



Episode 786: Why the Electoral College Is Great, and No One Should Even Think About Abolishing It

Guest: Brion McClanahan & Kevin Gutzman

WOODS: All right, look, I was just saying I could have done this episode with one of you guys, with both, with just myself, but it's a lot more fun for the three of us to sit down and talk about pretty much anything, so the Electoral College, why not? That's a good enough reason to gather all of us together. Let's talk about the Electoral College. First of all, I guess, particularly given that about 17% of listeners to the show are from countries other than the United States, they may not actually know how the Electoral College works, and you know what? In parenthesis, maybe some Americans don't quite know how it works. So Brion, just take 60 seconds: describe how the Electoral College works. Then I want to get into why we have it.

MCCLANAHAN: Okay, well, the Electoral College is essentially the system that elects the president of the United States. When you go and vote for president, theoretically you're not actually voting for the president; you're voting for a slate of electors or unelectors – it depends on where you are – that will then cast the vote for the president of the United States. And that was originally designed as a way – Well, I don't want to get ahead, but the states are involved in the process, and so when you look at the returns and you start looking at, well, the popular vote is this amount or the popular vote is that amount, that actually wasn't even tallied until 1824. So the first several elections in American history, presidential elections, you didn't have the popular vote even matter. You can't even find it. And so you had the electors going out and voting for the president of the United States.

And this system of course is seen as anti-democratic. It's seen as a process by which the people are not represented, because you can have a situation where somebody will lose the popular vote and still win the Electoral College. And so I guess the point is people are looking at this saying, Why are we having this antiquated, archaic system that doesn't seem to fit with modern democracy? And that's the main truss of the argument against it, and I tend to support it, and I'm sure Kevin does too. But it's a system by which you have an indirect election for the president of the United States.

WOODS: All right, now, as we all know there's a lot of consternation right now because of the defeat of Hillary Clinton – well, more the victory of Donald Trump. And therefore you've got people who support Hillary saying she got more votes, so she's the winner. I contend that somebody who speaks that way does not understand the United States at all. Kevin, can you back me up on that bold contention?

GUTZMAN: Well, yes, I agree with you in terms of the actual structure of our constitutional system, and of course that claim is nonsensical in relation to the way the elections work. So we have this Electoral College system that Brion just described, and candidates thinking about how to campaign, how to amass Electoral College majorities, don't even consider the question, whether they're going to get the majority of the popular vote.

So if it's true that, as happened recently, one candidate wins 49 states by 2 million votes and then loses the other state by 3 million after essentially not campaigning there, you can end up in a situation in which the person who wins the Electoral College doesn't have more popular votes than the other one, but it's because in our system that doesn't matter. That doesn't have anything to do with being elected. If it did have anything to do with being elected, then the candidates would campaign to try to maximize their popular votes. So you would see Republicans campaigning in California; you would see Democrats campaigning in Alabama. And the outcome would be unrelated to the Electoral College outcome.

So besides that, I said it's not really a reflection of any understanding of our constitutional system. Our constitutional system is a federal one, not a national one, and so the way that it was structured was to ensure the ongoing role of the states in the system, just as the House of Representatives isn't composed of people who were elected from the districts with equal populations. Why is that? Well, it's because the representatives are divvied up among states, and that means you're going to have some variance in population between the least populous House of Representatives' district and the most populous House of Representatives' district. It's a federal legislature; it's a federal legislative body.

And of course the Senate doesn't reflect population at all, so you could say, well, X party won a majority of popular votes for the US Senate. Nobody ever says that, by the way. You ever notice that? There's a reason for that. But it would be the same kind of observation. So it's nonsense. It's brought up every few years. It's basically because California has become a kind of rotten borough where, as I said, Republicans essentially don't campaign, and so Democrats run up huge majorities while they're getting swamped in the rest of the country.

WOODS: When I used to teach, I gave this analogy, and I pointed out that it's obviously imperfect, but it helps people to think the right way. I said imagine the World Series. Team A wins the first three games 8 to 1. Each game: 8 to 1, 8 to 1, 8 to 1. Team B wins the second three game 2 to 1: 2 to 1, 2 to 1, 2 to 1. And then Team B wins the seventh game 2 to 1. Well, Team B wins the World Series, and people would think it was just being a sore loser for Team A to say, But we scored a greater absolute number of runs over the course of the games than the other one did. That has nothing to do with it whatsoever. No one has ever measured a World Series that way, and it would be viewed as bizarre for anyone to raise that objection. That would be the ultimate sore loser objection. It's how many games did you win.

Well, since the United States is a collection of societies, in effect – now, granted there's some weighting for population. Idaho is not the same thing as California. But all the same, it's analogous to saying how many societies did you win. How many little societies did you win; how many games did you win. The United States is supposed to

be different from other countries. Remember that whole thing? We're so unique and wonderful. Well, one thing that makes us unique is that we're a collection of societies, and we're not just an undifferentiated aggregate of individuals.

What about this claim — By the way, is that a legitimate — I mean, granted that it's not a perfect analogy, do you guys go for that?

GUTZMAN: Kevin, here. Yeah, actually, I think if you think about the strategy involved in managing the World Series, your analogy is illuminating. So for example, in game one, the club that's down 6 to 1 in the eighth inning isn't going to put in its best relief pitcher, because it doesn't care what the final margin is. At that point they know they've lost, they want to save their best pitchers for the remaining games, and so they don't throw their number one guy out there in the ninth inning.

On the other hand, if it mattered what the margin was in game one, if that had anything to do with who was ultimately going to win the series, then you might see the ace closer come on in the ninth inning when the score's 7 to 1 to try to ensure that there weren't any more runs scored. So that is —

WOODS: Wow, my analogy is far better than I thought (laughing).

GUTZMAN: So that's like Trump not spending much effort campaigning in California.

WOODS: Right.

GUTZMAN: There's just no reason for him to go waste money and his own time or Pence's time or some Trump offspring's time or anyone's time trying to get more votes in California when they know they've lost. So again, you get to the ninth inning of game one; you're down 6 to 1; you're going to put the scrub middle reliever out there to get batted around a little bit, because you really don't care. You just want to get the game over with, and let's move on to game two.

MCCLANAHAN: Right. I also think too, about this, when you look not just at the World Series but you look at these professional leagues — I mean, they are leagues, and so you can compare the United States to that as well. You have these independent clubs that manage things differently from other clubs. You know, how the New York Yankees run their franchise might be different from the Boston Red Sox. But at the end of the day, they're all in this league, and theoretically the league is supposed to benefit and burden all equally in this league. So looking at a professional sports league with all the teams, and it's developed in the same way, that it should be uniform in how these teams initially operate in terms of who's going to benefit from the rules of the league or who's going to be unduly burdened by the rules of the league. You see this more in the NFL than Major League Baseball, but I think that's also a nice analogy for the United States as well. So I think your sports analogy works, Tom.

WOODS: All right, that's good. I haven't followed baseball since the Red Sox lost the World Series in '86, but the old noodle still works up here. Wheels are still turning up there. I want to point out, first of all, that I'm glad, Kevin, that you mentioned that if the object had been to win the greater number of popular votes, then the campaign

strategy would have been different for both, so there's no telling what would have happened. That to me is decisive.

What can we say about this claim that — It's almost like anything that the left doesn't like, if you go back far enough in history, it had something to do with slavery. So the Second Amendment had to do with slavery, and now it's the Electoral College had to do with slavery. I'd like each of you to comment on that. Tell me — I want the entirety of the evidence for that claim, please.

MCCLANAHAN: I'll let you go first, Kevin.

GUTZMAN: Well, sure, it happens that the three of us are speaking on a Thursday, and on Monday this week I was in Minneapolis participating in the annual symposium of the St. Thomas University Law School. One of the other three scholars presenting papers in the symposium was a legal historian named Paul Finkleman, who's the guy who's currently pushing this argument that the Electoral College is all about slavery. It's his recent article that has gotten all this attention.

And this is a ridiculous argument. The bottom line is it's ridiculous. One of the very first questions that was taken up in the Philadelphia convention was what the shape of the executive branch ought to be. So the Virginia Plan, which was presented by the Virginia delegation at the very beginning of the convention, included a call for there to be, in the words of the Virginia Plan, "a national executive." It didn't say what shape the national executive ought to have; it didn't say whether there should be one presiding officer in the executive branch or whether there ought to be a committee or whether there ought to be a presiding officer with the committee or whether he ought to have somebody cooperating with him in vetoing bills or somebody cooperating with him in pardoning people. It didn't say anything like that.

One of the first issues that came up in relation to the executive was, well, even if we get past the question of how to structure it, how are we going to select this person or these people? And when a nationalist delegate from Pennsylvania, James Wilson, an immigrant from Scotland, said of course we should have a national election, we should have citizens vote, the immediate reaction of other delegates was to say, as Elbridge Gerry of Massachusetts put it, "We have suffered from an excess of democracy."

And a lot of people thought that the reason why America government was in such a bad pass in 1787 was that the newly republicanized state constitutions were too democratic. They gave too much authority to the lower houses of the legislatures, and they had democratized them by getting rid of property qualifications, by making districts very tiny, and so on. And so there was a lot of pushback against that idea of having a national election. And in fact, that proved to be a very unpopular idea, having a national election.

Instead, you end up with this mechanism we have, which is that there should be voting within each state for informed people who then would decide who should be the president. And the idea here was, as one delegate put it later on in the summer in Philadelphia, your typical voter in, say, Georgia, didn't know anything about the typical politician in New Hampshire, or the typical voter in Massachusetts didn't know anything about the typical voter in South Carolina, and therefore, having a

national election really wouldn't make any sense. It would be uninformed people casting completely uninformed votes.

And so the idea was that if you took the political elite in each state and elected some of them to make the choice of the president, they would be attuned to the political records and personalities of people who had been in Congress or had been governors or had been on state supreme courts or whatever. And then these informed people, ultimately the presidential electors, the Electoral College, they could cast a more informed, more appropriate vote.

And I think the utility or the desirability of a system more like that than the one we've come to have, where we have essentially popular elections for president in each state now, I think the desirability of having something more like what the people at the Philadelphia convention envisioned is shown by the kind of people who've become president in my lifetime. I'm 53, and we've had in my lifetime Richard Nixon and Bill Clinton and George W. Bush, and it seems to me that all of those are people who couldn't have been elected before. Also, Gary Hart wouldn't have been chosen by the political elite and so uninformed people from each state. Why? Well, because each of these guys had character flaws that were just glaringly obvious to anybody else who'd been at the highest levels of politics, but which were unknown to the common public – well, except in the case of Hart, whose monkey business escapades became known. But he was a leading candidate for much of the '84 election cycle, and it was chiefly because people didn't know anything about him. He was just a kind of campaign image.

And so the fact of the manipulation we witness in our contemporary presidential election campaigns is I think a validation of the idea of the Electoral College. So for example, think of the recently released audio of Mrs. Clinton while she was a candidate for president telling high-dollar donors – I think it was a Goldman Sachs private meeting – well, of course they have to have one position in private and another one in public. That is exactly what the idea of the Electoral College was intended to help avoid.

WOODS: Right.

MCCLANAHAN: And I think the idea too that this is all tied in to slavery, if you look at the people that were against national popular vote, a lot of these people came from northern states, and last I checked most of these northern states had abolished slavery by the time you got to 1787. So the fact that you have a cherry-picking – essentially is what happens. They've cherry-picked Madison, where supposedly he supported slavery as a reason for the Electoral College. What they've done is erased the entire Philadelphia convention debates, because you have over and over again individuals from these northern states saying, No, we're afraid of democracy; we're afraid of the effect that that will have on the executive branch. And of course, as Mason said, we don't want an elected monarch. We don't want a popularly elected monarch. That's very dangerous for the future of the United States, and essentially, that's what you're going to get if you abolish the Electoral College.

And of course there is a proposal to do that. It's called the National Popular Vote Initiative, and it would be a disaster, because you would have a situation where

the Electoral College is essentially eliminated, and you would have essentially a few pockets in the United States controlling the election for president. So the fact that slavery is even mentioned in this is just, as Kevin says, completely ridiculous. It's a preposterous idea that somehow that was behind the entire proposal for the Electoral College.

WOODS: Now, let's talk about that national initiative, because I think it's a way – I'm not sure I remember the details, but it's a way to get around the necessity that would exist otherwise of amending the Constitution to get rid of the Electoral College. Because you realize that obviously three-quarters of the states would never vote to get rid of the Electoral College, because they would just be signing their own death warrants. They benefit from the Electoral College. The president could get elected campaigning in New York, Florida, and California, and ignore the rest of the country if there were no Electoral College, and they'd never amend the Constitution. That would never happen. But they could do an end run around it. What would that look like?

MCCLANAHAN: So what happens is that of course you need 270 Electoral College votes to win the presidency, and that's the majority of the Electoral College votes. So if you could get enough states with that many Electoral College votes to sign off on this National Popular Vote Initiative, it doesn't matter who wins that state; it matters who wins the overall popular vote.

So obviously states like New York and California, they would sign on to it, because what would happen is it would invalidate what happens in Alabama, because Hillary Clinton right now is maybe ahead by about 700,000 popular votes, I think last time I checked. So it really doesn't matter, if Alabama had signed on to this, for example, if Donald Trump won Alabama. If Hillary Clinton won the popular vote, all the Electoral College votes would go then to Hillary Clinton. And of course the states can decide how their Electoral College votes are collected and how they're divvied up. So this is – in that regard, this would be constitutional. But the question would be is this now an interstate compact that would somehow be unconstitutional, because the Constitution denies states the ability to do that.

But yes, you don't have to amend the Constitution. You just say, Okay, in our state it doesn't matter who wins our state; it matters who wins the popular vote. We're going to assign our Electoral College votes to that person. So you're right; it's an end run around the Constitution, and it would completely destroy having the states have any role in the election of the president.

One other thing that has to be said about this too is that if there's no majority in the Electoral College, the election is then thrown to the House of Representatives, which has happened. And vote there is by state, not by individual delegates. So it shows completely that the states were intended to be part of this process of selecting the president, not just this amorphous mass of people saying, I'm going to vote for candidate X or Y or whatever it is because they're going to give me free stuff. I mean, this is why the states were part of this, to prevent this type of situation.

WOODS: Can one of you explain the phenomenon of the faithless elector?

GUTZMAN: Go ahead, Brion.

MCCLANAHAN: Well, the faithless elector, this is a new phenomenon, because you've got — Whoever wins your state, you take a pledge. So I'm an elector in the state of Alabama where I live. I take a pledge. And there are two slates of electors: there's Republican electors and Democratic electors. So if Hillary Clinton somehow magically won the state of Alabama in 2016, those Democratic electors would have voted for Hillary Clinton. Same thing with Republican electors. So what they've done, of course the electors can theoretically make their own choice. They can go in and say, you know, I know the state went Trump, but I'm going to vote for Ron Paul, because I don't want this Trump guy. I'm just going to vote for Ron Paul and be principled and sport that.

Well, there's a fine for that now. Almost every state has a fine, and this actually came up in this election, because there was a guy I think in Washington or Oregon — I can't remember — where he said, Look, if Clinton wins, I don't care; she's so corrupt; I can't vote for her, so I'm going to cast my Electoral College vote for somebody else. And they would have fined him \$1,000 if he'd done that. So the states have tried to establish situations where these electors will go with whoever they're told to vote for, under penalty of a fine, typically, if they don't do it. But I guess if someone had \$1,000 and they didn't care about blowing it, well, I mean, you could vote for whoever you want. You still have a situation where the electors can vote for who they want, and I think that is something that people should know more about, because these electors, as Kevin just described it, in the system should be free to vote for who they think should be the best person, no matter who wins the popular vote in that state.

And I think the system that Nebraska and Maine have is actually preferable to any of the others, because you actually have — the Electoral College goes by district, and then you have at-large delegates. So it would actually allow a third-party candidate maybe to make inroads and create some chaos in the system and have it potentially be thrown to the House, or have a situation where a third party might actually make some headway and get close to winning the presidency. So the system has been corrupted by national parties, I think is the end of the story. The Republican and Democratic parties have corrupted the entire process and created this monster that we have now.

GUTZMAN: Tom, let me make a comment about that. It's a very interesting constitutional question whether a state actually can fine an elector for his vote. I would tend to think that it couldn't. That has never been litigated, of course.

The other thing is this system we're used to, in which virtually every state decrees that all of its electors will go to the candidate who wins the plurality of popular votes, this idea actually central to Thomas Jefferson's victory in the 1800 presidential election. What happened was in 1796, there were a couple of districts in Virginia that gave their electoral votes to John Adams, and so when the 1800 election was in the offing, James Madison, who had retired from Congress, had sought election to the state legislature to protest the Alien and Sedition Acts of 1798. And then he also steered through the Virginia General Assembly reform of its allocation of electors, so that from that point all of them would go to whomever won the majority of popular votes. Of course what this meant was that Fredericksburg and Richmond would no longer be able to cast votes for Federalists, that those two towns were little islands of Federalism in a great Virginia Republican sea.

And at the same time that this was going on, Aaron Burr succeeded in changing the city of New York's support from the Federalist column to the Republican column. When that happened, Alexander Hamilton wrote a letter to his friend, the governor of New York John Jay, and said, Well, in light of these election outcomes this years, our assembly is now going to be controlled by Republicans. You should call a special session before the Republican state control and have the outgoing Federalists cast our electoral votes for Adams. And Jay left this letter in his papers. On the back of it, there was in Jay's handwriting the observation that this letter recommends "a measure for party purposes which I do not believe it would become me to adopt." So if it hadn't been for the fact that John Jay had, shall we say, a higher ethical standard than James Madison, John Adams would have been reelected in 1800. If either Madison or Jay had acted differently, Adams would have been reelected in 1800.

WOODS: What are we leaving out here about the Electoral College? Am I missing anything?

MCCLANAHAN: I don't think so.

WOODS: Oh good (laughing).

MCCLANAHAN: I think we've covered all the bases. The Electoral College is, in my opinion, essential to ensure that you have a real federal election and that we don't have this awful system where you would have, as Kevin described it, California voting for your president every single election cycle. I mean, this is what's at stake, and so if we succumb to this idea that we're a democracy, which is completely false, then we're going to run into a situation where every state and the people of these states – which, of course Trump won more states than Clinton. Clinton won very few states. And of course if we want a system where the majority of the people are represented in the states themselves, then we have to keep the Electoral College, and that's real federalism.

GUTZMAN: Well, and the other thing to notice about the California phenomenon is that the governor of California, Jerry Brown, has repeatedly invited illegal aliens to come into the state. He's basically said that they're free to vote. So even if we end up with a popular vote margin of a couple hundred thousand votes in favor of Mrs. Clinton – which, as I explained at the beginning of our conversation is really just an artifact. It doesn't tell us anything at all about the popularity of the two candidates. But if we ended up with that, we still don't know how American citizens voted, because in California there's this chicanery going on, and I think in future election cycles California's behavior will get worse in this regard. So there's even more reason to oppose eliminating the Electoral College.

MCCLANAHAN: Yeah. And of course, I've seen that as many as 3 million votes have been cast by illegals, so –

GUTZMAN: Me too, yeah. And actually we know that in past off-year election cycles, according to *The Washington Post*, there were hundreds of thousands of illegal aliens voting, and this means, among other things, that Al Franken almost certainly was elected by illegal alien voters in Minnesota.

MCCLANAHAN: Mm hmm.

GUTZMAN: And he cast [inaudible] in favor of Obamacare.

MCCLANAHAN: It's a dangerous proposition to have the popular vote be the model that we would follow. And of course there was just an article in *The Washington Post* the other day about abolishing the states, so this is – (laughing) This is where we are, I think, in the American polity. We're talking about these issues, because the left is whining about a situation where they can't necessarily win by cheating. And if they can get rid of states – but this has been the dream of all nationalists. There was talk about abolishing the states in Philadelphia, so the states were the problem, and for the nationalists they always have been. And right now the nationalists on the right are okay, the neocons are okay, because they think they're going to get back in power, and they can force their will on everyone else, but as soon as those nationalists are out, they'll talk about other things too.

So the real kicker in all this is that we need to emphasize federalism is the design of the US Constitution, it's a federal republic, and that it's not a single, popular-vote republic and move forward – We're no France, in other words. We're not a unitary state, and I think that's the important thing to get out of this.

WOODS: All right, and with that I'm going to say thank you to Brion and Kevin. This is the – Maybe I'll title this episode – Did you guys ever read *The Hitchhiker's Guide to the Galaxy*?

MCCLANAHAN: No, part – Well, it's hard for me to remember. Yes, I read it years ago.

WOODS: Oh my gosh, my – First Kevin has terrible musical tastes, so he's already way, way out there, and now this? I was going to say, I'm going to call this "The Electoral College: The Ultimate Answer to the Ultimate Question." But you won't even know the reference. But I'll tell you for people listening, the idea is that in one of the books they're building this machine that's going to come up with the ultimate answer to the ultimate question of life, the universe, and everything, so they build it, and they wait with anticipation, and the machine spits out the answer, and the answer is 42.

MCCLANAHAN: (laughing)

WOODS: So it makes them think, I guess we don't know what the question is. I guess we have to build another machine to figure out the question (laughing). So I was thinking that, people have been waiting for the ultimate – The analogy breaks down, you understand, because we actually are giving the ultimate answer. But people have been saying, You've got to give us an episode on the Electoral College. I'm getting killed on this question. I think this does it. I don't think we ever have to talk about the Electoral College again. I'm going to refer people forever just to TomWoods.com/786. There's nothing else to know. And also, Brion, you did an episode on the Electoral College.

MCCLANAHAN: I did, yes.

WOODS: So I also want to make sure people visit BrionMcClanahan.com, so visit that. KevinGutzman.com. All kinds of stuff about these two gentlemen will also be at TomWoods.com/786. All right, here's hoping we're talking about impeachment one of these days, and thanks again.

MCCLANAHAN: Thanks, Tom.

GUTZMAN: Well, Tom, you're welcome, and now I'm going to go to a meeting of Rush and Yes fans, where we're going to talk about the significance of the number 42.

WOODS: (laughing) See, now you're getting the idea, Kevin. Maybe I'll let you back on the show now. All right, see you guys. Thanks a lot.