

Electing the President- The Popular Vote vs. The Electoral College

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[00:00:00.1] Jeffrey Rosen: As we approach the 2024 presidential election, the NCC convened a debate about the Electoral College. Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate, the National Constitution Centers and are nonpartisan nonprofit, chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode, two leading writers debate the Electoral College versus a national popular vote and anticipate possible legal challenges that might arise from a contested election. Jesse Wegman is a member of the New York Times editorial board and author of *Let the People Pick the President, the Case for Abolishing the Electoral College*. And Robert Hardaway is a professor at the University of Denver's Sturm College of Law and author of *Saving The Electoral College, why the National Popular Vote Would Undermine Democracy*.

[00:01:00.6] Jeffrey Rosen: Thank you so much for joining Robert Hardaway and Jesse Wegman. Let's begin with an important question that both of you have written books on taking opposite positions. Should we abolish the Electoral College and have a national popular vote or not? And after we've dug into that important question, we can broaden out to some unresolved issues that may possibly arise in the next election. So, Jesse Wegman, your book states the case as clearly as possible. Let the People Pick the President, the Case for Abolishing the Electoral College. What is the case and why should we have a national popular vote?

[00:01:56.3] Jesse Wegman: Hi, Jeff. Thanks so much for having me and for hosting this debate. The quickest answer, and I think the cleanest answer to that question is that a modern representative democracy, like the United States, really runs on two fundamental principles. And those principles are political equality and majority rule. Political equality means all votes count the same wherever they're cast, and majority rule means the candidate who wins the most votes wins the election. I think those have been our underlying principles. One of them, majority rule, from the start, you can actually see the founders themselves talking about how majority rule is the essence of Republican government, as they said at the time. And political equality obviously

is enshrined in our Declaration of Independence, but it has taken us more than two centuries to come anywhere close to achieving it in practice.

[00:03:00.6] Jesse Wegman: Obviously, starting with the slavery that was literally written into the Constitution of the founding and going up through the 1960s when the Civil Rights Act and the Voting Rights Act finally made real the promises of the reconstruction amendments. But one person, one vote, that's political equality, and majority rule, the person who gets the most votes wins, those are at the heart of how a representative democracy should run. The Electoral College, as it is currently constituted, violates both of those principles. It violates majority rule because as we have seen many times, well, five times over the nation's history and almost saw in 2020 and may well see next week, the candidate who gets fewer votes can win the White House.

[00:03:48.3] Jesse Wegman: And it violates political equality because as we see every year, no matter who wins the election, some votes count for more than others, some people matter more than others in the election, in how the candidates treat them, in how their votes determine what happens to all of us all over the country. So that's the quickest way I can put it, that majority rule and political equality are the guiding lights of a representative democracy in the 21st century, and the Electoral College as it works under the winner take all rule today, violates both of them.

[00:04:20.0] Jeffrey Rosen: Thank you very much for that introduction. Robert Hardaway, your book puts your case clearly in the title as well. It's called, 'Saving the Electoral College: Why the National Popular Vote Would Undermine Democracy'. Why would it?

[00:04:36.6] Robert Hardaway: Well, the main reason I set forth is that I'm, of course, in complete agreement that we want the people to elect the candidate. The problem with the so-called Russian system and the French system is that without the Electoral College, you might have 15, 16, 17 parties vying for the presidency. And because no one will get a majority, generally, there's gonna be a runoff, which I call it the great illusion. The French experienced this. Well, it was John F Kennedy when he saved the Electoral College back in 1956. At that time, Republicans were convinced that the Electoral College aided the Democrats. And so they wanted to "abolish the Electoral College."

[00:05:28.8] Robert Hardaway: And so in the French election of 2017, they had, I don't know, nine, 10, 12 parties. And because there were so many parties, no one really got a high popular vote. It was 23% for the extreme right wing candidate and something like 18% for somebody nobody had heard of. And as a result, the runoff was between the person who got 23% and the person who got 17%. And so it turned out that the voters in the second round were asked to vote for one of the two, and then somebody had to get a so-called majority in that situation. But what happened during the election, during that so-called runoff was that somebody was elected who was opposed by two thirds of the people. And the French electorate was so outraged by what

passed as democracy that several million people cast blank ballots to say, "This is not democracy."

[00:06:35.9] Robert Hardaway: So it was John F Kennedy who pointed this out in 1956 when the Republicans were trying to "abolish the Electoral College." He pointed out that under the so-called the Russian system, the French system, and the so-called popular vote system, you're going to elect a person who's opposed by the vast majority of the people. And there indeed were riots after that election because the people said, "This is not democracy." And the other fallacy that's involved with, "Oh, just let's let the popular vote decide," is that you have to have these runoffs, at least two, well, at least one. And the result is you don't get somebody who's supported by the majority of the people. And the drafters of the Constitution understood this, and that's why they created the Electoral College.

[00:07:31.9] Robert Hardaway: Now, it's very easy to say no vote should count more than somebody else's. And that's the exact argument that's used today to abolish the US Senate. The Green Party and others, and some Democrats have said, "Let's abolish the US Senate, or at least make it proportional, so that California has 50 senators, and North Dakota is lucky to get one senator." But that's not the kind of scheme that the drafters had in mind for a large country. You can't have a country ruled by people on the coast, you have to have support that is broad as well as deep in a particular area. And so as a result, the Electoral College is the one that is most likely to give you a result that's supported by the majority of the people.

[00:08:24.1] Robert Hardaway: And the other fallacy with the popular vote idea, which is set forth at the NPVIC, the National Popular Vote Interstate Compact, is a compact between the states. And if they represent as many as 270 electoral votes, they agree, we're gonna ignore the will of the people of our state. We're going to look at what the so-called hypothetical popular vote is in the other states. The problem with that is there is no popular vote in other states. People today, even you talk to somebody in the street, and they say, "Who did you vote for?" And they say, "I'll vote for Trump. I'll vote for Clinton, whoever." No, you don't. You vote for electors, which is exactly the way they do it in all the parliamentary democracies.

[00:09:11.0] Robert Hardaway: The Electoral College in Great Britain, for example, of course, they call it a parliament, where you vote for a representative who goes into the parliament, and then those people elect their leader. And that's what happens here. You vote for electors, not a candidate. And those electors, in the majority of states, they're not even required to vote for the person they're pledged to vote for, and very few have enforcement mechanisms to make them do it. So there is no popular vote under the NPVIC that says, "We're going to go with the popular vote in other states," but there is no popular vote in other states.

[00:09:53.2] Jeffrey Rosen: Great. Thank you so much for that. Jesse, Robert says that on the two principles you identified, the Electoral College does better at reflecting majority will, and it wasn't intended to have total equality because of the US Senate. Your response?

[00:10:08.4] Jesse Wegman: There's a lot there that Robert just said, and I'll try to respond to as much as I can in a short amount of time. First of all, with regard to plurality winners, which Robert was expressing as a concern. Apparently, the American people have no problem with plurality winners today. One third of the presidents who have been elected in American history have won with less than 50% of the vote. And as we are talking about here today, five of those winners didn't just win less than a majority, they won less than their opponent, and they still became president. So if the American people can survive that, and if the American experiment can survive that, I think it can survive plurality winners under a national popular vote.

[00:11:00.0] Jesse Wegman: Now, to the extent that you are concerned about a plurality winner who wins a lower percentage of the vote, say under 40%, there are ways to deal with that. We have ranked-choice voting, which helps to more accurately assess the wishes of the electorate and get to a majority level of support for whichever ends up being the winning candidate. Ranked-choice voting has been implemented at state and local levels all over the country with great success. People like it, it actually elects leaders who end up representing a majority of their constituents.

[00:11:36.8] Jesse Wegman: But ranked-choice voting is not gonna save us this year or in the immediate future, so I think really it just suffices to say that the system that we have right now already permits plurality winners to become president and minority winners to become president. And I think that to me is a much greater offense to the Constitution and to the concepts of majority rule and political equality than anything that might happen under a popular vote.

[00:12:03.4] Jeffrey Rosen: Thanks so much for that. Robert, your response to the idea that ranked-choice voting might more accurately assess voter preferences and unbalanced, the Electoral College is less likely to reflect the majority than the alternatives.

[00:12:15.0] Robert Hardaway: They have not worked very well. Let's say you have 17 candidates that are on the ballot.

[00:12:21.3] Jesse Wegman: I'm sorry to interrupt here, I apologize. But you've used this example twice now of 17 parties, and I think that it's just a bit of a red herring.

[00:12:29.7] Robert Hardaway: Let's just say four.

[00:12:30.5] Jesse Wegman: We're not gonna have 17 parties. You might have more parties, and I'm an advocate for more parties. I think a two party system has done a lot of damage, and we're watching the damage it does to the country right now. But even if you have three or four parties, maybe even five parties, you're still going to have, fundamentally, because of the nature of how politics works, political thermodynamics in this country, you're going to have a two party presidential contest. That's what we have right now, that's what we'll have in the future, even under a popular vote.

[00:13:01.9] Robert Hardaway: That's because we have an Electoral College that we've narrowed it down.

[00:13:03.5] Jesse Wegman: No. It's because we have first-past-the-post elections in the presidential election.

[00:13:08.4] Robert Hardaway: All right. Let's just say that we only have four or five. Let's say we have four or five, and let's say one is the Democrat, one is the Republican, and there's three others, but it's a close call between the first and the second. If you want the Democrat to win, are you really gonna vote for the second as the second most qualified? No, you're gonna vote for that person as last, because that's the one that is the most competitive with the one who you want to win. So you're not gonna rank them, and when you have a lot of candidates. It's all you can ask a voter to know the background of two and not four or five. And believe me, you would have four or five.

[00:13:48.6] Robert Hardaway: We already have minority candidates, Robert Kennedy, so forth.

[00:13:53.5] Jesse Wegman: But that's how ranked-choice voting works.

[00:13:55.0] Robert Hardaway: Yes. What happens with every place it's tried, it hasn't worked. So you would prefer the five current-

[00:14:02.5] Jesse Wegman: That's not true. That's just not true. Ranked-choice voting is currently in use all over the country with success. It is absolutely working. It is electing leaders who represent a majority of their constituents, which is exactly what a representative democracy is supposed to do.

[00:14:19.3] Robert Hardaway: If you were to try something like that, the arguments that Jesse makes for abolishing the Electoral College, the arguments he makes are exactly the arguments that people make for abolishing the whole US Senate, because it's not one person, one vote.

[00:14:35.0] Jesse Wegman: We can talk about the Senate. I'm happy to talk about the Senate. It's somewhat of a corollary point, but if we wanna talk about political equality in the Senate, I'm happy to do that.

[00:14:46.5] Robert Hardaway: Right. Well, and people have advocated that we give 50 senators to California, one for North Dakota, and this would hold the country together. I understand that argument, and many Democrats have made that argument, but there's a problem with that. And the problem is the last sentence of Article V, which says that if you want to do away with the one state, one vote as opposed to the one person, one vote, that's the only provision in the entire Constitution which cannot be amended. You'd have to have every state agree. And of course, the Electoral College is based on a little bit of extra that the constitutional framers gave to the small states, because a small state has a low population, still gets two senators and still gets two electoral votes. So you can't abolish the Electoral College, but as John F Kennedy said, when you start messing with one part of our constitutional system, you have to change the whole thing.

[00:15:44.1] Robert Hardaway: If you wanna abolish the Electoral College, you're gonna have to abolish the US Senate. You can't just take one part of it. It is a grand compromise that was conceived by the drafters of the Constitution, because we came very close to not having a constitution that melded all these disparate colonies that were forming their own proto-countries into one country. And that was the solution. And without that, we'd be like South America, we'd have eight or nine different countries, where we managed to put them all together because at the last minute, Benjamin Franklin said, "Let's do both. Let's have a legislature, which is based on population, a senate, which is based on one person, one vote." And I'm sure Jesse has made the point that that's not fair. The Constitution isn't fair when it allows somebody in South Dakota to have greater voting power in the legislature than somebody in California.

[00:16:40.2] Robert Hardaway: But that's what brought the country together. And without that, we wouldn't have one country. And ever since then, we've had people who have tried to abolish the Electoral College, but it all comes down to the bottom line. You can't do it unless every state agrees, because the last sentence of Article V says that every state has to agree to abolish the one vote equal vote in the Senate, every state's equal vote in the Senate.

[00:17:07.9] Jeffrey Rosen: Great. So Jesse, on the point of the equal Senate and anything else you'd like to respond to?

[00:17:12.3] Jesse Wegman: There's a lot coming out here in each answer, and there are many different points. And some of them I think are debatable at best, and some of them I think are just misleading. I don't think it's correct to say that you need to abolish the Senate in order to change the way we elect the President. There's nothing in the Constitution that says that, there's

nothing in the Constitution that implies that. Robert is right that the Constitution effectively makes the Senate unamendable. I think there's a lot of problems with equal state provision in the Constitution.

[00:17:44.3] Jesse Wegman: The founders, several of the top founders, those who drafted the Constitution itself agreed. They thought it was an abomination to have states have equal representation in the national legislature. But they lost that fight. They lost that fight because, as Robert correctly says in part, the smaller states and the southern states, the slave-owning states threatened to walk if they didn't get their equal representation in Congress. They threatened to walk several times throughout the summer. Were they bluffing? Were they not bluffing? We can never be sure because the northern states and the larger states folded and they agreed, they accepted, they knew that there was a lot of pressure, we're just coming out of a revolutionary war, finances are in shambles, there's a huge amount of pressure to get a new government underway, replace the Articles of Confederation, and get the country running again.

[00:18:37.2] Jesse Wegman: The Electoral College was not part of that grand compromise. In fact, the Electoral College was a last minute addition at the very end of the convention that was agreed upon by a committee. It was somewhat of an informal committee called the Committee of Unfinished Parts, which met in a side room of the convention hall in mid September, days before the constitution was finished and signed and sent off to the states for ratification. And this small group of men basically scrambled to write something that everyone could agree to quickly, and that was not opposed by enough people to make it a non-starter. All the other proposals throughout the summer had been rejected, right? For a congressional choice of the president, direct popular election, which was promoted by James Wilson and James Madison, selection by the state legislatures.

[00:19:32.2] Jesse Wegman: All of these were rejected, and the one that was finally accepted, what we today call the Electoral College, was accepted because it was the least bad of all the other options. James Madison, later in his life, admitted that this was not a great design, as they saw it start to fall apart within a decade of the country's birth. I'm paraphrasing here, but he said, we were rushing, we were rushing at the end and the final product was the result of that rushing. It was not as well conceived as it might've been. So I think the idea that the Electoral College is in any way central to the founder's design of the country is just flat wrong on the history, but even if it were right, I would say it only matters insofar as we think we should be bound by things that were decided 240 years ago. So I think absolutely we can make the case that it is good or that it's not, but whether or not it was adopted at the founding is only one part of that consideration.

[00:20:36.6] Jeffrey Rosen: Thank you so much, Robert. Your response, including thoughts about how founding era history supports your argument.

[00:20:47.7] Robert Hardaway: Well, they had left the whole question of representation in Congress until the very end, because everyone knew that was going to be the crucial issue. And even George Washington said, I regret having even participated. We're never going to get an agreement between the small states and the large states. The large states wanted to predominate the country. So they insisted that representation in Congress be based on population. The small states were fine, from your own country. And they were. New York and Pennsylvania were setting up tariffs. We were dividing into these kinds of proto-states. And as a result, very few, we didn't want the constitutional convention left to the very end. The question of what kind of representation will be there in Congress. And then it was at the last minute when it was about to break up, people were about to say, there's no compromise, we can't do it, that Benjamin Franklin saved the day.

[00:21:40.4] Robert Hardaway: And he said, let's do both. Let's have a population determine the representation in the lower house. And let's have one state, one vote in the upper. And as part of that grand compromise was the Electoral College that some of the small states like what? At that time it would be like Rhode Island, for example, who said, we're not going to participate in any country where the big states are going to predominate and bully us. We're not going to join. And they said, we'll form our own country. And they had an amalgamation going with some of the small states. And that's when Benjamin Franklin stepped into the fray and said, let's do both. And as part of the grand compromise, we'll have an Electoral College in which some of the small states also get a little extra, just a little extra in presidential elections.

[00:22:34.3] Robert Hardaway: And the New York Times, to their credit, back in 2000, I think it was 2000, said in their editorial that that's one of the reasons why we have an Electoral College. The Electoral College said the New York Times was first and foremost, a compact among states, large and small, designed to ensure that one state or one region did not dominate the others. It was because of the safeguards of balanced federalism, much like the allocation of two senators to each state, regardless of size. And by offering the promise that even the smallest states could keep the balance in close elections, the system made it impossible to ignore them. Without this compromise, the grand compromise had two prompts.

[00:23:20.6] Robert Hardaway: One was that we'd have representation by population in the lower house. We'd have one state, one state got a vote, equal voice in the Senate, and the Electoral College would be based on that. So how we're going to abolish the Electoral College without also abolishing the weight that each state gets and induce them to form the union without that compromise. The other thing is you can't confuse the two compromises. Jesse was mixing up two compromises. Yes, it's true. The Southern states wanted representation in Congress based on their total population, including slaves. Obviously, the Northern states did not agree to that because the slaves did not have any right to vote. And so that's where the three-fifth compromise.

But don't mix that up with the entirely separate compromise between the large states and the small states. Virginia was a slave state, but it was also one of the big states.

[00:24:23.7] Robert Hardaway: So their concern was whether or not they would have equal representation in the Congress. That was a completely separate compromise. And so that's why without that grand compromise, which includes the Electoral College. Now, how are you going to abolish the Electoral College without also abolishing the weight that the last sentence of Article V says, that they have a right to in the Electoral College? They have equal weight in the Senate, and that's what the Electoral College is based on. And it's like John F Kennedy said, when the Republicans were trying to abolish the Electoral College, you can't fiddle with one part of the Constitution without doing the others. You can't abolish the Electoral College without abolishing the Senate. It's a grand scheme. It's a general system of government. And there's been attempts to undermine that ever since our founding.

[00:25:34.0] Robert Hardaway: I'll leave it there, but I have one question for Jesse with regard to the NPVIC, which is the National Popular Vote Interstate Compact, in which a California billionaire has decided he doesn't want yachts and airplanes and so forth. He wants to change the whole Constitution. So he is introducing these bills sort of coming in the back door, using his agents that he pays quite a bit of money to say, let's have the states agree that they will ignore the will of the people in their state and go by the total popular vote. But there is no popular vote. People don't vote for a candidate. They vote for electors, just like they do in every parliamentary democracy in the world. And how do you count popular votes for an elector who may or may not vote for the person they're pledged to vote for? And how, if the parties who object to this NPVIC, they want to kill it, it's very easy. Just do like Alabama did, Mississippi did in the 1960 election.

[00:26:43.6] Robert Hardaway: And if you're allowed, as Alabama, Mississippi, other states have done, to have a political party present a slate where the members of that slate haven't been pledged to any candidate. How do you count the popular votes for a slate where there's no pledge? Where are the popular votes? That's my question to him. How would he calculate popular votes for unpledged electors?

[00:27:04.7] Jeffrey Rosen: Thank you for all that, Jesse. Your response to this, we'll have one more beat and then I'm going to broaden out to some current issues.

[00:27:14.3] Jesse Wegman: Let's bring this back to what this is really about, which is what is happening today in America under the winner-take-all Electoral College. Under the winner-take-all Electoral College, only a few states matter in any election, right? That is how our process works. It does not protect small states. It does not protect rural states. It doesn't protect Republicans or Democrats. It protects what we call swing states. And the only reason it does that

is because of this winner-take-all rule that all but two states use to allocate their electoral votes, which in effect erases all the votes of the people in that state who did not vote for the candidate who won the state. And when you repeat that all over the country, you get the kinds of distortions that lead to losing candidates winning the election. That is the problem. The problem is the focus on a few small districts in a few swing states that decide the election for all of us. This year, we know what those states are: It's Wisconsin, it's Arizona, it's Pennsylvania, it's Georgia.

[00:28:17.7] Jesse Wegman: Why should a few thousand or possibly even a few hundred people in those states, in a few key districts or even towns, decide who the president is for 330 million people, not to mention the entire world, which is waiting on tenterhooks for the outcome of the presidential election of the world's biggest superpower. There is just no excuse for that. As for this argument that Robert has been making about people not voting for presidents, they vote for electors. I mean, forgive me, but this is nonsense. Of course, people vote for president. Yes, technically, it is the electors who cast the ballots. But all the states now use the short ballot. They use the short form ballot. They vote for Kamala Harris and Tim Walz or for Donald Trump and JD Vance. They're not voting for those electors. They don't see except in one or two cases. They don't even see the electors' names on the ballot.

[00:29:24.6] Jesse Wegman: And yes, while it's true that in some states, electors could, in theory, go against what the popular vote in their state told them to do, they virtually never do it throughout American history. It's almost never done for an obvious and simple reason, which is that electors want to vote for their candidate. They're chosen because they're party loyalists, that's why Democrats choose the electors they choose and Republicans choose the electors they choose. They don't act as the sort of disinterested, thoughtful, well-informed stand-ins for the American people that the founders had briefly presumed they would be. They're just team players. So people vote for the candidate they want to win wherever they live in the country. They don't care about what state they live in. I've never met a single American who votes for president based on what state they live in. They vote based on who they want to win and they don't vote for electors. They vote for the candidate.

[00:30:15.2] Jeffrey Rosen: Thank you so much.

[00:30:20.6] Robert Hardaway: Can I just respond super quickly to that?

[00:30:20.8] Jeffrey Rosen: Yes, yes, please.

[00:30:21.2] Robert Hardaway: The whole point and I agree with Jesse that the winner takes all is something, but that's up to the states because under Article II, they can elect electors any way they want. And California was given a referendum. Do you want to split your votes based

on the votes for each candidate or the electors for each candidate? And California said we don't want to share our electoral votes with Trump. We don't want that. But they don't want what Jesse wants. They opposed that. So it's up to the states that they want to take all, I would propose that states not do that. I think that's a great idea. And Jesse, go to the states and see if you can convince them to do it. But California didn't want to do it. New York didn't want to do it. And Colorado didn't want to do it. But the whole notion that citizens are diluted, they're given this at the bottom of the video on election night. It says so and so got a popular vote. The candidate did not. It was the electors and every ballot says electors. It may be in smaller print, but it says you're voting for the electors and half the states don't require them to vote for the person that they're pledged to vote for.

[00:31:33.5] Robert Hardaway: And sometimes the slate of people who are presented by a political party aren't pledged to anyone. So I asked my question again, how do you count popular votes for candidates based on a citizen's misconception as to who they're voting for? They're not voting for the candidate. How do you count popular votes for un-pledged candidates? It's impossible.

[00:32:05.6] Jeffrey Rosen: Okay. Thank you both very much for this exchange. I want to introduce some possible forthcoming issues, in the Wall Street Journal on October 25th, Cass Sunstein wrote a piece on January 6th. Will Vice President Harris certify the election? And Cass Sunstein notes that in 2022, Congress enacted a reform to the Electoral Count Act, which states that the president of the Senate shall be limited to performing ministerial duties. And the president and vice president can play no role in deciding which slates are valid. Cass Sunstein argues the good news is the Constitution grants Congress the power to make all laws which are necessary and proper for carrying into execution all the powers the Constitution vests in the national government. And therefore, Cass Sunstein argues that the Electoral Count Act reforms are consistent with the constitution and will reduce the possibility of partisan intervention. Jesse Wegman, do you agree with Cass Sunstein or not? And do you feel that the Electoral Count Act reforms will avoid a repeat of what happened last January 6th?

[00:33:11.4] Jesse Wegman: I think the reforms that passed in 2022 with a bipartisan majority in Congress do go a long way toward responding to what Donald Trump and his allies tried to do in 2020. Obviously, as with all laws, you're fighting the last battle. And we can't know for sure what exactly is going to happen this year. Trump and his allies have already floated lots of ideas about ways in which they will attempt to interfere with or slow down or object to outcomes that they're not happy with. Whether those will be addressed precisely by the Electoral Account Reform Act, I think is anyone's guess. But I do think those were important reforms, particularly making clear that the vice president's role is ministerial alone and also increasing the threshold for objections in Congress.

[00:34:12.6] Jesse Wegman: If you recall, on January 6th in 2021, it only took one senator and one member of the House of Representatives to object to stopping the count completely, to stop the certification of the count completely and go into debate for two hours. They started with Arizona. Ted Cruz, Josh Hawley, people who certainly know the Constitution better than I think most members of Congress, jumped all over that. They exploited that low threshold and they stalled what was going on in Congress, which should have just, you know, it should have just been a ratification of what happened in the states where there was no contest of the certification of any vote in any state. But now with the new law, it takes one fifth of each house of Congress to object. And the objections, the grounds for objections have been limited dramatically. So I think that's a really good reform. Congress clearly has the authority to pass it. And I hope that it does limit the opportunity for chaos and interference in this election.

[00:35:16.0] Jeffrey Rosen: Thank you so much for that. Robert, some scholars, including Jack Bierman and Gary Lawson, have argued that the Electoral Count Act and its reforms are unconstitutional because the Constitution allows no role for Congress in this process and gives plenary authority to the states. Do you agree or disagree that the Electoral Count Act reforms are consistent with the Constitution? And if not, why not?

[00:35:50.7] Robert Hardaway: I think Jesse and I agree that the one critical element of that act is that it's purely ceremonial. It's like the inauguration. Any other alternative would be preposterous to say that one person in the Senate, say the president of the Senate, could change the whole election by miscounting the votes as preposterous. So it's obviously ceremonial. The 12th Amendment is completely ceremonial. So it doesn't matter whether the vice president says, oh, I reject these votes. And no question that on January 6, Trump tried to affect the election, but that was an impossibility. It can't be done because it's only ceremonial. It would be like not going to the inauguration. That's ceremonial. But just because you don't show up to the inauguration, do you nullify 200 million votes? Of course you don't. So I agree with that part. But the part you can't agree with is the part that says we still give to the federal government the power to second guess, to change, to challenge, to entertain objections to certifications that are final from the states. And once that is accepted and this electoral act, says that it's okay. The federal government can get their mitts on the whole process. And that was not the intent of the framers. It's clear from Article II.

[00:37:02.0] Robert Hardaway: They have no say so. And once an electoral slate, once electors are chosen by the states, that's it. End of the story. There's a ceremonial counting. They didn't have calculators in those days. Maybe the arithmetic wasn't good. That's a nice little ceremony, but it has no effect on the election. And that's the part that's unconstitutional. To suggest that people in Congress can now second guess the appointment of the electors by the states.

[00:37:28.0] Jeffrey Rosen: Thank you for that. I wanna explore how far that theory might go. Jesse Wegman, Politico reported recently that President Trump has plans to after the election, deepen distrust in the election results, lean on friendly county and state officials to resist certifying election results, call on allies in GOP controlled swing state legislatures to appoint alternative presidential electors, rely on Congressional Republicans to endorse these alternative electors and try to ensure that Vice President Harris is denied the majority of electoral votes. If that scenario comes to pass, and if state governors refuse to certify election results for Harrison and instead certify them for Trump, would that be consistent with the Constitution or not?

[00:38:29.6] Jesse Wegman: I mean, this is why we have courts, right? Is to resolve disputes based on evidence and fact, and as we saw in 2020, these aren't just Donald Trump's plans for 2024. This is what Donald Trump has been doing since he entered national politics, is attempting to game the system in his favor. He and his allies brought, I think over 60 lawsuits, challenging various vote counts, voters back in 2020 and 2021, they lost all of those cases, but for one small victory that got overturned on appeal anyway. So Trump is essentially repeating the playbook, but with more, I think he has more pliant, you know, allies in the states now. There were a lot of Republican officials who pushed back against him in the states back in 2020 and 2021, most famously, Brad Raffensperger, Secretary of State of Georgia, who refused to "find Donald Trump 11,780 votes so that he could win Georgia's 16 electors."

[00:39:32.5] Jesse Wegman: Right now, Brad Raffensperger, thankfully, is still in office, but a lot of people who were in office in 2020 and 2021 have either lost reelection or left because out of fear for their families and their own lives, and they've been replaced by people who might be much more willing to intervene. We've already seen this year where election officials at the local level in some states have refused to certify vote counts. For one thing, as Robert said about the Congress, this is not a discretionary act. The state laws in the states that really matter here, those swing states, are very clear that these are non-discretionary acts. They must certify the vote when the vote is finalized. If there is a challenge from either candidate over vote counts or who voted or any aspect of the vote, that can go through the normal state and then federal court systems and those channels that have been long established, and those will get worked out.

[00:40:38.7] Jesse Wegman: And it's fine for those to go through that process. That's how it's built. The new law actually provides for expedited consideration of these challenges because of the short timeline between election day and inauguration day. But I don't think, you know, Donald Trump has an endless bag of tricks up his sleeve. This is part of the problem with a sort of anti-democratic authoritarian movement, which is that they will always find the weak spots, they will always look for and find the sort of the loose ends that weren't tied up by lawmakers who have to assume on a basic level that people are operating in the best interest of the country. The American system of government and the American legal system is not designed to handle someone like Donald Trump as we're seeing right now.

[00:41:27.5] Jeffrey Rosen: Thank you for that. Robert, I raise this question 'cause it's the obligation of the NCC to anticipate the constitutional issues that might arise. If in the election, President Trump were to persuade a state governor to refuse to certify results on the grounds that it had been fraudulent, and if the governor rejecting the reported results were to certify for Trump rather than Harris, do you believe under the Constitution and the independent state legislature doctrine, that that state governor's certification would have plenary constitutional authority or not?

[00:42:08.3] Robert Hardaway: Well, generally, a state goes through a process, the legislature approves it and then it's signed by the governor. Once that happens, that is it. If they decide they don't want to submit the certification by the governor of that state to the Senate, that's fine. That they just won't be counted. But I have to disagree with Jesse, that we want the courts for months, sometimes weeks, months, to play around with objections is not sound. Let's let the people decide. Once a governor certifies it, that's it. Analogize to a football game. I mean, if a referee makes a mistake, the video replay shows he made a mistake, you don't say, we're not gonna have the Super Bowl, we're gonna play the game over. Once the game is over, it is over.

[00:43:00.3] Robert Hardaway: And you can spend the next three years with court cases suing people who may have done something fraudulent, but the election is over. The election is over once the governor of a state, as the final process of the legislative process of each state, signs it and submits it. End of story. That will prevent all the January 6th catastrophes that are potentially gonna come into play. Once we accept Article II, that it's entirely up to the states, the courts don't have any play in this. The Senate certainly does not have any play in it. And once it's certified, the election is over. That's what Article II says. And to say, oh, we're gonna let courts debate this for the next year or so, that is not a democratic result at all.

[00:43:49.9] Jeffrey Rosen: Thank you so much for that. Jesse, I hear Robert saying that if a state governor were to certify a result, even if it rejected the reported results in the state, it would be conclusive and neither states nor Congress could second guess it. That does sound like a version of the independent state legislature doctrine that the US Supreme Court rejected in *Moore v. Harper*, although three justices accepted it. Is that your sense? And tell us what the US Supreme Court might do if it were faced with this scenario.

[00:44:24.7] Jesse Wegman: I can't say what the court is gonna do. Obviously that case, *Moore v. Harper* was about districting and not about this process. So we can't be sure. I do think given that it was a 6-3 ruling, you would be likely to see the independent state legislature doctrine also rejected at least by a 5-4 decision by this court. I do think that there are, you know, the Constitution is the floor and this constitution is supreme over the states. And so the federal government, the federal courts, including the Supreme Court, will have the final say over any

constitutional violations that occur in the process of counting and certifying votes. I don't think we're gonna see that particular scenario this year. I think all the governors of the swing states are Democrats.

[00:45:14.0] Jesse Wegman: But it's possible. I mean, this gets a little bit in the weeds, I think, because I think the fundamental problem here with the Electoral College is what most people understand it to be, which is that it violates these basic principles of majority rule and political equality. You know, just to separate out the presidential election for one moment, you know, Robert has talked about federalism and the importance of protecting states' interests. The state's interests are protected throughout our system of government. We have states, we have the Senate as he's pointed out, which is effectively unamendable. We have governors, we have state legislatures, we have the House of Representatives, which gives, I think a distorted number of representatives to each member because the House of Representatives is too small and therefore can't properly, you know, represent the number of people in the country.

[00:46:08.7] Jesse Wegman: But the states are protected at all of those levels. Their interests are protected at every level of government. We have only one office in this entire country, one elected office whose job it is to serve all Americans equally, no matter where they live. That's the presidency. And therefore, the president should be elected in that manner, by the jurisdiction over which he or she presides, which is how every other election in this country is run. And so when the president is not elected in that way, but is instead, incentivized to focus only on these few states, you get a president effectively of the battleground states, not of the whole country. We see this play out. This isn't just theory. We see it play out in how presidents and presidential candidates respond to what happens on the ground. You've been watching this in real time for the last six or eight weeks with the natural disasters that happened in North Carolina.

[00:47:00.8] Jesse Wegman: You know, and the stories that have come out about how Donald Trump, when he was president, actually denied or attempted to deny disaster relief to California because it was a democratic majority state. He literally said this to his own aides. He said, I'm not gonna send them money. They're not gonna elect me anyway. You know, so we see it has real effects on the ground, for people on the ground when they live in a state that, you know, could piss off the president. And so I really think these are the life and death, the real life consequences of having an election that is targeted at a very small number of people, allowing the presidents of both parties to essentially ignore people, all hundreds of millions of Americans all over the country.

[00:47:47.1] Jeffrey Rosen: Thank you so much for that. Robert, your response to Jesse's argument that under the Electoral College, you get a president of the battleground states, and do you think the Electoral College is better at resolving contested elections than the alternative?

[00:48:05.8] Robert Hardaway: We had the Electoral College, Kennedy won the electoral vote, we knew it that night. If we had had a popular vote, it was so close that people have estimated it would've taken seven or eight months to have recounts in 42,000 places. That's not a good idea to, especially in the middle of a cold war, to not know who's the president for seven months. That's one of the beauties of the Electoral College. And we remember nostalgically in the days back in 1960 when we knew the night of the election who was gonna win. It's not a question of protecting states. That's not the issue. What's an issue is the Constitution of the United States, which says under Article II, when the state certifies, if they have a governor, the states are entitled to say, we don't need the signature of the governor. That's their procedure.

[00:48:55.1] Robert Hardaway: The Article II doesn't specify that. But in most states, when you pass legislation or you appoint electors, then generally, it's the governor who certifies it. If they don't wanna submit their certified votes to the Senate, that's up to the state. But I can't imagine any state doing that. And the whole notion that battleground states, that goes back to Jesse's point, well, I don't like the winner taking all. I don't like it. Well, if he doesn't like it, go to those states and tell them you don't like it. Get them to change it. Back in California said, we don't want to change it. We don't want it proportional. So that's up to the states. Under Article II, it's up to the states. And once they go through their process of appointing the electors, game over. And people can bring their lawsuits against people who are allegedly defrauded, that can go on for years. But it does not change the outcome of the election. And any other solution, you're just begging for another January 6th catastrophe.

[00:49:58.7] Jeffrey Rosen: Jesse, on this crucial point about whether the Electoral College is better at resolving these disputes than the alternative, is it right that giving states plenary authority to decide who won is the best way or would a national popular vote resolve those disputes more effectively in your view?

[00:50:14.3] Jesse Wegman: Well, just to give the counter example to what Robert just offered, I think about 1960. In 2000, we knew who had won more votes nationwide on election night, it was Al Gore, it was 30 something days before the Electoral College disputes were resolved in favor of his opponent George W Bush. In 2020, just four years ago, we knew on election night that Joe Biden had won significantly more votes than Donald Trump. It ended up being a margin of 7 million. And yet we waited days to find out the final count in Pennsylvania and Georgia and Arizona. The Electoral College as it runs today, is not allowing us to somehow resolve these disputes more quickly and more easily. If it matters to you in fact, that we have a result on election night, which, you know, is mostly an artifact of the TV age.

[00:51:08.6] Jesse Wegman: You know, before that, people were okay with waiting days, sometimes weeks, for election results to be tabulated and then distributed in the news. So I know we live in the 21st century and people expect quick answers. The quickest answer almost always

comes from the national popular vote. I just wanna respond, I'm seeing comments in the thread about, or questions regarding, wouldn't big states just, you know, dominate an election? And if I could just briefly explain why that isn't the case, first of all, as I said earlier, when you say big states or big cities, you're implying that big states or small states as big states or small states have some sort of unique interests that they share with each other, but it's not true.

[00:51:56.5] Jesse Wegman: There are big states with more Democrats like New York and California. There are big states with more Republicans like Texas and Florida. Same with small states. In fact, of the 14 smallest states in the country, seven have Democratic majorities and seven have Republican majorities. There's no common interest among these states. And in fact, the bigger states, even if you were to group them together, don't come anywhere near dominating a national election. In fact, of the hundred biggest states in the country, you have basically the same size, the same number of people as the rural areas of the country. So they kind of offset each other. The election is mostly decided in the suburbs. The bottom line to all of this, all of these statistics, is that why should it matter where you live, in what state, in what city, on the coast, in the middle of the country, rather than just that you are an American citizen whose vote should count no more and no less than anyone else?

[00:52:55.7] Jeffrey Rosen: Thank you so much for that. Robert, we're gonna wrap up in a moment with closing statements. Before that, your final thoughts about the issue of big states versus small states and contested elections and anything else?

[00:53:09.1] Robert Hardaway: Well, again, Jesse keeps going back to some kind of popular vote in one state or another. And of course, there is no popular vote. We do it exactly like they do it in England. In England, 35% of the voters voted for Labor, but yet when they went into the parliament, they were allowed to elect the leader. And no one said that Parliament is undemocratic, we have to abolish a thousand years of democratic history because of the hypothetical popular vote. 35% hypothetically voted for electors. They call them members of parliament, of course. And so he keeps going back to, well, people think they're voting for a candidate and we're gonna somehow read the minds of people. And if that elector votes for someone else or is unpledged, we're gonna guess what it is.

[00:53:56.9] Robert Hardaway: And that's how he comes up with this hypothetical popular vote. There is no popular vote, and it's up to states. The reason we have these battleground states is 'cause states like California say, we're not gonna share, we don't wanna give 40% of our electors to Trump. So we don't wanna share, we wanna give everything to the Democratic, and that's fine. That's up under Article II, that's their choice. But you need to go to the states if you have a problem with that. If you don't like there being big states that can turn the election, so-called swing states, go to them, convince them not to use that system, the winner takes all the system. But the Constitution says they can do it any way they want. Article II says, it's up to the

states, and once they certify it, whatever their certification process, so the election is over. You don't need two years of lawsuits while everybody is in limbo, who's gonna be the president? You don't need that. There'll be plenty of time to sue the malefactors after the event.

[00:55:00.0] Jeffrey Rosen: Thank you so much for that. It's time for closing statements in this vigorous and illuminating discussion. And just one minute each of you can just sum up your central points. Jesse, the first one is to you. What is the case for abolishing the Electoral College?

[00:55:18.3] Jesse Wegman: One person, one vote, majority rule. I mean, I've been debating this issue now for some years, not as long as Robert has, but for a number of years, and I've just yet to come across a defense of the Electoral College under the winner take all rule that actually is rooted in empirical fact or historical accuracy. I'm sorry to say that, but it's true. I don't understand how we're still having this debate in 2024. We are a modern representative democracy. We elect our leaders by majority rule and by one person, one vote. And that's how the biggest election of all should be run.

[00:56:00.4] Jeffrey Rosen: Thank you so much. Robert Hardaway, last word to you. Why would the national popular vote undermine democracy?

[00:56:08.6] Robert Hardaway: Well, the main reason it would undermine democracy is it's based on an illusion. That we don't do it like we do in Great Britain. We don't elect electors. We don't elect candidates, we elect electors. And the reason that the Electoral College is so critical is because you're much more likely to get a candidate supported by the majority of people. John F Kennedy, in his famous speech in 1956 when republicans were trying to do what Jesse is suggesting, get rid of the Electoral College. And he said, first of all, you can't do that unless you change everything, which would mean like what? Like the US Senate. He's making an argument for one person, one vote. Well, if you really believe that, then advocate for the abolition of the Senate. It can be done.

[00:56:54.4] Robert Hardaway: All the states have to agree. But if his argument holds sway, every state should say, yeah. That we don't want a system where it's not one person, one vote. So let's abolish the Senate. And that's why I say the way that we get a winner who's supported by the majority of the people is through the Electoral College. If you do it through this popular vote system, you get the result that you got in Russia. I didn't go through all that. The Russian system, plebiscite system, you don't get a winner supported by the majority of people and that's the problem with it.

[00:57:26.8] Jeffrey Rosen: Thank you so much, Jesse Wegman and Robert Hardaway, for a robust, uninhibited and wide open debate about the Electoral College versus the national popular vote. It is urgently important for the National Constitution Center to convene a diverse range of

views on important constitutional topics. And that's exactly what both of you have provided our grateful listeners today. Jesse, Robert, thank you so much for joining.

[00:57:52.3] Jesse Wegman: Thank you.

[00:57:52.4] Robert Hardaway: Thank you, Jeff.

[00:57:52.9] Jeffrey Rosen: Today's episode was produced by Tanaya Tauber, Lana Ulrich, Samson Mostashari and Bill Pollock. It was engineered by David Stotz and Bill Pollock. Research was provided by Yara Daraiseh, Samson Mostashari, Cooper Smith, Gyuha Lee and Matthew Spero. Please recommend the show to friends, colleagues or anyone anywhere who's eager for a weekly dose of constitutional illumination, civil dialog and debate, and who today is not. Friends, I am thrilled to share, as I did last week, that the NCC has partnered with Khan Academy and launched our new Constitution 101 course. I'd love you to check it out. It brings together America's leading constitutional scholars and historians. It is deep. It is rich. It is meaningful. It has quizzes, which you can test yourself with, and I know you'll do great. Check it out.

[00:58:29.8] Jeffrey Rosen: It's khanacademy.org/humanities/constitution-101. Or just Google it and you'll find the link. It's great. Please check it out. And if you have any feedback, please let me know. Sign up for the newsletter at constitutioncenter.org/connect. And always remember that the National Constitution Center is a private nonprofit. We rely on the generosity, the passion, the engagement, the devotion to lifelong learning of people like you who are inspired by our mission. Support us by becoming a member at constitutioncenter.org/membership or give a donation of any amount to support our work, including the podcast at constitutioncenter.org/donate. On behalf of the National Constitution Center. I'm Jeffrey Rosen.