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Sun, 1/24 12:30PM 1:04:19

## SUMMARY KEYWORDS

filibuster, constitution, people, bryce, votes, incentives, president, anthony, power, prediction, party, impeachment, election, electoral college, congress, senate, system, democracy, part, state

## SPEAKERS

Justin Angle, Ryan Tutell, Bryce Ward, unknown, Jonah, Smoky the Bear, Anthony Johnstone



Anthony Johnstone 00:00

You know, this is about incentives and instincts. And at least Madison's view of the Constitution was you've got people with these instincts that aren't all for the common good. How do we change the incentives?



Justin Angle 00:24

This is a new angle. And I'm your host, Justin Angle. This show is supported by first security bank, Blackfoot communications, and the University of Montana College of Business. Hey, folks, welcome back. You just heard some new music from BTO and a new intro mix. That's because today marks our third anniversary, and we are celebrating. We've put out an episode every Tuesday for three years, along with some bonus content along the way. It's hard, but it's never felt like work. That's because of you listeners, and our amazing guests. You are all so fun to interact with. Thank you all for being a part of the new angle family. And we're cooking up some exciting stuff for year four, so buckle up. It also feels right, that this anniversary episode corresponds with our monthly incentives and instincts series. Bryce Ward was our first ever guest on January 26 2018. And he's back today. How's it going, Bryce?



Bryce Ward 01:25

I can't believe it's been three years. I'm literally sitting here going like, how is it possible

that that was three years ago?

**J** Justin Angle 01:32  
Yeah.

**B** Bryce Ward 01:33  
But I yeah, I'm still here. So I guess that's good.

**J** Justin Angle 01:38  
Yeah, being here is feels like a bit of an achievement at this point. So congratulations to you. Congratulations to us. Anyway, this series in particular is fun, because it gives us the opportunity to zoom in and out of the news cycle. And since Bryce and I thought there was some nonzero chance that we'd be in a civil war or some sort of constitutional crisis today, we asked our friend, colleague and resident expert on the United States Constitution from the Blewett School of Law professor Anthony Johnstone. Anthony, thanks so much for being here.

**A** Anthony Johnstone 02:13  
Thanks for having me, Justin, and congratulations on your third anniversary, to both of you.

**J** Justin Angle 02:19  
Yeah, well, we've been trying to get you on the show for a while. It feels like the right time. I'd like to just sort of start with some reflections. We've been through a lot these last couple of months, our democracy appears to while it's certainly undergone a stress test, it appears to be surviving. How are you kind of making sense of the moment we're living through right now?

**A** Anthony Johnstone 02:41  
I think stress test is exactly the right word. We're seeing parts of the constitution that we certainly don't talk about much in class and rarely appear in the supreme court or, or in our everyday conversation, kind of become the fulcrum for some big decisions. The role of Congress most significantly in counting the electoral votes, which was the occasion for an insurrection at the Capitol. This is a time in the constitution that is new terms of testing

some of these areas of our constitutional structure that really haven't been tested much, or at least not for more than 100 years, but also seems to be reflecting some very old of original blind spots in the Constitution, particularly around the question of parties. In partisanship.

**J** Justin Angle 03:46

Yeah, it seems like, you know, this this sort of peaceful transition of power or something, we kind of hold up, you know, almost, I don't want to say mythology, because it's sort of always happened, but doesn't appear to be like, spelled out in any form of legislation or document about, you know, the norms around how people should behave in these instances. Is that kind of an accurate way to think about it?

**A** Anthony Johnstone 04:12

I think that's right, particularly around presidential elections. The way the Constitution has handled presidential elections is super clunky. And that's a technical term. No part of the Constitution has been amended more than the way in which we elect our president, the various ways that votes in the states are translated through the Electoral College, into the President and the various ways that the President might come out of office in terms of, you know, the 25th amendment and other things. So since the beginning, we've had a very complicated relationship between the politics on the ground and how we get to a president. Usually, things are not close enough or polarized enough to really test those provisions. But I think that's what we've just seen is this kind of clunky apparatus of picking a president has some cracks in it.

**J** Justin Angle 05:17

Bryce, how are you kind of making sense of of this time?

**B** Bryce Ward 05:21

Certainly not through a constitutionalist. You know, I mean, I look at it, you know, as we've discussed in previous episodes might, you know, my background has to do with social networks, social norms, and things like that. And so I look at it from the norm perspective, you know, and how much we rely on. things which are not necessarily codified, and I'm not sure necessarily need to be codified, or in an ideal world wouldn't be codified, because we would all just be on the same page that unless you have very clear evidence, you don't undermine the democratic process. Right. I mean, that's just, that is, that is the most fundamental thing, right, we, you know, we can talk about what it means to be an

American, and all sorts of other things about our identity, and all sorts of things that we kind of, you know, have been held up and mythologized throughout at least my life. And, you know, I think we just kind of, maybe we haven't thought hard enough about it, but at the very core of all of it is a belief in a ballot. And in that counting of ballots, and that you accept the results of that counting, and to have a large group of an established political party, including the President, actively undermine that process to the point of fomenting violence is outrageous in the literal meaning of that word. It is outrageous. And we collectively as a society, if we're going to actually have a society when particularly one that is based on all the things that we have kind of upheld to be American, have to viciously put down and never allow that to happen again.

J

Justin Angle 07:17

So let's Anthony, backup, just a moment, I mean, Bryce, you're talking about this, this belief in a particular type of governance. Anthony, can you give us a little bit of like political theory on why the Constitution is structured the way it is, what a constitutional democracy is some some basic kind of primer, so we sort of understand the basis for this, this belief system that Bryce was laying out there.

A

Anthony Johnstone 07:46

Sure, and I should say that, I agree with Bryce, I think that's, that's all true. But part of understanding where we are, and where we can go from here, is understanding the way in which the constitution constitutes our politics. And we'll come into it, we'll talk about constitutional law and look at the Supreme Court. And a lot of the interesting questions are about rights to do this or to do that. But at its bottom, by far, the most important function of the Constitution is to create the space in which our politics takes place. So we don't have norms of ballots, meaning anything, unless there is a rule that every two, four and six years we elect, our federal officials, and so it is what we might consider the hardwired parts of the Constitution, that are most under strain right now, precisely because of the violations of well established norms that are possible. Within the letter of the Constitution. It is possible to contest the presidential election for months after the votes were cast. Because we have this Electoral College, and we have this failsafe provision for Congress counting the votes. And so you know, I think it's, it's right in terms of understanding where we can go from here and why we find ourselves in this moment, we have to look back to some significant blind spots in the way that the Constitution structures our politics.

J

Justin Angle 09:32

So what would be the most I mean, yeah, we sort of all, anybody paying attention got probably more information than we ever wanted to know about the various dates and process and timeline and steps. And, you know, some were led to believe these were opportunities. Others were led to believe these were just ceremonial, whatever, may give us the most charitable interpretation of that part of the rules or code or law or I don't know where it It was necessarily like, well, what is the purpose of that long drawn out process? And all those steps and dates and doesn't seem like it's a series of opportunities to object, it seems like a series of opportunities to maybe validate like what's what's the best defense of that system?

A

Anthony Johnstone 10:17

I think that's right, Justin, it is supposed to add to the legitimacy of the result, not undermine the legitimacy of the result. But the reasons people would come into that process and try to undermine it. And to be clear, that process under the Constitution was simply to count the votes. There are laws and a long set of practices that dealt with any irregularities through other processes. So this was really just about whether you're going to count the votes or whether you're going to throw the votes out on January 6, but the idea that you would look to the Congress to validate the presidential election seems kind of quaint, right. And so in some ways, and it goes to the fact that the original Constitution that set up the system was written at a time when parties were considered a, I guess, a bug rather than a feature of our system. And, you know, to the point that, for the first several presidential elections, the President was the person who got the most votes in the Electoral College, and the vice president was the person who got the second most votes. So you had rivals such as Jefferson and Adams, sure, serving together, one of our first fixes was the 12th Amendment, which was a limited concession to the existence of party politics. But it would take more than a century for that party politics to evolve into the kind of partisanship and polarization headed by a president of either party that we see today, that puts so much power into that decision that people are willing to really put into question their constitutional oaths, just to keep someone in power.

J

Justin Angle 12:15

So Bryce, let's pivot to you, I mean, I I share your your passion and an outrage, really, you know, I think about this moment, sort of culturally and situated in a world where this is the theme of this series is like, we've kind of gotten a lot worse, or maybe I don't know if we've gotten worse, but we're not good at solving problems at a government level. Right now, we have a lot of problems. And we need to have a government that is doing good work to make progress. And what does it say about our kind of state of affairs that a group of people are so fed up with government that they're willing to try to overthrow it?

B

Bryce Ward 13:02

I don't think it says anything good. I and we've obviously talked about this for multiple episodes now. And yeah, I don't think when we had those episodes, it I don't think it crossed my mind that something like January 6 was even possible. And yet, in retrospect, it was pretty obvious that that was highly likely. But you know, I mean, ultimately, this gets to problems of voice. So how, who has voiced to say what? And, you know, how do we have that process of having a discussion. But I think maybe more importantly, it speaks to, when we talked about this a couple episodes ago. democracy works in a rational context, where people are using the rational component of their brain. And that means that they're interested in finding truth. And there's a set of institutions that help try and guide them towards truth that are not partisan. Right. They're just literally trying to say, Well, what is truth? And for whatever reasons, I think that's broken down. Right. So what we see you know, we get to violence, particularly violence over something that was obviously fictitious, fictitious, you get to that when people are just they're not interested in truth. And to be fair, it's not to say that, that that were they weren't interested. There were lots of powerful parties that made it very easy for them to believe something which wasn't true.

J

Justin Angle 14:46

Right. Right.

B

Bryce Ward 14:47

And so that, to me, is where we have to maybe start working is you know, how do we get to the point where I mean, the image, the logical inconsistency is here are, you know, amazing, right? Only the presidential election was apparently stolen. There were 1000s of other elections that occurred at the same day using the exact same balance, the same counting processes. But only one, apparently is that issue.

J

Justin Angle 15:26

Yeah. And those ballots actively elected a lot of the people who objected to this exactly.

B

Bryce Ward 15:31

I you know, I mean, it's, it's, it's mind boggling that we've got to a point where the amount of misinformation and hatred that is being spread in our society allows a large group of people to be so confused, that they take violent action to storm the capital. I don't know how to deal with it, given the First Amendment. But you know, we have a problem. And

that problem fundamentally stems from a breakdown of trust, and a breakdown in our ability to kind of reach truth. It does say that there's always truth. But there should at least be very basic truth. Like, we have a process for counting ballots, and it's pretty hard to tamper with it. It has a whole bunch of fail safes, and no, you know, there weren't 1000s of fraudulent ballots cast in multiple states. That's just, that's, you know, given what we know about how ballots or elections work, that's just, that's really hard to believe, and to just believe it, because somebody you know, because you want to effectively, and a bunch of people want you to is what's discouraging? And I think, you know, obviously, we have to figure out what we do to try and solve both the trust and then the truth problems.

J

Justin Angle 16:56

Yeah, you know, it's, it's, it's an interesting kind of conundrum, if you will, I mean, Anthony, you sort of describe the system as it's designed, is clunky. And another way to think about it is, is it's very distributed, like out to the States, and then the counties and so forth. And like, those, those properties of clunkiness, like, actually make it much more difficult, if not impossible, to sort of put together as a systematic conspiracy at the level that's being sort of speculated. But on the flip side, those very attributes and arcane rules and weirdnesses and clunkiness, sort of open it up and make it vulnerable to these suggestions, of irregularities and so forth. So, you know, we're thinking about designing a system from a legal standpoint, are those forces you even consider a balance, like, how are you? How do you think about that?

A

Anthony Johnstone 17:54

Well, the Constitution has given us a system that is distributed in terms of elections. And I think we have been lucky that no other country does that. No other country runs a national election, through local election officials. But that I think you're right is added to it has made this most recent election more robust. And it's created the conditions for republican election officials to validate votes for the Democratic candidates. And in the past, it's done the converse, and that's been important. You know, returning to a race, Rice's point, you know, this is about incentives and instincts. And at least Madison's view of the Constitution was you've got people with these instincts that aren't all for the common good. How do we change the incentives? You know, there's always been falsehood and conspiracy theory and poisonous, toxic lies circulating in American life and civic discourse. But what distinguished this I think is we've all recognized is the extent to which our political leaders signed on to this in what was a play for power. Right? Why would they do that? What are the incentives there? I think the the big part of it, and this is the cycle that needs to break, if we're to move forward is a system in which there is a disconnect between simple majoritarianism and electoral results for various reasons the

Electoral College, the Senate, the Supreme Court and other things, that allows leaves a minority party and places the opportunity and incentive to capitalize On very thin margins in a divided country that you do by polarization by pushing the other side further away or characterizing them as other in them, putting them outside of the mainstream feeds a cycle of polarization drives out your voters, and maintains what have been what has been for decades now, very thin margins, where in order to hang on that, to that margin, you will do or say just about anything, to stay in power. And one of the things you do, and this is the cyclical part of it, is that you ensure that the other side, in particular, the president can't get anything done. So that you can feed the cynicism of the voters, and just hold the score for long enough to get your guy back in there. That's that's where we are where basically, instead of having a separation of powers, and Congress in its lane, and the President doing their thing, to some extent, the courts doing their thing, we have a separation of parties, where everyone where the incentives are there for everyone to try to run the table, takeover the whole thing, because that's the only way you're going to get something done, given the polarization that our politics and politicians have created, and so on and so forth. And we see that that cycle has gotten worse and worse, to the place we're in now.

B

Bryce Ward 21:29

And, you know, obviously, it's, it's correct that, you know, we have to kind of identify, well, what are the incentives that issue here? And how do we correct those incentives? And as we talked about, I don't even know which one, we certainly talked about this issue of lack of small d democracy? And, you know, it certainly seems like that is part of the problem. And it just builds on itself, right. So I have to maintain power. And that means because of the media environment, or whatever it is, even something that has is totally common sense. makes sense to do it, whatever it might be. I won't do it. Because if I do it, it means that the other team gets a win.

J

Justin Angle 22:13

Right.

B

Bryce Ward 22:14

Right. And, you know, I mean, that happens on big in terms of what happens in legislative, but it also happens in small, right, like, small little administrative decisions, you know, that are being made at local bureaucratic offices? And it's like, well, no, that makes sense. And yeah, that, you know, we're gonna end up getting sued over this by somebody who doesn't like our decision, but we can't do that. Because, you know, the other side asked for it. And,

you know, so it just, it's this whole breakdown of the incentive to get back to, you know, what we want, which is compromise and collaboration. And it's because it's so tightly contested. You know, and and that I do think that seems to be a big part of why we find ourselves in this particular Doom loop is elections keep being close? And, you know, there's just what, in that close election cycle? Well, yeah, I can't do anything that might tip the balance. And so we just keep, you know, essentially shooting ourselves in the foot. And I don't know how to change that incentive. So somebody else will have to say, you know, I can certainly talk about well, how do we, you know, fix the process of, you know, participating in democracy, and how do we fix the process of civic engagement and all that kind of stuff. Those I think, have solutions. But, you know, the big anti democratic parts of the process are the parts that are enshrined in the Constitution, like the Senate and the electoral college. And so they're hard to change.

J

Justin Angle 23:56

Let's talk about that, Anthony. I mean, as you've kind of lived through this, this the stress test, as we're, as we're calling it, you know, that there's, I'm sure there's all kinds of hot legal takes on what we need to change. I mean, one view would be Oh, yeah, this has revealed all these flaws that we need to fix. Another view would be, well, no, actually the system held, it's because it's a good system. Yeah. What's your view? Do you think there's things that we need to consider changing? If so, what more do you think this was sort of a testament to the integrity of our kind of founding documents?

A

Anthony Johnstone 24:32

Well, I'd like to be the optimist and say that in the end, you know, as Bryce has pointed out, the courts rejected the claims of election fraud. That was an important turning point, frankly, and important talking point to get people to see the truth of what happened in the election. You know, there are a couple things that Bryce brings up and I will come back around to that. To the local aspect, because one of the things that's happened as part of this, and I know Bryce has done work on political geography is that in the past, you could rely on on states to balance things out, right, you would have some different ideas in the States, state officials would have different incentives. And in some places, in really critical places, we've still seen that hold up, for example, with the Secretary, the republican secretaries of state, in states that voted for the president or in Georgia voted for two democratic senators so that that's important, but that's rare and rare, because their incentives are now moving in lockstep with those of the National Party so that we see debated on the floors of state houses, questions that are largely outside of their reach, or power.

J Justin Angle 25:59  
A New Angle is supported by First Security Bank, Blackfoot Communications, and UM's College of Business. Access to capital, broadband and education are three ingredients any community needs for success,

U unknown 26:12  
Raging wildfires, has scorched a record number of acres and killed leads to climb from those devastating wildfires.

J Justin Angle 26:18  
Last year, wildfire scorched a landmass nearly five times the size of Yellowstone National Park. It was the largest area burned since reliable records began. fires are getting bigger and hotter, and more devastating than ever before. But what all that fire means? And what to do about it depends on who you ask.

U unknown 26:40  
Let's face it, the forest taking fire is really something. Not only a gift to us, it's more more of a gift to the land. There will always be fear of fire. I know that and I don't pretend there won't be, but in certain situations, there shouldn't be.

J Justin Angle 26:55  
I'm Justin Angle. And for the last couple of years, I've been talking with scientists, scholars, and firefighters themselves to hear their stories.

U unknown 27:05  
You owe it to the guy that died.

J Justin Angle 27:08  
I wanted to figure out how did we get here.

U unknown 27:11  
We're going to knock fire out of the landscape.

- S** Smoky the Bear 27:13  
Remember, only you can prevent forest fires.
- U** unknown 27:16  
It was a crazy ambition.
- J** Justin Angle 27:18  
And where do we go? It just knowledge is the freakin power.
- U** unknown 27:23  
I'll talk about in a calm way. This is me hitting the panic button.
- U** unknown 27:27  
Am I making any difference here with the science? That's what I wonder sometimes.
- J** Justin Angle 27:33  
This is backfire. A six part podcast series about what wildfire means for the West, our planet and our way of life. Coming February 23, subscribe wherever you get your podcasts.
- R** Ryan Tutell 27:53  
Hey, this is Ryan Tutell of ESPN Radio in Missoula and you're listening to a new angle.
- A** Anthony Johnstone 28:03  
So and that's that's been another thing that's that's accelerated this this polarization is that there's not really a safe spot in politics, you know, maybe maybe City Council, right? Where you actually have to do something. But that's that's been another problem. Coming back around to the disconnect with respect to democracy and thinking about some of the things that are on the reform agenda. Now, you know, the electoral college leads to is, is in perfectly aligned, to say the least with the popular vote. The advantage has swung both to Democrats and two republicans over time. But there are reasons to think that as long as that's the case, by the way, reform of the electoral college is still on

the table. Because if Republicans and Democrats are under a veil of ignorance, in other words, if they if they can't know whether their ox will get gored by a particular reform or not, and they might be willing to work out a deal and compromise and fix some of these things. The same with the Senate. Right, the Senate has swung back and forth in the past. The real risk right now is there seem to be some trends and in political geography and the way in which democrats tend to live and continue to migrate into heavily populated dense population centers and Republicans remain spread out, both within a congressional district level and at a state level, rural urban state level, we might be seeing a really dangerous possibility that that one party has a durable structural advantage in politics and so therefore could continue to win elections and govern with a smaller and smaller share. of the popular vote, in order to get over that, you know, you're talking about it's not enough to win majorities, you're talking about having a win bigger and bigger majorities that whether it's the president, the Senate, you're talking about having a win by four, seven, maybe 10 points, you have to win a landslide just to govern by very narrow margins, as we've seen, in the most recent elections. That is a concern. And that is likely to be one of the major obstacles to any democratic, small d democratic and also Big D democratic reform because the other party is does not have the incentives to play ball if they benefit from the current structural advantages of the Senate in the electoral college. And let's not forget the court.



Justin Angle 30:53

Indeed, and one of the sort of pieces of that that's sort of hotly debated right now is the filibuster. Your latest reporting is that Mitch McConnell, now, technically minority leader is trying to hold up the rules making process to ensure that the democrats don't get rid of the filibuster. Yeah. So this is a contentious issue, getting rid of it, willy nilly has surely has major consequences, as we sort of seen play out with with different appointments and Supreme Court Appointed nominees and so forth. You know, how are you both kind of thinking of the the filibuster right now, Anthony, is it a democratic institution, the filibuster? Or is it sort of this silly rule that we've just sort of held on to for many years,



Anthony Johnstone 31:39

it is not a democratic institution, it's, it's, it's nowhere in the Constitution. It's a deliberative institution. And so for purposes of deliberation, it has at times perform that function. But overall, it has a pretty ugly history of when it's been used to hold up civil rights, for example, has been some of its most famous uses. And its effect is to take nowadays, at least right the effect that this question of whether this Congress, the Senate will have the filibuster is a question of whether the Senate, the decisive vote on most legislation is going to be seven points more republican leaning than the popular vote, or maybe 15 points

more republican leaning. So it basically is about what extent do we require a supermajority to govern? Or conversely, you just flip it around? To what extent are we going to allow a political minority to block reform? That's the debate on the filibuster. But of course, we have to remember one of the reasons where we're in here is the democrats said that in an act of what the scholars called constitutional hardball, right. The Democrats were the first to lift the filibuster around certain appointment processes. So it is a momentous change, both because the stakes are so high in terms of readjusting the Senate to be more reflective of popular majorities in the American electorate, but also in terms of the potential. Exactly because of that the potential stakes of the minority party being structurally locked out of power, that could cause them to find other nuclear options that might be out there. And that's that's a really tough spot that the majority leader Schumer is in as he works this out,

J

Justin Angle 33:58

I was trying to sort of detect in there, Anthony, whether you're sort of sympathetic to the notion of getting rid of the filibuster, or if you are sort of trying to maintain being agnostic?

A

Anthony Johnstone 34:11

Well, I think that I am, I come to con law through election law. And I am sympathetic with the democracy reform agenda and many of the reforms in HR1 for all of the voice reasons that Bryce first talked about, one of the reasons we're in this place is that all sorts of people, regardless of political orientation, right, regardless of party, feel like they don't have a voice. And one of the things we found again and again, is is and this election was a test of it is the more that we are able to open up the election process. Look how many people voted this? Yeah. President Trump Former President Trump did get more votes than any prior president except for President Biden. That is a great thing that so many people turned out and engaged. And it is just odd to see that one of the things that people are talking about now is how can we, how can we ensure that fewer people are engaged next time because it's actually good for both parties, by broadening broadening that base. So now the filibuster? I think that I just think based on recent history, we need to think about whether it will matter whether whether it's, it's really possible because of course, you can't get outside of the system. So the people who whose votes you'll need to break the filibuster, Senator is right in the middle like Senator Manchin from West Virginia and others also have the strongest interest in maintaining participation in that swing a center of the Senate, right, they have more power at times because of the filibuster than in a world where there isn't a filibuster. So whether the filibuster is a possibility. I'm not, I'm not as optimistic as some that the filibuster is in play in terms of taking it out. But whether filibuster or not, we should push to try to keep and build on the gains to democracy that

we've seen by holding a an election that saw record turnout across the board that we haven't seen for more than a century. I'm all in favor of that.



Justin Angle 36:36

Bryce, your thoughts on the filibuster?



Bryce Ward 36:40

I mean, I think filibuster by itself, you have to combine it with a bunch of other stuff. Yeah. Right. So by itself, yeah, I mean, I'm a small d person, as we've talked about before, I think that we need government that is responsive to voters. And when it's hard to get things done, it's hard for me as a voter to be like, why want to respond to what you did or didn't do, because you didn't do anything. But part of the problem with the filibuster was part of why the filibuster remains something that, you know, even the Big D democrats want to keep around is because of the anti democraticness of the rest of the system. So it's possible for Democrats to get locked out of power, in spite of winning more votes. So the filibuster becomes a safeguard against that possibility. And, you know, so if you had a system where the electoral college wasn't as skewed, where house districts weren't heavily gerrymandered, where people could vote in rank choice voting, so that they, you know, could pick moderate people as opposed to the extremists, you know, all sorts of things, right. And so, yeah, like, I think the filibuster is an impediment to a whole bunch of reasonably good ideas. But it would be a lot easier to get rid of the filibuster, if you knew that the rest of the government was going to actually be accountable. And so, to me, it's, we need the whole suite of electoral reforms that go from, if we're not going to get rid of the electoral college outright, we at least need to make the House of Representatives a lot larger. So that the electoral college become you know, the Senate votes in the electoral college get weighted down and the house votes get weighted up. You know, we need what we have now have in Alaska and Maine, which is ranked choice voting, potentially coupled with multi member districts and proportional allocation, and, you know, a whole bunch of stuff that allows that it's one thing to allow people a voice on Twitter or whatever it is. But the more important voice is how does my voice matter in the ballot box, right, in terms of how does that then translate into representation and governance? And right now, I don't think that process is well, you know, it's not operating well. And if we got an operating Well, maybe we wouldn't need to talk about the filibuster, maybe it'd be a lot easier to get rid of the filibuster, because we could count on the process of the voting, the ballot box to, you know, correct things that we don't like, because right now, I think a lot of people feel like, well, if something bad happens in Congress, I won't be able to my voice is basically irrelevant in trying to get that overturned or changed or not happened in the first place. And so to me, I think that's where it has to start. It has to start with getting voice into the

people and then allowing that process of, you know, giving us the people Ideally, also kind of working with what I talked about earlier, you know, a civic process, which gets us so that we the people not only have the power to vote, but also the mindset and the information that we need to do that, you know, in an informed manner, but, you know, it's, it's easy to focus on the filibuster, because it's the, it's the actual, you know, barrier. But it's part of a larger system that ultimately would be a lot easier to deal with if we dealt with the rest of the system. Of course, the problem is, is that we can't deal with the rest of the system and pass things like HR1, because of the filibuster. So I don't know.

J

Justin Angle 40:39

Yeah, it's a real Gordian knot. So, you know, one other sort of just troublesome issue that deals with incentives and instincts and one where you know, that the the right move from strategic and political standpoint is not so clear. Is, is impeachment. We're in this way? I don't think I don't know, Anthony, you're the expert, but it doesn't seem like impeachment was a sort of process conceived to occur largely after a president or an elected official has left office. Does that even make sense? I know, there's some, you know, arcane case law that supports that. You can do it when somebody left office. But yeah, I mean, it's explained the legal moment we're in with regard to President Trump and the impeachment articles that I think were delivered from the house over to the Senate today.

A

Anthony Johnstone 41:36

Yeah, I think I read that they might be going over Monday.

J

Justin Angle 41:40

Okay. takes a while to cross across the the Capitol Building, I guess. Right. Right. Security these days.

A

Anthony Johnstone 41:48

You know, it is important when we talk about We The People the Constitution constitutes We the People constructs it in many ways. But but it is important to pick up on Bryce's points that most of this stuff isn't in the Constitution. It is stuff that politically courageous people are responding to an active citizenry who are pushing them to do the right thing. It's something that we can get done. That's true of the filibuster. That's certainly true of the democracy reforms in House Resolution 1. And and there's in some ways, a silver lining to the general breaking of norms around around this area, is, is that most of these are just political norms and views that might be a little more flexible Now, going forward. Now,

you talked about the filibuster, when you're talking about impeachment, you got to get to 67 Senators, you know, a year ago at this time, I was at the senate trial. And it was amazing to see everyone gathered there and listening to the evidence and working their way through it. But the outcome was preordained. Sure, kind of knew how it was going to end. I haven't seen a lot that would suggest that, that two thirds of the Senate would convict, but I think it's a possibility. Now we are dealing with a president who's out of office, this is about a part of the constitution that says that you can remove someone from office. But that you can also disqualify them to hold any office in the future. And it's that latter part, that is the basis for an impeachment and not removal removals off the table. Former President Trump has left the building, but disqualification from future office. That's the suggestion and there is historical precedent. Not with presidents we've never removed or convicted a president under impeachment in our history. But in other offices, there there is precedent to try and punish by disqualification officers of the United States under the Constitution.

J

Justin Angle 44:20

Yeah, I mean, it would seem I'm trying to sort of think this through, you know, we should probably Bryce one of your game theoretician friends who join us one of these episodes. I'm trying to think it through like, it would seem like McConnell has a lot of reason to sort of just move on from Trump to sort of extra excise that piece of the party and reconstitute some sort of a coalition if that's possible. And then you know, I think a particularly cynical take would be like if you're a Cruz or a Hawley clearly positioning for a presidential run. If you can take a Trump off the board for 2024 you know, that might be a useful move, although you might not be the one to have your fingerprints on it? Bryce, how do you sort of feel about this? From a, you know, like a game theory standpoint? Like what what? How do you think these actors are thinking about it?

B

Bryce Ward 45:11

Well, look, in an ideal world, this would not be a question of politics. You're right. In an ideal world, this would be a question of isn't acceptable behavior within our political system, regardless of party. Right. And so that's, that's the frame that I tend to look at it from, which is, look, if there are actions that we do not want to see happen, we need to have punishment for those actions, right? We talked about that two or three podcasts ago, right is we there has to be accountability for people who do things, which we think are bad. And I think undermining elections and inciting interactions are bad. And there has to be a mechanism for punishment, so that we get the incentives right the next time. So that, you know, people are doing, you know, when they're engaging in the political process, when you're making a decision to you know, undermine or stoke, you know,

feelings that might lead to violence or an insurrection, you have to do so knowing that there will be consequences for you, regardless of the letter that they put underneath your name. Right, they're just there has to be some things that we hold up and say, these are allowed, and these are not allowed. And so, you know, I am all for punishment, not because of the implications for, you know, individuals, political futures, but because it's what we need in the system, there has to be a means of punishment. We can no longer live in a system in which, well, you're on my team, it doesn't matter what you do. Right? Because that's basically what the Trump presidency was. A whole lot of, if anybody else had done this, if anybody on the opposite side had done it, we would have said, Oh, no, no, you know, Republicans would have been absolutely out of their minds upset about it. But if it's their president doing it was a president of their party doing it? Well, we can't say anything, because that might upset some of his voters. And we just that system, that's a toxic system. Right, there has to be accountability for certain behaviors. That's not to say that, you know, there needs to be accountability for things that we can just disagree about, like what level the minimum wage should be, or what taxes should be. But when you're violating the process, right, when you're undermining the, the fundamentals of the process, whether that's, you know, what do you got a peach for the first time, which is using the foreign policy of the United States to try and gather political dirt to help you an election or inciting an insurrection? Those to me seemed like, maybe I'm wrong. But there have to be boundaries. And there has to be punishment for people who go outside those boundaries. And if there's not, then I'm not sure how hopeful we should be for the system going forward.

J

Justin Angle 48:26

Indeed, I asked you a fairly cynical strategic question, and certainly came back with yeah, I mean, I'm on board with you, Bryce. I agree. I just unfortunately, I'm not certain it's gonna play out that way. Right?

B

Bryce Ward 48:42

No, because we've gotten to the point of a bunch of cynics. We we we have elected the wrong people to office. Yeah, right. I'll say it bluntly. On we have created a system in which the people who run for office and accumulate power are far too often literally bad people. And we have to do something that gets us back to a system in which good people have regardless of ideology, good people are running for office and holding the levers of power.

A

Anthony Johnstone 49:16

Yeah, and, you know, I, again, I agree with Bryce as well, in terms of the the norms of this.

You know, the trick here is that we're entering a world that usually you just see in fragile democracies, which I guess we can now count ourselves among or around the world. We're entering a stage of what some people have called, and they call it in other countries transitional justice. How do we get from here to there, and that is that involves accountability. It involves making amends. It involves seeing people see consequences for their destructive behavior. But it is also informed by the urgent need to get through it and have something at the end. And I that is that is the difficult question here. I think, as you look, the democrats are in a position, set aside the Senate if you're if you're President Biden, you're trying to figure out what tone to set. Look, you can push the accelerator and hope to turn things around quickly enough and hold people to account and clean house and pray that, that snaps voters out of it, or at least enough of them, to see that we can do good things together, we can prosper as a nation, there's a good opportunity coming out of the pandemic. That's that's one, one possibility. But there are risks. And those are risks that are positively harmful and destructive to the future. Because there are people on the other side, and they have political power that they will wield in just two years time. The other option is to actually sincerely look for compromise and bide time and hope that tempers cool. That's certainly been President Biden's message. I'm not sure what his internal strategy is right. But but that's the right thing to say right now. And it is so hard as a matter of transitional justice of getting from here, this mess we're in to they're out of this mess, to know what the right call is, when precisely because we are a democracy. We can't just say that you're wrong, we're right. We win. We're going to take all the marbles. There's going to be an election in two years. There's going to be an election two years after that. And I would hope and I think that our leaders are wrestling with exactly those questions of what's it going to take for us to get out of it? I don't know what the right answer is. And I think either of those options or possibilities. But boy, is it a quandary for our democracy to figure out what the next step is? And how hard to push on on cleaning house and getting us turned around back on the right track given that the electorate is so closely divided.



Justin Angle 52:47

Well, let's hope that enough people are committed to at least wanting to figure out the right answer. You might not agree on what it is, but sort of knowing the potential correct answers out there and working toward it as important. We got a couple kind of quick hits to do before we get out of here. But we got a listener question, Anthony, that I think is well suited for you. It comes from Jonah.



Jonah 53:12

Hello, my name is Jonah. I live across the river from DC in Arlington, Virginia. And I was

hoping you could talk about what kind of circumstances would constitutionally justify an armed insurrection of the capital, if any? And relatedly, does the constitution system of checks and balances clarify how the branches of government must respond to an attempted coup? Thank you.



Anthony Johnstone 53:35

Well, thanks, Jonah, for that question. No set of circumstances justifies an armed insurrection of the capital constitutionally speaking, by the time people are in the street, and are acting violently, it means politics has failed. And it means the Constitution's job of sustaining politics has failed. So that would be a true constitutional crisis, where we're not going to find the answers in the Constitution. And we saw what that look like, got a quick glimpse and should all be grateful that we so quickly within a matter of hours through the courageous leadership, which is increasingly rare of Congress, that they got things back on track and certify the vote. On the second part of the question, checks and balances how government must respond to an attempted coup. Well, it kind of goes back to the impeachment question. The Constitution does provide a self defense mechanism of every branch. That's part of the checks and balances. And so if Congress is working correctly, if a president is leading an attack on the Capitol, then impeachment is the remedy, right? It gets trickier with respect to insurrections, and we actually saw this this was actually a big problem. in those early afternoon hours in Washington DC during the insurrection, insurrection appears in a few places in the Constitution. First, the Constitution says that the United States shall protect each state against domestic violence. In this case, when we think about an insurrection or an invasion. The problem, of course, is that when it happens in DC itself, DC is not right now a state. And so there were complications and even calling forth the National Guard. It is incredible irony of our system that our seat of government does not have representation in Congress, even when it was up to the cops on the beat in Washington, DC to save Congress, where they had no voice. The other place where they respond to the Constitution speaks to insurrection is in the post Civil War amendments in the 14th amendment. And this is being talked about as an alternative to impeachment or a compliment, section three of the 14th amendment, you had to deal with the rebels. And the fact that you had both state and federal officials, former cabinet officials even turn on the Union and the constitution that provides for the disqualification of anyone who swore an oath to uphold the Constitution and violated that oath. We've already seen one state legislator who participated in the insurrection resign. The some of the questions now are about either the president or members of Congress, who played a role in creating the conditions for the insurrection who incited it. That is one of those areas of the constitution that haven't been stress tested yet, but the words are there that provide us some self defense against people who swore an oath to the Constitution, sometimes just weeks before, and then went ahead and violated it by trying to throw out

valid votes. So we'll have to see.

- J** Justin Angle 57:10  
We'll have to see. Thank you, Anthony. Our final segment, which is sort of in line with the notion of having to see is predictions. Anthony, at the end of these incentives and instincts episodes, Bryce and I offer predictions as to what might happen in the month between now and our next gathering. You can go out a little further with that. Would you like to join us in a prediction?
- A** Anthony Johnstone 57:31  
Oh, sure. Although I know, Justin, that, you know, your last prediction was a Twitter ban for President Trump. And you were only a couple of days, a couple of weeks off of that.
- J** Justin Angle 57:39  
I know they did it before my prediction. Who would have thought?
- A** Anthony Johnstone 57:44  
Well, I didn't want to go first.
- J** Justin Angle 57:46  
Okay, Bryce, you lead off, what's your prediction this, this this month?
- B** Bryce Ward 57:52  
I'm gonna go optimistic. I'm gonna predict that we're going to see acceleration of vaccination. So hopefully, we will start doing better than we've been doing. And, you know, we get many more people vaccinated in the next month.
- J** Justin Angle 58:13  
I like that prediction. I hope it comes true. I certainly can't see deceleration is a possibility. Anthony, how about you?

A

Anthony Johnstone 58:22

Well, yeah, I'm with Bryce. And I'm quite hopeful that the President's 100 million shots in 100 days is a lowball. And and I've seen some positive indicators that it might be that we might end up ahead of that. I guess my prediction would be that we will see President Biden bring his agenda into Congress after a failed impeachment of the President. And that we will very quickly know whether we're entering a new era or not, I guess my best prediction is that we're going to see some honeymoon period where a majorities in the Congress with or without the filibuster, are going to sign at least some significant elements of the President's program with the kind of reasonable compromises that we expect and us to see all the time.

J

Justin Angle 59:23

Awesome, both predictions in line with a government that is more oriented toward solving problems and hopefully more effective at solving problems. My prediction, it's a bit of an informed prediction. I predict transformative changes to A New Angle in the coming months. So stay tuned for that. Again, this is our third anniversary. I can't think of a better crew to celebrate it with I have to give a special call out to my partner in crime on this show. It's Jeff Meese does so much of the sound work behind the scenes and assembling the mix. Jeff will be hard at work over the weekend as will I to get this episode ready for you. We recorded as late as we could just we could sort of keep this thing up to date. You know Anthony, Bryce, thanks for joining me. I wasn't smart enough to become an economist or an attorney, but I certainly love the way that you to think and in listening to explain your thoughts. Thanks for being here today.

B

Bryce Ward 1:00:18

Thanks.

J

Justin Angle 1:00:25

Thanks for listening to A New Angle. We really appreciate it. A New Angle is presented by First Security Bank, Blackfoot Communications and the University of Montana College of Business with additional support from consolidated electrical distributors and drum coffee. AJ Williams is our producer, Jeff Emet, John Wicks and BTO made our music and Jeff Meese is our master of all things sound. If you have any questions, suggestions, comments, insults, whatever, please email me at [anewangle@umontana.edu](mailto:anewangle@umontana.edu). If you like what you heard, tell your friends about it. Thanks a lot. See you next time. Ha, you thought you were done with me. But not quite yet. Our friends at Vi Thompson Overdrive have a new album out Pandemina and they graciously shared some tunes with us. The track you

heard and our new intro is titled Secret Hug Club. Have a listen to the full track with vocals right now.