

AFTER 234 YEARS, IS IT TIME FOR A NEW CONSTITUTION — OR AT LEAST A NEW SUPREME COURT?

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Introduction

“What the Constitution Means to me”

- Broadway play by Heidi Schreck

Overview of talk

- A few thoughts on what’s remarkable and flawed about the Constitution
- How well have the Constitution and the Supreme Court withstood the test of time
- Current calls to amend the Constitution
- Proposed reforms for the Supreme Court

What’s Remarkable

Created a republic on a national scale for first time

- A government derived from the people, based on the idea of popular consent — “We the People”
- Placed governance back in the people by representative democracy
- By current standards left much to be desired, but gave more democracy than ever seen in terms of who could vote and hold office

What's Remarkable

Gave us a secular state

- “Godless Constitution”; no mention of God; unique among documents of its time
- Quite cognizant of religion; created an environment where religion could thrive

What's Remarkable

Provided a significant level of personal liberty against the state

- Recognized that majority rule must itself be checked at times to ensure liberty
- These limits are seen with separation of powers/checks and balances
- But most profoundly evident in the Bill of Rights — a remarkable statement of freedoms that we as individuals and as groups hold against government

The Tragedy of Slavery

- The permanent stain on the Constitution
- Not merely accommodated, but more deeply entrenched
 - Fugitive slave clause, prohibition on ending slave trade prior to 1808; prohibition on amending Constitution to prohibit slave trade
 - Most problematic the 3/5 compromise — permitted slaveholding states to have disproportion power in House and Electoral College
- Led to Civil War and consequences that continue to this day

How have the Constitution and the Court withstood the test of time?

One view: though imperfect, the arc of the Constitution and the Court have bent toward greater freedom and democracy

- Civil war amendments — end slavery, equal protection, right to vote
- 1910's — 17th and 19th amendments
- 1960's — 1971 — D.C. electoral votes, end poll tax, vote at 18
- S.Ct. cases — one-person, one-vote; expansive reading of Bill of Rights
- The Constitution, as amended and as interpreted, has become **more inclusive, more democratic, and more protective of personal liberty**

How well have the Constitution and the Court withstood the test of time?

Another view — yes, but

- The promise of the Civil War amendments was long delayed
- Other rights came slowly; gender not protected until 50 years ago (and still no Equal Rights Amendment)
- Finally: anti-majoritarian features have become a hindrance to addressing issues facing the nation

Calls for Change — Amending (or abolishing) the Constitution

- Criticism and calls to amend the Constitution nothing new, but more pronounced today
- General theme — the Constitution is an anti-majoritarian document that makes it virtually impossible for the nation to address many of the critical issues we face
- A few argue to abolish, most just to amend
 - Electoral college, overturn *Citizens United*, Voting Rights
 - On the right, calls for balanced budget amendment

Calls for Change — Amending the Constitution

- **The Problem: The Constitution is extremely hard to amend**
 - Requires 2/3 of House and Senate and ratified by ¾ states (38)
 - Has rarely occurred; last amendment 50 years ago
- **Alternative approach — Constitutional Convention**
 - 2/3 states (34) can call for CC to address amendments; need ¾ states ratify
 - 28 states have passed resolutions for a CC for a balanced budget amendment
 - 5 states have passed resolutions for CC to overturn *Citizens United*
- **Bottom line: Need to amend Article 5 itself**

Calls for Change — Reforming the Court

- **Presidential Commission to examine reforming Supreme Court**
 - Report due November 14; will be available to public
 - 36 members, mostly academics
 - Not making recommendations; examining benefits/risks of proposals
- **First Question: What's the problem that needs fixing?**
 - Payback for recent Republican behavior
 - Depoliticize nomination process and the Court
 - For some people, make the Court less important

Calls for Change — Reforming the Court

- **Category One — Court Packing (Sledgehammer approach)**
 - Size of Court has varied over the years; at 9 since 1869
 - Pure political payback — tit-for-tat
 - **Bottom line: very bad idea**
 - Will lead to escalation
 - Will undermine the institutional legitimacy of the Court

Calls for Change — Reforming the Court

• **Category Two — Jurisdictional Proposals** (make the Court less important)

(1) Control the Court’s Docket

- Based on idea that Court selects cases to advance an agenda

(2) Remove Constitutional Cases from the Court

- Create a special “Constitutional Court” made up of lower court judges
- Supreme Court limited to statutory and regulatory cases
- Based on a combination of Article 1, sec. 8 (9) and Art. 3, section 2 (2)

(3) “Cleanup” Shadow Docket (emergency stays, injunctions)

- Make more transparent, require explanations, oral arguments

Calls to Change — Reforming the Court

• **Category Three — Term Limits**

- Popular proposal — 9 justices with 18-year terms
 - Appoint new justice every two years
- Benefits
 - Make nomination process less political
 - Would even out appointments
 - Would make individual justices less important, but not the court
- Has received broad support across political spectrum
- Question of whether this requires a constitutional amendment

Conclusion

- Marbury v. Madison — Constitution is the highest law of the land and the Court itself has the final word on what it means
- We as a people have come to embrace that, not just as a legal principle, but as a societal norm that provides finality in our affairs
 - Noah Feldman — “The Court enforces and protects the rule of law, articulates the standards that ensure individual liberty and equality, and oversees the system of constitutional democracy.”
 - May not do it perfectly or to our liking, but it is critical that there be an authoritative voice on those matters, and the Court remains the best choice
- Any changes that would undermine that societal norm should be rejected
