

## Connecticut Debate Association

September 25, 2016

### Novice Scrimmage: E.O. Smith High School and Greenwich High School

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**Resolved: The US Electoral College electors should vote their conscience.**

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#### Conscience vote

From Wikipedia, the free encyclopedia

A conscience vote or free vote is a type of vote in a legislative body where legislators are allowed to vote according to their own personal conscience rather than according to an official line set down by their political party.

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#### Let the Electoral College Do Its Duty

The Wall Street Journal, Sept. 7, 2016, by DAVID B. RIVKIN, JR. and ANDREW M. GROSSMAN

As the Ohio Supreme Court ruled in 1948, no state can ‘dictate to the electors’ how to vote.

To those counting the days until Nov. 8 when the presidential election campaign will finally end, some bad news: The contest won’t truly be decided until the Electoral College’s vote on Dec. 19. Then again, this could be good news for Americans who still hope to escape the dilemma presented by the major parties’ nomination of two unpopular candidates, Hillary Clinton and Donald Trump—but only if the electors’ constitutionally guaranteed independence is observed in the face of state laws seeking to control their votes.

America’s method of presidential selection is as peculiar and clever as the federalism and separation-of-powers principles that fostered it. To guard against the passions of populism, the Framers interposed a college of state-based electors between voters and the actual presidential selection. To discourage political obligation and intrigue, they provided that the electors would meet just once, in their respective states, for the sole purpose of casting ballots for the next president and vice president.

And to prevent the presidency from being captured by regional interests, they required the winner to obtain a majority of the Electoral College votes. Failing that, the election is thrown to the House of Representatives, to choose among the top three vote-getters.

Today, the Electoral College vote is regarded as a nearly mechanical process: The parties nominate their slates, elector seats are awarded (in most states) to the popular vote winner’s party slate, and a few weeks later the electors certify what the people have already chosen.

In an unusual campaign year like this one, however, that may be too much to take for granted. Electors are typically party stalwarts, but many ideologically committed Democrats and Republicans lack enthusiasm for this year’s top-of-ticket candidates. Several would-be Republican electors are already publicly flirting with the idea of casting their votes for someone other than Mr. Trump, believing that his erratic outbursts have “disqualified” him from being president.

Right or wrong, that is exactly the kind of discernment that the Constitution demands electors exercise. It was their duty, Alexander Hamilton explained, to ensure that “the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications.”

Instead, representing the interests of their states and constituents, the electors would vote only for those possessing “the esteem and confidence of the whole Union” sufficient to win the requisite majority vote, thereby providing “a constant probability of seeing the station filled by characters pre-eminent for ability and virtue.” If the parties have failed in that task, then it falls to the electors to provide a final check.

Elector independence is also a practical necessity. Federal law provides no other means to respond to the death or incapacitation of the popular vote-winner after Election Day but before the Electoral College votes. Likewise, death or disability shortly before Election Day may present the same quandary, given state-law delays in altering ballots. And should electors blind themselves to revelations of corruption or foreign control that might emerge in the weeks before they meet? To deal with all of these contingencies, the Framers’ intention was that electors would exercise their discretion and judgment.

As a matter of original constitutional meaning, elector independence is not a controversial proposition. Both Article II of the Constitution and the 12th Amendment, which clarified the selection of the vice president, provide that electors

shall “vote by ballot,” a term of art referring to secret ballots rather than publicly cast votes.

By contrast, other constitutional provisions use words like “choose” or “election” that do not indicate secrecy. Voting in secret is the means by which electors may exercise their discretion, free from any attempt to control their vote.

Nonetheless, 29 states and the District of Columbia have laws on the books purporting to bind electors to vote for their party’s candidate or in accord with the state’s popular vote. Some enforce those mandates with fines or even criminal penalties—typically a misdemeanor charge. Others regard the casting of a “faithless” elector vote as resignation from the post and cancellation of the ballot. Despite dozens of electors choosing over the years to cast ballots for someone other than their party’s candidate or to abstain, these laws have never been enforced. Nonetheless, their very existence misleads the public and, even worse, chills electors from discharging their duty to exercise judgment.

The time is ripe to put an end to this legal charade and establish, as federal-court precedent, that the Constitution forbids enforcement of elector-binding mandates. The Supreme Court ruled in a 1952 decision, *Ray v. Blair*, that delegate pledges are unobjectionable, as nothing prevents an elector from announcing his intended vote beforehand. But the court recognized that enforcement of pledges raises constitutional concerns.

State courts that have considered the matter have held that elector pledges can impose, in the words of the Supreme Court of Ohio in 1948, only “a moral obligation, not a legal one.” As that court concluded, when a state attempts to “dictate to the electors the choice which they must make for president and vice president, it has invaded the field set apart to the electors by the Constitution of the United States, and such action cannot stand.”

Messrs. Rivkin and Grossman practice appellate and constitutional law in Washington, D.C. They represented Beau Correll, a delegate to the Republican National Convention, in his successful legal challenge to Virginia’s delegate-binding statute.

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## **Electoral College (United States)**

From Wikipedia, the free encyclopedia

The United States Electoral College is the institution that elects the President and Vice President of the United States every four years. Citizens of the United States do not directly elect the president or the vice president; instead they elect representatives called "electors", who usually pledge to vote for particular presidential and vice presidential candidates.[1][2][3]

Electors are apportioned to each of the 50 states as well as to the District of Columbia (also known as Washington, D.C.). The number of electors in each state is equal to the number of members of Congress to which the state is entitled,[4] while the Twenty-third Amendment grants the District of Columbia the same number of electors as the least populous state, currently three. Therefore, there are currently 538 electors, corresponding to the 435 Representatives and 100 Senators, plus the three additional electors from the District of Columbia. The Constitution bars any federal official, elected or appointed, from being an elector.

Except for Maine and Nebraska, all states have chosen electors on a "winner-take-all" basis since the 1880s.[5] That is, each state has all of its electors pledged to the presidential candidate who wins the most votes in that state. Maine and Nebraska use the "congressional district method", selecting one elector within each congressional district by popular vote and selecting the remaining two electors by a statewide popular vote.[6] Although no elector is required by federal law to honor a pledge, there have been very few occasions when an elector voted contrary to a pledge.[7][8] The Twelfth Amendment, in specifying how a president and vice president are elected, requires each elector to cast one vote for president and another vote for vice president.[9][10]

The candidate who receives an absolute majority of electoral votes (currently 270) for the office of president or of vice president is elected to that office. The Twelfth Amendment provides for what happens if the Electoral College fails to elect a president or vice president. If no candidate receives a majority for president, then the House of Representatives will select the president, with each state delegation (instead of each representative) having only one vote. If no candidate receives a majority for vice president, then the Senate will select the vice president, with each senator having one vote. On four occasions, most recently in 2000, the Electoral College system has resulted in the election of a candidate who did not receive the most popular votes in the election.[11][12]

### **Background**

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In *The Federalist Papers*, James Madison explained his views on the selection of the president and the Constitution. In *Federalist No. 39*, Madison argued that the Constitution was designed to be a mixture of state-based and population-based government. Congress would have two houses: the state-based Senate and the population-based House of Representatives. Meanwhile, the president would be elected by a mixture of the two modes.[19] Additionally, in the

Federalist No. 10, James Madison argued against "an interested and overbearing majority" and the "mischiefs of faction" in an electoral system. He defined a faction as "a number of citizens whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." Republican government (i.e., federalism, as opposed to direct democracy), with its varied distribution of voter rights and powers, would counteract against factions. Madison further postulated in the Federalist No. 10 that the greater the population and expanse of the Republic, the more difficulty factions would face in organizing due to such issues as sectionalism.[20]

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### **Electors: Selection**

Article II, Section 1, Clause 2 of the Constitution requires each state legislature to determine how electors for the state are to be chosen, but it disqualifies any person holding a federal office, either elected or appointed, from being an elector.[30] Under Section 3 of the Fourteenth Amendment, any person who has sworn an oath to support the United States Constitution in order to hold either a state or federal office, and later rebelled against the United States, is disqualified from being an elector. However, the Congress may remove this disqualification by a two-thirds vote in each House.

Candidates for elector are nominated by their state political parties in the months prior to Election Day. In some states, the electors are nominated in primaries, the same way that other candidates are nominated. In some states, such as Oklahoma, Virginia and North Carolina, electors are nominated in party conventions. In Pennsylvania, the campaign committee of each candidate names their candidates for elector (an attempt to discourage faithless electors).[31]

Since the Civil War, all states have chosen presidential electors by popular vote. This process has been normalized to the point that the names of the electors appear on the ballot in only eight states: Tennessee, Arizona, Idaho, Louisiana, North Dakota, Oklahoma, Rhode Island, and South Dakota.[7][32]

The Tuesday following the first Monday in November has been fixed as the day for holding federal elections, called the Election Day.[33] Forty eight states and Washington, D.C., employ the "winner-takes-all method", each awarding its electors as a single bloc. Maine and Nebraska use the "congressional district method", selecting one elector within each congressional district by popular vote and selecting the remaining two electors by a statewide popular vote. This method has been used in Maine since 1972 and in Nebraska since 1996.[6]

The current system of choosing electors is called the "short ballot". In most states, voters choose a slate of electors, and only a few states list on the ballot the names of proposed electors. In some states, if a voter wants to write in a candidate for president, the voter is also required to write in the names of proposed electors.[31]

After the election each state prepares seven Certificates of Ascertainment, each listing the candidates for president and vice president, their pledged electors, and the total votes each candidacy received.[34] One certificate is sent, as soon after Election Day as practicable, to the National Archivist in Washington D.C. The Certificates of Ascertainment are mandated to carry the State Seal, and the signature of the Governor (in the case of the District of Columbia, the Certificate is signed by the Mayor of the District of Columbia.[35])

### **Meetings**

The Electoral College never actually meets as one body. Electors chosen on Election Day meet in their respective state capitals (electors for the District of Columbia meet within the District) on the Monday after the second Wednesday in December, at which time they cast their electoral votes on separate ballots for president and vice president.[36][37][38]

Although procedures in each state vary slightly, the electors generally follow a similar series of steps, and the Congress has constitutional authority to regulate the procedures the states follow. The meeting is opened by the election certification official—often that state's secretary of state or equivalent—who reads the Certificate of Ascertainment. This document sets forth who was chosen to cast the electoral votes. The attendance of the electors is taken and any vacancies are noted in writing. The next step is the selection of a president or chairman of the meeting, sometimes also with a vice chairman. The electors sometimes choose a secretary, often not himself an elector, to take the minutes of the meeting. In many states, political officials give short speeches at this point in the proceedings.

When the time for balloting arrives, the electors choose one or two people to act as tellers. Some states provide for the placing in nomination of a candidate to receive the electoral votes (the candidate for president of the political party of the electors). Each elector submits a written ballot with the name of a candidate for president. In New Jersey, the electors cast ballots by checking the name of the candidate on a pre-printed card; in North Carolina, the electors write the name of the candidate on a blank card. The tellers count the ballots and announce the result. The next step is the casting of the vote for vice president, which follows a similar pattern.

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## **Faithless elector**

## From Wikipedia, the free encyclopedia

In United States presidential elections, a faithless elector is a member of the United States Electoral College who does not vote for the presidential or vice presidential candidate for whom they had pledged to vote. That is, they actually vote for another candidate, or fail to vote, or choose not to vote. A pledged elector can become a faithless elector only by breaking their pledge; unpledged electors have no pledge to break.

Electors are typically chosen and nominated by a political party or the party's presidential nominee: they are usually party members with a reputation for high loyalty to the party and its chosen candidate. Thus, a faithless elector runs the risk of party censure and political retaliation from their party, as well as potential criminal penalties in some states. Candidates for elector are nominated by state political parties in the months prior to Election Day. In some states, the electors are nominated in primaries, the same way that other candidates are nominated. In some states, such as Oklahoma, Virginia, and North Carolina, electors are nominated in party conventions. In Pennsylvania, the campaign committee of each candidate names their candidates for elector (an attempt to discourage faithless electors).[1] The parties have generally been successful in keeping their electors faithful, leaving out the cases in which a candidate died before the elector was able to cast a vote.

During the 1836 election, Virginia's entire 23-man electoral delegation faithlessly voted against victorious Democratic Party Vice Presidential Candidate Richard Mentor Johnson[2] due to Johnson's openly admitted, publicized, long-term "interracial" relationship with his octoroon slave, Julia. The loss of Virginia's support caused Johnson to fall one electoral vote short of a majority, causing the Vice Presidential election to be thrown into the U.S. Senate for the only time in American history. However, Virginia's electors voted for Martin Van Buren as pledged, meaning the presidential election itself was not in dispute. The U.S. Senate ultimately elected Johnson anyway after a party-line vote. Despite 157 instances of faithlessness as of 2015, faithless electors have not yet affected the results or ultimate outcome of any other presidential election.

### Legal position

Twenty-one states do not have laws that compel their electors to vote for a pledged candidate.[3] Twenty-nine states plus the District of Columbia have laws to penalize faithless electors, although these have never been enforced.[2] In lieu of penalizing a faithless elector, some states, like Michigan and Minnesota, specify that the faithless elector's vote is void.[4]

Until 2008, Minnesota's electors cast secret ballots. Although the final count would reveal the occurrence of faithless votes (except in the unlikely case of two or more changes canceling out), it was impossible to determine which elector(s) were faithless. After an unknown elector was faithless in 2004, Minnesota amended its law to require public balloting of the electors' votes and invalidate any vote cast for someone other than the candidate to whom the elector was pledged.[5]

The constitutionality of state pledge laws was confirmed by the Supreme Court in 1952 in *Ray v. Blair*. [6] The court ruled that the states have the right to require electors to pledge to vote for the candidate to whom they are pledged, and the right to remove electors who refuse to pledge. After an elector has voted, their vote can be changed only in states such as Michigan and Minnesota, which invalidate votes other than those pledged. In the twenty-nine states that have laws against faithless electors, a faithless elector may only be punished after they vote. Article II of the Constitution grants the power of selecting delegates to state legislatures, and subsequently the Supreme Court has ruled that, as electors are chosen via state elections, they act as a function of the state, not the federal government. Therefore, states have the right to govern electors.

The Supreme Court has never ruled on the constitutionality of state laws that punish electors for actually casting a faithless vote.

### History

On 22 occasions, 179 electors have not cast their votes for President or Vice President as prescribed by the legislature of the state they represented. Of those, 71 electors changed their votes because the candidate to whom they were pledged died before the electoral ballot (1872, 1912). Two electors chose to abstain from voting for any candidate (1812, 2000).[2] The remaining 106 were changed by the elector's personal interest, or perhaps by accident. Usually, the faithless electors act alone. An exception was the 1836 election, in which all 23 Virginia electors acted together.

That election was the only occasion when faithless electors altered the outcome of the electoral college vote. The Democrat ticket won states with 170 of the 294 electoral votes, but the 23 Virginia electors abstained in the vote for Vice President, so the Democrat candidate, Richard Mentor Johnson, got only 147 (exactly half), and was not elected. However, Johnson was instead elected Vice President by the U.S. Senate, so faithless electors have never changed the final outcome of an election.

### List of faithless electors

1 – 2004 election: An anonymous Minnesota elector, pledged for Democrats John Kerry and John Edwards, cast his or her presidential vote for John Edwards [sic],[7] rather than Kerry, presumably by accident.[8] (All of Minnesota's electors cast their vice presidential ballots for John Edwards.) Minnesota's electors cast secret ballots, so unless one of the electors claims responsibility, it is unlikely that the identity of the faithless elector will ever be known. As a result of this incident, Minnesota Statutes were amended to provide for public balloting of the electors' votes and invalidation of a vote cast for someone other than the candidate to whom the elector is pledged.[9]

1 – 2000 election: Washington, D.C. Elector Barbara Lett-Simmons, pledged for Democrats Al Gore and Joe Lieberman, cast no electoral votes as a protest of Washington D.C.'s lack of congressional representation.[10]

1 – 1988 election: West Virginia Elector Margarette Leach, pledged for Democrats Michael Dukakis and Lloyd Bentsen, but as a form of protest against the winner-take-all custom of the Electoral College, instead cast her votes for the candidates in the reverse of their positions on the national ticket; her presidential vote went to Bentsen and her vice presidential vote to Dukakis.[11]

1 – 1976 election: Washington Elector Mike Padden, pledged for Republicans Gerald Ford and Bob Dole, cast his presidential electoral vote for Ronald Reagan, who had challenged Ford for the Republican nomination. He cast his vice presidential vote, as pledged, for Dole.

1 – 1972 election: Virginia Elector Roger MacBride, pledged for Republicans Richard Nixon and Spiro Agnew, cast his electoral votes for Libertarian candidates John Hospers and Theodora Nathan. MacBride's vote for Nathan was the first electoral vote cast for a woman in U.S. history. MacBride became the Libertarian candidate for President in the 1976 election.

1 – 1968 election: North Carolina Elector Lloyd W. Bailey, pledged for Republicans Richard Nixon and Spiro Agnew, cast his votes for American Independent Party candidates George Wallace and Curtis LeMay.

1 – 1960 election: Oklahoma Elector Henry D. Irwin, pledged for Republicans Richard Nixon and Henry Cabot Lodge, Jr., cast his presidential electoral vote for Democratic non-candidate Harry F. Byrd and his vice presidential electoral vote for Republican Barry Goldwater. (Fourteen unpledged electors also voted for Byrd for president, but supported Strom Thurmond, then a Democrat, for vice president.)

1 – 1956 election: Alabama Elector W. F. Turner, pledged for Democrats Adlai Stevenson and Estes Kefauver, cast his votes for Walter Burgwyn Jones and Herman Talmadge.

1 – 1948 election: Two Tennessee electors were on both the Democratic Party and the States' Rights Democratic Party slates. When the Democratic Party slate won, one of these electors voted for the Democratic nominees Harry S. Truman and Alben W. Barkley. The other, Preston Parks, cast his votes for States' Rights Democratic Party candidates Strom Thurmond and Fielding L. Wright, making him a faithless elector.

8 – 1912 election: Republican vice presidential candidate James S. Sherman died before the election. Eight Republican electors had pledged their votes to him but voted for Nicholas Murray Butler instead.

4 – 1896 election: The Democratic Party and the People's Party both ran William Jennings Bryan as their presidential candidate, but ran different candidates for Vice President. The Democratic Party nominated Arthur Sewall and the People's Party nominated Thomas E. Watson. The People's Party won 31 electoral votes but four of those electors voted with the Democratic ticket, supporting Bryan as President and Sewall as Vice President.

1 – 1892 election: In Oregon, three electors voted for Republican Benjamin Harrison and one faithless elector voted for the third-party Populist candidate, James B. Weaver. All four were pledged to President Harrison, who lost the election.

63 – 1872 election: Horace Greeley died before the electoral vote. 63 of his electors cast their presidential votes for four non-candidates instead of the late Greeley. Three of his electors voted for him anyway; these votes were not counted by Congress.

23 – 1836 election: The 23 electors from Virginia were pledged to vote for Democratic candidates Martin Van Buren (for President) and Richard Mentor Johnson (for Vice President). However, they abstained from voting for Johnson, because of his open (and therefore scandalous) liaison with a slave mistress. This left Johnson with one fewer than a majority of electoral votes. Johnson was subsequently elected Vice President by the Senate.

32 – 1832 election: Two National Republican Party electors from the state of Maryland refused to vote for presidential candidate Henry Clay and did not cast a vote for him or for his running mate. All 30 electors from Pennsylvania refused to support the Democratic vice presidential candidate Martin Van Buren, voting instead for William Wilkins.

7 – 1828 election: Seven of nine electors from Georgia refused to vote for vice presidential candidate John C. Calhoun. All seven cast their vice presidential votes for William Smith instead.

1 – 1820 election: William Plumer pledged to vote for Democratic-Republican candidate James Monroe, but he cast his vote for John Quincy Adams, who was also a Democratic-Republican, but not a candidate in the 1820 election. Some

historians contend that Plumer did not feel that the Electoral College should unanimously elect any President other than George Washington, but this claim is disputed. (Monroe lost another three votes because three electors died before casting ballots and were not replaced.)

4 – 1812 election: Three electors pledged to vote for Federalist vice presidential candidate Jared Ingersoll voted for Democratic-Republican Elbridge Gerry. One Ohio elector did not vote.

6 – 1808 election: Six electors from New York were pledged to vote for Democratic-Republican James Madison for President and George Clinton for Vice President. Instead, they voted for Clinton to be President, with three voting for Madison for Vice President and the other three voting for James Monroe for Vice President.

1 - 1800 election: A faithless elector in New York, pledged to vote for Democratic-Republican candidates Thomas Jefferson and Aaron Burr, tried instead to vote twice for Aaron Burr. This additional vote would have given Burr the highest total of electoral votes, and he would have been elected President. But Article 2, Section 3, of the Constitution prohibited an elector from casting both votes for an inhabitant of the same state as the elector; Burr was a resident of New York. So the state of New York reassigned the second vote to Jefferson. This placed Burr and Jefferson in a tie; Jefferson was subsequently elected by the House of Representatives.

19 – 1796 election: Samuel Miles, an elector from Pennsylvania, was pledged to vote for Federalist presidential candidate John Adams, but voted for Democratic-Republican candidate Thomas Jefferson. He cast his other presidential vote as pledged for Thomas Pinckney. An additional 18 electors voted for Adams as pledged, but refused to vote for Pinckney.[12] (This election took place prior to the passage of the 12th Amendment, so there were not separate ballots for President and Vice President.)

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## **Five reasons to keep our despised method of choosing the president.**

Slate: The View from Chicago, By Richard A. Posner, Nov. 12, 2012

The Electoral College is widely regarded as an anachronism, a nondemocratic method of selecting a president that ought to be superseded by declaring the candidate who receives the most popular votes the winner. The advocates of this position are correct in arguing that the Electoral College method is not democratic in a modern sense. The Constitution provides that “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.” And it is the electors who elect the president, not the people. When you vote for a presidential candidate you’re actually voting for a slate of electors.

But each party selects a slate of electors trusted to vote for the party’s nominee (and that trust is rarely betrayed). Because virtually all states award all their electoral votes to the winner of the popular vote in the state, and because the Electoral College weights the less populous states more heavily along the lines of the Senate (two Senators and two Electoral College votes for every state, and then more electoral votes added for each state based on population), it is entirely possible that the winner of the electoral vote will not win the national popular vote. Yet that has happened very rarely. It happened in 2000, when Gore had more popular votes than Bush yet fewer electoral votes, but that was the first time since 1888.

There are five reasons for retaining the Electoral College despite its lack of democratic pedigree; all are practical reasons, not liberal or conservative reasons.

### **1) Certainty of Outcome**

A dispute over the outcome of an Electoral College vote is possible—it happened in 2000—but it’s less likely than a dispute over the popular vote. The reason is that the winning candidate’s share of the Electoral College invariably exceeds his share of the popular vote. In last week’s election, for example, Obama received 61.7 percent of the electoral vote compared to only 51.3 percent of the popular votes cast for him and Romney. (I ignore the scattering of votes not counted for either candidate.) Because almost all states award electoral votes on a winner-take-all basis, even a very slight plurality in a state creates a landslide electoral-vote victory in that state. A tie in the nationwide electoral vote is possible because the total number of votes—538—is an even number, but it is highly unlikely.\*

Of course a tie in the number of popular votes in a national election in which tens of millions of votes are cast is even more unlikely. But if the difference in the popular vote is small, then if the winner of the popular vote were deemed the winner of the presidential election, candidates would have an incentive to seek a recount in any state (plus the District of Columbia) in which they thought the recount would give them more additional votes than their opponent. The lawyers would go to work in state after state to have the votes recounted, and the result would be debilitating uncertainty, delay, and conflict—look at the turmoil that a dispute limited to one state, Florida, engendered in 2000.\*

### **2) Everyone’s President**

The Electoral College requires a presidential candidate to have transregional appeal. No region (South, Northeast, etc.) has enough electoral votes to elect a president. So a solid regional favorite, such as Romney was in the South, has no incentive to campaign heavily in those states, for he gains no electoral votes by increasing his plurality in states that he knows he will win. This is a desirable result because a candidate with only regional appeal is unlikely to be a successful president. The residents of the other regions are likely to feel disfranchised—to feel that their votes do not count, that the new president will have no regard for their interests, that he really isn't their president.

### **3) Swing States**

The winner-take-all method of awarding electoral votes induces the candidates—as we saw in last week's election—to focus their campaign efforts on the toss-up states; that follows directly from the candidates' lack of inducement to campaign in states they are sure to win. Voters in toss-up states are more likely to pay close attention to the campaign—to really listen to the competing candidates—knowing that they are going to decide the election. They are likely to be the most thoughtful voters, on average (and for the further reason that they will have received the most information and attention from the candidates), and the most thoughtful voters should be the ones to decide the election.

### **4) Big States**

The Electoral College restores some of the weight in the political balance that large states (by population) lose by virtue of the mal-apportionment of the Senate decreed in the Constitution. This may seem paradoxical, given that electoral votes are weighted in favor of less populous states. Wyoming, the least populous state, contains only about one-sixth of 1 percent of the U.S. population, but its three electors (of whom two are awarded only because Wyoming has two senators like every other state) give it slightly more than one-half of 1 percent of total electoral votes. But winner-take-all makes a slight increase in the popular vote have a much bigger electoral-vote payoff in a large state than in a small one. The popular vote was very close in Florida; nevertheless Obama, who won that vote, got 29 electoral votes. A victory by the same margin in Wyoming would net the winner only 3 electoral votes. So, other things being equal, a large state gets more attention from presidential candidates in a campaign than a small states does. And since presidents and senators are often presidential candidates, large states are likely to get additional consideration in appropriations and appointments from presidents and senators before as well as during campaigns, offsetting to some extent the effects of the malapportioned Senate on the political influence of less populous states.

### **5) Avoid Run-Off Elections**

The Electoral College avoids the problem of elections in which no candidate receives a majority of the votes cast. For example, Nixon in 1968 and Clinton in 1992 both had only a 43 percent plurality of the popular votes, while winning a majority in the Electoral College (301 and 370 electoral votes, respectively). There is pressure for run-off elections when no candidate wins a majority of the votes cast; that pressure, which would greatly complicate the presidential election process, is reduced by the Electoral College, which invariably produces a clear winner.

Against these reasons to retain the Electoral College the argument that it is undemocratic falls flat. No form of representative democracy, as distinct from direct democracy, is or aspires to be perfectly democratic. Certainly not our federal government. In the entire executive and judicial branches, only two officials are elected—the president and vice president. All the rest are appointed—federal Article III judges for life.

It can be argued that the Electoral College method of selecting the president may turn off potential voters for a candidate who has no hope of carrying their state—Democrats in Texas, for example, or Republicans in California. Knowing their vote will have no effect, they have less incentive to pay attention to the campaign than they would have if the president were picked by popular vote, for then the state of a voter's residence would be irrelevant to the weight of his vote. But of course no voter's vote swings a national election, and in spite of that, about one-half the eligible American population did vote in last week's election. Voters in presidential elections are people who want to express a political preference rather than people who think that a single vote may decide an election. Even in one-sided states, there are plenty of votes in favor of the candidate who is sure not to carry the state. So I doubt that the Electoral College has much of a turn-off effect. And if it does, that is outweighed by the reasons for retaining this seemingly archaic institution.

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## **10 reasons why the Electoral College is a problem**

MinnPost, By Eric Black | 10/16/12

Sticking with the Electoral College system, but not yet plunging into the surprising too-little-discussed history of why the Framers put it in the Constitution, I want first to dash off a quick list of ten problems and potential problems with the Electoral College system:

**Problem No. 1**

It creates the possibility for the loser of the popular vote to win the electoral vote. This is more than a theoretical possibility. It has happened at least four times out of the 56 presidential elections, or more than 7 percent of the time, which is not such a small percentage, and it created a hideous mess every time. The most recent occurrence was 2000.

**Problem No. 2**

It distorts the presidential campaign, as alluded to yesterday, by incentivizing the parties to write off the more than 40 states (plus the District of Columbia) that they know they either can't win or can't lose. Among the states that, in recent history, don't get campaign visits (other than for fundraising) or TV ads (which is most of what all that fundraising pays for and the main method by which the campaign and their "independent," "uncoordinated" allies seek to persuade the persuadable voters in the persuadable states) are the three most populous states (California, Texas and New York, which among them make up more than 25 percent of the U.S. population), the geographically biggest state (Alaska) and the best state (Minnesota, which, despite missing out on the ads and the campaign visits, usually leads the nation in voter turnout anyway, so there).

**Problem No. 3**

The Electoral College system further distorts the presidential campaign by causing the candidates to grant extra weight to the parochial needs of the swing states. If you have to carry Florida to win, it elevates the already ever-present need candidates feel to pander to elderly voters, Cuban-Americans, orange-growers and any other group that can deliver a bloc of Floridians. The same thing with Iowa and ethanol subsidies and other agriculture-friendly policies, except even more so because Iowa is not only a swing state over recent cycles but has become since 1976 the key first state in the presidential nominating process. . (But that last bit about the nominating process, of course, is not rooted in the Constitution.)

Since the selection of Paul Ryan as Mitt Romney's running-mate, how many stories have you read that said Ryan's controversial plan to change Medicare could be especially costly to the ticket because so many of the swing states have above-average portions of senior voters? Pandering to large groups of voters is not a pretty aspect of democracy, but pandering to groups just because they happen to be concentrated in "swing states" is even uglier. Who can explain how this can be a good thing?

**Problem No. 4**

For the same reason, it distorts governance. A first-term president who expects to have a tough reelection fight (as they all at least expect to) but who wanted to establish diplomatic and trade relations with Cuba (broken in 1960) would have to consider the possibility that such a policy might cost him Florida and therefore a second term. Perhaps this helps explain why long after Washington normalized relations with the Soviet Union, China and other governments that formerly or presently call themselves Communists, Cuba remains on the do-not-call list.

**Problem No. 5**

The Electoral College system further distorts the one-person, one-vote principle of democracy because electoral votes are not distributed according to population. Every state gets one electoral vote for each member of its delegation to the House of Representatives (this by itself would be a rough measure of its population) and each state also gets two "bonus" electors representing its two senators.

This causes significant overrepresentation of small states in the "College." In the most extreme case, using 2010 Census figures and the new distribution of House seats based on that census, an individual citizen in Wyoming has more than triple the weight in electoral votes as an individual in California. Yes, you read that right. In fact, it's closer to quadruple than triple. Can this be a good thing?

If we could do nothing more than allocate the electoral votes on a population basis, it would make the system substantially more democratic. But we can't do that, at least not without amending the Constitution, because the apportionment formula is embedded in the Constitution as one more inducement that the Framers felt was necessary to attract support of small states for ratification.

**Problem No. 6**

The Electoral College creates the possibility of a 269-269 tie vote, and in almost every recent election there has been a relatively credible scenario for such an outcome. (Here's a recent CNN piece going over the ways that we could end up there this year and a Nate Silver article on the same subject.) The rules of the Electoral College system for dealing with a tie are bizarre and scary and create a fairly plausible scenario by which no one would be elected president in time for Inauguration Day.

Imperfect Union: The Constitutional roots of the mess we're in  
The only tie in Electoral College history was in 1800, a totally bizarre situation, in the days before formal tickets, and back in the days when several states still did not even

hold a popular vote in the presidential selection process. (The Constitution did not and still does not require that any popular vote be conducted for president.) In that 1800 election, Thomas Jefferson tied with his own running mate Aaron Burr. Better not try to cram that whole saga in here right now. It led to the 12th amendment (ratified 1804), which changed the Framers' original language so that each elector could indicate which candidate they supported for president and which for vice president, thereby eliminating the possibility that any presidential candidate will end up in a tie with his own running mate. But that didn't solve the serious problems inherent in the tie scenario.

#### **Problem No. 7**

Although our system, as evolved, makes it very hard for third parties to win elections and almost impossible for a third party to win the presidency, the Electoral College system makes it quite possible for a small third-party showing in a single state or two to change the outcome of the whole national election.

This happened in 2000, when Ralph Nader, running as the Green Party nominee, finished third in the popular vote with just 2.74 percent, and received just 1.6 percent in Florida, but those votes (plus a number of other weird factors about which some people are still arguing) probably shifted the state from Democratic nominee Al Gore to Republican George W. Bush. And, because of winner-take-all, that one state also tipped the outcome of the national election.

In most recent cycles, there has been at least one halfway credible scenario under which a small third party can tip a key state and perhaps the whole election. Here's a Fox News piece about the possibility that Libertarian Party nominee Gary Johnson could play that role in 2012. Johnson, by the way, will be on the ballot in 48 states. (According to this New York Times piece, Republican state officials in Michigan "blocked Mr. Johnson from the ballot after he filed proper paperwork three minutes after his filing deadline, and Romney campaign aides participated in unsuccessful efforts to keep him off the ballot in other states as well.)

There's an even weirder scenario in which former Congressman Virgil Goode, the nominee of the tiny, right-wing Constitution Party, costs Mitt Romney the presidency by drawing votes in Virginia (which happens to be the state Goode represented in Congress, so he has a name there). Although the Constitution Party doesn't even show up in national polls, when Goode's name is included in Virginia polls this year, he has scored as much as 9 percent. I doubt he'll get anywhere near 9, but Virginia is considered very close and has been designated a key swing state worth 13 winner-take-all electoral votes. Maybe that's why a couple of lefty parties helped Goode get the signatures he needed to get on the ballot in Virginia.

Of course, even in a pure popular vote system (unless you have ranked choice voting) minor parties have the potential to change the outcome. But the Electoral College, paired with the winner-take-all aspect, greatly increases the leverage. I'm not predicting that any of these scenarios will come true in 2012, but the Electoral College system makes such shenanigans possible, and they happen more often than you might realize. (And by the way, if the name Virgil Goode rang a bell but you can't place it, Goode was the congressman who made the biggest fool of himself objecting to both the election of Minnesota U.S. Rep Keith Ellison – first Muslim ever in Congress -- and to Ellison's decision to take his oath of office on a Qu'ran. The Qu'ran, by the way, had belonged to Thomas Jefferson.)

#### **Problem No. 8**

The Electoral College system prevented Dick Cheney from becoming vice president. Well, no, it actually didn't, but it would have if we had taken the letter and the intention behind the words in the Constitution seriously.

The Constitution says that an elector cannot vote for a presidential and vice presidential candidate both of whom come from the same state as him/herself (the elector, that is). This rule actually made sense when the Framers put it in there but stopped making sense almost immediately. (To explain this, we'll eventually have to get to the story of how the Framers thought this contraption was going to work.) But it's still in there. George W. Bush was a Texan. In 2000, when he became Bush's running mate, Cheney had been living and voting and paying taxes for five years in Texas where he eked out a living as CEO of Halliburton.

If you had to say which state he "inhabited," at that point in his life, you could not say anything other than "Texas." This became awkward when the Bush-Cheney ticket carried Texas. The Constitution (in both the original and as changed by Amendment XII) technically prohibit the Texas electors from voting for both Bush and Cheney. And the electoral vote was so close that without the Texas votes, Cheney would not have had a majority.

It's true that shortly before the election, Cheney obtained a Wyoming driver's license and put his Dallas home on the market (he had a vacation home in Wyoming, which is the state he used to represent in Congress). And the courts decided that was good enough to make him a non-Texan for electoral vote purposes. It would have been silly to disqualify Cheney over this, but the issue is at least one more bizarre legacy of the Framers' contraption and the fact that we are still (wink, wink, nod, nod) bound by the rules ratified in 1789 and 1804.

#### **Problem No. 9**

In case of a tie, or if no candidate receives a majority of all electoral votes cast for president, the choice of president is

thrown in the House of Representatives but the election is conducted on a one-state one-vote basis. (Yes, Wyoming – population 563,000 in the 2010 census -- would have equal say in the selection of the president with California – 37 million.) And to win, a candidate must receive the support of an absolute majority of states.

But states that have an even number of House members may deadlock. (Minnesota, with its current delegation of four Democrats and four Republicans, would be a good candidate for this fate.) A deadlocked state cannot vote at all for a presidential candidate. But, to produce a winner, one candidate would still have to win 26 states, even though several states would presumably be deadlocked.

If no presidential candidate can get to 26, there is no constitutional mechanism for producing a winner. The vice president (whose selection in this scenario would be thrown into the Senate) could serve indefinitely as acting president. This has never happened, although it has come close. If we wait long enough, it will happen someday.

#### **Problem No. 10**

And here's a really crazy part, which sort of underscores the craziness of our practice of abiding by the Framers' language. When the Framers put that crazy structure, where the presidential election would be thrown from the Electoral College into the House for a one-state one-vote choice of the next president, they believed this would actually happen on a regular basis. Which is why you need to come back here tomorrow for the installment on what the Framers thought they were doing when they came up with the Electoral College system (which, as I've already mentioned, had pretty much nothing to do with how it has turned out).

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### **How a Third-Party Candidate Could Cause an Electoral Crisis**

The Huffington Post, by Greg Carrey, Mar 17, 2016

Imagine this scenario. As expected, Hillary Clinton wins the Democratic Party's nomination for president, and Donald Trump wins the Republican nomination. However, disaffected Republicans run a third-party candidate. In the presidential election Clinton wins a plurality but not a majority of the popular vote. (A third-party candidate would likely hurt Trump more than Clinton.) Clinton likewise wins a plurality but not a majority of votes in the Electoral College. According to the Constitution, the House of Representatives then selects the president, with each state delegation possessing one vote. In this scenario the House of Representatives is the same heavily Republican body that now sits. The third party candidate, who finished second or even third in the popular vote, becomes president of the United States. Imagine the uproar, hopefully not a violent one, that would ensue such a subversion of the popular will.

Right now groups of Republicans are planning to bring about precisely this turn of events. Refusing to support Donald Trump, they want to make sure a Trump nomination does not destroy the Republican Party. Erick Erickson, founder of the conservative website "The Resurgent," laid out a framework for such a plan in an NPR interview this week. A Trump nomination, Erickson reasons, would discourage many Republicans from voting, harming other GOP candidates all the way down the ballot. Not only would a third-party candidate bring out Republican voters, she or he just might win a controversial election.

Ordinarily third-party and independent candidates do not heavily disrupt presidential elections. They may influence the final outcome by pulling more votes from one candidate than from another. People still debate whether Ralph Nader's 2000 candidacy pulled the election away from Al Gore to George W. Bush. Hanging chads aside, however, no third party candidate has turned the election over to the heavily partisan House of Representatives. That could happen this year.

The only thing voters can do to prevent such an outcome is to mobilize. They could mobilize to protect one another by rejecting third-party candidates. No such effort would eliminate support for such candidates, but it could prevent a third-party candidate from winning Electoral College votes. Alternatively, voters could prevail upon their House representatives to honor the plurality of electoral votes, should things come to that. I highly doubt such an effort would be successful.

If you find a House election of a candidate who finishes second or third in the Electoral College vote an ugly prospect, it has happened before. The 1824 election featured four candidates, all from the same party. With no Electoral College majority, the House elected second place finisher John Quincy Adams over Andrew Jackson, who had won a plurality of votes. Representative Henry Clay, who finished fourth in electoral votes himself, turned over his support to Adams. In what came to known as the "Corrupt Bargain," Adams appointed Clay as secretary of state.

Not only could it happen again, people are planning to make it so.

Greg Carey, Professor of New Testament, Lancaster Theological Seminary

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