



Jeffrey Rosen: [00:00:00] I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We The People, a weekly show of constitutional debate. The National Constitution Center is a non-partisan non-profit, chartered by Congress to increase awareness and understanding of the Constitution among the American people. The National Constitution Center recently launched a Constitution Drafting Project. We brought together three dream teams of leading constitutional scholars. Team Conservative, Team Progressive, and Team Libertarian, to draft and present their ideal constitutions.

On today's We The People, we bring you a special episode to celebrate the launch of the project and to review the major proposals of each team. I'm joined by the leaders of our three dream teams. Caroline Fredrickson is the leader of Team Progressive, which includes Professor Jamal Greene of Columbia Law School, and Professor Melissa Murray of NYU School of Law. She is distinguished visitor from practice at Georgetown Law Center, senior fellow at the Brennan Center for Justice, and author of the books *The Democracy Fix*, *Under The Bus*, and *The AOC Way*, *Secrets of Alexandria Ocasio-Cortez's Success*.

Caroline, it is wonderful to have you back on the show.

Caroline Frederickson: [00:01:22] It's great to be with you.

Rosen: [00:01:25] Ilya Shapiro is the leader of Team Libertarian, which also includes Timothy Sandefur, vice president for litigation at The Goldwater Institute, and Christina Mulligan, vice dean and professor at Brooklyn Law School. Ilya is the director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute, and author of the book *Supreme Disorder*, *Judicial Nominations and Politics of America's Highest Court*. Ilya, it is great to have you back on the show.

Ilya Shapiro: [00:01:54] Good to be back on.

Rosen: [00:01:56] And Ilan Wurman is the leader of Team Conservative, which also includes Professor Robert P. George of Princeton University, Professor Michael McConnell of Stanford Law School, and Professor Colleen A. Sheehan of Villanova. Ilan is associate professor of law at the Sandra Day O'Connor College of Law at Arizona State University, and author of *The Second Founding*, *An Introduction to the Fourteenth Amendment*. Ilan, it is wonderful to have you with us.

Ilan Wurman: [00:02:22] Well, it's a real pleasure to be here, so, thank you so much.

Rosen: [00:02:25] Ilan, we will start with you because Team Conservative is presenting for the first time. In the introduction to your Constitution, you write, "our country today is fraught with civil disrespect and all too often a disregard for the lives of others, many of our proposed changes are designed to enable elected officials to break free of the grip of faction, and once again to deliberate with the aim of listening attentively to, as well as educating, public opinion and promoting justice and the public good", tell us more about your Constitution which emphasizes the importance of Madisonian deliberation.

Wurman: [00:03:03] Yeah, well, thanks again for having me, and, so, the idea here is, you know, the Libertarian Constitution might focus predominantly on liberty and protecting



liberty, and, of course, there are structural protections for liberty, there's, there's no doubt about that. And the Progressive Constitution might focus on democratic accountability, you know, from the Conservative perspective, self government is not necessarily the same thing as, you know, unfiltered, unmediated democratic choice, democratic accountability, there's a very thin line separating that kind of, you know, democracy, in our view, from populism.

And, so, to- to the Conservative mind, what, what we were going f- for, right, the idea is that self government is, is government that's ultimately responsible to the people, but where the general will, the people's will, is refined and enlarged through, you know, a series of successive sort of intermediating institutions, like the representative mechanism. And, so, the thought here was not to be more democratic, not all the time, right, sometimes we try to be more democratic, but it was to increase deliberation, which is sometimes intention with democracy. So, the key innovation here, our most radical proposal, and we get that it's radical, okay, we get that this is radical. We make the Senate even less democratic than it already is.

So, everyone already complains that the Senate is anti-democratic, you have equal representation of the states, so, you know, a voter in California in the Senate has much less voting power than someone in, in, you know, Wisconsin or Montana, which ha- have you, and it's a pretty small body. We double down on this. We make the Senate 50, one per state, basically, which is closer to the original, you know, size of, of 26 when they were the, the original 13 colonies. We, originally debated, I don't know if I should confess this, we, we originally had them, deliberate in secret and vote in secret, and we decided that that was too far in, in, you know, the anti-democratic extreme.

And, so, and, so, we walked that back, at some point after, you know, a series of deliberations. We req- we have one long nine year term in this Senate, and we require them to take a pledge. We require them to take a pledge to legislate for the common good, for the national interest and not the interest of any party or class. And, so, again, the idea is what does it mean to be governed, you know, to be a self governing society? It's, it's where we the people ultimately have political power through elections, but where our passions, right, the passions of factions, our passions our refined, they, our passions don't become into policy. It takes time and deliberation and reflection and refinement for the popular will to, to translate into policy.

And, so, you know, the, the, the biggest reflection of that is, is in the Senate. Another place, and, and then I'll stop for now, I'll mention Presidential selection. So, we wanted to make Presidential selection simultaneously more democratic and also less democratic. I- in the sense that we thought that the current primary process, perhaps, you know, unsurprisingly, is not particularly good at identifying and selecting really meritorious choices, okay, to be candidate for President. N- not to say that they aren't meritorious, but, but we could imagine much more meritorious candidates.

At the same time, you know, the, the Electoral College itself has, is been criticized as anti-democratic, so, we wanted to create a process whereby the candidates would be selected in a less democratic way. One possibility was to have the parties do it, the political parties choose, the candidates. But then have the, the, a national popular vote, for President where,



you know, some number of states have to be carried, say, 20, 20 of the states have to be carried, so, so this, the national popular majority is somewhat distributed, nationally, geographically speaking.

and, so, the idea here was to make the ultimate vote, you know, on the second Tuesday of November or whatever it is, the first T- Tuesday of November or whatever it happens to be, more democratic, but that the candidate, the, the choice of candidates would be less democratic, where the parties would have more of a role of selecting the candidates, so that there'd be sort of meritorious choices. So, that's just another example of, of this tension that we tried to resolve throughout the document between democratic accountability, and, proper deliberation, with reflection and choice.

Rosen: [00:07:18] Caroline, you and your colleagues write in your introduction to the Progressive Constitution, "as Progressives, we believe in democracy rather than government by judiciary. At the heart of our Progressive Constitution is an accountable and inclusive political process", tell us about the ways that the Progressive Constitution emphasizes democracy as well as equality.

Frederickson: [00:07:40] Well, it was very interesting listening to, Ilan talk about, the, the Conservative Constitution, because there is definitely a very, big contrast between how we approached our work. And we do believe very much in democracy and equality, and, you know, people might be surprised in the way that we drafted, in that we spent a lot more focus on structural Constitution than on the rights bearing part of the Constitution, and that is, to a great extent, because we think democracy is the best protection for fundamental rights. there are some areas where we laid out a clearer protections for rights that we think are, already should be protected under our Constitution but where there is some dispute.

We do think that our Constitution as it exists right now is not, as well designed as it could be to protect a democracy, and I think we've seen that as elections have played out. So, we have really focused, much more, in terms of developing a Constitution that would ensure free and fair elections. an accountable and inclusive, government. Effective governance, we provide a mechanism to update the Constitution that is more workable than the current process under article five. And we looked to establish real equality.

in the structural side, you know, very much in contrast to the Conservative Constitution, we actually expand the size of Senate. we think it's a very unaccountable body as it already is, it's very undemocratic. Because we believe in democracy, we believe that there are already sufficient checks on sort of the, extreme populism that the Conservatives may be, afraid of, that appear to have dictated a lot of their choices. a six year term is already quite long, but what we do is ensure that the vast swaths of the population that now go unrepresented in the Senate or are underrepresented will get a greater voice, and we look to do that by providing a senator for every state, but then allocating the additional Senate seats by a population ratio.

we also looked to lengthen the service of House members from two to four years, and perhaps the Conservatives would agree with this, but we do think the burdens of fundraising, make, service in the House much more about serving the campaign, coffers than



about serving the people. And we move that election to an off year, non-Presidential election year so that the Congress is a better check on the Presidency.

And we look to, get rid of the Electoral College because, as was already mentioned, it is, again, a reflection of a very anti-democratic viewpoint about the way that we should select our President, and look to rank choice voting as a better mechanism to, select the President. so, those are some very specific, areas in which we address the structure of, of our elections, but we also believe that we need to have a process by which there can't be manipulation of electoral districts, and gerrymandering needs to be addressed, frontally by a constitutional revision. as well as the excessive role of money in politics, and I know my Libertarian friends would disagree [laughter] on this one, But we think it's a very problematic, part of our political system right now and a real misreading of the First Amendment, so we, even though we don't think Citizens, United was correctly decided, or Buckley for that matter, we do, want to make it more explicit in our Constitution that such regulation, can move forward. and, so, we, I know we'll, we'll talk a lot, about the other provisions, but in terms of the kind of structural, democratic, reforms that we envision, that is really, sort of w- w- where we put our emphasis.

Rosen: [00:11:07] Ilya, you and your colleagues write in your introduction to the Libertarian Constitution, "this was probably an easier project for us than for our Conservative and Progressive counterparts, because the current US Constitution is fundamentally a Libertarian or more precisely a Classical Liberal document, so much so that at the outset we joked that all we needed to do was to add 'and we mean it' at the end of every clause", tell us more about the ways that the Libertarian Constitution emphasizes liberty.

Frederickson: [00:11:35] Yeah, we, because we think that the existing Constitution is already pretty, pretty good, as long as you actually follow what it says, which we, have been observing in the breach for the last, number of decades. after all, the Constitution set out a government of limited and numerated powers, powers that are divided both horizontally among the three branches of the federal government, and vertically, in a federalist system that recognizes, while limited, the sovereignty of states in order to protect the blessings of liberty. That is the American, idea, and we find that, as you read, the first paragraph of our essay that that's the, Classical Liberal ethos of, of our republic.

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. And then the reconstruction amendments, what some call completing the Constitution after the Civil War, further advanced that project by extending the Constitution's Libertarian guarantees to protect against state violation, including eradicating slavery, which is the single greatest contradiction, to the American ethos.

Now, unfortunately, many parts of our fundamentally Libertarian Constitution, the existing one, particularly those that limit federal power, have been more often ignored or cleverly evaded than honored. Especially by court decisions that have perverted the meaning of the document's text. And, so, our task was to clarify and sharpen those provisions, most notably the Commerce Clause, the Congress' power to regulate interstate commerce that's been



transformed into a charter of expansive federal power far beyond whatever was, envisioned or meant.

of course, there have been some developments in the 230 years since the original Constitution and Bill of Rights took effect, and 150 years since the post Civil War amendments were ratified, that have demonstrated certain deficiencies from a Libertarian perspective. So, out of control spending, necessitates a, a balanced budget requirement, except in emergencies. Today's imperial Presidency, because Madison didn't, foresee that, congressional, parties, who are members of the same party as the President would just, expand, executive power in that way. So, the imperial Presidency militates for a reweighing of checks and balances, eh, in various ways.

We also couldn't help but add, a few of those and we mean it provisions, the, the belt and suspenders just to be safe, and enhancing certain liberty enhancing, or adding certain liberty enhancing reforms that were suggested by scholars such as Randy Barnett, Milton Friedman, like allowing the states, if they achieve a certain supermajority to, reverse, federal regulations or even federal laws. And we borrowed new protections from several State Constitutions, states have, historically borrowed from the federal one, but, there are state innovations, you know, 51, charters of, of freedom, if you will, and, so, we added prohibitions against so called special laws or gifts of government funds, stronger security against warrantless searches and against the use of eminent domain and other forms of, property confiscation.

in the spirit of focusing on drafting a Libertarian Constitution, we tried to avoid purely good government reforms that don't have clear Liberta- Libertarian salience, so, you know, I could debate with, with Ilan, with the Team Conservative, various very interesting structural reforms, I kind of lean towards, leaving the Senate as is but expanding the House significantly. So, the number of, constituents for each representative would be about the same as, you know, or at least getting towards what it was originally, to have the House be more accountable.

By the way, that would solve, largely, the Electoral College problem that the Progressives have, because then the number of electors in the more populous states would, would grow as well. But that's not a Libertarian reform, we thought, all of these kinds of, you know, term limits, things like that, we thought that's kind of good government or too political science-y and we really wanted to stick to, constitutional structure and, theory of rights. But, again, we did focus as the original Constitution's authors did on protecting negative rights, rights against being interfered with, instead of creating positive rights such as the right to education or healthcare, other things that have to be provided by others.

We were actually surprised that Team Progressive didn't have more of these sorts of things, relying instead on, what to our mind is unchecked democracy to provide those sorts of p- what would be, p- presumably popular goods, Classical Liberal theory holds that the only valid rights are things like free speech, private property, and the right to be left alone. So, our Libertarian Constitution, like the Constitution of 1787, provides and indeed precludes, such free entitlements at least at the federal level.



Rosen: [00:16:18] All right, now, let's dig into the details of the proposals of each of the three teams. We The People friends, please check out the Constitutions themselves, go to constitutioncenter.org at the debate page and we'll also post this link on our podcast page. Ilan, you note that many of your reforms, having to do with the powers of Congress and the states are designed to promote deliberation and to ensure elected branches that focus less on reelection and more on legislating and governing in a deliberative way. You've already told us about the proposed, reform to the Senate, but you have m- many other proposed reforms, including increasing the terms of House members to three years, returning this election of senators to state legislatures, adding an oath for senators, requiring them to pledge that they'll pursue the common good and the longterm welfare of the nation and adding a veto for state governors.

Give us a sense of this and other proposed reforms having to do with the powers of Congress and the states, as well as any, you know, texture about the kind of debates you had as you thought about how to promote Madisonian deliberation in proposing your reforms.

Wurman: [00:17:23] Yeah, so, one thing we do have in common with Team Progressive is we increased terms across the board, so, we now do it on a three, six, and nine years, so, House members have three years, the President has one single six year term, can't run for reelection, this was actually something that the founders, this was a version of the founders initial proposal that was ultimately rejected, right, at the Constitutional Convention, and then senators also get one term, of nine years. So, again, not just longer terms, so you don't have to constantly be running for reelection, but you, you know, it actually gives you sort of this institutional expertise and you don't have to constantly worry about raising money for reelection and you don't have to worry about the political whims that how will this my affect my reelection chances and so on.

So, that was one, you know, big, set of things that we did. we also, just in, in Congress, we tried to resurrect the legislative process itself. We, we, we, we were trying to make Congress great again, right? We're trying to make Congress legislate again, by requiring it, in, in our Constitution, they are required to pass a budget on a three year scale, you know, for, for each session. And it takes priority over all other legislation, so, they, they, so, Congress is the one that has to pass the budget and then all appropriations, you know, have to be raised before they can be spent, you know, in accordance with, with the budget resolution and so on.

And, so, the idea is to get Congress, to govern here again, and, and to deliberate again, and to take its proper role and we have a variety of reforms of the administrative state along this line. we accept, you know, the inevitability, so to speak, of broad delegations of power. Right, not all delegations, we do sneak in, implicitly, a non delegation clause, right, in, in our Constitution. but we also accept the inevitability of, of the delegation of, of substantial amounts of, of, of authority to the executive branch, and, and we try to, rein it in, though, by giving Congress the legislative veto on the back end, and I think the Libertarian Constitution does this too, or it could be the Progressive one, n- now I might be, forgetting w- w- which one it is exactly.



But we give Congress a backend cheque, which doesn't expire, by the way. They could always go back and just rescind regulations without, Presidential approval, right, and w- and w- and we think that this sort of restores Congress' role. I- in terms of, private right, in terms of judicial cases, we also tried to rein in the administrative state here, by recognizing, we recognize that Congress can create administrative courts that hear public rights cases. In private rights cases, which, today, the administrative agencies routinely hear, we sort of provide a spin on, an idea that I'm actually proposing as legislation in, in Congress, which would be to make administrative law judges, make, their reports in private rights cases, this is like reports and recommendations that are then reviewed, the objections to the reports are reviewed de novo by a district judge, and this way you solve the article three problem by having, you know, de novo reviewed by judges and so on.

But the administrative process also resolves a lot of issues, right? I mean, you can't just rehear the whole thing, you have to give specific objections. So, basically, administrative law judges become like magistrate judges. So, again, all of these are proposals, to get Congress to legislate again, to get, you know, the executive and the courts to do their proper role again, all while accepting, you know, sort of the reality of, of modern governance and modern needs.

Rosen: [00:20:40] Caroline, you propose a series of reforms to ensure effective governance as well as to provide what you call real checks and balances and on the subject of the administrative state, you clarify that Congress can legislate in the general welfare, you give Congress clear authority to establish independent agencies, you permit Congress to pass law with legislative veto's, there we go, and you also propose, to revise the impeachment power in significant ways. Tell us about the ways you approach the question of congressional power.

Frederickson: [00:21:14] Well, you know, I think it's really interesting to hear from Ilan, Ilan, sorry, of the Conservative Constitution, and there are really interesting overlaps, and distinctions with the Conservative Constitution and also with the Libertarian Constitution in different ways. And, so, [laughter] it's sort of a Venn diagram in some ways. we, so, we, we are interested in effective government, as well as ensuring that Congress reasserts itself and, and we think those things go together very much. we, m- we all know the famous quote from James Madison, that, "ambition must be made to counteract ambition", but it's not functioning that way and, and Ilya and I are in agreement on this that they, you know, that the, the Presidency has become too powerful, and that Congress has withered.

and it seems like the Conservative Constitution has that viewpoint, and, so, I think that's an interesting, point of agreement between all of them, in thinking about how we actually address an overly robust Presidency and the threat that it makes, we think to democracy and equality, but certainly, as well, to liberty. and to rule of law. So, like the Conservative Constitution, we do, believe that a legislative veto should have some role and the problem with Congress right now is that, in fact, you know, the unanticipated rise of the parties, really undermined the idea that there would be institutional independence and that each branch would protect its turf. Congress is, certainly failed to do that, in many ways a legislative veto would, would help ensure that.



We also, make more explicit the ability of Congress to engage in oversight. It's been particularly problematic during the Trump administration, but we all know that it has been, a regular practice of the executive branch to resist and deny the ability of Congress to ensure that the programs that it has established through legislation are actually being run properly, and to Ilan's point about budgeting, you know, it's very hard to do budgets if you don't have a sense of how the money's being spent. Is it being well spent? and, so, thus congress really needs to have a more explicitly delineated, ability to engage in oversight.

And we also share the viewpoint that there should be, more accountability in the executive branch, and that is, a- again, not just the oversight but, changing and clarifying of the impeachment power. The impeachment power does not exist and I- this has been clear, but we wanted to make it more explicit in the Constitution that there is- does not need to be a crime committed for a President to be, impeached, we wanted to make it clear, something that we think is already the case under the current Constitution that an abuse of the public trust could be the basis. We also lower the vote threshold for impeachment.

We changed the way that the Constitution can be amended, because, again, we think is has, has become overly complicated and it's difficult to amend the Constitution, we think it should not be so difficult, and, so, change the process to ensure that two thirds of the population, states representing two thirds of the population, could get the same standing as two thirds of the states in the process of amending the Constitution. So, you know, we, we do address a number of other areas in which, we try and have- establish effective governance. but those are, are areas that we think are particularly important.

Rosen: [00:24:27] Ilya, tell us about the Libertarian approach to the powers of Congress and the states, it was fascinating to hear Caroline identify areas of agreement and disagreement with the Conservative Constitution, if you could do the same that would be great, you propose rewriting the commerce clause to capture, more pre-New Deal jurisprudence that would limit Congress' power, you, limit the sweep of the Necessary and Proper Clause and I think you're more skeptical about the administrative state than the Progressives and the Conservatives.

On the other hand, like both of them, you revise the impeachment clause to make it clear that officials can be impeached for behavior that renders them unfit for office, I think that's actually in agreement among the three of you, so, please identify agreement and disagreement when it comes to the powers of Congress and the states.

Shapiro: [00:25:15] Yeah, more federal officers I think need to be impeached and I'm not talking just about the President, but, we, we, we do, make clear, as Caroline just did, that it goes beyond, high crimes and misdemeanors and just, you know, being, unfit for office, although we didn't change the two thirds requirement to convict and remove because we don't want it just to be a, a partisan thing, every single time.

with the Commerce Clause, yeah, we, we allow the federal government to regulate only actually interstate, actual commerce, unlike today's legal precedent which allows control over non-commercial activity and activities that take place wholly within one state, although we do allow for regulation of interstate pollution, so, we actually have an explicit expansion



of, you know, what's now recognized as the EPA's power to control, both water and, and air that flows interstate, that is not commerce, so, under an originalist reading of the Constitution, that should not, you know, the, that power is not constitutional, but, we make it such.

we, make explicit that the General Welfare Clause is a limitation, not a grant of power, that is it refers to the general as opposed to the parochial or specific, welfare. We sharpen the Necessary and Proper Clause to only allow laws incidental to the enumerated powers, not wholly new ones in kind of an endless string of knee bone connected to the shin bone reasoning that today's legal precedents, allow. Yeah, we are very skeptical of the administrative state, I don't know whether more or less or the same as the Conservatives, probably more than the Progressives, but we do put it even in our preamble, and, frankly, a lot, I think, of what the Conservatives do, it sounds like a preamble, all these oaths and, you know, sentiments about the, the common good and, longterm welfare and, you know, things like natural law.

You know, that's great, these are all hortatory, and so we do put in our preamble that these ends shall be secured by the powers of this new government, which shall be divided into three branches, and no branch shall exercise the authority of any other branch, so, you know, we, again, a lot of what we do is just very minute tweaks, to, to really say, as- an- and we mean it, I think we only allow ourselves one actual, quote unquote, "and we mean it", at the very end, wh- the current Tenth Amendment to say that the powers not expressly delegated are reserved to the states or to the people, and we mean it, but we make sure that the state power also is not unlimited because we are strong believers in the Fourteenth Amendment, and, so, you know, more explicitly spell out what now might be covered by substantive due process or what some, including myself, think should be covered under the Privileges or Immunities Clause.

But, in general, it's, we have a rebalancing of powers, and, you know, in- infinite rights, if you will.

Rosen: [00:28:01] Ilan, tell us, please, about Team Conservative's proposals for reforming the Presidency and the judiciary. You propose expanding, as you said, the President's term to six years and preventing Presidents from running for reelection, tell us more about your amended Electoral College, impeachment process, writing the President's removal power into the Constitution, establishing a process for a state of emergency, as well as setting the number of Justices at nine and setting Supreme Court Justice's terms to a single term of 18 years.

Wurman: [00:28:35] Yeah, and, so, there isn't universal agreement on the 18 year term for Supreme Court Justices, but there is an academic consensus, now, I think among sort of all, all positions that there, you know, I mean, there are still some defenders of the, of this lifetime tenure for Supreme Court Justices, but it does seem odd, right? A- a- as much as the Conservatives liked President Trump's nominees, there is something really odd, you know, about President Trump in one term getting three nominees to the Supreme Court and President Bush in eight years got two and President Obama in eight years got two, and we think it would, it would reduce the temperature of the confirmation battles, if, if, if we had



them in staggered, you know, 18 year terms, such that every two years there's a new appointment, right?

So, in the real Constitution, every President gets between two and four appointees, in our Constitution, you know, with the six year term, everyone will get three, we think this, it's just better that way, right? I mean, some Justices stay too long, right? For any number of reasons, they can have political retirements, and they can maneuver their retirements, right, and, so, this would be, this would be much, much better, we think.

We also put a provision to prevent court packing in the lower courts, and we say that courts can only be expanded by one judge per court every two years. We, we think that will also solve that problem. Now, you know, Congress could still create new courts, all right, and, and, and try to get around the restriction that way, but there's a political cost to doing it, I mean, and, and, and th- and that's fine, we just want Congress to have to eat the political cost of packing the court, while we also, the lower courts, while we also want to create the opportunity for the national expansion o- of the judiciary.

in terms of, you know, the Presidential selection process, we have actually quite a bit of disagreement. We spent the most time, which is why it took us so long, sorry, [laughter], you know, discussing the Presidential selection process, because the initial proposal that we debated, would've had actually sort of three phases to it. First, the state legislatures would nominate, you know, worthy candidates, right. So, the state legislatures would nominate. And among anyone receiving a, a nomination from the state legislature, the political parties would then choose them. Right, the political parties would choose their candidates, and then there would be a national sort of popular vote, and this, again, gave the parties the ability to choose meritorious candidates, because we think the parties are self interested, they're interested in self preservation, they're interested in, in, in choosing someone who they think can win, presumably who's not crazy.

Right, so, we think that the parties would actually be pretty good. Now, then we hit a snag because we had four members, two of whom did not want to mention political parties in the Constitution. They wanted to be true, you know, to the George Washington sort of view that, that political parties, you know, are, are, you know, that there's something about small R republicanism that's worth preserving, that's, that's a- apolitical, that's not tethered to parties, to actual political parties. And then two of us, you know, thought that, look, parties are inevitable, why, you know, turn a blind eye to, to the inevitable? Parties, in fact, are salutary, in a way, it c- we can't think of sort of a better mechanism to channel political disagreements than the political party system.

And, so, we, we had that debate and, and we ultimately decided not to mention parties and the let the state legislatures drive the nomination process. But we assume, we assume that the political parties will be organizing, you know, these various state legislatures that are nominating individuals for President, and, you know, the, the person with the most nominations, will, will be a candidate, you know, the top two and so on, and, and we tried to do it in a way to ensure that the two major parties, which we don't explicitly mention, but, again, [laughter] we know they're there. You know, we'll always get one of the candidates, so, that's what we did for, you know, to President selection.



you mentioned a lot of other things, on impeachment I'll say we also clarified that the standard doesn't require a crime. It's not just any crime, but it also doesn't have to be a crime, right? It has to be sufficiently important political, you know, or criminal offense, but the other thing that we do, and this is a theme of our Constitution elsewhere, is we have a three fifths voting rule in Congress for a lot of specified things, where we think there should be bipartisan buy-in, like terminating a war, declaring emergencies, and impeachment. Both to impeach, and to convict is a three fifths vote in our Constitution, this makes it harder to impeach than the current Constitution, which is just a majority vote in the House, and it makes it easier to convict than the current Constitution, which requires two thirds, right?

The, the problem today is arguably the last two impeachments, right, one of Democrats impeaching a Republican President, and then 20 years ago, Republicans impeaching a Democratic President, it's, we had an impeachment that was almost, I- I- there's almost zero chance it would've ended up in a conviction. So, we just go through a national circus for zero chance that it's going to end up a kinda, in a conviction. Well, by doing three fifths for both, it increases, you know, the, the bipartisan buy in, in, at the front end, but it also makes it likelier for conviction on, on, on the back end and we think that would be, an improvement to the impeachment process altogether.

Rosen: [00:33:44] Caroline, tell us about Team Progressives proposals for the Presidency and the courts. For the Presidency you propose revising the vesting clause to limit Presidential power. For the court, this, I think, is another surprising and significant area of agreement, you also would set an 18 year term for the Supreme Court, tell us more.

Frederickson: [00:34:06] Right, well, we wanted to make it clear that this theory of unitary executive is not one that can be understood to come from our Constitution, we don't believe it comes from the current Constitution. We want to make sure that that, viewpoint, is effectively, repelled by [laughter] the language that we use, currently some people argue that the President really has, a extraordinary amount of power that's much more monarchical than we think could've been envisioned by the founders, who were in a revolution against, an absolute monarch.

So, we want to make it clear that there was otherwise, legal limits that could be placed. you know, as I mentioned earlier, we do establish a different selection process, for the President, which we think will make the President much more accountable by eliminating the electoral college and using a ranked choice voting method. As we all know, the, the current election, system means that certain states are attended to to a much greater extent, not just by candidates, but the President as well, after election, either for purposes of reelection, or for purposes of helping somebody following in his and in the future, soon, hopefully, her footsteps, who may want to become the next candidate for the Presidency.

Having ranked choice voting and no Electoral College would ensure that the Presidential candidates were attentive to the entire United States, and not just to Ohio, Wisconsin, Florida. now, Ilan, probably appreciates that Arizona has become much more important in [laughter], in this whole, effort, but nonetheless I think, you know, there are states that get neglected and, and it happens not just as a campaign matter but also as a, a public policy



matter, as a consequence of the campaigns. And, you know, I think we all share a belief that the President, needs to be more accountable through a change in the impeachment process.

I think it's very interesting the Conservative approach, actually, in terms of applying a three fifths vote on the House, we did make a three fifths vote in the Senate ourselves to make it easier to convict, but didn't make the change in the House. I think it's a place where, where we'd all have, a Convention, a Constitutional Convention, we might be able to come to agreement, on, on that kind of a change, it certainly seems to be very, commonsensical.

so, those are, in essence, the, some of the major changes, in the Presidency. but we did also, agree with the other, teams. I don't think that the Libertarian Constitution made this in their text, although I may be misremembering, that we all share the agreement, though, that term limits for judges and certainly for Supreme Court Justices are not only appropriate but necessary. I, you know, I, I, I read articles by people like Steven Calabresi who founded the Federalist Society, advocating an 18 year term. and for many of the same arguments that I would use, which is that, the judiciary has certainly changed in terms of how, and, and the Supreme Court, above all, in terms of how service unfolds, that is, it used to be, for Supreme Court Justices, a kind of capstone of a career.

I like to think of Earl Warren as a great Justice, who came to the Supreme Court after being Governor of California, who had a great deal of experience and understanding of government and how, and, and, states, and how, the system, did function and should function, and approached the Constitution from, from that vantage point. it doesn't happen anymore, we now have a, a class of, of, of Justices who were sort of lifetime, more or less, and are being appointed at an earlier and earlier age and don't have that kind of life experience.

I would also argue, though, that, that the accretion of power to the judiciary is very damaging to a democracy. So, an 18 year term, which, as Ilan says, you know, would ensure that, Presidents had a somewhat more equal role, between Presidencies and appointing Justices because the mechanism would be to give each President two appointments, in our process. we think it's, would be a very important reform, and would do a lot to ensure that the sort of the role of the, the branches was appropriately calibrated again, that the separation of powers and checks and balances was better, designed and did not give either such great power to the Presidency or to the judiciary, an elected branch, but rather bring back Congress in its, allowing it to have a greater power that was envisioned under the Constitution.

Rosen: [00:38:28] Ilya, tell us about Team Libertarian's thoughts on the reform of the Presidency and the judiciary. Remarkably, you, like Team Progressive, propose rewriting the Vesting Clause to limit the President's power, although you may have a different approach to how you would rewrite it, so, tell us about that as well as your proposals to revise impeachment, where I think there is broad agreement, and then when it comes to the judiciary you propose fewer changes but did you consider term limits? And tell us about other changes you propose to the judiciary.



Shapiro: [00:38:59] Sure, well, we, we, I already talked about impeachment but we, we clarified that the power of the executive branch is the power to execute the laws and not some broader or freestanding power that adds to something that's, in article one, although we do, clean up the lines of separation of power such that Presidents are given the explicit power to exit treaties, that's sort of just assumed now. We clean up the appointment power, we state that no treaty or international agreement can expand congressional power, or be domestically enforceable without enabling, legislation and, ratifying a recent Supreme Court decision for purposes of recess appointments, the Senate alone determines when it's, in recess.

Most of these just make explicit what's already in the law. One thing we add that might some, listeners might find cute is that we eliminate the grotesque spectacle of the annual State of the Union address by requiring this information to be transmitted in written form as it was until Woodrow Wilson made this one of the many changes to our constitutional order that we think are, to the nation's detriment.

Speaking of that, the taxing power. We, we remove the progressive era amendments of both the taxing power, the income tax, sorry, and prohibition, of course, get rid of that. We keep women voting, but we make clear that Congress can only tax through a, effectively, a value added tax, nationally. on the, judicial branch, yeah, we don't, we don't fiddle with that too much, I personally, agree, I have, you know one and a half maybe two cheers for Supreme Court term limits, although we have to recognize that while that would get rid of the morbid, health watches over octogenarian Justices or politically timed retirements, it won't, ideologically, rebalance the court, it won't change the importance of the issues that the court rules on.

I go into this in some depth in my book, *Supreme Disorder*, Judicial Nominations and the Politics of America's Highest Court, so, w- you know, we didn't, we didn't fill, fiddle with those kind of good government, sort of, provisions on the judicial branch, although I personally, you know, my colleagues probably to a certain extent, would be fine or amenable to a- at least, to Supreme Court limits.

We do make sure that there is taxpayer standing to challenge allegedly unconstitutional uses of funds. And, so, you know, we'd probably have a slew, initially at least, of all sorts of, lawsuits against all sorts of, uses of congressional power, of, of the spend on this and that, and that's great, we'll quickly clarify what exactly can and can't do under this, Constitution. And we add an Open Courts Clause, this is borrowed from Oregon State Constitution, that forbids secret courts and also overrules legal precedent that hampers the checks and balances by preventing courts from considering certain kinds of lawsuits against the government. We, encourage, more lawsuits, against the government to make sure that it's, that the, that the judicial branch can indeed check and balance the political branches.

Rosen: [00:41:59] Ilan, tell us, finally, in our last substantive round, about Team Conservative's approach to fundamental rights. You insert key passages from the Declaration of Independence at the beginning of the Constitution, you don't add a laundry list of new rights but you do add a few new rights like an explicit protection for parental rights and rights to conscience and association, that's something that you share with the



other teams and there are a whole bunch of other really interesting provisions, including placing limits on the national government's use of conscription, allowing for national criminal laws, and preserving the commitment to birthright citizenship.

Wurman: [00:42:38] Yeah, so, we do start with the Declaration of Independence, and, you know, there was a lot of debate on this, too, believe it or not. Do we touch the preamble? I mean, in the spirit of, of, of this project, right, we, we made a lot of bold proposals but at the end of the day, we're Team Conservative, and notwithstanding that Ilya claims the Constitution is a Classical Liberal Constitution, you know I- I, maybe that's part- partly true, I think Conservatives could, could, could claim it, too, so maybe that's some, debate I could have with, with Ilya a bit later.

But we at least didn't want to touch the preamble. Surely, Conservatives can't touch the preamble? But we decided that we ultimately wanted to connect the Constitution to sort of a higher law, right? Not necessarily, you know, a Christian higher law, but the, the na-, the sort of natural law of the Declaration of Independence, right, it- it- it's often said that the Constitution of 1787 is sort of a repudiation of the principles of 1776, that was an aristocratic revolution, and so on, and we wanna say, no, they're connected, there is a connection between the Declaration of Independence and the Constitution.

The Constitution completes the revolution, right? The, the revolu- the 1776, the Declaration of Independence is the first half of a revolution, right? It specifies that the existing government, right, is, is unjust, and it says what a, a government must do to be a just government, right? Must secure our inalienable rights. But it doesn't actually specify the particular forms of, of, of the government, right? that would be consistent with that, and, so, we think the Constitution completes that revolution, and, and, and we wanted that connection to be clear, we wanted, you know, to remind people that at the end of the day, you know, there is sort of this higher natural law out there that we should try to comport ourselves to and, and, and we wanted to, to, to, to at least make a mention of that and so we do that in, in the preamble.

So it's a preamble of the preamble, if you will, we just quote the Declaration of Independence. As for fundamental rights, we actually don't do much here beyond sort of clarification, right? So, inc- w- I w- actually, that's not, that's not entirely true, right? So, there's disagreement among originalist scholars over whether the incorporation of the Bill of Rights against the states is correct. Everyone thinks, today, that, even among originalists, that the Privileges or Immunities Clause of the Fourteenth Amendment, right, "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States", a lot of originalists think that incorporates the Bill of Rights against the states.

In the book you mentioned, that I just, I just published, two weeks ago it came out, the second founding and introduction of the Fourteenth Amendment, I claim, I might be the only originalist, okay, under 60, who still thinks that incorporation of the Bill of Rights is probably wrong as an originalist matter, because, I claim, that the Privileges or Immunities Clause is an anti-discrimination provision. Really, it's, it's what the Equal Protection Clause



was supposed to be, right, it was supposed to be the Privileges or Immunities Clause was supposed to do a lot of that work, which I think means California can ban guns, right?

It just- it just means it can't say only Black citizens can't own guns, right? so, we, we, f- to, to, to obviate any ambiguity, we just go ahead and incorporate every right. We have a new section, we restructure it, right, in the current Constitution, right, there's article one section nine which is restrictions on Congress, article one section 10, which are restrictions on the states. We move most of the Bill of Rights to a new section, I think it's section 12, I can't remember what it is exactly in our Constitution, that says neither the states nor the United States shall, and that's where the First Amendment goes and the Second Amendment goes and, you know, equal protection and due process and so on.

So, we solved sort of the incorporation problem directly that way. then, on the citizenship question, we thought this would actually be, the most controversial, wha- I- I- in both directions. Some Conservatives would think it's controversial, and, and, and some Liberals and Progressives would think it's controversial. We had a lot of debate about this, and we ultimately decided to keep birthright citizenship, because it has such a long history in the Anglo-American legal tradition, and because there's this real risk, that some, persons will be born citizens of no country, right, if we got rid of birthright citizenship.

So, we decided to keep birthright citizenship, but we did make, a p-, for apportionment purposes, for census purposes, for voting purposes, we did specify, that apportionment should be on the basis of, of citizens, rather than persons. This should not be taken as an endorsement, by the way, of, of, you know, the current administration's legal attack, you know, on, or legal claim that, that the current census clause allows them to do that, right, we certainly don't take a position on that.

But we specify citizens, and we think it's justified also by the concept of one person one vote. Because otherwise, right, in, in states with a lot of non-citizens, the citizens who can vote have a lot more political power, right, because they have more representation in Congress because of persons who, who, who can't vote, right? Non-citizen persons, who live there. So, that was sort of the trade off we did, it, it took a lot of discussion and argument and debate, but we decided, yes to birthright citizenship, but we would also limit apportionment to citizens as well.

Rosen: [00:47:40] Caroline, tell us about Team Progressive's approach to fundamental rights. Like Team Conservative and Team Libertarian, you do propose clarifying the protections for freedom of conscience, as well as, the right of association. You also propose, u- updating the Fourth Amendment for a digital age, tell us about those proposals and more.

Frederickson: [00:47:58] Sure, well, one of the things that we were very concerned about is, you know, not surprising, was establishing real equality, equality which is not something that really came into the Constitution initially, despite, the reference in the Declaration of Independence that all men are created equal, the Constitution itself, made no such guarantees and in fact incorporated and made, accommodated the institution of slavery.



and, so, we wanted to ensure that equality, came into the Constitution in a more forceful way, than, even had been done in the Reconstruction Amendments because even though the Fourteenth Amendment guarantees equal protection of law, it's, it's clear that all citizens were not recognized the same way, and in, in time there have been, welcomed and fought for expansion of the understanding of who's actually protected under the Constitution.

but we wanted to make sure that there was, more clarification, in fact cementing the kinds of gains that had been made by, in- incorporating them into the Constitution. So, we try and, update the, the Reconstruction Amendments, and, as well as the Nineteenth Amendment, which extended the franchise to women, and to make it more of a, an equal protection amendment, and, so, it would in fact provide f- for treatment of women as equal citizens, and provide for, gender, sexual orientation and gender identity, protection in the way that, the Reconstruction Amendments addressed with a race.

and we deal with reproductive justice in the same way, to ensure that, there are protections for pregnancy, childbirth, and all attendant conditions, which means the right whether to be pregnant or to terminate a pregnancy. but we do, as you mentioned, Jeff, address a number of other things. freedom of conscience was very important, James Madison's original desire was not just to protect freedom of religion, but also freedom of conscience and thought, and we wanted to ensure that that vision that Madison had, was actually realized in our Constitution.

and therefore that equal rights of conscience, should have it's, have a prime place in the Constitution, so that, we can ensure, a broader understanding of freedom of thought and freedom of speech under our Constitution. and, we, you know, this is consistent with a more modern understanding of religious pluralism, that, other countries have adopted, and reflects the, the changing nature of spiritual life in the United States with many, Americans who are not affiliated with a particular, church, or, oh, or religious institution, to give protections to those people as well, or maybe affiliated with none at all.

we didn't, you know, as I mentioned earlier, really lay out otherwise a, a kind of panoply of fundamental rights because, as we, really analyzed the, this, the Constitution that we thought would be the most protective, for our fundamental freedoms, we believe that that is based on a democratic process that works, where people express their views, that way, rather than trying to anticipate every possible right that we might want to acknowledge, that leads to a laundry list, that could grow exceptionally long and things that you leave out, might be seen therefore to not be protected.

So, we wanted to approach it through mechanisms of ensuring certain fundamental rights that are so i- important in a democratic framework, that allows democracy to function, but, then, really ensuring that the structural Constitution was one where a democracy could work, where the right to vote is protected, where money doesn't buy politicians, where the President can be held in check when he and in the future she may misbehave in a way that, harms the public trust, and we, we think that that, rather than a kind of a explicit laying out, of every single possible fundamental right, was a much more, workable, but also effective way to protect those very fundamental rights.



Rosen: [00:51:56] Ilya, tell us about Team Libertarian and rights protection. You, too, clarify the protections for freedom of conscience and associations as well as emphasizing protections for personal privacy under the Fourth Amendment, but you also emphasize the Prefatory Clause of the Second Amendment, and you strengthen the Takings Clause, you check course of plea bargaining in the Sixth Amendment, tell us about your approach to rights.

Shapiro: [00:52:16] Right, well, first of all, we move the Establishment Clause up into article one, because, after all, it's a, a power that, Congress, does not have, we're saying, nor do any states have the power to establish religion. And while we're still in article one, I should, backfill some things I should've said earlier, some other structural things. For example, we add a provision to prevent states from being coerced into accepting federal funds by dangling new federal funds, we enable states to, to decline those funds with strings and instead choose to receive a block grant to be used for the same purpose.

On immigration, we, we have what we call, an Ellis Island clause, restoring our immigration policy to what it was until about 100 years ago, allowing anyone to come to try to make their American dream, as long as that person isn't a terrorist or a criminal and doesn't have a contagious disease. we thought about further restricting eligibility for public benefits but then realized that under our system, there wouldn't be many public benefits available at the federal level, at least, and states can do what, rules, they wish.

We also did away with the direct election of senators, or at least allowed states to choose, repealing the Seventeenth Amendment, how they want to elect their senators. We actually don't think that will make much of a practical result, because things were going towards the popular election of senators anyway. Now, getting back to more, to the more explicit rights, as you said, we, add the freedom of conscience to the Free Speech Clause, and combined both with a Free Press Clause, because, after all, the, the, the, the Free Press Clause protects, an activity, not a type of speaker.

we expand the Freedom of Assembly Clause to cover the freedom of association and non-association, again, making explicit what is largely already in the law. And we add a very important protection for a person's rights to the fruits of one's labors, we actually borrow this wording from the Missouri Constitution, and add a catch all right to live a peaceful life of one's choosing, sort of like that elegant formulation of what's the essential Libertarian, value, and, contra the Progressives, we add the explicit right to make political contributions, which, of course, is part of today's First Amendment but is under, concentrated, attack.

as you said, we, we remove the prefatory militia part of the Second Amendment to make clear, to eliminate any confusion about the natural right to keep and bear arms for self defense, we strengthen the Fourth Amendment to, to clarify the warrant requirement. we make a number of important changes to the Fifth Amendment, clarifying that the double jeopardy clause does apply to dual sovereigns, so, the state and federal government can't prosecute you for the same, crime. we eliminate the possibility of using eminent domain for private use, so, reversing Kelo vs. New London.



we require compensation for regulatory takings, borrowing from, Arizona, language. we only allow the use of eminent domain after the government has paid or secured just compensation, again, strengthening of, of various properties. On those unenumerated rights, what, what's now covered by the Fourteenth Amendment, we replace, you know, either substantive due process or privileges or immunities with natural or civil rights, to translate the 19th century speak, even though the meaning, is really the same.

And we add a new section to expand on the Due Process Clause, requiring the government to show a genuine reason for restricting or regulating any individual, liberty. This, effectively, eliminates rational basis review, a doctrine invented by courts in the '30s to allow the government to do virtually anything it wants to, at least state governments, with respect to rights that judges consider, non- fundamental.

And maybe at this point it should be, we should bring up another point of agreement among all three of us, and that's the, more explicit protection of the voting rights of District of Columbia residents, although, each of us does this in a different way. Team Liberty decided to retrocede all of DC except the explicitly federal buildings, lands, monuments, back to Maryland. and, you know, let, let, let Maryland, you know, thereby, maybe, gain a House seat or, you know, what, what, what have you. the, I'll let the Conservatives and Progressives speak to this if, if they want, I think the Progressives just make DC into a state and, and allow it that, that kind of representation, and the Conservatives consider the people who have moved to DC, for voting purposes residents of the states, whence they came, which is a creative solution.

Rosen: [00:56:42] Well, it's time for closing thoughts in this absolutely fascinating project which has surpassed all of our hopes at the Constitution Center for illuminating areas of agreement and disagreement among the three teams. the question I'll ask each of you is, first, i- identify the areas of agreement and disagreement that you heard, in, in this discussion between your Constitution and that of the other two Constitutions. And, more broadly, it strikes me that all three teams chose to reform the Constitution rather than to replace it, tell us about the experience of being a, a framer with, with your fellow teammates and whether, in thinking about our current Constitution, you concluded that the reform that was necessary was, m- m- moderate or radical. Ilan, first thoughts to you.

Wurman: [00:57:28] Yeah, well, thanks, again, for the opportunity to participate in this project and to explain a little bit, about what we did. just starting at the high level of generality, I think what we, what we can tease from the discussion and the three different Constitutions is that, at the end of the day, the task of writing a Constitution for a free society like ours, is a task of balancing competing ends and competing objectives. On the one hand, we, we all agree that we need to protect liberty, but on the other hand, we also recognize that part of having a Constitution is it creates, you know, it creates the opportunity for ordinary politics, it channels ordinary politics, but it creates the opportunity to actually govern ourselves and, and, and to make, y- a- and to make choices, political, moral, social, economic choices as a society and that the task of writing this Constitution is a balance.



And the Libertarians strike it a bit differently than the Progressives, and the Progressives strike it a bit differently than the, than the Conservatives, but, but it's all balancing these two different sort of ob- objectives. and it's just very interesting to see how we, we do it in slightly different ways, but, but also come to agreement on a lot of things.

On the specific points of agreement, I think, you know, we can see that, that the judiciary, like, something needs to be done with the Supreme Court, you know, I know the Libertarians didn't do this in the Constitution, but we know Ilya tends to agree with that, as well. Presidential power should be more specific, how, in our Constitution, we keep the Vesting Clause as it is, but we specify that the President is head of state, you know, we specify that the President superintends the execution of the law, we specify things about executive orders and, and, and, and executive agreements, right.

And, so, so, we think there's, I don't think anyone doubts that article two is sparse and, and could use some clarity, right? So, that's a position o- of, of agreement that was, that was enjoyable to hear. impeachment, you know, we're all attuned to modern times, so, so that was an interesting point, of agreement. But just all in all, I- I- I'm, sort of impressed by, by all the team's efforts, you know, to, to, to tackle just the problems of modern governance, in, in really creative ways.

Rosen: [00:59:33] Caroline, your thoughts about significant areas of agreement and disagreement among the teams and whether the experience made you convinced that our Constitution needs, moderate or, or radical reform.

Frederickson: [00:59:45] well, I- I mean, Ilan hit on a lot of the main points, I was also, it's been very interesting to see, where there has been significant agreement, I, you know, I think it's, important to step back from the constitutional drafting for a minute to just think about what that reflects about the ability to rise above [laughter] perhaps partisanship and polarization and think about how to improve, the way our system functions, a general recognition that the, that article two has need for clarification and need for further constraints on executive power.

At least with the Conservatives, we agree that Congress, doesn't function the way it should, that there needs to be, a, a return to sort of article one's, role as, as establishing Congress as the first branch, and important, a generally shared understanding, again, not as much in the Libertarian Constitution, but between all three of us, about, a need for changes in the federal judiciary. I, you know, I think it's, it's, you know, would, would give me hope that we could maybe have a Constitutional Convention and come out with at least some agreement, I don't know if we'd get to the end of the process.

but, you know, as, as a matter of, of, of disagreement, there is a disagreement about what some of the ills are that face our society. we think that equality has been, neglected throughout, American history, starting with the original Constitution, which included slavery and which limited, political participation in the franchise to a very narrow swath of a white male property owning Americans, that women could not vote, and that even with the Reconstruction Amendments which broadened our understanding of who, could participate in the political process as well as, of course, ending slavery, real participation didn't happen



for, Blacks in the United States, certainly not for Black Women, and that there, there needed to be a greater emphasis on the congressional ability, better understanding of congressional ability to actually enforce the provisions of the Reconstruction Amendments.

so, I th- you know, those are, those are areas where I think, you know, from, from the, from the Progressive perspective, we really do think that th- that equality needs to be, enhanced, and that the political process is the best way when you have a process that, unlike the Conservative Constitution, takes away representation by, by even making the Senate even less representative, that would just do further harm to those Americans who are already underrepresented. And we think that's a, a, definitely would be a move in the wrong direction.

but, so, our emphasis is on democracy as the best way to enhance that equality, to advance it in significant ways, and to make sure that, there's no retrenchment towards, a system in which fewer people have control of the levers of power and can shut others out, in a way that, undermines what we think are the fundamental rights of all Americans.

Rosen: [01:02:37] Ilya, the last word in this fascinating conversation is to you, please identify the areas of agreement and disagreement that strike you between the Libertarian, Conservative and Progressive Constitutions.

Shapiro: [01:02:50] Well, I think we've all discussed the similarities, our wanting to push back on executive power, you know, I don't think there's much disagreement on, you know, that, that, women and people of all races should be equal under the law, you know, I agree with, with, Caroline that the Thirteenth, Fourteenth, Fifteenth and Nineteenth Amendments need to be, enforced as much as the original Constitution.

but I- I'm not sure what, you know, other than reversing the interpretations to the contrary and the practices to the contrary, I'm not sure that, you know, more really can, or, or need be done in, in, in that regard. With the judiciary, the fundamental problem isn't the structure, and this is why I only have one and a half or two cheers for term limits, you know, fundamentally, the reason why we have these cataclysmic ballo- battles over the, you know, every precious vacancy when it arises is because the court is very powerful, because the federal government is very powerful.

And, so, the only way, you know, rather than nibbling around the edges or rearranging deck chairs on the Titanic, and the Titanic is the ship of state, you know, we have to enforce separation of powers and federalism so that Washington isn't making one size fits all, decisions for this, this big nation. That's why we didn't, you know, feel the need, Team Liberty didn't, didn't feel the need to restructure the, the courts so much and why I didn't feel the need to do so either, and, in my book, *Supreme Disorder*, but, ultimately, you know, we, we, we, took the existing Constitution as our base, again, for us, I think it was easy because we fundamentally think of this as a Classical Liberal document.

but also, because the incentive is t- is to do that, we're all, of course, busy constitutional lawyers, and, why start from scratch when we can just build on, on, on Madison's genius. I will end on this, one point of surprise, with both, what Team Conservative and Team



Progressive did, and I'm glad that Team Conservative finally did submit their Constitution, we thought for a while that this was going to be an unwritten Constitution, that that was their conceit, just like our conceit was and we mean it, but, anyway, the fact that they both focused on structure, rather than rights, you know, I was expecting Team Conservative to simply, overturn Roe vs. Wade or Obergefell and, I guess Bostock, now, although that's a statutory case, as, as, you know, key, aspects while they, you know, enhance their hortatory vision of the, of the common good and what have you.

But, in very different ways, just as Team Progressive focused on democratization, Team Conservative I guess focused on republicanization, if you will, small R of course. and I don't disagree with a lot of, Ilan, with a lot of the structural changes that I suppose that, that, that you put on, but, I would ex- have expected both of them to be more right centered, but maybe that's my own Libertarian projection, and maybe it's good to know that everyone, I guess, accepts, a certain conception of a limited government, liberty oriented, Constitution.

Rosen: [01:05:34] Thank you so much. Ilan Wurman, Caroline Fredrickson, and Ilya Shapiro, for a extraordinarily illuminating discussion, and thanks to you and your teammates for your contributions. It has been inspiring to learn that all three of you decided, as Ilya just put it, why start from scratch when you can begin with James Madison's genius? It is striking that all three of you emphasized, structural reforms rather than radical proposals and it is encouraging to see how the basic principles of the United States Constitution continue to unite, all of you extremely distinguished scholars and Americans of very different perspectives.

Ilan, Caroline, Ilya, thanks so much to you and your teammates for your contributions to the National Constitution Center's Constitution Drafting Project.

Frederickson: [01:06:31] Thank you, Jeff.

Shapiro: [01:06:33] Thank you and take care.

Rosen: [01:06:42] Today's show was engineered by Kevin Kilburn, and produced by Jackie McDermott. Research was provided by Lana Ulrich, Tom Donnelly, and Nicholas Mosvick. The homework of the week, friends, please read all three Constitutions, the Progressive, Libertarian and Conservative Constitutions, by visiting the Constitution Drafting Project. You can find that online at constitutioncenter.org/debate and click on the special projects page. We'll also include the link in the resources page for this episode.

And thank you so much, dear We The People friends, for your recent reviews of We The People on Apple Podcasts. They're incredibly meaningful to all of us at the We The People team, we so appreciate the fact that these episodes are meaningful for you and are very grateful for your feedback, and thanks for continuing to review us and recommend this show to friends and colleagues and anyone, anywhere who is hungry for civil, meaningful and illuminating constitutional debate.

And, always remember, that the National Constitution Center is a private non-profit, we rely on the generosity of people from around the country who are inspired by our non-partisan mission of constitutional education and debate, you can support the mission by becoming a



member at constitutioncenter.org/membership or give a donation of any amount including \$1 to support our work and signaling your support, at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.