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Kaitlyn Marlowe
kmarlow3@vols.utk.edu

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The Electoral College is Bad for Democracy

Kaitlyn Marlowe

Advisor: Dr. Anthony Nownes

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Abstract

The Founding Fathers created a presidential election system they believed could serve the United States and allow for a democracy while still providing a barrier between direct elections and Congressional elections. The Electoral College is bad for democracy because it removes the ability of U.S. citizens to directly elect their President. In this paper, I will explain the founding of the institution, analyze the flaws with the system, and offer alternatives that provide a more democratic than the current Electoral College. By analyzing various potentials for electors to act on their own accord and discussing the four elections where the Electoral College winner varied from the popular vote winner, I will explain why the Electoral College is unfit for democracy in the United States.

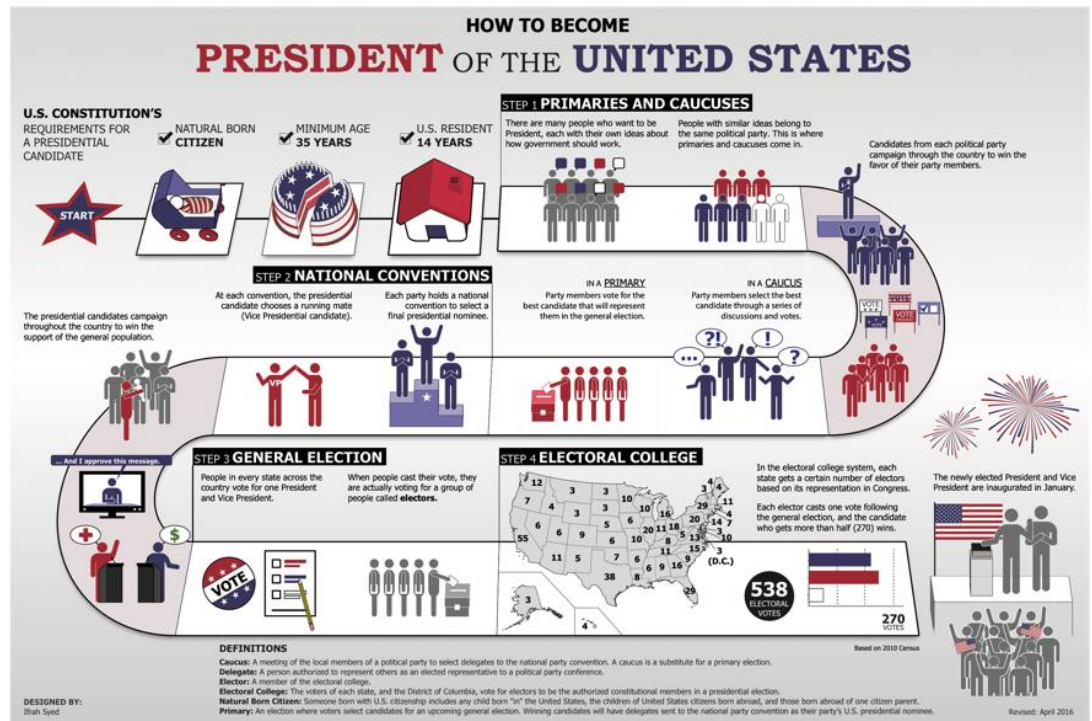
The United States' Founding Fathers created the Electoral College to control the presidential election process. The United States, as a democracy, should have elections in which the people elect the President freely without having a buffer between their vote and the winner of the election. Robert Dahl explains democracy as "every member must have equal and effective opportunity to vote, and all votes must be counted as equal" (Edwards, 38). By this definition, it is clear that having electors vote on behalf of the people is not democratic enough for a country that claims to be the greatest democracy in the world. The Electoral College is bad for democracy because it does not allow citizens to elect their President.

What is the Electoral College?

The Presidential Election Process

The presidential election process should be as simple as eligible citizens voting for a presidential ticket, the ballots being counted, and a clear winner being certified. However, the process is much longer and more intricate because of the Electoral College. The presidential election process starts in February on the election year with state primaries and caucuses that produce a candidate from each political party for the general election. Following the completion of primaries and caucuses, each major political party holds a national convention to formally announce their Presidential and Vice Presidential nominees. These conventions are also held to develop a campaign platform ("Presidential..."). The general election then takes place the first Tuesday following the first Monday in November every four years. Citizens can vote early, absentee, or on Election Day. These ballots cast do not directly elect a presidential candidate. Instead, the ballot is indicating which candidate the state's electors should vote for. Ballots will read "Electors for *Presidential candidate name* and *Vice Presidential candidate name*." There is

also the potential for voters to write in a candidate if they are not on the ballot. The difference in voting for electors compared to directly voting for the candidates explains why there can be a disparity between the popular vote and



the popular vote and electoral vote. The popular vote is determined from citizens marking the box next to the candidate's name. However, that number simply contributes to deciding the electors' votes in December. The popular vote result is, mostly, determined following Election Day even if not all absentee ballots have been counted. However, the popular vote does not impact certifying who the President is and step four of the presidential election process begins once all votes are counted. The fourth step of the presidential election process is the Electoral College casting their votes for the presidential ticket.

The presidential election process does not mimic the state election process for other officials, like Governor, state or federal representatives, and county officials. All other elected offices are selected through direct election. This was the case before the Constitutional Convention of 1787 and will likely remain the process of electing officials because it is democratic. In state elections, each citizen who votes in a state or local election has potential to change the election outcome

because it is a direct election. Their vote matters just as much as the person voting next to them, which is the foundation of a democratic nation. While a direct election of the President is not the current system, the argument can be made that if directly electing the state executives is the democratic way to elect that position, then it would also be more democratic to elect the federal executive in the same manner. This debate has been ongoing since the Constitutional Convention and will likely continue until the Electoral College is changed.

The Electoral College

The Electoral College, in general, is “a group of people appointed by each state who formally elect the President and Vice President of the United States” (Greer). The Electoral College is a process, not a place, and is used to finalize the presidential election results after the popular vote results are determined. This is a Constitutional process established by Article II, Section I, Clauses II and III of the U.S. Constitution (Williams). The Electoral College is comprised of electors that will formally cast a ballot to vote for the presidential ticket. However, the selection process is not Constitutionally mandated; therefore, each state can choose how it selects their electors. Most states allow each major party to select their own electors. Each major party, Democrats and Republicans, is able to choose their electors. This process often involves selecting party loyalists and could include activists, local elected officials, or other party leaders who are not active members of the state or federal legislature. The electors are not well-known by the population at large making it possible for citizens to vote without knowing who the electors are (Williams). Whichever candidate wins the popular vote within the state will have their electors certify votes in the Electoral College. This means a voter casts a vote for the electors of a presidential ticket and then the electors cast an official vote. Third parties can

produce a candidate and are becoming increasingly more publicized, but historically they are not able to generate enough popular votes to carry electoral representation (“Role..”).

Currently there are 538 electors that form the Electoral College. During the Electoral College debates, the Founding Fathers decided that each state would receive the same number of electors as members of Congress. Later, three extra electors were added to represent the people of the District of Columbia (“What...”). This allows states with larger populations, like California and Texas, to have a larger number of electors than states with smaller populations, like Rhode Island and Vermont. The number of electors could change every ten years following the census. Since the number of representatives in the House of Representatives is proportional to state population size recorded by the U.S. Census, the number of electors could increase or decrease depending on the number of representatives increasing or decreasing per state. It is unlikely that this will change drastically every ten years, but in swing states like Ohio and Florida, having more electors could change the results of an election.

Safe states can also come into play with determining elections if they were to flip to another party. Safe states consistently voted for the same party for the previous five elections. For example, states like Tennessee will likely remain a Republican voting state for the near present and have voted Republican in the majority of presidential elections. If Tennessee and other safe states were to flip and become a battleground state or safe state for the opposing party, they could impact the election and change campaign strategies. The possibility of a state with a large number of electoral votes potentially swinging a presidential election represents the undemocratic nature of the Electoral College. A presidential election should not be determined by one or two states, but instead by the vote of each citizen.

How Votes Are Determined

Despite the Electoral College is Constitutionally mandated and used in all 50 states and

Washington D.C. The

manner in which the

electors decide votes is

dependent on the state.

Historically, states either

use the winner-takes-all

system or the district

system. The winner-

takes-all system is used

in 48 states and guarantees that

whichever candidate wins the popular vote in that state, even if that win is 50.1% to 49.9%, all

electoral votes for that state will be cast for the candidate that wins the popular vote. However,

the vote does not have to be a true majority to win a state's popular vote. As long as a candidate

wins a plurality of votes, meaning the largest percentage of the vote over other candidates, even

if that percentage is under 50 percent, will win the electoral votes in that state (Harper). This

concept is important in larger states like California (55 votes), Texas (38 votes), and Florida (29

votes). Since a candidate only needs 270 of the 538 electoral votes to win an election, if they

were to win in all states with 14 or more electoral votes, they would win the election without

needing any support from smaller states (Williams). This impedes on democracy because it

allows largely populated states to represent the country as a whole. Maine (4 votes) and

Nebraska (5 votes) are currently the only two states that use a district system for their electors.



Figure 1: <https://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx>

The district system allocates one electoral vote per Congressional district and then two electoral votes are given to whichever candidate wins state-wide. Since the state populations are so small, they have fewer representatives, and therefore less Congressional districts making the district system more manageable than in places with a large number of districts like Florida (FairVote). It should be noted that in almost every election, besides 2008 and 2016, both states have ended up with a single candidate winning every district. However, in 2008, former President Barack Obama won a singular electoral vote from Nebraska while former Senator John McCain received the other four votes. In 2016, President Donald Trump was given one electoral vote from Maine while the other three went to former Secretary of State Hillary Clinton (FairVote).

How Electors Vote

Electors do not meet to cast their votes on Election Day in November to allow time for states to certify which candidate won the state or districts. Following the presidential election, each state's Governor sends the National Archive a list of certified electors. Only those electors are able to cast ballots for the presidential election unless a replacement is named at least six days before the ballots are cast (Edwards, 22). Each presidential election cycle, a day in December is chosen for electors to cast their votes which gives the states enough time to work on any issues with the ballots and certify their electors. Most states' electors convene at noon at their state capitol building (Edwards, 22). The act of voting differs by state, but the options are either casting a paper ballot, an oral vote, or a secret ballot with the expectation to publicly announce who the elector voted for after casting the ballot. In an attempt to keep the process democratic, there cannot be truly secret ballots or the citizens of the state would not know if they could trust their electors to vote in the citizens' interest (Edwards, 24). Each elector casts a

separate vote for the President and Vice President, as directed by the Twelfth Amendment, and at least one candidate must be from a different state than the elector voting. This requirement ensures there will likely never be a President and Vice President from the same state which supports democracy because it does not allow the Executive Branch to favor any one of the fifty states over another. The final step for the Presidential electors is sending certifications of their votes to the U.S. Senate. State Governors or Secretaries of State often collect these certifications before mailing them to the Senate instead of the electors directly mailing their certifications (Edwards, 24). On January 6 at 1:00 pm the sitting Vice President, as head of the Senate, reads the presidential electors' votes in front of Congress to certify who the new President of the United States will be. It is possible for members of Congress to dispute votes, often votes from their state, and those are submitted in writing and discussed by Congress (Edwards, 26). Any disputes must be resolved before Inauguration Day on January 20th.

Election Contingencies

Presidential elections are important to a democracy because they give citizens' the ability to elect the official that runs the government. Due to this fact, there are contingency plans set in place within the Constitution for a nominee's death, but there are not 'rules' for a candidate dying before inauguration. If a candidate dies between being nominated by their party and election day there is no Constitutional guideline on how a new candidate is selected. Instead of holding another primary or caucus, the party will likely appoint a new candidate or have the nominated Vice President fill the role of Presidency (Edwards, 32). If a candidate dies between election day and electors voting, the electors could pledge their vote to anyone, but often will allow the conventions to produce a new nominee and vote for that candidate. Again, it is likely

the Vice Presidential candidate would be promoted and would then choose a new Vice President (Edwards, 33). This contingency plan has only been used once when Horace Greeley died in 1872. In this election, the Democratic electors voted for various members of the party, including the deceased Greeley, which caused the Democratic votes to be split enough for the Republican party to win the Presidency (Edwards, 33).

Once the Electoral College casts their ballots, the Twentieth Amendment's succession plan is enacted. If a President-elect or Vice President-elect dies before Congress counts the votes, the order of succession will take place. The Vice President would become President and then nominate a new Vice President for Congress to confirm (Edwards, 34). The same process would take place if a candidate died after Congress counted votes, but before the candidate took office; this contingency has never taken place. The final contingency plan is for a candidate not qualifying before Inauguration Day. For a candidate to qualify, they would need 270 electoral votes after the electors cast their ballots. However, this could potentially not happen if states are still recounting ballots or there are disputes from Congress about the electors' votes. If this is the case, the Twentieth Amendment's succession plan as well as the Presidential Succession Act of 1947 would be enacted. This means either the Speaker of the House or President Pro Tempore of the Senate would resign from their position to fill the Presidency, or whoever is next in line from the current administration would fill the vacancy (Edwards, 34). It is likely a member of the current administration would fill the vacancy because the Speaker or President Pro Tempore would have to resign their positions to fill the role temporarily which is an unlikely occurrence. These contingency plans are all necessary to guarantee a democratic and smooth transition of power between elections while still accepting the reality that politicians are people who can die and elections can potentially be contested.

If there is a contingent election, an election where neither candidate wins the electoral vote in any capacity, the election goes to Congress to be determined. If this happens, the House will elect the President and the Senate will elect the Vice President, which could result in the unlikely event that nominees from separate tickets are elected together (Edwards, 74). The Constitution does not lay out strict guidelines for the presidential election timeline if this were to take place. It also does not explain how many votes a candidate needs to be declared the winner. Congress has full power over the decision. Contingent elections, while possible, undermine democracy as a whole because the vote of citizens is completely disregarded and Congress is not required to have an open door proceeding for the election (Edwards, 75). Congress is also not required to vote based on the popular vote, which further impedes democracy. The same guidelines stand for election of the Vice President's in the Senate. The first contingent election was in 1800 between Thomas Jefferson and Aaron Burr, which resulted in the Twentieth Amendment's creation in 1804. This election went to Jefferson after months of ties in the House (Edwards, 78). In 1824, the second contingent election occurred between John Quincy Adams and Andrew Jackson. In the end, the House elected Adams, but he would not be reelected in 1828 due to controversy during his first term (Edwards, 80). There have only been two contingent elections in history, but the opportunity for a President to be elected completely independent of the will of the people shows the undemocratic nature of the current election process.

Electors are not federally bound to follow the state's popular vote and only 29 states have laws about "faithless electors." A faithless elector is one that does not vote who they pledged they would. This means in a winner-takes-all state like Arizona that does not have a law controlling faithless electors, an elector could decide to vote for the Republican candidate even if

the state's popular vote was for the Democratic candidate ("States.."). Even in states with faithless elector laws, violating the law does not come with hefty consequences. In fact, most states only have a \$1,000 fine ("States..").

Summary

For a presidential ticket to officially win an election, it needs 270 electoral votes. 270 votes is exactly half of the electoral votes plus one, giving that candidate the majority. This means an election could result in one candidate winning by receiving 270 votes while the other loses with 268 votes. It is important to reiterate that when people are voting, they are voting for electors to choose who they are casting their vote for, not the specific candidate. This is why the results come Election Day will not be the official results of the election. Until the electors certify their votes, there is not an official winner of the presidential election (DeSilver). December 14th is the official day electors meet to cast their votes. Until December 8th, states are able to continue to change their "vote" based on late ballots, any potential controversy, lawsuits, or contests. Up until the 8th states do not have to officially certify the candidate who won the state and then electoral voting will take place on December 14th (DeSilver). This result will officially determine the next President; however, the official inauguration does not take place until January so there is a possibility of conflict and contested votes changing the results after electors vote.

Once the new or incumbent presidential ticket is officially declared the winner of the election, the next four years take place, and the U.S. repeats the process. An individual is only eligible for two four-year terms at a total of eight years as President, even if the terms are not consecutive. In summary, the presidential election process takes about eleven months total, consists of citizens casting their votes to declare electors for a presidential ticket, those electors

then casting their votes either for the ticket their state elected, or being a faithless elector and voting otherwise. The process then ends in January with a new four-year term for the winning administration.

History of the Electoral College

Founding the Electoral College

The Electoral College was established in Article II, Section I of the U.S. Constitution. There are few qualifications to be chosen for the Electoral College, however, no one holding a position of trust or profit, or a current member of Congress qualifies to be an elector (“Congressional...”). This was likely a way for the Founding Fathers to limit congressional bias during an election. If Congressmen were electors, they could potentially vote for their party rather than honoring the popular vote. Once the decision for the presidential election process was made, the Founding Fathers further declared that electors would cast two votes for President with the contingency that one vote had to be for a candidate that did not reside within the elector’s state (Belenky). In 1787, the idea of patriotism was less towards America as a country and more towards state pride. This division meant electors would likely cast votes only for candidates within their states, therefore it can be inferred that the Founding Fathers wanted to safeguard against this potential bias.

The Electoral College has been a key topic in politics since the Articles of Confederation failed. The debate around electing the President began in early 1787 with the Virginia Plan, which was an alternate proposal to what is now the U.S. Constitution. On June 13th there was a proposition to have the President elected for one, seven-year term, without a Vice President, with Congress acting as electors (Feerick). This proposal was voted down and the next day the New

Jersey Plan was presented. In this plan, the President would be elected through one vote per state and only have one term. Alexander Hamilton also produced a plan for the presidential election which would allow the president to be elected for a life term, similar to Supreme Court Justices, and would be voted on by electors chosen in a similar manner to the present (Feerick). July 17, 1787 the Constitutional Convention settled on Congress electing the President and would allow the President to run for reelection. However, that was quickly diminished because some convention members, including James Madison, believed the people should be voting for the person charged with governing them (Feerick).

It was not until September 4th, 1787 that the Convention officially landed on the electoral process that is used today. The Electoral College was able to address all concerns brought up during the Convention of term limits, giving the states too much power, giving Congress too much power, and still allowing citizens to have some form of a vote to maintain a democracy (Feerick). By allowing states to appoint their electors how they see fit and having citizens vote on the electors for the Presidential ticket, the Founding Fathers were able to create a process that was a compromise but could function. However, to keep Congress in favor of the process, they would be the ultimate decision makers. If there were a tie or no candidate received a plurality of votes, it would be up to Congress to elect the next President, with or without consideration of the electoral or popular vote. This key factor in the presidential election process shows that the Founding Fathers' looked at the Electoral College as a step in the process while Congress would be the deciding factor (Belenky). The Constitution was sent to state conventions on September 17, 1787 to be ratified along with the presidential election process and the Electoral College.

John Feerick of Fordham University infers that the main reason the Electoral College was chosen was to limit the power of the legislative branch in electing the executive branch (Feerick).

It is suggested that the Founding Fathers believed this form of election as an easily corruptible one due to the nature of checks and balances. If the President were to run for reelection, the attention would likely be on winning over members of Congress instead of running the country well enough to earn the trust of the people. The chosen upon manner of election also gave the people just enough of a voice without having complete control of the election. In short, the Founders wanted only the highly educated, upper class to be electing the President, but also wanted the less educated to feel as though they had a say in the election (Feerick). While no one saw the system as perfect, it is system that has stood the test of time and will likely continue to endure.

Why the Electoral College?

The United States was a safe haven from the British monarchy so while drafting the Constitution after the Articles of Confederation failed, the members of the Convention spent time guaranteeing the executive could not become a King. The pure fear of a powerful monarch is the original reason for the Electoral College's creation (Kurdova, 8). There was a need for separation of powers, protection from an individualistic leader, and the unrealistic desire for a direct democracy. Just like the rest of the Constitution, the Electoral College was decided on as an agreement, a compromise. It was not chosen because it could stand the test of time or be the democratic institution the Founders were trying to create (Kurdova, 8). However, it has fared well since 1787.

The Founding Fathers did not want a direct election, even though they believed in a democracy. There were some ideological reasons for this, but there was also the issue with physical barriers. The main concern with a direct election in a country as widespread as the new

country was that it would be nearly impossible to have an accurate census of every eligible voter, there would be no federal voting laws because there was no official federal government yet, there was not enough money or physical capability to complete a direct election in a timely manner, there was the potential for citizens loyal to their state governors to cause civil unrest, and there was the political issue that common citizens would not know enough about a candidate to be able to vote for the President (Kurdova, 9). These reasonings are why very few states used direct elections for their state governments and were all practical reasons not to use a direct election for the federal government. In the end, at the Constitutional Convention only two of the eleven states present voted to have a direct election even if this was the most democratic option (Spivak).

From the beginning, the Electoral College has been bad for democracy because the Founding Fathers did not want to give the people power to elect the President. Disregarding the physical impossibility of a direct election, these Founders were extremely educated and did not trust less educated citizens with a vote for the most powerful position in the country. As previously mentioned, the original decision was to have Congress elect the President without any popular vote influence. It is difficult to understand why the Founding Fathers wanted this format of election, but one reason could be because it mimicked how some state governors were elected during the time. In eight of the thirteen states, the state legislature elected their governor while in only two, likely the same two that voted for a direct election, had citizens vote for the state governor (Spivak). However, this form of election was not selected because the Founding Fathers were determined to respect a separation of power within the federal government.

The Electoral College seems extremely different from Congress electing the President, but for the Founding Fathers, that was the 'why'. By not giving Congress that power, there should be enough separation between the Legislative and Executive branches that the President

would be able to act in their own will, with their own decisions, without having to fear not being reelected if Congress did not agree with decisions the President made during their first term. However, the Founding Fathers likely did not predict the negative consequences on democracy that this separation of power would cause. While the Electoral College gives some voters a voice, there are very few states that determine elections. Therefore, instead of the President attempting to stay on good terms with Congress, they now attempt to serve the citizens of swing states because that is the path to reelection. The Founders could not have predicted the U.S. to change so greatly since 1787.

In the end, the Founding Fathers only 'why' to settling on the Electoral College is because it combined the election formats various factions wanted while still placing most of the power with the government. Most of the Founding Fathers believed that the Electoral College would almost always end in a tie and Congress would be electing the President, so allowing citizens to vote would simply be a formality that likely would not have a large impact on the final result (Spivak). Clearly the Founding Fathers did not realize how quickly the nation would grow, how swiftly political parties would develop, and how isolating to candidates outside of majority political parties their settled upon system would be. While the Founders were not advocating for a complete direct democracy, it is difficult to believe they would support the Electoral College as it has come to fruition since 1787.

Critiques

In 1792, adjustments to the Electoral College were made by the second Congress (Kurdova, 53). The first change set the new number of electors to 65 based on the most current census that was taken and provided new states that joined the Union with electors. The second change mandated electors to be declared 34 days before the first Wednesday in December. This

was to allow electors to create a path of travel and certify who they would be casting a vote for. Finally, Congress decided the states would certify their own electoral votes and turn them into Congress rather than having electors all travel nationally to the same place to vote (Kurdova, 53). Despite the federal law providing regulations and deadlines for choosing electors, the states are still at liberty to select their electors how they so choose and many of the new states at the time struggled with this process.

The Twelfth Amendment was the first critique to the Electoral College since 1792. This amendment replaced the system in Article II, but it did not necessarily change anything other than the system for electing the Vice President. Originally, the Vice President was the runner-up candidate. Sparked by the political environment following the Presidential Election of 1800, the Twelfth Amendment was created to ease the tension between newly formed political parties, provide a smoother transition of power, and give a more equal chance for opposing political parties to be chosen as electors in smaller states (Kurdova, 108-9). This amendment, ratified in September of 1804, allowed the creation of a presidential ticket. This means two members of the same party would be elected into the Executive Office rather than the Vice President being a direct competitor of the President (Harper). This change in the system meant the electors no longer cast two votes for President. Instead they each cast one vote for a Presidential ticket. This amendment was less of an adjustment for democracy and focused more so on having peaceful power without opposing candidates attempting to serve the country. In many ways, this was a win for federalism. However, the next critique would be a win for democracy.

The second Constitutional change was the Twenty Third Amendment ratified in 1961. This amendment gave electors to Washington D.C., which previously had no representation in the Electoral College (Harper). While this may seem like a small adjustment, Washington D.C.

has a large population so by allowing the district to have representation, more citizens are being included in the vote for the President. While these two amendments are the only federal changes to the Electoral College, some states have adapted how electors are selected and how they must vote. The states determine if they will use a winner-takes-all system or a district system of voting. Some states have created faithless elector laws that fine or punish electors who do not vote in the way they pledged (Harper). This concern was not taken into account when the Founding Fathers first created the Electoral College. The changes to the Electoral College, both federally and state-level, have not changed the Electoral College holistically, but simply smoothed a few challenges in the process. The Twenty Third Amendment provided a win for democracy because it gave a large population of citizens that were not represented by the Electoral College a vote for President.

A less extreme critique to the Electoral College came in 1887 with the focus on how electoral votes are counted. The Electoral Count Act of 1887 was passed to explain how disputed votes should be determined (Edwards, 27). The overall goal of the Act was to place the burden of disputes onto the states which would remove some power in the presidential election process from Congress. If a state has an already determined means to deciding disputed votes, Congress will keep the final determination as long as the manner in which decisions are made is certified before Election Day in November. The determination also needs to fully solve any issues with an electoral vote and be settled six days before electors cast their ballots in December (Edwards, 28). Ultimately, it is a state's job to fix their voting issues, not Congress's. Finally, Congress is able to throw out ballots if two votes from the same elector are certified.

In summary, the Founding Fathers believed, that while a democracy was necessary, there needed to be a buffer between a direct democracy and a fully Congressional voting system for

the President. The Constitutional Convention allowed the Founding Fathers to create the Electoral College to provide a compromise for electing the President. The system is not perfect and has been critiqued slightly over the years by the Twelfth Amendment and the Twenty Third Amendment, but these changes were relatively minor. Despite the Founding Fathers creating this system and there being slight critiques, the Electoral College continues to negatively affect democracy because it does not allow citizens to directly elect their President.

Why the Electoral College is Bad for Democracy

Flaws

The first flaw in the Electoral College is that a candidate who wins the popular vote, therefore representative of the people, will not always be elected by the Electoral College. The popular vote is the most democratic means of election because it gives citizens' the opportunity to directly control an election, while the Electoral College could potentially change the outcome against the nation's will. While this is not common, there have been four elections resulting in the winner of the Electoral College differing from the winner of the popular vote. In 1876, Rutherford B. Hayes won the election with 185 electoral votes defeating Samuel J. Tilden who only received 184 votes. In 1876, there was a smaller U.S. population and therefore less representatives at the time. However, Samuel J. Tilden, won the popular vote by 264,292 votes ("Presidential1878..."). The 1888 election was a larger split in the electoral votes with Benjamin Harrison winning 233 to Grover Cleveland's 168 votes. However, Cleveland won the popular vote by 100,456 votes ("Presidential1888...". The 2000 election proved difficult because Ralph Nader, a third-party candidate, received 2,882,955 votes in the election, but he received zero elector votes. After a large debate and the Supreme Court ruling on the election, George W. Bush

won 271 electoral votes to Al Gore's 266 and served as President. However, Al Gore won the popular vote by a mere 540,520 votes ("Presidential2000"). If a portion of the votes for Nader had switched to Gore, there is the potential that the election outcome would have been completely different.

Finally, in 2016 the election turned out completely different than anyone expected. The popular vote was split between five candidates. Gary Johnson, Jill Stein, and Evan McMullin were the three, front running, third party candidates with a combined 6,674,811 votes. However, none of them received any electoral votes. President Trump won 62,980,160 popular votes compared to Clinton's 65,845,063 popular votes. 2,864,903 more Americans voted for Clinton than Trump, however, Trump won the election with 304 electoral votes while Clinton only received 227 ("Presidential2016..."). While there are similarities between the 2000 and 2016 election, the 2016 election solidified how unrepresentative of the citizen's wishes the electoral process is. If swing states such as Florida and Pennsylvania had voted for Clinton it is likely she would have won the election. With a few of the most recent elections showing disparities between the popular vote and the electoral vote, citizens will likely start taking notice if this pattern continues and begin to demand a new system of electing the President.

The potential for election results to differ between the Electoral College and the popular vote proves the undemocratic nature of the system. The U.S. functions as a democracy in state elections, but never gave citizens' the ability to directly elect their President and Vice President. This system is also undemocratic because it allows states, like Florida in the 2000 Election, to individually determine the results of a presidential election. By prioritizing one state, in some cases, or a handful of states in others, there is a loss of democratic practice and results in lower voter turnout in safe states. Since voters in safe states do not feel as though their vote counts,

they will not vote in presidential races and will likely not vote in other state and federal elections. By deterring citizens from voting, the Electoral College continues to be less democratic than other potential systems.

The Electoral College, as a process, is complex, however, complexity does not equal democracy. The United States is a democratic republic therefore the Electoral College was never designed as direct democracy. However, the voice of the people should still be shining through and represented by the people who are voted into office. The second flaw with the Electoral College is that it takes away the ability for citizens to elect the presidential ticket. While most states use the popular vote to determine who the electors vote for there are still two issues blocking citizens' votes with this. The first issue is that even if a candidate only receives 30% of the popular vote, if that is the plurality then they receive all electoral votes for the state. This means that anyone who did not vote in that 30% is not being represented by the electors. While the winner-takes-all system may alleviate some issues of dividing votes and portioning out electoral votes, it allows for some citizens' voices to matter more than others.

The third flaw in the Electoral College is that it favors a two-party system. There is not a possibility for a third-party candidate to receive an electoral vote. The first reason for this is the plurality problem. If an independent candidate received 10% of votes in a state, they would not receive electoral votes. The second reason is that electors are chosen by the two major parties so even if a candidate were able to get the plurality of votes in a state, the faithless elector punishments are not severe enough to discourage an elector from voting for their party.

Along with the three major flaws in the system, there are other smaller factors that make the system bad for democracy. One is opportunity for an election to result in a tie. This has not happened since the Election of 1800, but it is possible for two candidates to both receive 269

votes. If this happens, the American peoples' only say in the Presidency is who they elected into the House of Representatives (Black). As previously explained, in the result of a tie, each state gets one vote cast by their House Representatives. This avoids having to complete a second election to determine a winner, while it completely eliminates the voice of citizens. Fortunately, the likelihood of this happening is statistically very low, but the potential is still present.

A second consideration is that candidates are likely only focusing on swing states because there is no desire to waste resources campaigning to safe states. This means only ten states are targeted during an election. It is worth resources for candidates to visit states like Pennsylvania and Florida but going to Alabama or Maine would be a waste of time, in candidates' eyes. This is a problem during campaign season, but it is also an issue for incumbent Presidents. If a President knows they need to win Pennsylvania to win the reelection, they are going to favor policies during their first four-year term that help Pennsylvania over Rhode Island. This means that not only during the campaign trial is a candidate ignoring most states, during their Presidency they could potentially also ignore most states.

Finally, the Electoral College allows states with larger populations to hold smaller states hostage. However, some people see the smaller states as overrepresented since every state has two electoral votes to represent their Senators (Black). In the end, places like California will have more sway in an election than places like Maine due to the high population allowing them to have a large of representatives and therefore the most electoral votes to give to a candidate.

Why it is bad for democracy

A system that silences the voice of citizens in favor of the more elite, or more densely populated state, is inherently bad for democracy. The Founding Fathers could not determine the

best system for presidential elections, hence why the originally voted upon plan was for Congress to elect the President. It was simple and could easily be completed. The Founders also had a clear mistrust in the capability of the citizens to elect the President. This mistrust caused a clear divide in 1787 between Americans who could afford to, and were allowed to be, educated and chosen as electors to those who did not. The Founding Fathers could not have predicted a world where African American citizens and women had a vote. The system proposed was to protect a democratic republic that no longer represents the current state of affairs; it does not protect the democratic nation the United States should be.

As previously explained, the Electoral College causes candidates to focus in on states with the largest populations and largest number of electoral votes. When a candidate is aware they need to win Florida, Ohio, and Pennsylvania, they will visit those states, speak with those citizens, and develop a platform that promises policies that will favor those states even if those same policies hurt states like Vermont and Rhode Island that are small, with small populations, and fewer electoral votes. By limiting the impact of a citizen from one state and increasing the impact of another, there is a direct imbalance that causes the system to be bad for democracy.

Despite the clear imbalance of a vote between a swing state citizen and a safe state citizen, there is the overall issue that one person does not equal one vote as it should in a democracy. Due to the manner of distributing electoral votes based on state plurality, many votes are completely ignored even if a candidate does not win over fifty percent of the votes in a state. This is not representative to the will of American citizens or a state as whole therefore causing the institution to be undemocratic.

A democracy should give the citizens a direct vote for their President, but the Electoral College does not do that. The candidate who receives the most electoral votes may not produce

the same winner as the popular vote, as seen in four previous elections and becoming increasingly common. When citizens vote to elect a presidential ticket, a democratic institution would inaugurate the President that won the popular vote. However, the Electoral College interrupts that main objective of democracy. It is undemocratic for the vote of the citizens to matter less than the vote of electors who are likely loyal to a party and not the country (Grofman and Feld).

Finally, the Electoral College is bad for democracy because it institutes a system where a third-party or independent candidate cannot win any electoral votes, even if they manage to win a large number of votes. Since electors are decided by the state and states almost always have a Democratic or Republican leaning, it would be virtually impossible to have an elector for a third-party or independent candidate chosen to be an elector. Then if the candidate was chosen, they would be considered a faithless elector if they did not vote for the candidate that won the plurality in the state they are in. After that, to win, a candidate would have to be so overwhelmingly voted for in the popular vote that they received 270 electoral votes. This event has never come close to occurring and likely never will. The only way for a candidate that is not in a major to win the election is to abolish the Electoral College. A system that suppresses candidates and parties other than the two major parties is bad for democracy because it does not give equal opportunity for all citizens to be represented in government.

Court Cases

The main focus of Supreme Court cases brought by the Electoral College is faithless electors. The main question in these cases is if states can force their electors to vote for the pledged candidates or if that would violate the Constitution. The current precedence is yes for all

presidential elections a state can force electors to vote for the winner of the popular vote. The 1952 ‘Ray v. Blair’ Supreme Court case began certifying that electors could not vote for any candidate that they wanted to, but that they had to vote for the candidate for which they pledged. In this case, Ben Ray was the Chairman of Alabama’s Democratic Party Executive Committee. His role was to certify that electors would vote for the President and Vice President that was voted on by the people of Alabama. However, Edmund Blair would not certify that he would vote for the Presidential ticket that the Democratic Party produced so Ray did not certify him as an elector. This case originally went to the Supreme Court of Alabama where Ray was forced to make Blair an elector, but then went to the United States Supreme Court where the ruling was overturned. The Supreme Court decided that parties could force electors to pledge their vote to a candidate in primary elections for the President because it would guarantee that the electors were secure and loyal to the party (“Ray...”).

Most recently, in July of 2020 the United States Supreme Court ruled on ‘Chiafalo et al. vs. Washington’. The case involved Peter Chiafalo, Levi Guerra, and Esther John, electors in the state of Washington suing the state government for a faithless elector fine. The electors claimed the fine violated the First Amendment and their rights to freedom of speech (“Chiafalo...”). In 2016, Clinton won Washington, but these three electors violated their pledge to Clinton and were fined \$1,000. The electors appealed their fines and it went up to the Supreme Court. Justice Kagan delivered the majority opinion that states can fine faithless electors and force them to vote with their certification. The majority opinion was decided because the electors need to represent the vote of the state’s citizens not their individual opinions (“Chiafalo...”). With the majority vote, there is a precedence going into future elections that all electors should be voting for the

presidential ticket that wins the plurality in their state, even if the state does not currently have a faithless elector law.

Justice Clarence Thomas offered a concurring opinion in this case supported to by Justice Gorsuch. The opinion states that Article II of the Constitution should not have determined this case, but rather the Tenth Amendment which states any powers not within the Constitution should be delegated to the states (“Chiafalo...”). With this opinion, it is likely that the Supreme Court would have concluded the same outcome for the electors with the reasoning that Washington had the right to determine what the penalty for a faithless electors was, not the federal government.

In 2019, ‘Baca v. Colorado State Department’ led to the Tenth Circuit Court determining electors had a right to vote for whichever candidate they so choose. Three electors in Colorado in the 2016 election, Michael Baca, Polly Baca, and Robert Nemanich wanted to vote against Clinton, despite Clinton winning the state. Colorado has faithless elector laws so these electors are legally obligated to vote for the winner of the state. Michael Baca violated the laws and voted for John Kasich, the Colorado Secretary of State discarded the vote and removed his as an elector (“Colorado...”). However, this case was not decided at a Supreme Court level until 2020 after the ‘Chiafalo v. Washington’ case therefore the court overturned the Tenth Circuit Court opinion and Baca was officially removed as an elector in Colorado. This result shows a pattern of precedence that will likely continue throughout elections to come.

While the clear decision that electors have to vote for the candidate that received the plurality of votes in their state, there are times the Supreme Court is involved in contested elections that come down to a small margin of electoral votes. Bush v. Gore, 2000, is that most well-known example of this. In 2000, there were disparities in the Florida election and no clear

winner was presented between former President George W. Bush and former Vice President Al Gore. In this case, the Florida Supreme Court began forcing certain counties to manually count ballots that did not clearly indicate which Presidential candidate was voted for. The Bush campaign filed a request to review the Florida Supreme Court's decision and the U.S. Supreme Court forced the ballot recount in Florida to stop, which ultimately gave Bush the Presidency. The reasoning for the Supreme Court's ruling is that the Florida Supreme Court forcing ballots to be manually counted was unconstitutional since the system of recounting varied so widely throughout the state. Justices Rehnquist, Scalia, and Thomas claimed it was unconstitutional because it created a new election law which was not within the jurisdiction of the Florida Supreme Court to do so. Justices Breyer and Souter dissented because they believed the recount was Constitutional. Finally, Justices Ginsburg and Stevens also dissented on the basis of every vote needing to be counted for the sake of democracy ("Bush..."). This case led to the longest outstanding presidential election so far but set a precedence for potential recount cases that could arise in the future. While the decision was not unanimous, it was a 5-4 vote certifying the power of the Supreme Court to stop ballot counting or recounting during a presidential election ("Bush..."). This power of the Supreme Court could potentially be harmful for democracy if it were to be abused to sway the results of an election, however, due to the checks and balance system within the U.S., the Supreme Court is a necessary member in potential disputes within the executive branch.

The role of the judicial system during an election is limited, however, it is important to secure that rules are being followed both in the presidential election process, especially regarding recounts, and certification of electoral votes. From previous court cases, there is now a precedence that electors must vote for the presidential ticket that wins the plurality of votes

within a state and each state can create a faithless elector law to attempt to deter electors from voting out of their own will. Finally, the Supreme Court can be involved in stopping ballot recounts if the Justices deem that the recount was called in an unconstitutional manner.

Propositions

The Electoral College is a system that the Founding Fathers settled on without the hindsight to predict the negative impact democracy the system would have. From the beginning, the Founding Fathers did not want this system, which is why it should be updated to fit the needs of the United States currently, not the new United States in 1787. The first solution would be to eliminate the Electoral College as a whole. A democracy should allow the people to vote for their President and representatives in a one person, one vote manner. In recent years, the U.S. elections have seen a trend where the popular vote is a close race, but the candidate who wins only wins because of the Electoral College. When this happens, the undemocratic nature of the Electoral College is obvious because the will of the people is not respected as much as it is a game of numbers. By using a direct election, or the popular vote, the winner of the presidential election would be selected by the people, for the people. There are other democratic ways of electing a President, but the direct election is the truest form of democracy.

The next system would be another type of compromise. The National Popular Vote Interstate Compact has been making headway in recent years and allows the popular vote to be combined with the Electoral College. The goal of the Compact, referred to as NPVIC, is for each state to give all of their electoral votes to the candidate who wins the popular vote nationally (“National...”). This would mean that if a Democratic candidate won the popular vote overall, but a Republican candidate won Alabama, Alabama would agree to give all their electoral votes

to the Democratic candidate. The purpose of NPVIC is to respect the essence of the Electoral College while still electing the candidate that wins the popular vote. Currently, Washington D.C. and fifteen other states, including large electoral states like California and New York, have legislation that allows them to use NPVIC in the presidential election. A candidate needs 270 electoral votes to win and right now there are 196 votes from states involved with NPVIC (“National...”). The Republican Party tends to lean in favor of the Electoral College system because it comes directly from the Constitution so no red, safe states have adopted NPVIC. There are currently no impactful swing states involved with NPVIC. The Compact is more democratic than the Electoral College because it guarantees that winner of the popular vote will win the election even if electors are still casting votes. In many ways, this Compact respects the wishes of the Founding Fathers because it gives citizens the ability to vote while still having a buffer between a direct election and a Congressional election.

Direct elections and the NPVIC are the two proposals that would be capable of resulting in a third party winning the Presidency. With the two-party system as it stands, third parties are practically incapable of winning because they will not have electoral votes given to them. However, if a third-party candidate won the popular vote, in a direct election they would be the outright winner and with NPVIC, the states would be bound to support the third-party candidate. By moving away from party politics, these systems would be more democratic than the Electoral College because they would give each citizen a vote and offer the potential to have a third-party candidate win the election.

The third proposition would be to split states votes up by House district and give the plurality winner two votes on top of the district votes. Currently, Maine and Nebraska are the only states that use a district system of electing the President; however, this system is seemingly

more democratic than the winner-takes-all system of the other 48 states and Washington D.C. because it decreases the chance for the plurality winner to not represent the will of the state. In a state with a large number of electoral votes, like Texas (38), the district system could allow for a more competitive presidential race within the state. With two votes guaranteed to the plurality winner, there is the potential for eighteen electoral votes to go to a Democratic candidate and the other eighteen to go to the Republican candidate. This system could completely change the results of an election especially in states like Tennessee, where specific districts flip blue, but the state as a whole remains red. This is a more democratic system than the Electoral College because it gives more weight to the popular vote per district. However, it is less democratic than a direct election because it can still lead to an imbalance if some districts had more voters than others. The district system could be a potential step in the right direction to get to a direct election in the future.

In a similar manner as the first district system, the Electoral College could adjust to having states with ten or more electoral votes to being split by districts and states with nine or less votes continuing as winner takes all. Washington D.C. (3) and Alaska (5) are likely never going to determine the outcome of an election while states like Ohio (18) and Florida (29) very well could. The democratic issue with this system is that only states with large numbers of electoral votes will be catered to, but more states than with the current system would be campaigned for. This format would be complex but could be one of the small steps to getting to a direct election because changes in democracy do not happen quickly.

The third district form of electing the President could be a fully proportional Electoral College. Each House district would receive an electoral vote allowing for a more representative Electoral College. States like Arkansas would likely give one or two elector votes to a

Democratic candidate even though the state is primarily red. This is more democratic than the current system or the other proposed district systems because it shrinks the scope of an election down to a district so the people within that area would have more influence over which candidate wins. This gives more power to the people of a district and would likely change the outcome of many presidential elections. The main issue with this proposal is that it removes two votes from every state and one from the Washington D.C. so that means instead of 538 electoral votes there would be 437 electoral votes, which could potentially come out in a tie. In this system, a candidate would need 219 electoral votes to win the election, but that is only half a vote away from a potential tie and could easily result in district specific recounts.

Overall, district-based election systems would be more democratic than the current Electoral College, but they would be better utilized as stepping-stones for change rather than the system settled on for another 300 years. District based systems have the potential of isolating specific districts within a state that have higher population allowing them to control the rest of the state in a similar manner that states with higher population control the current Electoral College.

Finally, there is potentially a format that keeps the current Electoral College but adapts it to a more democratic institution. Right now there are very few states with faithless elector laws, and while the Supreme Court has often ruled in favor that states can force their electors to vote for their pledged candidate, the Supreme Court cannot create legislation, therefore there is no federal law or Constitutional amendment to ensure electors vote the way their state popular vote indicates. Faithless electors are rare, but the pure capability of an elector to vote however they see fit is undemocratic. Currently, 29 states have laws that punish faithless electors, but those punishments are often not severe enough to discourage those electors from voting. In some

states, those votes are simply removed so if a state has ten electoral votes and three are faithless electors than only seven votes are turned in, which could lead to its' own set of issues depending how close an election is. However, the solution would be to either force all states to create strict faithless elector laws that are severe enough to truly discourage faithless electors or for the federal government to create a law punishing these electors at the federal level. The purpose of these laws would be to take away the free will of electors and force them to respect the winner of the state. However, these laws only fix one undemocratic issue of the Electoral College.

In summary, the only truly democratic way to guarantee a one person, one vote election of the President would be to have a direct election with the winner based on the popular vote. However, there are a number of ways to adjust the current Electoral College that would make it progressively more democratic than it is now. The end goal of adjusting the election system needs to be a system that gives every voter a voice and does not favor certain state or districts over others.

Electoral College Supporters

There are some people who believe the Electoral College should remain untouched despite the numerous examples of why it is undemocratic. Opinion journalists have been very vocal in defense of the Electoral College since the 2016 election. George Will, opinion writer for *The Washington Post*, quickly defended the Electoral College following President Trump's election claiming that California would have determined the election had the popular vote chosen the winner (Will). He claims that the popular vote would be an unfair way to elect the President because it would hold states with small populations hostage to states like California and Texas. This defense is common because people believe that the Electoral College takes away the large

disparities in state population that could sway an election. However, states with large populations already determine elections because of their large number of electoral votes.

There are also people who believe the process of elections is completely democratic so the issues with the Electoral College should be with federalism, not democracy. Martin Diamond claims that elections are completely free and direct for state elections, they are just not completely direct in presidential elections (Diamond, 7). According to Diamond, the Electoral College is simply a federally democratic institution while elections of state representatives is nationally democratic. His major defense of the Electoral College being democratic is that democracy is simply on the basis of choice and we chose the federalist form of democracy rather than the national form of democracy (Diamond, 8). Diamond's claims of the democratic nature of the Electoral College could potentially have influence, however the concept of separating a country into two types of democracy goes into a complex gray area of where the nationalistic democracy ends and the federal democracy begins. Despite there being some arguments to keep the Electoral College unchanged, the negative impact of democracy as a whole outweighs the few arguments in favor of the current system.

There is also of group of supporters who recognize that the Electoral College is not democratic but believe that the alternatives would cause more issues than the current system has. The main argument from these supporters is that the Electoral College is needed for a federal based system and a direct election would undermine federalism (Edwards, 144). This assumption is likely based on the idea that federalism gives sovereignty to that states by having each state choose electors. However, federalism was not the principle on which the Founding Fathers chose the Electoral College. It was chosen as a compromise that gave some power to the citizens, but retained that power within the government (Edwards, 168). Since the Electoral College was not

created for the purpose of federalism and has little connection to maintaining federalism, it is difficult to justify the argument that without the Electoral College federalism will be diminished.

Summary

The presidential election process is complex and becomes more complicated when the Electoral College is involved. While citizens are in some ways electing the President of the United States, they are overall voting who electors will pledge to elect. This removal of the popular vote from deciding the President makes the electoral college an undemocratic system. The Founding Fathers settled on the Electoral College without the knowledge of rapid growth, strong political parties, and widely educated citizens present in the U.S. The Electoral College has had very few changes since 1787 with the first being for the protection of federalism and the second increased democracy by giving citizens of Washington D.C. votes in the Electoral College.

This system of electing the President is bad for democracy because it takes away the peoples' power to decide who their President is, opens the door for faithless electors to determine an election, allows candidates to wholly ignore certain states with fewer electors, and removes the opportunity for third party or independent candidates to win the election. There have been notable court cases from the Supreme Court attempting to alleviate the issue of faithless electors, but that is the only issue that has had any potential for change in recent history.

The Electoral College functions how it was written in 1787, but there are number manners of electing the President that would be more democratic than our current system. Moving to a direct election is likely too radical for immediate implementation, but even adjusting the Electoral College to be proportional and based on districts would allow for a more democratic process than what is currently available. Finally, the arguments by originalists that

the system must remain the same need to be challenged on the basis of supporting a democracy that provides all citizens a voice rather than the few most populated, electorally provided states.

Conclusion

Martin Diamond based his defense of the Electoral College against the 1969 ABA report which called the Electoral College archaic, undemocratic, complex, ambiguous, indirect, and dangerous (Diamond, 1). While Diamond disagrees, the six adjectives describing the Electoral College are accurate and I believe I have proven that through historical background, court cases, and provided potential solutions to adjust the Electoral College without initially throwing out the entire system. The Founding Fathers settled on this system with safeguards that allowed Congress to assist in the final presidential election process if needed. However, as a country, we have advanced past needing to be safeguarded from a direct election. Change to a Constitutionally developed system cannot happen overnight, but the process has to begin to start transitioning to the democratic nation our Founding Fathers would want the United States to be.

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