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To Amend or Not? Princetonians Weigh In On the U.S. Constitution

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PAW asked constitutional scholars what changes they would make

What amendment would you make to the U.S. Constitution? For this year's Constitution Day, Sept. 17, PAW asked Princeton alumni and professors who are constitutional scholars to weigh in. Their responses below reflect a moment in our nation with broader implications for the balance of powers and how we can and should move forward.

Keith Whittington, William Nelson Cromwell Professor of Politics, Princeton University

There are certainly many amendment possibilities that would make sense, and some are more pressing than others, but let me just point to Article V. Article V lays out the procedure for amending the Constitution itself, and it was designed to avoid the kind of problems that eventually brought down the Articles of Confederation. The Articles required the unanimous agreement of the states to amend, and critical amendments proved impossible in the face of a small number of holdouts. The Constitution allowed for the possibility of a large majority of states overruling a small minority in order to make necessary constitutional changes, but it probably did not go far enough.

There are many fine balancing acts that are needed in constitutional design, and one of those involves creating procedures for constitutional change. We should want a process that is not so easy that it is possible for transitory and narrow majorities to make fundamental changes in the basic law of the political system, but we should also want a process that is workable and does not incentivize reformers to look for workarounds that avoid formal constitutional change. Experience suggests that the founders set the bar to amendment too high. Other democratic constitutional systems have developed procedurally easier amendment systems, and it is possible to lower the procedural hurdles that Article V creates while retaining the stability, deliberativeness, and supermajoritarian qualities that Article V was aspiring to establish.

Kim Lane Scheppele, Laurance S. Rockefeller Professor of Sociology and International Affairs, Princeton University

The most important amendment is to amend the amendment rule so that amending the Constitution is an available route for political discontent with Supreme Court decisions.

Scheppele pointed to her testimony on this subject for the Supreme Court commission, which includes the following:

[You] might consider why there has been such clamor for changing the Court at this moment. I would submit that a very powerful Supreme Court with the power to nullify laws for unconstitutionality combined with a nearly- impossible-to-amend Constitution produces impossible pressures on the Court, pressures that push the institution to the breaking point with increases in political polarization. If the Supreme Court makes high-stakes decisions because that is its job, and if political supermajorities have nowhere to turn within the democratic system to alter Court decisions that they believe are wrongly decided, their only recourse is to put pressure the Court itself so that it will reverse its own rulings. This dynamic, intensified over decades in the United States, has severely strained the judicial nomination and confirmation process because the most obvious way to change the decisions of the Court is to change the judges who make them…

How can this pressure be lessened? Looking across comparative cases, I suggest that there are two ways that involve changing other parts of the constitutional system even more than changing the Court itself:

a) making the Constitution easier to amend so that there is an available super-majoritarian route to alter unpopular judicial decisions through democratic means or

b) providing checks and balances on the Supreme Court by adopting a version of what has been called the "Commonwealth model" or "weak-form judicial review" in which court decisions may be overridden, either temporarily or permanently, by the democratically accountable branches of government.

Ilya Shapiro '99, vice president and director, Robert A. Levy Center for Constitutional Studies at the Cato Institute

Last year I participated in a National Constitution Center project that had teams of legal scholars answering this exact question. I led Team Libertarian, and we joked that, because the Constitution is already a classical liberal document, all we needed to do was to add "and we mean it" to the end of every clause. After all, the Constitution set out a government of limited and enumerated powers, powers that are divided both "horizontally" among the three branches of

the federal government and "vertically" in a federalist system that recognizes, while limiting, the sovereignty of states, in order to protect "the blessings of liberty."

That original structure provided a mechanism to preserve the full range of individual liberties because it largely withheld from government the power to violate them. The Reconstruction Amendments further advanced that project by extending the Constitution's guarantees to protect against state violation, including eradicating slavery, the single greatest contradiction to the ethos of the American experiment. Unfortunately, many parts of our fundamentally libertarian Constitution, particularly those that limit federal power, have been ignored or cleverly evaded, especially by court decisions that perverted the actual meaning of the document's text.

So while 230 years of experience have demonstrated certain deficiencies and room for updating, the primary thing I'd do would be to clarify and sharpen those provisions that define and restrain federal authority — most notably the Commerce Clause, which has been transformed into a charter of virtually limitless power.

Sarah Seo '02, professor at Columbia Law School

Rather than amending the Constitution, I would undo nearly 100 years of case law that have watered down the rights guaranteed by the Fourth Amendment. In 1925, the Supreme Court held in Carroll v. United States that the police do not need a warrant to stop and search a car that they believe contains contraband. Ever since then, courts have interpreted the Fourth Amendment's guarantee against "unreasonable searches and seizures" by deferring to law enforcement's understanding of what is reasonable.

In 1968, the Court held in Terry v. Ohio — by citing Carroll — that the police did not need probable cause, but only reasonable suspicion, of a crime or danger in order to conduct certain searches and seizures called "stop and frisks." By 1995, a bestselling law enforcement textbook actually encouraged patrol officers to "know search-and-seizure laws inside-out because they are your tools." But the Fourth Amendment was intended to be the people's tools to shield their privacy from the government. To reclaim its guarantees, I would go back to the common-law understanding of reasonableness: Searches and seizures require a warrant, with very few exceptions for exigent circumstances, which would still require probable cause that a crime has been committed.

Phillip C. Bobbitt '71, Herbert Wechsler Professor of Federal Jurisprudence, Columbia Law School

There is no amendment at this time — in this deeply polarized political environment — that I would propose. Our first duty is to protect the integrity and stature of our embattled democratic institutions — including the courts — and a campaign for ratification of any new amendment is

unlikely to do that. Indeed, given the demographic swings of the last few decades, such a campaign might well result in a minority of the population ratifying an amendment even though ¾ of the states must vote to ratify.

Robert George, McCormick Professor of Jurisprudence and director of the James Madison Program in American Ideals and Institutions, Princeton University

The first word of the first (and only) sentence of the first article of the Constitution of the United States is the word "all": "*All* legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." If I could amend the Constitution, I would add a single sentence, consisting of three words, immediately following it: "All means all." In other words, I would not change the meaning of the Constitution. Rather, I would reinforce it — and demand that public officials in all three branches of the federal government begin respecting and honoring it.

Why is such reinforcement needed? For the simple reason that, over time, more and more legislative authority has been *abdicated* by the legislative branch — the Congress — to the executive and judicial branches — or *seized* by them. The laws — the rules — under which Americans live are, in violation of the Constitution, too often made by presidents and other executive officers and by judges. The Constitution does not divide up legislative powers and allocate them across the three branches of government; it vests *all* legislative powers granted to the United States in the Congress. What is it about the word "all" that's so hard for presidents and judges — and members of Congress themselves — to understand?

Evidently, however, they don't understand it. Who today can with a straight face say that *all* — or anything approaching all — legislative power is exercised by the Congress? Who can deny that Congress has *given away* an enormous amount of legislative authority and that the executive and judicial branches have significantly *usurped* the power "vested in Congress"? It's time for we the people to demand that legislators do their job, namely, *legislate*. And it's time to demand that presidents do their jobs — i.e. taking care that the laws are faithfully executed, and judges do their jobs, resolving disputes by faithfully applying laws they themselves did not, and do not, make.

The root of the problem, I believe, is that partisanship overwhelms fidelity to constitutional principle. Republicans and Democrats, liberals and conservatives, tend to accept — even endorse — the usurpation of legislative power by the other branches when it serves their partisan and ideological interests. They only complain when it's their opponents doing it. The complaints are hollow because they are hypocritical. So the beat goes on, and each incursion by, say, the Democrats is used to justify the incursion after that by the Republicans. So the authority of Congress continues to erode, as legislative power is siphoned off by the executive and the judicial branches.