



New Amendments and the Future of Constitutional Reform

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[00:00:00] Jeffery Rosen: Hello friends, I'm Jeffery Rosen, president and CEO of the National Constitution Center. And welcome to *We The People*, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan, nonprofit, chartered by Congress to increase awareness and understanding of the Constitution among the American people. Earlier this year, the NCC convened in Miami for a series of great constitutional conversations. This one is about the amendment process, Article V, and the future of constitutional reform. The four scholars you'll hear are Akhil Reed Amar of Yale Law School, Caroline Fredrickson of Georgetown Law, David French of the New York Times, and Ramesh Ponnuru of the National Review. It was wonderful to host this conversation, and I'm so glad to share it with you. Enjoy.

[00:00:57] Jeffery Rosen: Friends, the question of Article V and the amendment of the Constitution has suffused our wonderful discussions over these past two meaningful days. We've talked a lot about how constitutional change should come. Should it come from the courts or from the people, through the amendment process. And we've talked about how controversial contested changes can be when they're imposed by judged on a polarized nation. And there's broad agreement that amendments, through the Article V amendment process, reflecting supermajority will would be preferable if we can muster the supermajorities to pass them.

[00:01:36] Jeffery Rosen: There's a widespread belief nowadays that the Constitution is essential unamendable because we don't have the supermajorities necessary to converge around constitutional change. That's an argument that Jill Lepore made recently in *The New Yorker*. And she noted that the US now has the lowest rate of constitutional change of most Western democracies. And yet, there is grounds for hope.

[00:01:58] Jeffery Rosen: The Constitution Center recently convened a remarkable project called the Constitution Drafting Project, where we asked three teams of scholars, conservative, progressive and libertarian, to draft a Constitution from scratch. And to everyone's amazement and surprise, in the course of just two meetings in a state of nature or a state of Zoom-

[00:02:22] Speaker X: [laughs]

[00:02:23] Jeffery Rosen: ... and a little bit of email follow-up, these ideologically diverse, brilliant scholars, agreed on five amendments to the Constitution. And we're honored tonight to have Caroline Fredrickson, who led team progressive, to talk about this project. And I'm gonna

ask her to put the amendments on the table. And then I'll ask our other panelists what, what they think of those amendments, and also whether they wanna talk about others that they've written about. And then we'll talk about possibilities for a constitutional change outside the amendment process.

[00:02:57] Jeffery Rosen: And then we'll end this panel, by asking, What's the step forward? Is it conceivable that there might be a, a national movement that could converge around these proposals or others. Caroline the five amendments that your project converged on were first, ending the national born citizenship requirement for, for president. Second, 18 year term limits for Supreme Court Justices. Third, resurrecting the legislative veto, which the Supreme Court struck in the 19- in 1980, and would allow Congress to repudiate executive action by majority vote. Fourth, making impeachment a little bit harder in the House, and making conviction a little easier in the Senate. And fifth, making the amendment process itself a little easier. That's my summary, but it was just an incredible project. Tell us about the amendments, how on Earth you achieved this consensus, and, and what you make of the whole thing.

[00:03:50] Caroline Fredrickson: Well Jeff, thank you so much. And, and I, I actually, I really want to thank you and the National Constitution Center for having conceived of this project, because it was really just a fundamentally incredible experience for me through the whole, the whole process. The initial process of assembling our team of three and Melissa Marie was one of the team members, Jamal Greene from Columbia and consulting with a whole range of, of constitutional scholars across the country about how we might conceptualize a Constitution to draft it now.

[00:04:25] Caroline Fredrickson: And we really thought that, about that a lot in the context of the National Constitution Center and its mission it's vital mission of civic education. And we wanted to engage that audience in a way by not say, you know, we could've decided that we would start from scratch and do something that's more like one of the more modern constitutions, the German constitution, the South African constitution. But we really wanted to engage in some of the major discussions around the Constitution we have. So we thought, let's really work with the bones of that structure.

[00:04:58] Caroline Fredrickson: And so we, we drafted the Constitution. And then when we came together and we, when, when we all looked, we looked at the libertarian constitution and the conservative constitution, as Jeff mentioned, we found some really amazing things. And that was these areas of consensus. And with, then with knowing that we came together through this Zoom convention worked through, I mean, some really difficult discussions. But we worked through how we would frame the areas of overlap, where we thought we could actually come to consensus.

[00:05:39] Caroline Fredrickson: And and there was a lot of there were a lot of concessions made on everybody's part. So the legislative veto w- is actually quite limited. Right? It's not a very, it, it, it has to be in the actual congressional enactment, so in statute by statute rather than a kind of broad framing. The impeachment discussion was quite interesting, because we worked through, you know, whether we should address the standard. You know, how, should

we clarify what crimes, high crimes and misdemeanors actually mean? That is, we need to make it clear that that a president who say has engaged in some activity that's not technically a crime but is an impeachable offense that should be made abundantly clear that those kinds of actions are also subject to the impeachment process.

[00:06:26] Caroline Fredrickson: But we also recognized that impeachment was too easy in the House but too hard to convict in the Senate. And that, so it should be harder to, it shouldn't be a partisan exercise, it should really require hopefully some kind of bipartisan agreement in the House before there's a process moving forward. But it shouldn't be impossible in the Senate.

[00:06:46] Caroline Fredrickson: We came together around term limits for the Supreme Court. This was a very, very broad, broadly supported idea across the ideological spectrum. And a number of us up here have, have, have worked on that issue already. And so these things were took a lot of very difficult discussion as we worked through all the nuances.

[00:07:09] Caroline Fredrickson: And one of the things that, that you know, I was particularly happy about, was getting to an agreement on the amendment process itself. And that is, reaching consensus that our Constitution is too hard to amend. And that we, as we've heard, we have one of con- a constitution that in, in the modern, in the modern world, as Jill Lepore has pointed out is, is in- incredibly different from what's happening in other countries.

[00:07:39] Caroline Fredrickson: And, and as we heard about the California situation, what, I think 500 amendments to the California constitution since its adoption. And we have so very few. So we did also agree and this was probably one of the hardest areas to reach agreement. What was important for me and for the progressive team was to add in a process where we could engage in, in some kind of popular participation. That is recognizing that, that there are, that the current process because of how we have structured the, the, the role of the states gives a much greater power to small states than large ones, despite the large populations that might have a real interest in amending the Constitution.

[00:08:22] Caroline Fredrickson: So we didn't go as far as we wanted in the progressive constitution, but we did make that change. And so anyway, it was a wonderful process. And I got to be, you know, found lovely people to work with who I hadn't met before. And and we're doing a road show. Right? So [laughs] anyway-

[00:08:39] Jeffery Rosen: We're doing a road show, and, and this is one of the first this is the opening act. Lovely people of extraordinarily different views. Robby George and Michael Michael McConnell talking with you and Jamal Greene and Melissa Murray, and, and the great libertarian team from Cato. It was ex- I never would've expected that people with such different views, so quickly, debating at such a high level, could reach agreement. I felt like I was listening to modern day founders.

[00:09:03] Jeffery Rosen: And one reason I think, is that you were all so learned in constitutional law and history, and were able to frame your arguments in terms of principle,

rather than partisanship, and to take the long view, and above all, to compromise. You used that word, and no one got everything that they wanted, but everyone contributed. And it, it seems to me a highly significant sign that constitutional consensus is possible.

[00:09:26] Jeffery Rosen: All right, I want to ask our other friends. You're hearing these amendments perhaps for the first time, but David you wrote a piece for the Atlantic over the summer about how Congress isn't doing its job, and as a result the Supreme Court and the presidency are being bloated in response. You cited the recent EPA case and the, and the Trump border case as examples of the Court basically saying, "Hey Congress, you've gotta act." But Congress won't. And as you say, there's a disfunction. Several of these amendments have to do with allowing Congress to do its job, in particular with the legislative veto and the beefed up impeachment process. How do they sound to you?

[00:10:03] David French: Yeah, so I'm not a person who's really in favor of trigger warnings, but there is one trigger warning for me before you're gonna say this phrase, co-equal branches of government. At that point, I, I go into involuntary spasms of rage when I hear that, 'cause-

[00:10:18] Speaker X: [laughs]

[00:10:20] David French: ... the constitutional structure is not co-equal branches of government. The, the actual constitutional structure, yes they can check each other, but the actual constitutional structure has Congress pretty clearly supreme. You can't spend a dime without Congress. You're allegedly not allowed to declare war without Congress, allegedly. You ... Congress can fire the president. Congress can fire members of the Supreme Court through impeachment proceedings. So Congress, the system is supposed to work with Congress being the preeminent branch of government. And what has happened is Congress has become the least powerful branch. It has voluntarily abdicated its authority within our system of government. And that has had several down line knock on effects that have been terrible for the American republic.

[00:11:09] David French: And one of the reasons why I'm open and I'm very curious and, and like some of these amendments, is because they do deal in some pretty important ways, with some of the deficiencies that Congress has exhibited. But there's also another way to deal with this, which is called Congress doing its job which is you know, it's just an out of bounds thing to say now like, "Congress do your job." Bit really, we have a lot of deficiencies that can be corrected by Congress doing its job.

[00:11:39] David French: And t- let's take impeachment for example. It is absurd to me that in 2019, it was the first time in American history that a senator cast a vote to impeach a member of his own party. And that was Mitt Romney in the 2019 impeachment. There was Andrew Johnson, total partisan unity, Bill Clinton, total partisan unity. And you cannot tell me that senators from both parties looked at all of the evidence with an open mind and just happened to reach a completely uniform, partisan conclusion on what the evidence presented dictated. It's stunning that it was the first time, that this was Mitt Romney.

[00:12:24] David French: So I would say this. I would say my option A is Congress do your job. That's my option A. And if Congress continues to not to do its job, to you know, if you're ... I'm pro-life, but if you're pro-choice, I would be livid that between 1973 and 2022, there was not, and there were many times that there was a filibuster proof majority, for some degree of federal protection for abortion rights. And we can leave aside for a moment whether that would be constitutional. But I would be livid if, to realize that in, between 1973 and 2022, there was not a Congressional enactment.

[00:13:04] David French: And you know, you can go down issue after issue, that is a live issue of s- extreme importance today, where Congress has not done anything. It's punched it over to the president. It's put it over to the j- judiciary. And so I do like that these amendments, in many ways empower Congress. I do like that a lot. However, I will say I am so skeptical at this point, that I think you can even empower, even give them new goodies, and they would say, "No, what I really think is the best and highest use of my time is that 10 minute hit on Tucker or that nine minutes on Rachel Maddow. That, that's where I can really make a difference for the United States of America."

[00:13:48] David French: So you'll, you'll forgive me if I'm a little bit cynical because I think that what we're trying to deal with right now, the fruit, we've got the fruit of the poisonous tree, and the poisonous tree is decades of Congressional abdication of its constitutional role.

[00:14:05] Jeffery Rosen: Akhil Amar, you are one of the most important early advocates of a term limits for Justices amendment, which you championed before Congress before, as well as having produced the leading theory of how it might be possible to amend the Constitution outside of the ordinary Article V amendment process. You're hearing these amendments for the first time perhaps too. What's your sense of them, including the term limits for Justices amendment?

[00:14:34] Akhil Reed Amar: I see my friend David Brooks. We're gonna hear him soon. I, I, I really loved a piece he did a long time ago about his mentor, Bill Buckley, who said about an academic, very famously said about a very famous academic, you, you think agr- you think disagreeing with Harry Jaffa is hard, try agreeing with him. [

[00:14:55] Speaker X: laughs]

[00:14:55] Akhil Reed Amar: ... so I don't wanna quite be like that, so, especially when people are agreeing with me. I, I want to, you know, agree back. Here are my principles for constitutional amendment that I put forth in the last chapter of a book called America's Unwritten Constitution. They are descriptive, interpretive, and predictive. And I look back on the amendments that we've had and I say, "What can we learn from them, in terms of what the amendments of the future should be?"

[00:15:23] Akhil Reed Amar: And one is, I'm very Brandeisian and that's music to Jeff's ears, 'cause he has written a great book on Brandeis. Just look to the states. Almost everything that the

US Constitution has done, including the US Constitution, was done first by states. They, there were state Constitutions. First thing ordinary people say when they look at the proposed Philadelphia draft is, "Dude, you forgot the rights." 'Cause state constitutions had bills of rights, most of them.

[00:15:49] Akhil Reed Amar: A lot of state constitutions got rid of slavery immediately. Women's suffrage, all sorts of things. They're tripartite first among equals with could say. You know? So c- co-equal, equal but first. Okay bicameral [inaudible 00:17:02] so, so look to what states have done. States should road test ideas. I think because amendments should reflect a certain consensus, and it's a two party system, it's a strong two party system, strongest in the world, same two parties basically for over 150 years dominate almost ever position state and federal. So both parties are gonna have to kind of buy in, or the, the different groups progressives, I like liberal as a word but conservatives libertarians. And our amendments in the past have added to liberty and equality, except for prohibition, which didn't work so well.

[00:16:36] Akhil Reed Amar: So I, I think those are three good principles, is add to liberty and equality. Could both parties be on board? And you know, let's look at the states. So, now let's measure some of these things, 'cause think you know, 'cause I actually have a framework. Only one state has life tenure for its judiciary on the federal model. That's Rhode Island. No knock on Rhode Island, but ... So I, I think and, and I propose you're right Jeff. A long time ago in 2002, 18 years, I think 18 fits with 9 Justices in, in certain ways, as certain special properties.

[00:17:09] Akhil Reed Amar: I think it can be done by a mere statute. But many mere statutes have given rise or, or customs to formal amendments. Two term custom, with a t- two term amendment. Informal direct election of senators in a whole bunch of places, leading to a formalization, the 17th Amendment. So if you could do it by constitutional amendment, that's fine. You know, I think it could even be done by a statute. If the statute works, then it would be followed by a constitutional amendment. And I think 18 is about right. It's a sweet spot for a lot of states, plus or minus, so yes to that one.

[00:17:42] Akhil Reed Amar: Was there one about natural born?

[00:17:44] Caroline Fredrickson: Mm-hmm.

[00:17:44] Akhil Reed Amar: Okay, so I testified, and I talk about this in the last chapter of the America's Unwritten Constitution book. I testified on behalf of Orrin Hatch's amendment to let people who come here legally they're not lucky enough to have been born citizens they way some of us are. And and, and he's a great republican, the longest serving republican Senator in, in American history. This was his version of the DREAM Act. I, I testified in support of it. Pat Leahy said the nicest thing he's ever said about Orrin Hatch, and he didn't say very many nice things about Orrin Hatch. He said, "Of all the horrible and terrible, no good ideas that Orrin Hatch has ever had, this seems less horrible, no good and terrible, than, than anything else."

[00:18:26] Speaker X: [laughs]

[00:18:26] Akhil Reed Amar: So, so okay but governors you see do it. With they're, they're, they're naturalized citizens. Jennifer Granholm in Michigan, Arnold Schwarzenegger. And governors are mini presidents you see, so the states are doing it. It adds to equality. And this will be the republican version of the DREAM Act. [inaudible 00:19:56] want to do other things maybe even full path to citizenship, so I think that's two for two so far.

[00:18:50] Akhil Reed Amar: Now state constitutions are much easier to amend than federal when you compare them. I used to think that maybe we should be much, much closer to California. On the other hand, most people today have more attachment to the federal Constitution to the state. That's interesting. And we've had very few bad federal amendments. Lots of bad state amendments. People in the world, yes, their, their constitutions are easier to amend. But last time I checked, most of them are trying to come here and few of us are trying to go there, so that's interesting.

[00:19:24] Akhil Reed Amar: So I've changed a little bit on constitutional amendment. I'm glad in my lifetime certain amendments were defeated; flag burning being a federal crime, marriage being one man, one woman. But I do think a modest modification and a lowering of the amendment bar is a good idea. One thing that's true of our Constitution is the amendments have come in clusters. Founding and Bill of Rights and 11th and 12th Amendment. Then nothing for a long time. 13, 14, 15, then nothing for a long time. 19 teens, s- 16 through 19, nothing for a long time pretty much. And then the 1960s. If you can amend [inaudible 00:21:23] once, you, you have a coalition, 'cause it's not so easy, you can often do several things.

[00:20:05] Akhil Reed Amar: So if you can get one amendment through, maybe what we can actually do is get an amendment through to make it a little easier for future amendments. So I think that's a pretty cool idea. But not too low because here's the thing, we have rights in the Constitution, and I don't want them easily undone. Right now best of both worlds, in that we have rights. States can't go belong them. They can experiment above a safety net. And I wouldn't want that. I wouldn't want the first amendment lightly modified by future amendment okay. So I think three for three.

[00:20:36] Akhil Reed Amar: I think the impeachment one fits pretty well because I think states actually, many of them don't have the the same differential between impeachment by one house and, and conviction by another. And so this seems to me sort of sensible. Just using the framework that I developed you know, a while ago.

[00:20:54] Akhil Reed Amar: I'm a little more skeptical candidly, about the term limits, I mean, about the legislative veto sort of stuff. But you know, I haven't heard the details. But that one doesn't quite have as much of a counterpart I think in the Brandeisian state experience. But anyway, that's a framework of analysis.

[00:21:13] Jeffery Rosen: That's such a helpful framework. Pro liberty and equality bipartisan support from all sides, and,

[00:21:21] **Akhil Reed Amar:** And, and if I could just say one thing-

[00:21:22] **Jeffery Rosen:** ... and, and, and, and also,

[00:21:24] **Akhil Reed Amar:** To my [inaudible 00:22:54]

[00:21:25] **Jeffery Rosen:** ... having a root in the states.

[00:21:26] **Akhil Reed Amar:** Yeah.

[00:21:26] **Jeffery Rosen:** I just wanna, I want us to remember the framework, because it's a very good basis for evaluating the future.

[00:21:30] **Akhil Reed Amar:** M- my friend David made a point about Congress not doing anything. We heard the solution already. It wasn't mine. I wish I had initiated the whole thing. But Catherine's point, we have to change, you know, the fundamental structure of incentive for members of Congress, 'cause they're on Maddow or, or Tucker Carlson, because actually, the game is the primaries, where they're just appealing to extreme bases in a Twitter-verse.

[00:21:56] **Akhil Reed Amar:** And, and so that, her idea is one of the most important ideas I think that there is out there. Catherine, I promised I would say that.

[00:22:05] **Speaker X:** [laughs]

[00:22:05] **Akhil Reed Amar:** Okay? I'm, I'm true to my word.

[00:22:07] **Caroline Fredrickson:** Can I just-

[00:22:08] **Speaker 7:** But I didn't pay you.

[00:22:09] **Speaker X:** [laughs]

[00:22:10] **Caroline Fredrickson:** I just wanna add one to that point. One thing we came really close to agreement on was abolishing the filibuster.

[00:22:18] **Speaker X:** Ah-

[00:22:19] **Caroline Fredrickson:** That was, that was-

[00:22:20] **Speaker X:** I'm for it.

[00:22:21] Caroline Fredrickson: ... very close. All the teams really agreed, well, most of the members of the teams agreed on it, but you know, we didn't quite come to a final [inaudible 00:23:59] so that, that one I think reflects that issue of you know, Congress not doing its job, in part it's, it's hobbled itself.

[00:22:36] Jeffery Rosen: Absolutely fascinating, and thank you for the shout out to Catherine. C- Catherine's championship of of ranked choice voting as a way of decreasing polarization has gotten a lot of interest among the members of this [inaudible 00:24:22]

[00:22:51] Akhil Reed Amar: And the states are experimenting with it, Brandeisian.

[00:22:54] Jeffery Rosen: And the states are experimenting, and you don't necessarily need a constitutional amendment, which is what, Ramesh, I want both your reaction to the Constitution Drafting Project amendments, and also thoughts about other ways of achieving constitutional change that might not require an amendment, like ranked choice voting.

[00:23:11] Ramesh Ponnuru: So I'm, I'm a, I'm a skeptic on constitutional amendments. Generally over the years when I've been in meetings and somebody brings up the idea of a constitutional amendment, I think, "Oh, okay, this is gonna be a waste of time."

[00:23:25] Speaker X: [laughs]

[00:23:25] Ramesh Ponnuru: I can, I can, I can mentally check out now.

[00:23:27] Speaker X: [laughs]

[00:23:28] Ramesh Ponnuru: But that said I, I do like this list of five. I'm, I lean toward three of 'em, and I'm not, I wouldn't rule out the other two. I think the judicial term limits the making impeachment harder to initiate but but easier to actually finish that, those are good ideas. I, I would need to know and think more about the legislative veto proposal, to to render a judgment on that. And then on amending, amending the Constitution, I think that's directionally right. I don't know, you know, again, I'd, I'd wanna know the details. But I think that it should be difficult to amend the Constitution, but maybe not quite as difficult as our system makes it.

[00:24:07] Ramesh Ponnuru: So I think all of those things make a lot of sense. I don't know whether any of them are-

[00:24:13] Akhil Reed Amar: What about our Indian cousins being eligible to be president and you know-

[00:24:16] Ramesh Ponnuru: Well, I'm just gonna, I'm gonna I've got too many conflicts of interests-

[00:24:18] Speaker X: [laughs]

[00:24:18] Ramesh Ponnuru: ... to, to weigh in on that. I do recall though as a, as a child my, my brothers were both in India, and I was born in the US, and [

[00:24:28] Speaker X: laughs]

[00:24:28] Ramesh Ponnuru: ... we were all under the impression that I now had a pretty good shot-

[00:24:32] Speaker X: [laughs]

[00:24:32] Ramesh Ponnuru: ... by virtue of being born in the US, that was like, you know, once you'd passed that key hurdle the rest you know, was, was pretty easy. Yeah, no, I, I think, I think one of the things that strikes me about these provisions is you know, if we were making a constitution from scratch and knew what we know now, I think some of them are n- are natural. We wouldn't, if we were starting a constitution from scratch, have large swaths of US public policy dependent on the health and retirement plans of a few elderly lawyers. Right? I mean, that's just not something that we would've done. And we didn't, I think, deliberately choose to go down that road. But the system sort of evolved in that way.

[00:25:12] Ramesh Ponnuru: And similarly, I think having looked at this at the history of impeachment where it's actually never been carried through, and, and it only has really one success in in, in pushing a president out of office I think, you know, we, we need a, we need a better tool for presidential accountability. And so these, those are the things that I like.

[00:25:34] Ramesh Ponnuru: I do wonder whether the very breadth of support ends up limiting their potential to actually be enacted, because nobody is passionate about using th- getting these amendments to achieve, you know, longstanding, emotionally compelling, partisan goals. And so you know, I, I, you're not gonna, you're not gonna excite a rally with judicial term limits.

[00:25:57] Speaker X: [laughs]

[00:25:57] Ramesh Ponnuru: And I don't know how you, how you get to the finish line without having gotten past that first hurdle.

[00:26:04] Jeffery Rosen: Well, that's a great question to put on the table for our last round. And I think we have time for comments from everyone else. I want to also put on the table some proposed amendments from our friend John Storr who's here. And he's writing a book called Common Sense: 10 Reforms to Put the People in Charge. And he suggests promoting representation through ending gerrymandering, reducing the influence of primary voters, and prohibiting officeholders from fundraising. The second promotes federalism. Negotiate a 21st

century list of national issues. Enforce the boundaries between state and national governments. And lower the Article V supermajority of states. And then Supreme Court reforms.

[00:26:43] Jeffery Rosen: John, you're, you're thinking along similar structural lines of our team of how to empower the branches and decrease partisanship. And it's great to put those on the table. Caroline, taking the closing thoughts in whatever direction you'd like, but given Ramesh's point that there's not intense mobilized support for amendments like this, we certainly want to take this show on the road, talk about the amendment process across the country and present the amendments. But what do you think a constructive path forward might be? And could you imagine any of them actually being presented to Congress [inaudible 00:29:13]

[00:27:16] Caroline Fredrickson: I, I do. I can actually. And I'll, I'll tell you why, 'cause I want to pick up on what Akhil had said earlier about the bundling [laughs] of amendments. There's no possibility of amending the Constitution until there is. Every, every time we have amended the Constitution, it has come in groups. Now admittedly, it happens generally very rarely. [laughs] you know the first amendments, like bang, bang, bang, right away. And then the next 17 took you know, basically, collectively, you know, 235 years give or take a few. Right? So, so you know, that's pretty slow to amend the Constitution because we did so much so early with the Bill of Rights and the 11th and 12th amendments.

[00:27:55] Caroline Fredrickson: And so we know it's hard. And we know it's unlikely. On the other hand, it is always unlikely in our history until it happens. And so-

[00:28:03] Speaker X: Mm-hmm. Mm-hmm.

[00:28:04] Caroline Fredrickson: You know, I think that the, the, the issue is, is that these are broadly compelling ideas that clearly are are appealing to a, a very diverse spectrum of Americans, across all ideologies. And so, are they, are they things that people are passionate about? Not in the same way perhaps as some of the other ones. But you know, even when you look back at, at the amendments that we have adopted they sound a little technical and not very exciting in retrospect. Right? You know direct elections of, of Senators or the idea of you know, ending the poll tax, un, or, you know, they're not necessarily like a broad social movement that garnered everybody in the United States' support. Right?

[00:28:48] Caroline Fredrickson: There were movements that took charge and sort of led the way and brought people along. And when they did that, the whole progressive movement, you know, was able to put these things, you know, a, an income tax, direct election of Senators and women's suffrage. You know, those things don't go together all that much. And they weren't necessarily appealing to the same groups of people initially. But there was a moment when the Constitution was amendable. And so we amended it. And I think that can happen again. In the same way, I think when people start you know, a movement starts around term limits, a movement starts about making the Constitution easier to amend, there will be a movement, and it will coalesce, and these things will come together. Because I think constitutional reform does it- it's like grapes, it grows in bunches.

[00:29:35] Jeffery Rosen: Hmm. David the last amendment that might've passed but didn't was an amendment to reform the Electoral College. It was proposed by Birch Bayh. It was supported by presidents of both parties. It would've been ratified. It went through. It was killed by about three Southern Senators. Given congressional dysfunction, which you just talked about, is it plausible to get amendments that people would pass? And if not, what's the alternative?

[00:30:00] David French: You know, I, I agree with the consensus here that it's not possible r- as, as we can foresee it. But it's, anything that has happened before, I don't think we can sit here and say it will never happen again. So I do think it is possible to put forward amendments that can capture folks' imagination. I also think that an enormous amount of it depends on, on quite literally who's, who is proposing it.

[00:30:28] Jeffery Rosen: Mm-hmm.

[00:30:28] David French: In what context? Is it connected to a broader, more popular, a broader popular movement as well, that is, maybe has other ancillary issues attached to it. So that if you were, if we can imagine this, [inaudible 00:32:55] I think will come, have a time again in this country, where we might have an extraordinarily popular president. It's, it's possible. It's happened before.

[00:30:50] Speaker X: [laughs]

[00:30:50] David French: And who's running in a wave reelection. Think you know, Reagan in '84. Last time we, I mean, it [inaudible 00:33:12] 1996 C- Clinton won pretty darn resoundingly. I mean, these are things that have happened in the lifetime of the people in this room. I do think it is possible to attach meaningful, substantive reforms to popular movements, as sort of they're part of it, they're ancillary to it, but they're, they're still part of it. I think that might be one of the paths forward. But I, I keep circling, I'm gonna be a broken record, I keep coming back to this congressional point, because I can't help but realize how many of these amendments seem to me to be reactions to congressional failure, not all of them. I'm very much in favor of repealing the natural born citizen requirement. I just have this vision of a future presidential race between Elon Musk and Prince Harry.

[00:31:43] Speaker X: [laughs]

[00:31:43] David French: And that would be rem- just an amazing thing to watch. A possible reunification with the mother country, there's many things at stake.

[00:31:51] Speaker X: [laughs]

[00:31:52] Jeffery Rosen: Which one?

[00:31:54] Speaker X: [laughs]

[00:31:54] David French: Right, exactly. And so there's ... I, I, I keep going back to this point that a lot of this is reacting to a, a multi decade spiral of dysfunction. And I don't know what's easier honestly, amending the Constitution to address the multi decade spiral of dysfunction, or ending the multi decade spiral of dysfunction through through congressional will and through congressional leadership. I'm not incredibly optimistic on either count.

[00:32:26] Jeffery Rosen: Akhil, you mentioned Catherine's proposal of ranked choice voting or top five voting. That could be enacted at the state and local level, without the need for constitutional amendment. Maybe identify some other reforms like that wouldn't require an amendment-

[00:32:41] Akhil Reed Amar: [inaudible 00:34:58]

[00:32:42] Jeffery Rosen: ... including the National Popular Vote Compact that you described, and also, what you think the path forward on constitutional change should be.

[00:32:47] Akhil Reed Amar: So filibuster reform can be done immediately. Truthfully, I'm actually [inaudible 00:35:10] one of the architects, the fathers of the nuclear option. All you need is two votes by simple majorities of the Senate and you can, you can change anything. You can modify anything. That's what Reed did for lower federal courts. That's what M- McConnell did for, for Gorsuch. So we already have the, the possibility that without an amendment, don't need a statute, [inaudible 00:35:35] House doesn't need to be involved or presidential presentment. So, so two proposals that I took seriously in this chapter ... It's a book called America's Unwritten Constitution.

[00:33:27] Akhil Reed Amar: And I care a lot about the written Constitution. But there's an unwritten one as well. We have both. The Brits only have one. We've got two, and the second one has all sorts of things, separation of powers, checks and balances, federalism, rule of law. You won't find those in the written Constitution. Unenumerated rights, two party system, all sorts of [inaudible 00:36:07] including rules about you know, unwritten rules about how you construe the written rules, which was mentioned, some state constitutions actually have that in their constitution. We don't.

[00:33:56] Akhil Reed Amar: But the last chapter, America's Unwritten Constitution, was America's unfinished constitution, the constitution of the future, 2121, 2222, so it's just imagining what it, it might look like. And I talked about Orrin Hatch's proposal. I, I talked about two more. One is the possibility of a direct election of the president. And again, here's why, 'cause states have governors, 50 of them, and none of them have a mini Electoral College. You see? And it adds to equality, because it's one person, one vote.

[00:34:32] Akhil Reed Amar: Now back when I wrote it, I thought two parties might both agree. I don't think that's true today, because one party thinks that the Electoral College favors it. That wasn't true back in 2000. We had Governor Jeb Bush here. When his brother was running for president the first time around, it was easily imaginable that George W Bush could win the

popular vote and lose the Electoral College. That's what a lot of people thought might happen, including, you know, his own team.

[00:35:00] Akhil Reed Amar: So, but now there's a perception that the Electoral College favors the republicans by about three points or so. Biden say wins by four nationally, but only wins in Wisconsin, which is the pivot state, by one. But that could change if Texas changes, if Florida changes. So you won't get direct election of the president unless both parties actually ... Frankly th- there's gonna have to probably be an election in which the Electoral College favors the democrat, and then both parties having been bit in the butt will say, "Hmm, that's you know ..."

[00:35:33] Akhil Reed Amar: So that's one possibility. Here's the second one. I'm embarrassed I didn't mention it before. ERA, speaking of Birch Bayh, who proposed this as well. States do it. It adds to equality. I hope I ... My party I think is all in. I would hope a lot of, you know, republicans of good faith could, could see their way to support this.

[00:35:56] Akhil Reed Amar: Gandhi was once asked ... And you say, "Well what, what does this add?" I'm not sure it does add anything. 14 plus 19 already equals ERA, 14th Amendment, 19th Amendment. But let's do it once more with feeling. Constitution is about symbols. You know? And nothing is more important as a symbol. Like, "We hold the truths to be self evident, that all men are created equal."

[00:36:16] Akhil Reed Amar: Symbols are really important. Lincoln understand that. Founders understood that, whether it's Jefferson or in my view, Franklin and Adams. So Gandhi was once asked what he thought of Western civilization. And he paused for a moment. He said, "I think it would be a good idea."

[00:36:33] Speaker X: [laughs]

[00:36:33] Akhil Reed Amar: So that's my view of ERA as well. So but there's a framework. States do it, adds to equality, I think both parties would be in favor of it. Maybe at some point, direct election. Filibuster reform I think we do w- without an amendment.

[00:36:47] Speaker X: [inaudible 00:39:12]

[00:36:49] Jeffery Rosen: Ramesh, last word to you.

[00:36:51] Ramesh Ponnuru: I think that one reason we didn't get the ERA was the i- was the judges were doing a lot of the ERA without needing the ERA. And I also think that, that the growth of judicial power over the last 60 years let's say, didn't just reduce the demand for amendments, but also increased opposition to amendments, because people became more worried about what judges could do with with new amendment language. And that certainly was a big part of the opposition to the ERA.

[00:37:22] Ramesh Ponnuru: The kinds of things that have doomed other amendments in the past, I think the kinds of amendments we're talking about here would be immune to some of those problems. And so I think that they're, they're more promising. As for the ranked choice voting thing, I think that is something. I'm more open to it than a lot of conservatives. A lot of conservatives, particularly looking at New York City and looking at Alaska, I think for reasons that are not fundamental to the idea, have, have turned pretty harshly against it.

[00:37:49] Ramesh Ponnuru: I think these are ideas that need to be refined further and, and put into practice more places. So there I think the laboratories of democracy make makes perfect sense. And I do like some of the ways that [inaudible 00:40:33] they aim to change the incentives of politicians. So a very, very slim doors towards some political reform.

[00:38:08] Ramesh Ponnuru: I will say, just one last thing, which is that the filibuster I think actually is going to go. I would be very surprised if in 10 or 15 years we still have the Senate filibuster, because it just seems like the sort of thing, you only need to have that vote once. And once you've gotten rid of it, it- it's never coming back.

[00:38:27] Jeffery Rosen: Ladies and gentlemen, please join me in thanking our panelists.

[00:38:36] Jeffery Rosen: Today's episode was produced by y Lana Ulrich, Bill Pollock, and Sam Desai. Please recommend the show to friends, colleagues, or anyone who's eager for a weekly dose of civil dialogue and constitutional debate. And always remember that the National Constitution Center is a private nonprofit. We rely on the generosity, the passion, the engagement, the devotion to civil dialogue of folks like you, who are inspired by our nonpartisan mission of constitutional education and debate. It's so meaningful when you give donations of any amount, \$5 or \$10 or more, so please do that. Support the mission by becoming a member at constitutioncenter.org/membership or give a donation of any amount to support the work, including the podcast at constitutioncenter.org/donate.

[00:39:20] Jeffery Rosen: On behalf of the National Constitution Center, I'm Jeffrey Rosen.