

## **Electoral College vs. National Popular Vote**

Do you remember hearing that Hillary Clinton lost the presidential race to Donald Trump in 2016? Though Clinton won the popular vote, she lost in the Electoral College. Trump supporters were elated. Clinton supporters were devastated. The impact of that election went beyond the loss by a particular candidate, symbolizing the loss of the democratic ideal of one person, one vote.

### **HISTORY OF THE ELECTORAL COLLEGE**

#### Birth of the Electoral College, 1787 Constitutional Convention

The U.S. Constitution, signed by the Founding Fathers in 1787, did not provide a detailed method for selecting the president and vice president. The term “Electoral College” does not appear in the document. As the Constitutional Convention of 1787 was ending, the last major unanswered question was how the president was to be selected. The two leading options for selecting the president were either appointment by the U.S. House of Representatives or the Senate or by a national popular election. The delegates could not agree on which method to adopt, leading to the compromise we now know as the Electoral College.

The idea of Congress selecting the president was opposed because it would make the executive branch too dependent on the legislature, weaken the executive's ability to check legislative power, and create opportunities for corruption in the selection process. Conversely, electing the president through a national popular vote was opposed for several reasons. Southern delegates argued that the influence of northern and southern regions would be determined entirely by the number of votes that their residents cast. The overall population of the North and South were similar. However, a significant portion of the population in the South was enslaved and could not vote. Therefore, the number of eligible voters in the South was much lower than in the North. Southern delegates argued that because of this disparity, the southern states would have no influence in the election of the president. Other reasons to oppose a popular vote included concerns that voters, lacking sufficient information, would choose candidates from their states, leading to presidents always coming from larger states. There was also a fear that the public could be easily influenced and misled by unprincipled men.

After months of indecision, disagreement, and discussion, the delegates finally turned the issue over to a committee of eleven to find a solution acceptable to all. In less than a week, the committee returned with a proposal that, with slight revision, would come to be called “The Electoral College.”

#### Final Compromise, 1778

- The president and vice president are to be chosen every four years by individuals referred to as presidential “electors.”
- Each state is entitled to one presidential elector for each of its U.S. representatives and senators. The number of U.S. representatives is based on a state's population, and slaves will count as three-fifths of a person when determining the population of each state.
- A presidential or vice-presidential candidate must win a majority of the electoral votes to be elected to office. In the absence of a majority, the U.S. House of Representatives chooses the president, and the U.S. Senate chooses the vice president.
- Each presidential elector shall cast two votes. The leading candidate becomes president, and the second-place candidate becomes vice president.
- Each state shall appoint electors in a manner determined by its legislature. The specifics regarding who votes for presidential electors and how these votes are counted for presidential electors are determined by each state.

### **THE ELECTORAL COLLEGE TODAY**

The Electoral College consists of 538 electoral votes distributed among the 50 states and the District of Columbia. Each state continues to receive the number of votes equal to its two senators plus the number of its congressional districts, determined by the census taken every ten years. The District of Columbia receives three votes allotted by the 23<sup>rd</sup> Amendment to the Constitution.

Each state, including the District of Columbia, decides how to appoint its electors. Currently, every state, except Maine and Nebraska, allocates all of its electoral votes to the winner of the statewide popular vote. Maine and Nebraska appoint individual electors based on the winner of the popular vote within each congressional district plus two “at-large” electors based on the winner of the statewide popular vote.

A presidential candidate needs 270 electoral votes to be elected. If no candidate receives 270 votes, then the vote goes to the House of Representatives, which elects the president from the three candidates who received the most electoral votes. Each state has one vote, and since the District of Columbia is not a state and has no representation in Congress, it cannot vote. A candidate must receive 26 votes to be elected. This has happened twice: In 1800, when the House chose Thomas Jefferson, and in 1824, when the House chose John Quincy Adams. The Senate chooses the vice president. Each senator has one vote for vice president, and a candidate must receive 51 votes to be elected.

A “faithless elector” refers to a member of the Electoral College who does not vote for his/her party’s nominee for president or vice president. In 37 states and the District of Columbia, electors are legally required to vote for their party’s nominee. In the other states, there is no such legal requirement. Oregon is one of the 37 states that prohibit faithless electors. Oregon law (ORS 248.355) states: “A candidate for elector when selected shall sign a pledge that, if elected, the candidate will vote in the electoral college for the candidates of the party for President and Vice President. The Secretary of State shall prescribe the form of the pledge.”

Throughout U.S. history, only 90 electors have not voted for their party’s nominee. Of those 90 electors, 63 voted for a different candidate following the death of their party’s nominee.

#### **POPULAR VOTE LOSSES AND THE ELECTORAL COLLEGE**

The Electoral College has overruled the national popular vote in five United States presidential elections. In 1824, John Quincy Adams won over Andrew Jackson; in 1876, Rutherford B. Hayes over Samuel J. Tilden; in 1888, Benjamin Harrison over Grover Cleveland. The following two modern cases bring up many questions that the abolition of the Electoral College would remedy.

In 2000, George W. Bush became president after the Supreme Court, in *Bush v. Gore*, ruled in favor of him in a disputed election against Al Gore, who won the popular vote. Gore received 50,992,335 votes while Bush had 50,455,156 votes. Ralph Nader also had 2,882,738 votes but no electoral votes. State results tallied on election night gave 246 electoral votes to Republican nominee Texas Governor George W. Bush and 255 to Democratic nominee Vice President Al Gore, with Wisconsin (11), New Mexico (5), Oregon (7), and Florida (25) too close to call that evening. As the final national results were tallied the following morning, Bush had clearly won 246 electoral votes and Gore 250, with 270 needed to win. Two smaller states—Wisconsin and Oregon—were still too close to call, but Florida's 25 electoral votes would be decisive regardless of their results.

Between 7:50 p.m. and 8:00 p.m. EST on November 7, just before the polls closed in the largely Republican Florida panhandle, all major television news networks declared that Gore had won Florida. They based this prediction substantially on exit polls. But in the vote, Bush began to take a wide lead early in Florida, and by 10 p.m. EST, the networks had retracted their predictions and placed Florida back in the “undecided” column. At approximately 2:30 a.m. on November 8, with 85% of the vote counted in Florida and Bush leading Gore by more than 100,000 votes, the networks declared that Bush had carried Florida and therefore been elected president. But most of the remaining ballots to be counted in Florida were in three heavily Democratic counties—Broward, Miami-Dade, and Palm Beach—and as their votes were reported, Gore began to gain on Bush. By 4:30 a.m., after all votes were counted, Gore had narrowed Bush's margin to under 2,000 votes, and the networks retracted their declarations that Bush had won Florida and the presidency. Gore, who had privately conceded the election to Bush, withdrew his concession. The final result in Florida was slim enough to require a mandatory recount (by machine) under state law; Bush's lead dwindled to just over 300 votes when it was completed the day after the election.

Most of the post-electoral controversy revolved around Gore's request for hand recounts in four counties (Broward, Miami-Dade, Palm Beach, and Volusia), as provided under Florida state law. Florida’s Secretary of State Katharine Harris, who also co-chaired Bush's Florida campaign, announced she would reject any revised totals from those

counties if they were not turned in by 5 p.m. on November 14, the statutory deadline for amended returns. The Florida Supreme Court extended the deadline to November 26.

On December 8, 2000, the Florida Supreme Court ordered manual recounts of ballots in all Florida counties where so-called "undervotes" had not been manually tabulated. Noting the closeness of the election, the court explained that, based on the record before it, there could be no question that there were uncounted "legal votes"-i.e., those in which there was a clear indication of the voter's intent sufficient to place the results of the election in doubt. However, the Republican candidates for president and vice president who had been certified as the winners in Florida filed an emergency application for a stay of this mandate. On December 9, the U.S. Supreme Court granted the stay application, overruling the Florida Supreme Court's decision.

In 2016, Donald Trump defeated Hillary Clinton in the election despite losing the popular vote by almost 2.9 million votes, with Clinton's 65,844,954 (48.2%) to Trump's 62,979,879 (46.1%), according to revised and certified final election results from all 50 states and the District of Columbia. Trump had 305 electoral votes while Clinton had 227. Clearly, the will of the people had been overruled by the use of the Electoral College.

### **THE ELECTION OF 2020 AND THE ELECTORAL COUNT REFORM ACT OF 2022**

At the time of the 2020 election, the procedures for the casting and counting of Electoral College votes were governed by the Electoral Count Act of 1887. Donald Trump employed several strategies that exploited ambiguities in that law in his attempt to overturn the 2020 election results. In 2022, the Electoral Count Reform Act was enacted to clarify provisions in the original 1887 Act to prevent similar strategies from being used in the future.

#### Trump's Attempts to Interfere with the Electoral College Vote

- **Pressuring Local and State Officials to Refuse to Certify Election Results:** Immediately after the election, Trump pressured local and state officials to refuse to certify election results that affirmed Biden's win. These efforts included calls from Trump to local officials on the Wayne County, Michigan canvassing Board and the Maricopa County Arizona Board of Supervisors. He also engaged in public and private campaigns to persuade the Georgia governor and secretary of state and the Arizona governor to reject or undo state certifications of the election results.
- **Creating Alternate Sets of Electors:** After a sufficient number of states had certified their election results making it clear that Biden had enough electoral votes to win, Trump's efforts to overturn the election focused on creating alternate sets of electors (fake electors) in states where certified election results showed a Biden win. Ultimately, slates of these fake electors were established in seven states: Arizona, Georgia, Michigan, New Mexico, Nevada, Pennsylvania, and Wisconsin.

When the Electoral College met on December 14, 2020, Trump supporters were organized from each of those seven states to gather and declare themselves properly appointed electors. Their stated rationale was that Biden's victories in those states would be overturned once claims of widespread voting fraud and other irregularities were sustained, and that it was only prudent to have the "alternate" slates of electors in place for that eventuality. As there were no legitimate claims of such fraud or irregularities, those seven states all certified Biden's victory.

The attempts to replace electors continued even after the Electoral College formalized Biden's win. The focus shifted to using the fake electors to disrupt the ceremonial congressional certification process on January 6. Ultimately, several dozen Trump allies in the seven states listed above signed false slates of electors which they submitted to Congress.

Trump also continued to pressure Republican state legislators in key swing states to formally vote to recognize Trump's alternate electors in place of Biden's. Despite this pressure, no legislative body voted to endorse alternate electors.

- **Pressuring the Vice President:** The next step in the plan was to pressure Vice President Pence to accept the slates of fake electors during the joint congressional session on January 6. Alternatively, it was hoped that he would use the fake electors as a basis to declare that the election was defective or in dispute. If the outcome of the election

was legitimately disputed, the law would allow the election to be determined by a vote of the state delegations in the House of Representatives, which would have given Trump a victory.

- **Delaying the Proceedings:** The fake electors could also be used to delay the proceedings by having members of Congress make objections to legitimate slates of electors and argue that the newly submitted fake slates should be counted. It was thought that such a delay might be used to pressure some state legislatures to vote to replace their Biden electors.

### The Electoral Count Reform Act

The Electoral Count Reform Act (ECRA) was enacted in December 2022. ECRA clarified ambiguous provisions in the original 1887 Act that Trump had relied on in his attempt to overturn the 2020 presidential election to ensure that similar strategies could not be used in the future. ECRA contains the following key provisions:

- A state may not change its method of selecting electors after Election Day. This means that state legislatures have no authority to set aside election results they do not like and choose electors by some other means.
- The state official responsible for issuing the “certificate of ascertainment” formally appointing the winning slate of electors is defined as a state’s governor, or the mayor of Washington D.C. Previously, it was unclear which state officials had the power to appoint electors. That lack of clarity created the potential for states to appoint multiple seemingly valid slates of electors in the event of a disputed election. Additionally, the certificate is “conclusive” unless ordered revised by a lawful court order. These changes greatly reduce the possibility of a state sending to Congress more than one slate of electors that, on face value, appear valid.
- The role of the vice president is ministerial only, and he or she does not have the authority to determine the validity of electoral votes or otherwise “adjudicate or resolve disputes.”
- An objection to a slate of electors must be signed by one-fifth of the senators and one-fifth of the members of the House of Representatives. At the time of the 2020 election, it took only one senator and one representative to force debate on an objection, which created the potential for prolonged delays caused by baseless objections.
- If the number of electoral votes cast decreases because, for example, Congress votes to sustain an objection and not count a slate of electors, the number of votes needed to win also decreases. For example, if Congress discards ten electoral votes, the total number of votes cast drops to 528, and the number of votes needed to win drops to 265. This reduces the incentive for a losing candidate to try to throw out electoral votes so that Congress can select the president. After the 2020 election, some Trump supporters hoped that if they could get enough of Biden’s electoral votes thrown out so that he had under 270, then the House could vote to install Trump as president.
- A presidential election may not be postponed past Election Day, set by statute as the first Tuesday after the first Monday in November, an idea Trump floated in the run-up to the 2020 vote.

### **SHOULD THE ELECTORAL COLLEGE BE ABOLISHED?**

Whether the Electoral College should be abolished has been a question of ongoing debate, and polls show that a majority of voters believe it should be abolished in favor of a national popular vote. However, there is still significant support for keeping the Electoral College.

### Arguments in Favor of Keeping the Electoral College

- The Electoral College ensures all parts of the country are involved in selecting the president. Without the Electoral College, candidates could limit campaigning to heavily populated areas or specific regions. When candidates need electors from multiple regions, it ensures they build campaign platforms with a national focus.
- The Founding Fathers wanted to balance the will of the populace against the risk of a “tyranny of the majority,” and the Electoral College was intended to prevent states with larger populations from having undue influence over smaller states by favoring the smaller states with more electoral votes per person. This rationale still applies today as demonstrated by the fact that although Hillary Clinton won the national popular vote, she won only about a sixth of the counties in the nation, and her support was based mostly in urban areas on both coasts.
- An election by purely popular vote allows a candidate to receive the highest number of votes among all candidates but still not receive a majority of the votes. This happened with President Nixon in 1968 and President Clinton in 1992, both of whom won the most electoral votes while receiving 43% of the popular vote. In those cases, the Electoral College eliminated the possibility of calls for recounts or run-off elections.

- The winner of the popular vote has lost the Electoral College vote only five times in over 200 years, demonstrating that the system is working.

#### Arguments Against the Electoral College

- The Electoral College gives too much power to swing states and allows the presidential election to be decided by a handful of states. The two political parties can each count on winning certain states. Because of this, candidates only need to focus their campaigns on a limited number of states that could swing one way or the other. For example, in the election between Donald Trump and Hillary Clinton, the candidates made more than 90% of their campaign stops in just 11 battleground states. Of those visits, nearly two-thirds took place in the four battlegrounds with the most electoral votes.
- The minority interests the Founding Fathers intended the Electoral College to protect were those of slave owners and states with legal slavery. Although the overall populations in the North and the South were relatively equal, the number of eligible voters in the South was much lower because of the substantial non-voting slave population. The Electoral College gave each state a number of votes based on the combined number of their senators and representatives. The number of a state's representatives was determined by its population which was calculated to include three-fifths of the non-voting slave population, resulting in southern states having a number of electoral votes that was disproportionately larger than their share of the voting population.
- The Electoral College overrepresents small and medium-sized states to the detriment of large states. For example, in Wyoming each elector represents 192,284 in population. In Texas each elector represents 753,683 in population.
- Democracy should function on the will of the people, allowing for one person, one vote. Having a president who lost the popular vote undermines electoral legitimacy.
- A majority of voters believe the Electoral College should be abolished and the president elected by popular vote.

The winner of the popular vote lost in the Electoral College twice within the past 25 years, and current economic and political systems may lead to more frequent discrepancies. Under the current system, there is a mismatch between economic vitality and political power. Only 15% of American counties generate 64% of America's gross domestic product, and most of the country's economic activity is on the East and West Coasts and in a few metropolitan areas in between. These areas are included in 15 states having 30 senators while the remaining areas include 35 states having 70 senators. The Electoral College gives the 35 states with smaller economic activity disproportionate power to choose presidents and dictate public policy, which may fuel increased populism and more frequent discrepancies between the popular and Electoral College votes.

#### **THE NATIONAL POPULAR VOTE AND NATIONAL POPULAR VOTE INTERSTATE COMPACT**

The National Popular Vote (NPV) law was drafted in 2006 to ensure that every vote will be counted in a national presidential election. In contrast, under the current Electoral College system, the winner in each state would be awarded all of that state's electoral votes, except where there is proportional representation, thereby discounting the votes for the losing candidate. The NPV retains the mechanism of the Electoral College but commits the participating state electors to cast their votes for the national popular vote winner.

Currently, 17 states and the District of Columbia comprise the National Popular Vote Interstate Compact (NPVIC), totaling 207 electoral votes: Maryland, New Jersey, Illinois, Hawaii, Washington, Massachusetts, Washington, D.C., Vermont, California, Rhode Island, New York, Connecticut, Delaware, New Mexico, Oregon, Colorado, Minnesota, and Maine. The NPV law takes effect only when enough states control a majority of the electoral votes (270 out of 538).

The Compact mandates that the deadline to reach the 270 electoral vote threshold is July 20 in presidential election years, six months before the inauguration. Changes after the deadline due to a state's withdrawal or fewer electors due to reapportionment cannot occur in the blackout period until the next president is confirmed on January 20. The Compact would apply to each presidential election cycle.

If each presidential candidate has the same number of popular votes, the electors will vote for the popular vote winner in each state. Each state will handle disputes and recounts according to its laws. Unless Congress provides for a nationwide recount, no authorized procedure is in place.

### Arguments in Favor of the NPV and NPVIC

- In the current system, the president and vice president are elected indirectly instead of by the voters.
- States considered non-competitive in presidential elections receive less engagement from candidates, which tends to depress voter turnout in those states. The NPV would increase access to candidates by widening the geographic scope of their campaigns.
- Affiliation with the NPVIC is possible because the states have exclusive control of their electoral format, including the power to reform it.
- In contrast to the current system, electoral fraud is unlikely to be a factor in the NPV because of the large number of votes needed to effectively change the outcome of an election.
- The NPV ensures that the candidate with the most votes from the people becomes the president. Every voter counts as one vote regardless of race or any other demographic identity.

### Arguments Against the NPV and NPVIC

- The founders intended to prevent a “tyranny of the majority” by implementing the Electoral College to protect minority rights. Under NPV the smaller states will become the minority, lessening their impact in presidential elections as candidates prioritize densely populated regions.
- The NPVIC may be unconstitutional. Some legal scholars argue that it is unconstitutional for a state’s appointed electors to align their votes with voters outside their state. Additionally, a strict interpretation of Article I, Section 10, Clause 3 of the Compact Clause of the U.S. Constitution states that no state shall enter into any agreement or compact with another state without Congress’ consent. However, the Supreme Court has made practical rulings, concurring that Congressional approval would be required only for compacts that would increase the states’ political power while undermining federal sovereignty.
- Candidates would try to appeal to constituents with overly broad policies, leaving diverse minorities disadvantaged.
- The NPVIC could lead to more third-party candidates, drawing votes from the major candidates.
- Implementing a national popular vote system would require significant changes to the current election infrastructure and processes, which could be costly and complex.
- There is no authorized national recount procedure currently in place. Should a recount be necessary, disparate vote-counting procedures in different counties within a state and the time-consuming process, as in Bush v. Gore, would violate the Equal Protection Clause and possibly delegitimize the presidential election.
- According to Harvard legal scholar, Norman R. Williams, it is unlikely that Republican-controlled states will reform a system that has worked in their favor, leaving the necessary electoral votes to enact the NPVIC in doubt.
- Even if the compact were in effect, there would be no legal way to prevent a state from withdrawing if the opposition were to win the popular vote, leaving disputes to the courts.
- Eliminating the Electoral College and amending the U.S. Constitution to enact a nationwide popular vote would be the most realistically possible way to enfranchise voters equally.

## **ALTERNATIVES**

### Proportional Representation

While proportional representation does not eliminate the Electoral College, it does ensure genuine representation. Maine and Nebraska utilize congressional districts to determine their electors. These states allocate two electoral votes to the winner of the statewide popular vote and one electoral vote to the popular vote winner in each congressional district. (Currently, Nebraska legislators are considering a change in law that would make it a winner-take-all state.)

### Arguments in Favor of Proportional Representation

- Proportional representation can provide a more precise reflection of the popular vote within each state, ensuring that the Electoral College results align more closely with the overall will of the people.
- Voters may feel more motivated to participate in elections if they know their vote contributes to the overall electoral vote count, even if their preferred candidate does not win the majority in their state.
- In a winner-takes-all system, votes for losing candidates do not impact the outcome. Proportional representation ensures that every vote counts towards the final allocation of electoral votes.

### Arguments Against Proportional Representation

- Implementing proportional representation would necessitate significant changes to the current system, requiring each state to change its electoral process
- Proportional representation could increase the likelihood of no candidate securing a majority of electoral votes, particularly when there is a third-party candidate, resulting in the need for runoff elections. It could complicate the election process and make it more difficult for any single candidate to achieve a decisive victory.

### Constitutional Amendment

Amending the Constitution is a complex and lengthy process that requires broad support, which may be challenging to achieve. To pass a constitutional amendment, it must be proposed either by a two-thirds majority in Congress or by a constitutional convention called by two-thirds of state legislatures (34 out of 50). It must then be ratified by three-fourths of the states (38 out of 50), either through their legislatures or through state conventions.

### **LEAGUE POSITION ON THE SELECTION OF THE PRESIDENT**

At the 2024 National League Convention, the abolition of the Electoral College was a central topic, featuring a panel discussion and three work sessions. Since 1970, the League has advocated for its abolition and has recently added support for the National Popular Vote to its position. The League's "Position on Selection of the President," as announced by the national board in January 1970, revised March 1982, updated June 2004, and revised by the 2010 Convention states:

"The League of Women Voters of the United States believes that the direct-popular-vote method for electing the President and Vice President is essential to representative government. The League of Women Voters believes, therefore, that the Electoral College should be abolished. We support the use of the National Popular Vote Compact as one acceptable way to achieve the goal of the direct popular vote for election of the President until the abolition of the Electoral College is accomplished. The League also supports uniform voting qualifications and procedures for presidential elections. The League supports changes in the presidential election system— from the candidate selection process to the general election. We support efforts to provide voters with enough information about candidates and their positions, public policy issues and the selection process itself. The League supports action to ensure that the media, political parties, candidates, and all levels of government achieve these goals and provide that information."

### Discussion Questions

1. Is the NPV a fairer system for selecting the president?
2. How would the process of resolving Bush v. Gore be different if the NPV had been in effect?
3. How would the use of NPV compare to proportional representation in selecting electors in each state?

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