

What If We Wrote the Constitution Today?

Proposals from libertarian, conservative, and progressive scholars displayed a few striking differences—but also some profound similarities.

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As the world’s oldest written constitution, the U.S. Constitution has been remarkably resilient. For more than 230 years, it has provided the foundation for America’s economic prosperity, political stability, and democratic debate. But during the past two centuries, changes in politics, technology, and values have led many to assume that if Americans set out to write a new Constitution today, the document would be quite different. To find out what a new Constitution might look like, my colleagues and I at the National Constitution Center recently asked three teams of scholars—conservative, progressive, and libertarian—to draft new Constitutions for the United States of America in 2020 from scratch.

The results surprised us. As expected, each of the three teams highlight different values: The team of conservatives emphasizes Madisonian deliberation; the progressives, democracy and equality; and the libertarians, unsurprisingly, liberty. But when the groups delivered their Constitutions—which are published here—all three proposed to reform the current Constitution rather than abolish it.

Even more unexpectedly, they converge in several of their proposed reforms, focusing on structural limitations on executive power rather than on creating new rights. All three teams agree on the need to limit presidential power, explicitly allow presidential impeachments for non-criminal behavior, and strengthen Congress’s oversight powers of the president. And, more specifically, the progressive and conservative teams converge on the need to elect the president by a national popular vote (the libertarians keep the Electoral College); to resurrect Congress’s ability to veto executive actions by majority vote; and to adopt 18-year term limits for Supreme Court justices. The unexpected areas of agreement suggest that, underneath the country’s current political polarization, there may be deep, unappreciated consensus about constitutional principles and needed reforms.

The conservative team, composed of Robert P. George of Princeton, Michael W. McConnell of Stanford, Colleen A. Sheehan of Arizona State, and Ilan Wurman of Arizona State, focuses on structural reforms designed to improve the country’s political discourse. Many of their proposed changes, they write, “are designed to enable elected officials to break free of the grip of faction and once again to deliberate, with the aim of listening attentively to, as well as educating, public opinion, and promoting justice and the public good.” The changes they describe as most “radical” are reducing the size of the Senate to 50 members to encourage genuine deliberation, increasing senatorial terms to nine years and the presidential term to six years—both with no possibility of reelection—and (in a proposal the libertarian team also put forward) reintroducing

senatorial appointment by state legislatures. In their view, these reforms would encourage elected officials to vote their conscience and focus on the common good rather than partisan interests.

The progressive team, composed of Caroline Frederickson of Georgetown University, Jamal Greene of Columbia, and Melissa Murray of New York University, also finds much to admire and preserve in the original constitutional structure. “We wanted to make clear our own view that the Constitution, as drafted in 1787, is not completely incompatible with progressive constitutionalism,” they write. “Indeed, in our view, the original Constitution establishes a structure of divided government that is a necessary precondition for a constitutional democracy with robust protections for individual rights.” The goal, in their proposed changes, is to secure the blessings of liberty and equality promised by the Declaration of Independence, by doing more to strengthen the “structural protections for democratic government.” Rather than abolishing the Senate, the progressive team would make it more representative, with one senator for each state and “one additional senator [for] every one-hundredth of the national population.” For example, California would have 13 senators, Texas would have seven, Florida nine, and 22 states (including Washington, D.C.) one. Senators would serve for one six-year term. The progressives would also decrease fundraising pressure on representatives by extending the House term from two to four years, and by making clear that the government has the power to set both spending and contribution limits in political campaigns. Their proposed Progressive Constitution would also codify judicial and legislative protections for reproductive rights and against discrimination based on gender, sexual orientation, gender identity, pregnancy, and childbirth.

The authors of the proposed Libertarian Constitution—Ilya Shapiro of the Cato Institute, Timothy Sandefur of the Goldwater Institute, and Christina Mulligan of Brooklyn Law School—emphasize their intent to clarify the original Constitution, not replace it. “At the outset,” they write, “we joked that all we needed to do was to add ‘and we mean it’ at the end of every clause.” Their particular focus is resurrecting limitations on the commerce clause. Since the New Deal era, the Supreme Court has interpreted the commerce clause to grant Congress essentially unlimited power to regulate anything that might have a tangential effect on interstate commerce. The libertarians would allow regulation only of actual interstate commerce, not of noncommercial activity that takes place within one state. They would also limit federal power in other ways, requiring all federal regulations to be related to powers enumerated in the Constitution and prohibiting the federal government from using its powers of the purse to influence state policies. Like the conservative team, the libertarians would return the selection of senators to the states, in the hope of promoting federalism. The libertarians also include a series of other restrictions on state and federal power to protect economic liberty, such as limiting the states from passing rent-control or price-control laws, prohibiting the states and the federal government from subsidizing corporations, providing for a rescission of national laws by a two-thirds vote of the states, and requiring a balanced federal budget.

Although all three Constitutions maintain a balance between state and federal power, the main differences among them concern how they strike that balance, with the libertarians imposing the greatest restrictions on federal power and the progressives the least. (In this respect, their debates resemble those of the original Framers in Philadelphia.) But, strikingly, all three Constitutions embrace structural reforms to ensure that the balance among presidential, congressional, and judicial power is closer to what the original Constitution envisioned, with all three branches

checking each other, rather than an imperial president and judiciary checking a passive and polarized Congress.

Most notably, all three Constitutions seek significant limits on executive power. The three teams all clarify that the president's power to execute the law is not a freestanding power to make laws: The conservatives emphasize that executive orders don't have legal effect unless authorized by Congress; the libertarians underscore "that the power of the executive branch constitutes the power to 'execute the laws' and not some broader, freestanding power"; and the progressives propose that "Congress's oversight authority over the executive branch must be made more explicit to ensure it can effectively police wrongdoing in program administration or otherwise." To increase Congress's oversight powers over the president, both the Conservative and Progressive Constitutions would resurrect the so-called legislative veto, which the Supreme Court struck down in 1982, allowing Congress to repudiate presidential regulations and executive orders by majority vote. For both teams, the resurrection of the legislative veto would allow Congress to take the lead in lawmaking, as the Framers intended.

Along the same lines, all three Constitutions would relax the standards for impeachment, making explicit that the president can be impeached for non-criminal offenses. At the same time, both the Conservative and Progressive Constitutions would require a three-fifths vote in the House, to reduce the risk of partisan impeachments. The conservatives also note that "it is generally improper for the President personally to direct prosecutions" and that "the President may not pardon himself or the Vice President." The progressives include other reforms, such as requiring a two-thirds vote in the Senate for the confirmation of the attorney general, "to ensure that the law enforcement power of the federal government is not abused for partisan gain."

On the election of the president, the conservatives and progressives once again converge on nearly the same language, with both teams providing that the president shall "be elected by a national popular vote conducted using a ranked-choice voting method." While agreeing that the Electoral College system for choosing among candidates is not democratic enough, the conservatives believe that the system for selecting candidates undervalues experience and character; therefore, they would abandon the presidential primary system, allowing presidential candidates to be selected by elected representatives at the state level. Resurrecting a proposal that was nearly adopted at the original Constitutional Convention, the conservatives would also limit presidents to a single six-year term, to encourage them to focus not on reelection but on the common good.

Finally, there is the Supreme Court. Once again, the conservative and progressive teams agree, this time on the need for 18-year term limits for justices. And the libertarians leave the question of Court terms open (their team's leader, Ilya Shapiro, recently endorsed limits in his new book, *Supreme Disorder*), but they decide not to propose them, in the spirit of avoiding what they call purely "good government" reforms, without clear libertarian salience. This convergence suggests that if President-elect Joe Biden does, in fact, convene a commission to examine judicial reform, term limits for justices will be a proposal that has the potential for broad cross-partisan support.

It is on the subject of rights, rather than constitutional structures, that disagreements among the three teams really emerged. All three teams maintain and even strengthen most of the existing provisions of the Bill of Rights (the libertarians and progressives even update the Fourth Amendment's prohibition on unreasonable searches and seizures for a digital age). However,

each Constitution also adds provisions about rights that reflect the teams' unique concerns. For example, the progressives try to increase democracy and reduce judicial power by providing that all rights are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." By contrast, the libertarians create the opposite presumption for courts to apply in evaluating claims about rights, emphasizing that whenever government infringes on the presumption of liberty, "courts shall determine whether that government has constitutional authority for its action and a genuine justification for its restriction or regulation."

The three teams also strongly disagree about how to strike the balance between liberty and regulation when it comes to the First Amendment rights of speech and religion. All teams would include explicit protections for freedom of conscience, but they define it in different ways. The Conservative Constitution declares, "All persons have the inalienable right to the free exercise of religion in accordance with conscience," but, like the conservative justices on the Supreme Court, makes clear that the free exercise of religion cannot be impeded "except where necessary to secure public peace and order or comparably compelling public ends." The Libertarian Constitution emphasizes that "the freedoms of speech and conscience include the freedom to make contributions to political campaigns or candidates for public office." The Progressive Constitution, by contrast, provides that "everyone shall have the right to freedom of thought, conscience, and religion" but emphasizes that "Congress and the legislature of any State shall ... have the power to establish by law regulations of the financing of campaigns for elected office, provided that such regulations are reasonably aimed at ensuring that all citizens are able to participate in elections meaningfully and on equal terms." In the three Constitutions, as on the Court today, the progressives diverge from the conservatives and libertarians on campaign-finance restrictions and on religious exemptions from generally applicable laws.

Another divergence is on the topic of gun rights. Unsurprisingly, the conservative team proposes a Constitution that clearly recognizes an individual right to keep and bear arms "ordinarily used for self-defense or recreational purposes," but it does allow for the federal and state governments to pass "reasonable regulations on the bearing of arms, and the keeping of arms by persons determined, with due process, to be dangerous to themselves or others." The progressive proposal, by contrast, does not explicitly recognize an individual's right to bear arms for the purpose of self-defense, but emphasizes, like the conservatives, that gun ownership is "subject to reasonable regulation." The libertarian version alone contains no provisions for the regulation of gun rights, stating unequivocally, "The right of the people to keep and bear arms shall not be infringed."

I don't want to understate the philosophical and practical disagreements among the three Constitutions: The libertarians' emphasis on liberty leads to a much more constricted version of federal power to regulate the economy, for example, than either the progressives or the conservatives, who want to restore Congress's primary role in making laws and checking the president. But the areas of agreement—reining in presidential power and reducing partisanship in Congress—are far more surprising than the areas of disagreement.

The most striking similarity is that all three teams choose to reform the Constitution rather than replace it. And all three focus their reform efforts on structural and institutional protections for liberty and equality rather than creating a laundry list of new rights. As Shapiro put it in a recent

interview about the project, “Why start from scratch when we can build on James Madison’s genius?”