

Election 2022: Are We Ready?

September 28, 2022

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[00:00:00] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations in the base, hosted by the center in person and online. I'm Tanaya Tauber, senior director of Town Hall programs. With midterm elections just a month away, we hosted a discussion on election integrity, voting rights, and proposed election reforms to help bolster democratic guardrails in the United States. Our guests were contributors to the National Constitution Center's Restoring the Guardrails of Democracy Initiative, Edward Foley of the Ohio State University, David French of The Dispatch, and Ilya Somin of the Antonin Scalia Law School of George Mason University and the Cato Institute. Ken Randall, dean, and a professor of law at the Antonin Scalia Law School of George Mason University, provided intro remarks. And Jeff Rosen, President and CEO of the National Constitution Center moderated. It was streamed live on September 28th, 2022. Here's Ken Randall to get the conversation started.

[00:01:04] Ken Randall: I'm Ken Randall, dean of the Antonin Scalia Law School, and I'm pleased to welcome you to today's program. One of our law school's points of distinction is our commitment to providing a forum for multiple points of view on today's most important topics. Today's webinar, Restoring the Guardrails of Democracy, is a great example of this commitment. We today are welcoming and are honored to welcome three distinguished scholars. One from our own law faculty, who will propose three different perspectives for bolstering our democracy as we look ahead to the fall elections of 2022 and beyond.

[00:01:43] Ken Randall: Our co-sponsor this event is the Philadelphia based National Constitution Center, which is America's leading platform for constitutional education and debate. We'd like to thank the Center, the NCC, particularly Lana Ulrich, Tanaya Tauber, and John Guerro for their assistance in organizing today's webinar. It's now my honor and privilege to introduce Jeffrey Rosen, President and CEO of the NCC, who will set the stage for our event and welcome and introduce our speakers.

[00:02:16] Jeffery Rosen: Thank you so much, Dean Randall. It is an honor for all of us at the NCC to partner with you and George Mason University Antonin Scalia Law School for today's program. We're gathered today to discuss a wonderful initiative called the Guardrails of Democracy Initiative, which embodies the NCC's non-partisan mission. Last year, we convened three teams of scholars. A libertarian, progressive, and conservative, to explore structural and constitutional and institutional reforms that might strengthen the guardrails of democracy.

[00:02:56] Jeffery Rosen: And the reports were published last spring, Ilya Somin at George Mason had the wonderful idea of having a follow-up web seminar on the Volokh Conspiracy blog to explore areas of agreement and disagreement, and today's seminar will be a follow up on that virtual symposium, so that we can ask, where are we in the current discussions about institutional reforms for the guardrails of democracy? And what further areas of agreement, and productive disagreement can we explore?

[00:03:28] Jeffery Rosen: I will now introduce our panelists, and then we'll jump right in. Ilya Somin was a member of team libertarian of the Guardrails of Democracy project. He's a professor of law at the Antonin Scalia Law School at George Mason, and a regular contributor to the Volokh Conspiracy blog. Hosted by Reason, he's the author of several books, including most recently, *Free to Move: Foot Voting Migration and Political Freedom*.

[00:03:53] Jeffery Rosen: Edward B. Foley led team progressive of the Guardrails initiative. He holds the Charles W. Ebersold and Florence Whitcomb Ebersold chair in constitutional law at the Ohio State University, where he also directs its election law program. He's a contributing opinion columnist for the Washington Post, and the author of several books, most recently, *Presidential Elections and Majority Rule: The Rise, Demise, and Potential Restoration of the Jeffersonian Electoral College*.

[00:04:18] Jeffery Rosen: And David French, who's a member of team conservative. He's a senior editor for the Dispatch. He writes the weekly newsletter, the French Press, and cohosts the weekly podcast, *Advisory Opinions*. He's a contributing writer for the Atlantic, where he's also the author of its newsletter, the Third Rail. And his most recent book is *Divided We Fall: America's Secession Threat and How to Restore our Nation*. It's wonderful to see all of you, Ilya, Ned, and David.

[00:04:42] Jeffery Rosen: Let's begin with some breaking news. The House has just passed and the Senate's on the verge of passing a reform to the Electoral

Count Act. That's the act responsible for tabulating electoral votes after presidential elections. In the Guardrails of Democracy reports, reform of the Electoral Count Act was one area that all three teams converged on. Both team libertarian and team progressive advocated it, and team conservative said that they assumed that it would be a good idea, and they embrace it as well. So Ilya, let's just begin with this wonderful example of bipartisan agreement. Tell us about the bill that it looks like Congress is about to pass, and why does team libertarian think it's a good idea?

[00:05:26] Ilya Somin: Sure. There are actually at least two different versions of the bill before Congress. One before the House and one before the Senate, which I believe will need to be reconciled. But the basic bottom line is that the 2020 election revealed the number of weaknesses in the Electoral Count Act of 1887, which is an old, fairly archaic statute, which sets out the rules for counting the electoral votes, and certifying who is the winner. And in my view, and I think, actually, there are probably is not much, if any, disagreement with the other panelists. A reform of the Electoral Count Act should achieve three major goals.

[00:06:05] Ilya Somin: First, it should prevent potential rogue states or governors of states from in effect, trying to change the rules after election day, if the state government doesn't like the result that the voters supported. Before election day state legislatures have pretty broad power to change voting rules, or to potentially go as far as to say that their electoral votes from that state won't even be allocated by popular vote. But they can't change the rules after the fact and a reform should clarify this, given threats that were made both in 2020 and in discussion in some states today that such after the fact rule changing would be attempted.

[00:06:46] Ilya Somin: The second is that when Congress convenes to certify the electoral votes, which of course, happened in January 6th of 2021 and led to the riot of those days, as well as some bogus objections to the electoral votes by some Republican members of Congress it reformed the Electoral Count Act should clarify that Congress has very limited authority to throw out properly cast electoral votes and some other procedural changes need to be made there as well.

[00:07:14] Ilya Somin: And finally, the reform should make clear that the vice president, who presides over the certification in Congress that he or she does not have the power to simply negate or throw out electoral votes. I think that power already didn't exist, and then Vice President Mike Pence was right to refuse Donald Trump's call to try to say that he should be able to throw out those

votes. But it would be good to clarify that for the future. We want to make this an easy call for the next vice president who might be in such a situation whereas there's some vagueness in the 1887 Electoral Count Act.

[00:07:52] Ilya Somin: On top of that, there might be some other reforms to ECA that are desirable, but those in my mind are the three big issues, and at least one of our panelists, Ned Foley, actually, I think knows more about this issue than I do because he's been actively involved in drafting reform proposals. So it's possible he will add to what I've said, or even point out if I've erred on some point or other.

[00:08:15] Jeffery Rosen: Ned, you have indeed been centrally involved in Electoral Count Act reform and are one of America's leading experts on it. Tell us what the bill that's likely to pass does with regard to the three areas Ilya mentioned, including making it harder for Senators to object to electoral votes, making it clear that the vice president doesn't have the power to throw out electoral votes, and also making clear that state legislatures can't change the result after the fact. In particular, on that point, what does the bill do, and does it do enough?

[00:08:47] Edward Foley: Yeah, thank you, and Ilya's summary was fantastic. I would just echo everything he said, and it does those three things. Those are the three key things. And I think it does them well. There... As he said, there are two different bills at the moment. The house has passed one bill what we know about the Senate, which is the really good news from yesterday, is both Senators McConnell and Schumer are supportive of the bill that came out of a compromise that Senators Manchin and Collins initiated with a large group of bipartisan Senators. And then that went through so-called markup in the relevant Senate committee, where Senators Klobuchar on the Democratic side, and Senate Blunt on the Republican side agreed to some technical adjustments that developed during the hearings and the deliberative process.

[00:09:38] Edward Foley: You know, it seems pretty clear that it's gonna be the Senate bill that ultimately gets passed. I don't think the House bill would pass the Senate. But I do think the Senate bill would pass the House. It still has to happen the Senate isn't gonna take it up until the lame duck session after the election. And so we have to keep our eye on it to make sure it does cross the finish line before this Congress runs out of time at the end of December. But I think given the news from yesterday, I think it's very likely to pass the Senate and the House. And this is extremely good news for the American people, the American system of government.

[00:10:16] Edward Foley: I wish it wasn't happening quite so close to the deadline. 'cause I wish it would have happened, you know, much sooner after the flaws were revealed on, you know, January 6, 2021. But as long as it gets done, you know, before this Congress closes its lights in December, we have the last in place for when we need it after the 2024 election. So hopefully it could actually be a model for other bipartisan electoral reform. Electoral reform needs to be done on a bipartisan basis for structural reasons that we could explore.

[00:10:50] Edward Foley: Just real quick, Jeff, since you asked about how the bill does what it does so well. It does it by, first of all, taking away a bad provision of current law, which talks about the possibility of state legislatures being able to appoint electors themselves if they think there's been a failed election. It would be a misuse of existing law to try to claim an election was failed just 'cause you didn't like the outcome. But we can imagine how, you know, partisans might try in the heat of the moment to abuse it. That loophole is completely shut off. Now, you can only, in the case of a specified emergency that's, like, a hurricane, unfortunately, that you can have in election year. But the only thing you can do is extend the period of voting. You can't repudiate the result. So it closes off the possibility for legislatures to after the fact undo the popular vote that they had authorized ahead of time, which is the point that Ilya made, which is the essential point.

[00:11:54] Edward Foley: The other way it does this is it says, whatever dispute happens after the ballots are cast in a state in November, about how to count those votes, that... the litigation that occurs in court will be decisive. And it uses the word conclusive in a way, multiple times to explain that the judicial process controls the counting of the vote. Not a legislature, not a governor. That's how there cannot under this law be rogue state officials who want to just do their own thing in terms of counting votes.

[00:12:28] Edward Foley: And so it locks down in a rule of law way what the answer is to who won the popular vote in this state. And it obligates that answer to be sent to Congress, and then it obligates Congress to accept that answer. And then it obligates the vice president to preside over a process that accepts that answer. And it limits the ability of any member of Congress to object both by raising the threshold for objections, so it's more than just a single Senator and a single Representative. You need one third of each body to even have an objection process go into motion. But it also substantively says that an objection 'cause you don't like the outcome is not a valid objection. In fact, as long as the courts have settled what the outcome is, that court decision is binding.

[00:13:16] Jeffery Rosen: Fascinating. Thank you, so much, Ned, for explaining that so clearly. It is very interesting to learn that the reform takes away the ability of state legislatures to appoint their own electors, can only allow them to extend the period of voting, not to change the result, and says that the judicial litigation will be conclusive. And thanks for flagging that this might be a model for other forms of nonpartisan electoral reform, and I'll certainly ask all of you about that in the next rounds. David French, team conservative, didn't explicitly address Electoral Count Act reform because as Sara Iskra, the team leader of Team Conservative, said in a recent panel, all of you assume that that would be a good idea. Tell us about what you think of the Electoral Count Act reform. Do you indeed support it? And what areas does it leave unaddressed that you think would be a productive area for reform in the future?

[00:14:11] David French: Not only do we support the Electoral Count Act reform I would describe it as maybe the biggest no brainer in the history of the universe. [laughs] To quote, I... Some movie, somewhere. Normally at The Dispatch we like to have very understated headlines and not be very click baity, but the last thing that I wrote was stop screwing around and reform the Electoral Count Act. We're idiots if we don't. Because I think Americans don't fully appreciate the crisis that would have occurred had Mike Pence just said yes. Had he said yes to the plan you know, that Johnny's been laid out. Whether it was declaring Trump the winner, as one version of an Eastman memo said, or whether it was punting the whole issue, not certifying the electoral results of the election and punting everything back to the states is another course of action urged, we would have had a constitutional crisis that was the worst since 1861.

[00:15:05] David French: And so the idea that we need to reform this Electoral Count Act, where the intent of the Electoral Count Act is a relatively clear. But in one of the most garbled, poorly drafted paragraphs in the history of legislation, the details are very difficult to decipher. This is an easy call. And-and there are two aspects of it that I think are, I think the legislation is drafted well enough that I don't see glaring holes in it. I mean, the only thing I would have are small quibbles.

[00:15:39] David French: So for example, raising the threshold of object of objection you know, I believe that the legislation is raising it to around one fifth or so of legislators. I think that's absolutely indispensable. Could it be better at one third? I think so, but I'll take one fifth. In particular because it's one fifth of both houses. I think getting one fifth of the House of Representatives, where a majority of Republican members of the House voted against certification is an easier lift. One fifth of the Senate is a harder lift. It's a more difficult lift. And so

I think that one provision, and I wrote this. That if you reform nothing else, just raising the threshold, it would be an important change.

[00:16:25] David French: But it does much more than that. And I also think the premium on judicial decision making and the judicial determinations is also a really important part of this legislation. Because one thing that we saw during the course of the election, the attempt to Trump's attempt to steal the election, was that of all of the institutions of government. And there were many members of state governments who held firm, such as the Secretary of State of Georgia, Brad Raffensperger, and the Governor of Georgia, and the Governor of Arizona and others. But institutionally, the courts performed very well in that... During the election steal effort.

[00:17:03] David French: Institutionally, on a... It didn't matter whether you were talking about Obama or Clinton appointees, or Bush or Trump appointees, the unanimity of the courts in demanding rigorous evidence before they're going to find any sort of, material fraud and rejecting frivolous legal arguments decisively. The unanimity of the courts on that point was indispensable, and I think placing this sort of, this premium on judicial decision making is again indispensable.

[00:17:32] David French: And then the last thing, when you're talking about clarifying that the vice president's role is just ceremonial, I think is also indispensable. So the proposed reform hits all the major beats. There isn't something where I say, "There's a glaring hole here." If this reform had been in place, I'm not gonna say that nobody would have stormed the Capitol on Jan 6th. I'm not gonna say that. There was a frenzy on that day. But the pressure placed on the system would have, I believe, had been greatly lessened. And that ability to create that spectacle, and the ability to place that behind the scenes pressure on Vice President Pence would have greatly minimized. And I think as I said, this is indispensable legislation. I think just indispensable.

[00:18:24] David French: Doesn't mean that the next election is going to be peaceful. Uncontroversial. Doesn't mean that at all. But it does take a weak point in the system and strengthen it substantially.

[00:18:34] Jeffery Rosen: Thank you very much for that. Wonderful to see this unanimous agreement about all three teams about the need for Electoral Count Act reform, and very wonderful to see that this bill may pass as a shining example of thoughtful good government reform. And that could indeed be a meaningful guardrail of democracy. Let's discuss, now, the possibility of constitutional constraints on the ability of Congress or state courts to constrain

the choice of state legislatures in elections. This is the so-called independent state legislature doctrine. It's being litigated before the Supreme Court this term. In the Moore and Harper case. And several of our audience members ask about the possibility of constitutional constraints on Congress's power.

[00:19:23] Jeffery Rosen: Nielson asked, "Could the Electoral Reform Act be challenged at the Supreme Court on Article I, section 4 terms, that reserve elections to the states?" Collin Tivo asks, "Do any of the panelists agree with the idea that any legislation that empowers Congress to throw out state electoral votes is unconstitutional? Ilya Somin, the contours of the independent state legislature doctrine are controversial. What is your position and the position of team libertarian on whether it constrains Congress's power in any way to stop state legislatures from changing the result after the fact? And what do you think that the independent state legislature doctrine does? What is its scope, and are you concerned that it might lead to confusion in a future election?"

[00:20:05] Ilya Somin: So the issue of the independent state legislature doctrine is not addressed in our report, so I can only speak for myself, rather than the other report authors. What I would say is a couple of things. First, in my own mind I'm not an expert on independent state legislature doctrine, or if I'm not fully decided sort of what my view of it is. But what I would say is a couple things.

[00:20:27] Ilya Somin: First, even if the court decides in favor of the independent state legislature doctrine, I do not believe that in any way imperils the Electoral Count Act or similar congressional legislation, because Article I of the Constitution clearly empowers Congress to set various rules and regulations for federal elections. Deadlines for when the electoral vote count has to be done by and so forth. So I don't think the ECA would be affected by this.

[00:20:54] Ilya Somin: What is at stake with the independent state legislature doctrine are various constraints set up in state constitutions on the discretion of state legislatures in determining various electoral rules. Possibly, it could also constrain judicial review of electoral law passed by state legislature, judicial review by state courts. And it might also constrain delegation of some electoral rules, issues, or decisions that might be delegated to the executive or to a court, or to an independent commission.

[00:21:28] Ilya Somin: And I think how much it would constrain them really depends on sort of what version of the independent state legislature doctrine the Supreme Court majority decides on. And I think more moderate versions, while they may not be the correct constitutional decision the risk would not be so

great. Whereas more extreme ones, the which essentially... if a more extreme one which said that essentially a state legislature has the power to override all state constitutional constraints, and that there's no judicial review, at least at the state level, [inaudible 00:22:39] that would be bad, and to my mind, would almost certainly be at odds with the text, original meaning of the Constitution as well.

[00:22:07] Ilya Somin: On the other hand, sort of more modest limits on how much authority over elections can be delegated to an independent commission or to executive branch agencies at the states, again, that isn't necessarily the right constitutional decision, but it wouldn't necessarily be terrible. I would note also that even if there is no independent state legislature doctrine at all state legislatures already have a lot of power do a lot of potentially problematic things with elections, including gerrymandering you know, setting electoral rules that they hope will benefit one party at the expense of the other. So we should not assume that you, in the absence of ISL there would be no abuses by state legislatures. Sadly, they happen on a regular basis.

[00:22:53] Ilya Somin: Anyway what the independent state legislature doctrine would do if adopted by the Supreme Court is if it is adopted in a more extreme way it could potentially eliminate or severely truncate some safeguards that exist on the state levels, essentially say the state legislature is a completely autonomous actor that has the power to do whatever it wants, at least with federal rules for federal elections without being checked by things like the state courts and the like.

[00:23:24] Ilya Somin: But I don't think the more extreme version of ISL is necessarily the one that the court would adopt, even if they adopt some more moderate version, I hope, though I do not know that there would not be five votes on the Supreme Court for the most extreme possible approach to ISL. But obviously, we'll see, and it may be that the other panelists have, you know, a different view on that.

[00:23:45] Jeffery Rosen: Thank you very much for clearly distinguishing the various versions of the independent state legislature doctrine and for making clear that you don't think that they'd touch Congress's power to prevent state legislatures from changing their mind after an election. Ned Foley, team progressive did address this question. You wrote in your report, "To the extent that there's any confusion on this point, generated by invocation of the so-called independent state legislature doctrine, it's imperative to dispel it as part of Electoral Count Act reform. Whatever the appropriate contours of the controversial independent state legislature doctrine may be, the doctrine has no

capacity to negate the separate power of Congress explicitly delineated in Article II to set the time for appointing states electors for any specific quadrennial election."

[00:24:29] Jeffery Rosen: So first, does the Electoral Count Reform Act that Congress is likely to pass answer your concern and dispel any claim that state legislatures can change their mind after the election? Do you have any concern that the US Supreme Court might repudiate that part of the congressional reform? And what are you concerned about in the versions of the state le-independent state legislature doctrine that the Supreme Court might adopt when it comes to federal and presidential elections?

[00:24:57] Edward Foley: So I think the easiest way to maybe understand this is that the Electoral Count Act reform is necessary no matter what the US Supreme Court decides in the Moore versus Harper case. So I'm pleased that Congress will pass this law, but it's essential that they do, as we've been saying. And also, whatever the Supreme Court decides in that case cannot negate the effect of this essential law. So they're just two separate... I understand why people sometimes talk about them in relationship to each other, but actually, analytically, they are very different.

[00:25:33] Edward Foley: And the reason for that is the same Constitution that gives state legislatures the power to choose the manner of appointing presidential electors in Article II, which is, you know, there's an independent state legislature doctrine component both in Article I, having to do with congressional elections, and in Article II, having to do with presidential elections and the electoral college system. But it essentially allows the state law to set the rules for appointing electors ahead of time. But it... The same text of the Constitution says Congress has the authority to set the time for appointing electors, which we all know to be election day in November.

[00:26:18] Edward Foley: And so once electors are themselves appointed on the specified date, state legislatures can't undo it 'cause Congress got to set the time. And so you would be interfering with the actual congressional power to control a calendar, if you said, "Oh, the state legislature says, 'Oops, we don't like how we appointed electors, we're gonna do it differently for this election.'" No, no, no. They can change the rules for the next election in four years for presidential elections. But They've got to pick their method of appointment before the date of appointment, in essence.

[00:26:56] Edward Foley: So that's why I think it would be unbelievably remarkable for the Supreme Court to negate that clear textual command at the

same time it was purporting to build an independent state legislature doctrine out of the text of the Constitution. So I just don't foresee it happening. And it would be dicta anyway because the Moore versus Harper case concerns gerrymandering and just a different set of issues. It doesn't concern the appointment of electors. So I'm optimistic that these two things will just proceed on separate tracks and not collide.

[00:27:33] Edward Foley: As for the Moore versus Harper case itself, you know, just really quickly. I also worry about the bigger version of what the court might do there because if it did disable state constitutions from regulating and constraining state legislatures, it would impact the ability to do redistricting reform, as the State of Arizona did, and as the Supreme Court approved in a 5-4 decision not that long ago. But potentially could be up for reconsideration if Moore versus Harper is a very, you know, broad opinion.

[00:28:11] Edward Foley: And likewise, any other kind of electoral reform that states might want to adopt to improve electoral systems and by using their ballot initiative methods to change their constitution, you know, could potentially be vulnerable. The court doesn't need to go that far, and again, if it tried to go that far, it really would be dicta because I think what Moore versus Harper is gonna come down to is a concern about very broad, vague provisions in a state constitution. Like, there must be free and fair elections. Not specific rules for how you draw district lines, or not specific rules for say, rank choice voting, as Alaska has adopted. I mean, any clear rule in a constitution could be consistent with a decision in Moore versus Harper that says what we can't permit is to give state courts carte blanche to rewrite legislation by pretending they're interpreting a very vague constitution that may not have anything to do with the problem at hand.

[00:29:10] Speaker 5: So if the court, you know, does a more moderate version of this doctrine, whether you like it or not, it will leave intact the possibility of electoral reform that would be worthwhile. If the court's very aggressive, it won't affect the Electoral Count Act, but it could affect other kinds of electoral reforms.

[00:29:28] Jeffery Rosen: Thank you so much for that. And for so clearly explaining this complicated doctrine. David French, you've heard the discussion, and I'm gonna ask you the same thing. First, do you feel that the part of the Electoral Count Act that prevents state legislatures from changing their mind after the congressionally specified deadlines is constitutionally secure and addresses that danger? And second, what do you think about the Moore and Harper case, and are there versions of the independent state legislature doctrine

that you think go too far? And do you think that a narrow version of the kind that Ned and Ilya both identified that might constrain state courts from coming up with electoral rules based on vague constitutional provisions, but doesn't do more than that would be consistent with the Constitution?

[00:30:15] David French: Yeah there's a lot there. So let me sort of take it one by one. One is do I think the Electoral Count Act is consistent with the Constitution? I think so. And let me go back for a minute. Because there's actually some case law here. In the hurricane and the blizzard of cases that arose as the result of the election steal effort, was a case that wound up through Wisconsin and ended up in the Seventh Circuit, which dealt with the independent state legislature doctrine. And so you had two Trump appointees, Brent Ludwig in the Eastern District of Wisconsin. And then you had Michael Scutter writing the opinion in the Seventh Circuit, who grappled with this independent state legislature doctrine and did so in a way that I think was completely consistent with the Constitution.

[00:31:03] David French: And essentially, so if you remember what the controversy was, it was that as a result of the pandemic, there were administrative changes made to the process of the election in multiple states. So secretaries of state or other state officials had changed early voting hours, for example, added drop boxes, expanded absentee balloting. This happened all over. And so what the Trump team did, is they challenged many of those administrative changes, saying they did not come through the legislature, and it's the legislature that dictates the manner of selecting electors. And so therefore, since these changes did not come through the legislature, they were illegitimate, and then the election was therefore illegitimate. Which is a kind of breathtaking legal remedy, when you think about it.

[00:31:53] David French: But the best explanation, I think, of the independent state legislature doctrine properly understood, or the role of the legislature, I should say, properly understood, comes from the district court, I think. And Judge Ludwig in the Eastern District of Wisconsin. And he says essentially that what that means is that the legislature was making a broad declaration when it talks about the manner, it's determining how, broadly, the electors are selected. Is it by popular vote in the state? Is it selected by the legislature of the state? Is it selected... are they selected by the governor of the state? What's the broad manner?

[00:32:31] David French: And then when you're talking about drop boxes and voting hours, those are matters of administration, not manner. So that's the role of the legislature, is to decide what's the broad manner. Because in theory, a

legislature could say, "Well, in Wisconsin, the governor appoints the electors." because this it's a matter of state law how the electors are determined. But in Wisconsin, the legislature determined there is a popular vote to select the electors. And nobody disputes that's the overall manner. Everything else is administration.

[00:33:04] David French: So then this goes up to the Seventh Circuit. And Judge Scudder says "A, well, look, the time for you to challenge the manner was before the election, not after the election." Like, that's just a basic 101 sort of level. If you're gonna challenge the manner, do it before the election. But going to the merits of the elector's clause argument itself, the court said that Trump team would fail even under a broad construction of the elector's clause. Because the election procedures were still substantially consistent with the legislative scheme. Which was popular vote of electors. And this- and then they also said that state courts are going to be the authority on what state law is. And this is important for the radical version of the independent state legislature doctrine, which says state courts don't really have a say. It is what the state legislatures say and what the state legislatures say only.

[00:34:04] David French: Why do I bring up those two cases as particularly important? Judge Ludwig, Judge Scutter, these are outstanding judges who are coming from a philosophical strand of jurisprudence that is quite similar to a majority of the Supreme Court of the United States. These are not outlier type judges here. And I think it's an interesting preview, I think, of and you can't get into justice's heads until all of this is said and done. I think this is an interesting preview, in my view, of how justices who possess a similar judicial philosophy will read these clauses.

[00:34:40] David French: And now this is regarding presidential elections. But I don't think you can disconnect Article I and Article II entirely from each other when you're interpreting these clauses. And I think the way the Seventh Circuit, and the way the district court in Wisconsin outline this, I think, is the proper way. You're talking about a broad definition of how the election is conducted with the administration of the election not necessarily up to every last syllable dictated by the legislature. Because if you took the Trump administration's or the Trump campaign's version of the independent state legislature doctrine and applied it broadly, they would have lost all of Texas's electoral votes, for example. Because Texas made some administrative changes to the way the election was conducted as a result of the pandemic.

[00:35:36] David French: And so I think that there is... It's simply unsustainable to argue that the provision of the Constitution that says that

legislature dictates the manner means all of the details. [laughs] As opposed to a broad instruction. This is, you... And so, I would encourage folks to read those cases. I think they're very instructive, very well drafted given the haste and the urgency of you know, of the decisions. And I think they offer a preview of where judges with similar philosophies will come down.

[00:36:08] Jeffery Rosen: Thank you so much, David. So illuminating. We will post the case that you describe, which so helpfully distinguishes between the manner of elections and the administration of elections. And it is indeed a great way to prepare for the upcoming Supreme Court case. Ilya Somin, let's take a round on remaining reforms to the electoral process, the various teams have recommended. Team libertarian outlines a number of reforms that can safeguard the electoral process against attempts at reversal, while also curbing presidential powers. Among the most urgently needed, you write, are new constraints on presidential powers under vaguely worded emergency statutes, like the Insurrection Act, which could be manipulated by an unscrupulous administration. In addition, you propose ways to incentivize electoral losers to concede defeat, rather than engage in bogus accusations of fraud and voter suppression to restore trust. Tell us about those proposed reforms to incentivize losers to concede defeat and others that you think are important to safeguard presidential elections.

[00:37:14] Ilya Somin: Sure. So the Insurrection Act, which dates back all the way to the early 19th century, gives the president fairly vaguely worded authority to call out the National Guard and perhaps even the armed forces, the regular armed forces to suppress so-called insurrections, and we propose to tighten that up so it's not as easy for the president to call them up and then try to use them for his own purposes. Trump did not actually do this in the aftermath of his election, but some of his advisors and supporters, like the former National Security Advisor Michael Flynn, did, in effect, urge Trump to do this. And the wording of the law by itself is not solely sufficient to fix this 'cause obviously if the military, the National Guard are corrupt enough, they could just disobey the law, or obey legal orders from a president.

[00:38:06] Ilya Somin: But we would want to tighten up the act so that the circumstances in which the president's allowed to use the military domestically are clearly delineated and make it much tougher for him to simply say, "Well, I think the election was stolen from me and therefore I'm gonna use force to keep myself in power." and in the end Trump was not able to do this in any significant way, but we shouldn't count on that good fortune in the future.

[00:38:32] Ilya Somin: The issue of incentivizing losers to admit defeat is tougher in that it's much harder to regulate that by means of law. It's really more regulated by political norms. The report, I think, makes a number of points on this, though. One is, there might be at least some modest legal reforms. We mentioned the possibility, for instance, that if one side in the election demands a recount if the margin in the recount is... and the margin in the original count is large enough that a recount is highly unlikely to change anything then the side that demands the recount will actually have to pay for it. That rule exists in some states, but not in others.

[00:39:11] Ilya Somin: There might be, here on this point, I speak for myself, but it might be possible to adjust campaign finance laws such that the, a side which does not admit this defeat in a timely manner might not be able to as easily use campaign finance funds to pay down its debts and the like. But ultimately incentivizing loser to admit defeat is something that depends more on political norms than on laws. And we would urge both public and elite opinion to penalize sore losers, so to speak, more than it does now.

[00:39:43] Ilya Somin: But we recognize, certainly I recognize that it's hard to do that in a highly polarized environment, where obviously, while Donald Trump and some of his supporters, they've taken some reputational damage from their effort to overturn their election obviously much of their base still has rallied to them and has believed the lies that they have put out. And others, even if they don't necessarily believe every detail of the lies, they're reluctant to turn on their own leaders, lest that bolster their political opponents.

[00:40:14] Ilya Somin: So it is desirable to restore a political norm of admitting defeat when it's clear that you've been defeated as, I think was certainly clear to any reasonable objective observer after the 2020 election. But there's severe limits to what can be achieved on that front in terms of legislation. Unlike with the Insurrection Act, where that certainly can be cleaned up, and there, there is a legislative solution. And it's disappointing that Congress hasn't done much on this.

[00:40:42] Jeffery Rosen: Thank you very much for that. Ned Foley, you mentioned there might be other bipartisan reforms dealing with presidential and other elections on the horizon. Maybe identify what those are and then tell us about the reforms that team progressive identifies for elections, including those dealing with congressional as well as state elections at the gubernatorial and local level.

[00:41:07] Edward Foley: I think we need to spend more time thinking about basic electoral structures, about how we translate voter preferences into election outcomes, winning- winning candidates. You know, it's important to talk about the right to cast a ballot, and to have that ballot counted honestly and fairly. So we, and the Electoral Count Act reform, again, was absolutely no brainer, must do.

[00:41:31] Edward Foley: But now that we've done that you were just talking about polarization. We have a system that skews results by distorting results and accentuating the divergence of views, as opposed to finding where the majority will really is. We tend to think that the purpose of an election is to have majority rule. And we think that we want majority winners. Obviously, if everybody agreed, there'd be unanimity. You wouldn't have to have an election. So the whole point is when there's disagreement, which side should prevail. And we usually think the majority should prevail over the minority when it comes to voting. Sure, we protect minority rights through the Equal Protection clause in the Bill of Rights, so we're not talking about giving up on basic constitutional protections. But when we put something to a vote, what should happen?

[00:42:23] Edward Foley: And we now have a system that in many different ways works against the will of the majority. One, is our primary elections. You can win a primary with 20% of the vote, 23% of the vote, and then you can be on the ballot in the general election. And if the state leans in one direction, they'll have to hold their nose and vote for that more extreme candidate for that party, 'cause they're not gonna vote for the other party. And the person that lost the primary might have actually been more acceptable to both sides. And yet, the system sort of negates that more middle of the road candidate, 'cause they're knocked on the primary, and they can't make it to the general election. We're seeing this again and again and again in all of this year's midterms, whether we looked at Arizona, or Pennsylvania, or North Carolina, New Hampshire, Ohio, and so the middle of the electorate is completely getting hollowed out, whether gubernatorial elections like Arizona, Senate elections like Ohio or Pennsylvania.

[00:43:23] Edward Foley: So for even statewide elections, we're not doing this well. And then when you add the problem of gerrymandering on redistricting, we exacerbate polarization for US House of Representative seats or state legislature seats because they have the same structural problem, flaw of how primary elections interrelate with the general election. And they have the added flaw of of gerrymandering distorted districts. So we've got to come up with new structures to get back to equilibrium.

[00:43:55] Edward Foley: I think the experiment that Alaska is doing you know, with its new system. We've seen this one special election just to fill the remainder of the House seat, you know, for this year. And then we'll have more results from Alaska in November. We're already seeing how that's an improvement in that the rank choice voting system does mitigate polarization. If you're a very polarizing candidate like Sarah Palin was, you're not going to survive that kind of system.

[00:44:27] Edward Foley: But it actually turns out that there are different versions of rank choice voting, and the results from that special election, and this gets a little bit technical, but I think it's worth mentioning quickly. It turns out that one of the winner was the Democrat, so I guess if you're, you know, you're a partisan Democrat, you got to be happy with the result. But if you're a non-partisan independent analysis of how that system worked, it turned out that the other Republican in the race, not the Trump endorsed Sarah Palin, but the more traditional Republican would have beat either of the two opponents in straight up head-to-head competition. You can look at the rank choice ballots, and aggregate the voter preferences, and see that a majority of voters in Alaska wanted the other Republican, named Nick Begich, more than they wanted Palin by a decisive majority, and they wanted Nick Begich more than they wanted the Democrat by a size- decisive majority.

[00:45:26] Edward Foley: So I think we need to do some more work as a society figuring out how we want to structure our elections to actually reflect the will of the majority. And that was part of what was in the analysis. We didn't have the results of the special election when we, you know, wrote team progressive's report, but we anticipated some of these issues with the analysis that we did.

[00:45:45] Jeffery Rosen: Thank you for so much for that. David, team conservative endorsed something like the wholesale adoption of the 2005 Carter Baker commission report, which produced 87 recommendations to make elections more open and secure. You know, give our friends a broad sense of what some of those recommendations are, and Daniel Beneventano, in our chat, asks, "What are the major issues the panelists see impacting the midterm elections?" Are there any issues in the midterm elections that team conservative thinks could be address with structural reforms?

[00:46:17] David French: So, I'm going to honestly have to punt a lot of the Carter Baker stuff to my very absent contributor, Sarah Isker, who is our team leader, who, if you ask her, if you just use the names Carter and Baker in the

same sentence in any order she will immediately launch into a highly educated discussion of all 87 recommendations.

[00:46:40] David French: I actually wanna focus on a couple of elements of our report that I think are not popular, but I think worth considering. Okay? And the two elements that are not popular but I think worth considering are the elimination of the individual campaign limits for donations. It the limit, the elimination of limits on individual campaign contributions. And I want to explain that for a bit. This is one of the elements that we talked about as a team, and have talked about at great length as a team. And that is, that one of the elements of radicalization of our politics is the premium placed on the small dollar donor. That it turns out that the small dollar donor is not representative at all of your average voter. This is not actually the average, ordinary, everyday voter contributing to the political process. This is a radicalized subset of the voting base. This is the core of your primary voting base.

[00:47:44] David French: How do we know this? One of the ways that we know this is who is it that vacuums up contributions? You know, Marjorie Taylor Greene is one of the leading congressional fundraisers on the Republican side. Is she also at the same time the most as popular a legislator in the broader Republican public, as she is a popular fundraiser? No. The answer is no.

[00:48:07] David French: And so what has ended up happening with the limit on individual campaign contributions is perversely enough, a radicalization through fundraising. And that fundraising has led to increased radicalization. And so I think we need to, and as someone who's a longstanding advocate of free speech we see time and time again, when we limit free speech, we often have perverse consequences that flow. And one of those perverse consequences of limiting free speech by limiting campaign contributions has been radicalization. And an appeal to a radicalized minority to make up for financial shortfalls caused by decreased ability to raise money from individuals from high, you know, wealthy individuals or institutions.

[00:48:54] David French: So that's one unpopular reform that I think is worth thinking about. Getting at least in some folk's mind. Why are we so radicalized now? In part because we're consistently seeing fundraising messages sent to the most radicalized members of the community. And that's how the parties and the candidates sustain themselves financially, is by appealing to a radicalized minority.

[00:49:14] David French: The second thing that we talk about is making election day great again. And this is putting a premium, not saying that election

day should be the only day in which we vote. But tightening the time span. Election... We've turned from election day to election week to election three weeks to election month. And at the same time, one of the things that's gone along with this is that we've also in many jurisdictions, dramatically slowed down the pace at which votes are counted.

[00:49:42] David French: And so you have a combination of a long election season often where people end up voting before material information is made available about candidates. Late breaking developments. A late debate where important events occur, or important moments happen. Late breaking revelations. How many people voted, for example had already voted by the time of the James Comey letter with Hillary Clinton. These are late breaking revelations that matter to people. Or the drunk driving conviction revelation about George W. Bush. These are events, and information that we learn after a lot of people have already cast their ballot and made their decision. And if we're going to say that an election process is a persuasion process as opposed to just a mobilization of already precommitted folks, then I think tightening that time span. Now, to make voting easier in that tightened time span. Make election day a holiday make it as easy as possible in that tightened time span.

[00:50:44] David French: And then we really need to put a premium on promptly and accurately counting votes. We live in a time in which trust in institutions is very low. And look, I fully acknowledge that some of that trust is illegitimately manufactured distrust. But it is distrust nonetheless. And I think we really need to put a premium on rapidly and accurately counting votes.

[00:51:08] David French: So that means, and this is something that occurred in the 2020 election, you had Republican state legislatures who were fully cognizant of the Trump plan to cast doubts on absentee ballots and put a premium on in person election day votes, and so they didn't permit prompt counting of absentee ballots as they arrived. Instead, they required them to be opened and counted after polls closed. And that created a substantial delay in reporting results in some key states, which allowed conspiracy theorists, gave them room to run. And so we need to have prompt, accurate voting, tighten our time span for voting, and lift limits on individual donations so that they way to finance a campaign is no longer dependent on a highly radicalized base, along with everything that Sarah would say she is here, about the Carter Baker commission. [laughs]

[00:52:01] Jeffery Rosen: Excellent, thank you very much for putting those important reforms on the table, including elimination of individual campaign contributions and slowing down the pace that votes are counted. And we'll

check out the report for the Carter Baker recommendations. Well, I'd like to ask each of you, as we wrap up, by trying to identify future areas of nonpartisan agreement about the results of the NCC's recent virtual constitutional convention.

[00:52:31] Jeffery Rosen: So friends the Guardrail of Democracy project was such a success, that we used a similar model to convene three teams of scholars, libertarian, progressive, and conservative, to propose amendments to the Constitution. And we were just blown away when over August, the three teams met, and in a Zoom convention of two sessions with a little email followup, they proposed five amendments for the Constitution, which they launched at the NCC two weeks ago. And I, this is a sort of cold call question, but I wanna treat you as the mini-ratifying convention, to consider these proposed amendment, and just get your broad response to it. Cause it really was striking that there was so much agreement on them.

[00:53:12] Jeffery Rosen: Here's the topic of the five amendments. First, 18-year term limits for Supreme Court justices. Second, making presidential impeachment easier. Conviction has a lower threshold, although indictment by the House has a slightly higher threshold, and the standards for impeachment are clarified. Third, making it slightly easier to amend the Constitution which is a theme which several of you addressed in your reports. Fourth, a legislative veto that would allow Congress to repudiate executive actions it disagrees with by majority vote. And finally, eliminating the birthright citizenship requirement for president.

[00:53:48] Jeffery Rosen: Again, I'm just, of course, you'd have to study this to have an informed opinion, but as you hear those recommendations, do you imagine that those are the kind of things that you and your team members might be able to get around? Why don't we wrap up by identifying any other areas of potential electoral reform that you think might be productive. Ilya Somin, why don't you start?

[00:54:09] Ilya Somin: So I agree with at least four of those five proposed amendments. I'm not sure about the legislative veto. Indeed, when I wrote a piece about a year ago now on the constitutional drafting team project that NCC did, I identified I think many of those points of agreements, including the 18-year term limits and some of the others as well. The... eliminating birthright citizenship requirement. I also noted that at least in the, all of the three reports that those other teams did, all three agreed on abolishing sovereign immunity and the 11th Amendment, which protect state and federal government officials in many cases from lawsuits when they've violated people's constitutional rights

and done other kinds of illegal activities. It should be much easier to hold them liable and bring lawsuits against them when they've done things of that sort.

[00:55:00] Ilya Somin: So I do support all or almost all of those reforms, except possibly for the legislative veto. With a legislative veto, I think it might be desirable in some situations but I also think that there are some kinds of executive actions that probably should not be subject to it. And I think, you know, that would need to be analyzed more more thoroughly. But the the other four, I definitely support. And I will put in the chat a link to the piece that I wrote for NCC about points of agreement between those teams, though I also note an important point of disagreement, which is also a theme of the team libertarian report, for the Guardrails project, which is we strongly believe that we must have tighter limits on the power of government generally and especially of the federal government.

[00:55:45] Ilya Somin: That's concentration of power in the federal government more generally, and especially in the office of the presidency is as menace in a wide range of dimensions, and it's also part of the cause of our polarization that when people are disagree deeply on various issues, it seems unacceptable to have that great power held by the opposing party, who you think is wrong on so many issues. If there was greater decentralization of power which can be achieved in some cases through constitutional reform, but in other cases simply through stronger enforcement of the Constitution that we have already, and through policy change there would be less to fear when your political opponents hold the presidency or control Congress. And therefore, less likelihood that there will be toleration of all sorts of violations of political norms efforts to overturn elections and so on.

[00:56:38] Jeffery Rosen: Thank you so much for that. We've already posted the piece. You did a great service by identifying those areas of agreement up front, and you're right, thank you also for recalling that there was agreement on sovereign immunity reform. The convention didn't address that. Perhaps as in Philadelphia, they were tired and wanted to go home, but perhaps they could reconvene to put that on the table.

[00:57:00] Jeffery Rosen: And you also in your piece, said it's too early to see that these areas of agreement can result in successful constitutional amendments, 'cause the obstacles to enacting them are high. But it would be great to have your further reflections on the amendments, now that they're proposed, and to think about next steps.

[00:57:16] Jeffery Rosen: Ned Foley, again, you're just hearing these proposals on the fly. But what is your reaction to the amendments proposed by the NCC's virtual constitutional convention?

[00:57:26] Edward Foley: Yeah, I'm presumptively sympathetic with all of them. The one that concerns me a little bit, actually, is the impeachment adjustment. I'd really wanna look specifically at that. And the reason for that is you know, I think the problem with the use of the impeachment process, at least in current times, it hasn't been so much the number, but the partisan polarization around the impeachment process. And so I don't know that lowering the number fixes that because if you lower the number in the hopes that you'll get some more successful convictions, let's say, the other party can turn that around and convict in a situation where it's not proper. You know, in other words, if we completely make impeachments a partisan affair, so to speak, the numerical issue cuts both ways, I think. And so I definitely would wanna think more about that.

[00:58:21] Edward Foley: In terms of other ones that didn't make the list I think anybody thinking about what makes sense for American elections going forward would want to think about the possibility of a national popular vote for president instead of the electoral college. That's been talked about at length. The only thing I'd emphasize, is I would urge any national popular vote be based on a majority vote, again, and not a plurality vote, cause I think the difference between a majority and plurality, particularly for the chief executive of nation is important and the electoral college system at least requires a majority of electoral votes. That majority principle has been abused at the state level, or abandoned at the state level, since you win all of electoral, a state's electoral votes without a majority of the popular vote in- in ways that has destabilized the process, I think, problematically. That was the subject of the book that you kindly mentioned.

[00:59:15] Edward Foley: And while we're on the topic of majority, the one thing that I would try to elevate in immediate national attention is, in think it oughta get bipartisan support in Congress now, or at least in enough in the Senate, is a majority rule principle for congressional elections, Senate or House. You wouldn't need to amend the Constitution for this, and you wouldn't need to mandate any particular method of majority winner system. Like, you wouldn't micromanage the idea that you gotta adopt Alaska's system. But I do think a commitment to majority winning elections would do a lot for the future of our country. So that's what I would urge.

[00:59:55] Jeffery Rosen: Thank you so much for that, for that thoughtful reaction to the proposed amendments. And indeed, team conservative and team progressive had agreed on reform of the national popular vote and eliminating the electoral college. Team libertarian did not, which is one reason that that didn't make its way into the final draft. Along with the fact that team conservative had wanted to have presidential candidates nominated by state legislatures, and the two nominees receiving the most nominations would then be subject to a national popular vote. So it was... the devil as in the details on that one. And thanks also for identifying the other proposed areas of reform.

[01:00:31] Jeffery Rosen: David French, the last word in this really rich discussion is to you. What are your thoughts on the amendments proposed by the NCC's virtual constitutional convention, and would you like to put any others on the table that you think might possibly get bipartisan agreement?

[01:00:46] David French: So I'm four for five. The one I'm most reluctant about is the strengthening Congress's impeachment power. I'm not certain that I trust Congress in that circumstance. But here's what I would want to do that is even tougher on presidents. I'd want to make sure that the pardon power does not apply to the president. In other words, the president cannot pardon himself. And that a president will be automatically removed from office if the president is convicted in a criminal court of competent... In other words, there's a final adjudication of criminal liability at the felony level of a criminal court of competent jurisdiction.

[01:01:22] David French: We've now crossed the threshold where it is very possible that the people of the United States of America will elect an actual criminal to be president of the United States. And we also know that Congress is in its current iteration and ethos, is so fundamentally broken that partisans will happily overlook some of the most grotesque conduct imaginable, rather than cross a president of their own party.

[01:01:49] David French: And we've also seen that in the American court system of all of our major institutions, has weathered our partisan polarized storm better than most. And so I would want presidents to be clearly subject to criminal law while they are in office. They are not kings. They are American citizens. I want that to be made perfectly clear. And if there is a final adjudication of a felony conviction, they're out. So that would be a way I would strengthen oversight of the president, not through Congress, but through the judiciary.

[01:02:23] David French: The other thing, and this isn't a constitutional amendment, but I believe we are beginning to reap the whirlwind of the end of the judicial filibuster. What you have now seen is that what we now see occurring often, is we're now seeing judges auditioning either for elevation, or individuals auditioning for the judiciary by demonstrating how strongly partisan they are, and how firmly, how they would be undeterred by the courts of public opinion in their decision making, or how they would... they are going to be they're not going to be squishes. [laughs]

[01:03:03] David French: And so because if all you need is 50 plus 1 to have, receive a confirmation, then what you have is you're incentivizing sort of partisan auditioning. So I would like to see filibuster restored for judicial nominees. But the filibuster slightly weakened on all grounds. In other words, that it's not as quite a high a threshold. So restore the filibuster for judicial nominees, but weaken the filibuster, so that the bipartisan requirements are just a little softer, and I think you're gonna readjust some incentives here.

[01:03:37] David French: But I'm quite concerned as I read a number of judicial opinions in recent years, that what I'm reading is less of a work, especially when you're talking about some rather unique concurrences or dissents less a work of scholarship and more a resume bullet point, and that worries me.

[01:03:57] Jeffery Rosen: Thank you for that resonant warning. And thank you so much Ilya Somin, Ned Foley, and David French for a illuminating and productive discussion about these important areas of structural and constitutional reform. Friends, the Guardrails of Democracy project has been so meaningful because it provides a platform for all of you great scholars and thinkers of different perspectives to talk and explore areas of agreement and disagreement. And the light that's emerged from this discussion has reminded us of the value of the project, and we'll certainly try to keep it going.

[01:04:35] Tanaya Tauber: This program was presented in partnership with the George Mason University Antonin Scalia Law School, and in conjunction with the National Constitution Center's Restoring the Guardrails of Democracy initiative. Today's show was produce by John Guerro, Lana Ulrich, Sam Desai, Melody Rael, and me. It was engineered by Greg Scheckler. Research was provided by Kel Sang Dolma.

[01:04:57] Tanaya Tauber: For a list of resources mentioned throughout this episode, visit constitutioncenter.org/debate. While you're there, check out our upcoming shows and register to join us virtually. You can join us via Zoom,

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