THE CONSTITUTION OF 1787: WHAT'S ESSENTIAL?

Eugene R. Fidell†

In this increasingly strange presidential election year, the Constitution should be on our minds. Inexplicably, there are still a few people hoping to be the lucky (or unlucky) individual to whom the Chief Justice will administer the oath next January 20. One of them will be in town tomorrow.

You remember the oath: it is set out in Article II, Section 1. By it, the new President swears or affirms he or she "will faithfully execute the Office of President of the United States, and will to the best of [his or her] Ability, preserve, protect and defend the Constitution of the United States."[1]

What I would like to do this evening is raise with you the question of what this oath actually means. Specifically, could a President-Elect conscientiously take such an oath if he or she had misgivings about the Constitution? Here, let me draw a distinction at the threshold. What the Constitution means can be answered on two levels.

Of course we all know that there is an enormous judicial gloss on the Constitution, a gloss that has changed and developed over time. Indeed, decisions that interpret the Constitution may themselves be overturned by later decisions, and this happens from time to time. And what is more, the received learning is that the Supreme Court is less rigidly bound by constitutional rulings than by statutory interpretations, since Congress can always fix a statute if it disagrees with the Court's reading. So let us set aside the notion that a would-be President might be disingenuous if he or she sought the office and, if Fortune smiled, took the oath knowing full well that there were elements of the body of judge-made constitutional law that he or she disagreed with. After all, candidates for high office have been known to run, at times, on the very basis that they will appoint judges that will change constitutional

---

† Florence Rogatz Visiting Lecturer in Law and Senior Research Scholar, Yale Law School; 2016 Order of the Coif Distinguished Visitor. B.A. Queens College, 1965; LL.B., Harvard, 1968. This article is based on remarks from the 62nd Annual National Conference of Law Reviews, held at Syracuse University College of Law on March 31, 2016.

1. U.S. CONST. art. II, § 1.

rulings—think *Roe v. Wade*.[2]

But there is a second aspect of the question of conscience I have posed. What if the would-be President believes that some part of the written Constitution is wrong or unwise, either from the outset or having become so over the course of time? Certainly there are scholars and public officials who harbor doubts. To cite an example, among the changes retired Justice John Paul Stevens recommended in 2014 in *Six Amendments: How and Why We Should Change the Constitution* was a modification of the Second Amendment. In his version, the amendment would read,

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms [here comes the change] *when serving in the Militia* shall not be infringed.[3]

Justice Stevens made other suggestions, such as adding four words to the Supremacy Clause in Article VI[4] and tweaking the Eighth Amendment to make it clear that capital punishment is forbidden cruel and unusual punishment.[5] I will not go through all of his recommendations. The point quite simply is that it is entirely possible to imagine changes to the actual text, and few people would lose sleep over the fact that a candidate took the required oath while harboring such views. As Professor Sandy Levinson noted in a May 28, 2012, *New York Times* op-ed with the memorable title *Our Imbecilic Constitution*,

> In the election of 1912, two presidents—past and future—seriously questioned the adequacy of the Constitution. Theodore Roosevelt would have allowed Congress to override Supreme Court decisions invalidating federal laws, while Woodrow Wilson basically supported a parliamentary system and, as president, tried to act more as a prime minister than as an agent of Congress.[6]

I will give you my bottom line: I see no greater impediment to honestly and properly swearing to defend the Constitution while standing with Justice Stevens on his textual changes than to considering that important parts of the judicial gloss on the Constitution ought to be modified or overruled. This question could come up in other contexts as well, such as when a nominee for judicial office is questioned at a

---

2. 410 U.S. 113 (1973).
3. JOHN PAUL STEVENS, SIX AMENDMENTS 132 (2014).
4. *Id.* at 31.
5. *Id.* at 123.
6. Sanford Levinson, *Our Imbecilic Constitution*, N.Y. TIMES: CAMPAIGN STOPS (May 28, 2012, 8:36 PM), https://campaignstops.blogs.nytimes.com/2012/05/28/our-imbecilic-constitution.

confirmation hearing. There is a, by now, well-developed minuet that occurs between such nominees and members of the Senate Committee on the Judiciary, with the latter trying to smoke out the nominee's views and the nominee trying to avoid being pinned down—assuming the committee deigns to hold a hearing.

So there seems nothing particularly objectionable in being open to the notion that the Constitution is imperfect. After all, the Constitution itself recognizes this, since the Framers wisely included provisions for amendments. Those provisions make the ratification of amendments extraordinarily difficult, and—for better or worse—there have been very few amendments since 1787. Under the text of Article V, there are only two limits on amendments:

> [N]o Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and . . . no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.[7]

The first clause can be disregarded because it has performed its function. The intent was to prevent Congress from interfering with the slave trade before 1808, a date that was arrived at through a compromise.

The surviving part of the unamendability clause is what I would like to focus on because it may teach us something about the core of the constitutional plan. Professor Richard Albert calls it *constructive* unamendability because "no state would freely consent to a diminution of its representation in the Senate."[8] My colleague Professor Akhil Amar writes in *America's Constitution: A Biography*, "Even had these words been airtight, they did not purport to make anything formally unamendable. Rather, they merely provided for an alternative amendment procedure that in effect required unanimity among the states."[9] Assuming they are correct, my question is: What could you change in the text and still be able to swear or affirm honestly that it remained the Constitution of 1787?

One thing you could not do, it seems to me, is add a provision that was itself unamendable. Professor Douglas Linder wrote in *What in the Constitution Cannot be Amended* about an amendment that was proposed on the eve of the Civil War that would have protected slaveholding and

---

7. U.S. CONST. art. V.

8. Richard Albert, *Constructive Unamendability in Canada and the United States*, 67 SUP. CT. L. REV. 181, 184 (2014).

9. AHKIL R. AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 293 (2005).

would have been immune to future amendment.[10] The amendment never got anywhere,[11] but the idea is instructive. It would violate the unamendability clause to, in effect, amend that clause itself by adding something else to the category of untouchable provisions. As Professor Linder wrote,

> The words and history of article five indicate that there is one express limitation on the amendment power: no state can (without its consent) be deprived of its equal suffrage in the Senate. Through an understanding of the underlying purposes of the Constitution it is possible to appreciate a second limitation on the amendment power: article five itself cannot be amended so as to create any new limitations on the amending power.[12]

That much seems clear. But does the "equal suffrage" term of the unamendability clause itself tell us anything about what is truly essential to the 1787 document? I believe it tells us five things:

- It tells us that there must be *states*—more than one, since if there were only one, the "equal suffrage" clause would lose its meaning.[13]
- It tells us that, whatever else are the properties of statehood, they must include the ability to give or withhold consent.[14]
- It tells us that there must be some political entity other than the states.[15]
- It tells us that that non-state entity must have a Senate,[16] although what the properties are of Senatehood are not prescribed: those set forth in Article I, Section 3[17] are subject to amendment.
- It tells us that—unless a state happens to consent—it must have equal suffrage with however many other states there happen to be.[18] That equality presumably could be achieved by means other than equal numbers of senators, so long as each state had the same voice in the chamber. Thus, you could argue that an Article V-compliant Senate might contain unequal numbers of

10. Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 728 (1981).

11. *Id.*

12. *Id.* at 733.

13. U.S. CONST. art. V.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* art. I, § 3.

18. U.S. CONST. art. V.

senators but their votes could be weighted. For example, Kentucky might have ten senators to Idaho's four, but each Idaho senator's vote would count as 2.5 times the vote of each Kentuckian's. If we retained the idea of having more than one senator from each state, could an amendment provide that each state may cast only a single Senate vote (as most states now do in the Electoral College), in contrast to the current arrangement under which any state's senators may and often do vote differently on the same matter?

So where does this leave us? What is up for grabs? If the obstacle course for amendments could be navigated, look what could be done:

- We could have a unicameral, like Nebraska—a one-house legislature, where the only chamber was the Senate.[19] A friend has suggested that because the first clause of Article V refers "both houses,"[20] that must imply that there must be two chambers. But if you read Article V as a whole, even that part of the amending clause could be amended so long as the currently prescribed process was followed. If the prescribed amending process is followed, the obstacle course for amendments could be made easier or tougher.
- Or we could have three or more chambers. How about a third chamber to include representatives of federally-acknowledged Native American tribes? (I'm serious about this, although this is for the tribes to decide in the first instance, and they may well not want to buy in to the constitutional framework.)
- Members of the Senate could be appointed. (By whom? The governors? The President? The Supreme Court—if we had one?)
- Lawmaking power could be vested in the President alone (if we had one).
- Each state might have a single senator or many, provided only that the number was the same for all.
- States could be combined, split, or extinguished, since Article IV, Section 3 is amendable. (Query: Does a state have a right to die, like a town that seeks to surrender its charter? Seemingly, except that the last two states would not enjoy that right, since there have to be two.)
- Could the country be made a monarchy? Yes, so long as there

---

19. *On Unicameralism*, NEB. LEGISLATURE, http://nebraskalegislature.gov/about/ou_facts.php (last visited Mar. 3, 2017).

20. U.S. CONST. art. V.

was a Senate with equally-represented states.

- Could one or more or all states be made into hereditary principalities? Nothing in the unamendability clause ensures the eternal application of the republican form of government clause of Article IV, Section 4.[21]

You get the point. Article V leaves a great deal of the political architecture open to change, and while the examples I have given are outlandish and in most cases entirely unthinkable, they show that to be the case. At bottom, all we can be certain of is a federal system (i.e., one in which there is a national political entity and more than one subordinate entities), with a one-house national legislature in which subordinate entities called "states" have equal votes.

This is a thought experiment. My purpose is not to suggest that all or any of these changes ought to be made simply because they are not precluded by the unamendability clause. Rather, it is to suggest that it is important not to take our remarkable constitutional arrangements for granted; to marvel at the strong fabric of extra-textual constitutional values we have worked through over the years; and to be unafraid to question aspects of the constitutional architecture that may no longer make sense—or even may not have made much sense at the Founding.

Now I would like to change the subject a little. Ask yourself whether there can be such a thing as an unconstitutional constitutional amendment, and unconstitutional not in the formalistic or merely procedural sense that it has become stale or had for some other reason not been properly ratified, but in the core sense that it is incompatible with the basic constitutional design. Once or twice claims have been made that amendments to the U.S. Constitution were so far out of sync with the genius of the plan developed at Philadelphia that they could not stand.[22] These have been rejected.[23]

In other countries, there have been similar "basic structure" challenges, but they are an uphill battle and the outcomes are inconsistent. Only last summer, a majority of the Supreme Court of Pakistan, ruling on a constitutional amendment that had been rammed through the legislature to authorize military court jurisdiction over civilians, held in *District Bar Association, Rawalpindi v. Federation of Pakistan* that there was no such

---

21. *Id.* art. IV, § 4.

22. *See, e.g.*, Christian Feigenspan, Inc. v. Bodine, 264 F. 186, 188 (D.N.J. 1920) (challenging the validity of the Eighteenth Amendment), *aff'd sub nom.* Nat'l Prohibition Cases, 253 U.S. 350.

23. *Id.*

thing as an unconstitutional constitutional amendment.[24] (Personally I thought Pakistan's unfortunate Twenty-First Amendment, which is supposed to expire after only two years, could and should have been invalidated on the narrower ground that it was temporary. I would have held that such a sunset provision is inherently inconsistent with the notion of a constitutional amendment. We will see whether the Twenty-First Amendment is extended before it expires next January. I think it will be.)[25]

In contrast, the Supreme Court of neighboring India has applied the "basic structure" doctrine, as have a few other countries.[26] There is a rich literature on the subject, with strong advocates such as Israel's remarkable Aharon Barak, but most judges have been understandably loath to embrace the idea given its antidemocratic implications.

What do you think? What would you change in the Constitution, and how far do you think you can go?

---

24. Dist. Bar Ass'n, Rawalpindi v. Fed'n of Pak., (2015) 68 PLD (SC) 401.

25. Events proved me right. Although the 21st Amendment expired on January 7, 2017 in accordance with its sunset clause, Pakistan approved a 23rd Amendment on March 30, 2017, which essentially revived the power of military courts to try civilians for another two years. PAKISTAN CONST. art. 175, cl. (3), *amended by* The Constitution (Twenty-third Amendment) Act, 2017 (Pak.).

26. *See* Kesavananda Bharati v. Kerala, AIR 1973 SC 1461 (India).