



Thoughts on the National Constitution Center’s “Constitution Drafting Project”

The NCC put together teams of conservatives, progressives, and libertarians to propose their own rewrites of the Constitution. All three teams came up with interesting ideas - and with some notable areas of agreement.

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December 9, 2020

The National Constitution Center recently conducted a fascinating exercise in which it named three groups to produce their own revised versions of the Constitution: a conservative team, a libertarian team, and a progressive one. Each team included prominent scholars and legal commentators affiliated with their respective camps. Here is the list of participants:

Team libertarian was led by Ilya Shapiro of the Cato Institute and included Timothy Sandefur of the Goldwater Institute and Christina Mulligan of Brooklyn Law School. Team progressive was led by Caroline Fredrickson of Georgetown Law School and included Jamal Greene of Columbia Law School and Melissa Murray of New York University School of Law. Team conservative was led by Ilan Wurman of Arizona State University College of Law and included Robert P. George of Princeton University, Michael McConnell of Stanford Law School, and Colleen A. Sheehan of Arizona State University.

It is perhaps worth noting that Caroline Frederickson is the former president of the American Constitution Society (liberal counterpart to the Federalist Society), and that libertarian team leader Ilya Shapiro is a different person from me.

Each team produced a rewritten version of the Constitution, and an introduction explaining the changes they made from the status quo. The Progressive Constitution and Introduction are available here, the conservative versions are here, and the libertarian ones here.

There are important—and often unsurprising—differences between the three teams. But there are also notable points of convergence. NCC President Jeffrey Rosen summarizes some of them in an Atlantic article on the project:

The results surprised us. As expected, each of the three teams highlights 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.

As Rosen points out, the libertarian team may well also agree on 18-year term limits for Supreme Court justices, which they omitted from their draft constitution only for tactical reasons (because they wanted to focus on specifically libertarian proposals, as opposed to generic "good government" measures). Elsewhere, team leader Ilya Shapiro has endorsed the idea, and it enjoys considerable support among other libertarian legal scholars and commentators (myself included).

In addition to the points of convergence highlighted by Rosen, it's worth noting that all three teams would abolish the Eleventh Amendment, which has been interpreted by the Supreme Court as giving states broad "sovereign immunity" against a variety of constitutional and statutory lawsuits brought by private citizens. The conservative constitution puts it best, I think, in proposing to replace sovereign immunity with an explicit statement that "Neither the United States nor any State shall enjoy immunity from suit in the courts of the United States."

Yet another point of agreement is that all three teams would abolish the requirement that the president must be a "natural born" citizen, thereby allowing immigrants to hold the nation's highest political office. This has long been my own view, as well.

It is too early to say that these areas of agreement can result in successful constitutional amendments. The obstacles to enacting any significant amendment are high, and the three teams' views are not fully representative of their respective political camps. Nonetheless, the points of convergence between the three teams are at least plausible candidates for amendment initiatives which deserve serious consideration.

All three proposed drafts include useful ideas aside from those on which there is convergence. The conservative and libertarian constitutions both contain valuable (though different) constraints on federal spending. The conservative version also forestall court-packing by fixing the number of justices at nine, and proposes a ranked-choice voting method for the presidency that might well be an improvement over the status quo.

The progressive constitution includes thoughtful proposals for forestall gerrymandering by requiring legislative districts to be drawn by independent commissions, banning discrimination on the basis of sex and sexual orientation, and protecting secular exercises of conscience on the same basis as free exercise of religion. Interestingly, the progressive drafters chose not to follow the example of left-liberal constitutional drafters in other countries by including a variety of "positive" welfare rights in their draft (a decision I commend, though some of their ideological allies might not agree).

Perhaps not surprisingly, I am most in agreement with the libertarian draft constitution. Indeed, I agree with that team's work even more than I expected to, based on what I previously knew of their views.

I particularly commend their "Ellis Island Clause" (which would sweep away most federal immigration restrictions, thereby returning us to something like the original meaning of the current Constitution, as understood by Madison and others) their expansion and clarification of

the Fifth Amendment's protections for property rights, and the modification of the Thirteenth Amendment to include an explicit ban on the military draft and other forms of mandatory service imposed by the state. I defended the latter idea in my 2018 testimony before the National Commission on Military, National, and Public Service.

I am disappointed that none of the three teams—not even the libertarians—thought to limit Congress' nearly unconstrained power to restrict international trade, the harm of which has been compounded by ill-advised legislation giving the president the power to impose tariffs on almost any foreign-produced goods he might wish to target. This issue is high on my list of "Things I Hate About the Constitution"—areas where even the most correct possible interpretation of the present Constitution leads to bad outcomes. The libertarian draft does include useful provisions reigning in the Supreme Court's expansive interpretations of Congress' power to regulate interstate commerce, but does not address the power to regulate international commerce, which is subject to many of the same abuses.

Obviously, I also differ with the teams on various issues, particularly the conservatives and progressives. I oppose the progressives' proposals to exempt a wide swathe of campaign finance restrictions from the First Amendment, and their plan to give Congress a new power to "legislate for the general welfare, insofar as such action is necessary to address problems that are national in scope, and that are unlikely to be addressed adequately by state or local governments." I also find troubling their proposal (inspired by the Canadian Charter of Rights and Freedoms, I think), to create a general exemption from all constitutional rights for legislation "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." I fear this provision will exacerbate the already problematic tendency of courts and legislatures to carve out exemptions from constitutional rights, especially when they don't especially like the right in question, when the legislation at issue conforms to their ideological proclivities or some combination of both.

When it comes to the conservative constitution, I am not convinced by their elaborate proposal to restructure the Senate, or by their endorsement of Alexander Hamilton's approach to the spending power over James Madison's. I think Madison's more limited view (largely endorsed by the libertarian team), is preferable.

While I have few disagreements with the changes made by the libertarian drafters, I do think they were wrong to dispense with the Seventeenth Amendment, which made the Senate directly elected, as opposed to chosen by state legislatures. The team is probably right to think that eliminating the Seventeenth Amendment probably wouldn't change much, as most state legislatures would essentially delegate senatorial selection to popular vote anyway. That had already happened in all but a few states before the enactment of the Seventeenth Amendment. But if little would change, and that little would not be an improvement, I see no reason to change the current rule in the first place. I discussed this issue in greater detail in a 2011 debate with co-blogger Todd Zywicki.

Much more can be said about all three teams' proposals. What I cover above only scratches the surface of the many interesting ideas and issues they raise.

I doubt that any these proposals will actually be enacted any time soon. Even the ideas the three teams agree on would face an uphill struggle in the constitutional amendment process. Still, it is clear that at least some aspects of the Constitution can use reform. The National Constitution

Center and its three teams have made a valuable contribution to the discussion of these issues. I hope others can build on it!

UPDATE: I have updated this post to include the point that all three teams would abolish the requirement that the president must be a "natural born" citizen. I defended that position myself in various writings, most recently a *USA Today* op ed coauthored with Harvard law Professor Randall Kennedy.