

The Electoral College

EXECUTIVE SUMMARY

- In a presidential election system that is unpredictable and, in many ways, fraught with problems, there is one enduring feature that provides stability and unites the various states into a single nation: the Electoral College.
- Under the Electoral College system, an American presidential election is the aggregate of 51 democratic elections held in the 50 states and the District of Columbia.
- This system ensures that no President can be elected without *broad national appeal*, as opposed to just deep regional support.
- Unfortunately, it has become trendy to attack the Electoral College as “outdated” and to call for its replacement with one massive national election.
- So far, all attempts to amend the Constitution to provide for the direct election of the President and Vice President by nationwide popular vote have failed.
- Because amending the Constitution has proved challenging, opponents of the Electoral College seek to eliminate it by interstate compact. States that sign onto the compact agree to give all of their electoral votes to the winner of the nationwide popular vote—*even if a majority of voters in that state voted for someone else!*
- Although a nationwide popular vote has some surface appeal, it is not the best method of electing a President in a country as large and diverse as ours.
- A single, nationwide popular vote would result in political and administrative chaos, undermine national cohesion, raise questions as to the legitimacy of the winner in closely contested elections, and upset the delicate system of checks and balances that protects us from the tyranny of the majority.
- As an organization committed to our constitutional system and the rule of law, Independent Women's Forum opposes dismantling the Electoral College and all efforts to circumvent our constitutionally prescribed amendment process.

MORE INFORMATION

Background

American presidential elections are not perfect. Many Americans have legitimate concerns about the lengthy nominating process, party rules, and the undue influence of the media and special interest groups. Voting procedures sometimes allow fraud or hinder accessibility. Our campaign finance laws can be simultaneously insufficient and overbroad.

But in a presidential election process that is unpredictable and, in many ways, in need of repair, one enduring feature provides stability and makes us truly a nation of united *states*: the Electoral College.

Under the Electoral College system, voters elect the President of the United States, not in one massive nationwide election, but in 51 democratic elections in each of the 50 states and the District of Columbia. Based on the results of those individual elections, “electors” from each jurisdiction cast direct votes for President. The process by which the electors cast their ballots is known as the “Electoral College.”¹

The goal of this system, enshrined in our Constitution, is to ensure that the President is elected with *broad national appeal* (as opposed to deep regional support). In this way, the Electoral College helps binds us together as a nation.

Unfortunately, it has become popular in recent years to attack our Electoral College system as “undemocratic” and “an unnecessary vestige of the past.” While the Electoral College has, indeed, been around since the founding of our Republic, it is anything but undemocratic or unnecessary. Rather, it is an essential piece of our federalist system that provides a much needed check on the power of the majority (or even the plurality) over the rest of the nation.

A System of Checks and Balances

Americans commonly refer to our system of government as a “Democracy.” Some prefer the term “Republic.” In truth, our country is both.² We have a representative

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*Pure democracy is ‘two
wolves and a sheep voting
on what’s for lunch.’*
—Benjamin Franklin

¹ Thomas H. Neale, Cong. Research Service, RL32611, *The Electoral College: How it Works in Contemporary Presidential Elections* (2017).

² See e.g., Jay Cost, *Democracy or Republic? The U.S. is the later, and partly the former*, American Enterprise Institute, Sept. 13, 2018, www.aei.org/publication/democracy-or-republic/ (last visited May 2, 2019); Eugene Volokh, *The United States is Both A Republic and a Democracy*, Reason, January 17, 2018, www.reason.com/2018/01/17/the-united-states-is-both-a-republic-and/ (last visited May 3, 2019).

democracy, governed by a written constitution that balances the interests of the people with the interests of the states.

How did we end up with this unique form of government?

Our Founding Fathers were fearful of both unchecked government power and unchecked democracy, which they regarded as mob rule. Although they believed that “We the People” are the only legitimate source of government authority, the Founders also worried that a *pure democracy* would allow the majority of the people to trample the rights of the minority. (Benjamin Franklin famously described pure democracy as “**two wolves and a sheep voting on what’s for lunch.**”)

The Framers of our Constitution concluded that the best way to maximize the power of the people *and* protect the rights of the minority is with a system of checks and balances. They, therefore, created a government that divides power among three distinct branches of the federal government and between the federal government and the states.

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The Electoral College system ensures that no President can ignore those in the minority for too long.
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The Electoral College is a critical piece of this intricate design. And, like many other aspects of our government, it is the product of compromise.

Some of the delegates to the Constitutional Convention wanted the state legislatures to select the President. Some wanted Congress to choose the President. Others advocated a straight national popular vote. The compromise was Article II, Section 1 of the U.S. Constitution, which provides that the President of the United States is chosen by electors from each of the individual states.³

As with other aspects of our structural Constitution, our electoral system was designed to ensure that the will of the people in large population centers does not overwhelm that of the people in more rural communities.

How Does the Electoral College Work?

When voters cast ballots for the President and Vice President, they are actually voting for “electors” who have pledged to support particular candidates. Each state has a

³ MARTIN DIAMOND, THE ELECTORAL COLLEGE AND THE AMERICAN IDEA OF DEMOCRACY 4 (American Enterprise Institute, 1977).

number of “electors” equal to its number of Representatives and Senators in Congress.⁴ With the passage of the 23d Amendment in 1961, the District of Columbia was granted three electors (the number it would be entitled to if it were a state).⁵ These electors then meet in their respective states and cast direct votes for President.⁶ The results are sent to Congress where the each state’s electoral votes are counted and the winner certified.

In order to win election, candidates must win “a majority of the whole number of Electors appointed” (at least 270 out of a total of 538).⁷ If no candidate receives a majority of electoral votes, the House of Representatives chooses the President and the U.S. Senate chooses the Vice President in what is known as a “contingent election.”⁸

In the vast majority of presidential elections, the candidate who wins the most votes overall also wins the Electoral College. Every so often, however, a candidate wins more votes than any other candidate, yet fails to gain a sufficient cross-section of support to win the Electoral College. Electoral College “upsets,” such as these, are unusual. In fact, there have been only **five** U.S. Presidents who won the Electoral College without also receiving the most votes nationwide: Donald J. Trump in 2016; George W. Bush in 2000; Benjamin Harrison in 1888; Rutherford B. Hayes in 1876; and John Quincy Adams in 1824.

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A Useful Analogy

One way to understand the Electoral College is to compare it to the baseball World Series. The winner of the World Series is the team that wins four out of seven

⁴ Forty-eight states and the District of Columbia employ a “winner-take-all system,” whereby a state’s entire slate of electors goes to the winner of the popular vote in that state. Maine and Nebraska use “the district system,” which awards two electors to the winner of the statewide popular vote and one to the winner of the popular vote in each of the state’s congressional districts. See Cong. Research Serv. RL32611, *supra* note 1, at 10-12.

⁵ U.S. CONST., AMEND. XXIII.

⁶ The Constitution does not mandate that electors vote as they promised to vote. However, 26 states and the District of Columbia “bind” their electors to vote for their promised candidate. Electors who vote against the wishes of the voters are known as “faithless electors.” According to the U.S. House of Representatives, there was one faithless elector in each of the following elections: 1948, 1956, 1960, 1968, 1972, 1976, and 1988. In 2000, one elector cast a blank ballot. In 2016, there were seven faithless electors on the presidential ballot and six on the vice presidential ballot. History, Art, and Archives of the U.S. House of Representatives, *Electoral College Fast Facts*, <https://history.house.gov/Institution/Electoral-College/Electoral-College/> (last visited May 2, 2019).

⁷ U.S. CONST., AMEND. XXIII.

⁸ U.S. CONST. ART. II, SEC. 1, CL. 3; U.S. CONST., AMEND. XII. The Framers believed that most elections would be resolved in the contingent process. As it turns out, however, only two Presidents (Thomas Jefferson in 1800 and John Quincy Adams in 1824) have been elected this way. See TARA ROSS, *THE INDISPENSABLE ELECTORAL COLLEGE: HOW THE FOUNDERS’ PLAN SAVES OUR COUNTRY FROM MOB RULE* 136 (2017).

individual games. In most cases, the team that wins the best of seven also scores the most runs over the course of the Series. But not always.

The 1960 World Series between the Pittsburgh Pirates and the New York Yankees is illustrative. That year, the Pirates won four close games, with scores of 6–4, 3–2, 5–2, and 10–9. The Yankees, by contrast, won three blowout games, with scores of 16–3, 10–0, and 12–0. Overall, the Yankees scored 55 runs during seven games—more than *twice* as many as the Pirates, who scored a total of only 27 runs.⁹ But the Pirates, having won four out of seven games, were the legitimate World Series Champions of 1960.

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In the World Series, as in U.S. presidential elections, the winner is the team that demonstrates consistent, broad-based success, not the team that runs up score in a single contest.
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Recent Attacks On the Electoral College

Some critics of the Electoral College are thoughtful commentators and scholars who genuinely believe that one nationwide popular vote is preferable to the system of mini-elections bequeathed to us by our Founding Fathers. Unfortunately, however, many Electoral College opponents are simply sore losers. These partisans are, understandably, upset that Hillary Clinton received a plurality of the votes cast nationwide in 2016, yet lost in the Electoral College.¹⁰

Given the rarity of occurrences like this, a nationwide popular vote is a solution in search of a problem. It is also a *bad* solution that would weaken national cohesion, undercut the legitimacy of the presidency, and begin to unravel our unique federal system of checks and balances.

The current attack against the Electoral College is being waged on two fronts:

Constitutional Amendment—In April 2019, U.S. Senator Brian Schatz (D-HI) introduced an **amendment** that would abolish the Electoral College and provide for direct election of the President and Vice President by nationwide popular vote. The proposed amendment is one of hundreds previously introduced in Congress to eliminate or change the Electoral College system.¹¹ None of these proposals has been adopted.

⁹ See www.baseball-almanac.com/ws/yr1960ws/shtml (last visited May 16, 2019).

¹⁰ Many of the **2020 Democratic candidates for President** are now calling for the abolishment of the Electoral College system. (**Donald Trump** also once opposed the Electoral College, calling it a “**disaster**,” but now seems to **support** the current system.)

¹¹ Cong. Research Serv. RL32611, *supra* note 1, at 18.

State Legislative Action—Amending the Constitution is a lengthy and laborious process (and an infrequent occurrence).¹² Perhaps not surprisingly, then, in 2006 a group calling itself National Popular Vote (NPV) proposed an interstate compact under which participating states agree to give their electoral votes to whichever presidential candidate wins the popular vote nationwide.¹³ The National Popular Vote Interstate Compact (NPVIC) takes effect if/when states with a combined total of at least 270 electoral votes join the compact. Although the NPVIC would, technically, preserve the Electoral College system, it would render it a mere formality.

NPVIC legislation has been introduced in all 50 states and the District of Columbia. As of this printing, **15 jurisdictions** (CA, CO, CT, DC, DE, HI, IL, MA, MD, NJ, NM, RI, NY, VT, and WA), with a total of 189 electoral votes, have joined the compact.

The NPVIC Is Undemocratic and Unconstitutional

Under the NPVIC, participating states agree that, in all future presidential elections, they will give their electoral votes to the winner of the national popular vote—*even if a majority of voters in that state voted for somebody else!* This is a usurpation of the people’s right to determine, one election at a time, how their state will distribute its electoral votes.

The NPVIC is not only undemocratic, it is also unconstitutional. The U.S. Constitution establishes the method by which we elect the President. Only a constitutional amendment can alter that arrangement. The NPVIC is a backdoor effort to impose a nationwide popular vote without going through the constitutionally required amendment process.



The NPVIC is an effort to circumvent the Constitution and impose a nationwide popular vote through the backdoor.



The NPVIC also violates the Constitution’s Compact Clause, which requires Congressional approval of any agreement between the states that would harm non-compacting states or challenge the supremacy of the federal government.¹⁴ More fundamentally, it attempts to undo the constitutionally prescribed federal nature of our electoral system.¹⁵

¹² The U.S. Constitution has been amended only **27 times**. A constitutional amendment may be proposed either by Congress (with a two-thirds majority vote in both the U.S. Senate and the U.S. House of Representatives) or by constitutional convention called for by two-thirds of the state legislatures. In order for an amendment to become law, it must be ratified by three-fourths of the state legislatures (38 out of 50). **U.S. CONST. ART. V.**

¹³ See National Popular Vote, www.nationalpopularvote.com (last visited May 5, 2019).

¹⁴ U.S. CONST. ART. I, SEC. 10, CL. 3; see also William G. Ross, *Popular Vote Compact: Fraught With Constitutional Perils*, JURIST, Feb. 28, 2012, www.jurist.org/forum/2012/02/william-ross-vote-compact.php (last visited May 13, 2019) (explaining that the NPVIC violates the Compact Clause).

¹⁵ States may not distribute their electoral votes in a way that interferes with the federal nature of the electoral system. See Ross, *supra* note 12. See also Ian J. Drake, *Federal Roadblocks: The Constitution and the National Popular Vote Interstate Compact*, PUBLIUS: THE JOURNAL OF FEDERALISM, Vol. 44, Issue 4, Pp. 681–701 (Fall 2014) (arguing that states cannot effectively alter the structural Constitution by compact).

Although it is understandable why Electoral College opponents want to avoid the lengthy and difficult constitutional amendment process, they cannot simply undo the Constitution by non-constitutional means.

A Nationwide Popular Vote Is a Bad Fit for a Country as Large and Diverse as Ours

There are at least **six** reasons why instituting a nationwide popular vote would be problematic in the United States.

(1) Adopting a nationwide popular vote would exaggerate the influence of coastal elites at the expense of voters in “fly-over” country. With a nationwide popular vote, the person who received a simple majority (or even a mere plurality) of votes cast would be the winner of the election. It would not matter where those votes came from. Only the total number of votes would matter. In a nationwide popular vote, therefore, candidates would focus all their attention on dense media markets. Time spent courting votes in, say, Colorado or Iowa, would be time wasted. The result would be presidential campaigns that run up the vote count in large population centers like New York and California, rather than trying to appeal to voters in different parts of the country.

This would have negative policy consequences for voters in less populous places, as Presidents would, inevitably, prioritize the needs of metropolitan areas over those of the rest of the nation. By contrast, the Electoral College system ensures that Presidents remain responsive to a range of voters from different parts of the country.

(2) A nationwide popular vote would undermine our federalist system. Our federalist system is based on the premise that states matter. By balancing the rights of the people with the rights of the states, our Constitution knits together diverse communities into a single tapestry. Scrapping the Electoral College in favor of a nationwide popular vote would start to unravel this tapestry¹⁶ and undermine the very notion of a nation of “united” states.



Although it is understandable why Electoral College opponents want to avoid the lengthy and difficult constitutional amendment process, they cannot simply undo the Constitution by non-constitutional means.



¹⁶ See Diamond, *supra* note 3, at 7 (“When federalism has already been weakened, perhaps inevitably in modern circumstances, why further weaken the federal elements in our political system by destroying the informal federal element [of presidential elections]?”).

Consider this example proposed by attorney and writer Dan McLaughlin: Candidate A is wildly popular in California but not in the rest of the country. Candidate A spends an inordinate amount of resources driving up the vote totals in San Francisco and Los Angeles and wins in California by a margin large enough to tip the entire election. Under this scenario, Candidate A would become the President of the entire country, *even if 48 of the 50 states decisively reject that person in favor of Candidate B.*¹⁷

(3) A nationwide popular vote would reward demagoguery and (further) radicalize U.S. politics. To win a nationwide popular vote, a candidate need only generate high turnout from his or her base. This, of course, favors flash-in-the-pan candidates with large social media followings who appeal to the passions of the moment. Today, this might mean hip-young social justice progressives. Tomorrow it might mean populist, right-wing candidates, such as we see sometimes in Europe. Many Americans are already frustrated by the polarization in politics today. Moving to a nationwide popular vote would only institutionalize and deepen this trend. The Electoral College, by contrast, encourages coalition building and, thus, moderation.¹⁸

(4) A nationwide popular vote could decrease voter turnout. Electoral College opponents rightly note that the current system depresses turnout in states that are solidly Red or Blue. In these states, where the outcome is all but certain, voters may feel little incentive to show up on election day and vote. But a nationwide popular vote would only exacerbate this problem. Currently, voters (at least in competitive states) feel that their votes might make a difference. Were we to move to a nationwide popular vote, each vote would be arguably inconsequential among the approximately **200 million** potential votes nationwide. The feeling that one vote out of 200 million is unlikely to make a difference could create a nationwide incentive to stay home.

(5) A nationwide popular vote could undermine the institutional legitimacy of the President. While it is unusual for a candidate to win the Electoral College but not the popular vote, it is fairly common for a candidate to win the presidency with a razor thin popular vote margin or with a mere plurality of votes nationwide. There have been thirteen elections (including the elections of Abraham Lincoln, Harry S. Truman, Richard Nixon, and John F. Kennedy) where the winner received only a plurality of votes, yet won a clear victory in the Electoral College. In 1992, for example, Bill

¹⁷ According to McLaughlin, 13 percent of Hillary Clinton's 2016 votes came from California, and her 4.2-million-vote margin in that state "more than accounted for her 2.9-million-vote plurality nationally." Dan McLaughlin, *What the Electoral College Saves Us From*, National Review, April 5, 2019, www.nationalreview.com/2019/04/what-the-electoral-college-saves-us-from/ (last visited May 6, 2019)

¹⁸ Some critics argue that President Donald Trump is a populist demagogue. Whether you agree or disagree, the fact remains that, absent an Electoral College, populist demagogues (from the left and the right) are more likely—*not less likely*—to be elected. President Trump himself seems to acknowledge this, claiming that it would be even **easier** for him to win a nationwide popular vote than it was for him to win the Electoral College.

Clinton received only 43 percent of the votes cast nationwide. (President George H.W. Bush received 37.4 percent and independent candidate H. Ross Perot received almost 19 percent of votes cast.) Even though 56 percent of voters chose someone other than Bill Clinton, Clinton won an Electoral College landslide with 370 electoral votes to Bush’s 168. As a result, the legitimacy of the Clinton presidency was never in question.¹⁹ A decisive Electoral College win provides important institutional legitimacy to those Presidents who squeak out narrow popular victories.²⁰

(6) A nationwide popular vote would increase chaos and discourage finality. The Electoral College prevents close elections from being determined by nationwide recount. Under the current system, a narrow nationwide margin of victory is irrelevant so long as the Electoral College outcome is clear.²¹ Without the Electoral College, however, close outcomes²² will, inevitably, become

contested outcomes. That is because with only *one* national election (as opposed to 51 smaller elections), recounts in any jurisdiction, anywhere in the country would have the potential to change the outcome. A nationwide popular vote would discourage finality by creating incentives to litigate the outcome of the election across multiple jurisdictions. Recounts are difficult enough to process on a small scale—**remember Palm Beach, Florida?** Now try to imagine that chaos occurring all across the country. Clear Electoral College outcomes make this nightmarish possibility unnecessary.

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Myths About the Electoral College

MYTH #1: If not for the Electoral College, Hillary Clinton would be President. Hillary Clinton received a plurality, although not a majority, of votes cast nationwide in 2016.²³ This does *not* mean, however, that she would have won the election had we scrapped

¹⁹ Peter J. Wallison, *Why We Need The Electoral College*, American Enterprise Institute, Dec. 6, 2016, www.aei.org/publication/why-we-need-the-electoral-college/ (last visited May 4, 2019).

²⁰ With a nationwide popular vote, plurality winners would become even more common. This is because a nationwide popular vote encourages fringe candidates with appeal in large population centers. A nationwide popular vote would make U.S. presidential contests more like European-style elections with numerous candidates from across the political spectrum. This increase in the sheer number of candidates makes it more likely that no individual will win a majority of votes.

²¹ Under the current system, a close margin of victory is only relevant where the outcome of that state could change the outcome of the Electoral College. In such cases, a recount in specific jurisdictions might be necessary. But this circumstance is unusual.

²² As noted above, there have been thirteen presidential elections in which the winner received only a plurality of the votes cast nationwide. In addition, Jimmy Carter (1976), George Bush (2004), and Barack Obama (2012) each won a majority of the popular vote with margins of victory less than 4%.

²³ Hillary Clinton received 48.25% and Donald J. Trump received 46.15% of all votes cast in 2016. Trump, however, won the Electoral College decisively—304 to 227 (five Democratic and two Republican “faithless electors” voted for people other than Clinton or Trump). Drew DeSilver, *Trump’s victory another example of how Electoral College wins are bigger than popular vote ones*, PEW Research Center, Dec. 20, 2016, www.pewresearch.org/fact-tank/2016/12/20/why-electoral-college-landslides-are-easier-to-win-than-popular-vote-ones/

the Electoral College prior to 2016. Both Donald Trump and Hillary Clinton understood the rules of the electoral game, and both candidates played by them. Had the rules been different, the candidates would have adopted different campaign strategies. It is, therefore, simply not possible to know how a different set of rules would have changed the way the candidates played the game or whether it would have altered the outcome.

MYTH #2: The Electoral College favors

Republicans. The Electoral College does not favor one party or another. The Framers adopted the Electoral College before political parties existed and, therefore, without regard to partisan advantage. Moreover, human mobility among states, demographic changes within states, and economic and cultural shifts over time mean that any advantage for one party or another is short-lived. Thus, while the voters in “fly-over country” might currently lean Republican, that may not always be the case. Once solidly “Red” California is

now predictably “Blue.” Formerly “Blue” Texas became solidly “Red” and is now slowly turning “purple.” And states once considered “safe” (Pennsylvania for Democrats; Virginia for Republicans) are now considered competitive. The Electoral College is, therefore, neither pro-Democrat or pro-Republican.²⁴ Parties that worry the current electoral map is stacked against them would be better off learning to win according to the rules of the game, rather than trying to change them.

MYTH # 3: Electing the President by nationwide popular vote would make our presidential elections more “democratic.” A nationwide popular vote would not make our presidential elections more democratic. Our current system is the aggregate of 51 separate democratic elections. The Electoral College is a democratic method of securing buy-in from a *range* of voters and from a *range* of states. Eliminating the Electoral College would not make our presidential elections *more* democratic, it would only make them national and, thereby, undermine the federal system deliberately established by the Framers.²⁵



The Electoral College does not favor one party or another. The Framers adopted the Electoral College before political parties existed and, therefore, without regard to partisan advantage.



²⁴ As attorney and Electoral College expert Tara Ross explains, commentators and political scientists in the post-Reagan era were certain that Republicans had a “lock” on the Electoral College for years to come. Then Bill Clinton came along and turned nine states Blue for the first time since 1964. Prior to 2016, conventional wisdom had it that the electoral map vastly favored the Democrats. Then Donald J. Trump came along and carried the Rust Belt. ROSS, *THE INDISPENSABLE ELECTORAL COLLEGE*, *supra* note 8 at xviii - xix.

²⁵ Diamond, *supra* note 3, at 7.

MYTH #4: Eliminating the Electoral

College will improve policy-making. Some argue that a nationwide popular vote would remove the incentive for candidates to promote policies favored by voters in swing states (such as retirees in Florida). It is true that moving to a nationwide popular vote would change political incentives, but it would not eliminate the pressure to cater to certain constituencies. Politics will always influence policy, no matter how elections are structured. For example, a nationwide popular vote would create an incentive for Presidents to pander to voters in Los Angeles, New York, Chicago, and other major metropolitan areas. While each system creates different political incentives, only the Electoral College ensures that the President take into account various regional interests.

Conclusion

The Electoral College is an ingenious system that aggregates the result of 51 separate democratic elections. By creating an incentive for candidates to appeal beyond the base, the Electoral College creates national cohesion, which is critically important in a nation as large and diverse as ours. Moreover, the Electoral College prevents the majority from running roughshod over the minority, lends legitimacy to the institution of the presidency, and encourages finality and national stability. These advantages should appeal to all Americans—regardless of party affiliation.



While each system creates different political incentives, only the Electoral College ensures that the President take into account various regional interests.

