

WHAT'S HAPPENING

In 2016, Hillary Clinton lost the U.S. presidency to former President Donald Trump, despite the fact that she had received nearly 2.9 million more votes than her opponent. This is not an unheard-of phenomenon in American politics. In five different election cycles – in 1824, 1876, 1888, 2000, and 2016, respectively – the candidates who received the most votes did not win. In these cases, the discrepancy between the popular vote winner and the president-elect was due to the existence of a unique process known as the Electoral College.

Established by Article II, Section I, of the U.S. Constitution, the Electoral College is a temporary group of "electors" formed every four years.3 Unlike other elections in the United States, like those for members of Congress, American presidents are not elected by the nationwide popular vote, but by the votes cast by those electors.4 Oftentimes, the voting patterns at the Electoral College reflect the popular vote winners. At pivotal moments in recent decades, however, the Electoral College chose the candidates who had lost the popular vote, making George W. Bush president in 2000, and Donald Trump in 2016.5 With the upcoming 2024 presidential election, and as political polarization continues to dominate American domestic politics, the Electoral College may once again prove to be a critical determinant of the American presidency.6

The Electoral College's complex struc-

ture has left its function inadequately understood by the general public, both in regional and global terms. Popular belief continues to assume that the votes of individual American citizens determine who gets to become president, overlooking the fact that the groups of electors from each state are the ones who, in fact, have the final say.7 In total, there are 538 electors, distributed among the fifty states and the District of Columbia. Each state directly gets two electoral votes, corresponding to its two Senators in Congress. The rest of the electoral votes are determined according to the distribution in the House of Representatives, which is proportional to the state's population.8 This means that more populous states have more votes in the Electoral College. California and Texas, for example, have 55 and 38 votes, respectively.9 Less populous states, such as Vermont, Wyoming, and Alaska have three votes each.¹⁰ Overall, 270 out of 538 electoral votes are needed to win the presiden-Cy.11

Electors are appointed by the political parties in each state. Typically, states have a "winner-takes-all" system, which awards the total number of a state's electoral votes to the candidate who receives the majority of the popular vote in the state. Commonly, the electors cast their votes for the president per the statewide popular vote, but they are not constitutionally mandated to do so. Since 1789, there have been more than 150 electors who did not vote for their party's chosen candidate. This has



raised questions regarding whether or not the American electoral system truly reflects the democratic ideals embedded within the country's constitution.

Especially since the turn of the century, the Electoral College has been criticized as an inequitable institution. advantaging less populous states in presidential elections.¹⁴ In 2016, former President Donald Trump won 306 electoral votes, compared to the 232 won by Hillary Clinton, despite him having lost the popular vote by a nearly 2% margin. 15 Such divergent results are caused by the demographic distribution of the American public. Democratic voters tend to live in populous states, which have lower representation in the Electoral College per capita. 16 For instance, 1% of the three electoral votes cast in Wyoming represent around 190,000 residents, while in California, 1% of the 55 electoral votes represent more than 750,000 people.¹⁷ As urban and non-white communities tend to live in more populous states, the Electoral College has been accused of "effectively [diluting] the votes of African Americans, Latinos, and Asian Americans."18 Accordingly, in the 2016 election, Donald Trump's main electoral base - white, working class Americans – generally resided in more rural and less populous states, amounting to a smaller number of popular votes but a greater share of Electoral College votes, which ultimately awarded him the presidency. 19 Against the possibility of another such outcome, many actors, both within and outside of Congress, have called for amending

the Electoral College process before the next presidential cycle. However, considering the divisiveness which surrounds the electoral reform process, and the resulting barriers to passing such a proposal through Congress, it is yet to be seen when and how such a change can be implemented effectively.

WHY IS IT HAPPENING?

The contemporary challenges standing in the way of reforming or abolishing the Electoral College stem from its centuries-long presence and status within the Constitution. The Electoral College was first established as a response to the political dynamics of the late 18th century United States. It was devised at the Constitutional Convention in Philadelphia in 1787 as a compromise between two leading proposals at the time on how the president should be elected, either by Congress or by the nationwide popular vote.²⁰ Election by Congress was included in the first draft of the American Constitution.21 However, opponents of this method argued that a congressional election could lead to opportunities for wrongdoing and corruption between the executive and the legislative branches.²² The resulting conflicts of interest would jeopardize the separation of powers.²³ Proponents of a congressional election, on the other hand, were concerned that the popular vote might lead to a "democratic mob steering the country astray."24 There



were concerns about whether the population could make informed decisions when voting as well. In the 18th century, a significant majority of would-be voters, especially in rural areas of the country, lacked the resources needed to learn about a campaigning president's agenda.25 At the time the electoral system was being debated, delegates were operating without precedent, and making assumptions about what the relevant system for presidential elections could, and should, look like. As they did not have a point of reference for a nationwide popular vote, especially for how it would be cast and how it would be counted, arguments for congressional elections or for the popular vote came not from observations of how the system worked in other countries, but from how delegates estimated the choice would play out. Ultimately, "electoral intermediaries" emerged as a compromise between the two leading methods.²⁶ The intermediaries would not be selected by Congress, nor be voted upon by the public. Instead, they would be chosen by each state and vote for the president, in an informed manner, in accordance with the popular sentiment in their state.²⁷

The Electoral College presented another advantage to the democratic process, which continues to be cited today as an argument against abolishing the institution. In the late 18th century, the United States still harbored a significant degree of federalist sentiment, whereby states wished to maintain legislative independence at the state level and a

notable say in federal policy-making at the same time. The Electoral College ensured that larger states, due to the greater number of presidential votes cast by their residents, would not be unduly represented in national politics compared to smaller states. The institution would provide "needed checks and balances" for American democracy, ensuring fair representation among states.²⁸ This argument is popular in contemporary times as well. By giving electoral votes to each state, the Electoral College stands in the way of "one region, or a handful of major metropolitan areas, from controlling the White House. "29 By this logic, the Electoral College ensures that "every state matters," by turning "swing states into microcosms of America, where candidates are forced to go beyond the big cities and reach out to all kinds of people."30

Because of these very specific distribution dynamics, presidential candidates are disincentivized from solely campaigning in populous states. The population of California and New York, combined, for instance, totals nearly 60 million, which equates to more than the total population of the 15 least populous states in the U.S.31 Proponents of the Electoral College insist that the institution inhibits large states from exercising "something like colonial rule over the rest of the nation."32 As more votes would be cast in populous states, they posit that such states will have disproportionate sway over national policy, potentially disadvantaging smaller states



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on the federal level.

Beyond arguments for fair representation among states, contemporary scholars maintain that another more insidious factor played a part in the establishment of the Electoral College, and continues to do so. Wilfred Codrington, Professor of Constitutional Law at Brooklyn Law School, has called the Electoral College "the nation's oldest structural racial entitlement program," arguing that out of all the considerations for the existing electoral process, "race and slavery were perhaps the foremost" determinants.33 During negotiations of the electoral system in the 18th century, a primary issue was how to calculate the populations of states, from which the number of electoral votes would be distributed. The logic at the time was that if slaves would be counted, the distribution of the population would greatly change. Slaveholding states, predominantly in the South, boasted significantly higher populations, even though enslaved people could not vote.34 On the contrary, Northern states had smaller populations overall, but more individuals who could vote.35 At the time, voting rights generally belonged to white males, who typically owned property, and therefore paid taxes.³⁶ In the end, what is called the "three-fifths compromise" was reached, meaning that in the population census for each state, enslaved individuals would be counted not as one, but as three-fifths of a person. The document outlining the policy then read, "Representatives...shall be apportioned among [the states] accord-

ing to their respective [population], which shall be determined by adding to the whole number of free persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."37 Through this provision, white slaveholders residing in Southern states could benefit from a large population comprised of enslaved peoples, gaining greater representation in the Electoral College. Considering this historical context, and as the Electoral College continues to marginalize urban and largely non-white populations residing in large states, critics have argued that its continued existence perpetuates historically racist dynamics. Though this lens, the Electoral College represents the embodiment of the racial foundations that have been built into all structures of governance in the country, making its abolition the only just way forward.

The dichotomous arguments outlined thus far reflect the bipartisan character of the Electoral College. On the one hand, as it necessitates an intermediary between the popular vote and the president-elect, it has been criticized as undemocratic, reflecting outdated contexts that stand in the way of achieving true racial equality in contemporary American politics. On the other hand, proponents continue to maintain that the institution is critical in ensuring that the president-elect represents the will of the whole nation, not merely that of large states. In Congress, these contrarian positions have played out through a series of legislative roadblocks, inhibit-



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ing any real change or reform to the institution.

WHAT'S BEING DONE ABOUT IT?

Despite these obstacles, recent polling shows that the American public is largely in favor of abolishing the Electoral College. Last August, the Pew Research Center reported that 63% of American adults support changing the electoral system so that the president is elected by the nationwide popular vote.38 This sentiment builds upon centuries of dissatisfaction with the process. Over 700 proposals to reform the institution have been introduced in Congress,³⁹ 360 of which specifically sought to abolish it.⁴⁰ A proposal made in 1844, as early as forty years after the Constitution was established, read, "Any State, instead of appointing electors of the President and Vice President, [should], by statute of such State, authorize the people thereof to vote directly for President and Vice President."41 Similar attempts continued into the 20th century. In 1934, a proposal in favor of abolition failed to pass by only two votes in the Senate. Again in 1969, a proposal to elect the president through the popular vote failed in the Senate as well.42

The Electoral College can only be reformed or abolished through a constitutional amendment. Article V of the Constitution, added in 1787, states that amendments can be proposed "whenever two-thirds of both houses [of

Congress] shall deem it necessary."43 Additionally, the amendment, after passing through Congress, must be ratified by "the legislatures of three-fourths of states."44 This double supermajority requirement has made the Constitution difficult to amend. Since 1789, more than ten thousand amendments were introduced in Congress, only 27 of which succeeded in becoming part of the Constitution.⁴⁵ In recent decades, amending the Constitution has become even more challenging due to increased partisanship in American politics, which makes achieving a supermajority in both the House and the Senate unlikely.46 The last constitutional amendment to be ratified was in 1971, which lowered the voting age from 21 to 18.47

Due to the difficulty of amending the Constitution, political actors interested in abolishing or significantly reforming the Electoral College have devised workarounds to diminish the institution's power or to at least bypass the double supermajority requirement. One example is the National Popular Vote Interstate Compact (NPVIC), an agreement between several states to award the state electors' votes to the candidate that receives the majority of the popular vote nationwide.48 This would ensure that the popular vote winner becomes the president-elect. For the NPVIC to be effective on the federal level, states representing at least 270 electoral votes need to adopt the legislation at a state level.⁴⁹ So far, 16 jurisdictions have enacted the NPVIC into law.50 Together, they represent 195 electoral votes.51 The



NPVIC has passed one state legislative chamber in 8 additional states, including Michigan with 15 electoral votes, Virginia with 13, and Arizona with 11.⁵² By making the Electoral College redundant but not going so far as to abolish it altogether, the NPVIC might achieve what constitutional amendment proposals in two centuries have not, which is to ensure that the presidency always reflects the popular vote.

There have also been proposals to change the composition of the Electoral College itself to diminish the influence it grants to "battleground" states. The principal avenue for this would be to increase the size of the House of Representatives, in particular by admitting Puerto Rico, the District of Columbia. and Guam to statehood. At the moment, Puerto Rico and Guam are both "unincorporated territories" of the United States, making them neither sovereign nations nor American states.53 Those residing in the two jurisdictions are American citizens, yet they do not have a voting member in Congress.⁵⁴ They also cannot vote in presidential elections. Furthermore, the District of Columbia also does not have statehood. Its existence is rooted in Article I, Section 8, of the Constitution, which establishes the area as "the Seat of the Government of the United States."55 It does not have a voting member in Congress either, although its residents can vote for president.56 If the three legislations were to achieve statehood, the expanded House of Representatives would alter the number of electors from each state

and reduce the unproportionate Electoral College votes granted to swing states.

Political actors have also sought to ease the constitutional amendment process by foregoing congressional voting on proposals. In addition to the double supermajority requirement, Article V of the Constitution mandates that "on the application of the legislatures of twothirds of the several states," Congress can "call a convention for proposing amendments," whereby amendments can be ratified by "three-fourths [of states]," that is, 34 states.57 This alternative has not yet been implemented.⁵⁸ Despite widespread campaigns in the second half of the 20th century to consider national policy through such conventions, calls have so far failed to gain approval from 34 states.⁵⁹ Since 2013, this effort has been led by the Convention of States project, a nationwide grassroots effort.60 Even though the project focuses on proposing amendments to "impose fiscal restraints on the federal government, limit its power and jurisdiction, and impose term limits on its officials and members of Congress," if successful, it can provide a blueprint for Electoral College reform.⁶¹ Until now, 19 states have enacted legislation for this purpose, 15 short of the 34 required. 62

WHAT'S NEXT?

The continued existence of the Electoral College ultimately supports smaller and predominantly Republican states in presidential elections. For the Democrat-



ic Party, this dynamic is deeply problematic, as it marginalizes people of color and effectively erases the votes of individuals residing in populous states. On the contrary, the Republican Party maintains that the Electoral College makes the presidential system more democratic by ensuring populous states do not dominate national politics. Given the January 6 hearings, the Electoral College is now under increased scrutiny.⁶³

In the lead-up to the Capitol insurrection of January 6 in 2021, former President Donald Trump had obscured former Vice President Mike Pence from certifying the Electoral College votes which had elected the current President of the United States, Joe Biden. Concerned that the Electoral College structure can create opportunities for future claims of "stolen elections," Congress lawmakers are debating a framework to enforce a clear process for how Electoral College certification is done. 64 At the moment, under the Electoral Count Act of 1887, the Electoral College outcome can be challenged, triggering a recount, by only one member of the House and one member of the Senate. With the proposed framework, the recount can be carried out only if 20% of each congressional chamber challenges the outcome.⁶⁵ In September 2022, the Senate Committee on Rules and Administration voted in favor of an updated Electoral Count Act, named the Electoral Count Reform Act (ECRA).66 In early 2022, the House of Representatives also passed the Presidential Election Reform Act (PERA). Now, the Senate must "harmonize" ECRA and PERA on a bipartisan basis.⁶⁷ This is no easy feat, however, it indicates progress on the issue.

In the next presidential election, the Electoral College will once again play a critical role in deciding the political trajectory of the country. Crucially, the coming election will, for the first time, take into account the post-2020 census reappointment, which is the redistribution of the seats in the House of Representatives based on changes in population.⁶⁸ As the Electoral College seats are determined according to each state's congressional representation, the next American president will be elected by a College with redistributed seats. In particular, following the 2020 census, Texas has gained two votes, and Colorado, Florida, Montana, North Carolina, and Oregon each gained one vote. 69 California, Illinois, Michigan, New York, Ohio, Pennsylvania, and West Virginia, on the other hand, each lost one vote.70 As predominantly Republican states, such as Texas and Florida, gained more votes in the Electoral College while traditionally Democratic states, such as California and New York, face decreased representation, the next presidential election is likely to showcase unprecedented results. Unlike earlier election cycles, whereby analysts could provide predictions regarding past voting patterns, the 2024 election currently looms in the dark, making all outcomes equally plausible.



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