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# Presidential Selection: Electoral Fallacies\*

JACK N. RAKOVE

*The remaining mode was an election by the people or rather by the qualified part of them at large. With all its imperfections he liked this best.*

—James Madison, July 25, 1787<sup>1</sup>

Serious discussion of the so-called “electoral college”<sup>2</sup> was one minor casualty of the thirty-six days of legal and political maneuvering accompanying the Florida recount that ultimately decided the presidential election of 2000. For perhaps a week after 7 November, the realization that the runner-up in the national popular vote could well inherit the White House sparked a modicum of interest in the workings of the electoral college. Events in Florida soon took over, however, not to be dislodged. Even then, one might have thought

\* On 27 September 2002, there took place in the Iphigene Sulzberger Tower Suite at Barnard College a symposium on various aspects of the question: “Should Americans Have the Constitutional Right to Vote for Presidential Electors?” The symposium was sponsored by the Academy of Political Science and the Barnard College Department of Political Science and was funded by the Carnegie Corporation of New York. The question addressed was provoked by the part of the Supreme Court decision in *Bush v. Gore* which asserted that there is no constitutional right to vote for president, so voting directly for presidential electors can be given and taken away by state legislators even after a popular vote. In our Summer 2003 issue, we published one of the papers and a transcript of the ensuing panel discussion. In this issue, we publish two more of the papers prepared for that symposium.

<sup>1</sup> Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1966), II, 111.

<sup>2</sup> The term is not found in the Constitution, nor does it accurately describe the activities of a body that never meets together and never deliberates. The term might be more appropriate had the Framers provided for a national electoral assembly to meet as a single body and deliberate and vote until a decision was reached, but that idea barely surfaced at the Federal Convention and was never seriously discussed.

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that the rationale for the winner-take-all rule of appointing electors that has prevailed in nearly every state since the early nineteenth century might attract critical scrutiny. After all, why should all of Florida's electors go to the candidate who mustered a statistically insignificant plurality of a few hundred or thousand votes in a statewide electorate of six million? If the election demonstrated anything, it was that Florida voters were divided into two equal halves, one of whom, if asked or pressed, would have preferred seeing twelve of the state's twenty-five electoral votes go to the losing candidate, the hapless warrior Al Gore, rather than maximize the state's impact on the national electoral arithmetic. But both the logic and the irony of the winner-take-all rule eluded the attention of the national media and citizenry.

The collective preoccupation first with Florida and then with the Supreme Court's surprising intervention has obscured the most important political fact of the election. George W. Bush's ability to hold on to victory in Florida can be attributed to many factors, among which were: the legal obstacles foreclosing a challenge to the Palm Beach County butterfly ballot, which cost Gore enough votes to dwarf the shift of any recount; Gore's unwillingness to challenge illegal military votes; and a legal strategy that failed to seek a statewide recount. But Bush's *national* victory was peculiarly a tribute to the electoral calculus that gives different leveraging power to voters in different states through the "senatorial bump" that allots two additional electors to each state. In a close election, carrying more states with fewer people may produce a decisive electoral advantage, and so it did in 2000. Bush carried thirty states with 271 electoral votes, or nine votes per electoral unit, and Gore carried twenty states and the District of Columbia, with 267 votes, or roughly thirteen votes per unit; Bush carried thirteen of the twenty least populous states to Gore's seven. Carrying more of the smaller states was the one political advantage that mattered most in the electoral arithmetic.

Defenders of the electoral college profess to see numerous cautionary advantages to this state-based system of electing a president. It is said to support a healthier form of aggregating the preferences of the people than would a simple election in a single national constituency, replacing a crude, perhaps too democratic form of majority rule with a healthier constitutional form that values the capacity to carry numerous provincial constituencies. It is also said to favor a more nationalizing style of campaigning, requiring candidates to assemble multistate and multiregional coalitions rather than focusing their political efforts on the largest, most concentrated (hence urban) communities and therefore to be more sensitive to the array of concerns that are diversely distributed across the country.<sup>3</sup> It is said, too, to be an essential feature of the grand design

<sup>3</sup> For a succinct statement of these themes, see the early op-ed written by Harvard Law School professor and former Solicitor General Charles Fried, "Electoral College, Safeguard of Federalism," *New York Times*, 11 November 2000. For other representative statements, see the essays collected in Gary L. Gregg II, ed., *Securing Democracy: Why We Have an Electoral College* (Wilmington, DE: ISI Books, 2001); Robert M. Hardaway, *The Electoral College and the Constitution: The Case for Preserving Federalism* (Westport, CT: Praeger, 1994).

for a truly federal republic that remains one of the great legacies of the founding era. As Professor Judith Best repeatedly suggests in her accompanying essay, an attack on the federal aspects of the electoral college would ultimately threaten federalism itself.<sup>4</sup>

These are serious criticisms, but they also rest on fallacious premises, a problematic reading of history, and an evasion of another great revelation of the Y2K election: that the logic of the electoral system and the sophistication of modern polling methods enable campaigns to concentrate resources and attention only on the relatively small number of electoral units that are in serious contention and are therefore designated “battleground states.” Far from diffusing political activity across the extended republic, electoral logic allows it to be narrowly targeted to key communities and particular interests within them. Perhaps more important still, the defense of the sliding calculus of the value of votes in states of different sizes rests on assumptions that James Madison tried, but failed, to disprove at the Federal Convention of 1787: that the interests of citizens are somehow defined in some essential way by the size of the states in which they live or by the corporate identity of the states. But attachment to the principle of statehood or to the size of states is irrelevant to the formation of the preferences according to which citizens actually cast their votes. If that is so, then a system that allows the existence of states of different sizes to justify an inequitable rule for weighting votes on the basis of the accident of residence should not be deemed superior, in principle, to one that would rest on the modern democratic principle—usually labeled one person, one vote—that gives every vote the same value.

Were I the Madisonian lawgiver, then, I would replace the Framers’s hastily sketched system, which was obsolete within a bare decade of its inauguration, with a single national electorate and a requirement that a victorious candidate receive at least 45 percent of the vote on the first round, or failing that, capture a majority in a run-off between the two highest finalists to take place within two weeks of the initial election. To ward off the danger that close elections would produce nasty recounts subject to all manner of legal and political hanky-panky in the grand Florida mode, I would further recommend either a vigorous use of the power of Congress to regulate its own elections or authority derived from an appropriate provision in the requisite constitutional amendment to set the standards for balloting at the highest level possible.

For better or worse, however, I am not a Madisonian lawgiver, but merely a working historian whose primary subject is the origin of American constitutionalism in the late eighteenth century, with a special interest in the relation between questions of the “original meaning” of the Constitution and the conduct of contemporary politics and governance. Accordingly, rather than defend this scheme on its merits, as a real political scientist might, I shall devote the

<sup>4</sup> Judith A. Best, “Presidential Selection: Complex Problems and Simple Solutions,” *Political Science Quarterly* 119 (Spring 2004): 39–59.

rest of this essay to explaining how the electoral system was first devised and why it evolved as quickly as it did; in doing so, I shall also challenge the federalism rationale that underlies Judith Best's defense of the existing procedures. But first, it would be useful to discuss some subconstitutional remedies for the perceived inequities of the electoral system.

No one who earns his daily bread studying history can be a stranger to the doctrine of unintended consequences. So, too, any historian rash enough to support as fundamental a change as the replacement of the electoral college with a national popular vote could fairly be asked to check his professional credentials at the door, subject his intellectual baggage to heightened scrutiny, and undergo interrogation as to whether he is simply cloaking his own political preferences in the best available historical garb. A system that misfires only once a century, even with some occasional near misses,<sup>5</sup> cannot be that bad, especially if we can plausibly conclude that without the integrative impetus it has long given to American politics, our notoriously lax party system might grow flabbier still. Better the equilibrium we know than the uncertainties we would face should so significant a reform be implemented.

A second form of historical common sense further confirms that even to talk about reforming the electoral college is "a waste of time," as former president Jimmy Carter reminded me, after summoning me on a fool's errand to make much the same argument I will develop here.<sup>6</sup> Every politically astute American knows the constitutional arithmetic. If one assumes that a reform of the presidential election system should take the form of an Article V amendment, then only a certified naif could imagine that the least populous states would permit a change whose first objective would be to eliminate the unfair leverage their voters derive through the senatorial bump. The two-thirds congressional majorities required to propose amendments assure that the Senate would establish a near impermeable line of defense. And should that senatorial line somehow be breached, one can hardly imagine that the thirteen least populous states would fail to exercise the constitutional negative provided by the ratification provision of Article V. Under the most recent allocation of electors following the federal census of 2000, twelve states will cast either three or four electoral votes in 2004 and 2008.

Of course, there are alternative methods of tacitly amending the electoral system without complying with Article V. As the last election reminded us, the

<sup>5</sup> It is worth noting that in 1976, a relatively small swing of votes in Ohio and Hawaii would have given electoral victory to Gerald Ford, notwithstanding Jimmy Carter's national plurality of well over a million votes. And in 1960, a plausible case can be made that Richard Nixon could be credited with a popular vote plurality over John Kennedy because accounts of the voting in Alabama customarily lump voters preferring an unpledged slate of Democratic electors with those pledged to support Kennedy in aggregating the preferences of the good citizens of that state. See Brian J. Gaines, "Popular Myths about Popular Vote-Electoral College Splits," *P.S.: Political Science and Politics* 34 (2001): 71-75.

<sup>6</sup> See the transcript of the hearings of the National Commission on Federal Election Reform, 26 March 2001, accessed at <http://www.reformelections.org/data/transcripts>.

power of determining how electors are to be selected belongs not to the people but to the state legislatures.<sup>7</sup> Of their own volition, the state legislatures, or even a partial combination thereof, could adopt either of two oft-mentioned alternatives. They could move to implement the Maine-Nebraska system of appointing two electors statewide, with the remaining electors selected by voters in each congressional district. Or a coalition of states (presumably but not necessarily the most populous) that could cumulatively produce the requisite majority of 270 votes could enact legislation pledging to cast all of the electoral votes of their individual states for the candidate receiving a plurality of the national popular vote, regardless of the preferences of their own voters.<sup>8</sup>

Each of these alternatives is vulnerable to significant objections. Given what we know of the zeal and science that go into the decennial follies in congressional redistricting, would it really be wise to tie presidential elections to the same techniques of manipulation?<sup>9</sup> It would make far more sense to divide electors among candidates on the basis of the statewide popular vote, rounding fractions up in favor of the candidate enjoying a statewide plurality.

The idea of an interstate bargain among a subset of states collectively casting a winning majority of electoral votes is vulnerable to similar reservations. It assumes, first, that legislators, for reasons of principle, would somehow transcend their own partisan preferences, and those of their constituents, to adopt a self-sacrificing rule that would commit one state's electors to the preferences of the voters of other states. Whatever weak fellow-feeling connects citizens and legislators of the most populous states—in my view, none—it boggles the mind to think that a principled recognition of the merits of acceding to the preferences of Californians (should a plurality of that state's voters coincide with a plurality of the nation's) would persuade Texans to bind their electors in this way (and vice versa). Second, the possibility of defection from such an agreement would seem high, especially in close elections like the split decision of 2000. (It might also tempt faithless electors to follow their hearts at the moment of truth.) This rule seems far less likely to produce a stable equilibrium, even among a small number of assenting states, than the winner-take-all, statewide appointment of electors that soon prevailed after 1800.

To my knowledge, an alternative, subconstitutional method of reforming the electoral system in the interest of alleviating the objectionable senatorial

<sup>7</sup> Anyone who thinks that the legislatures remain free to do so after the congressionally designated time by which electors have to be chosen, however, is constitutionally illiterate. In the last presidential election, the Florida legislature would have been free to devise any mode of electoral appointment down to 6 November, but not thereafter.

<sup>8</sup> Robert W. Bennett, "Popular Election of a President without a Constitutional Amendment," *Green Bag* 4 (2001): 241–246.

<sup>9</sup> This concern has been further exacerbated since the 2000 election by the controversies over redistricting in Texas and Pennsylvania, two states in which Republican-dominated legislatures used the increasingly sophisticated techniques of "cracking and packing" to enable their party to dominate each state's congressional delegations.

bump has so far gone unexplored. That would involve expanding the size of the House of Representatives beyond the arbitrary figure of 435 set in 1911. The premise here is simple. The larger the share of electors that corresponds to the membership of the House, the more the senatorial bump is diluted. This proposal could be defended and rendered attractive on grounds that would not be limited to the composition of the electoral college. The standard Madisonian argument that the quality of congressional deliberation would decline after the House grew too numerous hardly matters in a body that never deliberates in the ways that the Framers would have imagined. The British House of Commons represents a population roughly a third the size of ours, yet seats a hundred more members than our House of Representatives. But as C-SPAN aficionados know, any comparison between question time with the prime minister and the lonely soliloquies our orators deliver to an empty chamber and the amusement of insomniacs everywhere will not redound to the advantage of American rhetoric or the memory of Daniel Webster, Henry Clay, and John C. Calhoun. Moreover, enlarging the House could also be defended on the traditional principle that our representatives should be rendered as accountable to and sympathetic with their constituents as possible.

Whether the nation's capital would gladly welcome another hundred congressmen, with the accompanying impacts on office space, housing in the District, and traffic in the Virginia and Maryland suburbs, not to mention the necessary multiplication of subcommittees to satisfy the newcomers' political ambitions, is another matter. So let us drop the pretense of partial, subconstitutional reform and consider the question of the electoral college at a more profound (if doubtless impracticable) level.

For starters, we should reject the casual notion that the obsolescence of the electoral college is a simple function of the enormous distance and differences that separate our political culture from that of the revolutionary generation. For all practical purposes, the electoral scheme of 1787 was obsolete in 1800. The rapid evolution of political parties during the 1790s had already falsified essential concerns of 1787. What was left was the political logic that belatedly led the Framers to replicate their previous decisions over congressional representation in the formula for allocating electors, so that all three political branches of the new government could be said to embody satisfactory compromises between large and small, and slave- and nonslaveholding states. That impression might have had a useful function in promoting a final harmony within the Convention and in selling the Constitution to the political nation mobilized for the ensuing ratification struggle. It was, however, irrelevant to shaping the political preferences of either citizen-voters or lawmakers thereafter.

A good case can be made that the design of the presidency proved the single most difficult task the Framers faced at Philadelphia, becoming the object of what Madison called "tedious and reiterated discussions" that revolved primar-

ily around the mode of election and related questions of tenure.<sup>10</sup> The sources of these difficulties were multiple. Although the Framers were clearly retreating from the antimonarchical sentiments that led to the general evisceration of executive power in the state constitutions, most remained unwilling to restore the robust conception of prerogative that, for example, recent administrations have invoked to justify unilateral presidential war making. True, within the first week of debate, the Convention endorsed the idea of vesting the executive power in a single person, to be armed with a limited veto over legislation. But much of the growth in presidential power that occurred during the final month of deliberations seems to have resulted more from a reaction against the Senate than from a Hamiltonian appreciation of the potentialities of a vigorous executive.

More important, however, were the genuine puzzles the Framers encountered in trying to imagine the political dimensions of executive power. In the eighteenth century, executive power was still monarchical power, or the emerging ministerial variant that the Americans knew best from their colonial experience. Even under the limited monarchy of the eighteenth-century British constitution, the discretion and whims of the king still mattered a great deal. The choice of a chief minister remained very much a matter of royal discretion, and although that minister's continuation in power depended on his capacity to maintain the support of Parliament, in practice, the techniques of influence (or "corruption") generally enabled the crown to keep both houses in fairly docile trim. The same body of ideas that led the Americans from resistance to revolution before 1776 also taught them to be mistrustful of ministerial power.<sup>11</sup> But if executive power was to be neither monarchical nor ministerial, what form would it take?

Within the states, the main answer to that question was that the executive was just that: an institution to implement the legislative will, without political influence or real independence, elected by the assemblies for a term of a single year. The exceptions were the second-generation constitutions of New York (1777) and Massachusetts (1780), which provided for popular election of the executive. It is revealing that the upstart George Clinton in New York and the aristocratic John Hancock in Massachusetts emerged as the two most potent governors state politics produced.

<sup>10</sup> James Madison to Thomas Jefferson, 24 October 1787, in Jack N. Rakove, ed., *James Madison: Writings* (New York: Library of America, 1999), 144. The analysis presented in this section draws on Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1996), 244–287; Jack N. Rakove, "The Political Presidency: Discovery and Invention" in James Horn, Jan Lewis, and Peter S. Onuf, eds., *The Revolution of 1800: Democracy, Race, and the New Republic* (Charlottesville: University Press of Virginia, 2002), 30–58.

<sup>11</sup> Bernard Bailyn, *The Ideological Origins of the American Revolution*, enlarged edition (Cambridge, MA: Harvard University Press, 1992), 1–159; see the more focused discussion in Bernard Bailyn, *The Origins of American Politics* (New York: Knopf, 1968), 59–105; and Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969), 132–150.



Once the Federal Convention turned to the question of presidential election in mid-July 1787, its perplexity quickly became evident. As the Virginia Plan emerged from preliminary deliberations in a committee of the whole, the executive would be chosen by the legislature for a single term of seven years. This arrangement posed several problems. For those who wanted an enhanced executive to be able to carry out its proper duties free of congressional meddling—“encroachments” in their lexicon, “micro-management” in ours—any form of election that made the executive the political creature of the legislature was troubling. Restricting the executive to a single extended term could only partly relieve this concern. By republican standards, seven years smacked a bit of monarchy, while the ban on incumbents promised to encourage officials less Cincinnatus-like than Washington to maximize their utilities while they could. Most interesting was the idea that the promise of re-election would be an incentive to all the right kinds of ambition that a new-modeled republican constitution should encourage.

In late July, the Framers considered two obvious alternatives to legislative election. One was election by the people in a single national constituency, favored initially by James Wilson and then, after his reservations were overcome, by Madison. It was vulnerable to two objections. One was that a single national electorate would disadvantage southern prospects because of the demographic disparity between a free northern society based on small farmers and free labor, all prospective property owners and citizens, and a southern society that included a massive enslaved labor force completely devoid of all rights and even legal personality. This was the objection that Madison first voiced but then relinquished after the defects of the final mode of election—an appointment by electors—became apparent. The second and fatal objection to popular election was the likelihood that voters in a highly decentralized polity like the United States would lack knowledge about properly qualified national candidates and thus regularly vote for the provincial notables they knew best, preventing any decisive choice from being made without a series of qualifying elections for which no precedents or examples existed. Popular election was a casualty not of the Framers’s fear of demagoguery but of an information problem for which they had no obvious solution.<sup>12</sup>

In the face of these difficulties, the initial proposal for an appointment by twenty-five electors, to be named by the state legislatures and to meet in a single assembly, briefly became something of a panacea. But the enthusiasm was short-lived. There was no reason to think that the electors would “be men of the 1st nor even of the 2d grade in the States.” By 26 July, the Convention was back to where it had started: legislative election for one seven-year term.<sup>13</sup>

To say that this decision embodied no positive consensus would be an understatement. By the time the Convention returned to the executive in mid-

<sup>12</sup> Farrand, ed., *Records*, II, 29–32, 56–57, 109–111.

<sup>13</sup> Farrand, ed., *Records*, II, 57–58, 99–101, 118–121.

August, a reaction against the Senate had begun to set in that ultimately worked to enhance the powers of the presidency. But the Framers had not resolved their electoral conundrum. On 24 August, the Convention deadlocked on the “abstract question” of replacing legislative election with an appointment by electors.<sup>14</sup> Rather than debate the issue further, however, the Convention left its resolution to the committee on postponed parts. Its report of 4 September made the key changes, proposing an appointment by electors apportioned in accordance with each state’s membership in both houses of Congress. The electors would meet in their states—never assembling “in college,” so to speak—and cast two votes each, one for a resident of another state (implying, as Madison observed in a game theoretic analysis, that everyone’s second choice would be the collective first choice). Should the electors fail to produce a majority for any candidate, the election would go to the Senate, to decide among the top five.<sup>15</sup>

Herein lay a rub. The solution ingeniously combined the supposed compromises on representation that the Convention had forged in July. The large states gained the advantage in promoting candidates (although the small states already enjoyed their senatorial bump); the small states, the same principle of equality they enjoyed in the Senate whenever the electors failed to produce a majority; and southern states could count their slaves in the allocation of electors by the three-fifths rule. But because the same report also joined the president and Senate in the treaty and appointment powers, the formula for a contingent election violated the underlying desire to make the executive as independent of the legislature as possible. Because many Framers expected that the electors would ordinarily serve as an equivalent to a modern primary, this posed a serious problem that consumed three days of debate until Roger Sherman stumbled upon the idea of placing the contingent election in the House of Representatives, voting by states.<sup>16</sup>

What inferences can we draw from this record? First, the decisions about presidential election are best described as a weighing of the comparative disadvantages of different modes of election. The system of electors emerged triumphant because the doubts about its efficacy were less telling than were the killer objections that militated against either popular or legislative election. Rather than view the electoral system as a well-conceived element within the overall constitutional design, we can recognize that it represented a highly experimental leap into a political uncertainty that, in turn, reflected the difficulty of conjuring up the political dimensions of a national republican executive. Second, one should hesitate to conclude that the Framers saw positive advantages in a state-oriented or state-based system of presidential election. As their expressed reservations about both popular election and an appointment by electors sug-

<sup>14</sup> Farrand, ed., *Records*, II, 403–404.

<sup>15</sup> Farrand, ed., *Records*, II, 497–499.

<sup>16</sup> The relevant debates can be found under the dates September 4, 5, and 6 in Farrand, ed., *Records*, II; for Sherman’s *aperçu*, see *ibid.*, 527.

gest, they viewed the likely parochialism of voters and electors alike as a problem to be overcome, rather than a laudable advantage in terms of promoting an aggregation of local interests and preferences. Third, we can reject the notion that the Framers imagined the electors as a body of notable citizens capable of making a superior choice. Had they done so, the electors could have met in one place to deliberate and vote until they reached a decision—in the manner of the college of cardinals (admittedly an unlikely example for Americans to emulate). Instead, an offsetting fear prevailed: assembling electors of uncertain qualifications in one place would open them to dangerous influences and the specter of “cabal.” Fourth, in the absence of any recorded debate of the point, we should similarly balk at ascribing too much importance—in the grand manner of the plurality concurrence in *Bush v. Gore*—to the decision allowing the state legislatures to determine the mode of appointing electors. In effect, the Framers solved their own inability to determine how electors were to be appointed by deferring and defaulting that decision to the states—an unsurprising action given the lateness of the hour.<sup>17</sup> Fifth, by retaining a decisive role for the national legislature in the contingent election of the president, they acknowledged the importance of having the most qualified national officials choose the president on all those occasions when no individual had the stature to gain a majority of electors.<sup>18</sup>

Whatever can be said about the “original intentions” behind the electoral college, the decisive facts in its evolution were discovered within the first long decade of its operation. In the first two presidential elections of 1789 and 1792, of course, the procedures adopted by the states for the appointment of electors were irrelevant and inconsequential because the election and re-election of George Washington were foreordained. As soon as the office was seriously contested, in 1796 and again in 1800, the appointment of electors and the disposition of their votes became subject to intense political manipulation. This was almost as true in 1796, when Washington’s delayed announcement of his retirement might have been expected to retard such maneuvering, as it proved in 1800, when the lessons of 1796 were there to be studied and corrected.

In 1796, the key development involved Alexander Hamilton’s efforts to enable Thomas Pinckney, the nominal Federalist running mate, to receive more electoral votes than Vice President John Adams, the party’s nominal head. This scheme foundered when New England Federalists smelled a rat. Eighteen New

<sup>17</sup> Here, as in the comparable procedures for congressional redistricting, one can regret the Convention’s failure to specify uniform constitutional rules that could have had the effect of reducing or minimizing the political manipulation of elections at the state level. By Madisonian logic, a uniform constitutional rule is less likely to be susceptible to factious manipulation across a multitude of diverse states than one that devolves the decision to locally based majorities.

<sup>18</sup> Note, however, that the electoral system was likely to be most effective when it was judging the merits of an incumbent. On such occasions, the information problem would no longer reign, and electors would be able to make a decisive choice, whether to fulfill the Hamiltonian goal of rewarding proper ambition, or to reject a president who had been found wanting.

England electors voted for Adams but not Pinckney, not only enabling Thomas Jefferson to take second place, three votes behind Adams, but also preventing Pinckney's election as president outright and Adams's selection as our only three-term vice president.<sup>19</sup> The constitutional requirement that the electors meet and cast their votes in the separate states on the same day had not prevented Alexander Hamilton, the Federalist *eminence grise*, from undertaking just the sort of cabalistic calculations and influence wielding the Framers had dreaded.

The more interesting maneuvers, however, took place as the two parties jockeyed for the rematch of 1800. Most accounts of that celebrated election focus on the glitch in the design of the electoral college that produced the tie between Jefferson and his nominal running mate, Aaron Burr, which in turn threw the election into the lame-duck House of Representatives, where Federalists held the balance of power, and that eventually led to the adoption of the Twelfth Amendment requiring electors to ballot separately for president and vice president. In fact, the preliminary maneuvers governing the appointment of electors are far more revealing of the emerging political logic of the system that the Framers had invented.

In 1796, Jefferson had not only eclipsed Pinckney to become vice president, but had fallen only two electors short of becoming president himself. Those two votes could have been found in the Republican heartland states of Virginia and North Carolina, where electors were chosen by districts, and from each of which Adams had managed to snatch a single vote.<sup>20</sup> Going into 1800, the advantage of converting to a winner-take-all, statewide mode of appointing electors seemed obvious to the Virginia assembly. Alerted to this development, the solidly Federalist Massachusetts delegation to Congress urged the General Court back in Boston to follow suit and not risk losing a vote or two to pockets of Republican strength in the Bay State. Rather than take any chances with the electorate, the legislature arrogated the appointment of electors to itself.<sup>21</sup> Meanwhile, in New York, Federalists had confidently assumed that an election by the state legislature that they expected to control would give all that state's electors to their party (although Hamilton was once again maneuvering to pre-

<sup>19</sup> Richard P. McCormick, *The Presidential Game: The Origins of American Presidential Politics* (New York: Oxford University Press, 1982), 52–57; and see Joanne Freeman, *Affairs of Honor: Political Combat in the Early Republic* (New Haven, CT: Yale University Press, 2001), 213–229. Note that in the cabalistic numerology of *gematria*, the letters that form the number eighteen (the number of defecting New England electors) also form the Hebrew word *chai* (life), implying that the defectors were, in fact, giving life to Jefferson's candidacy. One should not pursue these calculations too far, however.

<sup>20</sup> See Charles Pinckney to James Madison, 16 May 1799 and 30 September 1799, in Robert A. Rutland et al., eds., *The Papers of James Madison* (Charlottesville: University Press of Virginia, 1962–1991), XVII, 250–251, 272.

<sup>21</sup> See the circular letter from the Federalist members of the congressional delegation to correspondents in Massachusetts, 31 January 1800, in *Proceedings of the Massachusetts Historical Society*, 43 (1910), 652–654 and the discussion in James Banner, *To the Hartford Convention: The Federalists and the Origins of Party Politics in Massachusetts* (New York: Knopf, 1969), 226–227.

vent those votes from going to Adams). Burr's superb political organization in New York City, however, gave control of the assembly to the Republicans. Hamilton then urged Governor John Jay to call the outgoing assembly into special session to enact a districting law that could preserve some votes for the Federalists. He justified this expedient on grounds of sheer political and moral necessity, but Jay treated the request as a matter of honor, docketing Hamilton's letter with the comment: "Proposing a measure for party purposes wh. I think it wd. not become me to adopt."<sup>22</sup>

In fact, no fewer than six states changed their electoral law for the occasion. They acted not in response to deep constitutional values in a contest where such values were supposedly at stake, but from purely strategic calculations of partisan interest. But that did not mean that the choice of modes for appointing electors would remain permanently open to innovation and alteration. Once some states began to move decisively to the winner-take-all model, it is easy to see why that would become the equilibrium that other states would emulate. Why should one state risk diluting its electoral impact when other states were maximizing theirs? The only condition under which adhering to a district rule would make sense would occur when the party controlling the legislature worried that it would not enjoy similar success in a presidential election. But the circumstances of controlling the legislature would likely convince partisan lawmakers to err on the side of optimism, hoping for the greater return to be provided by winner-take-all than the lesser dividends of salvaging districts.

All of this makes sense from the perspective of partisan calculation and helps to explain why the current Maine and Nebraska variant is unlikely to be widely replicated elsewhere. But does a winner-take-all statewide rule make sense from the vantage point of either voters or the state electorates they comprise? Or does a state-based system of presidential elections that leverages the electoral power of states in inverse proportion to their population make sense as an essential element of federalism? Those are the critical questions to which I now turn.

Two arguments from the constitutional deliberations and debates of the late 1780s provide a useful point of departure because both implicate the underlying claim that a state-based system of presidential elections is integral to the principles of federalism. The first and simpler argument involves asking whether electoral mechanisms are essential to the existence and health of federalism. The second, more nuanced and even elusive—but ultimately more powerful—argument requires asking whether political behavior and the preferences that voters express are connected to their citizenship in particular states, conceiving of states as jurisdictional entities whose legitimate interests and political rights somehow reflect the disparities of population among them.

The first argument stems from the Antifederalist charge that adoption of the Constitution would lead to a genuine consolidation of all effective power in

<sup>22</sup> Alexander Hamilton to John Jay, 7 May 1800, Harold C. Syrett, ed., *The Papers of Alexander Hamilton* (New York: Columbia University Press, 1962–1979), XXIV, 464–466, 467 n. 4.

the national government, leaving the states either to wither away or to survive, barely, as hollow jurisdictions. Federalists rebutted this charge by pointing to the essential role that the states would play in determining the political composition of the national government. State legislatures would elect senators directly while designing rules for the election of members of the House of Representatives (subject to a rarely exercised corrective power of Congress) and the appointment of presidential electors. The states would also regulate the electorate, either through legislation or by constitutional provision. Anti-Federalists still doubted that these functions would counterbalance the open-ended invitation to legislate contained in Article I, Section 8 (including, of course, the Necessary and Proper Clause), the capacity of the national government to control the most productive sources of revenue, and the greater majesty of the Supremacy Clause.

Twenty-one decades later, universal suffrage, frequently expanded and occasionally enforced by the federal government, and the popular election of senators and presidential electors may have diluted the value of the Federalist assurances of 1787–1788 even further, leaving the decennial reapportionment mess in the states as the sole area in which state governments retain direct influence over the national political process. What all this has to do with the viability of American federalism is difficult to discern. On the one hand, this imposition of democratic and egalitarian norms has clearly reduced the degree of discretion that states could theoretically claim as quasi-sovereign entities. But this pressure against the states comes from both above and below — that is, from both nationalist and populist sources. Anyone wishing to argue that federalism would be strengthened by allowing states to exercise greater discretion over elections would have to swim upstream against very powerful currents. The logical starting point for such a campaign would be to urge the state legislatures to resume their constitutional authority to appoint electors or seek the calling of a constitutional convention to restore their right to elect senators.

The more important point, however, is that federalism is not primarily about modes of election, but rather about the division of duties between national and state government. The nationalization of politics and election procedures since 1789 has obviously not brought the dire effects that Antifederalists would have predicted. The states survive as healthy jurisdictions, still enacting numerous laws that regulate the fabric of daily life and carrying out many of their traditional functions. Of course, the net allocation of the responsibilities of governance between the Union and the states has shifted over time. But this has been in response to developments that transcend alterations in the modes of election, as majorities have been aggregated in favor of national action in defiance of the inertial and centrifugal forces that have typified American politics. Presidential elections affect the structure of American federalism primarily when they produce results that serve to advance a strong political agenda that affects this balance. In the twentieth century, for example, one could suggest that the elections of 1932, 1936, 1964, and 1980 all had major consequences

for the state of federalism. But that was not because of the state-based structure of elections per se, but rather because the balance of national and state authority was implicated by the political results. In some elections, federalism is itself at issue, explicitly in terms of campaigns, or implicitly in terms of results. But those are the exceptions.

There is, however, a more fundamental criticism of the idea that a state-based system of presidential elections is worth preserving on federalism grounds regardless of the damage it does to the democratic principle of the equality of citizens through the leveraging factor of the senatorial bump. This criticism implicates a second, more subtle, but also more powerful element of the constitutional deliberations of the late 1780s: whether our political attachments as voters are truly linked to our residence in individual states, particularly in ways that reflect the size (that is, the population) of those states and their existence as coherent political communities.

If states and their citizens are to receive somewhat different electoral weight as a function of the senatorial bump, some persuasive legitimating principle other than the fact that the Framers endorsed the idea should be available to justify that calculus. No such principle exists. Or rather, if such a principle does exist, it was only persuasive at the original moment of constitutional foundation, as a necessary cost of reaching agreement, but its rationale disappeared as soon as agreement was reached, never to operate convincingly thereafter—for reasons that James Madison well explained in his efforts to deny the states an equal vote in the Senate.

What could this abstract statement mean? The size of the population of a state was arguably a legitimate interest at the moment when the Constitution was being framed, but only because delegates necessarily represented more and less populous states and had an incentive and even an obligation to stake out positions that would maximize their constituents' collective political influence. When rules of voting are at stake, delegates can be expected to assert and protect those interests. But does that make those interests legitimate over the long run, once the Constitution itself has gone into operation?

Madison thought not, and a significant although regrettably overlooked aspect of his theory of faction was devoted to explaining why his argument against an equal representation of states in the Senate rested on the understanding that the size of a state would never again affect the political behavior of voters or representatives after the Constitution was adopted. All the real determinants of political behavior depended on the interests, opinions, and passions of individuals, and these in turn were tied to characteristics that owed nothing to the size of states and everything to such factors as occupation, wealth, religious affiliation, ethnic identity, and so on. As Madison well recognized, the most striking and potentially threatening characteristic that distinguished Americans was whether they lived in states whose social structures rested on the presence or

absence of slavery.<sup>23</sup> That was a long-term, seemingly permanent interest that the Constitution could legitimately accommodate because slavery would continue to divide Americans indefinitely.

The size of states, however, would not have a similar effect. Subsistence farmers in Massachusetts and Rhode Island would not think differently because one was classed as a large state in 1787 and the other was not. Merchants in Baltimore and Philadelphia might share common interests in regard to the dominant vectors of Atlantic commerce or act as rivals competing for the same market, but the respective classification of their states as large and small would not be a factor. Different communities might think strategically about the likelihood of forming winning political coalitions on the basis of the relative size of their populations, but the interests they pursued would not be differentiated in the same way.

One can translate this basic insight into a modern context with a number of examples. A soybean farmer descended from German Lutheran immigrants of the mid-nineteenth century is not likely to view politics differently depending on whether he lives on the east bank of the Mississippi River in Illinois or the west bank in Iowa. Working-class weekend hunting enthusiasts in the venison belts of Michigan and Pennsylvania will not think differently from other Second Amendment firsters in Idaho and Wyoming. Evangelical Baptists in Texas and neighboring Arkansas will similarly vote alike, as do African Americans on the South Side of Chicago and their cousins in the Mississippi delta who never rode the Illinois Central north.

If there is no correlation, therefore, between the size of the states in which voters live and the political preferences they express—especially when voting in a presidential election—then why should population provide a legitimating basis for the differential calculus of the electoral college? One answer might be that the residents of small states deserve extra compensation, or leverage, precisely because they stand to be outvoted, and their essential interests trampled underfoot, by the mean-spirited domineering majorities of the big, bad, populous states. But this objection is fallacious because neither small- nor large-state voters cast presidential ballots on the basis of the size of the states in which they live. They may vote as farmers or urbanites or suburbanites, religious enthusiasts or militant secular humanists, or for any other reason. But again, the size of the state has no bearing on the preferences voters express.

This account of the irrelevance of size in turn operates to refute another ostensibly federalist argument for the electoral college: that the existence of multiple constituencies works to “diffuse” (a Madisonian word) political activity more broadly across the electorate, and indeed the countryside, than would be the case should the president be elected by a national popular vote. This rationale appears equally problematic on several grounds.

<sup>23</sup> On this point, see especially his 30 June 1787 speech in Federal Convention, Farrand, ed., *Records*, 486–487.



The first, and arguably most important, is that a state-based electoral system actually narrows rather than broadens the focus of political attention, as measured by the various indices of media buys, tarmac appearances, and the other activities that constitute a modern presidential campaign. The presidential election of 2000 illustrated this point perfectly. The sophistication of modern political polling enables campaigns to direct resources only to those “battle-ground states” that are “in play,” that is, where the candidates are competitive. In 2000, those states included six that replicated the narrow division in the national electorate—Florida, most famously, but also New Hampshire, Iowa, New Mexico, Washington, and Wisconsin—as well as West Virginia, Michigan, and Pennsylvania. Most of the rest of the country—including the states that form the big L of the Republican coalition that sweeps down the mountains and then marches, like a great Sherman, through the old Confederacy until it hits the sea—could expect to be ignored.

One could speculate as to whether size might weakly correlate with competitiveness. By the original logic of Madison, for example, one would expect large states to be more competitive than small states because it is arithmetically easier for majorities to coalesce in smaller than in larger communities. Or conversely, one could speculate that large states should prove more competitive because the greater diversity of interests they contain should make it easier to identify the median point on the political spectrum that the weaker party can strive to capture by picking off smaller elements of the dominant majority coalition. The key fact to be recognized, however, is that the competitive playfulness of a state is essentially an accidental result of the different distribution of population groups within the largely arbitrary geographic boundaries that provide the minimal territorial definition of statehood. Competitiveness, in a sense, just happens as a by-product of demography, rather than as the diffusive effects of the electoral system.

It is nonetheless objected that a national popular vote would confine campaigning to the great metropolitan areas, to the exclusion of the heartland. Candidates and resources would flock to the great urban-suburban communities of the coasts and Great Lakes, leaving the smaller cities, towns, and rural areas of the great interior to wither in political isolation.

One could answer this concern in several ways. The first is to apply what might be called the Willy Sutton rule of politics, with a twist. Candidates *should* be encouraged to seek out the largest concentrations and numbers of voters, wherever they may be found, for the same reason that Sutton robbed banks. Why that system would be inferior to one that concentrates resources only in jurisdictions that remain competitive would be worth explaining. The logic of the current system encourages candidates to focus on those issues and approaches that seem most likely to sway undecided voters or mobilize loyalist turnout in the contested jurisdictions. By contrast, the challenge of forming a national plurality or majority is more likely to generate broad-gauged strategies for mobilizing voters than one that encourages precision targeting within spe-

cific communities. Moreover, the parties and campaigns would discover a greater incentive to enhance turnout across the country than that currently provided by the stunting logic of the electoral college. In a national electorate, a vote would be a vote that counted wherever it was cast, and both majority and minority parties in states that are unlikely to be “in play” in any presidential election in the foreseeable future would be rewarded for developing methods of increasing turnout. For those who believe that encouraging voter participation is in itself a healthy objective, that potential advantage would outweigh the downside risk of mounting a national recount in the wake of an election that found the leading candidates separated by a 1960- or 2000-style eyelash.

The greater risk that Professor Best evokes in her paper, however, is that establishing a national electorate for the presidency would deliver a deep insult, even a mortal blow, to American federalism more generally. This is pure hyperbole, and the claim founders on two main objections. First, the idea that state-based presidential elections fulfill important values and functions of federalism remains vulnerable to the criticisms already registered. Second, it is difficult to see why a national presidential vote would undermine all the other protections for federalism that already exist, whether defined in terms of the persisting and resilient division of tasks between the national and state governments, or the conjuring of the ghost of Spencer Roane in the federalism jurisprudence of the current Supreme Court, or the political safeguards provided by the state-based election of both houses of Congress. If the last does not protect the local concerns that are often equated (perhaps not always correctly) with federalism, it is difficult to see how the blunt instrument of presidential election could possibly serve the same values more effectively. If enhancing federalism is truly Professor Best’s concern, she should be waging not a defense of the electoral college but an offensive campaign to repeal the Seventeenth Amendment. Nor need we fear that the states will ever be stripped of their equal vote in the Senate, since that is the one clause of the Constitution that is immune to Article V amendment.

All of these arguments are, of course, easily dismissed on grounds of pure political impracticability. That certainly is the case if one refuses to discuss them at all. The last presidential election suggests, however, that we ought to hold both the Constitution and our own political behavior subject to a higher standard. In my view, the principle of the equality of all citizens, regardless of the accident of their residence in one state or another, is the highest standard we could apply.<sup>24</sup>

<sup>24</sup> For a more comprehensive development of these and other criticisms of the electoral college, see the forthcoming work of George C. Edwards, III, *Why the Electoral College Is Bad for America* (New Haven, CT: Yale University Press, 2004), which came to hand, in galley form, too late to be incorporated into this article.