

3 Takeaways Podcast Transcript
Lynn Thoman
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Ep. 120: How Worried Should We Be About Dysfunctional Government? Gifted Constitutional Expert Kannon Shanmugam Weighs In

INTRO male voice: Welcome to the 3 Takeaways podcast, which features short, memorable conversations with the world's best thinkers, business leaders, writers, politicians, scientists, and other newsmakers. Each episode ends with the three key takeaways that person has learned over their lives and their careers. And now your host and board member of schools at Harvard, Princeton and Columbia, Lynn Thoman.

Lynn Thoman: Hi, everyone, it's Lynn Thoman. Welcome to another 3 Takeaways episode. Today, I'm excited to be with Kannon Shanmugam. He's chair of the Supreme Court practice at the law firm Paul, Weiss, Rifkind which is one of the largest law firms in the world. And he has argued 34 cases before the Supreme Court. He previously served as Assistant to the Solicitor General and as a law clerk for Supreme Court Justice Antonin Scalia. I'm excited to find out about some of the most important challenges facing the US Constitution and government today, including why the justice system seems so politicized and whether judges are just politicians in robes. Kannon is the perfect person to ask as he practices law before the Supreme Court and has also worked at the Supreme Court as well as worked in all three branches of government over the course of his career. Welcome, Kannon, and thanks so much for our conversation today.

Kannon Shanmugam: Thank you, and it's great to be with you.

LT: So the original American Constitution is a very short document, only a couple of pages. Why is it so important?

KS: Well, Lynn, I think it's the most important non-religious text ever written. And that's for the simple reason that it's the oldest written national constitution and it has served as the model for countless constitutions worldwide. And in some sense, the genius of the Constitution lies in its simplicity. As you point out, the Constitution is only a few pages long. If you go to the National Archives, you'll see all four pages of the Constitution laid out. And yet it has served as the enduring foundational document for our government now for almost two hundred and fifty years. And while we all have the power to amend the Constitution, I think it's notable that that power has only rarely been exercised. And if anything, it has been exercised even more rarely in recent times. There's only been one constitutional amendment in my lifetime, and that was as constitutional amendments go, a relatively minor one. Aside from that, the Constitution has remained essentially the same and has remained the same with a few important exceptions for almost the entirety of our nation's history.

LT: What are the general principles of the Constitution?

KS: So the Constitution has two parts, and the most familiar part is, ironically enough, not part of the original Constitution. It's the Bill of Rights, which contains all of the familiar individual rights, the rights to free speech, to religion, the rights of criminal defendants, the right to be free from unreasonable searches and seizures, the right to carry firearms and many other rights. Those were amendments. There were the original ten amendments that are in the Bill of Rights and then the

subsequent amendments that have been added ever since. But when you really look at the Constitution and look at the core of the Constitution, the core of the Constitution concerns the establishment of the government and the separation of powers. And in particular, the provisions that are contained in articles one, two and three that establish Congress, the presidency and the courts respectively. And I think it's really important to realize that those two things go together.

KS: The founders themselves viewed the provisions that established the government as themselves protecting individual rights. And that's for the simple reason that the founders were concerned about excessive government, for lack of a better way of putting it. I think that's a fair way of describing the way that the founders thought about the British crown and their rule over the colonies. And so the founders deliberately established a variety of limits on the powers of government in order to protect individual liberties. And indeed, Alexander Hamilton went so far as to say that those protections were so significant that there was not even really a need for a bill of rights, because if the government didn't have, for instance, the power to regulate the press, there was no need to protect the right to a free press. And so when you think about the Constitution, again, we often talk about the First Amendment or the Fourth Amendment. But really, the founders themselves, I think, viewed the initial provisions of the Constitution, the provisions establishing and structuring the government as the most important.

LT: What do you see as the mistakes, if any, of the Constitution?

KS: There were some obvious mistakes. It was obviously a mistake to countenance slavery, infamously to provide that Black Americans only counted as three-fifths of a person for purposes of apportionment, not to initially give women the right to vote. But the major mistakes in the Constitution were addressed through amendments, of course, in the wake of the Civil War. Equal treatment of all Americans, including former slaves, was guaranteed by the Reconstruction Amendments, the 13th, 14th and 15th Amendments, the right of women to vote was enshrined in the 19th Amendment. But I think more broadly, the Constitution itself really didn't have any sort of structural mistakes. I think one potential reason for criticizing the Constitution is that it wasn't particularly specific. But in some sense, I think that was the genius of the Constitution. I think that the founders by design, set up general principles that could apply to new contexts as well as to familiar ones.

KS: And the perfect example of that is the First Amendment. The First Amendment simply provides that the Congress shall not abridge the freedom of speech. Of course, what the framers thought of as speech in 1789 took a very different form from speech today. The framers were very concerned with pamphlets and pamphleteers, and we don't really have pamphlets anymore. We have Twitter and we have social media. And yet the principles they established apply in very analogous ways to these new forms of media. The things that the government can do to surveil all of us are very different as a result of technology from what constables could do in the 18th century. And yet the Fourth Amendment protects us against unreasonable searches and seizures. And those terms and the term unreasonable ensure that as these technologies evolve, the Constitution can kind of rise to meet those technologies and to protect ordinary citizens. And so, again, some could potentially say that you could have a Constitution that addresses specific context or that provides for more specific rights. But the Constitution has really stood the test of time, even as our society has changed and really now in many ways bears little resemblance to American society in 1789.

LT: How did the framers of the Constitution see the three branches of government? How did they

see the balance of power?

KS: Well, the framers, perhaps learning from the lesson of Britain, were above all really concerned about legislative power. So obviously, the colonies were regulated by the Crown and by Parliament. And I think they were very concerned that in the American system, Congress would become the most powerful branch. And so the framers really imposed significant limitations on Congress, and in particular in Article One, Section Eight of the Constitution, the framers enumerated the powers that Congress would have. And that was significant. They didn't just say that Congress can pass laws on whatever it wants to. They said that Congress could regulate interstate commerce or act in other very specific ways. But that was really designed, I think, to ensure that the legislature in particular did not become omnipotent.

KS: By contrast, the framers were not all that concerned about the judiciary. The judiciary, famously described as the least dangerous branch. And I think that the framers were so unconcerned about the judiciary that they actually didn't even really provide for courts other than the Supreme Court. The Supreme Court is the only court that is specifically enumerated in the Constitution. And then the Constitution gives Congress the power to establish such inferior courts as it might provide. And so I think the framers had views about how this was all going to play out. Obviously, their goal in the Constitution was to provide what we all famously know of as checks and balances to ensure that each branch of government would have some ability to restrain the other two. And those checks and balances really work in all directions. If you were making a chart with the three branches on it, you would have limitations in both directions on all sides of the triangle. And I think the right way to think about the separation of powers was that the framers really attempted to establish a three-legged stool. And it's really hard to sit on a three-legged stool if one leg is longer or shorter than the other two. And I think that the framers tried to establish ground rules to ensure that the branches would have relatively similar powers.

LT: How do you see Congress now?

KS: Well, I think one of the really significant challenges that we have today is that far from an omnipotent Congress that is seeking to exert its powers really broadly, we have a relatively weak Congress right now because of the gridlock in that institution. And we have seen that Congress is simply unable to legislate, certainly on major issues, but really almost unable to legislate on any issues at all. And the best evidence of that is empirical evidence. If you go back to the 1970s and the 1980s, which weren't all that long ago, Congress was passing somewhere in the neighborhood of 700 laws per session. And a session of Congress is a two-year period. In the most recent Congress, which is not quite complete at the time of recording, but is almost complete, Congress passed only 213 laws. So there's been a significant decrease in law making. And I would submit an even greater decrease in law making on major issues.

KS: If you look at an issue like immigration, Congress has not passed a significant law in the area of immigration for almost 20 years, even though everyone would agree that immigration is one of the most pressing issues facing the country. Now, there are any number of explanations for that, and you probably would need a political scientist rather than a lawyer to tell you why Congress has become so dysfunctional. Certainly, there seems to be less compromise between the two major political parties. The fact that as a practical matter, the Senate's rules require 60 votes for legislation to move forward at a time when the two political parties are so polarized and when the control of Congress is so closely divided. These are all things and inevitably are contributors to the inability of

Congress to act. But I think Congress's failure to be able to act on the major issues of the day has really created a dysfunction in the separation of powers. It's really created a vacuum. And when you look at the other two branches, I think they have in many ways stepped in and stepped in in ways that perhaps the framers would not have contemplated.

LT: How do you see the executive branch now?

KS: So I think that the executive branch has really taken over a lot of the law making function. And of course, if you remember Schoolhouse Rock, it's not the job of the executive to make the laws. That's the job of Congress. It's the job of the President to sign the bills that Congress passes. But now presidents, I think, have really sort of filled the vacuum in the area of policy making. And what we have seen across parties is presidents getting frustrated with the inability to get their policy priorities through Congress, increasingly resorting to the rulemaking process, resorting to the process of making law unilaterally through the executive branch. And there are any number of ways that a president can do that.

KS: One way that a president can do that is by issuing an executive order, which is an order directly from the president on an issue of public policy. Another way of doing it is through the formal rulemaking process, where a cabinet department or increasingly an administrative agency will simply issue a rule and often a rule that looks a lot like a statute on an issue of great public importance. And the problem with that is the relative lack of accountability. When a law goes through the process of being enacted by Congress and signed by the president, the citizenry knows where to look. And if they're dissatisfied with the laws, they can throw the bums out and bring in new elected officials. That's harder to do when you have an executive agency acting. And it's even harder to do when that agency is a so-called independent agency and agency like, for instance, the Securities and Exchange Commission or the Federal Trade Commission, which Congress has attempted to insulate from political control, typically by making the heads of those agencies not accountable to the President. And so you have these massive administrative entities. And looking out my window here in Washington, I can see several of them from my window that essentially have taken on primary responsibility for making the law.

LT: And you believe they are essentially acting like a fourth branch of government that there is no check and balance on?

KS: I think that that's right. And while I do think that the courts have increasingly reviewed the work of those agencies, you still have the fundamental problem, which is that this is not how the framers expected that the government would operate. Most of the administrative agencies that we're talking about didn't really exist until the 20th century. And certainly at the time of the framing, I think there was little, if any, expectation that this was how law making was going to work, that you would have a code of federal regulations that really rivals in many ways the code of laws that Congress has passed as the substantive source for law in this country.

LT: How do you see the judicial branch now?

KS: Well, I think that the judicial branch has also largely stepped into the vacuum and has stepped into the vacuum left by the failure of Congress once again to pass laws. And I think the best way to think about this, Lynn, is just to look at the issues that the Supreme Court has been resolving, issues like abortion and gun rights and questions of religious liberty, immigration, more recently,

affirmative action. These are some of the most contentious issues of the day. Really, arguably, virtually all of the most contentious issues of the day seem to wind up in the Supreme Court sooner or later. And indeed, it feels like we're living through a period where almost every major issue is winding up at the Supreme Court at the same time.

KS: And the judicial branch, therefore, has become in many ways the last stop on a lot of incredibly contentious political issues. And that has had a really significant impact on the process of selecting judges, which I think has become more political as both political parties realize that the way in which they're going to have an impact on public policy is through the judges that each political party nominates. And in particular, we see that with the Supreme Court, where nominations to the Supreme Court almost feel like political campaigns and numerous presidents in recent years have said that they have no more important function than appointing Supreme Court justices. And so I think that the importance of the Supreme Court and now increasingly the lower courts has only grown as the political branches have become more dysfunctional.

LT: You raised the issue of abortion. How do you see that?

KS: Well, what's interesting about the issue of abortion is that as a result of the Supreme Court's decision in the recent Dobbs case, the Supreme Court has said that there is no longer a constitutional right to an abortion. And the issue of whether or not to permit abortion and what restrictions potentially to impose on abortion has therefore been returned to the political process. But because abortion is an issue on which Congress arguably doesn't have the power to legislate and on which the states do have the power to legislate, that issue has largely been returned not to the political branches on the federal level, but rather to the political branches on the state level. And what we're really seeing play out is a variety of efforts on the state level to pass legislation in both directions and in some cases even to amend state constitutions, either to provide a right to an abortion or to prohibit or restrict abortions.

LT: What do you say to people who say that judges are just politicians in robes?

KS: Well, I understand why people say that, because when you have a Supreme Court that is deciding intensely political issues, it's easy to see law as politics by another means. And I think that that's particularly true when as a practical matter, you have six Supreme Court justices who are appointed by Republican presidents who often vote one way and three Supreme Court justices appointed by Democratic presidents who often vote in the opposite direction. But I think it's really inaccurate to describe judges as politicians in robes. Judges today are doing what judges have always done, they are attempting to decide what the law is to the best of their abilities. And there are meaningful disagreements about how to go about that task, as there always have been. But I think judges are performing the judicial function as they always have. I think the principal difference today is that because judges are deciding these political issues, the politicians are spending much more time trying to select judges who will vote in a way that is consistent with their preferred political aims. And it's understandable why both political parties want to try to do that. But it does create this impression that the judiciary branch is just like the other political branches. And I think particularly when the judiciary is itself divided, there is a risk that people will perceive the judiciary in that way.

LT: How do we fix this situation?

KS: That's a hard question to answer. And I think ultimately, particularly with regard to the perception that judges are acting politically, the key is really to restore a functioning political process. Because I think if we have a functioning political process, it'll put much less pressure on the courts and the Supreme Court in particular to be the final word on contentious political issues. And that, I think, is a long-term project that requires a lot of thought and a lot of thought really from all of us as to how to restore a political process where actual legislation can take place, where there's some degree of consensus in our political process. And I do think there are certain structural challenges right now. I've mentioned one of them, which is the fact that it's very hard to get any legislation passed in the Senate because of the need for 60 votes. Another example is the way in which the political parties have gotten more sophisticated at drawing district lines for elections, which I think creates fewer districts that are genuinely in play in our elections process. And these are ultimately political issues that I think have to be resolved through the political process.

LT: Before I ask for the three takeaways you would like to leave the audience with today, is there anything else you'd like to mention?

KS: I don't think so. We've covered the entire Constitution in the space of twenty minutes, Lynn.

LT: What are the three takeaways then?

KS: I think my first takeaway is that I think that the future for our country is actually very bright. We're living through a time when I think people have a great deal of concern about the future for the country. But I think we do have an incredibly sturdy system of government thanks to the Constitution. And while at various times in our nation's history, the Constitution has perhaps bent a little bit under the pressures of the day, it's never broken. And I have a great deal of confidence that our constitutional structure will survive whatever challenges are thrown at it. I think my second takeaway is that the law is a noble profession. And ever since I started practicing law, lawyers have always been the butt of jokes and some degree of skepticism. But I feel the same way about the profession now that I did when I started out as a lawyer at the end of the last century. And that is that it is a truly noble calling to work within our constitutional system. I have the great privilege of arguing cases at the Supreme Court, many of which involve the interpretation of our Constitution. And it's just an enormous professional privilege to have the opportunity to do that.

KS: And I always encourage young people not to be scared off becoming a lawyer because there are those who criticize the profession. I continue to think that it is a very high calling. And then my third takeaway is really not so much a takeaway as it is advice for your audience. And that is that it is really important for all of us to be engaged on the questions that we're talking about today, not just to be engaged supporting political candidates getting out to vote, but also all of us as citizens really thinking deeply about the challenges that our system of government faces and to be thinking about solutions to those challenges. And so if there's one charge I could leave your audience with, it's that everyone think about ways to become engaged on these issues. The preamble to the Constitution contains the famous phrase in order to become a more perfect union. And it's always seemed to me that what the founders were really doing was delivering a charge to all of us to think that the country is never perfect, that there are always things we can do to make the country more perfect. And I think that that's an important responsibility for all of us as citizens to keep in mind.

LT: Kannon, this has been terrific. Thank you so much.

KS: Thank you Lynn, it was great to be with you.

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