Announcer: Welcome to Civil Discourse. This podcast will use government documents to illuminate the workings of the American government and offer context around the effects of government agencies in your everyday life. And now your host, Nia Rodgers, public affairs librarian, and Dr. John Aughenbaugh, political science professor.

Hey, Augie.

Hey, Nia.

Sorry, you were drinking coffee. Oh man, I did that thing. It's like I was a waitress in a former lifetime. You know how they always walk by and they wait until you have food in your mouth and they are like, "Are you enjoying your meal?" You're like, [inaudible]."

I have that talent as a faculty member. I apparently, wait to go ahead and ask a particular student a question just after they took a bite of potato chips or they took a swig of water or coffee or whatever. They just look at me like, "Really, dude?" I have that talent.

What did I do to you?

Yeah. One, why are you calling on me specifically? Two, why did you wait until I got a mouthful of beverage or food?

Calling on people, that's the Socratic method.

That is the Socratic method.

So everybody here needs to do the readings, including you in the back taking a nap, because I'm probably going to call on you.

Yeah, or if you think that you're not going to get asked a question because you just took a bite.
A swig of coffee. Too bad for you.

Yeah.

Okay. I like how we set up a sort of slightly combative atmosphere.

It's part of the charm of the way I teach. Charm said with air quotes.

That's right. You can't say them, but they're there hanging in there.

Yes.

So we're in an election. I don't know if you've noticed that we're in an election year.

Yes, we are in a presidential election year.

It's been occasionally mentioned.

In between corona virus and the impeachment, people occasionally are like,

"Oh, yeah. The Iowa caucus is in a week."

Week, that's right.

It's terrifying because I always think, it's way far away. It's like the mountains when you're driving across Colorado. They are way far away. Then suddenly you're going vertical instead of horizontal because the road has taken a drastic turn.
I've driven Interstate 80 through Colorado.

It's amazing, isn't it?

Yeah. You enter the state.

We're not going to be at those mountains forever and then suddenly there you are.

Yeah. Then you're driving straight up.

How did this happen?

One, how did this happen? Two, did I get a really good inspection?

Is my car going to make it? Which is how I feel about the caucuses. Is my election going to make it?

That's right.

But it's the whole thing.

But now I'm in that mode. But I wanted to ask you about something. So I asked one of our listeners for her thoughts on the Electoral College. Her first question was, which I thought was interesting, not her first question, one of her questions was, why did the Supreme Court take the Bush v. Gore case? Which got me thinking about this whole idea of the Supreme Court and Electoral College and intervention, and how all of that works. Then here lately, there's been something right there cases now about faithless electors, which isn't nearly as sexy as it sounds. Because when I first heard that I was, "Oh, faithless electors. Give me some of that."
Well, you get politics and sex.

Yeah, like-

No, not really.

Yeah. Not really, almost never actually in this case also as well.

But what the heck? What is going on?

So let's unpack this.

There's a lot. I brought a lot of luggage today. So?

That's quite all right. Because when you go on long journeys and when you discuss the Electoral College, it is a long journey. It's probably good to pack a bunch of clothes.

If nothing else, changes of underwear and socks?

Yeah. So let's go back to the writing of the Constitution. One of the chief defects of the Articles of Confederation was that there was no executive branch in our national government. So there was basically no branch that could implement those rare times where the 13 states could actually agree to do something post-revolutionary war.

So the current "we don't agree on anything except perhaps to all breathe" goes all the way back to the very beginning?

Yeah. Post-revolutionary war.
So this dream of like congressional harmony and all the kumbaya love, the why can't people just get along? Not so much.

Not so much.

That was crushed early on.

I mean, that's a rare condition. It's a statistical anomaly.

They're getting them on.

So the framers of the constitution, one of the issues they struggled with was, so we have an executive branch. There's somebody new that needs to run the executive branch, but how do we choose who this person will be? There were any number of proposals.

So there was no method for electing the president at this point?

No. I mean, so we're at the Constitutional Convention and-

We'll appoint somebody, we'll do rock, paper, scissors, which would've been awesome. Just saying, Jefferson probably would have won that. He would have figured out some way to.

Yeah. Because he would have studied it over 12 years and wrote down every single odds.

The statistical chances or whatever until he could.

I mean, that's what Thomas Jefferson did.
So I'm not going to cover all the proposals. But just to give you an example. One proposal was the president would actually be a multi-person committee of Congress.

So the president is the presidents?

Yes. It would be an Executive Advisory Council to the legislative body.

Which is terrifying because if you don't want something to happen, you ask a committee to do it.

Sure. I mean, hey, we both work at a university, right?

Library committees are fabulous, I'm just saying. All library committees are completely fabulous and there's never any waste of time, ever. I don't know what you're talking about.

Because in political science, they are models of inefficiency.

I mean, committees get stuff done, but there's also personalities and there's varying opinions and sometimes you have to try stuff and it doesn't work and you have to try something else, which is fine unless you're leading a nation, which is a little scary.

Yes.

Because then you're like,"Well, let's try a little war against Spain. Oh, that was a terrible idea. Let's undo that." That's much harder to undo than it is to do, as we've discussed with War Powers, it's not so easy to just stop.

I mean, one of the pathologies that public administration scholars have identified with any kind of bureaucratic structure is, they are prone to inaction, not action.
That makes sense. You protect what's already in place, and it's easier, it's cheaper and simpler.

You've got to convince a whole bunch of people on the committee to actually agree to something.

Which is hard to do.

Yeah.

Except for chocolate cake. I mean, you can get a way to agree to eat something like that.

Increasingly with better diets.

Well, that's true.

It's pretty hard to go ahead and eat.


Is this healthy? Hey, I got high blood pressure, high cholesterol. I shouldn't be eating this. Well, the rest of you guys are eating bad. I will go ahead and be part of the group. Really? Another proposal was that the Congress would actually pick the president, much like the parliamentary form where the majority party in parliament gets to pick the prime minister. But for obvious reasons since they just got done being under the yoke of the British Crown, they were, "No, not so much." Another proposal was a majority of the popular vote of the entire country, which the individual states did not like. The individual states were like, "Hey, wait a minute here. If we're small state, whoever our citizens want as President, well, we're going to lose out to all the larger states."

Right. Our vote counts less because there's just fewer of us. Mathematically, it doesn't work in their favor.
But then ultimately, what the framers settled on was that you would have eligible voters in each of the states vote. Then within each state the elites would be chosen as part of what they called the Electoral College that would have the potential authority to override the popular vote within a state. I want to make sure I get the right Federalist Papers. I used to know all of these. I actually had undergraduate professors who forced us to memorize what each of the Federalist Papers was about.

Wow.

How about that?

That help you in life?

Not so much.

Well, to you because you teach this subject.

But I mean, I wonder how many of your classmates are using that every day?

Of course, that's my argument against subtraction, too. Why did I have to learn subtraction? How much of that do I do?

Then you get in trouble if you don't know what you are typing in.

It's like calculus for me.

What am I going to do with that? Which is not. Everything you learn in school is useful because it changes your brain in some way.
Changes your brain, teaches how to think differently, it's a process. Hey, if you can struggle through a subject you don't like, then maybe you can struggle through something later on in life.

But in Federalist Papers number 68, Alexander Hamilton actually discussed why an Electoral College was necessary. He gave basically two reasons. One, and I want to get the exact quote because this is good stuff. He's said, "You need an Electoral College to make sure that a person was chosen that had the 'requisite qualifications' and possessed more than just 'talents for low intrigue.'"

Wow.

By the way, that was a phrase in the late 1700s.

Talents for low intrigue.

That was a phrase in the late 1700's to describe what we would refer to today as a demagogue.

Oh, okay. So he's saying, not just people who can whip up a crowd.

That's right.

Okay.

Then second here.

Your charisma doesn't count. You need to have other qualities.

That's right. Again, if you think about the evolution of political power historically, what the United States and then subsequently other Western democracies were trying to do was replace traditional political
power, i.e, a monarchy with the powers of kings or charismatic leaders with rule by law. That's what they were trying to create.

Well, and weren't they also trying to create a system where someone didn't stay in power until they were overthrown/ killed/ died of something?

Yes.

I mean, like that's also part of elections is that you want a consistent length of service.

Then you want an orderly stable handover of power.

Yeah, the peaceful transition of power, which is the common phrase that's used to describe that as a separate view from the coup d'etat/ dictatorial.

Revolutions, right.

The second reason that Hamilton mentioned, which actually has some relevance in regards to the 2016 presidential election, is that many of the framers were concerned that foreign nations would try to influence presidential elections, and that Electoral College voters would be able to go ahead and overturn decisions made by the voting populace that may have been influenced by nations at that time, Great Britain and France. So I want you to keep that in mind. Those were the stated reasons in the Federalist Papers for why we need an Electoral College. Now, let's be very clear. The Electoral College is an anti-Democratic institution, because it basically says to the voters in each state, no matter who you pick, if we as elites who are members of the Electoral College, we get to go head and second guess you. We get to go ahead and say you guys were wrong and we're right. Okay?

Okay. I know what's better for you than you do. It's very parental.

It's very parental.
Or nanny, whatever you want to call that.

Government by elites.

Right. The idea that you're not bright enough to pick a person, which is pretty insulting. I mean, I'm just saying.

Okay. That was the original purpose, but then almost immediately, the political parties, the Democratic Republican party led by Thomas Jefferson and the Federalist parties immediately tried to, if you will, rig the system because they basically passed laws in the various states that would require the electors to follow the results of the popular vote within the state.

Which at that point makes it moot to have an Electoral College.

Completely moot.

Because why? Well, now you're just saying, okay, my people said this, so I'm saying this, a equals a, equals a. Well then we can just count it the first time and be done, and we don't have to wait till December.

That's right. Okay. So almost immediately, the promise or purpose of the Electoral College was subverted by the political parties who were like, hey, wait a minute here, okay?

I love the American system.

Right?

What a great idea. Let me tweak just a little.
Again. Listeners of the podcast of how you say this. Okay, I have thousands of students who hear me say this all the time. We have the constitution as written, and then we have the constitution in practice, okay?

Yeah.

The constitution in practice was almost immediately subverted as it relates to the original intent of the Electoral College, right? So as this develops throughout the 19th century, a majority of the states passed laws that explicitly said, if you are chosen by your political party to be a potential member of the Electoral College, you must swear an oath to uphold the popular votes results within that state, and it became a way for political parties to reward those very active members of the party, right?

I don't know if listeners can visualize the conventions. But at the conventions, at the different states, the two different conventions. So all the Republicans go to their convention, all the Democrats got to their convention. So let's say, you're a Republican from Virginia and you go to the Republican Convention, you go because you've been chosen to go by the state party, and basically, you're being rewarded for service to the party, right? You've gotten out and gotten the vote out and you've done all kinds of stuff in your local polling places.

You've helped raise money.

You've done a lot of work, and the way they reward you is they send you to a big party where everybody gets to hang out and go, yeey, we love being Republican, or Democratic, or I assume the Libertarian said something like that, but I don't know whether it's.

Yeah, they have.

I can see them phoning it in, which will be very Libertarian of them. Yeah, we're not coming out, we'll just tell you what we think.

You can't tell me to come to a convention.
Exactly, don't bug me. So don't tread on me.

But another way to reward these party faithful is to select you, because the way the Electoral College works is you have the presidential election on the second Tuesday or first Tuesday? All right, I can't remember.

The election?

Yeah.

The first Tuesday after the first Monday in November.

Okay. So you have the election and then the Electoral College actually comes to Washington DC in December to cast their votes. Now, because the parties have already rigged the system, we basically know the evening of the election, what the Electoral College votes should be.

Right, and some of them are by the whole state, winner takes all, and some of them are broken up by percentages. If there are 10 votes in a state, then if 70 percent went for the popular vote, one for one candidate, then they would get seven and the other person will get three. There are a few states that are like that.

There's only two or three states that actually divide up the Electoral College vote based on either percentage or by which presidential candidate won a congressional district within the state. I think it's basically 47 or 48 do the winner-take-all.

So it's a rubber stamp?

Yeah. So in Virginia, for instance, in 2016, a majority of the voters picked Hillary Clinton. So all of Virginia's Electoral College votes, and if you are trying to figure out how many Electoral College votes your state has, it's the number of representatives in the House plus two senators.
I didn’t realize the Electoral College is 538 people.

Yeah, because it's 535 members of Congress plus three Electoral College members for the District of Columbia. That's how they tabulate it.

Yeah, they get the vote.

So basically if your presidential candidate.

But wait, so Guam doesn't and Puerto Rico doesn't, and all of our territories were American Samoa, they don't get...

They don't have Electoral College vote.

That's not nice.

That's not.

I mean, they vote and it doesn't matter.

It doesn't matter.

I would protest if I lived in Guam. I would be grumpy about that.

I would be extremely grumpy.

So you've got 538, and a majority is 270. That's math that I can do.
So you need to get to 270.

Yes, and on election night, that's what all those giant boards on CNN, MSNBC, Fox, all of them, have a giant board. I have to say, even though I try not to be partisan and I try to actually watch a lot of them, the one that I happen to watch the most is actually this guy named Steve Kornacki who is on MSNBC.

MSNBC and he has a white board.

That's right. It's because he also at about four o'clock in the morning, it's like he's on 80 grams of heroin. I mean, he's just like his hair sticking out in all different directions, like, do you really take this seriously. His heart is in it, his ties on.

His suit jacket is off.

Two buttons are versa. He's rolled up his sleeves and he's doing journeyman work at this point.

Whatever makeup they put on him, long gone. It's on his collar.

Is it Stephen King, I think,

[inaudible] at CNN.

He's very dignified.

Is it John King?

John King. Thank you. That's John King.
Yeah.

Stephen King is an author. That would be really terrifying, wouldn't it? If he was doing the election. Actually, that would be really cool.

Hey, if he wrapped a presidential election into one of his horror books.

1963.

Yeah, there you go.

He did with like what if Kennedy hadn't been assassinated.

But nevertheless.

I can't remember the who guy is at Fox. I can't remember his name off the top of my head. That's terrible. But he, also very dignified. The man Kornacki, he's like he's got half a donut hanging out of his mouth while he's counting things and talking and he's just great. I love him.

Yeah.

He's like us. He's into it.

Yeah. Because for politics junkies, presidential elections, no matter who win or whether your favorite candidate won or lost, it's our Super Bowl.

Oh, yeah.
Okay?

There should be puppy elections. All the things that go with Super Bowl should be a party.

Yes.

With food.

Yes.

There should be commercials that are made for the election, but not election commercials, because those aren't so good.

I've not done this but I've been told that they're actually political science students who have such parties, and then they actually drink when certain words are said throughout the night. Again, I've never done this kind of thing, but I've told that such parties occur.

That's awesome.

Okay.

Take a drink when you hear upset.

Yes, or downstate vote.

Yes. Oh, my gosh. Anyway.
Precincts reporting, that's another one.

Yeah. You could totally get.

Oh, my goodness.

You can get smashed really early in the evening.

Yes. Right. Go again.

So anyway, all that being said.

Okay. So you got to get to 270.

So the Electoral College historically, ends up being a tool for campaign strategy.

Oh, yeah. You need a certain number of either big states or you need a whole bunch of little states.

Yes.

Is that what you're getting at? It's this idea that California has a cazillion. It's not really a cazillion, but they have a huge number of votes.

Yeah, and I tell my students is think about this.

But so does Texas.
Okay.

Those two usually go Democrat and Republican.

Yeah. Think about this.

In 2016, Hillary Clinton basically knew, even before election night, that she already had California, New York, most of the New England states already wrapped up.

Yeah.

Because they are solidly Democratic states right now.

Donald Trump had Texas.

All of the deep south.

Likely Florida, or was Florida gray?

Florida is gray.

Okay.

They say purple.

My bad. That's right.
Red versus blue.

I don't know why I was thinking of gray and purple.

Okay. So basically, it leaves a handful, maybe 10 states that are "battleground states".

Another thing that you drink to.

The number of times they say on election night coverage, "In the battleground state of," insert.

Yeah. Slurp.

So you’re talking about rust belt states like Pennsylvania, Ohio, Michigan, Wisconsin. Florida typically is. Virginia was, for a period of time, though increasingly most political scientists believe it's become a blue state.

Really? I thought we were still purple.

Well, if Democrats get any modicum of turnout, the state's population centers of Northern Virginia, Central Virginia, and Hampton roads area have become overwhelmingly blue. The conservative parts of the state, the Republican parts of the state-

Southwest of the state.

- Southwest and Southside had been losing population since the 1980s.

Isn't that also happening in a lot of rural areas across the nation that had tended to be more conservative, more Republican. As people are moving into cities, their votes are getting watered down,
maybe, that's not really the word I want to use. But if they move into a city that's overwhelmingly Democratic, even though they're still voting Republican, there's math involved.

Yeah, well, eventually, if you have a rural state, but has a couple of big cities, and we know that right now, at least, big cities are attracting Democratic voters. So you used Texas as an example just a few moments ago. There are some political scientists that have gone ahead and said that if not this presidential election, maybe 2024 or 2028, there is the potential, at least statistically, demographically, that Texas could go Democratic simply because Texas has a handful of rather large cities, and again Democratic voters are tending to reside in big cities. That's one of the more interesting phenomenon of our relocation patterns currently in the United States, is that if you take a look at the map, the 2016 presidential election map, overall geographically, it looks like the country is overwhelmingly Republican. But that's because of rural areas that Republicans tend to do very well in. Democrats are residing in cities and they're doing so in overwhelming numbers. So we are, if you will, and I'm struggling with the word, we are segregating ourselves geographically, based on political party in this country right now. Democrats tend to live in cities. Very few Democrats want to move to rural areas.

Although that may shift as younger people decide they want to have vegan farms, and they want to have tiny homes, and they want to have those. There may be a little bit of shift back.

There have been some newspaper articles about how many Californians are leaving the state because of the high price of living in the state. But the problem for Texas is they have a handful of very large cities. So Austin, Houston, Dallas, San Antonio are drawing a large percentage of younger, and right now younger voters are leaning decisively towards the Democratic Party. But nevertheless, your larger point is correct. So in 2016.

Wait.

Okay.

Wait.

Yeah.
I want to say to listeners you can't see my face right now, but when he said Texas may eventually go Democratic, my face did a thing and thank you for not making fun of the thing my face did, because that is sea change in my lifetime.

The state of Texas has not voted for a Democratic presidential candidate since Lyndon Baines Johnson in 1964.

Before I was born. So my entire life, it has not been.

So for presidential elections, a rule of thumb for Democratic candidates is, it makes no sense to campaign in Texas.

Don't bother. Don't go.

Just like right now, particularly since probably the early 1990s, California has become overwhelmingly Democratic. So there's no good reason for a Republican candidate to campaign there.

Right. Why spend the money? Why spend the effort? You're probably not going to.

Likewise most deep South states, Mississippi, Alabama, Louisiana, et cetera, are overwhelmingly Republican. So if you're a Democratic candidate, why bother? So that basically leaves about five to 10 battleground states to get all the love, all the attention, all the campaigning.

All the ads, all the the robocalls.

So if you think about in 2016, the Electoral College basically meant that roughly somewhere between 35 to 40 states, really they watch the election.

Right.
We were just over here holding their beer while they were voting. Wisconsin was like, "Here, hold my beer. I got to go vote."

Again, smaller states don't get any attention typically from candidates because they only have three electoral college votes.

Yeah. Who goes to Montana?

Who goes to Montana, the Dakotas, Rhode Island, Delaware?

What's unfortunate is those states are lovely.

They are very lovely. But most Electoral College vote totals are not close. They aren't close. However, you actually mentioned one of the elections where it was close.

It wasn't just close.

Okay.

It was settled by about 15 people or something. Well, it's not quite that small, but it was less than five thousand.

So when we started this podcast episode, Nia made reference to her colleague’s question about Bush versus Gore in 2000.

Yeah, why did the Supremes take that case?

So for those of you who weren't paying attention to presidential elections in 2000 or you weren't yet born, in 2000 presidential election, Bush II ran, George W. Bush-
Forty-three. It was 43.

- ran against Al Gore, who was the vice president for the Clinton Presidential administration. It was a close election, and it basically came down to one state's electoral college votes, Florida. Florida at that time had 25-plus electoral college votes. So whoever won Florida would-

Would go over the top. I don't remember what their scores were, but it was like 250, and 250.

It was very close.

It's not quite that. But you know what I mean?

Yeah.

It was very close and it really did matter.

Yes.

So they started a recount.

So in Florida, like many states, if the outcome of an election is less than one percent, the losing candidate can ask for a mandatory recount, and that's what happened in the 2000 presidential election in Florida. The difference was less than one percent. In fact, as Nia pointed out, as we come to find out, it was basically less than five thousand votes out of the millions that were cast in Florida in that presidential election. So Al Gore asked for a recount. The problem is in Florida, Florida had passed a state constitutional provision that basically said that each of the voting precincts could determine on their own how to conduct the recount. Florida then, just like most of the counties in Florida today, use computer punch cards when you cast your ballot.
The infamous hanging chad.

Which if you were drinking during that election-

That would have been another phrase.

- that drinking game would have been based on hanging chads.

So on computer punch cards, if a voter doesn't push the lever strong enough for the candidate that they want to vote for in a particular race, you could either have a pregnant chad.

So the paper gets pushed by a machine.

That's right.

You push down on the paper and it makes a hole, and the hole is next to the name of the candidate that you want. But if you don't push down hard enough, you either push it so it just makes the paper distorted, distended, pregnant.

Yes.

Or you push it such that it's cut mostly but not completely-

Yeah, it might be hanging on.

- which is known as hanging.

That's right.
The hanging chad, and those are chads.

If it all goes all the way through, what drops on the floor is a chad.

That's right.

That gets swept up at the end of the election.

Then they run the punch cards through a computer that records the results.

Because it can see where the hole is.

That's right.

So although some of them were off, I think. Some of them were off, like they couldn't tell which name it was next to.

Yeah, in some of the counties, some of the voters complained that they meant to vote for Bush or Gore, but they ended up voting for Ralph Nader or Pat Buchanan.

I was going to say that Pat Buchanan got a bunch of votes out of that, which we're chuckling because he had no chance of winning that election, but yes. So then if you're too young to remember this, you should do a Google image search for hanging chad. What you'll find is a whole bunch of electoral witnesses, like the people who are checking over those cards, holding them up to light, trying to see where the hole is in.

Yes.
What the voter intended. So a lot of it was about voter intent. Can we read voter intent-

Based on the chads.

- by going back and look at these?

So as it happened, this is a very time-intensive process to do recounts.

Yeah. With millions of votes. Yes.

So the Florida State Supreme Court went ahead and extended the deadline for the recount, which upset the Bush campaign because before the recount, the Bush campaign was actually ahead in Florida. So the Bush Campaign filed suit in Federal Court, and this is Bush versus Gore I. There's actually two cases that get to the Supreme Court. First time it goes to the US Supreme Court, basically, issues a ruling telling the Florida State Supreme court, you have to follow the Florida constitution, and the Florida constitution says the recount must be done this way in this amount of time. The case goes back to the Florida State Supreme Court, and the Florida State Supreme Court basically said to the US Supreme Court, "Thanks for sharing. You guys can continue the recount."

How nice for you, Supreme Court.

So the recount continues, and the Bush campaign was just "Like, Okay, We're getting screwed here." Because the Florida State Supreme Court at that time, most of the judges on the Florida State Supreme Court had been picked by democratic governor, and they're like"Hey, we're not getting a fair shake here,. and it was a big issue in a number of large counties that were considered democratic strongholds.

Broward, Dade.

Yes. Miami-Dade.
Miami-Dade, the bigger counties where the big cities are.

That's right. The rural counties in Florida-

Came out pretty clear. It was pretty clear it was Bush. They didn't even argue about it. I don't think they were even arguing about this. Not really.

Yeah. And many of those counties were like, "We don't have any hanging chads or pregnant chads. We're done with the recount."

We've turned our number in, we're going home. We'll see you all in four years.

That's right.

The Bush campaign files suit a second time. This time the Supreme Court takes the case to hear the substantive issues. This is where gets at the heart of your colleague's question because basically, it is highly unusual for the Federal Courts to get involved with how states determine vote counts but also their participation of their electoral college members at the electoral college. Highly unusual because basically, if you read the US Constitution, the conducting of elections is to be done by states. Time, place, and manner of voting is controlled by states. There are a few exceptions. We've had a couple of constitutional amendments.

One that, for instance, prohibits poll taxes, so you don't have to pay a tax when you go to vote. You have the Voting Rights Act of 1965.

You have suffrage.

You have suffrage but nevertheless, basically the actual conducting of an election is to be done by states,. Time, place, and manner. That's why you have variance among the states in regards to voting hours.
Early voting, absentee voting, those things can all be very different. We have a research guide on that, I'll link from here. The states have some very different rules about some states require an ID, some states don't.

Some states will allow you to vote by mail.

Something really spiffy in Virginia that's actually not super common is that if you are physically unable to get out of your car but you can get into your car to come to the polling place, you just can't get into the polling place, they'll come out, and let you vote at your car.

Yes.

You have to bring somebody with you who goes inside and gets the-

The ballot.

No, they can't. They have to bring out the person, the polling manager. They bring that person out with the ballot, that person witnesses your ballot, and then takes it inside and puts it in for you and you get to vote. It's cool that we do that here but that's different from other states, like their states are like, "No, sorry, we can't. You are going to have to absentee vote. You just mail it in."

Yeah some states say that if you're in line when the polls are closing, that you can still vote.

In other states, if you don't vote-

By 7:00 p.m. or 8:00 p.m. or whatever.

- you are out of luck.
That's not fair. That would make me bonkers.

Okay.

Especially if I had waited in line a long time.

In regards to the Florida recount in 2000, some states do almost all their voting with touch pads.

So a recount there would be a couple hours.

Couple hours. But in other states, like for instance in Alaska, they actually have some voting precincts that still do pen and paper.

Really?

Because they're so small.

Well, its true. All 10 of us will get together and vote.

Yes. So the Supreme Court takes the case, highly unusual, and what was even more remarkable is that pretty much all the conservatives in Bush versus Gore overturned the decision of the Florida State Supreme Court to allow this mass recounting. It was unusual because typically the conservatives on the Supreme Court since the late 1980s were all about states rights and states authority. All the liberals were like, "No, we should not be getting involved." Which was again, highly unusual because liberals, since basically the Warren Court in the 1950s are like, "Hey, if the states aren't following their established procedures, we need to overturn their behavior." So you had strange bedfellows, if you will, in regards to the Bush versus Gore. It all flows from the Electoral College vote count in Florida, because it was the determining factor in that particular presidential election.

Because Florida is a winner take all.
That's a winner take all state.

So it mattered.

It did.

Every one of those votes mattered.

Mattered. Yes.

As opposed to if it had been by county and county, it might have actually mattered less because a lot of Florida is rural.

Very rural.

It might have been much clearer earlier-

Yes.

- who was going to win.

So in some ways I could see where that would be a frustration for Florida, where they would say, you know what, we should probably do it in a different way.

Yeah.
Although that's not what happened.

I have to say that after that case, I know that at one point Scalia was asked about that case, and he basically said, and I quote, "Get over it."

They have to get over it.

Because he said-

It's done. It's done people. Move on.

- it's done.

Well, and again, even though there are still, and I have friends who are still miffed about the outcome and the fact that-

I know some of those people.

- that the Supreme Court actually, well, in effect, decided the 2000 election.

Right.

At the same time, we had a peaceful transition of power come January.

Right. Al Gore did not stage a coup.

No. Al Gore conceded.
Bill Clinton left office.

Bush came into office.

Assumed the powers and authorities of the office of president.

When Al Gore made his concession speech, Bush also made a speech saying how much he respected that choice, the choice for the peaceful transition of power. Everybody there acted as gentlemanly as they could, given that they were probably very hurt feelings-wise.

Oh, yeah.

It was a very comforting thing, I think to know that even when we have a really angry.

For almost a month, that dominated the news cycle, American politics, because nobody knew who had actually won.

It was polarizing.

Oh, very polarizing.

Yet people came together after.

Yeah.

Then at 9/11, people came together to say.
But then there’s another criticism, there’s the Electoral College, and your colleague probably gets to this, and that is, you saw this in 2016. We've seen this a handful of other times in our nation's history, and that is where the Electoral College vote does not match the popular vote. What I'm talking about here is a presidential candidate could win a majority of the popular votes cast in the country overall, but still lose the Electoral College. That's what happened in 2016. If you tabulated all the popular votes cast by the voters in 2016, Hillary Clinton had a majority by at least three million. The problem is she didn't win a majority of the Electoral College votes produced by the states.

She had a majority in places that didn't count, relatively speaking.

Yeah.

They count because every vote counts, but if you win the majority of California, you don't get any more electoral votes than you were already going to get.

That's right.

All you have to do in a state is get 50 plus one.

That's it.

You don't have to get everybody. So if you get everybody but you get them and they're not broadly located, is basically what that means is that hers were clumped.

You need to win a large number of states with significant Electoral College votes. So it doesn't matter if you win California by 60 percent or 50.2 percent, you get all of California's Electoral College votes. But you also then need to win a number of other large states. States like Pennsylvania, Ohio, Michigan, Wisconsin, Virginia, North Carolina.

See earlier note: battleground states.
That's right and that's where increasingly, and this goes in cycles.

That's where the elections are happening right now, at least right now.

Yeah. It goes in cycles.

There was a period of time in the 1980s, early 1990s, where there were more Republican voters in the country than Democratic voters. Right now, there are more Democratic voters in the country than Republican voters, but the Electoral College still gives the Republican Party candidate a chance to win if you win enough Electoral College votes.

Which is just what Donald Trump did. He went to Wisconsin, he went to Michigan, he went to Ohio, he went to Pennsylvania. He spent a lot of time in those states because he knew that winning over those states was, well, somebody knew. I don't know how versed he is in the Electoral College because I don't know how versed any candidate is, but that's why they hire people who come up with strategies who say, we need to hit these 10, 15 states and really hammer them with our message because our message speaks to them in some way.

They have a significant, if you will, Electoral College vote total that will help us get to 270.

Right.

That was one of the criticisms of the Clinton campaign in 2016.

She didn't go to Wisconsin. She didn't go to Ohio, or she didn't go enough.

She didn't do enough because here's another thing that we know about the voters of both political parties. Republican party voters, faithful, tend to vote more than Democratic voters. Democratic party voters need to be motivated. We know this. Political scientists who study voting behavior have identified this.
Democrats get passionate and Republicans get in line.

That's right.

It's something like that. I can't remember what the phrase is but it's a similar idea.

That's a really good paraphrase of the old adage. Republican Party voters view it as an obligation. It's a habit. We're going to go vote. Whether or not they like a candidate all that much, they're going to vote. Democratic Party voters, they need to get enthusiastic. You've got to give them a reason to vote, because for many of them, they are new voters or they have other things going on in their lives.

Well, and the Republican votes skew slightly older, slightly more stable.

Socioeconomic status, et cetera.

Right. All of those kinds of things which allow you to go vote.

So that's one of the criticisms of the Electoral College. So now you have various proposals that we get rid of the Electoral College, or that states promise that they will cast all their Electoral College votes for whoever wins the popular vote throughout the entire country.

Wait a minute. Let me just ask you a quick question because now you know me, and you know my power grabbing nature.

Yeah.

If I'm an elector from Virginia, and Virginia is a take-all state.

Winner take all.
Winner take all.

Yeah.

But at the time that the electoral vote is happening, "I think I'm going to vote for Nader, even though Virginia did not go for Nader. What happens to me? Does the Electoral College accept my vote?"

Typically, yes, unless you happen to live in one of the 28 states who actually punish faithless Electoral College voters.

Hence, that's what would make me faithless.

You would be faithless. That's right.

On so many levels.

Yes.

Okay, so how do I get punished? Where they take away my right to be on the Electoral College? That only happens every four years, why do I care? By then I might have even changed parties. Who knows what I'll do?

Nia, what you're referencing is a phenomenon that is actually in front of the Supreme Court this term. Later on this spring, the Supreme Court is hearing two consolidated cases arising from the states of Washington and Colorado, where those states had faithless electors. In the state of Washington, you had an elector who I believe promised to vote for whoever won the popular vote in Washington, and Hillary Clinton won the popular vote in the state of Washington. He is a member of the Democratic Party in good standing. He swore an oath..
You take an oath to be an elector.

Yes. In many states, the political parties force you to take an oath.

That's awesome.

But then when he-

Gets in the room and he writes in Mickey Mouse.

No, well, he didn't write in Mickey Mouse.

He actually wrote in former Secretary of State, former Chairperson of the Joint Chief of Staff, Colin Powell.

Okay, I'm in. I could totally see Colin Powell. He's fabulous.

Okay. I'm trying to remember in Washington, they allow faithless electors to be punished.

In Washington, what was it?

Oh, he was fined $1,000.

That's his punishment?

He got fined $1,000.
Wait, but did his vote still go in as Powell?

Yes. But then the State of Washington fined him $1,000.

Well, I mean, but it'll be worth it to $1,000 if you want it, if you had $1,000.

Well, according to- I think his name was Michael Baca, B-A-C-A.

No, that was in Colorado.

This one, his name is-

Chiafalo?

Yeah, Chiafalo. So Chiafalo goes ahead and casts his electoral college vote for Colin Powell. The State of Washington finds out so they fine him $1,000.

I like this guy. I don't even know who this guy is, but I like him. They find out.

They're just sitting around. The State of Washington's just sitting around on its porch, hanging out, and somebody says he voted for-

Well, as far as both political parties in the State of Washington are concerned, you can't be having faithless electors.

No. I mean, we can get enough of them and your votes don't matter at all.

I mean, basically, he removed a vote from the State of Washington.
That could have been an election changing thing.

Yeah. I mean, let's face it.

It wasn't, it could have been.

It wasn't, but it could have been, right?

I mean, in the history of the United States, prior to 2016, we've had about 160, 165 faithless electors. None of them have changed the outcome of a presidential election. But if you've got enough of them in a single election, it could have an impact.

Well, and again, it comes back to, you really shouldn't get to change the vote of thousands of voters. That's not your job. Once you've gone and cast your vote, which you should do because everybody should vote, then you agree that you will represent the people of Washington according to the state's rules, which is the popular vote. I mean, I'm saying I'm a fan, but I'm not really a fan.

Okay. But your comments get to the constitutional issue. Have the states, in particular the political parties within each 50 state, rigged the system to contravene the original intent of the framers?

Okay, that's a fair point because if their intent is to be a check on the people in case the people will say, "Hitler, that guy seems nice. Let's elect him." Right? Then you would want them to say, the voters are nuts.

Yes.

We should not do this. Okay, all right.
Now, I see the [inaudible]. It's another one of those constitutional issues where my liberty is coming up against the greater democratic concepts of what the framers intended and what the constitution intends.

So in the State of Washington, the Washington State Supreme Court said, "No." Because based on US Supreme Court, precedent in the 1950s, if states are allowed to go ahead and put restrictions on how electors may be chosen by the parties, then the states should be able to go in and punish electors who don't follow the rules after the fact. However, in Colorado, we had this guy, I think his name was Michael Baca, who again, Colorado, the popular vote was for Hillary Clinton. Baca decides to go ahead and vote for former Ohio Governor, John Kasich, right?

Okay.

But in Colorado, you don't get fined. The Colorado Attorney General gets to remove you as a member of the Electoral College. Baca says, "Hey, wait a minute here. That's unconstitutional." He file a suit in federal court, and the Tenth Circuit Court of Appeals agrees with Baca. So now, we have a conflict among lower courts. So the Supreme Court's taken the case to answer the question, can states punish faithless electors? There were actually some groups who want to get rid of the electoral college who hoped that the Supreme Court sides with the faithless electors so that actually scares the public into wanting to get rid of the electoral college. Because again, faithless electors, you could make the argument or actually furthering the intent of the framers. But if in practice, you have a whole bunch of faithless electors who basically overturn an election, well, this upset enough of the American public to where they're finally willing to get rid of that damn Electoral College. The political parties want the Supreme Court to rule in favor of the states because the political parties are basically are like, "Hey, wait a minute here, they swore an oath to basically follow the popular vote outcome in the states, and we can't be having a whole bunch of our party faithful deciding independently whether or not we picked a good presidential candidate."

Yeah. Because that way lies madness and chaos for the state party.

Yeah. By the way, not for nothing, and I tell this to my students are like, "We got to get rid of the Electoral College."

I said, "Really?" I said, "Has either dominant political party in their national platforms ever advocated for getting rid of the Electoral College?"
There is no plank for that.

No. You know why?

Because it's an elite group of people who are chosen by an elite group of people.

Moreover, it's the rules of the game and they know the rules.

That's true. I mean, if you just went with straight popular vote, this thing could get out of hand quickly as far as and especially now in the age of social media. Think about voter interventions like cyber attack and stuff.

But it's even more essential than that.

This is a big can of worms they're opening.

But it's even more essential than that for the political parties.

Whoever the Democrats picked to run against Donald Trump this fall, they basically already know that they have the States of Colorado, New York, the New England states already wrapped up.

Yeah. They've got California.

Okay?

Yeah.
Republican candidates basically know-

They've got Texas.

They got Texas, they got the Deep South, they got the upper midwest states like Wyoming, Montana, the Dakotas. They got all of those already wrapped up. So basically, their job is to go head and focused on a handful of states. Those are rules they're willing to play with.

Right.

Okay?

Because it's easier for them to work that system.

But if all of a sudden, we got a bunch of potentially faithless Electoral College members running around the countryside saying independently, "Yeah, my fellow voters in the State of Texas, they were wrong, and I'm going to go ahead and vote for Bernie Sanders."

Oh my gosh, Texas as a state would lay down and die or it would scream so loud that Europe would say, "What is that sound?" That is the sound of Texas screaming. Or California, if all of a sudden, California went for Donald Trump, can you imagine?

Or even better, you're Democrat from the far northern part of California, the part of California that has made noise over the last 20-25 years of wanting to secede from California to create the 54 state of Jefferson. They are libertarian, they're conservative, they're gun owners. But nevertheless, you're somehow able to work within the Democratic Party for years. They reward you as Electoral College member, and you're like, "Now, I'm going to go ahead and vote for Donald Trump." You imagine what that would do to a whole bunch of Democratic Party faithful in the State of California? They would be like, "What is this treasonous behavior? This is heresy."

Oh my goodness.
As far as the political parties are concerned, you can't have that madness.

No. Well, because predictability encourages winnability.

That's right.

Right? I'm more likely to win if I understand the rules of the game. I mean, think about the first time you ever open a board game that you've never laid eyes on.

You don't know the rules.

Right. You flip over the box lid, you start reading the rules. Usually, you get about halfway through and you go, "I think I've got it." Then your partway through the game, and you're like, "Wait, give me that box again," because you got to look and back up. But I mean, you don't just open the game and start playing.

Hardly anybody does that.

The parties have a lot of time, money, energy, invested in things like elections. Remember, political parties want to win elections because if you win elections, guess what you get to control? Government institutions.

Right.

You don't win elections if you got all faithless.

The people are just running around voting for anybody they want to vote for.
I can see it both ways because I can see the arguments on, but it will be interesting to see with it. So the Supremes are taking that up this?

This term.

This term? So they'll hear something by the fall?

Well, you'll hear something by the end of June.

Okay. So we'll know before the elections.

Yeah. Because remember, as we've discussed in previous podcast episodes, Supreme Court members don't like to work beyond the last week of June.

Oh, that's right. They take the summers off. We're going to summer in the Hamptons or wherever. Actually, I think they go, "Don't think earn a lot of money going and doing speeches and stuff in the summers."

Yeah. Well, usually, two or three of them teach constitutional law in European law schools.

Well.

They summer in Italy or France.

So yes.

How nice for them. I summer in Richmond. I also winter in Richmond in case there was any question, I'm all seasonal in Richmond.
Yeah. There was no cynicism in your [inaudible].

Yeah, I wasn't being sarcastic in the least.

Yeah.

So once we hear about this, we're going to talk about it more-

Oh my God, sure.

- because we have to talk about how this comes out.

Yeah, maybe because-

That's going to have a huge effect on-

On campaign strategies of the two political party candidates, right?

Yeah, I mean, If you can go after faithless electors, why wouldn't you?

Oh my God.

I would start buying those people meals. I would start kissing body parts. Their babies.

Yeah.
Because that's what-

There we go, [inaudible] kissing babies and all that stuff.

Yeah.

Bringing people candy bars and hanging out with him and doing everything.

They run a barbecue joint. All of a sudden you show up.

Yeah, like, "Hey."

Yeah.

But it'll be amazing.

Yeah. Again the Supreme Court taking these two cases as raised a few eyebrows among constitutional law scholars because getting back to your colleague's question about Bush versus Gore.

Right let me check it.

Typically, the federal court stay away from this stuff because it's considered a political question.

But you said something I think is important to that, which is it's a conflict between two. In this particular instance, it's a conflict between two lower courts, which they do tend to try to settle if they can-

They're trying.
- because otherwise, then you have utter chaos?

Yes.

Because the different districts can do different things and-

That's right.

No one wants.

Some state courts would be like, "Hey, we agree with the state of Washington we're going to punish these faithless electors."

We're going to make it worse. We're going to put them in prison, and we're going to make it a $10 billion fine.

In other state courts or other federal courts are like, "Yeah, the tenth Circuit Court of Appeals got it right, Colorado should not be able to do this."

So I can see why the Supremes are going to take that particular case.

Yeah.

So it's still a question we could talk about with Bush V, but I suspect that I would assume that part of that answer was also what we were talking about with the peaceful transition of power. At that point, my guess is that part of what they wanted to do was get it settled.
Yes.

This needs to be settled. It is extremely unsettling for the country. You were talking about a month, it was like 4-6 weeks of incredibly unsettling times, and both for the government and for the people of not knowing who is coming in. That's really scary, and I'm assuming the Supreme Court impart looked across the nation and said, "We don't need this to keep boiling and wondering and not having a stability here"

An important of the difficulty is, nobody in Florida could give an accurate prediction as to when the recount would be done.

Right. Is it going to take seven days? Is it going to take three weeks?

Weeks.

Is it going to take six months?

When we can't wait that long.

We also know and presidential scholars tell us this, when somebody wins the presidency in early November, they need all two months-

Oh for the transition.

- for transition.

Yeah.
I mean, the federal government is just too big for a transition that's less than two months. In fact, most presidential scholars would argue, we need to push back inauguration probably to the original date and time, which was mid March. Because most presidential administrations, doesn't even matter if you once worked in the White House and you become a presidential candidate later on, it just-

It's different.

It's the sheer scope of all the appointments and all the meetings and then figuring out what's going on in international affairs, and then being able to figure out who you can or should work with in Congress, that's a massive undertaking.

So I'm assuming that partly is why they put it played into that as well as, "You know what, this needs to get settled because it needs to be done."

Yes.

We can relitigate it for the rest of our lives but the reality is, George Bush became president. He served as president, and that's that.

Yes.

Donald Trump has served as president whether you agree with the election or don't agree with the election, what happened or the popular versus the electoral vote. What separates us from other nations is our ability to say, "Okay, well, we're moving on."-

Because the election gives legitimacy to whoever occupies the position next.

I have to admit, I'm a little frustrated, we haven't done that in the last two elections because, excuse me, with Obama and with Trump, there was a lot of carryover of anger and frustration.
Yeah.

About your candidate not winning, and that's just not helpful to anybody. It comes back to why we started this podcast. It's not helpful to keep relitigating your anger and frustration. What's done is done. We need to move on. Let's work to find a way to work together or at the very least to not hurt each other.

That's right. I mean because in the last, if you will, two presidents that have been elected, first Obama and now Trump, the losers have demonstrated a recalcitrance, an anger, if you will, that's just not healthy. I don't think it's healthy.

So losing side?

So you lost.-

It hurts and it's hard.

We have another presidential election in four years, what are we going to do in those four years?

Right.

Because as we've discussed before, right or wrong, we have a form of democratic governance in this country that requires cooperation, compromise, and consensus to get things done. So unless your anger is so overwhelming to where you never want to get things done, well, at some point in time, you're going to have to stop and say, "Okay, we lost. We don't necessarily like the other side, but there are some things we want to get done."

Right.

You can't do that if you always view whoever won an election as the enemy.
Right.

Yeah.

I agree.

Yeah.

We'll get together and talk there next week.

All right. See you.

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