# PICKING THE PRESIDENT

*understanding the electoral college*

EDITIED BY ERIC BURIN

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## *Understanding the Electoral College*

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## 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.

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## 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

In my role as a public philosopher, I received a question from one of my blog readers asking about the independence of the Electoral College.[1] The person wrote:

> Long before the election, my class was discussing the Electoral College, and one student opined that it should be kept because the popular vote doesn't accord with the electoral vote only some of the time. This got me thinking, "Would we find it acceptable if the popular vote never matched the electoral vote?" It would seem that whatever makes it acceptable to have the popular vote not match the electoral vote in some instances, would also make such an outcome acceptable in every instance. Or, conversely, whatever makes it unacceptable to have the popular vote not match the electoral vote in every instance, would also make such an outcome unacceptable in each instance. But perhaps I'm missing something, so I thought I'd see what you have to say in regard to the argumentation.

To put the question another way: if it is okay for the Electoral College to contradict the popular vote once in a while, why isn't it okay

* A version of this essay appeared as Jack Russell Weinstein, "If the Electoral College can contradict the popular vote sometimes, why would it be wrong for them to do it every single time?" *PQED: Philosophical Questions Every Day* (blog), November 28, 2016, http://www.pqed.org/2016/11/if-electoral-college-can-contradict.html

for it to do so all the time? How can opposing the popular vote be right only some of the time?

This is a good, philosophically interesting, and relevant question. To answer it, we first have to ask why we have an Electoral College in the first place, although, surprisingly, there isn't a consensus on this basic fact.

One theory is that the Electoral College was intended to give an equalizing voice to a region of slaveholders with a smaller white population. There is some evidence for this. James Madison himself seemed concerned that "the right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of Negroes" (Madison Debates, July 19, 1787).[2] In other words, since there were more Northern than Southern voters, without the Electoral College, the South would not be able to protect its right to maintain slaves.

Some cite Madison's argument as a case against the very legitimacy of the Electoral College itself, but such a critique isn't persuasive. It runs afoul of the Genetic Fallacy, the observation that the truth or validity of a conclusion does not depend on its history or origin. Why the Electoral College came into being is irrelevant to its current purpose. GPS was invented for the military, yet many peace activists still use it. Adolf Hitler designed the Volkswagen Beetle (although one scholar argues that Hitler stole it from a Jewish engineer),[3] yet people who drive them do not necessary subscribe to his fascist philosophy. Similarly, just because the Electoral College may have been in support of slavery at one time does not mean it is now.

In fact, the real remedy for the Southern states' disproportionately small influence was the Three-Fifths Compromise found in Article 1 of the U.S. Constitution. Also proposed at 1787 con-

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[1] *PQED: Philosophical Questions Every Day* (blog) http://www.pqed.org/

[2] James Madison, "July 19, 1787," in *Notes of debates in the Federal Convention of 1787*. See Documents section.

[3] Paul Schilperoord, *The Extraordinary Life of Josef Ganz: The Jewish Engineer Behind Hitler's Volkswagen*. (New York : RVP Publishers, 2012).

stitutional convention, this clause declared that slaves should be counted as three-fifths of a freeperson for voting and taxation.

The Compromise is frequently and understandably touted as a philosophical synecdoche of American racism. But it's purpose was not to reduce the humanity of the slave to less than one as it is usually described; it was to *give* a slave some electoral power in the first place, and, by extension, the electoral power of the South.

Naturally, I do not mean to suggest that the compromise is not racist. It is. Slaves did not actually vote, slaveholders simply justified their additional electoral power on the backs of slaves using the Electoral College to consolidate their power. My point is simply that people tend not to understand its origins, giving credence, yet again, to the Genetic Fallacy, and making slavery less important to *today's* debate about the Electoral College. Once slavery was abolished in 1865 and the Three-Fifths Compromise rendered obsolete, this aspect of the Electoral College remained historically important but functionally irrelevant.

Another popular justification for the Electoral College also stems from the Madison debate: that it is a kind of "affirmative action" for rural voters. Given the different population densities of urban and agricultural regions, the Electors are supposed to equalize the power of voters across the country. This is the same sort of justification the framers used when apportioning two Senators per state regardless of their size, while basing the number of Representatives in the House on population. Without it, many claim, urban populations would determine all national elections.

This notion of the Electoral College emphasizes the lack of direct democracy in the Federal system. It echoes the Three-Fifths Compromise in that it holds that for votes to be equal, they need not be identical. Equality necessitates proportional, not uniform, representation.

But there is a problem with continuing to justify the Electoral College on these grounds. First, it assumes that rural voters have inherently different interests than urban voters, a generalization that simply doesn't hold. Political positions must be evaluated on a case-by-case basis, there is no reason to think that living in the country or the city would affect one's position on internation-

al relations, abortion, interstate commerce, net neutrality, or the vast majority of issues that concern government policies. It may affect one's position on agricultural issues, but even there, farmers disagree on ethanol, genetically modified seeding, and the importance of monoculture farming, to name just a few controversies.

People also tend to assume that rural voters are necessarily more conservative than urban voters, but this is simply not the case. For many decades, Appalachia was a Democratic stronghold. It isn't anymore; it changed. But that just proves my point. And while much has been made of the "traditional" family farm, there are few populations that are more embracing of technological change and government subsidies, and more suspicious of school choice than small farmers. ("Vouchers" and charter schools are untenable in rural areas where many towns share a single school.) The rural and urban electorate can simply not be cleanly divided into conservative and liberal, no matter how much lip service is given to the so-called "real America."

Regardless of all of these considerations, if increased representation of the rural is the reason for the Electoral College, then it simply failed to do its job in 2016. It did not magnify the agricultural voice; it increased the influence of the suburbs instead. As Joel Kotkin and Wendell Cox summarize in Forbes magazine, it wasn't alleged rural racism that rocketed Trump to power, it was the suburban five-point lead, a three-point increase from Romney in 2012.[4]

To summarize: if slavery is the reason for the Electoral College, we can't answer the reader's question at all and if voter equity is the reason, then all we have learned is that the Electoral College has failed. We do not yet know whether there is a moral difference between the college opposing the popular vote sometimes and it differing all the time.

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[4] Joel Kotkin and Wendell Cox, "It Wasn't Rural 'Hicks' Who Elected Trump: The Suburbs Were -- And Will Remain -- The Real Battleground," *Forbes*. November 22, 2016. Accessed on December 31, 2016. http://www.forbes.com/sites/joelkotkin/2016/11/22/donald-trump-clinton-rural-suburbs/

However, the answer to the reader's question can be found, I think, in what I have always understood as the true purpose of the Electoral College: to be an educated body in the face of an uneducated public. From Plato onward, one of the most trenchant criticisms of democracy has been that public policy is simply too complex for the average person to understand. One needs both special training in political reasoning, the argument asserts, as well as to be able to emancipate oneself from private interest to qualify as enlightened voter.

This is the tradition that Hamilton calls upon in *Federalist* No. 68 when he wrote: "electors should be men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation…[they would be] most likely to have the information and discernment" required to choose the president.[5] Ultimately, he argued, the presidency should be determined by the most *qualified* voter, not by people who vote simply because they are *eligible*.

What might have Hamilton meant by these comments and how does this change the role of the Electoral College? There are, it seems to me, two possible interpretations—and two possible answers to our main question—depending on whether this layer of qualified electors are to be regarded as insurance or as a representative body.

Let's begin with the first interpretation, that is, that the job of the Electoral College is to be a last-ditch effort to protect the country from a demagogue who fools the public into voting for him or her. If this is the case, then the Electoral College should be regarded as an insurance policy and, as with all insurance, we hope never to have to use it. We buy insurance hoping to waste our money.

Under this interpretation, if the Electoral College contradicts the popular vote with good reason, we should celebrate their choice. However, if it does so under conditions different than its prescribed safeguard, if, for example, the candidate is not dangerous or a demagogue, but simply won because of the vicissitudes of

[5] James Madison, *Federalist* No.68, in *The Federalist Papers*. See Documents section.

electoral politics, then such a decision is to be deplored and the presidency is illegitimate. This illegitimacy is, however, something we have to put up with to preserve the protection we might someday need. In such a case, a president who did not win the popular vote is the "price we pay" for the Electoral College.

In other words, if we consider the Electoral College as an insurance policy against demagoguery, the justification for the Electoral College is utilitarian. We are willing to accept some bad stuff for the greater good. An occasional disagreement between it and the popular vote can be justified, but continual disagreement cannot.

My personal feeling, by the way, is that this is the true purpose of the Electoral College. Since it did not protect us from Trump, it will never protect us from anyone and can no longer be justified. Even more so, since one of Hamilton's specific concerns was that the vote might be corrupted by "foreign powers to gain an improper ascendant in our councils," it failed in its very specific mandate.[6] As a preponderance of evidence has shown, Russia significantly influenced the election, orchestrating a Clinton loss despite her popular-vote landslide. The Electors knew this but disregarded it, emphasizing that the Electoral College no longer plays its intended part as insurer. It has become, instead, a tool for partisan sidestepping of the popular vote.

The second possible interpretation of Hamilton's preference for educated electors over the general population leads to a deontological justification for the Electoral College—it builds on a principle that allows for no exception. It puts forth the idea of representative government in its strongest from, regarding electors themselves as agents akin to all of our officials, not simply protectors with narrow mandates whom we call upon in very specific situations.

If we regard Electors as representatives—if we see them like Congress members or as specialists who have more refined political senses than the layperson—then we have to think of the popular vote as only advisory rather than binding. In other words, when the general populace votes and expresses its will, the Electors ought

[6] Madison, *Federalist* No.68. See Documents section.

to consider it as only one of many factors, and then vote based on their personal (allegedly professional and educated) judgment. This may or may not assume their personal judgment is better, but it does regard their representative role as having more *authority* to choose the president than an average voter.

There are, incidentally, good and convincing fictional portrayals of this point of view. In an episode of *The West Wing* titled "The Lame Duck Congress," when faced with deciding whether to approve a nuclear treaty against the wishes of 82% of the voters, the fictional President Bartlett says:

> Can I tell you something, honestly? This is one of those situations where I couldn't give a damn what the people think. The complexities of a global arms treaty, the technological, the military, the diplomatic nuances, it's staggering, Toby. 82% of the people cannot possibly be expected to reach an informed decision.

Bartlett's point is taken significantly farther by President Andrew Shepherd, in the movie *The American President*:

> **Lewis Rothschild**: …People want leadership, Mr. President, and in the absence of genuine leadership, they'll listen to anyone who steps up to the microphone. They want leadership. They're so thirsty for it they'll crawl through the desert toward a mirage, and when they discover there's no water, they'll drink the sand.
>
> **President Andrew Shepherd**: Lewis, we've had presidents who were beloved, who couldn't find a coherent sentence with two hands and a flashlight. People don't drink the sand because they're thirsty. They drink the sand because they don't know the difference.

If this point of view is correct and if the American population is simply not educated enough to make good democratic decisions, then the popular vote is simply advisory to the Electoral College

rather than binding. And, if this is the case, the College's decision is, by definition, always right. It and only it, has the job of choosing our president. In such an interpretation of Hamilton's words, there is no such thing as an electoral vote that contradicts the popular vote, just one that considered it and moved on.

One final observation: differing attitudes about voter knowledge is a point of contention in the debate between John Locke and Jean Jacques Rousseau, the patron saints of American and French democracy, respectively. The role of individual perspective marks a dividing line between the American notion that people's beliefs about their own interest is more important than their generalized knowledge, and the French democratic model, which assumes that personal interest is secondary to collective understanding, or the Republic's interests. Hamilton's view of the Electoral College as permanent representative seems to fit more with the French model than the American one, suggesting, yet again, that the Electoral College is inconsistent with American democratic values. It seems to me that the given all we have discussed, the only viable justification for the Electoral College is one based on its role as insurance against demagoguery and, as we have seen, it has failed in its role. Certainly, this conclusion is based in part on my own political leanings, but that doesn't make it wrong. Perspective and bias are not the same thing.

Nevertheless, to sum up my rather lengthy answer to the reader's question: if the Electoral College is insurance, then we have to put up with a couple unjustified conflicts in order to protect ourselves against potential serious dangers. In such a case, the Electoral College must agree with the popular vote in most but not all instances, and when it doesn't, we have to regard it as a necessary evil.

But if the Electoral College plays a representative role and the general popular vote is advisory, then it is theoretically possible for the Electoral College to disagree with the majority every single time and still be legitimate. In this case, the popular vote will always be secondary to the judgment of its representatives. Or, as President Bartlett puts it immediately after his comment above: "…we forget sometimes, in all the talk about democracy, we

forget it's not a democracy, it's a republic. People don't make the decisions, they choose the people who make the decisions. Could they do a better job choosing? Yeah. But when you consider the alternatives,…"

As is hopefully evident, the reader's question goes to the heart of the American experiment. Are we a democracy or a republic, and if we are one or the other, is it what we were supposed to be or just what we ended up as? The Genetic Fallacy makes original intent a less powerful argument for any constitutional interpretation, but it doesn't make it less interesting. Whatever damages the Electoral College may or may not have inflicted this time around, the fact that it has given us an opportunity to reflect on the nature of democracy is itself a gift worth celebrating.