

# PROPOSALS FOR ELECTORAL COLLEGE REFORM

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HEARING  
BEFORE THE  
SUBCOMMITTEE ON THE CONSTITUTION  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED FIFTH CONGRESS  
FIRST SESSION

ON

**H.J. Res. 28 and H.J. Res. 43**

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the presidency the same as that of the Congress. A plebiscite would increase the power of the presidency in relation to the Congress.

Sixth, the proper system should preserve the federal principle. If the federal principle is illegitimate in presidential elections, why isn't it illegitimate for the Senate? If numbers of votes are all that matters, why should a state with half a million people have the same representation in the Senate as a state with 20 million people? And why should each state regardless of size have at least one representative in the House? Why shouldn't small states have to share a representative with people from other states? And why should each state have an equal vote on Constitutional amendments? An attack on the federal principle in presidential elections is an attack on that principle in the whole Constitution.

The current system is not perfect, no electoral system is. However, it has successfully served all six of our goals for presidential elections. A non-federal election would serve none of them. Some years ago a student asked me, "Why does the Electoral College keep winning?" I was in a hurry and answered quickly, "Because the federal principle is just as important in presidential elections as it is in the rest of the Constitution." Today I say to you: "because, from the perspective of our Constitution, it produces the right winner."

Mr. CANADY. Professor Amar.

**STATEMENT OF AKHIL REED AMAR, PROFESSOR, YALE  
UNIVERSITY LAW SCHOOL**

Mr. AMAR. Thank you, Mr. Chair. My name is Akhil Reed Amar. I teach constitutional law at Yale Law School, where I currently hold the Southmayd Chair. It is a great privilege to be here today to discuss proposals for Electoral College reform.

I consider the so-called Electoral College a brilliant 18th century device that cleverly solved a cluster of 18th century problems. But as we approach the 21st century, we confront a different cluster of problems, and our constitutional machinery of presidential selection does not look so brilliant. Is it possible today that this once brilliant device has become a constitutional accident waiting to happen?

In asking this question, I'm aware that we must be extremely careful about constitutional amendments; that the current system seems to function tolerably well. But a car with a defective air bag might seem to run quite well until there is a collision. Should a prudent owner wait until after the collision to fix the flaw? Of course not. The time to act is before the accident. And this, I submit, has been our unfolding constitutional tradition on the vital issue of who should occupy the Oval Office.

Of the 15 amendments proposed and ratified after 1800, no fewer than five have directly adjusted the original Electoral College system, and four more have indirectly modified the system by federalizing the right to vote in presidential elections. Had we rejected all reforms of the original system, political parties would have had trouble evolving the current ticket system; residents of this city would remain constitutionally expelled from the Electoral College; and blacks, women, and young adults would have no Federal constitutional right to vote for President on equal terms with everybody else.

Let's, then, turn to the logic that gave birth to the Electoral College 200 years ago and consider whether this logic still holds. The framers emphatically did not want the President dependent on the legislature, so they rejected a parliamentary model in which the legislature would pick its own leader as prime minister and chief executive officer.

How, then, to pick a president? The visionary James Wilson proposed direct national popular election. But the scheme was deemed unworkable, for three reasons.

First, very few candidates would have had truly continental representations among ordinary citizens. Ordinary folk across the vast continent could not have enough good information to choose intelligently among national figures.

Second, a populist presidency was seen as dangerous, inviting demagoguery and possibly dictatorship as one man claimed to embody the voice of the American people.

Third, national election would upset a careful balance of power among States. Since the South didn't let blacks vote, southern voices would count less in a direct national election. A State could increase its clout by recklessly extending its franchise. For example, if, heaven forbid, a State let women vote, it could double its weight in a direct national election. Under the electoral college system, by contrast, a State could get a fixed number of electoral votes whether its franchise was broad or narrow; indeed, whether or not it let ordinary people pick electors at all.

Those are the original arguments. None of these arguments, in my view, works today. Improvements in communications technology and the rise of political parties make possible direct election of a populist presidency. De facto, that is our system today. Blacks and women are no longer selectively disenfranchised, thank God. And States no longer play leading roles in defining the electorate or in deciding whether to give voters a direct voice in choosing electors. I was especially happy to hear the remarks of the president of the League of Women Voters on this point.

The national election would encourage States to encourage voters to turn out on election day. But this hardly seems a strong reason to oppose direct election. Ingenious, indirect, sophisticated arguments made on behalf of the Electoral College by clever theorists these days are legion. I think we have just heard some very ingenious arguments. But, in my view, almost are all make-weight. If the scheme is so good, why doesn't any State or any foreign nation copy it, say, for election for governor?

A low plurality winner in a three- or four-way race is possible, even with the Electoral College, and could be avoided in the direct national election by single transferable voting, voters listing their second or third choices on the ballot, in effect combining the first heat and runoff into a single transaction. Alternatively, a runoff could be held on a second day, as envisioned by the LaHood and Campbell proposals now before the committee.

The only two real arguments against abolition of the Electoral College sound in federalism and inertia. Only federalism could explain why we should use an electoral college to pick Presidents but not governors. But it is hard for me to see what the federalism argument is today.

The specter of the national government administering a national election, I confess, does not give me the cold sweats. A razor-thin popular vote margin might occasion a national recount. But States now manage recounts all the time, and new technology will make counting and recounting much easier in the future. And this is, by the way, a problem you can have under the current system. Even

if there is a clear national popular winner, the current system might require recounts in a number of closely-contested States if the electoral college is close.

Inertial, Burkean arguments take two forms. And here I will end. First, the argument goes, a change in presidential selection rules would radically change the game in ways hard to foresee. I think this is what Representative Hyde was saying, and Professor Best. Candidates would not care about winning States, only votes, and campaign strategies might change dramatically and for the worse. But it is hard to see why, given that historically the Electoral College leader has also tended to be the popular vote leader, the strategy for winning shouldn't change dramatically if we switch from one measure to the other.

This sets up the final inertial point. The dreaded specter of a clear popular loser becoming the Electoral College winner has not happened in this century. Why worry? But that's what someone might say after three trigger pulls in Russian roulette. One day we will end up with a clear loser President, clear beyond any quibbles about uncertain ballots. The question is, will this loser/winner be seen as legitimate at home and abroad?

If our modern democratic ethos, when focused on the thing, would balk at a Byzantine system that defines the people's choice on election day, true Burkean theory would seem to argue against the Electoral College. If we the people would want to amend the Constitution after the loser President materializes, and I tend to think we would, why are we now waiting around for the inevitable accident to happen?

Mr. CANADY. Thank you, professor.

As you have heard, the bells have been ringing, so we have a vote on the floor of the House. We are going to have to recess for a few minutes while we go to the floor and vote, but we will come back. I understand there is just going to be one vote. We will come back as soon as that vote is concluded and continue with the hearing.

Mr. CONYERS. Mr. Chairman, is it true that the vote is on adjournment?

Mr. CANADY. It is a motion to adjourn. Someone must be unhappy. We have had a month off, and they want to adjourn already. I do not quite understand that, but it is the way things work around here sometimes.

The committee will stand in recess.

[Brief recess.]

Mr. CANADY. We are facing another series of votes in about 45 minutes which will be quite an extended series, so it is my hope that we will be able to conclude the hearing before that series of votes. I do not want to cut anyone short. And I certainly do not want to cut any of the members of the panel or the Members short on having the opportunity to ask questions. But I think if we can accomplish that, that would simplify life for everyone.

I understand that Professor Berns needs to be gone by noon. You certainly can go next. Although we are going to get to you before noon in any event, because Mr. Gans probably will not take much more than 5 minutes.

Mr. GANS.

the effectiveness of government if such a scenario develops? And I, quite frankly, think it is troubling.

I will be very candid with you. I do not think this proposal is going anywhere. I do not know that we are going to spend a lot of energy on it or any more energy on it. I am not sure that this would pass the House, but I do not think it would pass the Senate. So there we are.

But, Professor Amar, do you have anything to add?

Mr. AMAR. I did want to say that those of us who believe in direct national election believe in the importance of regional variation. I do not think we are levelers that way. We think that intrastate regional variation is very important, and yet we have Governors elected in all 50 States not by any version of the electoral college, but by within the State direct election, and that system ordinarily does generate candidates with sufficiently broad appeal in various regions. Even if they do not win all sorts of regions, they have to at least be competitive in all sorts of different parts of the State.

We also believe in federalism. This is the last point. And it is connected to the Ranking Member's question about turnout and whether direct national election would increase turnout. The electoral college system was born, again, I repeat, in part so that States that had very few people voting, that didn't allow very many people to vote, wouldn't be penalized in the Presidential selection process. I think that was unfortunate that it was about giving the South credit for all these black people; they could have credit in the electoral college even though they didn't let them vote.

This is one of the reasons I am a little uneasy about odes to the framers without recognizing this was part of the original system and how we have changed in a bunch of ways about people in this city being able to participate in the Presidential election system, about African Americans and women being able to participate.

But here is how we believe in federalism, also. Under the current system, State governments do not have that much of an incentive to encourage their citizens to turn out, because whether it is a high turnout or a low turnout, a safe State or a contested State, California still has 54 electoral votes. It doesn't matter. If we move to—

Mr. HYDE. Excuse me, but there are other people running for office in a Presidential campaign, and they campaign furiously to get the vote out. Senators, auditor of public accounts, secretary of State, Congressmen; every 2 years, they are beating the drums to get the vote out. So the President may not excite anybody, and the others do.

Mr. AMAR. It is a very good point. Perhaps it is because I happen to have been in California, where Jimmy Carter, for whom I think I was planning to vote at the time, conceded the election before I had even cast my ballot, and I went out and still cast my ballot, but lots of my fellow Californians, alas, didn't. And this move to direct national election might give State governments a little bit more, not just candidates, but the government apparatus, a little more incentive to encourage their citizens to vote, which might be a good thing. It does raise issues of fraud, which is why, as I said, if you are going to go this way, you are going to have to accept the role of the national government in monitoring a national election.