

The real reason we have an Electoral College: to protect slave states

“In a direct election system, the South would have lost every time.”

[Sean Illing](#) Nov 12, 2016, 9:30am EST



Scott Olson/Getty Images

Every four years, we elect a president in this country, and we do it in a strange way: via the Electoral College. The reasons for the Electoral College are unclear to most people. On the surface, it appears anti-democratic and needlessly complicated.

Why not rely on a popular vote, as almost every other democracy does? If a popular vote makes sense for gubernatorial elections, why doesn't it make sense for presidential elections? What did the American founders have in mind when they erected this ostensible firewall against majority will?

Professor Akhil Reed Amar is the Sterling professor of law and political science at Yale University. A specialist in constitutional law, Amar is among America's five most-cited legal scholars under the age of 60.

He's also written extensively about the origins and utility of the Electoral College, most recently in his new book, [*The Constitution Today*](#).

In the wake of last week's election, I reached out to Amar to get his thoughts on the justness of our current system. I wanted to know why the Electoral College exists, whether it's anti-democratic by design, and if he believes there's any chance of the electors intervening this year.

Our conversation, lightly edited for length and clarity, follows.

Sean Illing

Let's start with this: Why does the Electoral College exist? Is it exclusively about federalism and slavery?

Akhil Reed Amar

There are several standard stories that I learned in school, and then there's an emerging story that I find more explanatory. I learned in school that it was a balance between big and small states. But the real divisions in America have never been big and small states; they're between North and South, and between coasts and the center.

The House versus Senate is big versus small state, but from the beginning big states have almost always prevailed in the Electoral College. We've only had three small-state presidents in American history: Zachary Taylor, Franklin Pierce, and Bill Clinton. All of the early presidents came from big states. So that theory isn't particularly explanatory.

Then there's the theory that the framers really didn't believe in democracy. But they put the Constitution to a vote, they created a House of Representatives that was directly elected, they believed in direct election of governors, and there are all sorts of other democratic features in the Constitution. So that theory isn't so explanatory.

There is an idea that democracy doesn't work continentally because there are informational problems. How are people on one part of the continent supposed to know how good someone is on another part of the continent? But once political parties appear on the scene, they have platforms. And ordinary people know what they stand for, and presidential candidates are linked to local slates of politicians. So that problem is solved.

So what's the real answer? In my view, it's slavery. In a direct election system, the South would have lost every time because a huge percentage of its population was slaves, and slaves couldn't vote. But an Electoral College allows states to count slaves, albeit at a discount (the three-fifths clause), and that's what gave the South the inside track in presidential elections. And thus it's no surprise that eight of the first nine presidential races were won by a Virginian. (Virginia was the most populous state at the time, and had a massive slave population that boosted its electoral vote count.)

This pro-slavery compromise was not clear to everyone when the Constitution was adopted, but it was clearly evident to everyone when the Electoral College was amended after the Jefferson-Adams contest of 1796

and 1800. These elections were decided, in large part, by the extra electoral votes created by slavery. Without the 13 extra electoral votes created by Southern slavery, John Adams would've won even in 1800, and every federalist knows that after the election.

And yet when the Constitution is amended, the slavery bias is preserved.

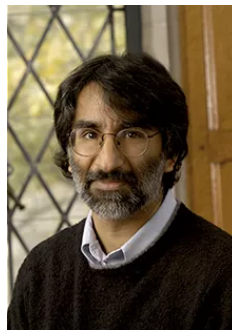
Sean Illing

So this raises an obvious question: Why do we still have the Electoral College? What's the utility now?

Akhil Reed Amar

Well, inertia is one reason. It's the system that we have. A constitutional amendment is a very difficult thing to accomplish. As a matter of public education, most people are not taught the slavery story. They're taught that the Electoral College was about, say, federalism and institutional checks.

They're not told that the Electoral College was not the framers' finest hour.



Prof. Akhil Reed Amar.

Sean Illing

The founders weren't entirely contemptuous of democracy, but were they

skeptical about the ability of the average person to exercise wise political judgment?

Akhil Reed Amar

No, the standard story is that the electors were wise elders making choices instead of the citizenry, but from the beginning most electors were nondescript potted plants who simply ratified the choice made by voters on Election Day. And early on, in almost every place, popular elections for presidential electors became the norm.

Sean Illing

Who are these "electors" today, and is there any reason to suppose they're enlightened decision-makers?

Akhil Reed Amar

They're nobodies from nowhere. They're not even on the ballot. The Constitution prohibits them from being real notables like senators or representatives. They have to meet on a single day, which means there's no time for them to deliberate with each other.

So, again, the standard stories that are told that the framers created an Electoral College because they didn't trust voters doesn't line up with the data.

Sean Illing

Then why didn't they create a directly representative system? Why attach a useless appendage to the process? Is the answer once again slavery?

Akhil Reed Amar

Yes. At Philadelphia, the leading lawyer in America, James Wilson, proposed direct elections. Wilson was one of only six people to sign the Declaration of Independence and the Constitution. He wrote the words "We the people" in the document. He's one of the first five associate justices on the Supreme Court. And he was for a direct election.

When he advocated this, James Madison's immediate response was: In principle, you're right, but the South won't go for it because they'll lose every time because they won't be able to count their slaves.

Sean Illing

The common criticism today is that the Electoral College is anti-democratic. That we've all just witnessed the election of another president who lost the popular vote will only fuel this perception.

Akhil Reed Amar

The Electoral College is in tension with one strong democratic ideal that I endorse: the idea of one person, one vote. The Electoral College ends up counting votes unequally depending on where they're cast. That is at tension with a modern democratic sensibility of counting all votes equally.

Let me put it a different way: When it comes to governors, we count all votes equally, and if the election is close, we recount all votes carefully. This is how we do it in every one of the 50 states. And the governor analogy is useful because governors are, in effect, mini presidents. They typically have four-year terms and veto pens and pardon pens, and in no state do we have a mini Electoral College picking the governor.

Sean Illing

Just or not, the electors have the ability to install the candidate of their choosing. Is that even a remote possibility this year? If Donald Trump's election doesn't justify going "rogue," what or who could?

Akhil Reed Amar

Donald Trump does not justify going rogue. I opposed him politically as fiercely as anyone, but he was picked by the rules.

Here's a situation that would justify a rogue Electoral College: If something happened dramatically after Election Day but before the meeting of the Electoral College, such as a stroke or a death or possibly some extraordinary new information, a scandal that would've changed the minds of the people who picked the candidate. That, I believe, would justify a faithless elector.

Sean Illing

If the electors are going to reflexively vote the way they're supposed to, then what's the point?

Akhil Reed Amar

In many places, they pledge to vote a certain way — that's true in about half of the states.

Sean Illing

Are they legally bound to honor their pledge?

Akhil Reed Amar

That's a great question. The law requires them, in many places, to take a pledge, and the Supreme Court came very close to saying that those laws were constitutional and that they do reflect our actual practice of bound electors. From the beginning, these electors have been understood as obligated to vote in accordance with their pledge.

Sean Illing

So I take it you see no plausible or likely scenario in which the Electoral College will overturn the results of an election?

Akhil Reed Amar

Only, as I said, if there were dramatic new information that would've changed the minds of the people who voted for that candidate.

Sean Illing

Do you agree that a popular vote would encourage greater turnout? As it stands, there are plenty of people who feel their vote is meaningless because they live in a politically homogeneous state.

Akhil Reed Amar

It would encourage greater turnout in a couple of ways. First, it makes every state a swing state in that the margin of victory matters, and so every voter can make a difference.

Second, it creates incentives for states seeking to maximize their clout to facilitate voting. Today, if a state makes it hard for people to vote, it pays no Electoral College penalty. It gets the same number of electoral votes whether it makes it easy or hard for citizens to participate.

In a direct election world, states that facilitate and encourage voting loom larger in the final count. So that gives states an incentive to experiment in ways that promote democracy.

Sean Illing

What's the best defense of the Electoral College?

Akhil Reed Amar

It's the system that we have. There are always transition costs. Brilliant reformers never fully anticipate possible defects in their reforms, and there are always unintended consequences.

We've managed to limp along with this system. It's not highly skewed to either party today. The Democrats tend, in general, to win more big states. The Republicans tend, in general, to win more states overall. And these skews offset for the most part.

If we have a direct election, we're going to need far more federal oversight over the process, and that's a massive undertaking. States might also have incentives to push democracy too far, like lowering [voting age] to 16, for example. Hence you'll need more federal regulation over the process.

Sean Illing

What's the greatest argument against it?

Akhil Reed Amar

Again, it's in tension with a basic idea of one person, one vote. The problem with most of the arguments for the Electoral College is that they prove too

much, because if they were good arguments, every state is stupid, as no state has a mini Electoral College. And if that's good enough for the governorship of Texas or California, why not for the presidency of the United States?

The only argument that has the right shape would have to explain why popular votes make sense for governors but not for presidents. There are only two that I can think of. One is just inertia — that this is the system that we have and we have to accept it.

The other is some argument about federalism, namely that there's a difference between the federal governor (a.k.a. the president) and the state governor. But direct election would still involve states and state experimentation. It would preserve federalism at its best.

Sean Illing

How difficult would it be to throw off this system and replace it with a popular vote? Are there any serious reform efforts underway?

Akhil Reed Amar

There is one that's afoot called the National Popular Vote Interstate Compact, and it's an idea that several states have already endorsed. Under this idea, state legislatures have agreed that if enough other state legislatures agree, they will give their state's electoral votes to the national popular vote winner.

Right now, only blue states have signed on to this. No red states have, and that partisan divide may be likely to intensify because Republicans might think the current Electoral College system favors them given the results in 2000 and this year.

Sean Illing

Are you in favor of eliminating the Electoral College?

Akhil Reed Amar

I'm a believer in direct election, but I am aware that there's always the possibility of unintended consequences of even well-intentioned reform. That, I suppose, is the Burkean conservative in me.

Author's note: This article previously indicated that eight of the first nine presidents were from Virginia. It has been updated to read that eight of the first nine presidential races were won by Virginians.