

Democracy Checkup- Preparing for the 2024 Election

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[00:00:00.0] 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, the senior Director of Town Hall Programs. In this episode, Richard Hasen, author of *A Real Right to Vote, how a Constitutional Amendment Can Safeguard American Democracy*. Sarah Isgur, senior editor of The Dispatch, and Lawrence Lessig, author of *How to Steal a Presidential Election*, provide a Health Check on the State of American Democracy, and look ahead to potential areas of vulnerability in the run Up to the 2024 election, Jeffrey Rosen, president and CEO of the National Constitution Center moderates. Here's Jeff to get the conversation started.

[00:00:52.4] Jeffrey Rosen: Hello friends. Welcome to the National Constitution Center and to today's convening of America's Town Hall. I'm Jeffrey Rosen, the president and CEO of this wonderful institution. Before we start, let's inspire ourselves as always for the discussion ahead, our setting together the National Constitution Center's mission statement. Here we go. I know you can do it by heart. The National Constitution Center is the only institution in America chartered by Congress to increase awareness and understanding of the US Constitution among the American people on a nonpartisan basis. And now it is a great pleasure to introduce our panel. Three great constitutional scholars and friends of the National Constitution Center to discuss challenges to American democracy. Richard Hasen is Professor of Law and Political Science at the University of California Los Angeles School of Law, where he directs the Safeguarding Democracy Project. He is the author of many important books, including *Cheap Speech: How Disinformation Poisons Our Politics- and How to Cure It* and many other works.

[00:01:58.5] Jeffrey Rosen: And his new book, which he's here to discuss today, is *A Real Right to Vote, how a Constitutional Amendment Can Safeguard American Democracy*. Sarah Isgur is senior editor of The Dispatch, where she hosts the legal podcast advisory opinions, before joining The Dispatch, She served in the Justice Department and frequently appears as a legal analyst. And Lawrence Lessig is Roy L. Furman professor of Law and Leadership at Harvard Law School and founder of Equal Citizen. He's the author of many path-breaking books, including *They Don't Represent Us: Reclaiming Our Democracy* and *Fidelity & Constraint: How The Supreme Court's Read The American Constitution*. And he's here to discuss his forthcoming book, *How to Steal a Presidential Election* written with Matthew Seligman. Thank you so much for joining Rick, Sarah and Larry. Larry, let's begin with you. Your new book, *How to Steal a*

Presidential Election, describes the course you taught at Harvard Law School which you began teaching before January 6th, 2020. January 6th happened. You set out to identify the vulnerabilities in America's election system to help us think through what could happen on January 6th, 2025. Tell us about the project and what could happen.

[00:03:15.8] Larry Lessig: Yeah, So we taught this course. We called it War Gaming in 2020 in the fall. It's a seminar and the students worked through every plausible way that they thought the election could be inverted through legal, but obviously non-intended means. And actually on January 5th, 2021 we were quite relieved because none of what we thought were very plausible strategies were actually deployed. And then January 6th happened, which of course none of us imagined. Indeed, I don't think really Donald Trump imagined it to play out the way it in fact played out, because I don't think anybody imagines that a presidency that was bought through the force of violence would be sustained. But what that led us to think about is just how unprepared the political system, including journalists were for thinking about the particular threats that the complex system that we have for selecting our president, especially at a time where there isn't good faith operating in our system presents.

[00:04:24.9] Larry Lessig: And so we laid out in our book strategies that we think clearly can't work, strategies that might work, and strategies that almost certainly would work if deployed. It's important, of course, to frame all of this by saying nothing is gonna go wrong if it's not a close election. If it's a clear election, nobody's gonna have any space to wiggle. But if it's a close election, which I take it, we assume it's going to be, then there are moves that can be made and we ought to be prepared to resist them.

[00:05:00.7] Jeffrey Rosen: Thank you so much for that. Rick, you imagine in your book a future January 6th, 2025 and say that a constitutional amendment protecting the right to vote could help. How do you think through the potential threats on the next January 6th?

[00:05:16.3] Rick Hasen: Well, first, let me say it's great to be with you again at the National Constitution Center and glad to be with Sarah and with Larry having this discussion with all of you. Obviously, even if we got a constitutional amendment, I see this as a multi-year project. Nothing's going to happen before January 6th 2025. So the world we're living in, I mean, the first thing I would say is putting aside all of the legal machinations, which Larry covers in his book, I'm worried about the potential for violence. I'm worried about people not believing the results of the election because this is what we saw in 2020. You mentioned my earlier book, Cheap Speech, where I talk about how it's become so much easier to share false information about elections being stolen or rigged. We now have millions and millions of people who believe the last election was stolen or rigged, despite all the reliable evidence.

[00:06:10.5] Rick Hasen: To the contrary, democracy depends upon the people who are on the losing end, agreeing that the election was fair and square and agreeing to fight fairly the next time. So I am worried about public acceptance of results. I'm worried about the potential for violence against election officials, against poll workers, against voters. We're in a very volatile and polarized moment in our history. I hope that cooler heads will prevail and that, we'll be able to get through this period. But even before we get to Congress's counting of the electoral college

votes on January 6th, there's a lot that has to happen that a lot that has to go right. And there's a big part of civil society that needs to make sure it goes right. Let let me say one thing about a hole that is left open regarding January 6th 2025, a legal hole.

[00:07:01.3] Rick Hasen: Some of the things that I know Larry had been worrying about and Matt for a long time involved manipulation of a old law back from the 1870s called the Electoral Count Act. Congress fixed some of the problems with that act when it passed the Electoral Count Reform Act in December of 2022. There was also this very broad theory called the Independent State Legislature Theory. There was an extreme version of it that would've let state legislatures potentially put in an alternative slate of electors. The Supreme Court seemed to shut that down in a case called Moore v. Harper that decided last term, but in a case called Trump v. Anderson, which the Supreme Court just decided weeks ago, the court left open the possibility that Congress could potentially try to disqualify an apparently winning candidate from having his or her electoral votes counted on grounds that the person participated in an insurrection and is therefore disqualified under section three of the 14th Amendment. The Trump v. Anderson case involved whether states could disqualify candidates in this case disqualify Trump, but left open in a very kind of unclear way what Congress might be able to do and when they might be able to do it. So that's another scenario in addition to all the ones that Larry lays out that I worry about in terms of legal challenges to the results in 2025.

[00:08:30.8] Jeffrey Rosen: Thank you so much for laying out those threats, violence, the public acceptance of the results and those legal challenges ranging from the independent state legislature theory being resurrected in some form to Congress disqualifying a winning candidate. Sarah, how do you see the threats, you've written so thoughtfully about the courts and about this current Supreme Court being not a 6-3 court, but a 3-3-3 court, how might that play out in potential election challenges? And what challenges do you see on the horizon?

[00:09:03.8] Sarah Isgur: So I see my role here tonight, not to echo stuff that Larry and Rick already said, and rather to bring another dimension to this. So it's not that I'm disagreeing with anything they've brought up so far, actually. But I'll say that a concern that I have that hasn't been brought up is the concern to the institution of the court itself that I think it was a real benefit to the United States, that you had six justices on the Supreme Court who've been appointed by Republicans basically putting their stamp of approval on a Democrat winning the 2020 election. And you had Trump appointed judges throughout the country, knocking out his attempts to challenge the results of the election in a bunch of states. In particular, the hearing held in Wisconsin, where Trump appointed judge said that it was baseless, that there was no evidence presented.

[00:09:55.1] Sarah Isgur: Things like that were incredibly helpful. My concern is what if Donald Trump is the one who clearly wins the election in 2024, that it's Democrats who are challenging the results? Larry has this scenario in his book that seems like it could be pretty spot on, right? That Joe Biden wins the popular vote, but loses the electoral college. And that the challenges then that are going to what most people think is a "Republican appointed Supreme Court" and the Supreme Court still applies the law the way they should, but this time it benefits a Republican heading into the presidency. I think we're in a much different position than we were

in 2000 for Bush v. Gore. And I fear that that will undermine trust in the institution of the court, call for more court packing. And really, I think that happens, frankly, regardless of which side benefits or loses heading out of this election. That for most people, whatever the Supreme Court's involvement will be, they will see it as a political Supreme Court and that it won't matter all of the other decisions that the Supreme Court has made in the last several terms that have really defied, I think, any political characterization of this court, all they're going to see is whatever that last decision is who ends up in the White House. And we are far, far from the Bush v. Gore America that still really trusted its institutions like the Supreme Court.

[00:11:24.3] Jeffrey Rosen: Thank you very much for raising that troubling but real possibility. Larry, your book begins with scenarios that might occur on January 6th 2025, and including president Biden winning the popular vote, losing electoral vote. And then you take us through, in each chapter various scenarios for stuff that could go wrong, ranging from VP superpowers, faithless electors, rogue governors, all the way up to the nuclear option. Walk us through Those troubling and important possibilities.

[00:11:56.0] Larry Lessig: Well, let's start by focusing on two. One of them was I think inadvertently created by the Supreme Court when the Supreme Court determined that state legislatures have the power to control how electors vote. And they framed it unfortunately by saying, "state legislatures have the power and electors have no rights". And so, imagine we're in a very close election. Imagine it's the state of Wisconsin, which will still have its gerrymandered legislature, through this election cycle. But imagine Wisconsin goes for Joe Biden, but it's so close that it's plausible. People can raise a real question about whether, in fact, Joe Biden had won. And the legislature starts a campaign that basically says, we don't believe Joe Biden has won, we believe Joe Biden. So if he has won, it's only because of fraudulent votes or any other type of claim like that.

[00:12:55.5] Larry Lessig: The Constitution plainly requires that the electors be selected on the day or on the time that Congress set. So there's no doubt that the electors in that case would have to be Joe Biden electors. But the question is whether the legislature, and if you believe the independent state legislature doctrine, may be just the legislature can direct the electors how they must vote and say, we believe that the winner of our state is not Joe Biden, it's Donald Trump, and you have to vote for Donald Trump. And the companion case to the Chiafalo case, the Baca case, which addressed the Colorado system, upheld removing electors who vote contrary to the law and replacing them with electors who will vote with the law. So you could imagine the scenario developing. Now I'm quite convinced the court never intended this.

[00:13:52.4] Larry Lessig: The court didn't give a thick enough theory to show exactly how they intend this to be resolved. So I think the court could fix this, but the challenge is the timing, because if they time it properly, so they time it very close to when the electors have to vote, what we call elector's day, the court could just literally have no time to resolve it before the electors vote. So imagine the court does finally say, no, no, you can't do this. Then the question is whether the Biden electors have voted, and of course, the whole campaign against, so-called fake electors and the threats against in Wisconsin in particular electors who voted without being certified as the electors who had to vote, or the Trump electors raise the question whether there

would be votes on January 6th to count. So this scenario is an unfortunate one that we don't have a mechanism for resolving or clarifying. Justice Alito in the Trump v. Anderson case raised it as a question, and I was kind of hopeful they were gonna drop some kind of note to signal just how crazy the theory was. But unfortunately it remains live or as live as it could be.

[00:15:09.2] Jeffrey Rosen: Thank you for that. Rick, are you concerned about that scenario? How might the courts respond and what are your nightmare scenarios for January 6th?

[00:15:23.7] Rick Hasen: Well, one thing I'd say is we have to avoid catastrophism. Larry opened up with this and said, this is only gonna matter if we have a really close election. And, there's room for this kind of manipulation. And I was heartened, for example, there was an article in Roll Call, Washington, DC newspaper just yesterday talking about, back to my earlier scenario about Democrats potentially seeking to disqualify Trump, where leading Democrats said, we're not gonna do that. And so I'm hoping as we saw in 2020 that there are enough responsible people among Democrats and Republicans that the will of the people is going to be properly reflected. But let's just take a step back and pause about how ridiculous this discussion is. And the reason it's so ridiculous is because our constitution is so convoluted, because it does not protect individual's right to vote even for president.

[00:16:09.1] Rick Hasen: So the original Constitution gave state legislatures the power to set the manner for conducting presidential elections in article two, that power has since been limited by things like the 15th Amendment. You can't have race discrimination in how you might conduct an election. But state legislators have a lot of power. Why doesn't our constitution grant us the right to vote for President? In Bush v. Gore, the case that ended the dispute over 2000? The Supreme Court said that in future elections, state legislatures could take back their power to appoint electors. So we need a modern constitution, constitution like they have in Canada or Germany, or most other advanced democracies that says, look, if you're eligible to vote, you're a citizen, you're an adult, you're a resident, you're not convicted of a felony, or you've had your voting rights restored, then you have the right to vote. And we could have such an amendment and it would solve so many of these problems without even changing the electoral college. We could say no, we're gonna keep the electoral college, but within each state, the way that votes are going to be chosen for each state's electors is going to have to be through a popular vote. At the very least, a modern democracy should do that. There shouldn't be a way to try to manipulate the outcome so that you could turn an election loser into an election winner.

[00:17:32.8] Jeffrey Rosen: Thank you so much for that. Sarah, what do you make of Rick's proposal for a right to vote amendment that would guarantee the right to vote in presidential elections as well as the right of the people to choose representatives of their choice, would make clear that Congress's power to protect the right is voted broad and can't be limited by the Supreme Court? Among other features, he says it's not a partisan proposal, and might even favor Republicans in some circumstances, but could you imagine Republicans converging around it? And what do you think of Larry's scenario for January 6th?

[00:18:17.9] Sarah Isgur: That's a lot. So I'll take Larry's first, which is to start where Rick also started though. Look, right now the polls make this panel irrelevant, right? If the election were

held today and those polls turned out to be true, Donald Trump sweeps in every swing state that Joe Biden won. This isn't close. It would be blowout compared to 2016, for instance. And I don't really think that any of these scenarios would even be relevant. We'd be talking about democratic controlled states that are still swing states, Michigan type states that try to do something, but it wouldn't be enough, 'cause you'd have to overturn all the states.

[00:19:04.0] Sarah Isgur: It does have to be close. It really has to be the Bush v. Gore. It comes down to Florida. Or it's sort of why 2020 wasn't. For Larry's class when they were gaming this out, why they didn't game out January 6th was because there wasn't really something that was going to make a difference when it didn't just come down to Georgia, for instance. They were cooked when it was Pennsylvania, Georgia, Michigan, Wisconsin, Arizona. So again, the reverse happening and this panel is irrelevant. That being said, I think this panel is more important than just 2024 because I think it highlights some fundamental concerns that anytime there could be a close election in the future. On the state legislature's concerns, this is gonna come up throughout Larry's book that on the one hand, look at all these things that can go wrong. And on the other hand, you do walk away realizing that you have to have a lot of bad actors.

[00:20:07.6] Sarah Isgur: I'm not saying that's impossible, of course, but there have to be people of bad faith acting in a partisan manner. And something again that we saw in 2020 that should hearten people is that actually, there weren't nearly enough people of bad faith. The Vice President, the Secretary of State in Georgia, all of these Trump-appointed judges acted against their partisan interests. I mean, Mike Pence acted against his employment. And that that is something we should probably celebrate more than we do instead of simply focusing on the catastrophic parts of January 6th, which I don't mean to minimize one bit. But we should also be heralding why something like that didn't come even close to working. On the right to vote, on the amendment to vote, A, as Rick knows well, sure, is there a theoretical bipartisan consensus that could come around something like that? I think there is.

[00:21:02.9] Sarah Isgur: I think he lays out a good case for that. But the second sort of the culture war gets a wind blowing in one direction and any idea becomes part of the culture war, it dies. I had someone talking to me about declawing cats. They wanted that banned in the state of Virginia and how to do that. And I was like, well, really good news. Stay away from the culture war. Do not try to get one side on your team or the other side because of negative polarization will simply be against it. So right now, I don't think that Rick's is a particularly polarized idea, but it could be. So there's that sort of can it happen part of it. I guess, not totally clear that it would fix a lot of the problems that we've seen so far.

[00:21:49.4] Sarah Isgur: I do think there's something about always fixing the problem that we had last time instead of thinking ahead. And so I do still like Rick's idea. But a lot of the problem we saw in 2020, for instance, was stuff that I think would have been really hard to anticipate. A worldwide pandemic hits. And so you had local election officials changing the rules for how to vote in those elections. State legislature saying, no, that's in fact our job. You weren't allowed to change the rules and therefore we want to disqualify those votes. That was sort of the strongest legal argument that was presented on any of the election cases. I'm curious if Rick thinks that his amendment would solve that particular issue 'cause it wasn't really about a right to vote. It was

an emergency pandemic and they're trying to actually create that right to vote, but in a way that didn't follow the rules that had been prescribed ahead of time.

[00:22:44.5] Jeffrey Rosen: Many thanks for that. Larry, say more about the nuclear option. You say you imagine swing states declaring before Election Day they'll cancel their popular election for president or that the legislature will vote at the end of Election Day for the slate of electors, who the legislature believes reflects the will of the electorate. And you say this possibility where a state legislature cancels its election before Election Day and chooses the state's electors directly. Has a significant chance to flip the results, and it could result in future elections. You say there's strong precedent at the time of the founding where legislatures directly appointed electors. And in fact, Alexander Hamilton tried to overturn an election result in the by-elections for governor by switching from legislative elections to district elections after election day had taken place. And there was no legal question of the right to do it, although the effort failed. So how concerned are you about it? Might it happen? And might the Supreme Court actually let it go ahead?

[00:23:50.6] Larry Lessig: Yeah, I'm gonna answer that question. But I think it's really important to build on what Sarah just said, because I think it's important to distinguish between catastrophizing that imagines people acting extremely badly, and catastrophizing that recognizes the way the procedure as it's in place could allow really bad outcomes to occur. So let's go back to Wisconsin for a second. If anybody's not watched the full of the succession series, this is a warning. I'm about to reveal a little bit about the penultimate, or maybe it's two before episode, where they're having an election and in Wisconsin there's a fire. In the Milwaukee polling place, which obviously destroys a whole bunch of Democratic ballots. And because those Democratic ballots are destroyed, the state goes for the Republican. This actually is plausibly addressed under the new Electoral Count Reform Act, because it's plausible that the governor could, under that act, deem that a kind of catastrophe that allows for continuation of voting.

[00:25:00.4] Larry Lessig: So he could start saying, it's continuation of voting shall occur. I guarantee if he does that, immediately there'll be a lawsuit brought by the Trump campaign that says that there's no authority for the federal government to regulate, to allow that to continue to occur. And in the time to process that lawsuit, the opportunity to save the result is lost. Now that's not requiring any elected official to do anything bad. That's not requiring anybody to be weak. It's just allowing that the procedure that lawyers could take advantage of could actually flip the result in a way that would be quite significant. It's another really clear example of this. It's really astonishing to me. We've not, we can't even get the op-ed published to sort of point it out. Hawaii in 1960 is an example that the Supreme Court apparently didn't think about in Bush versus Gore, but it quieted.

[00:25:49.8] Larry Lessig: 1960 was a case where Nixon was originally the winner. And then, so he was certified as the winner. Then there was a recount. The recount couldn't be completed until the end of December. When the recount was completed, Kennedy had won, and there was a new certification. And the electors, this is the first kind of fake electors, the electors for Kennedy and the electors for Nixon both met on Electors Day, and they cast their ballot. And when Nixon, as Vice President, recognized this, and I have these slates for me and a slate for Kennedy. He

counted Kennedy slates. It wasn't going to matter. Who knows what he would have done if it wouldn't matter, but he said, I'm going to count the Kennedy slates. That actually was the right result under the Electoral Count Act.

[00:26:32.5] Larry Lessig: And so therefore, the Kennedy slates, the ultimate winner, was able to be counted. The Electoral Count Reform Act produces the other result. The Electoral Count Reform Act says that the only slate that can be counted is the one certified by the governor who is required to certify six days before the electors vote. So in this case in the Hawaii case it would have been the Nixon slate, then imagine there's a recount, there's no mechanism in the Electoral Count Reform Act for a new certification to be counted or recognized and the only basis for objecting is that the certification was improper but the certification at the time was proper, so you can imagine just the procedural structure of having to overcome the presumptions built into the law, meaning you can't overcome the presumptions building law.

[00:27:21.6] Larry Lessig: You just have to get one house to basically go along with the bad outcome and the bad outcomes produced. So we completely celebrate people in the states, like Georgia officials who did the right thing, Pennsylvania officials, Arizona officials, Mitch McConnell, another person who did the right thing. But you can imagine the scenario teeing up in a way that doesn't allow the right thing to come up. The nuclear option is really interesting because, I think Rick acknowledged this in the opening, there's long history recognizing the electors had been selected by legislators and the court in Bush versus Gore said that they could do it again. And I agree with Rich, Rick, it's outrageous that the legislature could do that again. If they did that, they would again need to be doing it in a context that Sarah's hoping, and I'm hoping too, is not, well, yeah, maybe I am hoping it's close if Sarah's prediction is right. But.

[00:28:22.6] Sarah Isgur: Just the current polls, that's all I'm going by, making a wish.

[00:28:27.3] Larry Lessig: Yeah. I actually think the latest, I think the latest is actually Bush, that Biden is ahead. I think the average polling now is Biden is ahead. But anyway, that's not important. So, yes, if you have a fog of war situation before the election, even a day before the election, the legislature said we have lost confidence in our election process. And so, therefore, we are now voting to select the electors ourselves. They need to do it the day Congress says, so they need to do it on election day. But if they do it, that's it. Now, people can think that's kind of ridiculous, but I think a really important point to recognize is that in this current election cycle, all but six states have already done that. I mean, not counting the ones that don't have winner-take-all. So maybe all but six and then two have already done that. Because the consequence of winner-take-all which is the rule that says the winner, the plurality winner of the popular vote in a state gets all the electors of that state. The consequence of that rule is that there's no meaningful election for president in the states which are not swing states. In the state of California or New York or Kentucky or Utah, we have this pretense of an election, go vote for your presidential candidate, but it has no meaningful chance of affecting the result. And that's solely because of the choice to allocate electors in a winner-take-all manner. If you allocated electors proportionally, and I actually think you could do it fractionally proportionally. Then every single vote would matter because every single vote would increase the proportion of electors that you could get. And that change would fundamentally change the dynamics of presidential elections,

which right now are solely focused on these swing states. We kind of outsource the election of our president to these swing states, these non-representative swing states. But that's just a consequence of legislative decision, which could be different.

[00:30:24.2] Jeffrey Rosen: Thank you very much for all that. Rick, you argue that despite the advances of the Electoral Account Reform Act and other reforms, there's still risks of subversion that could be mitigated by the passage of a constitutional right to vote amendment. And you note a bunch of benefits. First, people could argue that the Electoral Account Reform Act is unconstitutional. Second, this would confirm that state voters have the right to vote for president and the choice wouldn't be up to the state legislatures. And wouldn't allow them to discriminate on the basis of race and other impermissible characteristics. It would be useful in determining whether laws like Georgia are aimed at subverting the will of the voters, suppressing Democratic turnout, and finally, it would be a tool for voters to be free from violence and intimidation. I read from your reasons 'cause they're so clear. Tell us more about all that and why you think that an amendment would help.

[00:31:21.2] Rick Hasen: It's hard. I think we're all United States citizens and we've become used to the idea that we're going to have these discussions every four years. Other advanced democracies are polarized. You can look at the UK and Brexit, you look at Germany, France. I mean, there is polarization everywhere. Australia. They're not having discussions about whether we can hold a free and fair election in the next election. That's mostly because they have protection in their constitution for the right to vote, and they have national nonpartisan election administration. Now, back in a book I wrote in 2012 that we talked about a long time ago called *The Voting Wars*, I made the case for a national nonpartisan election administration. But you'll notice if you read my new book, *A Real Right to Vote*, and that's not part of my proposal because there is so much resistance, and it's not a partisan thing.

[00:32:20.9] Rick Hasen: It's from Democrats and Republicans to nationalizing our election system. And we could have that debate, but we're not going to do that. So we have a patchwork of rules. We don't have one election. We don't have 51 elections. The states and District of Columbia, we have over 8000 simultaneous elections. So when Sarah talks about what happened during COVID, this was where rules were being changed on the local level. This is just kind of the manifestation of the hyper decentralization of our elections. So a constitutional amendment guaranteeing the right to vote, at least the one that I proposed, would do a lot of things to minimize the kind of lack of uniformity and the lack of protection for voters. One of the things I propose is that we would have universal voter registration within each state.

[00:33:07.2] Rick Hasen: So the states would have to go out and affirmatively register all eligible voters under their state's laws. And working with the federal government, provide them with an identification number. So national voter ID combined with universal voter registration, something for the left and the right. I've been tracking election litigation since before 2000. We have about a tripling of election litigation in the post-2000 period. Many, many, many of the lawsuits are about fights over registration, fights over some of the basic rules for how voting rolls are cleaned. All of this would be eliminated. We'd have less litigation, more certainty. So that's another way of protecting the right to vote, by having a system that is more rational. We

can still have a federal system. We don't have to nationalize our elections in order to improve them. And so it's not just about giving people the right to vote. It's about having a system where we're not gonna have angst every four years. As much as I love talking to you, Jeff, I'd rather that we talk about something else in 2028.

[00:34:15.0] Jeffrey Rosen: Me too. And there'll be lots to talk about regardless. Sarah, more responses to Rick's right to vote proposal, and then maybe let's dig in on issues that are still opened after Trump versus Anderson. Is it possible that some electors might choose to not vote for President Trump on the ground that he's disqualified as an insurrectionist? And what would the Supreme Court do then?

[00:34:40.5] Sarah Isgur: So, first of all, we actually solved this 20 years ago. It's just that no one did anything about it. James Baker and Jimmy Carter got together after Bush v. Gore. They did the Carter-Baker Commission. They had 87, you guys may correct me if I'm wrong about that, 87 proposals that would all make our elections both more secure and more open and more fair. And we just didn't do them. And nobody seems to care. And it's like, I'm the only person who like is taking the flag of the Carter-Baker Commission up the hill, but like, there's not even anyone shooting at me. Like just nobody cares. I'm fighting a fight that nobody's fighting. So and many of them, I think are exactly the ones that Rick is thinking about. There's something for every side when you make the elections both more secure and more open. I think that's just a good thing.

[00:35:35.4] Sarah Isgur: I think, though, that Rick would acknowledge you can't fix everything. You can't end all voting litigation because a lot of the problems, again, going back to 2020, but really every election have to do with mail in ballots. Last time, what was it? There was a date by which the ballot had to be received, but what about the ones that were undated, but they were received by the right time, just like silly stuff like that, that you're not gonna have a constitutional amendment to fix all of that stuff. Of course, it's a great irony. I was a former Republican campaign operative. I've worked in many of these sort of pre-recount situations of ballot misprints and everything else. I've been on the ground, my job in 2012 for the Romney campaign was election operations, which was preparing for a recount that didn't happen.

[00:36:29.6] Sarah Isgur: But one of the things that you're most focused on is thinking through all of the different things that can go wrong and trying to fix them ahead of time. So in some sense, I think the campaigns are both on board with trying to minimize the litigation. Because it's a huge waste of their resources during the campaign in advance. To move to Trump v. Anderson, and this gets to my overall thesis about why the court is in 6-3 and why it's better thought of as a 3-3-3 court, that you have this axis on the bottom. It's an x-axis. It's the ideological one that you're all very familiar with, conservative to liberal, although boy, we might be stopping thinking about that as a linear spectrum and more a scattered chart at this point. We seem to have three, if not seven different parties going on right now that don't fall, I think, very neatly along that.

[00:37:28.0] Sarah Isgur: But let's just put it on that for now. But then there's this other spectrum that's very specific to the Supreme Court on institutionalism. And I think there's

different things that fall into that spectrum. I don't have a single definition of it, but institutionalism in general is going to care about how easy something is to follow for the lower courts or for the country for that matter, how much it settles an issue, how much it helps or hurts the credibility of the court moving forward. The consequences of it. Does it result in chaos or does it result in sort of the orderly administration of justice? And boy, do I think the Trump v. Anderson case, and this is whether Colorado as a state had the ability to disqualify Donald Trump under the Section 3 of the 14th Amendment Insurrection Clause, there was a lot of institutionalism going on there.

[00:38:22.4] Sarah Isgur: What's interesting is that that cut against what you normally see from institutionalist judges, justices. Which is minimalism, judicial minimalism, something that the chief justice cares a great deal about. Only deciding as many decisions as you can, because that's how you get the most number of people to agree to it. That's how it sort of has the least amount of impact on the institution and the credibility and all those things I mentioned. Except in this case, because the narrowest version of a Trump v. Anderson decision would have just said Colorado can't do it. It's what the four actually were advocating for, including Justice Amy Coney Barrett. And she even said, I would have just gone with the minimalist decision here.

[00:38:58.4] Sarah Isgur: But I think the reason that the five went with the more maximalist decision, deciding things that they didn't have to decide, technically speaking, was because they were not going to do it. In this case, the institution was better protected by ruling out some of the nonsense that was clearly gonna come down the pike if they didn't do that. The reason I bring that up is really to tell you where I think the Supreme Court sees this. They're very concerned about what happens next. They absolutely believe that this election will end up in their hands. They don't want it to. They think that will hurt the institution greatly. And they do care about the credibility of the court. And in over-deciding Trump v. Anderson, I think you can tell how open they are to sort of nonsense, what they view as nonsense challenges to what should be left of the political process.

[00:39:48.0] Jeffrey Rosen: Many thanks for that. Larry, how do you see Trump v. Anderson, what, why did the court go broad and what's still open during the last election you encouraged some electors to be faithless and not to vote for Trump, under Trump v. Anderson might current electors refuse to vote for Trump 'cause he's an insurrectionist and what would the supreme court do you.

[00:40:16.3] Larry Lessig: Well, I mean, first, I'm always wanting to finish and continue the great conversation that Sarah had started. Let's be clear. I actually, I think Rick's proposal would actually do more than Sarah's crediting it with. Because if you establish an affirmative constitutional right to vote, that changes the litigation dynamic dramatically. Now states are burdened with defending in a much more significant way their steps to restrict the access to the right to vote. And I think that would be very consequential. My sense is, number one, if we're gonna go for an amendment, we ought to be going for more than just getting us to the baseline, if not a stolen election. There's so much more we could be aiming for. And so much more, I think, politically people should be open for. I think politically, three-quarters of the states should love a fractional proportional vote allocation for the electoral college.

[00:41:05.3] Larry Lessig: They're not gonna go for the national popular vote for partisan reasons. But if you had fractional proportional vote, certainly, I think, more than three-quarters of the states would be better off 'cause they'd matter in the presidential election. And right now, they don't matter. But I think the ultimate problem is most people in the academy is just not willing to embrace what is the only path that could get us an amendment on the table, which is not Congress, but something of a convention, which I hope Jeffrey will eventually have a conversation about. As for Trump v. Anderson, I think Sarah's exactly right. It was a completely institutional case. And I thought it was exactly right. I thought it was completely rightly decided, and I had been arguing. I think it's just crazy people think that the court is going to allow Colorado to do what it was doing.

[00:41:55.2] Larry Lessig: I think the important thing about how they've narrowed it, I think they've said, and I think people have misread what they've said, they've said that if you're gonna enforce Section 3, you're gonna need to do it through a statute that Congress has passed for federal officers. There is such a statute. 2383 is a statute that could have been invoked by Jack Smith, and he could have prosecuted under it. If you listen to the lawyers for Colorado, it was such a simple case. It sounds like it would have been a one-day trial and he would have been convicted. And had he been convicted under Trump v. Anderson, he would not be a candidate. But obviously, Jack Smith didn't think it was an easy case. And so therefore, he wasn't prosecuted under that provision. And I think all of us should stand back and say, if you don't think you can prove that he actually committed insurrection in a criminal sense.

[00:42:47.4] Larry Lessig: Why do we think we ought to be allowing him to be kicked off of the ballot? I know everybody says this is just a qualification, but it's not just a qualification. It's a qualification that speaks to his culpability for a criminal, what is in essence a criminal Act. And I think like narrowing it to that is really important. But I do think it's really, I hadn't seen the essay that Rick pointed to. I'm really heartened to see Democrats are saying that they're not going to take up disqualification. But this is a reason why it's important to unpack what the rules actually are, because I don't think under the Electoral Count Reform Act, you're allowed to consider disqualification. Or age or any other qualification for deciding whether to count a state's electoral vote.

[00:43:33.1] Larry Lessig: Because what the law says is that Congress can refuse to count a vote if it's not regularly given, meaning given by the electors and not regularly given by the electors. And what they were pointing to or imagining is somebody being coerced or bribed to give a vote one way or the other. And so you look at the process for the vote, and you say there's something wrong with the vote. I don't think that reaches, though there's slight legislative history to the contrary, it has no basis, I think, in the language of vote not regularly given. There's any basis for anything other than a charge about how the electoral votes were cast, and this points to Congress as a failed institution for enforcing its laws, because in 2020, when Josh Hawley tried to rally Congress to throw out Pennsylvania's votes, he completely violated the basis of the Electoral Count Act that was enforced then.

[00:44:28.9] Larry Lessig: Because then again, the only basis for throwing out Pennsylvania's votes was that the votes of the electors were not properly given. But obviously, the votes of the

Biden electors in Pennsylvania were properly given. They were Biden electors and they all voted for Biden. There was no question that they had been forced to vote one way or the other. So there was no legal basis for his objection. Yet he and 146 other members of Congress objected to the counting of Pennsylvania's ballots, which means he either doesn't know the law, which as a former law professor seems unlikely, or he doesn't care what the law is. And that's the real concern, that people will act contrary to what the law actually says and just do what they wanna do and do it in a way that creates this opportunity. To be clear, I didn't argue in 2020 anybody should vote contrary to how they were pledged.

[00:45:24.5] Larry Lessig: This is what we, this was, I didn't even argue, I didn't, the electors in 2016 who did that came up with this completely without me prompting them to do it. I defended their ability to do it. But in our book, what we say is, there ought to be a law in every state right now to bind electors to the popular vote. Because while I don't believe there's any basis for believing an elector would be bribed, never in our history has that even been suggested. And the one time you saw an elector switch sides in a way that was to the opponent, and in theory could have mattered, was the very first faithless elector, Sam Miles, who did it in 1796, and did it because it turned out Jefferson had won the district where he was gonna be an elector. So he did it for the right reasons. But what I fear, going back to harkening back to what Rick said at the very beginning, is that this class of our elected election officials could be under enormous pressure, threats to vote one way or the other.

[00:46:28.8] Larry Lessig: And so while we were very proud of the electoral, election officials who stood up and did the right thing in 2020. I'm really anxious about them standing up and doing the right thing if they're being threatened by thousands of people at their house demanding that they would vote one way or the other. So I would like to lock them in. But there's a really important loophole here that we've gotta close. If the president dies or the candidate who wins the popular election dies between Election Day and Electors' Day. And the standard binding statute is in effect, which basically says you have to vote for the guy who won the popular election. Then a bunch of those electoral votes could be lost. They just couldn't be cast. This issue was actually raised with Horace Greeley in 1872, who died between the election and Electors' Day. 63 of those electors shifted sides, and three of them continued to vote for Horace Greeley. So these statutes need to be modified to make sure that if, in fact, the candidate doesn't survive to Electors' Day, and given these two candidates, it's not an improbable thing to worry about, we've got to make sure that we don't throw away electoral votes because that too would throw the integrity of the system into doubt.

[00:47:47.7] Jeffrey Rosen: Many thanks for all that, for the clarifications and for the thoughtful proposals. Rick, you wrote a piece on March 5th and Slate, the Supreme Court has just delivered a rare self-owned for John Roberts. It's about Trump v. Anderson. And you say the majority didn't explain how far its holding goes. The elephant in the room is what happens on January 6th. Can Democrats opt not to count votes for Trump on the ground that he's an insurrectionist? Would that require a prior statute? Is the power to disqualify it? When counting electoral votes, something within Congress's power under the 12th Amendment, separate from the rule on statutes. And you say that the court is not clear about the answers to those questions. And for that

reason you think that the Chief Justice and the majority failed to impose finality. Tell us more about your thoughts about Trump v. Anderson, what might happen in the counting of electoral votes, and then if you'd like to broaden out to the other reasons that you think that we need a right to vote amendments, that would be great too.

[00:48:47.2] Rick Hasen: Well, just all the scenarios that Larry's spewing out there is reason enough to get rid of this convoluted system that we have. Even if we're not gonna have a national popular vote, we don't have to have all of these steps. We didn't even talk about what if the people who are supposed to certify elections don't certify them. That's just another place where there is a potential problem. What my amendment would do is put a big thumb on the scale favoring voters and instruct courts to favor voters in close cases and favor the right of enfranchisement. And that would solve a lot of these problems. Now, I filed a brief, an amicus brief, in Trump v. Anderson, not supporting either side, not taking a position on whether or not Trump is disqualified. But I filed this with election law professor Ned Foley and with Republican election lawyer Ben Ginsberg.

[00:49:43.4] Rick Hasen: And we said to the Supreme Court, whatever you do, make it clear what's gonna happen on January 6, 2025. Like we need certainty because it's a volatile moment. And. People might try to manipulate the outcome. And then they didn't. And so the self-own that I talk about in the Slate piece that you mentioned is that something weird happened between the time that the majority opinion, in that case, a per curiam, unsigned opinion, people think maybe written by Chief Justice John Roberts, but we don't know, between the time that an original draft of that was written and the time it got released. Well, they call themselves concurring justices, but they're really the dissenters, the three more liberal justices on the court, Sotomayor, Jackson, and Kagan, accuse the majority of doing all kinds of things to reach out and decide all of these issues related to Congress's power that they don't actually decide. So I guess I disagree with both Larry and Sarah in thinking that it's pretty definitive that you have to have a statute.

[00:50:46.2] Rick Hasen: That's certainly true under certain circumstances, but not necessarily true, for example. Let's say we're talking about an insurrectionist senator. I assume that that senator might not be seated under the rules of the Senate, and that would not require a statute to do that. So it's just uncertain. And so Roberts and the rest of the majority took heat from the liberal justices for reaching out and deciding more than they needed to, but they didn't decide enough. Like, if you're going to take the hit, tell us what's supposed to happen on January 6th. There's a line in there in reference to what states could do talking about chaos that could happen if voters are disenfranchised after they voted for a candidate.

[00:51:31.2] Rick Hasen: Well, that seems to suggest that it would apply to Congress too, but the court never says that. I do think it's odd that the basis for the court's decision was that we have to have national standards for presidential elections or for federal elections more generally. Well, we don't already. We have a really decentralized system. So is Robert F. Kennedy Jr. Going to be on the ballot in your state? It depends on what state you're in and what the ballot access rules are. The ballot's not gonna be the same everywhere. There are different rules that apply. So, whether or not you think that this procedure that Colorado used was a fair one,

whether or not you think states should do it, it was a really odd place for the court to find. And on this point, the Justices, I think, were unanimous.

[00:52:21.7] Rick Hasen: The last thing I'll say on this is that Justice Barrett issued a very interesting opinion of her own in the case, where she talked about turning down the national temperature. And some of that ire was, I think, aimed at the more liberal Justices, I think, because they didn't take out some of their language criticizing the majority or criticizing the plurality, even after the plurality likely changed their opinion to be less forthcoming. But I did think it was a good sign that it was clear that Justice Barrett is somewhat of an institutionalist, that when she's deciding these cases, she's not only thinking about the legal niceties. But also thinking about the political implications of what the court's doing. And I think that's really a necessary thing for the Justices to do at this particular time when we're dealing with issues of democracy and probably what's going to be a very intense election period coming up.

[00:53:25.0] Jeffrey Rosen: It will indeed. Sarah, I think this is the last word is to you 'cause we're approaching 8. Rick has suggested that if the majority's goal in *Trump v. Anderson* was institutional legitimacy, it failed to achieve that. And indeed, Justice Barrett thought that legitimacy would have favored a narrower rather than a broader ruling. Your thoughts on *Trump v. Anderson* in light of your 3-3-3 split? Here are the three textualists, Justices Alito, Gorsuch, and Thomas suddenly became institutionalists to the consternation of the dissenters. Were they being true to their principles or not? And since it's the last word, what are you most concerned about for January 6th, 2025?

[00:54:12.7] Sarah Isgur: First of all, I'll bet my cat that the Chief Justice wrote the majority opinion because of the first line in the concurring opinion by Justice Sotomayor where she quotes the Chief back to himself. That was certainly an intentional line. Yes, I think that in many of the cases you've seen over the last few terms, you'll see textualist versus textualist. And one of the cases where Kavanaugh's in the majority and Gorsuch is in the dissent, for instance, and there's one that's vice versa. You'll see them sort of sniping at each other of like, no, I'm the real textualist. No, I am. *Bostock* being one of the prime examples of that. These are two Justices who came up. Together in every sense, right? They went to the same high school. They went to elite institutions for college and undergrad. They both clerked on the court at the same time.

[00:55:03.8] Sarah Isgur: They're both circuit judges. And yet they can't even agree on what the right textualist outcome is. In the same sense, I think that you had a disagreement over what institutionalism is as well and what the correct institutionalist answer was, again, between judicial minimalism and this other concern about the institution leaving open a lot of doors if they decided the case too narrowly. I'm a Chesterton's fence kind of girl. I think it's why you hear a bunch of my skepticism towards Rick's amendment idea. I kind of think we should just have election day and then it should be a national holiday. We should do everything we can to help people vote on election day, but that everything else we're doing is causing a bunch of these problems.

[00:55:47.5] Sarah Isgur: And the more we try to tinker around the edges, whether it's campaign finance reform or voting reform, we end up causing more unintended problems that we

didn't see coming. Campaign finance reform causes small dollar donors to rise, which has caused this populist explosion and some of the real negative polarization that I think we've seen, for instance. Okay, so what am I concerned about for 2024? I am concerned that we will continue to see the failure of trust in our institutions because it is in both partisan sides' interest to keep degrading those institutions, whether it's your local election officials, whether it's the Supreme Court, and everything in between, and that that incentive from partisans to erode faith in our civil society and structure will have actually far greater negative consequences than the sort of specific catastrophes that we've been thinking of today that could go wrong with the election itself.

[00:56:50.9] Larry Lessig: Jeffrey, can I just have 10 seconds? I think it's really important to clarify. Rick is completely right that the Senate would be able, because they are judge of their elections, to exclude somebody who they think is an insurrectionist. But the job of Congress is to count votes, not to be the judge of the elections in the states. This is Josh Hawley's mistake. So there is no space under the power to count votes to make a judgment about qualification. It's just not what they can do. So that's why I think they have closed boundaries for anybody to act other than those who are judges of the elections, which is both the House and the Senate.

[00:57:33.7] Jeffrey Rosen: Thank you. Rick, would you like the last word?

[00:57:36.3] Rick Hasen: Well, I'll just say that there's not uniform agreement about this. And if there's not uniform agreement, there's space for people to do the wrong thing.

[00:57:41.4] Larry Lessig: But let's make their uniform agreement. If you and I agree, then here we have it, uniform.

[00:57:45.0] Rick Hasen: Well, I don't know that I agree with you on this point.

[00:57:50.3] Jeffrey Rosen: Well, it is precisely that civil disagreement that is the point of the National Constitution Center and why we're always so thrilled to convene the three of you for thoughtful, deep, respectful agreement and disagreement about these profound questions about democracy. Dear friends who are listening, we all know what challenging times these are for America, and it's urgently important to convene substantive discussions like this one with great scholars of diverse perspectives so that we can think through about how best to meet the challenges. Please join me in thanking Rick Hasen, Larry Lessig, and Sarah Isgur for an illuminating discussion. Thank you all.

[00:58:26.1] Larry Lessig: Thank you, Jeff.

[00:58:29.0] Rick Hasen: Thanks.

[00:58:31.4] Tanaya Tauber: This program was streamed live on March 21st, 2024. This episode was produced by Lana Ulrich, Bill Pollock, and me, Tanaya Tauber. It was engineered by David Stotz and Bill Pollock. Research was provided by Yara Daraiseh, Cooper Smith, Samson Mostashari, and Lana Ulrich. Check out our full lineup of exciting spring programs and register to join us virtually at constitutioncenter.org. As always, we'll publish those programs on the podcast, so stay tuned here as well. Or watch the videos. They're available in our media

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