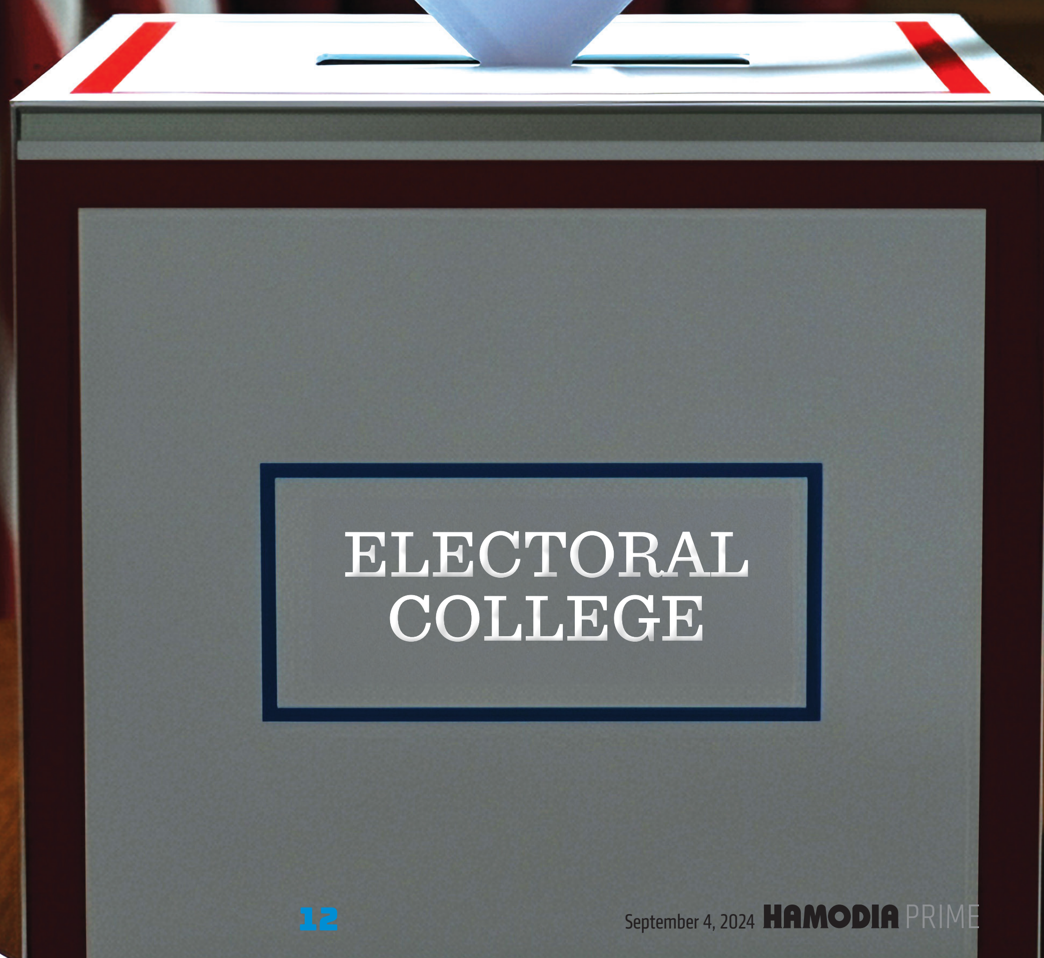
INTERVIEW

BY REUVAIN BORCHARDT

# THE UNPOPULAR VOTE?

***Walter Olson, a senior fellow at the Cato Institute's Robert A. Levy Center for Constitutional Studies, discusses the pros and cons of the Electoral College.***




**Why did our Framers establish an Electoral College system for electing presidents?**

They were trying to balance and accommodate several factors, some of which are more relevant today than others.

They were in the first place interested in keeping power with the states over how to run elections, and that shows up in several different places of the Constitution. You don't have a single federal administration for federal elections; they are entrusted to the states.

Another thing very important for the Framers was something that has kind of been lost over the years: they wanted some sort of filtering through expertise in which, rather than the voters deciding directly, the voters would pick talented or distinguished people who would presumably bring some sort of better judgment to the final selection of whom to vote for for president. Now, as we know, it didn't quite work out that way — electors are not selected on the basis of some sort of qualification of being wiser, and mostly they are not encouraged to make up their own minds. Rather, they're just put in as nominees by their party. So that's an important original idea behind the Electoral College, but if it ever did function that way, it isn't functioning that same way now.

Another thing that I think was quite important that the Electoral College helps to solve is that the states — back then as well as now — have very different turnout rates. In some states more than half of registered voters go to the polls, while in others it's much lower than that. The idea of the Electoral College was to keep states' proportional representation in the system more or less fixed, regardless of whether they were a high-turnout or a low-turnout state. And the whole slavery issue is part of this: For purposes of determining population for Congress and therefore electoral votes, a slave was counted as three-fifths of a person, though they couldn't vote.

So the South had many slaves who were partially counted for purposes of population but who couldn't vote. And there were some northern states where the franchise was highly restricted to property owners, so relatively few of the free whites voted, while there were other northern states that were very different from that. So there was a lot of diversity and variation as to which states had high turnout, and the Electoral College, by its structure, just breezes right by that and says a state is going to have the same representation in the presidential vote as it has in Congress, whether it's a high-turnout or a low-turnout state.

One of the reasons that I think the Electoral College has had such longevity and never been replaced is that if just before Election Day there were an earthquake

AP Photo/Robert F. Bukaty

William Henry heads to the ballot box after making his selections during early voting, Oct. 30, 2020, in Lewiston, Maine.

in California or a hurricane in the southeast, or something else that tremendously depresses turnout in one part of the country, with a popular vote the outcome of the election could turn on that catastrophe. Since voting throughout American history has had a highly regionalized kind of quality, where different regions tend to vote for different candidates from each other, the electoral count just eliminates the effect of any catastrophe as a major influence. So if there is low turnout in the southeast because of a hurricane, the voice of those affected states — assuming that they still wind up voting for the candidates they would have otherwise — is not diminished. The Electoral College tends to bypass those sorts of claims of unfairness and demands for a do-over if some catastrophe were to occur that prevented many people in a particular state or region from voting.

**Most of the controversy over the Electoral College results from the fact that all states besides Maine and Nebraska give all their electors to whoever wins the majority of votes from that state. Why do states do it that way? Is it just because whichever party is in power in that state, and presumably will win a majority of the state's votes in the presidential election, wants to keep all the votes for itself?**

Yes, that's what makes that so hard to change, even though a lot of people agree that it would be good to change and have a system like Maine and Nebraska where the electoral votes are split. [In Maine and Nebraska, two electoral votes go to the state's popular-vote winner, and one of each of the remaining electoral votes — two in Maine and three in Nebraska — goes to the winner of each congressional district.] This is quite an attractive idea, with one caveat, which is that if the state's districts wind up gerrymandered, so will the electoral votes, so you'd really want to work to curb gerrymandering if you went this route.

There's also a reason for winner-takes-all that goes beyond simple partisanship: Many people believe that the state as a whole is more likely to be paid attention to if it can threaten to go all or nothing. For example, Georgia and Pennsylvania get a lot of attention because they have a fairly large group of electoral votes that will go all one way or all the other way. And so the candidates spend a lot of time and make a lot of promises that are aimed at those states as a whole. On the other hand, if you switched over to a split system, there's no particular reason why they would necessarily be spending that much time in those states. That might be good for the rest of the country, because we'd get more attention, but you can see why people in big swing states like that sort of attention.

It's hard for them to willingly give up being more important than people in other states and having politicians throw favors at them.

**If New York unilaterally decided it would split its electoral vote, that would hurt Democrats; if Texas decided unilaterally to do so, that would hurt Republicans. So splitting the vote could realistically only work if all the states got together and agreed to it.**

Yes, that's what economists call a coordination problem, which is that everyone would be better off if everyone agreed to do it at the same time, but anyone who does it on their own without getting everyone else to do it at the same time puts themselves at a disadvantage. So to move to a better system, you'd need to coordinate.

The main effort that has been made in this direction is called the NPVIC: the National Popular Vote Interstate Compact. [Under this agreement, which seeks to ensure that the winner of the national popular vote is elected, states would agree to give all their electoral votes to whichever candidate wins the national popular vote. Seventeen states and the District of Columbia, representing 209 electoral votes, have joined the NPVIC, but it only takes effect once it has enough states that it represents 270 electoral votes, the number needed to win the presidential election.]

It's a clever idea, but unfortunately, it's too clever by half. They were so impressed by their own clever idea that they didn't do the hard work of figuring out how implementation would work. And implementation involves a lot of potentially frightening disputes and uncertainties. There is no enforcement mechanism in the event a state decides to turn its back and not live up to its promise. There is no one who can sue that state for essentially saying, "We now realize that we'd be electing a candidate we don't actually like, so we want to back out." No one can enforce that.

There is no forum to hand down any sort of definite determination, not only on that issue, but also on questions of recounts. There is no provision that can force a state that ratified the NPVIC — and especially one that hasn't — to hold a recount if there is a question about who won the popular vote in that state that would determine who won the national popular vote. And it gets worse, because for various reasons, we often have not had full access to all of the information on popular votes, so we may not even know who won the popular vote. North Dakota legislators strongly dislike the NPVIC, and they announced that they simply weren't going to release

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AP Photo/Matt York, Pool

In this May 6, 2021, file photo, Maricopa County ballots cast in the 2020 general election are examined and recounted by contractors working for Florida-based Cyber Ninjas at Veterans Memorial Coliseum in Phoenix.

full figures for the North Dakota vote; they were simply going to say who won their state's vote and send those electoral votes to Congress as they are required by the Constitution, but then they weren't going to release the exact figures on the popular vote in North Dakota — which may affect the outcome of the national popular vote.

The bottom line is that if it happens to be a super close election, and particularly if some states are not trying to abide by the spirit of the NPVIC, then you may get into a constitutional crisis without meaning to.

## A benefit of the Electoral College is also that it limits the need for recounts. We had the recount craziness with Florida in 2000 because that was the state that decided the election. But if every vote across the country matters equally, and every question of fraud or irregularity or butterfly ballots or whatever matters equally, then there could be recount fights every election.

That is a very important consideration — though I'm not sure it was considered by the Framers.

There's an analogy to a submarine. You want to have internal compartments, so that if you sustain damage by running into rocks or something, a couple of compartments can flood, but the water doesn't get into the entire vessel. In some ways, that is what the Electoral College does. There may be a couple of states where the votes can't entirely be counted on, because there's some sort of corruption problem or whatever, but the litigation can focus on those states. You can get a more effective spotlight on a couple of states rather than having to reconsider every practice and every vote around the whole country.

## So it seems that you are in favor of keeping the Electoral College.

I wouldn't put it that way. I say I don't think we should commit to getting rid of the Electoral College until we know what is better. I want them to have a specific alternative that is better thought-out than the NPVIC to compare with, and then we can see what the pluses and minuses are.

## There are two main arguments for using a national popular vote, though of course that would require a constitutional amendment. One is that the majority of the voters would then see their candidate elected; and the second is that each person's vote would then be equally valuable, rather than people in swing states having their vote matter much more than others' and getting all the attention and favors from candidates.

Yes, those are both good points, and they are worth considering. If we can address some of the downsides and ways in which this could go wrong, then I'm happy to agree that getting a closer match for the sentiments of the overall voters, and also remedying the strange imbalance between states, are worthy objectives. But we shouldn't follow worthy objectives over a practical cliff. We should be sure that we are also retaining the things the current system does well, if we can.

I would warn that if we go to a national popular vote, you are going to see a lot of federal rules imposed on the states. If we have a national popular vote when states have different rules — like with mail-in votes, absentee votes, allowing felons to vote, etc. — you're going to have tremendous pressure to have Congress standardize all of that. And that means Congress will become the rulemaker for these things, and will change the rules every few years, by passing bills signed by the president — the same president who might be running for reelection. All of a sudden you are back to what the Framers were specifically trying to avoid, which is Washington, D.C., sending orders to the states as to how they handle their elections.

## Are there any particular policies you can point to that government promotes because they're popular in the swing states?

I think it's very likely that some of the issues of manufacturing and trade protection get more attention because of the so-called Rust Belt swing states. The fact that there was this coherent kind of belt of states from Pennsylvania to Michigan to Wisconsin, that were seen as having a lot of union manufacturing jobs and where there was a lot of concern about competition from foreign products, may well have pushed both parties to being a little more oriented toward manufacturing than otherwise.

## We know that big states have the power to deliver a large number of electoral votes. But voters in small states have a different sort of advantage: Since each state, as well as the District of Columbia, has a minimum of three electoral votes no matter how small it is, the electoral power of each voter in the smallest states and D.C. is actually worth more. Might they therefore resist going to a national popular vote, because then no person's vote would be worth more than any other?

Yes, smaller states are protective of that and are more likely to not want change.

By the way, the reason each state has a minimum of three electoral votes is that that is the minimum number of Members of Congress they have: two senators and one House member.

Now, one of the interesting proposals that is floating around in Washington, and I think getting growing support, is to increase the size of the House of Representatives. We could increase it to 600 or 800 and still have it be smaller than some national legislatures, like the British House of Commons.

One of the consequences of expanding the House of Representatives would be to dilute the "smaller state bonus" in the Electoral College, because everyone would have more electoral votes and the vote of a small-state voter would not necessarily be worth so much more than the vote from a voter in a larger state.

I myself don't worry all that much one way or the other, because I'm old enough to remember when a lot of these small states that are now Republican were highly Democratic and would vote for liberal candidates.

I try to take the long view and say, whenever you complain about the process being unfair, just wait for the wheel to turn.

A policy that you think helps one party today could tomorrow help the other.

There's no built-in system that favors Democrats or Republicans. ■