



Jackie McDermott: [00:00:00] Welcome to live at the National Constitution Center. I'm Jackie McDermott, the show's producer. This week, we hosted a panel on voting rights and the constitution today. The panelists discussed Georgia's new voting law, the election reform law recently passed by the house and currently being debated in the Senate, and more. Here's Jeff to get the conversation started.

Jeffrey Rosen: [00:00:24] welcome to the National Constitution Center and to today's convening of America's town hall. I am Jeffrey Rosen, the president and CEO of this wonderful institution. And let us inspire ourselves for the learning ahead, by reciting together the National Constitution Center's mission statement, the National Constitution Center is the only institution in America, chartered by Congress to increase awareness and understanding of the constitution among the American people on a nonpartisan basis.

We will take questions throughout the show today. So put your questions in the Q&A box. I'll introduce them as I can. And I wanna say how excited we are to present today's program with support from the Stavros Niarchos Foundation. The show is presented in partnership with the SNF Agora Institute at Johns Hopkins University, and as part of our ongoing series of conversations about how to restore the guardrails of American democracy.

I will now briefly introduce our distinguished panelists, and then we will begin. Ted Johnson is senior fellow and director of the fellows program at the Brennan Center for Justice. He is also a retired commander in the U.S. Navy and has served as a military professor of the U.S. Naval War College and has written widely.

Rich Lowry is editor of National Review. He writes for Politico, a regular panelist on Meet The Press and other national shows and the author of *The Case for Nationalism, how it made us powerful, united and free. Lincoln Unbound: How an Ambitious Young Railsplitter Saved the American Dream--and How We Can Do It Again* and the New York times bestseller *Legacy: Paying the Price for the Clinton Years*.

Ilya Shapiro is vice-president of the Cato Institute, where he directs the Robert A. Levy Center for Constitutional Studies and his publisher of the *Cato Supreme Court Review*. I think he's just also gotten a promotion at Cato to be a vice-president, congratulations Ilya. He's a longstanding friend of the NCC and appears frequently on our, *We The People* podcast. He's the author of the new book, *Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court* and many other books.

And Kimberly Wehle is professor of law at the University of Baltimore school of law. She is the author of the bestseller, *What You Need to Know About Voting and Why, How to Read The Constitution and Why, and How to Think Like A Lawyer*. She's a contributor for BBC World News and has practiced before the U.S. Supreme court. Thank you so much for joining Ted Johnson, Rich Lowry, Ilya Shapiro, and Kim Wehle.

Now friends, I would like our important conversation to be... today to be a constitutional conversation rather than a political one. In other words, I'm going to ask each of you about the bills that are pending in legislatures across the country Republicans describe them as means to ensure voter integrity. Democrats denounce them as forms of voter suppression.



We are going to debate not whether they are a good idea politically or not, but whether they comport with the constitution and with the voting rights act as interpreted by the Supreme Court. And I am very eager for your thoughts on both the legality and constitutionality of those pending voter bills, as well as H.R. 1 pending in the house, which would provide federal provisions for broad swaths of election law.

Ilya I'm gonna to ask you to start off because you filed briefs in some of these cases. This is a very complicated area of law, and it involves educating our friends who are watching about the difference between section five of the voting rights act, that provision that the Supreme Court struck down in 2013, that had said that states that had previously discriminated in voting have to get approval from the federal government before they could change their voting provisions.

Now that that provision is struck down, the remaining provision of the voting rights act that remains available for challenges, section two, which prohibits changes that make it harder for minorities to elect representatives of their choice and allows people to challenge laws that have discriminatory effects, even though they don't have discriminatory intent.

Now that's a mouthful. And I'm gonna now ask you to tell us what are some of the most controversial provisions of the Georgia law and might any of them be challenged as violating section two of the voting rights act as interpreted by the Supreme Court?

Ilya Shapiro: [00:04:52] Thanks, Jeff. And good to be with you. Yet again, I have the cover story in the latest Washington Examiner magazine that goes into a, a lot of this stuff. Just one point on what you said, Supreme Court in 2013, the Shelby county case disabled, the coverage formula that is which jurisdictions are subject to section five pre-clearance requirements because the Congress had not updated that formula of in, in 40 years given changes on the ground.

And so in theory, Congress could pass in fact, part of H.R. 1 which we'll get into does update that coverage formula to try to re-operationalize the pre-clearance requirement of section five. The section five was only meant to be a temporary emergency provision while we had actual Jim Crow, not this you know, fain Jim Crow that, that, that I think politicians irresponsibly talk about now.

While we had actual Jim Crow, we needed extraordinary kind of change in, in our constitutional practice. Section two of the voting rights act is the key is the is the gemstone of it and that prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in one of the language minority groups identified elsewhere. Now, so that raises the question, what does it mean to discriminate based on race, color, et cetera.

And there's actually pending Supreme Court case called Brnovich versus Democratic National Commission about what standards courts are to apply, because for the longest time when section five was operational section two claims were almost entirely about redistricting. And when drawing districts would detract from racial minorities ability to choose candidates that they wanted in the election.



This is different. And so the question is in, in, in the Georgia law, in others, that that may be challenged is whether having 17 rather than 20 days of early voting is a violation of section two, or whether having, you know, the hours be 9:00 AM to 7:00 PM rather than 9:00 AM to 8:00 PM, or whether having only a certain number of drop boxes for absentee or mailed ballots, whether that's somehow a restriction.

You can tell by my skeptical tone that I don't think any of this even comes close to being a colorable section to claim whether in Georgia or elsewhere in terms of these latest laws that are being passed, because this isn't simply a narrative of voting rights versus voting suppression or, or ballot integrity versus voting suppression. I think both of those are overheated kind of a dispute between elites.

Most people find it fairly straightforward to vote. You register, you pick up your ballot, you mark your ballot, you deposit it somewhere, it gets counted. The devil of course is in the details, and different states can and do historically do these processes in different ways. That's what the constitution allows.

And so Georgia after the kind of tumultuous free for all of the COVID 2020 elections, a lot of states are changing their election laws in, in various ways to deal with... to standardize the temporary expansions due to the large number of mail ins, to change the... to, to, to codify the rules over absentee ballots and, and what have you. So I don't know how much the Georgia specifics actually matter. They have 17 days of early voting.

There's a 67 day window for requesting an absentee, a no fault absentee ballot. You have to write your state ID or driver's license or social security number on the ballot so that they can verify these things. And the the, the drop boxes are where the polling locations are. On its face that doesn't seem racially discriminatory, moreover, in places where perhaps you've seen around Metro Atlanta, where there are long lines the law provides that polling locations that face these long lines have to adapt and add more locations for future elections things like that.

I mean, I don't think there's a platonic ideal number of early voting hours or days or anything like this. Delaware, president Biden's own Delaware hasn't had early voting. That goes to into effect next year. There are six states that have no early voting and they're all over the place. There's no common thread to them. So, I mean, look states generally including Georgia, including Iowa, including blue states, they're, they're dealing with kind of a, a changing terrain.

And the real issue is we have low confidence in in ballot integrity, in the security of the vote. Neither side trusts each other. And so states are trying to, you know, standardize and make clear what the rules of the game on the ground are. I think that the Georgia debate has been skewed in many ways, but this is really a policy debate, how best to administer elections.

This is not trying to, I don't know, take away souls to the polls on, on Sundays or some of these other things not provide water to voters, some of these myths that, that, that, that have gotten around. So I don't think any of these laws, however the Supreme Court decides this case this term that the Brnovich case out of Arizona I don't think the Georgia laws or



others that have been kind of caught up in the latest debate are even coming close to being a violation of the voting rights act.

Jeffrey Rosen: [00:09:47] Yeah, Thank you very much for that introduction to this complicated and important question. Ted, as Ilya says, the Brnovich case seems on point here. That case involves a challenge to two Arizona laws. One bars the counting of provisional ballots cast in the wrong precinct and the other bars the collection of absentee ballots by anyone other than a family member or a caregiver. The court does seem prime to uphold those provisions.

But Justice Kagan during the argument quizzed the Republican lawyers with a series of hypotheticals that sounded a lot like the Georgia law. Suppose Justice Kagan said a state has had two weeks of early voting and then the state decides it's going to get rid of Sunday voting, and suppose the evidence is the black voters cast their ballots on Sunday 10 times more than the white voters, is that system equally open, she asked.

The lawyer, Mike Carvin said, "I think it would be because Sunday is the day we traditionally close government offices," but Kagan was not convinced. And she said, "States don't usually have Saturday hours early, but they do for early voting." So Justice Kagan seemed to think that some of these early voting provisions might violate section two of the voting rights act.

Do you agree, and can you help our friends in the audience explain what is the argument that these provisions in Georgia and Arizona and elsewhere do violate section two of the voting rights act?

Ted Johnson: [00:11:02] Yeah. A great question. And again, thanks for having me here. So a couple of things here. One is, you know, the elections clause basically says that states get to run the elections the way they see fit. And as long as they sort of adhere to the constitution and aren't, you know, discriminating against folks and, and violating their 15th amendment rights, for example, then they can do pretty much what they want to.

And this gives us a patchwork of laws that where depending on where you live will dictate how you vote, how you register to vote, whether you can vote or not, you know, in Maine or Vermont prisoners can vote, but in states like you know, Virginia until recently you know, if you had a felony conviction, you were pretty much done unless you got pardoned by the governor. In fact, the governor still has to sign some paperwork.

So there, there isn't an evenness of voting across the country and it's intentional. I mean, it's in the constitution that states get to make these decisions. But the question is when states make decisions that harm particular groups more than others, what is the role of the federal government to provide oversight.

For quite a while, the voting rights act of '65 helped guide us, but as now, some of the sections are being picked apart and some being ruled unconstitutional, we've got to find some new guardrails on how we operate and what, what's considered fair and what is what's considered to be in pro democracy positions, you know, to facilitate our participation and, and our democracy. So the question at the heart, at least as I see it of the, the, the



Supreme court case and that puts Georgia's voting law squarely in its sights is whether the disparate impact framework can be applied to voting rights.

We know disparate impact can be applied to housing and to labor law. The Supreme Court recently upheld disparate impact when thinking about housing. With disparate impact says basically, and again, I'm not, I'm not a legal expert here, but it basically says that if a policy or, or regulation or some, some way of conducting business discriminates against a group, even if that discrimination isn't intentional, then that policy regulation, whatever needs to be revisited.

And so intent doesn't matter, in discriminate... in disparate impact in ways that it does and other parts. So when we look at section two and as Ilya said, this is a question about when we say that it's section two of the voting rights act prohibits voting practices or procedures that discriminate, do we mean intentionally discriminate, meaning we have people in the back room saying we don't want black people to vote let's figure out how they vote and stop that?

Or does it mean that discrimination results based on the policy put in place? And that's the question before the Supreme Court. If it's the former, everyone agrees that that's not acceptable. If you are intentionally discriminating against groups, you can't do that especially if it's, if they're a protected class, like a racial ethnic group. If discrimination is the result of a set of policies or laws or regulations put forward can the government intervene to stop the result in discrimination?

And that is what the, that is the disparate impact question around voting rights that the Supreme Court will determine. And this I think is what Kagan was getting at with the voting rights law in Georgia. If they're passing a set of things ostensibly in as a way to protect against voter fraud and the things that they're passing are, are perceived or, or proven based on historical data to have, or to look like they will have a disproportionate impact on certain groups of voters, should the section two of the voting rights act prohibit those actions from being put in place?

That's the question. I do think for something, a basic duty of citizenship that we should air on the side of voter protection here. And if a set of laws are put in place to stop a thing, voter fraud that is not widespread and has an impact on groups that might complicate their access to the ballot in order... in the name of voter fraud... in the name of preventing voter fraud, then I think we should air on the fact... on the side of the group seeking access to the ballot and not on the side of security, looking to prevent things that are very rare in their occurrence anyway.

this is about efficiencies, this is about cost cutting measures, fine. But let's do it in a way that doesn't complicate access to the ballot for one group over another. And, and, and that's that's what I think is at the heart of both the controversy around the Georgia law and Supreme Court case. The last thing I'll say, I wanna agree with Ilya on this point, this is not 1900 Jim Crow. This is 1950s Jim Crow. This is not slavery all over again by a new name.



I think when we make those kinds of comparisons, we degrade the suffering and the anti-democratic illiberal impulses of previous generations. And, and, and for the sort of exaggeration for the sake of effect to make our point today. What we're facing today is a, a debate about whether or not it should be easier for people to vote on the side of democracy, or whether we should make it a little bit more difficult and air on the side of security.

This is not about making people take literacy tests and grand- pass grandfather clauses before we before we allow them to vote. So I do think it's not helpful to make those comparisons.

Jeffrey Rosen: [00:15:48] Thank you so much for joining the issue so well, and for helping us understand that the central legal debate before the Supreme Court is how we identify laws that have discriminatory effects and make it harder for minorities to vote without explicit discriminatory intent. Rich at least one justice on the court, Justice Thomas suggests that section two itself might be unconstitutional because it requires legislatures to be race conscious in drawing districts and that violates the colorblindness requirements of the constitution.

And in addition to that, you and a piece about the Georgia law take issue with the claim of Democrats that the Shelby County decision in 2013, which ended pre-clearance requirements in fact, would lead to voter suppression, you noted in a paper via a PhD candidate at the University of Oregon, which concludes the removal of pre-clearance requirements did not significantly reduce the relative turnout of eligible black voters.

So tell us, tell our friends, do you agree with Justice Thomas or not that section two is unconstitutional? And tell us more about why you think that striking down section five did not reduce African-American voter turnout.

Rich Lowry: [00:16:59] Well, first I have not thought extensively about, so I'll take a, a pass if you don't mind on, on that one Jeff. On the, the broader question of the Georgia law and the, the effects these sort of laws have, they, the idea that what Georgia has done is, is voter suppression is completely wrong. One, if you just look at the provisions, I mean it expands, expands early voting hours in a lot of rural districts. It deals with a number of problems that Stacey Abrams has complained about in the Georgia electoral system for a long time.

She's complained about provisional balance not necessarily being counted. Well, the reason why a lot of people in Georgia end up voting provisionally is they go to the wrong precinct. So what the Georgia law says is if you're... show up at the wrong precinct prior to 5:00 PM, go to the right precinct and vote. If you can't go to the right precinct, because it's too late after 5:00 PM, then you sign an affidavit saying you can't get to the right precinct and then you vote.

But this is, this is an attempt to take care of a problem. The, the the tighter deadline on requesting an absentee ballot is driven by the fact that if you request an absentee ballot less than 10 days before the election, I think it is, you're, you're very unlikely to return your ballot on time, or at least there's, there's a much higher chance your ballot isn't gonna arrive on time.



So that's an attempt to get people to request ballots in a timely manner, which means they can actually vote those balance. The signature match provision is something that Stacey Abrams has complained a lot about that's done away with [inaudible 00:19:40] ballots. You know, it's no longer dependent on the signature. You write your driver's license number. So it removes all subjectivity with... when you're evaluating whether the, the ballot is actually voted by the person who supposed to be voting it.

So I think the Georgia law has, has been misunderstood in, in many cases smeared, and there's just, there's no way one fewer person in Georgia is gonna vote because of this law. And I think that the research shows, the paper you mentioned Jeff about the the voting rights act. There's also been papers about strict voter ID law. It tends to show that these changes don't affect turnout.

And it's my belief that an extreme view of a convenience theory of voting, which is what folks like Stacey Abrams have, which basically says if it's slightest bit more inconvenient to vote, people in droves aren't gonna vote. And I don't think that's true. And it's the, the threshold question for whether someone's gonna vote or not, is whether there's, they're motivated, whether they're interested, and if they are turn up is gonna go up no matter what the rules are.

There's a fascinating study of the 2020 election that showed it didn't matter whether states had no excuse to absentee balloting or did, when it came to turn out, turn out went up everywhere because everyone was interested in this last presidential election. And the authors of this study, Jeff, and I'll just conclude with this, they use Texas as a, as a really interesting test case here because in Texas there's no excuse to absentee vo- voting for people 65 and older.

So if you adhere to the convenience theory of voting, there should have been an enormous drop-off turnout among 64 year olds, right? 'Cause they're suppressed, they're excluded. They can't vote, no excuse to absentee where people one year older than they are can. But in fact, there is no difference in turnout whatsoever between 65 year olds and 64 year olds in Texas, because this convenience theory is basically flawed, within limits. Obviously you don't want people standing in line for 10 hours, that's gonna discourage people.

And it was outrageous that that was happening in the primaries in Georgia and places like Fulton County last year. And again, the Georgia law attempts to alleviate that problem. It says, if you ha- I believe the [inaudible 00:22:03] is if there's a, a line at the time of the closing of the poll that lasts more than an hour, that locality needs to split up that precinct to make it smaller and or add equipment or new people new poll workers to get the, the time of voting down.

So there are things in the Georgia law that would have been mistake, certainly targeting Sunday voting, that that would have been legitimately challenged and perhaps thrown out by the court if it ever got there. But that was abandoned. And this law I think is entirely defensible on the merits and probably I believe on the margins makes the, the voting system in Georgia better.



Jeffrey Rosen: [00:21:23] Thank you very much for all that. Kim, what is your response to Rich, Rich's claims, including the, the last one, which he clearly said far from making the system worse, the law makes it better? And in particular you've criticized the Supreme Court's 2013 Shelby County decision saying when the court scrapped Congress's spectacularly successful legislative fix to the suppression nonsense it took the department of justice out of the business of pre-clearance.

So tell us why you disagree presumably with his analysis of the effects of straightened down section five, and then tell us about the balancing test that you've noted called the Anderson-Burdick test, which gives court's discretion to determine when a law restricting voting is too burdensome. You've written that because of the tests inherent subjectivity, bogus state claims of voter fraud and enhanced electoral activity divorced from actual empirical data operate to justify in judges minds, laws that conflate ballot access for no good reason.

So in other words do you believe that if section two and section five are not available to the courts, this balancing test might end up striking down aspects of the Georgia law or not?

Kimberly Wehle: [00:22:28] Yeah. Well, thanks for that, Jeff. And as I know you're a former law professor as well. I'm gonna start with first principles because I can't help myself. And so for those who, this is repetitive, forgive me. But the constitution, the original constitution doesn't say anything about an affirmative right to vote. And that's really important when it comes to how the Supreme court makes decisions about what to do about any, any ballot access measure. And we don't need to name it anything.

But essentially in most cases involving the constitution, the Supreme Court will balance things and say, we've got this interest on one end and hand in this interest on the other. When it comes to police reform, we have the need for security in our streets against individual rights to be free from police brutality. How do we strike that balance?

For voting rights because there's no affirmative right to vote in the constitution. There's this balancing test that essentially doesn't, in my mind, hold up the right to vote as as high as it might be in terms of how much it needs to be weighted because it's not affirmatively in the constitution. Framers couldn't decide on it, left it to the states as was mentioned earlier by Ted. So what does the constitution say affirmatively?

The times places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature. So the legislature of the states determines access to the ballot, but the Congress may at any time by lawmaker alter such regulations. So Congress does have power to make national voting rules for federal elections, and that trickles down to state. That's why we have motor voter registration. You can go to a federal, you can you know, get, get your driver's license and vote and, and register to vote.

That's a federal law. So that's what we're talking about. You mentioned H.R. 1, massive package out of the Supreme out of Congress right now that's pending passed the house. We also have H.R. 4, the John Lewis voting rights act, which is designed to fix the Shelby County, County situation. So let me back up a minute from there. So unlike other Western democracies, we're an opt-in system. We have to prove our eligibility to vote and as Rich



said, said... indicated, we have to show up to the polls and show a desire that we wanna vote.

Only about 50% in off presidential years of Americans vote. I think it was 66% in the last presidential election. So about 40% of us just don't go to the polls. And I think a big piece of that is education. So, so, but historically it was only white, rich men who could actually vote. And so when we have amendments of the constitution, we've enlarged that tent, the 15th amendment allowed African-American males to vote.

It said you can't discriminate on the basis of, of race. lot of states got cute around that anyway, you mentioned poll tax system. Someone did mention counting the bubbles in a bar of soap, reciting the declaration of independence, these arbitrary barriers to voting. In 1965 Congress came in and said, "We're not gonna let you and run around the 15th amendment anymore. We're gonna pass the voting rights act."

Two key provisions, section five, which basically said, states that have a history of doing these maneuvers have to get what's called pre-clearance. They've got to get it cleared by the justice department before we're gonna allow you to say impose a new restriction on ID, for example. The, the, the Congress basically affirmed that, or continued that law in 1970, 1975, 1982 in 2006 by wide bipartisan majority.

So when you think about the separation of powers, where is the role of the people? The role of the people is not in the courts because federal judges are appointed and they're there for life. They're not elected. It should be in the Congress. My critique of Shelby County in 20- in the 2013 decision basically gutting that pre-clearance part of 2015 is that the United States Congress multiple times said this is what the people want.

And I think from a conservative standpoint, the Supreme Court should stay out of that unless there's some blatant violation of the constitution, which there was not with respect to section five. But because section five has gone and basically the court said, Congress, come back with updated numbers to Ruth Justice, Ruth Bader Ginsburg famously in dissent said, "Listen, it's working so well that, you know, it's kind of like saying, I'm gonna get rid of my umbrella, ;cause it's doing such a great job keeping me dry in the storm."

And to Rich's point, I just wanna quote from the campaign legal center, another non-partisan voting and election law source. It says in 1965, only five African-Americans in the U.S. house and Senate, combined today there are 48. Across all state and local offices in 1965, fewer than a thousand African Americans in office, now over 10,000. Black registration rates and former Confederate states went from 30 percentage points below white rates in 1960 to equal or greater by 2010.

So statistically, even the conservatives on the court said, section five worked really well. Now we have section two, section two is not, not the DOJ coming in and saying, you've gotta clear it by us, but regular people coming in and suing for discrimination as was indicated, what's going on in the Supreme Court, Congress didn't give a test, didn't give a test for what constitutes discrimination under section two.



Is it just results of unequal access to the ballot? Is it lack of opportunity, Justice Kavanaugh mentioned that, but then even counsel for Arizona sort of agreed that it wouldn't be enough opp- it would be not sufficient opportunity if only the only ballot access sites were in country clubs, for example. So how do you define opportunity or do you have to show discriminatory intent that would make it much harder to challenge these laws.

There's nothing in the statute about intent. Congress needs to fix that. The H.R. 1, H.R. 4 is not gonna get by a Republican filibuster. So if we wanna fix voting rights, it should be done in the Congress. Republicans, get it... need, need to get on board to fix some of these stuff and, and confine, confine the powers of the United States Supreme Court in, in, in my view on that. What's happening in Brnovich specifically, two laws.

One is, as you mentioned, what people pejoratively call ballot harvesting, but it's essentially allowing a third party to collect ballots. This is particularly important on Indian reservations, native American reservations, where they just don't have access to the postal service in the same way other people do. And a lot of poverty, they don't have cars, they don't have transportation. It just makes it much harder. That provision did not get by section five pre-clearance.

Just to be clear, it didn't get passed the justice department under section five. So now the question is it, is it is it violate section two. I don't know, probably not because Congress didn't give a test for that. And I think that's probably the right outcome. I don't think courts should be making this stuff up. The other piece is whether if you vote in the wrong precinct, your whole ballot should be canceled even for the n- for the statewide races.

So the idea is listen, if you're not in your right precinct, you shouldn't be voting for those local, those local races, but why your whole ballot should be canceled. And that again is harder for low-income people who might change their, change their residents. They might move around, don't have the paperwork in place, that ballot gets canceled. At the end of the day this really comes down to how important it is for every American to balance in favor of access to the polls.

We the people, not we the politicians. And this notion of fraud, it's just, there's, it's empirically not there. Also, you know, in response to Justice Amy Coney Barrett's question of the Arizona Republican party lawyer as to why we need this. He said, quote, "Politics, Mr. Carvin is a zero, zero sum game. It's the difference between winning an election 50 to 49 and losing. So it's not, we're not even having a debate about fraud."

And I know Ilya mentioned the problem is low confidence in ballot integrity and security of the vote. No, that's not the problem. The problem are the lies around that myth, that is not empirically, empirically a problem. And I know that you asked Jeff that this be a non-partisan discussion. In my view, access to the ballot and, and you know, absent serious fraud or serious problems with electoral integrity. Yes [inaudible 00:32:10] that.

We all should be circling around making it easier for people on an equal level to access the ballot. And I, I think that's something that is not a partisan point of view, a blue versus red. If the constitution is the bridge over a rushing river, and that goes down and politicians start



picking their voters, blue and red Americans, Conservatives Democrats, Republicans, Liberals, all lose. That's my point of view on that.

Jeffrey Rosen: [00:30:48] Thank you very much, Kimberly. Thanks to all four of you for very thoughtful elucidation of these extremely complicated legal issues involving section five and section two of the voting rights act, as well as a good faith disagreement about the substantive effects of the Georgia law. Okay. Now we're gonna turn in the next round to another equally complicated and equally important, big question, which is H.R. 1, the federal voting rights bill pending in Congress passed the house, unlikely in practice to pass the Senate without a filibuster change.

But I'm gonna begin Ilya by asking you what provisions, if any, you think violate the constitution. There have been several constitutional clauses evoked to support H.R. 1. One of them Kim mentioned, the election clause which says as she quoted that the times, places and matters of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof.

But the Congress may at any time by law make or alter such regulations except as to the place of choosing senators. There's a lot in H.R. 1 ranging from laws requiring states to set up independent redistricting commissions to the federal allowance of mail-in balance to some campaign finance reform, to enfranchising felons. What, if any provisions of H.R. 1, do you think violate the constitution?

Ilya Shapiro: [00:32:15] Sure. I'll, I'll get to that in one second, but just to correct one thing that Kim said I didn't say that voter fraud, massive voter fraud is a, is a problem. That is a lie. That's it's, it's unfortunate it does decrease public confidence, just like the lie that there's massive voter disenfranchisement or suppression is a lie that decreases voter confidence. So, as I said, the problem is a lack of confidence in the integrity of the process in that everybody gets to vote, their votes are counted on both sides.

It's the, it's the public understanding of electoral processes and therefore the legitimacy of the governance that that produces. And again, that happens on both sides and that's a problem. That's why the strongest argument for something like voter ID, for example, isn't the prevention of fraud. There's very little in-person voter fraud. It's to increase public confidence.

That's why there are a huge majority of people, including Democrats, including racial minorities that are in favor of, of voter ID. But anyway back to H.R. 1 the... it's, it's a federal takeover of election law. Others on this panel have discussed how our constitution sets up a system where the states just like they're responsible for family law and tort law and contract law are responsible for election law and election administration.

There are limits on that. They can't discriminate based on race or gender or those under over 18, the, those sorts of constitutional protection, statutory protections. But here what the federal government is trying to do is rewrite those state election laws to dictate how states conduct their elections. And that is whether you call it a technical legal term



commandeering of the States, which the Supreme Court said, the federal government cannot do.

Whether it's a violation of first amendment rights in terms of how, how the campaign finance system is being rewritten, that part of an H.R. 1. Even the relatively less politicized, less ideological part of H.R. 1 regarding judicial ethics Congress purporting to tell the Supreme Court how to run itself. That is a problem of separation of powers. So even before we get to differences, we may have about how to properly have elections or how to draw district lines.

The the mechanism that H.R. 1 uses, just federal control, kind of a, a massive section five forever, if you will for election rules, similar parallels for campaign finance that sort of thing subverts the, the, the normal operation of our constitutional order with respect to election administration.

Jeffrey Rosen: [00:34:30] Thank you for that. Ted, Ilya just made a strong claim. He called H.R. 1 a federal takeover of election law, and yet the constitution empowers Congress to pass election laws, not only the election clause, which I read but also the 14th and 15th amendment, which say Congress shall have the power to enforce these provisions by appropriate legislation. Congress has exercised that power when it banned the use of literacy tests and the voting rights act.

And of course the voting rights act of '65 itself was a dramatic federal intervention into elections, which states upheld. So do you agree with Ilya that parts of the H.R. 1 are unconstitutional and, and maybe you can make a, a defense of H.R. 1 on constitutional grounds?

Ted Johnson: [00:35:11] Yeah, so here's, here's what I think. And, and it sort of follows from my previous comment. We, we have, because of the way elections are administered, we have a number of different rules and regulations depending on where you live on whether how you participate in whether you can participate, et cetera. And so when you have for this basic fundamental right of citizenship um, or maybe, maybe rights guaranteed maybe guaranteed maybe guaranteed maybe guaranteed by guaranteed by state constitution, but not affirmatively, affirmatively guaranteed by the constitution, as Kim mentioned that that is not good for democracy.

For people depending on what their latitude and longitude is they have a different set of, of rules on how they can participate in democracy. And so while states should retain that authority largely, I think it is okay for Congress to create a baseline for participation in our democracy. And the argument for H.R. 1 is that that's what it's trying to do. And so you can disagree with the tactics for trying to baseline participation for trying to baseline ease of access.

That's fine. But the principle that that participating in our democracy should be something the federal government makes easier for everyone, no matter what state or town or city they live in, I think is the right principle. The other part of this is that while the constitution is



very clear that racial discrimination is unconstitutional, at least in our present reading of it, it didn't use to, you know, the interpretation wasn't always that clear as it is as today.

Partisan discrimination or partisan gerrymandering, or setting rules that [inaudible 00:39:07] partisan advantages is something the Sup- the Supreme court as of just two years ago said, you know what? That's not a matter for the courts to figure out. The people don't like what they're partisan behaving state assemblies are doing.

All they have to do is vote those people out of office. And of course, the problem is if you have state assemblies that are losing the popular vote and holding on to the majority's and state assemblies, the people have to work extra hard to tell the state that they don't like what the, what the government, what the government is doing.

People should not have to bear that burden. People should be able to participate in the state, be responsive. I mean, it is in our declaration, right, that, that government derives its power from the consent of the governed. And if the government makes that consent extremely difficult to provide that should not be something we stand, stand and pat for. We should be okay with that.

So I think what H.R. 1 is trying to do away from the technocratic details of each of the provisions is create a baseline of participation that allows people, Americans, no matter where they are in the nation, to have some level of confidence that their participation will be no more difficult or no easier than their fellow compatriots, the next state over.

And so for those reasons, I think it is absolutely in line with the principles the nation was founded on and absolutely aligned with the principles of a pro democratic society, and whether or not some of those proposed measures that are in, in the in the bill may fall short of that or, or exceed it is, is a debate I wish Congress would have.

Instead we're having a very partisan debate in, in, in the house or have one, and we'll probably have to whatever extent a real debate happens in the Senate. It will be partisan which is to say that the very problem undermining a lot of our conversations about democracy may prevent our ability to facilitate participation.

Jeffrey Rosen: [00:38:19] Rich, do you agree with, Ted's strong statement that it's a basic principle of democracy that, that Congress should have the power to make it easier to vote? And then tell us what you think about the constitutional arguments about H.R. 1. C. Boyden Gray in Newsweek said that Congress has only a secondary concurrent power over congressional elections and an even smaller role in presidential elections, and no specific role in state elections.

So what, what provisions if any, of H.R. 1 do you think are unconstitutional? And then I'll just throw in the question, if Congress were to pass the John Lewis act, which would restore the ability to require pre-clearance of, for voting changes in states that discriminated on the past. As a policy matter, do you think that that would be a good or bad idea?

Rich Lowry: [00:39:08] So the constitutional question, I think clearly some of the speech and ca- campaign finance regulations would be vulnerable on free speech grounds. I think the



the, the electors clause, which gives the states wide ranging authority to determine how electors are chosen is gonna be a big problem for a lot of this law. I just think it's a bad idea. It's clearly, it's gonna federalize elections to an extent unprecedented in our history, take away the, the power of states to draw congressional districts, you know, that they've had for 200 years.

So this is, this is a radical measure. And, you know, I'd be willing to consider it if, if it were clear what problem it was addressing. But there's not a problem. We don't have a vote suppression problem in America. We just don't, turn out has been up. Again if you go to Georgia, which has been the poster boys, supposedly, supposedly for voter suppression, it has had looser rules than a lot of blue states.

I mean, it adopted no excuse, absentee balloting, I think 15, 15 years ago, early voting 12 years ago, automatic regist- registration I think in 2016, online registration just a couple of years ago. And these are provisions that a lot of blue states haven't adopted or are much slower to adopt. So th- there's just, there's just not a problem with having access to the ballot in America.

And you look across all states, the tendency has been towards making more means of voting more readily available. And I think reasonable people can disagree about whether these are worthy measures, but that's, that's been the, that's been the tendencies. So I think the whole voter suppression thing doesn't accord with reality, and it is basically based on, on a moral panic.

And I would oppose, I'm not sure I supported the Supreme Court's decision to throw out pre-clearance or, or at least the the test for what locality it, it applied to. But I think as a policy matter that was... that's the right that, that was the right measure. And I, I wouldn't support reimposing it. Georgia just does not, it's not a vote suppression state. It's not experiencing Jim Crow 2.0, it's doing just fine the way every other state has forever.

And, and well, not, I shouldn't say forever, 'cause obviously there's a huge problem when there was actually was a voter dis- disenfranchisement, but that's just not happening today. It's just not. And if it, if it were, I would oppose those measures, but you know, Jim Crow, you, you had you know, 90% of African-Americans disenfranchised in, in certain States.

Every single measure was pre-textual obviously to stop African-Americans from, from voting and just tweaking your voting system to make it more secure and deal with problems that people have long complained about it's just nothing like that. And it's, it's a lie to say so least if you know what you're talking about, it's a lie, a lie. I think a lot of people are misinformed. So H.R. 1 is, is addressing what is clearly a non-problem.

Jeffrey Rosen: [00:42:08] Kim, so Richard said H.R. 1 is addressing a non problem that there's no serious voter suppression problem and therefore no need to address it federally. And what's your response. And at this point in the debate, we've, we've learned that the Supreme Court has said that Congress's attempts to address voter discrimination through section five were unconstitutional. It may be unsympathetic to efforts to challenge these laws under section two.

So Congress comes in and says, well, the only way we can get voter suppression is through this H.R. 1 provision. But that even if it passed, which it won't might be challenged, parts of it is unconstitutional. So is Congress left without a remedy for voter suppression? And do you agree with Rich that that's okay because voter suppression is not a problem?

Kimberly Wehle: [00:42:49] Well, one thing that's coming out of this conversation, which actually I think is heartening is that there's more a consensus than disagreement about a few things. And that is, I would think... I would assume everyone on the call agrees that even if it's not expressed in the original constitution, the Supreme Court has long held that the right to vote is implicit as preservative of all other rights.

The idea being, if you can't pick your, pick your bosses or pick your elected officials, it's no longer a representative democracy, somebody else's deciding government. So, so we all hold up some measure of access to the ballot as really fundamental and central to American democracy. Now, the debate between the role of the states versus the role of Congress, I think the devil is definitely in the details, but just so people are clear on the call. I mean, the listener's many, many federal laws have been passed.

The civil rights act in four different provisions of its iterations, voting rights legislation, the voting rights act of 1965, voting accessibility for the elderly and handicap, 1984, uniformed and overseas citizens absentee voting act 1986, national voter registration act, 1993, help America vote act 2002, military and overseas voting empowerment act of 2009. These are under Republican and Democratic presidents.

And a lot of these are about making it easier to vote, right? So that grandma doesn't have to go out in a pandemic and, you know, get an Uber or whatever, or get somebody to help her. You know, other countries where it's an opt-out system like, like Australia, it's in the 90 percentile. People vote and it's a party, it's on a Saturday. It's a, it's a right of, of sort of a moment of celebration of democracy. That is my vision for this. I would love to see that happen.

H.R. 1 includes things like vote by mail, highly, highly popular. Five states did it almost exclusively. Prior to the pandemic, the voter participation rates are higher, including for Republicans. It's good for regular people. It makes life easier. A paper trail, mandatory paper trail H.R. 1, so that we wouldn't be relying on machines. And guess what? The machines are usually in the hands of third party vendors who are out to make money.

They're not even regulated by government. So government is hijacked by private entities. Those are, you know, some of those machines are old. The equipment can't be updated. So H.R. 1 would say, you know what, you need a paper trail. So we can, we can make sure that elections have integrity. Issues like gerrymandering I have views on that. I don't think we have time to talk about that. I think it should be fixed because it should be voters picking their politicians, not politicians picking their voters.

There are provisions on cybersecurity. We should all like that. Keeping foreigners out of our elections, we should all like that. Having presidents and vice presidents turn over their information about their financial interests, their tax returns, enforcing ethics rules against



government officials, transparency and advertising. I mean there's dark money out of politics.

There seems to me there's a lot that both sides could coalesce around if we shifted the debate and not had it be around lies about voter suppression and lies about the big lie, which is that Joe Biden is an illegitimate president. I would love and I, I, I encourage everyone to get out in public and just like Ilya just did and, and say, no that the, the election in 2016 or 2020 was according to empirically the, one of the safest, if not the safest election in the history of America.

And we should all feel really good about the millions and millions and millions of regular people who not only voted, but volunteered at the polls, worked the polls, managed these elections. They are my heroes. They are not partisan. They're not red, they're not blue, they're not politicians. And that's what we should galvanize and, and circle around. And I think, again, that's that, that's not a partisan thing.

We can be consistent in the messaging across the board, that there really is not a problem, problem with ballot security in America. That is not real, but let's tweak the pieces that maybe there are problems to make it easier for everybody to participate in our democracy. And to me, I don't see that as political.

Jeffrey Rosen: [00:46:53] Thank you very much, Kim, for finding some areas of common ground among all four of you in this really rich discussion of a very tough area. And I'm grateful to the spirit of all of your comments. So for this last round, I'm gonna ask each of you to propose a guardrail for democracy that you think could resurrect Madisonian deliberation and democratic values. The Constitution Center has an initiative to identify these guardrails.

Many of which have been undermined by social media, by polarization and other forces and just in a few sentences, cause we only have seven minutes left and we always end on time. I'm gonna ask each of you please identify one guardrail that you think would help improve the workings of American democracy. First to you Ilya.

Ilya Shapiro: [00:47:38] Sure. I mean, first I can't resist. Kim, Kim had a whole list of things that she claims are non-ideological or just neutral, good government reforms. I'm not gonna go through the list, but I disagree with most of it. So I don't, I don't... I think it is controversial. And so you can't just wave away and define your own provision as... your own provisions as, as you know, the kind of shouldn't be debated.

But anyway, my one guardrail one... my one reform is to look at how Florida administered its elections. In 2000 after Bush v. Gore, Florida was a laughingstock for a whole host of reasons, but then under the leadership of the the Jeb Bush administration, this is over 15 years ago now, they put in a lot of reforms, one of which would have been so helpful in the 2020 election and that's to get all of those absentee mail and other unusual ballots counted on election night.



Florida, a swing state, a huge state with two time zones and, you know, just millions of people managed to get its result in and certified before everyone went to bed. I mean, it was great. Every state should have that, and no state should have the... its own state Supreme Court rewriting the rules within a week before the election and all of those kinds of shenanigans, that sort of behavior.

And that kind of lack of clarity and direction, whether in a COVID year or otherwise is what led to a lot of the distrust over the results that we were getting it, coming in dribs and drabs over days after the election. So count the votes on election night, make sure the early ones coming in and get counted when they come in.

Jeffrey Rosen: [00:49:03] Count the votes on election night. Thank you very much for that. Ted, what reform would you propose as a guardrail for American democracy?

Ted Johnson: [00:49:11] Yeah, no, this is a hard question because there is no silver, silver bullet. I think that the easiest thing to do is automatic voter registration. I mean, when I turned 18, the selective service said, "Hey, sign this card or you don't get access to a whole bunch of stuff the government provides like loans and, and you know, you get dinged on job applications, et cetera." But nothing showed up around voting at all. I had to go seek out how, and this is, you know, in the '90s, this is before the internet was around.

I had to go figure out how to go, where do I go? Where I get the paperwork? What do I do? And so I think just as you know, in, in a democratic society that when you cross the threshold to voting age it should be super easy for you automatically to be added to the roles and the maintenance of it, the efficiency of the role, the accuracy of it that's government's job to make sure it's, it's, it's it's there and oversight will be there to make sure that the job is done well.

But people should not have to do extra work just to participate in our democracy when voting is so fundamental to our society. So if that was the one thing I could recommend, it would be that following very closely behind that, which I won't go into are things like, you know, more civic education, which has become a bit of a [inaudible 00:53:41] acclimation now because it's needed so much.

But also deliberative democracy, compelling people to actually deliberate with people they disagree with and then come up with binding decisions at different levels of government so that everyone is invested in our democracy. Freedom ain't free. Then then, you know, put your cards on the table and let's have a discussion about how we can make our country stronger.

Jeffrey Rosen: [00:50:32] Thank you very much for that. Automatic voting registration is a powerful suggestion and civic education is never a tried suggestion and the National Constitution Center is eagerly standing by to provide that constitutional education for America. And thanks to all of you for doing precisely that in this great discussion. Rich, what is your proposed reform to resurrect the guardrails of American democracy?



Rich Lowry: [00:50:53] Well, in terms of voting, if I could wave a magic, magic wand, I would cut way back on mail voting, no excuse to absentee voting, make in-person voting the gold standard, make it a holiday election day, a holiday to make it easier for people to show up in person, but in-person voting should be the gold standard. It's more... it's private it's secure, it's much more foolproof than absentee voting.

And I think that there's something to be said for the ritualistic aspect of having everyone doing making this, this momentous choice to the extent they can on the, on the same day altogether in the same way.

Jeffrey Rosen: [00:51:28] In-person voting, thank you very much for that. Kim, the last word in this great discussion is to you, what guardrail would you like to leave our listeners with to resurrect American democracy?

Kimberly Wehle: [00:51:39] Well, constitutional amendments are close to impossible to achieve because it takes both houses, two thirds of both houses of Congress and two thirds... or three quarters ratification to the States. But I think an amendment to the constitution to actually ensuring the right to vote would clarify things and be a shot across the bow. We shouldn't be debating whether the right people should be exercising their right to vote. I agree with Rich, if it were a day, if it were a day and it was mandatory in-person voting and we use pencil and paper, but the numbers were up high.

I'd be totally fine for that. I would love to see the numbers in the '80s, '90s percentile, and I think it would shift a lot of things around politics. Too much of it is determined by people in power that as our framers of the constitution understood their it's human nature to wanna amass it and entrench it and ultimately abuse it.

And the more we keep the power in the people, the better it is. So I would like to see less power in entrenched politicians around access to the ballot, which is both a state, local and federal issue. But my number one thing would be encouraging people, people to vote. I've been asked by Politico and other places to weigh in on this. I don't think a penalty like it happens in Australia would be the way, but what about a tax credit, 50 bucks if you can show that you voted.

If this were something that people did, like have their coffee in the morning and hold their kid's hand when they cross the street, I think if it were just part of what you do, you pay your taxes, not because the IRS has this force that comes banging on your door, but because it's just what you do. And if we could shift the conversation around policy, what... how we want our politicians to be making laws and not around access to the ballot I think that would be a terrific thing. And if more people voted, maybe we could finally do that.

Jeffrey Rosen: [00:53:16] Constitutional amendment and a tax credits to encourage voting. Thank you for that, and thank you so much Ilya Shapiro, Ted Johnson, Rich Lowry, and Kim Wehle for a model of a civil dialogue about a controversial and crucially important, constitutional and legal question, namely the boundaries of the right to vote. Thanks to you, friends for taking an hour in the middle of your day to educate yourself about the constitution.



And please join us on Thursday when we're gonna have another great discussion should we have a third reconstruction. Ilya, Ted, Kim, Rich thanks so much. Thanks to you friends. Bye everyone.

Jackie McDermott: [00:53:54] This program was presented in partnership with the SNF Agora Institute at Johns Hopkins University and made possible with support from the Stavros Niarchos Foundation. This episode was produced by me, Jackie McDermott, along with Tanaya Tauber, Lana Ulrich and John Guerra. It was engineered by Dave Stotz. Please rate, review, and subscribe to the show on Apple podcasts or follow us on Spotify, and join us back here next week. On behalf of the National Constitution Center, I'm Jackie McDermott.