

The Democratic Deficit in America

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I. Introduction

The term “democratic deficit” has become a staple of contemporary political analysis.¹ Most often used to analyze presumed deficiencies within the political order of the European Union,² it has all too much application as well to our own political order within the United States. Some analysts would no doubt point to the unseemly and often corrupting role played by money in our electoral process; others might note the continuing concerns simply about the reliability of counting the votes that are cast in our elections. No one, unfortunately, could come out of the last two presidential elections or the 2006 mid-term elections with unalloyed confidence that we meet this most basic test of democratic self-government. [new footnote 3] Other analysts have focused on the degree to which the partisan gerrymandering of legislative districts in effect allows representatives to choose their voters rather than the other way around.³ Though I agree that campaign financing, partisan gerrymandering, and the potential of election-day chaos present significant problems for anyone concerned about the future of American democracy, we delude ourselves if we believe that solving these problems alone would remove the root causes of our democratic deficit. Indeed, to a significant extent, the American democratic deficit is a function of the Constitution itself.

A provision of the New York Constitution in effect requires the New York electorate every 20 years to answer yea or nay to the question, “Shall there be a convention to revise the constitution and amend the same?”⁴ The constitution also sets out procedures for holding the convention should the electorate vote in the affirmative.⁵ The New York constitution is not unique among American state constitutions in offering what one writer has described as a “mandatory referendum” that “enforce[es] the people’s right to reform their government.”⁶

Imagine that the United States Constitution contained such a sensible provision and, therefore, that we had the same opportunity as New Yorkers and the residents of thirteen other states to take part of such a referendum. Or imagine being in a similar position to voters in France, Holland, Iraq, and Kenya, four nations that in the past two year years gave their publics the opportunity to ratify proffered constitutions, either national (Iraq and Kenya) or transnational (France and Holland with regard to the draft constitution for the European Union). Should we have such an opportunity ourselves, I would vote “yes” myself and heartily advocate that everyone else do so as well. It is well past time to call a new convention authorized to consider the multiple ways in which the Constitution does not adequately protect, in 21st century terms, what we would like to believe is our national commitment to democratic self-government. And, it is worth noting, my zeal to call such a convention is not abated in the least because of the Democrats’ victory in the recently concluded mid-term elections. Indeed, a major point of what follows below is that those victories, however welcome, will have far less impact on the actual course of American politics because of the undemocratic features of the Constitution that

I will be highlighting. The fact that Democrats will now be able to prevent some truly awful legislation does not in the least translate into the proposition that Democrats have become empowered actually to enact into law the kinds of progressive legislation presumably supported by most members of the American Constitution Society.

I note at the outset that I have no particular desire to engage in “Founder bashing” or harsh criticism of those who decided in 1787-88 to vote to ratify the constitution placed before them.⁷ The issue is not at all the sagacity of those men in meeting the challenges of *their* era; it is whether we should continue to be trapped in the particular constitutional cage they bequeathed us.

The Founders themselves would scarcely be surprised by my questions and criticisms. “Is it not the glory of the people of America,” Madison wrote in Federalist #14, “that . . . they have not suffered a blind veneration for antiquity [or] for custom . . . to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?”⁸ Madison was, of course, speaking to his own compatriots, but there is surely no reason to believe that the “glory of America” would come to an end with the ratification of the Constitution. Even more telling is a letter written within two months of the Philadelphia Convention by its president, George Washington, to his nephew Bushrod:

“The warmest friends and the best supporters the Constitution has do not contend that it is free from imperfections . . . t]he People (for it is with them to Judge) can, as they will have the advantage of experience on their Side, decide with as much propriety on the alteration and amendment which are necessary. I do not think we are more inspired, have more wisdom, or possess more virtue, than those will come after us.”⁹

We should accept Madison’s and Washington’s invitation to talk about some of the “lessons” of our experience with the current Constitution.

What follows consists of two parts. The first part sets out what lawyers might call a “bill of particulars” against the Constitution. What are the particular features of the Constitution that most contribute to a serious democrat deficit in our country today? The second part asks in many ways a more difficult question: How indeed can We the People correct these deficiencies?

II. A Bill of Particulars

The easiest way of setting out the bill of particulars is by asking a series of questions.

1. Even if you support having a Senate in addition to a House of Representatives, do you support giving Wyoming the same number of votes as California, which has roughly seventy times the population? Can a country ostensibly committed to “one person one vote” justify such a system of political representation in the 21st century?

2. Are you comfortable with an Electoral College that, among other things, has regularly placed in the White House candidates who did not receive a majority of the popular vote? Since World War II alone, that list includes Harry Truman, John F. Kennedy, Richard Nixon, Bill Clinton (twice), and George W. Bush. Whether one admires or disdains these presidents, one can scarcely describe them as “the people’s choice” if that term suggests majority support.

Moreover, almost all of these elections were close enough that the shifts of relatively few votes in certain states would have created deadlocks in the Electoral College, requiring, under the Twelfth Amendment, the ultimate decision to be made by the House of Representatives. Assuming the existence of the Electoral College in the first place, one might find this reasonably sensible. But can you possibly believe that the crucial votes in the House should be taken a “one state one-vote” basis? There is no defense for Vermont’s Peter Welch, good Democrat that he is, for having an equal say in such a momentous decision as the entire thirty-two person (and majority Republican) delegation from Texas, or for Alaska’s Don Young being able to offset the fifty-three (and majority Democratic) delegation of representatives from California.³ Is it appropriate that a president can frustrate the will of a majority of both houses of Congress by vetoing legislation with which he disagrees on purely political grounds? American law professors endlessly obsess about the “countermajoritarian” difficulty allegedly posed by the fact that the Supreme Court has, over our 220-year history, invalidated approximately 165 federal laws.¹⁰ Presidents, on the other hand, have vetoed 2501 laws, many of them of great import.¹¹ Of course, the threat of impending veto directly shapes more ongoing legislative battles than does the possibility that a court will overturn legislation at some indefinite point in the future. In any event, anyone who expects great things from the now-Democratic Congress should be aware that a fire-breathing dragon can emerge at any moment from the White House and negate any legislation that the Democrats can pass.

4. Is it a desirable feature of the Constitution that the impeachment clause enables us to rid ourselves of a criminal president, but leaves us at the tender mercies of an incompetent one until the conclusion of his or her fixed term of office? Might we not have something valuable to learn from the great majority of countries that have some mechanism by which sufficient loss of confidence in the nation’s primary political leader can lead to the termination of his or her tenure in office?

5. Does it make sense that an incumbent defeated in a national election maintains the presidency for a full ten weeks beyond election day, fully capable of making policy decisions that may drastically effect the future of the United States? We the People recognized that the original March 4 inauguration day disserved the nation, and we added the Twentieth Amendment to the Constitution. But January 20, both literally and metaphorically, is far closer to March 4 than it is to the first Tuesday in November. One might contrast our approach with Great Britain’s, where a new prime minister literally replaces a defeated incumbent the very next day. One might, incidentally, ask similar questions about “lame-duck Congresses, including the discredited Republican Congress that will meet one last time in November-December 2006.

6. Do you really want justices on the Supreme Court to serve up to four decades and, among other things, to be able to time their resignations to mesh with their own political preferences? Almost no other country has genuine life tenure. Most have mandated retirement ages, and many countries have specific terms of service.¹²

7. Do you support the ability of thirteen legislative houses in as many states to block constitutional amendments desired by the overwhelming majority of Americans and, potentially, by eighty-six out of the ninety-nine legislative houses in the American states?

These questions are largely rhetorical. If and only if you answer affirmatively to *all* of them are you an unequivocally proud supporter of our Constitution; in that event, you should without hesitation cast a vote in a national referendum to retain it. If, however, you share my own negative response to all, or even some, of the issues I highlight, you recognize that ours is a distinctly imperfect Constitution and that we should, as Washington and other luminaries suggested, spend less time celebrating our Constitution and more time asking if it is indeed serving us well. As a matter of fact, the really difficult task is not to criticize the Constitution but, rather, to suggest feasible ways of responding to its many imperfections.

III. The Pathways of Change

The Constitution contemplates its own amendment in Article V, but renders it virtually impossible. One political scientist has determined that the United States has the most difficult-to-amend constitution in the entire world.¹³ Bruce Ackerman has noted the extent to which “non-Article V” amendments may have occurred over our history with regard to new conceptions of national power, as occurred during the New Deal.¹⁴ Ackerman is undoubtedly correct, but he does not pay adequate attention to the basic imperviousness of the “hard-wired” structural aspects of the Constitution, as set out above.

Article V offers one crucial alternative to the ordinary amendment process, namely, a new constitutional convention, which Congress must call upon the petition of two-thirds of the states. It is unlikely that thirty-four states will agree to a full-scale convention, not least because the fourteen smallest states would not tolerate revision of the Senate. After all, the organization of the Senate assures that highly populous states will receive far less in federal per capita revenues than the less populous, and thus more represented, states. Ross Perot’s colorful terminology of the “giant sucking sound”¹⁵ adequately describes dollars moving from New York, California, and other large states to Wyoming, Idaho, and the Dakotas. Indefensible boondoggles like the “bridge-to-nowhere”¹⁶ are directly traceable to the Constitution’s allocation of voting power in the Senate.

The kind of change that the United States needs will come only if the public mobilizes itself behind the possibility of a new convention and, in effect, forces Congress to call one even in the absence of state petitions.¹⁷ Only if serious discussion begins now and the long, hard work of political mobilization

begins soon will it be thinkable, as the country faces ever further fundamental crises, to rise to the example of our courageous and visionary Founders and craft a Constitution that is suitable for the 21st century. I do believe that, should a convention take place, the participants would be well advised to emulate the Founders and establish a new ratification procedure for its handiwork. Just as the Founders paid no attention to the unwise unanimity requirement set out in Article XIII of the Articles of Confederation,¹⁸ so should the founders of a constitution adequate to the 21st century ignore Article V in favor of a national referendum.

I conclude with some observations on two very common reactions to my proposal. The first expresses fear at the possibility of awakening the slumbering giant that is “We the People” and actually taking popular sovereignty seriously enough to contemplate the possibility of a genuine national conversation about the adequacy of our Constitution. I fear that those who describe themselves as “progressive” in their politics have become basically Hamiltonian in their fundamental mistrust of their fellow citizens. A movement that fears the people can scarcely hope for success—at least in a democracy. Lincoln spoke of government *by* the people as well as *for* them. Are we more comfortable, at the end of the day, embracing the second vision of politics than the first?

A second, linked, response is to point out that the United States is not in fact committed to “democracy” but, instead, is a “republic.” There is a reason, after all, why the term “democracy” appears nowhere in the Constitution, whereas Article IV does guarantee to each State a “Republican Form of Government.”¹⁹ In some sense, this point is absolutely correct. The founders were in fact committed to some version of a “Republican Form of Government,” and not to what we would today recognize as a modern democracy.

But the point is that we have, almost entirely for the better, wandered far from our 18th century “republican” roots. The 18th century version of the republican form of government was, among other things, racialist and patriarchal, not to mention religiously skewed. [new footnote 21] For the most part, only propertied, Protestant white men were invited into the republican experiment. Everyone else was pretty much an onlooker. Nor, of course, was there any nonsense about “one person, one vote.”

I do not accuse contemporary partisans of “republican” (as distinguished from “democratic”) government of supporting such outmoded and rejected institutions as slavery or the subordination of women. Still, I wonder whether the impulse to emphasize that the Founders never intended to create a “democracy” is not mired in the same kind of worship of tradition that led earlier generations to oppose prior important changes in our polity. These have included such fundamental changes as the abolition of slavery, the lifting of racial and gender bars to the suffrage, and the turning over of election of United States senators to the populace. In all instances, defenders of the status quo argued that the changes violated our “republican” commitments.

I do not rule out the possibility that my particular suggestions for eliminating the policy veto, the electoral college, the equal-vote allocation of power in the Senate, etc., are not only debatable, but even

out-and-out bad. That said, I am confident that simplistic reminders that "we are a republic, and not a democracy," do not contribute to the public debate unless they are accompanied by a robust theory of precisely how the anti-democratic, anti-majoritarian features of our Constitution serve important public values beyond simply making it difficult for the majority to rule.

I suggest, then, this final act of imagination: you have been invited to consult with a new country trying to draft a constitution. Its leaders describe themselves as devoted to "democratic values." Do you try to talk them out of that commitment? And, whatever your answer, would you suggest that the "hard-wired" structural features of our own Constitution – in contrast to explicit rights protecting clauses such as those in the Bill of Rights – offer a good model for their country? To the extent that you would veer away from presenting our own Constitution as a model, it is worth asking what besides blind faith would suggest that it is altogether adequate to our own situation.

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¹ **I note that a search for "democratic deficit" on Google produces about 472,000 entries.**

² See e.g., Jennifer Mitchell, *The European Union's "Democratic Deficit": Bridging the Gap between Citizens and EU Institutions*, available at

<http://www.eumap.org/journal/features/2005/demodef/mitchell/>; Andrew Moravcsik, *Is There a 'Democratic Deficit' in World Politics? A Framework for Analysis*, 30 *Gov't and Opposition* 336 (2004), available at <http://www.princeton.edu/~amoravcs/library/framework.pdf>

(new footnote)³. There is, perhaps appropriately, given the 2000 election fiasco in Florida, a raging dispute about the operation of voting machines and the accuracy of the vote count in the 13th Congressional District in Florida, which had been represented by the egregious Katherine Harris, the architect of George Bush's "victory" in that earlier election. See Jeremy Wallace, "Political Staffs Head to Sarasota," *The Lakeland Ledger*, November 11, 2006, available at

<http://www.theledger.com/apps/pbcs.dll/article?AID=/20061111/NEWS/611110461/1003/NEWS01>

³ See, e.g., the classic article by T. Alexander Aleinikoff and Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 *Mich. L. Rev.* 588 (1993).

⁴ N.Y. CONST. art XIX, § 2.

⁵ *Id.*

⁶ See Robert J. Martineau, *The Mandatory Referendum on Calling State Constitutional Conventions: Enforcing the People's Right to Reform Their Governments*, 31 *Ohio State L. J.* 421 (1970)

⁷ If I were going to be critical of the Founders, it would be because of the compromises made with regard to slavery, an issue no longer before us.

⁸ THE FEDERALIST No. 14 (James Madison) (Clinton Rossiter ed., 1961).

⁹ Letter from George Washington to Bushrod Washington (Nov. 9, 1787), in THE PAPERS OF GEORGE WASHINGTON, <http://gwpapers.virginia.edu/index.html>.

¹⁰ For one compilation of invalidations of federal laws, see THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 2117-2150 (Cong. Ref. Service,

Library of Congress, 2004)(158 cases); for another see Lee Epstein et al., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 163-166 (3rd ed. 2003)(162 cases).

¹¹ See Michael A. Sollenberger, *Congressional Overrides of Presidential Vetoes*, Congressional Research Service Report for Congress, April 7, 2004, available at

<http://72.14.209.104/search?q=cache:aCbNW7VBpNUJ:www.senate.gov/reference/resources/pdf/98-157.pdf+%22Congressional+Overrides+of+Presidential+Vetoes%22&hl=en&gl=us&ct=clnk&cd=1>

¹² See e.g., Tom Ginsburg, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 40 (2003).

¹³ See Donald Lutz, *Toward a Formal Theory of Constitutional Amendment*, in Sanford Levinson, ed., *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237 (1995).

¹⁴ See Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION*, supra n. 13, at 63 (1995).

¹⁵ See Jeffery J. Mondak, *NEWSPAPERS AND ELECTIONS IN A SOCIAL EXPERIMENT* (1995).

¹⁶ See Carl Hulse, *How to Unite Congress: Spend Billions on Roads*, *N.Y. TIMES* (March 11, 2005).

¹⁷ I do not read the Constitution to say that Congress can call such a convention *only* if the states petition it to do so. Rather, Congress *must* call a convention should the petitions come raining in. But Congress always has the option to call a convention on its own.

¹⁸ Articles of Confederation art. XIII, para. 1.

¹⁹ U.S. CONST. art. IV, § 4.

New footnote 21: An indispensable book on this point is Rogers Smith, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN AMERICA* (1997).