

The U.S. Needs a New Constitution—Here's How to Write It

By *Alex Seitz-Wald*



Richard A. Bloom/National Journal

America, we've got some bad news: Our Constitution isn't going to make it. It's had 224 years of commendable, often glorious service, but there's a time for everything, and the government shutdown and permanent-crisis governance signal that it's time to think about moving on. "No society can make a perpetual constitution," Thomas Jefferson wrote to James Madison in 1789, the year ours took effect. "The earth belongs always to the living generation and not to the dead Every constitution, then, and every law, naturally expires at the end of 19 years." By that calculation, we're more than two centuries behind schedule for a long, hard look at our most sacred of cows. And what it reveals isn't pretty.

If men (and, finally, women) as wise as Jefferson and Madison set about the task of writing a constitution in 2013, it would look little like the one we have now. Americans today can't agree on anything about Washington except that they want to "blow up the place," in the words of former Republican Senator George Voinovich as he left Congress, and maybe that thought isn't so radical.

Clocking in at some 4,500 words—about the same length as the screenplay for an episode of *Two and a Half Men*—and without serious modification since 18-year-olds got the vote in 1971, the Constitution simply isn't cut out for 21st-century governance. It's full of holes, only some of which have been patched; it guarantees gridlock; and it's virtually impossible to change. "It gets close to a failing grade in terms of 21st-century notions on democratic theory," says University of Texas law professor Sanford Levinson, part of the growing cadre of legal scholars who say the time has come for a new constitutional convention.

Put simply, we've learned a lot since 1787. What was for the Founders a kind of providential revelation—designing, from scratch, a written charter and democratic system at a time when the entire history of life on this planet contained scant examples of either—has been worked into science. More than 700 constitutions have been composed since World War II alone, and other countries have solved the very problems that cripple us today. It seems un-American to look abroad for ways to change our sacred text, but the world's nations copied us, so why not learn from them?

No Longer a Model

Supreme Court Justice Ruth Bader Ginsburg was pilloried when she [told Egyptian revolutionaries last year](#) that she "would not look to the U.S. Constitution, if I were drafting a constitution in the year 2012." But her sentiment is taken for granted by anyone who has actually tried to write a constitution since politicians stopped wearing powdered wigs. "Our Constitution really has been a steady force guiding us and has been perhaps the most stable in the world," says Louis Aucoin, who has helped draft constitutions in Cambodia, East Timor, Kosovo, Rwanda, and elsewhere while working with the U.N. and other groups. "But the disadvantage to the stability is that it's old, and there are things that more-modern constitutions address more clearly."



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Almost nobody uses the U.S. Constitution as a model—not even Americans. When 24 military officers and civilians were given a single week to craft a constitution for occupied Japan in 1946, they turned to England. The Westminster-style parliament they installed in Tokyo, like its British forebear, has two houses. But unlike Congress, one is clearly more powerful than the other and can override the less

powerful one during an impasse.

The story was largely the same in defeated Nazi Germany, and more recently in Iraq and Afghanistan, which all emerged from American occupation with constitutions that look little like the one Madison and the other framers wrote. They have the same democratic values, sure, but different ways of realizing them. According to researchers who analyzed all 729 constitutions adopted between 1946 and 2006, the U.S. Constitution is rarely used as a model. What's more, "the American example is being rejected to an even greater extent by America's allies than by the global community at large," write David Law of Washington University and Mila Versteeg of the University of Virginia.

That's a not a fluke. The American system was designed with plenty of checks and balances, but the Founders assumed the elites elected to Congress would sort things out. They didn't plan for the political parties that emerged almost immediately after ratification, and they certainly didn't plan for Ted Cruz. And factionalism isn't the only problem. Belgium, a country whose ethnic divisions make our partisan sparring look like a thumb war, was unable to form a governing coalition for 589 days in 2010 and 2011. Nevertheless, the government stayed open and fulfilled its duties almost without interruption, thanks to a smarter institutional arrangement.

As the famed Spanish political scientist Juan Linz [wrote in an influential 1990 essay](#), dysfunction, trending toward constitutional breakdown, is baked into our DNA. Any system that gives equally strong claims of democratic legitimacy to both the legislature and the president, while also allowing each to be controlled by people with fundamentally different agendas, is doomed to fail. America has muddled through thus far by compromise, but what happens when the sides no longer wish to compromise? "No democratic principle exists to resolve disputes between the executive and the legislature about which of the two actually represents the will of the people," Linz wrote.

"There are about 30 countries, mostly in Latin America, that have adopted American-style systems. All of them, without exception, have succumbed to the Linzian nightmare at one time or another, often repeatedly," according to Yale constitutional law professor Bruce Ackerman, who calls for a transition to a parliamentary system. By "Linzian nightmare," Ackerman means constitutional crisis—your full range of political violence, revolution, coup, and worse. But well short of war, you can end up in a state of "crisis governance," he writes. "President and house may merely indulge a taste for endless backbiting, mutual recrimination, and partisan deadlock. Worse yet, the contending powers may use the constitutional tools at their disposal to make life miserable for each other: The house will harass the executive, and the president will engage in unilateral action whenever he can get away with it." He wrote that almost a decade and a half ago, long before anyone had heard of Barack Obama, let alone the Tea Party.

You can blame today's actors all you want, but they're just the product of the system, and honestly it's a wonder we've survived this long: The presidential election of 1800, a nasty campaign of smears and hyper-partisan attacks just a decade after ratification, caused a deadlock in the House over whether John Adams or Thomas Jefferson should be president. The impasse grew so tense that state militias opposed to Adams's Federalist Party prepared to march on Washington before lawmakers finally

elected Jefferson on the 36th vote in the House. It's a near miracle we haven't seen more partisan violence, but it seems like tempting fate to stick with the status quo for much longer.

How would a parliamentary system handle a shutdown? It wouldn't have one. In Canada a few years ago, around the same time Washington was gripped in yet another debt-ceiling crisis, a budget impasse in Ottawa led to new elections, where the parties fought to win over voters to their fiscal plan. One side won, then enacted its plan—problem solved. Most parliamentary systems, which unify the executive and legislative branches, have this sort of fail-safe mechanism. If a budget or other must-pass bill can't get passed, or a prime minister can't be chosen, then funding levels are placed on autopilot and new elections are called to resolve things. The people decide.

Arend Lijphart is a political scientist who has spent much of his career trying to answer the fundamental question, "What works best?" and he thinks he knows the answer. "Democracies work best if they are consensus instead of majoritarian democracies. The most important constitutional provisions that help in this direction is to have a parliamentary system and elections by [proportional representation]. The U.S. is the opposite system, with a presidential system and plurality single-member-district elections," he said in an email, drawing on complex quantitative analysis he's done to compare economic and political outcomes across dozens of democratic countries with different systems.

If he had to pick any country whose system we might like to try on for size, he'd pick Germany. "Some aspects of it do need to change, of course," he says. Yet it's a nice bicameral federal system for a large country, like ours, but it has a proportional representation parliamentary system.

Thinking Outside the Box

Still, latter-day framers probably won't be able to start from scratch. So how might they remodel?

Take the Senate. What started as a compromise to preserve states' rights lost even that pretext with the ratification of the 17th Amendment, which gave the people, and not state legislatures, the right to elect their representatives in the upper chamber. Today, the Senate is an undemocratic relic where 41 senators, representing just 11 percent of the nation's population, can use the filibuster to block almost anything and bring government to its knees. A single voter in Wyoming, a state with a mere 600,000 people, has the equivalent representation of 66 Californians unfortunate enough to live in a place with 38 million other people. The two-senator allotment to each state also makes it essentially impossible to change the makeup of the states or admit new ones like the District of Columbia. And the House, of course, isn't a more attractive alternative.

Larry Sabato, the ubiquitous and mild-mannered political prognosticator by day, is a radical constitution-rewriter by night. In his 2008 book, *A More Perfect Constitution: Why the Constitution Must Be Revised*, Sabato offers a number of pragmatic ideas: The Senate, he says, should be expanded to give more populous states at least a bit more representation, and it should also include "national senators"—all former presidents and vice presidents, maybe others—whose job it is to guard national interests over parochial ones. Sabato's plan would also double the size of the House (to make

representatives closer to the people) and enforces a nonpartisan redistricting process to end gerrymandering. Elections for president, Senate, and House, in Sabato's vision, are rescheduled to coincide more often, while presidents would serve a single, six-year term (the idea is to make their governing less political, while giving them enough time to implement change).

Regardless of how you feel about *Citizens United*, something needs to be done about campaign finance. No one thinks lawmakers should spend several hours every day raising money (some estimates say lawmakers spend 25 percent to 50 percent of their time "dialing for dollars"). No one prefers that a tiny fraction of wealthy Americans provide the vast majority of the money needed to supply our democracy with leaders. (Only about one-half of 1 percent of Americans have given more than \$200 to a candidate, PAC, or party, while just under 10 percent report donating at all.)

Lawrence Lessig, the iconoclastic professor who is now at Harvard, traces the rise of hyper-partisanship to the emergence of the perpetual campaign and the constant need for money. "Since the end of earmarks, the best way to raise money is to increase partisanship. Look at the shutdown. It cost the economy billions of dollars but raised millions of dollars for both Democrats and Republicans," he says. At some point, this money chase has to take a psychological toll. How do you spend all morning attacking your opponent and then make a deal with them in the afternoon? Instead, Lessig, along with fellow Harvard law professor Laurence Tribe and many others, proposes a bottom-up form of public financing where voters get a voucher of, say, \$50 off their taxes, which they can use to donate to candidates.

Then there's just basic housekeeping. Any constitutional lawyer can point out the places that need work: How much authority should presidents have in the case of a national emergency? Can they lock up Japanese-Americans, as FDR did? Do individuals have a right to privacy in an age of high-tech snooping by the National Security Agency? How is power really divided between the states and the federal government?

The list of questions goes on, but the Constitution doesn't answer them, so judges have had to fill in the blanks. Where modern constitutions in other nations get specific, we get judicial activism. Sometimes it works, but it's not an approach without serious drawbacks. Take civil rights, which the courts have done a decent job of protecting—only after reversing earlier mistakes. And there's theoretically nothing to stop judges from flip-flopping back to their pre-*Brown v. Board of Education* jurisprudence.

"A lot of people have conniptions" when you start talking about changing the Constitution, acknowledges Nick Dranias, a constitutional lawyer at the conservative Goldwater Institute in Arizona. "But the idea that the Founders thought the Constitution would be a perfect and unchanging document is simply not true." The problem is that they didn't realize how difficult they'd made it to actually change things. The U.S. Constitution is the world's hardest to amend, according to Levinson. (Yugoslavia used to hold that distinction; perhaps not coincidentally, Yugoslavia no longer exists.)

Surprisingly, considering their reverence of the Founders, conservatives have led the way in reimagining the Constitution, so they can add an amendment to create a right to life after *Roe v. Wade* or to rein in the federal government with a balanced-budget amendment. Others have called for

more holistic changes, to empower states vis-à-vis Washington. But a full-on constitutional convention goes too far, says Dranias, and would inevitably descend into chaos (just imagine dealing with abortion, for instance, or gun rights).

Instead, Dranias and a diverse band of compatriots—including acerbic radio host Mark Levin, Lessig, and Harold R. DeMoss, a senior judge on the U.S. Court of Appeals for the Fifth Circuit—advocate a convention to propose amendments to the Constitution, as laid out in Article V, as opposed to starting from scratch. "The vehicle is not ideological—you put on whatever ideology you want," Dranias says. He wants a balanced-budget amendment; Lessig wants campaign finance reform; someone else might want to change the Senate. The states can call a convention to propose amendments if three-fourths (38) are in favor. Congress would still need to approve the changes, but the process puts the states, and not Washington, in charge.

They join a long line of fellow travelers from Republican Sen. Everett Dirksen, who called for a second constitutional convention throughout his long political career, to William Safire, who wrote in 1987 that he wanted to "be a delegate to the next Constitutional Convention (Con Con II)."

If Americans managed to convoke a constitutional convention, they could draw on hundreds of possible tweaks with text already written, available online thanks to the Google-funded Comparative Constitutions Project. After hundreds of tries, we (humans) have gotten so good at chartering governments that we've developed a set of best practices. Our Constitution violates many of them.

For one, the Public International Law & Policy Group, a pro-bono law firm that advises transitioning countries on the rule of law, developed a 222-page U.N.-endorsed "Post-Conflict Constitution Drafter's Handbook" that practically offers constitution-writing by the word game Mad Libs. It comes complete with sample language ("The capital city of [State] is [Capital City]"), instructions on how to write a preamble, and a veritable choose-your-own adventure story of democratic forms of governance: Would you like to be a federal state, where power flows from the regions to the capital, or a unity state, where all power derives from the seat of government? Religious or secular? Democracy is available off the shelf.

Far Out

As we've learned what works and what doesn't, constitutions have started to look and more alike. Not surprisingly, the U.S. has one of the world's least generic constitutions. (Djibouti has the most.) American exceptionalism is a fine thing, but there are still things we can learn from other places. "The Founders had only impressionistic, sometimes wrong, assumptions about human behavior," says Ryan Enos, a political scientist at Harvard. "We know a great deal more now, due to advances in psychology and other fields, about the nature of cooperation, group identities, incentives, et cetera."

Take elections, the most basic function of any democracy. We've been doing them the same way since the Progressive era, but instant-runoff voting has become increasingly popular because it allows voters to rank multiple choices instead of picking just one. Australia, India, Ireland, and dozens of other countries have adopted it, as has San Francisco and the Academy Awards. IRV, as it's known, would

make room for new parties by allowing people to vote for a third-party candidate first without "wasting" it, and then for a mainstream candidate second. This change would force politicians to compete for everyone's votes, because they would need non-first-choice votes too. Alternately, we could also eliminate party primaries, as California did recently, and replace them with a nonpartisan runoff between the top two vote-getters. These innovations would help reduce one-party monopoly and avoid the radicalizing effects of partisan primaries.

Other thinkers are even further out on the cutting-edge of democracy. Germany's Pirate Party advocates something called "liquid democracy." A cross between New England-style town meetings and Facebook, this model of delegative democracy leverages social relationships and expertise on an open-source software platform for collaborative decision-making. The process is a bit complicated, but essentially citizens can participate directly, say, by proposing legislation. They can also delegate their vote to a proxy they trust, who can then in turn delegate her vote and the original vote to a third proxy, and so on down the line until you get something that resembles a legislature.

For techno-evangelists, this is the future. Clay Shirky, a futurist at New York University, advocated for a "distributed version control democracy" in a recent TED talk. The New York state Legislature is already experimenting with this on its OpenLegislation platform, while the OpenGov Foundation, a nonprofit organization cofounded by Rep. Darrell Issa, R-Calif., is doing something similar on the federal level, allowing anyone to comment on and annotate legislation pending before the House.

These tools are still in their infancy, but scaled up they could change what democracy looks like in ways we're only just beginning to imagine. At the extreme, we could theoretically have smartphone-enabled direct democracy, where the public could vote directly on legislation and where Congress would almost be irrelevant. At the same time, Lorelei Kelly of the New America Foundation and the Smart Congress project warns against "mob sourcing." One glance at what's trending on the White House's "We the People" petition platform—e.g., "Investigate Jimmy Kimmel Kid's Table Government Shutdown Show on ABC Network"—confirms this. Instead, she says, we need something more like *Rotten Tomatoes* democracy. Unlike typical crowd sourcing, the movie-reviewing site privileges expertise and aggregates reviews for smarter results.

For a glimpse of where this is headed, turn to science fiction, where writers have long experimented with radical new social orders. In *Imperial Earth*, for instance, Arthur C. Clarke proposes something sure to appeal to the "throw-the-bums-out" crowd. The society in that novel automatically disqualifies from office anyone who wants to govern and instead asks the public to choose leaders from a preselected pool of candidates who have been algorithmically chosen for leadership potential.

In Robert Anton Wilson's *Schroedinger's Cat* trilogy, scientist cum President Eve Hubbard turns her country into a utopia by promoting a scientific approach and offering incentives, such as offering X-prize-style rewards to citizens who can better improve life. Even further down the techno-utopian rabbit hole, Robert Heinlein's *Starship Troopers* requires people to serve in the military if they want the full rights of citizenship.

One group that sounds like science fiction has real-world champions. The Seasteading Institute in San

Francisco wants to create floating cities of thousands of people or more, at sea, beyond the reach of terrestrial governments, where residents can write whatever constitution and laws they like in any form of government they prefer. "I know that what made the U.S. great a few hundred years ago was that it was innovative and new and great," says Randolph Hencken, the executive director. "But it's still all wrapped up in the same system that was written 240 years ago It's old technology."

Jump-Starting a Conversation

When the original constitutional convention convened in May 1787, members were tasked, simply, with proposing amendments to the Articles of Confederation. But once they got going, they realized that the Articles were so flawed and they wanted to change so much that they would need to start from scratch.

What a convention might look like is for the public to decide. It might, as Levinson proposes, be populated by citizens selected by lottery and given two years and plenty of staff and resources to come up with something. Or it might look like what Dranias and Lessig propose, where 38 states can come together to agree on the text of an amendment and then present it to Congress and demand ratification. "The most important thing a convention would do is to simply jump-start and conduct a national conversation that we're not having," Levinson says. After all, the status quo isn't working. We badly need a more perfect union.

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