themselves as independent from the identity that the party carries nationally. To cite the most prominent and the most obvious example, Joe Manchin likes to refer to himself as a “West Virginia Democrat.”[[50]](#footnote-51) The “Democrat” is the modifier and the “West Virginia” is the noun. He is for his state first, his party second.

In the Senate, Manchin is the exception that proves the rule. Though there are a few others like him, such as Susan Collins in Maine or Jon Tester in Montana, you can mostly predict how a member of Congress will vote by looking at their party affiliation rather than their state.

At the state level, though, there are many more Joe Manchins. Vermont has a Republican governor. Kansas has a Democratic governor. Larry Hogan, a Republican, was—until recently—governor of Maryland.

Common sense indicates the reason for this. If the Democratic Party wants to remain viable in the Wyoming legislature, it must run candidates who are best fitted to the more conservative population of Wyoming. If Republicans want to be viable in Connecticut, they have to run candidates who do not always follow the national party line. State-level candidates can pull this off because they do not have to vote and take a stand on many of the issues that divide the two parties nationally.

The evidence suggests that some states’ legislatures are much less partisan-dominated than today’s U.S. Congress. The legislatures in Arizona, Iowa, Ohio, and Minnesota most closely resemble the congressional model, in which the majority party gets its measures enacted into law and the minority party members can’t get much done.[[51]](#footnote-52)

However, in other states, such as Montana, Arkansas, New Hampshire, Texas, and Louisiana, there is very little difference between the two parties’ effectiveness at getting legislation passed.[[52]](#footnote-53) In those states, members from the minority party get almost as much of their legislation passed as the majority party members.[[53]](#footnote-54)

In those states where conditions for diminished partisanship exist, greater legislative capacity can help rank-and-file members act more independently of party leaders.

If we are so frustrated by Congress’s constant focus on messaging rather than governing, and performing rather than deliberating together, why don’t we look to state legislatures as an alternative? And in doing so, we should strengthen their capacity to represent their constituents and deliberate on their behalf.

*Checking Executive Power*

The third and final effect of legislative capacity is, in my view, the most important. State legislative capacity prevents the accumulation of power in the executive. In an important new book, titled *Checks in the Balance*, Alexander Bolton and Sharece Thrower explain that “legislative capacity . . . is the key to preventing the accumulation of power in the hands of an encroaching executive.”[[54]](#footnote-55) They examine thousands of gubernatorial executive orders and conclude that governors tread more carefully in the face of high-capacity legislatures.

Other studies lend support to the argument from *Checks in the Balance* that legislative capacity works to check executive power. One recent article explains that, at the state level, “partisan legislators appear to use the resources at their control to shape bureaucratic results to their preferences,” and that “this effect is magnified when the legislature is more professionalized, and thus has a greater capacity to engage in oversight activities.”[[55]](#footnote-56) These kinds of studies reflect a common-sense understanding of legislative capacity: the more capacity a legislature has, the more likely it can influence policy outcomes and control the power that it delegates to the executive branch.

**State Legislative Vetoes and Legislative Effectiveness**

All of this empirical evidence supports the notion that state legislative capacity is positively related to stronger representation, bipartisanship, moderation, and greater constraints on executive power. In short, state legislatures that offer more pay, longer sessions, and more staff resources for members to do their work will be better representatives of their states.

One additional recent study offers support for all of these conclusions. It examined more than 80,000 bills over a total of 1,000 legislative sessions, in 49 of the 50 states, from 1987 to 2018.[[56]](#footnote-57) The authors concluded that state legislatures still function very differently than the United States Congress. Seniority, committee chairs, and powerful committees still matter in state legislatures to a greater extent than Congress today.[[57]](#footnote-58) In addition, moderates are generally more effective legislators in state legislatures than extremists. The most successful legislators in the states have been closer to the middle than to the fringes. Of course, this varies by state, but on the whole, there’s more moderation, more compromise, more committee work, more shared power, in our state legislatures.

One potential way to further strengthen the power of legislatures and committees, especially in state legislatures with real capacity, is the legislative veto. This enables one or both houses of a legislature to reverse an executive branch rule or order by majority vote.

For a time, Congress used legislative vetoes to make sure that the executive branch did not gain too much unchecked power. If it is inevitable that Congress must delegate lawmaking power to the bureaucracy, legislative vetoes are useful ways to keep the people’s representatives in charge of how that power is used.

Congress’s use of legislative vetoes, however, was abruptly ended by the Supreme Court in *INS v. Chadha* in 1983.[[58]](#footnote-59) In the *Chadha* case, the Supreme Court said that legislative vetoes violate the bicameralism and presentment provisions of Article I of the Constitution.[[59]](#footnote-60) They attempt to change the law in a manner not authorized by the Constitution’s process for making law.[[60]](#footnote-61)

Similar developments occurred at the state level.[[61]](#footnote-62) Around the same time as the *Chadha* decision, many state courts ruled their states’ legislative vetoes to be unconstitutional. At least ten state courts have issued such decisions.[[62]](#footnote-63) Two other states—Tennessee and Virginia—repealed their legislative veto statutes based on these other state decisions.

State constitutions, though, are more flexible than the U.S. Constitution. And some state legislatures still have a form of legislative veto. Several states amended their constitutions to establish a legislative veto. And these states span the partisan divide: Connecticut, Iowa, Michigan, Nevada, New Jersey, and South Dakota.[[63]](#footnote-64)

It is very hard to capture the wide variety of legislative veto mechanisms across the states. Some states use committees to conduct regulatory review; others rely on the entire chamber. Some state legislatures can only review proposed rules, while others can even go back and review existing ones. Some legislative vetoes only delay implementation of rules, while others strike them completely.

Some have concerns about the use of legislative vetoes. They worry that it makes it easier for interest groups to capture the regulatory process, by giving them a special place to lobby. Structured correctly, though, legislative vetoes should be a powerful mechanism for state legislatures to resist executive encroachment, and we should study them in more depth.

**Caveats**

To summarize: legislatures with greater capacity are different from Congress in three important ways. First, they are closer to their constituents and have greater contact and interaction with them. They listen to their concerns and act on them. Second, they are, in general, less dominated by partisanship, polarization, and party leaders. Third, they are better able to resist executive encroachment.

But there is a minor *caveat* to these findings. The *caveat* is this: some factors which strengthen legislative capacity have mixed effects.[[64]](#footnote-65) They might *strengthen* rank-and-file members relative to party leaders, but also *weaken* the legislature relative to the executive.[[65]](#footnote-66)

Term limits provide a good example. They seem to weaken party leaders and committee chairs compared to rank-and-file members.[[66]](#footnote-67) This makes sense: term limits prevent party leaders from emerging simply because they have been around forever. Yet they also weaken the legislature’s ability to check the executive branch.[[67]](#footnote-68)

In other words, there will likely be tradeoffs associated with any reform that tries to increase the capacity and professionalism of state legislatures. And there shouldn’t be a “one-size-fits-all” approach to how a state legislature should be organized.

But in spite of these caveats, the main principles apply. Legislatures that are more professional and have greater capacity are actually better at connecting constituents to their representatives and their government.

**Conclusion**

In concluding, let me issue a call to continue to strengthen state legislatures by increasing their professionalism. They are starved of the resources they need to do their jobs as instruments of self-government. Continuing to develop legislative capacity at the state level, based on the evidence in contemporary scholarship, may help to restore a healthy relationship between the government and the people. It won’t be a panacea, of course, but it certainly could help.

We are often described as a nation wracked by acrimony. National divorce is increasingly suggested by both sides. Resistance to the national government’s measures is routinely suggested by minority parties.

I think that this depiction of our country is distorted. Self-government is already happening at the state level. Most people just don’t know it, because they aren’t engaged there. In a provocative article last year titled “The Dirty Little Secret: Government Works,” Andy Smarick of the Manhattan Institute wrote that state governments are “the beating heart of American politics.”[[68]](#footnote-69) And though you won’t learn about this from media, they are still doing noble, productive work.

There are many reasons we don’t hear about this productive work. One is the staggering decline of local and regional newspapers. Another is the old precept of the media: if it bleeds, it leads. Stories about dysfunction sell, but stories about mundane compromise don’t elicit much of a reaction.

A further reason is that the kinds of people who roll up their sleeves and work together to solve problems aren’t interested in media attention. The disruptors, on the other hand, always want a camera around to capture a viral moment. For all of these reasons “we get a funhouse-mirror version of public policy” from the media, when we neglect the real work that is getting done closer to home.

The state and local governments, and the people who work in them, reveal a country still capable of deliberating together and promoting the common good. If we build up the capacity of these institutions to do the work of self-government, we may find that things are not as bad as they seem on national television and social media.

1. \* Associate Professor of Politics, Hillsdale College. This Article is a lightly revised version of the William J. Brennan Lecture at Oklahoma City University School of Law, delivered in October 2022. [↑](#footnote-ref-2)
2. . *See* CFTC v. Schor, 478 U.S. 833, 859 (1986). [↑](#footnote-ref-3)
3. . *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). [↑](#footnote-ref-4)
4. . *See* Francis P. McQuade, *Mr. Justice Brennan and His Legal Philosophy*, 33 Notre Dame L. Rev. 321 (1958). [↑](#footnote-ref-5)
5. . Jason A. Schwartz, *52 Experiments with Regulatory Review*, N.Y.U. Univ. School of L. Inst. for Pol’y Integrity Rep. No. 6, Nov. 2010 at 3. [↑](#footnote-ref-6)
6. . *See* Sarah Binder, *Going Nowhere: A Gridlocked Congress*, The Brookings Inst., (Dec. 1, 2000), https://www.brookings.edu/articles/going-nowhere-a-gridlocked-congress/. [↑](#footnote-ref-7)
7. . *See* Alan Rosenthal, *State Legislative Development: Observations from Three Perspectives*, 21 Legis. Stud. Q. 169, 171 (1996). [↑](#footnote-ref-8)
8. . *See* Joel Rose, *6 in 10 Americans Say Democracy is in Crisis*, Nat’l Pub. Radio, (Jan. 3, 2022), https://www.npr.org/2022/01/03/1069764164/american-democracy-poll-jan-6. [↑](#footnote-ref-9)
9. . *See* Megan Brennan, *Americans Largely Pessimistic about U.S. Prospects in 2023*, (Jan. 3, 2023), https://news.gallup.com/poll/467528/americans-largely-pessimistic-prospects-2023.aspx. [↑](#footnote-ref-10)
10. . *See* *Public Trust in Government Near Historic Lows*, Pew Rsch. Ctr., Washington D.C. (June 6, 2022), https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/. [↑](#footnote-ref-11)
11. . *Ibid.* [↑](#footnote-ref-12)
12. . *See* Vanessa Barford, *Why are Americans so Angry?*, BBC News (Feb. 4, 2016), https://www.bbc.com/news/magazine-35406324. [↑](#footnote-ref-13)
13. . *See* Scott Rasmussen, *Scott Rasmussen’s Number of the Day for October 19, 2022*, Ballotpedia (Oct. 19, 2022), https://ballotpedia.org/Scott\_Rasmussen%27s\_Number\_of\_the\_Day\_for\_October\_19,\_2022. [↑](#footnote-ref-14)
14. . *See* Rich Lowry, *A Surprising Share of Americans Wants to Break Up the Country. Here’s Why They’re Wrong*, Politico (Oct. 6, 2021), https://www.politico.com/news/magazine/2021/10/06/americans-national-divorse-theyre-wrong-515443. [↑](#footnote-ref-15)
15. . *Ibid.* [↑](#footnote-ref-16)
16. . James Madison, “The Federalist, no. 62,” in Jacob Cooke, ed., *The Federalist*, 419-20. [↑](#footnote-ref-17)
17. . Alexander Hamilton, “The Federalist, no. 71,” in *The Federalist*, *supra* note 15, at 482. [↑](#footnote-ref-18)
18. . James Madison, “The Federalist, no. 10,” in *The Federalist, supra* note 15, at 61-62. [↑](#footnote-ref-19)
19. . James Madison, “The Federalist, no. 45,” in *The Federalist, supra* note 15, at 313. [↑](#footnote-ref-20)
20. . Alexander Hamilton, “The Federalist, no. 17,” in *The Federalist*, *supra* note 15, at 107. [↑](#footnote-ref-21)
21. . *Ibid*, at 108. [↑](#footnote-ref-22)
22. . *See* *Essays of Brutus*,N.Y. J., (Oct. 1787 – Apr. 1788). [↑](#footnote-ref-23)
23. . *Ibid.* [↑](#footnote-ref-24)
24. . James Madison, “The Federalist, no. 10,” in *The Federalist*, *supra* note 15, at 63. [↑](#footnote-ref-25)
25. . Jason Schwartz, *supra* note 4, at 3. [↑](#footnote-ref-26)
26. . This was a critical theme of early 20th Century conservatives, who repeatedly emphasized the need for the state governments to do the work of regulating and governing their economies. Only in this way, they reasoned, could we avoid centralizing that power in the national government. *See, e.g.*, Calvin Coolidge, *The Reign of Law*, May 30, 1925, in Am. Conservatism, 1900-1930: A Reader (2019), 144-148. [↑](#footnote-ref-27)
27. . *See supra* note 21. [↑](#footnote-ref-28)
28. . *See* Peverill Squire, *A Squire Index Update*, 17 State Pol. & Pol’y Q. 361, 362 (2017). [↑](#footnote-ref-29)
29. . *See* Joseph Postell, *Emergency Powers and State Legislative Capacity During the COVID-19 Pandemic*, 15 N.Y.U. J. L. & Liberty 628 (2022). [↑](#footnote-ref-30)
30. . *See* Peverill Squire, *Measuring State Legislative Professionalism: The Squire Index Revisited*, 7 State Pol. & Pol’y Q. 211, 214 (2007). [↑](#footnote-ref-31)
31. . *See* Carey, Niemi, & Powell, *Incumbency and the Probability of Reelection in State Legislative Elections*, 62 J. of Pol. 671, 683 (2000). [↑](#footnote-ref-32)
32. . See, *2022 Legislator Compensation*, National Conference of State Legislatures (July 12, 2022), https://www.ncsl.org/about-state-legislatures/2022-legislator-compensation. The states are Alabama, Alaska, California, Hawaii, Illinois, Maryland, Massachusetts, Michigan, New York, Ohio, Pennsylvania, Washington, and Wisconsin. Two things must be further noted. First, a handful of states determine their salaries by the number of legislative days. For instance, Kentucky pays its legislators $188.22 per legislative day, and Montana pays $100.46 per legislative day. These states tend to remain on the low end of the range of state legislator pay. Second, many states provide a significant per diem and mileage reimbursement, which likely supplements legislator compensation to a degree. [↑](#footnote-ref-33)
33. . *Ibid.* The New Mexico per diem rate, however, is $202 as of Fiscal Year 2023. [↑](#footnote-ref-34)
34. . *See* Squire, *supra* note 29, at 211 (2007). [↑](#footnote-ref-35)
35. . *See* Peverill Squire, *Legislative Professionalization and Membership Diversity in State Legislatures*, 17 Legis. Stud. Q. 69, 72 (1992). [↑](#footnote-ref-36)
36. . *Ibid*, 71. [↑](#footnote-ref-37)
37. . *Ibid*, 72. [↑](#footnote-ref-38)
38. . *Ibid.* [↑](#footnote-ref-39)
39. . *Ibid.* [↑](#footnote-ref-40)
40. . Christopher Z. Mooney, *Citizens, Structures, and Sister States: Influences on State Legislative Professionalism*, 20 Legis. Stud. Q. 47, 47 (1995). [↑](#footnote-ref-41)
41. . *See* *Full- and Part-Time Legislatures*, Nat’l Conf. of State Legis. (July 28, 2021), https://www.ncsl.org/about-state-legislatures/full-and-part-time-legislatures. [↑](#footnote-ref-42)
42. . *Ibid.* [↑](#footnote-ref-43)
43. . *See* John Dunbar & Leah Rush, *Study Finds $565 Million Spent on Lobbying in the States in 2000*, Ctr. for Pub. Integrity (May 1, 2002), https://publicintegrity.org/politics/state-politics/influence/hired-guns/ratio-of-lobbyists-to-legislators-2006/. [↑](#footnote-ref-44)
44. . *See* Peverill Squire, *A Squire Index Update*, *supra*, 362 (2017). [↑](#footnote-ref-45)
45. . *See* Jeffrey Harden, *Multidimensional Responsiveness: The Determinants of Legislators’ Representational Priorities*, 38 Legis. Stud. Q. 155, 156 (2013). [↑](#footnote-ref-46)
46. . *See* Peter Bucchianeri et al., *Legislative Effectiveness in the American States*, Ctr. for Effective Lawmaking, 32 (2020). [↑](#footnote-ref-47)
47. . *See* John H. Aldrich and David W. Rohde, *The Transition to Republican Rule in the House: Implications for Theories of Congressional Politics*, 112 Pol. Sci. Q. 541 (1997-1998); Aldrich & Rohde, *The Consequences of Party Organization in the House: The Roles of the Majority and Minority Parties in Conditional Party Government*, in Polarized Politics: Congress and the President in a Partisan Era (2000). [↑](#footnote-ref-48)
48. . *See also* Gary W. Cox & Mathew D. McCubbins, Setting the Agenda: Responsible Party Government in the U.S. House of Representatives (2005). [↑](#footnote-ref-49)
49. . Frances E. Lee, Insecure Majorities: Congress and the Perpetual Campaign (2016). [↑](#footnote-ref-50)
50. . *See* Jon Meacham, *Joe Manchin: The Outlier*, Time Mag. (June 19, 2014), https://time.com/2899492/joe-manchin-west-virginia-senator/. [↑](#footnote-ref-51)
51. . *See* Peter Bucchianeri, *supra* note 45 at 16 (2020). [↑](#footnote-ref-52)
52. . Ibid. [↑](#footnote-ref-53)
53. . Ibid. [↑](#footnote-ref-54)
54. . See, Alexander Bolton and Sharece Thrower, *Checks in Balance: Legislative Capacity and the Dynamics of Executive Power*, Princeton University Press: Princeton New Jersey (2022). [↑](#footnote-ref-55)
55. . Frederick J. Boehmke and Charles R. Shipan, *Oversight Capabilities in the States: Are Professionalized Legislatures Better at Getting What they Want?* 15 State Politics and Policy Quarterly 366, 380 (2015). [↑](#footnote-ref-56)
56. . *See* Peter Bucchianeri et al., *Legislative Effectiveness in the American States* (Ctr. for Effective Lawmaking Working Paper 2020), https://thelawmakers.org/legislative-research/legislative-effectiveness-in-the-american-states. [↑](#footnote-ref-57)
57. . *Ibid*, 2. [↑](#footnote-ref-58)
58. . *See* INS v. Chadha, 462 U.S. 919 (1983). [↑](#footnote-ref-59)
59. . *Ibid.* [↑](#footnote-ref-60)
60. . However, as Louis Fisher has explained, many provisions that are similar to the legislative veto have survived the *Chadha* decision. *See* Fisher, *The Legislative Veto: Invalidated, it Survives*, 56 L. & Contemp. Prob. 273 (1993). [↑](#footnote-ref-61)
61. . *See* Schwartz, *supra* note 4, at 32-33. [↑](#footnote-ref-62)
62. . *See* L. Harold Levinson, *The Decline of the Legislative Veto: Federal/State Comparisons and Interactions*, 17 Publius 115, 118 (1987). [↑](#footnote-ref-63)
63. . *Ibid*, 121. [↑](#footnote-ref-64)
64. . *See* Jill Nicholson-Crotty & Susan M. Miller, *Bureaucratic Effectiveness and Influence in the Legislature*, 22 J-PART 347, 362 (2012). [↑](#footnote-ref-65)
65. . *Ibid*, 359. [↑](#footnote-ref-66)
66. . *See* Gerald Wright, *Do Term Limits Affect Legislative Roll Call Voting? Representation, Polarization, and Participation*, 7 State Pol. & Pol’y Q. 256, 270 (2007). [↑](#footnote-ref-67)
67. . *See* Travis Baker & David Hedge, *Term Limits and Legislative-Executive Conflict in the American States*, 38 Legis. Stud. Q. 237, 240 (2013). [↑](#footnote-ref-68)
68. . *See* Andy Smarick, *The Dirty Little Secret: Government Works*, Manhattan Inst. (Nov. 8, 2021), https://www.manhattan-institute.org/the-dirty-little-secret-government-works. [↑](#footnote-ref-69)