Jackie McDermott: [00:00:00] Welcome to Live at the National Constitution Center. I'm Jackie McDermott, the show's producer. Last week, we joined with the University of Pennsylvania Journal of Constitutional Law to present its annual symposium on The Past, Present and Future of Presidential Elections. The first panel explores the origins of presidential elections while the second covers the more recent history and the third looks ahead to the future. Here's Jeff, to get this three-part conversation started.

Jeffrey Rosen: [00:00:30] Ladies and gentlemen, welcome to the National Constitution Center and to today's convening of America's Town Hall. I am Jeffrey Rosen, the president and CEO of this wonderful institution. I'm thrilled that today's symposium is presented in partnership with the University of Pennsylvania Journal of Constitutional Law, and many thanks to my esteemed colleague and friend, Professor Bill and the student staff of the journal for having organized this program and having made it possible. Alright friends. Bill, you all and the NCC team have convened America's greatest scholars of the presidency, and we're going to have three panels. I'll lead a conversation with all of the scholars. Please put your questions in the Q and A box as we're going along, and I'll introduce them as best I can as we're talking. All of the scholars will be reading them and we'll respond to them and keep this as interactive as possible. So let's begin with the first panel. The origins and theoretical perspectives of the electoral college and our scholars are William Ewald who is a Professor of Law and Philosophy at the University of Pennsylvania. He's the author of many pathbreaking articles on the founding including *James Wilson and His Role of the Constitutional Convention*. His forthcoming book is *The Style of American Law*. Kim Lane Scheppele is Laurance S. Rockefeller Professor of Sociology and International Affairs in the Woodrow Wilson School and University Center for Human Values at Princeton. She is one of America's leading experts on comparative constitutional law, as well as one of the most dynamic guests on the *We the People* podcast that we have the privilege of hosting. It's always a pleasure to talk with her. Jack Rakove, another great friend of the Constitution Center *We the People* and the University of Pennsylvania's Co-professor of History and American Studies and Professor of Political Science Emeritus at Stanford University. He's the author of many books including the Pulitzer Prize winning *Original Meanings, Politics, and Ideas in the Making of the Constitution.* Bill, Kim, and Jack welcome. It's such an honor to have all of you here. And Kim, I'm going to ask you to begin by setting the stage and telling us about the origins and theoretical perspectives of the electoral college in an international perspective.

Kim Lane Scheppele: [00:02:47] Right. Well, thank you so much. And I have to say one correction on my introduction since Princeton renamed the Woodrow Wilson school. So now we are the Princeton School. So I'm in the Princeton School at Princeton University. Obviously this is waiting for a donor, right. Anyway. But anyway, lovely to be here. So the thing that's sort of striking about the U.S. is of course, it's not the only country in the world that has elections. It is the only country in the world that has something quite like the electoral college. But I'm actually not going to talk about that so much because what I do want to say, and I think that's on the website, is that every time the U.S. runs an election it has international election observers that come and check out our election procedures and they assess us according to international standards. And none of these reports mention the

electoral college except to say that's how we do things. These international reports find fault with us on a whole bunch of other standards. And I just want to run through some of those just so that we realize how American elections don't wind up at the top of the pack internationally when assessed by international observers. So the first thing the international observers talk about is how we have a partisan election machinery. There are very few democracies in good standing that turnover the administration of elections to people who are elected on partisan tickets. This comes up periodically. It came up this year when we wondered whether the Michigan Board of Elections was going to certify the results because the results could have split 2-2 Republican and Democrat. And so suddenly we see this as a very, very rickety structure. Overall this year, it sort of worked, but it's an accident waiting to happen. This machinery is also underfunded. So very often the election technology that different districts use is way outdated, susceptible, rickety, hackable. There is still eight States with no paper trail for checking or doing any kind of audit or recount. Also weirdly in the U.S. we have no system of automatically registering people to vote. And the fact it's a struggle to register to vote in a lot of places. In most democracies, if you are a resident in good standing, you are automatically entitled to vote and here we put all kinds of hurdles in front of people to be able to register. The weirdest thing about our elections... though, is the fact that we run national elections, both presidential and elections for the U.S. Congress, according to 50 different rules in the 50 different States with some federal structure, but that federal structure is not very detailed. And so there are some States where you have mail-in voting or early voting or some States where you need a 30 day residency or a 60 day residency. In other words, we have a national election run by the States that can be a virtue, decentralized, harder to hack, harder to rig, but it can be a vice because in fact, the right to vote is not equally realizable across the country. That leads to another problem, voter disenfranchisement. So we literally have all kinds of ways once people struggle to get registered to vote of having them not vote either by showing voter ID or by doing purchase of voter rolls. By the way, all this has been upheld by the Supreme court. We're also unusual in having public of having our elections be funded by private donors and particularly now by private donors who are not very transparent, right. So we have an opaque and completely, almost completely unregulated campaign finance system. We also have a sort of blurring of state and party, which we saw a lot in this election. So many States have rules about limiting what incumbents can do to use their office for reelection. And this year in particular, those rules just went out the window if we ever had them. And then finally, I just want to mention one thing. We have a system in America of federal elections, both for the presidency and for the Congress, that are highly disproportionate. So we have a system in which if there's a 50/50 split, you don't get a 50/50 split, you know, in either the winner table. Cause we have all these winner-take-all districts, right? So Congress is very likely to be way out of whack with where public opinion is. That's true in the House. That's sort of complicated by gerrymandering, but it's also true in the Senate. So just consider one thing about the Senate. The six senators from California, Texas, and New York represent the same number of people as 62 senators from the smallest 31 States. So there's all kinds of ways in which our constitutional system enables minority rule and is highly disproportionate. All of those things get commented on by election observers when they come to observe us and the electoral college, weird though it is and obsessed that we are with it, is way down the list of things we could do to actually improve our standing and international perspective.

Jeffrey Rosen: [00:07:33] Thank you for that fascinating putting of our electoral system in the international perspective. And it's very interesting to learn about the ways in which we differ from international norms of which as you conclude, the electoral college is not the most dramatic. We'll next hear from our symposium convener, Bill. Bill, you are perhaps America's leading scholar of James Wilson, the forgotten founder of the convention who not only conceived of the central idea, that we the people of the United States as a whole of the sovereign power, but also seem to have brokered the unusual compromise with the electoral college. Tell us about the origins and the electoral college and the role of James Wilson.

William "Bill" Ewald: [00:08:14] Oh, okay. So there are two questions there. I'm glad that Kim decided not to talk about the electoral college because in fact, the most interesting single feature of the electoral college is it doesn't actually exist. There isn't an electoral college, as I'll explain in a second, that's actually related to Wilson who very often, as you say, he is either blamed or credited or given the responsibility for devising the electoral college. That I think is actually a mistake. And let me just, let me start with just, so in very broad brush terms, walk through the principle steps at the constitutional convention and explain what I think was going on. So at the very beginning of the convention, this is the 1st of June, Wilson proposes direct popular election. Nobody wants to take him up on that. Next day, he comes back and says, why don't we have a system of electors? And the usual thing to do, it's what I did when I first started writing about Wilson, and say, "Oh, Wilson was the divisor of the electoral college." Actually, what he was proposing is very different. What he wanted was a system of indirect, popular election. He wanted to bypass the States. He wanted to divide the United States into districts, have each district select an elector, then the electors would elect the president. Now, if you think about it for a second, that avoids the big state, small state controversies. It also avoids the three-fifths slavery issue. So his proposal really does not look like the final thing that gets ultimately called the electoral college. Okay. Neither of those proposals went any place at the convention. You're stuck with the Virginia plan. Virginia plan was let Congress elect the president. They kick things around. They have a long period in the middle of July when they're trying all different kinds of schemes, everything that you can think of, probably a lot of things that you can't think of. At one point Wilson, I suspect in exasperation said, "Why don't we just do this by lottery?" Okay. That didn't go any place either. They went back to the Virginia plan. And then something quite interesting happens in September where the documentation is not terrific, but a somewhat obscure committee known as the committee on postponed parts comes back to the convention and they say, "We've got this idea." We're going to use electors. And everybody seems quite confused. Say, you know, we talked about that. We rejected it and they say, no, no, it's a compound system. We're going to have a system of presidential electors. That's to take the decision out of the hands of Congress because Congress forms cabals. Congress can be corrupted. We'll have Congress in there as a backstop in case the electoral college doesn't yield a clear winner, but we're going to have electors first. Now, here's the interesting point. The electors were meant to be chosen by the state legislatures. There's nothing in the constitution about popular election at all. Okay. Of course, there's a possibility that maybe the state legislatures out of the goodness of their heart will say, why don't we have a popular election, but it's not required. In fact, the first number of elections,

it was quite overwhelmingly they tilted towards let the state legislatures appoint the electors directly. Okay. So why have electors at all? Well, the reason it was given that everybody seemed to have accepted was this is a way of preventing cabals from forming. And the operative part of this very ramshackled institution is we're going to make the electors vote on the same day in different States. They come together. They can't deliberate as a group. That wasn't an afterthought. That was kind of the, that was the point of this committee proposal. And what it means is it's not just that there is no collegial body that you can call the electoral college. They were deliberately trying to prevent anything like such a deliberative body from forming because they worried about cabal. Now there's a complex intellectual history of how the terminology of the electoral college comes into play. It doesn't really get firmly settled until the 20th century. People earlier they talked about the electoral colleges. The various ways of speaking about the system of presidential election. But anyhow, that's a long way of saying Kim is right not to talk about this non-existent entity and also saying you can't blame James Wilson.

Jeffrey Rosen: [00:13:32] Wonderful conclusion. You can't blame Jamie's Wilson is a fine model for our conference, although you can credit him with so much, including the emphasis on popular sovereignty, and so interesting to learn about the framers concern about cabals. And we'd love to hear more about how they connect their fear of cabals with their fear of factions. Jack Rakove, you are America's leading scholar of James Madison. And I think I would love to know how Madison differed from Wilson in his views about the electoral college. Did he support the Virginia plan, which would have had election by the legislature? At one point he seemed to support the national popular vote, but tell us about James Madison and the election of the president.

Jack Rakove: [00:14:14] Well, Jeff, I think the starting point to jump on Madison is to say that his ideas about the executive branch of the federal government probably represented the least developed aspect of his constitutional theory going into the convention. And even as the convention proceeded, I think Madison a good decade down into the mid 1790 or late 1790s, he's really starting to come to grips with the political potential of the presidency and to try and reconceive what American politics should be like once you reckon with how strong an institution, the president, could become. I think that the simple point is illustrative of a more fundamental problem. Which is, I think, I always say what we talk about the origins of electoral college it's important to cut the framers some slack. It's important to recognize that there was no precedent available for the kind of institution that they were committed to creating that's to say a national and lowercase "r" national republican executive. The dominant models of executive power in the 18th century were either monarchical or ministerial and primative form of cabinet government that was developing. They'd been developing in Britain since you know, since the early 18th century. So I think for starters you use a phrase that Madison himself cited that the presidency at the convention was a product of a Madison goal, tedious and reiterated discussions where the framers looped round and round, and before coming up with a proposal that came out of the aptly or curiously named committee on Postponed Parts. A wonderful and rather obscure name for a committee. I think the second key point to be made consistent with this is that as I read the debates that you know, that the bill was discussing it seems to me the leading edge was not the different

advantages that the different modes of election would provide, whether you had a popular vote or a congressional vote or a vote by electors. It was really in the disadvantages. Well, Madison actually joined Wilson. Madison was originally resisted the idea of having a popular election and he knows first off we have a population that means there's only a single constituency. If you have a true popular election, there's only a single constituency. Let's call it for reasons of convenience, the United States of America. And a vote, you know, according to my principles of have one person, one person, one vote model would have worked very well. But the problem with that is you'd have a big, there'd be a big adverse regional impact on the South for whose interests Madison spoke. So Madison originally imposed it, but then, you know, a day or two later, he reasoned Wilson, the popular election would not be so bad. But yeah, problem with popular elections, you can't be sure that voters at a local level or the, you know, within the States would know who the best characters were. So it'd be very hard to get a decisive result. You can solve that problem if you have a congressional election. By definition, Members of Congress. I mean, today, today, this is becoming a copper intuitive proposal, but by definition, members of Congress will be the best part of your national political class. So you solve the information problem you might have with a popular election. But the problem is if you're committed to the idea of an independent executive, the way Wilson was or Hampton was, or Governor Morris was, if you move the idea of, of excuse me, it could be that you have a legislative election and you want, the president would be constitutionally independent of Congress, then you have to limit him to a single term. Because otherwise it will become the tool or the toady, the lackey of Congress. And that turns out to be a killer objection. And, you know, you see this actually in the final debates in the committee on postponed parts report, because it's tied in with the whole complicated reason why we wind up in a contingent election, having the votes cast, not by the Senate but by the House with each state having one vote. And the reason for that is that the President and the Senate had been tied together with the two advice and consent clauses relating to the treaties in appointment. So it's kind of complicated, constitutional calculus. But I guess, you know, there are serious problems that congressional election, if you're committed to that notion of executive independence. I think in that sense, the idea of having presidential electors became in a sense, kind of the default option. It wasn't, it wasn't that anyone had a clear idea how it was going to work. It wasn't that anyone had any great degree of confidence of who, who the electors would actually be. I think it was George Mason says one point they might be men of not even secondary or tertiary importance. I mean, we just have no idea. And I think the other part of it is, which is, I think is starting to move ominously in our, in our politics again, is all the decisions about how electors are actually going to be appointed were defaulted to the States. Yeah. For about 40 years, we got to, you know, the basic default option of when it was called the unit rule, a winner take all statewide, popular, popular voting. So the, you know, all the electors chosen in the state would go to whoever has a parality. It's the kind of thing that Ned Foley is not all that wild about for his own reasons. But I think the key thing here is that the framers of the Constitution did not really work out who the electors would be or how they should be appointed. They, I think running out of time to just default to that option to the States, and this is becoming a scary possibility again, because we don't know what forms of manipulation might arise. I was just reading another horror story about Arizona this morning. And I'm looking at, you know, looking at, you know, a bill has been introduced to allow the state legislature to override a

popular vote. I don't think it would be, I don't think it will enact, but it shows how much mischief, how much toll could still arise at the state level.

Jeffrey Rosen: [00:19:43] Thank you so much for that, Jack Rakove. So interesting to learn of Madison's incompletely theorized conception of presidential elections, and that idea that he's grappling toward a solution and that the fear that, that idea of the fear that the people won't know the best candidates. So even if you want a popular vote, maybe Congress would be better, but then the president would be in the thrall of Congress and you'd have to term limit him and so the electoral college is sort of an uncertain compromise in order to grapple with trying to get the best candidate is absolutely fascinating. All right. One round of concluding thoughts for this panel. Kim having heard Bill and Jack's history, does any other country have similarly unusual, historically specific efforts to avoid popular passions directly choosing the presidency because of concern that they won't choose the best candidates? In other words, are there other historical analogs of the electoral college as an alternative to the direct popular vote and what are other aspects of our system that in light of our history seem out of the ordinary in an international sense?

Kim Lane Scheppele: [00:20:47] Right. Well, one of the ways to get a chief executive is of course to have the parliament or the Congress elect them and we call those parliamentary systems. Right? And the vast majority of stable democracies in the world are actually parliamentary systems in which the executive is accountable to a legislature, which can see what they're doing and can also vet the candidates a little bit better sometimes than our political parties are doing at the moment. But there have been other efforts. I mean, certainly in France under the 1958 constitution, there was a kind of public assembly of the members of the parliament and members of local governments to elect the president and that was abandoned within 10 years in favor of a popular election. So what you see is that the older a constitution is, the more distrust there is of the people and the newer the constitutions there are, the more there is direct, popular vote. So what you see basically in the U.S. is the fact that, you know, we're driving the model T of constitutions when the rest of the world is driving, you know, the cars of the future of the levitate and so on. So a lot of the weird features of our system come from the fact that it was designed before things that are commonplace now are commonplace.

Jeffrey Rosen: [00:21:55] Fascinating. Bill, the Constitution Center just ran the most illuminating constitution drafting project, and we convened conservative, libertarian, and progressive teams to draft constitutions from scratch and to everyone's surprise both the conservatives and the progressives proposed replacing the electoral college with a national popular vote with ranked choice voting. Would Wilson have approved of that solution? And are they basically coming back to his original vision or was his vision of a popular vote something else?

William "Bill" Ewald: [00:22:23] Well, Wilson himself, I think would pretty clearly have been on board, but the deeper point, which is something that Jack was saying that really needs to be emphasized, there's a kind of mythology that the framers came together in Philadelphia and there was this miraculous moment where there was a brilliant, deeply, theoretically conceived plan to set up the electoral college with profound, underlying thought. And that's

something that just simply is not true. They were stumbling throughout the summer trying to figure out what they're going to do about this. They changed their mind. Everybody. Wilson changes his mind. Madison changes his mind. They flip back and forth. They speculate. Then they say, Oh, that speculation is no good. They come up with this final device, which as I say, what they're trying to do is they're trying to prove that cabals. Well, okay. Try to explain that to a general audience that that's why we have the electoral college. You just got blank looks. And by the way, James Madison is very, very clear on this point. In his later correspondence in 1823, he's asked specifically about the system of presidential elections and he says, you know, my friend. It was late in the day. We were all very tired and then these wonderful phrase that says it was the hurrying influence produced by fatigue and impatience. That's why you've got that system. So, okay. There's James Madison, father of the constitution. That's his view on what happened. There was no miracle. They were doing their best. They should be given all the credit for doing their best, but seeing the electoral college as something that was profoundly thought through just, well take it up with Madison.

Jeffrey Rosen: [00:24:19] Thanks. Thank you so much for that. Jack, I'm going to ask you to take it up with Madison for the final thoughts on this panel. We've just seen the specter of Madison's worst nightmare. Madison warned that in all large assemblies of any character composed, passion never fails to rest the Sceptre from reason even if every Athenian had been Socrates, Athens would still have been a mob. And we've seen our mob marching on the Capitol, storming the Capitol. In light of Madison's concerns about mobs, fanned by Shay's rebellion and cabals as Billy Walt has described. Channel him today. If he were designing a presidential election system today, would he actually favor a direct, popular vote or would he want some other way of filtering the passions of the people so that the best candidates could emerge?

Jack Rakove: [00:25:02] No, I, it was a little bit to how far one wants to go when speculating about these things. But yeah, I think Jeff, I think if you look at the first decade, well really decade and a half after the constitution went into effect. So we get down to the ratification at least of the 12th amendment in 1804... The critical developments that took place- one is you have to get to the first two contested elections, 1796 and 1800. The framers, you know, so long as Washington wants to be president, it doesn't matter what the rules are. Whatever set of rules you apply, you'll get the same results. But as soon as Washington, as soon as Washington reveals his desire finally, to go back to Mount Vernon. A couple of things happened. The first thing is that the two parties were already well-organized in 1796. And even the Washington delayed his farewell address as long as he could partially to favor the Federalists and the kind of, you know, disadvantage, his Republican opponents, meaning Jefferson, Madison, and their team. As soon as everybody knew a contested election would take place, I think two things happened. The first is a popular vote would have worked in 1796. You had two preeminent candidates, Jefferson and John Adams. Both were well known to the American public. The problem with identifying voters in large, knowing who to choose from. I think that problem would largely have been solved. Second thing that happened is that all the electors were were really tools of party. They were not independent voices. They were all, I mean, they’re independent voices in the sense of Alexander

Hamilton, because he despised John Adams, tried to manipulate the Federalist vote, you know, away from Adams. So Hamilton has this complicated scheme for everyone to cast the second vote for someone he favored and it's frozen boats away from John Adams. That's the key thing is we try to imagine if the framers had that pure vision, that Bill was alluding to which in fact they did not. We try to imagine the electors as these extremely distinguished, where you have some, which is interested, non-factious use, Madison's phrase non-factious group of citizens. You know, the ones that really matter. That was never the case. So we worry now about the problem of faithless electors and the Supreme court just looked at and, you know, it is a interesting question by itself, but throughout their history, once elections matter, the electors were really party loyalists. So that whole image that you'd have this independent, distinguished body to avoid cabal, much less the Kaballah which could be even worse. They peruse them you know, that … was a fear they had, but it was never really realized. So two things: a popular election would work, and the electors were getting in a sense functionless… from the beginning and even more so once you get to the 12th Amendment.

Jeffrey Rosen: [00:27:44] Thank you so much for that. Never avoid the Kabbalah, which is always worth reading, but avoiding cabals is good. One of our friends in the chat asked what is a cabal? A cabal, the dictionary definition is a secret political clique or faction, but that leads to the tough question of what's a faction. And remember in Federalist 10 Madison talks about any group, either a majority or a minority animated by passion rather than reason devoted to self-interest rather than the common good, which of course begs the question of what is the common good? So a great question, but Kabbalah is something the founders feared. All right. We now turn to panel two. I'm going to invite all of them to join me on the zoom screen. Thank you so much, Kim Scheppele, Bill Ewald, Jack Rakove. Superb discussion! You've set us off so very well. And thank you for all the light that you have spread. Wonderful to talk. It's now my great pleasure to introduce panel two. We have Ned Foley, Alex Keyssar, and Guy-Uriel Charles. Let me introduce them each in turn. Ned, I'm going to ask you to start. You and the Constitution Center had such amazing discussions about whether the election of 2020 was going to be unusual in historical perspective. You've been writing such illuminating works about the historical perspective. Basically, tell us about how the election of 2020 compares to the most contested elections of the past, including 1800 and 1876. And in what ways, if any, was 2020 more extraordinary than any other election?

Edward Foley: [00:29:17] Well, sure. Thank you, Jeff. And it's great to be back. And yes, we have just lived through this amazingly searing election that culminated, as you said, with the insurrection at the Capitol. And for that reason, we both, in some ways, don't want to revisit that history as much as we need to. And we probably also don't want to think about 2024. Like, can we just take a break? But I actually think we need to spend some time thinking about how, what we just went through, sets us up for the possibility of an even more difficult election in 2024. In part, because of the fragmentation within the Republican party that we've watched over the last week or two. Frankly, since January 6th. And as you say, let's put the current events and the future in historical perspective by starting as you said with the early years and the 12th Amendment, because as Jack Rakoff just told us absolutely

importantly, our electoral college is the 12th amendment, which was put in place after the development of two-party competition, which as Jack said emerged by 1796 and 1800. So, the 12th amendment was built on the expectation that we would have, you know, two party competition that we normally do have. But what that means is that our system has very great difficulty handling a third party or multi-party elections. And that's what I fear may be coming down the road next time given the fragmentation of the Republican party. No guarantees from that. It's still four years away. But we have to imagine the possibility of a three-way split between Trump running again, as the Republican nominee; maybe Kamala Harris, vice president, running to be president on the democratic side; and then a non Trumpian Republican breaking from the Republican party because they can't tolerate any longer the fact that the Republican party has become the party of Trump and offering a genuine third party alternative. Not a Democrat. Not a Trumpian. You know, it could be Mitt Romney again, given the fact that he's so anti-Trump. It could be Ben Sasse. It could be a number of figures. Larry Hogan. But the point is, you know, we may not see a three-way split. But if we do see a three-way split, Trump versus traditional Republican on some other label versus Democrat, our system can't really handle that. And the nature of polarization now, and the ugliness of American politics now, makes that fraught in a particular way if we compare the current moment with the previous periods in our history where we've had difficulty handling third-parties. So really quickly, cause I know we want to move on. In the 1840s, that was a period where significant third party development occurred over the issue of slavery. You have the traditional fight between the Democrats and the wigs, but the Free Soilers or the Liberty party first in 1844, created a three-way split that the system couldn't handle. And as Sean Willens at Princeton says, you know, that 1844 election may have sent us on the road to the civil war for reasons we could discuss if we want to in Q and A. Another period of third party involvement was the 1880s and 1890s. And what's interesting, I think, as we compare that to today is Grover Cleveland wins in 1884, loses in 1888, and come backs and wins again in 1892. And we've heard Trump talking about wanting to replicate what Grover Cleveland did being a president who lost and comes back and wins again. Interestingly enough, Grover Cleveland was never impeached once. Let alone twice. He conceded defeat in 1888. In fact, he held the umbrella. It was raining for Harrison's inauguration. And unlike Trump who refused to go to Biden's inauguration, Harrison was willing to hold excuse me, Cleveland was willing to hold Harrison's umbrella as Harrison gave his inaugural address to show that our, you know, that they could still be friends despite their, you know, their electoral competition. So if we have a rematch between Trump and some Democrat in four years, it won't be as friendly. So the historical parallels aren't perfect, but that's why I think as we come to our present era, we haven't fully come to grips with the fact that ever since Ross Perot was on the scene in 1992 and Ralph Nader operated as something of a spoiler in 2000 and Gary Johnson and Jill Stein, arguably were a factor for why Trump wins the electoral college in 2016. Our system is in a new era of potential destabilization where it can't handle, you know, a third or fourth candidate. And so we need to think really carefully about what our architecture and infrastructure is going into the next election. Now, in the last panel, you mentioned the idea of rank choice voting. And you know from previous conversations, I do think rank choice voting at the level of the state choice like Maine has done to appoint it's electors is a way to handle this issue for reasons we could discuss in Q and A.

Jeffrey Rosen: [00:35:10] Thank you so much, Ned Foley, Ebersold Chair in Constitutional Law at The Ohio State University and your new book is Presidential Elections and Majority Rule. Alex Keyssar, Matthew Sterling Professor of History and Social Policy at Harvard. Your book, The Right to Vote: The Contested History of Democracy in the United States was named the best book in U.S. history by the American Historical Association and The Historical Society. Help us put in historical perspective the difference between contested elections that are really close, but don't lead to grave polarization or dispute like the election of 1916 which was extraordinarily close, and those of the kind that Ned discussed in the 1840s, and today where polarization and other factors makes us especially vulnerable to extraordinary disruption. How can we distinguish between these different kinds of close elections and in what kind of historical perspective would you put the contested election of 2020?

Alex Keyssar: [00:36:11] Thank you for inviting me. It's been a pleasure to be here and to join various friends and colleagues in these discussions. I'm not sure. I guess what I would see as the difference is between close elections that occur in periods of really acrid partisanship and close to elections that occur in other periods. You know, it's interesting that we live now in a world where we talk about sort of the kind of venom, you know, between the parties and it's real. And I agree with that. But I'm old enough to remember back to a period when a number of issues to talk about the Republican and Democratic parties as Tweedledum and Tweedledee. And that, you know, the only different, and quips about the Soviet union, that the only difference between our political system and the Soviet system was that we had two parties rather than one, but we only had one more than they had. And I think that you know, I think that in 1916, I mean, there was a lot of noise and the Republican parties are living with his own tensions, but I think that that was you know, that that was not a period of acrid partisanship. The other election that comes to mind in that respect really was the 2000 election. Which was extremely close. As close as it could be. Right. The final, the margin of difference was smaller than the margin of error of the technology, so that we don't really know who won the 2000 election. But in fact, what was really notable about it was how muted the protests were. I mean, it's certainly if you compare it to what just happened, which wasn't that close, but an extremely close election. I mean, there were some violence and threats of violence in Florida during the counting. But at the end of it all, not only did Al Gore say, you know, okay, you know, you won. And in fact, he presided over the Senate or he presided over the joint session of Congress. But there were also relatively, you know, there, there was a kind of dispirited protest on an inauguration day in the rain, but it was, it was quite small. And I think that behind that was a broader conviction which turned out to be false, but a broader conviction that it didn't matter too much whether Al Gore or George Bush would become president. And you know, George Bush had talked about a kinder, gentler America. So, you know, I think it's the difference in the periods and rather than in the elections themselves. And I think and I share Ned's apprehensions, and the apprehensions of others, their … apprehensions too. I, you know, to extend my comments for a minute or two, I think that the 2020 election has exposed a variety of flaws built into our presidential election procedures. That they've been there for a long time. They've been latent. They've been avoided because of our reliance on norms that you don't do that sort of thing. For example, the legislature does not choose

electorate by itself. But these norms are being cast aside. There are a lot of weak points in the process, including I, you know, I would also underscore what was said earlier about the fact that we have a very bizarre electoral system where we let partisan institutions decide the outcome of elections and there's no partisan intervention. So I see lots of sources of problems for 2024 and beyond, and in an atmosphere of such extreme partisanship that I think there's trouble ahead.

Jeffrey Rosen: [00:39:59] Thank you very much for that. And for pointing us forward and asking us to think about the guardrails of democracy that needed to be resurrected in light of our recent experience.

Alex Keyssar: [00:40:11] Jeff, one thing, could you also mention my book about the electoral college?

Jeffrey Rosen: [00:40:15] I can, but you can do it better. So why don't you tell us the title and everyone should get it. I can definitely endorse it because I know you and your books are.

Alex Keyssar: [00:40:24] It's called, *Why do we still have the Electoral College?*

Jeffrey Rosen: [00:40:28] Absolutely, of course and the next panel will be debating that question as well as I'm drawing on your wisdom as we always do. So. Thanks for all of your great work. Guy-Uriel Charles, you are currently the Edward and Ellen Schwartzman Professor of Law at Duke Law School. And just a few weeks ago, Harvard announced that in July you will join the Harvard Law faculty as the inaugural Charles J. Ogletree, Jr. Professor of Law and Service Faculty Director of Harvard Charles Hamilton Houston Institute for Race and Justice. Congratulations on that great appointment. You're also currently working on a book with Luis Fuentes-Rohwer about the past and future of voting rights. So why don't you take us back and also forward? What can we learn from the history of voting rights about the kind of structural laws or challenges that the 2020 election exposed that you think should be corrected in the future?

Guy-Uriel Charles: [00:41:21] Thank you, Jeff. And thank you for having me. I also want to build on the comments of my fellow amazing co-panelists, as well as the fabulous panel that came before to think about some of the structural divisions that we have in American democracy that sort of take us through the day. So we have a framework that divides voting rights and authority among and between the States and the federal government. We have a deeply polarized world that we currently live in, a partisan polarization, but even much more broader political polarization. There's an expectation of one person one vote in popular election, but within a framework of elitist competition where we rely upon the States; where we rely upon partisans, as others have said, to make fundamental local decisions; where we also rely upon the courts to resolve fundamental political disputes. And at the same time we have a presidential selection system that is fundamentally a popularity contest. And so if you could get it through, if we get through the party primaries and really what's interesting to me about that is anybody who has any popularity is being touted as that person should run for president, whether or not they've held previous office before, whether or not they're qualified, whether or not they're competent. So our current presidential election system

overlaid with different conceptions about democratic participation; overlaid with worries about political polarization; overlaid with worries about partisanship, partisan administration, de-centralization without true positive, fundamental rights to guide our way; without sufficient federal regulation to guide our way leads us to the current moment when, and if, there are distinctive pressures that are put on the system. And so we just saw in 2020, distinctive pressures, the intensity of competition and the preference or the temptation to bend the rules. So Jack mentioned earlier what's going on in Arizona. One can also think about what may be going on in Georgia. Which is, "Okay. Let's change the voting rights rules to provide an advantage in the next election that's coming, because we now know that Georgia is deeply a battleground state and that the votes there are going to matter and may be determinative for the next presidential election." So there's a temptation to change and bend the rules to provide partisan advantage in the next election. So given these pressures, we don't have an electoral, a presidential selection system that's capable of responding to these types of challenges. And so really what we have are norms that serve as our great guard rails and if those norms are weakened, as we saw that they were in 2020, then that sets up deep clashes within our society and within our framework. And it's not surprising, then that leads to things like what we saw in January 6th. So I know that your next panel will think about what we do next, but what I want to point out are some of the structural contradictions within the system that we currently have.

Jeffrey Rosen: [00:44:42] Thank you very much, indeed for that for teeing up the discussion of what comes next and noting both structural or legal needs, like you suggest the possibility of federal election supervision, as well as the buttressing of norms, which are necessary for the system to work. I would be I think that'd be a great focus for our, for your final observations for this panel. Ned, as you look to history and you've just studied so closely the remarkable election of 2020, if you had to propose a resurrection of any guardrails: constitutional, legal, or normative to avoid a repeat of what we've just seen, what would some of those guardrails be?

Edward Foley: [00:45:23] Yeah, well, to be clear, I'd love a constitutional amendment that got rid of the electoral college, but I don't see that as a feasible in the short term. And I think, you know, there's urgency. I mean, as much as we need to worry about the presidential elections, I'm actually also worried about Senate elections and how selections for the reasons that Kim was also, I think the, the major urgency on the national electoral agenda is how to have a healthy, competitive system where at least the two major parties believe in competition, meaning they'll play by the rules and the spirit of the rules. And one side is not doing that. And so I'm starting to call this the Rob Portman problem where Rob Portman, Senator Rob Portman from my state decides he's not gonna run for Senate again because of the hyperpolarization that is caused by the effect of primary elections interacting with our current system of general elections that knocks out the possibility of center, right candidates like Rob Portman, leaving you only with very far right candidates, and the left. Alaska has a really interesting reform that they just adopted in November which is called Top Four with rank choice voting, where you have a nonpartisan primary like California has, but instead sending two candidates to the general election, you send four to the general election and then you use rank choice voting. There's a version of this called the Final Five. I

don't think there's a magic number whether you have five finalists or four finalists. That theory wouldn't care about that. So I think we should use federalism, frankly, to have laboratories of democracy experiment in ways to avoid the problems of polarization. And so States that have ballot initiatives like Michigan, you know, Michigan just adopted gerrymandering reform. To get a commission that we'll see how that works for the state of Michigan. So I think we need to look at a lot of things between now and 2022 and 2024, because I think we're in a crisis moment. And I would put the effect of party primaries and the fact that there's this verb to be primaried cutting out the middle of American politics is the number one concern. But if we think about presidential elections, I think we have a big choice. And I know I got Jesse on the next panel is going to talk about this. We've got two problems with the current electoral college. One is the fact that it's not a national popular vote and so there's the idea of trying to use this compact to create a national popular vote without a constitutional amendment. The problem with that is that could leave you with a plurality winner, that could be less than 50% in a three-way race. Like I was talking about, you know, if Trump,if the race next time is Trump, Romney, Democrat, who wins the plurality? Trump or the Democrat? Does Romney pull more votes away from Trump, more votes away from the Democrat? What if the non Trump centrist is not Romney, but Ben Sasse does that effect the three-way split? You know, we haven't really looked into this carefully enough, you know. That's why I think we need to think creatively. Can we have both a national popular vote and something like rank choice voting at the same time without a constitutional amendment? That's very difficult to do, but I think we need all hands on deck to figure out how to handle this incredibly urgent moment that we're in.

Jeffrey Rosen: [00:48:55] Thank you very much for those concrete suggestions from ranked choice voting to the way a national popular vote would be structured. That is extremely constructive. Alex Keyssar, if you were proposing specific constitutional, legal, or normative reforms to strengthen the guardrails of democracy when it comes to voting in presidential elections, what would some of them be?

Alex Keyssar: [00:49:16] Well, I guess I would start with something that I implied in my earlier comments, which is that I think that we need to think very seriously about having some kind of a new institution that serves as a neutral arbiter of elections. This idea actually came up very early in our nation's history and it popped up again and was discussed at the time with the infamous Electoral Count Act of 1887 ended up being passed instead. But you know, that, that we let partisan, particularly in this period of extreme polarization that we let partisan elections be in the end, judged and certified bipartisan institutions is a very high risk. And that is one thing that, you know, that that is certainly one place that I would put some energy into building a guardrail there. You know, I think that we saw very clearly on January 6th what can happen when it's not present. I would also think that we need strengthened guardrails, legislative guardrails, federal legislative guardrails even to strengthen the right to vote, to restore some version of the Voting Rights Act or update the Voting Rights Act. The developments that my co panelists, you know, have mentioned about what's happening in Arizona and in Georgia and in a number of other States, there are going to be efforts made, serious efforts made, to make it harder for people to vote. And you know, and I think that the attack on there'll be major attacks. There are already attacks to

try to make a mail-in voting or absentee voting more difficult. And that comes from the view that it's sort of Democrats and poor people and minorities who are taking advantage of that system. I think that you know, we're still involved in the fights that we've been in since the 1990s and arguably for our entire history to try to protect the right, the voting rights of many of our citizens and that that's the second place where I would put my emphasis on guardrails. Although, of course, I mean, I, you know, I, I have to say, I mean, I think that we should replace the electoral college and I think we should do it with a constitutional amendment. And I think that we have to have a serious discussion about strategies to advance that cause.

Jeffrey Rosen: [00:51:40] Thank you very much for those suggestions. I should say that the National Constitution Center is launching a guardrails of democracy initiative to try to collect the most thoughtful proposals from scholars and thought leaders of different perspectives about what kind of guardrails to collect. These are phenomenal suggestions, and I know we will return to them as the initiative continues. Guy Charles, you introduced this really constructive discussion by pointing us toward the future and talking about the possibility of federal or congressional regulations of election. If you had to identify guard rails, constitutional, statutory, or normative to increase the integrity of elections, what would they be?

Guy-Uriel Charles: [00:52:18] Sure. So I'll make two points very quickly. One point that is probably flies under the radar, which is social sanction and economic sanctions for those who violate norms and legal sanction for those who violate norms. So we see, for example, some of the lawyers, prominent lawyers, who were making arguments that were way beyond the pale, right? So we're not talking about arguments that are within the bounds, even stretching the bounds of legal argumentation as to what a legitimate election would look like. So we see law firms we see social sanction for those, that type of behavior. So I think some of these social sanctions are also important and necessary. We're also seeing corporations not contributing campaign financing to candidates and elected officials who are, have participated and serious norm violation. So I think those types of advocacy in favor of those types of sanctions are awesome. We haven't mentioned a bill and that is currently before the house or the house has passed that hopefully we'll get to Congress For the People Act, which is trying to extensively rethink and redo voting rights in this country, including campaign finance. So I think those types of broad voting reforms are absolutely necessary and lieu of a rethinking of the constitutional structure with an amendment of the electoral college. So if we can't do that, we can, Congress can certainly pass legislation that addresses significant aspects of our voting systems, including sure enough voting rights.

Jeffrey Rosen: [00:53:54] Thank you for those important suggestions, including social sanctions of the kind that you described, reminding us, once again, that guard rails are often normative as you initially said, and not always legal or constitutional. Thank you so much Ned Foley, Alex Keyssar and Guy Charles for a wonderful and thought provoking discussion. You've given us so much to think about and have very well teed up our final panel, which I will introduce now. So, thanks to the three of you, and let me now have the pleasure of introducing our final panel, which will discuss prospects for the future of presidential elections.

In alphabetical order, Joel Benenson is founder and CEO of The Benenson Strategy Group. He led the award-winning research and polling programs for president Obama's 2008 and 2012 campaigns. Matthew Dowd, as a political analyst for ABC News and previously played leading roles in the elections of governor Schwartzenegger in California and President George W. Bush. Bradley A. Smith holds the Josiah H Blackmore II Shirley M. Nault Professor of Law position at the Capitol University Law School. He previously served on the federal election commission and is a contributor to the Constitution Center's Interactive Constitution. And Jesse Wegman is a member of the New York Times editorial board and author of the superb book, I can endorse it because I've read it and we've held panels about it, *Let the People Pick the President: The Case for Abolishing the Electoral College*. Welcome to all four of you.

I think in the interest of distilling your incredible learning, I'd like to begin with a mini discussion/debate between Jesse Wegman and Brad Smith about whether or not we should keep the electoral college because you're among the best defenders and critics of it in the country. And then I'm going to ask Joel Benenson and Matthew Dowd about the question of polarization, radicalization of voters, and what, if anything can be done technologically, politically or legally to lessen the dramatic polarization that we just saw? Jesse, why don't we start you off. You and Brad have debated this before and you've debated in other combinations. If you had to distill)you know, you've got about four minutes, if you can manage it--I know it's tough-- why you think we should abolish the electoral college? Give us your best arguments.

Jesse Wegman: [00:56:15] I think we should switch to a national popular vote by whatever means, not because I think it's the best idea, but because people of all political faiths throughout American history have thought it's the best ide. Obviously, nearly 800 attempts throughout history to amend or abolish the college speak to that. And I think it really just gets at this basic modern democratic notion that we value political equality. One person, one vote. And that we value majority rule, which is that the person who gets the most votes wins. The electoral college, as it currently operates, violates both of those. And I think everybody gets that the moment their party suffers. So what looks like a partisan debate, that's actually just not true. It's, Republicans say they like it only because they've happened to win two split elections in the last 20 years. So, what I really think is necessary to do here, I know my book says the case for abolishing the electoral college, and yet I write at length about the popular vote interstate compact, which does not technically abolish the college. It uses the function, the design of the college, to achieve an effect of the national popular vote. But here's what I'll say is, I think it's really important in this debate and in how we talk about it to make sure that people are understanding the stakes and understanding what's actually going on, that regular Americans are.

And the way I would do this most directly is to say, we already have a national popular vote for president. We have had a national popular vote for president at least since 1876, and really in almost every state before then. And what that means is, all eligible citizens have been able to cast their ballot for president. I know technically they're voting for electors, but really they think they're voting for the president since, since 1876 in every single state in the country. The only reason that we don't measure. The vote in that way as a national popular

vote is because of these statewide winner take all laws. And it's those laws that are at the heart of the distortions that are caused by the way the electoral college functions today. And when you talk to people about that and you make people understand that. You find almost nobody supports them. People say, Oh, well, yeah, that's a terrible system, you basically erase all the voters in the state who didn't choose the candidate with the most votes. I think that's really something that gets at people. And so when you can emphasize that point, that to me is the crucial kind of way into people's consciousness about this problem. The national popular vote interstate compact obviously targets that very part of our Constitution, that the States decide how to award their electors and they have virtually all do it by winner take all.

So, you know, we could debate for hours about whether or not the compact will survive, whether it will get enough States to join it in order to become effective, whether there will be constitutional or legal challenges to it that eviscerate it before it can even take effect. I think the bigger point is that what it is doing, this effort, and it's just now 15 years old, is making people aware of that winne take all, state winner take all, distortion. And that to me is a hugely valuable thing. And the reason I'll say that is the reason that it's so offensive to people, that idea, is something that Jack Rakove sort of made me especially aware of during the time I was working on this book, which is nobody votes for president based on the state he or she lives in, it just doesn't happen. People vote because of their political ideology, because of their personal history, because of the community that they live in, they don't do it because of the state. They don't care what state they live in. The big state, small state, medium state. It's about, you know, partisan preference and broader sort of personal issues.

So, I really thin when people realize that, and that's the reality of how people vote, the statewide winner take all rule becomes completely indefensible and. It's that that I think we really need to focus on. If we're going to talk about steps forward to getting to a true, popular vote for president, which is the way I think we should elect the one truly national office in the country.

Jeffrey Rosen: [01:00:03] Thank you very much for that very concise case against the electoral college. Brad Smith, since I've heard you do it very well before, can you make the most concise case you can in favor of the electoral college? What are the reasons for retaining it, even though it now serves a different purpose than the original framers had in mind, and perhaps you could also address Jesse's other points .Would a national popular vote pass legal muster, do you believe? And would you support other means of questioning a winner take all system, including allowing multi-member districts for the election of president, which might address some of the challenges that he where he put on the table.

Bradley A. Smith: [01:00:40] In four minutes?

Jeffrey Rosen: [01:00:42] Maybe five, but you're all doing great. I'm really impressed. And we're going to end this great discussion at 1:30, but thanks for your thoughts.

Bradley A. Smith: [01:00:49] Well, let me start with a reminder that's often overlooked. That is, almost every advanced democracy provides a system in which the government's chief executive officer can be elected, even though the person or the person's party got the

second most votes. Since World War II, that's happened more than once in the United Kingdom, in Australia, in Japan, in Canada, in New Zealand. It happens in almost all of the world's advanced democracies, and there's a reason for that. I'm not impressed by the argument that people feel if my candidate didn't win the state, our votes are erased. That's what elections do. The loser don't elect people. And that's particularly true in any nation, again like Canada, the United Kingdom, that elect people primarily in single member districts. When you lose your voter is in essence erased, if you want to use that term. I think that's way too strong, by the way, people do care about the margins of victory a lot. Democracy works by more ways than just aggregating votes. And people may not vote, they don't say, well, I'm going to vote because I'm a Pennsylvanian. There are probably a few who do, but, they vote based on interests that are shaped by the places in which they live and the interests of a state like Wyoming are very different than the interests in a state like Florida, which are very different than a state like Colorado and all these things, you know, vary from place to place. So one of the things that the electoral college does is it forces a national campaign. And if you think of how President Biden won, he had to go into traditionally Republican states or at least closely divided states, states that lean Republican, Arizona, Georgia, and he had to win those states.

Right. And if you took the electoral college out, it is true that those close elections in those tight states, you know, may have fostered some of the animosity and partisanship, but if you took it out, then you wouldn't need to go try to appeal to enough people in Georgia or Wisconsin to turn those narrow Trump victories from 2016 into narrow Biden victories in 2020. And so I think that generally speaking, the electoral college actually has been a moderating influence on our politics. It's one of the few good things that we can really defend, if we start to concentrate on how do we improve our system. And I do think national popular vote, this combination that Jesse mentioned rather than ammending the Constitution would be something of a disaster, in part, because you wouldn't have any uniform system for voting no uniform system for counting ballots. You know, some states might say, well, we're going to make ourselves more important. So, we'll lower the voting age to 16, and then some other, you know, state from the other party will say, well, let's make it 15. States might start doing all kinds of things to kind of gin up the vote. And with the most partisan states leading the way there are various other problems.

And, so I think it really should be a non-starter that some of the constitutional question issues are close, but at the end, I don't think that you can, that states can sort of gang up to deprive other states and voters of the rights they have under the Constitution. But that's something we'll see about. I think there are more important things that we need to look forward as we go forward and hopefully we'll get a chance to talk a bit more about those.

Jeffrey Rosen: [01:03:52] Thank you very much for that. And thank you for that wonderfully concise answer. That was a total triumph. Joel Benenson, you led the award-winning research and polling program for president Obama's 2008 and 2012 campaigns. In your experience, to what degree does the electoral college distort the nature of campaigning? Does it focus all of the attention of campaigns on a handful of swing states?

Joel Benenson: [01:04:12] Yes. Well--

Jeffrey Rosen: [01:04:13] And, let me just ask also, because I'm so eager for your thoughts, more broadly, what concerned you most about what we learned from the 2020 election? From online radicalization of people through disinformation to extreme polarization, what are the lessons that you take from it that we should be most concerned about and attentive to?

Joel Benenson: [01:04:31] Well, since everybody else has been talking about the electoral college, let me start there and then I'll come back to the other piece. I got to disagree with Brad Smith who has studied this from one vantage point. I can assure you that campaigning in Arizona and Georgia wasn't to guarantee Biden's election, it's to make his opponent play defense in states that he needs to win. If Biden had just won Hillary's map in Michigan, Pennsylvania, and Wisconsin, he still would have been elected president under that system. We only have one national election every four years, and that's for president of the United States. And look, I've been very skilled at it, you know, working on campaigns that target the right states and the right people. Battleground states. 12 to 14 States is where the campaigning takes place. We have a third of the country lives in the four largest states, California, Texas, Florida, and New York, a third of the country live in those states and they get virtually no national campaigning, except for when the candidates are asking for money. And this reflects the same distortion that I think Kim mentioned earlier about the U.S. Senate.

If we truly want to be one country, we have to modernize our system. And we have to not be so wedded--I don't think any of the founders truly believed in the theory of strict constructionism and original intent. The theory that governed --and I got a lot of historians here, so I may be getting out of my lane-- but they believed in a theory of disinterestedness that those who would run for office had property and wealth and would be disinterested in serving for long periods of times. What we now have is political figures who are significantly interested in preserving their power. So this does go beyond the issue of the electoral college. But for us to say, that we're not going to campaign in four states that are not only the four largest in population, but probably among the largest and contributing to the economy of the country as well. Probably those states that have some of the most significant health interests and healthcare issues. They have disadvantaged populations. They are all among diverse states. And yet they're not going to get the level of campaigning that say, even if you want to take your example of Arizona, that Arizona got with what 11 electoral votes.

I mean, we have to be rational about the times we live in here and with the changes in media, with the consumption of really not having three television networks, like I'm guessing a lot of us grew up with three television networks, some of us may be younger than that I think, but we don't have a common conversation in America. And if we can't use our presidential elections to turn them into a national conversation that is going to elect the most powerful person in our country and in our world, then I think we're really not being true in a way to what the founders would have anticipated we would do. And, you know, Hamilton was a great preacher of this when he talked about, you know, things that are necessary, you know, and he had the fight over the bank and everything like, we cannot be rigid about not modernizing our democracy.

So a host of other things have been mentioned, but I think as a practitioner, getting back, particularly with a fractured media environment, and I was a journalist, so I am very much an advocate of the first amendment, but I wonder whether we don't need a fairness doctrine as well, which we got rid of because we are so fractured in our communications and for the greatest power on earth to have a fractured national election, fractured media system, it is going to compound, our political dissonance and people's distaste for it. And we have to find a way where we unify around some of the political mechanisms, so that our leaders are not fighting over small power grabs, but they're focused on the people they represent. All 330 million over them.

Jeffrey Rosen: [01:08:21] Thank you for discussing the practical effects of the electoral college on defense campaigning as you put it. Thanks also for putting on the table, the possibility of reforms for a fractured media environment, which could include, as you just said a fairness doctrine, which might address some of the polarization problems. Matthew Dowd, you also are a very distinguished and experienced political observer. You worked on the elections of Governor Schwarzenegger and President George W. Bush. Do agree with Joel Benenson or not about the incentives that the electoral college gives to focus campaigning and in the swing states? And then maybe your thoughts also about what, if any, reforms, legal technological, or otherwise might be used to address this remarkable question of online polarization and radicalization?

Matthew Dowd: [01:09:09] I appreciate being part of this and as usual I will in all liklihood agree with Joel, as most practitioners, if you gave them true serum, would agree. I mean, the system, practitioners, I mean, I can have a debate over, I can give you my viewpoint on electoral college. But I think as a practitioner, what we do is we play the game with the rules that are provided. And the rules that are provided is an unrepresented presidential race. And therefore, you design a campaign based on an unrepresented presidential campaign race. Republicans know this. Republicans have lost the national popular vote of seven of the last eight presidential elections. They've lost the popular vote of the seven--and in 2004, when Bush won it. When I was the chief strategist on that campaign, Bush actually came within 70,000 votes in Ohio of winning the popular vote. But losing the electoral college in that race. With what Joel said, it's 14 or whatever you said 14 or 15 states. I actually think it's less. I actually think what campaigns really focus on today is about 10 states. Fundamentally 10 states. And in some ways it's eight states.

And in 2024, it's likely to be less. I think the democratic campaign will not target Florida, will not target Ohio, will not target Iowa in the 2024 presidential race, which reduces that to a large degree. And so what that means is if you have 10 States that are you're campaigning in to win the presidency, you're ignoring 40 states. And you're ignoring 40 states not only are you ignoring, as Joel said, California and Texas and New York and New Jersey. But you're also ignoring Alaska and Wyoming and Idaho and Mississippi and Alabama. And so what if in a national popular vote and I've gained this out a number of times as probably Joel has done with other people, other smart campaign people, what you would end up doing in a national popular vote campaign is concentrating on about 40 states. You wouldn't just be, I'm going to go to California. I'm going to go to New York. I'm going to go to Texas. You would look at, how do I win the popular vote in a country that encompasses urban areas, suburban areas

and rural areas and what's the coalition that I need to put together? What margins do I need to reduce in areas that are going to vote against me?

And what are margins do I need to increase in areas that are going to vote for me? And then I would go to the swing areas around the country. So, you would be campaigning in California. A Democrat would be campaigning in Texas. A Republican would be campaigning in New York. And so it would totally change the conversation and actually the issues of importance, because right now, the issues of importance that drive the conversation are reduced to a small group of states that have particular interests that might be separate from what the broad national issue set should or must be in the course of this. And so, as a practitioner in 2004, you designed the campaign almost exclusively on a resource allocation and a communication allocation that goes after the states that you think--you count the red states in your column as a Republican, you count the blue states in the column as a Democrat. And you go after these particular states that you allocate most of your resources, time. And most importantly, the candidates voice in those particular states.

I would say after we lost the popular vote in 2000, and then we approached 2004, we looked at it in such a way that we realized, and many of us realized, that the legitimacy of a presidency is compromised when you win the electoral college and lose the popular vote. So, one of the things we did was we knew we had to win the electoral college, but we also knew from our own vantage point, and we were actually thoughtful about this, that we wanted to win the popular vote for the, for the legitimacy of president Bush and his reelection campaign, for many different reasons in that. And so for me, we can argue over the theory of the electoral college and all of that, but the practical application of it is 80 or 85% of the country is left out of input, fundamental input, into who the leader of the country is. It's just the way it works in practical politics. And now when you have a House and a Senate that has been particularly partisan and polarized, who no longer stands up for their own power, who follows where the president goes.

It basically forces every institution, every institution of government now to follow the lead of a president who's elected in basically 10 states. So we no longer have any national popular leader. We have a Senate that is out of sync with where the country is and how Senate seats are allocated in the country. And we have a House which is heavily gerrymandered in a polarized, divided environment. And so we are left, I don't call it a constitutional crisis. I call it constitutional rot. Where we are today, which we are so far removed from the idea of one man, one vote or one woman, one vote in the sense of this country and any sense of have a country that represents the interests of the country as a whole. And on the particular thing of where we lead today. I'll agree with Joel on this too, is that we have always had media environments that were particularly partisan, but we have now is an access because of technology and because of cable into everybody's home, that what we're doing is confirming people's worst biases and we're confirming people's worst prejudices. And we now have a segment of the country, not small, who, because of how they consume information no longer believes in the democratic institutions that all of us believe in.

They believe in winning before they believe in what our constitutional rights are or what those are. And when we get to that, they would just have--you watched what happened in

2020, but for a few elected officials in a few states, this system, in my view would have collapsed. But for a secretary of state in Michigan, elected officials in Wisconsin, some particular elected officials in Pennsylvania, some people that stood up in Georgia, if those people, those five or six or seven people had been different people, and they could be different people in 2024, which is concerning, if they had not stood up and defended the system, we would have had a system where what happened on January 6th would have been much worse because I think the House of Representatives and the Senate and all of those things, there would have been contested elections, contested electors in various states.

And that's where we've arrived at. I don't think, well, I don't think in any time soon, we're going to pass a constitutional amendment to get rid of the electoral college. So I think the question is, is what do we do that we can take steps that we can take to make our system more responsive to the country as a whole? And there's many things which I'm sure we can talk about that I think we could do in order to fix that before we get rid of the electoral college, because I don't think in this polarized environment that will happen.

Jeffrey Rosen: [01:16:17] Thank you very much for that powerful statement. You just said 80% of the country is denied a voice in the election of the president. The result is a kind of constitutional rot and we need to make our system more responsive to the country. Friends, the one rule of Constitutional Center panels, like Supreme Court oral arguments, is that they must end on time, which means we have five minutes left, which means each of you has time really for just one sentence, essentially one or two sentences to answer the question that Matthew Dowd just set up so well: if you had to name a single reform, legal, political, technological, or normative, that would make our system more responsive to the people, in the spirit of James Wilson the founder who Bill Ewald has channeled so powerfully, what would it be? And so I'll ask each of you for one or at most you know, two sentences about what single reform you would identify to make our system more responsive. And I'll add that has a chance of passing. Let me say that too. And the first word is to Jesse Wagner.

Jesse Wegman: [01:17:20] Well, I'd call for mandatory voting, but I think that would be struck down right off the bat. So, I'll choose the next best thing, which is automatic voter registration in all states.

Jeffrey Rosen: [01:17:28] Great. Brad Smith.

Bradley A. Smith: [01:17:30] I think the big challenge facing us is the loss of confidence in elections. You know, prior to the November election, about 70% of Republicans indicated in polling that they thought there would be massive fraud, but almost as many Democrats also said that they thought there would be massive fraud. And I think if Trump narrowly won, you would see the same kind of--you might not have seen storming of capital, but you might see the same sort of attacks on legitimacy. So, we need to work on legitimacy and for a variety of reasons we just don't have time to go into, I think a key element there is not to make it harder to vote than it's traditionally been.

I, for example, agree with improving registration, making that easier, but I do think we should cut back dramatically on absentee balloting and on early voting. And we should get

back to the idea that we have an election day when we come together as Americans and think hard about what we want to do in the next, you know, two years or four years, and it's a day in which we come together and celebrate democracy and stand next to our neighbors at the polls in which there's much less concern about fraud, which has long been known would have been uncontroversial to say up until 10 months ago, that there is more fraud in absentee ballots, not enough to swing the election last year, but that is an issue. So that's where I would try to focus, put attention on restoring trust in the results of elections.

Jeffrey Rosen: [01:18:42] Thank you. Three minutes left, Joel Benenson.

Joel Benenson: [01:18:44] I would try to pass a constitutional amendment to require all states to have independent redistricting commissions. The fracturing of the country is occurring worse with the most extreme gerrymandering because the technology allows it in ways the founders could never have envisioned and that constitutional amendment should also require those commissions to keep communities as whole as possible. I think we would get a much better sense of representation in Congress from that and I think that would go a great way towards dealing with the day-to-day politics that are a total mess in Washington, DC.

Jeffrey Rosen: [01:19:19] Thank you so much for that and helping us come in right on time. Last word to you, Matthew Dowd.

Matthew Dowd: [01:19:24] So I'm gonna second Joel's thing on independent registration, I mean, independent commissions to decide that and get rid of partisan gerrymandering. But I would do that in combination of increasing the size of the House of Representatives, which can be passed by a majority, all it needs is a majority. We haven't increased the size of the House of Representatives since 1912, when one person represented 200,000 people, we now have one person representing 750,000 people. It would help make the electoral college more representative because it would accede more votes for representative votes for key states that you would then have to campaign in.

So, I would do those things. But I think we fundamentally have to figure out what we do about the United States Senate, because it's unrepresentative and maybe the thing is adding more, creating more states to make a more representative United States Senate, because today it doesn't represent the country either.

Jeffrey Rosen: [01:20:15] Beautiful right, right in on time. And well done to everyone. Thank you so much to our phenomenal panelists on all three panels for an illuminating and thoughtful and thought-provoking discussion. We have tangible takeaways for resurrecting guardrails that the Constitution Center will collect and will keep as part of the conversation. This great symposium will indeed be posted online, as many of you have asked and will be podcasted. So all of the light that are brilliant scholars and practitioners have the spread can inspire the country and guide us forward. Thanks to Bill Ewald and the University of Pennsylvania Journal of Constitutional Law.

And thanks to all of you, friends, for taking an hour and a half in the middle of your important work days to educate yourself about the U.S. Constitution. Thanks again, and I look forward to seeing you at another constitution center panel soon. Bye.

Jackie McDermott: [01:21:10] This program was presented in partnership with the University of Pennsylvania Journal of Constitutional Law. This episode was produced by me, Jackie McDermott, along with Lana Ulrich and John Guerra. It was engineered by David Stotz. Join us back here next week for another new constitutional conversation.

On behalf of the National Constitution Center, I'm Jackie McDermott.