Constitutional Barriers to Congressional Reform

John M. Greabe

University of New Hampshire School of Law, john.greabe@law.unh.edu

Follow this and additional works at: https://scholars.unh.edu/law_facpub

Part of the American Politics Commons, Constitutional Law Commons, and the Law and Politics Commons

Recommended Citation
John M. Greabe, Constitutional Barriers to Congressional Reform, Concord Monitor, Dec. 24, 2017 at D1, D3.
Constitutional barriers to congressional reform

Americans celebrate our Constitution as a beacon that can guide us through difficult situations. And justly so. But at times, the Constitution also has stood as a barrier to necessary reform.

Take, for example, the mess that is Congress. Bipartisanship and regular order are things of the past. A senator or representative’s willingness to work with someone across the aisle can trigger a career-ending primary challenge. Highly impactful health care and tax bills have been written in secret and rushed to votes without public hearings or, seemingly, regard for public opinion. Congressmen have used tax dollars to settle sexual harassment charges.

Little wonder, then, that Congress’s approval rating stood at 13 percent in November, according to Gallup. Moreover, 2017 will mark the eighth straight year in which Congress’s average annual approval rating has fallen below 20 percent.

What has caused Congress to become ever more dysfunctional in recent years? It is difficult to say, but many blame the astonishing surge of money in politics and the increased sophistication of partisan gerrymandering. The former tends to render Congress more beholden to special interests than to the collective interest.
Sometimes, there are Constitutional barriers to congressional reform

GREABE FROM D1

est. The latter tends to promote partisanship and deter members of Congress from engaging in compromise.

So what can be done? Unfortunately for those unhappy with the status quo, a divided Supreme Court has interjected the Constitution to place significant constraints on some of the more obvious pathways to reform: term limits, campaign-finance regulations and restrictions on partisan gerrymandering.

1. Term limits. Advocates for term limits - restrictions on the number of terms senators and representatives can serve - argue that they could improve the functioning of Congress. But in U.S. Term Limits, Inc. v. Thornton (1995), the Supreme Court split 5-4 to hold that states cannot impose qualifications for service in Congress (including term limits) beyond those specified in the Constitution.

The court concluded that allowing additional regulation would work an unconstitutional transfer of sovereign power from the people - who may elect their preferred congressional candidates subject only to constitutional citizenship, age and residency requirements - to the states.

2. Campaign-finance regulations. Federal and state legislation has sought to reduce the impact of money in politics. Provisions have been enacted regulating, among other things, campaign expenditures, campaign contributions, corporate and union support for campaigns, and the timing and veracity of political advertisements. Measures also have been taken to encourage the public financing of elections and to require public disclosure of the sources of certain political spending.

In a series of decisions, the Supreme Court has struck down many campaign-finance regulations as inconsistent with the First Amendment's free-speech principles. Arguably the most important of these rulings, Citizens United v. Federal Election Commission (2010), the court acknowledged that legislatures may enact campaign finance regulations to combat "corruption" without violating the First Amendment.

But dividing 5-4, the court narrowly defined corruption in terms of a quid pro quo - that is, a direct exchange of donor dollars for a specific legislative vote - and held that "infringement and access ... are not corruption." As a consequence, the court understands the First Amendment to protect the influence-peddling that is so pervasive and, many would say, corrosive to the public interest.

3. Limits on partisan gerrymandering. Some states have sought to reduce partisan gerrymandering - the practice of redrawing of voting districts lines by state legislatures to entrench the political majority after each census - has made most congressional districts politically monolithic. Representative service by such districts are incentivized to place party over country and become vulnerable to external threats.

In a famous dissenting opinion handed down in 1932, Justice Louis Brandeis argued that the Supreme Court might well reconsider the case in which the court under- חדשות that the Constitution assigns the task of redistricting to state legislatures alone. Moreover, the court presently has under advisement the question whether court-ordered limits on partisan gerrymandering might be constitutionally permissible in some circumstances.

But no court order striking down a partisan gerrymander has ever been permitted to stand. So, while reformers concerned with the issue have a bit more reason for hope than those who favor term limits or greater campaign-finance regulation, the battle remains uphill.

In a famous dissenting opinion handed down in 1932, Justice Louis Brandeis argued that the Supreme Court should not lightly interpret the Constitution to prohibit legislative responses to crises.

He wrote: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

Justice Brandeis was admonishing his fellow justices to permit the states to try out policies designed to counteract the effects of the Great Depression.

But his point can be generalized to apply to efforts by Congress to reform itself as well. And it is a point that the Supreme Court might well reflect upon as it watches our national institutions take on water.

(John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education.)