



# PICKING THE PRESIDENT

*understanding the electoral college*

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**EDITED BY ERIC BURIN**

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Electoral College*

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# Table of Contents

Preface .....i

Introduction: A Brief History of the Electoral College  
Eric Burin ..... iii

## Section One

### The Electoral College in Comparative Perspective

Ancient States and Representative Government:  
Greek and Roman Models for the Electoral College  
William Caraher ..... 1

The Electoral College as American Aristocracy  
Donald F. Johnson ..... 5

America’s Rotten Electoral College System  
Manisha Sinha ..... 9

The South (or the North, or the West...)  
Will Rise Again, and Again, and Again:  
Viewing the Electoral College from  
the Perspective of Chinese History  
Andrew Meyer ..... 11

## Section Two

### The Electoral College in Historical Perspective

What the Founders Were Thinking:  
Why We have the Electoral College  
Andrew Shankman..... 17

Did Disenfranchisement Give the South an Electoral Advantage?  
Patrick Rael..... 21

Citizenship, Civil Rights, and Electoral Politics  
Cynthia Culver Prescott.....27

Quantifying a Candidate’s Advantage in the Electoral College  
Timothy Prescott.....31

**Section Three**  
**The Future of the Electoral College**

If the Electoral College Can Contradict the  
Popular Vote Sometimes, Why Would It Be  
Wrong for Them To Do It Every Single Time?  
Jack Russell Weinstein.....37

Electoral College is Fixable; Senate is Not.  
Mark Trahan.....47

Long Habits and Legitimacy  
Mark Stephen Jendrysik.....49

In Defense of the Electoral College  
Allen Guelzo and James H. Hulme.....53

Electoral College Alternatives: Tradeoffs  
Benjamin J. Kassow .....57

**Section Four**  
**Teaching the Electoral College**

“Empathy for the Unicorn”:  
Teaching About the Electoral College  
Brad Austin .....63

## Documents

The Constitutional Convention .....	75
U.S. Constitution: Article II.....	101
<i>Federalist Paper</i> No. 68.....	105
<i>Anti-Federalist Paper</i> No. 68 .....	109
<i>Anti-Federalist Paper</i> No. 72 .....	113
Amendment 12 .....	117
Timothy Pickering Speech in Favor of the Twelfth Amendment.....	119
James Madison to George Hay .....	121
James Madison to John Hillhouse .....	125
Contributors .....	129

## **Preface**

The 2016 presidential election has sparked an unprecedented interest in the Electoral College. In response to Donald Trump winning the presidency despite losing the popular vote, numerous commentators have weighed in with letters-to-the-editor, op-eds, blog posts, and the like, and thanks to the revolution in digital communications, these items have reached an exceptionally wide audience. In short, never before have so many people had so much to say about the Electoral College.

This remains a high-stakes debate, and historians, political scientists, philosophers, and other scholars have an important role to play in it. They can enrich discussions about the Electoral College by situating the system within the history of America and other societies; untangling the intricacies of republicanism, federalism, and democracy; articulating different concepts of political morality; and discerning, through statistical analysis, whom the Electoral College benefits most. In spotlighting the Electoral College from various vantage points, this volume aims to empower citizens to make clear-eyed decisions about it.

If one of this volume's goals is to illuminate the Electoral College, another is to do so while many people are still focused on the topic. This project came together quickly. The entire enterprise went from conception to completion in a mere five weeks. That swiftness was made possible by working with The Digital Press at the University of North Dakota, which embraces a cooperative, transparent model of publication with the goal of producing open-access, electronic works that can attract local and global audiences. Likewise, this volume came to fruition speedily because the contributors agreed to pen brief essays in short order. As a result, while their works have the hallmarks of scholarly articles, they do not constitute an exhaustive examination of the Electoral College. Indeed, many germane subjects are not addressed. Even so,

these learned ruminations can enhance the ongoing debate about the Electoral College.

Essays of this sort are much-needed, for the post-election dialogue about the Electoral College has been warped by partisanship. Republicans who reckon that Electoral College benefits their party usually have defended the system. Conversely, Democrats, smarting from the fact that in a span of sixteen years they have twice lost the presidency despite popular vote triumphs, typically have denounced it. This mode of assessment is unfortunate, for it impairs our ability to analyze the Electoral College on its own merits, as opposed to how it affects one party or another. Put another way, the Electoral College is an inherently political institution, but appraisals of it need not be invariably partisan.

To facilitate and expand the conversation about the Electoral College, this volume offers short essays that examine it from different disciplinary perspectives, including philosophy, mathematics, political science, communications, history, and pedagogy. Along the way, the essays address a variety of questions about the Electoral College: Why was it created? What were its antecedents? How has it changed over time? Who benefits from it? Is it just? Should we alter or abolish the Electoral College, and if so, what should replace it? In exploring these matters, *Picking the President* provides timely insights on one of America's most high-profile, momentous issues.

# 13

## **Electoral College Alternatives: Tradeoffs**

Benjamin J. Kassow

Forty-eight states use a popular vote method to allocate electoral votes (two states, Nebraska and Maine, use a partially congressional-district based allocation for the electoral votes in those states). One of the key controversies regarding the Electoral College has been the degree to which the Electoral College is perceived by some to be “anti-democratic” in that people argue that the Electoral College does not reflect the “will of the people.” To me, as is often the case, the key thought is thinking about the Electoral College as it currently exists and other possible electoral systems for the presidency in terms of a series of tradeoffs.

What might these tradeoffs look like? First, do we want a system that directly reflects the will of the largest plurality of Americans, the majority (50+%) of voting Americans, or one that reflects some level of dispersion and geographic viability throughout a variety of regions in the country? Secondly, depending on what we prioritize as a country, what system might we want that would reflect these priorities? Thirdly, do most Americans want the Electoral College to change? Finally, if many Americans want to reform the Electoral College, what tradeoffs would we want to make to ensure that people feel that their vote counts?

One first question is how the Electoral College could be changed, from a logistical perspective. On first glance, eliminating (or strongly modifying) the Electoral College looks daunting. At a most basic level, the Constitution must be amended, which of course, is exceedingly difficult. While other approaches are possible to use (changing electoral laws in the states, for instance, which decide how to allocate Electoral College votes), questions remain

as to what might be the most feasible method to do so. Still, many attempts to change the Electoral College certainly exist in American history, although only one has really been fundamental in terms of changing the Electoral College allocation proposal in a serious way: the Bayh-Celler (H.R. J. Res. 681) Amendment (1969) proposal. The intractability of eliminating or massively changing the Electoral College is reflected in the relatively few major attempts at the federal level since the Civil War. Additionally, there are still substantial questions as to what tradeoffs we might want to have as a country, assuming a different approach from what we have now.

The second approach: changing state legislation as to how states distribute their Electoral College votes. While this is more practical, it also raises other potential issues of inequity among states, and how much your vote may count for president being in one state versus another. Unless somehow all states could change concurrently, simply changing a state or two would likely result in other problems, including substantial differences in how states award electors. This could lead to the potential for large inequities among states as to how people's votes actually count in presidential elections. From a Constitutional standpoint, specifically with regards to the Equal Protection Clause, this may prove problematic (see *Bush v Gore*, 531 U.S. 98, [2000]), and may lead to other concerns about how individual's votes are counted (i.e., if it varies dramatically among states).

Even if a majority of United States citizens approves reforming the Electoral College, another question of practicality also rears its head. If we open the Electoral College "Pandora's box," then what problems might we have with any other potential solution? Certainly, if we were to have a national popular vote, there would be strong criticisms by many that the will of states would be taken away. Similarly, if we were to adopt a different system, would that help to solve the problems that those who criticize the Electoral College level at the College? While it might, depending on the solution chosen, a host of other questions would also arise.

So, what could potentially be an alternative to the Electoral College, as it currently stands? President Nixon himself, in 1969,

proposed replacing the Electoral College with a national popular-vote based system that would simply award the presidential candidate with the highest percentage of the popular vote the presidency. One tool in this proposal would have prevented a candidate with a very small percentage of the popular vote from leading, which would be a mandatory runoff election between the top two candidates if no candidate exceeded 40% of the popular vote. But what tradeoff would a system like this have? The fate of the Bayh-Celler amendment, although it is only one case, is perhaps quite instructive as to the various tradeoffs involved with altering how the Electoral College functions, at the federal level. While the amendment passed with bipartisan support through the House of Representatives, it was successfully filibustered in the Senate, because it would damage the ability of smaller states to influence the outcome of United States presidential elections in the future. So, as I have already mentioned, the constant tradeoff is in terms of how to distribute voting power to choose the president: should it be distributed to individuals as one person in the entire United States, or distributed to individuals as part of an individual state *within* the United States?

In closing, thinking about the Electoral College, regardless of whether we may be in favor of it, opposed to it, or decidedly neutral, requires us to consider a series of tradeoffs. Do we want a political system that encourages political candidates to have majorities of geographic regions within the United States, or one that encourage presidential candidates to win the most votes more generally? Which system better reflects the will of the people? In any case, when thinking about whether we approve of the Electoral College as is or whether/how we may wish to alter it, it is crucial to examine any tradeoffs we might be making if we were to change it.