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**Introduction:** Thank you for joining us for this episode of Reasonably Speaking. Today, our panelists are going to explore the recent Supreme Court ruling on faithless electors. This episode will discuss the implications of the Supreme Court opinion and consider a broader set of questions on the Electoral College system as well as look ahead at what could happen in this year's election.

Our first panelist today is Kate Shaw. Kate is a professor of law and the co-director of the Floersheimer Center for Constitutional Democracy at the Cardozo School of Law. Prior to this role, Kate worked in the White House Counsel's Office as a special assistant to the president and associate counsel to the President. She's a regular contributor on ABC News. She co-hosts the Supreme Court podcast, *Strict Scrutiny* and serves as a public member of the Administrative Conference of the United States.

Our second panelist is Franita Tolson of USC Gould School of Law. Franita scholarship and teaching are focused in the areas of election law, constitutional law, legal history, and employment discrimination. She has written on a wide range of topics including partisan gerrymandering, campaign finance reform, the elections clause, the Voting Rights Act of 1965, and the 14th and 15th amendments. Her forthcoming book, *In Congress We Trust?: The Evolution of Federal Voting Rights Enforcement From the Founding to the Present*, will be published later this year.

We are also joined by Ned Foley. Ned is a professor as well as the Director of Election Law at The Ohio State University Moritz College of Law. In addition to teaching, Ned is a nationally recognized author and scholar. His latest book titled *Presidential Elections and Majority Rule: The Rise, Demise and Potential Restoration of the Jeffersonian Electoral College* was published earlier this year. Ned also served as the Reporter on The American Law Institute's, *Principles of the Law of Election*

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Administration, Non-Precinct Voting and Resolution of Valid Counting Disputes.

Ned and Franita co-hosts the podcast, Free and Fair with Franita and Foley. In the days leading up to November 3rd, their podcast will continue to break down complex legal issues for listeners who care about democracy and elections. You can find a link to this podcast as well as to Kate's podcast, Strict Scrutiny on this episode page on the ALI website.

Finally, the moderator for today's episode is Steve Huefner, a colleague of Ned's at The Ohio State University Moritz College of Law. Steve also serves as the Director of Clinical Programs at Moritz as well as the Director of the Moritz Legislation Clinic. He previously practiced law for five years in the office of Senate Legal Counsel, US Senate. His research interests are in legislative process issues and democratic theory, including election law. He served as the Associate Reporter on The American Law Institute's Election Administration Principles. I will now turn over the microphone to Steve.

Steve Huefner: Franita, Kate and, Ned, it's great to be with you again. It's been a busy flurry of activity at the Supreme Court this week as they finish that term. Of course, a pair of decisions included in this final week, involve question of faithless electors and the way in which the Electoral College works. I'm very much looking forward during this episode of the ALI podcast to talk about the Electoral College and some of the concerns that maybe we ought to be thinking about now in connection with the current presidential election.

Huefner: Ned, why don't I invite you first to just sort of situate the discussion we're about to have in the context of the faithless electoral decision as it's being called and then we'll broaden out from there.

Ned Foley: Sure. Thanks, Steve. Well, I think the Supreme Court took these cases and approach them with what was mentioned at oral argument is the avoid Chaos Theory of judging. There was knowledge that this could be kind of a real wildcard in our system and that could set things really a mess and kind of derail the whole election and the court was hoping to avoid that. The decision announced this week, tries to do that by saying, "States are entitled to bind their electors so that they're not faithless," meaning that they have to vote in the Electoral College according to the popular vote in the state.

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Foley: States have the power to enforce these pledges and prevent electors from being faithless but states have to exercise that power to make it work. The Supreme Court can't force the states to utilize that power. Some of the headlines that I saw after the decision kind of alighted that point and didn't quite completely understand it and seemed to assume that the Supreme Court has now saved us from any mischief. They've just simply allowed the states to reduce mischief but it's not clear that the state legislatures are going to take advantage of that.

Foley: There are only 15 states that have the rigorous enforcement of these pledges of the kind that was in front of the court. Thirty-two states try to have some sort of pledging system to prevent faithless electors, but that still leaves 18 states that don't have any laws of this type. We could see still the possibility of a faithless elector. I think the risk is small, but it's not zero. It's a more meaningful risk if there's a really close result in the Electoral College. I think the court was trying to do the country a favor, but I don't know if it's going to be successful.

Foley: That's kind of the decision and then we could talk more broadly about how we have this Electoral College, which is somewhat understood by all of us as American citizens, but there's sort of details to the Electoral College process, including the 12th Amendment, which is the part of the constitution that sets it up that the court talked a lot about but when you kind of look at that 12th Amendment and some of the procedures associated with it, you realize there's a lot of things that unfortunately could go wrong, some having to do with the idea of a faithless elector, but other things having to do just for the possibility of competing slates of electoral votes getting to Congress the way it happened back in 1876.

Foley: In the Hayes-Tilden election, the court mentioned in the footnote the tragedy of a presidential candidate dying and we don't like to think about that's kind of morbid but that is a kind of hole in our system as well. I think there's a lot for us to talk about today.

Huefner: Well, I would add to that list the operation of the Electoral Count Act, federal statutory scheme that is now quite antiquated and could have real impact on the way in which some of those kinds of controversies play out. Can I ask for any of you to react to one more question that relates to the faithless elector issue?

Huefner: I mean, Ned, you observed that there are a number of states that don't attempt to bind their electors to vote in line with the popular vote in their

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state. We often think about battleground states or swing states in the context of a presidential election. Of course, one of the interesting features of the possibility of a faithless elector is you could have a faithless elector in any state. It would not need to be in a swing state or battleground state, so to speak, and I'm just wondering whether Kate thoughts about the way in which those kinds of risks might be dispersed throughout the country, not just in the battlegrounds?

Kate Shaw: Well, I actually, when Ned was talking, it made me think about something that is not so much a legal observation as a sociological or kind of a constitutional culture observation, but that has cemented I think the chance of faithless elector is pretty low in the upcoming cycle. I wonder whether it is higher because the idea of faithlessness is now on the radar by virtue of the Supreme Court having taken it up in a way that it maybe wasn't previously.

Shaw: I remember reading an interview with one of the faithless electors in the case. I think it was not Michael Baca, but Polly Baca because remember, there are two cases, one out of Colorado, one out of Washington and she talked about having been approached with this idea that in fact, it isn't mandatory or, as it turns out, her state did attempt to bind her but there was in theory, the possibility of defecting and voting inconsistently with the outcome of the state's popular vote. The idea just hadn't crossed her mind.

Shaw: I wonder whether and I think that Michael Baca, again, another one of the faithless electors talked about trying to organize and there was a bit of a movement in 2016, these kind of self-identified Hamiltonian electors who would defect on math but of course, did not happen in 2016 but again, just to pose the question it seems worth thinking about, is it actually in a peculiar way despite the Supreme Court's effort to save the country from chaos and I will note, I think it's interesting that although this avoid chaos principle was invoked explicitly at the oral argument, it wasn't actually in the opinion. I think it's sort of an undercurrent, but the opinion purports to just read the Constitution's text and historical practice and get to this interestingly, unanimous result but in fact, doesn't say this is a consequentialist mode of analysis that we are engaging in because we just can't possibly do this disservice to the country in the electoral system.

Shaw: Anyway, there's a few thoughts in their response but I'd be curious to hear what the rest of you think about all of that.

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- Franita Tolson: One thing that I thought was interesting to sort of piggyback on the point that even though the risk of a faithless elector is low, I do think that the court's opinion was trying to inform how we think about the role of electors and perhaps the court is doing so with an eye towards influence and how not just everyday Americans think about it in people who deal with these types of legal issues, but also how Congress might approach its use of whether or not to count these votes because Justice Thomas's opinion, his concurrence makes the point that, look, the Constitution is silent on this, the court should just, it belongs to the states, right?
- Tolson: The Constitution doesn't speak to this but the court does not opt to go that simpler route. That was an easy way to sort of resolve the core issue in the court. Instead, what you get is an opinion that sort of lays out a vision of what an elector does and who an elector is supposed to represent. Our electors supposed to represent the voice of the people.
- Tolson: I think even though there is this undercurrent, as Kate mentioned trying to prevent chaos, I also think that the majority of opinion is trying to influence how we think about electors in the event that disputes arise in the future because the opinion does not definitively resolve all the potential issues that could arise with the faithless elector. We just know that states can punish them now or remove them.
- Tolson: I read the opinion with an eye towards, okay, so now we know to the extent that there's this tension between these two found in era republican principles, this idea of the virtuous individual who uses their independent judgment to speak for the masses versus the idea that the elector is supposed to be a representative of majoritarian sentiment. We know that the court falls on the line of that ladder of interpretation and I think that there's value in it.
- Huefner: Well, let me pick up that thread because one of the things that I know we've all been thinking about and I've talked about some previously is the possibility that in a disputed election in a given state, a state legislature might choose to itself appoint a set of electors after Election Day. We saw this talked about in 2000 in Florida and then we've hypothesized the possibility of something like that happening again. What are any of your thoughts about that kind of possible Electoral College conflict?
- Foley: I'll jump in on that. I think. For me, it is absolutely right that the majority opinion by Justice Kagan seems to want to speak strongly in favor of popular sovereignty of the people but there is some other language in the

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opinion that's intention with that just because of the way the Constitution is written and as Kate said that the court purports to be textualist in its interpretation.

Foley: Article two gives state legislatures the power to choose the manner of appointing electors and this opinion quotes 19th century precedent saying that that's a very broad Plenary Power. There is this nod to the possibility that state legislatures could appoint electors directly, although they have chosen to delegate this appointment to the popular vote.

Foley: I think I don't know exactly A, what would happen if a legislature tried to reassert that article to have power to appoint electors directly. There's another line or two in Justice Kagan's opinion that talks about how there are collateral constitutional constraints on article two. She mentions on behalf of the court equal protection. She says state can't appoint electors in consistent with equal protection. I guess they could have cited Bush versus Gore for that proposition but chose not to. Steve, I think your question is a good one but I don't know what the answer is and I'm curious what Franita think on that.

Shaw: Yeah, I mean, I have a few thoughts. One is that I think that Franita's right to point to the kind of popular sovereignty thread in the opinion and I think that all of that would influence how a decision by a legislature to attempt to appoint directly electors would be reviewed by courts. There's a separate question that I think we could probably talk about whether any of this would be resolved by courts at all but if in fact, it were to the extent that a legislature were attempting not to usurp, but to implement popular will to the best of its ability by engaging in direct appointment if there was something like a genuinely failed election, whenever that might mean because of COVID, because of some other kind of disaster or interference or disruption and it was simply the legislature attempting to do its best to figure out what the will of the people was.

Shaw: But rather than getting to a scientific certainty or maybe it's unknowable, they decide to appoint electors consistent with the will as far as they can determine it, then that I think would be reviewed differently than an attempt by a legislature to disregard that sort of best ascertainable will of the voters of the state and to appoint instead a slate of electors that say tracks the partisan composition of the state legislature.

Shaw: I do think that atmospherically, at least, all of that, in my opinion, might influence the way a particular legislative appointment decision was

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reviewed but one of the things I'll say is that the Kagan opinion in a footnote exactly, as Ned says, does suggest and doesn't suggest this as an exhaustive list of potential constraints on the article two Power of the State Legislature to directly appoint electors, but points equal protection, points to the presidential qualifications clause but it seems clear to me and I think that maybe both of you have probably spoken about this as well, that there could be due process problems if we're talking about a state legislature that purports to appoint electors after the citizens have already cast their votes in a way that just wouldn't arise.

Shaw: I mean, Kagan seems to me to be speaking in the abstract about the constitutional authority of states to choose a direct appointment route, which of course they do seem to textually have the power to do, but not to do so in order to override in some way, after say votes have already been cast in a particular election cycle.

Tolson: I think I'm in agreement because I'm sitting here thinking and I honestly don't know how this will play out for many of the reasons both Ned and Kate have identified, but also my struggle is thinking about this in light of current case law, just some things that have unfolded with all the voting related litigation in the COVID era.

Tolson: We have lived under this regime where Bush versus Gore teaches us that the court frowns on postelection changes. Rule changes the circumstances under which people cast a ballot. It would seem to me if a state legislature comes in and tries to allocate a slate of electors after people have voted, that is a postelection change but, as Kate points out, there are any number of circumstances that could justify doing so but my struggle is that when I think about some of the COVID litigation, if the Supreme Court has found on the ability of states to make adjustments in a once in a lifetime global pandemic, how could they justify that type of accommodation in the scenario that's being laid out?

Tolson: To me, what we're going through now is the worst circumstances to be trying to cast a ballot and the Supreme Court has basically said, "We don't care." Given that, how is the state legislature allocating a slate of electors that obviously varies from what people voted for or it's contested or because if it was consistent, we wouldn't be having this conversation. How can they justify that when they won't make an exception for what's going on currently, I guess is my question? I don't know.

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- Foley: If I can jump back in for a second, I mean, I think Kate very helpfully draws this contrast between the state legislature trying to act in service of the popular vote that's been disputed or uncertain in some way versus in opposition to the popular vote but I suspect that that's more of a spectrum of a range of circumstances as opposed to just an easy dichotomy.
- Foley: Again, we don't know what the world will look like on November 4th, 5th, or 6th but there may be partisan contestation around just where we are on that spectrum and how to characterize what the uncertainty is or how much doubt there is about the popular vote and how much adjustments there might need to be.
- Foley: Well, Franita, I agree with you that the courts right now look either hostile or suspicious to voting rights claims in the era of COVID. I think what the court's responses would be, again, the week after Election Day, to allegations of there being either a failed election or an election that needs some kind of adjustment. I think there's so many different scenarios that could be painted. We just don't know what the world would present itself as and then what the partisans will try to do to spin the truth, as it were and try to tell the story to the courts that they should see it a certain way.
- Foley: I can imagine an argument just on the question of are we in the zone of legislative discretion in this regard or would it be a due process violation for the legislature to act? That would be, I mean, you can imagine the briefs being written, but I don't think there's any on point precedent that would dictate how a court would handle that case, do you?
- Shaw: The way you just sort of identified some of the problems or that kind of partisan contestation that would be almost inevitable if we're talking about how to characterize what the legislature is doing makes me think that actually I should have flipped the order of my remarks and that in general, we should be thinking first about whether the due process concerns with a post vote casting legislative appointment of electors are serious enough that there should be a heavy presumption against it not a rebuttable presumption if an election is sufficiently troubled in a particular state that the only alternative is not to send, I suppose, a slate of electors to Congress at all.
- Shaw: I guess a legislative appointment is better. I think it strikes me that the due process problem seemed quite serious to me. A presumption against any kind of appointment once voting has finished or even once voting has commenced potentially, seems like a rule that would have support in

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general principles set forth in cases even if you're... I completely agree, there is no squarely on point precedent.

Foley: Well, you raised, Kate, the idea of you sort of hinted at the notion that well, maybe the state is so messed up that it can't have electoral votes in that particular election at all, then that's somehow better than having a kind of a false set of electoral votes that really are inconsistent with what the people of the state want. There's never been an election, I don't think in which disqualified electoral votes would matter to who wins the presidency and that's one of those nightmare scenarios that I hope we don't confront this year but this year has been so strange that we have to prepare, I guess, for any possible contingency.

Tolson: Why is it that an option now, though? We're talking about this in the context of what a court might do? A court might say to this equal protection violation for the state legislature to, sorry, due process violation for the legislature to send a different slate than what the majority voted for. That's, of course, assuming that it's clear. I mean, it could be Florida 2000 where the... They're separated by 500 votes are something crazy like that or it could go to Congress and Congress can decide and even if Congress says that we can't decide and they choose neither, that's still an outcome. What's wrong with that?

Foley: Well, I think you're right. I mean, and this goes back to Kate's question about is this going to be something that the court has the last word on or Congress has the last word? I mean, you could imagine a court... Let's say a court says that the legislature is acted in violation of due process by trying to appoint electors in opposition to the popular vote. That's a declaratory judgment, okay but is it an injunction against Congress that you can't count these votes, if that's what Congress wants to do? I'm not enough of an expert on sovereign immunity in article three to know, but I just can imagine an additional sets of procedural issues about the power of a Federal Court to tell Congress what to do in terms of its roll on to the 12th Amendment. Nothing that Bush versus Gore involved and nothing that Hayes-Tilden involves.

Foley: I think as important as it is to think about Justice Kagan's opinion for the court this week and the concept of how due process applies to Article two, I think there's a political reality here, as well as a jurisprudential one that Congress may have the last word unless Congress deadlocks. I mean, there is this risk that the Senate in the House because of partisanship or otherwise has different views. You can imagine the senate saying, "Hey,

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let's not count any electoral votes from Pennsylvania," and House will say, "No, yes, we do want to count some," that goes back to Steve's point about the Electoral Count Act being a statute that is unclear in this situation.

Tolson: Right. I do but I just think it's important to recognize that the opinion is not ignorant of political realities. I'm not sure Kagan is saying that the court would have the last word because one thing that struck me about footnote eight is, is that she says, "Look, yes, a presidential candidate might die but hopefully states will do the right thing." That is a very non-judicial answer in some ways, right? She's not saying that the court will resolve it. She's not saying that's not entirely germane to this case. She's saying, "Look, hopefully the states will kind of handle that or deal with it." It's a very sort of things that's very up in the air still after the opinion.

Tolson: To me, she's, on one hand laying out this vision of what electors do but on the other, she's not trying to resolve every possible scenario that could come up with electors and she's not saying that it's within the realm of the court necessarily to figure it out. In a way, she avoids many of the things that we're talking about today that are still directly relevant to how things might play out in November.

Shaw: Yeah, that footnote is the only place where the chaos principle I think, gets explicitly invoked. She says, she talks about how much turmoil such an event could cause. She is acknowledging it but you're certainly right, there's nothing remotely directive about this kind of general hortatory language, like maybe states give the vote. Figure out something that doesn't totally disenfranchise the people who voted for the now deceased candidate but that's sort of the only place that it is explicit in the opinion.

Huefner: We've got a number of different issues now on table. Let me just invite us to reflect for a minute more on something Ned teed up explicitly, which is the relative role of the courts versus Congress and I'd like to just invite each of you, if you care to, to talk about whether the Court's decision in the congressional subpoena case, the Mazars case yesterday gives us any indication of the way in which the US Supreme Court might itself back off or defer to Congress or see some of these issues around the Electoral Count Act as being non-justiciable perhaps. Is there something to be said from the Mazars decision on that issue?

Shaw: The court remember specifically requested briefing on whether the Mazars case presented a non-justiciable political question and everyone said, no, it doesn't. It wasn't even as though that was presented in an

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adversary way to the court but it is quite clear the court is very happy to resolve this type of separation of powers dispute and indeed seems to assert a pretty broad authority to do.

Shaw: It now does acknowledge this kind of history of accommodation and negotiation between the political branches but doesn't suggest that it is in any way deprived of jurisdiction to provide ultimate answers by virtue of a lot of such disputes being resolved outside of the courts historically.

Shaw: The Mazars opinion is a mixed bag, I think, for the President and Congress respectively. I do think it could have been more disempowering of Congress and particularly Congress's oversight power vis a vis the president but it just feels to me like the combination of the Mazars opinion in some ways the impeachment, which just seems like a million years ago, but the acquittal was in February, in which their seat, somehow the logic that the house managers by not seeking resolution of a bunch of kind of pressing testimonial and document access questions in the courts, sort of didn't properly pursue impeachment, something that I think really properly does happen inside of Congress and doesn't involve the courts at all and yet, somehow that narrative was pretty successful or at least was prevalent whether it was responsible for the acquittal or not like no, I'm sure not but it does feel like we were in a moment of relative congressional weakness vis a vis the other branches of government, I guess, would be the takeaway from a bunch of developments of late.

Shaw: I wouldn't be confident of even Congress's own interest in his serving its ultimate authority or successfully asserting it as against the courts if it wished to do that. These kind of muscles atrophy in separation of powers disputes that they're not used and it does feel to me as though Congress has and [inaudible 00:28:01] his work a lot. This is a point that he makes quite a lot but that Congress has relinquished a lot of its powers and handed them over to courts specifically and that could come back to haunt them if it were the case that there was a really hard question about whether Congress or courts had the ultimate say in answering some disputed election question. If the courts stood ready and willing to intervene, would Congress attempt to assert its sort of primacy as against the courts and do it successfully? I don't feel confident that it would.

Tolson: I agree, 100%. I think that that, I had a very similar thought in thinking about sort of the winners and losers from the case but one thing I think is a way of sort of thinking about the parallels between Mazars and the

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faithless elector cases and thinking about the power and oversight of the branches.

Tolson: One of the questions with the subpoenas is to what extent does it interfere with the President's ability to do his job. You can ask a similar question when we sort of explore the role between sort of judicial oversight and congressional oversight on this issue of whether or not Congress should count the electoral vote of a faithless elector and whether or not there are issues of due process depending on how the electoral slate is developed. That is also a question that concerns separation of powers.

Tolson: If the Constitution says that the votes shall be counted, to what extent does a judicial decision about the validity of the actions of particular electors interfere with the ability of the vote to be counted? Part of the problem is that we're just dealing with that constitutional language. Sorry for the people who criticize the Constitution, apologies, but it's not entirely clear what Congress's role is other than counting the votes, really but there still is this kind of standard question about would you judicial action on any particular issue with the Electoral College interfere with Congress's ability to count the votes. I think that the cases from this week, Mazars, I forget the name of the other one, Steve, you can fill in the blank, but the one of the... Huh?

Huefner: Was it Vance?

Tolson: Vance, right. Yes, the New York case. One of the key concerns of those cases was whether or not it would interfere with the ability of the president to do his job.

Huefner: Well, let me ask this more pointed question, Franita, you talked about is Congress's role simply to count the votes but is it Congress's role to decide what the denominator is, if there is a state which has failed to submit a slate of electors? Is that a congressional judgment that those electors are excluded from the count?

Tolson: Ned and I talked to Derek Muller, who is of the opinion that, yes, it is Congress's job but the text of the Constitution is not clear on that but it's just one of those questions where and it goes back to Ned's question about if the court decides that there's a due process violation here, does that enjoin Congress from counting those votes? These are questions that we don't know the answer to because one, it's never come up and then two, the constitutional text is not clear about it but it is a basic question about

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trying to understand the role of each of these departments in deciding who the President is and I think the interference question is an important one.

Foley: I think if I can go back to one of Kate's earlier observations or questions about whether, ironically, the decision this week or just the decision to take the case has now created more risk of a problem just by putting the concept of faithless electors in the air as it were. I tend to think of this area as a question of risk management and how do we reduce the likelihood of problems or uncertainty and I think there is something that Kate's point that inadvertently not through there anything the courts fault, but it just it might... This year, again, it's so chaotic and so strange with the pandemic and with everything else going on, the idea of new destabilizing events is unfortunately not so foreign.

Foley: Again, if we were to end up on November 10th or 12th, looking at something that looked like 270-268 or even a 269-269 tie, I think culturally there would be talk about is that movable by one or two faithless electors?

Foley: In that sense, I think we live in a just in a year of greater uncertainty because of the nature of our current political climate. Then I think, depending upon as events unfolded, that uncertainty could increase or decrease depending upon various events and actors. If the faithless elector emerged on December 14th when the Electoral College meets and attempts to be faithless but the state says, "Oh, we don't want you to," and then there's just a dispute over that and two submissions of alternative votes just around that one electoral vote, it might get back to court and the court might try to tell Congress, based on our precedent, "You're supposed to follow the popular sovereignty, not do what the faceless did."

Foley: Now, that may not be completely binding on Congress in any technical sense, but it might create a climate that makes it harder for Congress to kind of repudiate the court, picking up on Kate's other point that if the public perception of Congress is pretty low at the moment and the public perception of the court is relatively high, it might be harder for political actors in Congress to kind of go rogue relative to the courts pronouncement of what the constitution means.

Foley: The court may have a table setting function for what happens in Congress that's not the same thing as like an injunction that runs against you and me as individuals that we have no choice but that we shouldn't lose sight that the power of the table setting function might be really important this year.

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Tolson: Just a quick response to what Ned pointed out because I think that's a really important point but I wonder the extent to which that has been diminished since 2016 because there's really no penalty for bad behavior, if you think about it. The table set of function works when people in power perceive the court as the final arbiter as the sort of last word on things and that certainly used to be true. I think that's still true to some extent but I wonder if we were living in a moment where constitutional norms have been so eroded, that given the stakes of the presidency, people will just disregard the court. I think there's a higher risk of that this year than there have been in prior election, prior modern elections such that I'm not sure that the table set of function has the same power that it used to have.

Foley: That may be true but that goes back to what we were talking about where I said that Kate's useful dichotomy could be turned into a spectrum with gray areas, right? Same point could apply here. You don't have to say that the court has no table setting power, it has maybe less than it used to but the question is, does it have enough? It seems to me, picking back up on the chaos metaphor, this year, we're going to have forces of chaos up against forces of order or just reasonableness or normality and the question is whether the forces of chaos went out because they're strong enough or whether the forces of normality and democracy and popular sovereignty went out. It's not an all or nothing proposition, necessarily. If we can keep the level of uncertainty and the level of strangeness low enough, sanity may prevail, but if chaos breaks loose, then we won't be able to have a sane election.

Foley: One of the things that I'm wondering about is what usefully can happen between now and Election Day in the interest of avoiding chaos and I think some things are unavoidable. We have an Electoral College, whether we like it or not. We're not going to get rid of it by November but some of the ambiguities that Steve was mentioning in the Electoral Count Act, in theory, Congress could address if they had political will. I think some attention ought to be spent now that we've got this decision. People were waiting for this decision. What's the court going to tell us about the Electoral College and this issue?

Foley: I think some thought should be given, "Okay, now that we've got it, is there any more work to be done for the benefit of American democracy between now and November to increase the likelihood that we can have a successful election and reduce the risk of something bad happening?"

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Shaw: I do think we should talk in some detail about some of the sort of deficiencies in Electoral Count Act that you I know, Ned have written tons about but before that, can I just ask, do you think now that we have this decision that the states that don't have any binding mechanism for their electors would be well advised to pass laws doing that, so that we actually reduce the chances of defections and if so, do you see any sign that that is likely to happen in some of the states that don't at all bind their electors?

Foley: Short answer, yes. I think they should. So far, I haven't seen any sign that they will.

Shaw: Is it just like a lack of political will or crowded legislative calendar or is there some independent value that the states think, I mean, is there value to a state in preserving a degree of ambiguity around it? I doubt it is that. I just I don't know the answer.

Foley: My guess is that the states are so swamped now with just are they going to be able to successfully do vote by mail in an era where people are accusing both my mail of being problematic and they got to find poll workers and you've been very active in trying to recruit students to be poll workers, which is a great thing because the need is desperate. I think states are just so overwhelmed they may not have the bandwidth to think about the faithless elector problem.

Tolson: I think that that's a good idea, though, to have more legislation of that sort but I can't think of anybody who's actually beating the drum about it either. I can't think of an organization that has adopted that as like one of their key tenants or focus or I don't... I think that's part of the problem. There hasn't been a lot of attention given to that as a possibility. It's a really important one.

Huefner: Of course, until the decisions this week, it would have been a little harder for groups to mobilize to do that. Now, they can perhaps, but there are also some states that don't have regular legislative sessions year round. They, in fact, are only in session for a few weeks every couple of years in some places. That might be part of it.

Huefner: Maybe now, we could turn our attention to thinking about the kinds of achievable reforms or amendments to the Electoral Count Act that we'd like to see Congress take up. Of course, Congress is in session most of the year and would be well advised, now more than ever, to think about some of those deficiencies. What do each of you see is the principal problems in

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the Electrical Count Act? Again, this is this 140-year-old statutory mechanism that in some fashion purports to govern the way in which Congress counts the various state tallies of their electoral voting.

Foley: Well, if I could ask all of you what you think about an idea that Rick Pildes, one of our election law colleagues has put out there, he's wanted to distinguish between the calendar and dates associated with the Electoral Count Act and the way Congress sets up this whole structure versus the subset of rules because his instinct is, you'd be more likely to get Congress to be successful on changing the dates and he doesn't see a need for there to be quite as much of a gap between December 14th, which is currently the date that Congress is set for the Electoral College to meet and officially vote for president and then January 6th, which is the date that Congress receives those electoral votes from the states and he thinks that could be compressed giving states more time.

Foley: One of the things that Bush versus Gore showed us that there's only five weeks between Election Day in November, November 3rd this year and the so called Safe Harbor deadline, which is the, again another date that Congress's set of states can resolve any disputes over their electoral votes by that Safe Harbor deadline. Congress has pledged to respect the state's own resolution. Five weeks proved really too short for Florida to complete its processes as we know from Bush versus Gore. If you made the Safe Harbor deadline the same date essentially as the meeting of the electors and you made that January 3rd or 2nd to give states more time, then you shorten this window between the Electoral College itself and Congress's meeting, which was created in the 19th century or in the earlier 20th century may not be necessary. I'd be curious what other people think just on the calendar, and whether that should be changed this year.

Shaw: That seems achievable and productive to me because there isn't really anything that has to happen in Congress between December 14th and January 6th or really January... I'm not sure or January 20th, really, but the action could be in a difficult right complex election in the states. That strikes me as very good. I mean, the chaotic mess of the statute more broadly seems like a hard problem to solve in a very short period of time between now and the election but the calendar not so much though. My initial instinct and I hadn't encountered that proposal is that it's a very good one.

Tolson: It raises a question in my mind about whether or not there's been and Ned, you probably know this, if there's been any other instance outside of

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Florida where states have run into trouble with and I know Steve alluded to sort of like the crunch but I mean, in Florida, we saw the clock run out, right? Has there been like anything that's the equivalent of that, that just... Florida just has happened to be outcome determinative but I'm wondering what this looks like in in real life.

Foley: It wasn't outcome determinative but way back in 1960, the Kennedy-Nixon election, Hawaii had a recount and problems figuring out whether Nixon or Kennedy won Hawaii and they ended up sending three different submissions to Congress.

Foley: The first one was in favor of Nixon and I'm trying to remember exactly the details but the key point for this is that it was even after the date that the electors met and voted that they finally figured out that Kennedy, in fact, won on the recount. They sent an extra submission then that said, "Oops, we know we missed the date that the electors were supposed to vote but we really want to get it right."

Foley: Nixon was vice president. He presided over the joint session and he was careful to announce, "I'm not setting a precedent for the future but I think we ought to count the votes in favor of Kennedy." It was an act of magnanimity at the moment. It didn't make any difference but I think it was a dubious result because the Constitution says the electors are supposed to meet on the same day in all the states. Hawaii can't really revise its electoral vote after the electors are supposed to meet. That's where another example of a state trying to figure out who won but couldn't meet the deadline. If the Pildes proposal were adopted, it would give a state like Hawaii more time.

Tolson: Right. It doesn't even have to be sort of the crisis that... In 1960, it was a crisis of a difference sort but just in terms of thinking about giving states time to try to arrive at the right answer, this proposal is a good one.

Huefner: I would just add or be explicit about the point that in this particular election, the risks of a state not achieving the existing Safe Harbor deadline seem greater than we've ever seen before, that it's gotten harder rather than easier to make that deadline as the way in which we vote has shifted increasingly to absentee voting and early voting and provisional voting and so forth. This year, in particular, the risks are substantially greater that states will have difficulty and that's a combination both of the increased amount of mail in voting and the increased likelihood that there will be litigation about the counting of some of those votes.

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Foley: I mean, even in undisputed state like New York may have trouble meeting the Safe Harbor deadline because of their rules about counting vote by mail. I mean, that would be ironic if New York was shut out of the Electoral College because it couldn't. In the very first presidential election, New York failed to submit any electoral because they couldn't get their act together. It wouldn't be the first time that New York messed up.

Shaw: You said because of their rules about counting. I know that I think I've heard you talk about this before, but that New York and many other states prohibits the starting of counting until the end of the day on election day itself or is it even after that? When can the absentee ballots be counted in states like in New York and other states?

Foley: I may get it wrong. New York, I think, is unique and not been able to count for even days after Election Day for some reason, then they ought to really change that rule. Can I ask putting the timing issue to one side, which I think we all agree is an important one and taking Kate's point that it may be hard to get Congress to think about the substantive complexities of the Electoral Count Act.

Foley: There is this view that the morass of verbiage in three US Section 15, which is the main section of the act, that when you parse it all out that ultimately in a dispute with multiple submissions from the same state, whichever submission bears the signature of the state's governor is ultimately supposed to be the controlling one. It was a kind of arbitrary choice on the part of the Congress that adopted the statute because they knew that that could be politicized but they thought, at least, the politics would be limited to that particular state. It wouldn't be nationalized. In other words, partisanship might affect one state, but not the whole nation.

Foley: If that's the right understanding of the rules as it exists, wouldn't it be better for Congress in some fashion just to acknowledge that before November 3rd and whether through amendment or through hearings or something as opposed to leaving open the possibility of contestation, whether that is in fact, the correct interpretation or there's an alternative interpretation, which would be again to kind of throw out all the electoral votes from the state because reducing uncertainty over something as consequential as that seems advantageous, if achievable. It just may not be achievable. I'm curious as to whether you think there should be any effort to try to do some of that this year.

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- Tolson: I actually have two thoughts in response to that. The first is that I think you're right but I wonder if that was more 1887 and less 2020, this in the sense of whether or not the politics would stay localized. There was certainly polarization in the 19th century, but by given how polarized we are now, I wonder if it is right to sort of think of the structure of the actors as trying to channel politics so that it stays local, if there's any controversy. I just think that it will automatically become nationalized because everything does if you think about the amount of outside spending that goes into the state and local races. It's like everything is nationalized now and that kind of feeds into my second point.
- Tolson: My second point is that I think it's difficult to change anything about the act in terms of political will because one party benefits from the Electoral College and if you change it, that creates some uncertainty about who the changes will benefit. If one party benefits from the uncertainty, they have every incentive not to fix it because creating more certainty, it becomes unclear who benefits from that certainty, if that makes sense.
- Shaw: Freud's word, I do think that some more definitive statement that there is a presumption, although not an absolute one, in favor of whatever slate bears the governor signature in the situation in which there are competing slates, would be a productive sort of background rule for kind of creating some defaults going into what could be really uncertain fall.
- Shaw: I would just be wary of not creating some kind of release valve in the event there was a genuinely bad faith attempt to submit by a governor, a slate that was wildly inconsistent with what really did appear to be, say the will of the voters of the state but I think that you're right that that is a fix that is simple and achievable. Again, I would just want to build some kind of potential release into it and query whether that would dramatically reduce its utility, but I think it might still be useful.
- Huefner: I'd agree with that clarification like that has the potential to reduce some of the nightmare scenarios that exist out there about how the Electoral College could go awry. I know we're running out of time for conversation today. I'd love to give each of you a chance to just share what is your greatest worry about how the Electoral College might misfire, what your nightmare scenario is whether it's one that could be alleviated by some of the reforms we've been talking about or whether it's something else that is a result of some deeper problem in the electoral college process but given the way in which this election year is shaping up, what is it that most

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concerns you about the Electoral College itself? Maybe I'd start with you, Kate. Do you have a nightmare?

Shaw: I'm going to let Ned and Franita who's was much more expert than I am on some of the specifics, maybe provide some detailed scenarios if they want to but one kind of general theme that I would say keeps me up at night is also something that ties into some of the writing that Ned has done on this topic, but that kind of the power of the President's bully pulpit to kind of shape a narrative around an election night that has some uncertain returns or returns that are subject to some shifting over the course of the day and days, the day of election and the days to follow.

Shaw: I worry about the possibility of accusations of fraud and theft by a president being amplified by sort of a media ecosystem. I think that that does not happen in a way that is independent from kind of the momentum of litigation. I guess, to sort of identify the nightmare and then to also offer something constructive, it seems really, really important to me that the press who are key players in all of this, understand that this election is going to look really different from every other election that we've ever had for the president before and that we all kind of have our expectations about the speed of returns and the kind of amount of uncertainty that we should be prepared for set appropriately going into the election.

Shaw: Maybe I'll make one more observation, which is because we're at the end of the Supreme Court term and we're reading all the cases that come down whether or not they have any sort of direct tie into these kinds of democracy questions, I couldn't help but think about some of these questions and also to Franita's point, about the Supreme Court seeming unwillingness to protect voting in the context of this pandemic, at least in the Wisconsin case in April and an Alabama case a couple of weeks ago in which the court has stepped in to prevent remedial orders by district courts that would have very, I think, modestly expanded access to absentee voting. The signs are not very encouraging that the Supreme Court, at least, is going to be in a position to try to facilitate voting during this pandemic.

Shaw: There are cases and in particular the Saylor law case, which at a glance is sort of far afield from what we're talking about here but under the Constitution, the executive power is vested in a president and that in order... The framers very specifically gave the president all of this power and it's a constitution that likes to spread and check power, but it's okay to

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launch so much power in the president because the president is subject to the ultimate check, which is the people.

Shaw: Only the president is elected by the entire nation. It's like this concept that does a ton of work in our law. We use that to critique the Electoral College, but even within the system that we have, it seems so problematic to me for the Supreme Court to exalt that idea to the point that it leaves it to invalidate congressional enactments about agency structure and things like that, but isn't willing to do the work of actually ensuring that it's not just kind of as useful fiction, but in fact, describes the process of choosing our political leaders and in particular, the president. Those are somewhat scattered responses to your question but hopefully, somewhat useful ones.

Tolson: I'm trying to think of something positive to say. Usually on our podcast, Ned's positive and I am negative.

Huefner: I asked for a nightmare, Franita.

Tolson: I know but you have to like... But the second part of your question was, how do we fix it. Has anything we talked about today fix it. My nightmare actually kind of expect to come to pass, unfortunately. I think it is entirely likely that we won't know who won on election night and that the president will use his pulpit to sort of promote this idea that there is fraud or mishandling in the election. Then, if he loses, I don't think he'll go quiet in the night and so it creates sort of this national reckoning about our political system and that is my greatest fear. I just, I can't think of a good solution to that. I can't think of a good response.

Tolson: Another fear I have is 269-269. That seems unlikely to me but the fact that is possible, in light of everything that I just said prior, terrifies me. These are the things that keep me up at night. Under normal circumstances, I sort of lay out my nightmare and then they said, "Well, wait, Franita. We have all these beautiful things that we can do." I feel better about it.

Tolson: I'll actually leave that to Ned because for me, the nightmares are what consumed me and I have a difficult time trying to see a way out of it because it's just that things look so different now than they did even a few years ago, just in terms of where we are in our democracy. I wouldn't say that I was, I felt so hopeless about it but I do think with the Supreme Court decision and RNC versus DNC and the fact that we've had orders, as Kate points out, to make it more difficult for district courts to craft solutions to

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the problems of voting in a time of COVID. I just think that we are in a place in our democracy where we are at a reckoning, right?

Tolson: I think November may force our hand to decide what kind of probability we want to be moving forward. I don't have a good answer to how do we fix that or how do we get past that because it just seems so overwhelming to me. It's such a big question, right? What is the American democracy post-November? What is it look like? Who are we as a people? An election law scholars, we talk about the micro level rules that govern our elections and how we can fix things. Even if we could fix the Electoral Count Act of 1887, it still doesn't to meet address sort of core questions about who we are as Americans and what type of society do we want to live in? To me, this election raises those questions. I'll stop there.

Huefner: Thanks, Franita Thanks a lot.

Foley: I subdivide possible nightmares into different categories. In keeping with what Franita just said, I can imagine some outcomes which are very inconsistent with my conception of a fair election or democracy, but that, unfortunately, are tolerable under the legal regime that we have.

Foley: The easiest one to imagine is another split between the so-called national popular vote and just the clear Electoral College outcome that frustrates the will of the people and that could be even wider than it was in 2016 or 2000. If it happened again, it would be the third time in this young century but as bad as that would be from a sort of a normative perspective about the way to run a democracy, if there wasn't any legal dispute about it, the law would have a definitive answer and as long as there wasn't civil unrest around it, we'd be kind of stuck with a bad outcome from, again, a small democracy perspective, but the law would be that's the system that we have.

Foley: I would put the 269-269 into that category, because as awful as it would be from a democracy perspective to have the House of Representatives pick a president based on a one vote for each state rule, which is what the 12th Amendment says where you have California and Wyoming having one vote each, despite the vast population disparities, the Constitution is clear that that's the procedure. That would be a kind of nightmare but a different one than my worst nightmare.

Foley: My worst nightmare is that we have serious civil unrest associated with legal ambiguity as fighting over the results of the election. Snowballs get

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worse and worse as we propel towards January. The worst version of that nightmare is that in the period of time between January 6th and January 20th, there's still doubt and debate as to who's going to be president at noon on January 20th. That debate is fueled by these uncertainties of the Electoral Count Act and the 12th Amendment that allow both sides to make competing claims.

Foley: That's why I would hope that we could try to reduce the zone of uncertainty to minimize the risk of that serious civil unrest because I think if the morning of January 20th arise and you still have both candidates claiming the right to be president at noon, I think our anxiety level is completely through the roof at that point. I mean, it's anxious enough on November 4th not to know the winner but if we still don't know the morning of January 20th, I think, the country is in serious trouble.

Foley: That's why I do think some congressional hearings on this topic are worthwhile. Even if Congress doesn't act, I think just a better knowledge within Congress and within the media and within the public that cares about these things and just what the rules are, what the issues are, what the possible ambiguities are, could help if ever this becomes necessary that we have to really talk about this in a serious way after November 4<sup>th</sup>. That's my nightmare. That's how I would try to address it as best as possible to make it go away.

Tolson: Just to sort of piggyback on that, I don't mean to suggest that Congress shouldn't do something, right. We should definitely take steps as if we're living in a normal legal regime but I do think it's important to understand that there are wildcards that make it difficult for the nightmare scenario to improve for me. Even if we take steps and we amend things, you never know what will be tweeted out on November 4th. You have no sense of whether the lines will be 90 minutes versus four or five and six hours on Election Day. There's just always these things that keep happening because we don't address the core structural failures in our system. Anything we do between now and November will be a small fix, which is fine, to some extent. The question is, what can we do that will make things better? But at some point, we have to have a, as we say back home, will come to Jesus moment about fixing the structural things that make it difficult for us to be a healthy democracy. Anything that happens without sort of addressing those core failures, will be a small fix.

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Foley: No, that's right. That's right. Unfortunately, I think we're not going to meet the standard that you rightly want to hold us to because I fear that we are going to have four-hour lines somewhere, five-hour line somewhere.

Tolson: Yes, and that's why I'm bad copying your good cop, though. It works.

Huefner: Well, Ned and Franita and Kate, thanks to all three of you for being part of this conversation today. Lots of work yet to be done in our own respective worlds and communities and fields as well as more generally to build greater public awareness and legislative awareness and judicial awareness of so many of these possibilities. Thank you.

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