

THE CONSTITUTION CULT

The U.S. Constitution has served us poorly for decades despite the obligatory public reverence rendered to it. Its negative features stymie modern governance and democracy itself, while its good provisions were perverted or are virtual dead letter. Worst of all, its very structure impedes sensible revision.

But it is also resistant to change for psychological reasons: the document is so invested with quasi-religious baggage that it became a totem, foreclosing factual debate about its pluses and minuses. As a first step, before we even attempt to engage the rusty, clanking mechanism of constitutional revision, we need to be able to discuss the matter like adults and prepare the way for reform.

Both our major parties bathe the Constitution in adoration, but in distinct ways. Republicans swarm to the cult of "constitutional conservatism," which treats it as a perfect, unchangeable charter bequeathed to us by infallible founding fathers in the manner of God handing down the Ten Commandments.

This does not prevent the GOP from making the most radical interpretations whenever it suits them. A huge Republican legal industry headed by the Federalist Society exists to stretch constitutional construction to the breaking point. Whenever a Republican occupies the presidency, conservative operatives will insist the intent of the founders was to grant the chief executive dictatorial powers. When not convenient for them, the plain wording of the Constitution somehow is itself unconstitutional.

Democrats are content with a more restrained reading of the document. In the last few years, they invoked it in vain attempts to rein in a lawless and runaway chief executive. But all it demonstrated was that several constitutional provisions, like impeachment, insurrection, treason and emoluments, became amusing legal folklore, like Oliver Cromwell's prohibition of eating mince pies on Christmas day.

If there is one matter on which the framers were clear, it was that Congress has the sole power to declare war. It is now 80 years since they invoked this provision, never mind the wars in Korea, Vietnam, Desert Storm, Afghanistan, the invasion of Iraq and numerous other lesser conflicts.

The Eighth Amendment's prohibition on torture, codified in several laws and treaty accessions, likely became dead letter as of Abu Ghraib. Similarly, President Bush nullified the Fourth Amendment's ban on illegal search and seizure with an executive order. Expansive use of the Racketeering and Corrupt Organizations Act (RICO), a federal law eagerly copied by states, markedly injured the Fifth Amendment's due process clause, as well as impinging on the Fourth Amendment's restrictions on seizure.

Somehow, though, the Constitution's original provisions that impede democratic self-government remain fully in force. There has been wide comment on the anti-democratic features of the Constitution: the Electoral College, the wildly lopsided popular representation in the Senate, and the license for state legislatures to gerrymander at will.

Critics correctly tied those features to the maintenance of slavery, an issue one would think might remove some of the Constitution's immaculate luster. Given the disastrous performance of the Electoral College in two of the last six presidential elections, these inequities of the Constitution finally became more publicly appreciated.

An unrecognized problem is that the Constitution existed virtually unchanged for so long (the last substantive amendment, that lowered the voting age to 18, was

adopted 50 years ago), and its controlling precedents are so old that powerful special interests have learned to game it. A friend who worked in the Department of Homeland Security remarked that one of the best methods to thwart terrorists is to periodically change the security protocols so that the bad guys can't game them. A similar situation applies with our computers; we must frequently update virus protection or malevolent persons will hack them.

So it is that any rational system of governance must occasionally be adjusted to prevent such manipulation. The

wealthy and big corporations clearly get what they want by gaming the system. RICO may be a fearsome instrument against the little guy, but it and other statutes were not used to punish the malfeasance of large financial institutions following the 2008 crash. Such entities, which lavish money on our politicians, have the resources to ensure a peculiar due process which inevitably concludes in paltry fines and no admission of guilt.

That same lavishing of money on politicians is now enshrined within the sanctity of the First Amendment. Money equals speech, and one's ability to influence our system is proportionate to personal or corporate cash on hand. But if you are a citizen journalist with a cellphone camera who photographs inhumane or unsanitary conditions in a slaughterhouse, in many states you get no First Amendment protection; rather, you have engaged in slanderous commercial disparagement.

Alas, some of this gaming is performed not by special interests seeking to line their pockets, but by the supposed guardians of the Constitution. The executive has usurped war powers because Congress habitually shirks responsibility for matters of war and peace out of sheer cowardice.

Nowadays, appropriating money for war counts as implicit constitutional approval for a Congress terrorized by the potential political charge of "not supporting the troops." Likewise, the torture ban and prohibition of warrantless surveillance fell to the inability of members of Congress to explain that upholding the Constitution didn't mean they supported al Qaeda. These actions set a precedent, and the Supreme Court refused to rule against the executive. The Court believes, that it has no writ to intervene in any matter the executive chooses to label "state secrets." This is based on a 1953 lawsuit ruling.

The Constitution is, at present for all practical purposes, impossible to change. This is the Herculean challenge we eventually arrive at. Breaking a Senate filibuster is difficult enough, as it requires three-fifths of the full Senate membership. A constitutional amendment requires not only two-thirds of both the House and Senate, but three-quarters of all state legislatures. Given our current polarized political atmosphere, this is about as likely as discovering emperor penguins in the Amazon.

This inertia is symptomatic of a larger syndrome. The United States has reached a stage of chronic social and political stagnation, and even degeneration. This is a weird stasis in American culture that involves everything from fashion to housewares, to Hollywood movies to the architecture of our metropolitan areas, ever since the Reagan era. Other than high tech gadgetry, the outward texture of American life has hardly changed.

That stagnation is reflected in our politics as well. Since roughly 1980, our politicians have recited from the same dreary playbook: culture war demonization and bogus concern about debt and deficit. This suggests Americans don't deserve better and the government shouldn't do anything in any case. Incredibly, all these political mantras saw service even in a pandemic that has killed over a half million Americans. Throughout this four-decade period, the Constitution served as justification either for keeping things as they are or making them slightly worse.

The American government is older than most European state systems. The German Federal Republic dates from 1949, the French Fifth Republic from 1958, and virtually all other European states undertook radical transformation after World War II. Our Electoral College is an eighteenth century relic last seen in the Holy Roman Empire, which dissolved in 1803. Our Senate's minoritarian system of filibuster harkens back to the Polish-Lithuanian Commonwealth's legislature, whose liberum veto required unanimous consent of all members. It was a major reason why the commonwealth could not fend off destruction by neighboring powers.

The top and mid-level personnel of our government have acquired the look of a retirement community. The average age of a US senator in 2018 was 62 years, the oldest in the institution's history. In 1981, the dawn of the Reagan revolution,

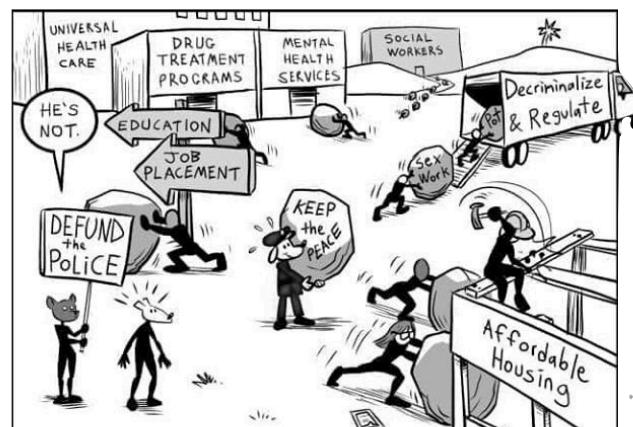


tion of gerontocracy, the average age of a senator was 53. House members have aged similarly: in 1981 the average age was 49, now it is 57. The president is 78; the speaker of the House is 80; the majority and minority leaders of the Senate are 70 and 79, respectively.

America is overdue for reform and rejuvenation. The Constitution has served as a ready alibi for stopping reform, as it did in the Gilded Age. One should have no illusion that an overhaul of our government, including the Constitution, will be anything but a frustratingly long-term project. But it is at least thinkable. The Gilded Age was followed by an era of progress in which the Constitution was amended to provide for a federal income tax, a popularly elected Senate and the franchise for women.

'But nothing will happen unless Americans at least talk about the Constitution's flaws and cease treating it like pagans worshipping a stone idol. Otherwise, we resemble a drug addict's family that fails even to candidly discuss the problem, let alone get the addict into treatment.'

From - Mike Lofgren billmoyers.com



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