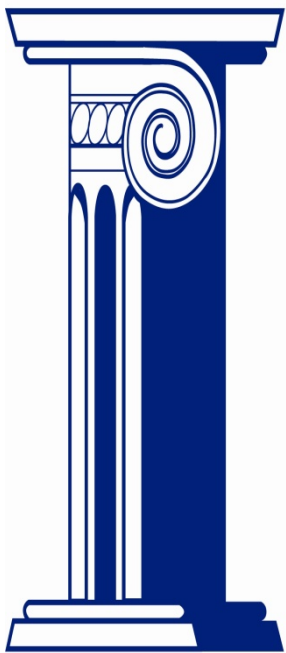


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I N S T I T U T E

# **The Electoral College: Explaining a Constitutional Mystery and Defending American Constitutionalism**

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**POLICY STUDY**  
No. 15-8 • September 2015

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## **Executive Summary:**

The Electoral College is one of the least-understood elements of the United States Constitution. For many Americans it is a mystery, and it is often viewed as antidemocratic and archaic. This is especially true in recent years when the Electoral College has come under fire, and with the approaching 2016 presidential election calls to reform or abolish the Electoral College will once again become more prevalent in political discourse. The most recent attempt to undermine the Electoral College is from the National Popular Vote Movement (NPV).

When the Founding Fathers met in Philadelphia in 1787, they designed a republican form of government that was based upon a written Constitution that limited the power of the federal government. The Constitution was a document that contained separation of powers, checks and balances, and federalism. The Founding Fathers were students of history and political philosophy and understood the dangers of democracy. Therefore, in deciding how to elect the executive, the Framers designed perhaps one of the most inventive and clever designs — the Electoral College. Rejecting the direct popular election of the President, the Framers of the Constitution looked to a more improved way to select a President by ensuring the protection of the states and providing every citizen with an equal vote. The Electoral College must be preserved, because it not only reflects the traditions of American constitutionalism, but provides the best avenue to elect the President and Vice President.

## **Introduction:**

Perhaps one of the most inventive and clever designs by the Framers is the Electoral College. Rejecting the direct popular election of the President, the Framers of the Constitution looked to a more improved way to select a President by ensuring the protection of the states and providing

every citizen with an equal vote. Gary L. Gregg, a political scientist and editor of *Securing Democracy: Why We Have an Electoral College*, wrote:

They [Framers] were convinced it would not be conducive to our common good to confine the political system to a simple and single formula of direct democracy. Rather, they established a complex system anchored to the more solid and varied foundations of a federative republic. As James Madison explained so clearly in *Federalist 39*, our Constitution is like a table with one leg upon the national community of individuals, a second upon the states directly as vital political entities, and yet a third upon a compound bond between the two.<sup>1</sup>

Gregg also argues that the design of the Electoral College reflects the greater role states played during the formation of the Constitution, which provides further evidence of the Founders' commitment to federalism:

The Constitution itself was ratified by the votes of the states as sovereign states, not by a national referendum. Indeed, the ratification process was so constructed as to forbid any majority of states from binding the minority who did not freely choose to enter the new compact. Representation in the lower house of Congress was to be distributed according to population on a roughly one-man, one-vote proportional basis. But in the Senate, the states would exist as equal political entities, no matter their size in geography or population. The central government would act with power to compel individuals directly, but the states were to retain considerable authority over most functions of government, which adds another federal aspect for balance.<sup>2</sup>

The states would have a key role in the election of the President via the Electoral College. Perhaps the Electoral College and federalism are two of the most misunderstood components of American government today, partly because both are being undermined by the growth of big government and progressive democracy. Although the Electoral College is unfairly attacked by being criticized as being both “undemocratic” and “out of date,” the process is actually fairer than if the Constitution had called for a direct election of the President.

As the Framers came to a compromise over representation in Congress with the House of Representatives based on population and the Senate based upon equality, the Electoral College provides the same protection to small states. Under the Electoral College, the number of electors each state receives is based on the total number of Representatives and Senators. The Electoral College provides fair representation to small states; otherwise, just as with today, large states would dominate the election of the President. To summarize how the Electoral College works:

Mirroring the system as a whole, the presidential selection process was to be compound — both national and federal. The distribution of electors would partly

be based on population (representation in the House) and partly on the states as autonomous political units (representation in the Senate). The system would be fair to both large states and small states, more populated regions and more rural communities. The process of selecting electors would occur separately in each state (and the method was left up to the people of the states to choose), and these electors would meet and deliberate within their own states. If the vote of the electors failed to resolve upon a single candidate, the more directly elected House would choose the president; however, House members would vote as single state delegations, adding yet another federal balance.<sup>3</sup>

Those who oppose the Electoral College argue that the system is archaic and undemocratic and that it either needs to be reformed or outright abolished and replaced with a direct national popular vote. The most aggressive movement against the Electoral College is led by supporters of the National Popular Vote (NPV), who advocate an interstate compact of states who agree to pledge their electoral votes to the winner of the national popular vote.

Opponents of the Electoral College fail to understand that not only does the Electoral College work, but it is also a fundamental part of our constitutional system. The Electoral College not only is a part of federalism, but it protects and maintains our two-party system, forces the political parties to build broad-based coalitions, and provides stability. The Founding Fathers rejected a direct national popular vote of the executive and even with close elections in our nation's history — elections of 1824, 1876, 1888, and 2000 — the Electoral College has proven to work.

Abolishing the Electoral College would have a devastating impact on our constitutional form of government.

### **Electoral College Explained:**

The Electoral College is one of the most misunderstood aspects of the Constitution. For many citizens it is a mystery, and just as with the entire Constitution, there needs to be a greater emphasis on civic education in learning and understanding the Constitution as a whole. Before getting involved in some specifics regarding the Electoral College, it is necessary to explain and define how it works. Tara Ross, a lawyer, historian, and the author of *Enlightened Democracy: The Case for the Electoral College* argues that “despite claims to the contrary, the constitutional process of selecting a President, while not straight-forward as a direct popular vote, is not terribly complicated either.”<sup>4</sup> Ross provides a simple way of explaining the Electoral College:

It is easiest to think of the election in two phases: First, the Electoral College vote, and second, the contingent election procedure, which is used only if no candidate wins a majority of electoral votes.<sup>5</sup>

Article II, Section I of the Constitution is where the Electoral College can be found. Article II of the Constitution specifically deals with the Executive Branch of government. Article II, Section I states:

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse [choose] by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse [choose] the President. But in chusing [choosing] the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse [choose] from them by Ballot the Vice President.

The Congress may determine the Time of chusing [choosing] the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.<sup>6</sup>

When the President and Vice President are elected every four years, voters, when they cast their ballots, are actually voting for that particular candidate's "electors":

The process starts with the nomination of partisan slates of electors by party conventions, primaries, or committees in each state. The number of electors in each state is equal to its numbers of Representatives and Senators; the Twenty-third Amendment allots three electors for the District of Columbia, making a total electoral vote of 538.<sup>7</sup>

A presidential candidate needs 270, or a majority of the electoral votes, in order to win the presidential election. Most states with the exception of Maine and Nebraska, whose "electoral votes are divided proportionally to the popular vote in each district," are based on the winner-take-all principle.<sup>8</sup> This means whichever presidential candidate wins the majority vote, then that specific candidate wins the entire state's electoral votes. "The electors pledge themselves to vote for their party's candidates for President and Vice President, although the Constitution permits them to use discretion."<sup>9</sup> Most states (at least half) require electors to support their party's candidates for President and Vice President.<sup>10</sup> As columnist George F. Will wrote: "America has direct popular election of Presidents, but it has it within the states."<sup>11</sup>

Therefore the Electoral College is a vote of the people, because citizens in each state are expressing their presidential preference by casting their ballots for a specific candidate's electors whether they are Republican or Democrat. In the aftermath of the November general election electors will meet in their state capitals and vote, and in January the electoral ballots are officially counted and certified before a joint session of Congress.<sup>12</sup> When there is no one candidate who wins a majority of the electoral votes, the election for President is decided in the House of Representatives, each state getting one vote. This occurred in 1824 when the House of Representatives selected John Quincy Adams to be elected President over the furious objections of Andrew Jackson and his supporters. In regard to the Vice President, the Senate decides on who will serve in that respective constitutional office.

The Electoral College has changed since it was created by the Founding Fathers, especially with the rise of our two-party system and with the Twelfth Amendment to the Constitution:

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — the President of the Senate shall, in the presence of the Senate and House of Representatives, open all

the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President. — The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.<sup>13</sup>

The Twelfth Amendment brought clarity to the Electoral College. Originally electors could vote for two individuals and in 1796 the Federalist candidate John Adams, who had served as our first Vice President under President George Washington, was elected President, but the Federalist political party was divided on who would become Vice President and that resulted in Thomas Jefferson, the leader of the Democratic-Republicans and a political enemy of the Federalists, to be elected Vice President. The Twelfth Amendment allowed electors to vote for a President or Vice President (party-ticket), which solved the problem. As Tara Ross wrote:

The 12<sup>th</sup> Amendment and Article II procedures are fairly similar, except the original Article II provision did not provide for separate voting for President and Vice President. Instead, the candidate with the most votes became President and the runner-up became Vice President. During the country's fourth presidential election in 1800, this combined voting procedure created problems. As a result, the 12<sup>th</sup> Amendment was adopted and governed the next presidential election in 1804.<sup>14</sup>

“America’s method of presidential election remains largely as it was first conceived by the Founders in the summer of 1787,” argues Ross.<sup>15</sup>

### Efforts to Reform or Abolish the Electoral College and the Consequences:

There are different ideas being proposed to either “reform” or abolish the Electoral College. Some of these ideas include:

- Popular vote: Scrap the Electoral College, and whichever candidate gets the most votes gets the top office.
- Popular bonus: Retain the current system, but give the winner of the popular vote extra electoral votes as a reward for carrying a state’s popular vote.
- Congressional districts: Instead of winner-take-all, award electoral votes per congressional district (this is the system in effect in Maine and Nebraska).
- Proportional allocation: Divide each state’s electoral votes according to the popular vote.<sup>16</sup>

Bill Whalen, a Research Fellow at the Hoover Institution, argues that “America’s smaller states stand to lose if any of these reforms take place.”<sup>17</sup>

Opponents argue that the Electoral College system is unfair and people are not getting their votes counted. This is a call for more “democracy” in our political system by having a direct popular vote of the President. Perhaps the most popular reform measure being pushed to circumvent the Electoral College is the National Popular Vote (NPV), which has political support from both Republicans and Democrats.

The mission of NPV is to get state Legislatures to pass legislation to commit their respective state’s electoral votes to the winner of the national popular vote:

The National Popular Vote bill would guarantee the Presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia. The bill has been enacted by 11 jurisdictions possessing 165 electoral votes— 61% of the 270 electoral votes necessary to activate it, including four small jurisdictions (RI, VT, HI, DC), three medium-size states (MD, MA, WA), and four big states (NJ, IL, NY, CA). The bill has passed a total of 33 legislative chambers in 22 states — most recently by a bipartisan 28–18 vote in the Oklahoma Senate, a 57–4 vote in New York Senate, and a 102–33 vote in NY Assembly.<sup>18</sup>

In the past the Iowa Legislature has also had the National Popular Vote bill introduced, but has failed to pass. Advocates of NPV are hoping that enough state Legislatures will pass the National Popular Vote bill, which will “guarantee the Presidency to the candidate who receives the most popular votes in the entire United States.”<sup>19</sup> Supporters of the National Popular Vote bill claim



that it will preserve “the Electoral College, while ensuring that *every* vote in *every* state will matter in *every* presidential election.”<sup>20</sup>

The objective of this legislation is very clear. It is an attempt to fool people by thinking that not only does their vote for President not count, but it will also end up replacing the Electoral College with a direct national popular vote — which our Founding Fathers rejected. The supporters of NPV will argue that they are not abolishing the Electoral College, which technically is true, but their National Popular Vote bill will destroy the Electoral College by committing states electors to the winner of the national popular vote.

Hans A. von Spakovsky, who is a Senior Legal Fellow at The Heritage Foundation, wrote that the “National Popular Vote scheme is an unconstitutional attempt to eliminate the Electoral College, because the proposed state compact would require Congressional approval.”<sup>21</sup> von Spakovsky argues that the NPV plan is “bad public policy” and would:

- Diminish the influence of smaller states and rural areas of the country;
- Lead to more recounts and contentious conflicts about the results of presidential elections; and
- encourage voter fraud.<sup>22</sup>

von Spakovsky also argues that “the NPV plan strikes at the Founders’ view of federalism and a representative republic — one in which popular sovereignty is balanced by structural protections for state governments and minority interests.”<sup>23</sup> John Samples, Vice President and Director of the Center for Representative Government at the Cato Institute, argues:

NPV offers a way to institute a means of electing the President that was rejected by the Framers of the Constitution. It does so while circumventing the Constitution’s amendment procedures. Implicitly, NPV advocates believe that direct election of the President by the greater number of voters weighs so heavily on the normative scales that bypassing constitutional propriety should be accepted. Yet the U.S. Constitution establishes a liberal republic not a majoritarian democracy.<sup>24</sup>

Samples argues that the debate over abolishing the Electoral College “shows a lack of understanding of American political institutions, and if ‘pure democracy’ line were followed, it would encourage the abuse of power and the violation of individual rights.”<sup>25</sup> As Samples further explains:

How does the Electoral College constrain political power? Direct election of the President would reflect the will of a majority. In contrast, the Electoral College provides representation for both the population at large and the states. It thereby tempers and limits the power of majority rule...<sup>26</sup>

The NPV is the most dangerous threat currently to the Electoral College. Certainly opponents of the Electoral College could try to reform or abolish the Electoral College through the constitutional amendment process, but that would be extremely unwise. “If the Founders had wished to create a ‘pure democracy,’ they would have done so,” stated Samples.<sup>27</sup>

Abolishing or reforming the Electoral College not only brings serious constitutional questions, but it also brings up the serious and troublesome consequences in elections. One concern is that states could lose influence if the nation were to adopt NPV. As von Spakovsky explains:

Although the point has been argued that under the current system, swing states garner the majority of candidates’ attention, swing states can change from election to election, and many states that are today considered to be reliably ‘blue’ or ‘red’ in the presidential race were recently unpredictable... While the Electoral College assures that minority interests in a variety of geographic regions are protected, the NPV will help to protect only select urban interests.<sup>28</sup>

“It is far from clear that most states would enjoy more influence over the presidential election in a direct vote system,” stated Samples.<sup>29</sup>

In addition, switching to a direct national popular vote would be the demise of small states as candidates would focus on larger states and areas of greater population centers. As John Samples explains:

First, consider the effects of direct popular election of the President. We would probably see elections dominated by the most populous regions of the country or by several large metropolitan areas. In the 2000 election, for example, Vice President Gore could have put together a plurality or majority in the Northeast, parts of the Midwest, and California.<sup>30</sup>

“By the time a President got himself elected under such a system, he would be indebted to — and would essentially represent — isolated regions, not the country as a whole,” stated Tara Ross.<sup>31</sup> Smaller states under a direct national popular vote would be neglected or outright ignored. Iowa and New Hampshire, which have the first presidential caucus and primary, would be completely ignored and much of the country would be considered “fly-over” country by candidates. Many complain that small states such as Iowa and New Hampshire hold a lot of influence during election years (Iowa is also a swing state), but candidates are forced to practice “retail-politics” in both states, which actually require presidential candidates to meet people and attend small gatherings at pie socials and other events, which provides a richer vetting process for voters than the traditional big city scripted campaign rallies. Small states, such as North and South Dakota, which each have three electoral votes, matter in a presidential election, but they

would be totally ignored if we had a direct popular vote, because in a close presidential election, such as in the election of 2000, three electoral votes were crucial to both major party candidates.

The consequences of this occurring would be as John Samples explains:

The victims of direct elections would be regions too sparsely populated to merit the attention of presidential candidates. Pure democrats would not regret that. But I wonder if a large and diverse nation should write off whole parts of its territory? We should keep in mind the regional conflicts that trouble large and diverse nations...The Electoral College militates against the poison of regionalism by forcing presidential candidates to seek support nationwide. By making sure no state is left behind, it works against disunity.<sup>32</sup>

Another benefit to the Electoral College is that it forces the major two parties (Republican and Democrat) to seek a broad political coalition to win the presidential elections. The best example of this can be found with President Franklin D. Roosevelt and President Ronald Reagan. Both were presidential candidates who built strong party coalitions across the nation. President Richard M. Nixon was successful at building a broad Republican coalition when he brought several southern states into the Republican Party. As von Spakovsky states:

The winner-take-all allocation of electoral votes within 48 states necessitates that a candidate be popular enough to appeal to a broad electorate, including moderate voters, and provides the winner of the presidential race with both finality and a mandate even if his popular vote total is slightly below 50 percent...The Electoral College requires a presidential candidate to win simultaneous elections across 50 states and the District of Columbia...<sup>33</sup>

Undermining the Electoral College will also threaten our two-party system. Political parties in the United States developed as a part of our political culture and our two-party system has remained strong. Throughout our history there have been multiple third-party candidates, but often third-party candidates do not attract a broad coalition, although President Theodore Roosevelt in the 1912 presidential election came in second and even beat the Republican candidate President William Howard Taft. Roosevelt was an exception because his Bull Moose or Progressive Party was led by a very popular former President, who won the support of a broad-based progressive movement against a more conservative Republican William Howard Taft. In the 1912 presidential election the top two vote earners, Roosevelt and Democrat Woodrow Wilson, who won the election, were both progressive candidates.

Third-party candidates can spoil an election. This occurred most recently in 1992 with Reform Party candidate Ross Perot, who many argue prevented President George H.W. Bush from winning reelection, and in 2000 when Green Party nominee Ralph Nader took votes away from the Democratic candidate Vice President Al Gore. Many Republicans are nervous about this

currently with the upcoming 2016 campaign in regard to the possible independent run by businessman Donald Trump.

The Electoral College provides stability within our political party system and forces candidates, just as with the example of Franklin D. Roosevelt and Ronald Reagan, to form broad coalitions. Eliminating the Electoral College and replacing it with a direct popular vote would allow more opportunity for more third parties, as well bringing in the problem of runoffs and potential for greater voter fraud, which is already a serious problem confronting campaigns at all levels. As Tara Ross states:

Granted, America is a long way away from such a multi-party, fractured political system. Psychologically, if nothing else, the electorate is used to thinking in terms of a two-party system. It could take a while before the system deteriorated. However, if the Electoral College facilitated the growth of the two-party system that has brought so much stability to American elections, would it not be natural to assume that eliminating the Electoral College would eventually lead to the end of the nation's stable two-party system?<sup>34</sup>

Political historian and commentator Michael Barone argues that the Electoral College provides "great institutional support" to the two-party political system.<sup>35</sup> As Barone wrote:

Some contend the Framers expected that the Electoral College would be made up of local notables, who would ordinarily vote for prominent state or regional leaders, and that the House of Representatives would then choose among them. But it was clear by 1796 and 1800 that there would be national parties who would choose national nominees, and that continued to be the case after the demise of the Federalist party, when the single major party, the Republican-Democrats, chose their nominees in a congressional caucus. After that system broke down in 1824, competition between two national parties promptly reappeared. The Electoral College became the scoreboard that determined the winner of the contest between these two parties.<sup>36</sup>

The Electoral College brings stability and forces the two major political parties (Republicans and Democrats) to build national coalitions in order to win the presidential election. As we approach the 2016 presidential election we can already see both Republican and Democratic candidates who are running for their respective party's presidential nomination trying to appeal to a broad coalition of voters, especially in swing states such as Ohio and Pennsylvania, among several others. As an example of this, several Republican candidates are trying to rebuild the Reagan coalition, which not only included rank-and-file Republicans, but also Southerners and blue-collar Democrats who supported both Reagan and Richard M. Nixon.

As Barone argues:

Our two major parties may be awkward beasts, ideologically incoherent much of the time, deeply divided within themselves on occasion, perceptibly different in different regions. But they have proved to be the best mechanisms for achieving acceptable results in the republican framework erected by the Framers.<sup>37</sup>

“Keeping the Electoral College will tend to keep our two major parties strong, and capable of presenting choices acceptable to a majority of Americans,” argues Barone.<sup>38</sup>

The issue of recounts and voter fraud is a serious question that needs to be addressed in regard to this debate over the Electoral College. “Under the NPV, recounts would be both more prevalent and more problematic,” argues Hans A. von Spakovsky.<sup>39</sup> von Spakovsky notes that:

The basic principles of federalism — the principles upon which this nation was founded — were used to design the U.S. election process. As a result, federal elections are decentralized affairs; each of the 50 states and the District of Columbia run their own elections on the first Tuesday of November every four years or for a varying period before then in early voting states. Every state has different procedural rules for the administration of elections, from the definition of what constitutes a vote to how recounts are triggered and conducted.<sup>40</sup>

“The winner-take-all system for electoral votes reduces the possibility of a recount since popular vote totals are often much closer than the Electoral College totals,” argues von Spakovsky.<sup>41</sup> The thought of a national recount would be far worse than the recount in Florida during the aftermath of the 2000 presidential election. As von Spakovsky argues:

The prospect of a candidate challenging ‘every precinct, in every county, in every state of the Union,’ should be abhorrent to anyone who witnessed the drama, cost, delay, and undue litigation sparked by the Florida recount of 2000. Worse still, there is little chance that the ballots would be recounted in a consistent manner across the nation or that there would be a national, as opposed to piecemeal, recount.<sup>42</sup>

In addition, election laws in each state and in the District of Columbia are different, and this would also lead to confusion and problems in a possible recount:

Election laws vary by state, which means that 50 different standards (plus the District of Columbia’s) would be applied to a recount, and no state or group of states that wanted a national recount could force other states to participate. Ironically the NPV, which is supposed to make each vote count equally, would likely result in varied and even conflicting decisions among the states as to the validity of each vote. Moreover, while the total of the national popular vote may

be close, the vote totals in particular states may not be close as all — certainly not close enough to trigger a recount under that particular state’s recount laws even if a losing candidate believes a national recount is warranted.<sup>43</sup>

Voter fraud is another problem that will emerge with a direct national popular vote. “Currently, a fraudulent vote is counted only in the district in which it was cast and therefore can affect the electoral votes only in that particular state,” stated von Spakovsky.<sup>44</sup> Although voter fraud is currently a serious issue, which is why voter identification is so crucial, it will only make the situation worse with a direct national election as von Spakovsky argues:

Under the NPV, however, vote fraud in any state would affect the aggregate national vote. To a would-be wrongdoer, this is a drastic increase in the potential benefit obtained from casting fraudulent ballots. Fraudsters would be encouraged to engage in fraud to obtain further votes for their national candidate. Under the current system, there are some states where such fraud would make no difference, but with NPV, every fraudulent vote obtained anywhere could make the difference in changing the outcome of the national race. This prospect is even more worrisome when one considers how much easier it is to cast fraudulent votes in strongly partisan neighborhoods and one-party districts where there are no (or few) members of the opposition party to work as election officials or poll watchers.<sup>45</sup>

As a historical example, Hans A. von Spakovsky illustrates the major concern with voter fraud with the close presidential elections of 1876 and 1888. In 1876, similar to the election in 2000, both the Republican Rutherford B. Hayes and the Democratic candidate Samuel Tilden claimed that they had won the election and a few states’ electoral votes were in dispute. Tilden had won the popular vote, but there was question about vote fraud in the Southern states that questioned the actual results of the popular vote.<sup>46</sup> In the close election of 1888 Democratic President Grover Cleveland won the popular vote, along with the South, but Republican Benjamin Harrison won “20 of 25 states.”<sup>47</sup>

Overall NPV is bad policy and state Legislatures should not be fooled into believing the “more democracy” arguments of those who wish to abolish the Electoral College. Hans A. von Spakovsky provided an excellent summary on why the NPV is bad policy when he wrote:

The NPV is both unconstitutional and bad public policy. It would devalue the minority interests that the Founders sought to protect, create electoral administrative problems, and radicalize the U.S. political system. If the proponents of the NPV believe that this change is necessary, they should convince Congress and the American people and use the proper method for amending the Constitution.<sup>48</sup>

The Electoral College is part of the Constitution, and therefore, part of our constitutional system, which must be preserved. Already as a nation we have drifted away from constitutional limited government and abolishing the Electoral College will further harm our constitutional republic. “The Constitution has succeeded precisely because federal constraints in the Electoral College have preserved the value of every American’s rights, interests, and votes,” wrote George Grant in *The Importance of the Electoral College*.<sup>49</sup>

### **The Electoral College and the Constitution:**

Perhaps one common mistake which leads many to dismiss the Electoral College is the fact that the term “democracy” is overly used in our political vocabulary. Most Americans refer to the United States as a democracy, but the Founding Fathers rejected democracy in favor of a republican form of government based on a written Constitution. The Founding Fathers had a pessimistic view of human nature. Many of the Founding Fathers understood the danger of democracy based on Western Civilization. As Bruce Thornton, a Research Fellow at the Hoover Institution, wrote:

Given that colonial America’s schools were steeped in the literature, history, and philosophy of ancient Greece and Rome, Americans of the late eighteenth century were intimately familiar with the follies and failures of Athenian democracy, as well as the two millennia of commentary on them.<sup>50</sup>

A republic, which is the basis of our political system, consists where “sovereign power rests in the people as a whole but is exercised by representatives chosen by a popular vote.”<sup>51</sup> As Gary L. Gregg II wrote in *Securing Democracy: Why We Have an Electoral College*:

The Founders were republicans. They were dedicated to a political system that would be based on ‘the consent of the governed’ and that would be represented in form and function. The men that held the power to make decisions for society would be representatives of the people that were somehow accountable to them and would not be likely to threaten their liberties or those of their freely chosen state and local governments.<sup>52</sup>

The Constitution also provides protections for both the majority and the minority. Through the constitutional system of checks and balances, separation of powers, federalism, and the Bill of Rights, liberties are protected through the Constitution. The people are sovereign under the Constitution and the principle of majoritarianism. Matthew Spalding, a constitutional scholar, states:

In the American theory of constitutional government, sovereignty exists in the people, who in turn delegate certain powers to the government. Government, in



order to be legitimate, must reflect the consent of the governed. In this sense, the United States is a popular form of government. But popular governments can vary as to the way in which they reflect democratic opinion. Strictly speaking, a pure democracy is a system by which the people rule directly, voting on each law and policy.<sup>53</sup>

As Spalding argues, in our republican form of government “lawmaking is done not by the people themselves, but by individuals they have chosen to represent them in the government.”<sup>54</sup> It is vital to understand why the Founding Fathers rejected the idea of a pure democracy, as Spalding explains:

The American Founders were wary of the passions of democracy, and wanted to encourage a politics of settled and thoughtful public opinion. They designed a form of popular government in which the people govern — equal rights means popular consent — but their consent is reflected through a representative process, under rules and regulations set down by a written Constitution, which allows for majority rule at the same time that it protects minority rights.<sup>55</sup>

“The Founders sought to correct the historic problem of majority tyranny while remaining true to the principle of popular government,” argued Spalding.<sup>56</sup> In regard to the Electoral College, it protects and provides equality in the election process. As Robert A. Levy, Chairman of the Cato Institute and a constitutional scholar, wrote:

The Framers meticulously crafted an electoral model that reduced sectionalism and reinforced minority rights. Instead, popular voting would favor regions with higher voter density and large states over small. ‘One man, one vote’ may be the rallying cry of a democracy; but that is not our form of governance.<sup>57</sup>

The Electoral College is fundamental because it protects both the people, and the states and replacing it with a direct popular vote or making it more “democratic” would result in extreme majoritarianism. As Spalding argues:

On the other hand, consent does not mean mere majoritarianism — that anything and everything the majority demands is right. Law making by consent is not the simple translating of majority will into public policy but is the product of settled reasoning consistent with a proper understanding of the first principles of liberty...Just because government is based on consent does not mean that it is incapable of violating equal rights. In 1934, for instance, 90 percent of German citizens officially approved Adolf Hitler as Fuhrer of Germany. To itself be legitimate, popular consent must understand and respect the rights and responsibilities of constitutional government, often despite the passions of the temporary majority.<sup>58</sup>



“We are bound to accept the rule of the majority, but consent is always limited by the higher principle that the rights of all must be equally respected and enforced,” noted Spalding.<sup>59</sup> In other words, the Founding Fathers, through the Constitution, “sought to correct the historic problem of majority tyranny while remaining true to the principle of popular government.”<sup>60</sup> The Bill of Rights was also designed to protect against majoritarian rule:

We should not forget that one of the major purposes of the Bill of Rights is to protect us from majoritarian rule — otherwise, popular democracy could abolish freedom of religion, limit political speech, or restrict the ability to assemble and associate with disfavored minorities.<sup>61</sup>

The Electoral College often is under fire for being “antidemocratic” by critics who believe that the President of the United States should be elected by a popular vote. Critics of the Electoral College and those who do not understand how it works fail to take into consideration that the Electoral College is an essential part of our constitutional system. As Tara Ross wrote:

The Founders deemed the Electoral College to be one of the best features of the Constitution that they created. I imagine they would consider it a great pity that most Americans now believe the Electoral College to be an anachronism, an institution that serves no real purpose...The world has changed since that summer in Philadelphia [Constitutional Convention of 1787] when the Founders drafted a new form of government. As a result, the Electoral College does not operate exactly as anticipated. It does, however, still serve the purposes that it was intended to serve.<sup>62</sup>

It is important to not only understand the Electoral College, but also to place it within the context of the Constitution.

The Constitution is a written document that limits the powers of the federal government. The Constitution limits government and protects liberty through the doctrines of checks and balances, separation of powers, and federalism. It is also important to keep in mind that under the Constitution the people are sovereign. “The people delegate to government only so much power as they think it prudent for government to exercise; they reserve to themselves all the powers and rights that are not expressly granted to the federal or state or local governments,” wrote Russell Kirk in *The American Cause*.<sup>63</sup> James Madison, the chief architect of the Constitution and who is considered the “Father of the Constitution,” stated in *Federalist Paper 45*:

The powers delegated by the proposed constitution to the federal government are few and defined. Those which remain in the state governments, are numerous and indefinite.<sup>64</sup>

Madison in *Federalist 45* was explaining the principle of federalism. This principle is further illustrated within the Constitution through the Tenth Amendment, which states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>65</sup>

In *The Importance of the Electoral College*, Dr. George Grant summarized the principles of the Constitution:

Drawing on great wealth of sage knowledge and practical experience, the Founding Fathers of the United States codified in their national charter a host of carefully wrought provisions designed to preserve the freedoms and liberties of the people. They designed a government with a series of interlocking checks and balances — not only were the executive, legislative, and judicial branches given spheres of authority over which the others could not interfere, localities, regions, states, and even individuals were afforded certain hedges against the imposition of tyranny. Powers were carefully separated. Authorities were circumspectly delineated. Rights were vigilantly secured.<sup>66</sup>

Although with the formation of the Constitution the Founding Fathers’ created a stronger central government, it must be understood that the states have a vital role to play through federalism. Today, federalism has been undermined by the growth and power of the federal government, but this was not the original intent of the Framers. As Gerard V. Bradley, a constitutional scholar, wrote:

First, the Constitution obviously establishes a federal system in which the national government has limited, enumerated powers. This federal power lacks plenary government authority. That is reserved to the states. The state constitutions set up governments with authority to legislate on family structure, religion, education, public morals — all the glue that holds civil society together. Here are governments fully in charge of an anchor: state authorities that the national Constitution presupposes, depends upon, and protects in many ways (including the guarantee to each of a ‘republican form of government’) and without which there could be no national government.<sup>67</sup>

“After all, without the states there could be no Senators, no Electoral College, no election of House Members,” argues Bradley.<sup>68</sup> The Electoral College, just as with other aspects of the Constitution, was an object of compromise. Clearly the Founding Fathers did not agree and in fact rejected the idea of not only a multiple-executive, but electing the executive based on a popular vote. The Electoral College was a unique compromise, which preserves not only a system of equality, but also symbolizes the idea of federalism. As President Ronald Reagan stated:

The very basis for our freedom is that we are a Federation of Sovereign States. Our Constitution recognizes that certain rights belong to the states and cannot be infringed upon by the National government. This is the guaranty that small states or rural, sparsely populated areas will have a proportionate voice in national affairs. Those who want to do away with the Electoral College really mean they want the President elected in a national referendum with no reference as to how each state votes. Thus a half dozen rural states could show a majority for one candidate and be out-voted by one big industrial state opting for his opponent.<sup>69</sup>

The Great Compromise at the Constitutional Convention of 1787 is another example to illustrate President Reagan's point. When the Constitutional Convention convened, one of the major debates was between large and small states over representation. The compromise which was hammered out was a balance between the large and small states. The House of Representatives would be based upon population and elected directly by the people, and the result would be larger states having more representatives in the House. In order to balance and protect the small states, the United States Senate would have equal representation — each state having two Senators that would be elected by the state Legislatures. Today, because of the 17<sup>th</sup> Amendment to the Constitution, Senators are elected directly by the people. Even though large states had an advantage in the House, small states could counter that with equal representation in the Senate, and as already mentioned, the Framers implemented a system of separation of powers and checks and balances into the constitutional system to prevent tyranny of the majority. As Hans A. von Spakovsky states:

In creating the basic architecture of American government, the Founders struggled to satisfy each state's demand for greater representation while attempting to balance popular sovereignty against the risk posed to the minority from majoritarian rule.<sup>70</sup>

The Electoral College works in a similar way that protects smaller states and forces more competition in the campaign process. If we elected the President by a direct popular vote, then as Reagan stated large states would easily dominate over small states. Opponents of the Electoral College will argue that this is not fair, but what do they say about the Senate? As George F. Will asks:

Do critics want to abolish the Senate as well? Delaware, the least populous state in 1789, was understandably the first to ratify the Constitution with its equal representation of states in the Senate: Virginia, the most populous, had eleven times more voters. Today Wyoming's Senators' votes can cancel those of California's Senators, who represent sixty-nine times more people. If that offends you, so does America's constitutional federalism. The electoral-vote system, like the Constitution it serves, was not devised by, and should not be revised by simpleminded majoritarians.<sup>71</sup>

Tara Ross agrees with George F. Will when she wrote:

To be logically consistent, Electoral College opponents should criticize the other federalist features of our government as they have the Electoral College. After all, disparaging the Electoral College as ‘unfair’ requires that similar criticisms be directed at the Senate or at other, similar features of our government that were created as protections for small states. No one, however, is seriously questioning the right of the Senate to exist. The Electoral College is simply one of several constitutional devices created by the Framers to protect the diverse interests of the states.<sup>72</sup>

Robert A. Levy argues correctly that “we are a constitutional republic; political outcomes are not always determined by majority rule...For example, it takes two-thirds of Congress to override presidential vetoes, approve treaties, impeach a President, or expel a member of Congress.”<sup>73</sup>

The Electoral College is clearly rooted within our constitutional framework and must be preserved. As Tara Ross wrote:

America's election systems have operated smoothly for more than 200 years because the Electoral College accomplishes its intended purposes. America's presidential election process preserves federalism, prevents chaos, grants definitive electoral outcomes, and prevents tyrannical or unreasonable rule. The Founding Fathers created a stable, well-planned and carefully designed system — and it works. Past elections, even the elections of Presidents who lost the popular vote, are testaments to the ingenuity of the Founding Fathers. In each case, the victor was able to succeed only because his opponent did not build the national coalition that is required by the Electoral College. In each case, smaller states were protected from their larger neighbors. In each case, the presidential election system functioned effectively to give the country a President with broad-based support. Alexander Hamilton was right when he described the Electoral College in *The Federalist* No. 68. Perhaps the Electoral College is imperfect — but a perfect solution is doubtless unachievable. Nevertheless, the presidential election process devised by the Framers is certainly excellent.<sup>74</sup>

Perhaps it is best to close by considering the thoughts of the late Senator Daniel Patrick Moynihan, who although not a conservative, understood the importance of the Electoral College. Moynihan argued that abolishing the Electoral College would be “the most radical transformation in our political system.”<sup>75</sup> “We have a republic. It has endured. We trifle with its arrangement at a risk not only to the future of that republic, but, most assuredly, to the reputation of this generation of political men and women,” stated Moynihan.<sup>76</sup>

There are a plethora of political and cultural problems facing the United States today. Much of the focus is on economic and foreign policy-related questions, but as a nation we must be prepared to defend our Constitution. Already we have witnessed a great deterioration of constitutional limited government, and defending the Electoral College is vital. Defending the Electoral College will require citizens to renew a spirit of constitutionalism within the country. As political philosopher Claes G. Ryn wrote:

Many defenders of the old American Constitution seem to think that all that would be needed in order to save the Constitution would be to persuade Americans of the correct interpretation of the Framers' intent. These 'constitutionalists' live in a world of abstractions, a dreamworld of their own. The argument here advanced should have demonstrated that there is only one way to revive American constitutionalism, and that is for Americans, from leaders to people in general, to revive or freshly create something like the older type of morality and to start living differently. Should that not be a likely development, the future of American constitutionalism is bleak.<sup>77</sup>

Eliminating or reforming the Electoral College is a mistake, and it must be defended. As the late Senator Barry M. Goldwater warned: "We can be conquered by bombs or by subversion; but we can also be conquered by neglect — by ignoring the Constitution and disregarding the principles of limited government."<sup>78</sup>

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<sup>1</sup> Gary L. Gregg, II, "The Origins and Meaning of the Electoral College," in *Securing Democracy: Why We Have an Electoral College*, edited by Gary L. Gregg, II, ISI Books, Wilmington, Delaware, 2001, pp. 20-21.

<sup>2</sup> *Ibid.*, p. 21.

<sup>3</sup> *Ibid.*

<sup>4</sup> Tara Ross, *Enlightened Democracy: The Case for the Electoral College*, World Ahead Publishing, Inc., Los Angeles, California, 2004, p. 17.

<sup>5</sup> *Ibid.*, pp. 17-18.

<sup>6</sup> The Heritage Foundation, "United States Constitution, Article II, Section 1," *The Heritage Guide to the Constitution*, The Heritage Foundation, Washington, D.C., <<http://www.heritage.org/constitution/#!/articles/2/essays/80/electoral-college>> accessed on August 10, 2015.

<sup>7</sup> Jack C. Plano and Milton Greenberg, *The American Political Dictionary*, 11<sup>th</sup> edition, Harcourt College Publishers, New York, 2002, p. 83.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> George F. Will, "Foreword," *Enlightened Democracy: The Case for the Electoral College*, World Ahead Publishing, Inc., Los Angeles, California, 2004, p. x.

<sup>12</sup> *Ibid.*

<sup>13</sup> "Twelfth Amendment, United States Constitution," *The Heritage Guide to the Constitution*.

<sup>14</sup> Ross, p. 17.

<sup>15</sup> *Ibid.*, p. 29.

<sup>16</sup> Bill Whalen, "Three Cheers for the Electoral College," *Hoover Daily Report*, October 6, 2004, Hoover Institution, <<http://www.hoover.org/research/three-cheers-electoral-college>> accessed on August 15, 2015.

<sup>17</sup> Ibid.

<sup>18</sup> National Popular Vote, “Explanation of National Popular Vote Bill,” National Popular Vote, <<http://nationalpopularvote.com/pages/explanation.php>> accessed on August 15, 2015.

<sup>19</sup> National Popular Vote, “Electoral College is 61% of the Way to Being Fixed,” National Popular Vote, <<http://nationalpopularvote.com/index.php>> accessed on August 15, 2015.

<sup>20</sup> Ibid.

<sup>21</sup> Hans A. von Spakovsky, “Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme,” *Legal Memorandum, No. 73*, October 26, 2011, The Heritage Foundation, Washington, D.C., <<http://www.heritage.org/research/reports/2011/10/destroying-the-electoral-college-the-anti-federalist-national-popular-vote-scheme>> accessed on August 15, 2015.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> John Samples, “A Critique of the National Popular Vote Plan for Electing the President,” *Policy Analysis, No. 622*, October 13, 2008, Cato Institute, Washington, D.C., <<http://object.cato.org/sites/cato.org/files/pubs/pdf/pa-622.pdf>> accessed on August 15, 2015.

<sup>25</sup> John Samples, “Keep the Electoral College,” Cato Institute, December 21, 2000, <<http://www.cato.org/publications/commentary/keep-electoral-college>> accessed on August 15, 2015.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> von Spakovsky, p. 7.

<sup>29</sup> Samples, “A Critique of the National Popular Vote Plan for Electing the President,” p. 7.

<sup>30</sup> Samples, “Keep the Electoral College.”

<sup>31</sup> Ross, p. 81.

<sup>32</sup> Samples, “Keep the Electoral College.”

<sup>33</sup> von Spakovsky, p. 9.

<sup>34</sup> Ross, p. 100.

<sup>35</sup> Michael Barone, “The Electoral College and the Future of American Political Parties,” in *Securing Democracy: Why We Have an Electoral College*, edited by Gary L. Gregg II, ISI Books, Wilmington, Delaware, 2001, pp. 82-83.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid., pp. 85-86.

<sup>38</sup> Ibid., p. 86.

<sup>39</sup> von Spakovsky, p. 8.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid., pp. 8-9.

<sup>44</sup> Ibid., p. 10.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid., p. 11.

<sup>49</sup> George Grant, *The Importance of the Electoral College*, Vision Forum Ministries, San Antonio, Texas, 2004, p. 55.

<sup>50</sup> Bruce S. Thornton, *Democracy’s Dangers & Discontents: The Tyranny of the Majority from the Greeks to Obama*, Hoover Institution Press, Stanford, California, 2014, p. 55.

<sup>51</sup> James McClellan, *Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government*, Liberty Fund, Indianapolis, Indiana, 2000, p. 253.

<sup>52</sup> Gary L. Gregg II, “The Origins and Meaning of the Electoral College,” in *Securing Democracy: Why We Have an Electoral College*, edited by Gary L. Gregg II, ISI Books, Wilmington, Delaware, 2001, p. 13.

<sup>53</sup> Matthew Spalding, *We Still Hold These Truths: Rediscovering Our Principles, Reclaiming Our Future*, ISI Books, Wilmington, Delaware, 2009, p. 118.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid., p. 119.

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- <sup>58</sup> Spalding, p. 49.
- <sup>59</sup> Ibid.
- <sup>60</sup> Ibid., p. 119.
- <sup>61</sup> von Spakovsky, p. 4.
- <sup>62</sup> Ross, p. 12.
- <sup>63</sup> Russell Kirk, *The American Cause*, ISI Books, Wilmington, Delaware, 2004, p. 68.
- <sup>64</sup> James Madison, “Federalist No. 45,” in *The Federalist: The Gideon Edition* by Alexander Hamilton, John Jay, and James Madison, edited by George W. Carey and James McClellan, Liberty Fund, Indianapolis, Indiana, 2001, p. 241.
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- <sup>66</sup> Grant, p. 7.
- <sup>67</sup> Gerard V. Bradley, *Religious Liberty in the American Republic*, First Principles Series, The Heritage Foundation, Washington, D.C., 2008, p. 24.
- <sup>68</sup> Ibid., pp. 24-25.
- <sup>69</sup> Ronald Reagan, quoted by Tara Ross, *Enlightened Democracy*, p. 75.
- <sup>70</sup> von Spakovsky, p. 3.
- <sup>71</sup> George F. Will, “A College Education,” in *With a Happy Eye But...America and the World, 1997-2002*, The Free Press, New York, 2002, p. 240.
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- <sup>73</sup> Levy.
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- <sup>76</sup> Ibid., p. 100.
- <sup>77</sup> Claes G. Ryn, “Power Without Limits: The Allure of Political Idealism and the Crumbling of American Constitutionalism,” *Humanitas*, Vol. XXVI, Nos. 1 and 2, 2013, National Humanities Institute, <<http://www.nhinet.org/ryn26-1.pdf>> accessed on August 15, 2015.
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