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*Issue Papers  
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**#4 “Reevaluating the Electoral College”**

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**“The United States is not, nor was it meant to be, a pure democracy....Nor was it contemplated that the United States government would operate under a general principle of majority rule, though majority rule is often used in decision making within governmental institutions. [It] was designed by the Framers to be a republic, with representatives of the people chosen to govern. In fact, under the original Constitution, members of the House of Representatives were the only government officials to be chosen directly by the citizens....[However] perhaps the most compelling argument that the President should be elected by direct popular vote is based on the premise that the President and the Vice President are the only national officials who represent the people as a whole. This argument is buttressed by the declaration in the Preamble to the Constitution: ‘We the people....’ ”**

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## Reevaluating the Electoral College

**James P. Pfiffner**

Alexander Hamilton concluded in Federalist No. 68 that the electoral method of choosing the chief executive of the new republic was one of the few parts of the proposed Constitution that raised few objections, even by opponents of ratification. "The mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents." He concluded that if the manner of choice "be not perfect, it is at least excellent."

Yet experience soon provided evidence of problems in the design of the Constitutional electoral mechanism. In the election of 1796, the Presidential candidate of the losing faction, Thomas Jefferson (a Democratic Republican), became the Vice President when John Adams was elected President because the Federalists had miscalculated.<sup>1</sup> In 1800 Jefferson and his Vice Presidential candidate Aaron Burr tied in the electoral vote, and it took 36 ballots in the House before Jefferson was elected President. The next century brought other electoral problems, and the electoral college has been the subject of more than 700 proposals in Congress to reform the system.<sup>2</sup>

In 1967, the American Bar Association declared in a report on electoral reform: "The electoral college method of electing a President of the United States is archaic, undemocratic, complex, ambiguous, indirect, and dangerous."<sup>3</sup>

This essay will briefly examine problematic elections involving the electoral college and the purposes of the Framers in designing the electoral mechanism. It will then examine arguments for changing the electoral provisions of the Constitution, based on the democratic premise that the candidate with the most popular votes should not lose the election. Objections in principle and practicality to proposals for change will then be examined. The author concludes that the Constitutional issues raised by the 2000 election are sufficient to reexamine the electoral mechanism for selecting the President of the United States.

### Problematic Elections: 1800, 1825, 1876, 1888

In the election of 1800, both Thomas Jefferson and Aaron Burr received the same number of electoral votes for President, even though it was well known that Jefferson was the intended nominee for President and Burr for Vice President. With no majority of electoral votes, the lame-duck Federalist House of Representatives had to choose the President, and it took 36 ballots to do so. In light of the 1800 experience, the 12<sup>th</sup> amendment to the Constitution, providing for separate ballots for President and Vice President was passed and ratified.<sup>4</sup>

Several other Presidential elections turned out to be problematic in other ways. In the

election of 1824, states had begun to give their voters the right to choose the state electors, and Andrew Jackson received the most popular votes (about 38 percent); he also received the most electoral votes (99 of 261), but not a majority. Thus the House of Representatives again had to make the choice, and it chose John Quincy Adams who had received about 32 percent of the popular vote and 84 electoral votes. Since the 12<sup>th</sup> amendment reduced the number of candidates from whom the House had to choose from five to three, Speaker of the House Henry Clay-with 14 percent of the popular vote and 37 electoral votes - threw his support behind Adams, who was elected. When Clay was appointed Secretary of State in Adams's Administration, Jackson charged that a corrupt deal had been made.

After the 1876 election, the nation did not know who would be President until March 2, 1877 because two separate slates of electors were sent to Congress from Florida, Louisiana, and South Carolina. Since both houses of Congress could not agree on which slates to accept as the legitimate ones, a special commission was created to make the decision. The commission consisted of five Representatives, five Senators, and five members of the Supreme Court. The partisan split was seven Democrats and seven Republicans, with the independent Chief Justice David Davis intended to chair the commission. When Illinois appointed Davis to be Senator from Illinois, he was replaced by Republican Justice Joseph Philo Bradley who voted with the other Republicans to award all of the 20 disputed electoral votes to the Republican candidate. This decision gave Rutherford Hayes the 185 to 184 victory in the electoral vote count and the majority he needed to win the Presidency. Democrat Samuel Tilden won 4,300,590 million popular votes to 4,036,298 cast for Hayes. Thus the runner up in the popular vote won 264,292 more votes than the winner of the Presidency.

The election of 1888 was the only election in which the uncontested winner of the popular vote came in second in the electoral vote count and lost the Presidency. Democrat Grover Cleveland won 5,537,857 votes to Republican Benjamin Harrison of Indiana's 5,447,129. Yet Harrison won 233 of the 401 electoral votes and became President.<sup>5</sup> Thus there were three elections in the 19<sup>th</sup> century in which the runner-up in the popular vote became President because of the electoral vote provisions of the Constitution and its contingency provisions. There have been a number of close calls in the twentieth century (e.g. 1948, 1960, 1968, and 1976), though the odds are against the runner-up in the popular election becoming President.<sup>6</sup>

But the unexpected happened in the Presidential election of 2000. The race between Democrat Al Gore and Republican George W. Bush was extremely close, with the winner being determined by Florida's 25 electoral votes, which were won by Bush by a margin of 537 popular votes. Gore won the national popular vote 50,996,116 to Bush's 50,456,169, a margin of 539,947 (.516%).<sup>7</sup> Bush won 271 electoral votes, one more than a majority; and Gore won 266 (one District of Columbia elector cast a blank ballot). Another case of the runner up in the popular votes being elected President raises again the question of the electoral college mechanism for selecting the President.<sup>8</sup>

## The Design of the Framers

Deciding how to select the chief executive was one of the most complex challenges faced by

the Framers in the summer of 1787. The method was deliberated at the Constitutional Convention on twenty-two different days and was the subject of thirty separate votes.<sup>9</sup> The result was not a coherent design based on clear political principles, but rather a complex compromise that reflected the interests of different states. The main variables that the Framers had to consider in the selection of the executive were: who would select the person, how long the term of office would be, and whether the person would be eligible for more than one term.

For most of the Convention, the assumption was that the chief executive would be chosen by the legislature, as was contemplated in the Virginia Plan drafted by James Madison. When the Convention adjourned on July 25, 1787 the chief executive was to be chosen by the legislature, but the term of office was not set nor was the question of re-eligibility.<sup>10</sup> The Committee of Detail reported on August 6 this formula:

The Executive Power of the United States shall be vested in a single Person. His Stile shall be, "The President of the United States of America;" and his Title shall be, "His Excellency." He shall be elected by ballot by the Legislature. He shall hold his office during the term of seven years; but shall not be elected a second time."<sup>11</sup>

But there were still objections that a President chosen by the legislature would be too beholden to it and thus not independent enough. For this reason James Wilson and Gouverneur Morris both argued for election by the people.<sup>12</sup>

The problem with selection by the people was not the Framers' distrust of this method's democratic nature (though the Framers were not trying to create a democracy). From their perspective, there were two problems with direct popular election of the President. The first was the probability that most citizens would not be personally familiar with all of the most qualified potential candidates. This was George Mason's concern; Mason favored the idea of popular election of the President, but thought it impractical.<sup>13</sup> "He conceived it would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trail of colours to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to be the judge of the respective pretensions of the Candidates."<sup>14</sup>

But the more important problem was the disadvantage some states would face if the vote were based only on population. The ratio of population of the largest state, Virginia, to the to the smallest in population, Delaware was about ten to one.<sup>15</sup> In addition to the problem with the small states, the slave states had smaller populations, and with a direct election they would not be able to count the slave population as they had in calculating their representation in Congress (counting 3/5 of the slave population).

Thus the proposal to base the election of the President on the ratio of votes that was established in the Connecticut Compromise for representation in Congress was attractive. It reassured the small states, because the ratio of influence in the vote would not be ten to one, between largest and smallest, but rather a four to one ratio. In addition, the slave states' representation would reflect three fifths of their slave populations. Madison put it this way: "The people at large were in his opinion the fittest in itself," for choosing the President, but:

There was one difficulty, however, of a serious nature attending an immediate choice by the people. The right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes. The Substitution of electors obviated this difficulty and seemed on the whole to be liable to the fewest objections.<sup>16</sup>

Thus the Brearley Committee on Unfinished Parts worked for four days and reported back to the Convention on September 4 with a plan for the electoral college. Under its plan the selection of President would be removed from the legislature and given, in effect, to an independent “ad hoc Congress” convened solely for the purpose of selecting the President.<sup>17</sup> Electors would be chosen by state legislatures, but they could not be members of the national government and would not meet together because of the danger of plots and cabals. The ratio of the states to the membership of the college was exactly the same as their representation in the legislature, with the number of electors equaling the number of Representatives and Senators to which each state was entitled. Any changes in population among the states would be reflected in changes in their Congressional representation.

Each elector could vote for two persons for President, one of whom could not be an inhabitant of the same state as the elector, and the winner had to receive a majority of all electors appointed. In the contingency that no candidate received a majority, the choice would devolve on the House of Representatives (changed from the Senate in the original Brearley Committee plan) which would choose the President from among the top five persons receiving electoral votes. In a concession to the small states, the state delegations in the House would cast only one vote per state.

Thus the Framers did not come up with their formulation because of a distrust of direct election by the citizens. Shlomo Slonim argues that: “Only a few delegates — most notably Mason, Gerry, and Butler — were opposed in principle to direct election of the executive...anti-majoritarianism was by no means the primary motivation behind the creation of the electoral college.” Rather, according to Slonim:

The delegates were confronted with a practical problem arising from the constellation of clashing forces at Philadelphia, and they devised a practical solution — an ad hoc congress that would faithfully reflect the pattern of weighted voting that was an integral part of the operation of the real Congress.<sup>18</sup>

Lucius Wilmerding, citing a number of statements by the Framers when they were explaining and defending the Constitution after the Convention, also argued that their intent was for Presidential selection to be based on the wishes of the citizenry. “It is clear,” he argues, “that the framers wanted and expected the popular principle to operate in the election of the President.”<sup>19</sup>

If this reasoning is sound, recent proposals to change the method of selecting the President to more closely reflect the popular vote cannot be dismissed as undermining the Framers’ intentions. The Framers came up with the electoral college device because of the peculiar constellation of political forces facing them at the founding, not because of fundamental political principles. Insofar as some of those important forces, most importantly the differences between large and small states

and slave and non-slave states, have dissipated over two centuries; proposals for change can be made without worry of violating the fundamental principles of the Framers.

The defense of the electoral college system against change, then must rest on arguments about how its current operation protects other fundamental values, such as federalism or the two party system. Or the argument can be made that any alternative proposed to the electoral college will have serious defects that outweigh the claimed advantages of change.

### The Argument for Reforming the Electoral College System

The electoral college system is “flawed” from the perspective of those who think that the candidate who wins the most popular votes should be elected President, or at least that the runner-up in the popular election should not be elected. According to Arthur Schlesinger, Jr., “It is intolerable because it is undemocratic. And it is intolerable because it imposes a fatal burden on the minority President.”<sup>20</sup> This perspective, it can be argued, is consistent with evolving democratic values in the United States over the past two centuries.

But first it must be recognized that the United States is not, nor was it meant to be, a pure democracy, even insofar as that might even be possible in a large nation state of 280 million citizens. Nor was it contemplated that the United States government would operate under a general principle of majority rule; though majority rule is often used in decision making within governmental institutions. The governmental system was designed by the Framers to be a republic, with representatives of the people chosen to govern. In fact, under the original Constitution, members of the House of Representatives were the only government officials to be chosen directly by the citizens of the United States. Other government officials were to be chosen by indirect means, with Senators selected by state legislatures, President and Vice President by electors, and judges appointed by the President with consent of the Senate.

In addition to governmental structure, there were other important ways in which the government was not intended to be a simple democracy of majority rule. The separation of powers system with checks and balances was designed to filter popular moods and fads and slow any impulse to sudden change. The Bill of Rights was intended to ensure that the simple will of the majority could not easily infringe on the rights of citizens. The federal nature of the government was assured by representation of the states and citizens in the Senate and House of Representatives and the independence of state governments. Thus the United States is a federal democratic republic in its fundamental structure.

Nevertheless, since the founding of the republic the nature of our polity has changed in important ways, and the Constitution has been amended to reflect some of those changes. With respect to the selection of the President, the original expectations of the Framers have been modified a number of times. The states individually have made the most important decisions by deciding to place the right to select Presidential electors in the citizens of the states. For the first quarter century of the republic, half of the states chose electors through election by the state legislature. Half of the remainder gave the selection to the citizens by district and half by a general ticket mode in which

the plurality winner received all of the votes of the state. After 1820 the general ticket method began to predominate, and by 1832 all of the states except South Carolina selected electors by popular vote.<sup>21</sup> States also decided that using the winner-take-all rule rather than a district plan maximized their influence. In the modern era, only Maine and Nebraska use a district method of selecting electors (with a bonus of two for whichever candidate receives the plurality of votes in the state).

In addition to the states' separate decisions to base the selection of electors in the voters of each state, the scope of the franchise has been broadened by the passage of six constitutional amendments:

The 15<sup>th</sup> Amendment (1870) extended the franchise to African Americans.

The 17<sup>th</sup> Amendment (1913) provided for direct election of Senators.

The 19<sup>th</sup> Amendment (1920) gave the right to vote to women.

The 23<sup>rd</sup> Amendment (1961) gave the vote to citizens of the District of Columbia.

The 24<sup>th</sup> Amendment (1964) outlawed the poll tax.

The 26<sup>th</sup> Amendment (1971) gave the vote to citizens eighteen years of age.

Perhaps the most compelling argument that the President should be elected by direct popular vote is based on the premise that the President and Vice President are the only national officials who represent the people as a whole and that the choice of the people is best approximated by the candidate who wins the most votes. This argument is buttressed by the declaration in the Preamble to the Constitution: "We the people..." The Framers intentionally required that the Constitution be ratified by special conventions called in the separate states and not by the legislatures of the states. The import of their decision is that "the people" created the Constitution. It is not too far a stretch to argue that the choice of the people ought to determine the only national elective offices in the government.

Arguing that the President should be popularly elected in no way implies that all elements of the government ought to be chosen by majority vote. Clearly we have a mixed form of government in terms of geographic representation (the Senate) and appointed officials (federal judges). Accepting the popular election of the President in principle does not imply that all other officials ought to be popularly elected any more than accepting the appointment of judges implies that all other officials should be appointed.<sup>22</sup>

The legitimacy of the popular election of the President among the populace is buttressed by the probability that many, if not most, citizens who go to the polls to vote for President think that they are voting for President rather than a slate of electors. Some state ballots specify that the Presidential vote is for a slate of electors, and some even list the individual electors, but many do not. At least this perception of many voters held until November 8, 2000.

## Proposals to Reform the Electoral College

One of the effects of the electoral college system is that the ballots cast by all of the voters do not carry the same weight. That is, the ratio of electoral votes to population varies from state to state, benefiting the smallest states. For example the ratio of electoral votes to population in Wyoming (with 453,5888 people and three electoral votes) is one to 151,196 and in California (with 29,760,021 people and 54 electoral votes) is one to 551,112. Thus a vote in Wyoming is several times more influential in selecting electors than a vote in California.<sup>23</sup>

But small states are not necessarily the largest winners in the electoral college scheme. Because most states have chosen to award all of their electors to the winner of the plurality of the votes in the state (called the unit rule or winner-take-all), the largest prizes in electoral votes are in the most populous states. Thus inhabitants of the large states benefit from candidates courting their votes. But in any given election, whether any large state will be courted depends on whether it is “in play” in the sense that either candidate might win the plurality of its votes. For instance, in the 2000 election George W. Bush did not spend much time campaigning in New York because he had conceded that a majority of New York voters would probably vote for Al Gore in any case. For the same reason, Gore did not have a large incentive to spend much time in New York, except to shore up the party faithful. After his nomination, Al Gore did not even campaign in California, visiting the state only once, because he calculated that a majority of its votes were his anyway.<sup>24</sup> Similarly, Gore did not campaign much in Texas, since Bush had the state sewed up.

But the abstract inequalities of voter weight in the electoral college system do not constitute the major problem with the system. As long as the winner of the popular vote also wins the electoral vote, there is little objection to the differently weighted votes. But this is not always the case, and the most important objection to the electoral college design is that the runner up in the popular vote can end up being elected president. There are three circumstances in which this can happen:

1. If several “faithless electors” do not vote as they pledged to vote, the runner-up may win the Presidency.
2. If no candidate wins a majority in the electoral college, the House of Representatives selects the President from among the top three electoral vote winners and does not have to consider the popular vote.
3. A candidate can win the majority of electoral votes without winning most of the popular votes.

The probability that electors will not vote for the candidate for whom they are pledged is not high. Electors are chosen for faithful service to their party and are firmly committed to the candidate of their party. There is little incentive for them to vote for someone else. There have been only nine faithless electors in our history of a total of 19,744 cast from 1789 to 1988.<sup>25</sup> Most recently, in 1988, a Democratic elector from West Virginia cast a vote for Lloyd Bentsen (the Vice Presidential nominee) for President rather than for Michael Dukakis, and 1976 a Washington Republican elector voted for Ronald Reagan for President rather than the Republican nominee Gerald Ford. In the 2000

election, a tenth faithless elector was added to the list when an elector from the District of Columbia cast a blank ballot rather than voting for Al Gore, for whom she was pledged. She said that her vote was intended to protest the lack of voting representation of the District of Columbia in Congress.

In addition to the low probability of an elector not voting for the expected nominee, the likelihood that a few faithless electors could change the outcome of an election is remote. The electoral college usually exaggerates the margin of victory of the winner of the popular vote. Nevertheless, it is possible that a close electoral vote could be changed by the defection of just a few electors. The 2000 election is a case in point. Though Al Gore won the popular vote by a margin of more than 500,000 votes, the electoral vote was 271 to 266. In such a situation, the defection of just a few of Bush's electors could have denied a majority to either candidate, or a switch of several could have given the election to Gore. (The exact number depends on whether the blank ballot would have been counted as a vote or not.)

While such a switch was unlikely, electors had switched before, and the temptation to go down in the history books might have tempted a few electors, as it did the elector from the District of Columbia. States, of course, have an incentive to prevent electors from defecting, and 26 states plus the District of Columbia have laws binding electors to vote for the candidate from whom they are pledged.<sup>26</sup> The constitutionality of such laws, however, would be in some doubt, since the Constitution provides that the electors will cast their ballots for President and Vice President and does not bind them in any way.

The second situation has happened twice in our history. In the election of 1800 Jefferson and Burr were tied, requiring the House to choose between them. And in 1824 the House chose John Quincy Adams over Andrew Jackson who came in first in both the popular and the electoral vote. The third scenario happened three times in our history. In 1888 the winner of the popular vote was clearly the loser in the electoral college, and there was no dispute. In 1876 Hayes, the runner-up in the popular vote, was granted the 20 votes he needed to win a majority by the special commission created by Congress to decide how to allocate the slates of electors from the three disputed states. In general, a candidate could win the popular vote yet lose the electoral vote by losing by narrow margins in the large states and winning by large majorities in the small states. This is what happened in 2000 when George W. Bush lost the popular vote by more than 500,000 but won the electoral vote 271 to 266.

In addition to the above mentioned elections, there have been a number of close calls in the twentieth century when the switch of a relatively small number of votes in key state could have put the election in the House or have changed the outcome of the election: 1948, 1960, 1968, and 1976.<sup>27</sup>

### Proposals to Change the Electoral College System

Over the years there have been many proposals to reform the electoral college system, some proposing relatively minor changes, some proposing a Constitutional amendment to provide for the direct popular election of the President. The "automatic plan" would eliminate the problem of the faithless elector by automatically casting each state's electoral votes in favor of the candidate who

won the plurality of popular votes in the state. There would be no individual electors to cast ballots and thus no opportunity for a vote to be cast in an unexpected direction. It would take a Constitutional amendment to make such a change.<sup>28</sup>

The “district plan” would give one electoral vote to the candidate who won a plurality of votes in each congressional district within a state. The extra two electoral votes would be granted to the candidate who won the most popular votes in the state as a whole. Since state legislatures now can decide how electoral votes are to be determined, this change could be made by individual states. In fact, Maine (with 4 electoral votes) and Nebraska (with 5 electoral votes) have adopted the district approach. Most states, however, have judged that their own influence is maximized by casting their electoral ballots in a block and follow the “unit rule” (winner-take-all) approach. Thus it is improbable that most states would adopt the district approach on a voluntary basis. The district plan would make the outcome of the electoral college vote more closely mirror the popular vote, but it would not entirely eliminate the possibility of the runner-up becoming President.

The “national bonus” plan would grant a bonus of 102 electoral votes (two for each state plus the District of Columbia) to the candidate who wins the most popular votes, providing the winner has at least 40 percent of the vote. This approach would virtually eliminate the possibility that the runner-up in the popular vote would become President while at the same time, preserving the distribution of electoral votes by states (though in a diluted form).<sup>29</sup> Arthur Schlesinger, Jr. has endorsed the national bonus plan and was a member of a Twentieth Century Fund Task Force that proposed its adoption in 1978. According to Schlesinger, the plan “would preserve both the constitutional and the practical role of the states in the Presidential election process.”<sup>30</sup>

But by far the most basic and important proposal to change the electoral college system is the proposal to amend the Constitution to provide for the direct popular election of the President. A version of this plan that was considered by Congress from 1966 to 1979 provided that “The people... shall elect the President.” The person “having the greatest number of votes shall be elected President...” If neither slate of President and Vice Presidential candidates wins forty percent of the vote, a runoff election would be held between the top two vote-getting teams of candidates.<sup>31</sup> After hearings in Congress the proposed Constitutional amendment was passed by the House in 1969 by 339 to 70. Hearings in the Senate were held over the next ten years, and in 1979 the Senate voted 51 to 48 in favor of sending the proposal to the States for ratification, well short of the two-thirds majority necessary to pass a constitutional amendment.<sup>32</sup>

### Defense of the Electoral College and Objections to Change

The defense of the electoral college system of electing the President is not based on the intent of the Framers. Their intention was to devise a compromise that would satisfy a number of different constituencies needed to ratify the Constitution, primarily the small states and the slave states. One of the most vigorous defenders of the electoral college system, Judith Best, admits that “the Electoral College has not worked as the framers anticipated...” And she even favors putting the unit rule (winner-take-all) in the Constitution because it protects federalism.<sup>33</sup>

The strongest defense of the electoral college system lies in the effect of the system on the Constitutional structure in practice over two centuries. The Constitutional defense of the electoral college system emphasizes how federalism might be affected by any change. The political defense of the system stresses the importance of the two party system to political stability and the ways the direct popular vote might imperil the two party system. Opponents of change also predict that in addition to splintering the party system, a direct popular vote approach would lead to disruptive recounts and challenged elections.

### *Federalism*

The strongest Constitutional argument against direct popular election is that it would undermine the federal nature of our government. Judith Best argues that direct popular election would “deform our Constitution” and would constitute a serious “implicit attack on the federal principle.”<sup>34</sup> William C. Kimberling argues that national popular election “would strike at the very heart of the federal structure laid out in our Constitution and would lead to the nationalization of our central government — to the detriment of the States.”<sup>35</sup>

By guaranteeing a specific number of electoral votes to each state, the electoral college system ensures that Presidential candidates must appeal to coalitions of voters that are widely distributed throughout the country. If the federal requirement were not there, candidates might appeal to regional clusters of voters whose votes could be aggregated across states and regions. This could potentially be divisive and lead to discord. This argument for the electoral college depends in great part on the fact that states have individually adopted the unit rule of counting all of their electoral votes as a block. That is why Best would put the unit rule in the Constitution and why Wilmerding was against it.<sup>36</sup>

Proponents of direct popular vote argue that federalism is indeed an important component of the Constitutional system, but that the electoral college system is not crucial to its maintenance. Certainly the electoral votes of small states does not attract active campaigning by major party candidates, who tend to go where large blocks of electoral votes are. More importantly, larger states will only be contested if there is a reasonable chance of their blocks of votes going either way. With direct popular election all votes would count for candidates, and they would be less likely to write off many states merely because they could not win the plurality in that state. They also argue that federalism is well protected by members of the House and Senate as well as by the legislatures and governors of the states. In the words of Jack Rakove, “States have no interest, as states, in the election of a president, only citizens do, and the vote of a citizen in Coeur d’Alene should count equally with one in Detroit.”<sup>37</sup>

### *The Two Party System*

Defenders of the electoral college system also argue that it is one of the key bulwarks of the two party system in the U.S. and that direct popular voting for President would lead to the splintering of the two party system and a proliferation of minor parties. They argue that minor political factions will have an incentive to run candidates for President with the hope that they will be able to force a runoff election and extract concessions in return for their support. Judith Best argues that “It is the very existence of a popular vote runoff, a second chance provision, that tempts more candidates to enter and voters to cast what they would otherwise consider to be a protest vote — a ‘send them a

message' vote.'<sup>38</sup> The hope of these minor parties would be to attract enough votes, along with other splinter parties, to prevent either of the two party candidates from winning 40 percent of the vote and thus force a runoff. Best argues, for example, that if the 40 percent runoff rule had been in effect in 1992 that Ross Perot would not have temporarily withdrawn from the race and could have offered his support in a runoff to one of the candidates for policy concessions.<sup>39</sup> Arthur Schlesinger, Jr. argues that direct popular election "would hasten the disintegration of the party system. Direct election with a run-off would give single-issue movements, major-party dissidents and free-lance media adventurers an unprecedented incentive to jump into presidential contests." These parties would "...extract concessions from the run-off candidates in exchange for promises of support."<sup>40</sup>

Proponents of direct popular vote argue that, in addition to our political culture, the real structural basis for our two party system are single member districts (plurality wins or first past the post) for representation in Congress. It is difficult to build a viable political party if there is little chance of electing government officials. Proportional representation systems for parliamentary elections encourage smaller parties to form because they can realistically win public office. In a Presidential election the probability of winning enough popular votes to force a runoff, even in conjunction with other minor parties, is low. The present system does not prevent many minor party candidates from qualifying for inclusion on ballots in many states. Nor does it prevent significant candidates from running, such as Theodore Roosevelt or Ross Perot.

In a popular election system, even if one minor party were able to win a significant portion of the vote, and there were a runoff election, how could the leaders of that party force their voters to vote for the person with whom the candidate made a deal? In the present system, however, electors are chosen by the party (or candidate) on the basis of loyalty. With the electoral college, if a candidate, for example Ross Perot, were able to win sufficient popular votes to produce a majority for another candidate in the electoral college, the candidate would have much more leverage in convincing his few loyalists on his slates of electors to vote for whom he chose in the electoral college vote than would a candidate have in convincing millions of voters to vote one way or another in a run-off election. Thus a third party forcing concessions on one of the major parties is more likely in the electoral college system than in a popular election with a run-off provision.

#### *Contested Elections*

Another argument critics of the direct popular vote plan make is that it would lead to endless recounts and challenges. Best argues that it would remove "the quarantine on fraud and recounts."<sup>41</sup> The reasoning is that if the election were close or the 40 percent threshold were in doubt that challenges and contests would not be limited to one or a few states but would be undertaken throughout the country, "...a recount of every ballot box in the country could be necessary...."<sup>42</sup> In the election of 2000, some commentators raised the spectre that 'if you think that what is happening during the recounts in Florida is complicated, if we had direct popular elections, this would be happening throughout the whole country.'

But one of the attractions of direct popular election is that recounts would be less likely. In order to undertake a recount, there has to be the reasonable possibility that enough incorrect or fraudulent votes can be found to change the election outcome. It is intuitively evident that the fewer the total votes involved, the more likely it is that a close contest may result in a small number of

votes deciding the election. Thus in the present system a few votes in one state may be able to make the difference in swinging a large block of electoral votes and possibly decide the election. This is what happened in Florida in the 2000 Presidential election; the election was so close that the swing of a few hundred votes might realistically have changed the election outcome. Thus a recount had a plausible possibility of changing the election outcome.

In Florida Al Gore had to find several hundred votes in order to change the outcome. If the election had been by popular vote, George Bush would have had to find more than 500,000 votes, a daunting task. Even in 1960 when Richard Nixon's supporters were working on challenges in Illinois, they would have had to find about 9,000 votes to change the outcome. And if they had finally won Illinois, they would have had to find about 40,000 votes in Texas. Since winning both of these states through recounts was unlikely, Nixon's supporters gave up. It would have been even harder to find more than 100,000 votes throughout the country, if the popular vote determined the outcome. Thus the argument of those supporting direct popular voting for President is that recounts and challenges would be less, not more, likely since the number of votes needed to change a national outcome would be much larger than the number needed to change the outcome in one state that controlled a large or deciding block of electoral votes.

#### Conclusion

The question of how we elect our President is a fundamental one in the constitutional system, and it has been debated many times over the past two centuries. It has not been fully settled, just as the important Constitutional issues of the right balance between the President and Congress or the balance between the states and the national government have not been finally settled. The Presidential election of 2000, with the runner up becoming President, has raised the issue again. Without prejudging the outcome, it is appropriate to begin a national dialogue and to deliberate about the appropriate mode for electing the President.

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## ENDNOTES

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1. Richard J. Ellis, *Founding the American Presidency* (Lanham, MD: Rowman and Littlefield, 1999), p. 114. The Federalists had arranged to withhold several votes from Adams's vice presidential candidate, Thomas Pinckney, so that there would be no tie between Adams and Pinckney. But they miscalculated and withheld too many, giving Thomas Jefferson the second most number of electoral votes and the vice presidency.
  2. See Shlomo Slonim, "Designing the Electoral College," in Thomas E. Cronin, Ed. *Inventing the American Presidency* (Lawrence, KS: University Press of Kansas, 1989), p. 33. First published as "The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for Selection of a President, *Journal of American History*, Vol. 73 (June 1986).
  3. American Bar Association, *Electing the President: A Report of the Commission on Electoral College Reform* (Chicago: American Bar Association, 1967), p. 3.
  4. The forthcoming election of 1804 was also on the minds of those who supported the Twelfth Amendment. See Lucius Wilmerding, Jr. *The Electoral College* (Boston: Beacon Press, 1958), p. 38.
  5. The voting data in these elections are from Joseph Nathan Kane, *Presidential Fact Book* (NY: Random House 1999).
  6. For data on these close elections see Neal R. Peirce and Lawrence D. Longley, *The People's President* (New Haven, CT: Yale University Press, 1981), pp. 257-258.
  7. The voting results were reported in *The New York Times*, 30 December 2000, p. A11. Other candidates: Ralph Nader, 2,864,810 (2.72%); Pat Buchanan, 448,750 (.43%); Harry Brown, 386,024 (.37%); *Washington Post* (21 December 2000), p. A9.
  8. It is an historical oddity that every time the son or grandson of a president has been nominated for president, he has been elected with fewer popular votes than his opponent. In 1824 John Quincy Adams, the son of John Adams, was elected by the House. In 1888 Benjamin Harrison, grandson of William Henry Harrison, won the electoral vote, but came in second to Grover Cleveland in the popular count. George Bush is the third son of a president to be elected, again with fewer popular votes than his opponent.
  9. See Shlomo Slonim, "Designing the Electoral College," in Thomas E. Cronin, Ed. *Inventing the American Presidency* (Lawrence, KS: University Press of Kansas, 1989), pp. 33-60. First published as "The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for Selection of a President, *Journal of American History*, Vol. 73 (June 1986).
  10. Slonim, "Designing the Electoral College," p. 45.
  11. Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, CT: Yale

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University Press, 1966), Vol. 2, p. 171.

12. Slonim, "Designing the Electoral College," pp. 48, 49.

13. Max Farrand, *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1966), Vol. I, p. 69 (June 1, 1787).

14. Max Farrand, *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1966), Vol. II, p. 31 (July 17, 1787).

15. Richard J. Ellis, ed. *Founding the American Presidency* (Lanham, MD: Rowman and Littlefield, 1999), p. 113.

16. Farrand, *Records of the Federal Convention of 1787*, Vol. 2, pp. 56-57.

17. Slonim, "Designing the Electoral College, p. 50.

18. Slonim, "Designing the Electoral College, p. 55.

19. Wilmerding, *The Electoral College*, p. 21.

20. Arthur Schlesinger, Jr., "Fixing the Electoral College," *Washington Post* (19 December 2000), p. A39. In his first annual address, President Andrew Jackson argued: "that in proportion as agents to execute the will of the people are multiplied there is danger of their wishes being frustrated....It is safer for them to express their own will....A President elected by a minority can not enjoy the confidence necessary to the successful discharge of his duties." Quoted in Arthur Schlesinger, Jr., *The Cycles of American History* (Boston: Houghton Mifflin, 1986), p 318.

21. Richard J. Ellis, ed. *Founding the American Presidency* (Lanham, MD: Rowman and Littlefield, 1999), pp. 118-119.

22. William C. Kimberling in "The Electoral College," argues that "Indeed, if we become obsessed with government by popular majority as the only consideration, should we not abolish the Senate which represents States regardless of population?....If there are any reasons to maintain State representation in the Senate and House as they exist today, then surely these same reasons apply to the choice of president. Why, then, apply a sentimental attachment to popular majorities only to the Electoral College?" The reason for state representation in the House and Senate is that each body is intended to represent citizens in local or state areas. The basis for electing the President by national vote is that the President is supposed to represent the nation rather than only one part of it. Kimberling's article is found on the National Archives and Records Administration website ([www.nara.gov](http://www.nara.gov)).

23. Another way to calculate differential influence of voters on the electoral college vote is to divide the number of electoral votes by all of those who voted for the winner in each state (since the votes of those voting for the loser in a state do not count for that candidate at all). See Adam

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Clymer, "Now What? This Time, Cries For 'Blood' Seem Unthinkable," *The New York Times* (12 November 2000), p. wk 5. See also the analysis of Lawrence D. Longley and Neal R. Peirce in *The Electoral College Primer* (New Haven, CT: Yale University Press, 1996), pp. 143-144.

24. George F. Will, "A Brief Moment," *Washington Post* (17 December 2000), p. B7. If questions about how a possible change in the Electoral College system might change campaign patterns are of concern, some empirical evidence can be brought to bear. Patterns of campaign activity in recent elections can be measured. For example, in the 2000 election, eight mountain states received no visits by candidates; all of them had few electoral votes and all were solidly Republican. The number of presidential campaign ads in Green Bay (WI) and Grand Rapids (MI) far outnumbered (by more than 5,000) the ads in the New York City or Los Angeles media markets. To win candidates' attention, states must be "in play" and have a significant number of electoral votes. For data on candidate state visits and media market ads see, Alexis Simendinger, James A. Barnes, and Carl M. Cannon, "Pending a Popular Vote," *National Journal* (18 November 2000), p. 3653.

25. Joseph Nathan Kane, *Presidential Fact Book* (NY: Random House, 1999), p. 374.

26. National Archives and Record Administration, website: [www.NARA.gov](http://www.NARA.gov).

27. For details and specific numbers of votes that would have to change in order to change the outcome in these elections, see Lawrence D. Longley and Neal R. Peirce, *The Electoral College Primer* (New Haven, CT: Yale University Press, 1996), pp. 35-36.

28. The Center for the Study of the Presidency sponsored a panel that issued a report in 1992 that recommended a version of the automatic plan that would have eliminated the office of elector. The panel also recommended that if there were no majority in the electoral vote that there be a runoff election rather than letting the House of Representatives decide. See Elizabeth P. McCaughey, "Electing the President: Report of the Panel on Presidential Selection," Center for the Study of the Presidency, 1992. Ronald Reagan, in a talk on April 13, 1977 also proposed costing votes automatically rather than giving any discretion to electors. See William Safire, "Reagan Writes," *The New York Times Magazine* (31 December 2000), p. 38.

29. See Thomas E. Cronin, "The Electoral College Controversy," in Judith A. Best, *The Choice of the People?: Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), pp. xxi - xxiv.

30. See "Winner Take All: Report of the Twentieth Century Fund Task Force on Reform of the Presidential Election Process," (NY, 1978). See Schlesinger's analysis of the national bonus plan in *The Cycles of American History* (Boston: Houghton Mifflin, 1986), p. 320-321.

31. The proposed Amendment is reprinted in Judith A. Best, *The Choice of the People?: Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), pp. 115-117. The legitimacy of a president who wins the election with less than 50 percent of the vote is not a problem. Seventeen presidential elections have resulted in such a "minority president" (Grover

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Cleveland and Bill Clinton two time each). Only Lincoln polled slightly less than 40 percent. The lack of a majority of the popular votes did not prevent some of these minority presidents from being reelected, including Lincoln, Cleveland, Wilson, Nixon, and Clinton.

32. Judith A. Best, *The Choice of the People?: Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), p. 83.

33. Judith A. Best, *The Choice of the People?: Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), pp. 84 and 14..

34. Judith A. Best, *The Choice of the People?: Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), p. 55.

35. William C. Kimberling, "The Electoral College," on the National Archives and Records Administration website ([www.nara.gov](http://www.nara.gov)). Kimberling is Deputy Director of the Federal Election Commission Office of Election Administration.

36. Best, *The Choice of the People?*, p. 14. Wilmerding, *The Electoral College*: "In committing the appointment of the Electors to the people, the state legislatures have fulfilled the intention of the Constitution; but in requiring the Electors to be appointed by a mode which gives to a single party the whole of a state's representation in on the Electoral College, they have defeated that intention. They have put the presidency on a federative rather than a national basis. They have taken the choice of the President from the people of the nation at large and given it, in effect, to the people of the large states." (p. xi).

37. Jack Rakove, "The Accidental Electors," *The New York Times* (19 December 2000), p. A31.

38. Judith A. Best, *The Choice of the People?: Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), p. 56.

39. Judith A. Best, *The Choice of the People?: Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), p. 56.

40. Schlesinger, *The Cycles of American History*, pp. 319-320.

41. Judith A. Best, *The Choice of the People?: Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), p. 57.

42. Judith A. Best, *The Choice of the People?: Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), p. 58.