

Attending (to the Electoral) College

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

Now that, for the second time in 16 years, the candidate for president who won the most popular votes has been denied the presidency, the media and public are paying much more attention to the Electoral College -- that strange institution our constitutional founders bequeathed us for choosing our nation’s chief executive. People now understand more clearly how each state’s electors, and not the nation’s collective voters, cast the decisive ballots. And residents of populous states like California are now keenly aware of large state-by-state disparities caused by the formula for determining the number of electoral votes each state casts.

And, of course, there has been a slew of opinions and arguments about the Electoral-College system in general – and as it operated in the Trump-versus-Clinton battle.

What can a podcast committed to bringing “background context” and light, not heat, hope to add to the mix? Three points might help listeners seeking to understand the current controversy.

First, it’s worth observing that the Electoral College system, which a (now 270-member) majority of a “College” of “Electors” chooses the nation’s president, is only one of several non-majoritarian, anti-direct-democracy institutions the Constitution’s Framers created in 1787. Fearing “the tyranny of the majority” and distrusting the judgment of the common man, the Framers severely limited the ranks of those who could vote. And, in designing the national legislature, the Framers deliberately gave majority power in one legislative chamber (the Senate) to a minority of citizens; and they chose to have Senators selected indirectly by state legislatures, rather than directly by voters.

Second, although the Electoral College is similar in effect to the other institutions just mentioned, the College is distinct in one major way. We needed constitutional amendments – requiring a super-majority (2/3 of both houses of Congress and ¾ of the States) – to achieve past electoral reforms. The 19th Amendment, which gave women the vote in 1920, is one of several constitutional amendments expanding voter ranks. And it took ratification of the 17th Amendment in 1913 to require direct election of Senators. By contrast, because of another core feature of the constitutional system – the Framers’ decision to leave most of the procedures for electing federal officials up to State discretion -- the Electoral College can be fundamentally reshaped by means short of constitutional amendment.

For example, voter-majority-rule could be achieved through the so-called “National Popular Vote Plan.” This proposal envisions individual states passing legislation agreeing that, regardless of which candidate wins *their* state, their electors will vote for the candidate who wins the most popular votes *in the nation as a whole*. Already

adopted by 11 states controlling 165 electors, if other states with at least 105 more electors join the compact – and, crucially, if the agreeing states stick with their bargain – presidential elections would become direct contests for the hearts and minds of all American voters, regardless of which state they live in.

Of course, it is unlikely -- in the short-term, at least -- that the National Popular Vote Plan, or any major reform plan for that matter, will be adopted. Which brings up a third background point: advances in the representativeness of our election system have generally required both a strong consensus that change is essential AND the lack of a perception that the change would systematically benefit one party or bloc. The very fact that both of the candidates recently benefitting from the Electoral College were Republican (and that most calls for reform are coming from Democratic-party partisans) would likely lead Republican office-holders in the Congress and the states to resist, for the time being, any significant change.

This isn't intended as a partisan slam. I'm just observing that – ironically! – although the Framers thought the Electoral College would *reduce* the influence of political parties, party politics is likely to control the fate of the institution!