
UPDATING THE CONSTITUTION: AMENDING, TINKERING, INTERPRETING

SYMPOSIUM DISCUSSION: KAY

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Audience Member: I think it's safe to say, or at least a consensus or a soft majority of the academic community would agree, that the Constitution should be amended in certain places. But the problem with that being that you need a pretty strong majority to accomplish that. I'm going to harken back to something Professor Levinson hit on. In this country where the Constitution is viewed as this absolute, almost biblical, document in its original sense, is there a way to repackage the republican view that it is important to amend the Constitution but alternatively that maybe the Constitution has served as sort of a baseline?

Kay: I can't say that it's impossible. Nothing lasts forever. This Constitution has lasted a long time and things in this country are really different now. Different in a way that I've never experienced in my unfortunately very long life. So, yes, it's possible. I think what you need is a crisis though that's kind of a tough thing to wish for. But, we may not see it. I won't see it.

Lisa Miller: Thank you very much, Richard. That was really interesting. I was intrigued by your comment about the amendments that were passed in the 19-teens at a moment you know when it looked like they weren't going to happen again. And it put me in mind of a quote that I think is attributed to Winston Churchill, "That the Americans always do the right thing, but only after they've tried everything else first." And I think it's true that there have been moments where just enough people have said we've had it. Right, we're just going to think about the Twenty-Fourth Amendment, the poll tax, let's just be done with this. That's somewhat encouraging to me. I'm wondering if you have any thoughts on what issue or issues or features of the Constitution might be, you know, close to in the next decade or so bubbling up.

Kay: There have been these periods; the progressive era in the 19-teens is not the only time it's happened. My colleagues will know better than I do. In the '60s, there were a whole bunch of amendments too, mainly about representation and voting. So, once you get one amendment through, and

the world doesn't fall apart, then maybe there's room for another one if they are modest.

Sanford Levinson: Your comments are very rich, but I find an interesting paradox with regard to judicial workarounds. If one believes, as I do, that life tenure, particularly in the Supreme Court but less serious for what the Constitution calls "spirit of courts," that full life tenure is a problem, then the Supreme Court, with the exception of Justice Souter, is modeling exactly the wrong behavior. You know, quite frankly, Justices Ginsberg and Stephen Breyer both should have retired after 20 years of service in 2013–2014 respectively. Clarence Thomas has been around now for 28 years or so. But it's clear with Souter as the splendid exception that there is something in Washington that generates kind of mental mania. I think some of it is being surrounded by law clerks and former law clerks who tell their justices that they are indispensable. But I do find that discouraging. If Souter had established a new norm 20 years and age 70. Seventy, I now think, is too young; 75 is not. But if he had really established a new norm, we wouldn't need a constitutional amendment because there is lots of discussion across the political spectrum of single, 18-year terms, and the Supreme Court seems oblivious to this.

Kay: Life tenure, I don't know if it's unique in this world, but it's close to being. I agree with everything you say. But someone who advocates this, will immediately be challenged as working from partisan considerations, and everyone will start talking about the 1930s and court-packing, that this will undermine the rule of law. So, life tenure is a big problem. It may be that we develop a new convention on retirement but not anytime soon.

Audience Member: You mentioned that it should be hard to amend the Constitution; however, our current system is clearly imperfect. What kind of procedure for amendment do you envision would be an improvement upon our current system?

Kay: I think that simply reducing the number of ratifications needed is possible. Some people have suggested that, and I think it is Richard's plan, that ratifications could be done by referendum instead of by legislature. You might monkey with those numbers and bring them down to a more realistic level. The very act of changing may alter the presumption that we should be so stingy in considering amendments. The very act of changing that could encourage more amendments.

Audience Member: I understood the thrust of your speech to say that our Constitution has done well and survived because we've been able to expand into jurisprudence and that to understand a broader and more robust

concept is to necessarily criticize and indict those that would tell us, Justice Thomas for one, that we need to return to just what the Constitution says and pick up a dictionary from the 1780s and read that. Is that a fair thought?

Kay: Ah, no. My description of that situation was really more one of despair rather than enthusiasm. In order to get that, in order to rescue us from the difficult amendment procedure, we've had to give up something pretty important. That is the safety and comfort of a fixed constitution. Is it possible to have both of these things? Well, yes. We were talking about this earlier this morning. You could have a constitutional requirement for a convention every 25 years. If that were there, I'm pretty sure that, in fact, we would be making changes and that originalist jurisprudence would not seem as unfortunate as most people seem to think it is. Because we'd be dealing with a set of rules, which were adopted or left in place by a recent representative process. Are we going to do that? I mean, not this year.