



Constitution Drafting Project- A Discussion of Five New Amendments

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[00:00:00] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the Center in person and online. I'm Tanaya Tauber, the senior director of Count All programs. Called a degenerate son of science by Thomas Jefferson, and a bungling lawyer by James Madison, Scottish philosopher David Hume was cited so often at the constitutional convention that delegates seemed to have committed his essays to memory. In this episode, scholars Angela Coventry, Dennis Rasmussen, and Aaron Alexander Zubia explore Hume's philosophical legacy and its profound impact on shaping America. Jeffrey Rosen, president and CEO of the National Constitution Center moderates. Here's Jeff to get the conversation started.

[00:00:35] 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 non-partisan, non-profit chartered by Congress to increase awareness and understanding of the Constitution among the American people.

[00:00:50] Jeffrey Rosen: This week, we're sharing audio from a program recorded at Arizona State University, in partnership with the ASU Center for Constitutional Design. We reconvened our Constitution drafting team, Caroline Fredrickson, Timothy Sandefur, and Ilan Wurman to discuss their five proposed Constitutional amendments and to prepare for a live convention that will be reconvening at ASU in the spring. Enjoy the show.

[00:01:02] Jeffrey Rosen: Thank you so much Dean Lindquist and welcome, friends. I'm so excited to be here, an emissary from the National Constitution Center in Philadelphia, bringing this project, which is so full of light, here to Arizona State, and it's so exciting that you're gonna reconvene in the spring and hold an actual convention to discuss the amendments.

[00:01:09] Jeffrey Rosen: Friends, this was one of the most uplifting and optimistic projects that the NCC has been privilege to sponsor, as Dean Lindquist said, we've brought together three

teams of America's greatest libertarian, progressive, and conservative Constitutional scholars and asked them to draft Constitutions from scratch. We were surprised that the Constitutions they produced had many areas of overlap.

[00:01:36] Jeffrey Rosen: So, we reconvened them for a Zoom convention, and in a state of nature of a state of Zoom, they produced five amendments to the Constitution, and it just blew our minds that in just over several days of deliberation, which were of such high quality that I felt like I was watching actual founders reinvent the Constitution and they agreed on five amendments.

[00:02:00] Jeffrey Rosen: In this polarized age, the fact that they were able to agree on these amendments is a sign for hope and it's gonna be incredibly meaningful to have these students from across the country thoughtfully debating them, and if your convention is able to ratify even one of these amendments, it'll be a real testament to the possibility for Constitutional agreement, and even if they don't, we know they'll have a civil debate.

[00:02:25] Jeffrey Rosen: Okay. So, let me first of all thank Stefanie Lindquist, Dottie Knox, Karen Sung, Alina McNeil, and all of your great colleagues here at the Center for Constitutional Design at Arizona State University. You're doing such innovative work and it's just been wonderful to be your partner.

[00:02:41] Jeffrey Rosen: I will introduce our remarkable panel of Constitutional scholars and we will, then jump right in. Ilan Wurman was the leader of team conservative. He's an associate professor here at the Sandra Day O'Connor College of Law at Arizona State University. Thank you, Ilan, for welcoming us to this great university. His latest book is *The Second Founding: An Introduction to the 14th Amendment*, so eagerly called for by my Constitutional law students that it's become a definitive text on the meaning of the second founding.

[00:03:14] Jeffrey Rosen: Congrats on that great book and on your book before that, *The Constitution of 1789: An Introduction*. That's actually forthcoming with Cambridge University Press. Caroline Fredrickson is the leader of team progressive. She's a distinguished visitor from practice at Georgetown Law Center and a senior fellow at the Brennan Center. Before that, she was the president of the American Constitution Society where her path breaking work with the NCC and with her counterparts at the Federalist Society led to the nomination of 80 of America's greatest liberal and conservative scholars to write about every clause of the Constitution.

[00:03:50] Jeffrey Rosen: That was an amazing partnership as well, Caroline. She is the author of several great books, including *The Democracy Fix: How to Win the Fight for Fair Rules, Fair Courts, and Fair Elections and the AOC Way*. And Tim Sandefur was head of team libertarian or rather he was a member of team libertarian, which was led by Ilya Shapiro. Tim is the vice president for legal affairs at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation.

[00:04:18] Jeffrey Rosen: He holds the Duncan Chair in Constitutional Government. He's the author of eight books, including, and this is such a great title, most recently, *Freedom's Furies: How Isabel Paterson, Rose Wilder Lane, and Ayn Rand Found Liberty in an Age of Darkness*, as well as, who can resist, *Frederick Douglass: Self-Made Man*. Great to welcome all of you here in Arizona.

[00:04:41] Jeffrey Rosen: Ilan, we're here on your home turf. Why don't we have an opening round of introductions about concretely, what you hope that these delegates, when they convene to discuss your amendments, will know, and how do you want to describe your deliberations within your team that produced these five amendments?

[00:05:03] Ilan Wurman: So, thanks so much for coming to Arizona for a change. It's a delight to roll out of bed, I mean, I did do that earlier this morning to get here. So, this project, is really important for a number of reasons, and as Jeff Rosen already suggested, the fact that you could get conservatives, libertarians, and progressives to agree on anything, let alone amendments to the Constitution, proposed amendments to the Constitution, I think is inspirational. Pedagogically, I think it's valuable. I think it's valuable to show that we could still have civil discourse, and as a self-proclaimed originalist I think it is extraordinarily important that we amend the Constitution in the next 50 years.

[00:05:49] Ilan Wurman: Okay? Because the title of my first book, which I thought is what you were going for originally, is called *A Debt Against the Living*. It's this idea that this Constitution creates a binding debt against future generations, and the idea being it was supposed to create stability, it was supposed to be enduring in many ways. It was an improvement upon the natural condition of the world that justified continuing adherence to it.

[00:06:12] Ilan Wurman: But on the other hand, the founders, the framers of 1787, rejected many of the Constitutions of 1776. So, again, stability for the sake of stability, conservatism for the sake of conservatism, it doesn't work. At some point, the people will think that the Constitution is too old and too outdated, such that perhaps it should be abandoned.

[00:06:33] Ilan Wurman: So, I really think that, as conservatives, if you're an originalist, if you're conservative, if you're happy that you've procured six votes on the Supreme Court, I'm not even sure, that they have, but nevertheless, that doesn't mean the Constitution is perfect. It just doesn't mean that that's true.

[00:06:51] Ilan Wurman: I think it's very, very important that we do that in the next few decades. The hopes here for the mini convention is that, I don't know, or would smart college and law students they're probably a special class of citizen. They're probably a bit more precocious and extraordinary than maybe, the ordinary citizen, but the hope would be that if they can come to agreement, you know, we're just a bunch of academics. Okay?

[00:07:19] Ilan Wurman: So, maybe academics have a special view of the world. We tend to be collegial. The real world, there's a lot less collegiality, I think, when it comes to political battles like this, but the hope is that these students could come together and, if they can come to agreement on any of these, I think that is a nice indication that these amendments are actually possible. This wasn't just a pedagogical exercise. I mean, it mostly was. Let's be real. Okay?

[00:07:44] Ilan Wurman: I don't think it was just that. These are really plausible structural reforms that we'll go through, legislative veto impeachment reform, appointment and confirmation reform, and this gives me hope, if you will, that we can actually amend the Constitution, again, as hard as it might seem right now.

[00:08:03] Jeffrey Rosen: You're so right. It would be such an affirmation of the promise for agreement, and that's why so much hangs on it. Caroline Fredrickson, Ilan mentioned several of the amendments: impeachment reform, amendment reform, resurrecting the legislative veto and also ending the natural-born citizenship requirement among others. What do you want to tell us about the deliberations that led you to that agreement?

[00:08:28] Caroline Fredrickson: Well, I know I would say Supreme Court term limits is one that was also part of the group. So, that's what I'll wanna repeat the thanks of- that have already been- been given to everybody, to all of you, to our host. This has been a tremendous project. For that, I'd really like to thank especially Jeff and the National Constitution Center.

[00:08:47] Caroline Fredrickson: I have really found it to be a fascinating and hugely beneficial enterprise in part because I've learned so much from the people with whom I've collaborated and also because I think it was this very positive affirmation of the possibility of finding common ground, despite the fact that when first start off, you think there's no way that these people will ever figure out anything they can agree on. Right?

[00:09:13] Caroline Fredrickson: But we did, and in a way that was very, very collegial and extraordinary. I think what the amendments that we came up with, I'm very, very proud of. We all made concessions. I think that was a really important negotiation. People talked about the merits and demerits of different ideas and- and compromised.

[00:09:36] Caroline Fredrickson: That was a truly unusual experience in some ways. I mean, I live in Washington and I've spent a lot of time. I worked on Capitol Hill for a long time. I was really, very gratified by that process. And I do think that the amendments that we agreed upon were all very meaningful. They weren't just kind of easy things.

[00:09:57] Caroline Fredrickson: I think if we'd had a few more days, we might have actually come to agreement on a few other areas where we began to really get into some into some detail about the electoral college, about redistricting some kind of amendment that would have

proposed a redistricting commission, independent such as you wise people in Arizona have adopted but we didn't have enough time and we couldn't quite get that done.

[00:10:24] Caroline Fredrickson: But what we did get done, especially the amendment on amendments, I mean, I can't tell you how hard that was. Article IV is part of the Constitution that not a lot of people are really familiar with except to say that you know it's really hard to amend our constitution, and that was one area where we all agree. It's really too hard. And just to pick up on something to thank Ilan, because I must say, he did a lot of the initial groundwork, in terms of comparing the three constitutions and helping identify areas of natural compromise.

[00:10:58] Caroline Fredrickson: But just on one last note, and my sort of hopes for the future, I do think the last Constitutional amendment that was adopted was actually proposed, was kind of resurfaced by a student, who was a college student. And so, who knows what might come out of this convention. Maybe this will be the source of the next Constitutional amendment.

[00:11:18] Jeffrey Rosen: Bravo. That would be a wonderful outcome, and in fact, students are able not only to deliberate on your amendments, but to propose their own, and you identified two big areas, electoral college reform and redistricting reform, but they might want to address and very eager to see what else they come up with. You also identified the central importance of compromise and deliberation, and I was so struck listening to the Zoom, by how high quality the debate was and the fact that it was informed by all of your deep knowledge of Constitutional law and history, which gave you a common vocabulary.

[00:12:00] Jeffrey Rosen: There was an amazing moment where you were debating whether or not a state official who'd been impeached should be able to run for state or federal office after he left, and people had informed views on that and that was an important part of the collaboration, and it'll be the students are all law students. It'll be great to see them rise to your high level. Great, great points. Tim Sandefur, tell us about team libertarian, which came in, as Ilya Shapiro said, with a presumption that the only amendment should be, "We mean it," after each clause but in the end agreed to these five amendments.

[00:12:34] Timothy Sandefur: Yes. Well the point has been made before that Ilan did a lot of work in setting up how we operated, but it wasn't just in choosing sort of the subject area. It was also our rules of procedure. That was a very important step, was deciding how we would structure our deliberations, and law is the enterprise of subjecting human activity to the government of rules. And so, that's what lawyers deal with, is rules, and in this case, it's rules about rules, and actually rules about rules about rules.

[00:13:04] Timothy Sandefur: So, we're trying to design the machinery or tinker with the machinery, and I think a lot of people, a lot of non-lawyers especially, think that what Constitutional law people do is argue about the meaning of free speech or what should be a right

or shouldn't be a right and everything, and that is, of course, a lot of what we do, but it's also a lot of the discussions of the machinery, of how rather than what gets done by government.

[00:13:30] Timothy Sandefur: Which, of course, will determine, to some extent, to a major extent, the degree to which our freedoms are protected. So, and that, of course, is my central concern as a libertarian. My primary concern is protecting individual rights to the maximum extent possible. And with that in mind, I will confess, I approached the entire project with a degree of skepticism that I would like to attribute to people like George Mason or Patrick Henry at the Philadelphia convention. Henry was not at the Philadelphia convention for just this reason. And so, I was nervous about what would be proposed and how we would do our deliberations, and I think I made myself a bit of a gadfly in some of our discussion for just that reason, because my primary concern is not how do we get more laws passed, 'cause we have too many already, but rather how do we better protect individual rights. And so, it was very interesting to see the dynamic operating in that respect. Another very interesting thing for a Constitutional law like myself was, as you mentioned, about compromise.

[00:14:28] Timothy Sandefur: It was a compromise, on one hand, but, of course, it's also sticking to your principles on the other, and it's even more complicated than that, because sometimes the questions can't be resolved either way. One of our proposals is, as you mentioned, eliminating the birthright citizenship requirement, and we proposed replacing that with a rule that you have to be a citizen of the United States for a number of years as opposed to being 35 years old and having been born here.

[00:14:56] Timothy Sandefur: Well, how many years exactly? Right? And we went back and forth about this. I think your proposal was the one we ultimately went with. There's no principled line you can draw. There's boundaries within reasonable boundaries, it was interesting to me to see how our positions kind of rubbed against each other, and sometimes the edges rubbed off as we went back and forth, and there was, a degree to which it was, well, maybe if I give him this, he'll give me a little bit of that.

[00:15:25] Timothy Sandefur: So, it was a very interesting dynamic to watch, and what I would want students to know going in is that, well, I would say compromise should not be your number one goal. If compromise is your number one goal, then you have no principles at all and if you have no principles, then there's no reason to have a Constitution. The preface of a Constitution is to protect us from the government, and that should be your number one priority.

[00:15:47] Timothy Sandefur: What is going to be the rule that will protect me from being oppressed and deprived of my rights? That should be your overriding goal, and if you can't reach an agreement that satisfies that, don't sign that document. Have the integrity to say no, if you really feel you have to say no. But you also find that you really don't have to say no as much as you might think. I thought that was an interesting outcome.

[00:16:09] Jeffrey Rosen: Fascinating. So interesting that all of the amendments for protecting individual rights in this case, focused on structures like the legislative veto, and that 35-year-old compromise is interesting. Tell us about the exchange, just so our convention students are aware of the backstory. How did you arrive at the number you did?

[00:16:33] Caroline Fredrickson: You mean us?

[00:16:34] Jeffrey Rosen: Yeah.

[00:16:34] Caroline Fredrickson: I think it just seemed logical. I don't think there's any absolute reason to pick 15 years. Obviously a lot of people have talked about the fact that it seems silly in this day and age to require someone who wants to be President to have been born here. But there does need to be some tie, and the question is how many years of residence or citizenship make the right amount, and it just seemed neither too short nor too long.

[00:17:05] Caroline Fredrickson: You know, if you're gonna require somebody had lived here for 25 years, you're gonna exclude a lot of people who might have come here in their young adulthood who would be incredible leaders. If you say five years, then you're probably people don't necessarily have enough of a tie and permanence. And so, I think it's sort of like Goldilocks and the three bears, which bowl of porridge do I want to eat? The one in the middle, it seems just right. So, again, there was no real matter of principle. It was really a matter of trying to determine, you know, somewhere in this range, more than five, less than 25. 15 seemed right and nobody seemed to find that problematic.

[00:17:51] Timothy Sandefur: I originally had proposed 35, I think because I said just be a citizen of the United States for 35 years, was my original proposal.

[00:17:57] Ilan Wurman: Yeah, there was some discussion about how many years we had to make the requirement to make sure that Ilya Shapiro would still be ineligible.

[00:18:04] Caroline Fredrickson: We all agreed on that.

[00:18:06] Ilan Wurman: And so, it wasn't a point of principle.

[00:18:09] Jeffrey Rosen: Well done.

[00:18:10] Jeffrey Rosen: Ilan, tell us about the amendment. You made amending a little bit easier, although not all that much. How did you come up with the result you did?

[00:18:20] Ilan Wurman: Yeah. So, in one respect, the amendment on amendments is low-hanging fruit, in one respect, because nobody thinks that two-thirds of Congress, two-thirds of

each house to propose and three-quarters of the states to ratify is optimal. I don't think anybody thinks that. First and foremost is how do we make it easier to propose amendments?

[00:18:44] Ilan Wurman: At least more amendments should be on the table that can then be discussed in states, in the legislatures and the ratifying conventions. So, that was actually an easy lift. I think we reduced that to three-fifths.

[00:18:54] Ilan Wurman: Okay? And Caroline will correct me, because we're actually working on another Constitutional reform project where we did even more amendments to the amendment process. So, I'm hopeful that I'm not going to shade these and conflate the two. And then, the easiest thing is to say, take the three-quarters of the states down to two-thirds.

[00:19:12] Ilan Wurman: And that's probably more optimal than the two-thirds and three-quarters. Still gonna be hard but it's a little bit easier. We also did something, part of a compromise that team conservative originally was not really on board with, which we also provide a mechanism that the amendments, the proposals, can be ratified by states representing three-quarters of the population. Okay?

[00:19:37] Ilan Wurman: So, rather we take three-quarters of the states, which is the rule now, we take that down to two-thirds, and then we proposed, but also a number of states ratify the Constitution and those states collectively represent three-quarters of the population, we did the math. You need the 30 most populous states, not predictably red, not predictably blue.

[00:20:00] Ilan Wurman: And so, we on team conservative decided we could live with that.

[00:20:05] Timothy Sandefur: He literally really did do the math too. He's being literal about that.

[00:20:09] Ilan Wurman: You know, look the amendment process, there are a couple principles you have to keep in mind. Okay? If we're gonna amend the Constitution, number one, the majority or the approve of this has to be nationally, geographically distributed. Okay? It ... look, the entire support for an amendment to the Constitution can't come from California and- and New York, and it can't come from Texas and Florida. It has to obtain, somehow, a nationally distributed majority. That's principle one.

[00:20:40] Ilan Wurman: And principle two is it must, somehow, we must have evidence that this proposal has support over the long term. In other words, it can't just be that Congress, two-thirds majority, like, in Hungary. They can just rewrite the Constitution with two-thirds of the pretty much unicameral legislature. I mean Bicameral. Well, so, that also doesn't work. So, you need proposals that are nationally distributed, that also will take some amount of time to propose.

Right? And look, the Equal Rights Amendment, whether you think that was good or bad that it was defeated, I'm not sure it ended up having much impact-

[00:21:15] Caroline Fredrickson: We don't wanna get into that debate.

[00:21:16] Caroline Fredrickson: Some of us think it should be ratified.

[00:21:18] Ian Wurman: Well, and some people don't think the 27th Amendment was properly ratified for the same reason she thinks the area was properly. That's very inside baseball for those in the audience. But that's the point. You don't want something that could just happen overnight. And we think the proposals landed pretty, on a pretty good sweet spot.

[00:21:40] Caroline Fredrickson: Could I mention just one other thing about that? So team progressive in the Constitution we drafted did have the population proposal, because we thought it was really important that you don't have just a group of small states that can thwart what is in the vast majority of Americans want to see happen with our Constitution. So, we had a lower threshold for the percentage, but still, we were happy to see that as a matter of principle. The compromise was really important to us.

[00:22:05] Caroline Fredrickson: But one other piece that I wanted to mention as part of the amendment on amendments is that in the current Constitution, it's virtually impossible to amend the structure of the Senate. That is two Senators for each state, no matter what their size. We made that harder than the other ways of amending, but not impossible. So, basically retained the current numbers the two-thirds and three-quarters for Congressional proposal and state and Congressional ratification, state ratification but allowed it to happen.

[00:22:37] Caroline Fredrickson: So I think that was a really important element of it, because you can't have a real Constitution that has one piece of it that's just off limits forever and can never be amended. It's sort of contrary to Constitutional logic.

[00:22:52] Jeffrey Rosen: Tim, tell us about the impeachment amendment. You made impeachment a little harder in the House and conviction a little easier in the Senate, if I've got that right? And tell us about that decision, also, 'cause there are student delegates will be debating it at a particular moment in history, where the question of whether you're liable for criminal prosecution after an impeachment acquittal is obviously in the news. To what degree should or did you think about current impeachment debates?

[00:23:19] Timothy Sandefur: Yeah. Well, this actually connects a little bit to what we were just talking about because while you two were talking about how this persistent theme in American Constitutionalism about the degree to which you go in favor of the majority of the

nation should decide things as opposed to a situation where the states are protected as institutions.

[00:23:45] Timothy Sandefur: This was a tension obviously felt at the Philadelphia convention and a great deal in the 1780s and still today. There are reasons, both principled and pragmatic, why you want to preserve states as institutions and give them sort of a role to play in the machinery, but if you do that too much, then you end up with a very anti-democratic risk where small states can hold out.

[00:24:09] Timothy Sandefur: And likewise, the tension over impeachment is another thing that has obviously lasted not just as long as the US Constitution has lasted, but even a century before then, when you had impeachment crises under British rule. The impeachment amendment was really the one I think that I particularly was outspoken about. Yes, I was gadfly, but I was opposed to what we finally decided on, although it wasn't something where I think it was a total disaster. I think it's because I didn't like the wording we used.

[00:24:44] Timothy Sandefur: We used wording serious crimes or serious abuses of public trust. Those two separate things were the terms that ended up in the final version, and I didn't like the term, serious, because in my view, it should be very easy to impeach public officials, and we should impeach public officials a great deal more than we do now. In American history, we have impeached a tiny fraction of the public officials who deserved to be impeached. I don't think any reasonable person could say that we have met or exceeded the optimal number of impeachments in American history. That's ludicrous.

[00:25:23] Ilan Wurman: But we keep reelecting them.

[00:25:26] Timothy Sandefur: Well, this is another reason why the Constitution protects us against democracy. A lot of people think that the Constitution of the United States is designed to facilitate democracy. Justice Breyer, in fact, at an interview that you did with him you asked him, as I recall this is several years ago, asked him what the most important part of the Constitution was, and he answered democracy, which is a word not to be even found at all in the text of the Constitution of the United States.

[00:25:49] Timothy Sandefur: The Constitution is designed to protect us against democracy. It's designed to preserve liberty and primarily to preserve it against democracy, which historically speaking, has been in enormous threat to liberty, and that's why the Constitution puts so many restrictions on lawmaking. So, it's no surprise that the diluted majority frequently makes the wrong choice.

[00:26:09] Timothy Sandefur: For that reason, it should be easy to impeach public officials, far easier than it is now. And so, I was worried about the use of the word serious, 'cause it invites debate over what constitutes serious, and I also think it needs to be made absolutely clear that

mere incompetence is a crime against the public. For public officials to be incompetent of their job is a threat to the public safety and order, and they should be impeachable for mere incompetence, no question about it.

[00:26:36] Timothy Sandefur: All you have to do is read the history of, say, the low countries in the 17th century, where during the Reich's year, the I think that's the term for it, the government of Holland was so derelict in its job that England just invaded and took over everything without hardly a fight.

[00:26:54] Caroline Fredrickson: It was the Spanish government though.

[00:26:55] Timothy Sandefur: What I'm thinking of is the incident where the people were so outraged by the Prime Minister's dereliction of duty that they killed him and ate him in the streets. I'm not making that up. So the violence can result from this kind of incompetence. It's not a laughing matter, really. And so, I think it should be very easy to impeach public officials for incompetence as well as other things. So, I was opposed to the use of the term serious for that reason.

[00:27:24] Jeffrey Rosen: Caroline, team progressive, of course, had a very different view of democracy, and yet, you were able to agree with team conservative on impeachment. Tell us how.

[00:27:32] Caroline Fredrickson: I don't think we have a very large disagreement over this point, but we didn't have a large disagreement over impeachment, and that's because it is an important mechanism to protect the people against somebody who is abusing their position of authority regardless of whether you think the Constitution has a democratic structure or it's designed to prevent democracy.

[00:27:58] Caroline Fredrickson: In either case, nobody wants a leader who is abusing the public trust. I think there wasn't a problem and I think we also made it harder. So, contrary to your point, we made it harder to impeach in the House. We raised the threshold because it's too easy to impeach in the House right now, witness what's going on in the moment.

[00:28:18] Caroline Fredrickson: So, it will be harder to actually impeach in the House and easier to convict in the Senate because as you all know, no one, no President has ever been successfully impeached or convicted by the Senate. There have been a handful of judges no Supreme Court justice. And so, the mechanism is a failure essentially. It doesn't do what it was designed to do.

[00:28:42] Caroline Fredrickson: So, we all agree that and perhaps you wouldn't have wanted to lower two raise the threshold in the House, but we did agree on that ultimately but I think to

the point about the serious issue is the other area where I think we generally agreed and maybe why the team libertarian ended up agreeing to the final language was that, ultimately, impeachment is a political question.

[00:29:03] Caroline Fredrickson: One of the reasons it doesn't work right now is because of polarization and that there's no institutional identification as much as there is a party. Identification, and that means if the party of the President is in power, they're never gonna impeach. Right? It's just not gonna happen. So the mechanism is not functional.

[00:29:24] Caroline Fredrickson: So, we wanted to try and work that, but nonetheless, the determination of whether there's a serious criminal act or a serious abuse of the public trust is always gonna come down to what the politicians think it is. We did spend a lot of time talking about the word serious, but and I could have lived without serious in there, myself, but I think maybe team conservative was insistent that serious was important.

[00:29:49] Jeffrey Rosen: Ilan, a word if you'd like, on impeachment and then introduce, please, the legislative veto.

[00:29:54] Ilan Wurman: Okay. You'll have to remind me to do that. A little note on strategic ambiguity. There did come a point, the way that we structured it was for serious criminal acts or serious abuses of the public trust or serious abuse of the public trust, and at some point, someone suggested very artfully, why don't we get rid of the second serious. This raises an ambiguity.

[00:30:18] Ilan Wurman: Is the serious modify only a criminal act or also modify a public abuse or abuse of the public. And so, this was a situation where, you know we decided strategic ambiguity was not the way, I think. I've said before in writing that strategic ambiguity is useful on things not sufficiently important to scuttle what you're talking about, but this was important. This was one side wins and the other loses. Okay? Strategic ambiguity went out the window and from our perspective, we raised the threshold to impeach to two-thirds and we three-fifths, and we lowered the threshold for conviction to three-fifths. So, they're both three-fifths, up from a majority, down from two-thirds.

[00:30:59] Ilan Wurman: And we clarified a standard.

[00:31:01] Ilan Wurman: I think that the language we used serious abuse of the public trust is what we understand high crimes and misdemeanors to be, not just maladministration, but it doesn't actually have to be crimes. It can be a political question. Okay?

[00:31:14] Ilan Wurman: Now, having said that though, you know, they debated this in 1787 in the convention. Right? How independent of Congress would the President be? Initially, they proposed to have Congress select the President. Right? And then, you barely would need

impeachment. They said, no, we want the President to be an independent branch, not subject to the beckoned call of Congress, and we think at team conservative any way, that that was ultimately correct.

[00:31:39] Ilan Wurman: Now, to be clear, that doesn't mean there shouldn't be a mechanism to remove someone for inability or what was it inability and not incompetence.

[00:31:48] Timothy Sandefur: Maladministration?

[00:31:50] Caroline Fredrickson: Maladministration?

[00:31:50] Ilan Wurman: I think it was a bunch of Is. Inability, for sure, but basically, you know, if you're incapacity maybe?

[00:31:56] Timothy Sandefur: That's right, it was incapacity.

[00:31:57] Ilan Wurman: Because the way that we structured it. So, right now, Congress basically can expel its own members. Under the 25th Amendment, executive branch officers, the President's own people, can decide if the President is unable to execute the duties of the office, and in our proposal, I don't know if it made it into the draft of the judicial reform, but in at least the conservative Constitution. This made it into the draft of ours.

[00:32:23] Ilan Wurman: We provide a mechanism for the judiciary also to remove judges who are senile and incompetent rather than, 'cause again, does impeachment cover that? This came up in George Washington's administration. There was a senile district judge in New Hampshire and they just, like, assigned him different duties. You know, it would be much easier to just remove him. And so, we provide for each branch an internal mechanism to remove its own members for things like incompetence, inability, and incapacity.

[00:32:47] Ilan Wurman: But when it came to Congress impeaching someone from another branch, we decided to keep the higher standard, and we put a lot of thought into this. Like, who sits in judgment or who chairs an impeachment when the Vice President is impeached? Who presides? Does anyone know?

[00:33:05] Ilan Wurman: Well, the Constitution says that when the President is impeached, the Chief Justice shall preside, but otherwise, the President of the Senate presides. Well, the Vice President is the President of the Senate. Does he preside over his own impeachment?

[00:33:18] Ilan Wurman: You know? Now, Professor Akhil Amar has a clever theory, "Well, no one can be a judge in his own cause." Okay, fine. Natural law, whatever. We fixed it. We fixed it. Super easy. When either the Vice President or President, the Chief Justice shall preside.

We fixed the question of can you be impeached after office. We say yes, six months after and convicted up to a year after. Then we make them ineligible for holding any office under the state governments as well if you're impeached.

[00:33:43] Ilan Wurman: So, there's extra consequences because if Donald Trump had been impeached, he shouldn't get to be a state legislator in Florida. I don't know if that's his aspiration.

[00:33:52] Ilan Wurman: Same thing with President Biden. This is serious stuff. And so, that was a hotly debated point.

[00:33:57] Timothy Sandefur: This might be worth pointing out. This is an example of a real divergence from what the 1787 framers would have done. They would have viewed it as shocking, the idea that impeachment from federal office would also, as a function of federal law, disqualify you from a state government position because they had a much stronger idea of the autonomy of the states, whereas in a post-14th Amendment world, we're much less bothered by that.

[00:34:21] Jeffrey Rosen: Absolutely.

[00:34:22] Ilan Wurman: Did you still want me to do the veto or let's move on? Okay.

[00:34:24] Jeffrey Rosen: Caroline, why don't you put the legislative veto on the table. This is something that Congress used to exercise before the Supreme Court struck it down in the Chadha case. It seems geeky perhaps, but you identified it as a central Constitutional reform. Why?

[00:34:39] Caroline Fredrickson: Well I would say from the progressive Constitution, this was probably not a central Constitutional reform, but we followed the basic framework of the existing Constitution and also included some places where we thought the Court had gone awry in its understanding.

[00:34:58] Caroline Fredrickson: And the idea is that if the Congress very much disagrees with the- the way that the executive has interpreted the law they can exert a veto, essentially. But we made it so that it has to be both houses and it has to be signed by the President. There has to be some mechanism to set up this veto process, and I think where we disagreed but we came to a compromise, was that I think the conservatives would have put in the Constitution that there's always a legislative veto, that as Congress can always react.

[00:35:28] Caroline Fredrickson: In our proposal was in order to really reassert the importance and primacy of the legislative branch, it is Article I, after all, we gave it to Congress to decide. Do they want to have a legislative veto in particular statute? They could give themselves the power or they could even enact a kind of overall statute that would enable a legislative veto,

something like the Congressional Review Act that exists now that allows Congress to override regulations.

[00:35:59] Caroline Fredrickson: But again, it consorts with Congress acting and the President signing. We're consistent with that view, but again, it's sort of in the modern world so many people remark on how dysfunctional Congress is. And there are a lot of reasons for that but it has allowed for the aggrandizement of the other two branches, with the courts becoming and the Supreme Court super powerful, and the executive branch, and the President, super powerful. And this is, in some sense, trying to reestablish a little more equilibrium.

[00:36:32] Jeffrey Rosen: Tim would reinigorating Congress make libertarians happy?

[00:36:36] Timothy Sandefur: Yeah, I think so. I mean, any kind of veto is good for us. More vetoes, please.

[00:36:43] Ilan Wurman: More veto-gates.

[00:36:44] Timothy Sandefur: It would and we proposed in our libertarian Constitution proposal, we proposed a sort of along these lines where a certain number of states would be able to undo federal legislation in certain situations.

[00:37:00] Timothy Sandefur: It is definitely true that the abandonment of responsibility by Congress, particularly through the creation of the administrative state, has led to a situation where the many, if not, probably most of what we would consider the laws that regulate our lives are not even adopted by our elected officials. They're created by hired bureaucrats and administrative agencies, over whom you have no effective control, which is a serious concern from either an individualistic approach or a democratic approach.

[00:37:29] Timothy Sandefur: That's why today it's a big issue, the power of the administrative state. This case, Loper Bright, that was just argued in the Supreme Court a few weeks ago, is on this issue about how much power should these agencies have when Congress, today, what Congress does is it passes these massive, broadly-worded, vaguely worded statutes that say, you know, "There shall be no bad things," and then creates a no-bad-things agency that has the authority to define what a bad thing is, investigate potential bad things, and punish those bad things.

[00:38:05] Timothy Sandefur: You know, and then the Congressman goes home and says, "Look what I did. I solved the problem," and then if the no-bad-things agency does anything wrong, then he can call them before in front of the hearing and scold them and wag his finger at them and say, "That's not what I intended," you know. He gets all the credit and none of the responsibility, none of the blame for the bad things that these agencies do.

[00:38:24] Timothy Sandefur: So anything that will cabin that power and enable more checks and balances is good for the people, generally. Incidentally, this brings to mind another thought, which is that I have a- an interesting job. I'm primarily a litigator at a think tank, the Goldwater Institute that focused a lot on state constitutional law.

[00:38:45] Timothy Sandefur: And so, in approaching this project, it was also interesting to think about examples from state constitutional law, and state constitutional conventions that have wrestled with these ideas and other ideas that have come up throughout the history that elapsed after 1787. More specific protections for individual rights, for example. In Arizona, we have a state constitutional prohibition on government subsidizing private industry.

[00:39:14] Timothy Sandefur: We have a state constitutional prohibition on special laws, that is laws that apply to a narrow group of people, and things like that. And so, it was interesting to approach this project with the thought of, well, we can update the federal Constitution with the experience of the states. Impeachment is an example. A lot of states make it easier to impeach state officials, and as a result, state officials have to mind their Ps and Qs more than they otherwise would.

[00:39:37] Caroline Fredrickson: They also have term limits for their justices in their supreme courts.

[00:39:41] Jeffrey Rosen: Speaking of which, we'll take questions in a moment, 'cause we have just 10 minutes left and we wanna have some audience questions, but why don't we ask well, Caroline, tell us what the term limits proposal was.

[00:39:52] Caroline Fredrickson: Well, so, this is another area which I was very excited to find agreement on. It's actually reflects, I think, a broad agreement across the political spectrum in the United States that it's absolutely inappropriate way to structure a Supreme Court to provide for a life tenure and it's become more exaggerated because historically until the 70s, pretty much the typical term of service was more like 15 to 18 years and it has grown enormously.

[00:40:27] Caroline Fredrickson: And in part, we live longer than we used to. So, justices live longer, but they also get appointed at much younger ages. It's sort of no longer the kind of capstone of a glorious career in the same way that it was but instead, something that happens to somebody much earlier in their career. And so, you know, you have a kind of situation where you have people who have this enormous power who serve for generations, right, who cut across multiple generations of people and political cycles.

[00:40:58] Caroline Fredrickson: And that creates, I think, the kind of anti-democratic force that Ilan was mentioning earlier that comes from a Constitution that is virtually un-amendable. When you have a court that sits on so much power and judicial supremacy in the United States that allows the Court to exert such a pull. We could talk about so many issues that the Court has

said its imprimatur on. We recognize case names that are, I think, unusual compared to most other democracies.

[00:41:27] Caroline Fredrickson: So, we agreed that 18 years, we looked at historical numbers was a long enough to provide enough independence from the current political forces to guarantee that the justices wouldn't just be swayed by politics all the time, but not so long as they would become so indifferent to politics and feel so immune from any kind of outside criticism.

[00:41:54] Caroline Fredrickson: I think it's the more that, it's studies, the more people do polling more Americans agree on that reform, I think than probably any other one we could talk about, in terms of Constitutional amendments. And so, we came to agreement on that fairly quickly and I think the libertarian Constitution, because it was just, "And we mean it," didn't have initially a proposal for Supreme Court term limits.

[00:42:18] Caroline Fredrickson: But the conservative Constitution did and new to your credit, agreed that you could live with it. We went forward and we did also, because you might ask the obvious question, well, what happens if there's a filibuster on the Senate. So, we also dealt with that and basically have a provision that says, for nominations, generally because of the fact that we all agree that a President should have her cabinet and so, there should be some ability to make sure that there isn't an unjustified obstruction.

[00:42:51] Caroline Fredrickson: And so, after three months if there has been no vote, they are deemed appointed, or I can't remember the exact language that we used, and we did the same for Supreme Court justices for all nominations, essentially, so that the filibuster will be more or less kneecapped in this.

[00:43:07] Caroline Fredrickson: In our Constitution, actually did away with the filibuster all together in the progressive Constitution, but probably you'd like it but in any case, we agreed, in this particular case in terms of nominations, there would be it wouldn't be possible, so then you could get over that hurdle of what the Senate rules are now.

[00:43:24] Jeffrey Rosen: Superb. One or two questions, then I think Dean Lindquist has the mic.

[00:43:29] Dean Stefanie Lindquist: I do. So, if anyone has a question, I'll just walk over to you with this is the mic, believe it or not. If you could just speak into this.

[00:43:35] Justice Montgomery: Sure. So, fascinating discussion. My question is this, in as much as Abraham Lincoln referred to the Constitution as a silver frame around the Declaration of Independence is the apple of gold, to what extent did the principles of the Declaration of Independence inform any of the amendments that were proposed?

[00:43:55] Jeffrey Rosen: Great question. Well, Ilan, why don't you start with that.

[00:43:58] Ilan Wurman: Let me say one thing, if I may, Justice Montgomery, on the amendments, there was a compromise, Caroline hit everything except one thing, which was we fixed the justices at nine. I don't know if you mentioned that. That was the compromise. Right? If we were building a Constitution from scratch, 18 years would probably be a no-brainer in this day and age, but try to get any conservative on board, politically, now that they've had the Supreme Court. So, the deal was, you don't get to court pack and we'll accept term limits. That was the deal, and they're staggered every two years, which is why we needed to get rid of the filibuster and deem them automatically nominated, because the automatic lapsing doesn't help. Right?

[00:44:37] Caroline Fredrickson: Right. Let's just say if you wait til the actual natural progression, I think we can calculate it, it would be in 2047 or something before you actually had the 18-year term limits full implemented, and that was not acceptable to anybody.

[00:44:50] Ilan Wurman: But to answer Justice Montgomery's question, I think what we saw as the gold of the Declaration was different for each team.

[00:44:59] Ilan Wurman: And so, for example, I think the libertarians would say, "It says right there, inalienable right to life and liberty." Right? It didn't say equality, but the presumption was it does say equality, whether they meant it and how much they meant it is a separate discussion. And so, there is that part of it, and then it says consent of the governed, and I think that team conservative focused on consent of the governed, and that's why, when we were doing our proposals, we didn't talk about abortion, we didn't talk about same-sex marriage, we didn't talk about cultural issues. We talked about things like intergenerational debt. Right?

[00:45:33] Ilan Wurman: How can the future govern themselves if we saddle them with debt? That is what we took from the Declaration of Independence. How do we become a self-governing society? How do we recreate Madisonian deliberation, and we had some pretty aggressive pedagogical tools. So, for example, in our Constitution, in the conservative Constitution, we made the Senate one Senator from each state. So, it's only 50, make it very deliberative, and as some point, this was divisive even among the conservatives.

[00:45:58] Ilan Wurman: We had them deliberate in secret, just so no CSPAN cameras, you know, no journal, totally secret to increase deliberations, but therein someone decided that that was too antidemocratic. It would make us look, I don't know, aristocratic or whatever, and we didn't want that image. So, we didn't end up doing that. And so, I think that would be our answer to your- to your question, as conservatives, obviously, the act of writing a Constitution is the act of balancing these competing objectives of a free society, which is self-government and includes liberty, and I think that means equality too, because it's equality in the rights to self-government, and equality in the rights to liberty.

[00:46:35] Ilan Wurman: So, it's balancing these things, but from team conservative's perspective, the question was what is the major flaw in the way our country works today, and is it total dysfunction in the self-governing process? And that's what we tried to focus on in ours.

[00:46:51] Jeffrey Rosen: That's such a great answer to a really important question about how all three teams converged around the ideals of the Declaration, liberty, equality, natural rights, and government by consent, but then disagreed about how to strike the balance. And for more insight about the pursuit of happiness and the framers of the Declaration, check out the book!

[00:47:13] Jeffrey Rosen: No, but it really is the central moral philosophy that just defines the founding, and for me, what was so striking is to learn how, for the founders, personal self-government was necessary for political self-government, and they thought we couldn't control ourselves as democracy until we first found control and balance within our own minds. I think one more question.

[00:47:40] Speaker 7: One thing I've heard arguments for from each side of the political aisle or every representation of the political aisle here has been some aspect of political funding and the impact it has on our elections. In the libertarian sense, it kind of creates a funnel towards two parties. In other senses, it kinda puts corporate interests over people's interest and limits representation among some people who wouldn't otherwise have access.

[00:48:08] Speaker 7: So, do you guys think if you had more time to deliberate that political funding and some sort of pause on the completeness of Citizens United would have been discussed and agreed upon?

[00:48:23] Caroline Fredrickson: I won't speak for my colleagues.

[00:48:28] Ilan Wurman: Don't get your hopes up.

[00:48:28] Caroline Fredrickson: We would have been totally there, and in fact, the progressive Constitution recognized that Congress could adopt reasonable restrictions on money in campaigns. We had a number of what we thought democracy provisions that would flesh out what we think is already in the Constitution, anchor it more clearly, in terms of the right to vote in terms of fair elections in terms of restricting money in politics, in terms of independent redistricting in terms of abolishing the electoral college and having a national popular vote.

[00:49:03] Caroline Fredrickson: So, all those principles were very important in our draft and we took on the money piece head on. I know you wanna jump in, but I just wanted to speak, Justice, to your question a little bit, just to say, I think we all- we definitely looked to the equality sections of the Declaration, but also take the preamble to the Constitution very seriously, and I

think it's- it's a an aspect of the Constitution that is under-interpreted and the values that are embedded in there.

[00:49:32] Caroline Fredrickson: There's a wonderful book that was written by Erwin Chemerinsky, who's the dean of Berkeley Law called "We the People," where he talks about how we would understand the Constitution better if we actually took the values of the preamble to understand the later provisions. It's like that part of the Constitution too.

[00:49:52] Jeffrey Rosen: It's such a great question and we need to end. So, Tim, why don't you have the last word on the Declaration of the Constitution.

[00:49:57] Timothy Sandefur: With regard to the Declaration, and the Constitution, there's only one thing that is referred to as a blessing in the Constitution of the United States, and that's liberty. And so in interpreting the preamble, which is, indeed, under-appreciated, it's a cardinal rule of Constitutional interpretation that no provision of the Constitution should be left without without effect, and unfortunately, I think the courts do tend to ignore the preamble and consider it just to be sort of hortatory.

[00:50:23] Timothy Sandefur: But it actually instructs us to interpret the Constitution to protect individual liberty. The Declaration, of course, is, in our view, a libertarian document, and therefore informed everything about what we worked on. However, these amendments that we're talking about were structural amendments. They're not about the nature of individual rights or- or where we draw the boundaries between that and the public good and that sort of thing.

[00:50:44] Timothy Sandefur: So, it didn't come up in our deliberations because it was no more relevant to our deliberations than it was to the deliberations in Philadelphia in 1787, where they didn't discuss abstract questions of political philosophy because they were all on the same page. You know, philosophically speaking. With regard to the question about Citizens United, of course the libertarian position is that Citizens United was correctly decided, that every individual has the right to devote money to whatever political cause they wish to, including doing so in the corporate form.

[00:51:13] Timothy Sandefur: The corporations do have free speech rights. For example the New York Times, and that therefore, we would eliminate all of those kinds of campaign finance restrictions, which are always just attempts to somehow invent a system where money won't control everything and it's futile, because the only way to get money out of politics is to get politics out of money.

[00:51:34] Timothy Sandefur: As long as it worth people's time and money to lobby the government, they will find a way to lobby the government, and all these campaign finance restrictions, all they do is they're, like, trying to push down on a ball that's under a rug. It just pushed the ball over to one side, and then you're constantly chasing it.

[00:51:51] Timothy Sandefur: The only way to eliminate that is a separation of state and the economy, and thus a rigid protection of private property rights and the limitations on government, which team progressive and team conservative are unwilling to endorse, and as a result, they're constantly chasing this ball of campaign finance reform hoping that eventually, they'll find true democracy, which is hopeless in our view.

[00:52:13] Ilan Wurman: And my views shall remain a mystery.

[00:52:14] Jeffrey Rosen: Well we'll come back for more to hear them in May. Dear team leaders, the Constitution Drafting Project is among the most inspiring projects the National Constitution Center's been privileged to convene, and for being a model of civil dialogue, thoughtful engagement, and devotion to the ideals of the Constitution, thank you so much.

[00:52:36] Ilan Wurman: Thank you.

[00:52:37] Tanaya Tauber: This program was streamed live on February 6th, 2024. This episode was produced by Lana Ulrich, Bill, and me, Tanaya Tauber. It was engineered by Dave Stotz and Bill Pollock. Research was provided by Yara Daraiseh, Cooper Smith, Samson Mostashari, and Lana Ulrich. Check out our full lineup of exciting programs and register to join us virtually at constitutioncenter.org. 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 Podcasts, or follow us on Spotify. On behalf of the National Constitution Center, I'm Tanaya Tauber.