

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 Congress continues to debate new voting rights bills, and as the states pass new voting rights bills, we are convening on We the People today, two of America's leading experts on voting rights to teach us about the political and constitutional questions that they raise. Rick Hasen is chancellor's professor of law and political science at the university of California, Irvine.

He also blogs at Election Law Blog and served as an election law analyst for CNN in 2020. His most recent book, which we've been privileged to discuss on We the People, is "Election meltdown: Dirty Tricks, Distrust, and the Threats to American Democracy." It is wonderful to have you back on the show.

Rick Hasen: [00:01:06] Great to be back with you.

Jeffrey Rosen: [00:01:08] And Derek Muller is professor of law at Iowa college of law, where his research focuses on election law, especially on the role of the states in the administration of federal elections. Professor Muller has taught at Penn state law, Notre Dame law school and Pepperdine, Caruso law. Derek, thank you so much for joining us.

Derek Muller: [00:01:28] No, thanks for having me back.

Jeffrey Rosen: [00:01:30] Rick, please tell We the People listeners what is going on in the states. You've described two separate categories of voting rights bills of those dealing with what you call election subversion and voter suppression. Tell us about those categories.

Rick Hasen: [00:01:46] Sure. Well, so I think the first thing to say, which will become obvious as, as Derek and I have this discussion today, is that American elections are very decentralized.

So unlike most other advanced democracies where there's a national body that runs elections, the United States has a history of state and especially local election administration. So when we run a presidential election, we're only running something like 10,000 simultaneous elections, which makes things complicated.

It means the rules are different. It means there's division of authorities. There are some rules, some federal rules that apply because the Constitution gives Congress the power to set rules for congressional elections. So there are rules about registration, for example, that states and localities can't change states have rules about how.

Ballots are going to be distributed and counted and some power is devolved to counties. And those counties then actually administered the elections. Those are the ones who find the poll workers and are they're the people you turn your ballot into. And so in the aftermath of the very disputed 2020 election, with Donald Trump claiming falsely that the election was marked by great irregularities and that there was a great problem with fraud,

what we've seen is that there have been a host of new proposed laws that deal with voting. Some of these laws make it easier to vote. Some of these laws make it harder to vote.

Hundreds of these laws have been proposed by Republican legislators who have been following the lead of former president Trump and seeing that the election was stolen or that there are at least concerns about how the election was run and they've proposed laws meant to either prevent fraud or promote voter confidence.

We can have a discussion later on whether they actually do that. But if you look at the laws overall, you can't really generalize. So for example, there's been a lot of discussion about the Georgia law. The Georgia law does a lot of things. Some of those things I think are good. Some of those things I think are bad.

But as you mentioned within the category of bad, I think that we can subdivide that into two parts. One: kind of traditional voter suppression, the idea of making it harder for people to register or to vote. There was famously in that Georgia law a provision that says you can't give water to voters on line, or waiting to vote unless you aren't an election official and you are directing them to self-service water. Which seems like a kind of very strict rule for people who might be waiting in long lines. Maybe those people are in poor areas. Maybe they're more likely to be Democrats. That's at least the story that Democrats tell about what's wrong with these laws.

But cutting back on the period of early voting, cutting back on the time between the, the first round of the election and runoff-- these are things that some people think are meant to make it harder to vote. But the other kinds of provisions are those-- and I think here, I have a greater concern-- are provisions that will further politicize the process of counting ballots and of deciding how elections are run.

So Brad Raffensperger, who's the secretary of state of Georgia, Republican, who stood up to Trump, who would not manufacture 11,780 votes as Trump had asked for in order to flip the election results in Georgia, he's now been cut out in this bill from any role on the election board. He now has a non-voting role on the board and he's going to be replaced by someone appointed by the Republican legislature. That legislature also gave this new person and the board, the ability to take over up to four county election boards for months at a time.

And there's a thought that this might be used to try to, say, overtake the Fulton county election board, a heavily democratic area where Atlanta is, in order to manipulate how votes are going to be counted. And this really is something I never thought we would worry about in the United States, which is making sure that we have rules in place so that the way that votes are counted is done in a transparent and fair way. And so most of these laws that have been proposed have not passed, we're watching all of them. Some are more concerning than others. I think I'll probably stop there.

Jeffrey Rosen: [00:05:39] Thanks so much for that. Derek, what's your response? Rick said that laws that are supposedly designed to discourage voter fraud or prevent voter confidence can actually have the effect of either making it harder to vote or politicize the counting of ballots by manipulating the way votes are counted.

Would you accept or reject that characterization, and how would you describe the laws designed to discourage voter fraud or encourage voter confidence?

Derek Muller: [00:06:05] Sure. Yeah. A lot of the proposed changes in laws, especially in places like Georgia, Iowa, Florida, things that have been enacted have, have particularly targeted absentee ballots.

And I think that was one of the strongest, if you will, means that was pushed around in the 2020 election. President Trump and his supporters were very skeptical of absentee voting-- really strongly encouraged in-person voting. Many Democrats were really strongly supportive of absentee voting and this, it had interesting dynamics in 2020, they, they cross overlapped with notions of the severity of the pandemic or the, the risks that are attended with that, or changes that courts were making to accommodate voters in a time of a pandemic. So it's not clear how many of these things have such salience going forward as these legislatures are addressing absentee ballot concerns.

And then there's the empirical question at the backend that rules that change the ability of voters to request an absentee ballot or how absentee ballots are verified before they're counted... they're going to have some kind of impact. We don't know if it's something fairly marginal that really is perhaps affecting some of the more erroneous ballots that might've been cast or the occasional rare outright instance of fraud, or how much it's going to have a broader effect on the population. So. To take a couple of examples, we have in Georgia some rules that, that push back the deadline by which you could request an absentee ballot four days before the election.

You now have to request it 11 days before the election. And it was one of the more popular elements of the Georgia bill by public polling concerns. But undoubtedly it had a partisan divide; it is far more Republican supported at the Democrats. And the, the argument on the one side for the Georgia legislature is look, we want people to request a ballot, which was four days before the election, where the likelihood of their ability to cast the ballot is limited.

We need to set that deadline a little bit earlier, and if you can't put in that absentee ballot request early, then show up in person to vote. Or another one in Georgia was that signature verification was a sloppy outmoded method of verifying a voter's identity. And so the thought was, especially given some of the sloppiness or the concerns about it, or the appearance of it in 2020 let's instead require voters to put their driver's license number or some other state form of identification to identify who they are.

And we'll use that as a verification method-- again, a partisan divide about the appropriateness of that. Georgia has a voter identification law already in place. And so this might run along with it. And so then the question is, how much of an impact is that going to have? How many voters are going to be unable to cure their ballot by, by identifying themselves up front and if not, then drive them to in-person voting?

And so there's a theme here that, that voters still have that opportunity to participate, to show up on election day. It's simply tightens up some of the rules for absentee voting. I think

it's, again, it's an open question. What are the kinds of voters that are using that absentee voting? Historically? We might've thought it was the elderly and military voters, and there's a reason why Republicans strongly supported extending absentee rules to those demographics in the 1980s and nineties.

And now there's a perception, especially given the pandemic in 2020, that Democrats were far more likely to use absentee voting than Republicans. Although some of the empirical literature, I think, suggests that that's not even necessarily the case as it played out in terms of overall turnout in the 2020 election.

So on the one hand you can say these rules, they certainly tighten up some aspects of the absentee balloting system that could have an impact on voters. At the same time, you can say, well, if, if the normative goal is we want people to have as much information as possible to have a reliable, secure, easy to apply balloting system in the absentee process and if not, to show up on election day driving voters to election day-- if that's the case, I think it remains an open question about whether or not that goal will be achieved.

Jeffrey Rosen: [00:09:48] Thanks so much for that. Rick, when it comes to absentee ballots, Derek said that there's a case that some of them might in fact, increase voter confidence and discourage fraud.

Do you think that there is a case to be made for any of these absentee ballot provisions and then address more broadly the question of what, if any aspects of these bills that are pending could be seen as legitimate attempts to increase voter confidence and decrease voter fraud?

Rick Hasen: [00:10:17] I do think that I agree with much of what Derek said about the uncertainty of knowing how these laws are going to affect turnout.

I think that shouldn't even be the primary question. The primary question should be, why is the state making it harder for people to register or to vote? Is there a good reason? And that gets us into the questions about voter fraud and about promoting voter confidence. And it turns out that many of these laws, and again... every law is different. I can't, I'm not speaking to every single provision of all these laws. Generally speaking many of these laws neither prevent appreciable amounts of fraud nor promote voter confidence in terms of fraud. We do know that absentee ballot fraud is more prevalent than in-person voting fraud.

That's been known for a long time. We've often made the trade off and said, we'll tolerate the risk of a little bit more fraud, and we'll look for it in order to give voters convenience. During the last election, the calculation was different because we were voting during a pandemic, so that the cost of voting in person were much higher in terms of people exposing themselves potentially to a deadly virus.

And so we decided that that trade-off was worthwhile. People watched this election extremely closely. And what we found is very little evidence of absentee ballot fraud. It was just a case that came out a few days ago about a man who murdered his wife and then cast an absentee ballot for Donald Trump after he killed her.

There are these celebrated cases, but they're actually quite rare and we've seen no evidence anywhere in the country of any kind of absentee ballot fraud process to try to steal an election. This time around people have been looking for it.

On voter confidence there's a bit of what I consider some unscrupulous bootstrapping here. Donald Trump led Republicans in claiming that the election was stolen, that ballots were going to come in from China. We now have this crazy audit going on in Arizona, where a group called cyber ninjas-- this private organization-- is looking at ballots for traces of bamboo. That would supposedly show that ballots were imported from China, or from South Korea. I mean, just some crazy stuff going on. And this undermines Republican voter confidence in the fairness and integrity of the election process. If you look at polling, it shows that many Republican voters believe what Donald Trump and others have said, which is that that the election was stolen.

And therefore that's used as an excuse to pass new laws that make it harder to register, to vote in the name of promoting voter, promoting voter confidence. And we do know that studies of states, for example, that have stricter voter ID laws, they don't tend to have voters that are more confident in the processes.

Voter confidence is driven by other factors. It's actually driven by election laws. And so I don't think that these laws generally are doing much for voter confidence. They are probably doing much for the Republican legislators who are afraid of Donald Trump or trying to please their base and they're looking for something they can do that will convince those voters that there are steps being taken so that another election won't be stolen, even though this one wasn't stolen either.

Jeffrey Rosen: [00:13:11] Derek, Rick just said that the pending laws don't prevent fraud or promote voter confidence. Can you make the strongest case possible for the ways in which these laws do in fact prevent fraud or promote confidence?

Derek Muller: [00:13:27] Yeah, at least one thing in terms of confidence that I've been looking at, to the points Rick's raised earlier, is the uncertainty about having state officials, especially politicians, having a greater role in overseeing the election process. There was a related, but I think better concern to think about, which is when we talk about that decentralization-- how counties have done so much activity-- I think there was a lot of frustration. Maybe it was especial in Republican officials' parts, or Republicans who lost the presidential election pointed out the variants that was happening on a county by county basis. And we can attribute some of that to the pandemic, where county officials were doing different kinds of things.

We can attribute it to maybe the fact that county officials as Democrats or Republicans viewed certain accommodations as more important or less important. But I think undoubtedly, there were things and decisions that were being made for local level that led to some inequalities and what was happening in terms of the statewide overall results.

And so while I certainly agree with Rick's point that there's no evidence of systematic fraud, I think there's no question that at least some of the appearance-- and again comes more on

the losing side than the winning side, right?-- The appearance of inconsistencies in election administration was a problem in my judgment in 2020.

And so some of the rules in places like Iowa or Georgia or Florida that are providing some greater uniformity about how ballot box Dropbox locations are placed or about the timing in which that ballots can be mailed out or whatever it might be to the extent that the legislature is picking some ex ante rules that it wants to provide that are going to give voters and whatever part of the state you live in a more similarly situated experience... I think that's a good thing. And I think those are the kinds of rules that we need, regardless of the underlying motivation of them, if they're built on a lie. I think that's a very frustrating and disappointing thing rather than being built on the argument that we want to treat similarly situated voters more similarly.

Right. And understandably, there are people who are frustrated looking at some of these rules, rules that say one ballot box drop location per county. You don't want to wait, maybe that treats all voters equally, but if you're in a county that has 20 times the population of another-- or maybe it's not quite so equal, or if your county is physically much larger and larger and spread out, then maybe we need to be thinking about providing those better rules to provide the uniformity of the experience for voters and thinking more strategically about it. But I do think there is a case to be made for the legislature, at least upfront providing some of these rules that are going to be fixed. We're not going to have local election officials changing the rules close in time to the election. And to that extent, at least I think there are some, some positive things to be looking at in these bills.

Jeffrey Rosen: [00:16:08] Rick, you wrote a piece for the New York times recently which identified a threat that you're especially concerned about, which you called election subversion. Tell us about how that applies both in Georgia and in other bills that are pending before the states.

Rick Hasen: [00:16:25] So the concern-- and I think is a concern that Derek and I share-- is that we have fair rules upfront for how votes are going to be counted and that we have transparency in the process and accountability so that we don't have people messing with election outcomes. And so what I'm concerned about are, for example, we can leave Georgia and talk about Iowa, talk about what's pending in Texas laws that would criminalize the process of election officials sending out applications for absentee ballots to voters so that they could apply to vote by mail if they want to, or laws that will give poll Watchers-- who could be partisans, who are coming to mess with a fair election process-- giving poll workers limited access to what's going on at a polling place.

This could interfere with the fair administration of elections, these kinds of things that would either make it harder for election ministers to do their jobs, or actually give those jobs over to people who can't be trusted to count the votes. That's really troubling to me. If you go back and you look at the 2020 election and you ask, how is it that we survived this unprecedented period where you had a presidential candidate who was in incessantly claiming that the election was rigged and stolen against him and pressuring election officials to change election results? What kept this country from devolving into a situation where the results were going to be indeterminant was that that election officials held the line.

And this was both democratic and Republican election officials. I already mentioned Brad Raffensperger, the secretary of state of Georgia, a Republican who refused to find additional votes to flip the results for to Donald Trump from Joe Biden from Georgia. But there were many others. There was a Republican on the state canvassing board in Michigan who refused pressure to overturn the results there.

There were judges-- Trump appointed judges included among them-- who refuse to mangle existing jurisprudence to try to find a way to award Trump a revote or give the power over to state legislatures after state legislation has given the power to voters to choose presidential lectures-- all of those lines held.

But what I worry about is in 2024, that the people who stood up for the rule of law are going to be pushed out already. We've seen people like Raffensperger being censured by election officials. He's being challenged in his reelection by a current member of Congress who parroted Trump's false statements that the election was stolen or rigged.

And so I worry that the next time around, aided by new laws that are being passed by state legislatures in some Republican states, it's going to be easier to actually manipulate the outcome of elections and not fairly count the ballots. That's why we need things like rules that require that everyone vote on paper ballots.

So that there'll be something that can be examined by a fair counter or a court to make sure that the election results are not being manipulated Derek.

Jeffrey Rosen: [00:19:44] So Rick has identified at least three laws than he say, threaten elections of version including the Iowa law that threatens criminal penalties against local election officials.

The Texas bill that would give challengers the ability to interfere with polling place procedures and the parts of the Georgia law that give the legislature the power to handpick election officials. Do you agree or disagree that these could lead to elections subversion?

Derek Muller: [00:20:08] Qualified agree. Yeah. And I'll give the difference maybe at the end of my answer here.

At the opening, I work as a poll worker, and not a watcher. I love being a poll worker, and there's no question that as a worker, I feel mostly frustrated when I see the poll Watchers. Because I feel like this sense being, if you want to see this system improved, volunteer, invest your time and be a part of the process.

And I think, whenever I've worked in a number of states and counties as an election worker, everyone is diligently trying to do their job, getting paid essentially peanuts to try to help the system runs smoothly. So I think anything that tries to interfere with those folks' responsibility is a real problem.

And so on that, I wholeheartedly agree. And, I can beat the Iowa law in particular to think about on the one hand, the law has an open-ended provision that says technical infractions by a county official can result in a fine of up to \$10,000. And that in my judgment is an

extraordinarily sloppily drafted law. It doesn't provide you the context for what technical violations looks like. It's an open-ended question at the same time. The 2020 election in particular was a frustration in the state of Iowa for a handful of county election officials who just disregarded what state officers said where they were pre-filling out forms on absentee ballot requests and mailing them out to voters.

And there had to be repeated litigation going up to the Iowa Supreme court to instruct those county auditors not to do it, that the existing law didn't authorize them to do it, and that they were acting beyond the authority granted to them by the statute. And so the laws that are trying to constrain some of the flagrant behavior of counties, the flagrant, maybe well intentioned, but, but certainly in defiance of some of the clear guidance of the laws, in my judgment makes some sense. Now, providing criminal sanctions does discourage that behavior. On the flip side, if you provide open-ended criminal sanctions, that kind of thing, as Rick pointed out, that's a real problem.

It does incentivize some potential oversight from partisan officials to try to penalize the most mundane, run of the mill mistakes that an election official makes. So I think the key is trying to find on the one hand, some balance of incentivizing local officials to conform to statewide rules, while on the other hand, not overly politicizing the process to give those statewide officials a heavy hand of politicizing the process going. I agree that in 2020, statewide officials, election officials, almost uniformly with a brief exception in Michigan at the local level, were essentially uniform unanimous in certifying the results of the election.

And I think that was a really encouraging result to trust the process as it existed. And the hope is I think that whatever kinds of oversight happened in places like Georgia going forward we're still going to see those kinds of oversight by statewide officials that kind of respect for the process.

At least that's the hope. But there's certainly the concerns that Rick raised.

Jeffrey Rosen: [00:23:05] Rick, in your piece, you identified not only laws, but also steps like the Arizona state Senate, which has demanded the seizure of November ballots for an audit to be conducted in a way that you think is unreliable.

What are your concerns about the future of these election subversion efforts, and tell us more about what you think can be done to prevent them. You said that the counting of paper ballots would help, and that's already contained in HR one, the bill pending before Congress. But you also identify other election reforms that are not part of HR one, including the requirements that states impose basic safeguards in the counting of votes it's in federal elections.

Rick Hasen: [00:23:44] Yeah. So The risk of electrical subversion is a lot harder to plan against than voter suppression laws, so on another part of HR one, this mammoth bill that passed through the house and it is now stalled in the United States Senate, would require states to offer a period of early voting, whether it's by mail or in person.

I mean, so you can, there are things you can imagine doing to deal with efforts to make it harder to register and vote, but ensuring that you have fair counting processes-- well, that's

tough. Right? So one thing, having paper ballots, as I mentioned, that seems like a no brainer. And even if HR one is not going to pass, it seems as Congress should be able to come together and pass a narrower bill that says that in the places where they use fully electronic voting machines, those should not be allowed because, I mean, just imagine what Georgia would have been like if Georgia was still using Dre machines-- fully electronic machines that didn't produce a piece of paper. You know Trump would have claim that the machines had some malicious software code in it and there'll be no way to you know verify that he was wrong, but here in Georgia, they had a recap and a hand recount.

So every single ballot was looked at by hand. Right? So, so that's, that's one thing you mentioned, this recount or audit, I don't even know what you want to call it, this crazy thing going on in Arizona. Now in Arizona, there were challenges to election results. There was a court process.

There were no serious irregularities found in Arizona. And now we have this other process going on, which is actually interfering with ballots. And a letter was sent by Pamela Karlan who's an election law professor now working for the department of justice, suggesting that messing with these ballots might be interfering with existing federal law that says that states have to preserve ballots in federal elections for 22 months. And so some of this is about existing law, but I think so much of this is not about laws, but about norms. One of the things I say in that piece is that if someone's running for office and their parroting the big lie that the election was stolen, well, those people should be condemned.

So, I don't know. I really have a dog in the fight of who should win in for the Georgia secretary of state's race. I don't endorse candidates. And I I'm not a Georgia resident, but I do think that as a floor, every serious candidate should reject the idea that the election was stolen in Georgia.

And yet you have candidates who are not willing to say that. So I think a lot of this is about enforcing norms. You think about some of the problems that we have, and that we went through over the last four years. It's because Donald Trump undermined voter confidence in all of the kinds of guardrails that protect our democracy.

And again, talking about norms not laws-- faith in the FBI and law enforcement faith, into two party system, faith in an independent judiciary, faith in the press. I mean, these are all of the kinds of aspects of civil society and aspects of our government and our political system that ensure that people are following the rule of law.

And so rather than pass any single piece of legislation, aside from things like dealing with paper ballots, I think much of this is about bolstering the rule of law, and that's a really hard project, but it seems to me that's the most important thing we need to do as we look to 2022, 2024 and beyond.

Jeffrey Rosen: [00:26:50] Thank you for noting those guardrails of democracy. The NCC has a guardrails of democracy initiative where we're trying to identify ways of resurrecting them. And as you note, faith in independent judiciary, law enforcement, and the press is an important guardrail. Derek, you wrote a piece called the diamonds hidden in HR one's

massive mine, which I think you agree with Rick that some provisions about paper balloting might help increase security and reliability around the building process. Tell us about those aspects of HR one and why you think they're a good idea.

Derek Muller: [00:27:28] Yeah, absolutely. I think HR one runs at 886 pages, so it's hard to put any one critique in as, as a good or bad thing.

But I think there's a number of valid and valuable things as Rick pointed out about the paper ballots. And this is I think one of the most frustrating things coming out of the 2020 election critiques about dominion voting systems and the like-- that these electronic voting system providers were somehow subverting the election. In virtually all of these places, the electronic voting systems are scanning paper ballots.

So there's a paper trail out there, right? There are some places where there aren't. And one of the things that HR one would do is say, you need, you need to have a paper trail somewhere for these things. But undoubtedly, when we do recounts, we did a statewide audit in Georgia. It was paper ballots that were being looked at and verifying that whatever was being run through the machines was accurate.

And so codifying that as a standard for elections is I think a good thing. We made some progress after the 2000 fiasco of punch card ballots and hanging chads. We're not quite all the way there yet about modernizing our election systems, but another, this gets to the Arizona point and directly is to think about risk-limiting audits.

Which have been growing in popularity and at the, at the state level, on the one hand there's a wonky statistical thing that's sometimes hard to get legislators excited about, but it's one incentivizes states to say, you need to develop again, these ex ante rules. You need to, before the election say, here's how we're going to check to make sure the results are what we think they were. And there are problems that arise from the election night totals. This happens in every election. Where there's some corrupted information on a thumb drive that was submitting the information to the, the statewide reporting that happened in Michigan happened in Iowa elsewhere.

You could have situations where somebody fails to upload the information or. Or there was some ballots that were set aside that were not counted the first time that should have been. Right. So the canvas is a process to figure that out between those unofficial totals and the more official totals, but then auditing and going back in a methodical, systematic way to verify that whatever happened at the precinct, you have the number of ballots cast as the number of people who checked in that you can account for all of the ballots that were given to each precinct or each local location, right.

And to develop those kinds of rules to instill that confidence. And one of the most frustrating things about Arizona's legislative audit is you're freewheeling. It's not entirely clear what those standards are, what they're looking for, how they're going to examine it or identify good or bad outcomes.

And so providing those upfront rules, I think, is a crucial and critical safeguard. And again, I think one of the reasons why election officials across the United States were so readily

interested in certifying the ultimate outcome of the 2020 election, because we have some of those procedural safeguards in place.

I think there are ways of improving that. And again, at least a sliver of HR one is designed to help improve those kinds of things.

Jeffrey Rosen: [00:30:33] Rick, you wrote another recent piece called HR one can't pass the Senate, but here are some voting reforms that could. You argued that some parts of HR one are a progressive wishlist that couldn't survive a filibuster.

And you say other parts of it could be found unconstitutional, including a provision requiring states to reenfranchise all people convicted felons, not currently serving time in a correctional institution. But then you identify four reforms that could in fact pass and might attract moderate Republican support.

Tell us what those are.

Rick Hasen: [00:31:04] Well, I'll just say that piece is, I think now maybe a couple of months old, and what we really care about, is what does Joe Manchin care about? So let me just explain the politics of this a little bit. So HR one, as Derek mentioned, was a huge bill. And it became even larger, I think, on the Senate side. It was not voted out of committee.

It was a party line vote. And that that's how these things have proceeded. Democrats have 50 votes in the Senate, plus vice-president Harris's tie breaker. So they have a majority, but in order for most legislation to get out of the Senate and to get to president Biden's desk, it needs to overcome a filibuster, which requires 60 votes.

That's not true for certain economic legislation that can go through a process called reconciliation. But people aren't talking about that for a voting rights bill. And so, how are you going to get this bill out? Well over the last few years, both Republican and democratic senators have changed the rules for filibuster.

So Democrats, for example got rid of the filibuster as it applied to nominations by the president for everything but the Supreme court. That's when Harry Reid was a Senate majority leader. And then when Mitch McConnell came in, they got rid of the filibuster for Supreme court nominees that's how justice Gorsuch and other jurists have gotten through.

Well, now there's an argument- and I made one in Slate back in 2018- that Democrats should get rid of the filibuster for voting rights reforms, because as the Supreme court has said, voting rights are preservative of all other rights. So if you don't have the right to vote, how are you going to protect any other rights?

And so could we get anything through that would require blowing up the filibuster? It doesn't seem very likely right now because Joe Manchin, who's a democratic Senator from West Virginia has not only not endorsed HR one, but he's also said he won't blow up the filibuster and what he has proposed instead.

And so I'd rather talk about what he wants rather than what I want, since his position seems to be a little more important than what I wrote in an op-ed in the Washington post a couple

months ago. He wants pre-clearance restored and extended to all 50 states. And let me explain what that is.

So until 2013, from the late 1960s till 2013, anytime a state where the history of race discrimination passed a law that affected voting, the state had to get approval from the federal government, either from the department of justice or a three-judge court in Washington, DC, and showed that the law would not make protected minority voters worse off. This provision called section five of the voting rights act in 2013, the Supreme court in a case called Shelby county versus holder said that the coverage formula that was used to determine which states need to go through this pre-clearance process was too old, and that relying on this old data infringed on what the court majority called the equal sovereignty of states. That was a very controversial decision. And that's a topic for a different podcast, but the upshot is that the Supreme court didn't say that section five was unconstitutional. It said that section four, which defined which states were covered by this pre-clearance provision, was unconstitutional.

And Congress could go back and try and come up with a new pre-clearance formula. Well, what Joe Manchin is proposing is that we adopt HR 4, which is the John Lewis voting rights act which would restore pre-clearance. Although that provision has a new coverage formula, which Democrats believe would be found constitutional by the Supreme court, but Manchin suggesting no, let's apply it nationwide. That would solve the equal sovereignty problem, because he wouldn't be treating Alabama worse than you'd be treating New Jersey, but it does still create some constitutional questions.

It's not clear what the Supreme court would do with something like that. But I do think we could if we took out and restored pre-clearance in some form and we had limits on partisan gerrymandering, the Supreme court in a case a few years ago, called Rucho said that federal courts are not going to police partisan gerrymandering --the drawing of district lines to help one party or another-- but Congress has the power in the Constitution to set the rules for congressional elections.

It's an article one section four, and Congress could potentially require the use of redistricting commissions to draw district lines. And also I would add into that primary reform that would make it easier for a Republican moderates to get elected, which is important to kind of fight back the Trumpian wing of the party that is showing some authoritarian tendencies.

I think putting those two things in a bill and getting Joe Manchin to agree to it and blow up the filibuster to get those voting changes made-- that would be tremendous progress towards helping to protect voting rights in this country.

Jeffrey Rosen: [00:35:29] Thank you very much for that. Thank you also for explaining to We the People listeners so well what pre-clearance is and how the Shelby county case affected it.

Derek, I'll begin by asking, do you believe that a proposal to extend pre-clearance requirements to all 50 states could attract any Republican support? Do you think that conservative listeners should support it? And then after talking about that pre-clearance

proposal, maybe tell us what you think about Rick's other two proposals for partisan gerrymandering reform and primary reform, and whether you think they could or should attract any Republican support.

Derek Muller: [00:36:10] Rick is so succinct and able to pack so much information in a small bite. I'll see if I do my best to get through in terms of the nationwide pre-clearance. It's worth noting that the last version of the voting rights advancement act-- now, the John Lewis voting rights act --did have a provision for nationwide pre-clearance.

In a way, in the past, preclearance was an acceptable thing in the sense that it was targeting a handful of jurisdictions. And when we were renewing it, we weren't really changing the jurisdictions that were going to be covered. But now that we're writing from a blank slate, I do think it's going to be a little bit politically challenging, especially for those who come from jurisdictions that are going to be subject to pre-clearance again the swallow that and say, this is an acceptable outcome.

So there's that political component in terms of a nationwide pre-clearance, it does press what's been described by the Supreme court in Shelby county and as far back in, in, in the sixties, when it was approving the original voting rights act in cases like Katzenback .Extraordinary measure, right?

For the federal government to say your election law cannot go into effect until the attorney general or a federal court approves, it it's an extraordinary measure. It's not the kind of thing that was anticipated in the constitution. James Madison famously wanted a kind of opportunity for, for the federal government to veto state legislation that was never adopted.

So the question is, when it comes to that kind of remedy, what kind of record can Congress develop and say that this is an appropriate tailoring or the extraordinary remedy of pre-clearance to certain activities. So to pick it on a nationwide basis as Rick points out. Yeah. You're not treating states differently, right?

But it's still an extraordinary cause of action to say you can't do acts without the approval of the federal government. And so when you look at the last version of the voting rights act, it hasn't been introduced yet in this Congress, which is another interesting strategic political decision in my judgment.

It has things if you've, if you've changed election processes, like adding seats to an at-large political subdivision or changing jurisdiction boundaries, those kinds of things would require nationwide pre-clearance. And they're tethered to saying if there's language minorities, or if there's racial minorities in the state.

And so in a way you could say, this is a practice that Congress could identify at the nationwide level to say, listen, before you go changing how representation looks locally, you need to seek approval because it could dilute the rights of minority voters. And that might be something squarely within the power of the federal government to authorize them to acquire.

Something though that is assuredly not going to gain a lot of conservative support was one provision that said any changes to voter identification, laws, or requirements about proof of identity to register to vote would also need to seek nationwide pre-clearance, essentially freezing such laws in place and requiring you to go to a federal court or the attorney general to seek approval.

So I think when you include some provisions like that things that are already hotly contested, partisan issues at the state level and ratcheted up to the federal government's level to say you can't enact any of these statutes without the approval of the attorney general or a court, I think becomes a much more challenging measure for Republicans in Congress to support.

So it might be Senator Manchin. He is the swing vote. He might be the one who decides the touch things are okay. But I think it's also thinking about what nationwide pre-clearance looks like. It might be that some Republicans are okay with some of these provisions to say, when it comes to adding seats to local elections or redrawing jurisdictional boundaries, those kinds of things might be able to seek pre-clearance for some of these other provisions.

That might be a little bit tougher of a sell.

Jeffrey Rosen: [00:39:55] Many thanks for that. Well, in the final portion of this great discussion, let us talk about the constitutional dimensions of the voting rights bills that are pending in the states. This is a complicated question, Rick, but you're just the person to help us understand it.

Are there any aspects of the Georgia, Texas, Iowa, or other state bills that raise constitutional questions under sections under the 14th or 15th amendments and or under sections five or section two of the voting rights act?

Rick Hasen: [00:40:31] So you're right. It's a very complicated question. So let me just give a, just a very brief overview.

When a state law is challenged as say an effort to make it harder for people to register to vote, such a law might be challenged either under the Constitution, arguing that it's a violation of equal protection or due process, or under section two of the voting rights act, which protects minority voters and ensures that they have the same opportunity as other voters to participate in the political process and to elect representatives of their choice. Section five right now is a dead letter unless until the Supreme court revives it. On the question of whether or not these laws violate equal protection, sometimes the court uses measures like strict scrutiny, which makes it very hard for such laws to be sustained-- laws that directly infringe on whether someone can cast a ballot. Those laws are judged under strict scrutiny because of the right to vote is fundamental. But most of these laws are judged under a very amorphous balancing test, which is known in the election law field as the Anderson Burdick balancing test, which is named after two earlier Supreme court cases Anderson versus Celebrezze and Burdick versus Takushi.

In recent years, that balancing test has not been proven to be very successful for plaintiffs challenging a lot of these laws. As to whether these laws can be challenged to violation of

section two and those states that have large portions of minority voters, I can't answer that question until probably early July, because the Supreme court is considering a case called Brnovich

Brnovich is the name of the attorney general in Arizona. And it's a case that raises for the first-time what section two of the voting rights act means in the context, not of redistricting, where we have lots of cases and we know what the Supreme court thinks it means, but in the context of so-called vote denial laws that make it harder to register and vote. In the Brnovich case the Arizona rules were challenged as violating section two.

It doesn't sound like the plaintiffs are going to be successful in that case in, in showing a violation of section two, but the real action is going to be what the court is going to do in terms of fashioning a test for knowing when section 2 the voting rights act is violated. And let me so I can be embarrassed in the future-- let me give a prediction about something that might happen in that. I think that the plaintiffs are not likely to win based on the oral argument, but it is possible to imagine the court dividing say into three groups as it did in a 2008 case called Crawford versus Marion county election board, which involves a constitutional challenge to Indiana's voter ID law, where there was a block of liberals that wanted to strike the thing down. Here you'd have a potentially a block of liberals that want to say that these laws violate section two, although I'm not sure the liberals are going to go along with that.

In the Brnovich case, that's kind of a more extreme conservative block that's going to read section two as not really having any power in this area. And I'm thinking here of justices Thomas Alito and Gorsuch potentially. And then the middle block, which would be Kavanaugh, chief justice Roberts, and Barrett.

You can imagine them taking a middle position and reading saying that Arizona's law didn't violate section two, but not reading it as a totally toothless provision. And it's possible that three liberals go along with that interpretation. And so you could end up having a unanimous ruling against the plaintiffs in the Arizona case, but yet putting together kind of the liberal block and the moderate right block, if we want to call it that on the court, giving some teeth to allow plaintiffs to challenge the most restrictive laws.

I think at least chief justice Roberts recognizes the political difficulties right now in terms of voting and the polarization in this country. And another court decision that would read the voting rights act as mostly a dead letter would be very politically controversial and would also potentially not protect voters in an adequate way as Congress intended.

So I'm at least hopeful that we're going to end up with the potential for this kind of middle reading of section two, the voting rights act, and that that will help go after the most egregious of these voter suppression laws that are being passed in some of the states.

Jeffrey Rosen: [00:44:28] Thank you for that wonderfully succinct introduction to this extremely complicated topic.

Derek, you also have written about the Brnovich case. We've discussed it on the We the People podcast. And I'm eager for your thoughts about what this position, which Rick has

described as a middle position that would allow the most extreme voting rights laws to violate section two, would look like. As you note, section two says that state laws should be evaluated under the totality of circumstances and be struck down when voting procedures are not equally open to participation of racial minorities, in that its members have less opportunities than other members of the electorate to participate in the political process and to elect representatives of their choice. What test could you imagine? The center of the court converging around? And what laws would that call into question?

Derek Muller: [00:45:19] Yeah, it's a great question, because I think it's so complicated to think about the kinds of tasks the court can do add onto this fairly open-ended language in section two of the voting rights act, right?

How do we assess totality of the circumstances? How do we determine whether it's equally open to participation with those things? Undoubtedly, I think the center of the court was gravitating toward thinking about these laws holistically, and relatedly, I think this has been a controversial proposition and the lower courts, as Rick's pointed out, thinking about Anderson -Burdick balancing tasks, for many of these statutes that have often been challenged in the lower courts.

And yet they, they sometimes have found success at the district court level only to be overturned by the court of appeals or especially during the pandemic, by the Supreme court on short fuse litigation, where it says these laws need to remain in place. Take one example from Georgia, one I already mentioned about requiring you to submit an absentee ballot 11 days before the election instead of four days. How do we assess that in terms of the burden it places on voters, right?

Undoubtedly, there are some group of voters who might've wanted to get an absentee ballot between days four and 11 before the election and are unable to do so. And two are unable to go to the polling place and vote. And so do we focus on that group, however narrow it is? Sometimes the court in Crawford has suggested as such, if that group is disproportionately racial minorities.

Do we think about that group as the group being most disproportionately affected? Or do we look at the fact this is a law that treats everyone equally; it's on a statewide basis. Everyone has the same opportunities in front of the same opportunity to participate in the political process.

And we also look at it in the totality of the circumstances. You have had ample opportunities up until 11 days before the election to request an absentee ballot. And you can go to the polling place and vote in person. And when you look at it from that lens, most voters are not going to be affected and you still have ample alternative avenues to seek out the opportunity to vote.

And so I think that's what makes these laws in particular tricky to evaluate. On the one hand, you might look at them as it doesn't make it harder to vote. Maybe it does. And we look at it and some of these narrow discrete categories, but placing again in their totality of the circumstances tasks as the court might do under section two, or placing it under this

balancing test about how we're supposed to assess it as voters under Anderson Burdick, I think has made a lot of these tweaks to election laws, much harder for litigants to challenge.. Unlike some of these other statutes where voter identification laws prohibit you from voting. If you don't have the ID subject to some limited exceptions, these are much trickier. They, they, they make it a little bit more challenging and channel voters into different avenues to be able to participate.

But I think the court has had less appetite in letting the federal courts be the place, to make the adjudications for these more intermediate measures. And I think Rick is right, that Brnovich will come down in a way to say that there are some outliers, some extreme situations where litigants are going to win these challenges.

But under the totality of the circumstances, many times the plaintiffs will lose.

Jeffrey Rosen: [00:48:29] Thanks so much for that. One more round before closing arguments. Rick, if you were advising the Supreme court about how to interpret section two, what test would you propose for the adjudication of vote denial claims rather than vote dilution claims and how would it apply and what provisions of the laws we've been discussing would it call into question?

Well, I

Rick Hasen: [00:48:58] should say, first of all, what I would do is rework the burden at the Anderson Burdick balancing test, because I think that the court went in the wrong direction. And I've written about this for many years. I think that essentially what happens in these balancing tests is that the court is a bear on evidence. It requires tremendous evidence of burdens on voters. And, and yet when it comes to state interests like promoting voter confidence or preventing fraud, the court requires no evidence. We saw that in the Crawford case that I mentioned earlier with 2008 case upholding Indiana's voter ID law. It was justice Stevens who wrote the controlling opinion there.

And, he drops a footnote talking about voter fraud, and he had to cite boss Tweed back from the mid 19th century to find evidence of fraud or one, possibly one, fraudulent ballot cast in a governor's race in Washington state in the early two thousands. I think rather than doing this as an issue of the voting rights act and race, I would much rather than voters across the country, whether they can show racial discrimination or not-- get more protection. Again, the question should be, does the state have a legitimate reason to make it harder for people to register and vote?

And I know that Derek has talked about this as creating a kind of one-way ratchet, where when states increase access to the ballot and they have a hard time rolling it back, but I'm actually fine with that. I think they should have a hard time rolling it back. I think that voting rights should always be getting stronger so long as we do have adequate protections against actual fraud or, or problems with how elections are run on the section two question itself.

I think the lower courts pretty much had it right. You have to show that a law burdens minority voters greater than it burdens others. And that the states' Justification for making it

harder for protecting minority voters to vote is not, to use the technical language here from voting rights act cases, tenuous.

So tenuousness requirement. And let me just give you an example of what this looks like. Texas passed one of the strictest voter ID laws in the country. It was blocked under section five, one section five was still preclearance when section five was still there. As soon as the Supreme court decided Shelby county, Texas announced, I think within two hours, it was going to enforce its very strict voter ID law, a law that had only a very small number of acceptable forms of ID, which did not include student IDs.

Although it did include people who had a gun permits, that kind of idea was okay. That law was challenged as a violation of section two of the voting rights act in the fifth circuit, which is probably the most conservative circuit court in the United States. So the entire fifth circuit held the law was a violation of section two of the voting rights act. Texas then went back and it made its law a little bit less strict.

It said, for example, that voters who had a reasonable impediment to getting the kind of IDs that are allowed under the law, those voters could fill out an affidavit as to who they are. And that this could serve as an alternative to an ID. The law was still challenged. And when it went back to the fifth circuit, the fifth circuit-- there's no, that's fine.

And I think that's the way things should work. I'm not saying that those two particular decisions were necessarily right, but the idea is that you have a test that is meaningful, that has teeth that says that laws that are really restrictive, shouldn't be found to be violating the voting rights and laws that are, are, are reasonable ways of running an election.

Those are okay. And that's what I would like to see. I don't know exactly the court's going to draw that line. If there's going to be a majority opinion, I suspect we may not find out till the very end of a Supreme court court's term, but it is one of the most important cases that the court is going to decide this term, because it's going to have effects for 2022 and 2024 and beyond.

Jeffrey Rosen: [00:52:31] Derek, what are your thoughts about how the court should fashion attest for section two? In the Brnovich case, Rick endorsed the lower court test that the question is whether laws burden minority voters more than they burden others. And whether the state's justification for burdening minority voters is tenuous. Do you think that's the right test or would you advocate for another test and what do you think of the proposal to refine the Anderson Burdick test by asking whether states have a legitimate reason for making it harder for people to register and vote?

Derek Muller: [00:53:02] I support probably a little bit more of a stringent test. Arizona for instance, has had a law on the books that prohibits out of precinct voting. So it's a longstanding rule on the books. And the ninth circuit looking at it saying, you know what, we think this law disproportionately burdens racial minority voters, and we can't figure out the state's justification.

We're going to strike it down. I mean, to me, it is just a little bit too easy to for courts to just kind of step in and substitute their judgment. And it's true as Rick said, that that a lot of

times the, the legislature have to come forward with great reasons in front of the court and had done so in the past.

But in terms of providing opportunities, thinking about the opportunities for voters, there are equal opportunities to participate in the political process throughout Arizona. In particular, if we think about the precinct problem...there might be a problem in certain counties and another counties, they use vote centers where you don't have to go to any particular precinct, but you go somewhere within the county to go be able to vote.

And so thinking about the fact that there are many alternative avenues and the fact that it might have a burdensome impact on some population in the state in my judgment is just not enough. And I think that there was a position advanced by the solicitor General's office, until that was withdrawn once the Biden administration took over. So, I guess some kind of proximate causation that you're able to show that it was this law that was causing the effect. And not just that it had some burden. I think that that would provide a little bit more flexibility to the states to be able to preserve including long-standing laws in the books.

But also to say that those statutes are for the most part going to be upheld. Even when we think about these things, one of the, one of the frustrating things...We opened this conversation thinking about statutes, right? And we're so quickly into the courts. And in some ways Congress can obviate all this, not just an HR one, if it wants to slim it down or find something, Congress can provide a lot of uniform guidance to the states to prohibit certain kinds of practices or provide some kinds of floors.

And so if HR one is enacted, there's things within with which I agree or disagree, there are things that might be constitutional or not. But it would obviate a lot of litigation that's been happening at the lower court level to be thinking about these problems on a piecemeal ad hoc basis.

So I, I, I do wish that the legislature would flex its muscle a little bit more, maybe in some slimmed down versions rather than 886-page versions, but to address those problems that it thinks that the national level really need to be addressed. And maybe that's pie in the sky talk when we're talking about our partisanship.

But I think the, the, the real reason we lean so heavily on the federal courts to do so is because of a lack of federal guidance that would again cure many of these problems.

Jeffrey Rosen: [00:55:41] Well, it's time for closing arguments in this really rich and illuminating discussion. Rick, the first one is to you. Republicans claim that these pending voter laws discouraged voter fraud and promote voter confidence.

Democrats say that they are tools of vote suppression or election subversion. Is this essentially a partisan debate dressed up with broader principles? Or is there any common ground in this debate about the legality and constitutionality of voting rights bills in the states?

Rick Hasen: [00:56:11] Well, I think Derek and I can find common ground and if you would make us elections czars, I think we could run the elections fairly nicely. But we just get to be armchair quarterbacks here.

And so what I'd say is that, the debate over, I wrote this in my 2020 book: "election meltdown: the debate over voter fraud and voter suppression." I think the debate is actually over as a matter of actuality. The amount of fraud in this country is quite low. Certainly we need provisions to keep it that way, and we need aggressive prosecutors when there are serious violations.

And we see kind of lots of prosecutorial discretion, things that look serious, don't get prosecuted and things that seem very minor do get prosecuted. So I, I think it is unfortunate that this is a partisan debate. I don't want to look at this as a democratic versus Republican issue.

I side with the voters. And I asked, what can we do to assure that we have fair elections that people will accept as legitimate. We're all eligible voters, but only eligible voters can easily cast a vote that will be fairly inaccurately counted. And I think that's gotta be the baseline.

And there are lots of things I would favor to move in that direction, like moving towards national non-partisan election administration. Those are things that are not going to happen anytime soon in the United States, even though every other advanced democracy has a model like that. So we have to ask what we can do within the reality of the American system.

I would like to see more bipartisan cooperation on election issues. I think that it's going to require us to get through this Trumpian moment where election confidence is being undermined by lies about the 2020 election being stolen. So it's a particularly difficult time for us to get consensus. But I hope that maybe a decade from now we'll be past this moment and there will be, again, an opportunity for people across the political spectrum to come together and to pass the voting rules that make sense, that assure that eligible voters can cast a ballot.

And that really what the parties and others are doing are competing for voters' votes, not trying to shape who the electorate is.

Jeffrey Rosen: [00:58:11] Derek, the last word is to you. Do you believe that there are grounds for bipartisan cooperation on election issues so that people from across the political spectrum can cast eligible votes and what might those reforms look like?

Derek Muller: [00:58:28] Yeah. So I think I agree with much before Rick said, and again, I have the optimism for the future for many of these statutes. I'm not sure they do a lot of good. I'm not sure they do a lot of harm. I think some of them are a little more inexplicable as we open the conversation about banning people from handing out water bottles to Georgia voters waiting online.

But for most of these things, I think they're tweaking at the margins. And again, I think one of the more concerning things is that they are being used as explanations to say, wow, we are responding to the problems from 2020. And there just weren't a lot of problems in 2020.

And I think this is a long-standing issue, and it's been getting worse in the last 20 years --in particular losing candidates or losing parties, maybe losing partisans who feel like the system was rigged and stacked against them, and that they feel disaffected by the process until they win again or that there must be some defect in the system.

And that is very frustrating and unfortunate. And I don't know what the way forward is. It's obviously to tell the truth to instill that confidence in the public. It's very hard when a former president is insisting that the game was rigged and we've seen this in other situations in Florida in 2000 or in the Georgia gubernatorial election, 2018. Never at this scale and level. And then there's a worry, I think it is only going to get worse. So I think we do need to be thinking about, again, smartly about those kinds of reforms, paper ballots, auditing the votes and in the appropriate risk- limiting, auditing way, not in an ad hoc, legislative forensic audit- - thinking about those kinds of things that really can ensure broad consensus on a bipartisan basis to instill that confidence.

But at the end of the day, if the voters are unwilling to accept that result egged on by losing candidates, I think we're in a very dark place. So I like to be thinking about those kinds of things that can bring us together on a bipartisan basis and hopefully move the ball forward in improving the confidence in our elections.

Jeffrey Rosen: [01:00:22] Thank you so much, Rick Hasen and Derek Muller, for ending us on a note of light rather than darkness and for a non-partisan discussion of the most partisan of all constitutional and political issues. Rick, Derek, thank you so much for teaching us and thank you for joining.

Rick Hasen: [01:00:40] Thank you.

Derek Muller: [01:00:41] Thank you.

Jeffrey Rosen: [01:00:44] The show was engineered by David Stotz and produced by Jackie McDermott. Research was provided by Mac Taylor and Lana Ulrich. Homework of the week, We the People listeners: if you haven't yet, please check out our companion podcast, Live at NCC. It's just a wonderful audio feed of all of the incredible town hall programs that we're running every week.

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a wonderful show of support for an educational mission that we all care deeply about. So thank you. And on behalf of the National Constitution Center, I'm Jeffrey Rosen.