The Case for Reforming the Electoral Count Act – Part 2

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[00:00:00] Jeffrey Rosen: Hello, friends. 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.

[00:00:20] The Electoral Count Act of 1887 is the law that sets out the congressional procedure for certifying Electoral College results in a Presidential Election. Now, Senator Joe Manchin of West Virginia and Senator Susan Collins of Maine have introduced a bipartisan bill. They say, "We'll fix the Electoral Count Act and prevent future events like January 6th."

[00:00:41] Joining us to discuss the Electoral Count Act, the proposed reforms, and the Independent State Legislature Doctrine that the Supreme Court is about to consider are two co-authors of a piece on the election law called "Why Congress Should Swiftly Enact The Senate's Bipartisan Electoral College Act Reform Bill." They were part of a bipartisan group of scholars who wrote a piece on January 6th, calling for Electoral Count Act Reform and Congress has now answered their call.

[00:01:10] Rick Pildes is the Sudler Family Professor of Constitutional Law at NYU Law, and the author of several books, including *The Law of Democracy: Legal Structure of the Political Process*. Rick, welcome back to *We The People*.

[00:01:23] Rick Pildes: Thanks very much, Jeff and I'm very glad to be here with Professor McConnell as well.

[00:01:28] Jeffrey Rosen: And Michael McConnell is Richard and Francis Mallory Professor of Law at Stanford and Director of the Constitutional Law Center. His most recent book is the *President Who Would Not Be King: Executive Power Under the Constitution*. Michael, it is wonderful to have you back on the show.

[00:01:44] Michael McConnell: Thanks for inviting me.

[00:01:47] Jeffrey Rosen: Rick, what is the Electoral Count Act? And why does it need to be reformed?

[00:01:52] Rick Pildes: The Electoral Count Act is the statute that essentially regulates the relationship between the states and Congress in the context of the Presidential Election. And it specifies, uh, what goes on in, in what's called the Joint Session of Congress, where the electoral

votes are received and then counted. And uh, it's a crucial statute for providing a solid, clear, strong legal framework for the Presidential Election and for dealing with any potential disputes that might arise in the presidential election, at least with respect to how Congress interacts with the states. The statute was created in the aftermath of our most disputed election in American history, the 1876 Presidential Election. Congress came up with an ad hoc solution to deal with that disputed election and then Congress decided we need something stronger and more permanent in place to deal with that potential problem.

[00:02:57] So, in 1887, they enacted this Electoral Count Act. And the reason it needs to be clarified and updated is not just because the statute goes back that far, but it's very antiquated in particular in a number of respects and it's also very unclearly drafted. And what we need is clear rules that Congress understands, the people can understand, that states understand in advance of the election. And so, reforming the Electoral Count Act, modernizing and clarifying and bringing it up to date is particularly urgent in the aftermath of the controversies about that joint session in Congress that occurred in January of 2021, January 6th.

[00:03:41] Jeffrey Rosen: Michael, the effort to convince Vice-President Pence to refuse to certify the election is well-known, but you both argued that there are other flaws in the Electoral Count Act that might imperil future elections. Tell us what they are and why they need to be reformed.

[00:03:58] Michael McConnell: Yes, there are a number of problems, but there's one big problem. And that is the fact that the Act allows anytime one member of the House of Representatives is joined by one senator, uh, lodge objections the joint session of Congress, goes into... has to meet and debate the objections to the results from each state. So, this is on a state by state basis. And the problem is that the Act doesn't specify what those objections are going to be. And in for many years, we have some sort of understood norms and this did not blow up into constitutional controversies.

[00:04:44] But in the last several decades, not just on January 6, 2021, but four times since 2000, four times in this Century members of Congress have raised objection. Most of them, maybe even all of them frivolous, but nonetheless, they have the right under the Electoral Count Act to raise them. And on two of those occasions, count including 2021, there was somebody from both houses to do this and so, the joint session began.

[00:05:18] And then members of Congress have interpreted the Act to mean that they can serve as a kind of nationwide voting board to the side who won in various states, which is not at all what the Constitution contemplates. The Constitution contemplates that the states control the vote counting process, and this meeting of Congress is not intended to be a place where you can just sort of re-litigate all the cons- all the electoral, uh, issues. And yet, that's what it has turned into.

[00:05:53] Jeffrey Rosen: In a piece on the *Election Law Blog* on July 20th both of you joined by the scholars Ned Foley, Derek Muller and Brad Smith, wrote "Why Congress Should Swiftly Enact The Senate's Bipartisan ECA Reform Bill." Rick, tell us the main reasons that you think the ECA Reform Bill should be enacted?

[00:06:11] Rick Pildes: Well, there are a number of potential vulnerabilities in the structure that we currently have. And the bipartisan bill that's been released by the Senate deals with many of those vulnerabilities. So for example current Federal law actually allows state legislatures to appoint electors, if the election has "failed" in a state. The current provision doesn't give any definition of what a failed election might consist of and it's easy to imagine in the kind of environment we now exist in, unfortunately with respect to our elections it's easy to imagine state legislatures potentially trying to exploit this opening and declaring the election has failed in the state for one reason or another, such as disagreements about the voting process.

[00:07:04] So, one of the major things this bill does is it eliminates that provision, which is a huge move forward. What it does is it recognizes that there might be extraordinary circumstances in which a state cannot hold the vote on Election Day, for example, a natural disaster that prevents voting. And so, the bill would allow the state to have a vote sometime after Election Day, but only in these extraordinary and very limited circumstances. It takes the legislature out of the process.

[00:07:42] It remains the case that the voters will decide who their state will endorse. And in the rare circumstance of a natural disaster like that, it still maintains that it's the voters who must actually make the choice. Not just one provision. I won't go through all of them, but let's start there.

[00:08:02] Jeffrey Rosen: Great. Michael, tell us more about the draft bill's attempt to address the so-called failed election problem. Do you think the solution is adequate? And then tell us about another provision of the bill eliminating uncertainty about the results of a state election or the risk of competing slates of presidential electors?

[00:08:19] Michael McConnell: So, what this failed election provision did is it was really an invitation to members of Congress to pump their own definition in and us to make mischief. I mean, one side might complain that there was voter suppression. The other side might make claims that there was widespread miscounting or fraud in the election, even though those claims have been fully litigated and resolved below.

[00:08:49] And the philosophy of this bill is to require that elections be conducted according to the law passed by the state legislature in advance of the election. Now, that may seem obvious, and I think it was treated as an obvious norm for a long time. But it is in our current environment, apparently, not obvious. So, so the state legislatures set the law in advance, but then that's the role of the legislature is to write the rules. It isn't to count the votes.

[00:09:25] And under this bill, each state will have a certifying agent that will be the governor, unless the state law designate someone else, but it will almost certainly be the governor with the provision for judicial review. So, if the, if, if the candidates, not just sort of miscellaneous people who want to jump in and litigate. But if the aggrieved candidate brings an action that the governor's determinations can be challenged and it... uh, the bill provides for expedited judicial review before a three-judge district court with expedited review to the United States Supreme Court. So that this process is as much as possible taken out of politics, and put into a kind of rule of law framework.

[00:10:17] Jeffrey Rosen: Rick, tell us more about how the bill eliminates uncertainty about the results of the state election and the risk.

[00:10:24] Rick Pildes: Yes, so another important feature of this bill is, it establishes clear rules for what slate should be the officially recognized slate of electors from the state. So, back in 1876 and when the current Act was enacted, we had a situation of, um, states, different state officials sending in, uh, different slates of electors. Um, and the original Electoral Count Act, much of it was designed to deal with the situation of two slates of electors coming in from the state.

[00:10:59] This bill tries to make it clear, it sets up a structure to determine the single state slate that is officially the slate from the state. So, in other words, it eliminates the possibility of two-slate scenario. And it then tells Congress, "You're obligated to count, you know, to count that slate," the one that comes through the processes that the electoral count Reform Act bill establishes. So, it provides tremendous clarity and structure there, and it hopefully eliminates the scenario of two different slates of electors coming in from a state. It clarifies or reaffirms that the role of the Vice President in the joint session of Congress is merely a ministerial role. That the Vice President has no power. As Mike Pence recognized, he did not, to delay the process or to make any substantive judgments, uh, about the slate from a state that is sent in.

[00:12:00] And it sets up rules that that Congress self-enforces about what its role is in the counting process. And, and the limited role that it has there, which is basically to determine that the slate before it is the slate that came through the processes established in the statute.

[00:12:20] Jeffrey Rosen: Michael, Rick mentioned the procedural weaknesses that the bill repairs about how the existing Electoral Count Act structures the joint session of Congress. Tell us more about those and whether you think it adequately addresses those weaknesses?

[00:12:35] Michael McConnell: Well, no bill is going to be perfect and this one isn't, but I do think that this represents an enormous step forward. And to the extent that there are still issues that are, you know, being disputed. Many of those, I think, are going to be difficult to resolve on a bipartisan basis. So, I think this bill is not only very good, but it may be, uh, the best possible, uh, maybe there'll be some tweaks. But in, in its basic outline is probably the best possible result that we can get on a bipartisan basis. And I have to say, this is a win. Oftentimes, you hear the word bipartisan tossed around when, you know, when there are one or two people on the other side that that join.

[00:13:22] This, this was a genuinely bipartisan effort. It's been... it was being conducted quietly, which is a real sign that it's serious. And, and the bipartisan group of senators, who are putting it together, wisely consulted with not just our little group that Rick and I are part of but with, several other groups. So, they got a very wide range of outside opinion about how to go about it. So, no, it's not necessarily perfect, but I think it goes a very long way to solving the most important of the structural problems with, uh, the current Electoral Count Act.

[00:14:06] Jeffrey Rosen: Rick, you and Ned Foley wrote a brief response to Professor Laurence Tribe and others, who said that the bill doesn't go far enough in refining the Electoral

Count Act. Tell us about the most criticisms and, and why you think that the bill deserves to be passed despite not addressing them?

[00:14:23] Rick Pildes: Yes. So, unfortunately, there are a variety of legal misunderstandings floating around about exactly what this bill does. And Ned and I have tried to clarify what the bill actually does in response to, to some of these misunderstandings. So, one misunderstanding is that the bill would somehow change the structure that currently exists for state and federal court involvement in any disputes about the certification process. You know, the legal process that finally determines who has won the vote in the state. The bill doesn't supplant anything about current litigation that might take place in state or federal courts. That's been a misunderstanding.

[00:15:10] A second misunderstanding is that the bill leaves open the possibility that state legislatures after the election could decide they don't like the outcome in the popular vote, and just decide to appoint electors on their own. They do not have the power to do that. That's because Congress has the power to set the time of the election and Congress specifies that the election must take place on the first Tuesday after the first Monday in November, and electors must be appointed that day.

[00:15:41] Now, of course, people vote and they have appointed the electors that day, although it may take some time to determine exactly who won that vote. But the importance of that provision is that state legislatures cannot appoint electors based on their own preferences after Election Day. And it doesn't matter if they pass a statute in advance of the election trying to give themselves that power, saying, for example, we reserve the right after Election Day to appoint the electors ourselves. They do not have the constitutional power to do that, so that's another misunderstanding.

[00:16:17] As Michael said, it's important that there be bipartisan support for this bill, not just for the standard reason that you have to overcome the filibuster in the Senate and get to 60 votes, but this Act is self-enforcing in Congress. That is this is not a statute in which the courts are likely to come into the picture and determine whether Congress has followed the rules in the statute. So, it only works if you have significant buy in from both parties in Congress, that, "Yes, these are the rules we will be governed by." And, and that's why it's really essential here that there'll be strong bipartisan support for this bill as there, you know, apparently, it seems to be, at least so far in the initial stages of the rollout of the bill.

[00:17:06] Now, I know the house, by the way, has been working on a version of the bill as well. Uh, and they've been working, uh, for a long time and, and you know, very, um, intensively. I assume they will release a version sometime soon. And then we'll have to see, you know how that compares with the Senate bipartisan bill. As Michael said, you know, there are various tweaks, I might endorse to the bill. But the question is whether you can maintain substantial bipartisan support for any of those tweaks.

[00:17:41] For example, some people would prefer the threshold for objections to be not 20% of the House in the Senate, but a third of the House in the Senate. Um, in principle, I have no objection to that. If there's bipartisan support to agree that, that's how high the threshold should

be raised. But none of the minor concerns that have been expressed so far, uh, have changed the view from the piece that Michael and I and others signed when the bill came out, which is this is a vast improvement of status quo.

[00:18:15] It would provide much greater clarity and stability to the presidential election process. It might be improved in certain ways, if, if there's a possibility for that. But even if it's not, my view, is that Congress should endorse this bill, because it is a vast improvement over what we currently have.

[00:18:33] Jeffrey Rosen: Michael, why is there such notable bipartisan support for this bill? Is it fair to say that both Republicans and Democrats are concerned to make it clear that state legislatures can't change the result of a Presidential Election after it takes place? And tell us about your response to the claim that Congress lacks the power to enact such a bill and your view that there were sufficient worries about the prospects of a disputed Presidential Election in the 1800, that Congress back then seriously considered legislation in advance that would provide a subtle mechanism for resolving such disputes.

[00:19:08] Michael McConnell: So, why is this the occasion for bipartisanship? I think it really is because January 6th was such a shocking event. And the, the, the match that set it off was the joint session. And therefore, the attempted exploitation of some of the ambiguities in the Electoral Count Act. And it seems to people of both parties necessary to make sure that not only that doesn't happen again, but, once you begin looking carefully at this, there were other possible problems, too. And, we should eliminate those in advance because we can't deal with it on the, when it's actually upon us.

[00:19:56] Now, does Congress have the power to do this? The Constitution lays out very bare bones description of how electors are going to be chosen. And you need to know a little bit more than that. And the Necessary and Proper Clause of Article I, Section 8 gives Congress the power, to pass laws necessary and proper for the execution. Not just of its own powers, but of the powers of the United States as a whole. And I think that that is the is a very solid, constitutional basis for some kind of a statute that outlines how the electoral provisions of the Constitution will be carried out.

[00:20:43] Jeffrey Rosen: Turning to constitutional constraints on powers to regulate elections, Rick, you testified recently about the independent state legislature doctrine. And you identified seven potential versions of the doctrine, um, which you listed and addressed their practical consequences and the historical evidence for or against them. We've had a couple of great discussions about the doctrine on *We the People*. Tell us about the seven versions that you talked about in your testimony and what you think the consequences are?

[00:21:14] Rick Pildes: Yes, so your audience probably knows that there are two places in the Constitution that are the focal points when we talk about this independent state legislature theory. Article I, Section 4 gives state legislatures the power to regulate the time, place and manner of elections to the House and the Senate, though Congress can also take over that function. And then, with respect to the Presidential Election, the electors clause, as we call it gives state legislatures the power to determine the manner of the Presidential Election.

[00:21:47] And the issue here is whether the use of the word legislature in those provisions gives the state legislature a, a kind of special federal constitutional immunity from all the things that would normally constrain state legislatures. For example, the state constitutions, uh, the state courts in various ways. The debate about this, the Supreme Court will be hearing a case on it next year, which is why this debate has really taken off. Typically, it's framed in terms of, is there or is there not an independent state legislature doctrine? And that's obviously a very important question.

[00:22:25] But in addition, if the Court were to decide there is such a doctrine, it matters quite a bit what the scope of that doctrine might be. And the ramifications of the doctrine depend very significantly on what particular version the court might recognize. So, the most sweeping set of ramifications would follow from the sort of maximalist view of the independent state legislature theory, which is that state legislatures, when they regulate national elections cannot be bound by the substantive provisions in state constitutions.

[00:23:03] So, the state constitution, for example, for primary elections, says that we're going to use a structure that voters in Alaska had recently adopted. A top four primary in which the top four candidates...everyone runs in one primary and the top four candidates go onto the general election. Under this view of the doctrine, if a state legislature passed a statute saying, "No, the primary is going to be structured this way," the state legislature would prevail even over a state constitutional provision or if a state constitutional provision bans partisan gerrymandering as a number of state constitutions now do often, the result of voter initiated, initiated amendments to the state constitution. If a state stat- state constitution bans partisan gerrymandering, under the most extreme version of an independent state legislature theory that would not bind the state legislature and they could continue to engage in partisan gerrymandering.

[00:24:05] So, this is all just on the very first potential version of the doctrine. But that gives you a little bit of a sense of, of how sweeping the ramifications might be if the Supreme Court concludes that state legislatures are free of their own constitutions when they regulate national elections. I don't know how much we want to go through all, all seven versions that I've identified that are floating around out there as possibilities. But, but some have, you know, less dramatic ramifications, of course. So, I'll just mentioned one of those and then I'll stop.

[00:24:40] One version is that state courts can continue to apply state constitutional provisions, and if they invalidate some piece of state legislation regulating, regulating National Elections, they first have to give the state legislature a chance to come up with the remedy, instead of the courts themselves directly and immediately imposing the remedy. And the idea here would be on this version of the doctrine, uh, the Constitution contemplates state legislatures as the sort of fundamental regulator of National Elections, at least if Congress hasn't taken over. And so, state courts get in, you know, apply the state constitution, but they have to respect the legislature's role by giving the legislature a first crack at a remedy, instead of themselves directly imposing that immediately.

[00:25:29] Jeffrey Rosen: Thank you very much for laying all that out. Michael, in your view, should the Supreme Court recognize an independent state legislature doctrine, and how broadly should it sweep?

[00:25:39] Michael McConnell: Well, the reason why there appears to be an independent state legislature doctrine is in the text of the Constitution, and, of course, the Supreme Court needs to pay attention to that. The text, and Rick mentioned the two provisions, these do not say that states have the power to do these things. These provisions specifically say the state legislatures have the power to do these things. And, in another provision, the one having to do with constitutional amendments, it's pretty clear that the framers of the Constitution distinguish between the institutions for these things, so there's also specific reference to legislatures, there in countered and in comparison, to conventions, which were a more democratic process than the legislators themselves.

[00:26:35] So, it seems pretty clear from the text and from the context of, uh, that the framers of the constitution did really mean the legislatures. And that this is one view. I mean, Rick describes one extreme view, which is that the legislatures are not constrained by ordinary state constitutional law or other principles. That's one extreme. Another extreme is that states are free really to do this however, they exercise these powers, however, they wish. And that there's nothing, there's no state, independent state legislature doctrine at all, so states just can, can do what they want.

[00:27:17] My guess is that that the court will find that neither of those two extremes is going to work. And you know, I don't know all of Rick's seven [laughs] positions, but I suspect some of them are, or certainly, intermediate one. And he refers to one, which is to say that, yes, state courts and federal courts can continue to find that the legislatures have acted unconstitutionally, but they can't perform these functions themselves.

[00:27:44] What happens today in some places is that the legislature will pa- or do a, a map, the state court will say, "Oh, that's, that's gerrymandering. You know, that's, that's not good." And then the state court will itself write a map, which usually means letting the party that they like, putting the party that they likes mapped into effect. That seems wrong. It does seem that the court can say that what the legislature did was unconstitutional. But, still the legislature has to draw the map.

[00:28:21] I think that there's also, there may be a distinction between general principles of constitutionality, setting up the legislature, how they operate and due process, and so forth. Versus particular provisions of the state constitution that might take over the job, might for themselves specify the way in which elections would be conducted. And you know, it seems to me that there's a very strong argument that that's unconstitutional. But let me emphasize here, there's an override for the conduct of senatorial and congressional elections.

[00:29:02] If Congress wanted, for example, to authorize states to use a nonpartisan redistricting commission, I see no reason why they couldn't do that. And, and then the states would be able to, and notwithstanding the independent state legislature doctrine. Now there is no congressional

override with respect to the choice of presidential electors, so there's going to be some tension between those two provisions.

[00:29:32] Jeffrey Rosen: Rick, what is your response to Michael's identification of an intermediate version of the state legislature doctrine, which says that state courts can find that legislature acted unconstitutionally in drawing a map, but can't perform the function of writing a map themselves? And how does this apply in the context of the North Carolina case that the Supreme Court is about to hear?

[00:29:55] Rick Pildes: If we look to historical practice to try to resolve the meaning of the term legislature in the Constitution, I would say the overwhelming weight of historical practice is against the view that there is an independent state legislature doctrine in any form. There are some tidbits of evidence that support the idea of an independent state legislature theory, Justice Story mentioned this in 18... I think was 1828 in a Massachusetts Constitutional Convention and debates on certain issues. There are a couple of state court cases in the Civil War. People disagree about how to read those cases, but some read them to support the doctrine. There's the resolution of a disputed congressional election after the Civil War, where Congress invoked the doctrine.

[00:30:45] But, the larger historical kind of trajectory here, as I've looked at the evidence is against the idea that there is such a doctrine. So, for example, state constitutions have from the very beginning adopted substantive constraints on what state legislatures can do in regulating National Elections. There was never a case before the *Bush v. Gore* concurrence, three justice concurrence in 2000, in which anyone had even suggested, as far as I know. There's no historical evidence for this view, but this is one of the versions of such a potential doctrine that federal courts can kind of oversee state court interpretation of state election statutes. And if the federal courts decide that interpretation strays too far from the text of the statute, then the state court has acted unconstitutionally.

[00:31:40] That idea just only entered the picture in 2000 in the concurrence that Chief Justice Rehnquist wrote for three justices in *Bush v. Gore*. But that's another version of the doctrine. I'm not sure what Michael's view is about that particular version. That is definitely a prevalent one, but I don't find any historical support for that one. So, I do agree with Michael that, that I suspect a majority of the, the court, at least, will go into this case. Some sort of inclined toward thinking, there is such a doctrine that that word legislature carries some kind of distinctive weight. There are certainly several justices on the court now, who have indicated support for that view.

[00:32:24] I'm not sure that the court has been exposed to the full range of ramifications from adopting any one of these different versions that are out there of the doctrine. And I'm not sure the court or a number of these justices who have written short statements about the doctrine, um, have really worked through, uh, which of these different versions they are inclined to support.

[00:32:51] One version of the doctrine which might be implicated in the North Carolina case is that Justices Alito and Thomas, at least, have suggested that state courts might not be able to apply general constitutional provisions, broad provisions to strike down state legislation Regulating National Elections in North Carolina. It's, it's the districting for Congress. So, that

might leave open the possibility that state courts could enforce more specific state constitutional provisions. So, again, the state constitutional provision expressly bans partisan gerrymandering, so that there's not an enormous amount of discretion in the state courts.

[00:33:33] Maybe the suggestion in those statements from those Justices is, it's fine to continue to apply those provisions, but in North Carolina, the State Supreme Court relied on sort of broad clauses in the state constitution, about free and fair elections, for example or the right to vote. And at least those Justices, you know, seem inclined to the view that state courts can't enforce what Justice Thomas called vague constitutional provision against state legislatures. As I say, it's hard to know which version of the doctrine we're going to be talking about.

[00:34:09] In North Carolina, the court couldn't decide the case on narrow grounds that we've already discussed, which is perhaps the state court didn't give the state legislature enough opportunity to come up with a new map, uh, even if the court legitimately held the map unconstitutional. But it's hard to discuss this doctrine because or this theory, because it is just a theory at this point. The courts never... the Supreme Court has never endorsed the doctrine.

[00:34:36] I don't think there's any federal court decision before 2020 that endorses the doctrine. The Eighth Circuit did endorse the doctrine in the 2020 election, but until that point, there had been no Supreme Court opinion or Federal Court opinion, as far as I know, endorsing the doctrine in any of its versions. So, it's hard to... it's a lot of speculation right now as to what version of the doctrine we're going to be arguing about if the court endorses some version of it.

[00:35:03] Jeffrey Rosen: Michael, what is your response to the strong claim Rick makes that there's no support in original understanding for an independent state legislature doctrine? In your article, Two and a Half Cheers for *Bush v. Gore*, you quoted the election clause and noted that there's no relevant legislative history explaining why the framers of the Constitution, uh, made a departure putting federal courts in the unusual posture of determining for themselves whether state court's interpretation of state laws were authentic reading of the legislative will. What's your reading of the original understanding and what's the implication for the North Carolina case?

[00:35:41] Michael McConnell: We have a real paucity of historical evidence dating from the framing. But my main response to Rick is that until very recent times, and I'm thinking 1960s, at the earliest, the dominant doctrine from the Supreme Court was that the courts have no role in policing elections, period. So, Lyndon Johnson just out and out stole a senatorial election in Texas. And the issue went up to a Justice Hugo Black of, on an emergency motion and Black said, "No. We don't, we don't have anything to do with this. There's nothing we can do."

[00:36:25] Sometime in the '60s and '70s and then culminating in *Bush v. Gore*, I think in a way that *Bush v. Gore* is accepted across the spectrum today, uh, there has been such involvement. And, and it is only when that begins to take place that this problem of the independent state legislature doctrine ever arises. So, when Rick says there's no historical support for it, I... there wouldn't be because this is a product of the modern development of more judicial interference.

[00:36:59] Now, the idea that federal courts say, look at state court decisions and say, "Well, this one is pretty close to the law, and therefore, it's just an interpretation. But this one is so far away

from the state law, that it's making it up," that's very dicey. It's, it's something that makes me very uncomfortable. At the same time, there may be no alternative to that. And there are some other areas in the law where, where we do something like that, for example.

[00:37:30] And property rights, when state courts make relatively minor adjustments to the property rules, nobody says that that's a taking of property without just compensation. But when there's a convulsive like totally new change, resulting in people losing property rights that they seem to have for hundreds of years, then we do have a takings problem. It's really a similar situation. That's not, that doesn't mean it's not difficult. It means the line drawing is going to be really ferocious, but I'm afraid there may be no alternative to it.

[00:38:07] Jeffrey Rosen: Rick, Michael makes the strong claim that until the '60s, the dominant idea was the courts had no role in policing elections. But once courts began to police elections, in a way that he says is accepted by, uh, both liberals and conservatives, then it's necessary for them to read the text and create an independent state legislator doctrine. Do you find that a persuasive argument, especially for justices who claim to be bound by original understanding? And what do you think its implications are?

[00:38:39] Rick Pildes: I think we have to distinguish between the role of federal courts and the role of state courts. So, Michael is correct that until the 1960s, the federal courts generally did not believe the federal constitution had a significant role to play in overseeing the election process. And there's some exceptions to that. But, fundamentally, before the 1960s the Federal Court doctrine was that federal courts did not have a major role to play.

[00:39:09] But state courts have always been in the business of dealing with disputed elections. You have election contests, procedures. You have various other procedures for dealing with disputes over elections. That took place in the state courts, not in the federal courts. And just to be clear for the audience, everyone agrees that state legislatures are bound by the federal constitution, and by federal statutes that apply to the election process.

[00:39:41] So the question is whether... what state courts had been doing throughout American history with respect to interpreting state election statutes, applying state election statutes. Whether there is now the kind of constraint that Michael is talking about that would put federal courts in the role of deciding, you know, if... and this version of the doctrine. Deciding whether the state court interpretation of a statute or state executive application of a state election statute went too far from the text of the statute, with all the uncertainties. Michael acknowledges what that entails.

[00:40:20] And one thing to understand here is that, you know, this version of the doctrine with threatened to turn almost any dispute over the application or interpretation of state election law or federal elections into a federal court matter, because the losing campaign is always going to be pulling out every stop they can. And if the federal courts are open to re-litigating whether the state court interpretation of a statute went too far, it's easy to imagine that losing campaigns will be running to federal court to do this. And at the extreme, the risk is that this version of the doctrine would convert every dispute over state election law into... with respect to federal elections into a federal constitutional claim, at least.

[00:41:13] With respect to one of the concerns that Michael, um, identified, there is already federal constitutional doctrine, due process doctrine, that does constraint state court interpretation of election law for all elections, state and federal in one particular respect, which is, after votes have been cast, state courts cannot, uh, in the guise of interpreting election law, essentially rewrite the election law. Because this pulls the rug out from under voters, who have already voted based on the state of the law at the time they voted. And so, that does implicate concerns of fundamental fairness, the lower federal courts recognized.

[00:42:00] And so, the change that Michael was talking about after people have voted under one set of rules that could arise from state court interpretations that effectively changed the law that people had voted under. That does violate due process and there are protections against that the lower federal courts have already recognized. But that's a very kind of discrete domain. It's after votes have been cast, are the rules effectively being changed in a way that violates fundamental fairness, because you're throwing out votes or maybe including votes that under existing law were valid or were invalid.

[00:42:44] This version of the independent state legislature doctrine, as they say is far more sweeping, because it could, it could apply to any interpretation or application of election law in the States whenever the change take place. So, even if it's six months in advance of the election, and everybody knows what the state court has said about the deadlines for certain voting matters. A disappointed campaign could go into federal court and say that state court interpretation is illegitimate under the federal constitution. And that's the concern I have about opening this door. Um, and basically, you know, creating an avenue for re-litigating every dispute over state election law in the context of federal elections in the federal courts.

[00:43:30] Jeffrey Rosen: Thank you so much for that. Michael, Rick makes a really interesting point when he says that state courts have always been in the business of dealing with disputed elections. And to construe the elections clause in a way that the framers didn't anticipate to ask in every case, whether state courts went too far in their election decisions, would threatened to turn in any interpretation of election law by state courts into a federal constitutional question. Which is inconsistent, he says, with history and tradition. What's your response, as an originalist and more broadly?

[00:44:04] Michael McConnell: Well, it's certainly true that this will invite litigation from disappointed campaigns, and there'll be lots more cases, uh, going into federal court. This is true every time federal constitutional laws extended to a new area. It's true of equal protection and due process and so forth. The question is, is this consistent with what the Constitution commands? And if the language of the Constitution, the specification of the state legislature, as the body to create state law in this area, is to be given any weight, then I think the court is going to have no choice but to get into the area.

[00:44:49] I do think that the two extreme positions are un- unreasonable and I predict that they will be rejected. But how some of the intermediate positions are going to be handled is going to be I think quite a tough. And, Rick says once the votes are cast, well, due process already gives you the right, gives people the right to go into federal court and say that state courts have

misinterpreted the state law. And that's of course true. Well, what about when they intervene ahead of time?

[00:45:25] A concrete example that I think is useful to think about from the 2020 election, uh, was the Pennsylvania legislature debated and passed a new law, uh, vastly liberalizing the use of mail in ballots because of the COVID problem. It debated the question of whether those ballots had to be received on Election Day or not and they decided, yes, it did. And there's no argument that that's an unconstitutional decision on the part of, uh, of the, of the state legislature. The Pennsylvania Supreme Court referring to highly generalized language about fairness and so forth, decided, "Oh, no, uh, let the ballots... we'll continue to count the ballots for three more days after the legislature, uh, specified."

[00:46:16] And I think that's, uh, just a, a classic example. This is one we can all sort of chew on. Because if the legislature has the right to write the rules, things like a deadline for receipt of ballots should be something the legislature does. The state Supreme Court should not be able to rewrite that. Now, that went up to the US Supreme Court in advance of the election and the agreement was that any votes that came in after Election Day would be sequestered. And it turned out, there weren't enough of those to affect the result in Pennsylvania. And so, the Supreme Court dismissed the case. But had there been more of those and had it been a situation where it could affect the results of the election, the Supreme Court would have decided the independent state legislature doctrine in connection with the 2020 election.

[00:47:15] Jeffrey Rosen: Rick, Michael says that the Pennsylvania case he just mentioned is one that everyone should be able to agree on. Namely, that the Pennsylvania Supreme Court should not be able to, by invoking generalized language about fairness, change the rules after the election. Do you agree or disagree with him on that point? And then what's your response more broadly to his claim that federal courts without the benefit of original understanding are bound to follow the text wherever it may lead, even if that leads to results that the framers couldn't have anticipated?

[00:47:47] Rick Pildes: So, there are two different versions of the way the situation in Pennsylvania could arise and this implicates two different versions, potentially, of the doctrine, and they have very different implications. So, if the Pennsylvania Supreme Court had relied on sort of background principles of statutory interpretation, to say, in the context of COVID, this deadline, doesn't give people adequate opportunity to vote. And so many people will cast absentee ballots. At that time, there was great worry about the postal service and how quickly it would actually be able to handle ballots.

[00:48:25] If the Pennsylvania Supreme Court had rewritten a specific term, like the deadline in a state election statute for federal elections, based on sort of general principles of statutory interpretation in Pennsylvania, then one version of the doctrine would be, they can't do that. But what happened in Pennsylvania is the State Supreme Court relied on the State Constitution to conclude that in the context of COVID, that deadline violated state constitutional protections for the right to vote. And so, if the Court were to embrace that version of the doctrine what exactly

would it mean? Would it mean that State Constitutions as a general matter cannot constrained state legislatures?

[00:49:14] Would it mean that in less extreme versions, state courts cannot rely on general state constitutional provisions to strike down state election laws? And if that's what it means then we're going to open up this whole set of questions about how specific does the state constitutional provision have to be to be specific enough? What if the state courts have actually interpreted that provision over many years and given it more specific content? So, that as a general matter, just from the text, it looks like a broad provision, but actually, there's no established doctrine that the courts are then applying. Is that specific enough? And I don't know how Michael answers those questions. But I think either version once the state constitution is involved, as it was in the Pennsylvania case.

[00:50:07] You know, either version creates or opens up very big implications. And they could be quite destabilizing, because it could mean that a lot of provisions that have been in place for years are now suddenly unconstitutional unless the state legislature chooses to adopt them. So, one way I would answer the question about the meaning of the word legislature is that when Congress when the convention wrote those terms, uh, the background assumptions or understandings, I believe, and as Michael says, we don't really have evidence one way or the other on this question.

[00:50:49] But the background understandings that I believe they would have been acted against were that it's the legislatures created by the state constitution, it's defined by the state constitution as its powers are defined by the state constitution? That's what the legislature is. It's not this body that exists independently of all of that. And the normal processes of interpretation and application of state law would also be assumed as, as part of this process.

[00:51:18] So, the provisions give the state legislature the, you know, sort of fundamental authority to set the rules, but surrounded by all the things that apply to state law in general, which is, in my view, what the convention is best understood to have understood in enacting that provision. And that's why in terms of the... let me put the point this way, too. In terms of original public meanings, uh, original public understandings before the Civil War, I believe there's just a single instance in which scholars have identified an assertion of this theory, which is Justice Story's comments in that 1828 Massachusetts Convention.

[00:52:08] But as I mentioned earlier, there were at least five state constitutions at that time that impose rules on state legislatures for regulating federal elections. For example, one of the contentious issues early on is should there be voice voting where you vote publicly or should you be able to vote by a ballot? And that issue was resolved at the level of state constitutions and no one argued that this was an intrusion on the unique constitutional autonomy that state legislatures have when they regulate federal, uh, elections.

[00:52:44] Jeffrey Rosen: Michael, what's your response to Rick's claim that the texture-less analysis here is unbounded by history and raises all sorts of questions like can states not rely on general provisions to enforce election laws? How specific does the state court have to be? There's, there's little in text history or original public meaning that answers those questions, he

says. And that it would be perfectly reasonable to assume that legislators defined state constitutions not as independent bodies, but as ones that operated, uh, within the normal application of state law. Just to put the point, clearly for listeners, why isn't it right that a textualist should defer to text history and tradition in this regard, rather than adopting an open-ended doctrine that could really destabilize an awful lot of our law?

[00:53:32] Michael McConnell: I don't disagree with Rick, that the most sensible interpretation of this doctrine is that legislatures operate within the general framework of, of the law. I've... again, there is an extreme version, which I, which I don't find persuasive that would say that, but I think that's correct. But that doesn't mean that state courts can just step in and write their own election law. The incidences that Rick refers to when... were so well-accepted as a matter of law that nobody objected to them.

[00:54:14] I put Rick's examples in the category of absence of evidence rather than rather than actual evidence. If somebody had said, "Oh, no. The state legislature can't provide for the secret ballot, because that violates the independent state legislature doctrine and they had argued about it and, and come to the conclusion that the Constitution could do that. That would be something of real note. But unless there's a reason for a controversy to arise, I don't think we can look to that as evidence that there was no such doctrine. The other way to look at it is that the states, by and large, have obeyed the independent state legislature doctrine all along and it's really only in modern times when there is so much more state, uh, so much more court involvement that the issue has become also important.

[00:55:13] Jeffrey Rosen: Thanks so much for that. And for this rich and illuminating debate over the scope of the independent state legislature doctrine. Rick, let's conclude this great discussion by flagging for *We The People* listeners, what future threats to elections you think they should be paying attention to.

[00:55:29] Rick Pildes: So, one major threat we now face is what's been happening with election administrators. Many of these people, the poll workers, for example, are voluntary of people doing what they think of as a civic duty, they were very low profile. And now, given the attacks on the election system, the claims of fraud the claims of manipulation, one of the real tragedies here is that these people have come under assault in various ways. Threats, serious threats, threats to themselves threats to their family, harassment, efforts to intimidate. And there are a number of things that follow from that.

[00:56:14] One is that we're seeing lots of these people resign. It's not worth putting up with these kinds of threats and harassments and intimidations. That could create problems in terms of actually just being able to staff the polls fully. It's become so much more contentious of position. Secondly, offices that were elected and are more low profile, like Secretary of State Offices, have suddenly been thrust into the limelight because their role in administering elections has become more apparent. And that's led to more partisan types of people deciding to run for these offices. And there's concern about whether more partisanly kind of activist figures if they win state elections for these roles, to what extent can we trust them to administer the elections in a fair, impartial rule of law like way.

[00:57:09] There are also going to be worried about whether there are intimidation efforts at the polling places in upcoming elections. There's greater reasons to be concerned about that. So, there's not a lot of scope for bipartisan agreement at the national level on voting policy. We've seen that in the legislative battles over the Freedom to Vote Act, the John Lewis Advancement Act. But along with the bipartisan support for Electoral Count Act Reform, I would hope that Congress can find a way to bipartisan legislation at the national level that would provide more protection for election workers. More protection against intimidation, threats and the like, and also more protection for the integrity of the polling place.

[00:58:01] There are federal laws that regulate some of this, but I think those, we could toughen up hard enough the structure with national legislation to protect the election administration process from these kinds of, um, manipulations and, and forces.

[00:58:16] Jeffrey Rosen: Many thanks for that. Michael, last word in this great discussion is to you. Do you think there might be bipartisan support for legislation regarding protecting election workers against intimidation threats to the integrity of the polling place? And what threats to elections do you think *We The People* listeners should be thinking about?

[00:58:36] Michael McConnell: I believe there is legislation, which is part of this bipartisan agreement along with the reforms to the Electoral Count Act that would help to address this. I can't give you the exact details, but providing for enhanced criminal penalties for interference with election workers and that sort of thing. I would think that this would be an area of bipartisan agreement. If we were to really be wanting to talk ambitiously and to things that might not be so easy to get across, it really would be a good thing to think about how the state election administration could be restructured in a different way when there's a partisan election for Secretary of State that runs this.

[00:59:28] That may have been fine as long as, you know, you had basically public-spirited folks doing that, who are just going to obey the, the law. But with both parties now pouring money into those elections it's a real vulnerability on our system.

[00:59:47] Jeffrey Rosen: Thank you so much, Rick Pildes and Michael McConnell for offering *We The People* listeners a model of thoughtful civil debate about the Electoral Count Act, the Independent State Legislature Doctrine and other threats to election integrity. It's always an honor to have you both on. Michael, Rick, thank you so much for joining.

[01:00:07] Michael McConnell: Thanks for inviting us.

[01:00:11] Jeffrey Rosen: Today's show was produced by Melody Rowell and engineered by Greg Scheckler. Research was provided by Sam Desai, Vishan Chaudhary, Eliot Peck, Colin Thibault, and Samuel Turner.

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[01:01:01] I hope everyone is having a wonderful summer and on behalf of the National Constitution Center, I'm Jeffrey Rosen.