

# **An Imperfect Model for Democracy: Reevaluating the Outdated Electoral College in American Presidential Elections**

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## **I. Introduction**

The United States is unusual for a democracy, in that its President is elected by the people, as opposed to parliamentary systems with chief executives that are chosen by the legislature from among their fellow legislators. On its face, the American presidential election system appears simple, straightforward, and the ultimate example of democracy in action. When two or more candidates run for office, voters can choose their personal preference, and the candidate for President receiving the most votes is the next leader of the nation. My students in Japan will occasionally lament that national elections under their parliamentary system are comparatively boring and feel unfair, as voters cannot choose their Prime Minister directly.<sup>1)</sup> Such students believe that a direct election of their chief executive would inspire people to become more interested in politics and therefore yield more effective leaders. They see the United States' presidential elections as a model system in this regard, as American voters have a true voice in choosing the top leadership of their nation, and the process inspires debate, discussion, and the free exchange of multiple ideas. The reality is slightly more complicated, as voters in the United States only indirectly vote for their preferred presidential candidate. The strange and decidedly undemocratic institution known as the Electoral College actually stands between the people of the United States and a true direct election of the President. Because the Electoral College does not always reflect the will of the voters in practice, America's system for choosing the President is an imperfect model for other nations to follow.

The origin of the Electoral College is a reflection of the concerns shared by many of

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1) One of the great merits of American presidential elections is that almost anyone can be elected President. One of the great risks of American presidential elections is that almost *anyone* can be elected President. Other than basic age (at least thirty-five), citizenship ("a natural born Citizen"), and residency requirements (fourteen years within the United States) required under Article II, Section 1 of the Constitution, little else can prevent a determined individual from seeking the nation's highest office. Candidates are allowed to be as unvetted and unprepared for the responsibility as the electorate will tolerate.

America's founders over competing threats to its new democratic form of government. Communication and travel in the late 1700's were slow, making it difficult for ordinary citizens across the country to learn about individual candidates, or to have the time and resources to weigh their character and qualifications for the job. Instead, a method of electing the President was created whereby states could choose groups of individuals dedicated to the task of deliberating and deciding upon the best candidate to represent the people of their state. The Electoral College could provide a way for the people to indirectly cast their votes for preferred candidates, but also provide some institutional buffers against poorly considered candidates.

The ideals of this original plan evolved over time. Currently, citizens vote for the electors. Rather than choose independent delegates best capable of unbiased decisions, Americans vote for electors who promise to cast their vote for a particular candidate ahead of time. It may seem like virtually the same process as a direct election, but the way the system is structured means that sometimes a candidate who wins the most votes from people across the country will actually lose the election. The possibility of the popular vote winner losing in the Electoral College is surprisingly high and consistent in close elections, and likely to continue in the future, if the system is unchanged.<sup>2)</sup> As election results have become narrower in recent cycles, as exemplified by the elections over the past twenty years, the likelihood of popular vote winners losing elections will continue to increase.<sup>3)</sup>

Due to changes in demographics, and flaws within the Electoral College's basic structure, the system no longer meets the needs of the modern concept of democracy. It allows the candidate gaining the largest number of votes from the people to actually lose the election. "The nation has become more democratic since 1787 and more committed to political equality, but the Electoral College has not."<sup>4)</sup> To make its electoral system an inspiration for democracy around the world, the United States needs to change this Constitutional conundrum into a more perfect model of modern democracy.

## II. Origins of Electoral College

The rules for electing the President and Vice President of the United States were established under Article II, Section 1 of the Constitution, and were thereafter revised by the Twelfth Amendment. The rules provide that each state can select, in any manner chosen by the state, a number of electors to vote for the President calculated by adding the state's

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2) For elections decided by one percentage point or less, there is a more than forty percent chance of the "wrong" winner prevailing. Michael Geruso, Dean Spears & Ishaana Talesara, *Inversions in US Presidential Elections: 1836-2016*, 14(1) American Economic Journal: Applied Economics 327, 328-329 (2022).

3) *Id.* at 354-355.

4) Alexander Keyssar, *Why Do We Still Have the Electoral College?* 379 (Harvard University Press 2020).

number of Senators plus members of the House of Representatives. Currently, the total number of electoral votes available equals 538. The absolute minimum number of electors a state can be assigned is three,<sup>5)</sup> as even the smallest state by population must have at least one member of the House of Representatives, and every state has two Senators, regardless of size. While different states initially had different manners of selecting electors, all have been directly elected by voters for more than 150 years.<sup>6)</sup>

These 538 electors comprise the Electoral College. The use of the word “college” may be misleading to those unfamiliar with the U.S. system. In this context, the word does not refer to an established body of higher learning. To the contrary, electors meet only for the purpose of casting their presidential ballots. Electors meet state-by-state rather than as one large neutral group. A state’s electors can be chosen from just about anyone, as long as such person is not a Senator, Representative, or holding an office created by or under the Constitution itself.<sup>7)</sup>

### A. A Creation of Compromise

The Electoral College was planned as a workable compromise for the states that could not form a consensus about exactly how to choose the President. Assigning electors based on members of both the House and Senate gave some sense of reassurance to both large and small states. Unlike parliamentary styles of government, it also kept the presidency separate from Congress by not having a legislator chosen as the chief executive. Furthermore, it allowed the states to choose their own electors as they saw fit. Some states might decide to have their own state legislatures choose electors, while others might submit the issue to a popular vote. In either case, the Electoral College system would reduce the chance of all of the people voting at the same time and thus reduce the likelihood of hasty, mob-like decisions that could result in a tyranny of the majority. Furthermore, political manipulation would be that much more difficult with a decentralized system.<sup>8)</sup>

Despite these potential benefits of the Electoral College, fundamental flaws remained. One of the biggest deficiencies of the Electoral College system of voting is the fact that the loser of the popular vote can be elected as president, against the will of a majority of the voters. This is no mere theory or historical aberration. It has happened four times in American history,<sup>9)</sup> with the last two in the 2000 and 2016 elections. The reason this

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5) Washington, D.C., while not a state, also receives a number of electoral votes equal to the smallest state, pursuant to U.S. Const. amend. XXIII.

6) U.S. Congressional Research Service, *The Electoral College: How It Works in Contemporary Presidential Elections* (RL32611 May 15, 2017).

7) U.S. Const. art. II, §1, cl. 2.

8) U.S. Congressional Research Service, *The Electoral College: How It Works in Contemporary Presidential Elections* (RL32611 May 15, 2017).

9) Five, if you count the 1824 election of John Quincy Adams, where Andrew Jackson received the most popular votes, but when no candidate received a majority of the electoral votes, Adams was chosen by ↗

happens goes back to the basic structure of the system, which has changed very little over the past two hundred years.

When the United States was formed, the new nation was a very different creature from what we see today. Rather than one nation indivisible, it was a unification of disparate colonies with different laws, demographics, and interests. At the founding of the new United States of America, individuals were more likely to identify themselves as members of their home states rather than as “Americans”.<sup>10)</sup> Bigger states wanted a bigger share of the voting power in the new nation’s legislature. While each state would be assigned two Senators, the size of its delegation to the House of Representatives would be determined based on the state’s population. Southern states faced a dilemma in this regard, as they had significant slave populations who would never be allowed the right to vote. A system that allocated political power based on citizen population would reduce their influence proportionately. Large slaveholding states were able to benefit from the “compromise” of the Constitution, as the population calculation to determine a state’s Representatives in the House counted the number of “free” people in the state, plus the number equal to three-fifths of “all other” people, as provided in Article I, Section 2 of the Constitution.<sup>11)</sup> The legislative compromise also benefitted the large slaveholding states in the election of presidents, as the number of a state’s Electoral College votes is determined by adding the number of its Senators plus its Representatives in Congress. Thus, slaves were to be counted in the population as three-fifths of a person for the purpose of giving slaveholders that much more of a disproportionate pro-slavery influence in the Electoral College as well as in Congress.<sup>12)</sup>

## B. Early Failures

Some of the shortcomings of the electoral system as first written in the Constitution became apparent quite early. As originally written, the Constitution provided for one election that would determine the President and Vice President. The person with the highest number of votes became President, and the person with the second-highest number would be Vice President. The first few elections were fairly straightforward. The election in 1800, however, showed the impracticality of this system, when two individuals, Thomas Jefferson and Aaron Burr, received an equal number of votes. The ensuing repeated balloting over the next week made it obvious that the election of President and Vice President needed to have separate votes, and this was accomplished before the next election with the enactment of the Twelfth Amendment.<sup>13)</sup>

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↳ the House of Representatives.

10) Paul Schumaker, *The Twenty-Eighth Amendment?* 53 (Gatekeeper Press 2020).

11) Michael Herz, *Robert Dahl’s How Democratic Is the American Constitution?: An Introduction, with Notes on the Electoral College*, 26 Cardozo L. Rev. 2515, 2523-2524 (2005).

12) Schumaker at 54-55.

13) Ratified June 15, 1804, in time for implementation for the 1804 election.

The Twelfth Amendment changed the rules for electors to “name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President... The person having the greatest number of votes for President, shall be the President... The person having the greatest number of votes as Vice-President, shall be the Vice-President...”<sup>14)</sup> While the amendment solved one immediate problem of the presidential electoral system, another institutional failure remained, and continues to this day. The idea that the Electoral College would act as an independent bulwark to keep the American people “free of the supposed vices of popular election” did not work. Positions in the Electoral College “would typically be awarded not to leading citizens willing to express their independent judgments, as the Framers may have assumed, but to party loyalists, and usually minor ones at that.”<sup>15)</sup>

Today, most states allocate all of their Electoral College votes to the candidate getting the most votes within its borders, no matter how large or small the margin of victory. The concept of awarding all of a state’s Electoral College votes to the majority winner was not enshrined in the Constitution, but was gradually adopted.<sup>16)</sup> While some may see the winner-take-all method of allocating a state’s electoral votes as undemocratic, this is not a fundamental flaw of the Constitution itself. State legislatures can, at least to some degree, change the allocation of their own state’s electoral votes.<sup>17)</sup> Currently, Maine and Nebraska are the only states that have adopted rules that diverge from the prevailing winner-take-all approach of the other states. Instead, both Maine and Nebraska allocate two electors to the presidential candidate with a plurality of the statewide popular vote, with their other electoral votes assigned to the winner in each of their federal congressional districts. In any event, the state-based allocation of electoral votes can create big problems in close elections.

### C. The “Wrong” Winners

We can look at four examples in American history that led to undemocratic results directly attributable to the Electoral College system. The loser of the 1876 presidential race, Samuel J. Tilden, won the popular vote. The Electoral College winner, Rutherford B. Hayes, captured the presidency by a margin of one electoral vote. Close votes in Florida, Louisiana, and South Carolina left the winning slate of electors unclear, and the decision regarding which votes would count passed to Congress.<sup>18)</sup> Just twelve years later, Benjamin Harrison defeated incumbent President Grover Cleveland in the 1888 electoral count, even though Cleveland received a plurality of the popular vote.<sup>19)</sup>

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14) U.S. Const. amend. XII.

15) Robert A. Dahl, *How Democratic Is the American Constitution?* 78-79 (Yale University Press 2001).

16) Paul Schumaker, *The Twenty-Eighth Amendment?* 73-74 (Gatekeeper Press 2020).

17) Dahl at 82-83.

18) George C. Edwards III, *Why the Electoral College Is Bad for America* 66-69 (3d ed., Yale University Press 2019).

19) Grover Cleveland would go on to win both the popular vote and electoral vote in 1892, becoming the ✓

Until 2000, the possibility of the popular vote loser winning the presidency seemed like a rare historical anomaly to many Americans. After all, at that point, such a result had not happened for over one hundred years. But the 2000 election proved to be a very close race. Presidential candidate and incumbent Vice President, Al Gore, led the popular vote count by more than half a million votes, but he lost the presidency. The final electoral vote count was 271 for George W. Bush to 266 for Al Gore, due a narrow and controversial Bush win in Florida that became the deciding factor for the nation. In the aftermath of the election, there were some calls to reform the Electoral College, but no effort succeeded. Fortunately, the worst fears of the “wrong” winner taking office but being seen as illegitimate by the majority voters did not come to pass. As more years went by, it became easier to think that maybe 2000 was just another historical aberration, unlikely to reappear for another hundred years, if ever again. If the election of 2000 was a surprise, however, the nation was in for a shock just sixteen years later.

In the run up to the 2016 election, Hillary Clinton was overwhelmingly perceived to be the likely winner. She went on to win the popular vote, which she led by almost three million votes. But Donald Trump won the presidency by an Electoral College victory of 304 to 227.<sup>20)</sup> Narrow margins of victory in three key states gave Trump the presidency and rendered larger margins of victory for Clinton in other states as effectively meaningless. But why should people complain just because the “wrong” winner prevailed? The Electoral College would seem to give the nation a clear winner under a consistent set of rules, and provide certainty in a time when power in the federal government may transfer from one political party to another.

Unfortunately, the Electoral College provides no guarantees of delivering an immediate winner, even after all of the votes are counted. First of all, it is possible for some electors to vote for a candidate other than the one originally pledged.<sup>21)</sup> Additionally, it is possible that no one candidate will win a majority of the electoral votes. Or unfaithful electors could change their votes, and snatch victory from the candidate with a presumed win. Additionally, it is possible that a third-party candidate could win in just one state and deny the other two candidates the possibility of an outright electoral majority victory. In any such event, the party with a majority of state delegations in the House of Representatives would have the power to select the winner.

For all of the perceived problems and benefits that the Electoral College provides, one other overreaching problem was created by counting votes of states rather than votes of

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↘ only president elected in non-consecutive terms.

20) Alexander Keyssar, *Why Do We Still Have the Electoral College?* 354 (Harvard University Press 2020).

21) This occurred only eleven times in the Electoral College’s history before 2016, but seven electors in 2016 alone voted for a different candidate than pledged, with an eighth elector also changing his vote only to be removed and replaced by a compliant elector. To date, unfaithful electors have not changed the outcome of an election, but the possibility remains. See Paul Schumaker, *The Twenty-Eighth Amendment?* 148 (Gatekeeper Press 2020).

individuals. An individual's vote can have more power and influence over another citizen's vote based not on education, good character, or even any interest in politics whatsoever. Rather, the happenstance of physical geography can greatly increase or devalue the relative importance of that same individual's vote.

### III. Disproportionate Value of a Citizen's Vote Based on Residence

The Electoral College appears to benefit people in small states disproportionately over their larger-state brethren, as the weight of small-state votes is relatively greater when compared to voters in higher population states. While true to some degree, this does not necessarily mean small states have a guaranteed advantage in every election.<sup>22)</sup> For example, in 2020, the largest and smallest states in the U.S. by population were California and Wyoming, respectively. Wyoming had three electoral votes (the minimum possible allowed, as each state must have at least one member of the House of Representatives, in addition to its two Senators) for its 576,851 people. California had fifty-five electoral votes for its 39,538,223 people.<sup>23)</sup> On the one hand, the votes of Wyoming voters are more valuable than those of California voters, as the population to electoral vote ratio gives Wyoming voters almost four times more weight than their California counterparts. On the other hand, despite the relative overweighted allocation to Wyoming voters (or relative underweighted allocation to California voters, depending on your frame of reference), Wyoming still has only three electoral votes. In the grand scheme of a national election, winning California is more "valuable" than a small state when compared individually. But the value of each person's vote should be equal, no matter where they reside.

Defenders of the Electoral College may argue that people in big cities don't understand the problems of those living in rural areas, and that if a popular vote were held, politicians would grovel at the feet of conveniently concentrated city dwellers and ignore the interests of the sparsely populated countryside. Even if this were true, it is fair to ask why people living in small, rural areas should be protected from the majorities living in densely populated cities. There is no rational basis for deciding that certain geographical minorities deserve any more or less protection than racial, religious, or economically disadvantaged minorities. If any group were to have their interests given extra electoral weight (not to suggest that this should be done), a fair general principle to adopt might be to provide additional protection to the least-privileged minorities in society.<sup>24)</sup> If Americans are comfortable with voters in the

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22) Michael Herz, *Robert Dahl's How Democratic Is the American Constitution?: An Introduction, with Notes on the Electoral College*, 26 Cardozo L. Rev. 2515, 2524-2525 (2005).

23) United States Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, District of Columbia, and Puerto Rico: April 1, 2020 to July 1, 2021*, [https://data.census.gov/cedsci/table?tid=PEPPPOP2021.NST\\_EST2021\\_POP&hidePreview=false](https://data.census.gov/cedsci/table?tid=PEPPPOP2021.NST_EST2021_POP&hidePreview=false)

24) Robert A. Dahl, *How Democratic Is the American Constitution?* 84-85 (Yale University Press 2001).



smallest state having their vote count almost four times as much as voters in the largest state, one could argue that the weight of votes cast by Black citizens should be increased, to make up for the fact that their ancestors did not have the right to vote at all at the nation's creation. Such an allocation would be no less fair or logical than the current system.

Proponents of keeping the Electoral College like the idea that candidates have to campaign all over the country, rather than just focusing on a few major cities where large populations are gathered. While in theory this sounds appealing, the reality of the system's structure produces a very different result. Because most states award their electoral votes in a winner-take-all manner, small states do not have much individual value in a national election. "[S]ometimes small states get a lot of attention, but that has nothing to do with being small. They get attention when their voters are closely divided... Closely divided big states get even more. The attention results from the close division, combined with the winner-takes-all rule."<sup>25)</sup> Likewise, large states that are seen as a "lock" for one party also have little value to the opposing party under this system, as their millions of votes have no value if a candidate loses the state by even a single vote. The result is that candidates will generally focus their campaigning and resources on approximately ten states that the candidates believe can be won over to their side.<sup>26)</sup> A popular vote would encourage candidates to seek wider support across the country, rather than ignore entire states that they calculate as too difficult to win over in a particular election year. If a President is to serve the American people, the people should be the ones to directly choose that leader. Under the current system, some citizens do not even get the benefit of any vote at all.

Not only does the Electoral College system inflate or deflate the relative value of a citizen's vote based solely on election day geography, but it also results in some American citizens of voting age as being ineligible to vote for their president altogether. The drafters of the Constitution did not consider the disenfranchisement of citizens from the vote solely because they reside in a U.S. territory rather than a state. While perhaps understandable at the time, American citizens today should not be denied the basic right to choose their President, simply on the basis of geography. Citizens in Guam, the Northern Mariana Islands, the U.S. Virgin Islands, Puerto Rico, and American Samoa<sup>27)</sup> are no less Americans because they live in American territories rather than states. Residents of Washington, D.C., the capital of the nation, were similarly disenfranchised until 1961, when the Twenty-Third Amendment provided the district with the same number of Electoral College votes as the least populous state.<sup>28)</sup>

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<sup>25)</sup> Herz at 2525.

<sup>26)</sup> Jesse Wegman, *Let the People Pick the President* 166-169 (St. Martin's Press 2020).

<sup>27)</sup> Unlike the other four territories, people born in American Samoa are U.S. nationals, rather than citizens. Children of citizens born in the territory, however, acquire citizenship at birth. *Developments in the Law — The U.S. Territories*, 130 Harv. L. Rev. 1616, 1680 (2017).

<sup>28)</sup> U.S. Const. amend. XXIII.



It is simply unfair and undemocratic to deny portions of the national populace a say in presidential elections, just as it offends the American sense of egalitarianism that simply moving from one address to another can increase or decrease the power of a person's vote for the nation's highest office. If this affront to the democratic spirit were a tradeoff for some form of protection for the people, perhaps it could be a sacrifice worth further consideration. However, the founders' original plan for the Electoral College to be an elite, contemplative body for selecting the best President from among the best Americans in a fair and impartial manner has evolved into an ineffective rubber stamp procedure, stripped of most of the potential benefit it may have once contained.

#### IV. The Automaton Electors

Some of the goals of the Electoral College were admirable in their intentions, yet read as almost laughable in practice today. John Jay wrote that those choosing the President "will in general be composed of the most enlightened and respectable citizens" and vote for "men only who have become the most distinguished by their abilities and virtue..." Electors will "not be liable to be deceived by those brilliant appearances of genius and patriotism which, like transient meteors, sometimes mislead as well as dazzle."<sup>29)</sup>

Alexander Hamilton saw the Electoral College as an independent group of thinkers, able to make unbiased choices in determining the best leader for the nation. He envisioned that "[a] small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment"<sup>30)</sup> needed to choose the President. He believed this deliberative process would ensure "that the office of President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and for the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State" but would prove difficult to seduce the majority of the electors in a federal election. As such, he predicted "that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue."<sup>31)</sup>

If the Electoral College is meant to be a bulwark against the tyranny of the majority, or a final arbiter of competence and presidential material, it has failed miserably in its purpose. From the beginning, true deliberation among the earliest Electoral College representatives was the exception to the rule of electors acting as mere agents of their states' electorate.<sup>32)</sup> States are responsible for choosing their Electoral College representatives. They may let the

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<sup>29)</sup> *The Federalist No. 64*, at 316 (John Jay) (Oxford University Press ed. 2008).

<sup>30)</sup> *The Federalist No. 68*, at 334 (Alexander Hamilton) (Oxford University Press ed. 2008).

<sup>31)</sup> *Id.* at 336.

<sup>32)</sup> George C. Edwards III, *Why the Electoral College Is Bad for America* 50-51 (3d ed., Yale University Press 2019).

citizens of the state choose by direct vote, or the state legislature may make laws allowing the legislature itself to appoint a slate of electoral representatives without any public vote at all. These electors are not required to be independent. They are not required to be fair. In fact, most are members of a political party, unabashedly dedicated to the support and election of their candidate.

As an example, New York's 2016 electors included the Democratic governor of the state, the Democratic mayor of New York City, and former President Bill Clinton, the husband of the Democratic candidate, Hillary Clinton.<sup>33)</sup> It is unlikely that they would have been the ideal people to dispassionately determine whether or not Hillary Clinton was the best candidate for the job. There is no grand hall in the federal Capitol where all of the electors from around the nation gather to discuss and debate the merits of their preferred candidate, or subject the candidates to any litmus test of competence or character. Instead, electors gather state-by-state to cast an intrastate ballot.<sup>34)</sup>

Partisan electors are completely constitutional. The way of choosing electors who vote in the Electoral College is not set in the Constitution, so each state sets its own rules, but generally the political parties themselves are heavily involved in choosing their electors.<sup>35)</sup> Sometimes, however, electors do vote unpredictably. While not a common occurrence, faithless electors do occasionally appear,<sup>36)</sup> and none have yet changed the outcome of an election. Perhaps no greater effort was undertaken to do so, however, than in the 2016 election, when seven electors voted for candidates other than those to whom they were pledged.<sup>37)</sup> The election of 2016 perhaps magnified the failure of the Electoral College to ensure that the most virtuous and qualified candidate (at least among those in the race) be elevated to the nation's highest office, especially if one believes that the majority of the populace "voted for the dull centrist technocrat, who also happened to be one of the most qualified candidates in American history. The Electoral College, meanwhile, picked the person it was literally designed to keep out of office."<sup>38)</sup>

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33) *Id.* at 15.

34) *Id.* at 22-23.

35) U.S. Congressional Research Service, *The Electoral College: How It Works in Contemporary Presidential Elections* (RL32611 May 15, 2017).

36) The Constitution does not prohibit electors from voting for candidates other than the individuals they were pledged to support, though states can prohibit such actions under state law. See Chiafalo v. Washington, 140 S. Ct. 2316 (2020); Colorado Department of State v. Baca, 140 S. Ct. 2316 (Mem) (2020).

37) Edwards at 61.

38) Jesse Wegman, *Let the People Pick the President* 164 (St. Martin's Press 2020).

## V. The Electoral College is Not Democratic, and It Matters in a Government of the People

The idea of an indirect, non-democratic process for selecting the President as appropriate for the United States could be easier to accept if one believes that the United States is not really a democracy anyway, and the Electoral College system can protect the nation from fraud and bad decision-making. “The ultimate goal should be a democracy that works for the greatest number, and this may mean less emphasis on pure democratic procedures if it leads to better outcomes.”<sup>39)</sup> Therefore, we should first look at what we mean by “democracy” and whether the current, less democratic, Electoral College can lead to better results.

### A. The Fallacy that America Is Not a Democracy

The United States government was arguably never designed to be a pure democracy, as both the structure of Congress and the Electoral College demonstrate,<sup>40)</sup> but a representative democracy is a democracy nonetheless. If one of the goals for an electoral system is to be a democratic process in some way, how can a society determine if its procedure is meeting its goal? Robert A. Dahl proposed five criteria for an association to meet in order to achieve equal representation: effective participation, voting equality, enlightened understanding, control of the agenda, and inclusion of adults.<sup>41)</sup> In the United States, the first, third and fourth categories are arguably already protected for voters by the rights of free speech and the freedom of assembly as guaranteed in the First Amendment to the Constitution. The inclusion of adults is also cumulatively protected by the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.<sup>42)</sup> The Electoral College system required

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39) See Bruce E. Cain, *More or Less: Searching for Regulatory Balance in Race, Reform, and Regulation of the Electoral Process* 284 (Guy-Uriel E. Charles, Heather K. Gerken, & Michael S. Kang, eds., Cambridge University Press 2011).

40) Alexander Keyssar, *Why Do We Still Have the Electoral College?* 331 (Harvard University Press 2020).

41) Robert A. Dahl, *On Democracy* 37-38 (2d ed., Yale University Press 2015).

42) U.S. Const. amend. I: “Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble...”

U.S. Const. amend. XIV, §1: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

U.S. Const. amend. XV, §1: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

U.S. Const. amend. XIX: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”

U.S. Const. amend. XXIV, §1: “The right of citizens of the United States to vote in any primary or ↗

under the Constitution, however, makes the goal of voting equality difficult to implement in practice. If “all votes must be counted as equal”,<sup>43)</sup> the current system cannot fulfill that goal when the weight of a voter’s selection can change based on nothing more than geography, as discussed in Section III above. For example, if I vote for the candidate with the most votes in my state, my vote counted. If my candidate lost the statewide vote by just one vote, my vote does not count at all, as all of my state’s electoral votes go to the other candidate and none to mine.

One barrier preventing meaningful electoral reform in the United States may be that no single “democratic ideal form” is universally accepted as a model for free and fair elections. Reformers can argue whether a candidate receiving a plurality of votes has a sufficient mandate to govern, or whether simple majority rule is truly representative.<sup>44)</sup> Perhaps anything less than a unanimous vote is a failure of true democracy.

The Electoral College may not be the worst form of democratic representation for electing the President, but it certainly is not the most inclusive manner. A system where the winner can lose and vice versa goes against the American ideals of a democratic government reflecting the will of the people— not for every single issue, as in a pure democracy, but in terms of who is elected to work on behalf of the electorate as their representative in government. Less direct democracy may be beneficial if it can protect a nation from mass irrationality, as “[e]xcessive patriotism, widespread fear, and bandwagon effects can move majorities toward collective opinions that they might later regret.”<sup>45)</sup> But the Electoral College in its current form is no better at preventing such results than a direct election.

## **B. The Electoral College Offers No More Protection Than a National Election**

The Electoral College could theoretically act as a safety net for democratic integrity. An enlightened group of monitors could provide yet another layer of protection from threats to free elections. After all, if one state’s electoral system was rife with vote-buying, voter intimidation, or illicit voting, the deleterious consequences could be limited to just that state. Rather than launch a nationwide investigation, the efforts to maintain a free and fair election could be focused on the local problem area to quickly rectify any wrongdoing. Unfortunately,

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“other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.”

U.S. Const. amend. XXVI, §1: “The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”

43) Robert A. Dahl, *On Democracy* 37 (2d ed., Yale University Press 2015).

44) See Bruce E. Cain, *More or Less: Searching for Regulatory Balance in Race, Reform, and Regulation of the Electoral Process* 263 (Guy-Uriel E. Charles, Heather K. Gerken, & Michael S. Kang, eds., Cambridge University Press 2011).

45) *Id.* at 275.

if the integrity of just one state's election is called into question, it is possible that the outcome of the entire election may be altered due to the weight of the Electoral College. We can look back at the election of 2000 for a hypothetical example to illustrate this concept.

While the results of the 2000 election were not affected by voter fraud, it is this kind of close election where the Electoral College could serve as a great incentive for political partisans to promote fraud. As even the smallest state has three electoral votes, the entire outcome of the election would have been reversed had Democratic Party operatives managed to change the vote in any single state that their Republican Party rival won. Stealing just a few votes in a national election would have little impact on the total vote count, and would be unlikely to overturn the outcome. Conversely, changing the results in just one local area could be fatal to the integrity of a national election if an entire state's electoral vote flips. In this way, the state-by-state Electoral College system actually creates a much larger incentive to commit voter fraud than a national election could ever manage.<sup>46)</sup>

Accusations of fraud, not to mention incidents of simple error, lead to ballot recounts. As the state-by-state vote tallies theoretically protect the republic from fraud contaminating the whole vote rather than just one local area, the Electoral College system would also prevent the need of costly and time-consuming national recounts in the event of a disputed outcome. However, as contested election results in one particular state or region would have much less impact on a national vote as a whole, the need or likelihood of recounts would more likely be reduced rather than increase under a national popular election. Again, we can look at the 2000 election results for an example in action, where George W. Bush won the state of Florida by a few hundred votes, but lost the national popular election by more than half a million. The weeks of recounts and hand-wringing of disputed ballots in the state would have been moot in a national vote. As such, the Electoral College system is more likely to increase and encourage recounts, rather than reduce their numbers.<sup>47)</sup>

In addition, the 2020 election showed that politicians can challenge presidential election results in multiple states, triggering recounts in the hope of altering a few local districts in order to flip 100% of a state's Electoral College votes. In a national election, changing the results of a few thousand people in a vote decided by a majority of millions would be meaningless. A national popular vote would serve as a large disincentive to attempted fraud in one or more states or voting districts. No national recount would be required in a suspicious district or state if the national results would remain unaffected. Even with a direct election by the people, states would still organize voting within their borders. Irregularities may be pinpointed to specific locations. And the risk that

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46) George C. Edwards III, *Why the Electoral College Is Bad for America* 153 (3d ed., Yale University Press 2019).

47) *Id.* at 156. Recounts are also already fairly common under the current system. Twenty states plus Washington, D.C. require recounts in close elections, which are handled quickly and without disruption to the determination of the ultimate winner.

irregularities in one particular county, for example, could swing an election's results would be far less likely in a national count of individual votes than in a single state's vote, which could allocate *all* of its Electoral College votes to one candidate over another. In any event, states have shown that recounts are not beyond their capabilities, with uneventful recounts for governors' elections, for example.<sup>48)</sup>

The Electoral College makes matters worse by allowing for tie votes. In the hours and days after election night 2020, the intriguing and very real possibility of a tied Electoral College vote loomed large. It appeared that Donald Trump had locked in 232 electoral votes to 253 for Joe Biden, with Arizona (11 electoral votes), Nevada (6 electoral votes), Pennsylvania (20 electoral votes), and Georgia (16 electoral votes) still to be decided.<sup>49)</sup> If Trump had won Arizona, Nevada, and Pennsylvania, while Biden captured only Georgia, the Electoral College would have been tied at 269 to 269. While the Constitution does provide for contingencies in such event, it is difficult to envision how a vote in Congress, dependent solely on the political leanings of members then in power, is a better way to choose the President than an actual vote of the people.

Even if the Electoral College does not offer any practical benefit over a direct vote by the people, some may still hesitate to change something that has been around for so long. The constitutionally established system has unfailingly produced a president every four years since the founding of the nation. Yet, as a country committed to democratic principles and the equality of all citizens, it is important to always strive to do better. There is a better way to elect a chief executive, and that way is a popular vote of the people.<sup>50)</sup> The biggest question is how to accomplish this goal.

## **VI. Remedy for a Constitutionally Created Problem – Amendment of Agreement?**

Abolishing the Electoral College is no simple task, as it would require an amendment to the Constitution to do so. Amendments can be proposed in one of two ways: either two-thirds of both the House and Senate agree, or two-thirds of the state legislatures call for a constitutional convention. A proposed amendment can take effect only when three-fourths of the states ratify it.<sup>51)</sup> Many such amendments to alter or abolish the Electoral College

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48) Akhil Reed Amar with Vikram David Amar, *Countering the Top Ten Arguments for the Electoral College* in Akhil Reed Amar, *The Constitution Today* 350-351 (Basic Books 2016).

49) North Carolina (16 electoral votes) was also uncalled by most media outlets in the days after the election, but Donald Trump's lead was relatively greater and more certain than the aforementioned states.

50) Arguments can be made for or against the method by which direct votes are counted, such as declaring the winner of a plurality of votes the final winner, or requiring runoff votes until one candidate wins a majority of votes, or implementing a ranked choice voting system. In any case, abolishing the Electoral College is required before any refinement to the process could move forward.

51) U.S. Const. art. V.

have been proposed over the years, but none have been ratified. With fifty states, an amendment must be approved by at least thirty-eight states. While efforts to so amend the Constitution continue, a somewhat simpler workaround has been proposed which could effectively deliver a guaranteed “win” to the popular vote winner, notwithstanding the Electoral College vote.

In 2006, the nonprofit group National Popular Vote proposed an interstate agreement where participating states would pledge to award all of their electoral votes to the national popular vote winner, regardless of their state’s popular vote winner. This system would reflect the principle that all votes should be counted equally in the presidential race, by effectively removing the risk that the Electoral College vote tally will produce a different result from counting the votes of the people. If the vote of each citizen is counted equally, candidates will have to appeal to *all* Americans, and not just voters in a few key “swing” states.<sup>52)</sup> This proposed National Popular Vote Interstate Compact would likely face fierce legal opposition if ever implemented, but currently not enough states have signed on yet to make the agreement effective.<sup>53)</sup> While this compact is not likely to garner enough additional support in the immediate future, it requires less effort and fewer states to agree than a constitutional amendment, possibly making it a faster method for implementing change.

Critics may not approve of an agreement by the states to effectively change the Constitution without changing the Constitution. It doesn’t feel fair, much like the Electoral College results negating the result of a national popular vote not feeling fair. The National Popular Vote Interstate Compact proposal highlights the inherent unfairness of the Electoral College in the first place. Imagine if instead of a multi-state compact created to reflect the will of the popular vote, a few nefarious yet populous states plotted to pool their electoral votes to select the President in every single election.<sup>54)</sup> Theoretically, the legislatures of just eleven or twelve states<sup>55)</sup> could agree to throw all of their electoral votes to the same person and render meaningless the millions of votes in every other state. If the Electoral College can be so easily thwarted, perhaps it is not the best structure for electing a person to the nation’s most powerful political office.

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52) Alexander Keyssar, *Why Do We Still Have the Electoral College?* 341-342 (Harvard University Press 2020).

53) As of 2021, only fifteen states plus the District of Columbia have joined the agreement, for 195 of the total 270 electoral votes required to win an election.

54) Tara Ross, *Enlightened Democracy* 156; 188-189 (2d ed., Colonial Press, L.P. 2012).

55) In 2020, the combined electoral votes of California (55), Texas (38), Florida (29), New York (29), Illinois (20), Pennsylvania (20), Ohio (18), Georgia (16), Michigan (16), North Carolina (15), and New Jersey (14) totaled the 270 electoral votes required for victory. With the 2020 census, California, Illinois, Michigan, New York, Ohio, and Pennsylvania will each lose a seat in Congress, while Florida and North Carolina will each gain one, and Texas will gain two (<https://www.census.gov/library/visualizations/2021/dec/2020-apportionment-map.html>). Thus, this theoretical cabal of subversive states would need to add one more member to get the required 270 electoral votes for their candidate.



## VII. Conclusion

A healthy democracy is not guaranteed to stay that way, and should receive reevaluation from time to time. America has evolved in ways unimaginable to the creators of the Constitution, as the nation now spans across an entire continent and more. Individuals can access information from around the globe in an instant, from the comfort of their own homes. Much of the populace continue to live in small towns, but many also live in cities filled with millions of fellow countrymen. Additionally, the right to vote is no longer limited to an elite group of men of means, but is open to all adult Americans. If America actually values the input of its citizens by holding a national vote, it needs to respect the decision made by all participants, and treat each vote fairly and equally.

In one sense, perhaps the precise rules for electing a nation's leader do not even matter, as long as such rules are fair and get the job done.<sup>56)</sup> It is for this reason that Americans accept the winner of the Electoral College vote even for candidates who lose the popular vote. Everyone knows the rules of the game before it begins. However, just because a rule is "fair" in the sense that it applies to all equally does not mean that it is a just rule, or even "fair" in the sense of being the best way to accomplish a goal. The winner of a baseball game *could* be determined by counting the number of hits for each team, and declaring victory for the team with the greatest number. The rule is fair in that it applies to each team equally, but it is hardly fair that a team that has two singles in a game but no runs on the scoreboard should defeat a team with one home run but no other hits. The team that attained the most runs would lose to the team with zero runs, but more hits. It may be objectively "fair" under the rules as set before game time, but it would not feel so to anyone either watching or playing the game. Such is the Electoral College to a national election.

Changing the Electoral College to a popular vote is not a new, risky, or untested method for electing politicians in the United States. In the late 1700's, only a minority of states elected their governors by popular vote, but now every state elects their chief executive by a direct, popular vote. No state has ever rolled back its direct election of the Governor, nor have any serious criticisms or complaints arisen from the concept of directly electing a state's governor.<sup>57)</sup> However, the world has seen the confusion and frustration affecting the United States when the popular and electoral vote winners do not coincide. Unless the American presidential election system changes, such mismatches will happen again and again. Changing a familiar system can be challenging, but refusing to fix a flawed system is irresponsible. The United States can and must make its presidential elections a true reflection of the democratic ideals it promotes around the world. The most democratic

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<sup>56)</sup> Tara Ross, *Why We Need the Electoral College* 56-57 (Regnery Gateway 2017).

<sup>57)</sup> John R. Koza, Barry Fadem, Mark Grueskin, Michael S. Mandell, Robert Richie, and Joseph F. Zimmerman, *Every Vote Equal* 773 (4th ed., National Popular Vote Press 2013).

electoral system must choose a representative directly by voters whose ballots are treated equally. Only once the Electoral College is permanently relegated to the history books will the world be able to look to the United States of America as a true model for electing a nation's chief executive.