

# The Electoral College: Is it Time to Replace it?

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The Network for Responsible Public Policy and The Academy of Political Science would like to thank Kyle T. Kattelman and Alexander Keyssar for their participation, and Margaret LaScala for managing the Q&A. Marianna Palumbo, Loren Morales Kando, and Joseph Kratz contributed to producing and editing this summary report. The views expressed do not reflect those of the institutions with which participants are affiliated or of any other organization.

# Overview of the Electoral College

KYLE T. KATTELMAN

## WHAT IS THE ELECTORAL COLLEGE?

- When voting for the president and vice president of the United States, we are voting for a slate of electors. The Constitution assigns each state a number of electors “equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.” A state’s number of votes in the Electoral College is determined following each decennial census. There are 538 total presidential electors, including the 3 electors allocated to Washington, DC under the Twenty-Third Amendment of the Constitution. To win the presidency, a candidate must receive 270 electoral votes.
- Most states use the winner-take-all system whereby the candidate that wins the majority of the popular vote on Election Day determines which slate of electors chooses the president.
- Electors assemble in their respective states on the first Monday after the second Wednesday in December. They are expected, though not technically required, to vote for the candidate they represent.
- Electoral votes are counted and certified by a joint session of Congress on 6 January. If no candidate receives a majority, the president and vice president are elected by the House and Senate, respectively.

## ORIGINS OF THE ELECTORAL COLLEGE

- A popular vote was proposed, but the Framers were worried about how they would manage that across large swaths of territory. Also, under the three-fifths compromise, slavery artificially inflated the population of white, property-owning males in the South. A national popular vote would not benefit the South, and would likely result in the North choosing the president. The electoral system was a reflection of compromises between the big states and the small states, as well as compromises between the Northern states and the Southern states.

- Although the public chose the electors, the state legislatures determined how the electors were chosen and retained the right to choose the presidency.
- The Framers did not foresee the future of the national party system, and its complete domination over American politics and the electoral system.

## THE ELECTORAL COLLEGE TODAY

- After the 2016 election, when Donald Trump won the election despite Hillary Clinton winning the popular vote, people questioned what can be done with the Electoral College.
- The status quo is very difficult to change. Theoretically, states can control this process and unilaterally get rid of the Electoral College. States may not like the system, but they are afraid to take the steps to overturn it.
- Partisanship is a hurdle to overcome. When the parties are not diametrically opposed, change can happen. That is not the case at this time.
- For the Electoral College to change in our democratic system, we must assume there is a true collective need for reform.
- Kenneth Arrow’s Impossibility Theorem shows that it is difficult to interpret the outcome of any group decision-making process as actually being reflective of the public will. However, it is abundantly clear when it goes wrong—as in five close elections when presidential candidates won the popular vote but lost the Electoral College vote.
- Any system is going to have flaws. There has not been a way to design a process that produces rational outcomes while being truly fair. Each solution takes something away from one group and gives it to another.

# Reforming the Electoral College

ALEXANDER KEYSAR

## FLAWS WITH WINNER-TAKE-ALL

- The winner-take-all system—which became dominant by the late 1830s, but was not what many of the Framers had in mind—emerged as a result of partisan conflict.
- With winner-take-all, the winner of the popular vote gets all of the state’s electoral votes. This is not in the Constitution. The wording of the Constitution leaves it up to the state legislatures to decide if they will conduct a popular election.
- Before the election of 1800, the Virginia legislature passed a law that the state would cast its electoral votes via winner-take-all. This would guarantee that Thomas Jefferson received all of the state’s electoral votes. Massachusetts retaliated and used the same system to favor John Adams.
- Between 1815 and 1825 the Senate passed four constitutional amendments that would have done away with the winner-take-all system, but none made it out of the House.

## CRITICISMS OF THE ELECTORAL COLLEGE

- As early as the 1790s, people began to dislike having human electors. They were simply messengers—not local, politically-experienced notables as intended.
- Today, the Electoral College and winner-take-all systems essentially ensure that eight to 10 states decide presidential elections.
- The contingent election process, whereby the election is determined by the House, has been seen as an abomination since the early 1820s.
- The Electoral College can produce the “wrong winner”—a candidate that wins the electoral vote without winning the popular vote. The electoral college has been called undemocratic as it does not conform to the fundamental principle of one person, one vote.

- The 2020 presidential election highlighted flaws in the process:
  - The state legislatures have the constitutional right after an election to put aside the apparent results and choose their electors.
  - Are lawmakers from the House and Senate assembling simply to count the electoral votes, or to use their own judgement about the merits of each states’ electoral votes?

## EFFORTS TO REFORM THE ELECTORAL COLLEGE

- Why has the Electoral College been so hard to change?
  - It is hard to amend the Constitution.
  - The Electoral College has been preserved by the desire to maintain white supremacy in the South.
  - Since the 1980s, the Electoral College has become a partisan issue. Republicans believe they will do better with the Electoral College than with a national popular vote.
- The most prominent method of altering the electoral system without amending the Constitution has been the National Popular Vote Interstate Compact.
  - The compact provides that a state will give its electoral votes to the candidate that wins the *national* popular vote, not the state vote. The compact will take effect when enough states totaling 270 electoral votes have signed on.
  - This system is problematic. It is inherently unstable because it does not abolish the Electoral College.
  - Problems will arise when a state finds itself voting for the candidate that did not win its popular vote. Immense pressure will be on state legislatures to get out of the compact before the next election.

- The Electoral Count Act (1887) can be changed by legislation. There will be an effort in Congress to do that, to avoid some of the problems that arose since November.
- Another idea put forward proposes to award electors by congressional districts. This is a good idea in theory, except for problems with gerrymandering—which is bad enough without importing it into presidential elections.
- In a proportional system, a state divides electoral votes in proportion to each candidate’s share of the popular vote in the state. This would meet some of the objections of people concerned about centralization, and let states remain in control of elections. It would take a constitutional amendment to create a mandatory proportional system.
- A final option is to have a national popular vote. This process is supported and opposed by many. The feasibility of adopting a national popular vote is unclear.
- The best chance for significant Electoral College reform is when the party system is a bit unstable. We may be heading into such a period.

## Question and Answer Takeaways

### What are the pros and cons of a proportionally-based voting system?

- Keyssar: The pros would be that it would bring the electoral vote and the popular vote into much closer congruence. It would also reduce the likelihood of a “wrong winner.”
- Kattelman: The cons would be the issues with gerrymandering, and that there would still be some version of the Electoral College. Also, how would you coordinate something like this across the states?

### Does the Constitution require the consent of Congress for any compact amongst the states to be legitimized?

- Keyssar: There are some compacts that do not require congressional approval. Some constitutional lawyers argue that anything that impacts the relative powers of the states does require congressional consent. However, constitutional lawyers are divided on that subject.

### Would rank choice voting bring some fairness to this system? Would it increase the chance of electing moderate candidates that a larger proportion of the population would find acceptable?

- Kattelman: There is the view that rank choice voting for legislators and in primaries does tend to lead to the selection of less extreme candidates. In terms of a national election, extreme candidates are fairly unusual to begin with.