The Electoral College, the Senate & the Quest or Fair Representation

Reading One: Does the Electoral College Uphold Democracy?

We are often told that American democracy is founded on the principle of equal representation: one person, one vote. In a democratic process, the majority is supposed to prevail. However, we have recently seen that some important American political institutions may be falling short of those ideals.

In two of the last five presidential elections, the victorious candidate was able to win even though they received a smaller number of the votes than their leading opponent. By taking advantage of the Electoral College, a candidate can ascend into office without securing the popular vote.

So what is the Electoral College and why does it exist in the first place? In a February 11, 2008 article for FactCheck.org Joe Miller, a writer at the Annenberg Center for Public Policy, explained some of the background behind the institution. He wrote:

> When U.S. citizens go to the polls to "elect" a president, they are in fact voting for a particular slate of electors. In every state but Maine and Nebraska, the candidate who wins the most votes (that is, a plurality) in the state receives all of the state's electoral votes. The number of electors in each state is the sum of its U.S. senators and its U.S. representatives. (The District of Columbia has three electoral votes, which is the number of senators and representatives it would have if it were permitted representation in Congress.) The electors meet in their respective states 41 days after the popular election. There, they cast a ballot for president and a second for vice president. A candidate must receive a majority of electoral votes to be elected president.
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> The reason that the Constitution calls for this extra layer, rather than just providing for the direct election of the president, is that most of the nation's founders were actually rather afraid of democracy. James Madison worried about what he called "factions," which he defined as groups of citizens who have a common interest in some proposal that would either violate the rights of other citizens or would harm the nation as a whole. Madison's fear – which Alexis de Tocqueville later dubbed "the tyranny of the majority" – was that a faction could grow to encompass more than 50 percent of the population, at which point it could "sacrifice to its ruling passion or interest both the public good and the rights of other citizens." Madison has a solution for tyranny of the majority: "A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking."….
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> The Electoral College was not the only Constitutional limitation on direct democracy, though we have discarded most of those limitations. Senators were initially to be appointed by state legislatures, and states were permitted to ban women from voting entirely. Slaves got an even

worse deal, as a slave officially was counted as just three-fifths of a person. The 14th Amendment abolished the three-fifths rule and granted (male) former slaves the right to vote. The 17th Amendment made senators subject to direct election, and the 19th Amendment gave women the right to vote.

https://www.factcheck.org/2008/02/the-reason-for-the-electoral-college/

But there is another, more troubling, story about the origins of the Electoral College. Akhil Reed Amar, who teaches constitutional law at Yale University, explained this more disturbing history in an article for *Time* magazine right after the 2016 election.

> Standard civics-class accounts of the Electoral College rarely mention the real demon dooming direct national election in 1787 and 1803: slavery.
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> At the Philadelphia [Constitutional] convention [of 1787], the visionary Pennsylvanian James Wilson proposed direct national election of the president. But the savvy Virginian James Madison responded that such a system would prove unacceptable to the South: "The right of suffrage was much more diffusive [i.e., extensive] in the Northern than the Southern States; and the latter could have no influence in the election on the score of Negroes." In other words, in a direct election system, the North would outnumber the South, whose many slaves (more than half a million in all) of course could not vote. But the Electoral College—a prototype of which Madison proposed in this same speech—instead let each southern state count its slaves, albeit with a two-fifths discount, in computing its share of the overall count….
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> If the system's pro-slavery tilt was not overwhelmingly obvious when the Constitution was ratified, it quickly became so. For 32 of the Constitution's first 36 years, a white slaveholding Virginian occupied the presidency.
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> Southerner Thomas Jefferson, for example, won the election of 1800-01 against Northerner John Adams in a race where the slavery-skew of the electoral college was the decisive margin of victory: *without the extra electoral college votes generated by slavery, the mostly southern states that supported Jefferson would not have sufficed to give him a majority.* As pointed observers remarked at the time, Thomas Jefferson metaphorically rode into the executive mansion on the backs of slaves.
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> http://time.com/4558510/electoral-college-history-slavery/

The Electoral College not only has a problematic history, it continues to create troubling outcomes. In the 2016 presidential election, Democratic nominee Hillary Clinton received nearly 3 million more popular votes than Republican Donald Trump, yet Trump won the Electoral College and thus the presidency.

What can be done to change the Electoral College? Advocates for directly electing the president would need a Constitutional amendment, which requires three-quarters of states to sign on. One alternative proposal is the National Popular Vote Interstate Compact, an agreement through which states would commit to give their electoral votes to the winner of the national popular vote, regardless of the outcome in their particular state. The compact would take effect when states whose total electoral college votes surpass 270 pass legislation in favor of it.

However, this effort has encountered opposition in Congress. In a January 21, 2018, article for *PBS,* reporter Kamala Kelkar described the effort to pass one such piece of legislation in Ohio:

> Within months of Trump winning the presidential election in 2016, despite failing to capture the majority of votes, lawmakers such as [Ohio State Representative Emilia] Sykes in Ohio as well as Florida, Georgia, South Carolina, Texas and at least a dozen other states supported bills to transform the process. If enacted by enough states to influence the majority, they would agree to give all their electoral votes to the most popular presidential candidate, regardless of who wins their state.
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> Ten states and Washington, D.C., have already agreed to join the compact.
> But in Ohio's two-thirds Republican legislature, the effort languished and the impetus started to fade. Lawmakers in other states, too, abandoned their fights. Attempts to change the Electoral College system that were once seen as bipartisan fell victim to the same kind of divide that fueled this weekend's federal government shutdown.
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> "The idea was to pitch this as something that was of interest to Democrats and Republicans alike," said Joshua Tucker, a professor of politics at New York University. "Now it's seen as a way of undermining the Republican party."
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> A Gallup poll after the election showed that Republicans who favored a national popular vote dipped from 54 percent in 2011 to 19 percent in December 2016.
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> https://www.pbs.org/newshour/nation/the-racial-history-of-the-electoral-college-and-why-efforts-to-change-it-have-stalled]

While the popularity of abolishing the Electoral College may depend on the temperature of the political moment, eliminating the institution would allow for a more direct exercise of democratic will than the process currently in place.

For Discussion:

1. How much of the material in this reading was new to you, and how much was already familiar? Do you have any questions about what you read?

2. According to the reading, what are some reasons that the Electoral College was created?

3. What might be some arguments for keeping the Electoral College? What are some arguments for eliminating it?

4. Do you think an effort like the National Popular Vote Interstate Compact be successful in changing the Electoral College? Why or why not?

5. One problem with the Electoral College is that most states appoint their electors entirely to one candidate. One alternative to eliminating the Electoral College would be for states to appoint their electors proportionally, as Maine and Nebraska already do. For example, under this system instead of California giving all of its 55 electors to the candidate who wins the majority in the state, it would divide its electoral votes proportionally in order to reflect the number of votes cast in favor of each candidate. What do you think of this possibility? What might be some arguments for or against states continuing to devote all of their electoral votes to one candidate?

Reading Two: Does the Senate Provide Fair Representation?

The Senate is another institution that raises questions of fair representation. Under the Constitution, each state gets two senators, regardless of the state's population.

This means that states with fewer people have their interests disproportionately represented in the Senate. For example, the 39 million residents of California have the same representation (two senators) as the 579,000 residents of Wyoming.

Recently, Supreme Court Justice Brett Kavanaugh was confirmed with the votes of 51 senators, yet these senators, many of whom who hailed from less populated states, represented just 44 percent of the American public. Moreover, residents of Washington, DC (population 693,000) and U.S. citizens in Puerto Rico (some 3.3 million people) are not represented in the Senate.

Why was the Senate designed in such a manner? The website for the U.S. Senate describes its own history like this:

> During the summer of 1787, the delegates to the Constitutional Convention in Philadelphia established equal representation in the Senate and proportional representation in the House of Representatives. Called the "Great Compromise" or the "Connecticut Compromise," the unique plan for congressional representation resolved the most controversial aspect of the drafting of the Constitution.
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> In the weeks before the Constitution's framers agreed to the compromise, the delegates from the states with large populations argued that each state's representation in the Senate should correspond to the size of the state….
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> Small-state delegates hoped to protect states' rights within a confederate system of government. Fearing the effects of majority rule, they demanded equal representation in Congress, as was practiced under the Articles of Confederation and assumed in William Paterson's New Jersey Plan. In fact, some framers threatened to withdraw from the convention if a proportional representation measure passed.
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> Other delegates sought a compromise between large-state and small-state interests. As early as 1776, Connecticut's Roger Sherman had suggested that Congress represent the people as well as the states. During the 1787 convention, Sherman proposed that House representation be based on the population, while in the Senate, the states would be equally represented.
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> www.senate.gov/artandhistory/history/common/briefing/Constitution_Senate.htm

This compromise also sought to create a body that would move slowly and with more careful deliberation than the House of Representatives. Yet critics of the Senate have noted that, in creating a structure that would slow the process of change and thus preserve the social and political order, the Founders expressed a skepticism of unfettered democracy. In an article on April 6, 2017, entitled "The United States Senate is a failed institution," *ThinkProgress* justice editor Ian Millhiser argued that, prior to the Civil War, the structure of the Senate ended up serving the interests slave-holding states. He wrote:

> Not long after the Constitution was ratified, slaveholders discovered that they had a problem — most of the nation lived in free states. By the early 1820s, free states controlled 105 of the 187 seats in the House of Representatives — and that's after you account for the fact that the Three-Fifths Compromise permitted slave states to count 60 percent of their enslaved and disenfranchised population when it came time to allocate seats in the House.
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> If the House were the only game in town, in other words, it could conceivably have banned the slave trade — or at least taken fairly aggressive steps to hobble the South's "peculiar institution."...
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> The reason why no new civil rights bill emerged from Congress until 1957 was the Senate. Though five such bills cleared the House in the 12 years following World War II alone, Senate malapportionment gave the southern senators far more influence over the legislative process than their states' population could justify.
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> https://thinkprogress.org/antidemocratic-history-of-senate-d05688f441b8/]

The disproportionate power of Senators from less populated states continues to draw criticism today. In an October 16, 2018 piece for *GQ Magazine,* staff writer Jay Willis argues that the structure of the Senate creates a body that does not reflect the current demographics of the country:

> The Senate's transformation into a funhouse-mirror version of the House is a quiet emergency for democracy, because its members are still allocated equally among *states*. And since there now are a greater number of sparsely-populated, mostly-white, right-leaning states than there are heavily-populated, racially-diverse, left-leaning states, the Senate acts to preserve power for people and groups who would otherwise have failed to earn it. A voter in Wyoming (population 579,000) enjoys roughly 70 times more influence in the Senate than a voter in California (population 39.5 million), which sounds like the most unfair statistic in American politics, until you remember that taxpaying U.S. citizens in Washington, D.C. and Puerto Rico still have no influence in the Senate at all….
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> In practice, the upper chamber now functions less often as a modest, ideologically-agnostic restraint on majority rule than it does as affirmative action for a particular party's agenda. As

these demographic shifts continue and population disparities widen, on scales the Founders never could have imagined, the Senate's legitimacy will continue to evaporate.

https://www.gq.com/story/the-case-for-abolishing-the-senate

Because the Senate, like the Electoral College, is enshrined in the U.S. Constitution, changing the institution would be a politically difficult task. Nevertheless, if enough citizens become dissatisfied with the undemocratic aspects of the body, it may face a serious challenge.

For Discussion:

1. How much of the material in this reading was new to you, and how much was already familiar? Do you have any questions about what you read?

2. According to the article, what are some of the reasons the Senate created in the form that it was?

3. What are some potentially positive or potentially negative effects that the Senate as it currently exists has on law-making and the democratic process?

4. Part of the reason for the creation of the Senate was to increase the power and protect the well-being of smaller, less-popular states. Look up the population of your state and compare it to other states. Does your state gain power in the Senate relative to its population, or does it lose power? Does this affect how you think about Congress and your representatives in it?

5. In the article from *GQ Magazine* quoted above, Jay Willis discusses the idea of abolishing the Senate and having a unicameral legislature—in other words, a Congress with just a House of Representatives. In order to maintain the idea that this single branch of Congress would act with caution and restraint, he suggests requiring that passing a bill through this House might require a supermajority of votes--for example, 60%. What do you think of these proposals? What might be some of the pros and cons?