Five New Amendments: Next Steps for Constitutional Change
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[00:00:00] Stefanie Lindquist: ... you here to the ASU Barrett & O'Connor Center. For those of you who have not been here before, I hope you enjoy the building. And I'm here to just introduce this event, my name is Stefanie Lindquist, I'm the Executive Director of the Center for Constitutional Design at ASU Sandra Day O'Connor school of law. And the mission of our center is to focus on promoting meaningful conversations about constitutional change, constitutional design, and even constitutional reform, and of course that's one of the purposes to discuss constitutional reform here today.

[00:00:35] Stefanie Lindquist: We are incredibly pleased to partner with the National Constitution Center and with Jeff Rosen to promote a series of programs that follow up on, among other things, follow up on the Constitutional Drafting Project that you'll hear about this evening. And so, Jeff, thank you for your partnership and thank you to all the folks that are here from the National Constitution Center for helping get this particular program off the ground.

[00:00:59] Stefanie Lindquist: The ASU Barrett & O'Connor Center here is home to our DC educational programs, law school educational programs. Students from ASU can study here for a semester or for a year, and we are just getting off the ground a new whiz-bang program on antitrust law, among other things. So if you are interested in anything about this center or about our programs here, they are, they operate under the very able leadership of Dr. Andrea Cayley, who is sitting right here in the front, and so she knows everything about those programs.

[00:01:36] Stefanie Lindquist: Thank you, again, to all of you who are here, and thank you Jeffrey. I'm gonna turn now the panel over to Jeffrey Rosen, who is the CEO and President of the National Constitution Center. He really does not need any introduction from me, because we all know him well. So thank you again for your partnership, thank you for being here, and I look forward to listening to the panel. Thanks.

[00:02:00] Jeffrey Rosen: Wonderful. Thank you so much, Stephanie. It is such a pleasure to be here. It's a beautiful building at ASU, and to launch this very productive partnership between ASU and the National Constitution Center. Our great institutions are aligned in our devotion to constitutional education, and being here in DC with you is so meaningful.

[00:02:21] Jeffrey Rosen: Friends, let's begin. As those of you who have joined Constitution Center programs know, we always do by reciting together the NCC mission statement to inspire ourselves for the learning ahead. Here we go, I know you can do it by heart. The National Constitution Center is the only institution in America chartered by Congress to increase awareness and understanding of the Constitution, you may, awareness and understanding of the Constitution among the American people, on a non-partisan basis.

[00:02:50] Jeffrey Rosen: And there's something so radically affirming about reciting that statement given to us by Congress during the bicentennial of the Constitution during these polarized times to convene a non-partisan constitutional discussion. And friends, among all of the non-partisan constitutional discussions we've convened recently, there's none more inspiring than the Constitution Drafting Project, which you're about to hear about.

[00:03:17] Jeffrey Rosen: Who would have imagined that convening teams of America's most distinguished liberal, conservative, and libertarian scholars could lead, in the space of a mere week of Zoom deliberations, to consensus around five constitutional amendments. When you stop and think about it, as I'm doing right now, it just blows my mind. None of us expected this degree of consensus, and to listen in on these deliberations by Zoom was like listening to modern-day founders.

[00:03:52] Jeffrey Rosen: And our panelists, who you're about to meet, and their co-teammates were debating these issues with such a high level of legal sophistication and with such historically-informed nuance, and, above all, with such ability to look the long view, at constitutional principal rather than short-term partisan advantage that it dramatically increased my hopes for the possibility of this kind of deliberation moving forward.

[00:04:18] Jeffrey Rosen: So the purpose of the evening is to introduce you to the teams, to talk about the amendments, and then to have a conversation about how we can bring this inspiring project on the road, and perhaps inspire support for it across America. Our team leaders also need no introduction, and I'm gonna just

note that they are the wonderful Ilya Shapiro of the Manhattan Institute, Caroline Fredrickson of the Georgetown Law School and the Brennan Center, and Ilan Wurman of ASU, who, by common consensus, is the James Madison of this convention, because it was Ilan who took, like Madison, the initiative to convene the teams and bring them together, and he just did a wonderful job in-

[00:05:02] Ilya Shapiro: Take notes.

[00:05:02] Jeffrey Rosen: And take notes. In making the whole thing happen. Although there are various people here who wanna be the scrivener of the convention as well. We all were competing, and Ilya, you said you were who, if Ilan was Madison?

[00:05:16] Ilya Shapiro: I thought I was George Mason, 'cause I threatened to leave at one point. There was some language we couldn't agree to, and I threatened to bolt if I didn't get my way.

[00:05:23] Jeffrey Rosen: That's right. And Caroline, who are you?

[00:05:25] Ilya Shapiro: I think Gouverneur Morris, was it?

[00:05:26] Caroline Fredrickson: Yep.

[00:05:26] Ilya Shapiro: Yeah.

[00:05:26] Caroline Fredrickson: Gouverneur Morris.

[00:05:26] Jeffrey Rosen: 'Cause you're-

[00:05:27] Ilya Shapiro: Because you have style.

[00:05:28] Jeffrey Rosen: 'Cause you're a great stylist, and-

[00:05:30] Caroline Fredrickson: Yep, and we made some changes that were very much consistent with what, you know, the interests of our team were, so we were really pleased with that. Which apparently Gouverneur Morris did a little bit of stylistic updating after the convention met, so. Uh-

[00:05:44] Jeffrey Rosen: Superb. Well, I just wanna begin with this question, Ilan, why did it work? And my sense is 'cause you're all lawyers, no constitutional history, had a common purpose, and had no immediate partisan goals, but why do you think it worked?

[00:06:00] Ilan Wurman: Well, if the question is why did it work after a few days on Zoom, it's because there was a lot of legwork, and of course Jeff and the National Constitution Center have a lot to do with that, because it didn't start with just, "Let's get a bunch of progressive, libertarian and conservative scholars in a room together," it started with individuals constitutions that we were drafting for our own respective teams, a conservative constitution, a libertarian constitution, and a progressive constitution.

[00:06:25] Ilan Wurman: And, of course, while I'll let them speak for themselves about what the libertarians preferred in their constitution and the progressives preferred in their constitution, but we all preferred something a little bit different. But what was interesting to me was when you look at certain structural provisions, right, everyone prefers their own sort of rights, set of preferred rights. Libertarians prefer certain rights, maybe libertarians prefer all rights, I don't know. Progressives have certain rights that they prefer, and conservatives, I guess we have rights that we also prefer.

[00:06:52] Ilan Wurman: But on the structural elements, there was some element. I think there was some consensus that we needed potentially to reform the appointment and confirmation process. Both the progressive and conservative constitutions had an interesting provision for a legislative veto, which made its way into one of the five post amendments. We had some potential agreement on electoral college reform.

[00:07:15] Ilan Wurman: So we basically were able to pick, to look at where there was overlap, and over a series of email exchanges and Zoom meetings, kind of set the legwork. Is this actually possible? Might we actually come to an agreement on certain language? And we took a stab at it, and we did. And so, I think the two things to say is a lot of legwork, and then a focus on structure. A focus on structure.

[00:07:38] Jeffrey Rosen: Hmm.

[00:07:38] Ilan Wurman: And I will say one last thing, in this project is important. You look at what's happening in Israel with judiciary reform right now, what's happening, you know, in Poland and Hungary, whether the criticisms are right or wrong is not my point, because they may be wrong, they may be right, the point is getting libertarians, progressives, conservatives, people from all sides of the ideological spectrum to agree on consequential, right, not anodyne reforms, but consequential reforms, is really quite remarkable.

[00:08:10] Ilan Wurman: And so, I think in a time when people are losing faith in the constitution, it would also be helpful to update it a little bit and really make it our generation's constitution again, and this is one small piece of that larger project.

[00:08:24] Jeffrey Rosen: Such crucial points. You're absolutely right, the legwork where each of you drafted a constitution from scratch in your own state of nature or state of Zoom was crucial in identifying potential areas of overlap, the areas did tend to be structural rather than rights, and putting on the table the comparative perspective. At a time when Israel is taking to the streets in defense of judicial independence, what an inspiring cause for a democratic revolution.

[00:08:50] Jeffrey Rosen: ASU does such important work on comparative constitutionalism. We had a great Zoom panel with ASU a few weeks ago with Jeff Sutton and international comparative law experts. I think as we take this show on the road, using it as a model for the world about constitutional agreement would be great.

[00:09:09] Jeffrey Rosen: Caroline, your introductory thoughts, why did it work? And also, maybe signal some of the areas of disagreement, because you didn't agree on everything. And, for example, the progressive constitution embraced certain principles that didn't end up in the final draft.

[00:09:21] Caroline Fredrickson: Mm-hmm. Well, thank you, Jeff, so much, and the National Constitution Center and ASU for hosting us tonight. It's been an incredible process overall, and Ilan was sort of right to bring up back to the origins, which were, uh, was the process of each team being assembled. And I remember when, Jeff, when you reached out to me initially to take on this project and I thought, "Wow, that's a big project." [laughs]. That's quite an undertaking to sort of, to think about how do you go about from square one drafting a constitution?

[00:10:01] Caroline Fredrickson: And so, when I reached out to the other two scholars who joined me on the progressive team, our Jamal Greene from Columbia and Melissa Murray from NYU, we really wrestled with the question of where do we start and how do we approach it? There are a lot of ways you could go about this. I mean, thinking about comparative constitutionalism, many countries do very different, uh, have very different approaches. They have parliamentary systems, they don't have judicial review of the same kind that we do. They have a very elaborate list of rights, and sometimes responsibilities.

[00:10:37] Caroline Fredrickson: Uh, and so, we really deliberated over that, and we spent a lot of time talking to other constitutional scholars, to get their viewpoints. And ultimately, while it has been much-remarked upon that we all worked from the same framework of the US Constitution as it exists now, we must... the progressive team did that in part, not completely, but we did it at least in part because it, this is an educational effort. And we did not want to be writing something that was purely theoretical or purely, you know, of interest to academics, we really wanted to be part of an ongoing discussion of what's possible in the United States now and in the future. And that meant really looking at the constitution we have, not looking at if we really were starting from zero, you know, if we were in some real state of nature.

[00:11:36] Caroline Fredrickson: Uh, and so, with that in mind, we did start with the basic structure of our constitution. We do also, you know, as we say in the introduction to the constitution that we wrote, believe that they, uh, separation of powers and checks and balances, this is a fundamental element of the protection of rights and liberties. And so we embraced that.

[00:11:56] Caroline Fredrickson: And so, the structural piece was very important for us. One of the things that we did not do, we decided not to do, was have an elaborate list of rights, in part because what we did in our constitution was really strengthen the democratic process in significant ways. Beyond what the other teams did, or ever wanted to do, I'm sure they disagreed with our approach in terms of preventing gerrymandering and securing the right to vote. There was greater agreement around the electoral college, at least with the conservatives, as a point of reconsideration. There were issues around the restructuring, uh, the House of Representatives, where there might be more ability to agree I think above all, amongst all of us that maybe we'll go back and do that.

[00:12:43] Caroline Fredrickson: But it was really very exciting as we started to see the contours of a possible agreement. And that was indeed thanks to Jeff, who wrote about this, Ilya Somin from George Mason, who wrote a very important article talking about the points of agreement. And then, you know, for us to come together and, you know, and again, thanks to Ilan, who-... Well, let's just be honest, he did really the heavy lifting initially in terms of writing out the areas of greatest agreement and what the language was in each of the three constitutions, and where there could be the ability to come up with some common language.

[00:13:27] Caroline Fredrickson: Um, and so, when we came to that... Well, I'd like to say that meeting in Philadelphia–

[00:13:34] Jeffrey Rosen: [laughs]. Which was actually on Zoom.

[00:13:35] Caroline Fredrickson: Which was actually on Zoom. We had a lot of the beginnings of what we could agree on already done, and so it was, there was still lots of disagreement and lots of really good... And the, you know, it was really interesting. And Jeff, I know you listened in, but to see how the different teams, we had three on each of our teams, although you somehow had four, and Melissa couldn't participate from our team, so I... Well, anyway. So-

[00:14:03] Ilan Wurman: One of our team members was on sabbatical in Portugal, I believe.

[00:14:06] Caroline Fredrickson: Right, so, you know, so there were some abnormalities of the voting process, but it all worked out. But what was interesting was that the teams didn't break... Even, you know, we could find consensus among these three teams on these five amendments. Even within the three teams, though, there were disagreements about specifics, and we voted as individuals, not as teams, and it was so interesting to see how that worked out.

[00:14:28] Caroline Fredrickson: And so, you know, I guess at the end of the day... So I just wrote a piece talking about this for the NYU Symposium Journal, that's coming out, on amending the Constitution. And the student editor emailed me back and he said, "Well, your piece is the only piece that made me feel hopeful." [laughs].

[00:14:50] Jeffrey Rosen: [laughs].

[00:14:50] Caroline Fredrickson: After I edited it. So, I guess that's-

[00:14:53] Jeffrey Rosen: I'll have to read it.

[00:14:53] Caroline Fredrickson: ... where I'd like to thank you and the National Constitution Center for, you know, giving us, you know, the ability to come to this point where we actually can not only feel hopeful ourselves, but maybe help inspire other people to think there's a possibility for change and improvement.

[00:15:05] Jeffrey Rosen: Beautiful, wonderful. Ilya, you were initially skeptical of the project. I'll let you know, I'll let you share your initial line on the whole thing, but like the rest of us, you were surprised. Tell us how.

[00:15:17] Ilya Shapiro: Yeah, well, the libertarian approach is pretty much, "Well, we have a good document, you know, really the biggest thing that we need to do is to add to every clause," and we mean it. And so we thought, you know, we have the easiest job of anyone, because in effect the problems in our constitutional governance is the failure to observe federalism and separation of powers, and all the rest of it over the decades.

[00:15:45] Ilya Shapiro: And if you look at our draft, that's pretty much what we do, we reinforced that interstate commerce actually means interstate and commerce, that states are separate sovereigns and have their own responsibilities, that the administrative state isn't a branch unto its own. And the line item veto eventually gets at that, where Congress checks further the executive branch.

[00:16:15] Ilya Shapiro: We were skeptical that the other teams, we'd have much agreement, 'cause they would have their own perspectives to alter. By definition, if our constitution is libertarian already, then any deviation from it, other than to strengthen the words on the page already, were not gonna be very good.

[00:16:37] Ilya Shapiro: And when Jeff talks about that we changed certain, or proposed structural amendments, it doesn't mean that we consolidated states and now we have like six branches instead of the on paper three, but really however many there are. CFPB is the fifth or the seventh, I don't remember.

[00:16:53] Ilya Shapiro: But anyway, we did the legislative veto, which is good, we changed appointments and fixed the number of Supreme Court justices and gave them term limits, which is fine. We allowed immigrants, non-natural born

citizens to become president, which I appreciate when I run in 2048, 'cause I was born in Russia and we came to Canada when I was little, I immigrated again. And like most immigrants, I do a job that most native-born Americans won't, defending the Constitution. Present company excluded, of course.

[00:17:24] **Ilya Shapiro:** But anyway, no, I was... The process of finding points of commonality was salutary, and especially since we issued merely, or solely, so-called good government reforms. We thought okay, our task is to find a way to make our governing structure more libertarian. Okay, so if we tweak this or that, it's just a matter of good government efficiency, that's neither here not there, we wanna make it more libertarian, which to us, again, meant just more of what the framers generally, including the framers of the 14th amendment, actually wanted.

[00:18:06] **Ilya Shapiro:** But the ultimate process was, it was fascinating to watch in practice, and I think, you know, Caroline wanted to move things in a more democratic direction. I'm not sure if we did or not, we sort of raised the bar for impeachment in the house, but lowered it for conviction, is that more democratic or less? I don't know. But I think we've certainly kept republican, small R republican, elements. We didn't radically change the entire thing, because there wasn't, as one might expect, huge overlap over the core ideas of, you know, what the Constitution should become.

[00:18:50] **Jeffrey Rosen:** Wonderful. All right, so-

[00:18:52] **Ilya Shapiro:** Oh, I should say one other thing-

[00:18:53] **Jeffrey Rosen:** Yep, go ahead.

[00:18:53] **Ilya Shapiro:** ... because Caroline alluded to this, and I'm sure some of you were wondering when she did, about our voting. She talked about each of us voted as individuals, there was three members, except he had four, one of whom was conveniently out on jury duty [laughing] during the amendment convention. But, uh-

[00:19:10] **Jeffrey Rosen:** But no, but each had a total of three, they each had-

[00:19:12] **Ilya Shapiro:** They each had a total of three ultimately, yes. But the voting rule that we set at the beginning, because first, of course, first you have to argue about the shape of the table before you argue about what's on the table, and

the rule that we set was you had to have at least a six to three to propose something, and there had to be at least one member of each group, so it couldn't be like, you know, all the conservatives and all the progressives against the libertarians or vice versa.

[00:19:33] **Ilya Shapiro:** So we did accomplish that. Most of the amendments were unanimous, there were a few that were not. There were also a few where like certain sub-amendments were contentious, but then when it came up to a vote for the whole thing, that became unanimous. An interesting process there, Jeff.

[00:19:49] **Jeffrey Rosen:** Great. Thank you for that. Thanks also for putting on the table our five amendments, and let's discuss them now. Each of you can tee one up, and the others can chime in, but the first one has to do with presidential eligibility, and, you know, the language is worthwhile, so I'm gonna read it, "No person shall be eligible to the office of President, except a person who shall have attained the age of thirty five years, and been a citizen, resident in the United States, for fourteen years." And then there's an inoperability clause. Ilan, why that clause, and tell us about the debate?

[00:20:24] **Ilan Wurman:** So I'm embarrassed to say that this is one, uh, so one of our five amendments, this was one that I did not put on the table when I created the so-called Virginia Plan or Ilan Wurman Plan, whatever. The, you know, proposal where here are five amendments-

[00:20:35] **Ilya Shapiro:** The Arizona Plan, presumably.

[00:20:37] **Ilan Wurman:** Well, yes, that's true. Arizona was heavily represented in the convention.

[00:20:41] **Caroline Fredrickson:** Yep.

[00:20:41] **Ilan Wurman:** There were three participants in this whole project as a whole. The fifth proposal, so this was the first proposed amendment, but it was the fifth one we discussed, and we discussed it... If you watch the We the People podcast, I joked about this when we first talked about this in September, kind of like Article III of the Constitution, at the last minute they're like, "Oh, shoot, we should provide for judiciary," and it's just like a really quick kind of slapdash endeavor.

[00:21:06] Caroline Fredrickson: It explains a lot.

[00:21:07] Ilan Wurman: It might explain a lot, yes. Like the exceptions clause, I do think they might have made a mistake there, but anyway.

[00:21:14] Caroline Fredrickson: [laughs].

[00:21:14] Ilan Wurman: We did not come to an agreement on the actual fifth proposal we were talking about, which Caroline already alluded to was redistricting and whether to have independent redistricting commission, what to do about gerrymandering.

[00:21:25] Ilya Shapiro: I'm telling you, the way to solve redistricting is to expand the house by ten times.

[00:21:30] Ilan Wurman: It wasn't actually clear that we would disagree about that, but that wasn't on the table, so that's-

[00:21:34] Caroline Fredrickson: [inaudible 00:21:34].

[00:21:34] Ilan Wurman: As Caroline alluded to that as well.

[00:21:35] Ilya Shapiro: We're gonna adopt a sixth amendment right here.

[00:21:38] Ilan Wurman: [laughs]. Yeah, we... We have a voting procedure, Ilya, so [inaudible]…[laughs]. That was equitable, to-

[00:21:44] Ilya Shapiro: Proxies in my pocket.

[00:21:45] Ilan Wurman: That was equitable, to be clear. Okay. So it became very clear that that was one of the five that we were not going to agree with. And then, Tim Sandefur of the Goldwater Institute Arizona said, "Hey, before we all just give up and close up, you know, at the end of these deliberations, I did notice that we all agreed on getting rid of the natural born citizenship requirement."

[00:22:05] Ilan Wurman: And so, we discussed it, we all had a little bit different takes on it. I think the conservative constitution simply had eliminated it, I think

the libertarian constitution, wisely, because Ilya was on the team, they didn't want him to become president anytime soon.

[00:22:17] Caroline Fredrickson: [laughs].

[00:22:17] Ilan Wurman: They provided 35 years a citizen, which struck us as too long. I think the progressive team-

[00:22:22] Caroline Fredrickson: Yeah.

[00:22:22] Ilan Wurman: ... lowered the age to become president to 30, and I can't remember exactly what you did with natural born, then we just got rid of it.

[00:22:27] Caroline Fredrickson: Yeah.

[00:22:28] Ilan Wurman: And so, we eventually compromised and said 14 years a citizen, resident in the United States, by the way. So, you know, you're worried about Manchurian candidates, well, okay, worry about someone who was born in San Francisco and moves to Manchuria, you know? [laughs]. Or wherever. Okay, so you have to actually be resident in the United States for 14 years as a citizen if you wanna run for president.

[00:22:47] Ilan Wurman: It just seemed a simple softball updating of the Constitution that everyone could agree on, and I think it will be... It's not the most consequential, I think it's probably the least actually consequential of our amendments, but I think it's nevertheless a powerful statement and worth updating.

[00:23:05] Caroline Fredrickson: Although, Ilya's statement makes me think maybe we worked, we went too fast.

[00:23:10] Ilya Shapiro: [laughs].

[00:23:11] Caroline Fredrickson: No, I think it was-

[00:23:13] Ilan Wurman: We should have just excepted Ilya from the, in the text of the constitution.

[00:23:15] Caroline Fredrickson: Well, that's true, but-

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[00:23:15] Ilan Wurman: We could have a bill of attainder-

[00:23:17] Caroline Fredrickson: Except for-

[00:23:17] Ilan Wurman: ... right in the constitution.

[00:23:18] Caroline Fredrickson: Except for, Ilya. No, I mean, I do think this was, you know, this one was really the low-hanging fruit that was easy for all of us to agree on. It was, it's so anachronistic, it doesn't make any sense in the... And I don't know that it made... Well, I guess it made a certain amount of sense at the time, but it certainly doesn't make sense now.

[00:23:36] Caroline Fredrickson: But we were, I think came to a real consensus around the idea that, you know, you have to have some attachment to the United States. Being born here isn't the attachment that was necessary, but having lived here, that was the, and being a citizen, that was what was important.

[00:23:51] Jeffrey Rosen: Great. If no more thoughts on that one, the next one is legislative veto, and I will read them, 'cause I... The precision, the technical precision of the language, is impressive and important, so here it is. "Congress may by law provide for a veto, by majority votes in each of the Houses of Congress, of actions taken by the executive department, except actions adjudicating the applicability of a stature or regulation to a person. A failure by Congress to act pursuant to such a law shall not affect any judicial determination as to whether any law, or any actions of the executive department, are valid or enforceable."

[00:24:37] Jeffrey Rosen: Caroline, unpack, tell us how this technical legislative veto, which Congress had exercised until the Supreme Court struck it down in the Chadha case in 1980, became front and center in your deliberations.

[00:24:48] Caroline Fredrickson: Mm-hmm.

[00:24:48] Jeffrey Rosen: And why you all thought it was a good idea.

[00:24:49] Caroline Fredrickson: Well, so this was an area where all the constitutions had some degree of agreement. And so, just to first say that I think there, it's generally agreed across the ideological spectrum that the branch that has atrophied the most is Congress, and that congressional power is only confined, in

many ways, by the executive branch exerting a fair amount of power and the judicial branch exerting quite a bit of power.

[00:25:24] Caroline Fredrickson: And so this is a way of kind of rebalancing. And to say... But it's specific in the sense that we were making sure we were addressing the Chadha case in part, which many of you may be familiar with, but also respecting the idea that we don't want Congress to reach in and overturn decisions about individual people, which was actually the case in that particular case. That being… exacting some kind of retribution, or using, you know, inflammatory politics to go after a disfavored individual or group and so forth. And then, not to also disturb a judicial decision similarly.

[00:26:13] Caroline Fredrickson: But again, it's a two house veto and it is kind– It's not available in every single case, but has to be authorized by Congress within the context of an individual law. So that is, there's not a veto of right, but by Congress has already determined that in this particular area we want the right to be able to override an executive action.

[00:26:39] Caroline Fredrickson: So it provides the legislative veto, but it has its constraints in a way that we thought would enable it to function the way that we hope it will function, that is to give Congress greater ability to control its own enactments without overriding key interests in terms of separation of powers.

[00:27:00] Jeffrey Rosen: Wonderful. Thoughts on the legislative veto, other reflections? Ilya?

[00:27:07] Ilya Shapiro: Well, we would have preferred to have major regulations passed only with the affirmative assent of Congress, but we didn't get the votes for that, so at least this is an overall improvement in allowing Congress to disprove, particularly egregious regulations.

[00:27:28] Ilan Wurman: And one more point about that, not just that you wanted something like the REINS Act, but another alternative was to have a... Or the difference between the REINS Act and the legislative veto, right, which Ilya was talking about, is under the REINS Act, agencies wouldn't be able to do anything unless Congress approved what they did. A legislative veto flips the inertia. Agencies can keep doing what they're doing, they can keep issuing regulations, right? But Congress can step in on the backend and veto the action.

[00:27:54] Ilan Wurman: So the administrative state can continue applying its expertise, government's not gonna grind to a halt, but Congress still gets this backend check. So one possibility is, as Ilya said, with something like a REINS Act, which would require affirmative congressional consent. Another possibility was baking in the legislative veto, right, as Caroline was suggesting, in the constitution itself, which was also on the table.

[00:28:15] Ilan Wurman: I can't remember if the conservative constitution baked it. We did, didn't we? We baked it in. We were willing to budge on that point and say, "Look, at least Congress has the option to authorize a two house legislative veto." And I know Caroline mentioned a specific law, which is how it would usually apply, but I don't see under our language what would prevent Congress from enacting a congressional review act-like law that generally created a legislative veto procedure for all laws, right? It could, I think it could do that. But the point is, then it could repeal, a future Congress could repeal that. And so, it leaves options.

[00:28:45] Ilan Wurman: I will say one other thing about the applicability, right? So the result in Chadha would actually be the same, because that involves the applicability of a law or regulation to a particular person, so Congress could veto rulemakings, but the case in Chadha specifically vetoing the withholding of removal of the, of Chadha, Jagdish Chadha, that would still... The result would still be the same in that case.

[00:29:09] Ilan Wurman: But there are other things, by the way, that aren't rulemakings, but that aren't the applying of laws or regulations to individual people. Like if the president, through executive decree, purported to conscript, create a draft, I think under our language, Congress could authorize vetoes of that. Sending money to fund a border law without specific authoriz... Or with or without specific authorization, I guess, from congress. I think it's the kind of thing Congress could allow veto of. So we really did think a lot of these things through.

[00:29:38] Caroline Fredrickson: The one thing I think this discussion really highlights is that we came to the amendments and the language that we used after a lot of deliberation, because we're obviously coming from very different points. I mean, when we started talking about agency expertise and why it is that the progressive team would never wanna have the kind of proposal that Ilya had just mentioned, because-

[00:30:03] Ilya Shapiro: I thought they were all about democracy, but no, it turns out they want the experts to do things.

[00:30:07] Caroline Fredrickson: Well, once we have a real democracy, which we would have had in our-

[00:30:10] Ilan Wurman: You could tell that team conservative was-

[00:30:11] Caroline Fredrickson: Right.

[00:30:11] Ilan Wurman: ... the peacemaker, right?

[00:30:13] Caroline Fredrickson: Yes.

[00:30:13] Ilan Wurman: [laughs]. In all of this.

[00:30:15] Caroline Fredrickson: And that was true. But, so we really debated these things and thought, well, what can we actually agree on that perhaps will appeal to a broad swath of Americans who can see that if these people, if these three, can agree, then, you know, the rest of us should be able to agree as well.

[00:30:30] Ilan Wurman: Here, here.

[00:30:32] Jeffrey Rosen: Our third amendment, which is amendment 30 in the proposal, is impeachment. And it's complicated, and I guess... Ilya, shall I read it, or do you wanna summarize it?

[00:30:45] Ilya Shapiro: Read it.

[00:30:45] Jeffrey Rosen: All right, I think we should read it, because... But it's important, and again, it's a testament to the-

[00:30:50] Ilya Shapiro: We argued over the call-up placement in this one.

[00:30:52] Jeffrey Rosen: No, it's really important. All right.

[00:30:54] Caroline Fredrickson: So read out the commas, too.

[00:30:56] Jeffrey Rosen: All right. "The President and Vice President, the judges of the supreme and inferior courts," I won't read all the commas, "and all civil officers of the United States shall be subject to impeachment for serious criminal acts, or for serious abuse of the public trust. Impeachments may occur up to six months, and convictions may occur up to one year, of the person leaving office."

[00:31:22] Jeffrey Rosen: Section two, "Upon conviction," this was a wonderful debate, "any person currently holding office shall be removed, and any such person, or any convicted person who no longer holds office, shall be subject to disqualification to hold any elective or appointed office under the United States, or under any of the States, and the person convicted shall be liable and subject to indictment, trial, judgment, and punishment, according to law."

[00:31:48] Jeffrey Rosen: Section three, "The House of Representatives may impeach by a vote of three fifths of the members present, and shall set forth specific grounds and written articles of impeachment, which shall be conveyed to the Senate immediately upon adoption." Four, "The Senate shall have the power to try all impeachments, and shall convict on the votes of three fifths of the members present. The Senate may convict only on one or more of the articles of impeachment. When sitting for that purpose, the Senate shall be on oath or affirmation. When the President or Vice President of the United States is tried, the Chief Justice shall preside."

[00:32:24] Jeffrey Rosen: One more section, section five. "The House, upon passage of a resolution initiating an impeachment inquiry by a majority of the members of the House of Representatives plus five percent, and the Senate, upon passage of articles of impeachment, or a committee of the House or Senate thereafter authorized by the House or Senate, respectively, shall have power to summon witnesses and call for papers, subject to privileges grounded in this Constitution. Any refusal to comply with such summons may be prosecuted in a court of the United States as prescribed by law, and a legal officer designated by the House shall have standing to bring such prosecution without involvement by the executive branch."

[00:33:03] Jeffrey Rosen: I wanna set this to music, this is just beautiful. [laughs].

[00:33:06] Ilan Wurman: We did pretty good.

[00:33:08] Jeffrey Rosen: It's so glorious.

[00:33:08] Ilan Wurman: It almost could have been written in 1787.

[00:33:10] Jeffrey Rosen: It's just amazing. What were you trying to say?

[00:33:13] Ilya Shapiro: Right. Well, that last section I just don't remember, that's about, you know, trial process in the Senate and who can subpoena witnesses and, you know, penalty of contempt of course if you, if they don't turn up and things like that. But, so I gave the broad bit earlier. We raised the threshold for impeachment by the House to three fifths from half, and we lowered the standard for conviction from two thirds to three fifths.

[00:33:41] Ilya Shapiro: We also, you heard Jeff read out, it's... Oh gosh, and now I can't remember the exact, but it's serious... What is the-

[00:33:52] Jeffrey Rosen: Serious criminal acts.

[00:33:53] Ilya Shapiro: Serious criminal acts-

[00:33:54] Caroline Fredrickson: Or breach of-

[00:33:54] Ilya Shapiro: ... and serious breach of the public trust.

[00:33:56] Ilan Wurman: Abuse.

[00:33:58] Ilya Shapiro: Now, abuse of the public trust. That's right, we argued over whether it's abuse.

[00:34:01] Caroline Fredrickson: Serious abuse.

[00:34:01] Ilya Shapiro: And the serious point, I just-

[00:34:03] Caroline Fredrickson: Yeah.

[00:34:03] Ilya Shapiro: As a draftsman, I didn't like the use of serious in two consecutive clauses, but we felt it was necessary to obviate the future argument over whether serious applied to only the first clause or to both clauses if we didn't repeat it.

[00:34:18] Caroline Fredrickson: That's why textualism is a questionable doctrine.

[00:34:20] Ilya Shapiro: [laughs]. I mean, team libertarian thought any breach of the public trust should be impeachable, because what, "Oh yeah, that official," not the president, by the way, this is to all, you know, officials under the– officers of the United States, "Should..." In addition to the president and the vice president, there's a debate over whether they're officers of the United States, but regardless. "That, they definitely breached the public trust, but it wasn't a serious breach, so we'll just let them keep their job." That made no sense to us.

[00:34:48] Ilya Shapiro: But we lost that argument, and I think I voted against it because–I think only one member of team libertarian ultimately voted for this– because we thought it was so serious, this inclusion of the word serious, doubly. But the point is, we broadened the standard for which, or the violation of behavioral standard for which an official can be impeached, raised the threshold for that impeachment, lowered the threshold for conviction.

[00:35:19] Ilya Shapiro: And, you know, team libertarian, in our own deliberations, we, this is the part that we did not just let ride, we actually did amend it to make it more easier to impeach, because we can think of lots of officials–again, not just presidents–who historically we would have loved to have seen impeached and removed.

[00:35:36] Caroline Fredrickson: Can I just add one little footnote, which is, and maybe you don't agree with this Ilya, but actually from our point of view, adding in breach of the public trust was not about changing a standard in any way, it was actually about clarification, because the question has come up, which I think is kind of a red herring, to suggest that the current high crimes and misdemeanors only implies actual crimes.

[00:36:03] Caroline Fredrickson: And while I think there's a fair amount of agreement among scholars that that's not the case, looking at historical evidence and so forth, nonetheless it came up, we just wanted to put that one to rest, and so we used– put in breach of the public trust, serious breach of the public trust, abuse of the public trust, to make sure that that was no longer gonna be a point of dispute.

[00:36:28] Jeffrey Rosen: So not every crime is impeachable, and not every impeachable act is a crime?

[00:36:32] Caroline Fredrickson: Exactly.

[00:36:32] Jeffrey Rosen: Yes.

[00:36:33] Caroline Fredrickson: As Charles Black said.

[00:36:33] Jeffrey Rosen: As Charles Black said, right. Ilan, there is a really historically rich debate about whether or not impeached officials should be allowed to run for state offices after their impeachment-

[00:36:44] Caroline Fredrickson: [laughs].

[00:36:44] Jeffrey Rosen: ... in order to blow off steam.

[00:36:45] Ilan Wurman: [laughs].

[00:36:45] Jeffrey Rosen: Tell us about that debate and what happened.

[00:36:48] Ilan Wurman: So this was actually initially kind of a controversial part that we added to this. There are a lot of little details, by the way. I do really love the language, and this might be my favorite. We worked hard on this one, and there are lots of small things that we changed or clarified. For example, is the president an officer of the United States or an authority of the United States? There's actually a debate about that based on the different ways the Constitution-

[00:37:16] Ilya Shapiro: You can get tenure at a good law school by writing-

[00:37:19] Ilan Wurman: This is not-

[00:37:19] Ilya Shapiro: ... articles about this.

[00:37:19] Ilan Wurman: This is not my scholarship, bring it up with Seth Barrett Tillman, okay? He's the one who made a serious argument about this. We-

[00:37:26] Ilya Shapiro: And Jen Mascott, I mean-

[00:37:27] Ilan Wurman: Okay, fair enough. But, so we clarified that disqualification doesn't just apply to appointive officer, but also to elective office,

so if you're impeached, it doesn't mean you can't be appointed to Secretary of Defense, you actually can't run for president, we clarified that. Akhil Amar in one of his books, said, "Hey, wait a minute, if the president of the Senate presides over an impeachment, and the vice president is impeached but the vice president is the president of the Senate, then does the vice president preside over his own impeachment?"

[00:37:54] Ilan Wurman: Okay, well, he came up with some can't be a judge in his own cause or whatever, and so we just clarified that. When the vice president, or the president, or the president or the vice president, is impeached, the chief justice shall preside. We clarified these questions about office holders who, if they've left office and so on, can they be impeached for things they did while they were in office, we clarified that.

[00:38:15] Ilan Wurman: And we did throw in a somewhat anti-federalism thing here where we said, "And if you are impeached, not only are you disqualified from holding any elective or appointive office under the United States, but you are barred from holding any appointive or elective office under any of the states." So if Donald Trump had been impeached– had been convicted of an impeachment, he would not have been able to then run for Governor of Florida, for example.

[00:38:39] Ilan Wurman: And whether this was wise or not, I don't remember exactly what the debates we had over it, but I think if with the standard clarification-

[00:38:48] Ilya Shapiro: What about the-

[00:38:48] Ilan Wurman: ... serious abuse of the, right…

[00:38:50] Ilya Shapiro: What about Mayor of Palm Beach?

[00:38:51] Ilan Wurman: Okay. I don't think... That's interesting, I don't know. We may have to revisit that.

[00:38:56] Caroline Fredrickson: It may depend on the state constitution, right?

[00:38:58] Ilan Wurman: It may depend on the state constitution.

[00:39:00] Caroline Fredrickson: Yep.

[00:39:00] Ilan Wurman: Independent city mayor doctrine or whatever. [laughs]. So we'll see.

[00:39:04] Jeffrey Rosen: We have a question from Maria on Zoom, and the questions are phenomenal, by the way, thank you Zoom friends and friends in the room. What would one example of a breach of the public trust be for this impeachment amendment?

[00:39:15] Ilya Shapiro: It's a political question. Lying to the people, you know, making some speech where you say something to, I don't know, that's politically significant in some way. Because ultimately, impeachment is a political judgment, so if-

[00:39:30] Jeffrey Rosen: Whatever the House says?

[00:39:31] Ilya Shapiro: Whatever the House says, whatever the Senate says for... I mean, you know, there are examples, I suppose, but I don't think of examples, I think of, you know, if, is this worth impeaching and removing, which are solemn and serious actions? But has this person, you know, lost the public trust?

[00:39:50] Caroline Fredrickson: Well, so here's an example that came up in, well, let's just say the past, you know, four or five years let's say. That is the question of under the pardon power, there's some who say that the pardon power is pretty much unreviewable, that the president can pardon whomever he or she pleases. But the question is then, sort of is suborning perjury, say, in exchange for a pardon a violation of the pardon clause? Is that, somehow, a reviewable violation of the pardon clause?

[00:40:29] Caroline Fredrickson: Well, whether it is or it's not, it certainly could be something that could be a breach of the public trust, even if it's not a criminal act.

[00:40:38] Ilan Wurman: I second what Caroline, I second that entirely. People have to remember, I would often read, especially when Trump was president, but also before, the president would abuse some power, and all these fancy legal academics would say, "Oh, that power doesn't exist." It's like, "Well, no, maybe the power exists, but it can be abused." Power can be abused. The abuse of power, as an abuse, doesn't make it illegal.

[00:41:00] Ilan Wurman: So the president, I think, gets to control the decisions of the Attorney General. That doesn't mean the president should send the Attorney General after the president's political opponents. I think the US attorneys serve at the pleasure of the president. I don't think that means the president should be able to just remove, or should just remove, a bunch of US attorneys who are investigating his political allies, which happened in the past as well.

[00:41:22] Ilan Wurman: So that is, by the way, when they had this removal power debate in Congress in 1789 when they were debating whether the president had a removal power, and they concluded the president did, but the anti-federalists will read, "Oh, this could be abused." Madison said, "The wanton removal of meritorious officers would make the president himself liable to removal through impeachment." The president can have a power that can be abused, and impeachment, and it's not a crime. And I think those are several examples that would subject the president to impeachment under our standards.

[00:41:51] Caroline Fredrickson: Can I offer one quick fanciful example, which I think this is from Professor Charles Black who wrote about this, is say the president just decided he or she was tired and moved to some beautiful tropical island and just hung out on the beach. It's not necessarily a crime [laughing], although I suppose you could figure out some way that that was a crime for violating your duties and so on, but still, just shirking on the job. Not even moving to the Bahamas or something, but basically just hanging out in one of the nice bedrooms upstairs and playing video games.

[00:42:31] Caroline Fredrickson: That could be something that could be really seen as a breach or as an abuse of the public tr-

[00:42:36] Ilan Wurman: Or more realistically, a golf course-

[00:42:37] Caroline Fredrickson: Right.

[00:42:37] Ilan Wurman: ... either in Jersey or Hawaii.

[00:42:38] Caroline Fredrickson: A golf course, right. So those kinds of examples where you could start to see that-

[00:42:42] Ilya Shapiro: Well, the press constantly tallies how many days a president has spent on the golf course or at Camp David or on vacation. At a certain threshold, that rises?

[00:42:51] Caroline Fredrickson: Potentially, sure. If it's 365 days of the year, you know?

[00:42:54] Ilan Wurman: But this is also why we have the words serious in there.

[00:42:57] Caroline Fredrickson: [laughs].

[00:42:57] Ilan Wurman: Which Ilya did not want.

[00:43:00] Ilya Shapiro: Well, I would just vote against that. Anyway.

[00:43:03] Jeffrey Rosen: We have two more amendments to be read out presently, but I wanna make sure to introduce a question that several of our audience members and Zoom friends have asked, which is do these have any chance of passing? Which has the most chance of passing? This seems great, but it's an academic exercise, is there any plausible way that national support might coalesce around these amendments? And just to the put the point more precisely, moving away from this debate, how do you think that you might build support for these amendments around the country?

[00:43:38] Caroline Fredrickson: Well, thanks for that question, Jeff. The one that I think is really the most– has the most potential for actually moving forward is term limits for Supreme Court justices. And that's because there's a wide consensus among the American public, among scholars, that this anomalous situation that the apex court, as scholars like to say, the highest court in the land, unlike almost every other country in the world, we have a life tenure for our Supreme Court. And because of the change in lifespans, and because of the kind of politicization of the process in which presidents are encouraged to pick younger and younger people, you end up having justices who are now serving often over 30 years when there was a historical average of more like 18.

[00:44:34] Caroline Fredrickson: And why I think this has some potential, despite, I mean, in addition to the fact that it has, enjoys wide popular support, is that we actually have some progress moving forward. There are a number of different organizations that are advancing, in a very bipartisan way, advancing

ideas to sort of how to flesh this out in practice. There have been bills introduced in Congress.

[00:45:02] **Caroline Fredrickson:** I think it's a particularly difficult moment right now, as we all know, we're so polarized. But I think if the temperature can be dialed down a little bit, this is one where I think there's actually a lot of potential for us to move forward. You know, constitutional amendments, while I don't think there needs to be a constitutional amendment in this case, there is a statutory approach that is viable as well.

[00:45:25] **Caroline Fredrickson:** But let's say if it's a constitutional amendment, that does take time. But you build social movements, and you engage people, and I think this is one where there's some real potential. I would also say that there's only one state in the United States, and that's Rhode Island, that has life tenure for its Supreme Court. So I think we already see that there is broad consensus that this is a very anomalous type of approach to the Supreme Court terms, so it is one that I think we could really rally people around.

[00:46:00] **Jeffrey Rosen:** I'll ask the rest of you for other suggestions moving forward, but Caroline, just 'cause you mentioned it, let's put the term limits amendment on the table. It's quite long, and one of the challenges for building support would be to reassure voters that it's just not too complicated and it's, of course it's not gonna favor one party or another, which it's not, which it's designed not to do. I think as much as I enjoy reading this beautiful language-

[00:46:23] **Caroline Fredrickson:** [laughs].

[00:46:23] **Jeffrey Rosen:** ... it might take too long to do the whole thing, because it also involves appointments to other-

[00:46:29] **Ilya Shapiro:** Let me see if I can do this shorthand-

[00:46:30] **Jeffrey Rosen:** Why don't you do the shorter-

[00:46:31] **Ilya Shapiro:** ... and Ilan, correct me if I miss something, so 18-year term limit, fixed number of justices at nine, that's the grand compromise, and then what do you do about the interim? Because, first of all, the current justices, are we just gonna like let them serve for their 40 years, and in the meantime the court balloons as the new president, each president gets two appointments every

presidential term. And also, what about the strategery [sic] involved if you have divided government, and the Senate controlled by the opposite party just doesn't confirm anyone for four years, and the next president gets four appointments rather than two.

[00:47:09] Ilya Shapiro: So we provide for kind of automatic confirmation unless the Senate rejects within three months of nomination, so that takes care of one of the issues. So it's a kind of a ratcheting up of political power. If the Senate believes that it can just keep rejecting and rejecting and rejecting, and that the voters will like that, then they can keep doing that. If the president thinks he or she can keep appointing, you know, nominating way out there nominees and keep doing that, then it's, you know, at that point the politics comes in.

[00:47:38] Ilya Shapiro: And at a certain point, the most senior justice starts retiring. Anyway, there are transition issues that we provide for, and it's not meant to, you know, think about the current quarter, the next year, the next presidential election, we can put it out to 12 years or what have you, but the idea is that to increase confidence in the Supreme Court and get rid of these morbid health watches over octogenarian justices, and politically timed retirements and things like this, then we would regularize the process.

[00:48:07] Ilya Shapiro: Now, I agree with all of that, in fact I wrote a book about all this stuff, and Caroline served on the Presidential Commission about all that stuff, so we've all thought a lot about this. Ilan also testified before that commission. But the point is, this is really a good government thing, because when you think about it, if you regularize these appointments, these vacancies in the Supreme Court, every two years, the off non-election years, every presidential term gets two, that means every president explicitly is going to be running on I will get two appointments to the Supreme Court. Every senator says, "I, you know, I will be voting on three nominations."

[00:48:40] Ilya Shapiro: It sort of pushes the Supreme Court more in the political process. And the ultimate decision making might not change that much, but at least it feels like it's more accountable and closer to the people. It doesn't necessarily change the politicization or the heat in the confirmation hearings and things like that, but at least it takes out some of the arbitrariness.

[00:49:01] Ilan Wurman: I just wanna echo the confirmation point, because a lot of people forget about that, and I don't even remember how much the commission

spoke about it, but you cannot have appointment reform without confirmation reform. Because, as Ilya said, suppose the deal is every two years there's a retirement, staggered 18-year terms, what is to guarantee that the Senate will approve the president's nominee if the Senate is of another party than the president?

[00:49:29] **Ilan Wurman:** Nothing guarantees it, so you need something to make appointments plausible, possible. So what we provide for is all nominations to all executive and judicial offices, and I'll come back to that in a second, all of them are automatically confirmed, de-confirmed, within three months unless the Senate earlier within that three months make a vote of disapproval, or it can confirm them earlier as well.

[00:49:56] **Ilan Wurman:** What does this mean? It means that Merrick Garland would have gotten the vote. Maybe he wouldn't have been appointed, but he would have gotten a vote, and if he was voted down, President Obama would have put someone else up, and if Republicans time and again voted down ten nominees, at some point it would become politically catastrophic. Because this is the deal, we know that every president gets two appointees to the Supreme Court. The appointments process today, the confirmation process, is totally broken. It wastes the Senate's time, no one cares about this, and, quite frankly, President Trump should have gotten his cabinet in place swiftly, but he didn't thanks to Chuck Schumer. And President Biden should have his, you know, similarly his cabinet in place swiftly. Okay?

[00:50:37] **Ilan Wurman:** This is not a Republican or a Democrat thing, this is a Veil of Ignorance thing, behind a veil of ignorance, would we want to spend months and months and months wasting Senate time at the beginning of the term waiting to get these executive appointments, waiting to fill judicial appointments? It doesn't make sense.

[00:50:53] **Ilan Wurman:** So this is a really important reform, almost, in my view, stands independently of whatever we do in the Supreme Court. But certainly, if we reform the Supreme Court the way we suggested, we have to have the corresponding confirmation reformed as well.

[00:51:05] **Jeffrey Rosen:** An obvious question, why would Republican voters in Congress, or in ratifying conventions, want to adopt this given the fact that Republicans now have a majority on the Supreme Court?

[00:51:18] **Ilya Shapiro:** Well, because in future there'll be Republican presidents who will also benefit from having more nominees.

[00:51:25] **Jeffrey Rosen:** I mean, as a serious question-

[00:51:28] **Caroline Fredrickson:** Well, I mean-

[00:51:29] **Jeffrey Rosen:** ... do you think- might that be a suspicion if the-

[00:51:31] **Caroline Fredrickson:** Not, uh, I shouldn't be speaking for the others on this matter, but I do think, you know, I wanna, I have read enough scholarship from scholars who are quite different in their ideological orientation to know that there are a lot of people who just care about having a system that functions. And I'd say one of the major issues when you look at Supreme Court reform is this issue of accountability and kind of connection to the kind of democratic majority, which is not to say that the court should be reflexive and reflective of that majority, but the court shouldn't be completely unconstrained and unbound by the current generation.

[00:52:15] **Caroline Fredrickson:** And so, that is to kind of ensure that the court itself is somewhat more accountable to the current moment and to democratic change over time. And that's to prevent what we've seen in recent decades, which is the Supreme Court's reputation and approval amongst the American public in very serious decline. And when you have a situation where your court system is not as respected as it should be, you have a danger to the rule of law, because as Alexander Hamilton is known to have said, having neither sword nor purse, it's the least dangerous branch.

[00:53:00] **Caroline Fredrickson:** How does the least dangerous branch enforce its rulings? Well, that's because we trust it and we respect it, and we follow the rulings even when we disagree. So I think this is sort of bound up with that and why, and as I say, I'm speaking for my colleagues here, but I think there is a broad general consensus that we need to have this kind of reform.

[00:53:20] **Ilya Shapiro:** That concern about Supreme Court legitimacy is overblown, however, I've written about this ad nauseum. This is a time of institutional distrust more broadly, and societal mistrust more broadly, which is a bad thing for the body of politic and our society, et cetera. But the Supreme Court is still respected more than I think any federal institution except the Army, except

the military. It has declined, but, you know, those declines, and they now track partisan polling, which is, again, not a good thing, but it's not surprising when what we've had is the culmination of several trends where divergent interpretive theories map onto partisan preference at a time when the parties themselves are more ideologically sorted than they've been since at least the Civil War.

[00:54:04] Ilya Shapiro: You're not gonna fix that whole dynamic. I just, the reason why I favor all this is because public polls after public polls say that we would have increased confidence in Supreme Court if there were term limits. Without any change in the result, I don't think it would change the political, you know, fights over this stuff, that's good enough for me.

[00:54:25] Jeffrey Rosen: Great. Well, we have just five minutes left, and NCC panels, like constitutional conventions, end on time.

[00:54:30] Caroline Fredrickson: [laughs].

[00:54:30] Jeffrey Rosen: So we're gonna try to do that. So Ilan, a big assignment, a bunch of questions about the amendment amendment. Karen R asks, "Why is it such a long process to put amendments, or even change the Constitution?" Rosalie asks, "How do you react to campaigns to stop Article V convention efforts by the states?" Could you put on the table your amendment amendment, which makes it a little easier to propose and ratify, and also builds in a majoritarian consideration, and tell us why it's a good idea?

[00:54:57] Ilan Wurman: Sure. Before I answer that, I just thought of one other thing I wanted to say. I'm actually not sure I agree with Caroline that the appointments and confirmations is the most likely. I think the legislative veto one is more likely, because Congress gets to decide which amendments to propose, right? And Congress benefits from legislative veto.

[00:55:13] Ilan Wurman: Actually, I remember in my youth, when I flirted with functionalist legal theory, I now consider myself a formalist, so I've had something of an evolution, I proposed that we should just do legislative vetoes anyway as a matter of functionalism, and I got excited calls from chiefs of staff from various senators. And I had to remind them, "This is unconstitutional, this is just a thought experiment. I'm trying to become an academic." [laughs].

[00:55:37] Caroline Fredrickson: Well, funding can [inaudible 00:55:40]-

[00:55:38] Ilan Wurman: But this would be constitutional if you put it in the Constitution. And I think actually there's something to be said for that.

[00:55:44] Ilan Wurman: So on the amendments, just to wrap this up, we do have an amendment on amendments in some respects that tries to make the amendment process easier, but not too easy. In some respects, if the first four amendments are passed, it takes the winds out of the sails of the fifth amendment, right, the amendment on amendments, because we will have shown that we can nevertheless amend the Constitution.

[00:56:06] Ilan Wurman: But it is too hard to amend the Constitution, I think, right now. I think right now we feel like the Constitution isn't ours, rightly or wrongly, it doesn't belong to our generation. And I think I joked about this last time, I think I used the economics term a Laffer Curve, there's like a happy middle point, right, after which it becomes-

[00:56:23] Ilya Shapiro: That's my approach to drinking before public events.

[00:56:26] Ilan Wurman: [laughs]. Yeah, yeah. So for those who don't know, Arthur Laffer has this idea, what is the ideal tax point? If the tax burden, or if the tax rate is too low, then you're missing out on other tax revenue, but if it's too high, then people start to hide money. So at some point, you can raise the tax rate higher and higher, and you actually start losing money, income, the federal government starts losing income.

[00:56:45] Ilan Wurman: It's the same thing with how hard it is to amend constitutions. At some point, you want it to be difficult, because otherwise what makes it different than ordinary law? As Madison said in response to a Jeffersonian argument, you want the Constitution to have veneration that time bestows upon things, legal documents like that, but at the same time if it's too hard, if we haven't amended it in 30, 40... I mean, is the 27th Amendment ratified? I don't know. It's either 25 years or if you go much longer before that, so it's too hard.

[00:57:15] Ilan Wurman: So what we propose, there are like three different tiers in terms of proposing and ratifying, but part of it is we make it a bit easier, something like three fifths of the states, but we keep the two thirds thresholds for ratification if those two thirds of states represent two thir... Or if those states represent two thirds of the population. So now, we have a tier of ratification that

we reduce the number of states as states that have to approve it, but we keep the two thirds threshold if they reflect, as in two thirds of the population-

[00:57:48] Caroline Fredrickson: Can I just-

[00:57:48] Ilan Wurman: Yeah.

[00:57:49] Caroline Fredrickson: ... drop an explanatory note in here. This was very important for the progressives, so we had a much more expansive proposal in our constitution, but we wanted to make sure that a group of small states couldn't thwart the will of the vast majority. So to expand the amendment process to a population measure as well was very important to us. And so, we, that was one of the reasons why we were, found this amendment to be very important.

[00:58:18] Ilya Shapiro: This concern, by the way, I don't understand, because of the 10 small states, five are red and five are blue, so go figure.

[00:58:23] Ilan Wurman: As always, I'll play peacemaker, which is I don't think the con... The conservatives didn't wanna, did make in their constitution the amendment process a bit easier, but we did not do it according to population in this way. There were certain things that were very important to the progressives, and in principle, I don't see what's wrong with it. I don't think there's anything wrong with a federalist structure in the amendment process, just like I don't think there's anything wrong with the federalist structure of the Senate, and I know Caroline disagrees about that.

[00:58:50] Ilan Wurman: But in principle, I didn't see what was wrong with this idea, and it was very important to the progressives, and at the end of the day this is about compromise. This is about compromise, this is about coming together on common sense reforms behind a veil of ignorance, and behind that veil of ignorance, as Ilya himself just said, the five largest states too I think are divided reasonably well when you throw in Texas and Florida. So behind a veil of ignorance, this makes perfect sense, and at the end of the day that's what mattered.

[00:59:18] Jeffrey Rosen: Superb. It's just 7:00, I think we might as well have a vote. You've heard-

[00:59:23] Stefanie Lindquist: Yes.

[00:59:23] Jeffrey Rosen: You've listened to the text, you've heard the debates, and if asked whether you would ratify all five amendments as a package, we're gonna have a yes and no vote. Who would vote to ratify all five amendments to the constitution proposed by the teams, and who would vote no?

[00:59:44] Caroline Fredrickson: Hmm.

[00:59:45] Jeffrey Rosen: About half and half.

[00:59:47] Ilan Wurman: Ah.

[00:59:47] Jeffrey Rosen: Excellent. And maybe just the term limits amendment, who would vote-

[00:59:51] Ilan Wurman: Which amendments did y'all like?

[00:59:52] Jeffrey Rosen: What... No, no. Well, the questions will be asked–

[00:59:55] Ilya Shapiro: Let Jeff MC.

[00:59:55] Jeffrey Rosen: I'm the MC, absolutely, I'm paying for this microphone. Who would vote to ratify the term limits amendment for Supreme Court justices? And who would oppose it? That one might pass.

[01:00:10] Caroline Fredrickson: That was very close.

[01:00:10] Jeffrey Rosen: Not, maybe almost two thirds. Wonderful. Well, it's such a-

[01:00:13] Ilya Shapiro: They just don't want me to become president, that's the one that-

[01:00:15] Jeffrey Rosen: Well, we can do the 35 too. Just a superb discussion, so inspiring, and such a great partnership here with ASU in DC to take these five amendments across America and shed light about the possibilities for sober and civil constitutional deliberation. Please join me in thanking our convention.

[01:00:47] Jeffrey Rosen: Wonderful.