

Some Constitutional Reforms that America Needs but Are Not Likely to See Anytime Soon

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Scholars who point to ways in which the Constitution changes over time through processes of informal amendment, in which the Court is one player, cannot mean to suggest that all constitutional problems can be solved informally. Justice Scalia, in warning that the Constitution is not more democratic than the founders chose to give us, indicates that there are boundaries to how democratic that document is. If we want to make it more democratic, the argument is that we should amend it, and not try to achieve through judicial activism what cannot be achieved through the political process and through the Article V amendment process(es).

John Hart Ely won legions of devotees by arguing that the Constitution gave the Court power to intervene, in the name of enhancing democracy, when the political process deliberately and systematically excluded discrete and insular minorities, rendered their voice ineffective, and made it impossible for them to resolve their grievances there. Constitutional authorization for such intervention came from the overarching commitment to the democratic process. But there are other democracy-denying or damping aspects of the Constitution that don't have a fix in the judicial branch because it is far from clear that some alternate reading of a clause or two would overcome obstacles in the document itself to some version of the democratic process that we might consider desirable.

In *Our Undemocratic Constitution*, Sandy Levinson challenges Americans to propose a constitutional convention to fix some of these problems and to make America

more democratic. I'm going to join this call, focusing on a few specific problems and why they should be remedied (though others readily come to mind). There are strong voices and interests advantaged by current arrangements, and there are always some unknown consequences when change is instituted. Political scientists know that fear of discrete or tangible loss focuses the mind and helps mobilize constituencies far more effectively than hope of a less tangible gain, and that minorities mobilize more easily than majorities. Therefore, although we can certainly talk about what is wrong with current arrangements and what would likely be advantageous about change, I am less optimistic than Sandy that a constitutional convention, if called, would move to alter the Constitution in the ways I would like. Maybe that convention would propose to make abortion and gay marriage illegal (although perhaps such changes would fail); or ban the federal government from passing along unfunded mandates to the states; or eliminate certain understandings of the "wall" of separation between church and state so that prayer can once again find its way into public schools and religion regain its rightful place in American life; or require that any regulation that negatively affects the value of private property constitute a "takings" requiring compensation; or dramatically reduce (eliminate?) the power of the Supreme Court or curb its capacity to hear particular types of cases; or require that the federal government balance the budget each year (many state constitutions have such requirements, and these take great creativity to circumvent). Given the interests that have worked hard to mobilize at the local, state, and national level over the past quarter century, conservatives and libertarians surely have plenty of ideas to try out. Democrats may have won an important victory in 2006, but they should not mistake this for the kind of infrastructure more conservative elements have put in

place around the country. What might result from a constitutional convention actually frightens me.

Nevertheless, let me step up to the plate as a political scientist to propose a few constitutional reforms that I think would greatly enhance the quality of democratic deliberation and political participation in America. One of these does not, in my opinion, actually require a constitutional amendment, but it has become so much a part of the fabric of our politics (just as have political parties) that such a change probably could not be implemented without an amendment in this day and age. Sandy Levinson and Robert Dahl¹ have written so effectively about the over-representation of small states in the Senate that I will not belabor this reform. So I want to concentrate on the following:

- Mandating that Supreme Court decisions require 2/3 of the voting members in the majority
- Eliminating the Electoral College
- Guaranteeing that individual citizens have a federal constitutional right to vote for President (and for members of the House and Senate); eliminating felony disenfranchisement
- Changing the method by which redistricting occurs following the decennial census (and also reversing the Supreme Court's decision in *Department of Commerce v. U.S. House* 525 U.S. 326 (1999) while we're at it)
- Instituting proportional representation and preferential voting.

Proposal #1: Supreme Court Supermajority Voting

The number of justices to serve on the Supreme Court is not fixed by the Constitution. The Judiciary Act of 1789 called for the appointment of a Chief Justice and five Associate Justices. Not until after the Civil War was there something approaching a consensus that the number of justices would be nine. Notice that the six-member court created by Congress has an interesting property: a simple majority and a two-thirds

¹ Robert Dahl, *How Democratic is the American Constitution?*, 2nd ed. (New Haven: Yale University Press, 2003).

majority are the same number—4. If we extend the term “framers” to the first Congresses that engaged in what Ted Lowi terms “constitutive” policy establishing the government, what did they intend? That judicial decisions (whatever it was that the Court would take up and consider) be made by a simple majority or a supermajority? The simple majority vote is in no way sacrosanct.

If we can leave aside our knowledge and investment in particular precedents and decisions that currently hang by the most slender of threads, consider the consequences of the “radical” proposal to change to a supermajority. There are quite a few advantages. For Mark Tushnet and others who entertain the possibility of taking the Constitution away from the Court, this reform would reduce the number of cases that a closely divided Court could produce. When the Court writes a large number of 5-4 opinions, other branches of government, states and state officials, and the attentive public are more likely to see the Court as political and the outcomes as arbitrary, thus undermining the prestige and authority of the Court. Under a supermajority rule, the Court would simply not be able to issue opinions if they could not marshal the votes.

Would we want to contemplate requiring that a supermajority sign on to the majority opinion, not just concur in the judgment? This would displease Cass Sunstein, who wants to give members room to concur on results but differ on principles and reasons. The one advantage of this even more radical idea is that fragmented decisions are not very helpful to legislators and policy makers, or to lower courts. However, it is a) highly useful to democratic deliberation to hear how different justices reason about the meaning of the Constitution, and b) differently reasoned concurrences and dissents may

help generate “nodes of conflict”² (Julie Novkov’s term) for those outside the Court who are also engaged in generating constitutional meaning. Therefore, I would not “sign on” to this additional requirement.

Even the simple version of the supermajority rule could lead to greater pressure for members of the Court to “sign on” or to compromise—or if it kept the Court from deciding certain highly controversial issues, perhaps this would be acceptable. Individual presidents would have somewhat lesser capacity to change the direction of the Court. It is even thinkable that a Court producing fewer closely divided opinions and a more stable body of precedent would make that body a less attractive target of activists of all stripes. We might still find many decisions wrong-headed, but we would likely have a somewhat less politically engaged Court.

Proposal #2: Kill the Electoral College

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, §1. (*Bush v. Gore*, per curiam opinion, IIB)

Sandy Levinson has already made clear how Byzantine is the system we have for electing presidents. The Court seems to have determined that it was just too messy and problematic to leave the 2000 election to the House of Representatives, even though the framers seem to have expected many presidents to be selected by the House under the system ultimately adopted in Philadelphia.³ And here is certainly an arena in which the Constitution has been informally amended. As *Bush v. Gore* makes clear, citizens have

² The term is Julie Novkov’s. *Constituting Workers, Protecting Women* (Ann Arbor: University of Michigan Press, 2001).

³ John P. Roche, “The Founding Fathers: A Reform Caucus in Action,” edited and reprinted in Samuel Kernell and Steven S. Smith, *Principles and Practice of American Politics*, 2nd ed. (Washington: C.Q. Press, 2004), 63. Originally appeared under same title in *American Political Science Review* 55 (December 1961). (Yet another instance of the Court privileging the power of the Executive over that of Congress?)

no constitutional right to vote for electors for president of the United States unless their home state legislature chooses to allow citizens to select electors. South Carolina became the last state to allow for direct popular election of electors, a change made nearly a century and half ago. During the 19th century, the move to allocate electors on a unitary basis statewide also gained momentum—again, not constitutionally mandated. Maine and Nebraska allow electoral votes to be split at the Congressional district level.

California considered such a proposal. Consolidating electoral votes arguably gives the state more clout; dividing them makes it somewhat less likely that the electoral vote will diverge as much from the popular vote as it currently can and does. Tinkering with but retaining the Electoral College has its own set of considerations. However, we should eliminate it completely, and doing so has the potential to increase interest and turnout among voters.

The office of President of the United States has become far more powerful in the 21st century—and even more powerful in the past few years—than it was at the time of the founding. Some of the recent growth in the office in the era of George W. Bush must be rolled back and contained (I will leave these Constitutional Amendments to someone else to propose and discuss.) I simply assert that someone this important who claims to represent “all the people” should be elected by the people. If electors simply cast their votes mechanically as the popular vote of the state goes, they serve no positive purpose—it is simply a ritual in most years. There is, to be sure, no popular recourse for the faithless elector problem. But the more serious issue arises because a) small states have a disproportionate share of votes in the Electoral College and b) in close elections, the state’s entire slate of electoral votes will be generally be thrown to the presidential

candidate who gets a bare plurality of the popular vote total. I have long predicted that the next time a popular vote for President diverged from the electoral vote, the Electoral College would be gone. I was wrong. We need to alter the Constitution now.

This reform enhances democracy in more than one way. Yes, it allows the people's voice better to prevail, favoring popular majorities over states and allowing more votes to "count". However, it does more. Political scientists know that citizens are more likely to take an interest in elections and to vote when there is an active campaign going on where they are. Many states and Congressional districts are currently ignored by candidates, either because they are sure to win or sure to lose that state. Battleground states get a tremendous number of candidate visits (along with visits by other national politicians and celebrity friends). A very few battleground states get an enormous infusion of money, media buys, and candidates.⁴ The timing of primaries privileges some voters even more. While residents of tiny New Hampshire, with 4 electoral votes, have trouble counting the number of primary candidates who visit their towns or living rooms, residents of some states have never been engaged in campaigns or courted. In those areas where candidates are invisible, where no campaign advertisements run, and where the election is remote, participation is lower and electoral turnout is lower. When the potential electorate is mobilized, their interest in issues and in politics is higher.⁵ The Electoral College system demobilizes many potential voters because of the strategic behavior of candidates.

⁴ See Levinson, *Our Undemocratic Constitution*, 88.

⁵ Steven J. Rosenstone and John Mark Hansen, *Mobilization, Participation and Democracy in America* (Longman Classics, 2002) have richly demonstrated that citizens participate in electoral activities when mobilized. But often they are not asked, and this is often quite deliberate.

From this perspective, one objection to the elimination of the Electoral College is that in a strict popular vote system, candidates would concentrate on large metropolitan areas, and that rural America would be neglected. With the current strength of the Christian conservatives, I doubt ex-urban and rural American voters would be neglected anytime soon. Moreover, considering the under representation of urban racial and ethnic citizens in the Census enumeration, and therefore the under representation of these citizens in the apportionment of representatives, this attention would not be inappropriate. At present, most of this attention is given by Democrats. As Jack Rakove argues, “the logic of the current system encourages candidates to focus on those issues and approaches that seem most likely to sway undecided voters or mobilize loyalist turnout in the contested jurisdictions.”⁶ Parties are currently unlikely to seek to mobilize those who do not participate since these nonparticipants do not simply mirror the electorate and they introduce a great deal of uncertainty into election outcomes.⁷ If the Electoral College bites the dust, a vote would be a vote wherever it were cast throughout the country. Instead of the current system where candidates, parties, and 501C-3s use negative advertising to try to demobilize those relatively inattentive voters who might be persuaded not to cast that vote for their opponent (in other words, if his/her negatives are high enough), and devise strategies to put together winning coalitions of states, we might see an attempt to actually turn out voters so long as the parties as a whole are sufficiently competitive on the national level.

⁶ Jack N. Rakove, “Presidential Selection: Electoral Fallacies,” *Political Science Quarterly* 119, No. 1, 2004, 36.

⁷ Frances Fox Piven and Richard A. Cloward, *Why Americans Don't Vote* (New York: Pantheon, 1988). See the discussion of felony disenfranchisement below. Piven and Cloward argue that historic efforts by reformers in the Progressive Era to demobilize African-American and immigrant working class voters in the late 19th and early 20th centuries shaped the character of nonvoting.

It is simply not the case that the framers were conscientiously attempting to create a presidential selection method that added additional protections for federalism. The system for electing presidents was one of the last matters settled in Philadelphia in the summer of 1787, having been referred to a Committee of Eleven at the end of August. There were many considerations involved, including fatigue, when the final plan was reported out.⁸ Opponents of the “plebiscitary presidency” bemoan the loss of something important to constitutional design: “If the states are removed from the presidential election system, these unique and celebrated features of political locale will lose much of their significance . . . With a national plebiscite, the media mavens will not have to leave their offices in New York, Washington, or Los Angeles to run a presidential campaign.”⁹ However, having taught Farrand, I am convinced that the creation of an Electoral College was nowhere near as clearly argued out or considered as many other provisions of the Constitution. It resulted in part from fears that the populace could not be trusted to make good decisions and would not know candidates outside their own states or regions. As John Roche argues, the framers were pragmatists and the Electoral College “was merely a jerry-rigged improvisation which has subsequently been endowed with a high theoretical

⁸ George C. Edwards III, *Why the Electoral College is Bad for America* (New Haven: Yale University Press, 2004), the most thorough and extensive treatment of the problem of the Electoral College. As Edwards argues, “Most of the motivations behind the creation of the electoral college are simply irrelevant today and can be easily dismissed” (89). See also Max Farrand, *Records of the Federal Convention*, Vol. II and for a classic work calling for direct election of the president, Neal R. Peirce, *The People’s President* (NY: Simon & Schuster, 1968; revised edition Yale University Press, 1981 with co-author Lawrence D. Longley).

⁹ Michael M. Uhlmann, “Creating Constitutional Majorities: The Electoral College after 2000,” in Gary L. Gregg, ed., *Securing Democracy: Why We Have an Electoral College* (Wilmington: ISI Books, 2001), 106-107. A generation ago, Alexander Bickel cautioned against a strict majoritarian premise and argued that the Electoral College serves importantly to make sure the president represents a diverse constituency. And that the one-man, one-vote vision of the Court should not prevail here. Different ways of counting heads provides diversity. See Alexander M. Bickel, *Reform and Continuity* (New York: Harper & Row, 1971), 3, 14-17. See also Judith Best, *The Case Against Direct Election of the President* (Ithaca: Cornell University Press, 1971), who contends that urban issues the interests of black voters are actually accentuated because of the electoral college system.

content . . . The future was left to cope with the problem of what to do with this Rube Goldberg mechanism.”¹⁰

Proposal #3: Create an Individual Federal Constitutional Right to vote for President (and Supervise the Federal Election Process)

It is furthermore essential that the individual citizens have a federally recognized right to vote for President of the United States, as well as for members of the Senate and House. If such a right were recognized, there would be warrant for more federal oversight to assure that elections are fair and free of fraud and intimidation. The federal government could assume greater responsibility for rules under which votes in federal elections are counted and recounted; in making sure that polling places are sufficiently numerous and locations well-advertised; that voting equipment used in federal elections is adequately available and reliable; that state actors who suggest that anyone with an outstanding parking ticket might be arrested if s/he shows up at the polls would be held federally accountable; and that state party activists who call up black voters in Virginia (2006) and tell them (incorrectly, deliberately) that their polling place has been moved will be held accountable. It would give the beleaguered and whittled-away Voting Rights Act some new purchase.

While under Article I, Congress retains power to alter the “times, places, and manner of holding elections for Senators and Representatives,” (Article I Sec. 4), Congress has been unwilling to make election processes and provisions uniform. We will have to remove this power from the states in order to make sure that the federal

¹⁰ John P. Roche, “The Founding Fathers: A Reform Caucus in Action,” edited and reprinted in Samuel Kernell and Steven S. Smith, *Principles and Practice of American Politics*, 2nd ed. (Washington: C.Q. Press, 2004), 63. Originally appeared under same title in *American Political Science Review* 55 (December 1961).

constitutional right to vote is equal, fair, and uniform and place this among the powers of Congress (can we compel them to exercise it?). We will then want federal rules governing voter registration that make voting easier, not harder. We could make election days for federal officials national holidays or experiment with a multi-day election to enhance participation. We can assure that federal ballot access for minor parties is not encumbered (e.g., by rules governing nominating petitions) and should revisit the Court's determination that a ban on fusion candidacies does not violate the Constitution in *Timmons v. Twin Cities Area New Party* (1997).

This reform would also cut the legs from under the "antifederalist" argument in *U.S. Term Limits v. Thornton* (1996) and assure the federal government the capacity to determine all the qualifications for membership in the House and Senate. Now it may be that my reform proposal will be vying with proposals to institutionalize term limits, and I am willing to listen to arguments for a constitutional reform mandating term limits for elected officials, as a way to enhance democracy, but I am not convinced by these arguments at present. Other reforms might better curb the influence of lobbyists and campaign contributions on legislation. Term limits just make more legislators novices. They do not make Congress as an institution do its job better. Term limits would, at least, put citizens on a level playing field, which would not be the case if individual states were able to limit terms of federal officials.

If there were a constitutionally recognized individual right to vote for President and if the right to vote for other federal officials was guaranteed robust federal protection in the ways I have suggested, we could also stipulate an end to state practices of long-term felony disenfranchisement. It is not merely the case that convicted felons are

barred from voting in most states; in many of these, those paroled or on probation are still denied the right to vote, and in a significant number of states, ex-offenders are barred for life from voting.¹¹ These measures disproportionately affect African-American males and were instituted as ballot-restricting measures beginning in the late 19th century. As my colleague Keith Reeves has long been arguing, this kind of civil death has additional demobilizing, depoliticizing consequences for inner city residents. We can at least address voting in federal elections. I believe that we can overturn the Court's *Richardson v. Ramirez* (1974) determination that lifetime disenfranchisement of ex-felons poses no 14th Amendment equal protection difficulty, but we will probably also have to reword Section 2 of the 14th Amendment to deal with its specific mention of "crime" as a reason for disenfranchisement.

Proposal #4: Changing the method by which redistricting occurs following the decennial census

As currently practiced, partisan redistricting has a variety of harmful consequences for democratic politics and processes. We need to devise a different method for drawing district boundaries following the decennial census—one that takes the process away from state legislative majorities and/or that eliminates many of the prerogatives they currently enjoy.

The Court considers that, in addition to factors such as compactness and contiguity, partisan gerrymandering is a time-honored and generally constitutional reason for drawing district lines for congressional seats. There may be limits (non-retrogression, vote dilution; see *Bandemer v. Davis*) when the gerrymandering impacts minority voters,

¹¹ Overview and Summary, The Sentencing Project, Human Rights Watch, 1998. <http://www.hrw.org/reports98/vote/usvot98o.htm>. According to this study, 14 states barred ex-offender voting for life as of 1998. In Maryland, felons are barred from voting for life upon conviction of a second offense.

but these impose rather modest constraints on legislatures (See *LULAC v. Perry* and the related Texas redistricting cases; also *Vieth v. Jubilerer*).¹²

Partisan gerrymandering generates safe legislative seats. Voters have a much more difficult time evicting incumbents or changing policy direction by changing their representatives. If electoral outcomes are made predictable and relatively safe for the party that constitutes the majority of the state legislature, citizens are less likely to vote and those who are dissatisfied with the status quo are more likely to feel alienated and disempowered. Term limits amendment proposals seek to impose constraints on representatives that voters themselves are unable to effect at the ballot box, although partisan gerrymandering still makes it extremely difficult to change parties. Parties protect their own power at the expense of the electorate.

Partisan gerrymandering has an insidious effect on Congress, and on the policy making process. Keith Poole and Howard Rosenthal have documented how much more polarized Congressional voting is than at any time in the past century; when Congress was last this polarized, American politics was at its most violent and unstable.¹³

Research suggests that a polarized Congress pays less attention to policies that might narrow income disparities and less attention to social welfare policy for all but the

¹² Gary King believes that the Court may be increasingly receptive to a measure of partisan symmetry as a standard by which to gauge the constitutionality of partisan gerrymandering, since the *Vieth* majority held out some hope that partisan gerrymandering could be found unconstitutional under some circumstances if there were a manageable standard, and three members of the *LULAC v. Perry* Court exhibited interest in partisan symmetry. See Bernard Grofman and Gary King, "The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after *LULAC v. Perry*," *Election Law Journal*, Vol. 6, No. 1 (January 2007), forthcoming, copy at <http://gking.harvard.edu/files/abs/jp-abs.shtml>.

¹³ Keith T. Poole and Howard Rosenthal, *Congress: A Political-Economic History of Roll Call Voting* (New York: Oxford University Press, 2000); Norman Ornstein and Barry McMillion, "One Nation, Divisible," *New York Times* (June 23, 2005) at <http://www.nytimes.com/2005/06/23/opinion/24ornstein.html?ex=1141102800&en=2bee9cc7a7c8562b&ei=5070>. Keith Poole made the point about violence at a Mathematics Department lecture, Swarthmore College, Spring 2003.

elderly.¹⁴ In fact, increases in polarization in different periods of American history tend with increases in economic inequality.¹⁵ Since other evidence suggests that when Americans benefit from governmental social provision policies, they are more likely to be invested in and participate in political and civic life, policy disinvestments in all but the elderly that we have seen since 1980 may also be linked to a decline in civic engagement.¹⁶

According to students of Congressional roll-call voting, propensity for legislative gridlock appears to rise with party polarization in Congress, and reduces the output of significant (as opposed to trivial and narrow) legislation. “Perhaps one of the most important long-term consequences of the decline in legislative capacity caused by polarization is that Congress’s power will decline relative to the other branches of government.”¹⁷ It even seems plausible that perceptions of Supreme Court activism may be rising as Congress is doing less and even delegating enforcement power to courts, and that such perceptions may therefore be integrally linked to what is going on elsewhere in the federal government. This is a question that students of courts might well consider.

While we are on the subject of reapportionment, we should make sure our reformed Constitution makes clear that an “actual enumeration” of the population in the decennial census stipulated in Article I Section 2 does not preclude the use of statistical

¹⁴ Nolan McCarty, Keith T. Poole, and Howard Rosenthal, *Polarized America: The Dance of Ideology and Unequal Riches* (Cambridge: M.I.T. Press, 2006).

¹⁵ McCarty, Poole, and Rosenthal, *Polarized America*, 3, 6.

¹⁶ Suzanne Mettler, *Soldiers to Citizens: The G.I. Bill and the Making of the Greatest Generation* (New York: Oxford University Press, 2005).

¹⁷ McCarty, Poole, and Rosenthal, *Polarized America*, 178-183; quote 186. The authors suggest that Congress may even be choosing to delegate more enforcement activity to the courts rather than to administrative agencies, weakening the other branches relative to the judiciary (citing an unpublished 2003 manuscript).

sampling. The Census Act was amended by Congress in 1976 directing the Secretary of Commerce “in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the “decennial census date”, in such form and content as he may determine, including the use of sampling procedures and special surveys.”¹⁸ The Supreme Court held that this section was still limited by Section 195, which states that “Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as “sampling” in carrying out the provisions of this title.” Obviously, deference to administrative determination of procedures was not the governing principle in this case. While it is possible that Congress could amend the statute to eliminate what the Court sees as conflicting language, it is also quite possible that the Supreme Court would then turn to the Constitution itself and aver that “actual enumeration” precluded statistical sampling, a position that seems to be at least suggested by the Court’s position in *U.S. Department of Commerce v. U.S. House of Representatives* (1999). *Department of Commerce v. U.S. House* demonstrates yet again that many Supreme Court justices understand little about statistics and have even less desire to understand.¹⁹ Or more properly stated, the Court has no sense that there are constitutional issues in undercounting and under representing minority or urban residents for purposes of congressional redistricting as a result of “actual” enumeration. As Justice Frankfurter famously remarked, there is not a judicial remedy for every political mischief. In this matter, there should be. Census enumerations are high-stakes games,

18 U.S. Code 13 Section 141.

¹⁹ We’ve known this at least since the time of *McCleskey v. Kemp* (1987) and the Court’s profound disinterest in the results of the Baldus study.

relevant not only for legislative apportionment but for determining access to federal revenues. A statistical sampling method can get the head count done more accurately, and it is not especially costly to make a counting improvement.

Proposal #5: Moving to Proportional Representation and Preferential Voting

I will not be able to develop this proposal adequately, but I am quite certain that we would encourage political participation in America by designing a better system of representation. It makes no sense that, with single-member districts, the Blue Party could receive 49% of the vote in every district, the Red Party receive 47% of the vote in every district, and the Green Party receive 4% of the vote in every district and Congress would be 100% Blue Party. Our current system does not adequately give voice to the distribution of preferences in the nation. Minor parties have no chance of electoral success. Many citizens are discouraged by the inability to have their views taken into account in the halls of Congress. Lani Guinier makes the very appropriate point that if some identifiable and intensely felt interests are unable to ever contemplate winning a majority, they will feel disenfranchised because their voices are absent in policy-making circles. She is, of course, talking about race, but she admits that her argument could pertain to feminists, environmentalists, or others.²⁰ The issue is sense of legitimacy and belief that one's voice matters in government. There is also a good chance that, if more diverse values and voices are heard, there will be new ideas infused into politics.

When the framers considered the importance of representing place, they were fighting against “no taxation without representation,” arguing that the colonies could not

²⁰ Lani Guinier, *Tyranny of the Majority: Fundamental Fairness in Representative Democracy* (New York: Simon & Schuster, 1994).

be represented without a virtual presence in Parliament. They also considered the chief interests dividing them to be by state and region, were doubtful that the customs and values in their own states were compatible with those in others, and were worried that potential new western states would bring yet other interests to bear, upsetting a delicate balance between coastal states and their already diverse interests, including their interest in the use of slave labor. Geography is not the unifying interest it once was.

At a constitutional convention, we should discuss what kind of system would better serve us. Could we imagine municipal, regional, or statewide multi-member House districts, with citizens having the same number of ballots as there were seats, with opportunities for bullet or cumulative voting? Such systems have been used at the state and municipal level. What about preferential voting—a modified Hare system, or a single transferable vote to minimize wasted votes? If voters had been able to rank preferences, many Nader voters might have indicated Gore as a second choice in 2000, for example. There would be less disincentive to vote third party if the strategic voter did not have to consider that his/her vote would likely lead to the election of their least preferred candidate. Or, we could urge adoption of a party-list proportional electoral system, and vote totals would determine how many of the party's candidates win. This would have the potential virtue of not further undermining the role of parties in elections. Many of these options have something to recommend them in terms of enhancing the democratic process, improving representation, and making people feel they have more of a stake in electoral outcomes.

Conclusion

I kept thinking of more possible alterations as I wrote. Let's allow the premature end of a presidential term by a vote of no confidence! Let's find ways to eliminate the corrupting influence of money in politics! Let's make sure that the power of Congress to declare war means something in an era of undeclared wars and "wars on [drugs, terror, etc. Is war on the trade deficit next?]"! Despite our successes in the past roughly 220 years, there are many ways we could form a better plan of union for a 21st century nation. I believe the proposals I offer would help reinvigorate democracy and enhance democratic processes, though they are far from an exclusive list.