

Should the Electoral College be Abolished?

Donald Trump won the 2016 presidential election by winning a majority of the Electoral College votes (306, 36 more than the 270 required to win), even though he lost the popular vote to Hillary Clinton by nearly 3 million votes (roughly 63 million to her 65.8 million). It was the fifth time in U.S. history, and the second in sixteen years, that a president was elected without receiving the most votes. To a modern observer of democratic systems, the election of a popular vote loser seems inconsistent with the majoritarian principle of representative government.

At the time of the Constitution's ratification, the Electoral College was a compromise designed to address concerns of small states worried about being overwhelmed by the power of large states, to respect the importance of states in a federal system, to insulate the presidential election from strong public passions, and to provide the executive a degree of independence from the legislature. It also was designed to require candidates to gain support from across the country: as Alexander Hamilton argued in *Federalist* 68, the indirect process would filter out individuals whose "talents for low intrigue, and the little arts of popularity" might be enough to win the support of one state, and would "require other talents, and a different kind of merit, to establish [an individual] in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate."

But given that our concepts of representation, and the vast differences between how we think of legitimacy now and how the framers thought of it then, does the Electoral College still deserve our deference? Should it be abolished and be replaced with a simple national popular vote?

The three readings in this section provide competing perspectives. In "Democracy Denied," John Nichols, a progressive writer, argues that the Electoral College is an absurd anachronism that violates the fundamental notion that a government founded on "the will of the people" must itself be based on "the premise that the popular vote defines who wins and who loses." While we have corrected other errors in the original compromises that produced the Constitution—by adopting the direct election of Senators and abolishing slavery—he writes that "the most anti-democratic of the founding constructs—an elite Electoral College created to thwart the will of the great mass of voters—remains." Nichols supports the National Popular Vote Compact, in which states have changed their laws to award their Electoral College votes to the winner of the national popular vote, and sees reform as part of a broader move to protect voting rights nationwide.

Richard Posner, a retired federal judge, wrote in 2012 that the Electoral College has five crucial advantages: it ensures a definitive outcome, requires a candidate to have national appeal, gives swing state voters an incentive to pay close attention to candidates, gives large states due importance, and ensures that the winner has an absolute majority of votes. Posner dismisses the criticism that the Electoral College is undemocratic: "No form of representative democracy . . . is or aspires to be perfectly democratic." The entire federal judiciary, for example, (appointed to life terms) is manifestly undemocratic.

Guelzo (a professor of history) and Hulme (an attorney in Washington, D.C.) defend the Electoral College in the context of the 2016 results. They stress the importance of the institution to our federal system, and argue that "the Electoral College is preeminently both a symbol and a practical implementation of that federalism." They specifically contest the notion that the Electoral College was connected to the protection of slavery (as Nichols argues), and maintain that the claim is "more of a rhetorical posture than a serious argument."

John Nichols

Democracy Denied

In the mid-1980s, shortly after Ronald Reagan won a forty-nine-state landslide victory in his campaign for a second term, David Bowie had a top-forty hit with a haunting song from the soundtrack to the spy drama *The Falcon and the Snowman*. The song resonated with people who felt disconnected from their nation. It was titled “This Is Not America.”

Sometimes, of course, an election result *is* America: a Franklin Roosevelt or a Dwight Eisenhower or a Lyndon Johnson wins so decisively that the President can claim a genuine mandate. As frustrating as it may have been for a lot of us, Ronald Reagan won big in 1984—the year George Orwell had warned about.

But what about those times when the “winner” is not the winner at all? What about those years when the finish of a long campaign is in conflict with itself?

There is always a tendency on the part of major media outlets and political insiders to suggest that the United States is defined by the prominent men and women who take office after elections. Too frequently, even those of us who dissent from the conventional wisdom of American politics fall into the trap of imagining that the headlines declaring who has won define our times. But when that is not the case, there is a duty to speak the truth: “This is not America.”

Such is our circumstance today.

The Washington Post's post-election headline declared, “Trump Triumphs.” The *New York Post* trumpeted, “President Trump: They Said It Couldn't Happen.”

But it didn't actually happen in the way that so much of the media imagines. Trump's America is not America. In order to imagine that Trump's presidency has a triumphant mandate, or even the barest measure of democratic legitimacy, Americans must surrender to the hoax that media branding is reality.

The reality, as Michael Moore noted in caps, is that “HILLARY CLINTON WON THE POPULAR VOTE!” “If you woke up this morning thinking you live in an effed-up country, you don't,” the filmmaker explained on the day after the election, stating what the headlines did not: “Your fellow Americans wanted Hillary, not Trump.”

Democracies and democratic republics that take seriously the notion that governing extends from the will of the people begin with the premise that the

popular vote defines who wins and who loses. In other countries that elect presidents, Hillary Clinton's popular-vote victory would have her preparing for an inauguration. In America, it had her walking her dogs on the day after her concession speech.

On election night, Clinton's win was a narrow one. But the United States has archaic systems for casting and counting ballots, which means that the tabulation process stretches out for weeks, even months, after the polls close. One week after the election, Clinton's lead had grown to more than one million votes. The Democratic advantage will just keep expanding, as the longest counts tend to be in West Coast states such as California, where Clinton is leading Trump by an almost 2-to-1 margin. Nate Cohn argues that Clinton could end up winning by two million votes and more than 1.5 percent of the total; others suggest the margin could go higher.

Even as the count progressed, Clinton's winning margin grew greater than Richard Nixon's in 1968. It was greater than John F. Kennedy's in 1960. In fact, it was greater than the winning margin in more than twenty of the presidential elections the United States has held since its founding. Of course, the elections of the distant past had smaller overall turnouts. But Kennedy and Nixon were elected in high turnout elections in relatively recent times.

And there's an even more recent election that offers an even more relevant comparison. In 2000, Democrat Al Gore beat Republican George W. Bush by 543,895 votes. At the time, that was the biggest ever popular-vote victory for someone who lost the presidency. But Hillary Clinton's popular-vote victory over Donald Trump is already dramatically greater than Gore's.

At the same time, the final 2016 count will give Trump a substantially lower percentage of the overall vote than Republican Mitt Romney received in his losing 2012 challenge to Democratic President Barack Obama.

But none of this matters, we are told, because Trump will prevail by a narrow margin in the December vote by the 538 members of the Electoral College.

So how do 538 electors trump—apologies—the choice of the more than 120,000,000 actual voters for the presidency? Because they represent a relic of the same set of founding compromises that permitted human bondage in a land where the Declaration of Independence announced “all men are created equal.” The Electoral College is, constitutional scholars say, a “vestige of slavery,” and was created to help protect that institution. The goal, history reminds us, was to keep the more populous northern states from overruling the South.

“It’s embarrassing,” argues Paul Finkelman, a law professor who has studied the institution. “I think if most Americans knew what the origins of the Electoral College is, they would be disgusted.”

The Constitution has been amended frequently to correct the errors of the past. The franchise has been extended to African Americans and women; the poll tax has been banned; the voting age has been lowered. The old practice of choosing Senators via backroom deals has been replaced with an elected Senate. Yet the most anti-democratic of the founding constructs—an elite Electoral College created to thwart the will of the great mass of voters—remains.

The Electoral College warps and diminishes American democracy at every turn. As George C. Edwards III, a political science professor at Texas A&M University who edits the *Presidential Studies Quarterly*, tells us: “The Electoral College . . . has the potential to undo the people’s will at many points in the long journey from the selection of electors to counting their votes in Congress.”

Consider this: In Wyoming, each elector represents roughly 160,000 eligible voters, compared with the more than 600,000 eligible voters represented by an elector from California.

Often this warping and diminishment is obscured when the Electoral College’s choice mirrors that of the national popular vote. The Electoral College only gets major attention when the college’s choice diverges from the national popular vote.

What Americans need to recognize is that such major malfunctions are becoming more common.

For the second time in sixteen years, the national popular vote decision is going to be overridden by the Electoral College. Trump has a narrow advantage in the Electoral College (so narrow that a shift of just 57,000 votes would have made Clinton the winner in the three states she needed—Michigan, Pennsylvania and Wisconsin—to gain the 270 electors required to prevail). But that advantage is definitional under the current system.

This is a problem.

To be fair, it is a problem that has been flagged since 1787.

The group FairVote tells us that more than 700 constitutional amendments have been proposed to modify or abolish the Electoral College, “making it the subject of more attempted reforms than any other subject.” A proposal to replace the current allocation of state electors on a winner-take-all basis with a

proportional electoral vote gained the endorsement of the Senate in the 1950s but failed in the House. A proposal to abolish the Electoral College won the support of the House in 1969 but was blocked by a Senate filibuster led by southern Senators who had opposed civil rights legislation.

Even Donald Trump griped that “the Electoral College is a disaster for a democracy”—but that was in 2012, not 2016.

The trouble with historic attempts to replace or reform the Electoral College is that they tended to be based on frustrations and fears extending from a particular election result, and thus absorbed in the closed circle of Congress.

The aftermath of the 2016 election, in which the Electoral College has again proven to be a disaster for democracy, can and must be different. There are many proper reactions to this election, including solidarity movements to defend those most threatened by the combination of a Trump presidency and a fiercely right-wing Congress. But if ever an election demanded a mass movement for reform, this is it.

Yes, this Congress is disinclined toward reform. But FairVote and other groups are advancing a credible vehicle for getting around Congress, and it has already gained considerable traction. Activists want state legislatures to endorse a National Popular Vote compact, which requires states to “choose to allocate their electoral votes to the candidate who wins the most popular votes in all fifty states and the District of Columbia.”

Ten states and the District of Columbia—with a combined total of 165 electoral votes—have passed legislation to enter the compact. And the idea has been proposed in the legislatures of the remaining states. This is a real reform plan. But it does not need to be the only one. What is necessary now is for Americans to organize on behalf of a constitutional amendment to abolish the Electoral College, or at the least to reform it with a proportional representation plan. We can sort out the specifics later. But this moment cannot be lost to frustration at a rigged system, or hopelessness about prospects for reform.

This should be a moment of radical urgency. Activism to abolish the Electoral College should be combined with advocacy to end the corrupt practice of gerrymandering, which allows incumbent politicians and their allies to draw maps of voting districts that are skewed to prevent competition. (Since 2010, these have been used to lock in Republican control of the U.S. House of Representatives. In 2012, for instance, GOP House candidates won 49 percent of the votes and 54 percent of the seats.)

Any movement for real democracy must also address voter suppression, which played a profound role in the 2016 election. Restrictive voter ID laws, complex registration procedures, limits on early voting, and cuts in the number of polling places undermined democracy in jurisdictions across the country and, voting rights activists argue, contributed to declines in turnout that benefited Trump and his allies.

This was the first national election in fifty years that was not conducted under the full protection of the Voting Rights Act of 1965. That is a travesty, yet there is little chance that a Congress led by House Speaker Paul Ryan and Senate Majority Leader Mitch McConnell will renew the act's protections, especially under a President who has dismissed efforts to make voting easy and efficient as the "rigging" of elections.

The time really has come to embrace the proposal by Democratic Congressmen Keith Ellison of Minnesota and Mark Pocan of Wisconsin to amend the Constitution to declare: "Every citizen of the United States, who is of legal voting age, shall have the fundamental right to vote in any public election."

The same goes for the amendment proposed by Vermont Senator Bernie Sanders to overturn the U.S. Supreme Court's anti-democratic rulings in cases including the 2010 *Citizens United* decision. Only an amendment will address the flow of billionaire and corporate money into our politics, which in 2016 Senate races proved decisive.

Yes, it requires hard work to amend the Constitution. But the document has been updated twenty-seven times since 1787, often in moments as difficult and divisive and challenging as these. And the American people are ready to make the change. * * *

The anger, the frustration, the fear and loathing that extends from the 2016 presidential race is real. It will find many expressions. One of them must be a bold and unapologetic call for democracy—a call grounded in the recognition that Donald Trump did not win a mandate. He did not even win the popular vote. And a system that allows the loser to win is not sufficient for a nation that proposes to be of, by, and for the people. * * *

It will not be easy. But if the 2016 election has taught us anything, it is that radical reform is necessary. We renew ourselves not with bitterness, but with a commitment to make the change that brings democracy to the United States of America.

Richard A. Posner

In Defense of the Electoral College

The Electoral College is widely regarded as an anachronism, a nondemocratic method of selecting a president that ought to be superseded by declaring the candidate who receives the most popular votes the winner. The advocates of this position are correct in arguing that the Electoral College method is not democratic in a modern sense. The Constitution provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." And it is the electors who elect the president, not the people. When you vote for a presidential candidate you're actually voting for a slate of electors.

But each party selects a slate of electors trusted to vote for the party's nominee (and that trust is rarely betrayed). Because virtually all states award all their electoral votes to the winner of the popular vote in the state, and because the Electoral College weights the less populous states more heavily along the lines of the Senate (two Senators and two Electoral College votes for every state, and then more electoral votes added for each state based on population), it is entirely possible that the winner of the electoral vote will not win the national popular vote. Yet that has happened very rarely. It happened in 2000, when Gore had more popular votes than Bush yet fewer electoral votes, but that was the first time since 1888.

There are five reasons for retaining the Electoral College despite its lack of democratic pedigree; all are practical reasons, not liberal or conservative reasons.

1) Certainty of Outcome

A dispute over the outcome of an Electoral College vote is possible—it happened in 2000—but it's less likely than a dispute over the popular vote. The reason is that the winning candidate's share of the Electoral College invariably exceeds his share of the popular vote. In last week's election, for example, Obama received 61.7 percent of the electoral vote compared to only 51.3 percent of the popular votes cast for him and Romney. (I ignore the scattering of votes not counted for either candidate.) Because almost all states award electoral votes on a

winner-take-all basis, even a very slight plurality in a state creates a landslide electoral-vote victory in that state. A tie in the nationwide electoral vote is possible because the total number of votes—538—is an even number, but it is highly unlikely.

Of course a tie in the number of popular votes in a national election in which tens of millions of votes are cast is even more unlikely. But if the difference in the popular vote is small, then if the winner of the popular vote were deemed the winner of the presidential election, candidates would have an incentive to seek a recount in any state (plus the District of Columbia) in which they thought the recount would give them more additional votes than their opponent. The lawyers would go to work in state after state to have the votes recounted, and the result would be debilitating uncertainty, delay, and conflict—look at the turmoil that a dispute limited to one state, Florida, engendered in 2000.

2) Everyone's President

The Electoral College requires a presidential candidate to have transregional appeal. No region (South, Northeast, etc.) has enough electoral votes to elect a president. So a solid regional favorite, such as Romney was in the South, has no incentive to campaign heavily in those states, for he gains no electoral votes by increasing his plurality in states that he knows he will win. This is a desirable result because a candidate with only regional appeal is unlikely to be a successful president. The residents of the other regions are likely to feel disfranchised—to feel that their votes do not count, that the new president will have no regard for their interests, that he really isn't their president.

3) Swing States

The winner-take-all method of awarding electoral votes induces the candidates—as we saw in last week's election—to focus their campaign efforts on the toss-up states; that follows directly from the candidates' lack of inducement to campaign in states they are sure to win. Voters in toss-up states are more likely to pay close attention to the campaign—to really *listen* to the competing candidates—knowing that they are going to decide the election. They are likely to be the most thoughtful voters, on average (and for the further reason that they will have received the most information and attention from the candidates), and the most thoughtful voters should be the ones to decide the election.

4) Big States

The Electoral College restores some of the weight in the political balance that large states (by population) lose by virtue of the malapportionment of the Senate decreed in the Constitution. This may seem paradoxical, given that electoral votes are weighted in favor of less populous states. Wyoming, the least populous state, contains only about one-sixth of 1 percent of the U.S. population, but its three electors (of whom two are awarded only because Wyoming has two senators like every other state) give it slightly more than one-half of 1 percent of total electoral votes. But winner-take-all makes a slight increase in the popular vote have a much bigger electoral-vote payoff in a large state than in a small one. The popular vote was very close in Florida; nevertheless Obama, who won that vote, got 29 electoral votes. A victory by the same margin in Wyoming would net the winner only 3 electoral votes. So, other things being equal, a large state gets more attention from presidential candidates in a campaign than a small state does. And since presidents and senators are often presidential candidates, large states are likely to get additional consideration in appropriations and appointments from presidents and senators before as well as during campaigns, offsetting to some extent the effects of the malapportioned Senate on the political influence of less populous states.

5) Avoid Run-Off Elections

The Electoral College avoids the problem of elections in which no candidate receives a majority of the votes cast. For example, Nixon in 1968 and Clinton in 1992 both had only a 43 percent plurality of the popular votes, while winning a majority in the Electoral College (301 and 370 electoral votes, respectively). There is pressure for run-off elections when no candidate wins a majority of the votes cast; that pressure, which would greatly complicate the presidential election process, is reduced by the Electoral College, which invariably produces a clear winner.

Against these reasons to retain the Electoral College the argument that it is undemocratic falls flat. No form of representative democracy, as distinct from direct democracy, is or aspires to be perfectly democratic. Certainly not our federal government. In the entire executive and judicial branches, only two officials are elected—the president and vice president. All the rest are appointed—federal Article III judges for life.

It can be argued that the Electoral College method of selecting the president may turn off potential voters for a candidate who has no hope of carrying their state—Democrats in Texas, for example, or Republicans in California. Knowing their vote will have no effect, they have less incentive to pay attention to the campaign than they would have if the president were picked by popular vote, for then the state of a voter's residence would be irrelevant to the weight of his vote. But of course no voter's vote swings a national election, and in spite of that, about one-half the eligible American population did vote in last week's election. Voters in presidential elections are people who want to express a political preference rather than people who think that a single vote may decide an election. Even in one-sided states, there are plenty of votes in favor of the candidate who is sure not to carry the state. So I doubt that the Electoral College has much of a turn-off effect. And if it does, that is outweighed by the reasons for retaining this seemingly archaic institution.

Allen Guelzo and James Hulme

In Defense of the Electoral College

There is hardly anything in the Constitution harder to explain, or easier to misunderstand, than the Electoral College. And when a presidential election hands the palm to a candidate who comes in second in the popular vote but first in the Electoral College tally, something deep in our democratic viscera balks and asks why the Electoral College shouldn't be dumped as a useless relic of eighteenth-century white, gentry privilege.

Actually, there have been only five occasions when a closely divided popular vote and the electoral vote have failed to point in the same direction. No matter. After last week's results, we're hearing a litany of complaints: the Electoral College is undemocratic, the Electoral College is unnecessary, the Electoral College was invented to protect slavery—and the demand to push it down the memory hole.

All of which is strange because the Electoral College is at the core of our system of federalism. The Founders who sat in the 1787 Constitutional Convention lavished an extraordinary amount of argument on the Electoral College, and it was by no means one-sided. The great Pennsylvania jurist James Wilson believed that "if we are to establish a national Government," the president should be

chosen by a direct, national vote of the people. But wise old Roger Sherman of Connecticut replied that the president ought to be elected by Congress, since he feared that direct election of presidents by the people would lead to the creation of a monarchy. "An independence of the Executive [from] the supreme Legislature, was in his opinion the very essence of tyranny if there was any such thing." Sherman was not trying to undermine the popular will, but to keep it from being distorted by a president who mistook popular election as a mandate for dictatorship.

Quarrels like this flared all through the convention, until, at almost the last minute, James Madison "took out a Pen and Paper, and sketched out a mode of Electing the President" by a "college" of "Electors . . . chosen by those of the people in each State, who shall have the Qualifications requisite."

The Founders also designed the operation of the Electoral College with unusual care. The portion of Article 2, Section 1, describing the Electoral College is longer and descends to more detail than any other single issue the Constitution addresses. More than the federal judiciary—more than the war powers—more than taxation and representation. It prescribes in precise detail how "Each State shall appoint . . . a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress"; how these electors "shall vote by Ballot" for a president and vice president; how they "shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate" the results of their balloting; how a tie vote must be resolved; what schedule the balloting should follow; and on and on.

Above all, the Electoral College had nothing to do with slavery. Some historians have branded the Electoral College this way because each state's electoral votes are based on that "whole Number of Senators and Representatives" from each State, and in 1787 the number of those representatives was calculated on the basis of the infamous 3/5ths clause. But the Electoral College merely reflected the numbers, not any bias about slavery (and in any case, the 3/5ths clause was not quite as proslavery a compromise as it seems, since Southern slaveholders wanted their slaves counted as 5/5ths for determining representation in Congress, and had to settle for a whittled-down fraction). As much as the abolitionists before the Civil War liked to talk about the "proslavery Constitution," this was more of a rhetorical posture than a serious historical argument. And the simple fact remains, from the record of the Constitutional Convention's proceedings (James Madison's famous Notes), that the discussions of the Electoral Col-

lege and the method of electing a president never occur in the context of any of the convention's two climactic debates over slavery.

If anything, it was the Electoral College that made it possible to end slavery, since Abraham Lincoln earned only 39 percent of the popular vote in the election of 1860, but won a crushing victory in the Electoral College. This, in large measure, was why Southern slaveholders stampeded to secession in 1860–61. They could do the numbers as well as anyone, and realized that the Electoral College would only produce more anti-slavery Northern presidents.

Yet, even on those terms, it is hard for Americans to escape the uncomfortable sense that, by inserting an extra layer of “electors” between the people and the president, the Electoral College is something less than democratic. But even if we are a democratic nation, that is not all we are. The Constitution also makes us a federal union, and the Electoral College is preeminently both the symbol and a practical implementation of that federalism.

The states of the union existed before the Constitution, and in a practical sense, existed long before the revolution. Nothing guaranteed that, in 1776, the states would all act together, and nothing guaranteed that after the Revolution they might not go their separate and quarrelsome ways, much like the German states of the eighteenth century or the South American republics in the nineteenth century. The genius of the Constitutional Convention was its ability to entice the American states into a “more perfect union.” But it was still a union of states, and we probably wouldn't have had a constitution or a country at all unless the route we took was federalism.

The Electoral College was an integral part of that federal plan. It made a place for the states as well as the people in electing the president by giving them a say at different points in a federal process and preventing big-city populations from dominating the election of a president.

Abolishing the Electoral College now might satisfy an irritated yearning for direct democracy, but it would also mean dismantling federalism. After that, there would be no sense in having a Senate (which, after all, represents the interests of the states), and further along, no sense even in having states, except as administrative departments of the central government. Those who wish to abolish the Electoral College ought to go the distance, and do away with the entire federal system and perhaps even retire the Constitution, since the federalism it was designed to embody would have disappeared.

None of that, ironically, is liable to produce a more democratic election system. There are plenty of democracies, like Great Britain, where no one ever votes

directly for a head of the government. But more important, the Electoral College actually keeps presidential elections from going undemocratically awry because it makes unlikely the possibility that third-party candidates will garner enough votes to make it onto the electoral scoreboard.

Without the Electoral College, there would be no effective brake on the number of “viable” presidential candidates. Abolish it, and it would not be difficult to imagine a scenario where, in a field of a dozen micro-candidates, the “winner” only needs 10 percent of the vote, and represents less than 5 percent of the electorate. And presidents elected with smaller and smaller pluralities will only aggravate the sense that an elected president is governing without a real electoral mandate.

The Electoral College has been a major, even if poorly comprehended, mechanism for stability in a democracy, something which democracies are sometimes too flighty to appreciate. It may appear inefficient. But the Founders were not interested in efficiency; they were interested in securing “the blessings of liberty.” The Electoral College is, in the end, not a bad device for securing that.

DISCUSSION QUESTIONS

1. One other argument in favor of the Electoral College is that it “contains” electoral disputes: there is no reason for the losing candidate to contest the election in a state unless that state is pivotal in getting past the 270 vote threshold (as was the case in Florida in 2000). Is there merit in this argument? Would a national popular vote be more likely to produce a disputed result?
2. Defenders of the Electoral College often claim (as Posner, Guelto, and Hulme do here) that it discourages multiple candidacies and third parties. But is that an advantage or a disadvantage?
3. How would a national popular vote be tabulated? There actually is no official national vote total: the result is simply the sum of all state vote totals. Would a national popular vote require a new mechanism for computing official results? How would that affect the role of states in the election system?