

Can the Constitution Serve as a Document of National Unity?

Thursday, June 13, 2024

Visit our media library at constitutioncenter.org/medialibrary to see a list of resources mentioned throughout this program, listen to the episode, and more.

[00:00:03.3] Jeffrey Rosen: Hello, friends. 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's a nonpartisan non-profit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode, I'm delighted to share a conversation with two leading scholars about whether or not the Constitution can serve as a document of national unity. Yuval Levin is the author of *American Covenant: How The Constitution Unified Our Nation, and Could Again*, which was just released on June 11th. And Aziz Rana is author of *The Constitutional Bind: How Americans Came to Idolize a Document That Fails Them*, which came out on April 16th. Enjoy the show. Thank you so much for joining us, Yuval Levin and Aziz Rana. The thesis of each of your superb books is well encapsulated in the subtitle, Yuval, your book, *American Covenant: How the Constitution Unifies Our Nation and Could Again* is one which I so admire. I've had the honor of reading it. It's such a powerful argument for the Constitution as a Madisonian document of national unity. Tell us how the Constitution was designed to unify our nation and how it could again.

[00:02:49.2] Yuval Levin: Well, thank you very much Jeff, and thanks for the Constitution Center for bringing us together. It's an honor really also to be in this conversation with Aziz whose wonderful book everybody should read. I learned a huge amount of history and legal thought from it. My book begins really from the sense we have that we are living in a divided moment, in a moment when Americans feel as though we're turned against each other and our politics is polarized. Our culture wars are intense, and among the consequences of that sense is, I think, also a view that the Constitution is not serving us well. And certainly there is some truth to that view. Our system now is in a moment when it frustrates us and when we think about what could be changed, I think it's important for us to grasp the ways in which the Constitution is working and not working in this moment.

[00:03:42.5] Yuval Levin: And to my mind, that requires us to understand its purposes, to understand its structures, its design, the ways in which it lives up to those purposes and ideals and the ways in which it does not. Ultimately, the book does point toward political reform, but I think to reform we have to think about what we're trying to achieve and how that might be done. And when you begin to look at the structure of the Constitution, at the origins of it, at the intention of its framers and at its history, one thing you find is that the cause of unity and cohesion is very central. It mattered a lot to the framers of the document. It was a constant

subject of discussion at the constitutional convention. Unity or Union in one way or another is the subject of the first, third or so of the Federalist papers.

[00:04:28.7] Yuval Levin: And you say it's Madisonian. I think that's exactly right. James Madison, in a way, stands out in our political tradition for worrying about cohesion and unity. A tradition that's defined on the one hand by a kind of concern for political order and dynamism on the other, maybe by a concern for social justice and equality. Madison is not really quite in either camp, at least at the time of the framing of the Constitution. He's someone who worries about faction, who worries about division, who worries about disunion in a very distinct way. And Madison, of course, is by no means the sole author of the Constitution very far from it. He actually lost most of the important votes in the convention, but his emphasis on that point is very central to the way the Constitution goes about its work. The first stated purpose of the document is to form a more perfect union.

[00:05:18.6] Yuval Levin: And I think that there's also a distinct idea of what unity can mean in a diverse society that we can learn from the Constitution, from its design and from its history, an idea of unity that is, I think, more achievable for us now and also more useful for us now that sees unity not as thinking alike, but is acting together that is rooted in an active sense of the political that I think is itself rooted in classical philosophy and that doesn't imagine that what it would take for our society to be unified is unanimity or broad agreement on the fundamentals, but rather that we can become more unified by working through our differences, through negotiation, through accommodation, through competition. The very ways in which we fight in politics can bring us together if they're structured in the right way and engage us in a common purpose and a common mission.

[00:06:19.2] Yuval Levin: There are some very important ways in which the Constitution goes about that, that we can learn from now. There are also ways in which its institutions are failing now, and we should talk about those where I think repair would require some acquaintance with the purposes of the Constitution, but repair certainly is required.

[00:06:36.6] Jeffrey Rosen: Thank you so much for that. Not thinking alike, but acting together is such a powerful way of putting the goal of the Constitution as a document of national unity. Thanks for setting up the thesis so well. Aziz Rana, in your wonderful book, which I learned so much from as such a rich cultural, intellectual and legal history, you argue in your subtitle that Americans came to idolize a document that fails them. It's really a great narrative history of the critiques of constitutionalism over the years. But in your introduction, you introduce three clear institutional pathologies that you argue feed off each other. The existing order makes it difficult for today's multiracial and urban majority coalition to implement widely backed policies. Then there's the existing order, disempowering minorities empowers rules by a minority coalition. And third, the great 20th century workaround is the rise of the modern presidency. Tell us about your critique of constitutionalism and how you believe that it is failing us.

[00:07:41.2] Aziz Rana: Thanks so much. So first, Jeff, thank you for that wonderful introduction and everybody at the National Constitution Center for including me in this event. And Yuval as well, it's wonderful to share this discussion with you that I also learned a ton from your book. It's really terrific and I urge folks to read it and engage with it. So, I think honestly

the critiques of the constitution at this point are probably pretty familiar from just reading the opinion pages of the New York Times or the Washington Post. And so maybe I can just say a little bit quickly about what those critiques are and then talk a bit about the relationship I see between the federal constitution and the question of social cohesion. So the first thing to say is that there are many examples around the world of how to combine constitutionalism and democracy, and the US is one of these examples.

[00:08:33.5] Aziz Rana: Now, all of these different systems are still ultimately organized around a basic principle, which is the principle of one person, one vote. In large societies that are plural and diverse like the US or we can think of many other countries elsewhere. There's also this sense that you have to have respect for differences across various kinds of regional, ethno-cultural, racial, religious divides. And so you can't just have a simple system of majoritarianism. There have to be some checks and balances, including ideas of federalism as well.

[00:09:08.9] Aziz Rana: The problem in the US is that the types of checks or constraints, the counter majoritarian checks and constraints are incredibly extreme. They're far more extreme than comparable constitutional democracies elsewhere in a way that really inhibits that underlying value of one person, one vote. And what it does is it makes it very hard for organized majorities to influence policy, but it's not like that it just sort of limits or delays policy. At the same time, it also mobilizes and facilitates rule by particular empowered minorities.

[00:09:44.8] Aziz Rana: And over time, this is the third element, the kind of classic adaptation that Americans have developed. A system of presidentialism is subject to all of the problems associated with presidentialism elsewhere, where you might have presidentialism combined with winner take all systems where you can't call new elections and this generates paralysis if you don't actually find compromise. And that can lead to more aggressive forms of presidential authority that in fact end up strengthening the kind of authoritarian strains within presidential systems, but not addressing deep-seated underlying problems. And as just one example of how majorities authored very particular minorities are strengthened in ways that end up inhibiting a kind of richer democratic life. We can think of the role of the Supreme Court.

[00:10:31.4] Aziz Rana: So in the US, it's incredibly hard to amend the constitution. We have a constitutional system that is perhaps the hardest in the world to amend. And at the same time, you have a small Supreme Court, nine folks serving for life in an appointments process that's organized around a specific unit. In fact, all of representation in the US is organized around the unit of the state. So geography rather than a principle of representation based on one person, one vote again. And what this has done is, it's created a setting in which you could have a president that loses the popular vote. So seven of the last eight presidential elections, the popular vote's been won by Democrats. But then you have Republicans that end up serving as the president and then through control of the Senate that is deeply mal-portioned. So 70% of the population is now increasingly in just 15 of the states then be able to control the court.

[00:11:24.8] Aziz Rana: So you have a super majority of conservatives on the court, six to three. And in fact, Trump alone was able to nominate and confirm despite losing the popular vote, three justices to the Supreme Court where all republican, all, excuse me, Democrats since 1968 have only been able to nominate and confirm five total. There hasn't been a Democrat that's

been the chief justice of the Supreme Court since 1946. And because you can't amend the Constitution, it drives political and constitutional decision making into a court that has extensive power that can operate generationally in ways that are deeply inconsistent with where the public sort of would want constitutional politics to proceed.

[00:12:07.4] Aziz Rana: Now, I see all of this as tied to certain tendencies within the Constitution that actually run counter to the goal of social cohesion. And maybe this is something we can get into, which is, the classic story is that the constitutional system, because of the ways in which it divides and negotiates power, allows us to economize on virtue.

[00:12:28.9] Aziz Rana: It's a system not made for angels, as Madison would've said. But I actually think an assessment of American history highlights the extent to which for our constitutional system to operate effectively, it, in fact, needs a huge amount of background social cohesion. And indeed the historical periods in which something like the compromise and unity that Yuval is discussing, were actually operative in American life were very particular periods, the early 19th century, the mid 20th century were for distinct reasons the society writ large was able to marshal the type of background social cohesion and agreement that allowed a system that doesn't really work to foster cohesion to operate effectively.

[00:13:21.2] Aziz Rana: My theory instead is that really what the constitutional system does is it incentivizes various kinds of turns towards minority rule and tit-for-tat defection that we're in fact dealing with at the present. And so it's really vital for us to think about, well, how is it that the Constitution operates in practice rather than to idealize a kind of framing vision from the 18th century? And imagine that that's going to be instructive for how to address things today.

[00:13:52.2] Jeffrey Rosen: Thank you so much for that powerful critique of constitutionalism, both today and throughout history. Let's take the argument through each historical eras 'cause both of your books do such a great job in describing the critiques and responses to constitutions without history. Yuval perhaps the progressive era is the time to start our critique. You describe how progressive intellectuals and politicians led by Herbert Crowley at the New Republic and politicians like Theodore Roosevelt and Woodrow Wilson criticized the separation of powers, federalism and checks on majoritarianism and embraced a kind of populist presidentialism that undermined the framers design. Tell us about the critique and your response to it.

[00:14:44.1] Yuval Levin: Well, sure, I think maybe a way into that is to start from Aziz's excellent summary of what Casey makes. I think there's a way in which the underlying concern for justice that's expressed in the Constitution is a search for a balance between majority rule and minority rights. And the US constitution certainly stands out for its concern about the potential for majority abuses of power. And for that reason, although it is premised in the notion that only majority rule can legitimate political action, it also worries a lot about abuses of majority rule and therefore requires majorities to grow to broaden before they are empowered. And the American system therefore does make political action very difficult. It prioritizes coalition building over effective efficient policy action. And in that sense, it prioritizes coalition building overrepresentation sometimes as well.

[00:15:45.8] Yuval Levin: There's no question that it does not make pure representation its absolute good. No system does as Aziz says, but the American system stands out for requiring coalition building before meaningful action can occur in our system. And that requirement is very frustrating, particularly for relatively narrow majorities in our system. The system doesn't really empower narrow majorities in the way that some of the European parliamentary systems that we can talk about do. That kind of frustration, the sense that we just can't get our government to move and to respond to changes in the world and to respond to changes in public views, that frustration goes well beyond in our history, well before the progressive era. It's a frustration that was felt almost immediately in the constitutional system, but it absolutely reached a peak in the late 19th century America where there was a sense that as the economy was industrializing, as life became more complex, as the nation was growing and becoming a world power in some ways, the American system of government was lagging behind the needs of the society.

[00:17:03.4] Yuval Levin: Industrialization created tremendous political pressures all over the developing world in that time. They were much more extreme in some ways in Europe and put tremendous pressure on the European systems. They also put enormous pressure on the American system of government. That system did hold together, but it was forced to respond to the growing complexity of modern American life. And that demand took the form over time of an emerging progressive movement. Progressivism is many things, and I think it would be a mistake to say that there's one simple set of ideas in the middle and late 19th century that we would call progressivism. It was in some ways a movement of urban reform. It was a movement for transparency and a kind of journalistic movement for bringing to light the realities of capitalism in 19th century America.

[00:18:00.4] Yuval Levin: But over time, it gained the form of a movement for political reform, especially at the national level to better enable effective and responsive government. And it was in this sense, very much a movement of frustration with the American constitution. You begin to see this in the work of scholars and journalists at the end of the 19th century. Woodrow Wilson, before he was a politician, was really one of the great political scientists of the 19th century in America and very much a scholar of the problems with the American constitutional system. And he had in mind a model of a more responsive and more efficient kind of governing system that responded more directly to public views that sought to enable the system to use elections as moments of change to put questions before the public and empower the answer that was chosen by the majority. That's not crazy, that's how most democracies work.

[00:18:58.2] Yuval Levin: It generally hadn't been and hasn't been how the American system has worked. In the American system, when you win an election, generally what you win is a seat at the table, at a negotiating table rather than all the power in the system. And Wilson and others, and this took different forms and in different facets of progressivism, made a very strong case that was very persuasive to a lot of Americans for the need for constitutional changes and for political reforms, that would overcome the rigidity, and unresponsiveness of the American constitution. And that rigidity and unresponsiveness was understood both in terms of democracy and in terms of efficient and effective policymaking. And the argument for these changes, I think has had a lot to do with some of the changing character of the American constitutional system. It

was a dominant political force by the beginning of the 20th century, and a critique that in a lot of ways, of course, is very much still with us too.

[00:20:00.6] Jeffrey Rosen: Many thanks for that account. Aziz, you have also a nuanced and powerful account of the progressive and socialist critiques at the end of the 19th century and early 20th century that focused on the constitution's anti-democratic elements arguing for more direct popular control over governance. What is your account of what led to the progressive critique seeking adaptability through presidential leadership, the influence of other movements including women's suffrage and whether or not you think that the progressive era critiques were well founded?

[00:20:38.3] Aziz Rana: Yeah, so I think the first thing to say is just to echo something that Yuval has already mentioned, which is, the variety and multiplicity of critiques and perspectives during that period. And so I just wanna note maybe upfront that at the very least you can see two different strands that sometimes work together, but sometimes are really at loggerheads among critics of the constitution in the late 19th through the 20th century. And one kind of argument is the one that Yuval has been emphasizing, and it's associated with Wilson. I should say I am not a fan of Wilson at all. And this is a claim that the problem is a lack of energy. And so that you don't have energetic and effective governance. A second kind of argument was really an argument that the system facilitated minority rule. So it's not a question of how active or inactive the government was, whether or not it produced agreement. It was that, in fact, it actually mobilizes a form of power, but the power of those that are already deeply entrenched.

[00:21:39.8] Aziz Rana: The thought here is that the just how fragmented the vote was in the US meant that the one tool that most poor and working people had, the power of the vote was deeply limited as an effective mechanism for decision making. And that various kinds of racial and socioeconomic elites were able to use that fragmentation to have their own interests met. One way of thinking about this question of the problem being minority rule rather than efficiency, these different orientations is to take an example from the present. So in 2020, Mitch McConnell is majority leader in the Senate and Ginsburg has died. It's also, we're right about to have a presidential election. In my view, if you have a functional constitutional system in the lead up to a presidential election, you precisely want a system that incentivizes reaching across the aisle to deal with large scale social problems.

[00:22:36.7] Aziz Rana: And in that context, it would've been the COVID pandemic. And in fact, you'd want a system that incentivizes addressing that so that you can have benefits at election time. But what is it that McConnell does instead? McConnell really focuses in the context of Ginsburg's death on adding a new justice to the Republican majority on the Supreme Court because of the sense that, well, you have these minoritarian instruments that can lock in policy for generations to come, and that it's actually more important in a deep way to have control of the bench rather than to legislate policy. Those are the incentives that kind of facilitate a logic of minority rule through the constitutional system.

[00:23:21.7] Aziz Rana: And if you just think about it and take a step back, in many constitutional systems, this would be a strange thing to think that it's more important in election season with a massive pandemic to lock in the court rather than to deal with legislation.

[00:23:36.4] Aziz Rana: And that was a kind of argument that was sort of being promoted during the progressive period because the background setting was that the country was facing all these social socio economic problems that were a product of mass industrialization. You had states like the state of New York that were passing labor legislation sometimes with near unanimity, and that you had the federal courts that judges serving for life that essentially were rejecting those policies and that it was very hard in the context of the existing legislative system to be able to have clear national resolutions.

[00:24:14.4] Aziz Rana: And what ended up happening during this period is that there were a variety of solutions to these problems. Now, the solutions I tend to support are the ones that have become commonplace globally when we think of constitutional democracies. So having much longer constitutions that make it easier to amend so that you have more expansive rights, not just negative rights, but positive socio economic rights, reforms to the bench so that you have term limits for judges in the federal court globally, most judges serve for somewhere between nine and 15 years, much larger.

[00:24:46.1] Aziz Rana: Federal courts, India Supreme Court has 34. Germany has 16 shifts to the nature of representation in the house. So you might have proportional representation through ideas of multi-member districts that span urban and rural settings. Alterations to the structure of the Senate and elimination of the electoral college. So these were elements to try to maintain a system of checks and balances, but to push back against the problem of minority rule. What ended up happening instead was essentially the Wilsonian solution that Yuval describes which is adaptation through presidentialism in which the president becomes sort of the repository of representation and then is closely associated with the public writ large. And more and more lawmaking gets sucked out at the legislative branch, which both of us agree is like the central branch and moves into essentially an executive apparatus.

[00:25:46.9] Aziz Rana: This ultimately, in my view, has been very effective for asserting national security power and for, in many ways, asserting a kind of discretionary and oftentimes coercive rights abusing authority. But it has not been effective for bridging agreements across differences or for legislating over the course of the long term. And in a way, I think some of the problems of the present are a combination of problems from the founding period, limitations of that founding vision, which honestly, people in the late 18th century, you can't expect them to have solutions for the 21st century, combined with the limitations of the choices made during the progressive period that were good for organizing presidential power, consolidating the power of the state, not good for distributing power as a matter of popular authority and containing the minority power of socioeconomic and racial elites.

[00:26:44.2] Jeffrey Rosen: It's really striking that both of you are not fans of Woodrow Wilson are agreeing that some of the progressive era reforms consolidating executive authority and undermining Congress undermine the ability to form pluralistic agreement and deliberation. And then again, I think you disagree about the solutions. Yuval, give us your sense of what the evolution of the President and Congress post Wilson were, how it undermined the Constitution as an agent of deliberation and why you think Congress could, with proper reforms, resurrect its purpose as a deliberate body and engine of national union.

[00:27:23.9] Yuval Levin: Yeah, Let me maybe stress a couple of points of agreement with what Aziz said and a couple of points of disagreement and answer your question in that way. I don't think that I would describe the tendency of our system to impose veto points and restraints on majority action exactly as minority rule. I think minority rule gives the impression that minorities are able to act in ways that majorities are not. When the frustration with our system is often that no one can act when we have only narrow majorities. The system has exceedingly high thresholds for action. It requires broad, durable majorities across a set of institutions, and that does make it difficult to act assertively. And what it allows minorities to do very often is block action particularly by narrow majorities. Although majorities don't like to think of themselves as narrow.

[00:28:19.5] Yuval Levin: And so we might say there are constraints on majority rule that empower minorities to prevent action. I very much agree with Aziz that the flow of power toward both the court and the presidency has thrown the system out of balance in some important ways that certainly do begin to border on minority rule, especially when it comes to the court. I think the Supreme Court is much too powerful in our system that it has been much too powerful for a long time. And that in our time, a lot of the reason for that and also for the excessive power of the presidency is the weakness of Congress. I would argue that the core problem we now face in our system, rather than the structure of the system empowering minorities, is that we've created for ourselves a set of incentives that have disempowered Congress, which is the core democratic, institution in our system, and which is meant ultimately to set the direction of the system and to represent the public's will.

[00:29:25.2] Yuval Levin: The Constitution puts Congress first, not by coincidence and not in a subtle way. The Constitution defines the powers of the federal government as powers of Congress. It could easily have been written in a way that defines the powers of the national government and then describes the three branches, but that's not how it works. All of the powers are actually articulated within the system's definition of the Congress. The legislature is clearly meant to be the foremost branch of our government and the place where ultimately policy direction is set, that's valuable to the cause of building some national cohesion because the way the Congress works is through negotiation, accommodation, bargaining, deal making. It is a plural institution, which is what it takes to represent a diverse society. I think the chief problem that we confront now is the weakness and in many ways the willful weakness of the Congress.

[00:30:22.4] Yuval Levin: And what's required is a kind of rebalancing of the system that would call for changing incentives. The incentives that confront members now drive them to willfully give up power. They could assert much more power than they do. A lot of the power that is now redirected to both the courts and the executive, could be reasserted by Congress if the members chose to do that, and they don't. And I think that there's not enough awareness by Americans who care about politics and worry about the health of our system. There's not enough of an awareness of how much of the problem is rooted in the peculiar weakness of the Congress. And I certainly agree that that is a problem that the framers were not prepared to deal with.

[00:31:05.1] Yuval Levin: The ways in which you find the framers of the Constitution writing about power and writing about the institutions all assume that everyone in the system will want

as much power as they can possibly have. Congress today doesn't want the power it has. What it wants is a different kind of role. Members describe it as an oversight role. I think you might even describe it as a performative role as a prominent place in the theater of our politics rather than as legislative work that drives the direction of public policy at the national level in America. And I think in thinking about how to strengthen the system, we do have to think about how to strengthen Congress.

[00:31:49.2] Yuval Levin: The weakness of Congress is a function of a long historical trajectory. And I certainly agree with Aziz that it begins as a transfer of power to the presidency out of a sense that presidents were just much more able to act than Congress was. The emergence of the various administrative agencies came out of a kind of power struggle between the branches.

[00:32:14.2] Yuval Levin: There were sometimes ways to empower the president. There were sometimes ways to weaken the president, but I do think that we now confront a system out of balance. And the question for us is, what's the balance we seek? Is it something like the original conception of the system in which Congress is central and bargaining and accommodation is what happens at the core of our government? Or is it a system more modeled on the forms of some other democracies around the world where there is more direct democracy, there is more direct action, but there is also a greater danger of abuses of power by majorities?

[00:32:48.7] Yuval Levin: I think it's a perfectly legitimate question, but putting the question that way is an essential first step. And I think the way that Aziz raises his concerns is a very constructive way to get there, because it does, I think quite rightly, reject the Wilsonian view that ultimately what's missing is simply efficiency.

[00:33:10.1] Yuval Levin: Wilson wasn't that simple, but what's missing is efficiency. I think it's the wrong way to think about what's wrong with our government. We need to think about our government in terms of how it can facilitate the life of a democratic republic, and how it can advance those causes that are listed in the preamble. How it can advance union, yes, but also justice, and also the welfare of the public. These are the kinds of balances our system has to strike. It's not a simple matter, but I think to see these as the goal is the beginning of thinking about constitutional change and political reform.

[00:33:44.1] Jeffrey Rosen: Aziz, do you see the goals that Yuval identifies and ascribes to the framers as the right ones? Yuval argues that Congress should function as an arena of contention, coalition building and integration. He proposes specific reforms for reinvigorating the framers Congress, including strengthening committees, weakening leadership, removing TV cameras, and encouraging cross partisan negotiating. Are these persuasive to you or do you prefer looking to other non-American systems as ways of protecting minority rights and empowering democracy?

[00:34:27.5] Aziz Rana: Yeah, so my own view is that, I certainly think there's a value in reading the Federalist papers, just like I think there's a value in reading Montesquieu and reading Locke Rousseau and various sources of deep engagement with constitutional questions. The same time, I think that there's a real value in reading some of the people that I discuss in my

book like DuBois Color and Democracy from 45 or Black Reconstruction on how to think of addressing issues of white authoritarianism and moving toward a very different kind of constitutional democracy or figures like Harry Haywood and how to reconceive the Black Belt or Alan Benson socialist party on how to think about the Constitution. His book is called, the Dishonest Constitution.

[00:35:11.1] Aziz Rana: At a level of generality, the value of the framers to me is the fact that they're working through basic principles of constitutionalism and I'm also a constitutionalist. The problem that I have is that there's a culture that's been built around the framers that in my view, this is the argument that I make in the book, is really a 20th century product of how the US came to explain itself to the world against the backdrop of global decolonization, rising American global power. And then over time, how it came to understand its own internal reform projects. That is, it's very different actually than the world of the framers and has this effect of collapsing constitutionalism little C constitutionalism with the specifics and details of this big C federal constitution.

[00:36:03.4] Aziz Rana: Now, the federal constitution is not the source of all American problems, but I do think that it's played a substantial role in producing precisely the kind of disunity that Yuval is concerned with. And I'd even say that, for example, when talking about the fragmentation of the vote, one of the things that that fragmentation does is that it allows other resources, money, connections, influence, established and entrenched hierarchies to then play an outsized role in decision making because it's not like no decisions end up coming out of our governing system.

[00:36:46.7] Aziz Rana: There are actual outputs. These outputs though, oftentimes, end up privileging those that already have power and authority. And in a way, the problem writ large of the constitutional system is again, that actually it requires a huge amount of background social cohesion to work. If you think again about the early 19th century, why is it that the system more or less is able to get off the ground? It's because if you think of the US as a landmass, a massive landmass that has many diverse and plural populations that are subject to American power, indigenous peoples, enslaved black people, women, your American settlers, it's only a thin strand of those folks that are actually participating in political decision making. And the thing that's actually cohering the society is that they have a shared project of territorial settlement of the expropriation of indigenous land, so as to be able to ensure internal economic independence in some parts of the country through the use of coerced, enslaved black labor.

[00:37:52.9] Aziz Rana: That's a very particular type of society, and it's a very small stratum that are able to make decisions. And so it's not surprising that despite all of these fractures, you have agreement across differences. Similarly, in a way in the mid 20th century, why is it that the constitutional system basically works? It's because you've had a massive and very successful labor movement. In 1945, a quarter of the workforce was unionized, and that labor movement ended up giving massive super majorities that were able to overcome all of these veto points to the new deal and to FDRs.

[00:38:32.0] Aziz Rana: So in 1936, 80% of those elected to Congress in both Houses were supportive of FDRs agenda. So they're able to create something like a limited but still extensive

social welfare state. And then the experience of both World War II and the Cold War create existential enemies that lead center, left and center right to kind of rally around the politics of agreement that extends all the way through the great legislative victories of the Civil rights movement in '64 and '65.

[00:39:03.3] Aziz Rana: This 30 year period is really unusual in American history, and it's a product of background, social conditions that can overcome the problems of the existing constitutional order. And so today, I think in a way, what we're stuck with is a system that looks a lot more like what the Constitutional order consisted in with the rise of slavery as central political disagreement for the mid 18th century, all the way through to the New Deal, which is a framework that is not effective actually at producing agreement across difference.

[00:39:39.5] Aziz Rana: And that requires really extensive and democratic improvements to function effectively. And it's like one last point about the administrative state. My own view about strengthening Congress does not mean jettisoning the administrative state. These two things have to work together. So I'm a strong believer in the administrative state's ability to work hand in glove with popular majorities and effective legislative power to address social problems. In many ways, I do think that there are problems of the administrative state tied to its turn to a kind of technocratic authority. It's disconnected from the public, but there've been a variety of different kinds of experimental ideas about how to infuse the administrative state with greater deliberative and popular authority, including tripartite arrangements that incorporate business and labor and sort of establishing various kinds of policies.

[00:40:32.2] Aziz Rana: And that strengthening Congress returning to something that's a more coherent democratic system is not going to be achieved by gutting the, essentially like the state craft and the apparatus that we have for making good on the types of policy solutions that have historically been the basis of cohering the public.

[00:40:54.0] Yuval Levin: Jeff, can I say a few things? I think first of all, I certainly would not make an argument rooted in the framers out of authority in any way. I think we should only listen to the framers if they persuade us, if what they argue about the problems we face makes some sense as a way to think about those problems. There are areas where that's the case and areas where it is not, and looking to the framers is not something we ought to do because they're older or because they're James Madison, but because they have something to say to us. We should only do that as long as that's the case. I also think that it's too easy for us to look at past eras and think of them as simpler than our own. I think Americans in the early 19th century did not understand themselves as a unified people, and there were some extremely intense disputes.

[00:41:43.8] Yuval Levin: Regionalism was much more intense as a source of division than it is now. There was talk of secession in the early 1800s and of course, they were at the beginnings of an intense dispute that ultimately led to civil war. I also think that in the 1930s to the 1960s, that era did not feel to people who lived through it as a quiet time. There was much more political violence in America then than there is now. There were extremely intense divisions over questions that demanded the attention of the entire nation. Questions of fundamental justice, questions involving economic change and economic crisis. And so those were difficult times in

their own ways. And I think it's worth seeing that it is possible for our system to facilitate ways through times of difficulty.

[00:42:36.2] Yuval Levin: It's not simply the case that it only works when there aren't big problems to worry about. It can also work when there are, provided we understand something of what it is we're trying to achieve and how, and there, I certainly agree that we need administration in the modern world. We couldn't have an 18th century government governing a 21st century nation, but that's not what we do have. And I think an administrative state that was more accountable to a Congress that was actually more interested in legislating would certainly be a far better way to govern our society than the one we confront now. To me, it's not about more or less bigger and smaller. It's about the character of the governance we have.

[00:43:15.7] Yuval Levin: A congress that really did its job, would still require administrative agencies to carry them out. I mean, there's just no way for a modern government to do without them. And I don't think that we should imagine otherwise. But what we expect of the administrative agencies now is impossible. We expect them to do the work of legislating and the work of administering, and we expect them to do it in a way that satisfies this very diverse country with very intense divisions.

[00:43:41.3] Yuval Levin: And I don't think that's achievable. And the reason that we ask the impossible of them is it seems to me that Congress will not do its job. So to me, the focus of political reform really does have to be on Congress. And that is the place where changes in the rules, changes in the structure of the institution and expansion of the house, which we've failed to do now for a hundred years, and which I think of as a kind of constitutional maintenance that is absolutely necessary for our democracy to work. These kinds of changes would stand a chance of really allowing us to recover some balance in the system and seeing if it can work for us today. As it stands now, I don't think the system we have at the moment is what the American constitutional system is meant to be, and therefore, I don't really see it as a test of whether that system can work for us or not. We have to begin by helping it work.

[00:44:34.9] Yuval Levin: And I think reforms of Congress are also actually achievable. They only require a majority of Congress. That's where a lot of my work over the last 10 years has been focused for that reason. There has to be some intersection between what would be useful and what could be done. And those are both challenges to define.

[00:44:53.4] Jeffrey Rosen: Thank you so much for that. Aziz, in your last chapter, you are critical of the court focused rise of originalism as well as institutional reforms of the kind that Yuval suggests and instead call for a transformative constitutional politics that would shift discourse away from legal elites and from the courts and back to the political arena. Tell us more about the vision that you have in mind.

[00:45:24.8] Aziz Rana: So the argument that I make is that it's really telling that originalism as a cultural force got off the ground in the 1970s, because in some way, it'd be much harder to be an originalist in earlier periods in American life. So like the socialist, for instance, in the late 19th, early 20th century they are kind of originalists. They're very interested in Madison and Hamilton, but they see these figures as socio economic elites that saw the primary threat to rights

as threats from majorities to property rights. And that's what they ended up focusing on. And this is like the Charles Beard argument and Charles Beard, the historian goes through an analysis of the particular class position, whether or not we agree with the details of that analysis today that kind of reads as a type of originalism.

[00:46:15.9] Aziz Rana: And even at various points in time, you have different judges or commentators that say the best way to think about the constitution's meaning is by looking to what the framers may have intended or what the original public meaning of the text might have been at a specific moment in time.

[00:46:32.7] Aziz Rana: This was an argument made, for instance, against Brown versus Board of Education in the 1950s in the National Review. So the argument from Kilpatrick who was a close ally of Buckley and a strong defender of segregation was that Brown versus Board of education was not originalist. It's only after the successes effectively of the Civil rights movement and a cultural transformation in the status of the framers. In other words, somebody like Madison goes from being an enslaver. So he's a person that is an enslaver that is committed to a system of government that's organized around the interests of a very small number of Euro-American male settlers.

[00:47:15.3] Aziz Rana: So he goes from that kind of a person in the late 18th or the 19th century with all the pluses as well about like the thinking of federalism and checks and balances to a figure by the seventies who is most closely associated with an anti totalitarian bill of rights, a rights charter that's really a product of the mid 20th century, not of the late 18th through early 19th.

[00:47:42.3] Aziz Rana: And because of the argument that the constitution is understood essentially through the successes of the Civil Rights movement as an embodiment of the Declaration of Independence, that it's a treaty document that he gets the kind of reflected glory of folks like Frederick Douglass and Martin Luther King, people who in a deep sense he was profoundly politically opposed to if I were to do that anachronistic game. And it's at that moment when you have a broader cultural recovery of the framers and you have a desire for a type of restoration with the growing conservatism of American life, that arguments about originalism can really get off the ground because you have a broader swath of the public that's willing to say, oh everybody across the spectrum seems to like these framers. So conservative, legal interlocutors can be like well, if you like the framers, let's go back to what they may have intended or what their words may have meant at a specific moment.

[00:48:44.7] Aziz Rana: Now, as an actual methodology, originalism is really deeply over and under-determined, like there's a huge amount of intellectual critique based on the thought that it's very hard if you're focusing on intentions to figure out the intentions of a group. If you're focused on public meaning and you have small bits of text, that text can be incredibly vague. And so it's really hard to pin down what the text would imply for 20th and 21st century problems. But it's no doubt the case that a cultural context that thinks the best way to solve problems is by making analysis on the basis of what somebody in 1788 or 1868 might've thought is an approach that is more consistent with a kind of traditionalist conservatism and is more inconsistent effectively with a forward looking brand of politics that seeks to shift things in the future. And this is one of

the reasons among many others, that I think a huge problem in American life is that constitutionalism has become essentially the domain of legal experts and courts.

[00:49:56.4] Aziz Rana: And what judges think should be the relevant reform conversation is effectively the terms by which we end up having conversations about the big questions, race, economy, national security, foreign policy. What this means is that we've effectively, as a public, turned over the great debates about national values, national meaning, constitutional identity, and constitutional structure to a small range of state elites whose interests and commitments might be wildly distinct from the rest of ours. And it's why I actually think that figuring out ways to expand where constitutional politics takes place, including by revitalizing the amendment process, including actually by doing things that we don't even associate with constitutionalism, strengthening intermediate institutions like parties and unions and churches as sites for organizing public sentiment and for building the kind of coalitional commitments that you've all is connected to. This is the way to go in the future so that our constitutional memory and our constitutional discussions aren't dictated by really, in my view at this point, desiccated debates about whether or not the Constitution should be living or originalist.

[00:51:11.1] Jeffrey Rosen: Thank you so much for that. Yuval, you discuss the birth of originalism in the 70s as an intellectual agenda set of arguments developed by legal scholars like Robert Parkin and Scalia, Lawrence Silverman and others. Tell us about your views about why originalism arose in the current debate among conservatives about what form of originalism to adopt and whether or not it's consistent with your vision of the Constitution as a document of national unity.

[00:51:41.1] Yuval Levin: Yeah, thank you. It's very interesting. I mean, I would say, well, first of all, I very much agree that the revitalization of our kind of middle institutions is actually an essential element of constitutional renewal and including the parties, including unions, including religious institutions and others. I think the ironic thing is that the emergence of originalism has to do with the kind of concern that is connected to the one that Aziz articulates. Originalism emerges out of a sense that judges are too strong and that their strength is rooted in their being unbound by written law. And that judges, in a sense, had begun to make policy at their own discretion by interpreting the constitution and the laws in accordance with their own subjective views.

[00:52:36.4] Yuval Levin: And originalism is a search for some kind of reasonably objective criteria that would guide judges in interpreting the meaning of the constitution and the laws. It is explicitly to begin with an acknowledgement that this is an imperfect criteria, that it is better than subjective decision making by judges, but that it can never be, in any sense, absolutely objective or the ideal way to resolve problems. It's a kind of substitute for a traditional understanding of the role of the judge rooted in the nature of the common law, rooted in the place of the judge in the Anglo-American tradition.

[00:53:24.5] Yuval Levin: A substitute made necessary by judicial excess in the first half of the 20th century. Judicial excess by the way, that pulled in both directions that it first resisted progressive economic policy and then advanced in some respects progressive social policy. But in both cases involved a kind of judicial invention of the meaning of the law. And what you find

in the early originalist thinkers is that they are focused on judges and they're focused on restraining judges.

[00:53:54.4] Yuval Levin: Originalism is not a comprehensive constitutional vision, at least to begin with. It is really about the role of the judge, and it looks to restrain the role of the judge and some of the early originalists, the later Chief Justice Rehnquist when he is writing as a legal scholar before he becomes a judge, makes explicit the argument that the purpose of originalism is actually to open the space for the American system to enable Congress and the President to do their jobs and not have that space be filled by judges.

[00:54:29.0] Yuval Levin: To begin with, originalism is a theory of judicial restraint. And I would say that over time, originalism has come to be more of a comprehensive constitutional vision, rooted in a sense that the Constitution has a certain character, the judges have a role in advancing that character. And of course, we've seen in recent years as originalist judges have come to be a majority in the Supreme Court, that in the hands of some originalists, originalism is even a philosophy of judicial activism. And I think that that is ultimately inconsistent and incoherent in relation to the original aims of originalism.

[00:55:09.2] Yuval Levin: I think that, one more thing, it's important also to see that originalists look to the original meaning of the law or the constitution when they were written. So it's not just about James Madison, it's the original meaning of the 14th Amendment too, which in a lot of ways corrected James Madison in essential and necessary ways. It's about the original meaning of the laws and not just of the Constitution.

[00:55:32.0] Yuval Levin: Obviously, there is a problem that arises when the meaning of the law is not clear, is not obvious. Those are the cases that matter most. The hardest cases ultimately are the most consequential and the most controversial. And the question of what an originalist judge should do when the meaning of the law, whether it is the intention of its authors or the public meaning at the time it was written is not clear, is a question that's divided originalists for a long time. And that's created, I think, several waves of a kind of resistance to originalism on the right among legal scholars, resistance to the sense that originalism can simply be purely objective in hard cases. There are those on the right that say judges have to make decisions based on the one hand, a philosophy of individual rights rooted in the opening of the Declaration of Independence. You hear that from people like Randy Barnett and others, or on the other hand, from a kind of classical legal tradition rooted really in the tradition of Christian natural law that you hear now from people like Adrian Vermeule and others. I think both of those are rooted in frustration with originalism that is understandable, but that ultimately they point in directions that are not themselves rooted in our legal and constitutional tradition.

[00:56:51.6] Yuval Levin: And I think that in the cases where originalists minded judges find themselves confronted with an in clarity in the text itself, they should look to the logic of the constitutional system in which they play a role. And to my mind, that especially means that they lean in the direction of empowering the legislature. They lean in the direction of republicanism and therefore in the direction of judicial restraint, which is what originalism was at its root. These are complicated debates within the right, and there's certainly a lot of tension now on the

right, even though you might say originalism has triumphed, there's a kind of originalist majority on the Supreme Court.

[00:57:24.0] Yuval Levin: There is also, at the same time, intense debate on the right about the role of the judge and about the nature of judicial interpretation. I think what we require, and what I argue in the book, is that we require a broader constitutional vision than just a question of the role of the judge. We focus too much on judges. We give too much interpretive power to lawyers when we think about the constitution. The Constitution is not just a lawyer's tool, it's also for citizens, it's for legislators. It's for administrators to think about and interpret and put into practice too. And ironically, originalism arose as a way of restraining judges, but for a lot of people on the right as I am, originalism became a way of thinking only about judges when we think about the constitution. And I think that is a serious mistake.

[00:58:18.7] Jeffrey Rosen: Yuval, so well sums up the debates among conservatives about originalism and the shift to a kind of focus exclusively on the courts. Aziz, you too, in your final chapter say that you agree with Yuval's point that we need a broader constitutional vision and focusing on judges and legal elites, but of course, you reach very different conclusions about what a mobilized constitutional politics might look like. Last word to you Aziz in this great conversation, share if you would, your vision of what revived constitutional politics outside the courts might look like.

[00:58:57.7] Aziz Rana: Yeah, thanks so much. And thank you Yuval for the discussion. This has been really fun. So as a jumping off point, I'm deeply skeptical of the argument that originalism as a mode of restraint and even sort of looking to embedded structural features within the constitutional system can be pro-democracy. And the reason why is that if we agree effectively that Congress, the legislative branch, is deeply dysfunctional, I'd say what it does is it ends up promoting various kinds of minority rule. And at the same time, you have an amendment process that you cannot use. There's a reason why debates about fundamental values, for instance, reproductive rights and abortion have gone into the courts because other systems around the world, when you have super majorities that back a particular right, they can just add language to the text. We have a constitutional system in which you cannot do that. Right now, for instance, there is a super majority that supports reproductive rights.

[01:00:00.6] Aziz Rana: In a functional democracy, this would already actually be amended to be part of the constitution if you require passing through a legislative branch and then some kind of national referenda as many countries do. Or there would be a federal law. But because of the particularities of all of the overweening extreme forms of counter majoritarianism, none of that persists. And so as a result, the courts end up playing this oversized role when it comes to questions of basic rights and imagining that, oh, you can solve this problem through just a story about restraint or what the framers may have intended or what the original public meaning was including through the structure of the system, I think is like deeply inadequate to the broader problems. And what it ends up doing is it prioritizes a minority view, in this case, let's say reproductive rights. The anti-abortion position is an incredibly minority view within the US and yet it ends up winning.

[01:00:58.4] Aziz Rana: So what does that mean for the future going forward? I think what the US really requires is mass popular mobilization around the question of how to reconceive our democratic institutions and how to tie them to the basic problems that we as a society face. And you can imagine that through a whole host of reforms to the rules of the game, so that the system itself is more compatible or consistent with what a broad public might want, that it facilitates the kind of pluralism and agreement that Yuval supports. And at the same time, I think this would go hand in hand with changes to the legislative structure. So reforms to the Senate Electoral College, again, the courts, the House of Representatives, but then thinking more generally about, well, what kind of a society do we want? What sets of rights, broadly speaking, do we want to be emblazoned in a governing document?

[01:01:56.1] Aziz Rana: What should be the principles that undergird the exercise of foreign policy? Should it be organized through Presidentialism or other kinds of frameworks? What should be the underlying structures of state and economy? And I think that none of these changes, which broadly speaking, would combine the question of constitutionalism with the types of issues that affect the society writ large, can be addressed without building essentially movements and constituencies that understand these as vital to their own social projects and pushing for essentially like these vital shifts that would make something like equal and effective freedom operative for everybody.

[01:02:00.6] Jeffrey Rosen: Thank you so much, Yuval Levin and Aziz Rana for just a great discussion. It's so meaningful to convene you both. Your books make such powerful arguments and reach different conclusions, but this is a model for thoughtful, engaged dialogue about the core meaning of the Constitution as a document of national unity. Congrats to both of you on your books and Yuval Levin and Aziz Rana, thank you so much for joining.

[01:02:22.6] Yuval Levin: Thank you.

[01:02:22.7] Aziz Rana: Thanks so much to both of you.

[01:02:31.1] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Samson Mostashari, and Bill Pollock. It was engineered by Dave Stotts and Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, and Yara DeRose. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional illumination, conversation, and debate. Sign up for the newsletter at constitutioncenter.org/connect. And always remember that the National Constitution Center is a private nonprofit. Despite that grand and inspiring congressional charter, we receive little federal funds and we rely on the generosity of people from across the country who are inspired by our nonpartisan mission of constitutional education and debate. If you like recent podcasts, show your support by giving any amount, \$5, \$10, or more. Become a member at constitutioncenter.org/membership, or give a donation at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.