



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
Joel W. Solomon United States Courthouse
900 Georgia Avenue
Chattanooga, Tennessee 37402

THE CONSTITUTION – SEARCHING FOR AN ALTERNATIVE

September 2024

Tuesday, September 17, 2024, marks the 237th anniversary of the signing of the United States Constitution. The United States Constitution is the world's longest surviving written charter of government. It has served our nation and its people well over the past two centuries, even through a long and terrible civil war. And although it has served us well, like all human creations, it is not a perfect document. On the occasion of its anniversary, we think it helpful to briefly discuss some of the current sentiment for changing or amending the Constitution.

DISSATISFACTION WITH THE CONSTITUTION.

For various reasons, in certain circles of our society across the country, there is a serious, prolonged, and sometimes heated debate as to whether the Constitution has outlived its usefulness and should be discarded or extensively amended. Some argue that a document written so many years ago for a largely agrarian society where women did not have the vote and where slavery was still legal makes the Constitution antiquated.

Many are dissatisfied with provisions in the Constitution establishing the electoral college, assigning two senators to every state regardless of population, prescribing how federal judges are selected and appointed, and providing life tenure for federal judges. And although not specifically in the Constitution, some critics also question the concept of judicial review and propose increasing the number of Supreme Court justices and lower court judges, rotating judges on and off the Supreme Court, imposing term limits on Supreme Court justices, and limiting Supreme Court and possibly lower federal court jurisdiction. While most of the discussion concerns the Supreme Court, critics also focus on the federal district and appellate levels. These critics argue that there are too few judges to hear too many cases and additional judges would make the courts more effective and efficient.

ROLE AND FUNCTION OF THE FEDERAL JUDICIARY.

We will not attempt to address all of these arguments here, nor will we address those that concern matters outside of the federal judiciary. We also take no position on whether the arguments for changes are good or bad. Our purpose is only to explore the difficulty of making any of the suggested changes a reality, especially in our deeply divided and polarized society.

Regardless of what changes are proposed, there is close to universal agreement that a federal court system is essential for our nation. There is also consensus that the federal judiciary must be robust, respected, viable, and credible, and that the court system must be able to decide disputes.

PROCESS OF CHANGING THE CONSTITUTION.

Any change to the Constitution would have to meet the procedural requirements for amending the Constitution. The Constitution requires that any amendment must be proposed by a two-thirds vote of both Houses of Congress. There is an alternative mechanism that involves two-thirds of the States proposing an amendment by a convention called for that purpose. An amendment proposed by Congress must then be ratified by three-fourths of the State legislatures, or an amendment proposed by the States must be ratified by three-fourths of special ratification conventions called in the States.

The Constitution, for sound reasons, thus would not allow just a bare majority of the states to adopt a change in the Constitution. As former Chief Justice John Marshall wrote, the Constitution was written “to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” *McCulloch v. Maryland*, 17 U.S. 316 (1819). The Constitution is intended to provide stability in the governing of the country. For stability, it must be long-lasting. Requiring a supermajority of the Congress and/or the States helps to ensure the needed stability. However, this requirement of a supermajority leads us back to the problem faced by the original Constitution Convention—the need for compromise.

For a change to the Constitution to be adopted with respect to the judiciary, states as disparate as Massachusetts and Missouri would have to agree, or at least be willing to reach a mutually agreeable compromise. We have to ask ourselves, what judicial provisions would secure the votes of California and New York and South Carolina and Mississippi? To enact a constitutional amendment requires not just compromise but serious compromise. Realistically, this difficulty presents a serious obstacle to many of the currently discussed proposals being adopted in the foreseeable future, regardless of their merit.

OUR PRESENT CONSTITUTION IS LIKELY TO LAST INTO THE FORESEEABLE FUTURE.

Even assuming someone has a wonderful idea to improve the Constitution as it relates to the judiciary, it is exceedingly unlikely that the necessary widespread support and broad consensus for any of the changes being discussed could be mustered. It is also worth noting that some foreign countries are seeing widespread public opposition to proposed changes to their judiciaries even though the changes are intended to make them more amenable to public sentiment and citizen control. So even with its flaws, the system we have is likely to endure well into the foreseeable future.

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