12-24-2017

Constitutional Barriers to Congressional Reform

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

Constitutional barriers to congressional reform

JOHN GREABE
Constitutional Connections

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 inter-

SEE **GREABE** D3

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 interpreted 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 help to "drain the swamp." Term limits would ensure that, at any given time, Congress would be staffed by a number of members who cannot run for re-election and therefore would not be preoccupied with raising money for their next campaign. Moreover, members who know they are leaving might feel freer to stand on principle and to buck the donor class. Term limits also would ensure that Congress would more frequently be refreshed with new members.

By the mid-1990s, 23 states had enacted laws placing term limits on members of Congress. But in *US 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 guarantee. In 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 "ingratiation 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. Partisan gerrymandering – the practice of redrawing of voting district lines by state legislatures to entrench the political majority after each census – has made most congressional districts politically monolithic. Representatives serving such districts are incentivized to place party over country and become vulnerable to their extreme flank if they are seen as insufficiently partisan. In such an environment, compromise becomes next to impossible.

Some states have sought to reduce partisan gerrymandering by creating bipartisan redistricting commissions. And two years ago, in *Arizona State Legislature v. Arizona Independent Districting Commission* (2015), the Supreme Court split 5-4 to uphold the constitutionality of such commissions. In doing so, the court rejected the argument that the Constitution assigns the task of redistricting to state legislatures alone.

Moreover, the court presently has under advisement two cases that raise 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.)