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S.D. Yana Davis

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## Should the United States Keep the Electoral College?

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By S. D. Yana Davis

THE 2016 presidential contest joined a growing list of such elections featuring an Electoral College winner who failed to win the popular vote. The Founders intended the Electoral College to be gatherings of sage elders (in each state) who would deliberate and choose the most suitable statesman (this was prior to women being included in the political sphere) to lead the federal government for the next four years. To this day, the states have the power to choose Electors in whatever way the state legislature in each decides.<sup>1</sup> Later the method changed slightly when the Twelfth Amendment mandated separate ballots for president and vice president.

There is an argument that election of the president by electors constitutes an element of federalism, or the division of powers between the states and the federal

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<sup>1</sup> Article II reads: “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. “

government. So long as Electors remained representative of the state governments, this argument held. However, as early as the election of 1796, following the two unanimous elections of George Washington in 1788 and 1792, the Electoral College quickly became representative of voters (in that period, adult white men who owned property) as state legislatures provided that Electors be chosen by popular vote.

Thus, an argument can be made that if the Founders intended the Electoral College to be truly an element of federalism (i.e., the exercise of an important power by state governments) this intention was extirpated by the fifth election of Electors in 1804, when Thomas Jefferson was re-elected to a second term. All the Electors in 1804 and afterward were chosen by popular vote. An “indirect” popular election of the president and vice-president prevailed from 1804 on, with the winners receiving not necessarily the majority or plurality of the votes nationwide but the majority or plurality within enough states to win a majority of Electoral College votes. At no point from 1804 on did a presidential election hinge on the partisan sentiments of state legislators, since they had all left the task of picking Electors to the voters of their states.

In most elections since 1804, the Electoral College results have reflected the national popular vote results, with some notable exceptions. Abraham Lincoln won the presidency in 1860 with about 40% of the popular vote, a plurality over Stephen Douglas and two other candidates. Rutherford B. Hayes was elected in 1876 by a margin of one electoral vote over Democrat Samuel

Tilden, who won the popular vote. Republican Benjamin Harrison ousted President Grover Cleveland in 1888 with an Electoral College victory although Cleveland polled more popular votes. (Cleveland came back four years later to oust Harrison with majorities in both popular and electoral votes.)

Most recently, Democrat Al Gore won the popular vote in 2000 but lost the Electoral College to George W. Bush and, last November, Donald Trump won bare majorities in four Midwestern states to gain an Electoral College majority despite losing the popular vote nationwide to Democrat Hillary Clinton by more than 3 million ballots.

Importantly as well, the way most states chose Electors (winner-takes-all of the state's electoral votes except in Maine and Nebraska) guarantees that votes for the losing party in each state literally do not count in the national election. Moreover, since larger states choose more Electors (equal to number of House and Senate seats), this means that voters in California determine 58 electoral votes while voters in Alabama only determine 9 electoral votes. Voters in Delaware and Vermont only determine 3 electoral votes each. This is inherently unfair and unequal, but since the Electoral College system is enshrined in the Constitution, the system cannot be changed except by constitutional amendment.

I have shown that, historically, the Electoral College ceased being an element of federalism as envisaged by the Founders as early as 1804; that presidential elections can, and have been, "won" by a candidate who lost the nationwide popular vote; and that the system works to give dramatically unequal weight to votes cast in states with larger numbers of Electoral votes.

All of these argue for ending the Electoral College system and replacing it with a direct, nationwide popular election of the president and vice president, in

which every popular vote would count the same. There would be no compromise of federalism, as argued above, and the reform would end the possibility of "minority" presidents who received fewer popular votes than their opponents did.

