Amendment Reform in America and Abroad

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[00:00:00] Tanaya Tauber: Welcome to Live at the National Constitution Center. The podcast sharing live constitutional conversation and debates, hosted by the Center, in person and online. I'm Tanaya Tauber, the Senior Director of Town Hall Programs. In this episode, distinguished scholars survey several constitutional amendment processes in democracies around the world to shed light on the current constitutional reform debates in America.

[00:00:29] Tanaya Tauber: Our guests are Wilfred Codrington of the Brennan Center and Brooklyn Law School. Chief Judge Jeffrey Sutton of the US Court of Appeals for the Sixth Circuit. And Roselyn Dixon of the University of New South Wales. Jeffrey Rosen, President and CEO of the National Constitution Center, moderates. This conversation is presented in partnership with the Center for Constitutional Design at Arizona State University's Sandra Day O'Connor College of Law.

[00:00:58] Tanaya Tauber: Here's Jeff to get the conversation started.

[00:01:03] Jeffery Rosen: Thank you so much for joining, Wilfred Codrington, Rosalyn Dixon, and Chief Judge Sutton. Judge, let's begin with you. In your wonderful book, Who Decides: States as Laboratories of Constitutional Experimentation, you have a final chapter on the amendment process. And you note that Madison thought it should be hard to amend constitutions, Jefferson, easy. And as in your great formulation, Madison won at the federal level and Jefferson at the state level. Give us an overview of the difference between, how hard it is to amend the Constitution at the federal and state levels.

[00:01:40] Jeffrey Sutton: Yes, well, first of all, Jeff, as always, thank you so much. It's an honor to be with everyone. And thanks for inviting me. You know, Jefferson and Madison, didn't disagree about much. They lived 21 miles apart. They're both Virginians. Sequential presidents. They basically have exactly the same worldviews with this one key exception: what to do about the amendability of a constitution?

[00:02:03] Jeffrey Sutton: And you know, Jefferson thought it ought to be up for each generation. Back then, he thought of the generation as 19 years. And that you oughta be able to put up for a vote, a convention. Kinda starting from scratch, both with the charter and rights definition. Whereas Madison, as you pointed out, thought that would undermine the venerability of any constitution.

[00:02:24] Jeffrey Sutton: It is so striking in this country how different the views have evolved. Basically Madison won the debate at the federal level. Article 5, famously requires three quarters of the states to approve, ratify an amendment. That of course, is very difficult, today with anything remotely controversial. We've only had 27 amendments. 10 arguably don't count. The Bill of Rights. They were all part of the quid pro quo to get ratification of the federal Constitution.

[00:02:57] Jeffrey Sutton: That leaves 17, and two of them are a wash. Passing Prohibition, and eliminating it. So we've really had 15, you would say. And that just proves, Article 5 is quite a barrier to changing the Constitution. Either to deal with mistakes in the underlying document or changing circumstances and new norms.

[00:03:18] Jeffrey Sutton: The states are a remarkable contrast where Jefferson clearly prevailed. We have 46 states. And I'm speaking generally, but this is accurate. Main. 46 states permit an amendment with 51% vote. So once it's on the ballot for the people, whether through a legislative initiative, an initiative by the people. It just takes 51% of the folks to approve an amendment.

[00:03:46] Jeffrey Sutton: The highest threshold is New Hampshire, a two thirds. So that's still less than three quarters. Florida requires 60%. Colorado, 55. Delaware, interestingly, doesn't even have a vote. It just requires the legislature in two different sessions to approve the amendment. So that leaves 46 states where 51% vote suffices.

[00:04:10] Jeffrey Sutton: Now, the upshot of all this is that the states are just much more democratic. It being easier to amend state constitutions. I think we have, in total, in the neighborhood of 7,5000 state constitutional amendments. At the federal level, we've had one convention, one constitutional convention. Philadelphia. At the state level, there have been 144. So you can see that the ease of amendment facilitates lots of change.

[00:04:43] Jeffrey Sutton: And you know, as John Dynan, who's an expert in this area says. You know, here's not a state in the country where they have amended more infrequently than at the federal level. the plus of all this is that

the federal side does create stability. It's probably a good idea to have a more stable national government.

[00:05:04] Jeffrey Sutton: I guess the slight oddity is the state constitutions have evolved so much. So we just have so many areas that are just quite unrecognizable. You know, direct democracy even through the initiative. Election of judges. a plural executive, where you can vote for lots of different folks at the executive level. Term limits. All of these things don't exist at the federal level in part because there's such a barrier to change.

[00:05:32] Jeffrey Sutton: And you know, I'm not gonna say it hasn't worked well. But it is puzzling that the same people would approve such disparate approaches to amending a constitution. You might think if the people of Mississippi, Colorado, Californian, Ohio had the same view of amendment, they could change it at the federal level and do at the federal level what we've done at the states. But that is not how it's worked.

[00:05:59] Jeffery Rosen: Such a helpful overview of the difference between the federal and state systems. The dramatic, ease of, amendment at the state level, which isn't present at the federal level. and the history in your great book, which teaches us that it wasn't till 1818 that the state allowed people to ratify legislatively approved amendments. But that now, as you just told us, 41 states require a majority vote of the people to ratify.

[00:06:24] Jeffery Rosen: Rosalyn Dixon, give us a sense of how the US Article 5 method of amending the Constitution contrasts to system around the world. You've identified three major buckets of when it comes to constitutional amendments. The first, flexibility and rigidness in the amendment process. The second, plebiscite approach. And the third is Article 5, which is very much of an outlier. Tell us about the differences between Article 5 and those other two approaches.

[00:06:50] Rosalyn Dixon: Well, thanks, Jeff. I think that the most, pithy way of putting the US, Article 5 procedure in comparative perspective is to say it's truly exceptional in the difficulty of amendment, that it imposes. There was a famous study some, 20 years ago by a very respected, professor of political science, Donald Lutz, where he said, "The US Constitution was the second most difficult in the world to amend, after Yugoslavia." And of course, Yugoslavia no longer exists in the form, that it was studied at that time.

[00:07:24] Rosalyn Dixon: And so the US Constitution really is, by almost all accounts, the most difficult, to amend in global terms. By virtue of both the

degree of super majority requirement, for support in Congress and the Senate. And then the ratification requirements in the states. So it's extremely rigid, in global terms. And as you note it's not only that it's more difficult, it involves less popular involvement than a large number of countries worldwide, and the US states.

[00:07:55] Rosalyn Dixon: If I may, let me just respond a little to Judge Sutton. You know, the Chief Judge says, "Well, this has implications." I wanna highlight, four functions that I think a flexible amendment rule can play. The first is as the Judge said, mistake correction and updating in light of changing circumstances.

[00:08:15] Rosalyn Dixon:: But there are two more. One is about the renewal of democratic consent, which is a hypothetical function, but an equally if not more important one. And one that goes along with that, which is especially important many other democracies, is that the legislature and the people have tools available for overriding the Supreme Court or the constitutional court where they render decisions that meet with widespread reasonable disagreement. So it's another tool for legitimating judicial review, as well as renewing consent for the Constitution.

[00:08:49] Rosalyn Dixon:: I do wanna suggest, however, that any kind of upbeat analysis that suggests that Article 5 has created stability by making the Constitution rigid is too upbeat. Because the way in which we understand formal amendment as under Article 5 has to be put in the context of informal modes of change. So when you have a really rigid constitution, it puts pressure on the judiciary to do the updating. And it also encourages Congress and the executive to find what Professor Mark Tushnet has called constitutional work-arounds. Ways of dealing with an overly outdated and rigid Constitution that involve kind of fairly, creative ways of lawyering around the Constitution. And they are a necessary part of American modern government, but they are not desirable from a rule of law perspective.

[00:09:41] Rosalyn Dixon: So I think in global terms, Article 5 is rigid and an outlier in ways that are democratically problematic. But let me, for American pride reasons, note two things that I think actually are innovations in Article 5, which have been picked up in some ways elsewhere. The first is a very, nefarious clause in Article 5, which is the phrasing of the slavery compromise. Has been used elsewhere not in relation to things as problematic as racial injustice, but rather other desirable features have been baked in for some time, in order to promote stability of a compromise.

[00:10:21] Rosalyn Dixon:: And the more important enduring design innovation in Article 5, again, designed for the wrong, preservation of the equal voting of the states in the US Senate. That kind of tiering, it's really hard to amend the US Constitution, but it's impossible to amend the equal representation of the states in the Senate because it requires their consent to change it. That kind of tiering is best practice now globally.

[00:10:47] Rosalyn Dixon:: And the version of it that's been picked up in South Africa and by kind of judicial interpretation, in Kenya, in India, in Colombia, is one that says, "Some things should be rigid." As Chief Judge Sutton said, we don't want everything to be up for grabs all the time. That's why the US Constitution sitting on stop of state constitutions is such an important stabilizing force. But there's a whole bunch of stuff that we want to be more flexible, for all the reasons that I've indicated.

[00:11:18] Rosalyn Dixon:: And that kind of tiered structure that you see in the origins of Article 5 has been picked up and redesigned for global best practice around democratically sensitive, processes that are two-track, higher and lower track, depending on the democratic fundamental importance of the provisions at stake.

[00:11:38] Jeffery Rosen: So interesting to learn about those two tiers. I'm just gonna ask, what are specific examples of the un-amendable or hard to amend tiers in South Africa, Kenya, and the like?

[00:11:51] Rosalyn Dixon:: So in Colombia and India, these tiers have been developed by judicial implication. And so there's always a kind of standard-like fuzziness where they say, "It's the fundamental character of the Constitution." Or, "It's the basic structure of the Constitution." And we know that that includes the separation of powers. It includes the presidential term limits in Colombia, in ways that are designed to prevent a single president from appointing all of the other independent branches.

[00:12:19] Rosalyn Dixon: In Kenya and South Africa, it's more defined in the text. To refer to basic founding values of the constitution. Around dignity, equality, and freedom, as well as certain important structures, around federalism, and the separation of powers. I think that the Kenyan/South African model really is best practice. But every country's gonna have to figure out what's on the higher versus lower tier in a way that is contextual. And that takes into account it's own history, its own values, and its system of government.

[00:12:51] Rosalyn Dixon: You know, presidential systems are gonna have to put different things on the higher tier than parliamentary systems because of the very nature of how democracy functions in those systems.

[00:13:02] Jeffery Rosen: Very interesting. To learn about those, high tier provisions. And also your very thoughtful observations about how amendments can engage in both mistake correction, also the renewal of democratic consent, and the legitimating of judicial review.

[00:13:20] Jeffery Rosen: And Wilfred Codrington, I'd love to ask you about that point. So many of the significant amendments to the US Constitution, as you've argued in your book, The People's Constitution, have been in response to Supreme Court decisions. And, there have been... you and others have suggested perhaps six, amendments that have overturned Supreme Court decisions. Tell us about them, and, and the role of these decisions in precipitating constitutional change.

[00:13:48] Wilfred Codrington: Sure, and thanks for the question, Jeff. And for having me. And just kind of tying on to what Rosalyn said quickly, is that the difficulty of amendment, in the United States is very much the backdrop to a lot of the conversations and debates in constitutional law.

[00:14:06] Wilfred Codrington: So and that, probably first and foremost is, judicial interpretative methodologies, right? So how are we to read this constitution in light of the fact that it's not very easy to update it. And so that's something that just goes on.

[00:14:22] Wilfred Codrington: But, to your point more specifically, yeah. It has been about a half dozen, up to seven, different times, depending on how you count the holdings. And the takeaways from these cases. That, the American people have amended the Constitution to, displace a Supreme Court ruling.

[00:14:42] Wilfred Codrington: So, that happened first with the 11th Amendment, and the 11 Amendment basically, disallowed, citizens from a state to sue, the state. So citizens from another state to sue a state. And so, this was at least in discussions about, ratification, perhaps a misreading of what was supposed to be, the case. In the wake of the Revolutionary War, where there was a lot of, debts. This kind of became an issue, and, the 11th Amendment, actually just sailed to proposal and ratification quite easily.

[00:15:27] Wilfred Codrington: And so we have that, and there's a number of things that stem from the 11th Amendment, that we can debate today, if that

was the initial, meaning of the 11th Amendment. But that was the first time it was done. And that was in the 1800s.

[00:15:40]Wilfred Codrington: Following that, we've had it on a number of other occasions. The most famous one would probably be the 13th and 14th Amendments, which were ratified in the wake of the Civil War. And that was to overturn the ruling in Dred Scott decision. And in that case, the justices basically said that Black people were not people, for all intents and persons. Not citizens of the United States, and they had no rights that the White man was bound to respect.

[00:16:09]Wilfred Codrington: So it took a war, the Civil War, to kinda get to the point where we could amend the Constitution. But then we had three Reconstruction amendments basically undoing what the court did there. We got one famously in Pollock versus Farmers Loan and Trust. So that was the, the case where the Supreme Court said, "Despite the fact that, the national government had imposed, income taxes, specifically to fund the Civil War and other ventures, that Congress doesn't have the power to do that." Congress does not have the power to tax, on income. And so we got an amendment, to overturn that one in the early 1900s.

[00:16:55]Wilfred Codrington: And I'd say, the most recent one, that might be worth discussing is, uh, the 26th Amendment. And the 26th Amendment lowers the national voting age to 18. And that displaces a ruling, a very complicated ruling that, touched on a lot of things. But specifically, when Congress reauthorized Voting Rights Act in the 1970s, they included a provision to lower the vote- national voting age to 18. And the Supreme Court basically said in this fractured opinion, in Oregon versus Mitchell, "Well, Congress, you have the power to do that for federal elections, but you don't have the power to do that for state elections." And so as Judge Sutton just talked about, you know, we have 50 different constitutions under the Constitution. They all have their own unique procedures for amending the Constitution, for being amended themselves.

[00:17:50]Wilfred Codrington: And, a number of them at the time actually required these amendments to go through two different sessions to be, adopted. And so with an election coming up, and sort of a federal election, age in place at 18. And various ones at 18, 19, 20, and 21 in the states, we amended the Constitution very quickly. It was ratified, in three months. So it was the fastest one ever ratified, to ensure that we had that uniformity in the national voting age and, state election administrators would not kind of have the difficult task of trying to navigate two different electoral systems.

[00:18:30]Wilfred Codrington: There are several more, but I think those kind of represent, a number of important ones during the different, waves of amendment that we've had over the course of the 200 and some odd years.

[00:18:44] Jeffery Rosen: In your book, The People's Constitution, you identified the four areas you talked about. The founding area, Reconstruction, progressive, the New Deal. And then the Civil Rights Era amendments. In the 1970s. It's, the series of eras.

[00:18:59] Jeffery Rosen: And Judge Sutton, I want to just jump off of the '70s. It is remarkable that between '60 and '71, there were three Voting Rights Amendments. And there were a series of other amendments that were proposed and nearly got through but didn't. there was a amendment to reform the electoral college, that had it been proposed by Congress, would have been immediately ratified by the states. It was endorsed by both political parties. It was blocked by a few Southern votes in the Senate. Why was it that the federal Constitution seemed so easy to amend in this burst of voting rights amendments in the '70s? And now it seems essentially unamendable.

[00:19:40] Jeffery Rosen: And then, tell us about what's going on at the state level, where in the wake of Dobbs, as you've noted, some think the Constitution is too easy to amend. And the pro-life forces that are proposing to make it harder. To raise the bar to 60%. Broadly, is it too easy to amend the constitution at the state levels and tell us what's going on there?

[00:20:05] Jeffrey Sutton: Yeah, you know, one way of thinking about, um, what Wilfred was just saying, and- and kind of the sweep of American history is, yes, it is difficult. And the idea that the US Supreme Court has only made six mistakes in nearly 250 years is, you know, of course, can't be right.

[00:20:22] Jeffrey Sutton: So what are we doing? Rosalyn correctly pointed out the, it's amendment by interpretation, is what has really happened. Even so, even if that's fair to describe as something that has happened intermittently, we did once have a tradition of using amendments as the approach to deal with either an incorrect decision or perceived incorrect decision or shifting norms.

[00:20:48] Jeffrey Sutton: And I do worry that that tradition has disappeared. and I'm not an expert in political parties, but I'm gonna guess that there was a time where they thought it was to their advantage. It was actually good for them politically that they had to seek ratification in all 50 states. Because if they had a winning issue. Let's say, giving women the right to vote, they were ultimately

gonna prevail, and that was gonna be a positive thing to be pushing in each of the states. That was probably true with giving 18-year-olds the right to vote.

[00:21:23]Jeffrey Sutton: I find it fascinating and to me, disappointing, that the ERA did not succeed. You know, it's just so interesting that you get 30 states almost right away. Within a couple of years. It looks like it's just gonna get right through. A little bit like the ones, the amendments Wilfred's talking about. And then it shuts down. And they extend it, and they come up two states short.

[00:21:48]Jeffrey Sutton: In, you know, to give a concrete example, if the amendment requirement in Article 5 is two thirds, ERA would have been a constitutional amendment. of course, what happens next is an unfortunate lesson for the typical American. You get US versus Virginia, which is a decision that, you know, I'm not gonna say makes the ERA irrelevant. For those who care about those issues, you want it in the Constitution, not just a decision. But piratically speaking, US versus Virginia does really essentially what the ERA would have done.

[00:22:22] Jeffrey Sutton: And the thing I might point out at the state level, it's true we have so many more amendments at the state level, but one thing that's consistent with the absence of success with federal constitutional amendments in the last 40, 50 years, is that the state level, we've not had successful constitutional conventions for a very long time. And that, you know,that if you ask me, should have Americans looking in the mirror. Why is it that we tradionally have been able to do that, seek compromise, whatever it might be? It makes you worry the little bit that, there's very powerful interest groups that would make it quite difficult to get through a convention in a way that would be very successful.

[00:23:08] Jeffrey Sutton: You're quite right that with the Dobbs decision, it not only has put a spotlight on state courts and state constitutions. Because after Dobbs, anyone seeking, a right to choose, for example, is going to have to get relief from a state legislature, a state court, or a state constitution. Maybe state constitutional amendment.

[00:23:32] Jeffrey Sutton: And because the state constitutions are so much more easy to amend, that's a hopeful prospect for somebody that, is worried that maybe the state legislature is unwilling to enter the fray. Or what they're willing to do in entering the fray is to go as far as someone wishes. And you know, 18 of the states allow direct democracy, a constitutional initiative that, of course, goes right around the legislature. The legislature has no role in that.

[00:24:06] Jeffrey Sutton: And so it's really been fascinating since last June to watch not just the activity of state courts. We had three states, for the first time, recognized explicitly a right to abortion in their constitutions. So, you know, I think it was what? Vermont, Michigan, and California. So that was just last November.

[00:24:26] Jeffrey Sutton: One wouldn't be surprised to see more of this, in the future. For many of the reasons we've had proposed amendments in the past. They... you not only support the idea, but you might think it's useful for your particular party when it comes to get getting people out to vote, which I think Wilfred would agree, is not an unheard of phenomenon when it comes to putting something on the ballot.

[00:24:49] Jeffrey Sutton: So the fact that 46 of the states permit amendments, with a 51% vote. The fact that 18 of them permit direct democracy make constitutional amendments look like a very useful tool in the toolbox for people that care deeply about that issue. Frankly, in either direction, right? It can help you in either direction. There's... one of the things that I think both happy and sad about state constitutions and this whole debate is it's ultimately quite neutral. [laughs] Doesn't tell you what should be done, it tells you the ways it has to be done.

[00:25:24] Jeffery Rosen: So interesting . . . Absolutely. Showing the range of options is very powerful, indeed. Rosalyn Dixon, defending tiered constitutional design, you say that a moderate level of amendment difficulty is a good compromise between the strengths and weaknesses of being too flexible or too rigid. Can you give us specific examples of success stories? You've noted that the South Africa constitution is one example of tiering. Has that led to effective protection of individual rights and responsiveness to popular sovereignty? And maybe give us a sense of other success stories, and then some cautionary tales around the world that are less successful in striking that balance.

[00:26:08] Rosalyn Dixon: So I think it's a really important question when we look around the world, not just to look at the provisions, but to pressure test them, you know, in operation. I'm gonna answer the question in a slightly roundabout way, if I may. Which is, picking up on, Judge Sutton, I think that, you know, one can look at why has it been so difficult in the US. And then why are people either in favor or against the kind of Dobbs, post-Dobbs plebiscitary turn, in order to understand some of these issues.

[00:26:34]Rosalyn Dixon: So the first thing I think, is worth noting is that the US rule has, and this is some research I've done, with Professor Richard Holden.

Has de facto got harder as the number of states and numbers of members of Congress has gone up. That's a kinda statistical finding.

[00:26:51] Rosalyn Dixon: But surely since the '70s, polarization in American politics has been a huge problem for Article 5 style change. Which is, Article 5 is premised on the idea of a kind of either non-partisan, in the founding moment, or bipartisan approach to constitutional change. And bipartisan, politics is basically dead in the United States right now. Which makes constitutional change equally challenging.

[00:27:21] Rosalyn Dixon: And if you look around the world, understanding party politics as a vector for success or failure in amendment design is really important. So if you look at South Africa, one of the reasons it has been successful is that it set a 75% threshold, which looks really difficult. But that the African National Congress, which was a dominant party, coming out of the liberation movement, got close to but never achieved, sole control of the amendment threshold.

[00:27:52] Rosalyn Dixon: So in the first post, apartheid elections, they got in the low 70s. And since then, that they've kind of hovered around the 60s, 70s mark, never achieving complete dominance of the amendment process. So they've been in a position to command, the ability to drive change, but not unilaterally impose it.

[00:28:11] Rosalyn Dixon: And the party political configuration really impacts how formal design rules work in practice. And I think that's a really important thing for us to understand. Both the challenges of the US, and where success has arisen elsewhere. My own view is, if we can fix the partisan, polarization in the United States, Congress, we could also fix amendment over time. And that's really a kind of a big part of the challenge.

[00:28:39] Rosalyn Dixon: On the Dobbs issue, I just wanna resist the idea that what I recommend is moderate difficulty. Actually, what I'm trying to suggest is there should be really flexibility on some issues, and real difficulty of amendment on others, so that the kind of moderate approach is the averaging it out, whereas in general, I'm suggesting you wanna go higher and lower, depending on the issue.

[00:28:59] Rosalyn Dixon: So on Dobbs, the easy answer for progressives is to say, "Well, you know, plebiscitary change is fine here because it's just adding to the protections that women enjoy. It's not taking anything away." But for the pro-life movement, it is taking something away. It's taking fetal rights away.

And so whether you regard it as too flexible or not depends obviously a great deal on where you start.

[00:29:27] Rosalyn Dixon: Supposing one were to take both positions seriously, and say that we take both the pro-life and the pro-choice view on the kind of basic core of what's, difficult to amend. I think you would say that, the kind of democratic experimentation that is arising post-Dobbs is perfectly fine democratically. But not if it allows for abortion on demand at all stages of pregnancy. That's insufficiently protective of the fetus. And its interests or rights. And not if it restricts access to abortion in a range of circumstances necessary to protect women's health and dignity, and certainly life.

[00:30:05] Rosalyn Dixon: And so I think my own view is that, if you were to take a first, principles approach to the design of the kind of post-Dobbs experimentation, you would say, "Great, let's embrace post- Dobbs experimentation." But not if it takes away basic rights of access to reproductive healthcare, and not if it gives no, credence to the importance of people's commitment to fetal life by imposing at least some, if you like, moral suasion against access to abortion without due consideration and attention to the stage of pregnancy.

[00:30:41] Jeffery Rosen: Such a provocative suggestion that I'm gonna ask the follow up question. There’s no mechanism for putting certain values off the table in the US context. Are there some constitutions around the world that would allow for the solution that you've suggested? Where there's debate, you know, on the margins but not about the basic, interests of women and fetuses?

[00:31:04] Rosalyn Dixon: So the German constitutional court has had to grapple with the abortion question from the opposite direction to the United States. So the challenges that have come to the German constitutional court have been from pro-life legislators challenging the de-criminalization of abortion in Germany through the '70s into the 1990s. And the court basically struck down decriminalization efforts, saying they were insufficiently protective of the dignity of the fetus. But saying that it was equally important for women's dignity to be protected. And so some balance had to be achieved.

[00:31:40] Rosalyn Dixon: And the court did so in reliance on Article I of the basic law, which is the right to dignity. Which post, you know, Holocaust, was made unamendable. So the dignity-based, interpretations of the federal constitutional court of Germany are not amendable. And so the balance that the court has struck between fetal rights and interests and women's rights and interests is one that has evolved, and there's been pushback, from civil society to

the court. But which is fundamentally on a higher tier because it's an interpretation of the dignity clause of the basic law, which is unamendable.

[00:32:20] Jeffery Rosen: Thank you so much for that. Wilfred Codrington, Rosalyn Dixon just suggested that polarization in America has made it difficult for social movements to enact their will into law. In your book, you talk about how consensus from the ground up of social movements in the Progressive Era and throughout American history, has been the main engine for constitutional change. What to do in an age where polarization seems to have made the mechanism the framers anticipated for amendment, hard to deploy?

[00:32:53] Wilfred Codrington: Yeah, it's interesting because in our book, we actually, grapple with a number of factors that we tend to see in these periods of amendment or leading up to them. And two of those factors, one of 'em, I already discussed, which was, unpopular Supreme Court decisions and a response there.

[00:33:10] Wilfred Codrington: But two of the other ones are sort of social and demographic changes, and the movements that, respond to them. And political polarization. So they both tend to be present around periods of amendment. And so speaking to political polarization, we are obviously seeing, great political polarization during this era, but that is not, abnormal.

[00:33:37] Wilfred Codrington : We saw political polarization in each of the four waves of amendment that we discussed. So in the Founding Era, the Federalists had, as our president, former president said, "Shellacked" the anti-Federalists. And they really didn't even need the anti-Federalist to get the Bill of Rights. And in fact, there was a debate over whether, the Federalists were going to follow through with their promise. And propose the Bill of Rights. So, that happened, and it did get the bipartisan support, but it didn't even need it at the time.

[00:34:10] Wilfred Codrington: During the Reconstruction Era, the Civil War, I mean, that was completely one-party politics at the time. You didn't really even have a Democratic Party. Or at least, most of them because most of the Southern states were not, acting as members of the polity. And so it was the radical Republicans that press through, their agenda and gave us the amendments of that time. And there are some technical issues about how that was done. But that was mostly one party.

[00:34:43] Wilfred Codrington: During the Progressive Era, you just kind of get this... the Progressive Era's really interesting because you get this push from

populism to progressivism that, really strikes a chord with both parties. And you kinda get the splintering. So you get, support for the income tax and the direct election of senators from both major parties. Members of both major parties.

[00:35:08] Wilfred Codrington: And so those seem to be, those broke through the polarization that had existed in the lead-up to that. You had really close elections. You had two misfires of the electoral college, where you got the popular vote winner losing the presidential election. That was all in the lead-up. So there was intense polarization there, but there was a breakthrough.

[00:35:27] Wilfred Codrington: And similarly, in the Civil Rights Era. The Civil Rights Era was this period, where again, you had the Southern Democrats, not really on board with any of these progressive amendments. Particularly the Voting Rights ones, and the ones that were sort of trying to, grapple with racial justice during the era.

[00:35:45] Wilfred Codrington: But you had Republicans pushing it and Democrats from other areas of the country. So and we've seen a realignment where, you know, most of the South now is not Democrat. Or they used to be. And so that is part of the polarization we see today. So, there are these social movements that sort of exist, and they push these issues. That are related to fundamental changes going on in society, economic, demographic, technological, and things like that. And often, they have a constitutional agenda. And a constitutional reform agenda.

[00:36:24] Wilfred Codrington: And it's not clear if that pushes through the polarization or if there are other factors that make the polarization go away. But both are, connected to periods of amendment, at least at the federal level in the United States.

[00:36:38] Jeffery Rosen: Judge Sutton, tell us about the argument that some state constitutions are too easy to amend. You talk about California, which using the plebiscite, which is adopted in 1912. No other state, you quote the former chief justice of California saying, "As the practice is extreme in California, which allows petitions to be placed on the ballot with 8% of the voters and then approved by majority." Tell us about how the initiative or plebiscite is feared in California and in other states that use it, and whether or not that's a cautionary tale.

[00:37:10] Jeffrey Sutton: Justice Black on the US Supreme Court used to proudly point out that he carried the Constitution around with him in his front pocket. And wouldn't have been one produced by the National Constitution

Center, but one could imagine that happening today. I would say with Justice Gorsuch. A justice from the California Supreme Court or the Alabama Supreme Court, really most US supreme courts, who tried to carry the state constitution around with them not only couldn't put it in their back pocket, they need a pretty sizeable backpack. And, it's astonishing.

[00:37:41] Jeffrey Sutton: And, you know, the words, I think... I don't think I have this exactly right, I'll be my co-panelists will have this number, but you know, the US Constitution comes in, I think, in the 7,000-ish words. Jeff, you probably know this exactly. I think the state constitutions average in, like, the 30,000 range. So it's an astonishing difference.

[00:38:02] Jeffrey Sutton: And I do think it reveals that, in America, we might have a group where it's too easy. And, you run into this problem that if you constitutionalize everything, you're constitutionalizing nothing. And you're really breaking down the distinction between what a constitutional provision is and what a statutory provision is.

[00:38:28] Jeffrey Sutton: And that doesn't seem healthy. I mean,that seems to me quite dangerous. One can worry that a reason for this is interest groups. That, in interest groups, that desire something in a given state would prefer. All else being equal, to put it in the constitution, rather than a statute.

[00:38:46] Jeffrey Sutton: You really see this dynamic. This is one defect in quite a few state constitutions. Quite a few of them make it about as easy to amend the constitution through an initiative as they do to amend a statue by a referendum, right? So referendums are generally creating statues or fixing statutes. Initiatives, generally speaking, adding something to the constitution or changing something.

[00:39:11] Jeffrey Sutton: Well, if you're gonna make those two requirements roughly the same, who wouldn't take the constitutional route? And, that strikes me as problematic. You know, the thing about whether initiatives are the blame.it is true. I don't know this for sure. But my suspicion is, many of the state constitutions that are the longest are states with initiatives. I can promise you that's not exclusively the case.

[00:39:39] Jeffrey Sutton: So one can worry that the ease of putting something on the ballot, riding a wave politically of something popular at a given time, is, you know, unfortunate and not the way we should run a government. But that said, what's easy to add is easy to subtract. And, I find it interesting that not too many initiative states have subtracted.

[00:40:02] Jeffrey Sutton: At the same time, you know, one would have guessed. I mean, Wilfred was talking about the Progressive Era when the initiatives idea came to the fore. Lots of states got on this band wagon pretty quickly. Then it slowed down, and then it stopped I mean, you would think that would be a rather easy thing to get people to agree to if you're thinking well, why wouldn't I want to have the right to vote to amend the state constitution? Well, you haven't had many states... I think it's been quite a while, actually, since the state added a initiative, which suggests to me it really does have some wards. Maybe oughta have a higher barrier to entry.

[00:40:40] Jeffrey Sutton: A good example of a state that in my view attended to this issue is Florida. In one sense, they facilitated initiatives by creating this ongoing constitutional commission, which gets together every 10 or 20 years. And proposes things directly on the ballot. But one thing they did in return is raise the requirement to 60%. And you know, that strikes me as healthy. You know, if I were speaking from my own state, I would much prefer to see it at 55, 50- 60%, rather than 51, as it is in Ohio.

[00:41:19] Jeffrey Sutton: Frankly, I don't know how my co-panelists feel, but I don't think we'd be hurting or destabilizing the federal Constitution if we dropped it to two thirds. I think we would increase the likelihood that we would take Article 5 seriously, and decrease what has become our tradition, too frequently, in my view, of amendment by interpretation, which I think everyone here knows, is not cost-free. It runs the risk of politicizing the high court. And you know, that's the world we're in right now.

[00:41:55] Jeffrey Sutton: I'll just make one other brief point, just 'cause I know, Jeff, you're gonna love this. You know, the whole debate we have about living constitutionalism and originalism, and it's just so intense. It's almost political parties at this point. That grows out of the phenomenon of amendment by interpretation, right?

[00:42:13] Jeffrey Sutton: I mean, we wouldn't... in a world in which a constitution could be amended by 51% vote, it kind of sounds silly to talk about amending, why would you have an evolving guarantee when it's so easy just to change the darn thing? Or if you did, it would be the rare exception.

[00:42:34] Jeffrey Sutton Whereas in our case, whether it's structural or rights provisions, a lot of things are on the table when it comes to accounting for new norms. And I think that follows from the difficulty of amending it. And you know, I'm not saying this fixes everything, but I sure would be happy to see it go down to two thirds and have the states go up to 55 or 60.

[00:42:57] Jeffery Rosen: That's such an interesting point about how our originalism, living constitutionalism debate, flows from the difficulty of amending the Constitution both in leading judges to be more expansive in interpreting the Constitution, in the 20th century and leading, to constrain judges in the 21st.

[00:43:17] Jeffery Rosen: And your suggestion that the Constitution be a little easier to amend is shared by our Constitution drafting team, which, unanimously proposed making both proposal and ratification a little easier, not much.

[00:43:31] Jeffrey Sutton: Well, they've had a vote in Ohio.

[00:43:33] Jeffery Rosen: [laughs]

[00:43:33] Jeffrey Sutton: They've got one on the plus side in Ohio.

[00:43:37] Jeffery Rosen: We're getting to two thirds, so already. I think you can feel the band wagon. Rosalyn Dixon, examples, if you could share with us, of constitutions around the world that are too easy to amend. Have countries around the world found this California plebiscite problem of 51 being too low a threshold?

[00:43:58] Jeffery Rosen: And then tell us about Israel. Which is an example that several of our friends in the Q&A have asked about. Is the current constitutional crisis in Israel a result of the fact that the constitution isn't written down? Or is it a lack of separation of powers that allows the executive to assault judicial independence and, what lessons can we take from that?

[00:44:23] Rosalyn Dixon: So too easy. I think absolutely, going back to my prior mark, is that if an amendment rule is set with a view to it being a kind of bipartisan or multi-partisan threshold, and then a particular party gets a lot of power, all of a sudden, it's extremely flexible, right? So Mexico, you know, India, various times, have had dominant parties that have just simply had more... they've just had more representation than amendment threshold. And so they have amended willy nilly.

[00:44:55] Rosalyn Dixon: And it's partly why courts why the Indian Supreme Court came up with implied limits on the amendment power. Like the basic structure doctrine in Kessa Venanda, because they were very concerned about the degree to which in Judge Sutton's words, it was kind of becoming change that looked like legislation, highly partisan, some of it very anti-rule of law.

You know, Candy used amendment to insulate herself that Netanyahu's now doing in Israel. And they were seen as very problematic. So that is why at the back end, courts came up with these implied limits that were designed to kind of tier the constitution ex post, in order to counter,this problem.

[00:45:36] Rosalyn Dixon: In terms of plebiscitary politics, people often talk about Switzerland as an example where there's generally a fairly well-designed balance between rigidity and flexibility. But where the initiative process has actually produced some very wacky amendments in the last decade or two.

[00:45:54] Rosalyn Dixon: You know, if you're on the left, you might like the fact that they tried to ban holiday homes by plebiscite, but you would also be concerned by the Islamophobia in some of their other plebiscites around mosque buildings. So I think that the California of Europe is Switzerland. And there are some concerns there.

[00:46:16] Rosalyn Dixon: I have an article on the Swiss constitution, where we propose that the Supreme Court of Switzerland should deny those plebiscites full affect in law until they are ratified by the federal parliament. So a kind of reverse, engineering of a tiered structure where you need constitutional implementation of a plebiscite before it can take, legislative effect.

[00:46:40] Rosalyn Dixon: Definitely, there are those kind of cautionary tales. Some of them easy to predict as in Switzerland. Others much harder because it's a matter of how politics plays out.

[00:46:51] Rosalyn Dixon: If I may, I just want to say something very brief about, as Judge Sutton's invocation of Justice Black and the Constitution that fits in the pocket. Of course, Justice Black had a very textualist justification for that, you know, kind of image. He wanted to invoke the idea that the Constitution was a written document and that was all, and it had to fit in the pocket.

[00:47:13] Rosalyn Dixon: There's also a really broader rationale for that, which is if you want people to understand the Constitution in the way the National Constitution Center sets out to do, it has to be, you know, not a lot, a long novel. It has to be a document of government that can be accessed and understood. But I think the experience elsewhere is that you can create, again, tiers of a constitution, where if you like, judges carry around the kind of high-level constitutional values in their pocket, and they leave the detailed provisions in their office.

[00:47:46] Rosalyn Dixon: That actually works for popular imagine as well. I have an experiment with Professor Landau that we report in our article in tiered design, where we actually tested on Interc how quickly kind of people lost a sense of a constitution by how long it was. And it drops off really fast. And so I think there's a real important difference, not only between how difficult constitutions are to amend within a constitution, but how specific they are.

[00:48:12] Rosalyn Dixon: And I think you could imagine a tiered structure where there's a kind of flexi-specific constitution that looks a lot like legislation, actually. And it's about whether, you know, the locality or the state has broader responsibility. And then there's a kind of abstract and entrenched set of values and founding principles that everyone carries in their pockets. They learn in elementary school. And is really hard to amend.

[00:48:36] Rosalyn Dixon: And I think that we can have a black, vision for 2023, but one that's more tiered, and that does take seriously Judge Sutton's critique because there isn't that kind of rendition of a supra-constitution for California. But there could be, and that's what the work we could do … were redesigning from the ground up.

[00:48:55] Jeffery Rosen: We have some questions in the chat about what specific aspects of the amendment process our, drafting team trying to achieve? And the proposed amendment would make it easier to propose amendments by lowering the threshold for ratification from two thirds of Congress and three quarters of the states to three fifths of Congress and two thirds of the states, so like Judge said, this proposal, it makes things a little easier to amend, but not much.

[00:49:26] Jeffery Rosen: Wilfred Codrington, do you have proposals for amending Article 5? If so, what might they look like?

[00:49:39] Wilfred Codrington: Yeah, so I'm in agreement with, I think . . . I don't think Rosalyn weighed in on whether or not we should amend the US Constitution's, amending provision. But I'm in agreement with most scholars who say ours is too difficult, and it should be reformed.

[00:49:53] Wilfred Codrington: Of course, the paradox there is that we have to amend the Constitution to amend the provision. But were I to do that, yeah, I think that there are various ways to think about it. So one is just simply lowering those levels as, team for the National Constitution Center are doing. As Judge Sutton, mentioned.

[00:50:14] Wilfred Codrington: There is the tiered design that, Rosalyn mentioned. So you can do certain things. Obviously, this time, it wouldn't talk about slavery, or the Senate in that. Or maybe it would talk about the Senate, but it wouldn't talk about slavery in the way that it did in Article 5.

[00:50:31] Wilfred Codrington: Another way is that you can adopt some things that other constitutions and the state that are around the world do, which is to also put some of this to people, right? Whether you do that sort of directly, or you do that sort of on the back hand to adopt something that the legislator has proposed or something that states have proposed.

[00:50:49] Wilfred Codrington: There is an alternative way of amending the Constitution, which we've never used. It just bears mention, particularly because Judge Sutton talked about conventions, of constitutional conventions of the states. There is a provision that allows, a convention to amend the Constitution, where Congress would have to call this convention if you get two thirds of the states, petitioning to Congress for this. And so we've never had this, as I've said. And we don't really know what that would look right, in terms of rules. We don't know what quorum requirements would be like, delegations would be like. The agenda and whether or not they would have to stick to certain things. But that's another way of proposing.

[00:51:33] Wilfred Codrington: I think that there are just several options out there. And right now, while, you know, in the beginning, in the founding era, it may have made sense to set such a high threshold. A lot of the factors that we think about, the admission of new states. The sort of permanence of two-party systems. And other things have just made that such a high threshold.

[00:51:56] Wilfred Codrington: So I'm open to a number of different ways to reform that. But I do think that some way allowing the people to weigh in on it more directly would be helpful. We are not a nation of states or sort of in this way that we were when we came together. We are a more unified country right now, or at least we hope we are. So I think, you know, having the aggregate, the entire police sort of weighing in on these questions would also be helpful not only just for the Constitution itself, but for civic engagement in a time where we, you know, see voting at low levels and we see people just sort of dispirited about the level of gridlock, and traction at the federal level.

[00:52:43] Wilfred Codrington: So I think reform would be good in some way. And I would think about a way for engaging the people more in that process.

[00:52:52] Jeffery Rosen: Such a thoughtful suggestion. That the people be engaged in constitutional reform. And it nicely ties up this wonderful discussion. Because we learned, throughout the course of it, that at the state level, the amendment process became more democratic. Initially being truly legislative, and then bringing in the people. And we've also learned that the around the world, that kind of popular participation is increasingly common.

[00:53:19] Jeffery Rosen: I'm so grateful to you, Judge Sutton, Rosalyn Dixon, and Wilfred Codrington for a marvelous discussion of this complicated and crucially important question. And for teaching us so much from a comparative perspective around the world and between the federal and state system. This is part of an ongoing series of conversations and it will be an honor to convene all of you again before long. And from all of us at the National Constitution Center, thank you so much.

[00:53:51] Tanaya Tauber: This conversation was streamed live on March 16th, 2023. This episode was produced by John Guerra, Lana Olrick, Bill Pollack, and me, Tanaya Tauber. It was engineered by the National Constitution Center's EV team. Research was provided by our wonderful interns here at the NCC, Sophia Gardel, Emily Campbell, and Liam Kerr.

[00:54:15] Tanaya Tauber: You can check out the National Constitution Center's exciting lineup of America's Town Hall Programs and register to join us virtually at constitutioncenter.org/townhall.

[00:54:26] Tanaya Tauber: As always, we'll publish those programs on the podcast. So stay tuned here as well. Or watch the videos. They're available in our media library at constitutioncenter.org/medialibrary. Please rate, review, and subscribe to Live at the National Constitution Center on Apple Podcast or by following us on Spotify. And join us back here next week for a conversation on the constitutional role of the state solicitor general.

[00:54:52] **Tanaya Tauber:** On behalf of the National Constitution Center, I'm Tanaya Tauber.