



Jeffrey Rosen: [00:00:00] I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We The People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. As the election approaches, the U.S. Supreme Court issued two recent rulings on state election laws. Uh, on Wednesday, the court ruled five to three to stop counties in Alabama from offering curbside voting. And earlier this week the court upheld Pennsylvania's extension of its now invalid deadline by a split, uh, four to four vote. On this week's episode, we'll explore the constitutional basis behind those two ruling a- other key election rulings, uh, so that we understand the constitutional parameters that the ra- Supreme Court is using to evaluate these election c- uh, rulings. I'm honored to be joined by two of America's leading experts on, uh, voting rights, who have been closely following the litigation.

Emily Bazelon is a staff writer at the New York Times Magazine and is the Truman Capote fellow for creative writing in law at Yale Law School. She's also the cohost of Slate's podcast, Political Gabfest and the author of the award winning book, Charged. Over the summer, she joined me for a great constitutional class on elections in America, which listeners can check out at the link in this episode's resources page. Um, Emily, it's wonderful to have you back on the show.

Emily Bazelon: [00:01:32] Thanks so much. I'm really glad to be here.

Jeffrey Rosen: [00:01:35] And Brad Smith is chairman and founder of the Institute for Free Speech and the Josiah H. Lockmore II/Shirley M. Nault designated professor of law at Capital University Law School. He's also a visiting fellow in the James Madison program at Princeton University. He served on the Federal Election Commission from 2000 to 2005. And he's the author of several explainers for the National Constitution Center's Interactive Constitution, including the 15th Amendment, which listeners should check out as well. Brad, it's wonderful to have you back on the show.

Brad Smith: [00:02:07] Thanks, Jeff. It's a pleasure. Thanks for having me.

Jeffrey Rosen: [00:02:09] Let's begin with the Alabama case, which the Supreme Court ruled just yesterday, uh, the court blocked a trial court ruling that would have allowed but not required counties in Alabama to offer curbside voting. The vote was five to three, with the court's more conservative, uh, members in the majority. There was an unsigned order, uh, but a written dissent by Justice Sonia Sotomayor. Brad, um, can we begin with you? Um, what are the constitutional standards that the court applies in reviewing these cases? What are the relevant cases, and what do you imagine, uh, that the majority was concluding when it decided to block the trial court's ruling?

Brad Smith: [00:02:51] Let's start, I mean there are three basic principles. One is obviously, not maybe that sh- doesn't need to be stated, but maybe that's the reason we should state it, which is voting is considered a fundamental right that the American people have. So burdens on voting have to be justified. Historically, in looking at burdens on voting, the court uses a test developed in a case called *Anderson v. Celebrezze*. And, and basically the test comes down to what is the burden on the voter versus what is the state's interest in having



its law in place? Uh, it's a very, kinda loose balancing test, huh, test is almost the wrong word. It's more sort of just the way that a court should look at the the case.

The other principal that comes into play, here, is from a case called *Purcell v. Gonzales*, a 2006 case, in which the, uh, Supreme Court noted that, "Courts should be very hesitant to change election rules, uh, in near proximity to an election." That that tends to cause chaos, uh, distrust in the process, and so on. So courts should be very reluctant to step in in that kind of scenario. Those, I think, are the three, you know, main legal principles. I think there is a fourth issue lurking in the background, uh, for the courts these days, which is a, an increasing concern among many in the courts about political accountability and democratic legitimacy, that it maybe is part and parcel the Purcell Principle. But for the most part, states have the authority to set their own election rules, and I think the court is becoming increasingly concerned about courts being too quick to step in rather than let the political processes, the legislatures, and, and governors, and so on, uh, play a role in deciding what the policies should be on elections.

Jeffrey Rosen: [00:04:30] Many thanks for setting out those standards. Emily, in her dissenting opinion in the Alabama case, which was joined by Justices Kagan and Breyer, Justice Sotomayor, uh, said the Purcell Principle shouldn't apply here. She say, she said the district court's compromise, uh, allowing, uh, curbside voting and not requiring it, uh, does not risk creating voter confusion and consequent incentive to remain away from the polls. The injunction lifts burdensome requirements rather than imposing them and permits county officials to help educate voters about whether curbside voting is available. Tell us more about Justice Sotomayor's dissenting opinion, why she thought Purcell didn't apply, and why she thought the majority was wrong on the law.

Emily Bazelon: [00:05:10] Well, I think part of what's going on here is a question that Justice Sotomayor and other judges in other cases have asked about whether expanding voting rights soon before an election is actually causing chaos. So if all you're do is adding to the ways in which people can vote, is that really going to be a problem for the electorate? And what you have in this Alabama case, is the state secretary of state banning curbside voting. Then a district court in joining that order, saying, "We're gonna just freeze that." And then counties saying, "You know what? We would like to ord- to offer curbside voting. And we're especially concerned about our disabled voters." And then plaintiffs, um, representing disabled people suing under the Americans with Disabilities Act, saying that this curbside voting is necessary as a reasonable accommodation for people with disabilities so they can vote.

And of course, uh, with all this as the backdrop of, uh, the Coronavirus and the fears that people have about going into polling places. And given all of those factors, I think what Justice Sotomayor is saying is that the loose balancing test that Brad was laying out weighs in favor of allowing more voting, weight sin favor of the plaintiff's here, because all you're doing in some counties is giving people one more option about how they vote. And that should not, um, really be a problem for the Purcell Principle.



Um, and she, you know, quotes from, uh, a disabled voter, saying at the end of her opinion like, "Look, this is a person who, um, is vulnerable." Um, and calling on this man, his name is Howard Porter, Jr. He's a Black man in his 70s. He has asthma, he has Parkinson's disease. And he told the district court, "So many of my ancestors even died to vote. And while I don't mind dying to vote, I think we're past that. We should be past that at this point." And so I think she's invoking this idea that, you know, the right to vote, like Brad said, is really fundamental and urgent. And states and counties should be making it easier for people.

Jeffrey Rosen: [00:07:11] Many thanks for that. And for helping us desegregate, uh, the question of whose action is being stayed. Um, Brad, can we dig into Purcell a bit? It's a remarkably brief procuring opinion from 2006, so listeners should check it out as well. It's, uh, in other words, it's unsigned. And it involved, uh, the State of Arizona, which had just passed, uh, Proposition 200, which was a voter ID law designed to combat voter fraud by requiring voters to present proof of citizenship when they register to vote, and present identification when they vote on election day.

And as you suggested, the, the, the central, uh, concern was, uh, as the court said, "In view of the impending election, a necessity for clear guidance to the State of Arizona." And the fact that there wasn't time to resolve the factual disputes, the U.S. Supreme Court, um, decided to allow the Voter ID Law to go into effect. Justice Stevens filed a, a brief concurring opinion. He said, "I agree here. There are important factual disputes to resolve. And I think that we can do that, allow the election to proceed and figure out the factual disputes later."

Why is this Purcell case bearing so much weight? It was if the centerpiece of the U.S. Supreme Court's decision to, uh, intervene in the Wisconsin case, uh, last spring. How, how significant would you say it is constitutionally? Is it well grounded? And what, what is the basis for the disagreement between liberal and conservative justices about how to apply it, uh, now?

Brad Smith: [00:08:37] Well, I'm, I'm not sure that there's that much disagreement. I mean, obviously, as Emily pointed out, that there is, in, in yesterday's decision, *People First of Alabama versus Merrill*. But for the most part, both liberal and conservative justices have been pretty quick to invoke the the Purcell Principle. And in fact lower court justices have as well. Uh, uh, recently the, uh, fourth circuit upheld the North Carolina law that we may talk about later, relying on the Purcell Principle in a way that, uh, uh, would have, uh, I guess we could say, expanded the, the voting rights. So it's, you know, it works both ways, and I think there's, is pretty broad agreement on it.

Um, but I do think that the, the principle is important in ways that are not immediately obvious, and perhaps a bit broader in the court. And it goes back to this idea I said that, earlier, I, I think what we see a- as as sort of a submessage in the Supreme Court and in a number of the lower court opinions, is this notion that it's not only that the court shouldn't interfere in the, at the last minute in challenges, it's that there ought to be, and maybe this is more *Anderson v. Celebrezze*, but I think it goes in with Purcell, that there ought to be a strong presumption that the political branches are the ones that ought to be making these decisions.



So we look at something like People First versus Merrill, the Alabama case last night. And, uh, we don't know what the court was thinking. They didn't write an opinion for the majority, they just give a quick order. But, uh, we have this quote that was mentioned by Emily from this fellow, Howard Porter. But it, Howard Porter can vote by absentee ballot. It's not that hard to vote by absentee ballot. He was plenty of time, still, to request one. And I think there's part of the court that's looking and saying, "Look. You know, not everything that is an inconvenience is a disenfranchisement." And I think that there is a sense a bit on the court that the, that the federal courts need to stop, you know, being too quick to pull the trigger rather than, than, let the democratic branches, uh, play out, and, and engage in, in, in a balancing of what they need to do.

The Alabama case by the way, I mean the State's view was that curbside voting infringes on the secrecy of the vote because somebody's actually gonna take your ballot to you, you're going to fill it out, and then they're gonna take it back, and they can see you filling it out, and so on. Uh, and, and that's a potential problem. And when we talk about, you know, would instill chaos or not, well, yeah, uh, uh, a- I mean, at least the argument is there, which is under the lower court's ruling here, some counties in Alabama might offer drive by voting, some counties might not.

Voters, you know, get messages from all kinds of things. They hear from friends who live in a different county. Maybe people'd be in ... not to know, "What's the rule in my county?" They think they can drive up to vote, and they try to do that on election day and they can't do it, and now it's too late for them to request an absentee ballot. So, so there is a certain level of, of chaos that goes on. And even here, you know, the rule was changed, you know, within about a, a few weeks of the election. And, and so, I, I, I think the Supreme Court is looking at Purcell not just as a very narrow case about not stepping at the last minute, but as a fairly broad case about not stepping in generally unless we really have a good deal of time to have a full case, and, and the courts should be very cautious about that.

Jeffrey Rosen: [00:11:49] Emily, Brad suggested that, uh, the Purcell Principle is invoked by lower court judges, uh, of both, uh, s- stripes. And that, uh, it's being implied in a nonpartisan way, uh, and generally it favors deference to political actors to make the final voting decisions. On the other hand, we do have at least three examples where the U.S. Supreme Court did seem to divide along liberal/conservative lines, the Wisconsin case in the spring, the Alabama case, and the Pennsylvania case, we'll talk about it in a moment. Do you agree with Brad that Purcell is being implied in a nonpartisan way? And, and of course Justice Sotomayor had a response to that idea that, uh, the voter could have voted by using absentee ballots. Tell, tell us about that response as well.

Emily Bazelon: [00:12:32] I mean, I am a little more concerned about the partisan splits, I think, in these cases. What I do agree with Brad about is that when you change the rules close to an election, and I guess this is, I agree with the Purcell Principle too, um, I think you establish expectations that we don't know if they're gonna be fulfilled. So in the North Carolina, and Pennsylvania, and Wisconsin cases, and those matter nationally because those are swing states, one of the big fights going on is if your ballot is postmarked on November



3rd, election day, how much time does, um, does the election board have or do you have to get your ballot back through the mail?

So these are ca- cases that are about extending the deadline to November 6th in Pennsylvania, I think it's, um, November 12th in North Carolina, and November 9th in Wisconsin, if I'm right. So if voters think they have those extra days and they can put their ballot in the mailbox on November 3rd and as long as it's postmarked, it'll be fine. And then it turns out that that changes at the last minute, even after the election, which is still possible in the Pennsylvania case, 'cause the Supreme Court did not dismiss that case. Then what?

Then you're really talking about disenfranchisement. You're talking about people voting with the expectation their ballots will be counted and then a post-hoc ruling changing that. And something like that basically, a- almost or did happen in Wisconsin last spring, where you had people receive ballots that told them they could return them, um, with more time, or to, you know, drop off boxes, and then it turned out that their, those ballots weren't counted or if they received the ballots and they didn't have enough time to get them back from the mail, then it turned out that they were out of luck.

And that seems like the most important thing to prevent. It seems like what Purcell really should be the heart of, um, what that case is about. And I do worry with all this flurry of litigation, that we're, um, courting that kind of disenfranchisement with some of these rulings partly because we don't know what the Supreme Court is gonna do. Um, and so I think that is kind of lurking, here, as an overall concern in this litigation.

Jeffrey Rosen: [00:14:49] Brad, Emily mentioned the Pennsylvania case. Uh, that, that was the case where the Supreme Court, uh, let stand a ruling by Pennsylvania's highest court that allowed election officials to count mail ballots received up to to three days after election day. Uh, the Pennsylvania Supreme Court had ruled that that three day extension was required by the pandemic and delays in the mail service, and so it said that the ballots, which were clearly mailed on or before election day, had to be counted and those with missing or illegible postmarks counted, were counted, too, unless a preponderance of the evidence demonstrated it was mailed after election day. That was a four to four split where Chief Justice Roberts joined the more liberal justices, and that had the effect of allowing the lower court opinion to go into effect. Chief Justice Roberts, there, seemed to be concerned about the appearance of a conservative/liberal split. Do you think that's a fair inference? And try to reconstruct what the conservative justices were thinking when they would have voted to stay the lower court decision.

Brad Smith: [00:15:49] Well, I, I do think we know, not just from cases in the election arena, but elsewhere, that, that Justice Roberts has a concern about the appearances of the court's legitimacy. One thing I think is unfortunate, actually, is, is that I think commentators are sometimes a little too quick just to focus on who appointed who, and so on, that we find in a number of these cases, um, uh, judges not ruling on that basis. For example, uh, in Pennsylvania, one of the suits, not, not the Supreme Court suit you've ref- referenced but another suit, Trump v. Boockvar, uh, held that, uh, had to do with dropboxes, uh, being



allowed in the states. Uh, the Trump campaign challenged a State order allowing multiple dropboxes as one that invited fraud and would therefore invite dilution and so on.

And that claim was rejected by not just a republican appointed judge, but by a Trump appointed judge, uh, Judge Ranjan. Uh, in the North Carolina case that I referenced earlier, this is the case called *Wise v. Circosta*, and again, we may get into the details of that. For now it's just enough to know that the, uh, fourth circuit, en banc, declined to review the order, uh, the, of the panel of the court of appeals, uh, thus leaving in place the new, uh, uh, court order, the lower court ruling. And, uh, the, uh, tr- all three Trump judges, uh, appointed to the fourth circuit voted with the majority on that, in part on reliance of the Purcell Principle.

So i- it is true. There's, there, there are, tend to be partisan splits. But I don't think it's really fair to line those up as partisan. I think part of our job is to reassure people that, you know it's fairly predictable because Republicans and Democrats tend to have different judicial philosophies. I don't think it's nearly so simple seeing they're just ruling sorta for their party or for their side in these cases. Um, so with, with that, uh, little caveat, in, in getting into to, *Scarnati versus Boockvar*, that's just the case the Supreme Court split on [inaudible 00:17:41] out of four to four, one of the arguments that comes up in the Purcell principle is what exactly is the baseline?

For example, is the baseline, uh, what existed prior to any court involvement? Or, is the baseline what now exists after a lower court has made some other ruling should the higher court be sensitive about stepping in and, and possibly changing that? Uh, you know, and, and of course because cases take awhile to work through the courts, obviously, at each stage of appeal we get closer to the election. And you know, the, the news people are reading the papers, and it flips block back, back and forth, "Now you can do this. Now you can't. Now you can." Uh, so that's one of the battles that, that goes on in the court, is, is setting just what even is the baseline?

I, I think that the position, I think, I'm kinda speculating, here, of the, uh, the five-three majority in Alabama yesterday, uh, i- i- is something along the lines of the baseline really ought to be what the legislature or other, you know, uh, normal government bodies have said is the rule before there's any court involvement. You can't sue, get a lower court ruling on us and say, "Now we have a new baseline. You can't overrule it."

Jeffrey Rosen: [00:18:52] Emily, what are your thoughts on the Pennsylvania case? What do you imagine Chief Justice Roberts and the three more liberal justices were thinking when they would have, when they decided to allow the lower court decision to go into effect? And do you agree with Brad or not that the conservatives tend to view legislative action more as the baseline and perhaps, uh, more progressive judges pick a different baseline?

Emily Bazelon: [00:19:13] Yeah. It's such an interesting question. So the posture of the Pennsylvania case, if I understand it right, is that the Pennsylvania legislature has not acted since Coronavirus to extend deadlines. The legislature did last year, pre-Coronavirus, um, expand voting rights in a number of ways in Pennsylvania, and say that you don't have to have an excuse to get an absentee ballot. So the kinda backdrop in Pennsylvania is that a



state that, in previous election has had like a 2% rate of absentee voting is gonna have many, many millions more people vote by mail-in November than they've ever had before. There were some problems in some parts of Pennsylvania with the primaries over the summer, and I think there is a lot of apprehension. I'm from Philadelphia, so I've been watching this closely [laughs]. And I would say there is apprehension in Pennsylvania about properly administering this election, and already warnings that all of the votes are not gonna be counted and the results are not gonna be declared until at le- at least Friday after the election.

And the reason for that is, um, a law which I would argue is a terrible idea, which is that they're not allowed to do any preprocessing or tabulating of ballots in Pennsylvania until November 3rd, which is different than most states in the country. Most states let election officials start getting ready, uh, sometimes weeks before the election. And this is not a red state/blue state divide. I think Kentucky is one of the states where like they start preprocessing the ballots in September.

Anyway, so with all of that concern in Pennsylvania, um, the plaintiffs sued, this case, uh, there, there's a federal case but there's a state court case. And that's the case in which the Pennsylvania Supreme Court interpreted the Pennsylvania Constitution as allowing for an extension of the deadline. The ballots still have to be postmarked by November 3rd, but they can come in through the mail a little later and of course one of the reasons for this is the concern over the summer, that the post office might not be operating properly around election time.

So when I look at this four-four split on the Supreme Court, I'm struck by the fact that usually it's, um, there's a fair amount of deference from conservative as well as liberal justices to the interpretation of a state Constitution by that state's Supreme Court. It's not the same as the legislature acting, that's true. It's still the courts. But it's a state court kind of comedy in federalism question. And so that was what, um, really, um, got my attention, that you would have for conservatives who are willing to say, "No, no. This, the Pennsylvania Supreme Court doesn't get to interpret its own Constitution to allow for this, um, postmarked November 3rd but more time for the ballots to come back. We're gonna step in, here."

And it looks like, um, in all likelihood that if Amy Coney Barrett Amy Coney Barrett had been confirmed in time, this case might've come out five to four on the other side, and indeed, this case is not gone, as I mentioned before. It's possible that it could be revisited even after the election, after ballots are cast, with a full complement of justices and we don't know what would happen. And so if we had that kind of five-four split, um, that would seem to me to be quite alarming about the partisan as well as ideological differences among the justices. And that may be much less true on the lower courts. I think Brad gave some great examples of that. But of course, in the end, these cases can wind up in front of the Supreme Court, and the ideological and partisan split there is what matters.

Jeffrey Rosen: [00:22:47] Brad, Emily has suggested generally, uh, conservatives want to be deferential to the state courts interpreting their own state constitutions. In *Bush v. Gore*, in



fact the liberal justices excoriated the majority for failing to be deferential. How do you account for the fact that they're denouncing to be deference in this Pennsylvania case?

Brad Smith: [00:23:06] Well, I, I think that there are three potential avenues that might make, uh, the conservative justices more willing to step in on a state Supreme Court ruling based on this state Constitution. The first is that Article I of the Constitution gives the authority, uh, to regulate elections to the state legislature. And there is some argument, it's not one, frankly, that I'm particularly enamored of but there's some argument in conservative circles that the legislature literally means the legislature. So if the state Supreme Court steps in and interprets something that is pretty much clearly contrary to the legislative meaning and the legislature's rule was it had to be postmarked and received within a certain number of days, it wasn't an ambiguous statute, but that's not the legislature acting. Even though the Supreme Court and the state Supreme Court is saying, "Oh, it's a constitutional matter. We're ruling the statute unconstitutional."

The second, uh, issue is that there is a federal statute that requires ballots to be cast on election day or they can be cast and [inaudible 00:24:04] interpret it as before. But the Pennsylvania ruling allowed ballots to be counted even if they didn't have a postmark showing that they'd been cast by election day, uh, which is that Tuesday. So the argument would be that this violates the federal statute because it may allow people to vote after the election day. So that might be another reason why the conservative justices would think this is a state Supreme Court decision that shouldn't really stand.

And finally, I th- I, I do think that some conservative, and I don't know if this applies to any of the justices on, justices on the Supreme Court, but many read the chaos- the Pennsylvania Supreme Court decision and just found it appalling enough and partisan enough, uh, the, the decision was based on a, a sort of generic clause in the Pennsylvania Constitution that says elections have to be free and fair.

And the, they feel like the, the Pennsylvania Supreme Court was just an elected Supreme Court and did divide along partisan lines. Uh, went and, and just, uh, stepped in said, "Well, free and fair." You know, a- uh, that kind of malleable standard and said, "That means nine days after the election's fine." So those are some of the reasons that the court's conservatives might have been willing to step in. I don't know if any of those apply. But I think it's useful to think about those.

Jeffrey Rosen: [00:25:14] Thank you very much for, eh, helping us understand that. Emily, response to Brad's channeling of the conservative justices? He noted both that, as in *Bush v. Gore*, the, uh, Supreme Court, uh, conservative justices may have felt that the lower court justices were partisan and felt a need to correct that. And he also interestingly noted that, uh, many conservatives argue that legislature should mean legislature and not courts. And in fact, Michael Morley on our interactive Constitution interpretation of Article I Section 4, the election clause says that the holdings, uh, including *Arizona State Legislature versus Arizona Independent Redistricting Commission*, that interpret the word legislature to include, uh, referenda and, uh, other, um, nonlegislative actions are flatly wrong and directly contradict the plain meaning of the election clause.



Emily Bazelon: [00:26:07] Yeah. I mean, watch this space because the cases you're talking about were really important for allowing, uh, ballot initiatives to create nonpartisan, um, redistricting commissions in several states. And the big fight, that was a five to four case, I think it's from like 2015, and Chief Justice John Roberts was, uh, vociferously in the dissent. And this was exactly the fight. The fight was legislature means legislature, and ballot initiative, and direct democracy is not the legislature. And if a newly composed Supreme Court overturns that decision, that would be a really big deal for, um, disallowing these nonpartisan redistricting commissions, which, you know, have been one of the big, um, hopes. And I think, uh, have created some gains in preventing a lot, the, the most extreme forms of partisan gerrymandering. So that is a [laughs] a kind of offshoot question.

I think that Brad is probably correct in channeling the conservative, um, jurisprudential point of view on the Pennsylvania case. Um, I mean, I think it's odd to say that it's appalling to extend a deadline for returning ballots by, I believe just three days. I think we're just talking about November 6th. And if I remember correctly, and tell me if I'm wrong, the deal with the postmarks was that they were going to obviously look for postmarks and most of the ballots would have par- postmarks, but I think presume that if they were received by the 6th, they were probably postmarked by the 3rd if that postmark wasn't clear, 'cause sometimes the postmark just is blurred and you can't see it, which is probably involving quite a small and number of ballots.

So I don't think there was some kind of free-for-all here that was, you know, really, uh, threatening a violation of that federal law, although, I could be wrong. To take a step back, here, it is crazy to me that we're having all these state and even local-specific fights about balloting. Like why isn't there a national law? Congress also has the power to set election rules for the states. And it seems really kinda bananas that we don't have national standards for when you're supposed to return ballots for how bal- Just the kind of basic contours of the election. And we're having all these fights, which, I think, adds to the chaos [laughs] and confusion that judge and, and all of us should be concerned about. It would be so much easier if we were talking about implementing a national standard, here.

There are really good things about having lots of state and local control over elections, it means that, you know, the systems are much less hackable, um, to adversaries, and it also means that there is a lot of state and local care that goes into actually administering these elections. But the basic shape of the rules, it just seems like, uh, we're really seeing the disadvantage of not having a more uniform set of standards.

Jeffrey Rosen: [00:28:53] Yes. Uh, Brad, you've mentioned the North Carolina case. Uh, that's more against Circosta. And in that case, the question is whether Coronavirus-related changes implemented after the start of absentee voting by North Carolina election officials to a number of mail-in ballot procedures including extending the deadline to receive ballots and remedy issues with verifying them as well as providing additional ballot dropboxes violate the state legislature's power to regular elections under the Constitution as well as the Equal Protection Clause. A district judge found a likelihood of success on a Bush v. Gore challenge, basically saying that there, uh, the unequal treatment of the voters and the relighti- resulting Equal Protection violation was likely to succeed and should be, uh,



enjoined. But then there was a Purcell, um, issue as well. So help us desegregate the constitutional, uh, ruling in North Carolina and its status.

Brad Smith: [00:29:51] Sure, uh, yeah. There's a lot going on in that case, which I, I believe and I, and to be honest, it's hard to keep all this straight, but I think that case has now been retitled *Wise v. Circosta* at this point. It began as *Moore v. Circosta*. In any case, uh, yeah. What, what's going on there is that here the state board of elections passed rules making a number of changes to the election procedure. So this even more raises that question of the legislature acting as opposed to the State acting. You know, here it's not like in Pennsylvania where it's the state Supreme Court saying, "Well, under our Constitution, we think the, the, the statute has to be amended." Right? But here there's no kinda state constitutional claim. This is just an unelected, appointed body that says, "Oh, we're gonna change the rule for the election." And so that makes that argument that the legislature should do it stronger.

Now, having said that, that was rejected by, ultimately by the panel, I should say the district judge ruled in favor of, uh, the, the conser- I guess we'd call them conservative challengers to the change. They were the, they were the leaders of the state legislature who are republicans in both the state house and state senate. Uh, and, eh, uh, then this week the, uh, uh, the, uh, the full circuit en banc affirmed the, the panel's ruling.

Um, the action by the board of elections came after about a half million votes had already been cast in early voting. Ki- North Carolina starts really going very, very early. I think they're, I think they're first in the country, maybe second or third. Um, and so, the biggest change was to allow ballots to receive up to nine days after the election when the statute very clearly says they have to be received within three days after the election. Uh, there were some other changes as well including doing away with the signature verification, or, or, or, no, I should say witness requirement, that is, North Carolina was one of several states that has the requirement if you vote absentee you need to have somebody sign as a witness that you're, you cast the ballot, a- and so on.

And they, they did away, uh, with that. And if I remember correctly, that provision did get knocked out at the lower court, that is, just still required some witness thing. So it really came down to the question of extending the deadline. Now, here we get an interest in Equal Protection argument. The majority of the en banc decision that is upholding the extended nine day, uh, return rather than three days, as required by the statute said, "Look, there's no Equal Protection violation. Anybody who already voted has already voted. Anybody who hasn't already voted, they get an extra six days." It's not so ... So the people who have already voted aren't hurt a- and therefore, you know, their votes are still gonna count the same as anybody else's. It's not really a different system. It's not like, "Oh, if they'd known they had nine days they would have waited another week to vote, or that makes a difference."

So I think that's a pretty s- common sense position, uh, by the majority there. On the other hand, it does raise, again, that argument about, you know, who should be making these decisions? Uh, one of the concerns we've heard very often and Emily touched on it in one of her earlier responses, is the concern that we're not going to know who won on election



night. And, and you think about the ripple effects this has. So you've got social media, Facebook, and Twitter saying, "Well, we're not gonna let, we're not gonna let anybody retweet or republish if one of the candidates, you know, announces that they've won."

And then people accuse them of censorship and trying to rig things. And this is kinda all building chaos around it. A lot of election experts say, "Oh, this will one of the worst things if we don't know on election night." And, and especially if like I- let's say Trump is ahead on election night and as the absentee ballots come in over time, the Democrat, Biden, pulls ahead, that will shatter people's confidence in the election.

Well, having a firm rule with a pretty tight date after the election is one thing a state might want to do, or a state legislature might want to do. "Okay, we're gonna solve that problem by saying, 'The ballots have to be in by election day.'" Which is the norm in most states that do all mail voting, or tightly after, like three days as they passed in North Carolina, which is a very recent statute, was done this year, just this summer, after COVID. Um, and so to have somebody else step in then, and, and come up with a different formula, you know, maybe it is more important to let the ballots come in for nine days rather than three.

But maybe it's more important not to have that uncertainty, and that chaos, and that chance for people to make allegations of fraud. Or perhaps to actually do fraud eshm- ballots. I'm not a big believer that there's a lot of fraud in, in American elections. But certainly, if you have the election day results, you have a better idea if you wanna commit fraud, as to how many votes you need, and you could start trying to figure out ways to get more votes into the system, you know, in those few days, the first stage right after the election.

My point, here, really is that these are the types of prudential judgments that we expect the legislatures to make. So there's a good argument on, on both sides, I think, in, in the case, and much of it came down to, again, that idea of what is the baseline? The majority of the en banc said, said, "Well, look, the, you know, the baseline now is, uh, what has been in place since the board of elections made this change." Uh, and then there was a, there was a lawsuit and there was a consent decree on the lawsuit, and so on. And the dissenters in the en banc panel said, "No, the baseline should be what was the rule before any of these changes started to be made by groups that shouldn't do it?" And, and you know, there's a pretty good argument on both sides, there.

Jeffrey Rosen: [00:35:04] Emily, disaggregate the North Carolina case. Once again, Brad has helpfully raised the question of the baseline. Do you think that helps exchange the ruling? And tell us, also, is this the, uh, resurrection of Bush v. Gore? At the time, Bush v. Gore said that it was a ticket for one train only. Uh, but, eh, it was invoked here, to require equal treatment of similarly situated ballots.

Emily Bazelon: [00:35:27] Yeah. It's the, [laughs], the attempt at resurrecting Bush versus Gore. And I thought Brad did a great job of explaining why e- at least to me, that doesn't seem like a very strong claim when you're talking about extending deadlines. I guess I would say the North Carolina case, um, I don't, can't really decide what I think about a board of elections making this extended deadline versus the legislature. I mean, I understand that in the Constitution it says the legislature. I, it's, it, it seems to me like if a state decides that an



appointed board of elections is where these rules comes from, then maybe it's fine for the board of elections to be making the extensions. They are the ones who are really immersed in this in thinking about it, and legislatures have lots of jobs they're doing, and often don't have their acts together to address things. And like maybe it's okay that they've delegated this job.

But I'm, I'm honestly not sure what I think about that. I could probably [laughs] argue it on the other side, too. I am also, and this is really neither here nor there, but it seems to me, you know, in North Carolina, the law gives everyone 'til Friday the 6th to return the ballots. That's what like the big fight is over in Pennsylvania. And in North Carolina we're talking about whether to take it all the way to the 12th. It doesn't seem that meaningful to me. And so maybe just for a- as a sort of extra tool of enfranchisement, um, and maybe given all the other prudential considerations, here, like that wasn't the best call. But again, then that depends on whether you think the board of elections has the power to make that call or not, 'cause like what I think about it, who cares w- about that?

Um, the other thing I wanted to go back to is this question of election night and how long it's gonna take for the returns to come in. Um, I think that we all need to be prepared for the idea that we're not gonna know the results. And then that could have nothing to do with fraud or any bad decisions by states. It could just have to do with this tidal wave of mail-in ballots that's going to hit. And the ways in which certain states, particularly Pennsylvania, and potentially Wisconsin, are not set up to count them in advance. And everyone is just gonna have to be a little patient. Um, and because that really has [laughs] to do with the law in Pennsylvania about not preprocessing, which is also the law in Wisconsin, and those are potential swing states, that's like out of the hands of the decisions the other states are making. It's possible we will know on election night, because states like Florida, which can do a lot of precounting, will decide the outcome.

But we just don't know yet. And we have to be prepared, I think, for a lot of different eventualities. And I thought that the Facebook, Twitter, um, decisions to try not to let people falsely report results are actually pretty important. And I think the social media platforms are, um, in this particular way, trying to line up with traditional media, which is also readying itself to be very cautious about calling states, not to make the mistakes that some of the TV networks made in 2000, of prematurely calling the election, because that could really install chaos, especially when we have President Trump, who has been casting doubt on the fairness of the election with n- zero evidence to that effect for months now. So given the climate of all that, I just think it's important to be clear about what knowing or not knowing the results on Tuesday night may or may not mean.

Jeffrey Rosen: [00:38:49] Um, Brad, we have, uh, a- at least two other big, uh, uh, challenges that are pending in Wisconsin or Texas. In Wisconsin the question is whether the pandemic requires a number of changes to election procedures like extending the deadline to return absentee ballots, uh, and permitting electronic delivery of the ballots, and then we have the Texas case as well, which, uh, where Governor Abbott anticipating a surge in absentee voting because of the pandemic, uh, extended in person, early voting by six days and allow



to complete, completed absentee ballots to be delivered before election day. You're summarizing the cases so well. C- Can you take up either or both-

Brad Smith: [00:39:29] [laughs].

Jeffrey Rosen: [00:39:29] ... uh, Wisconsin and Texas? Your, [laughs] your call.

Emily Bazelon: [00:39:31] Yes, please. [laughs].

Brad Smith: [00:39:32] I, and I think, I think both of these cases are probably at the end of their judicial line, here. Wisconsin has a case called DNC, Democratic National Committee versus Bostelmann, uh, in which the district court extended the registration deadline, and then extended the deadline for requesting absentee ballots, and then it requested the receipt deadline from November 3rd to November 9th. Uh, the seventh circuit, uh, uh, overruled the district court two to one, invoking the Purcell Principle.

Uh, there was, eh, this was one case, by the way, in which there was, uh, one of, the, there was a dissent, it was a two to one panel decision, and the dissenting judge ... It's just worth mentioning because we talked about the partisanship earlier, was a Reagan appointed judge, judge, Judge Rovner. So again, I don't think, I think it's too simple to say Republican judges always rule one way and Democratic judges another. But, uh, that was the basic case, could you extend all of those deadlines? And it really came down to the end, extension of the deadline for receipt.

And, you know, as Emily says, you know, is it that big a difference day three or day nine? Well, again, I think when you see how much people seem to be concerned about that, and how much confusion there is about it, and, you know, should, should media be withholding results? And if they do that, can they do that in a partisan way, in a biased way? That's exactly why states might want a, a, a closer deadline.

Remember, it's not like you're disenfranchised, you h- you just have to make sure that you get your ballot and get it in the mail on an early basis. And when you start switching those timelines around, if we invoke the Purcell Principle, people are like, "I heard it's November 3rd, I heard it's November 9th." You know. And, and maybe it's best to just say, "Look. Here's the rule. It's November 3rd. If you don't like it, maybe after this election, you sue way- well in advance of the next election before people have, have started thinking about voting."

Um, and then the Texas case is Texas Democratic Party versus Abbott. Uh, as you noted, uh, j- uh, Governor Abbott extended, uh, early voting by a week. But what the state refused to do was to recognize COVID or exposure to COVID, we should say, as a disability that would give you an excuse to vote absentee. Texas is a state that still requires you have an excuse to vote absentee. It's not m- In most states now, majority of states, you can just say, "I wanna vote absentee." And they'll give you a ballot.

Texas adheres to the old rule, which was the rule everywhere in the country until really, pretty recently, that you have to have an excuse to vote absentee. And they just said, and Governor Abbott, who, by the way is, himself a, a, a disabled individual, said, "Look. I- Mere



exposure to COVID is, is not a disability." Uh, and the court, uh, held essentially that that's a, that's a proper decision for, again, that elected official to make. It's not an unreasoned decision.

Uh, and, I'll quote, actually here, f- not from the court in that case but from the, uh, uh, district court of Pennsylvania in, in Trump v. Boockvar, this is the case I mentioned earlier, where a Trump appointee voted against, uh, Trump. Uh, he says, "The job of an unelected federal judge isn't to suggest election impro- improvements, especially when these improvements contradict the reasoned judgment of democratically elected officials." And I quote that, uh, you know, for, you're talking about Texas because I, I really think that is kinda the philosophy that is motivating those judges who are saying, "No. You shouldn't be making these changes."

Jeffrey Rosen: [00:42:29] Thank you for that. Thanks for a great, uh, summary, and, and also for a powerful hypothesis that, uh, here it's, uh, the more conservative judges are deferring to elected officials, and, and you're saying that that's what happened in Texas and perhaps in North Carolina as well. Emily, as you look at the North Carolina and Texas cases, do you agree with Brad, that that helps to explain the rulings or do you think something else is going on?

Emily Bazelon: [00:42:51] I mean, I do think it helps. And I think the, the [laughs] sort of move straightforward fix here, as it almost always is, is for lawmakers to go in and make a change, and for voters to demand that. I mean, often, our democracy fails to operate in that fashion, right? Like if you polled people in some of these states, they might think it made a lot of sense to extend these deadlines. But, the, um, the distance that has to be traveled from the public feeling something, and then the legislature actually acting on it can be quite vast. And you know, the, the partisan backdrop here is that lots of Republican politicians including President Trump, very clearly, out loud, have said, think that if more people vote, they're gonna lose.

And so, um, you know, when President Trump said that over the summer, it was just one of those moments where someone says the quiet part out loud. And so you can n- you can have the much more principled discussion that Brad was laying out, which is real, about which branch of the government should make changes to voting laws? Or you can just, um, think of this through this, uh, quite striking partisan lens, which is that if you enfranchise more people and count more ballots, that probably is an advantage to Democrats and Republican officials like Governor Abbott in Texas are very eager for that not to happen.

Another think Governor Abbott has done in Texas is to limit the number of drop off boxes for, um, returning ballots to one per county. So, there are a lot more people who live in Harris County, which is Houston and the suburbs, than in various, smaller, rural, more Republican-leaning, um, counties in Texas. And so that could look like a kind of fair and nonpartisan decision, or it could look like it's absolutely about skewing, um, the election toward the Republican party, which is Governor Abbott's party.

Jeffrey Rosen: [00:44:38] Well, it's time for closing arguments in this extremely illuminating discussion. Uh, Brad, the first one is to you, maybe share with our listeners, uh, the



distillation of the argument you've been making throughout the discussion, which is that, uh, the judges in these cases are not voting on the basis of partisan politics, but are applying, uh, different conceptions of, uh, of, uh, what the Constitution requires.

Brad Smith: [00:45:01] Well, uh, [laughs]. A- And I don't think we call it closing arguments. I don't think Emily and I have actually been arguing [laughs] as much as-

Emily Bazelon: [00:45:07] [laughs].

Brad Smith: [00:45:07] ... trying to, to discuss these cases, and-

Emily Bazelon: [00:45:08] I have no ... Yes.

Brad Smith: [00:45:08] ... talk about the-

Emily Bazelon: [00:45:09] I don't see it that way, a-

Brad Smith: [00:45:10] ... the ruling on them. But, i- yeah, I think that for, uh, the, uh, I, I, I think that there actually should be a strong presumption against these lawsuits, that there's been, you know, over 250 lawsuits filed nationwide. And it's really as, as much as anything, the lawsuits more than comments by Trump or anybody else that's causing this widespread sort of sense of our election system is out of control, uh, is it fair? What are the rules? The rules are changing. Are these judges making partisan rulings?

You know, this is a case where it strikes me that we should just say, "Look. These are the rules. If you didn't like them, you had a chance to protest them well in advance. They were known, you know, much, much sooner, uh, than some of these lawsuits have been brought." And, I, I think there's a real advantage to having that kind of certainty, uh, it, that's very important to elections.

One of the key things is that legitimacy and the people feel like, "Okay, I think this was a fair election. Maybe the process wasn't the best, but it's what we all agreed to in advance." And when you start having these changes brought about by lawsuits, when you start having election policy determined by lawsuits which are being decided by district court judges all over the country, not everything can get up to appeal, they go up on scanty records, that that creates a lot of chaos.

And I, and I really do think that's probably the big motivating factor why conservative judges have been more willing to say, "Look. Here was the rule. Here's what we go with." Whereas liberal judges who have always favored a bit more of an activist judiciary, more concerned with what we might call equity than with law, are, are willing to jump in and say, "No, no, no. You know, we should, we should step in."

But I think it's important, a final point, is that I think these conservatives would say, "Look. Most of these cases are not ... " You know, we throw around the term disenfranchised way too quickly when we maybe mean inconvenienced. And for example, if we take, uh, you know, the case we talked about early on, uh, yesterday's decision in *People First of Alabama versus Merrill*, and the, they quote the *jus*- Justice Sotomayor included from, uh, this



gentleman, Howard Porter saying, "Oh, you know, I shouldn't have to die." No. But maybe it's okay if you have to vote absentee ballot. And that's not quite the same thing [laughs] as having to, to risk death, uh, to vote.

So I think if we all kept that perspective and relaxed a little bit, um, you know, eh- our elections are, are generally free of fraud. Our elections are generally, uh, uh, it's easier to vote in the United States today than at any time in our nation's history. And I think sometimes we're too focused on what little problems remain rather than realizing on the whole, the system works pretty well, and if we all calm down and rely on that system, i- it'll work out pretty well. And that requires judges to do that too, to take the position that, "Look, you know, again, we've got rules, that's what we're gonna use."

Jeffrey Rosen: [00:47:48] Uh, Emily, you and Brad have not been arguing, you've been having a very civil conversation in the best traditions of We The People. But I wonder if you could share with our listeners whether you're convinced by Brad's, uh, closing thoughts that Republican judges are applying a principled desire to enforce existing rules whereas more progressive judges are more concerned about equity, uh, or if you have some other thoughts about what's going on in these election cases?

Emily Bazelon: [00:48:11] I feel like I wish I lived in [laughs] the universe that Brad is laying out, because it sounds so ordered and more principled about law. But I don't actually feel [laughs] like I live in that universe right now. Um, and I agree that certainty is hugely important. But I also think that these last minute changes of the rules are coming, um, you know, from conservatives on the Supreme Court and other courts as well as, um, democratic appointed judges. And I kinda worry about all of that.

Um, you know, I think President Trump has caused enormous, um, distrust in the election by constantly talking about how it's rigged, how there's gonna be widespread fraud from mail-in balloting. I mean, it's been just a drumbeat of attack on our election system. And so, I really think that if people are concerned about fairness, that that, those headlines, and they are, i- those tweets, those statements are in the headlines much more than these judicial rulings. Um, I think that it's pretty clear where we can lay the blame for that kind of mistrust.

Um, and I also think that more and more, we are seeing, you know, quote activism from conservative judges in a range of cases, um, as well as from liberal judges. So I feel like that, um, kind of, uh, label for li- liberal form of judging does- doesn't really apply anymore. I mean, conservative judges seem a- willing, also, to overturn democratically enacted laws. Um, so I just wanna kind of address that.

I mean, I guess I'll end by saying, you know, you've mentioned a couple times, Brad, this idea that we're merely talking about voters being inconvenienced. And in the Alabama case, what Justice Sotomayor said, um, about people who are disabled, who are losing this opportunity for curbside voting is that under the Americans with Disabilities Act, the benefit can't be defined in a way that effectively denies otherwise qualified disabled people the meaningful access to which they are entitled.



And she points out that in person voters get assistance from poll workers. They don't have to have witnesses, or notaries, or copies of their photo IDs, as Alabama law requires for absentee ballots. They're not worried that their ballots are gonna arrive too late or be rejected for a failure to comply with absentee ballots' many requirements. And so, yes, I think you are seeing a concern from here, there, about equity. And I think it really goes beyond inconvenience. Um, when I was writing about the Wisconsin primary in April, I heard a lot of stories from people who thought they had filled out their ballots accurately, and then, you know, realized afterward that something had gone wrong. So election officials, for example, were picking up ballots in drop off boxes at the library that didn't have the proper envelope.

And they were gonna have to throw those ballots out. We know that there is a higher rate of rejection for mail-in ballots, especially for people who are doing it a- the first time, um, by themselves. You have to do a number of steps correctly. I was filling out my ballot last night and like really trying to pay attention to make sure it was gonna be okay. And I was feeling kinda worried about it.

So I think there is a deeper question, here, about enfranchisement that is really important. And my advice to people who are voting is to not rely on the courts to extend your rights. Vote early, make sure your ballot gets in. Because we just don't know how this is necessarily gonna play out. And that is the uncertainty that concerns me the most.

Jeffrey Rosen: [00:51:42] Thank you so much, Brad Smith and Emily Bazelon for a rich, nuanced, rigorous, and really illuminating discussion about the law and the constitutional parameters surrounding election litigation. Brad, Emily, thank you so much for joining.

Brad Smith: [00:51:59] Thanks, Jeff.

Emily Bazelon: [00:52:00] Thanks for having us.

Jeffrey Rosen: [00:52:03] Today's show was engineered by David [Statz 00:52:06] and produced by Jackie McDermott. Research was provided by Mac Taylor, Jackie McDermott, and Lana Ulrich. Homework of the week, on the resource page, we will post Emily Bazelon's articles, Brad Smith's explainers for the interactive constitution, a series of really great programs we've had about the history of disputed elections and the Purcell case, Purcell versus Gonzales, so for extra credit, read Purcell, and decide for yourself whether you think the Supreme Court is applying it in a neutral way.

Please rate, review, and subscribe to We The People on Apple Podcasts, and recommend the show to friends, colleagues, or anyone who is hungry for constitutional illumination, and light, and debate, and always remember that the National Constitution Center is a private nonprofit. Uh, it's so meaningful to be able to offer you this public service, uh, during these, uh, contested times, and thanks to all of you who are writing to express your support as well as generously giving to the Constitution Center to make our programming possible. Uh, support the mission by becoming a member at constitutioncenter.org/membership, or give a donation of any amount to support us at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.

