

Constitutional Amendments to Fix America: A Brief Analysis

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By Nov.10, 2016, Americans again witnessed to Presidential election go to a candidate who lost the popular vote to his main rival: this has now happened *twice* in 16 years, in two out of the last five Presidential elections. But we do not need geographical affirmative action in the Presidential election: smaller-population states already have extraordinary amounts of extra weight in the federal Senate to protect their interests. The filibuster in the Senate makes minority domination there even worse, and thus prevents bipartisan compromise bills from passing. Similarly, in the House, a small leadership can prevent votes on bills that would gain large bipartisan majorities.

These are only three of the many deep structural problems that are making our federal system impotent and ineffective. The presidential veto is now massively overused; treaties cannot get ratified; full budgets rarely get completed; the danger of default on the federal debt is rising; many presidential appointments simply die from inaction in the Senate; and so on.

Americans have reached a point of fury at "gridlock in Washington" and a "corrupt system" being fueled by private money. During the 2016 election, many people expressed anger at Hillary Clinton for taking large campaign donations even though that is what our system has required for decades – unless one is a billionaire and can fund one's own presidential campaign. Encouraging ultra-rich candidates is a recipe for plutocracy. But neither candidate explained the root of campaign finance problems, which leaves people focusing on "corrupt politicians" when in fact the federal system forces them to raise money the way they do.

The last Presidential election was also manipulated by data thefts from one of the two campaigns, which prevents a level playing field. Strict limits on use of stolen data are clearly needed, along with much clearer criteria for impeachment, and guarantees to ensure that the Department of Justice remains independent of all political parties. Financial disclosures need to be required for elected officials and conflict-of-interest laws need to be strengthened.

People are also disgusted that they cannot vote for third party candidates without simply helping candidates one of the two dominant parties to win instead. Efforts to suppress turnout abound and people are worried about voter fraud, even though a national photo ID card could easily fix this. Gerrymandering of districts has reached extreme proportions, making too many House districts into "safe seats." This drives politicians to extremes to please primary voters. Due to all this gerrymandering, a party can also win the House despite getting a million less votes for House members in the election than the main rival party gets.

- Thus we can end up with minority rule in the Senate, the House, and Presidency all at once.
- D.C., a city with a majority of poorer black voters, has no Senators or voting House members.
- Puerto Rico also has no representation in Congress or weight in the Presidential election.
- The problems with Supreme Court appointments are also getting worse, with longer delays by those opposed to appointees, and many Presidential appointments at lower levels just ignored.

Too few Americans understand these *fundamental structural roots* of our national problems: no President or political party can solve them simply by winning an election anymore. Even holding the Presidency and both houses of Congress with a veto-proof majority, which is almost impossible, is not enough to break through gridlock, given the power of major lobbies today. These problems can only be solved through structural reforms that require constitutional amendments. I focus on *procedural amendments* concerning how the government works and how

elections operate, with the hope that wide agreement would be easiest on procedural issues.

Proposed Constitutional Amendments

Federal Elections in General

- Campaign finance and lobby limits (rejecting money = speech, corporate speech = personal)
 - the main reason for this change is to end special-interest domination via superpacs;
 - but it is also important to limit political advertising to bring us closer to deliberative ideals, and to reduce radical inequalities in political voice that exist within the electorate today.
- *Automatic runoff* systems for federal legislators and for the President, so that third parties can rise without functioning as spoilers.
- A fair national primary system with rotating dates for all states (e.g. 10 states vote on each of 5 dates, with each group of 10 getting its chance to be in the first primary every fifth election).
 - reasons for this include ending the grossly unfair influence of Iowa and New Hampshire.
- Provisions to ban political campaigns from using stolen information, including privileged material obtained through cybercrimes, especially when foreign powers are involved.
- Mandatory and massive sanctions against any foreign government that hacks into our political campaigns to influence American elections or otherwise tries to manipulate our system.
- Election day should be a national holiday, with two early voting dates mandated for each state (not more than two weeks before Election Day), the same vote-by-mail process for every state, and requirements that no voter have to wait in lines longer than one hour to vote.
 - the main reason for such measures is to increase participation and end voter suppression.
 - fairness also suggests that the same system should prevail across all states.
- The actual voting system and vote counting methods, including recount norms, should be set by one single federal standard for all states.
- Every citizen should be issued a national photo ID card with their Social Security number. This plus one other piece of identification should be sufficient to register to vote. The registry should automatically change their place of registration whenever they move, and the ID card should be sufficient everywhere to get into the voting booth.
- Every candidate for federal election, cabinet-level appointment, and appointment to the federal judiciary should disclose at least five years of tax returns.
- A requirement that every high school student take at least one semester of Civics covering the federal budget and basic tax law in the last 50 years, along with elementary macroeconomics.
 - to facilitate deliberative democracy with at-least minimally well-informed voters.
 - just as high school drivers education courses end with a provisional license after in-car training, this course could end with voter registration upon reaching age 18.

The Legislature

- end the filibuster in the Senate, which currently enforces even more extreme minority rule.
 - reasons for this include the original intent of the Grand Compromise in the Convention, and the reduction in coordinative power that departure from simple majority voting brings.
 - And without the filibuster, compromise legislation is much more likely to pass.
- an end to gerrymandering of House districts by adopting an impartial geometrical rule applied by independent districting boards, with strict limits on compactness of shape.
 - this would ensure more competitive districts and reduce the disproportionate influence of the most extreme primary voters on both ends of the political spectrum.
 - proportional representation across states might be even better, but is probably not feasible.
 - if House members could represent their states at-large rather than per geographical district, then cumulative voting for them could ensure some minority representation.
- at least a 10-year gap between serving in the House or Senate and serving as a paid lobbyist.

- No member of Congress can participate in making legislation from which he or she may realize large financial gain, or use any information obtained in Congress for insider trading.
- Reduce the threshold for approval of treaties to 3/5^{ths} of the Senate. If the Senate does not take a vote on a treaty within six months of its submission by the President, the treaty is automatically ratified.
 - this is necessary because it has become so hard to approve treaties now that Presidents seek to use other measures to circumvent the treaty process (e.g. esp. on trade); this makes our agreements unreliable because they are easily changed by each new administration.
- Agenda liberalization: 40% of House members can petition to force an item onto the House agenda for a vote.
 - this facilitates cross-party compromises on measures that a party leadership opposes.
- A *four-month* limit for the Senate to vote on all nominations made by the President, including especially Supreme Court nominations. In addition, Congress can appoint heads of any executive bureaus left vacant by the President for over six months.
 - this would end the backlog of empty positions while nominations are increasingly delayed, and Presidents resorting to interim appointments to dodge Congressional oversight.
 - it would also stop Presidents from undermining offices established by Congress.
- We cannot end state equality in the Senate, which is a fairly extreme form of minority rule, but we can make it less lopsided by making Puerto Rico into a state, treating Washington DC as a state (2 senators, House members proportional to population), and giving all other US protectorates outside state boundaries one senator and two House members.
- Possibly change the terms of the House members to four years, with a rotation so that half the House is elected every 2 years – to reduce time spent just on electioneering.
- Consider possible methods for cumulative voting within House and Senate procedures.
- Reduce to 3/5^{ths} the vote needed in both the House and the Senate to send a proposed constitutional amendment to the states for consideration and possible ratification.

The Presidency

- direct election of the President: no more Electoral College.
 - the main reason is to make all states important to Presidential election (ends the *winner-take-all* in each state system, which cannot be changed in fair way by just a few states at a time).
 - in addition, small-population states do not need further protection given the Senate.
 - and small states with 2 - 4 House members and thus 3-5 electors are greatly disserved relative to small states with 1 House member and 3 electors within the present system.
 - moreover, appointment of electors cannot just be left up to state governments.
 - history shows that the 1787 Convention came within one vote of adopting direct election, which was almost adopted again in 1967 (failing by 2 votes to pass the Senate).
- Reduce to 3/5^{ths} the threshold needed for the House and Senate together to override a President's veto -- to rein in excessive use or abuse of the veto in recent decades.
- But also give the President power to set a budget if Congress fails to pass a comprehensive budget by a given date; and give the President power to ensure that the government never defaults on its debt by balancing the budget if we reach the debt limit.
- Alter the clause on impeachment of the President to include gross incompetence, dereliction of duty, and gross violation of the customary norms of this high office.
- Clarify the need for the President and other high officials to be free of business ties or debts to foreign powers that could influence decisions impacting the well-being of the United States.
- Limit the pardon power to ensure that no President can pardon someone who is accused of a crime potentially linked with other officials in the President's inner circle, or the President's family, business associates, or close friends (courts could overturn such suspicious vetoes).

The Supreme Court and Judiciary

- An 18-year term limit for Supreme Court justices with a rotation system to ensure that each President appoints exactly two new justices to replace retiring ones.
 - reduces the "dead hand of the past effect," reduces problem of incompetent older judges.
 - ends incentive to appoint very young justices who may not be ready for this level.
 - ends politically strategic timing of retirement by serving justices.
 - fairness to voters: each President gets an equal level of influence on the Court, rather than having this determined by the contingencies of physical health.
- A mechanism for death or early retirement of justices: for example, in these cases, one of the nine chief judges of the Appellate courts is chosen by lot to become a Supreme Court justice immediately, without further confirmation, with the retirement date of the justice replaced.
- An option for federal courts to refer a law back to Congress for mandatory reconsideration (an option between ratifying or striking down a law).
- Clarification of the principled grounds on which the Supreme Court should decide cases not strictly dictated by the letter of the Constitution.

The Need for a New Constitutional Convention to accomplish such amendments

Critics will say it is impossible to pass such amendments, but smaller population-states may be persuaded by the advantages of becoming competitive arenas again, perhaps along with other amendments they favor. A constitutional convention makes this kind of compromise possible.

The history of the last 50 years, including the failure of Congress (by 2 votes) in 1967 to pass an amendment for direct election of the President, shows that Congress cannot fix its own problems or those of the federal system in general. The solution will have to come from the states, which have the power to fire a grass-roots movement by calling a convention to send out amendments for ratification – something that would renew hope among very frustrated citizens.

Yet in recent years, liberals in politics and academia have frequently expressed fear that a convention called directly by the states under Article V would be a "runaway" process leading to extreme right-wing dogma being enacted. This fear is heightened by Tea Party groups calling for such a convention and the recent similar call by Texas Governor Greg Abbott. Thus liberals tend to perceive the idea of a new convention as a far-right 'nuclear option.'

These fears are entirely unfounded and, taken to their logical endpoint, express despair over the very possibility of democracy fixing itself. Even if a convention passed some highly ideological amendments, e.g. banning Islam, or outlawing abortion after the first trimester, or demanding a balanced federal budget with no exceptions for deep recessions or other emergencies, 3/4 of the states would certainly not ratify them. A convention cannot "runaway" because of the ratification process. On the other hand, a new convention just might produce incredible results.

- it would inspire a deep national conversation and improve citizens' understanding;
- it would provide a positive way for people to channel the deep frustration that has built up about partisanship and anger at dysfunction in the federal government as a whole.
- this new source of hope could help rebuild civic virtue and a sense of fraternity in the nation;
- a convention would bring some of the best political minds of our time together under a call to transcend party politics, and do an end-run around the big lobby groups with a lock on DC;
- convention delegates, with historical reputations at stake, would be under great pressure to come up with innovative solutions and to produce substantive results that could be ratified;
- this offers the prospect for compromises that break basic logjams by combining into a single amendment provisions more favored by the left and provisions more favored by the right;
- several senior scholars have come to the same conclusion: see the work of Lawrence Lessig and Sanford Levinson among others.