

ELECTION LAW ISSUES IN THE PAST, PRESENT, AND POSTERITY: ELECTION GAMESMANSHIP

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JESSICA KNOUSE:

Hi everyone, welcome. I am Professor Knouse. This final panel of the day focuses on election gamesmanship, which refers to the games played by parties and media during elections, including gerrymandering, misinformation or disinformation, voter suppression, and other phenomena. These are all interlinked ways of undermining the legitimacy of our elections. They impact historically marginalized communities, especially people of color. They impact election officials, whose jobs have become more dangerous, and they impact our ability to enjoy a functioning democracy. I think this panel is very closely related to the previous panel, and probably to both of the previous panels. I'm looking forward

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5. Law Review Symposium Audio Transcript by Rev.com.

to this continuation of the conversation. I will introduce all three of our panelists and then they will each speak, and we'll save hopefully a good amount of time at the end of the panel for Q&A.

First we have Professor Bertrall Ross from the University of Virginia School of Law. Professor Ross's research is driven by a concern about democratic responsiveness and accountability as well as the inclusion of marginalized communities and administrative and political processes. His past scholarship has been published in several books and journals, including the *Columbia Law Review*, *New York University Law Review*, and the *University of Chicago Law Review*. Two of his articles were selected by the Yale-Harvard-Stanford Junior Faculty Forum. Professor Ross received graduate degrees from the London School of Economics and Princeton University's School of Public and International Affairs, as well as his J.D. from Yale.

Next, we have Professor Atiba Ellis of Marquette University Law School. Professor Ellis is a frequent speaker at academic conferences, university and law school lectures, and community events about voting rights law, how race and gender affect the law of politics, diversity issues, and other matters related to the law of politics. His research focuses on voting rights law with specific attention to how varying conceptions of the right to vote exclude voters on the margins.

And finally, we have Professor Luis Fuentes-Rohwer of the Indiana University Maurer School of Law. Professor Fuentes-Rohwer's scholarship focuses on the intersection of race and democratic theory as reflected in the law of democracy in general and the Voting Rights Act in particular. He received a J.D. and a Ph.D. from the University of Michigan and an L.L.M. from Georgetown. So, with that, I will turn it over to Professor Ross.

BERTRALL ROSS:

Thank you for the introduction.

Now, it's always a danger in starting a talk immediately after a lunch, when the belly is full and the eyes are tired, with the National Voter Registration Act,⁶ because if there's anything that will send you to sleep it's any discussion of the National Voter Registration Act. So, I promise not to stick to it too long, but I just want to describe a feature of it as a lead-in to what I describe as passive voter suppression in terms of understanding election gamesmanship.

So, the National Voter Registration Act required that voter jurisdictions keep data on voter history, voter history data, which is data on whether you voted in past elections. Now, this data was important because it was required to satisfy the mandate that states maintain their voter rolls. In order to properly maintain your voter rolls, you have to know whether that individual voted in past elections, and if they hadn't voted in past elections, then the state or local jurisdiction can send you a mailer to ask whether you lived at that address or not still. And if they didn't receive the mailer back, then you would be removed from the rolls. And the idea is to try to make sure that the rolls are clean and people aren't on the rolls that no longer lived in the place or were no longer alive. Now, this voter history data has come to do much more.

6. National Voter Registration Act of 1993 § 9, 52 U.S.C. § 20508(b)(1) (2023).

Now, there's no real obvious reasons why political parties or candidates would need voter history data, at least from the perspective of election administration. Nonetheless, after the Help America Vote Act⁷ in 2002, which led states to centralize their collection of voter history data, they started to offer this voter history data to political parties and candidates for sale. Sometimes they would give it to them for free.

Now, at the same time as this voter history data became available, there were some developments in our understanding of campaign and understanding of how to mobilize people to turn out to vote and how to persuade them to vote for you as a candidate. Now, from the advent of television in the 1950s forward, the focus of campaigns was on television advertisement. Television advertisement explaining why you should vote for X candidate and why you shouldn't vote for Y candidate.

But over time, it was found through studies that, well, these television advertisements aren't all that effective at doing what they were designed to do. They do not mobilize people to vote very well, and they don't persuade people really at all. The only thing that they really seem to do is maybe depress the vote because the negative advertising turns people off and people decide not to vote.

So, the AFL-CIO, the labor union in the 1990s, who had been devoting so much money to campaigns, who are spending it on these television advertisements that didn't work, decided to do a little study of their own. And in their study, they turned to whether canvassing might be used as a means to turn out voters. Now, canvassing had been used in the past. Before the advent of television. This was a primary way in which candidates and campaigns reached out and connected to voters.

But, then it kind of faded with the advent of television and this focus on television advertisements. But then unions thought, "Well, maybe there might be an opportunity to check whether canvassing is effective or not," since television advertisements certainly are not. So, what they did was engaged in a bit of an experiment. And in this experiment, they had a treatment group, which was a group of voters in a jurisdiction that they reached out to and they reached out to these voters to share information about the election. And then there's another group of voters that they did not reach out to, to share information about the election. And what they found was quite stunning. Those voters that they did reach out to, which was a random distribution of voters, were eight to ten percent more likely to vote than those that they did not reach out to. Political scientists followed up this study and did it in a more systematic and widespread way, and they found the same effect.

And so, campaigns are thinking, 'Wow! Wait a minute, television advertisements don't work, but canvassing might. Let's go back to the old boots-on-the-ground, boots-on-the-ground, hands-to-the-door method of campaigning.' And so, we saw this pickup in the 2004 election, but then it really took off with the Obama 2008 campaign. And if we remember that campaign, Barack Obama, flush with campaign money, engaged in this extensive amount of voter outreach, outreach to individuals who had not participated in prior elections, outreach to communities that had never had anybody knock on their door. And we saw a

7. Help America Vote Act of 2002 § 303, 52 U.S.C. § 21083 (2023).

turnout effect from those efforts. And that's a great story and that's a story that started to spread to the Republican Party. The Republican Party with John McCain tried to do this as well, but he wasn't as flush with money as Barack Obama was. So, he wasn't able to do it as effectively.

But in the 2012 election, we saw Mitt Romney with boots on the ground, and we saw Barack Obama with boots on the ground. But something changed. And what changed was that they decided that we need to do this more efficiently. Sure, we're flush with money, but there's still a budget constraint. There's only so much money that we have, and we can't reach out to everyone. So, let's try to figure out how to most efficiently reach out to people to ensure the greatest turnout effect from our canvassing efforts.

And so, what did they do? They started to collect information about voters. Now, you know about the marketing information that they collect from first marketing companies and then social media about your preferences and desires that could give a sense of whether you're likely to vote for a candidate. And that has been discussed quite broadly and frequently, but that's not the most important piece of information that they collected.

The most important piece of information that they collected was from the state itself, and that was voter history data. So, what does voter history data tell them? Well, it tells them how likely that person is to vote in an election, full stop. What studies have shown is that a person who has voted in the past is likely to vote in the future, but if they haven't voted in the past, they're less likely to vote in the future.

And so, this gamesmanship started to emerge with respect to canvassing. And that involved a process by which campaigns constructed an algorithm that included all this information. Most prominent in the algorithm was voter history data, and they made their decisions about who to contact based on what this algorithm told them. And so, who did that ultimately leave out? That ultimately left out non-voters who tended to be low income.

What we know from data and studies is that those who are lower income are less likely to vote. Why are they less likely to vote? Well, there are resource constraints that they face, but there are also information constraints that they face that are greater than those from other classes. They have less information or ability to acquire information because of lower education (often about voting in elections), where to vote, how to vote, when to vote, or even more importantly (in my mind), the issues or the candidates, what the candidates represent, what their views are, and how that would impact my utility—how they would impact my well-being.

And to the extent that voters do not have that information, they are highly unlikely to vote. And so, what you see with respect to this new micro-targeting form of canvassing is an impact, a particularly detrimental impact on those marginalized communities who are infrequent voters.

So, what are the costs of that? Well, you could say the cost in kind of instrumental terms or describe the cost in instrumental terms in the sense that those voters who do not vote are not represented in the political process. And that could be sort of a classic "it's your fault" story that we tell about low income and poverty. "If you want to be represented, you should vote. And the fact that you're not voting

means you're not going to be represented. That's your own fault." And that might not lead or inspire people to intervene with some sort of policy proposals that would incentivize campaigns to reach out more broadly to more people.

But there's another impact that implicates us all, that should lead us to care about this even beyond whether you care about the instrumental representation of these groups. And that goes to political stability, democratic stability. When you have a marginalized community that's out there that doesn't participate, that doesn't engage in the political process, there may be times, and maybe most of the time, where they're quiescent, where they're just kind of off to the side. They don't care, they don't engage, they're left alone, you leave them alone.

But there might be a time in which they awaken, and they may awaken in response to anti-democratic leaders, to authoritarian leaders who say, "I alone can fix your problems. That the system in the democracy that we live in has hurt you, works against you, doesn't care about you." And there are plenty of defects in our democracy that they could point to that are absolutely right, but it raises a threat to the stability of our democratic system. And so, when we think about campaigns and their role in the marginalization of communities with respect to voting, we should see it as imposing broader structural questions about our democracy and its ongoing stability.

Now, what can be done? Well, this is something I've thought about quite a bit and I'm not sure what the answer is. Certainly, one thing you could say is like, "Well, you can't have this voter history data. We're going to take this away from you. There's no reason why the state should distribute this." But then the problem is that they've relied on this voter history data for so long that they'll ultimately just come up with proxies for what that voter history data used to say. And those proxies might lead them to believe that persons with low income are not likely to vote at all, so campaigns won't reach out to any of them, which is actually worse than the current state of things right now where they'll reach out to some of them. So, eliminating voter history today doesn't seem to be the answer. My thought is well, how do you incentivize campaigns to contact these low-income individuals? And I think that that's where we should be focusing.

Now, I'll just kind of give you one sort of proposal that I've been working through and maybe it could be part of a broad discussion that we have later. And that proposal has the example and the model, the Seattle voucher system that's in place right now.

So, in Seattle, what the city does is it provides every person or every resident of Seattle, every voter eligible resident in Seattle, a hundred-dollar voucher that they can contribute to a campaign. The idea is to kind of even out the playing field with respect to contributions; rather than having the wealthy people dominate contributions, you're giving everybody the opportunity to contribute and, to the extent that contribution provides you with access or voice, then that has an equalizing effect.

But it also could have another effect. It could have an outreach effect to the extent that a candidate or campaign engages or canvases people and knows that they can not only earn their vote, but also money potentially, then perhaps that would incentivize those campaigns to reach out to those voters. And there's some evidence of that effect going on in Seattle, but it has not really changed the mix of

individuals that they've tried to reach out to. To the extent that everyone has these vouchers, they just engage in the same calculus that they make with respect to who to contact. So, you have to make a revision into that system. And such a revision would be means testing that system, providing vouchers to those who are less likely or haven't voted in past elections, and to provide campaigns with the incentives to engage those communities through the use of vouchers.

So, those are kind of one idea. There's other ideas that could be put forth, but I'll conclude by noting that this form of election gamesmanship on the ground that involves kind of a use of algorithms to engage in biased canvassing away from those who are less likely or have been less likely in the past to participate in elections is a threat to our democratic system as a whole. And I think we need to pay attention to it as much as we pay attention to other tangible barriers to voting that we've talked about over the course of today. Thank you.

ATIBA ELLIS:

Thank you.

So, the thoughts I want to share with you today are about gamesmanship and the meme of voter fraud. The meme of voter fraud is something that I have been writing about for a number of years now, first in an article in 2014 and all the way to a couple of essays that I wrote in light of the leading up to, and then immediately after, the 2020 election. And so, what I want to do in this talk is to talk to you about what I mean by the meme of voter fraud and how that fits into a notion of gamesmanship and what consequences that will have for us going forward. So, with a quick search, I found one definition of gamesmanship as the art of winning contests by using various ploys and tactics to gain an advantage.

And so, this idea, as we heard in the prior talk from Professor Ross in terms of microtargeting, that's one tactic. I want to talk about the voter fraud myth as another tactic to gain advantages both in terms of the politics of politics as well as, and given our focus here, the politics of law around the right to vote.

So, in thinking about the meme of voter fraud, I have often defined it as sort of the unsupported and ungrounded belief that there is a crisis of fraudulent behavior amongst voters in their relationship with the election system. And that this is divorced from evidence, which has shown by a number of political scientists and law professors. Lorraine McKnight, Rick Hasen, and others have developed the evidence of how voter interference with elections—especially in terms of going to the polls, voting, exercising that right through and using chicanery like voter impersonation where I say, "I'm Bertrall Ross," and then cast his vote—that that is so highly unlikely, it's virtually nonexistent.

Now, certainly there is a difference between that and absentee ballot fraud, which is more documented and more risky given the appreciable risks of ballots being cast out of the control of the administration of elections. But nonetheless, the problem with absentee ballot fraud is that sometimes the threat of fraud gets exaggerated. And this sort of exaggeration or mythical talking about fraud is one set of problems. And in my prior work, I've talked about how these kinds of problems get over-emphasized as a basis for passing laws like voter identification laws and other sort of hyper regulation of the political process in order to at least send the perception that we're making it harder for certain populations to vote.

And as Professor Ross pointed out, the poorer you are, the less likely you are to vote. And moreover, there are studies that show that the more barriers you have put in front of you, if you are in that situation, it is even less likely for you to vote, especially depending on your perception of those barriers.

And so, in this sense, talking about the meme of voter fraud is talking about creating that perception both for purposes of arguably disenfranchising people by giving them a reason to believe they cannot vote. And by creating a belief around the threat, the need for security that is clear and dangerous, that you need to make political choices and endorse legal choices to protect against this threat.

All of that encapsulates how I've thought about this prior to 2020. 2020 took this idea and escalated it to a fever pitch. And one of the replicators of this meme of voter fraud is the former President of the United States, Donald J. Trump. And in my prior work, I have talked about how he has done this sort of escalation from his very first campaign where he emphasized all sorts of language around threats, some of which about how, for example, the fact that he lost the popular vote by three million votes must have been because of fraudulent behavior. That was one big moment. But you can look at examples and examples that have been collected, but if we focus on 2020 in particular, you can see Trump as this sort of replicator of the meme of voter fraud as one of repeating again and again without evidence and based on assumptions that things like using mail-in voting are inherently fraudulent, full stop, notwithstanding the studies that are out there, about how mail-in voting is effective and in states where that is legal, fraud is nonetheless nearly nonexistent.

And that is one thing in and of itself in terms of the debate about policy. But we saw something very unusual happen in the 2020 election because, remember, that was an election that happened in the height of the pandemic, in the COVID pandemic. And it was an election where the efforts by state administrators to try to protect voters from the pandemic meant that things like drop boxes were used in order to allow social distancing while engaging in the act of voting. And certainly, this rhetoric about these sorts of devices are just per se fraudulent because they are not the go-to, regular ritual of voting, go to the voting place and stand in the poll booth and vote, and this took more and more currency.

Of course, the problem with that is even though they might have motivated voters to vote in the name of election security and to agree with Trump or what have you, the result of the election nonetheless showed that the majority of the people in the United States wanted Joe Biden and not Donald Trump. But the idea that this framing of elections is inherently fraudulent because they contained these types of devices stuck.

Now, I didn't talk much about them, what the meaning of a meme is, but my argument in my scholarship about memes is that if there is any idea that we can repeat, that we can share—not just cute cat pictures on the Internet—but any idea that gets sticky and it sticks with us and we share it and through the dent of repetition, we tend to embrace it as a belief notwithstanding the truth or falsity of the idea.

And that is the process that we have seen around this idea of voter fraud. And that's the process that we saw through the vehicle of the meme of voter fraud being amplified. Through the election litigation that we saw after the November 2020

election. We saw sixty-four lawsuits, a number of which were premised in one way or another around this meme of voter fraud.

I currently live in Wisconsin and notably (and this is the subject of a paper so I won't go into detail about it here) one of the Supreme Court Justices in response to the advocate for the Trump campaign arguing that this is a fraudulent election and sort of doing, almost literally banging his hand on the gavel about the voter fraud argument, the Supreme Court Justice at another point in that argument basically said, "This lawsuit smacks of racism," direct quote. You can see the hearing on YouTube, but there is arguably, for example, this meme of voter fraud replicating racist ideas in terms of the perception of how minority votes get treated.⁸

Now, that's one problem which gets to the point about the integrity of the process in and of itself. Another problem that I think is worth stressing is the problem of the per se lack of integrity of those running the system. If you repeat a meme that the system itself is defunct because it has these practices or as we ultimately saw in the wake of the 2020 election, the system is fraudulent because my guy didn't win, then you end up in this situation where all the people who are running the system get treated as villains in this process. But as we know, the data shows that the 2020 election had no problem of overt fraud. Those sixty-four lawsuits brought to the courts as independent entities, state and federal courts found no credible accusation of fraud. And indeed, the purveyors of this meme of voter fraud are now being sued for libel and they may well win. I hope they win.

But the point, though, is, in the wake of this, those who believe in this meme of voter fraud then engage in violence. And I do literally mean violence in terms of attacks on election administrators, in terms of disparaging the process. And I see our friend in the audience who is an election administrator in Michigan, so you have lived this.

But this also poses threats to the system in the name of a kind of gamesmanship designed to bring together groups of common belief and to sort of express and signal a type of power. And then, there is the problem of disbelief continuing to carry purchase within the 2022 election and beyond. There's been a lot of reporting of late. I pulled an article just before I came up here about election deniers and how there are somewhere in the neighborhood of a couple of hundred candidates who in one way or another keep espousing this myth that the 2020 election was fraudulent, and they are running for office.⁹ Most concerning, some of these are running for secretary of state and other chief election administrator positions.

So, this raises this question, how do we protect an election administration system from people who do not believe in the validity of the election process? This concern should give us pause about the future of elections.

8. Justice Karofsky on *Why She Told Trump's Lawyer Lawsuit 'Smacks of Racism'*, YOUTUBE, https://www.youtube.com/watch?v=hu5abGV8N_0 (last visited Mar. 23, 2023).

9. Elaine Kamarck & Norman Eisen, *Democracy on the Ballot—How Many Election Deniers are on the Ballot in November and What is Their Likelihood of Success?*, BROOKINGS: FIXGOV (Oct. 7, 2022), <https://www.brookings.edu/blog/fixgov/2022/10/07/democracy-on-the-ballot-how-many-election-deniers-are-on-the-ballot-in-november-and-what-is-their-likelihood-of-success/>.

So, in conclusion, I'll just say that in some ways this is a legal problem in as much as scholars, such as Heather Gerken and Spencer Overton have been arguing, that we should rely on objective truth in order to dictate our policy around elections. And yet we are seeing the rise of election deniers and maybe in the Q&A we can also talk about the problem of the heightened prosecution of election crimes based all on this meme of voter fraud. But it's akin to letting the foxes of election denialism guard the henhouse of our electoral process. And ultimately this problem needs to be solved by we the people, who demand objectivity and common knowledge, and avoiding the existential crisis of democracy run amuck as an excuse for authoritarianism to be avoided, so that each of us, we the people, get our voice in elections. Thank you.

LUIS FUENTES-ROHWER:

Thank you. Well, good afternoon everyone, and thank you for coming back after lunch.

So, I'll be quick, ten minutes, maybe twelve, so we can get to our conversation, which should be really, really interesting as the one before. So, when I think about election gamesmanship, my thought goes straight to the 19th century, 1865. This is, of course, is the end of the Civil War. This is the end of slavery. This is the beginning of freedom and essentially the country beginning to ask a question, what does it mean to be free? And if you've never thought about that question, it actually is not really that simple, or you think it is, but it's really not when you push it. On the one hand, you have President Johnson saying, "Freedom means to not be a slave, the absence of shackles and that's all it is, full stop."

And as you remember, he got impeached for that. That's not good enough. So, then, of course, the other side, the congressional Republicans, they wanted more. And so, the first step, the first definition, perhaps the easiest one was "to be free" meant for citizens to have civil rights protected by law. This is the 1866 Civil Rights Act¹⁰ and arguably the 14th Amendment.¹¹ That's definition one.

That also meant, back at that same moment, the attainment, the extension of political rights. This is the 1867 Reconstruction Act,¹² which I'd love to tell you more, but I'm going to stick to my ten minutes. Please ask if you want to know more about that one. It's an obscure one, but that is the first time in American history that Congress in fact enforced the idea of political rights and applied it to a population of, in this case, a freedman. And it's a really aggressive assertion of congressional power, arguably unconstitutional. But that's a separate question. It happened in 1867.

And, of course, the one we think about, the 15th Amendment.¹³ So, that's two, civil and political rights. That means the meaning of freedom meant both of those. The one thing it did not mean was social rights. This was, to be sure, the

10. Civil Rights Act of 1866, Pub. L. No. 39-26, 14 Stat. 27-30 (1866) (current version at 42 U.S.C. § 1981 (2023)).

11. U.S. CONST. amend. XIV.

12. First Reconstruction Act, Pub. L. No. 39-153, 14 Stat. 428-30 (1867).

13. U.S. CONST. amend. XV.

1875 Civil Rights Act,¹⁴ a public accommodations law that the court struck down in 1883. This is the Civil Rights Cases. And, of course, this was also in *Plessy v. Ferguson*.¹⁵

Then came the same story, extended to 1890 and the notorious Mississippi Plan. This is a moment of mass disenfranchisement. All the enfranchisement done during Reconstruction came to a halt or began to end at that moment, 1890. Also, this is the last moment until the Second Reconstruction when Congress attempted to enact a federal law with any teeth in it.

This is the Lodge Election Bill, named after Senator Lodge, that attempted to bring the federal government to enforce rights in protection of the freedmen. It failed by not many votes, and that was the last moment. This is now 1890 or so.

Then came, in a decade, the notorious Alabama Convention of 1901. But this moment is key and here's why. I want you to think about this for a second. Here we have a 15th Amendment, clear as can be, which pretends to secure the right to vote on account of race or color. But the 15th Amendment we've come to know and love today, and yet Black registration and voting plummets all across the South. And when I say, "plummet," I mean plummet. This happens in the face of the 15th Amendment being good law. So, the question we ought to ask, how is that possible?

Well, here's our panel, election gamesmanship. This moment, 1901 in Alabama, is election gamesmanship at its finest or not, of course.

So, let me just give you two examples. Some delegates basically just said, "Look, just do it." For example, "What would be the effect," a delegate asked, "if we should put in there every white male citizen of the state and every white male citizen of the United States and only they may vote in our state? Just say it." The delegate conceded that language might violate the Constitution. It's too blunt.

And yet, he continued. This is really interesting. "We should just simply go up and plead guilty," I quote, "to violating the 14th, undoubtedly the 15th Amendment of the Constitution, like a man before the bar of justice that comes up and pleads guilty of carrying concealed weapons. 'Your Honor, yes, we did it.'" Basically, he's daring the court or the federal government to do anything about it.

He continued, "This doesn't have to be a hard question. Solve through proxies and," quote, "makeshift solutions," these gamesmanship memes and voter fraud. Just do it. Instead, he continued, "put the word white in there and I will support it. Let us take our medicine like men. Let us go to the Congress of the United States and say that Alabama, the first state upon the role of the United States recognizes only the white people to vote." Unquote.

But the convention didn't do that. Again, too blunt, they didn't hide the fact, however, that this was a convention with a stated goal of furthering white supremacy. For example, they said time and again, "The white race must dominate because it is a superior race." And again, they said this enough times. To leave no doubt, that's what they were doing. But here's the part I want you to think about,

14. Civil Rights Act of 1875, Pub. L. No. 43-114, 18 Stat. 335-37 (1875) (current version at 42 U.S.C. § 1981 (2023)).

15. *Plessy v. Ferguson*, 163 U.S. 537, 563-64 (1896), *overruled by* *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954).

and I'm going to connect this to our present moment in a second. Said this one delegate, "The white race must dominate because it is the superior race and in that domination, the meager will find the safest pledge and guarantee of just and impartial administration," unquote.

Said another delegate, "Restoring white supremacy in Alabama as before was about," and I quote, "good government," unquote. Some delegates argued that they had not come to the convention to, in fact, preserve white supremacy because, and I quote, "white supremacy is secure in Alabama." We don't need to be doing anything here that we haven't done already. Rather, the convention meant, and I quote, "a response to the call the people of Alabama for fair elections," unquote.

So, this is the gamesmanship point, which is part of our panel this afternoon. So, how do you secure good government in Alabama in 1901? How do you secure fair elections through, quote, "rational methods," unquote? These included the ones we all have come to know throughout American history, which began at that moment. Poll taxes, understanding tests, literacy tests, good character clauses, the secret ballot, voter registration laws, grandfather clauses, felon disenfranchisement laws, all of them sprung up around this time.

These are things that delegates told us once and again that are still left to the states. The states get to do this, not the federal government, surely not the 15th Amendment. We may have done that in 1870, but these tasks are still left for us to do.

And here's a quote for example: "There's nothing in the 15th Amendment to deny the validity of any provision, which is really directed to the question of limiting the suffrage to those possessed of such character and such intelligence as to be entitled and qualified to exercise this right for the public benefit." The 15th Amendment, in reference to what we're trying to do here, doesn't do anything. To the convention, all these election gamesmanship tools were consistent and rational and surely consistent with the U.S. Constitution and the 15th Amendment. And maybe they were right about that.

This example I am giving you shows all of us how weak our constitutional right to vote, in fact, is, which is why we're having this panel in the first place. We think about the right to vote, we read all the cases, and we read how the court likes to talk about the right to vote as a fundamental right because it preserves all the rights. That's just words. I think it's unfortunate, but maybe not.

We can surely talk about that. So, that's point one. Point two, today we talk about election gamesmanship, and I am here to suggest to you that's been true from the founding through the wake of the First Reconstruction and into the Second. In fact, election gamesmanship, it's part and parcel of American history, full stop. So, that it's useful to remember, as we're talking today about memes and voter fraud and all the things we're going to talk about in a moment. Let me just remind you, that is not new. It will always be true because of the first point, how weak the federal right to vote, in fact, is. And with that, I will stop and thank you.

JESSICA KNOUSE:

Thank you to all of our panelists. Before we open things up to the audience for questions, I'd like to offer our panelists the opportunity to either ask questions of each other or make comments on each other's presentations.

ATIBA ELLIS:

I think that this whole idea of the weakness of the right to vote, as I was hearing you talk about that and how rooted in history and how sort of expansive the interstitial space is between our conception of the right and how it's applied and thus not treated as a right. I hear you saying that. And I think to myself to just pick one point of departure, if you go to other constitutional democracies, that kind of interstitial space is far, far small. And a lot of the characteristics of those democracies are that a lot of the rules are uniform. They flow from one place. I am thinking of, for example, I did some research about Australia and voting and there is one federal electoral act and it defines how things are done and it has all sorts of requirements for it.

But this room of interpretation and this room for, oh, let's decide how we want to do how we're going to do, because we all know what we're out to do, don't we? There's no space for that.

So, as one way of thinking about voting is that sort of fact that of America does it differently and has this sort of deference and space here. And I think, Bertrall, I really love the point about the sort of election integrity, as opposed to democratic accountability sort of point that you're raising.

And so, I react to that and sort of think, well, one of the challenges to begin with is sort of thinking about how wealth is so maligned as a category for protection under our current constitutional law. So, one of the first premises is, and I mean, we kind of came close to it, I mean, the closest in the law of democracy context is *Harper*,¹⁶ right? And sort of one's ability to pay a poll tax is irrational to the ability to vote. And yet, we have seen a whole generation where that point gets made, and then we've departed from it in so many ways. And so, part of my reaction is how do we get back to that larger ethos and, in ways, our works intersect around some of those questions. So, anyway, some quick reactions.

BERTRALL ROSS:

All right, let's leave that there. So, I think that *Harper* is a great jumping off point because at the core of *Harper*, which was a 1969 challenge to the Virginia state poll taxes—

ATIBA ELLIS:

'67.

BERTRALL ROSS:

'67. Thank you. Virginia state poll taxes in which the court held two things somewhat ambiguously but can be read to support two constitutional claims. The first constitutional claim could be that wealth is a suspect classification and that discrimination on the basis of wealth should be subject to strict scrutiny. It seemed to hold that rather clearly. And another one is that the right to vote is fundamental.

Now, both of those are under that wealth as a suspect classification was subsequently rejected by the court in a series of cases in the 1970s. So, wealth is

16. See *Harper v. Virginia State Bd. of Elections*, 240 F. Supp. 270, 271 (E.D. Va. 1964), *rev'd*, 383 U.S. 663 (1966).

not a base for protection, which is a bit surprising if you look at the original purpose for protection of particular classes, that those groups lack the political power to defend themselves in a political process. Therefore, the court will step in to make sure that laws that discriminate against them are appropriate under a rigorous form of scrutiny.

Now, with the fundamental right to vote, this is where my concern lies after *Dobbs*.¹⁷ Now, *Dobbs*, of course, held with respect to the right to abortion, right for reproductive autonomy, however you want to label it, that that right is no longer entitled to protection because it's not based in the text of the Constitution. There's nothing in the Constitution that says anything about abortion rights, and neither is it implicit in the Constitution either using a kind of text and history of traditions analysis that there hasn't been this history of protection of abortion rights in the past, and therefore we can't even imply rights to reproductive autonomy.

Now, the question that that raises with me is with respect to the right to vote. There's a lot of talk about other rights to privacy that might be implicated by the *Dobbs* decision such as same sex marriage and sexual autonomy in the home. But I'm really curious as an election law scholar, it's a future of the right to vote. The right to vote is not contained in the text of any provision of the Constitution. There are prohibitions against discriminatory granting of the right to vote, but there is no affirmative right to vote in the Constitution itself. So, that text argument that they made in *Dobbs* that there is no right to abortion here could be made as well about the right to vote.

Then, you look to the implicit, the text tradition and history analysis. And so, is there a way to connect it to any particular piece of text from the basis and tradition in history? And thus far, what we have are the court in the past, ever since it announced in the *Yick*¹⁸ case in the 1880s, that the right to vote is fundamental because it's preservative of all other rights, is the court kind of going in multiple directions in terms of locating the right within the Constitution, and the tradition in history supporting the right to vote needs to be bolstered.

So, what we have now in terms of what the court has done is that they started off by talking about the 14th Amendment as being the source of the rights to vote, then appeal to the 15th Amendment, even though it's more of a prohibitory provision, then it went to Article I, Section 2 of the Constitution that provides the voter qualifications for members of the House of Representatives are set forth there, then comes back to the 14th Amendment. But none of this relies on the kind of the history analysis that the court seems to value in *Dobbs* and still is a functional analysis. That the right to vote is fundamental because it's necessary for representative government.

And so, what I think is the onus on scholars and those who care about the right to vote, is to bolster that right through a historical analysis. And I think that there are opportunities to do so because if you look to the 19th century in that Jeffersonian, Jacksonian Democratic era, you have this push and thrust toward a protection of the right to vote in state constitutions, or at least the elimination on barriers to the right to vote in state constitutions, under this, what was then a radical

17. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

18. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

Republican conception, that voting is a key necessary predicate to representative government.

The arguments that are made in the Court's opinion that bolster history and fact need to be developed over time because if it's not developed over time and the Court decides to take this on, because I don't think (unlike Derek Muller earlier), I don't think anything's off limits for the Court at this point. I think everything is fair game right now.

So, if that is potentially under threat and we also have the independent state legislature theory working in the background, which would limit the ability of courts to enforce state right to vote provisions, then we might not have any basis or means of protecting the right to vote. And it just opens the door to an extreme amount of gamesmanship that will distort our democracy such that we don't really have a democracy other than in name only. We will be like the democracies in China or in the Soviet Union such that they have elections, but they're essentially meaningless. That's my fear.

ATIBA ELLIS:

Just see why we snuck in a whole other talk.

BERTRALL ROSS:

No. That's my one minute.

LUIS FUENTES-ROHWER:

Very, very quickly, I just want to say I agree with all of what you've said and the one thing that I was reminded of is the Voting Rights Act Justice, then Solicitor General Thurgood Marshall. He goes to the White House, and he asks for one thing. What do you think he asked for? He said, "Money." Why? Mobilizing voters.

He says, "Look, the NAACP's doing all this work. They can't do it alone." So, he's got a bunch of memos asking the White House, asking the Democratic Party. "Well, we have a Voting Rights Act. That alone is not going to do it." And it didn't happen the way he wished it did. And, of course, he became the nominee and then he went to the Supreme Court. But I was reminded of that in reference to what you're talking about, the reference that the right to vote is something that we have. It's gamesmanship up and down. I thought of it as suppression tactics. You're thinking about it a little bit differently, which is, that's something I never thought about. You have to, in fact, come up from the.... It's top-down, those in power, those who are actually carrying out elections, in your case, of political parties asking voters, seeking voters, reaching out to voters. And that's expensive. And of course, there's a cost benefit that, of course, as you point out, poor people are going to lose.

BERTRALL ROSS:

All right. Terrific. Thank you both.