

## De Libertas

### The Electoral College

The Electoral College created by the U.S. Constitution is (again and forever) under attack as being unfair and anti-democratic. Truthfully, the attack has nothing to do with fairness: unfairness is when rules are applied differently to favor or disfavor different people. The Electoral College has been applied the same way to all candidates for over 200 years. It is not unfair, in either creation or application. The real underlying complaint about the Electoral College is always that one group is not getting what it wants at the ballot box under the rules in place as to how our elections are conducted.

There is no argument that the Electoral College is “anti-democratic” in the sense that it frustrates a pure one person-one vote result. It was *designed* to do that. We do not have a pure one person-one vote democratic system, in many respects. The real dispute is whether we should, or not?

First let’s make sure the electoral college is actually understood. Before saying to yourself, “Oh, sure, I know what it is” – have you ever read the Constitution? If so, how long ago?

The Electoral College only applies to the election of the President and the Vice President. Congressmen and Senators (now, not originally) are elected by direct election, majority wins. For the President and Vice President, each *State* appoints a number of Electors equal to the number of Senators and Representatives it sends to Congress. Electors, then, are apportioned by population to the same degree as are Senators and Representatives, with smaller states getting to a limited extent more than their pro-rata share because all States regardless of size have 2 Senators. Still, the Electoral College is roughly apportioned by population according to the latest Census (which is one of the reasons why the fight over counting illegal immigrants in the Census is so important). How Electors are appointed is left to each individual State to decide, except that the dates on which they are chosen and of their voting shall be the same throughout the US, and except that no Senator, Representative or person holding federal office may be an Elector. This latter is an attempt to insulate Electors from purely political influences.

This process was created to select the leader for the United *States*. A leader can effectively lead only when there is consensus among the citizenry to follow, as the events recent years amply demonstrate. The Electoral College springs from the idea that election results alone (especially close elections results) do not necessarily generate consensus as to the best leader. The Electors were supposed to allow judgement by informed representatives of the people to decide who should be the leader. Of course, if one candidate wins overwhelmingly, this has never been an issue. That is the mandate of the ballot box, an overused term that really has no place in describing a close election.

Interestingly, there is nothing in the Constitution that requires the Electors to vote in accordance with the popular vote of their State. In fact, in 2016 10 of the 538 electors cast ballots for someone other than their state’s popular vote winner. Having so-called “faithless electors” is not unique to the 2016 election, but 10 was an unusually high number. They made no difference in the outcome of the 2016 election, but 10 could have changed the outcome of 5 previous U.S. presidential elections. Most States now have laws requiring the Electors in those States to vote according to the popular vote in that State. These laws were unanimously upheld by the US Supreme Court because the Constitution reads “Each State shall appoint, *in such manner as the legislature thereof may direct*, [its] Electors.” However, in so ruling, the Court severely crippled the original concept that Electors should or could use their collective

personal judgements in selecting a leader different than whom the slimmest majority of a popular vote prefer.

So now what is the purpose of the Electoral College? It supports five things that are vital to stability and to *free, fair and generally accepted* elections: 1) consensus in the country; 2) protection of minority rights against “tyranny of the majority”; 3) absence of vote fraud; 4) stability in case of death or disability of a candidate; and, 5) elimination of the need for run-off elections in case of plurality.

The entire system of checks and balance and separation of powers is designed to prevent any major, sweeping changes in the absence of clear, broad consensus throughout the country. Consensus is broad agreement in general opinion. The Electoral College is another aspect of the system requiring consensus, not just majority. “Back then” it was protecting Rhode Island, the smallest State, vs Virginia, the most populous state, and protecting “the South”, with less population, from “the North” with most population. Today, conditions, attitudes and cultures still vary greatly by geography despite almost universal travel and nationwide communications. Today, urban dwellers think differently on many issues than rural dwellers. On many issues, attitudes in Indiana are very different from attitudes in California.

As a simplistic example, consider that even though there are many more people in California than Indiana, Californians cannot impose their life choices on Hoosiers – or vice versa – unless and until a lot of people in a lot of other States agree, and then enact those choices by a law passed by majority vote in the House and the Senate and signed by the President. Even then, that law must pass Constitutional muster by the Supreme Court. If this process is followed, there can be no radical departures from what is commonly accepted. Debate and persuasion are necessary, rather than the brute force of a slim majority or a court decree.

If you favor an unchecked unitary federal government, then you disfavor the Electoral College, along with the rest of the separation of powers. If you prefer government closer to the people, at the State level, and prefer protections of minority rights and fear abuse of government power, you should thank the Founders for the Electoral College. The Electoral College forces anybody running for national public office to address all parts of the country, rather than just the most populous parts, and to persuade enough voters from all parts of the country to the candidate’s way of thinking.

Failure to achieve consensus has terribly dangerous consequences for the country. It ruptured the country in 1861, and threatens to do it again today. A more current example easily understood, regardless of whether you agree with Roe vs. Wade, that decision by the Supreme Court sidestepped this process of developing consensus - and as a result abortion is still an enormously hot divisive topic some 50 years later.

Protecting minority rights is in the DNA of this country. Driving consensus and preventing imposition of ideas on parts of the country where those ideas are less popular go hand in hand. Ironically, that is precisely how minority opinions sometimes become majority opinions – peacefully. Together, consensus and protection of minorities protect the fabric that binds this country together. Anything that weakens these weakens the entire country, and jeopardizes its unity. United we stand, divided we fall. Without the Electoral College (or something like it), a significant majority in a few populous urbanized states render elections in less populous states irrelevant as to the final result of “who wins.” 100% of the vote in several states like Wyoming could not overcome a significant majority in New York or California. The

question in a national election must not be what most people in New York or California want, or what most people living in cities want, but what most people in most places in the US want.

If there is no consensus, there should be no rule. Otherwise, unity will be destroyed. If there is no consensus on an important topic for an extended period, unity will also be destroyed, and disaffection and violence will result. Consensus is indispensable for peaceful change and unity. The Electoral College encourages consensus. Meanwhile, whether you characterize it as a pressure relief valve or an experimental laboratory for government ideas, individual States can go their own way on almost everything, without forcing those living in other States either to follow suit or to pay for that with which they disagree. This is a good thing for the country.

The Electoral College also serves two other functions.

Rigging elections is easiest when elections are close, whether it is by voter fraud, vote suppression, bribery, changing the eligibility or procedural rules, or whatever method. It is easier still when the critical elections can be targeted, because the riggers can marshal their efforts and resources where it matters. The more difficult it is to determine where those efforts and resources must be focused, the less likely rigging – even if successful on a local level – will have much effect at the national level. With the Electoral College, there are many, many elections that matter to the final overall result. Without the Electoral College, the chances of rigging the overall election by affecting the few targeted high vote precincts are greatly enhanced. Election corruption is encouraged. Anything that discourages this is a good thing.

What happens if something dire happens to a Presidential candidate during the campaign period, or before swearing in? Two septuagenarians running against each other, one of whom who is unhealthily rotund and just contracted coronavirus, and the other of whom appears to be frail and perhaps exhibiting early symptoms of dementia, makes this no idle speculation. If after the votes are tallied but before either is sworn in, if the presumptive winner dies or becomes incompetently disabled, whomever it is, can you imagine the chaos and the inevitable riots in the streets that would ensue? Attempting another general election in such circumstances would only make the situation worse. Under the Electoral College, there would not be another general election. Instead, the Electors would vote. I don't know how the State statutes regarding faithless electors might affect such a mess, whether Electors would be released to vote their consciences or not, but I can't imagine they would be forced to vote for a dead or mentally incompetent candidate. If no majority of Electors for any candidate results, enter the 12<sup>th</sup> Amendment, which provides that the decision passes to the House of Representatives – but the House does not vote individually by Member but rather each State collectively gets one vote, and the Majority vote of the *States* wins. Once again, a broad consensus across the country would win over a popular vote concentrated in a few States. The majority of the total popular vote as the result a few highly partisan States would not prevail over a smaller total vote that was spread over more States – another form of separation of powers by checks and balances that favors consensus over simple majority.

The same protection applies when a candidate only achieves a plurality of the votes cast, not a majority. This has happened multiple times in U.S. history. No runoff election to determine the winner was or is required. Can you imagine the chaos and disruption in the wake of an election of the President of the United States that has to be done over? No problem. It is the vote of the Electoral College that determines the winner.

This country is still the United *States* of America. By design, the federal government is not omnipotent: “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.*” 10th Amendment, U.S. Constitution The Electoral College is another Constitutional brake on unfettered federal power. It is an important factor in the design of our government to incent consensus and protect minority rights that also inhibits election fraud and could preserve stability in the event of an election crisis. To get rid of it would fundamentally change what has worked successfully for over 200 years. It should not be disturbed.