

# THE ELECTORAL COLLEGE, DEMOCRACY, AND THE CONSTITUTION: AN ARGUMENT FOR THE FOUNDER'S INTENT

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*ABSTRACT* Against the backdrop of President Trump's election and scenes of thousands of Americans rioting in the streets chanting "Not my President," she calls for a change in the way the president is elected and its new significance. Many Americans have expressed a preference for a national popular vote over the traditional and constitutional Electoral College. Many more Americans do not understand why this complex election system even exists. This article presents a defense of the Electoral College and explains its place as the guardian of the American system of government.

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In the Constitution, the Founders attempted to balance the competing interests of both the small and large states, the urban and the rural areas, and the Federalist and Anti-federalist thinkers. They attempted to form a system that would harness these interests and human nature to create a form of limited government that would be responsive to the people's wishes but maintain its limitations. On the question of the election of the chief executive, the Founders concluded that the best way to balance these competing interests was "to form an intermediate body of electors," known as the Electoral College.<sup>1</sup> Since the Progressive Era, there has been growing popularity, in the name of democracy, for the popular election of the President. A change in the system to a popular election, however, would ignore the labored efforts of the Founders and would harm the United States. The Electoral College is better than the more democratic popular election for three main reasons: democracy is not an inherent good, federalism is important, and the system is still the most practical way to choose a president.

First, the Electoral College is better than popular election because democracy is not an inherent good. "Democracy" is somewhat of a nebulous term, and more of a spectrum than a specific definition. The term refers to any form of government by the common people, be that through direct popular vote or a representative body, but the term in its essence refers to a system built on majority rule.<sup>2</sup> American political culture upholds

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1 Joseph Story Commentaries on the Constitution, in 3 *FOUNDERS' CONSTITUTION* 558 (Philip B. Kurland and Ralph Lerner, eds., 1987).

2 MICAH ISSITT, SALEM PRESS ENCYCLOPEDIA.

democracy as an inherent good, but the Founders disagreed strongly. First, I will explain how American political culture upholds democracy as a political good, and then I will demonstrate why the Founders designed a system to combat democracy's essence, majority rule.

First, American political culture sees democracy as an inherent good. President Franklin Roosevelt and the activists of the Progressive Era first popularized the idea of "democracy" as an inherent good in American political thought in the early 1900s and championed the idea as a social and political goal.<sup>3</sup> The Progressive movement succeeded in making democratic reforms across the states (adding initiatives, referendums, and recalls into American state politics) and on the national level (changing the election of senators to popular election through the 17<sup>th</sup> Amendment to the Constitution).<sup>4</sup> Through the following years, presidents continued to use the term "democracy," and, today, referring to America as a democracy is commonplace, and reporters commonly measure the government by its level of democracy. For example, veteran reporter Rick Hampson of *USA Today*, wrote an article following the 2016 presidential election that posed the question, "what does democracy [in America] mean today?"<sup>5</sup> Other, similar articles

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3 SIDNEY M. MILKIS & MICHAEL NELSON, *THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT, 1776-2011* (2012).

4 Thomas G. West & William A. Schambra, *The Progressive Movement and the Transformation of American Politics*, HERITAGE.ORG (December 15, 2016), <http://www.heritage.org/research/reports/2007/07/the-progressive-movement-and-the-transformation-of-american-politics>.

5 Rick Hampson, *From E.B. White to Colin Kaepernick: What Does Democracy Mean Today?* USA TODAY (Nov. 24, 2016), <http://www.usatoday.com/story/news/politics/2016/11/24/eb-white-colin-kaepernick-what-does-democracy-mean-today/94344960/>.

questioning the future of American democracy have appeared in the *New York Times*<sup>6</sup> and on CNN's website.<sup>7</sup> This idea of "democracy" as a good is pervasive in American politics, affecting all areas, including foreign policy. In the early 1990s, Presidents George H. W. Bush and Bill Clinton initiated the strategies of democratic engagement and enlargement, in accordance with the American consensus to spread democracy around the globe.<sup>8</sup> Later, President George W. Bush justified his policy toward Iraq in the Iraq War as being "part of a global campaign for democracy and freedom."<sup>9</sup>

This pervasive idea of democracy as an inherent good is the impetus for the calls for the reform of the Electoral College. Progressive groups have called for reform before, but with the recent election results of 2000 and 2016 in which the outcome of the popular vote and the outcome of the Electoral College vote differed, groups are reenergizing their call for reform. Based on principles of "majority rule" and "fair representation,"<sup>10</sup> and with

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6 Steven Levitsky & Daniel Ziblatt, *Is Donald Trump a Threat to Democracy?*, *NEW YORK TIMES*, Dec. 16, 2016

7 Julian Zelizer, *Is American Democracy Dead?* CNN.com.

8 Douglas Brinkley, *Democratic Enlargement: The Clinton Doctrine*, *FOREIGN POLICY*, Spring 1997, at 111.

9 Ivo H. Daalder, *On the Record President Bush's Speech on Global Democracy and Freedom*, Brookings.edu, November 10, 2003, <https://www.brookings.edu/on-the-record/president-bushs-speech-on-global-democracy-and-freedom/>.

10 Ulrich, Roy, *Dump the Electoral College!* *THE AMERICAN PROSPECT*, <http://prospect.org/article/dump-electoral-college>.

700 failed attempts at national reform,<sup>11</sup> progressive groups have introduced the “National Popular Vote” as a way to circumvent the amendment process. They have proposed an interstate compact that would bind states’ electors to cast their vote for the winner of the popular vote in the nation. As of October 2016, 10 states and the District of Columbia have signed on to the agreement, but it will not take effect until a majority of states sign.<sup>12</sup> Progressive groups capitalized on the most recent election by organizing protests across the nation on December 19<sup>th</sup> when the official Electoral College vote for the 2016 election took place.<sup>13</sup> These increased calls for reform reopened the debate on the Electoral College and democracy in the United States.

In spite of what one would be led to believe by the centrality of “democracy” to American political thought and life, the Founders of the nation did not view pure democracy as a positive concept. In fact, the Founders feared democracy and actively tried to avoid it. Madison wrote in the Federalist Papers that no “pure democracy” can solve for “the mischiefs of faction” and that democracy will result in a tyranny of the majority.<sup>14</sup> The Founders wrote extensively about the composition and the mischiefs of

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11 John Nichols, *The Electoral College Lets Losers Like Trump Become President*, THE PROGRESSIVE, November 29, 2016, <http://www.progressive.org/news/2016/11/189079/magazine-electoral-college-lets-losers-trump-become-president>.

12 Ulrich, Roy, *Dump the Electoral College!* THE AMERICAN PROSPECT, <http://prospect.org/article/dump-electoral-college>.

13 Gabriel Debenedetti, and Kyle Cheney, *Progressive Groups Plan to Protest Electoral College Vote*, POLITICO (2016) <http://www.politico.com/story/2016/12/electoral-college-vote-protests-232311>.

14 THE FEDERALIST NO. 10, at 46 (James Madison)(George W. Carey and James McClellan ed., 2001).

factions in the Federalist Papers.<sup>15</sup> They defined faction as a group within the populace that is “united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”<sup>16</sup> Today, in a country of about 300 million, factions are prevalent. Some current examples are the Pro-Life movement, the LGBTQ movement, the Black Lives Matter movement, and, more generally, labor unions (with manufacturing interests) and banks (with finance interests). Each of these movements pits the rights of one group against the rights of another: the rights of a mother against the rights of her unborn child, the rights of gay citizens against the rights of a store owner, the rights of black citizens against the rights of police, the rights of consumer versus producer, and the rights of lender versus borrower. The Founding Fathers designed the American system to give equitable credence to the rights and interests of all—those in the majority and those in the minority. They did not design a pure democracy; they designed a representative *republic*.<sup>17</sup>

A majority of the Founders opposed democracy. They did not see the ideal of democracy as an inherent good. Many of the Founders opposed majority rule for its disregard for justice and its oppression of minorities. Madison warned in Federalist No. 10 that the factions inherent in “popular government” lead to a government “not according to the rules of justice and the rights of

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15 James Madison, *THE FEDERALIST*, (George W. Carey and James McClellan eds., Liberty Fund 2001).

16 *Id. No. 10* at 43.

17 *Id.* at 46.

the minority party,” but to a government “by the superior force of an interested and overbearing majority.”<sup>18</sup> He assured Americans that the “well-constructed” government in the Constitution, with its checks and balances and its Electoral College, would mitigate this problem of tyranny of the majority.<sup>19</sup> Many of the Founders even specifically opposed popular election. As described by Joseph Story in his *Commentaries on the Constitution*, at the Constitutional Convention the Founders discussed popular election and its tendency to lead to volatile elections decided by public passions of the moment.<sup>20</sup> This volatile opinion of the majority can be seen in the most recent election in the United States. In a culture where many in the populace believe that the government should be responsive to the majority opinion, the discrepancy between the popular vote and the election of the President caused thousands across the country to protest, chanting “Not my president.”<sup>21</sup> Imagine a government where these crowds of protesters were allowed to decide government policy. Doing away with the Electoral College would not make the United States a pure democracy, but it would introduce popular election, or majority rule, into the most visible and the only nationally elected office in the United States’ system. The introduction of majority rule would erode at the Founders’ principles of compromise

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18 James Madison, *THE FEDERALIST*, (George W. Carey and James McClellan eds., Liberty Fund 2001), 46.

19 *Id.*

20 Joseph Story *Commentaries on the Constitution*, in 3 *FOUNDERS’ CONSTITUTION* 558 (Philip B. Kurland and Ralph Lerner, eds., 1987).

21 Matea Gold, Mark Berman, & Renae Merle, ‘Not My President’: Thousands Protest Trump in Rallies Across the U.S. *THE WASHINGTON POST*, Nov. 11 2016.

and balancing interests and would strip away the protection that the Electoral College offers minorities by giving the majority the power to control the presidency and thus control cabinet, bureaucratic, and judicial appointments and effectively leave minorities with only the representatives in Congress that they can manage to elect.

The Founders decided that elections like these would not yield one of the "highest and purest, and most enlightened men in the country" as President.<sup>22</sup> Madison wrote in strong support of, and the Founders decided on, "an intermediate body of electors" (the Electoral College) who would be chosen by the people for their likelihood "to possess the information, and discernment, and independence" "to discharge of the duty" of choosing the President of the United States.<sup>23</sup> He wrote that such a system would be the best defense against "cabal, intrigue, and corruption" in the republic.<sup>24</sup> The Founders intended that the Electoral College be representative of the population, and originally they intended that it be deliberative. Unfortunately, in direct contrast to what the Founders intended, the practice of electors "pledging" to a particular candidate before the election effectively ended the possibility of deliberation before it even began.<sup>25</sup> In spite of this development, the Electoral College continued to be a means by which to elect a president who could be "the voice of the people"

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22 Story, *supra* note 1 at 558.

23 *Id.*

24 *Id.*

25 *Id.* at 559.

without favoring the majority over the minority.<sup>26</sup>

The Founders understood that democracy was not an inherent good, and they built a system based on balancing interests and preserving the rights of the minority. Any move away from the Electoral College and toward democracy is a dangerous move for the stability of the system and for every American's rights.

Not only is the Electoral College better than popular election because democracy is not an inherent good, but, secondly, the Electoral College is better because federalism is an important component of the U.S. government, and that component is preserved by the Electoral College. Federalism is central to the American system as the Founders envisioned it. The Founders worked hard to incorporate federalism into the new government and established a government that was both national and federal.<sup>27</sup> They wanted to strike a balance between protection of individual rights and protection of state rights. The national components of the government were necessary to safeguard individual rights, and the federal components of the government were necessary to safeguard state rights. The national components included the popular election of the House of Representatives, the authority of the Supreme Court over disputes between the states, and the universal application of the Bill of Rights across the states. The federal components included the ratification of the Constitution (only binding on those states that ratified) and the election of the Senate by state legislatures. Additionally, the Founders designed

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26 *Id.* at 558.

27 Madison, *supra* note 13, No. 39, at 193-199.

the election of the president and amendments to the Constitution to be processes that combined national and federal aspects.<sup>28</sup> The major plank of federalism found in the election of Senators by the state legislatures has already been done away with by a Progressive reform in the early 1900s. As state rights have been restricted and de-emphasized, the Electoral College remains the most constant reminder to citizens that they live in a country of not just a national government, but of a federal government too.

The Electoral College reinforces the idea of federalism in the minds of citizens and preserves federalism in three key ways. First, the presence of differing election rules between the states preserves federalism. Some states apportion their electors to whichever candidate wins the popular vote in their state, while others apportion their electors by Congressional District (meaning that both candidates could receive electors from a single state).<sup>29</sup> These different rules remind citizens that states are different jurisdictions with different laws and some level of autonomy.

Second, the manner in which the Electoral College influences the party system preserves federalism. Interestingly enough, the political party system in the United States has emulated the Electoral College in its nominating process. The presidential primary process reflects the Electoral College in several ways. Just as states apportion their electors in different ways in the Electoral College, states in the presidential primary system

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28 *Id.*

29 NATIONAL ARCHIVES AND RECORDS ADMINISTRATION *What is the Electoral College?*, <https://www.archives.gov/federal-register/electoral-college/about.html>.

nominate candidates in various ways, with some holding caucuses while others hold open or closed primaries.<sup>30</sup> Additionally, just as the Electoral College accounts for geographical differences in the way it allocates electors, the party nominating system accounts for geographical differences in the way it holds their primaries/caucuses on different days. By holding the contests on different days, the system forces candidates to focus on various issues that concern different geographical regions throughout the campaign,<sup>31</sup> and thus making the candidates more viable in the geographically diverse Electoral College. These two components of the party system reflect the Founders' intent for an electoral system that was federal and that balanced the various interests within the country. The federalism of the presidential primary process reinforces federalism in the broader political culture. But if the presidential election process were to change to a popular vote, the nominating system would likely fall in line in order for parties to maximize their potential to win in November. Parties would no longer need to test candidates' abilities to win a plurality of states, but their abilities to win one national popular vote. There would be no reason to focus on different geographic regions. In fact, rather than having separate primaries in each state, it would make more sense to have a national "best 2 out of 3." This would allow the

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30 *State Primary Election Types*, National Conference of State Legislatures (July 21, 2016), <http://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx>.

31 LINDSEY COOK, *Why New Hampshire Matters in Presidential Elections*, U.S. NEWS AND WORLD REPORT (Feb. 2, 2016), <http://www.usnews.com/news/blogs/data-mine/2016/02/02/why-new-hampshire-matters-in-presidential-elections>.

party to test the viability of each candidate through the test of current events and the ebb and flow of public opinion. Without the Electoral College, the federalism of presidential primaries would not be needed and would likely fade away.

Political parties also emulate the Electoral College by holding a convention where delegates from each state come to cast their vote for the nominee their state chose and to partake in the platform writing and other party development activities at the convention. If the Electoral College were abolished, it would be all too easy for parties to morph into a simple electronic reporting of the popular vote and a roundtable of elites and pollsters strategizing how best to capture the California and New England vote. The Electoral College is important for preserving federalism in and of itself, but it is also important because of the way it influences the party system.

Third, the Electoral College preserves federalism by making sure that one man does not equal one vote, but that all men receive the considerations of the candidates. Critics of the Electoral College say that the system is unfair because Wyoming receives one elector for every 160,000 voters, but California only receives one elector for every 600,000 voters.<sup>32</sup> But if the votes were "equitable," Wyoming would only receive one vote to California's 55. In that world, a candidate would pay much more attention to the concerns of the people of California than to what issues matter to the people of Wyoming. In that world, living in a large state would make your vote worth more than a

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32 Nichols, *supra* note 9.

person living in a small state. In the same way, the change would affect the worth of people's votes between rural and urban areas. In a popular-vote world, a voter in an urban area would be worth more than a voter in a rural area, because it is easier to reach urban voters in a campaign. In this way, the delicate balance the Founders created between the large and small states and between urban and rural areas would be lost to the tyranny of the interests of the urban centers in the large states.

A move away from the Electoral College would cast away the last remnants of the federalist balance that the Founders attempted to achieve in their republic. It would exchange the balanced interests of manufacturers in Michigan and Ohio, farmers in Wisconsin and Iowa, social conservatives in the South, technology gurus in Silicon Valley, and investors on Wall street for the volatile opinion of the amorphous majority. It would exchange the balanced consideration of the president of these various interests for the interests of the 51% across the nation that can elect him. Without the Electoral College, the United States would lose federalism, and in its place get majority rule in the White House and in the Supreme Court that the White House appoints. Minorities would be left with only the little influence they have in Congress.

Finally, the third reason that the Electoral College is better than popular election is because, even after 200 years, the system is still the most practical way to elect the President. It is the most practical way to get an election with clear and secure results. In the late 1700s, a popular election was simply not practical due to time

and transportation restraints. But even today with transportation and technological advances, a national popular election is still not practical. First, a nationwide election would mean nationwide recounts. Currently recounts are done at a precinct level,<sup>33</sup> meaning that the individual outcome does not impact the overall outcome of the election very much. A nationwide recount, however, would have a much bigger impact, and would, therefore, lead to more calls for recounts and more protest and unrest over the recounts. Second, a nationwide election would most likely mean an increase in national election rules and federal oversight. These increases in federal control would mean that the behemoth of federal government bureaucracy would have its hands deep in one more area of the American political system, bringing with it incompetence, backlogs, and corruption. With a nationwide election, the executive branch itself could very well be in charge of the election of the executive branch. Because a national popular election would lead to volatile nationwide recounts and federal incompetence, backlogs, and corruption, the Electoral College is still the most practical way to elect the President.

Through the long process of the Constitutional Convention, the Founders agreed on a system that they believed would best balance competing interests in order to form a government of limited means and ends that would endure. The Electoral College is a key part of that system that has thus far endured, even while other components have faded away through Constitutional

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33 Meghan Keneally, *Everything You Need to Know About the Election Recount Efforts*, ABCNews, Dec 9, 2016.

Amendments and Court decisions. In fact, the Electoral College may be one of the most important components of the balanced government that the Founders devised, as it staves off democracy, preserves federalism, and peacefully and securely elects a President every four years. The Electoral College effectively preserves the Founders' Intent for a government that is not democratic, but one of constitutional limits.

*Endnotes:*

1 Madison and Hamilton wrote extensively about faction and its dangers in their defense of the Constitution in the Federalist Papers. Both men specifically mentioned faction in Federalist No. 8, No. 9, No. 10, No. 15, No. 21, No. 27, and No. 51.