A Defense of the Electoral College in the Time of Trump

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In the 2016 Presidential Election, Donald J. Trump lost the popular vote by nearly 3 million votes but still secured victory in the Electoral College. The second election in the last 16 years to yield a President without a popular majority has renewed efforts to alter or abolish the Electoral College system. Some legal scholars suggest that the Electoral College lacks legitimacy because the Framers designed it to advantage the slave states.

In this Essay, I respond to these criticisms of the Electoral College by providing a historical perspective on the Framers' decision-making. The drafting and ratification process demonstrate that the Electoral College was not designed to be "racist," and that it was a conscious mix of federalism and majoritarianism that provides benefits today. I caution against an overreaction to the 2016 election despite the Electoral College's failure to filter out a candidate such as Trump. I argue that the alternative to the Electoral College – a system of direct election that would not benefit from the state

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structure to dissipate and diffuse rash popular movements – could present a higher risk of the dangers of tyranny of the majority.

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I. INTRODUCTION

For a populist, Donald J. Trump strangely owes his presidential victory to a Constitution that limits mass democracy.

On Election Day, 65,853,514 Americans voted for the Democratic Party ticket of Hillary Clinton for President and Tim Kaine for Vice President.[1] Slightly less, 62,984,828, chose Donald Trump and Mike Pence.[2]

But Trump still won, thanks to the Constitution.[3] The Founders rejected

1. *Official 2016 Presidential General Election Results (2017)*, FED. ELECTION COMM'N (Jan. 30, 2017), https://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf.

2. *Id.*

3. *See* U.S. CONST. art II, § 1; U.S. CONST. amend. XII; *see also* Nicholas G. Karambelas, *The Electoral College and the Race to 270*, 72 J. MO. B. 260, 260 (2016) (noting that where no candidate receives 270 electoral votes, the U.S. House of Representatives elects the president and the Senate elects the vice president, rendering the popular vote meaningless).

direct popular election of the nation's Chief Executive.[4] Instead, the Constitution requires that voters choose "electors" from their state, who meet to select a President and Vice President.[5] Each state receives electoral votes equal to their representation in the House, plus two for their Senators.[6] Because of the extra two votes, the Electoral College (a phrase nowhere used in the Constitution) gives an advantage to smaller states, which otherwise would be swamped by their larger sisters.[7] The smallest state in the Union, Wyoming (563,767 residents in 2010), receives three electoral votes, while the largest, California (37,254,503 residents), receives 55.[8]

4. *See* Goldfeder, *supra* note **Error! Bookmark not defined.**, at 966–67 (noting that Founders like James Madison, "urged a direct national popular vote for President, but this . . . was defeated because the Founders worried it would lead to uncertain results").

5. *Id.* at 967; *see* U.S. CONST. art. II, § 1; U.S. CONST. amend. XII.

7. U.S. CONST. art. II, § 1, cl. 2.

7. *See generally* Karambelas, *supra* note 3, at 260 ("The term 'electoral college' does not appear in the Constitution . . . . Generally, there is one representative for every 500,000 people in a state.").

8. *See* William Petrocelli, *Voters in Wyoming Have 3.6 Times the Voting Power That I Have. It's Time to End the Electoral College*, HUFFINGTON POST (Nov. 10, 2016, 4:52 PM), https://www.huffingtonpost.com/103merica-petrocellli/its-time-to-end-the-electoral-college_b_12891764.html.

Trump won the vote of the electors by 304–227.[9] While Clinton won a plurality of the popular vote, 48.18 percent to Trump's 46.09 percent, Trump won by a comfortable 57 percent margin in the Electoral College.[10] Even though, as we will see, Trump evaded the Framers' original purpose behind the Electoral College, he won fair and square under its modern rules.

Critics immediately attacked the legitimacy of Trump's election. The New York Times declared the Constitution's system for selecting the President "antiquated" and called for a direct national vote for President.[11] The Electoral College, it argued, "is more than just a vestige of the founding era; it is a living symbol of America's original sin" because it originally advantaged slave states in the electoral count.[12] In an interview with CNN, Hillary Clinton agreed that the electoral college "needs to be eliminated,"[13] and 2000 presidential candidate Al Gore argued that adopting a popular vote for

9. *See Federal Elections 2016: Election Results for the U.S. President, the U.S. Senate and the U.S. House of Representatives*, FED. ELECTION COMM'N 6 (2017), https://transition.fec.gov/pubrec/fe2016/federalelections2016.pdf (last visited March 14, 2019).

10. *Id.*.

11. The Editorial Board, *Time to End the Electoral College*, N.Y. TIMES (Dec. 19, 2016), www.nytimes.com/2016/12/19/opinion/time-to-end-the-electoral-college.html.

12. *Id.*

13. Dan Merica, *Clinton: It's Time to Abolish the Electoral College*, CNN POLITICS (Sept. 14, 2017), https://www.cnn.com/2017/09/13/politics/hillary-clinton-anderson-cooper-electoral-college-cnntv/index.html

President will "stimulate public participation in the democratic process like nothing else we could possibly do."[14] Not to be outdone, retiring Senator Barbara Boxer filed a lawsuit to overturn the results of the electoral vote and declared: "The Electoral College is an outdated, undemocratic system that does not reflect our modern society, and it needs to change immediately. Every American should be guaranteed that their vote counts."[15]

Critics of the Constitution's method of presidential selection could appeal to an unlikely ally: the winner of the 2016 contest.[16] Four years earlier, Trump had declared that the Electoral College was "a disaster for democracy."[17]

14. Rebecca Savransky, *Al Gore: End the Electoral College*, HILL (Nov. 29, 2016, 5:24 PM), https://thehill.com/blogs/blog-briefing-room/news/307966-al-gore-says-he-supports-elimination-of-electoral-college.

15. Sarah D. Wire, *California Sen. Barbara Boxer Files Long Shot Bill to Scrap The Electoral College System*, L.A. TIMES (Nov. 15, 2016 10:37 AM), http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-boxer-files-longshot-bill-to-scrap-the-1479234745-htmlstory.html (quoting Barbara Boxer).

16. *See* Louis Nelson, *Trump Pushes to Swap Electoral College for Popular Vote*, POLITICO (April 26, 2018, 10:47 AM), https://www.politico.com/story/2018/04/26/trump-electoral-college-popular-vote-555148 (acknowledging Donald Trump's support for doing away with the Electoral College for presidential elections).

17. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 6, 2012, 8:45 PM), https://twitter.com/realdonaldtrump/status/266038556504494082?lang=en.

Shortly after his 2016 victory, the President-elect even conceded: "I would rather see it where you went with simple votes. You know, you get 100 million votes, and somebody else gets 90 million votes and you win. There's a reason for doing this because it brings all the states into play."[18] Even as recently as April 2018, Trump called into the morning news show *Fox & Friends* to wish that direct popular vote settled presidential elections, because "to me, it's much easier to win the popular vote."[19] He recognized, however, that a direct popular election would demand a different strategy from the electoral college: "I would rather have a popular election, but it's a totally different campaign. If you're a runner, you're practicing for the hundred-yard dash as opposed to the mile."[20]

Attacks on the Electoral College after the 2016 election echoed the controversy surrounding the 2000 contest.[21] Democratic candidate Al Gore

18. The Editorial Board, *Let the People Pick the President*, N.Y. TIMES (Nov. 7, 2017), https://www.nytimes.com/2017/11/07/opinion/elections-electoral-college-voting.html.

19. George Will, *The President Who Knew Too Little About the Electoral College*, NAT'L REV. ONLINE (May 3, 2018, 6:30 AM), https://www.nationalreview.com/2018/05/president-trump-electoral-college-complaints-unfounded/.

20. Josiah Peterson, *Keep the Electoral College, Because States Matter*, NAT'L REV. ONLINE (May 4, 2018, 6:30 AM), https://www.nationalreview.com/2018/05/electoral-college-important-states-have-unique-political-interests/.

21. *See, e.g.*, Akhil R. Amar, *The Electoral College, Unfair From Day One*, N.Y. TIMES (Nov. 9, 2000), https://www.nytimes.com/2000/11/09/opinion/the-electoral-college-unfair-from-day-one.html

barely won the popular vote, 50,999,897 to 50,456,002, a difference of 0.5 percent.[22] But George W. Bush won the Electoral College vote 271 to 266.[23] Only a month-long dispute, and the intervention of the U.S. Supreme Court in *Bush v. Gore*, awarded a 537-vote winning margin in Florida—and an Electoral College majority—to Bush.[24] As is the case today, critics of the 2000 election argued that Bush lacked legitimacy because he had won the Electoral College but not the popular vote.[25] But while the 2000 election ended up in a virtual dead heat, with only 500,000 votes out of 101 million cast separating Bush and Gore, the 2016 election decisively awarded the popular vote to

[hereinafter Amar, *The Electoral College*]; Akhil R. Amar, *States Don't Use an Electoral College to Choose Their Leader, Neither Should the Nation*, N.Y. TIMES (Nov. 16, 2016, 3:20 AM), https://www.nytimes.com/roomfordebate/2016/11/16/should-the-electoral-college-be-abolished [hereinafter Amar, *Neither Should the Nation*].

22. *2000 Official Presidential General Election Results*, FED. ELECTION COMM'N, https://transition.fec.gov/pubrec/2000presgeresults.htm (last updated Dec. 2001).

23. *Id.*

24. *See* Bush v. Gore, 531 U.S. 98, 103 (2000) (per curium) (finding that Florida's "use of standardless manual recounts" violated the Equal Protection Clause).

25. *See* Alison Mitchell, *Over Some Objections, Congress Certifies Electoral Vote*, N.Y. TIMES (Jan. 7, 2001), https://www.nytimes.com/2001/01/07/us/over-some-objections-congress-certifies-electoral-vote.html ("There is overwhelming evidence that George W. Bush did not win this election either by national popular vote or the Florida popular vote . . . .").

Hillary Clinton, who won by a margin of about 3 million votes.[26] Trump became the fifth President, along with John Quincy Adams (1824), Rutherford Hayes (1876), Benjamin Harrison (1888), and George W. Bush (2000), to lose the popular vote and still enter the White House.[27]

There is no doubt that the Constitution's system for picking the President runs against the majoritarian grain.[28] It does not appear that any other nation uses anything like it.[29] The Constitution relies on direct election of other federal officers, such as members of the House and Senators.[30] Nor do the states

26. *See Federal Elections 2016: Election Results for the U.S. President, the U.S. Senate and the U.S. House of Representatives* , *supra* note 10; *Official 2016 Presidential General Election Results (2017)*, *supra* note 1.

27. *See* Eva Ball, *Presidential Elections and Controversy: A Look Back at Election 2000*, 42 DOCUMENTS TO PEOPLE 8, 9 (2014).

28. *See* Robert W. Bennett, *Democracy as Meaningful Conversation*, 14 CONST. COMMENT. 481, 533 (1997) ("[T]he electoral college route to selection of a President . . . [is] evidence that our democracy is not so insistently majoritarian . . . .").

29. *See* Drew DeSilver, *Among Democracies, U.S. Stands Out in How it Chooses its Head of State*, PEW RES. CTR. (Nov. 22, 2016), http://www.pewresearch.org/fact-tank/2016/11/22/among-democracies-u-s-stands-out-in-how-it-chooses-its-head-of-state/ (finding that no other democratic nation fills its top position the way the U.S. does, with a body of "electors").

30. U.S. CONST. art. I, § 2, cl. 1; *id*. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII.

mimic the Constitution.[31] The majority (or plurality) of voters choose the nation's 50 governors and all state legislators.[32]

Trump's 2016 win prompted critics to attribute a more nefarious purpose to the Electoral College than simply giving the states a greater say in the creation of the national government.[33] As noted earlier, the New York Times editorial board tied the Electoral College to America's "original sin" of slavery.[34] The Times' charge of racism echoed those by serious legal scholars. In an opinion piece published shortly after Trump's victory, Yale law professor Akhil Amar declared: "Standard civics-class accounts of the Electoral College rarely mention the real demon dooming direct national election in 1787 and 1803: slavery."[35] Similarly, legal historian Paul Finkelman argued after the 2000 election that most Americans, and even many experts, have no idea that

31. *See*, *e.g.*, *Governors' Powers & Authority*, NAT'L GOVERNORS ASS'N, https://www.nga.org/consulting/powers-and-authority/ (last visited Feb. 18, 2019) (explaining that all state governors are popularly elected).

32. *Id.*

33. *See, e.g.*, Amar, *Neither Should the Nation*, *supra* note 21.

34. *See* The Editorial Board, *supra* note 11.

35. Akhil Amar, *The Troubling Reason the Electoral College Exists*, TIME (Nov. 26, 2018, 1:16 PM), http://time.com/4558510/electoral-college-history-slavery/.

the Framers designed the Electoral College to protect slavery.[36]

Accusations of racism follow Trump wherever he goes, but they miss the mark here. As we will see, they stem from a single comment by James Madison during the secret Philadelphia Convention that drafted the Constitution.[37] Instead of a device infused with racism, the Electoral College emerged as an imperfect compromise that sought to balance nationalism with states' rights, to leaven democracy's passions with deliberation and reason.[38] It may seem ramshackle to us today, but the Constitution's method of presidential choice sought to advance the voice of the people over the centrifugal forces of federalism and the threat of legislative capture.[39]

To overcome this collective action problem, reformers have asked states to adopt a National Popular Vote initiative (NPV), in which a state would give

36. Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1147 (2002).

37. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 56–57 (Max Farrand ed. 1911) [hereinafter 2 FERRAND'S RECORDS] (noting that James Madison stated that the people at large were the most fit to choose a president, but the serious difficulty was that "[t]he right of suffrage was much more diffusive in the Norther than the Southern States").

38. *See* Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1243, 1248 (2012).

39. *See* Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 205 (2004) (discussing the Framers' quickness to compromise on the proposed solution of an electoral college because each state would have an equal say).

all of its electoral votes to whoever won a *national* majority (even if the loser won the vote in the state itself).[40] For example, if Pennsylvania were to adopt the NPV, it would award its electoral votes to a Democrat who won the national vote, even if a Republican had won the popular vote in Pennsylvania itself.[41] The NPV pact, however, does not take effect until states representing a majority of electoral votes have adopted it, at least 270 electoral votes, and it may well fall afoul of the Constitution's ban on agreements between the states without congressional approval.[42]

This Essay will proceed in three parts. Part II will briefly describe the controversy over the Electoral College.[43] Part III will trace the history of the drafting and ratification of the Electoral College.[44] Part IV will discuss why the Electoral College's roots in federalism still remain relevant today.[45]

40. *See Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE (July 3, 2018), https://www.nationalpopularvote.com/written-explanation.

41. *See id.* (explaining that the national popular vote winner would be the candidate "who receives the most popular votes from all 50 states and the District of Columbia" on Election Day.").

42. *See id*.

43. *See* discussion *infra* Part II.

44. *See* discussion *infra* Part III.

45. *See* discussion *infra* Part IV.

II. THE ELECTORAL COLLEGE AT WORK

If there is a widely held understanding of the Electoral College today, it is probably that the Framers took the election of the President out of the hands of the people because they distrusted the masses. Under the old theory that the Framers sought to protect the rights of the wealthy, the Framers acted out of a fear of democracy's leveling tendencies.[46] Elbridge Gerry, inventor of the gerrymander, best expressed this perspective at the Philadelphia Convention when he declared that "[t]he evils we experience flow from the excess of democracy."[47] Gerry did not attack the people's character, only its innocence: "The people do not want virtue; but are the dupes of pretended patriots."[48] As a delegate from Massachusetts, Gerry would have held an understandable fear of populism after the disorder of Shays' Rebellion the previous year had prompted calls for stronger government. While debating the Presidency in the summer of 1787, Gerry predictably declared: "The popular mode of electing the Chief Magistrate would certainly be the worst of all."[49] In his opinion,

46. *See* Finkelman, *supra* note 36, at 1148.

47. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (Max Farrand ed. 1911) [hereinafter 1 FARRAND'S RECORDS].

48. *Id.*

49. 2 FERRAND'S RECORDS, *supra* note 37, at 57.

"[t]he people are uninformed, and would be misled by a few designing men."[50]

Imagine what Gerry would have made of Trump, who appealed to the pessimistic side of the American people. We might not blame him for opposing a popular role in picking a new President, but Gerry lost. The Framers rejected the system under the Articles of Confederation, America's Constitution version 1.0, which did not even create an executive office.[51] While assembled in the Continental Congress, the states simply chose a presiding officer of few powers for administrative convenience.[52] The Framers also shot down proposals in the Constitutional Convention to allow the states to select through the President directly or through the Senate. They also deleted from the first draft of the Constitution direct selection of the Chief Executive by the legislature. Properly understood, the Electoral College advanced, rather than denied, democracy.

Criticism has long followed the Electoral College, and sporadic efforts to change it have come close to success. After the election of Richard Nixon, for example, the American Bar Association declared that the "electoral

50. *Id.*

51. *See*, *e.g.*, ARTICLES OF CONFEDERATION of 1777; *Continental Congress*, 6 CONST. REV. 148, 156 (1922).

52. *Continental Congress*, 6 CONST. REV. 148, 156 (1922).

college method of electing a President of the United States is archaic, undemocratic, complex, ambiguous, indirect, and dangerous."[53] A half-century before Trump's election, the controversies over John F. Kennedy's close 1960 margin and George Wallace's 1968 third-party candidacy led to the strongest movement in our history to discard the Constitution's original electoral system.[54] A proposal to amend the Constitution to a direct election system even overwhelmingly passed the House by 339 to 70, and supporters claimed polls showed that an amendment had the support of roughly two thirds of state legislators.[55] But ever since the Twelfth Amendment, enacted after the election of 1800 to separate the votes for President and Vice President, the United States has never seen fit to alter its method for choosing Presidents.

Criticism, however, has long followed the Electoral College. Its primary vulnerability, of course, is that it selects Presidents not chosen by a majority of the American people.[56] While in most cases the Electoral College has reached the same outcome, a number of our modern Presidents have still won

53. AMERICAN BAR ASSOCIATION, ELECTING THE PRESIDENT: A REPORT OF THE COMMISSION ON ELECTORAL REFORM 4 (1967).

54. *See* JUDITH BEST, THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE 18–20 (1971).

55. *Id.* at 20.

56. THOMAS H. NEALE, ELECTORAL COLLEGE REFORM: CONTEMPORARY ISSUES FOR CONGRESS, CONG. RESEARCH SERV. 5-7 (2017).

the Oval Office without a majority.[57] This includes not just presidents who lost to winners of the majority vote, such as Donald Trump and George W. Bush, but also those who captured only a plurality, such as Bill Clinton (twice), Harry Truman, John F. Kennedy, and Richard Nixon. Some of our most consequential Presidents have won in this way, such as Abraham Lincoln in 1860 and Woodrow Wilson in 1912.[58] A majority vote system may not have produced the best outcomes for the nation if it had kept Abraham Lincoln and Harry Truman out of the White House.

Then there is the possible randomness of the system. If a third-party candidate can deprive a winner of an Electoral College majority, the choice could go to the House, where states vote by delegation.[59] The House could select a candidate who also does not represent the majority of the population, and the choice could fall prey to legislative deal-making.[60] In 1824, even though Andrew Jackson won the most electoral votes, he did not have a majority. When

57. *Id.* at 7.

58. *See Historical Election Results*, NAT'L ARCHIVES & RECORDS ADMIN., https://www.archives.gov/federal-register/electoral-college/votes/index.html (last visited Mar. 15, 2019).

59. U.S. CONST. amend. XII.

60. *See* NEALE, *supra* note **Error! Bookmark not defined.**, at 8 (stating that critics argue that in contingent election situations, the members of the House can exercise their choice "without regard to the winners of the popular vote in their district, states, or in the nation at large").

the election went to the House, it chose John Quincy Adams instead, with Henry Clay allegedly throwing the support of his party to Adams in exchange for appointment as Secretary of State. Small states have an equal vote with large states, amplifying even further the pro-federalism structure of the presidential selection process at the expense of majoritarianism.[61]

The system also relies on a certain randomness in its operation. In our winner-take-all system (a product of state law), candidates will not campaign in states where a large majority favors them or their opponent. Trump did not challenge Hillary Clinton in California, where Democrats had a majority in the millions, while Clinton did not contest Texas.[62] Candidates ignored other states with large populations that heavily favored one party or the other—New York, Illinois, and Massachusetts saw little of Trump or Clinton.[63] Candidates instead will focus their competition on states where the election is close.[64] Most of the election budgets will go toward the states which combine electoral

61. U.S. CONST. art. I, § 2; *see* NEALE, *supra* note **Error! Bookmark not defined.**, at 11.

62. *See* Matthew Conlen, *The Last 10 Weeks of 2016 Campaign Stops in One Handy Gif*, FIVETHIRTYEIGHT (Dec. 16, 2016, 3:34 PM), https://fivethirtyeight.com/features/the-last-10-weeks-of-2016-campaign-stops-in-one-handy-gif/.

63. *See* NEALE, *supra* note **Error! Bookmark not defined.**, at 13.

64. *See id.* at 4 n.18.

votes with competitiveness.[65] In the 2016 election, the candidates devoted a large portion of their spending to "battleground" states such as Florida, Ohio, and Pennsylvania.[66] Battleground states may have little importance to the nation as a whole or bear similarity to the country's majority, while states with large populations might go unnoticed.[67]

When it comes to the nation's most powerful office, the majority does not necessarily pick the winner. A strategic candidate could win bare popular majorities in enough states to carry the Electoral College, but then lose by large margins in the most populous states.[68] According to the 2010 census,

65. *See* Hendrik Hertzberg, *Count 'Em*, NEW YORKER (Mar. 6, 2006), https://www.newyorker.com/magazine/2006/03/06/count-em-2 (reporting that in the 2004 election, the candidates spent a total of $237 million on advertising, with $229 million of it spent in the thirteen battleground states).

66. *See* Anthony Terrell, *Trump Out-Campaigned Clinton by 50 Percent in Key Battleground States in Final Stretch*, NBC NEWS (Nov. 13, 2016, 2:31 PM), https://www.nbcnews.com/politics/2016-election/trump-out-campaigned-clinton-50-percent-key-battlegrounds-final-100-n683116.

67. *See* Hertzberg, *supra* note 65.

68. *See* LAWRENCE D. LONGLEY & NEAL R. PEIRCE, THE ELECTORAL COLLEGE PRIMER 2000, at 27 -30 (1999) (identifying four types of situations where the winner of the majority vote might not win the election, including elections where "there was an electoral college reversal of the popular vote winner," where "there was an electoral college deadlock and use of the House contingent

about half of the American population lives in the largest eight states (California, Texas, Florida, New York, Pennsylvania, Illinois, Ohio, and Georgia), but those states represent only 225 out of the 270 electoral votes needed to win.[69] A candidate could assemble the electoral votes of the smallest states and essentially concede in the largest states, and still prevail.[70] Whether by intention or luck, Trump now sits in the Oval Office by following such a plan.[71] Though he won in Texas and Florida, Trump did not contest California, New York, or Illinois.[72] The state-based allocation of electoral votes, and the extra two electoral votes for every state, create the possibility of losing the

procedure," where "the president elected did not have a majority of the popular votes," and where "minor vote shifts could have changed the outcome").

69. *See Paul Mackun & Steve Wilson, Population Distribution and Change: 2000 to 2010*, U.S. CENSUS BUREAU 2 (2011), https://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf; *Distribution of Electoral Votes*, U.S. NAT'L ARCHIVES & RECORDS ADMIN., https://www.archives.gov/federal-register/electoral-college/allocation.html (last updated Dec. 10, 2010).

70. *See* Hertzberg, *supra* note 65.

71. *See* Nate Silver, *Donald Trump Had a Superior Electoral College Strategy*, FIVETHIRTYEIGHT (Feb. 6, 2017), https://fivethirtyeight.com/features/donald-trump-had-a-superior-electoral-college-strategy/ (stating that Donald Trump was "pretty close to having an optimal Electoral College strategy" based on his strategy to focus on the "tipping-point states" rather than the "close states").

72. *See* NEALE, *supra* note **Error! Bookmark not defined.**, at 15 n.71 (identifying California, New York, and Illinois as the three biggest "blue wall" states, meaning those states that consistently vote for Democratic Party candidates in presidential elections).

popular vote but winning the election.[73]

The American political system need not allow the Constitution to produce such a result. Presidential candidates could always commit to conceding the election, no matter the Electoral College result, should they lose the popular vote.[74] It is difficult to imagine an Electoral College winner, given the power of the modern American presidency, living up to such a principle, just as Donald Trump could not follow through on his 2012 words.

But political reform need not rely simply on the candidates. The key reason why the Electoral College can choose a President who loses the popular vote rests in federalism. Article II of the Constitution mandates that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."[75] In the earliest American elections, states used a variety of methods for choosing electors, ranging from direct election to selection by the state legislatures themselves.[76] While the South Carolina legislature

73. *See* LONGLEY & PIERCE, *supra* note **Error! Bookmark not defined.**, at 135–38 (discussing how the "winner-take-all" system and the two additional electoral votes can cause the popular vote winner to lose the electoral vote).

74. *See id.* at 51.

75. U.S. CONST. art. 11, § 2, cl. 2.

76. *See* LONGLEY & PEIRCE, *supra* note **Error! Bookmark not defined.**, at 102 (stating that under the Constitution, state legislatures had broad authority to decide how the electors were chosen,

would continue to choose electors until the Civil War, most states soon allowed the popular vote to select the electors.[77] But the states also adopted a rule that reinforced the partially federal, partially state nature of the constitutional system.[78] Most states follow a winner-take-all rule, also known as the "unit" rule, which gives all of a state's electoral votes to the winner of the statewide popular vote.[79] Win a plurality of the popular vote within enough states that hold 270 electoral votes, and a candidate wins the election, even without a national majority.[80]

States, therefore, have it in their hands to prevent another Donald Trump from ever winning a presidential election with a minority. States could allocate their electoral votes proportionally, so that if a Democrat were to win Pennsylvania by 60–40 percent, the state would divide its 20 votes and give 12 electoral votes to the Democrat and eight to the Republican.[81] Only two

whether that meant choosing the electors themselves, or giving the choice to the people through the popular vote).

77. *Id.*

78. *See* NEALE, *supra* note **Error! Bookmark not defined.**, at 6–7.

79. *Id.* at 10.

80. *See Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote, supra* note **Error! Bookmark not defined.**, at 2536–57.

81. *Id.*; *see* Bill Whalen, *Go Ahead and Change the Electoral College, But There's Still a Trump Presidency*, FORBES, https://www.forbes.com/sites/billwhalen/2018/08/12/go-ahead-and-the-change-

states, Maine and Nebraska, however, divide their votes proportionally.[82] But states realize that were they to adopt such a rule, candidates would shift their time and resources to states where they have a chance to win all of the electoral votes.[83] It is the states (both big and small), rather than the Constitution, which maintains a system that allows a candidate to win the Electoral College without winning the nationwide majority vote.[84]

In the wake of the 2000 and 2016 elections, a new criticism has arisen. According to leading legal scholars, regardless of its anti-majoritarian tendencies, the Electoral College also advances a racist agenda through its protection of slavery.[85] "[T]he records of the Convention show that in fact the connection between slavery and the college was deliberate, and very much on the

the-electoral-college-but-theres-still-a-trump-presidency/#5271a95d14ca (last visited Mar. 15, 2019).

82. U.S. Electoral College, *Frequently Asked Questions*, NAT'L ARCHIVES & RECORDS ADMIN., https://www.archives.gov/federal-register/electoral-college/faq.html (last visited Mar. 15, 2019).

83. *See* Rigdon, *supra* note **Error! Bookmark not defined.**, at 25.

84. *See* Muller, *supra* note 38, at 1250 (noting that the Electoral College is in the states' best interest because "it is not simply a mechanism for state-based representation in selection of the President, but it is also a mechanism by which the states simultaneously administer the election and select electors as they see fit").

85. Finkelman, *supra* note 36, at 1147

minds of many delegates, including James Madison," argues legal historian Paul Finkelman.[86] Because of the Electoral College's inclusion of the three-fifth's rule, Amar notes, Virginia started out with 12 out of the first 91 electoral votes; even though Pennsylvania by 1800 would have 10 percent more free people than Virginia, it would have 20 percent less electoral votes.[87] "Perversely, the more slaves Virginia (or any other slave state) bought or bred, the more electoral votes it would receive."[88] Indeed, as Amar notes, a southern state that freed slaves who left for the North would actually lose electoral votes.[89] Finkelman observes that John Adams would have won the tight election of 1800 over Thomas Jefferson if the Constitution had not incorporated the three-fifths rule into the Electoral College.[90] Amar agrees: "Jefferson metaphorically rode into the executive mansion on the backs of slaves."[91]

This relatively new claim not only has risen to attack the Trump presidency, but it also undermines the legitimacy of the system we have used for more than two centuries to choose our presidents. It gives an added impetus

86. Finkelman, *supra* note 36, at 1147.

87. Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N.U. L. REV. 467, 470 (2007).

88. *Id.*

89. *Id.*

90. Finkelman, *supra* note 36, at 1155.

91. Amar, *supra* note 87, at 470.

to efforts to replace the Electoral College with some kind of national direct election of the President, though majoritarianism has not always been the best friend of minority rights. The next Part will describe the development of the Electoral College during the drafting and ratification of the Constitution to show that race had relatively little to do with it.[92] While a stray comment in the Philadelphia Convention may have pointed out the benefits to the southern states of the Electoral College system, this point did not seem to come to the attention of those who ratified the Constitution.[93] Further, any benefit would have disappeared with the erasure of the Constitution's protection for slavery in the Reconstruction Amendments.[94] It is to that history that we now turn.

III. THE DEBATES THAT CREATED THE ELECTORAL COLLEGE

The Electoral College, for all of its ramshackle nature, provoked little debate during the process of the Constitution's approval in 1788. "The mode of appointment of the Chief Magistrate," Alexander Hamilton observed in *Federalist 68*, "is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark

92. *See* discussion *infra* Part III.

93. *See* Amar, *supra* note 87, at 470.

94. *See* Muller, *supra* note 38, at 1250.

of approbation from its opponents."[95] Hamilton, who argued openly for an energetic executive of independent powers, even declared: "I venture somewhat further, and hesitate not to affirm that if the manner of it be not perfect, it is at least excellent."[96]

Hamilton may have accurately described the ratification process, in which the Constitution went before each state's specially-elected conventions. Critics of the new framework for government devoted most of their energies attacking the expansion of federal authority at the expense of the states, the Senate's strange mixture of roles, or the powers of the new presidency.[97] Antifederalists did not spend much effort on the Electoral College.[98] If there were a purpose to defend slavery or racism in the Constitution's system for selecting its Chief Executive, it did not garner much notice or debate during the ratification, which was the process that actually gave the Constitution its legal and political authority.[99]

95. THE FEDERALIST NO. 68, at 411 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

96. *Id.* at 411–12.

97. *Id.* at 414–15; *see* Nils Gilbertson, *Return of the Skeptics: The Growing Role of the Anti-Federalists in Modern Constitutional Jurisprudence*, 16 GEO. J. L. & PUB. POL'Y 255, 261, 267, 283 (2018).

98. Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35, 37 n.5 (1986).

99. On the importance of the state ratification conventions, see John Yoo,Crisis and Command: Executive Power from George Washington to George W. Bush ch. 2 (2010).

But Hamilton's words could not fairly describe the Constitutional Convention. Meeting in Philadelphia in the summer of 1787, delegates from the states secretly drafted a new framework for the national American government.[100] The mechanism of presidential selection balanced many of the same competing forces that affected the design of the rest of the Constitution: the struggle between big states and little states, nationalism versus federalism, North versus South, free states versus slave.[101] In the course of a few months, the Framers would consider a wide range of ways to select a President. The Electoral College represents their improvement on the Articles of Confederation, but with the compromises necessary for broad approval.

Early proposals for the Constitution would have created a system not unlike the parliamentary democracies of western Europe. Drafted by James Madison and introduced by Virginia Governor Edmund Randolph on May 29, 1787, the Virginia Plan created a national executive to "be chosen by the National Legislature."[102] The delegates swiftly set out the same competing visions for presidential selection which endure today. When discussion of the Virginia Plan began on June 1, Pennsylvania delegate and future Supreme

100. Id.

101. *See* Slonim, *supra* note 98, at 37.

102. 1 FARRAND'S RECORDS, *supra* note 47, at 21–22.

Court Justice James Wilson argued that "in theory he was for an election by the people."[103] He pointed to the experience in Massachusetts and New York, which showed "that an election of the first magistrate by the people at large, was both a convenient [and] successful mode."[104] Roger Sherman of Connecticut took immediate exception.[105] He "was for the appointment by the Legislature, and for making him absolutely dependent on that body."[106]

If Sherman and the Virginia Plan had prevailed, the American executive would look similar, if not identical, to a European democracy. In these parliamentary systems, the majority party of the legislature chooses a prime minister who heads the executive—there is no true separation of powers between the two branches. Many of the Framers, however, believed that legislative control over the executive in the revolutionary state constitutions had produced unstable and unfair laws, government favoritism and partisanship, and flagrant abuse of property and contract rights.[107] To reduce congressional influence over the President, George Mason persuaded the Convention to limit

103. 1 FARRAND'S RECORDS, *supra* note 47, at 68.

104. *Id.*

105. *See* Slonim, *supra* note 98, at 40 (explaining one argument for why the presidential election should not be left up to the people at large).

106. 1 FARRAND'S RECORDS, *supra* note 47, at 68.

107. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 (1969).

the executive to a single seven-year term, without possibility of re-election.[108] But Mason hit roadblocks with his effort to remove the legislature from the process of electing the President. He proposed the first version of the Electoral College: the Constitution would divide the states into districts, which would select "[m]embers for their respective districts to be electors of the Executive [Magistry]."[109] His motion, however, failed 7-2 (with one abstention), and the Convention kept to its plan that the legislature elect the president by an 8-2 vote.[110]

Representatives from the smaller states had even more plans in store for the presidency.[111] With their New Jersey Plan, introduced on June 15, these delegates proposed that each state have equal representation in the Congress, and that no house exist with seats allocation by population.[112] The conflict between large and small states paralyzed the Constitutional Convention for a month.[113] When it ended in the Great Compromise, the smaller states had

108. Slonim, *supra* note 98, at 37–38.

109. 1 FARRAND'S RECORDS, *supra* note 47, at 77.

110. *Id.*

111. *Id.* at 242–45; *see* Slonim, *supra* note 98, at 39.

112. *See* Slonim, *supra* note 98, at 37, 39.

113. *Id.* at 39 (explaining that the controversy was not settled until July 7).

won a significant change to the centrality of a popularly-elected legislature in the Virginia Plan.[114] The Senate, in which each state received two senators, became the central institution in the legislature.[115] Legislation could not pass without its cooperation; presidents could not make treaties or appoint judges and high officers without its advice and consent; a constitutional amendment could not go to the states without the agreement of two-thirds of the senators; and, it acted as the judge and jury in impeachment trials.[116] The rise of the Senate gave the states an effective veto over Congress's election of the President.

Large state delegates spent the remainder of the Constitutional Convention attempting to restore the popular voice in the Constitution. As I have argued elsewhere, nationalists at this point began to shift authority away from the Senate to the President.[117] They also sought to break presidential dependency on Congress. Re-opening debate over presidential selection on July 17, Gouverneur Morris demanded that the President "ought to be elected by the

114. *Id.*; *see* Jack N. Rakove, *The Great Compromise: Ideas, Interests, and the Politics of Constitution Making*, 44 WM. & MARY Q. 424, 436 (1987).

115. *See* Rakove, *supra* note 114, at 455.

116. *See* 1 FARRAND'S RECORDS, *supra* note 47, at 186–88 (discussing relevant portions of the Virginia Plan).

117. JOHN YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH (2009); *see* Rakove, *supra* note 114.

people at large, by the freeholders of the Country," who would "never fail to prefer some man of distinguished character, or services; some man, if he might so speak, of continental reputation."[118] If Congress selected him, on the other hand, "[h]e will be the mere creature of the Legisl[ature]" and the choice would be "the work of intrigue, of cabal, and of faction."[119] In response to delegates worried that a majority of the American people would not agree on a single candidate, Wilson proposed sending such deadlocks to Congress.

Opponents of the majoritarian revival stressed several concerns that have resurfaced in the Trump years. Sherman argued that the people would "never be sufficiently informed" and would tend to choose candidates from their own states, which would give larger states the advantage.[120] Charles Pinckney of South Carolina feared "a few active & designing men"—demagogues—would manipulate the people, or that "[t]he most populous States by combining in favor of the same individual will be able to carry their points."[121] Even though from a large state, Virginian George Mason agreed that "the extent of the Country" made it nearly impossible for the people to "have the requisite

118. 2 FARRAND'S RECORDS, *supra* note 37, at 29.

119. *Id.*

120. 2 FARRAND'S RECORDS, *supra* note 37, at 29.

121. *Id.* at 30.

capacity" to judge the candidates.[122] "[I]t would be as unnatural to refer the choice of a proper character for a chief Magistrate to the people," Mason declared, "as it would, to refer a trial of colours to a blind man."[123] Mason's statement often supplies the evidence for those who believe that the Electoral College advanced an anti-democratic agenda.[124] While Mason may well have held such views, he arguably did not influence the Constitution as he refused to sign the final product and became one of its leading opponents during the ratification.[125]

It was only at the close of this phase of the debate that the issue of race that has so obsessed today's Electoral College critics first emerged. Hugh Williamson of North Carolina rose to support Mason's arguments that most

122. *Id.* at 31.

123. *Id.*

124. *See* Jason Brennan, *Opinion: The Electoral College is Anti-democratic—And That's a Good Thing*, MKT. WATCH (Nov. 8, 2016, 8:39 AM), https://www.marketwatch.com/story/the-electoral-college-is-anti-democraticand-thats-a-good-thing-2016-09-12 (agreeing that the Electoral College is indeed anti-democratic, but suggesting that it is a good thing because the Electoral College serves as a check for when the majority votes to elect an obviously corrupt leader).

125. *See, e.g.*, GEORGE MASON, OBJECTIONS TO THE CONSTITUTION (Oct. 7, 1787), reprinted in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 349 (John P. Kaminski & Gaspare J. Saladino eds., 1986). Mason's objections were known to have been published in at least 27 newspapers from Maine to South Carolina and served as a sounding board for numerous Federalist and Anti-Federalist essays. *See id.* at 348.

voters would not have the knowledge, due to the size of the nation, to choose knowledgeably among multiple candidates.[126] Comparing election by the people with election by the legislature, he said, was like comparing "app[ointment] by lot, and by choice."[127] He worried that because of the lack of information, voters would generally choose candidates from their states, which would give large states the advantage.[128] Invoking the advantage of slavery, Williamson declared: "This will not be Virg[ini]a however. Her slaves will have no suffrage."[129] He was pointing out a comparative loss of power for the slave states under Morris's plan. Infamously, the Great Compromise included three-fifths of slaves in a state's population for allocating seats in the House of Representatives, even though the South did not allow them to vote. But if the Constitution allowed for the direct election of the president, the southern states would lose that three-fifths advantage, which only applied to the makeup of Congress.[130] After Williamson spoke, the Convention rejected Morris's motion and unanimously affirmed legislative election of the

126. *See* 2 FARRAND'S RECORDS, *supra* note 37, at 32.

127. *Id.*

128. *Id.* at 29–32.

129. *Id.* at 32.

130. *See id.*

president.[131]

The delegates, however, quickly backtracked out of concerns over executive independence.[132] Just two days after rejecting Morris and Wilson's pleas for direct election, the Convention made the choices that set the Electoral College in its final form.[133] Initially, they decided that the single seven-year term for a president would lower the incentives for success created by the prospect of re-election.[134] They began by lifting the single term limit.[135] But once they made a president re-eligible for election, they worried that he would seek ways to please the legislature, which would control his re-appointment.[136] Re-opening the battle he had just lost, Morris again moved for the direct election of the president.[137] "If he is to be the Guardian of the people let him be appointed by the people[.]"[138] Like others stung by experience under the state revolutionary constitutions, Morris believed that unrestrained

131. *See* 2 FARRAND'S RECORDS, *supra* note 37, at 32.

132. *See id.* at 50.

133. *See id.*

134. *See id.* at 34, 116.

135. *See id.* at 33, 50.

136. *See id.* at 33, 50, 58.

137. *See id.* at 52–54.

138. *Id.* at 52.

legislatures posed the greater threat to the people's liberties.[139] "[T]he Executive Magistrate should be the guardian of the people, even of the lower classes, a[gainst] Legislative tyranny . . . ."[140] With the President eligible for reelection, a majority of the delegates agreed with Morris that Congress should no longer hold the power of appointment because it would make the executive dependent on the legislature.[141] "[A] dependence of the Executive on the Legislature, would render it the Execut[ive] as well as the maker of laws[,]" Madison observed at this point in the debate.[142] "[T]hen according to the observation of Montesquieu, tyrannical laws may be made that they may be executed in a tyrannical manner."[143]

Madison joined Wilson's solution to subject presidential selection to popular choice, but in doing so also brought race back to the surface.[144] Because legislative selection would introduce "intrigues and contentions" that would produce "an improper connection between the two departments," Madison

139. *Id.*

140. *Id.*

141. *Id.* at 34, 61.

142. *See id.* at 34.

143. *Id.*

144. *See id.* at 56–57.

concluded that "[t]he people at large," were "as likely as any that could be devised to produce an Executive Magistrate of distinguished Character."[145] But popular election created an important "difficulty."[146] The northern states had granted the right to vote more broadly than the southern states, "and the latter could have no influence in the election on the score of the Negroes."[147] To maintain the South's population advantage due to the counting of three-fifths of the slaves, Madison declared that "[t]he substitution of electors obviated this difficulty and seemed on the whole to be liable to the fewest objections."[148] By a 6-3 vote on July 19, 1787, the Convention approved a motion by Oliver Ellsworth of Connecticut to replace legislative selection with an electoral college system.[149]

Critics of the Electoral College consider this critical vote to reveal the desire of the Framers to advantage slavery, and hence introduce racism into the Constitution.[150] This racism critique, however, does not comport with the manner in which the Framers actually voted. Of course, Williamson and

145. *Id.* at 56.

146. *Id.* at 57.

147. *Id.*

148. *See id*.

149. *Id.* at 58.

150. *See* Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 936 (1996).

Madison argued that direct popular election of the President would work to the disadvantage of the southern states, compared to legislative election, while an elector system would restore the balance.[151] But in the July 19 vote first adopting the Electoral College system, the delegates did not vote along slavery lines.[152] Paterson, who proposed the system, represented the free state of New Jersey and was an abolitionist.[153] Pointing out that the Articles of Confederation "had been ashamed to use the term 'Slaves' & had substituted a description," he had helped persuade the Convention to give Congress the power to ban the slave trade after 1808.[154] Paterson certainly would not have proposed a system to give the southern states greater power for racist reasons.[155] When it came time to vote, Delaware, Maryland, New Jersey, Pennsylvania, and Virginia approved the replacement of legislative choice with special electors.[156] Georgia, North Carolina, and South Carolina voted

151. *See* 2 FARRAND'S RECORDS, *supra* note 37, at 94.

152. *See id.* at 50.

153. *Id.* at 97–98, 664.

154. PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 6 (3d ed. 2015).

155. *See* Leonard B. Rosenberg, *Essay on William Paterson*, WILLIAM PATERSON U., https://www.wpunj.edu/university/history/essay_williampaterson.html (last visited Feb. 26, 2019).

156. 2 FARRAND'S RECORDS, *supra* note 37, at 98.

against.[157] The free states voted unanimously for the electoral system, but so did Virginia, the leading slave state.[158] Three slave states voted against, which directly undermines the claim that racism drove approval of the Electoral College.[159] The vote also breaks down along North versus South, but again, the leading state of the South, Virginia, voted for the electors.[160]

Another factor that often goes unaddressed is that this July 19 vote occurred about two months before final adoption of the electoral system.[161] Leading legal scholars often end their account of the Framers' design of the Electoral College with this decision, but neglect its development in a more democratic direction.[162] For example, almost immediately after the July 19 vote, the Convention reversed course 180 degrees to restore congressional election of the president,[163] and even reconsidered again a single term limit, and a period in office of anywhere from six to twenty years.[164] Debate began

157. *Id.*

158. *See id.*

159. *See id.*

160. *See id.*

161. *Id.* at 50.

162. *See* Earl M. Maltz, *The Presidency, the Electoral College, and the Three-Fifths Clause*, 43 RUTGERS L.J. 439, 440–41 (2013).

163. 2 FARRAND'S RECORDS, *supra* note 37, at 101.

164. *Id.* at 100–02.

to roam all over the map, with one delegate proposing a three-person presidency, with one representative from each region of the nation, another suggesting that a subcommittee of Congress pick the president, and another recommending that the choice fall to state governors.[165]

During these wanderings, Madison again urged the use of electors, but this time Madison did not mention the slave state advantage in an electoral system.[166] He continued his opposition to congressional elections, which he worried would "agitate & divide the legislature," lead to "intrigue" between the president and the dominant majority in Congress, or provide an opening for interference from abroad.[167] It also made little sense to grant Congress the power to choose the executive: "One object of the Natl. Executive, so far as it would have a negative on the laws, was to controul the Natl. Legislature . . . ."[168] Rather, Madison stressed that electors "chosen for the occasion, would meet at once, & proceed immediately to an appointment," which he predicted "would [provide] very little opportunity for cabal, or corruption."[169] But if

165. Slonim, *supra* note 98, at 44–45.

166. *See* 2 FARRAND'S RECORDS, *supra* note 37, 108–11.

167. *Id.* at 109.

168. *Id.* at 110.

169. *Id.* at 109–11.

the Convention continued to reject an Electoral College, Madison believed the only alternative was direct popular election, despite the voters' lack of information on candidate nationwide and their favoritism toward local sons.[170] "With all its imperfections he liked this best."[171] In fact, Madison conceded that the North would outweigh the South in numbers of voters (though he believed that the South's population would grow), but as a Southerner "he was willing to make the sacrifice."[172] Nevertheless, the Convention continued to reject amendments to lengthen the presidential term in office and to limit re-eligibility.[173]

Madison's defense of popular election did not win any converts.[174] "A popular election in this case is radically vicious," Gerry argued on July 25, because "the ignorance of the people would put it in the power of some one set of men dispersed through the Union & acting in Concert" to prevail, such as the Order of the Cincinnati.[175] However, support continued to build for electors because of concern over executive independence from the

170. *Id.* at 111.

171. *Id.*

172. *Id.*

173. *See* Slonim, *supra* note 98, at 46–47.

174. *See* 2 FARRAND'S RECORDS, *supra* note 37, at 111.

175. *Id.* at 114.

legislature.[176] "The two great evils to be avoided are cabal at home, & influence from abroad," Pierce Butler of South Carolina declared.[177] "It will be difficult to avoid either if the Election be made by the National Legislature."[178] "On the other hand, the Gov[ernment] should not be made so complex & unwieldy as to disgust the States," Butler warned. "This would be the case, if the election [should] be referred to the people."[179] The best way to accommodate state interests was election by electors chosen by the states, he concluded.[180] Morris again attacked "the undue influence of the Legislature."[181] He "considered an election by the people as the best, by the Legislature as the worst, mode."[182] Morris therefore "could not but favor the idea of" electors.[183] But when the delegates took a break and created a Committee of Detail to transform their deliberations into a unified draft, they still supported congressional election of the president (by a 7-3 vote), though for a

176. *Id.* at 112.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id*

182. *Id.* at 113.

183. *Id.*

single seven-year term.[184]

When the Committee on Detail reported its draft of the Constitution, the delegates occupied themselves with debates over the congressional process for choosing the president.[185] But then, at the end of their deliberations, on August 31, Morris suddenly moved to strike out the draft's authorization for Congress to choose the president.[186] He prevailed by the extraordinary vote of 9-1, with one abstention.[187] The debates contain no explanation why, but as Stanford historian Jack Rakove has argued, "a growing reaction against the Senate worked in favor of the presidency, encouraging those framers who opposed legislative election and favored re-eligibility to renew their efforts."[188] In other words, as the delegates understood that the body representing the states would have a veto over most powers of the federal government—the passage of laws, the confirmation of executive officers and judges, the adoption of treaties—the nationalists among them sought to free the President from its grasp.[189] With no method for choosing the president in the working draft,

184. *Id.* at 120.

185. *See* Maltz, *supra* note **Error! Bookmark not defined.**, at 458–61.

186. *See* 2 FARRAND'S RECORDS, *supra* note 37, at 480.

187. *Id.* at 471, 480.

188. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 263 (1996).

189. *Id.*

the delegates sent the question to the well-named Committee on Unfinished Parts for decision.[190]

On September 4, the Committee returned with today's Electoral College, though with the Senate serving as the backup method should no candidate win a majority.[191] The delegates observed that an Electoral College would reduce the chances for intrigue and corruption because it would come into being only to select a president and then disband.[192] It would eliminate presidential dependence on Congress through the promise of appointment.[193] It did not disrupt the fundamental bargain made between the large and small states over Congress by allocating electoral vote by population, giving the state legislatures the right to choose, and giving each state two additional votes.[194] In defending the committee's work, Morris explained that "[no one] had appeared to be satisfied with an appointment by the Legislature" and "many

190. *See* 2 FARRAND'S RECORDS, *supra* note 37, at 380.

191. *Id.* at 497–98 (outlining the process for how the president is elected by the electorate and how Senate chooses the president where there is no majority).

192. *Id.*

193. *Id.* at 522.

194. *Id.* at 265 (discussing how the Electoral College, in effect, limited the advantage of the larger states).

were anxious even for an immediate choice by the people."[195] Relying on electors would address "the danger of intrigue & faction if the appoinm[en]t should be made by the Legislature" and "the indispensable necessity of making the Executive independent of the Legislature."[196] Mason praised the new system because it "removed some capital objections, particularly the danger of cabal and corruption."[197] The Convention rejected every proposal to restore the choice to the legislature, but also voted 10–1 to give the House—voting by state delegation—the power to choose the president should the Electoral College fail to agree.[198]

When the delegates to the Philadelphia Convention explained their work to the state conventions responsible for ratifying the Constitution, they fairly described the different values they balanced.[199] But they also argued that the Electoral College would produce presidents of leading character and filter out the unsuitable.[200] Here, Trump's election demonstrated that the process did guarantee the substance.

When the Constitution went to the states for approval, the issue that had

195. *Id.* at 500.

196. *Id.*

197.*Id.*

198.*Id.* at 529.

199.*Id.* at 500.

200.*See id.*

so beset the Philadelphia delegates did not trigger a widespread outcry.[201] In fact, as Hamilton observed in *The Federalist No. 68*, the Electoral College was the only important part of the Constitution to have "escaped without severe censure" and had not "received the slightest mark of approbation from its opponents."[202] Hamilton, for once, agreed with the Anti-Federalists that "if the manner of it be not perfect, it is at least excellent."[203] Indeed, most Anti-Federalist objections to the presidency focused on its substantive powers, not the method for its selection, or likely collusion between the executive branch and the Senate to seize power.[204] George Mason's *Objections to the Constitution*, a leading Anti-Federalist critique widely circulated in September 1787, does not even mention the Electoral College.[205] To the extent that

201.*See* Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 IND. L.J. 619, 637 (1997).

202. THE FEDERALIST NO. 68, *supra* note 95, at 411 (Alexander Hamilton).

203. *Id.* at 411–12.

204. *See generally id.* at 413 ("They have not made the appointment of the president to depend on any pre-existing bodies of men who might be tampered with [beforehand] to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment.").

205. George Mason, Objections to the Constitution (Oct. 7, 1787), reprinted in 13 Documentary History of the Ratification of the Constitution, supra note , at 349. Mason's objections were known to have been published in at least twenty-seven newspapers from Maine to South Carolina and served as a sounding board for numerous Federalist and Anti-Federalist essays. See id. at 348.

they attacked it, Anti-Federalists worried more about the chances for foreign bribery of the electors or the President himself, rather than racism or state advantages in the system.[206]

Hamilton fairly reported the values that had guided the delegates, though he left out the heated arguments and the many shifts of position. Democracy remained the guiding principle.[207] "It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided," he wrote in *The Federalist No. 68*.[208] But in order to foster deliberation and access the broadest knowledge, the Constitution placed the choice in the hands of electors who "will be most likely to possess the information and discernment requisite to so complicated an investigation."[209] Mediating the choice through the electors, Hamilton predicted, would also "afford as little opportunity as possible to tumult and disorder"—unregulated passion, in other words.[210]

Hamilton also repeated the reasons for removing the choice from the legislature.[211] He argued that the Electoral College would prevent the "cabal,

206. *See* RAKOVE, *supra* note **Error! Bookmark not defined.**, at 268–75.

207. *Id.* at 412.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 412–13.

intrigue, and corruption" that would arise if Congress were to choose.[212] Hamilton argued, as did his fellow nationalists in the Constitutional Convention, that Congress would be the seat of such conspiracies, and hence the Presidency should be made independent of it.[213] The Philadelphia delegates "have not made the appointment of the president to depend on [any] pre-existing bodies of men, who might be tampered with beforehand to prostitute their votes," but instead vested the power into a group of electors chosen "for the temporary and sole purpose" of selecting the president.[214] Choice by electors would also support the president's continuing independence from Congress, rather than "sacrifice his duty to his complaisance for those whose favour was necessary" for his continuance in office.[215] By rejecting legislative selection of the president, the Electoral College advanced the fundamental principle that "the executive should be independent for his continuance in office on all, but the people themselves."[216]

The Federalists, however, failed in their predictions that this system not

212. *Id.* at 412.

213. *Id.* at 412–13.

214. *Id.* at 413.

215. *Id.*

216. *Id.*

only would prevent "cabal, intrigue, and corruption," but would also produce Presidents of the highest caliber.[217] "This process of election affords a moral certainty," Hamilton promised, "that the office of President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications."[218] Hamilton's praise for the Constitution here certainly went too far.[219] "It will not be too strong to say," he wrote, "that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue."[220] The Federalists did not clearly explain why the Electoral College would produce such high characters.[221] They may have relied on the widespread understanding that George Washington would be the first president. As Pierce Butler wrote afterward, he did not believe that the President's powers "would have been so great had not many of the members [at Philadelphia] cast their eyes towards General Washington as President; and shaped their Ideas of the Powers to be given to a President, by their opinions of his Virtue."[222] They may have further assumed that only the truly

217. *See id.* at 412.

218. *Id.* at 414.

219. *See id.*

220. *Id.*

221. *See id.*

222. 3 Farrand, Records, supra note , at 301–02; see also Yoo, Crisis and Command, supra note , at ch 2.

outstanding characters would have the continent-wide reputation, in an age of poor communications, to win an Electoral College majority.[223]

But the Framers did not anticipate that the Electoral College would establish a framework that created room for other purposes to assume a role. While more majoritarian than congressional or Senate selection of the president, the Electoral College advanced the primary objective of the Framers to reduce the ability of faction or party to control the government for its own ends. It was of a piece with other mechanisms, most notably the Senate and the judiciary, designed to decentralize and diffuse power over domestic issues within the federal government. Others, such as Thomas Jefferson, Martin van Buren, and most especially Woodrow Wilson, would use party government to modify the Framers' design. It is their innovations that have given us a selection system that elevates the president through a quasi-plebiscitary process in which political parties cooperate to advance a political platform adopted in a nationwide election.[224]

IV. IN DEFENSE OF THE ELECTORAL COLLEGE

Rather than a racist institution, the Electoral College advanced a more

223. 1 Farrand, Records, supra note 1, at 29 (remarks by Morris).

224. *See* Ceasar, supra note , at ___.

democratic voice in the selection of the president. We should not forget that the Framers started from a baseline—the Articles of Confederation—which gave all important decisions to the states. Their first proposal for legislative selection would have created a more democratic executive, but one too subservient to Congress. Delegates who supported a powerful, independent president, such as Madison, Morris, and Wilson, pressed for direct popular election. But they could not overcome the concerns of delegates such as Mason, who feared that limited communications and the vast size of the country would prevent voters from making an educated choice. Nevertheless, the Framers reached a compromise in the Electoral College which balanced nationalism with federalism. But unlike the Great Compromise over the makeup of the House and Senate, the nationalists prevailed in centering the selection of the president in popular choice, but mediated through the states. Democracy operates to choose the president, but within the states. "Thus[,] the essential spirit of the Electoral College, like that of the Constitution in general, was fundamentally democratic from the outset," observed political scientist Martin Diamond.[225]

Criticism that the Framers intentionally designed the Electoral College, in the words of Amar, to "advantage Southern white male propertied

225. MARTIN DIAMOND, THE ELECTORAL COLLEGE AND THE AMERICAN IDEA OF DEMOCRACY 6 (1977).

slaveholders in the antebellum era" seems off the mark.[226] Instead, the Founders believed that their unusual system would organize democracy through the states.[227] If we should discard with the Electoral College as an obstacle to the majority, critics should explain why the American people should retain the Constitution's other limits on pure majoritarian democracy. The separation of powers, for example, handicaps Washington, D.C.'s ability to govern.[228] Why not replace it with a British-style parliament, where the head of the majority party in Congress would form a cabinet of fellow members to control the executive agencies? Federalism further restricts national powers.[229] Why not follow European models again and replace the states with administrative districts subordinate to the national government? Judicial review and the Bill of Rights, for that matter, also poses limits on the majority. We could again follow modern Britain and leave the creation and definition of individual

226. *See* Amar, *supra* 87, at 472.

227. *See* Muller, *supra* note 38, at 1243.

228. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 639 (1984) (describing the divided federal government as "sufficiently distracted by internal competition to avoid the threat of tyranny").

229. *See* THE FEDERALIST NO. 51, at 95, at 323 (Alexander Hamilton) ("In the compound republic of America . . . a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

liberties to the legislature.

The same charges that critics bring against the Electoral College apply to Congress as well. Amar's and Finkelman's claim that the Electoral College rests on racist foundations have force only because it incorporated the same three-fifths rule that applied to the allocation of House seats.[230] But the Civil War and the constitutional settlement that followed, codified in the Thirteenth (ending slavery), Fourteenth (recognizing equal protection and due process of law), and Fifteenth Amendments (guaranteeing the right to vote), ended the three-fifths rule and extirpated the formal legal influence of slavery.[231] Today we commonly think of the House as the most democratically accountable and responsive element of the federal government, even though the Constitution continues to allocate seats by state.[232] Reconstruction ended the advantage of the slave states in the Electoral College as well.[233] A century would pass until a son of the South would win the presidency. In 1964, Lyndon B. Johnson won his great victory in the outpouring of grief after the Kennedy assassination.[234] Woodrow Wilson, the only other president from the South, had spent

230. *See* U.S. CONST. art. II, § 2, cl. 3 (amended 1868).

231. *See* U.S. CONST. amends. XIII–XV.

232. *See* U.S. CONST. ART. I.

233. *See* U.S. CONST. amend. XIV, § 2; *see also id*. art. II, § 1 (noting the Fourteenth Amendment's end to the advantage of former slave states afforded to those states by the Electoral College).

234. *See* Robert Caro, Lyndon Johnson Vice Presidency volume

his professional career in the North, receiving his Ph.D from Johns Hopkins, taught at Bryn Mawr, Wesleyan, and Princeton, and served as President of Princeton and Governor of New Jersey.[235]

Of course, the Framers gave an advantage to the states in selecting the Chief Executive. Recently, that difference has not mattered, except in close contests, such as the 2000 and 2016 elections. But the Electoral College's departure from the principle of "one person, one vote," first required by the Supreme Court in *Reynolds v. Sims* in 1964, grates on modern democratic sensibilities.[236] "I believe strongly that in a democracy, we should respect the will of the people," Hillary Clinton had said after the 2000 election, "and to me that means it's time to do away with the Electoral College and move to the popular election of our president."[237] While Trump might have won the presidency had the Framers chosen direct popular election, that results seems unlikely in light of Clinton's large majorities in major American cities.[238]

235. *See generally* Ronald J. Pestritto, Woodrow Wilson and the Roots of Modern Liberalism (2005).

236. 377 U.S. 533, 558 (1964).

237. *See* Mahler & Eder, *supra* note **Error! Bookmark not defined.**.

238. *See* William H. Frey, *A Substantial Majority of Americans Live Outside Trump Counties, Census Shows*, BROOKINGS (Mar. 23, 2017), https://www.brookings.edu/blog/the-avenue/2017/03/23/a-substantial-majority-of-americans-live-outside-trump-counties-census-shows/.

Federalism clearly worked to Trump's advantage.

But if critics dislike the amplified voice of the states, they have much more to worry about than the Electoral College. Consider the Constitution itself: It did not take effect by a simple nationwide majority vote. Instead, it adopted a procedure for its own ratification more similar to the Electoral College than any other form of lawmaking. Article VII required nine out of the thirteen states approve the Constitution, using special conventions called solely for the purpose.[239] No state ratified the document through its legislature, nor did any state have a direct plebiscite to approve the Constitution. Much like a presidential election, the ratification of the Constitution turned on assembling a majority coalition within each state, with its own unique political history and culture, and then combining them into the required nine states.[240] Amending the Constitution repeats the same combination of federal and state approval. Once two-thirds of Congress passes an amendment, it goes to the states for ratification by three-quarters.

Indeed, the Constitution channels and limits majority rule throughout its basic structure. The Electoral College may have allowed the states to choose Trump because of the small difference in the popular vote. But the states

239. U.S. CONT. art VII.

240. *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787–1788 (Simon Schuster ed., 2010).

enjoy an even greater advantage in the national government in the Senate, where state equality gives the same number of votes to Wyoming, with its 563,767 residents, as to California, with 37,254,503 residents.[241] The Framers routed all of Congress's important powers through the Senate, and hence gave the states a veto over most major federal policies.[242] Washington, D.C. cannot pass laws, raise taxes, or spend money without approval by the representatives of the states. The president cannot appoint any judges, cabinet members, or principal government officers without the Senate, nor can he make any treaties without its advice and consent. The Constitution established these supermajority and non-democratic procedures to promote more reason and less passion in government, and to rest public policies on a broader consensus in society.[243]

Even the Constitution's most democratic element, the House of Representatives, give states an advantage. While the number of House seats

241. *See* Petrocelli, *supra* note 8.

242. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1329 (2001)

243. *See* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 707 (2002); John McGinnis & Michael Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1702 (2010).

depends on the population, the Constitution grants them to the states by districts.[244] Only an allocation of seats by national party performance, where a Democratic nationwide victory of 60 percent would receive exactly 261 of the 435 representatives, would follow majoritarianism perfectly. Otherwise, the diversity of people, interests, and geography will produce uneven results across districts. Imbalances in party performance in different districts, for example, could easily produce legislative majorities that do not reflect the popular will. Suppose rural and urban districts numbered roughly 50–50, but the Republican party won the former by slight margins, while the Democratic party ran up huge majorities in the latter. In such a situation, the Republican party might achieve a majority of the House seats while losing in the overall popular vote. Indeed, modern gerrymandering seeks to compact an opponent's supporters into districts to win by larger margins, while spreading out one's own supporters to win more districts, but by smaller margins.[245] The Constitution vests the power to draw House districts in the state legislatures, subject to federal regulation, which recognizes state sovereign interests in the House.[246]

244. *See* Jeffrey W. Ladewig, *One Person, One Vote, 435 Seats: Interstate Malapportionment and Constitutional Requirements*, 43 CONN. L. REV. 1125, 1137 (2011).

245. *See generally* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (5th ed. 2016).

246. *See* Saikrishna Bangalore Prakash & John Yoo, *People ≠ Legislature*, 39 HARV. J. L. & PUB.

Even in Britain's parliamentary system, the use of geographic districts has yielded governments that won a majority of the seats without a majority of the population.[247] Such a result is even more likely with more than two political parties, both in a parliamentary system and the Electoral College itself.[248] Thanks to the third-party runs of Ross Perot, Bill Clinton handily won the Electoral College twice even though he won only 43 percent of the national vote in 1992 and 49 percent in 1996.[249] In 1992, only a single state, Arkansas, provided a popular majority for any candidate.[250] Eighty years earlier, the third-party effort by former President Theodore Roosevelt swung the victory to Woodrow Wilson, who ran up 435 of the electors but only 41.8

POL'Y 341, 342 (2017).

247. *See* Jack Blumenau, *What Would Britain Look Like Under Proportionate Representation* (May 6, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/05/06/what-would-britain-look-like-under-proportional-representation/?noredirect=on&utm_term=.72f0a17ccb30.

248. *See id.*; Ky Fullerton, *Bush, Gore, and the 2000 Presidential Election: Time for the Electoral College to Go?*, 80 OR. L. REV. 717, 717–18 (2001) ("[T]he four elections in which a President assumed office without winning the popular vote.").

249. *See* Christopher Klein, *Here's How Third-Party Candidates Have Changed Elections*, HIST. (May 31, 2018), https://www.history.com/news/third-party-candidates-election-influence-facts.

250. *1992 Presidential General Election Results–Arkansas*, U.S. ELECTION ATLAS, https://uselectionatlas.org/RESULTS/state.php?fips=5&year=1992&f=0&off=0&elect=0 (last visited Feb. 28, 2019).

percent of the popular vote.[251]

We should also not neglect the benefits of a state-based district system. Dispersing the power to choose the President into 50 states, with winner-take-all rules, tends to undermine the formation of large interest groups that can dictate the outcome. Of course, such groups could form, and one might even argue that the two political parties are great "factions," in the words of *The Federalist No. 10*,[252] but coordinating their campaigns across the states necessary to win 270 electoral votes presents greater costs and challenges than assembling a popular majority in the largest cities.[253] In close elections, the Electoral College may give minorities an exaggerated influence in comparison to their national size.[254] Because of the winner-take-all rule, a minority group in a critical state could swing the balance of its electoral votes, and hence the outcome of a close election.[255] The flip-side of these tendencies also gives the candidates the incentive to bring together a broad, nationwide coalition that can compete in the different regions of the nation.[256] A direct popular

251. *See* Klein, *supra* note **Error! Bookmark not defined.** ("Roosevelt and Taft ended up splitting the Republican vote, which led to an easy victory by Democratic nominee Woodrow Wilson.").

252. THE FEDERALIST NO. 10, *supra* note 95, at 77–78 (James Madison).

253. ALEXANDER. S. BELENKY, WHO WILL BE THE NEXT PRESIDENT? 90 (Springer, 2d ed. 2012).

254. *See* Amar, *supra* note 87, at 472.

255. *See id.*

256. *See id.* at 473.

election would instead encourage the candidates to only campaign in the major cities of the east and west coasts.[257] This is not to say that regional candidates could not prevail, as Lincoln demonstrated in 1860, but many (if not most) who have appealed solely to sectional interests have lost.[258]

Other arguments in favor of the Electoral College, however, do not persuade as once they might have. Some have observed that the system magnifies the political legitimacy of the president, because the winner-take-all rule transforms state pluralities into electoral vote majorities.[259] Bill Clinton might win just 43 percent of the national vote, but his large Electoral College majority gives him a political legitimacy he might otherwise lack.[260] It seems unclear, however, whether presidents with large electoral majorities should have a false sense of confidence in their political support within the nation, nor whether the other branches should grant these chief executives the same political respect that might come with a large popular majority.[261] Presidents

257. *See id.*

258. *See id.*

259. *See* BEST, *supra* note 54, at 55–57.

260. *See* Katherine Florey, *Losing Bargain: Why Winner-Take-All Vote Assignment is the Electoral College's Least Defensible Feature*, 68 CASE W. RES. L. REV. 317, 356 (2017).

261. *See* Florey *supra* note **Error! Bookmark not defined.**, at 356–58.

elected by pluralities or slim majorities might pursue a course of cooperation with Congress, which might have a better claim to popular support, rather than pressing an agenda born out of a false sense of electoral mandate.[262]

Another argument in defense of the Electoral College makes much of certainty. Supporters once claimed that the Constitution's system provided a clear winner by the end of election night, due again to the winner-takes-all rule.[263] Once a candidate reached enough states to get to 270 electoral votes, it no longer mattered to get the nationwide popular vote count precisely right.[264] Under a direct popular election, however, a close election might require the exact vote count, which could lead to long delays or open the door to cheating or fraud.[265] But the *Bush v. Gore* controversy showed that such concerns could afflict the Electoral College system too.[266] A closely divided nation, as in 2000 or 2004 for that matter, brought the choice of president down to the results in a single state (Florida in 2000, Ohio in 2004).[267] The

262. *See* BEST, *supra* note 54, at 193.

263. *See id.*

264. *See id.*

265. *See* BEST, *supra* note 54, at 193 (discussing that maintaining certainty is an objective of the electoral system and how the "potential for fraud arises when an election is very close").

266. *See* Bush v. Gore, 531 U.S. 98 (2000).

267. Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of* Bush v. Gore, 81 GEO. WASH. L. REV. 1865, 1868, 1879 (2013).

Florida recount left the eventual outcome in doubt and required the Supreme Court to intervene to force the state to deliver its electoral votes by a federally-mandated deadline.[268] As Amar observes, if direct elections work just fine in statewide elections for governor, even of large states such as California, Texas, and New York, we can accept the same uncertainty for national elections too.[269] Very close elections, however, might place the country in a state of uncertainty, which the nation cannot suffer for very long given the central role of the President for national security and law enforcement.[270]

The broad-brush democracy criticism ultimately asks the wrong question. Simple majoritarianism is not in itself an instrumental success for government; rather, we should ask whether the Electoral College advances other values in our Constitution's republican system. As we have seen, the Framers originally set out to block factional or regional candidates by creating a system in which only characters with a continent-wide reputation for public service could succeed. As else in their design, they foresaw that a primary threat to the new government would come from faction. Devices such as the separation of powers responded to the evils after the Revolution, when simple majorities

268. *Bush,* 531 U.S. at 101–03.

269. Amar, *supra* note 87, at 475.

270. *See* BEST, *supra* note 54, at 193.

had taken over state governments and misused their powers to override individual rights and enact special interest legislation.[271] The Electoral College's decentralization would allow only national figures to rise to the presidency, thereby shunting aside candidates who catered to a specific faction or region.[272]

Donald Trump's victory did not demonstrate the realization of the Founders' plans for the Electoral College, but its failures. Early days had first born out Hamilton's hopes in *The Federalist No. 68.* for choosing the President.[273] Despite the vicious partisan conflicts of the early 19th Century, our first Chief Executives were certainly the leading political figures of their day: George Washington won the nation's independence on the battlefield; John Adams led the political fight for independence; Thomas Jefferson drafted the Declaration of Independence and was governor of Virginia; James Madison drafted the Constitution and led the fight for ratification of the Constitution; James Monroe was Secretary of State and a leading Jeffersonian in Congress; John Quincy Adams was one of America's greatest diplomats. Even Andrew Jackson, who attacked the 1824 elections for going to the House after the Electoral College deadlocked, saved the nation in the 1814 Battle of New Orleans and

271. *See* WOOD, *supra* note 107, at 548–49.

272. *See* Amar, *supra* note 87, at 469.

273. THE FEDERALIST NO. 68, *supra* note 95, at 411 (Alexander Hamilton).

added Florida to the union.[274]

The United States also has had its runs of mediocre presidents, especially just before the Civil War and after Reconstruction. The years 1850–1861 included forgettable Chief Executives such as Millard Fillmore, Franklin Pierce, and James Buchanan, while 1877–1896 witnessed weak Oval Office occupants such as Rutherford Hayes, James Garfield, Chester Arthur, Grover Cleveland, and Benjamin Harrison. Average to poor performance in office, however, may owe more to circumstances than to ability. Solving the crisis over slavery may have fallen beyond the ability of any American president until secession and Civil War brought Abraham Lincoln's gifts to the fore. Exhaustion from Reconstruction and the economic boom of the Gilded Age may have demanded little from the Chief Executives. These runs of mediocrity may have little to do with the Electoral College and everything to do with circumstance. We see no great presidents in these eras because the nation did not need greatness in its presidents.[275]

Trump's election, however, proved Hamilton wrong in his claim that the Electoral College would weed out the very worst candidates. Between the

274. *See* John Yoo, *Andrew Jackson and Presidential Power,* 2 Charleston L. Rev. 521 (2008).

275. *See* Yoo, Crisis and Command, supra note , at chs 8-9.

Revolution and the Constitution, known by American historians as the Critical Period, leading nationalists grew concerned that unrestrained democracy in the states had led to instability in government, the invasion of individual rights, and the insecurity of property.[276] Earlier "wholly popular" forms of government in ancient Greece and Rome and Renaissance Italy had suffered from similar "instability, injustice, and confusion."[277] Because they had such faith in the people, the Framers attributed such problems to unreflective majority rule—in other words, the passions, as opposed to reason—unconstrained by "a more perfect structure."[278] The Constitution would prevent the people from making rash decisions by hemming in the legislature with the executive and judicial branches.[279] But the Presidency also raised the possibility of demagogues, who could use their powers of persuasion to further mislead the people.[280]

Hamilton admitted that demagogues might rise in a single state. But he

276. *See generally* DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 4–6 (1984); WOOD, *supra* note 107, at 393–423.

277. *See, e.g.*, THE FEDERALIST NO. 10, *supra* note 95, at 77 (James Madison).

278. *See* THE FEDERALIST NO. 9, *supra* note 95, at 72 (Alexander Hamilton).

279. *See generally* THE FEDERALIST NO. 47, *supra* note 95 (James Madison) (discussing the separation of powers between the three branches of government).

280. *See generally* THE FEDERALIST NO. 1, *supra* note 95 (Alexander Hamilton) (acknowledging the history of tyrants and demagogues but arguing that the Constitution is the safest course to the liberty of the people).

argued that such figures could not deceive the Electoral College, which represented the great breadth of the nation.[281] "Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State," Hamilton wrote in *The Federalist No. 68*.[282] "[B]ut it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States."[283] The Framers could not have anticipated Donald Trump's public life in more accurate terms. "Talents for low intrigue," and "the little arts of popularity" describe a career founded on reality television, branding hotels and casinos, and appeals to some of the worst instincts in the electorate. Trump seems to revel in tactical politics and driving the 24-hour news cycle, exactly as Hamilton feared in *The Federalist No. 68*.

The Federalist assumed that a demagogue could not successfully appeal to the people in all of the states, separated as they were by the slowness of communications, the differences in political culture, and lack of knowledge

281. THE FEDERALIST NO. 68, *supra* note 95, at 414 (Alexander Hamilton).

282. *Id.*

283. *Id.*

of national affairs. The Framers relied on these reasons, which had persuaded the Philadelphia Convention against direct popular election of the president, to protect the nation against a populist leader. But they could not predict the changes in technology and media that have accelerated the instantaneous speed of information, the spread of a common political culture, and the nationalization of politics through the Democrat and Republican parties. The Framers also imagined that a demagogue would appeal to the people's temporary biases, so they designed a system that would dilute the popular voice. They believed that state interests would stand athwart populism, rather than raise up a populist candidate such as Trump.

The Electoral College's failure to filter out a candidate such as Trump, however, does not provide the basis for proposals for radical change. One question worth asking is whether direct majoritarian election of a president would make the selection of a demagogue more or less likely. Political philosophers once thought direct democracy might make demagogues more likely—after all, the word refers to someone who is speaking to the people, the demos, for their support.[284] A direct election would make the demagogue's path to power easier, by allowing him to win the presidency by

284. *See* JAMES W. CEASAR, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT 1–40 (1979).

appealing only to the inhabitants of the nation's largest cities.[285]

The non-constitutional practices that have grown up around the Electoral College have gone some way toward increasing the legitimacy of the winner. As political scientist James W. Ceaser argues, succeeding generations have built upon the Framer's design to pursue different theories of presidential selection.[286] Jefferson soon replaced the Framer's original vision with the idea that the presidential election would present a choice between policy programs.[287] Developed further by Martin Van Buren, this new approach relied upon national political parties to present these platforms in each state, making the presidential election a choice on the issues.[288] Political parties, however, would also constrain the presidents and moderate any rapid change in national politics.[289] Seeking to burst partisan limitations on the presidency, Woodrow Wilson reversed the Framers' starting point that the electoral system should frustrate popular leaders.[290] Instead, he saw the selection of a president in a

285. *Id.*

286. *Id.*

287. *Id.* at 31–33.

288. *Id.* at 32.

289. *Id.* at 33.

290. *See id.*

plebiscitary manner as the only way to clothe the president with the legitimacy to lead the nation in sweeping reform.[291] Wilson's views have prevailed today: it was his idea that the people, rather than the parties, should control the nominating process; that the president should draw legitimacy for his agenda from his nationwide selection; and that the political party instead should help the president in enacting his program.[292]

This is not to argue that direct national election of the President would not have the same features. It certainly would, and probably in greater degree than the Electoral College. But Ceasar shows that the Electoral College system can promote these purposes too, thanks to the manner in which Jefferson, Van Buren, and Wilson have grafted their non-constitutional, political designs atop the Framers' original design. And perhaps the Electoral College does so without running as high a risk of demagogues or of a tyranny of the majority as direct popular election of a President. In this respect, the Electoral College fits in with other aspects of the original constitutional design—the separation of powers, the Senate, and federalism—designed to limit government powers and to render political change difficult.

291. *Id.*

292. *Id.* at 32–33.

V. CONCLUSION

Today's opinion commentary joins many scholarly views to discard the Electoral College in favor of direct popular election. They support a movement, the National Popular Vote initiative, which asks state legislatures to replace the winner-takes-all rule for assigning their electoral votes. Instead of giving their electoral votes to the winner of its own election, state legislatures under the NPV movement would designate them for whomever wins the majority vote in the nation as a whole. Thus, even if Trump won the election in a state that had adopted the NPV rule, the state would still assign the votes to Clinton because she won the majority of all votes in the country. NPV strikes at the heart of the reason why the Electoral College favors the states over majority rule: the winner-take-all rule. "The operation of the winner-take-all system results in effective massive disenfranchisement of voters supporting losing candidates," write critics Lawrence Longley and Neal Peirce.[293] Critics, however, often overlook that the Constitution does not require this feature of the presidential election, but that the issue remains with state legislatures.

The NPV would effectively undo the spirit of the Electoral College, even though it would observe the letter of the Constitution, which leaves to the state

293. LONGLEY & PEIRCE, *supra* note **Error! Bookmark not defined.**, at 136.

legislatures the choice of electors. It would have the states coordinate their right to choose the electors by simultaneously replacing winner-take-all with the national majority rule. It would have a radical impact on presidential campaigns. Under the current rule, candidates have an incentive to win as many states as possible by 51 percent. Winning by larger margins suggests that a campaign spent too many resources that it could have better spent in a state where it lost by a close vote.[294] As a result, winner-take-all encourages candidates to widen their campaigns to many states, and to build national coalitions that may serve to moderate their positions.[295] They should spend little time in the friendliest and most hostile states and instead campaign hardest in the swing states that could go for either candidate. Thus, in the 2016 elections, Trump should have spent little time in Texas or California; he won because he received bare majorities in states that had gone for Obama four years earlier, such as Pennsylvania and Wisconsin.

NPV would have the reverse effect. It would encourage presidential candidates to campaign primarily in densely-populated cities and counties and to deepen their ideological commitment to the positions that most appeal to their voters. Candidates would seek to run up the highest totals possible in their

294. TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE 79 (2004).

295. BEST, *supra* note 54, at 66 (quoting JAMES MCGREGOR BURNS, THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA 251 (1963)).

ideologically compatible states and ignore regions where they might have to moderate their positions. Ironically, an NPV might produce the very result that led the Framers to reject direct popular election: candidates who championed different regions of the nation.

But the NPV suffers from a serious constitutional problem itself, because it only takes effect if a majority of states adopt the NPV rule—which may amount to an unconstitutional compact between the states that requires congressional approval. But putting this problem aside, the NPV would exacerbate, not alleviate, the problem posed by Trump's election. Trump is unusual because his populist movement found support in the states, rather than the nation as a whole. The nation as a whole, however, did not embrace Hillary Clinton's agenda, as it returned majorities for the Republican party in the House of Representatives, the Senate, and a majority of governorships and statehouses.

Nevertheless, our constitutional system relies upon the state structure to dissipate and ultimately defuse rash popular movements—just as it successfully did with the original Populist moment in the late 19th Century. Replacing one of the Constitution's elements of federalism might seem to respond to Trump's 2016 victory, but it would make the rise of a future demagogue far more likely. Under the NPV, a future populist need only appeal to urban

majorities to win the presidency. Overreaction to Trump could do far more long-term harm to the Constitution than Trump could ever do.