



## Election Integrity and Voting Rights: Should We Rewrite the Rules?

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**[00:00:00] Jeffrey Rosen:** Hello friends, and welcome to the National Constitution Center. I am Jeffrey Rosen, the president and CEO of this wonderful institution. Friends, as you know, we're a nonprofit and we rely on your support to put on wonderful programs like this. And I'm thrilled to share that we are launching an exciting crowdsourcing campaign. Thanks to our friends at the John Templeton Foundation, every dollar that you give to support the We the People and Live at the NCC podcasts will be matched, uh, one to one up to a total of \$234,000 to celebrate the 234th anniversary of the ratification of the Constitution. You can go to [constitutioncenter.org/wethepeople](https://constitutioncenter.org/wethepeople), and it would be wonderful if you could give any amount, \$5, \$10 or more to signal your membership in this meaningful community of lifelong learners and your support for the programming that makes it possible.

**[00:00:59] Tanaya Tauber:** Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates, hosted by the center in person and online. I'm Tanaya Tauber, Senior Director of Town Hall Programs. The National Constitution Center has teamed up with the SNF Agora Institute at Johns Hopkins University to bring you a series of conversations about how to restore the guardrails of American democracy.

**[00:01:22]** Today's conversation is about exploring recent proposals to protect the integrity of our election process. We convene four experts to debate the merits of legislation pending in Congress and the states. Jeffrey Rosen, Center president and CEO moderates. Joining him is Charles E. W. Cooke, senior writer at National Review, Edward B. Foley, professor and director of the Election Law Program at The Ohio State University, Michael T. Morley, professor at Florida State University Law, and Dawn Teele, SNF Agora Institute associate professor of political science.

**[00:01:58]** This conversation was streamed live on February 15, 2022, and was presented in partnership with the SNF Agora Institute at Johns Hopkins University as part of the National Constitution Center's restoring the guardrails of democracy initiative. It was also made possible with the support of the Stavros Niarchos Foundation, and Mike and Jackie Bezos. Here's Jeff to get the conversation started.

**[00:02:22] Jeffrey Rosen:** Hello, friends. Welcome to the National Constitution Center, and to today's convening at the America's town hall. Let's begin with the Electoral Count Act. That may sound like a esoteric place to start, but it turns out to be one of the proposals for election reform that's gathering genuine bipartisan support, Rs and Ds in the Senate, I have talked about the need

to reform the Electoral Count Act, and I'm very eager to hear if and whether you believe that reform is a good idea or not.

**[00:02:55]** Ned Foley, you joined the NCC's We the People podcast recently for a superb discussion with Brad Smith on this very topic. So I know what you think, but our audience doesn't. So please share with our audience why you think the Electoral Count Act should be reformed and, and how you think it should be reformed?

**[00:03:14] Edward B. Foley:** Well, thanks, Jeff. Um, and I'll try to be brief because as you know, we could discuss this, uh, at great length. But, um, basically, the statute is unclear. Uh, it's very difficult to read. It was written in the 19th century after the Hayes Tilden dispute in 1876. It took Congress 10 years to try to figure out how to write the statute, so that's why it was adopted in 1887. But it was a compromise that papered over some disagreements, so left a lot of ambiguities. And just the way in which we talk in the 21st century about these sorts of things is just a different vernacular, different vocabulary that makes this old law just very hard to understand. So it needs to be updated.

**[00:03:58]** Also, um, whether you focus on the tragedy of last January 6, and the, and the violence at the Capitol, specifically, or how this statute has been abused in the last two decades by different political, um, groups, depending upon, you know, which side is ... uh, doesn't like the outcome in a particular case, um, mischief can be made because of the ambiguity. And so the goal for reform here is to create clarity instead of ambiguity. It's very hard to fight over something that's crystal clear. And so we need that clarity where it's most important, when you're fighting over the outcome of a presidential election. That's what the Electoral Count Act is about, by the way, it's counting the electoral votes specifically in a presidential election.

**[00:04:46]** So it's, it's at the moment, two weeks before Inauguration Day is where it really comes into effect. That's not when you want to fight about who won the, the, the White House. You need clarity at that moment, and that's why reform is needed.

**[00:05:01] Jeffrey Rosen:** Charles Cooke, do you think reforming the Electoral Count Act is a good idea or not?

**[00:05:06] Charles E. W. Cooke:** I do think it's a good idea. Yes, um, I agree entirely that it's unclear, and that it's good to update laws that are unclear. It is worth saying this problem we had last year wa- was as much to do with people as it was badly written law. You need people to behave badly to exploit or to try to exploit badly written laws. Uh, and I put a lot of blame at the foot of President Trump for what he attempted to do. Um, ultimately, enough people stood up and, and stopped him, including the Vice President, uh, but this, this isn't a bad self-executing law.

**[00:05:51]** Um, but yeah, of course, we need to fix it now, because we have seen that it's a liability. And in a sense, I look at this in the same way as I would look at, say the 22nd Amendment. Um, different topic, different importance, but for most of American history, presidents followed, uh, the informal norm of only running twice. Uh, and when a president said, "No, I'm gonna run more than that," in Roosevelt's case, I th- I think Wilson tried, the Congress

said, "Well, no, if, if you're not gonna do this voluntarily anymore, we're gonna clarify what we expect of the executive branch."

**[00:06:30]** And, and I, I think this is what we need to do with the Electoral Count Act. We need to make it clear that it is of course absolutely preposterous to suggest that the framers, uh, of the Electoral Count Act, or for that matter, the 12th Amendment, wanted the Vice President to in a sense, be a dictator, uh, and decide on his own who had won the elections. So, you know, if we can't trust, uh, our politicians, in that case, uh, Donald Trump, then let's write down what we expect of them far more clearly. But it is a shame that it has come to that.

**[00:07:03] Jeffrey Rosen:** Thank you very much indeed for that, and very significant multi-partisan agreement so far. So Dawn Teele, what do you think about reforming the Electoral Count Act?

**[00:07:12] Dawn Teele:** Well, I'm not gonna disagree with my esteemed colleagues here when they say the ambiguity needs to be rectified. But I would say that I don't think that the most important problem that we are facing necessarily is the exploitation of this loophole that, you know, resources and time are precious, and I think there are bigger fish to fry in the electoral arena, and bigger legal changes that we should be pursuing, so that the malapportionment and the terribly imbalanced representation that is currently the situation in the house, and the catastrophe that is the Senate are dealt with.

**[00:07:51]** So for me, it's about ... it's more about priorities. I want bigger reforms, rather than some of these, uh, not necessarily incremental things, but things that are not, to me, the biggest problem with the system.

**[00:08:05] Jeffrey Rosen:** And we have one, uh, panelist who I'm very eager to hear with, and that's, uh, Michael Morley. What do you think?

**[00:08:11] Michael T. Morley:** I've absolutely been advocating a reform of the Electoral Count Act for many of the reasons that Ned specified. And in the, the way that I think about it, there's really two main possibilities for improving it. On the one hand, you can take the current Electoral Count Act as it exists, and fix particular problems with it, everything from clarifying when safe harbor status does or doesn't apply, right? There's a statutory reference to, uh, safe harbor status attaches if there's been a final determination in a state. Well, what sorts of proceedings are sufficient to stop a slate of electors from claiming safe harbor status? Like if the deadline for seeking certiorari hasn't run, for example, or if there's a pending federal appeal, does that stop the slate safe harbor status?

**[00:08:58]** Uh, more clearly specifying the limits on the role of the vice president, more clearly identifying how to deal with multiple elector, uh, multiple slate of electors situations. The rules in three USC 15 are very unclear right now in terms of who even determines whether or not, uh, you're in a ... which of the, which of the various multiple elector situations you're in. So there's a lot of ways that we can improve in a very nonpartisan way, in a very technical way on ambiguities and gaps in the statute.

**[00:09:29]** Some of them, yeah, would seem, you know, very minuscule, but in the context of an actual hotly contested election that winds up hinging on those types of issues, as Professor Foley points out, that's the last time you wanna be figuring out what the statute does or doesn't mean. You could have what I would call an overhaul of the statute, which is addressing the fundamental question the statute deals with, which is under what circumstances, if any, can the chambers of Congress reject a slate of electoral votes?

**[00:09:58]** So right now, the ECA uses two key terms. Congress can, um, reject a slate of votes if it concludes that the electors were not lawfully certified, or that those votes were not regularly given. And those two key terms, lawfully certified, regularly given are entirely undefined in the statute, and the legislative history is very unclear about that. And so as some of the previous panelists have mentioned, over the past two decades, we've seen abuse of the system where different members have attempted to make objections, and in some cases, were successful in raising objections that were ultimately rejected based on their own interpretations of those terms.

**[00:10:38]** And so to, to address that issue, you would have to get down to the fundamental question of, who are we ultimately going to trust with the power to have the final say over whether, whether, um, what ... who the electors from the state are, whether that election was conducted in accordance with, with constitutional norms?

**[00:10:57] Jeffrey Rosen:** We are now in our next round of questions facing the issue of what proposed reforms each of you think would be salutary. And Ned, I know you've focused both on questions involving the right ... the fact that everyone has a right to vote and a transparent voting process, as well as systems that ensure that the candidate who wins a majority of votes wins their respective races, uh, rather than the plurality required in the current first-past-the-post system. So tell us about those majoritarian reforms you favor. I'm using Alaska as a model. But before you do, Joseph Lincoln has an interesting question, which would be great to have your answer. Does the proposed reform of the Electoral Count Act empowers state legislatures that may disregard the majorities in their states? Are we to rely on the McConnell court to determine the issues?

**[00:11:47] Edward B. Foley:** Sure. Well, let me take the Electoral Count Act part first, just 'cause that's what we've been talking about, and then transition into, uh, the topic of structural reform. So my view is that a well-reformed Electoral Count Act will prevent both bad people, as Charles said, in Congress from subverting the true results of an election. And this is why I do think this is an important reform, because the abuse of the process that fortunately did not succeed last time was an attempt to negate the validity of a valid election, and that is the denial of self-government.

**[00:12:25]** And so there are lots of, of things that we need to focus on in terms of improving American democracy. But if politicians have the capacity to negate the outcome just because they don't like it, that's the destruction of democracy, not just its imperfections, I would say. I think what happened last January 6, although unsuccessful, unfortunately, shows the risk that the same kind of bad intent, bad will, if enough, gets enough votes, either in Congress or in the state governments, could engage in successful subversion of the will of the people through the, the, the ballot box. And that's why this reform is so, so essential.

**[00:13:08]** There, there's two ways in which that subversion could happen. It could happen by the members of Congress themselves objecting to valid results because they don't like them. They fell short enough votes last time, but if, if one chamber of Congress accepted a submission from a governor, and the governor was in cahoots with trying to subvert the true vote, the current statute requires the governor's submission to prevail. So, uh, a mendacious governor combined with one mendacious chamber of Congress could upend the entire results. And so that needs to be ... And the either party could do that, could have a governor in their ... its pocket and a chamber of Congress in its pocket.

**[00:13:55]** The ... I think the question which is an important one is, what happens if that rogue effort to undo the election occurs in the States? Would a reformed Electoral Count Act prevent Congress from stopping the subversion by a governor or a legislature in the state? And my answer to that is emphatically no for the reason that we can rely ... The question mentioned the so-called McConnell court, but I take issue with that characterization. We may dispute different appointments to the Supreme Court, but the judiciary acted in accordance with the rule of law last time. Judges appointed by presidents of different parties all agreed that rule of law has to control the procedures for counting votes. And I think we have good reason to expect that if there's a divergence between the rule of law on the one hand, and pure political greed on the other, that the courts will protect the rule of law, and require states to comply with it, such that what gets sent to Congress will be consistent with the rule of law.

**[00:14:49]** I know this is long-winded, but I think this is an important point. And that's why the reformed Electoral Count Act has to make sure that Congress also abase the rule of law conclusion. Um, so the combination of the federal courts at the front end, and a well-written Electoral Count Act at the back end that requires Congress to follow the rule of law result, I think is the best recipe to constrain the kind of bad people that, um, Charles was talking about. So, you know, that's my answer on that point.

**[00:15:37]** Now, to quickly turn to the issue of structural reform, 'cause I agree with Dawn that there are other issues besides the Electoral Count Act to address. And the reason why I propose the Congress adopt, essentially a one-line statute, uh, that would say that to win a seat in Congress, you need a majority of votes in November, not a mere plurality. You know, a lot of US citizens, we sort of assume that it takes a majority to win. We sort of think elections are based on a majority of votes, but the legal rule in most states is you only need more than another candidate in a three-way split or a four-way split. The most could be less than 50%. And factions can gain that system and gain power even though they are opposed by a majority.

**[00:16:28]** And we can build on federalism in a good way. The, the genius of our Constitution is it makes the states laboratories of democracy. So if Congress simply said, "You need to win a majority to hold a seat in Congress," then states could experiment, what's the best way to achieve majority results? Jeff, you mentioned Alaska, Alaska has got a very interesting new innovation, which we could talk about the details if you like. But I think the key point, not that every state should do exactly what Alaska is doing, but it's one way to, you know, have basically, four candidates representing different, uh, spaces on the ideological spectrum. They use something called rank choice voting to get a winner, and that's a way of saying, "Okay, um, different

citizens have different options. There are progressives on the left, there are populace on the right, there's conservatives in the ... on one side of the aisle, in the middle, there liberals on the other side of the aisle. How can we take these four different ideological points of view, and get an answer about who should be US senator from the state of Alaska?

**[00:17:35]** Um, it's a different way of doing it than our traditional party primaries and our traditional plurality election system. And I think it's a model that could prove useful, and other states could either adopt that model or experiment with it, because that what I think we know now is that the President Trump's name was invoked. You know, he's never had a majority support of the American people, but he was able to gain power in 2016, um, through plurality elections on a state by state basis that fed into the electoral college. And what he's trying to do now is control the primary processing all around the country, in governor's races, secretaries of state races, Senate races, Congress races, all of them, in the hope that his faction wins the primary. And that's the only Republican name on the ballot in November.

**[00:18:27]** What Alaska does is opens that up. So in November, there will be very likely a Trump-endorsed populist Republican, but there also will be Senator Lisa Murkowski, who Trump opposes. And then the voters in November can decide which Republican they prefer. Trump doesn't get to make that decision. If that existed in Wyoming, uh, Representative Liz Cheney wouldn't have any problem. She could be on the November ballot, along with the Trump-endorsed opponent, and then the ... all of the voters in Wyoming can decide which brand of Republican they prefer. Whereas under the current system, it's only the party in its primary that makes that choice, and that has a skewing effect to the detriment of the system as a whole. So that's the essence for why I think we need to open up the process and look at different structural reforms.

**[00:19:18] Jeffrey Rosen:** Thank you very much for that, Ned, and thank you for putting those reforms on the table. Charles Cooke, you have argued that in some sense, the system has worked well, that what 2020 showed is the system is robust because the President tried to steal the election and didn't get very far. Are there any institutional or structural reforms related to the election that you think would be a good idea?

**[00:19:42] Charles E. W. Cooke:** So I, I do think our system works very well too. I, I, I think it stood up, uh, at the state level, I think it stood up in Congress. Not everyone did, but enough did. Um, I think the Vice President stood up, um, and the Supreme Court did as well. And, uh, beyond the Electoral Count Reforms, no, I, I don't think we need radical reform, certainly. Um, I, I think outside of President Trump, who's sui generis in, in some ways, the two points of, uh, freakout, to use a technical term, that you see on the left and the right, are largely false.

**[00:20:24]** Um, it is not the case that the United States is mired in voter fraud. That is not the same thing as saying there is never any voter fraud. But it is not a substantial problem, um, and neither is voter suppression. It is pretty easy to vote in the United States. I'm sure there are some bad laws on the books, and I'm sure some of the motives of the people who put them there are ugly. But I don't worry a great deal about our electoral system on either side of that. And I feel in- incredibly sorry for people such as, you know, Secretary of State Raffensperger in Georgia,

and Gabriel Sterling, who have run two good elections in a row, and been lied about and lambasted for it, first by Stacey Abrams in 2018, um, and then by, by President Trump.

**[00:21:16]** Um, my primary concern, and it is a real concern, is the confidence of the public in the electoral system. H, one of the reasons that that seems low is that people who have influenced, President Trump being the worst example in recent years, uh, lie a great deal about the election. Now, Ned is obviously the expert, uh, in the blue shift, uh, and, and sort of was eerily prescient in what he saw coming in 2020, but that is, uh, a real problem. It's a problem that is exploited and should not be exploited. Um, but it is a real problem.

**[00:21:54]** Um, I see this myself all the time, uh, people are absolutely convinced, especially on the Republican side that something dodgy happens late on in elections that the Republican is winning, and then the, um, powers that be sit around, work out how many votes the Democrat needs to win, and then find them.

**[00:22:18]** Um, uh, this will sound slightly facetious. I, I don't really mean it in that way. One of the reforms that I would like to see is for every state in the union to hire Jeb Bush to overhaul their election system as he did in Florida, because the Florida system, uh, whatever its other flaws, is efficient, it's quick, and it inspires confidence. You'll notice in 2020 that Florida did not get mired in the same sort of dishonesty and conspiracy theorizing that say, um, Pennsylvania did, uh, Georgia did, um, Arizona did.

**[00:22:54]** Now again, that is partly because Donald Trump, who's the main instigator of it, won Florida, uh, early on. But the results were clear. They came through early, and so many of the people that I saw, you know, stirring it up did not get the chance to do that in Florida. Um, so, you know, if we want to have people who believe in our system, which, which we should, we should try and improve on some of the ways we count votes. It takes ... You know, again, it doesn't particularly matter, given the partisan hue of it. But it takes such a long time to count votes in places like California and New York. It seems bizarre to me that this wouldn't be the first thing that we would try to fix.

**[00:23:37]** In terms of the way that we, we host, uh, elections, for many reasons, um, I am a, a, a big fan of first-past-the-post. Um, I'm, I'm not wild about alternative voting systems. I understand the critiques. Uh, I do think we do a fairly good job as a country of sorting this out through the primary system and, and by having parties that although there are only two of them, are fairly diverse. The Democrats are discovering this much to their chagrin at the moment, uh, with the likes of Joe Manchin and, and Kyrsten Sinema blocking their agenda. It's just not the case that, that the parties are, are sort of singular blocks.

**[00:24:13]** It's also not the case in my view that Donald Trump's having a particular effect on Republican primaries, his record's not that, that that good. Um, but I also think first-past-the-post is a good system because it really is easy to understand. Um, you can look at it as a newcomer to elections, and you can grasp how it works. The person who gets the most votes in the election prevails. It's much quicker to count, it's much quicker to understand, and you know, I follow this stuff and write about this stuff for a living, but when we have seen states such as Maine try alternative systems or, um, or Alaska, often you end up looking to experts with spreadsheets to

explain the, uh, the way that the election works and the most likely outcomes. I understand the argument for it. I just think with the state of trust in American democracy and elections, where it is, I think it would be catastrophic to mainstream that, uh, away from a system that, that is easily comprehensible.

**[00:25:13] Jeffrey Rosen:** Thank you very much for that. Thank you for your suggestion of Jeb Bush as a architect of electoral reform. Jeb Bush was a distinguished former chair of the National Constitution Center, as was President Biden, and we would be delighted to offer our beautiful center for a bipartisan commission of the kind that you described with our former chairs. And thanks also for your defense of first-past-the-post voting. Dawn Teele, you are a skeptic of first pass the post systems, and instead have championed the US adopting a system of proportional representation. Tell us why and how it work.

**[00:25:50] Dawn Teele:** I don't think it's easy to understand first-past-the-post electoral outcomes, even if it's easy to understand how the votes are tallied. You talk to my children, and you try to explain to them that you don't need to win the majority of votes in the country to win the presidential election, that you don't need to win the majority of the votes in a state to hold the state legislature, that is baffling. It's literally baffling.

**[00:26:21]** The other thing that's baffling is why in a country that prides itself on options and competition in so many realms of life, we would place undue emphasis on an electoral system, that the only law we know in political science is Duverger's law, that the first-past-the-post system encourages two parties, rather than multiple parties. Um, why we would encourage or be okay with an electoral system that provides us with so few options, both who we choose, and then who actually gets elected.

**[00:26:57]** So proportional systems have a whole lot of things that are different with them. I believe in the intelligence of the American people to understand, uh, different voting rules, and to be able to adjust, like the great people of Maine have to rank choice voting. You don't need a PhD to be able to understand how you can rank things, and certain people get eliminated. And I also think that most people are unhappy with the options that are on the table for them when it comes to political parties.

**[00:27:28]** So one of the issues with polarization isn't just that the parties seem to be far from each other, and I totally agree with Professor Foley that one of the things that is happening, and we have lots of political science that shows this, is that you get kind of more extreme candidates from all the parties that tend to win the primaries. But most people have to vote for a party that is very far from their actual preferences, and that is related to the first-past-the-post system in this country.

**[00:28:01]** So I want to live in a country where I can vote for people that are closer to my preferences on a variety of different dimensions, and I want alternative ideas to be represented in our houses of, of power. Uh, you know, for example, we don't have green parties, we don't have feminist parties. Um, you know, we ... The Tea Party, like in some states, they could have more representation, rather than have a stranglehold on a heritage party in this country. So I want more competition.



[00:28:34] I also think it's hard to understand when you look at the map of the United States, why some districts are very competitive, and other districts aren't at all. And I think that moving to proportional rules reallocates competition across the countryside, and it reallocates participation across the countryside, because you get these pockets where turnout is very high, and these other pockets where turnout is very low. So I think it's baffling, in fact, to see a country where you have just all of this difference in political participation, and proportional representation systems tend to have more evenly distributed turnout across the country.

[00:29:12] **Jeffrey Rosen:** Thank you so much for that important defense of first-past-the-post voting. Michael Morley, could I ask your opinion of the discussion you've been hearing about the merits of proportional representation, versus first-past-the-post voting? Do, do favor any kind of movement toward proportional representation? Uh, why or why not? And then, uh, what other reforms would you like to put on the table?

[00:29:35] **Michael T. Morley:** So no, I, I, I would not favor a move toward proportional representation. We've heard some of the arguments, pro and con in favor, in, in, in favor of the system and in favor of reforming it. I guess at, at the end of the day, we have a long standing, uh, democratic tradition in this nation of having our representatives in our districts, that when we, when we go to the polling place, right, when we're, when we're casting an election, we're choosing, right, the person who's going to represent us, as opposed to your proportional representation systems where basically all the votes throughout the entire state, for example, right, would be treated as fungible, get thrown into the same bucket, and then which depending on how many were cast for the Democratic Party, how many were cast for the Republican Party, that would determine how many seats in the legislature that party got.

[00:30:24] I think we would want to move away from a system where we are reducing local control over local representatives that way, and basically empowering the, the party. And you know, certainly if we look to Europe, there are different variations on the system, right? It's, it's not that you're proportional representation is a family of, of, of approaches, rather than any particular approach. But what I don't like is that, right, overall it increases the distance between the voters and their, and their elected representatives.

[00:30:52] Thinking more broadly about the types of recommendations that Professor Foley was talking about, in particular, the Alaska system, those are attempts to weaken the role of political parties in the political system. And I, and I think that, that there's at least a, a, a fair debate to be had on that. I mean, one of the stories that has, that has arisen over the, over the past decade is a party's as a moderating force on politics, that one of the reasons according to at least, you know, some political scientists, one of the, one of the contributing factors to hyperpolarization is the fact that due in part to campaign finance law, which we don't need to get into the, the, the details of here, it's ... there's, there ... it's been a lot harder for political parties to raise money. There are limits on the ability of political parties to raise money.

[00:31:40] Whereas outside super PACs can raise and spend un- literally unlimited amounts of money. And so it's a lot easier for, you know, millionaires or billionaires to fund their own preferred candidates, which are able to reflect their political preferences, whereas political parties

have to ... They're in it for the long term, right? They have a brand. They have to win, not just the selection, not just the seat, but hold together statewide national coalitions.

**[00:32:07]** And if we think more broadly about the difference between the American system versus European systems, right, everybody has the same problems. Everybody has the issue of, there are different segments of society, of environmentalists, of people who, people who support different types of issues, right? Labor-oriented voters, right? Tax-oriented voters, social justice-oriented voters. In, in European systems, right, this is hashed out where you have a series of minor parties develop. And then after the election, you then have to on the back end, have these minor parties come together, in order to try to form a coalition government.

**[00:32:47]** We're doing the same thing, right? The Republican Party, the Democratic Party, these are comprised of lots of different social interests. They just come together on the front end through the primary process, and in that push and pull, and the fight in the primaries, and the negotiations in the primaries, that's where in a sense, the governing coalition of each party is worked out. And then whichever candidate wins the election, that governing coalition is already in place.

**[00:33:14]** So I think they're basically two very similar way. They might look different. But in function, they're functionally similar ways of getting to the same place. I would suggest our system is a little bit more stable, simply because you don't have the ... you don't have to worry about the problem on the backend that you see in some European countries, where a governing coalition simply can't be formed, where the ... where parties in the parliament can come together to, to, to elect a new government.

**[00:33:39]** In terms of potential reforms, I'd guess, I would, I would throw out three potential ideas. One is I think, especially, uh, based after the ... after our experience of the, of the past election cycle, in addition to the Electoral Count Act, if I can add another previously obscure statute to the scoreboard here, I would also encourage reformation of the Presidential Transition Act, which specifies that the administrator of the General Services Administration has to "ascertain" the apparent winner of the presidential election, thereby who, who that ... who the administrator designates as the president-elect for purposes of that statute, right? Not officially, not constitutionally, but for purposes of the transition in order to make transition funding available, in order to begin background investigations.

**[00:34:29]** And yet, that ascertainment has no statutory criteria whatsoever, no regulatory criteria. It's up to the sole discretion of the administrator to decide whether or not based on the results of an election as they stand, it's been ... it's appropriate to ascertain a winner. This wound up being a huge problem in the 2000 election, uh, up until Bush v. Gore. It wound up being a huge problem in the 2020 election. And so reforming the, reforming the Presidential Transition act, I think is a minor way, a low profile way, but an important way of helping to lay a foundation to deal with contested elections.

**[00:35:08]** I've long been a strong advocate of election emergency laws at the state level, to lay out the powers that election officials can and importantly can't exercise in response to dealing with various types of emergencies, not just public health crises like COVID, but things like

natural disasters, earthquakes, hurricanes. Here in Florida, we're always getting hit with hurricanes in, in the, in the, in the context of elections. Superstorm Sandy up in, uh, New York and New Jersey impacted, I believe was the 2012 election cycle.

**[00:35:40]** And so making sure the authorities are in place to allow election officials to deal with these last minute disasters, rather than forcing it, forcing people to have to go to the courts and have generalist judges on an ad hoc basis in the context of ostensibly constitutional litigation trying to make up new rules on the fly. Structure the electoral system, so that the necessary legal authorities are in place in advance, and again, not just empower election officials in terms of what sorts of rules they can suspend, what sorts of rules they can change, what sorts of deadlines they can, they, they, they can put off, but also establish red lines. What are certain types of measures that even in the context of an emergency, we don't want you to authorize, such as internet voting, for example, to the extent that experts in the field deem returning ballots over the internet to be too insecure.

**[00:36:32]** Most broadly, I would suggest that, you know, when we think about the types of rules and the types of reforms we need for the electoral system, it's important to think about maintaining public confidence as one of the fundamental goals of the system. That is just as important as ensuring access to all eligible voters. That is just as important as ensuring accurate outcomes, but also, right, maintaining the appearance of accuracy, the appearance of legitimacy, and treating that as, as an important value. So restructure these laws, I think can help give us a new perspective on some of them.

**[00:37:08]** So like promoting transparency, for example, one of the measures in Florida that, that led to Florida's results to be so smooth was that state law authorized pre-processing of absentee ballots. So everything up to actually counting the vote on the ballot was all done in advance of Election Day, opening the ballot, determining the validity, comparing the signature, ensuring that person had actually requested the ballot, ensuring they hadn't already cast their ballots. All of the administrative steps that, right, may just take a, take a few minutes, but, you know, multiply that by a few million ballots, and now you're talking about some real time here. Right? Structuring state law to do that in advance.

**[00:37:47]** The flip side to that coin, in establishing deadlines for absentee ballots, have the deadline for the actual receipt of the ballot by election officials be election day, rather than having it be at either an indeterminate period or a period of up to 10 days after the election, as long as they're postmarked by election day, or if they're missing a, a, a postmark, right? In choosing between two possible deadlines that ex-ante, right, long in advance of the election don't impose any particular burdens on voters well in advance of an election cycle. Picking election day as the deadline for the return of absentee ballots is one way of potentially eliminating some of these conspiracy theories, one way of potentially bolstering the public confidence in, in, in elections.

**[00:38:31]** And as we think about other types of, of measures, you know, Professor Foley had mentioned rank choice voting, uh, uh, third-party ballot returns, sometimes, sometimes attacked as ballot harvesting. I think taking into account, you're weighing not just the impact on voters,

but also the impact on public confidence can help us at least reduce or narrow the range of opportunities that your malevolent actors can use to try to call into question the results of, of the election, or try to undermine public confidence in the system.

**[00:39:03] Jeffrey Rosen:** Thank you for those thoughtful proposed reforms. Well, in our last round, I wanna ask each of you about the future of election litigation at the Supreme Court. And the court just recently decided the Merrill case involving Section 2 of the Voting Rights Act, this is a very complicated case, and I want each of you to use your wonderful distilling public education skills to help us understand the arguments on all sides.

**[00:39:33]** Ned, there was a question in Merrill about when and whether the Supreme Court should intervene. Let's set that aside. The substantive question, as I understand it, and I'll try to do this as crisply as possible, is whether Section 2 of the Voting Rights Act, which guarantees minority voters the ability to go elect representatives of their choice, and has been interpreted to require the creation of majority/minority voting districts when minority voters are geographically compact and contiguous, and there's racially polarized bloc voting. Whether that required a second district to be created in Alabama, or whether the people drawing the boundaries should not even think about race when they're drawing electoral boundaries. Have I got that right, and where does this theory that you can't even think about race in trying to maximize the voting power of minority voters come from? And, and do you think it's constitutionally correct or not?

**[00:40:29] Edward B. Foley:** I do think you summarized it accurately. It is a complicated issue. I think the fairest way to understand what the Supreme Court did and what it potentially portends for the future, is I think there's general agreement on both sides of the litigation that if you looked at the specific Alabama map that was in contention under, you know, existing precedents that construed the statute as Congress had, had adopted it, that would yield the requirement that there should have been the second district added that would be majority black, and that the government failed to do that, which is why the district court held the government in violation of the Voting Rights Act, and ordered the creation of that second district.

**[00:41:16]** So the state of Alabama is asking for a reinterpretation of the statute to undo the prior case law, and adopt this new method of analysis, which has been facilitated by computer powers able to generate thousands and thousands of maps based on whatever criteria the computers are told. You can tell a computer, "Consider socioeconomic demographics, including race in turn ... 'cause the census knows all of the relevant data. So you could let the computer look at that, or you could basically tell the computer, ignore race, uh, and, and look at only other geographical factors. And so that is what I think the fight will be going forward.

**[00:41:59]** I think the motivation on the part of conservatives on the court to reinterpret the statute is based on a constitutional philosophy, which is in serious dispute on, on different sides, but the ... but we'll probably see it in play in the affirmative action litigation in terms of university admissions, as well as in this election law case. And that is, you know, there's a conservative philosophy that the 14th Amendment requires, essentially race-blind government decision making, um, not race-conscious decision making.

[00:42:36] And if you apply that overarching philosophy in the context of drawing maps, you might yield the conclusion that you should tell the computer to, to discount any racial demographics and look in what geographical considerations are possible. That would not be my own preferred interpretation of either the Constitution or the statute, but I think that is on the horizon, given what the court did.

[00:43:02] If I can add just one sentence more, without going into it, some of my current scholarship is an effort, and if you will, to have your cake and eat it too. I think if we liberated the whole concept of seats in Congress from geographical constraint, and if we ... This is getting a little esoteric for this hour. And if we flipped the way in which we do primary and general elections, we could actually allow voters to self-select into so-called communities of interest.

[00:43:35] So to go back to Dawn's formulation, you know, feminist voters could align themselves into a certain community that wouldn't necessarily be geographical-based. Other voters, environmentalist could become a community. And, and believe it or not, mathematically, technically, there probably is a way to combine what Dawn likes about proportional representation and what Charles likes, uh, about first-past-the-post into a kind of a whole new system. You know, is that on the horizon anytime soon? Doubtful, but I think the Supreme Court's decision may cause us to go back to the drawing board, because those of us who believe that, um, fair representation, given the history of America, lacking fair representation requires us going forward to, to meet certain benchmarks of fairness are gonna wanna think of new ways, and not sort of give up on the idea of fairness all together.

[00:44:31] **Jeffrey Rosen:** Thank you very much for that, and look forward to perhaps revisiting those proposals after the court wills. Charles Cooke, can you defend or help us understand the conservative position as well as possible? Is it right that conservative justices may believe that the Constitution is colorblind, and therefore, to the degree that Section 2 requires legislatures to be race-conscious in voting districts it's unconstitutional?

[00:44:56] **Charles E. W. Cooke:** Yeah. I, I think that's part of ... I, I think it has to be put, um, into a broader context and, and a context that includes some of the other Voting Rights Act cases, uh, from recent years, um, Brnovich and, and Shelby, in particular. And I, I know, I know you said we shouldn't address the question of whether or not the court should be looking at these at all. Um, I actually do think there is a strong argument, especially in Shelby, for example, that the Supreme Court, um, shouldn't be reviewing Congress's, um, decisions. I think in making it, you are a little bit putting your, your finger on the scales. But, but I do understand that argument.

[00:45:32] But, but if, if the Supreme Court is going to examine this sort of question, then you, you have to start by acknowledging that the reconstruction amendments are not self-executing, and also exist within a certain context. And I think that one of the points that the conservative justices on the court ha- have made is that it's not at all obvious what powers within the, the 14th and 15th amendments are or should be deemed to be more important, uh, than the powers that are accorded under the original pre-reconstruction amendment Constitution.

[00:46:11] Um, it, it is the case within our system, and I like this a great deal, um, that it is federalist and localist in nature. Leaving aside constitutional law, I like first-past-the-post

systems. I, I like local, um, elections because they create a, a, a strong bond, in my view, between voters and those who represent them. I also like the Electoral College, because I like the idea that we are a collection of states of the United States, uh, and each state sends, uh, its votes to the sort of central location and says, "We want this person or that person." I do except that's not how it's always worked. And in fact, in the early republic, it didn't work like that either. But, but as a, as a policy matter, I like that.

**[00:46:51]** But on the, on the question of constitutional law, no one wrote at the time of the passage of the 14th and 15th amendments in what circumstances this could be used. I mean, clearly the, the ... it took the Civil Rights Movement to spur Congress into action in the first place to, to create, uh, the, the Voting Rights Act that is now being so hotly disputed.

**[00:47:12]** And I think, uh, when it comes to the question of Section 2, and racially gerrymandered districts, you've got the same sort of question, albeit in a different context than you had in Shelby, which is, well, at what point does the ... do the other parts of the Constitution, uh, get restored? At what point are they preeminent? Um, now in Shelby, John Roberts and, and four others said that the, the, the formulas that were being used were out of date, therefore, it wasn't justified by current needs, I think was the language, um, and that it didn't, it didn't justify itself as a departure from the principle of equal sovereignty. Therefore, uh, sections four and five, uh, should be looked at differently, in one case, unconstitutional.

**[00:47:54]** The case in Merrill strikes me as similar. At what point does the plain text of the 14th amendment, um, and what we would now accept more broadly as, as being, um, at least a defensible interpretation of it, that is the, the, the interpretation that was given by Justice Harlan in his dissent in Plessy. At what point does that come to the fore in a society that has got past not all of, but many of the racial issues that it had in the past?

**[00:48:23]** And, and again, if we're going to litigate these questions, I think it is reasonable for, uh, justices to say, "The 14th Amendment demands that we take a colorblind approach to federal law, including federal law that governs elections. And therefore we cannot have districts, uh, within our country that are explicitly designed, and they are explicitly designed to benefit one or other race, even if that is a race that has been historically marginalized, which it has." So you know, I, I think it's defensible. I don't know if I would come to the same decision. I don't know if I would even have these questions reviewable. Um, but, uh, you know, given that they are, this really is one of those rare open questions in law where you have to throw your hands up and say, "Well, what do we think's more important?"

**[00:49:10] Jeffrey Rosen:** Dawn Teele, if the court adopts the interpretation that the 14th Amendment requires colorblindness with regard to voting rights, that would, uh, essentially, uh, gut Section 2 of the Voting Rights Act, as well as, uh, Section 5 which the court has already narrowed in Shelby County. Do you think that's a correct interpretation of the Constitution? And if the court does do it, are there alternatives of the kind that Ned suggested it to drawing voting districts that might maximize the strength of, uh, minorities and women?

**[00:49:43] Dawn Teele:** So I'm a political scientist who studies social movements, um, and I'm not a ... an attorney. So some of the ins and outs of these cases, you know, I know as well as

anybody else who's reading the newspaper coverage of it. In my view, again, one of the issues is that we are drawing these districts in strategic ways to begin with. And as the electoral geographers who are political scientists have shown us both whether it's partisan gerrymandering or racial gerrymandering, there's no way to draw the single member districts that is fair.

**[00:50:18]** Um, and so I'm basically all for getting rid of the single member district system, as I said before, and I've actually been saying that since long before the recent election, um, in part because I think that, uh, this idea that this local connection is, is really important for our legislators actually masks uncompetitiveness, patronage networks, and the lack of ideologically close options on a larger scale than just the local, the local leader.

**[00:50:51]** I will say that the countries that use proportional representation always have and continue to elect more women to their legislatures. They are the countries that imposed very easily gender quotas getting to 50% parity. There are big implications for social spending. When that kind of reform happens, the nature of public expenditure shifts towards the issues that women voters have tended to care about over time related to health, welfare, education, and away from, um, military expenditures.

**[00:51:23]** So, you know, my whole message here is that there's no way to draw these districts that are fair. There's no way to draw districts in Pennsylvania that get the representation in the state of Pennsylvania, where I have voted in almost every presidential election, 'cause I grew up in Pittsburgh, um, there's no way to draw the districts in Pennsylvania that gets accurate representation or even close to representation of majority preferences in the state legislature. So I wanna get rid of them entirely. I wanna move towards proportional electoral rules in the states, and then do something similar in the house, and I wanna get rid of the Senate because there's nothing fair about that. And rules that were written hundreds of years ago, you know, for problems that were faced by people who were trying to maintain the power of men and the power of wealthy men, I think should just be gotten rid of entirely.

**[00:52:18] Jeffrey Rosen:** Thank you very much, uh, for those eloquent, uh, words. Michael Morley, the last word in this excellent and very substantive discussion is to you. Do you agree with the view that the 14th Amendment requires colorblindness with regard to drawing voting districts, and therefore, Section 2 of the Voting Rights Act, uh, is, um, constitutionally questionable, or not? And in making the case for it, if you're inclined to do it, what do you say to the critics who note that the original understanding of the 14th amendment was that it shouldn't apply to political rights at all, which is why Justices Harlan, the second Justice Harlan and Justice Frankfurter said the court shouldn't enter the political thicket, and would be violating original understanding by second guessing voting districts on constitutional grounds?

**[00:53:08] Michael T. Morley:** So in terms of the 14th Amendment, this is one of the biggest questions underlying all of constitutional law. Several of the speakers have been talking in terms of colorblindness. I think of it in terms of an anti-classification approach versus an anti-subordination approach. Under an anti-classification approach, the 14th amendment identifies the use of racial classifications as the problem, right? And so when ... if you go back to, right, the Seminole 14th amendment case, you know, Brown versus Board of Education, you can read

Brown in a very anti-classification way, the use of race precisely because it is not morally relevant to anything, it doesn't tell you anything about a person's character, right? Precisely because there's been such a history in the country of using race for pernicious reasons. It's possible to read Brown, and therefore the 14th Amendment as taking an anti-classification, uh, perspective saying race is off limits for use as a, as a classification by the government.

**[00:54:10]** On the other hand, right, from an anti-subordination perspective, the purpose of the 14th Amendment is to dismantle the system of white supremacy, to dismantle the system of racial hierarchy that they can trace back to slavery in the country. And it's just as equally reasonable to read Brown from an anti-subordination perspective, that the whole reason, the whole message that was being sent by having a system of, of racially segregated schools was that the African American children were inferior, that the whole reason they had to be separated from the white students was to send a stig- a racial stigma.

**[00:54:42]** And so viewed from an anti-subordination perspective, the problem in Brown the, the ... that, uh, that the 14th Amendment identified wasn't just the fact that race was being used, but it was being used in a way to perpetuate racial hierarchy, to perpetuate white supremacy, and to impose racial stigmas on African American students. And so we're trying to figure out, what is the legacy of Brown? Do we read it? Is it best read from an anti-classification perspective? Is it best read from an anti-subordination perspective? Has tremendous ramifications, right, obviously, for, for, for education, for public employment, for the, the, the right to vote as we see, and we could even see that tension between anti-classification and anti-subordination.

**[00:55:25]** If you look at the, the relevant doctrine concerning racial gerrymandering, on the one hand, you have the sup- a line of Supreme Court cases going back to Shaw V. Reno, which as ultimately interpreted by the court said, uh, said that if the government's primary overriding factor in drawing districts is race, that that's unconstitutional, right? So the court has, as a matter of precedent, has already adopted something of an anti-classification approach, that if race is the predominant overriding factor in drawing districts, that's unconstitutional.

**[00:56:01]** But on the other hand, the voting rights act as a way of trying to protect against invidious racial discrimination, as a way of trying to root out even subtle forms of discrimination, right, the ones where legislators don't go on the record and ready to make, make terrible racist comments, right, on, on, on the floor of legislatures as a way of protecting African American voters from that sort of discrimination, the VRA, as interpreted up until this point, has said that where you have racial bloc voting, where you ... where members of a racial minority community live in a compact and contiguous area, that you have to draw a district in, in order for them to have the opportunity to elect the representatives of their choice.

**[00:56:46]** And so even where we stand today, we see this tension between anti-classification on the one hand, saying if race is your predominant factor, that's unconstitutional, versus anti-subordination, on the other hand, where the VRA is expressly requiring states to take race into account as an ... as a critical factor in determining when the so-called majority/minority districts are, are, are statutorily required. So that's the, that's the issue, that's the balance that the court is ultimately gonna have to grapple with as it deals with this case.



**[00:57:17] Jeffrey Rosen:** Thank you so much, Ned Foley, Charles Cooke, Dawn Teele, and Michael Morley for a substantive, vigorous and illuminating discussion of crucial issues involving the election and the Constitution. We're so grateful to our wonderful partners at the SNF Agora Institute at Johns Hopkins University, and grateful to all of you for taking out an hour in the middle of your busy evenings to learn, and grow, and listen to diverse perspectives, so that you can open your minds to arguments that are new, and we can grow together in reason and light. Thank you, panelists. Thank you, friends. Look forward to seeing everyone again soon.

**[00:57:55] Tanaya Tauber:** This episode was produced by Melody Rowe, Lana Ulrich, John Guerra and me, Tanaya Tauber. It was engineered by Kevin Kilbourne. This program is presented in partnership with the SNF Agora Institute at Johns Hopkins University, as part of the National Constitution Center's Restoring the Guardrails of Democracy initiative. It was made possible with support from the Stavros Niarchos Foundation, and Mike and Jackie Bezos.

**[00:58:19]** Visit [constitutioncenter.org/tobe](https://constitutioncenter.org/tobe) to see a list of resources mentioned throughout this episode, find the full lineup of our upcoming shows, and register to join us virtually. You can join us via Zoom, watch our live YouTube stream, or watch the recorded videos after the fact in our media library at [constitutioncenter.org/constitution](https://constitutioncenter.org/constitution). As always, we'll share those programs on the podcast too, so be sure to subscribe so you never miss an episode. If you liked the show, you can help us out by rating and reviewing us on Apple Podcasts, or by following us on Spotify. Find us back here next week. On behalf the National Constitution Center, I'm Tanaya Tauber.