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Restoring Trust in the Voting Process

Moderator: David Canon

Participants: Guy-Uriel Charles, Edward Foley, Richard Hasen, Lisa Manheim, Charles Stewart III, and Daniel Tokaji

ON MARCH 9, 2021, THE *ELECTION LAW JOURNAL* HOSTED a panel on “Restoring Trust in the Voting Process.”

DAVID CANON: Welcome to our panel on restoring trust in the voting process. I’m David Canon, the editor of the *Election Law Journal*, and professor of political science at the University of Wisconsin–Madison. I’m really excited about our panel we have for you today. Many of the nation’s leading experts on election law are here to talk about this very important topic.

Our democratic process in the United States was severely tested in the aftermath of the 2020 election. Electoral institutions survived that test, but the vulnerability of our democracy was exposed by a concerted effort to overturn the results of the presidential election, first in the courts and then with the insurrection at the nation’s capital on January 6th.

The core of this problem is the Big Lie that the election was stolen, and that lie was repeated so

often that now public opinion polls are showing that about a third of all Americans and two-thirds of Republicans believe that Joe Biden is not legitimately elected. And so for our discussion tonight the problem is that to restore trust in the process, about half of the country wants one thing and the other half of the country wants a completely different thing.

One half of the country wants to restore trust in the process by restoring integrity of the voting process. They see the election as being stolen, so you need to try to make sure that can’t happen again. That means making it tougher to vote. With the other half country, obviously it’s the opposite goal. They want to try to make it easier to vote. Tonight we’ll try to find if there is some common ground. Is there some place where we can compromise and try to figure out how to restore trust in the voting process?

I’m going to ask each of you two questions. The first question is you are the election czar of the country, and you can wave your magic wand and have any single election law changed to restore trust in the voting process. What would you change? Then the second question is to actually consider political reality, and come up with some proposals that would have more of a chance of becoming law. We will go through the panelists in alphabetic order to answer those two questions. Then we’ll open it up for discussion.

But first, I should mention for our audience that we originally had planned on having a live audience, but for a variety of reasons we had to move to being recorded. However, we did get a few questions from people in the audience ahead of time, and I’ll be asking our panelists those questions later in the Q&A. So, first up, we have Guy Charles, the Edward and Ellen Schwarzman Professor of Law at Duke Law School.

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GUY-URIEL CHARLES: Thank you David. Wonderful to talk to you, and to all of my friends on this panel. You're asking a really tough question, which is, how should we think about restoring trust in a process in which there is deep polarization, that is deeply divided, where we have motivated reasoning, and where the leaders have an incentive to manipulate electoral rules in order to promote a certain set of outcomes?

In many respects, at least in the current time that we're living, there is partisan asymmetry or different strategies by the parties in approaching how to deal with electoral rules, so it isn't simply that part of the country wants to make it easier and the other part wants to make it harder to vote.

That division is a partisan division, and some partisan leaders on the Republican side, seem to believe that manipulating electoral rules is a way of affecting outcomes. When you layer the division on top of the partisanship on top of the polarization, on top of everything else, then thinking about restoring trust in a society that can't even agree with respect to its fundamental rules is an extremely difficult set of propositions.

Now, there are a couple of things that one can try. One possibility is to remove the administration of elections from partisan entities, and to place that into the hands of professionals, independent individuals, nonpartisan experts, who are responsible for figuring this stuff out and administering elections. Think of the way that we run NASA. We don't simply ask, "Who's a Republican? Who's a Democrat?"

We're looking at experts to make these types of decisions, to determine policy and to administer policy, and as much as possible to keep some of the administrative process outside of the limelight. What we end up seeing is the result of policy. So one possibility here, if the goal is to restore trust in the process, is to be much more serious, as a number of folks here have articulated, about removing politics from the administration of elections and the rulemaking process.

There's going to be some part of the fundamental policy process that obviously has to go through the legislative process, but we need to remove as much as possible and to place it into the hands of nonpartisan entities, individuals, institutions. We need nonpartisan experts who are removed and insulated as much as one can be from that aspect of the decision making.

That is one way. Then one can begin to point to and to say, both by perhaps allowing folks to understand the decision-making process is not in the hands of the politicians, but also try to limit the gamesmanship that is being played with electoral rules. That might serve to enhance trust of the democratic process.

DAVID CANON: Thanks Guy. That's an excellent start. In Wisconsin, we had what probably was the model for that kind of nonpartisan administration, the Government Accountability Board, but it got taken away several years ago by our Republican governor. It's a great idea though. Next up, we have Ned Foley, who's the Ebersold Chair in Constitutional Law and the Director of the Election Law Center at Ohio State University, at the Mortiz School of Law.

EDWARD FOLEY: Thanks, and it is indeed great to be with all of you. My one wish would be for Congress to pass a statute that would require the winners of congressional elections to actually get a majority of votes, not merely a plurality. It's a very simple statute. It could be just one line or two, that you have to cross a 50% threshold to be a winner, to be a U.S. senator or win a U.S. House election. The reason for this proposal comes out of what Guy was talking about, in terms of the disease we're facing. By the way, I wrote a piece for the *Washington Post* making this argument on March 5th (Foley 2021b), so if anybody wants to look at it, they can find it online there.

What Guy was describing was the polarization that we have today, and the asymmetry of that polarization. The biggest pathology I see coming out of 2020 leading to the insurrection on January 6th is the risk that a significant cohort of one political party doesn't want to play by the rules and isn't willing to accept the premises of fair play competition. The more that subset of the system gains power, the more likely it is that we're going to lose the system as a whole. So that's why I think this is the highest priority of all the priorities we have.

Now, if the majority of the public wanted extreme right-wing politicians, majority rule would have to prevail, but again, we have a plurality winner system that combines with primary elections. That actually means that the November general electorate is not getting their preferred candidate, and I think the best illustration of this is to see what's happening to the U.S. Senate elections, as we're seeing retirements in my state of Ohio.

Rob Portman, a traditional Republican, is stepping down. He's not running for reelection. Senator Roy Blunt from Missouri just announced the same thing. He comes from the same McConnell wing of the Republican Party, if you will. The more traditional kind that is not the MAGA Trumpian part of the Republican party, and there's obviously this huge fight within the Republican party for its future.

Now, how do primaries and how do the general election cause this pathology? It's because of turnout and because of how partisan primaries work. Looking ahead for example, in Ohio, you're likely to get a more extreme winner next time who reflects the ascendant Trumpian MAGA base of the Republican party, and who will be the Republican nominee on the ballot in November, going up against whoever the Democrats choose.

Now, in a purple state like Wisconsin or Michigan, if the Republicans veer too far off the deep end to the right, the general election process will discipline that. But in states that are pretty red oriented, like a Missouri, where Blunt is, or Ohio, where Portman is, Indiana, Iowa, so forth, that discipline mechanism doesn't exist, and your MAGA far-right candidate is still going to be the likely winner. It's not guaranteed, but they're the likely winner of the general election.

Well, you could say great, so what? That's the way the system's working. Except, if you gave the general election voters in November the choice of three options, so the far-right MAGA type, traditional-right Portman/McConnell type, or Democrat, and you had a majority rule that says the November winner has to get a majority of votes, not merely a plurality of votes, there's a decent chance that the more traditional Republican is actually where the center of gravity is for a state like Missouri or Ohio.

They only go far right if they're left with those two choices in November, but they wouldn't if they had the more middle choice that would emerge, but the middle choice is getting boxed out by the system that we have. So if Congress simply said you have to win a majority in November, states would have the freedom to choose how to implement that.

They could adopt California's system of a top two where you have a nonpartisan primary that leads to two candidates in the general election. You could do ranked choice voting, like Maine

and Alaska now are going to do. You could do something newfangled called approval voting, which St. Louis just adopted this past week for its mayor's race.

There's a whole other menu of electoral systems that political scientists have designed that could be experimented with. They'd all be open for choice. States could serve their role as laboratories of democracy, and the only thing that Congress would say is you can't just use the current plurality system. You've got to have a majority system, so that's the top of my wish list.

DAVID CANON: Great, thanks Ned. So up next we have Rick Hasen, the Chancellor's Professor of Law and Political Science at the University of California, Irvine School of Law.

RICHARD HASEN: Great to be with you, especially, I think this is probably the first Zoom appearance of three editors of the *Election Law Journal* from different time periods appearing on the same screen. I always have a warm feeling for *ELJ*, having been the founding co-editor back in 2001, which is a really long time ago, especially for my students. When I talk to them about *Bush v. Gore* or those controversies, they were quite young. Soon, they will not even have been born yet, so that's a different situation.

I was torn when I heard what your question was going to be, between what I'll call the Guy approach, which is we've got to fix our election system itself, and the Ned approach, which is we have to change the rules to bolster moderates in the Republican Party. I think both of those are different ways of trying to tackle what is a very complex problem, but since those two suggestions have already been made, let me mention something else, which is strengthening intermediaries to deal with disinformation. This is a topic that I've been working on for a book that I'll have coming out next year called *Cheap Speech*.

I'm thinking about why disinformation has been thriving, why it has been, as Guy mentioned, somewhat asymmetrical. I'm going to offer a bunch of legal suggestions to deal with, for example, disinformation and false election speech. There is some room, consistent with the First Amendment, to have regulation, but towards the latter part of the book what I'm going to argue for is strengthening intermediaries.

This is a really important way of thinking about why we're in this situation that we're in. So if you

think about how Trump was able to consolidate his power, why he was elected president and essentially be able to fight against not only the Democrats, but also against the more traditional McConnell wing of the Republican party. He was able to attack and squelch the kinds of intermediaries that help with truth telling. Who's on that list?

The opposition party, the Democrats. I think he attacked the press more than any other institution as the true enemy of the people. The judiciary, where early on he was attacking particular judges as biased against him, whenever they ruled against him, and the FBI, of course, as involved in the old Mueller investigation and the Department of Justice.

If we think about all of these, the role of political parties in the political system, the role of law enforcement, the role of an independent judiciary, and of course the role of the press, which is among the most important of these roles, these all serve a checking and truth-telling function in our democracy.

They all serve a role of giving voters the information they need to be able to make choices, and so with this I hesitate to even call it “right wing” populism, because I'm not even sure how conservative Trump really is—but this kind of cult of personality populism that Trump has been able to put together—he's been able to convince millions of his followers that the election was stolen. Under this view, whatever kind of evidence you can produce to try and show the truth of how the election was actually conducted is not legitimate, and so what is going to be required is civic education and bolstering of institutions.

I'm known as a progressive in terms of my political orientation, but one of the things I felt was very important to do was to praise the Federalist Society-associated judges who held the line when there were cases that were brought to try to overturn the results of the election—over 60 cases in a number of states—and whether it was a Democratic appointed/elected or Republican appointed/elected judge, those judges almost all followed the rule of law, and they didn't bend to this kind of authoritarian populism.

It's really important for there to be cross disciplinary, cross ideological affirmation of truth telling, and so that's a long-term process, but I think changing to ranked choice voting or having more nonpartisan election administration, those both can

help. But if there's going to be 30 percent of the population that is going to not believe in the scientific method, not believe in truth, we're not going to be able to get ourselves out of this situation. So we need to bolster whatever intermediaries there are, to try to restore trust in institutions that can help people make political choices that are consistent with their interests.

DAVID CANON: Great. Thanks Rick, so these are all really good ideas to chat about a little bit later. Next up we have Lisa Manheim, who's the Charles Stone Associate Professor of Law at the University of Washington School of Law, which we call the “other UW,” by the way.

LISA MANHEIM: Thank you. Thanks so much for having me join the conversation today. I actually was going to also talk about disinformation and misinformation, along with Rick—unsurprisingly, given that this is such an important issue right now. I don't think it can be avoided. One thing that I've been thinking about is not only public law responses to disinformation and misinformation, but also private law responses to those problems, which track into some of the libel suits we've seen, for example. That brings us pretty quickly back to Section 230 of the Communications Decency Act. That's a whole area of law that didn't necessarily implicate election law up until fairly recently.

It's something that we all need to be thinking about. But because Rick just talked about misinformation disorder, I was hoping to pivot a bit to talk about what I refer to as “electoral sandbagging.” This is a term that comes from the criminal law context. Someone like Justice Scalia would criticize what he considered to be lawyers engaging in sandbagging. That's when lawyers allow a mistake to happen at trial, or they even purposefully introduce the mistake at trial, and then later on appeal try to point to that mistake and say, “Look at that thing that happened. Therefore, I need some sort of relief right now.”

Obviously, this practice is hugely problematic in a legal system. The legal system doesn't work if people are able to do this. Unfortunately, we're starting to see this in the electoral sphere. We saw a few examples in the most recent elections. We've seen it for a while, in the world of alleged voter fraud, when we have people with big platforms promoting a false narrative of voter fraud, and then subsequently turning to the

conditions that they've created where people perceive there'd been voter fraud, pointing to that and saying, "See, look—there's this perception of voter fraud so we need all these restrictive measures." This is one example of how the sandbagging works.

We also saw it in 2020, when we had state legislatures, for example, refusing to allow election administrators to begin processing absentee ballots, which predictably led to a delay in the counting of those ballots after Election Day passed. Then those same individuals would point to the delay and say "look, it looks like something wrong is happening," when in fact they were the ones who produced the problem.

The punchline here is that one thing that I'm really worried about is this sandbagging and how it can interact with presidential elections in a way that gives state legislatures an incentive to do a poor job allowing an election to go forward and then deciding after Election Day comes, and they see the results, whether they want to purport to call a failed election, and then claim to appoint electors of their choosing, rather than accepting the electors that the population has selected.

I hope that this problem will not arise, but given the patterns we've seen and given the way that our presidential elections work, this is very troubling. I wish I had a silver bullet to fix it. There are some things that the courts theoretically could do to push back on that sort of maneuver, looking to things like laches,¹ as well as really developing a robust right to vote under the equal protection clause as well using the due process clause to protect voters against these sorts of changes in election processes.

There's also theoretically things that Congress could look to in reforming the Electoral Count Act, although that becomes very complicated very quickly, in light of a number of constitutional concerns. These are the sorts of issues I've been thinking about recently.

DAVID CANON: Thanks Lisa. I love the idea of electoral sandbagging. I'd not heard that term before. Again, Wisconsin is a great example of that with the absentee voting. We were one of four states that couldn't start processing absentee ballots until Election Day, and then when Milwaukee reported those 200,000 votes at 4:00 in the morning, Trump and his supporters claimed fraud, "Oh my gosh, Wisconsin is stealing the election!" Well, no. It

was just because we couldn't process those ballots before Election Day.

Next up we have Charles Stewart, who is Kenan Sahin Distinguished Professor of Political Science at the Massachusetts Institute of Technology.

CHARLES STEWART III: Thanks David, and thanks for inviting me to spend some time with some of my favorite people in election law. It's always fun to be with this group. I'm not the only political scientist on the panel, but I am the only non-lawyer, and so my approach is slightly different, although not entirely.

Often in these webinars, I find myself the only one pushing back against the premise of the question, and I'm glad that we're all basically pushing back against the premise of the question, because I think, as Guy started and others have continued, that we have this problem. We do have a problem of trust, but that problem of trust in part has been manufactured, as Lisa has suggested. Even if it hadn't been manufactured, we know from the political science research that I and other people have done, that trust is a tricky thing in elections.

As I like to say, what we know from the research is that if you want people to trust the election outcome you need two things. One, you need to make sure they don't wait a long time to vote in line, and secondly, you need to make sure that their candidate wins. If you can guarantee those two things, everybody will trust the outcome of the election. But obviously we can't do that, so we have to go for other goals. One way of pushing back is to think about what I've been emphasizing, and that is not trust necessarily, but trustworthiness, that is to say the conditions under which an impartial set of observers would look at an election and say yes, the correct person was chosen in a free and fair process.

Now, I think my comments pick up from what Rick was saying about strengthening intermediaries. Although, I agree with everything that's been said so far—I would embrace them all—but during the period after the election, and even before the election in 2020, we saw a lot of horrible things, but one of the triumphs of the election season was the triumph of the fact-based part of election administration.

¹A legal doctrine permitting dismissal of a suit because of a plaintiff's unreasonable delay in bringing the case. In the context of election law, an example would be waiting until after an election (that the plaintiff lost) to challenge an election law, such as the process for counting mailed ballots.

It was the judges, as Rick was suggesting. It was election officials. In fact, almost universally, even when pushed to not certify elections, even when pushed to disavow the results because your party lost, the places that depended on facts prevailed. We hope they'll prevail in the future. We're worried about that in the future, absolutely, but, in addition to doing things to strengthen these interstitial institutions that we have, there are things in election administration that we can do to bolster the facts or fact-based institutions.

One thing I'm reflecting on is Georgia. I'm imagining what would this election have been like if they still had their electronic voting machines with no paper backup? What if it was hard to do a recount? What if they did not have their risk-limiting audit statute already passed? It would have been a real mess. So there are two things in that state at least, and there are other things the state did as well, but those are two high-profile things that the Republican secretary of state or any secretary of state could have pointed to and said, "These are things that make me believe the outcome of this election," and there are other things as well.

Some of them are as mundane as encouraging people to apply for absentee ballots online, and reducing the sorts of errors that oftentimes happen, because of the mail, because of manual entry and that sort of stuff. So if we're going to become a little more operational, which is how I tend to approach these things, improvements can be made in election administration that would improve the trustworthiness of elections, things like risk-limiting audits. If I were king of the forest, everybody gets a risk-limiting audit. You get one, you get one, you get one. Everybody gets a risk-limiting audit.

Everybody should be required to join the Electronic Registration Information Center. The reason is that there are great pressures to do voter list maintenance. They're going to be growing over the next several years. There's going to be great pressure to do it in a sloppy way. We need to bolster institutions that do things like try to clean up the voting rolls in a serious way. There are things like that, that could bolster the fact-based part of elections.

It's not going to make the 30 percent instantly, suddenly trust, but at least it might help to stop some of the metastasizing of the distrust, and provide at least a factual base for those institutions that want to travel on that basis, to govern elections moving forward.

DAVID CANON: Thanks Charles. I really like the recasting of the focus from trust to trustworthiness. That's a good way of thinking about it and I accept that as a friendly amendment because that is, I think, the key thing here, right? How can we have a fact-based acceptance of the election results? That's what we're interested in, so really, really good point.

Last up we have Dan Tokaji, the new dean of our law school here at the University of Wisconsin, the Fred and Vi Miller Dean and Professor of Law at UW.

DANIEL TOKAJI: Well, thanks so much, David. It is wonderful to see you, my new colleague here at the University of Wisconsin-Madison, to see Ned, my former colleague at Ohio State, and to see my good friends in the fields of election law and political science who are gathered here.

I have to say that after seven months now of being dean of the law school, and trying to run a law school in the middle of a pandemic, it's actually a pleasure to be with you all talking about elections, as fraught as that subject so often is. As is often the case when I have the chance to gather with my friends in the field of elections and election law, I find myself in agreement with what everybody has said so far, but I'm actually going to go big and go in an entirely different direction.

David, you'll be happy to know I'm actually going to embrace the premise of your question, that I am the election czar. I'm going to assume that what comes with that authority is the power to overrule Supreme Court precedents, and with that power I'm going to overrule two of the cases that I think have been the most damaging to our democracy over the past half century: those cases are *Citizens United v. FEC* and *Buckley v. Valeo*, which have helped create a campaign finance system that no rational person would design, and that virtually nobody in our country, Republican or Democrat, thinks works well.

What we have as a result of this system is a legal rule that independent expenditures, whether by wealthy individuals or by corporations, cannot be limited. What can be limited are contributions to candidates and parties. As a result, what we have is a crazy system in which more and more of the money financing our elections is going outside the candidates or parties through various outside groups with really destructive effects on our democracy.

So how does this tie in, you might be asking yourself, to trust in the electoral process? I think it has everything to do with the lack of trust in our electoral process because one of the things that people across the political spectrum share is the sense that our system really isn't working well for ordinary people. It's working very well for the super wealthy and powerful, who have managed over the past 40, 50 years to accumulate more and more of society's wealth. I don't want to suggest that our campaign finance system is entirely responsible for that. There's automation and all sorts of other things that have contributed to that. But I do think that the indefensible way that our campaigns are financed in this country, thanks largely to the Supreme Court, has a lot to do with the political dysfunction and with the lack of power that fuels distrust on actually both the left and right in our democratic process. If I were czar, that is what I would change.

DAVID CANON: Great, thanks Dan. We've heard a really broad range of ideas about how we can have more of a fact-based discussion, whether it's focusing on the intermediaries with the information and misinformation that's out there, having stronger institutions of election administration, or nonpartisan institutions of election administration.

These are all really great ideas, and I think we're all in agreement with everything that's been said so far. So I think what it comes down to is something that Ned pointed out earlier: we have to think about priorities. How do we figure out what it is that we're going to try to do next? And I think also, in the political reality we're in, now we're not election czars anymore. We have to deal with the political world that we're facing. What actually can be accomplished on bipartisan terms?

Some things that Charles mentioned could have bipartisan support. Things like ensuring the voter roll accuracy, given that's something that will be given some attention in Republican legislatures. One thing I'd like us to turn to next then would be to focus on this question of, that we really are trying to restore trustworthiness, a fact-based acceptance of legitimacy of election results. How can we try to get some concrete policy proposals that will get both parties to buy in?

Just to kick things off in that direction, let me share with you the five bullet points that came

from the Republican State Leadership Committee's Election Reform Commission a couple of days ago. This is a group of Republican state legislators and Republican secretaries of state that had five suggestions for election reform.

First was empowering the states, and so they don't want national solutions. They want to let each state decide for themselves. One size does not fit all they say. The second was ensuring voter roll accuracy, as Charles noted, is top of their list. The third was securing absentee mail-in voting, so this is sort of what we're seeing now in some states that are getting rid of no-excuse absentee voting (so you have to be out of the state or you have to be ill to be able to get a ballot). This is not calling for that, but just saying we need to have a more secure absentee mail-in voting, so things like barcode tracing and so on.

The fourth was increasing transparency for in-person voting, so a more systematic system of election observers basically, and then finally, streamlining the canvassing process. So these are all things that aren't as extreme as some of the things we're seeing actually being proposed in state legislature right now, but would be favored by the Republican State Leadership Committee to restore some trust in the integrity of the voting process.

What are your reactions to either those specific proposals or other ideas that you have for things that could actually gain bipartisan support, that would help create a trustworthy election process?

RICHARD HASEN: As Charles said, I'm going to push back on the premise of your question, which is that the way we're going to get election reform is through bipartisanship. That's extremely unlikely right now because the last election, and particularly the role of Trump in the last election, has politicized election administration in ways that we've never seen before.

I think about the list of the things you just read, and I think that list describes Georgia pretty well, in terms of how it did its election. It certainly wasn't perfect. There are things that could have been done better, but that didn't stop the person from attacking the Republican secretary of state and the Republican governor for how the election was run. Now, even though there were a number of Republicans who did not buy into Trump's arguments that the election was stolen, although 147 members of Congress did vote to object to Arizona and Pennsylvania's results on no basis whatsoever, no credible basis.

It's hard to see how you get bipartisan agreement on election administration changes to bolster trust in the process, when the election process itself has become so politicized. And so Democrats are trying to ram through H.R. 1, which is this humongous election reform bill that contains a progressive's wish list of changes, and yet the only way it's going to pass is if Democrats blow up the filibuster in the Senate, and that's a very uncertain thing to happen. But what you don't hear people talking about is are there things where you could peel off 10 moderate Republicans in the Senate, where you could actually get an agreement?

Ned Foley, the ultimate reasonable man, makes these kinds of claims, but it's not like they're getting traction. Look at Portman and Blunt. Even if they're not running again, they're still so afraid of the Trumpian base that they're not willing to make a reasonable compromise. And so you've got Democrats going for too much and Republicans not willing to meet them halfway, so at least on the national level I don't see how this works, and on the state level it's even worse.

In states with single-party control, think of California or think of Georgia, then the party in control doesn't look for compromise. They look for what they can maximum get through, and both politically get through and get upheld by the courts, and so it just doesn't seem to me to be the moment where bipartisanship is going to be what's going to save the day.

EDWARD FOLEY: Well, thank you, Rick. I take it as a compliment to be reasonable, so I really appreciate that, and I share your concern that trying to find some compromise might be naïve or illusive, but I wouldn't want to give up quite yet. I think we're still early in this year, and I also think the threat of potentially blowing the filibuster, as [Sen. Joe] Manchin is starting to signal a little bit, might create some room for some deal. I don't know exactly what it is.

I agree with you, H.R. 1 isn't going anywhere without getting rid of the filibuster, and that seems unlikely. It might not even get Manchin's vote, but I tried, in another column today put forward a principle which I think would be very useful to stop states like Georgia and other states from really decimating voting rights without doing all of H.R. 1. And I'd like at least to see whether or not there might be 10 Republican votes for something like that, given the threat of something much worse from their perspective if the filibuster got eliminated.

I think federalism needs to be taken seriously. The Republicans are entitled to say one size doesn't fit all, but on the other hand I don't think Congress should completely abdicate its role. Bipartisanship in this moment doesn't have to be equal. The Democrats only need 10 Republicans. They don't need all 50 Republicans. They've got the House, they've got Biden. H.R. 1 is 800 pages. There ought to be some way to peel off just some part of it and get to "yes" on something. It'd be tragic if nothing is accomplished at the federal level.

CHARLES STEWART III: I don't think the Democrats have anything even close to 50 votes in the Senate for H.R. 1 actually, so I think that the filibuster is a red herring, and is a cover for their inability to get to 50 votes. For that reason the states are going to be really the place to look. On the one hand, I share some of Rick's concerns, that states with trifectas [unified party control] can be set up to send the election law reeling. On the other hand, there are the laws of physics and there are the laws of politics, and as we observe these electoral processes grind through in states like Georgia.

Certainly, for instance, Georgia has two different parallel paths that are going to have to be reconciled. It's going to take months to reconcile the House and the Senate. In the process, there's going to be local election officials, there's going to be the Georgia election consultants who are going to remind members of the legislature that they're going to be cutting off their noses in many cases, to spite their face. There's going to actually be some innovations perhaps, to bring to the fore in say securing mail voting. So I think, to echo what Ned was saying, it's too early to give up on the states, although I am worried about it. But I do think it's going to be the states where it happens.

Given that, I think the one thing that I would push back the hardest to what the Republican list is, is the empower the states. Not because I don't think we should empower the states, but rather there is a role in the federal government in financing elections. They regularly pay nothing for the administration of elections, and regularly pay nothing, except a pittance when there's a pandemic, for innovation. States could be helped by a regular flow of money from Washington to help them figure these things out.

I hope that the headline to empower the states doesn't mean that the federal government walks away from helping finance elections, from research,

from best practices. There's a lot of things the federal government can do, even if you're a state-centered federalist.

DANIEL TOKAJI: I'd like to take up this theme that Charles and Ned are developing by telling a hopeful story about bipartisanship, and let me tell you, in the world of election law and election administration, these are very few and hard to come by these days. It's a story from Ned's state and my former state of Ohio that picks up on a theme that Guy mentioned earlier, the theme of non-partisan or bipartisan election administration, and it has to do with redistricting and gerrymandering.

For years, people including myself had been advocating in Ohio, as in so many other states, for some sort of redistricting reform. We've had gerrymanders drawn decades ago by Democrats, more recently by Republicans. Terrible, indefensible gerrymanders, where, for example, for Ohio's congressional districts in a pretty purple state (or at least it was back in 2010), 12 of the 16 districts were drawn as Republican districts, and remained that way throughout the last decade.

I was part of a group that included Dick Gunther of the Ohio State Political Science Department, and we literally sat down in a room with good government groups like the League of Women Voters and Common Cause, and came up with a proposal that we actually got put on the ballot in 2012 to reform the redistricting process. And we got creamed, but you know what happened?

Eventually, Republicans and Democrats in the state legislature were, almost miraculously, able to reach agreement on redistricting reforms. First, for the state legislature and later for Congress. The reform they came up with isn't perfect, but it's a lot better than what we had. It includes some better criteria for how districts are going to be drawn, as well as some provisions that would lead to greater, if not perfect bipartisanship in process for drawing district lines. We'll see how it plays out in the cycle.

Part of what was going on here is that at least some Republicans were really afraid of their base, of the Tea Party or Trump wing of the party. I'm not sure how much this is going to help at the end of the day, but there are some hopeful stories out there—although quite rare—of bipartisanship, including Ohio's redistricting process and the changes that were made towards the end of the last decade that will be in effect in this one.

GUY-URIEL CHARLES: I'm going to try to tell a less hopeful story, but I'm also curious to hear what the political scientists in this group have to say about it, so here's what I worry about. I worry about the nationalization of election disputes and how they've become partisan. So the federalism assumption assumes not just a division of authority between the feds and the states, but also that there's going to be some variation among the states, and that those are going to be driven by a diverse set of concerns and considerations. But it seems that the national party considerations are the ones that are driving the dispute in this area. If that's true, then the types of reforms or suggestions that we're getting from the states are simply a function of partisan identity.

That may be wrong, but if that's true then that makes the states less useful as sites of democratic deliberation and experimentation, because the extent to which the voter fraud, voter access serve as shortcuts for understanding what's happening at the state level. That's the worry that I have about the hopeful story about the states, though I do share the point that both Ned and Charles made with respect to the fact that the Democrats don't have the national power.

They don't have the votes in Congress, for example, to even think through some of the reforms in H.R. 1, and even some of the milder ones, even if they peeled it off. So in some senses we're at a stalemate, and of course that then means that you have to work with what you have, so if you have to work with the states, you have to work with the states.

Another way to think about it is maybe the best thing to do is to use Congress's spending power as a way of incentivizing the states to respond, but the question is to what extent is partisanship going to push back? And we saw in this in the context of the ACA [Affordable Care Act] with partisanship pushback, we saw in the COVID bill that the Senate recently passed.

There was no Republican support, so bipartisan-ship, even a mild version that uses the spending power, more carrots and less stick approach, that's going to be extremely hard and it's not clear to me that at the state level, that we're going to see anything other than the nationalization of these types of issues at the state level, so that's a less hopeful story. Maybe even hopeless story, but that's what I worry about.

DAVID CANON: On the question of the nationalization and national approach, I think Charles is probably right, that more of the action is likely to be at the state level, and Guy, I think you're also very right to point out the potential negative impact of nationalization on state-level action, but let me back up one step and go back to one of Ned's earlier proposals, and to not give up on Congress quite yet, so a couple points here I'd like to make.

One both Charles and Guy mentioned, which is about financing elections. That Congress can use the power of the purse to help do good things, like getting rid of the DRE [direct-recording electronic] machines. The paper trail in Georgia was a huge thing, and there were four or five other states that did that as well in 2020. If Congress can provide some money for that, that can really help. Another possibility would be something like the proposal that Ned had in another *Washington Post* editorial a few weeks ago, where he proposed this idea of a trade of a national voter ID law for redistricting reform law at the national level (Foley 2021a).

That might be the kind of thing that could actually happen. Congress has gotten bad about making these grand compromises, but they still can do it every now and then, and so it seems to me that may be a possibility. We had a question from one of the people in our audience, an e-mail earlier today that asked about reforming the Electoral Count Act of 1887. Would that be something that Congress could do, make the language clearer and to make it less subject to manipulation? Could we have some bipartisan support for that?

It would be more of a technical fix to something that really could be a disaster waiting to happen in the future, so is there still some room at the congressional level either for Ned's grand compromise on voter ID for redistricting, or a role for power of the purse, or something smaller scale like Electoral Count Act? Are there things that still could be done there, or do we really need to totally give up on Congress and just start looking to the states?

EDWARD FOLEY: I think we should hear from Lisa, because she mentioned the Electoral Count Act before, and she should get in here I think.

LISA MANHEIM: Thanks Ned. I'm definitely going to defer to you on the Electoral Count Act. But you asked, should we give up on Congress? I don't think it's appropriate to give up on anybody right now.

One way of understanding what's happening is that there are a number of elected officials who are benefiting from tapping into a very anti-democratic energy, and the question is: do you treat the symptom or you treat the disease? The added trouble, essentially, is that the symptoms are preventing you from treating the disease. So what do you do?

That's one of the reasons why it feels like we're stuck here. When it comes to treating the disease, there were a lot of resources, a lot of time, a lot of energy put into a very informal but concerted effort by a lot of different people in society to try to pull the 2020 elections over the finish line.

This included people working in the election context, people working in the media context, people working in business, social media, academia, lawyers, etc. And the courts. All were working together to try to bolster the rule of law. That's an example for us to look to.

I love your question because it'd be great if there were a silver bullet. It'd be great if we could be election czars. But that's not the world we're in, so it's going to be messy and it's going to require everybody to be doing something. So no, I don't think we should give up on Congress yet. We have to look to everything.

DAVID CANON: Other thoughts on the potential role for Congress? Does Ned or someone want to address the Electoral Count Act?

EDWARD FOLEY: My sense is that there is going to be an effort to try to amend the Electoral Count Act, and hopefully it'll be bipartisan. I think, again, we have to be cautiously optimistic and overly optimistic. It's a very tough statute, because it took forever for Congress to adopt it in the first place, and there's been an effort to try to amend it for years and years.

Now, the awfulness of what happened on January 6th you would think would spur an incentive to say never again, we've got to do something different, but wanting to get rid of something is not the same thing as knowing what you're going to replace it with. So I think people will be hard at work at it, but don't bet your house on it quite yet.

RICHARD HASEN: I would add that the window seems to be very, very narrow, because if you are the Republicans and you think that you might retake the majority in the Senate or the House or both

in 2022, and you're talking about what the rules are going to be for the Electoral Count Act, you might want to wait until afterwards, when you'd have a stronger hand, even if you thought that there was a room for compromise.

You might get a better deal with a Democratic president if you have a Republican Congress, so I don't know that this is the window of time where this happens. I would think that McConnell and the McConnell wing would try to fix things, so that we don't end up with the situation where you have the ease of these objections, because it's a blueprint for the future in terms of messing things up, but I don't know that politically the stars are lined up for that kind of reform right now on a bipartisan basis.

Of course, if the Electoral Count Act is amended by pushing through on a partisan basis, that kind of change, without buy-in from the other party, then you could have a situation where Congress just doesn't follow it, and says that it's unconstitutional, and therefore it's got to be Congress's unfettered power to decide what to do in the context of counting the votes. So it could backfire if it's not done on a bipartisan basis.

DAVID CANON: That's a really good point. I want to go back now to a theme that both Rick and Lisa mentioned in their introductory comments, which goes to the disinformation and the need to, as Lisa just put it, deal with the disease and not the symptoms. I think we would all agree that was at the core of what went wrong in 2020: the Big Lie and all the disinformation.

I like Rick's way of framing it, of trying to strengthen the intermediaries. Lisa talked about Section 230, private versus public law, libel law now being raised to try to clamp down on the Big Lie, but what are some concrete things there? Because that really is at the core of the disease here, is the misinformation, the disinformation. So what can be done to try to help get that on the right track?

LISA MANHEIM: I'm increasingly becoming convinced that reforming Section 230 makes a lot of sense. Just 10 seconds of background, generally speaking: where Section 230 does not apply, when you have some sort of institution that is circulating information, that institution needs to make sure to not circulate information that it knows to be false. The reason is because it's potentially going to be subject to liability going forward. So it's not a viable

business model to knowingly circulate false information, and that's one of the reasons that we have in the past had a vibrant press that's added to fact-based discourse.

But Section 230 ensures that social media companies, among others, don't have to worry about the same sort of liability. And so not only is this disinformation being circulated so widely in this liability-free world, but it's also, in a sense, undercutting more traditional media companies. Because the two business models are so different, it's an unfair advantage in that regard.

I think that the trick is figuring out how to reform Section 230, and it's something that Congress is talking about right now. So I know you said: should we give up on Congress? Again, no. Right now, they're talking about how to reform 230, and I think that makes a lot of sense.

DANIEL TOKAJI: I want to address the disinformation problem from a different perspective, and that is from the perspective of First Amendment doctrine. Let me say at the outset, what I'm about to suggest isn't something that is likely to happen in the near future, because the Supreme Court isn't nearly ready to go there.

Over the last few years I've been thinking a lot about the disjunction that exists between the theory behind freedom of speech and the reality of our contemporary political debate. The theory behind freedom of speech is letting 1,000 flowers bloom—the government getting out of the regulation of speech. Will that deregulation advance truth or lead to a well-functioning democracy? Virtually nobody would claim that's what we have. First Amendment doctrine is not giving us what First Amendment theory imagines—and I say this as someone who's deeply committed, as a former ACLU [American Civil Liberties Union] lawyer, to that vision.

Those who share that vision have to acknowledge that existing doctrine is falling short of the First Amendment's noble ideals. This is a really long-term project, but we have to think of some changes to First Amendment doctrine. One possibility, which some scholars have written about, is to reconsider the presumption against discrimination based on the content, and in particular the subject matter of speech. This has mutated into an almost absolute rule in the Supreme Court. We've gotten away from this idea that there are some categories of low value speech that can permissibly be regulated, and that there are sometimes justifications for restricting

speech based on content. The Supreme Court has been very wary about allowing or expanding the justifications for such regulation.

We should consider whether the pervasive falsehoods that exist in our political system today sometimes justify restrictions on speech. Again, I think these changes are going to have to await a different Supreme Court than the one we have now, but as scholars I do think we need to be thinking about and advocating for long-term changes in our free speech doctrine that might ultimately give us a better democracy.

GUY-URIEL CHARLES: If I can slightly dissent, as I worry about messing with the free speech doctrine, in some senses that's the core, and so before we go there we want to be sure that it's appropriate. I do want to go back to a point that Lisa, Rick, and Charles have made, in terms of reverse engineering why certain sets of institutions have really taken the issue of democracy enhancing very seriously, and the Big Lie very seriously. So why did Republican secretaries of state say, especially in Georgia for example, say, "Look, I'm not bending here?" Why were judges, federal judges appointed by presidents from both parties, say, "I'm not bending here?" Why is it that the media has now started to take these questions so much more seriously? Why do the social media companies finally decide that, hey, they were going to try to do something about misinformation and disinformation?

The question for me is, if we can begin to understand those motivations, and think about how we can strengthen those and how we can buttress those, then that might enable us to have our free speech framework without having to get the courts involved. Once we begin to allow the court to make its jurisprudence in this area, if it's wrong it's going to be damaging for a very long time, so I was very interested in thinking about those sets of questions as raised by my three colleagues, and try to see if we can reverse engineer what went right there, and if we can, then maybe we can buttress and replicate.

EDWARD FOLEY: As much as I agree with that, going back to one of Rick's point about intermediaries and how to get more trust, because as much as trustworthiness is a goal, if the 70 percent of Republicans refuse to trust the system, even if it's trustworthy, I think we're in trouble. So what I've been thinking about tentatively is, picking one of Lisa's ideas, can we use the tort system, not criminal

law, to force the perpetrators of the Big Lie to issue retractions? Because, if they had to utter statements like, "We were deceiving you all along," under penalty of huge punitive damages, what would that look like?

Frankly, my own view, Mike Pence has gotten more of a pass than he deserves. I didn't want him to be hurt on January 6th, and he came close to being captured. On the other hand, next to Trump, he was as responsible for what happened. I think we have to acknowledge it, as anybody else, because going up to January 4th he was in Georgia talking about how on the 6th all these claims of fraud would have their day in Congress.

If Pence had said what McConnell had said on December 15th, it's over. "We lost. I don't like to lose. Nobody likes to lose, but I lost, and so did my running mate." The Big Lie could not have metastasized, so people are suing Trump and Giuliani in tort. Does Pence deserve to be a defendant? I don't know that I know the answer to that, but I think we should be asking that question.

I was so disappointed with Pence's op-ed the other day (Pence 2021). His first public statement and he's talking about a version of the Big Lie. Not quite as Trumpian as Trump himself, but it's not accurate as to what happened. He should be forced to own up to the truth, and Mike Pence never has, and he's gotten more of a free ride after January 6th than he deserves, and I think the tort system could be brought to bear on that. At least that's a question mark in my mind.

RICHARD HASEN: I think I'm the only torts professor on this panel. So let me express some skepticism that the tort system can solve this problem.

Most of the lies about the election, number one, do not injure the reputation of anyone, meaning that of any individual. Slander against the system, so there's no plaintiff. It's only because the voting machine manufacturers were singled out that they can sue.

This is a unique opportunity, that lots of the lies are not actionable in defamation, and then the other point is lots of the lies are not lies that could be the basis, even for false campaign speech laws, which is something I'm going to advocate for in my upcoming book, because lots of the statements are statements that are statements of opinion or not falsifiable.

When you say, "I think that the system is rigged and I think they're going to cheat," these

are statements that can do a lot to undermine the trust in the election system, but I don't think they create a tort cause of action. So I'm skeptical that this method is going to work as a means of making change.

It can help. It certainly can help and it's helping in this case, but I think next time people like Giuliani will just be a little less direct in their language and they'll avoid the possibility of defamation claims.

EDWARD FOLEY: Well, I'm a little bit nervous about making this point, since I definitely am not a tort professor, so let me do this in the form of a question, because I agree, defamation isn't the only way to go and suits by the voting manufacturers isn't good enough, but the Georgia officials were subjected to death threats as a result of the Big Lie. I'm thinking of Raffensperger, Gabriel Sterling, and Chris Krebs, who served as director of the Cybersecurity and Infrastructure Security Agency in the Department of Homeland Security; he was subjected to death threats, too. Jocelyn Benson, her kids were harassed, as I understand it, by the Big Lie. I think there are lots of plaintiffs potentially, and lots of different tort theories. I think, whether or not you can put Trump in prison for the incitement, that's a criminal question, but I think there's a tort.

The personal injury of all the police officers on January 6th. We're starting to see some of that with the Eric Swalwell suit and the other member of Congress suit. I don't think we've seen the end of the possible tort actions to try to address the Big Lie, but maybe I'm wrong.

RICHARD HASEN: Color me skeptical with proximate cause and duty requirements to bring such claims. It doesn't seem to me that aspect of the legal system is going to be a major limitation. If an injured police officer tried to sue Trump in tort for what happened on January 6th, especially with Trump being president, raising issues of immunity, raising the First Amendment, I just find it's very unlikely that that's going to get anywhere.

DAVID CANON: I have a question from one of our audience members, Morgan Kousser. Many of you know Morgan. He writes, "What efforts are you aware of that have been successful in elevating voting as an obligation, as well as a right? What changes would you need to say to undertake to improve such a sense of civic obligation or duty to vote?"

This is a totally different direction. We haven't thought about it from the perspective of the voter,

and trying to install more of a sense of duty to vote, and so of course you have the compulsory voting in Australia, other countries. I don't think that's ever in the cards for the United States, but are there things that could be done more from the voter's perspective in terms of civic duty obligation to vote?

CHARLES STEWART III: Well, actually, I'm a compulsory-vote skeptic myself, but there is an interesting effort being led by Miles Rapoport and some co-conspirators. The Ash Center at Harvard and Brookings have put together a report that's beginning to be circulated about national service voting. They recognize this is a big lift. It's going to be years. There may be, it may not be a hit with the nation, certainly not states, but maybe the people in the "Republic of Tacoma Park" will pass it, and Cambridge, Massachusetts. There may be a path to something like that in the long haul, so I wouldn't totally write that off. This actually may be an area in which the laboratories of democracy might be able to work. It seems that in some states you could do it now in a handful of jurisdictions, so that's something.

The other thing to think about is the role of social media. We know that some people will succumb to social pressure to vote. We've seen examples of that through social media, encouraging people to vote. Now, people are getting "I Voted" stickers on Facebook, and the research suggests it actually works. So, as social media is feeling under the gun in terms of what they've done to undermine democracy, it seems to me that there's a path for their role, and maybe the role of others, who can plump for voting. But, I think it's going to be a long haul whatever people work on.

DAVID CANON: I think we are out of time, so that is a good positive note to end on: to think about getting more people to vote, and potentially making that more of a civic obligation.

Thank you so much for your participation. It really was an excellent session.

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