Even in the pantheon of maligned features of the American republic—gerrymandering, the Senate, first-past-the-post, voter repression—the Electoral College stands out. It’s a chimera, a system that serves as a rubber stamp when it’s working well, and as a massive, semi-automatic check on the popular will when it’s not. Formed as a deliberative body, it now has only a ceremonial semblance of such a function. The position of elector is essentially a sinecure that conveys no real financial or reputational rewards.

Almost half a century before Donald Trump became president, his victory was nearly undone. It was a close thing: The House of Representatives easily passed a constitutional amendment that would have eliminated the electoral college. The
Senate was getting closer and closer, just a few votes shy of the required two-thirds majority. Then the midterms came along, and Senator Birch Bayh of Indiana, an auteur of constitutional amendments second only to James Madison, was forced to shelve the proposal.

Bayh’s proposed amendment was the last serious attempt to alter the Constitution and do away with the Electoral College. Four times in American history, the candidate who lost the popular vote has won the Electoral College. Exactly who is advantaged by the institution is up for debate; some experts argue that, mathematically, the residents of larger states are empowered. Others say that small states come out on top. Most, however, agree that swing states get more than their fair share of political power and campaign attention come election time. But it’s unclear whether the system can change, and even those who think it should can’t agree on how to do it.

Bayh saw direct popular vote as “a kind of logical outcome to the continuing expanding of the franchise in the U.S.,” a natural extension of the then-newborn Voting Rights Act, says Jay Berman, a legislative aide to the senator from 1965 to 1972, when he became his chief of staff. (Bayh, who is 90, was not available for comment.) It was a piece of the great project of empowering the average citizen, which Bayh would further soon after with the Twenty-Sixth Amendment, which lowered the voting age, and which he would attempt to expand again when he authored the Equal Rights Amendment.

The measure was bipartisan. Three Republican senators were key supporters, and President Richard Nixon was open to the idea. Reform was broadly popular across party lines prior to 2016, when Trump’s election sent Republican support for a direct popular election from its 2012 level of 54 percent to 19 percent, according to a Gallup survey. (Democratic support surged from 69 to 81 percent in the same poll.) But in 1969, when the proposal was introduced, opposition was just as bipartisan, with the brunt of it coming from a set of southern senators including Sam Ervin and Strom Thurmond. Most were ardent segregationists.

The measure’s supporters pushed hard. Out of at least 700 attempts in Congress...
to alter the presidential-election system, the 1969 proposal came closest to making an actual constitutional change. Bayh argued against the potential for candidates such as George Wallace—the Alabama governor, who garnered 46 electoral votes as a third-party candidate in 1968—to swing the election. Bayh’s proposal called for a minimum of 40 percent of the vote to achieve victory. If no candidate reached that threshold, a runoff election would be held between the two highest vote-getters.

Bayh summarized his views by alluding to a hypothetical grade-school “homeroom captain” election, saying in a 1979 hearing of the Subcommittee on Constitutional Amendments, “Everybody that votes for Suzie gets their vote counted for Suzie, and everybody that votes for Johnny gets their vote counted for Johnny. The fact that Johnny gets less votes than Suzie, that is why Suzie wins. And that is not the case under the Electoral College system.”

But the Electoral College amendment couldn’t break out of Congress. It got 339 votes in the House, well above the required two-thirds, but two cloture votes failed in the Senate, garnering first 54 and then 53 votes. That doomed the amendment, and with it the yet-unthought-of presidencies of Al Gore and Hillary Clinton. “Poor Birch Bayh spent his life trying to get it done; it couldn’t even get two-thirds in the Senate,” says Bill Josephson, a retired partner at the law firm Fried Frank who has written extensively on legal issues surrounding Electoral College abolition.

[ Read: The Electoral College wasn’t meant to overturn elections ]

Most experts on the Electoral College believe the system is likely to stay in place for the foreseeable future, and even proponents of reform are not bullish on their prospects. “A realist would say the pessimism is warranted,” says Alex Keyssar, a historian at Harvard’s Kennedy School of Government whose extensive study of the Electoral College will be published in 2019.

Problems with the Electoral College are hardly new. In four elections, it has gone against the popular vote, and in a fifth—the four-way 1824 matchup in which every contender was a member of the same party—John Quincy Adams was eventually chosen in the House after the electoral college failed to give a majority to any candidate. But the college’s foibles have not been evenly spaced throughout
American history. Two came within a 12-year stretch in the late 19th century. In the first, Rutherford B. Hayes was chosen over Samuel Tilden, despite losing the popular vote by a full 3 percent, the largest such discrepancy in history. In the second, Benjamin Harrison won the Electoral College handily while losing the popular vote to incumbent Grover Cleveland.

After Harrison’s victory, there was a 112-year return to relative normalcy until, on December 11, 2000, the Supreme Court handed down the result in *Bush v. Gore*, giving victory to George W. Bush in a presidential election in which the plurality of voters backed his opponent. A decade and a half later, Donald Trump would triumph over Hillary Clinton despite losing the popular vote by 2,868,686 votes.

There’s no clear solution, either. Some, like Bayh and his allies, support a direct popular vote. That’s the simplest proposal, removing the middle man entirely and putting the election of the president and the vice president wholly in voters’ hands. But others have suggested allotting each state’s electoral votes proportionally to the votes cast in that state, an idea somewhat tarnished by its association with erstwhile Senator Strom Thurmond of South Carolina. Still others have suggested allocating electoral votes by congressional district, as is currently done in Nebraska and Maine.

The latter proposal gained steam in Republican circles after the 2012 presidential election. There was little done to disguise the reason: Had votes been apportioned by congressional district in 2012, Mitt Romney would easily have won the presidency, despite losing the popular vote by almost 4 percent, thanks to the GOP’s advantage in the drawing of House seats. In part, that advantage is down to nothing more than the concentration of Democratic votes in urban areas. In part, it was because of gerrymandering that favored Republicans. (The overall statewide winner takes the state’s two remaining electoral votes when electoral votes are allocated by district.)

But advocates of more far-reaching reform say that only a direct popular vote makes sense. At present, the idea of securing a constitutional amendment to abolish the Electoral College seems far-fetched. Advocates of reform, however, see a potential workaround. The National Popular Vote Interstate Compact is an
initiative that seeks to commit individual states to binding their electoral votes to
the national popular-vote winner; the system would kick in once states with a
majority of electoral votes have signed on.

The compact began with *Every Vote Equal*, a book that argues for the idea, and
National Popular Vote, an advocacy group that lobbies states to join the compact.
John Koza was the lead author of *Every Vote Equal* and a co-founder of National
Popular Vote. Most states, he argues, are simply ignored politically, with almost all
campaigning resources devoted to a handful of swing states at the expense of the
rest of the country. A national popular vote would ameliorate the situation and, he
believes, circumvent the need for a constitutional amendment.

[Read: New York is the latest state to reject the Electoral College]

Josephson, an opponent of the National Popular Vote compact, believes the plan
would likely be struck down by the Supreme Court as an unconstitutional
agreement between states, as it could be argued that the pact benefits its members
at the expense of other states. He also contends that electors might break from the
agreement when faced with the prospect of voting for candidates they disliked.

Faithless electors, those who do not vote for the candidate to whom they were
pledged, are not inherently a hang-up for Josephson, however. He believes that
repealing laws that punish faithless electors—28 states currently have such laws—
could restore “the situation the Framers envisioned so that electors were not party
hacks but could exercise their discretion and vote for who they actually think
should be president.” The Electoral College, in this conception, would be a
deliberative body that would decide the president largely independent of the
outcome of the popular vote.

John Feerick, a professor and former dean at Fordham Law School who advised the
American Bar Association during the Bayh hearings and testified before the
Subcommittee on Constitutional Amendments, noted that even in the early 1820s,
the Framers’ intent was largely understood to be kaput. Political parties
undermined the conception of the Electoral College as a deliberative body,
resulting first in Adams’s win in 1824 in the House and later in increasing use of the
Electoral College as an occasionally disruptive middleman between the electorate
Another problem haunts the Electoral College: There’s no consensus on who benefits from the system. Both opponents and supporters say it’s smaller states. The argument goes like this: Because each state gets a two-vote bonus in the college, relative to its normal allocation of seats in the House of Representatives, voters in smaller states are disproportionately represented, since two extra votes go further in Wyoming (population 579,000) than California (population 39.5 million). But that’s missing the point, according to John F. Banzhaf III, a law professor at George Washington University who pioneered mathematical analysis of the Electoral College’s impact in a major 1968 study.

The question, Banzhaf argues, is not the raw transfer of popular vote to electoral vote, but rather the “voting power” of an individual in any given state. So while a smaller state will have more electoral votes per person than a larger one, the ability of a voter in a larger state to decide a given presidential election will be far larger. Simply dividing population by votes, Banzhaf says, is nonsensical. “Mathematically, that doesn’t make any sense, in the same way you could divide the horsepower of cars by the number of cup holders,” he says.

But Banzhaf acknowledges that his analysis is largely theoretical. The actual electoral situation is somewhat different, since swing states command an outsized proportion of presidential candidates’ time and attention. That doesn’t mean small states are doing any better than their larger compatriots, however. Koza notes that 13 states (and the District of Columbia) that have just three or four electoral votes hosted a total of just 52 general-election campaign events in 2008, 2012, and 2016, of which all but six were in New Hampshire. Nearly 1,000 presidential-campaign events were hosted around the country during that period. The reason is straightforward: Six of the baker’s dozen are solidly Democratic, and six are solidly Republican. New Hampshire is the lone swing state in the group, and thus the only one to garner any substantial attention from presidential campaigns.

The smallest states, Koza argues, are not Republican-leaning — they’re narrowly blue-tinted, in fact — and they do not benefit from increased attention during presidential campaigns. Instead, it’s large swing states that receive both visits and,
Koza believes, policy preference from candidates. “What the current system does is it transfers power from the small states to the big states — selected big states, whichever ones are close,” he says. Trump’s 2016 victory was built on a selection of those close, large states, with victories coming in Pennsylvania, Wisconsin, Michigan, Florida, and North Carolina.

[Read: The Twenty-Fifth Amendment makes presidential disability a political question]

Keyssar says that many on the political right fear a surge in voter participation in coastal states if a switch to a popular-vote system were made. The nightmare for conservatives is that “with the national popular vote, an extra 10 million people or 50 million people will come out of the woodwork in New York or Illinois or California and drown the rest of the electorate.” But there’s no reason to believe that would happen, he says. Supporters of the national popular vote frequently argue that voter turnout would rise in non-battleground states without the Electoral College, but there isn’t any reason to think that would be more true of voters in blue states than red states.

Feerick, writing in 1968, argued for abolishing the Electoral College outright, noting that “if the popular-vote winner were to lose a presidential election … resentment, unrest, public clamor for reform and an atmosphere of crisis would probably ensue.” That point may be coming on fast. Two of the past five presidential-election results have seen reversals of the popular vote—and a third nearly joined them, with about 100,000 votes in Ohio taking the day for Bush in 2004.

At one of his 1979 hearings, Bayh addressed an academic opposed to direct popular election of the president who had argued that the senator was showing too little regard for the constitutional order. “You were suggesting the analogy that our Founding Fathers had infinite wisdom for a plan to choose the best president, and I suggest to you that they had ingredients in that system which I think we would totally be unwilling to accept today,” he said.

In 2018, the argument that parts of the Constitution lack utility as a 21st-century governing document is gaining ground in progressive circles. The
unrepresentativeness of the Senate, problems surrounding gerrymandering, and voting-rights issues are challenging to redress without constitutional change, and partisan gridlock makes such shifts politically unviable. Berman, the former aide to Bayh, believes it would be all but impossible to enact a constitutional amendment revising the Electoral College today. But that doesn’t mean the effort is futile. “Everything that has happened since 1970 has proved we were right,” he says.

Are there arguments for the Electoral College? Keyssar says that there could well be unforeseen difficulties with potential replacements, including a national popular vote. So one line of reasoning against changing the system is simple: “Stick with the devil you know, and we know this devil.”

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