

## BEYOND SISYPHUS: SOME THOUGHTS ON ELECTORAL COLLEGE REFORM

*Jack N. Rakove\**

Concluding his definitive account of the numerous efforts that have been made to reform the Electoral College, Alexander Keyssar muses that “The history recounted here has a Sisyphean air.”<sup>1</sup> Many patient readers will readily agree. The rallying cry they want to hear may therefore not echo the charge of Shakespeare’s young Henry IV: “Once more unto the breach, dear friends, once more.” And yet:

But when the blast of war blows in our ears,  
Then imitate the action of the tiger.  
Stiffen the sinews, conjure up the blood,  
Disguise fair nature with hard-favoured rage . . . <sup>2</sup>

If one believes that Americans are engaged in a fateful struggle to preserve their democracy; that the sacking of the Capitol on January 6, 2021 was as great a threat to our national security as the terrorist assaults of September 11, 2001; and that one of our political parties has degenerated into an authoritarian cult driven by visions of racial superiority and conspiratorial fears that meet or exceed the themes of Richard Hofstadter’s famous essay on “The Paranoid Style in American Politics”<sup>3</sup>; then King Henry’s advice to gird our political loins “once more” should “summon up the blood”—or at least the political brain.

This essay, though written by a historian of the American Revolution and Constitution, will not dwell at length on the origins and early evolution of the presidential election system – subjects that its author has already examined

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\* William Robertson Coe Professor of History and American Studies and Professor of Political Science, Emeritus, Stanford University. The author is grateful to his old friend Alex Keyssar and his younger colleague Jonathan Gienapp for their valuable comments on this essay.

1 ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 374 (Harvard Univ. Press 2020).

2 WILLIAM SHAKESPEARE, HENRY V act 3, sc. 1, l. 5-8.

3 RICHARD HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS, AND OTHER ESSAYS (1965).

elsewhere.<sup>4</sup> An opening section will nonetheless summarize and stipulate key historical points essential to the overall argument. Two of these will be stated rather concisely; the third, which relates to early experiments in manipulating the rules for appointing electors, will be developed at somewhat greater length, in part because our fascination with the 1800 tie vote of running-mates Thomas Jefferson and Aaron Burr has led us to slight other developments of equal importance. The emphasis will then shift to the concerns, principles, and ideas that should guide or inform any effort to replace the existing state-based system of presidential elections with a National Popular Vote (NPV). This goal can be attained only through an Article V amendment, and not via the National Popular Vote Interstate Compact (NPVIC), which is a Rube Goldberg constitutional conjuring trick that is fatally flawed.

In pursuing this thesis, it is also helpful to move beyond some of the standard points that are made in supporting reform, less because they are wrong per se, but rather because they fall short of addressing more important concerns that go strangely unstated or neglected. There is no need, for example, to justify the fundamental principle of one person, one vote, because that is a defining norm of modern constitutional and democratic thinking. Nor need we agonize over the impact that “battleground states” have in fostering the psychological deprivation that voters in non-competitive states allegedly feel when campaigns ignore their mobilization. Living in a state where citizens are not subjected to an endless flow of campaign commercials would not number among the “long train of abuses” that John Locke and Thomas Jefferson would invoke to justify rebellion.

Three other issues are more important. First, in seeking to end a state-based system of presidential elections, one has to ask what relation this system has to the maintenance of the federal system. It would be a truism to say that this system obviously reflects the existence of the federal system, but that tells us nothing about what if any positive value it contributes to the preservation of federalism. James Madison made a tentative effort to address this problem in *Federalist* 39, when, with typical nuance, he patiently tried to identify the

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<sup>4</sup> See generally Jack N. Rakove, *The E-College in the E-Age*, in *THE UNFINISHED ELECTION OF 2000*, at 201-34 (Jack N. Rakove ed., 2001); Jack N. Rakove, *The Political Presidency: Discovery and Invention, in THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC* 30-58 (James Horn, Jan Lewis & Peter S. Onuf eds., 2002), a slightly revised version is in *THE UNPRECEDENTED AMERICAN PRESIDENCY: FROM CONSTITUTIONAL FOUNDATION TO CONTEMPORARY PRACTICE* 7-33 (Thomas Sanders ed., 2020).

mixed “federal” and “national” characteristics of the Constitution. “The executive power will be derived from a very compound source,” he observed.<sup>5</sup> Presuming, incorrectly, that “the immediate election” (meaning the selection of leading candidates) would be “made by the States in their political characters,” and the “eventual election” by the House of Representatives voting by delegations, Madison concluded that presidential election “appears to be of a mixed character, presenting at least as many *federal* as *national* features.”<sup>6</sup> Given that the elections of 1800-01 and 1824-25 were the only ones to be decided by the House, it seems safe to say, in Madisonian terms, that presidential elections remain inherently federal in nature. But that still begs the question, how important are they to maintaining our federal system?

Second, to answer this question, one needs to think seriously about the basis on which citizens cast their votes. It is unjust that presidential votes cast in California weigh far less than those cast in Wyoming, Idaho, or North Dakota, those rotten borough states that Republicans maneuvered to create in the late nineteenth century in order to maintain their control of the Senate.<sup>7</sup> The presidential votes we individually cast are not determined by our perceptions of the collective or aggregate good of the states in which we reside, but rather reflect our individual interests, political preferences, and markers of identity. The array of interests, preferences, and sources of identity that American voters possess are distributed in different proportions across the states, but all these variables operate nationally. They have no relation to the disparate weight voters enjoy by the accident of their residence in more or less populous states. The local communities where we reside are much better reflectors of our interests and preferences than the states which gave those communities their legal existence.

Third, instead of worrying about the impact of battleground states on campaigning, we should be more concerned with the delegitimization of presidential power that has developed over the past three decades, ever since Bill Clinton showed that the Republicans did not have a lock on the White House, a revelation that left the GOP in political dismay and intellectual disarray. There are multiple sources of this phenomenon that reflect the personal characteristics and political circumstances of individual presidents.

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<sup>5</sup> THE FEDERALIST NO. 39, at 255 (James Madison) (Jacob Ernest Cooke ed., 1961).

<sup>6</sup> *Id.*

<sup>7</sup> See Charles Stewart III & Barry R. Weingast, *Stacking the Senate, Changing the Nation: Republican Rotten Boroughs, Statehood Politics, and American Political Development*, 6 *STUD. IN AM. POL. DEV.* 223, 241-42 (1992).

But one source clearly arises from our tendency to view presidential elections as factious and fractious competitions between blocs of red and blue states. The NPV could ameliorate this legitimacy question, not only by avoiding potential divergences between popular and electoral vote winners—a threat that now seems to be waxing rather than waning—but also by creating a true national victor decided in accord with a simple principle of majority rule, with provisions either for run-offs (*a la mode française*) or ranked choice voting producing that result.

### I. SOME HISTORICAL STIPULATIONS AND PRESUMPTIONS

It is not uncommon, in scholarly analyses of the origins of our rules for presidential election, to encounter political and moral criticisms of the Framers of the Constitution. Their mistakes seem *so* obvious. They failed to foresee the imminent rise of national political parties, which their clumsy methods of presidential appointment inadvertently necessitated. By requiring each presidential elector to cast two undistinguished votes for president and vice president, they opened an avenue for exactly the kind of factional maneuvering they ostensibly wanted to avoid, as Alexander Hamilton, acting out of a deep dislike of John Adams, quickly realized. Rather than explicitly making the president the choice of a popular electorate, they defaulted decisions for determining how electors would be appointed to the state legislatures, which created a new field for factional maneuver. Worse still, by basing the allocation of electors among the states on their two “compromises” over congressional representation, the Framers arguably made the defense of chattel slavery a tacit or even overt purpose of the presidential election system. And because the formal alteration of this system would require an Article V alteration to the Constitution, would-be reformers would have to perform the Gordian task of unknotting its two daunting super-majoritarian rules for framing and ratifying amendments.

Against the severity of these scholarly decrees, the empathetic historian, groping to understand the issue as the Framers themselves perceived it, should apply the lesson that James Madison propounded in *Federalist* 37. In that perceptive meditation on the entire enterprise of constitution-making, Madison (or Publius) instructed his readers in the many difficulties that the Framers of the Constitution must have faced. “[M]any allowances ought to be made,” he observed, “for the difficulties inherent in the very nature of the undertaking referred to the convention.”<sup>8</sup> What example existed in the

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<sup>8</sup> THE FEDERALIST NO. 37, at 233 (James Madison) (Jacob Ernest Cooke ed., 1961).

historical record for the kind of deliberation the Convention had been conducting? Whatever lessons the Framers could have learned from reflecting on history would function only as “beacons, which give warning of the course to be shunned, without pointing out that which ought to be pursued.”<sup>9</sup> The most obvious source of relevant experience, Madison knew—because he himself had participated in it; indeed, it marked his own political debut—was the drafting of the first state constitutions in the mid-1770s. But recalling those events, Madison concluded that the first constitution-makers had been more concerned with recalling the evils the colonies had suffered under the *ancien régime* of imperial rule than with foreseeing the challenges they were now likely to face. And he also knew, as he explained in *Federalist* 49, that the circumstances of 1776 had been more propitious to producing consensus than the conditions that would ordinarily apply in later times.<sup>10</sup>

For want of a better term—or perhaps because this is indeed the best term—we can distill these lessons as the *cut them some slack* rule, vizt., before judging the Framers too severely for their errors of judgment and expectation, we need to begin by appreciating the problems they were facing. To no set of questions did this maxim apply better than to the construction of the executive. Ready lessons about bicameral legislation and an independent judiciary were there for the taking. But no model was available for the design of a national republican executive. The dominant conceptions

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<sup>9</sup> *Id.* It is worth noting that *Federalist* 37 serves as a second introduction to these “papers,” appearing as the opening essay in volume II of the McLean edition of 1788. Madison echoed *Federalist* 1 by advising readers of the difficulties they would encounter in trying to assess the claims and counterclaims of an impassioned debate. But he then goes beyond Alexander Hamilton’s concerns with political rhetoric to identify the substantive problems the constitution makers must have encountered.

<sup>10</sup> His observations on this point still seem to me to be well worth quoting: “Notwithstanding the success which has attended the revisions of our established forms of government, and which does so much honour to the virtue and intelligence of the people of America, it must be confessed, that the experiments are of too ticklish a nature to be unnecessarily multiplied. We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the antient government; and whilst no spirit of party, connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation. The future situations in which we must expect to be usually placed, do not present any equivalent security against the danger which is apprehended.” THE FEDERALIST NO. 49, at 340-41 (James Madison) (Jacob Ernest Cooke ed., 1961). The first sentence of this passage provides the title for my next book, THE TICKLISH EXPERIMENT: A POLITICAL HISTORY OF THE CONSTITUTION, 1789-2021, which I hope will appear while we still have a constitutional republic.

of executive power in the late eighteenth century were either monarchical or ministerial in nature, and the American revolutionaries and republican constitutionalists of 1776 had rejected both. In the decade since then, some of the concerns and biases that shaped the construction of the governorships of the states had shifted. Indeed, the second generation of constitution making that began in New York in 1777 and continued in Massachusetts in 1779-80 brought some intriguing innovations, notably including the restoration of an executive veto over legislation, election by the people rather than the legislature, and in New York, a gubernatorial tenure of three years along with eligibility for reelection. But even then, what appeared feasible at the state level could still be deemed problematic with a national office.

A second stipulation relates to the level of confidence (or one could just as easily say diffidence) that the Framers vested in their design of the presidential election system. It would be ludicrous to claim that they forged a good working understanding of how this system would operate. The Framers took their crucial decisions on presidential elections during their final fortnight of deliberation. Even then it took three days of discussion to stumble on the rules for the contingent election of a president for those occasions—in some delegates' views, a potential majority of future elections—when electors would not deliver a majority for any one candidate. Throughout the various phases of this debate, the decisive considerations never involved the perceived *advantages* of the three rival modes of appointment—by the people, by the legislature, or by state-appointed electors—but rather their relative *disadvantages*, the fatal objections against the first two alternatives, which made the last method the ultimate winner.

What were those objections? In the case of a popular election, the main qualm was that ordinary voters in a highly decentralized polity like the United States would act on provincial biases and collectively fail to produce an adequate national plurality or majority to render a decisive judgment. It would be difficult to identify truly national *characters* as effective contenders. An election by Congress would solve that information problem; by definition, its members would be the nation's true political elite and the best-informed participants for this purpose. That is why, for most of their deliberations, the Framers kept reverting to legislative election as the optimal alternative. But that mechanism, too, had a fatal flaw, *if* one wished to make the executive as politically independent of other branches as possible *and* to make the promise of reelection the strongest incentive to statesmanlike leadership. A serving president who merited reelection on the basis of a record of accomplishment could still become the tool or lackey of a dominant party or faction in

Congress. The idea of entrusting at least the first round of the presidential appointment system to a select group of citizen-electors became, almost by default, the solution to these objections. Even then the Framers lacked either the time or the imagination to define who these electors would be. In an earlier discussion of the idea, Hugh Williamson of North Carolina had scoffed that “The proposed Electors would certainly not be men of the 1st. nor even of the 2d. grade in the States.”<sup>11</sup> In theory, the Convention could have set some criteria of experience as qualifications for electors. Instead, it defaulted all the relevant decisions to the state legislatures, leaving ample room for the states to decide not only who would serve but how they would be appointed.

The dialectical corollary to the *cut them some slack* rule therefore holds, first, that it is wholly permissible to fault the presidential election system on the basis of evidence of its manifest failings and potential dangers, and second, that one can level this criticism without blaming the Framers for mistakes they did not consciously commit.

A third set of historically grounded presumptions and stipulations relates to the critical innovations that occurred once presidential elections became competitive. So long as George Washington wanted to hold the office, it did not really matter what the rules for presidential appointment were, because one would always attain the same result. Once he decided that he was finally free to return to Mount Vernon, the newly formed Republican and Federalist parties were liberated to learn how the electoral system would actually work. Two lessons could have been (and perhaps were) drawn almost immediately. First, had a popular election been held in 1796, it would have produced a decisive result. There were two preeminent candidates, John Adams and Thomas Jefferson, who were already national “characters” and not merely provincial favorite sons. Second, there were two political parties that were also ready to campaign nationally, even though Washington delayed announcing his retirement as long as he could in order to disadvantage the Republicans. And one significant part of campaigning involved ensuring that the rival slates of presidential electors were composed of party loyalists. The one variable in this system rested on Hamilton’s aversion to Adams and his efforts to use the backdoor manipulation of Federalist electors’ second vote to promote an alternative candidate. But whether Federalist electors were amenable to this ploy or opposed to Hamilton’s maneuver, they were still acting as party loyalists, not the independent and politically

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<sup>11</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 100 (Max Farrand ed., 1911).

knowledgeable citizens whom the Framers—at least in their more optimistic or naïve moments—imagined.

The great moral of 1796, then, was that the original intentions and suppositions of 1787 would hardly constrain the political calculations of the two national parties. But that was not the only political lesson to draw. The first contested presidential election of 1796 demonstrated that the vote of the presidential electors could indeed be decisive, without a contingent election in the House of Representatives. With that political discovery, the tactical question of the mode for appointing electors that the Framers had defaulted to the state legislatures suddenly acquired a new urgency, especially if one felt, as many active participants did, that the fate of the republic was riding on the outcome. Although individual presidential candidates would not campaign in any active sense, the parties they represented could still think and act strategically, not only about the manipulation of each elector's two votes, but also about deciding which mode of appointing electors would prove most productive.

Any shrewd observer could draw the key lesson. In 1796, John Adams defeated Jefferson by three electoral votes, 71-68. A swing of two votes would thus have made Jefferson president and Adams the only three-term vice president in American history—an honor he likely would have renounced. Those votes had been there for the taking. Virginia and North Carolina were solidly Republican states, but each had used a district system to appoint electors, and Federalists had captured one district in each state. Had their Republican-controlled legislatures adopted a winner-take-all statewide rule, known as the “general ticket” or “unit” rule, Jefferson could have carried the election, 70-69, allowing his Jacobin supporters (as the ostensibly monarchist Federalists viewed them) to gain control of American foreign policy.

The initiative in launching the active manipulation of the electoral rules evidently came from Charles Pinckney of South Carolina, who had also represented his state at the Federal Convention. In September 1799, Pinckney wrote Madison, urging him to mobilize “all your Friends in the *republican interest* in the state Legislature” to replace the district system Virginia had previously used with a legislative appointment of electors. “The Constitution of the United States fully warrants it[.]” Pinckney observed, “& remember that Every thing Depends upon it[.]”<sup>12</sup> The idea that election by

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<sup>12</sup> Letter from Charles Pinckney to James Madison (Sept. 30, 1799), in 17 THE PAPERS OF JAMES MADISON, CONGRESSIONAL SERIES 272 (J. C. A. Stagg ed., 2010) (reiterating a similar request made in a prior letter; see Letter from Charles Pinckney to James Madison (May 16, 1799), in 17 THE PAPERS OF JAMES MADISON, CONGRESSIONAL SERIES 250 (J. C. A. Stagg ed., 2010)).



districts remained the best principle still had its adherents, Vice President Jefferson among them. In a lengthy letter he wrote to James Monroe early in the new year, Jefferson explained the new electoral logic in remarkable detail. “[A]ll agree that an election by districts would be best if it could be general [that is, national][,]” he wrote; “but while 10 states chuse either by their legislatures or by a general ticket, it is folly & worse than folly for the other 6 not to do it.”<sup>13</sup> Jefferson went on to explore the national inequity in having multiple systems of appointing presidential electors. “[I]n these 10 states the minority is entirely unrepresented[,]” he reasoned, anticipating the problem we now describe as the “wasting” of minority party votes.<sup>14</sup> A district system remained, on principle, the superior option:

being more chequered [a wonderful image to evoke here!], & representing the people in smaller sections, [it] would be more likely to be an exact representation of their diversified sentiments[,] but a representation of a part [of the nation] by great & a part by small sections, would give a result very different from what would be the sentiment of the whole people of the US. were they assembled together.<sup>15</sup>

From this general assessment of the political illogic of having two or more systems for the appointment of electors, Jefferson went on to describe a conversation he had just had with his running mate, Aaron Burr (113 in Jefferson’s code), “who has taken a flying trip here from N.Y.”<sup>16</sup> Assessing the spring elections to the state legislature, Burr predicted that the Republicans would carry the New York City seats in the lower house and also cut the Federalist advantage in the state senate by half, which would create “the best prospect possible of a great & decided majority on a joint vote of the two houses. [T]hey are so confident of this that the Republican party there will not consent to elect either by districts or a general ticket.”<sup>17</sup> In fact, that prediction proved incorrect: New York Republicans did push a bill for district elections, but Federalists held the line for a legislative appointment.

When Jefferson had been the Republican standard-bearer in 1796, he had remained splendidly isolated, politically as well as physically, at

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<sup>13</sup> Letter from Thomas Jefferson to James Monroe (Jan. 12, 1800), in 31 THE PAPERS OF THOMAS JEFFERSON 300-01 (Barbara B. Oberg ed., 2004).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* Presumably 113’s “flying trip” did not involve Trump Airlines, even though the former president has reminded us that the American revolutionaries recaptured the airports from the British.

<sup>17</sup> *Id.*

Monticello. His involvement in the 1800 campaign was far more intense, as this letter shows. Even with his endorsement and Madison's oversight at Richmond, the plan for a "general ticket" required a serious struggle. It was "so novel" an idea, Madison wrote Jefferson, "that a great no[sic] who wished it, shrunk from the vote, and others apprehending that their Const[ituen]ts[sic] would be still more startled at it voted ag[ain]st it; so that it passed by a majority of 5 votes only."<sup>18</sup> Though "[t]he event" still seemed "rather doubtful[.]" Madison predicted it would pass the state senate.<sup>19</sup> Once enacted, he thought, "it will with proper explanations become popular" because its "avowed object" was "to give Virga[sic] *fair play*["<sup>20</sup> The "general ticket" bill made one helpful concession, James Barbour informed Jefferson: it "preserved the principle of Districting" by requiring one elector from each district.<sup>21</sup> To ensure that this system worked as intended, Republican legislators also "adopted a general system of correspondence through the state" by creating five-member committees in every county "to repel every effort which may be made to injure either the ticket in genl. or to remove any prejudice which may be attempted to be raised against any person on that ticket."<sup>22</sup>

The shift in Virginia election law soon triggered developments elsewhere. Massachusetts had used the district system in previous elections, but because there were pockets of Republican strength in the Bay State, Federalists worried they might lose a handful of electoral votes there, and the General Court decided to reclaim the appointment of electors for itself. But the most important developments occurred in New York, and more specifically New York City, where Burr and Hamilton led the fierce campaigning in the legislative elections that took place between April 29 and May 1. These elections were effectively nationalized: that is, voters knew their state's votes could well decide the presidential election, and that the question of *how* these votes would be cast remained subject to legislative action. Once the Republican victory that Burr had predicted and worked so hard to attain was confirmed, despairing Federalists wondered what more they could do. The short answer, Hamilton concluded, was for Governor John Jay to call the

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<sup>18</sup> Letter from James Madison to Thomas Jefferson (Jan. 18, 1800), in 31 THE PAPERS OF THOMAS JEFFERSON 319 (Barbara B. Oberg ed., 2004).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Letter from James Barbour to Thomas Jefferson (Jan. 20, 1800), in 31 THE PAPERS OF THOMAS JEFFERSON 326 (Barbara B. Oberg ed., 2004).

<sup>22</sup> Letter from Philip N. Nicholas to Thomas Jefferson (Feb. 2, 1800), in 31 THE PAPERS OF JEFFERSON 356 (Barbara B. Oberg ed., 2004).

outgoing legislature back into special session to replace the legislative mode of choosing electors with a district mode that would allow the Federalists to harvest a few votes. Jay was a faithful Federalist, but his notions of partisanship were less strident than Hamilton. He never answered Hamilton's letter (at least in writing; surely they must have discussed it in person) but simply docketed it with this disdainful comment: "Proposing a measure for party purposes wh. I think it wd. not become me to adopt."<sup>23</sup>

Events in two other states also merit mention: neighboring Maryland and Pennsylvania. In 1796, Maryland had used a district system to appoint electors, but Maryland Federalists, believing that the fate of the election (and thus the republic) could pivot on the state's decision, concluded that the state should now shift to legislative appointment. That proposal dominated the energetic political campaigning that preceded the state legislative elections set for October, with rival candidates appearing to debate wherever "there is known to be a great concourse of people, at a horse race, a cock-fight, or a Methodist quarterly meeting."<sup>24</sup> These debates about a state office focused on the national political campaign and the Federalist proposal, to that party's net disadvantage. The intense criticism of the idea of legislative election compelled Federalists to promise that they would adopt this method for this election only, allowing the state to revert to district voting once the danger of a Jacobin presidency was averted. In the end, the Republicans did well enough to prevent the legislature from revising the practice, and Adams and Jefferson split the state's ten electoral districts equally.

The situation in Pennsylvania was stranger still. Here there was an excellent chance that the state would simply sit the election out. Because the prior statute governing appointment of electors had lapsed, the state assembly to be elected in mid-October would need to adopt a new law. Although the Pennsylvania electorate was solidly Republican, Federalists controlled the state senate, and only a third of its seats were up for election. Even though Republicans won six of these seven seats, the Federalists

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<sup>23</sup> On these political developments, see EDWARD LARSON, *A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN* 67-86 (2007), although I disagree with the subtitle in terms of its slighting of 1796 and its failure to recognize that it was really the election of 1800-01. *See also* Letter from Alexander Hamilton to John Jay (May 7, 1800), *in* 24 *THE PAPERS OF HAMILTON* 464, 467 (Harold C. Syrett ed., 1990).

<sup>24</sup> *See* LARSON, *supra* note 24, at 185. As Larson notes, "these debates showed just how universal the campaign themes had become. Despite the lack of mass media and national party organizations, virtually the same partisan messages reached citizens everywhere." *Id.* at 186; *see also* NOBLE CUNNINGHAM, JR., *THE JEFFERSONIAN REPUBLICANS: THE FORMATION OF PARTY ORGANIZATION, 1789-1801*, at 189-90 (1957).

retained a one-vote majority in the senate, and with it the capacity to paralyze the state's participation in the presidential election. Once the legislature met in special session, the Federalist senators intractably held their ground. In the end, the two parties brokered an agreement giving Jefferson and Burr each eight electoral votes, Adams and his running mate General Charles Cotesworth Pinckney seven.<sup>25</sup> This division badly understated Republican strength in the state's electorate, but at least it favored the stronger ticket.

The outcome was thus left to South Carolina, the last state to appoint its electors in the complicated election calendars of the sixteen states in the Union. In the wake of Hamilton's public efforts to persuade Federalist electors to support General Pinckney and abandon Adams, it was possible that the state's eight electors, appointed by the legislature, would favor a regional ticket of Pinckney and Jefferson. But Pinckney (perhaps showing a sense of honor that eluded Burr) refused to pursue this electoral ploy, and Republicans legislators held together to ensure that eight electors pledged to Jefferson and Burr would speak for the state. Ideally, at this culminating point in the distended electoral process, one or two Carolina electors should have thrown their votes away from Burr, thereby avoiding the tie for which the 1800 election remains most famous. But highly disciplined as they were, the Republican electors voted as a bloc, guaranteeing that the election would extend into the new year (which is why we should properly call it the 1800-01 election).

There is no need here to rehearse the political dynamics that finally led, with Hamilton's assistance, to Jefferson's election on the thirty-sixth House ballot. Many historians have told that great story, which set the necessary prelude to the adoption of the Twelfth Amendment, requiring electors to cast distinct votes for president and vice-president. In some analyses, this amendment provided a strong constitutional incentive for the consolidation of national political parties, precluding the kind of intra-party maneuvering that Hamilton had deployed against Adams, or the treacherous defection Burr countenanced against Jefferson, while also preventing the anomalous result of 1796, which made the rival opponents president and vice president.<sup>26</sup> Perhaps a constitutional amendment was necessary to attain these results, though one could also argue that the Jefferson-Burr tie of 1800

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<sup>25</sup> General Pinckney should not be confused with his first cousin, the other Charles Pinckney, who led the Republican party in the state.

<sup>26</sup> See, e.g., BRUCE A. ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 203-06 (2005).

was a mere political glitch that better coordination in the future would prevent.

The deeper lesson of the nation's fourth presidential election lay elsewhere. As Keyssar neatly summarizes it: "The constitutional design that permitted states to vary their methods of choosing electors had transformed the long electoral campaign into a procedural free-for-all—with changes made for largely partisan reasons and the people excluded from direct participation in nearly two-thirds of the states."<sup>27</sup> At the same time, the undistinguished dual votes the electors cast "had given rise to endless scheming, and the presidential electors themselves played no constructive role, casting their ballots without even pretending to deliberate."<sup>28</sup> Viewing the federal election system as a whole, one could plausibly argue that it was conceptually incoherent and even self-contradictory. Its dominant incentive was to invite state legislatures to alter the rules of election to meet the perceived partisan needs of the moment—and even admit, as the Maryland Federalists conceded, that the changes a party felt compelled to make in this election in order to defeat a Jacobin atheist would be undone the next time around.

The partisan manipulation of electoral rules is relevant to assessing other interpretations of this election. It is often alleged that the underlying source of the Republican victory in 1800 lay in the Three-Fifths Clause, which had been consciously designed in 1787 as one more protection for chattel slavery. The problem with this argument is that it holds steady every other condition relating to the appointment of electors when those conditions themselves were subject to substantial manipulation. In the "procedural free-for-all" of 1800, there was no national norm of how presidents were to be elected, so singling out one factor as being decisive when the entire system was in flux imposes an arbitrary constraint on the analysis. Moreover, if one poses the problem under a completely democratic rubric, asking which candidate or party did the popular electorate truly favor, there is no question that 1800 was a stunning Republican victory.

The best, arguably decisive proof for this proposition lies in comparing the results for the House of Representatives with those for the appointment of electors. In 1800, the Republicans gained twenty-two seats in the House, converting a 60-46 Federalist advantage in the Sixth Congress into a 68-38 Republican superiority in the Seventh. In Massachusetts, the electors

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<sup>27</sup> KEYSSAR, *supra* note 1, at 41.

<sup>28</sup> *Id.*

appointed by the General Court cast the state's sixteen votes for Adams, but the two parties evenly split the commonwealth's fourteen seats in the House. In New Jersey, contrary to Burr's prediction, the Federalist legislature appointed seven electors, but the Republicans captured all five House seats. Rhode Island produced a similar result: the assembly selected four Federalist electors, but the Republicans took the state's two congressional districts. And in Pennsylvania, the brokered 8-7 division of the commonwealth's fifteen electors fell short of the Republicans' 10-3 superiority in the House.

In the end, of course, we still celebrate the 1800-01 presidential election as the first peaceful transfer of power between two parties whose ideological aversions and animosities against each other ran quite deep—so much so that our standard civil libertarian criticism of the Alien and Sedition Acts of 1798 may need to take into account how much both parties believed that their opponent really were acting seditiously.<sup>29</sup> Still, the precedent for the peaceful transfer of power set in 1801 became an axiom of American politics until the last presidential election, when the degeneration of the Republican party into an authoritarian cult led to the January 6, 2021 assault on the Capitol and an effort to prevent the constitutional certification of the electoral vote. We now have ample reason to worry that the partisan manipulation of presidential electoral procedures pioneered in 1800 will be revived in 2024 and persist into future elections.

As it happened, the 1800-01 election marked the high point of overt partisan manipulation of the rules for appointing electors. A second round of intense manipulation did occur in 1812, with dramatic and hotly disputed rule changes taking place in North Carolina, Massachusetts, and (Keyssar observes) “[m]ost dramatically” in New Jersey, where the legislature reasserted its power to appoint electors only days before the people were set to choose them.<sup>30</sup> But with the conclusion of the War of 1812, the Republicans consolidated their commanding presence in the national body politic. Although Federalists had occasional chances to revive their waning fortunes, the dominant party of the 1790s was doomed to wither away. A second contingent election by the House of Representatives occurred in the “five-horse race” of 1824, when the Republican coalition devolved into

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<sup>29</sup> See generally WENDELL BIRD, CRIMINAL DISSENT: PROSECUTIONS UNDER THE ALIEN AND SEDITION ACTS OF 1798 (2020) (demonstrating the extensiveness of such prosecutions).

<sup>30</sup> KEYSSAR, *supra* note 1, at 66. The 1812 Massachusetts election also produced the birth of the gerrymander, which should properly be pronounced with a long g, not a putative j sound. I can testify to this important annunciatory fact on the basis of once having taught a namesake descendant of James Madison's second vice president.

partisan factions grouped around a new generation of prominent politicians. In a curious sense, the circumstances in 1824 resembled the factional politics of eighteenth-century Britain—especially the instability of the 1760s—and thus better illustrate how the Framers of the Constitution, on their better days, imagined the process of presidential selection, especially when no incumbent was in the running.

Meanwhile, support for further alterations to the presidential election system continued to be expressed. In the discussions leading to the Twelfth Amendment, several states and some members of Congress favored requiring the states to create districts for the popular choice of electors. That provision did not become part of the amendment, and in retrospect the Republican failure on this point during Jefferson's first term forfeited the nation's best opportunity to correct the defects in the original constitutional design.<sup>31</sup> As the more democratic of the two political parties, Republicans generally supported the idea of district elections in principle, but their commanding position in national politics diluted their initial enthusiasm. Congressional hearings on suitable amendments continued to be held in the 1810s and 1820s, but as Keyssar demonstrates with his Sisyphean endurance, the necessary super-majorities within both houses of Congress were never attained (though success was nearly in reach). Instead, the states gradually moved toward making the "general ticket" or "unit" rule the equilibrium for presidential elections, empowering popular majorities (or occasionally pluralities) in each state to give all its electors to one candidate.<sup>32</sup> One could agree, with Edward B. Foley, that the shift toward this equilibrium undermined another crucial element in the Jeffersonian consensus of presidential election reform: the belief that a presidential victory should require a "federal conception of a compound majority-of-majorities[.]" meaning a national majority of electors formed by a coalition of states where the victorious candidate gained majority rather than mere plurality support.<sup>33</sup> But a new electoral equilibrium soon existed.

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<sup>31</sup> KEYSSAR, *supra* note 1, at 53-54.

<sup>32</sup> *Id.* at 78-85.

<sup>33</sup> EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 37 (2020). I find Foley's argument intriguing but unpersuasive. See my review in 18 PERSPECTIVES ON POLITICS 1216, 1216-17 (2020). To my skeptical way of thinking, if, in closely contested elections, individual voters prefer 3<sup>rd</sup> or n<sup>th</sup> party candidates, who cares about their 2<sup>nd</sup> or n<sup>th</sup>-ranked choices? They are making a conscious decision to cast a vote that is more symbolic than effectual. We can respect their choice while deprecating and disparaging their judgment. Let the *nudnik* vote follow its own karma.

No doubt lessons can be learned from the failure of the efforts at further reform that began in the 1810s and 1820s and arguably reached their dramatic crescendo in 1969-70 (though that was not the final modern episode). It is well worth noting, for example, that the factors that mattered most in frustrating the serious reform effort then led by Senator Birch Bayh had less to do with the putative opposition of the least populous states—like the rotten boroughs of the mountain West, to mangle a political metaphor—than with the desire of southern segregationist senators to doom any campaign that they feared would enhance the influence and power of African Americans. But the deeper lessons that need considering pivot on other, arguably even more fundamental points, which do not involve relegating the importance of racial and racist attitudes in American history but rather understanding how they are only one (though arguably a primary or even supreme) example of underlying elements of our constitutional system that we generally ignore or fail to perceive. To these we now turn.

## II. THE SOLE ROAD TO REFORM

The effort to replace the Electoral College system with a national popular vote (NPV) can follow only two possible paths. One involves an Article V amendment, which requires meeting the super-majoritarian rules for proposing and ratifying formal changes to the Constitution. The other presumes that because these conditions are unattainable, a more ingenious strategy is needed. One such strategy is evident in the National Popular Vote Interstate Compact (NPVIC), an agreement to bind a coalition of states casting at least a simple majority of 270 electoral votes to pledge their electors to the candidate who wins the national popular vote. Under this scheme it would not matter how well a candidate performed within the electors' own state; a winning candidate might prove wholly uncompetitive in California yet still count the state's 54 electors in his or her column. The 270 votes required to carry a presidential election falls well below the number of congressional votes and state ratifications needed to satisfy Article V. Daunting as the Constitution's super-majoritarian rules are, the NPVIC seemingly offers an ingenious path to circumvent them.

But would the adoption of the NPVIC by a requisite number of states still satisfy the Constitution? The claim that it would do so rests on the potent presumption that the state legislatures possess plenary power over the appointment of electors. If the legislatures remain free to determine whether they will abide by the equilibrium of the general ticket rule or follow the isolated commitment of Maine and Nebraska to a district rule fused with the



state popular vote winner, why are they not also free to command their electors to cast their votes for the most popular national candidate, and to replace “faithless electors” who naively prefer the preferences of their constituents over the aggregate wisdom of a national electorate? Consider, for example, the fuss that would arise in California—a state that has approved the NPVIC—in 2024 or 2028 should a Democratic ticket headed by Kamala Harris lose the national popular vote to a Republican ticket led by Ted Cruz, whom the state’s electors would still be legally obliged to support. One shudders at the thought (and not only because Cruz seems to be so reprehensible a human being). But more to the point, one shudders even more at the flood of litigation that would ensue when majority voters within such states would claim that the legislature, however potent its authority might be under Article II, Section 1, had no plenary right to force *their* electors to vote for others’ preferred candidate.

The fatal constitutional flaw of the NPVIC, however, lies elsewhere. Whatever plenary authority the separate state legislatures may enjoy—and this would be subject to sustained challenge—the success of the entire scheme depends on the conscious collaboration of the participating states which must be secured through an interstate compact determining its working rules. Yet the efforts to explain how such a compact escapes congressional scrutiny under the Interstate Compact Clause of Article I, Section 10, which says that “No state shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State,”<sup>34</sup> seem far from satisfactory, much less persuasive. The idea that some members of Congress would not pursue this objection should the NPVIC ever be on the verge of implementation seems, in a word, unbelievable. And once the Interstate Compact Clause is invoked to challenge the legitimacy of the NPVIC, as it inevitably would be, it becomes equally plausible that objections based on Article V would be deployed just as quickly.

Some commentators, as well as its avowed advocates, have argued that the judicially dominant views of the Interstate Compact Clause do not in fact pose a serious obstacle to the NPVIC. That is, for example, what Michael T. Morley concludes in a searching review of “the constitutional infirmities” of the NPVIC. Invoking criteria laid down in other related cases, notably including *U.S. Steel v. Multistate Tax Commission*, Morley concludes that “Under the Court’s longstanding interpretation of the Clause, however,

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<sup>34</sup> U.S. CONST. art. I, § 10, cl. 3.

congressional approval is likely unnecessary.”<sup>35</sup> Compact Clause doctrine is sufficiently robust and authoritative, he suggests, as to incline the Supreme Court to accept its application to this case.

To this assurance, however, one can adduce two significant objections, one legal, the other political. Any case involving the NPVIC would be *sui generis*, transparently easy to distinguish from every other past controversy over the Compact Clause. All we would be talking about, after all, is the election of the single most important official in the national government and the development of a mechanism conceived with Rube Goldberg ingenuity to circumvent, evade, and arguably sap the authority of the Constitution. Nothing to look at here, Mister or Madam Justice: *U.S. Steel* clearly had just this situation in mind. To suppose that existing doctrine captures this case is a *reductio ad absurdum constitutionalis*.

Second, on the political side of the equation, let us make a wild leap and try to imagine that the members of the Supreme Court would ignore all of their political preferences, disdain any reckoning with the likely outcomes of the NPVIC, or forget that Republicans have carried the popular vote in only one of the last eight presidential elections. Again, what did *Bush v. Gore* reveal if it did not prove that the Justices will scrupulously follow an objective constitutional logic wherever it carries them, oblivious to political consequences. On the other hand (bear with me here), there might still be an outside chance that the Court would decide that a change of this constitutional magnitude, with potentially adverse consequences for Republicans, cannot be accomplished by an interstate compact driven largely or perhaps even solely by Democratic states.<sup>36</sup>

One, therefore, need not be a hyper-formalist or hyper-textualist to conclude that the Constitution presents a crippling hurdle to the ostensible ingenuity of the NPVIC. But the deeper constitutional argument against the NPVIC transcends the relevant clauses of the text. Beyond the question of constitutionality lies a parallel argument about political legitimacy. The presidency is by far the most important office in the American political system. Altering its mode of selection through a fanciful device like the NPVIC could never provide the legitimacy such a major reform would require for it to gain the essential popular acceptance and support that the preservation of the Republic and the Union would demand, and all the more

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<sup>35</sup> Michael T. Morley, *The Framers' Inadvertent Gift: The Electoral College and the Constitutional Infirmities of the National Popular Vote Compact*, 15 HARV. L. & POL'Y REV. 81, 100-06 (2020); *U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452, 473-74 (1978).

<sup>36</sup> All of the sixteen who have approved the compact thus far vote Democratic.

so at this parlous moment in our history when we face disturbing questions about the durability of both. Coupled with the partisan calculations that are giving state legislatures new incentives to meddle with their voting systems in complicated, devious, and self-aggrandizing ways, the adoption of the NPVIC by an adequate number of states would compound and arguably even nationalize the poisonous distrust of the election system that now permeates the Republican party.

If these concerns and considerations ring true, the idea that the NPVIC provides an adequate solution to the constitutional problem of presidential elections seems absurd. The only acceptable mechanism to replace the current presidential election system with an NPV requires an Article V amendment. There is no other way. Asking what new arguments would better sustain that project remains the challenge the rest of this essay will pursue.

### III. A TROIKA OF ELECTORAL FALLACIES

One might think, in this Sisyphean endeavor, that everything that can possibly be said for and against Electoral College system has already been stated, and that there is nothing new left to say. Or, following Qohelet, the Hebrew author better known from the Septuagint as Ecclesiastes, this essay should have been entitled, “Vanity of Vanities, or, the Folly of the NPVIC and Every Other Scheme of Electoral College Reform.” But in place of folly, it might be more appropriate for the sober scholar to discuss several fallacies that inform and distort our understanding of how the presidential election system operates, in the doubtless naïve hope that their elucidation can clarify some future debate. In pursuing these points, we will move beyond the familiar contrast between the weight of individual presidential votes cast in Wyoming and California or between the divergent lifestyles of inhabitants of battleground and safe states. The aim instead is to examine other aspects of the presidential election system that do not receive the attention they deserve.

Three fallacies merit discussion: one relating to arguments about federalism, a second to how voters define their interests and preferences in presidential elections, and the third to the supposition that the victor in a multi-state (as opposed to a merely popular) election gains a greater degree of legitimacy for his ensuing administration.

In multiple obvious ways the presidential election system fully reflects the existence of the American federal system. The states determine how presidential electors are appointed and the rules and constraints under which

they act. Political strategy pivots on identifying a minority of competitive states and then devoting the vast bulk of a campaign's resources to conquering these battlegrounds. Victory depends on gaining a simple majority of 270 electors or more by carrying the right number of states. Should the electors not produce a majority, as they uniquely failed to do in the five-horse race of 1824, the contingent election goes to the House of Representatives, voting by states. All these factors allow the presidential election system to fall tidily within the "partly federal, partly national" framework of *Federalist* 39, which is exactly how James Madison described it, as an institution "of a mixed character, presenting at least as many *federal* as *national* features."<sup>37</sup>

Yet it is one thing to acknowledge that the presidential election system *reflects* the existence of a federal system, and another to explain exactly what it *contributes* to its existence and operations. The federalism argument in favor of the Electoral College presumes that the role that the states play in the conduct of presidential elections is essential to the preservation of American federalism and, conversely, that its replacement by the NPV would impose some harm on that system of governance. This argument for federalism, however, does not depend on asking what impact, if any, the structure of presidential elections has on the distribution of governing authority between the nation and the states, which is arguably the most important dimension of explaining how any federal system functions. Historians and political scientists can easily describe how individual elections (1860, 1912, 1932, 1964, 1980) have had a measurable impact on the process of American state-building. But that is much more a form of *histoire événementielle* that the *longue durée* approach this argument would seemingly require.<sup>38</sup> It tells us why particular elections mattered in terms of the political outcomes they rendered, but not how or why the structure of presidential elections has affected the federal system.

Of course, the presidential elections that matter most are those that simultaneously create effective working majorities in both Congress as well. But that consideration identifies another weakness in the federalism argument. Which of these elections matters more for asserting the interests

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<sup>37</sup> See Derek T. Muller, *The Electoral College and the Federal Popular Vote*, 15 HARV. L. & POL'Y REV. 129, 130-31 (2020) (quoting THE FEDERALIST NO. 39, at 255 (James Madison) (Jacob E. E. Cooke ed., 2010)).

<sup>38</sup> I allude here to the notions of historical time deployed by FERNAND BRAUDEL, *THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILIP II* (1972), and usefully criticized by Bernard Bailyn, *Braudel's Geohistory—A Reconsideration*, 11 J. ECON. HIST. 277 (1951).

and concerns of state and local governments and their constituencies: those that select the members of both houses of Congress or those that choose the president? In structural terms, the territorial basis of representation in Congress is far more supportive of federalism than anything the presidential election scheme can contribute. The dominant incentive of presidential candidates is to tailor their appeals to the critical interests of battleground states, but again that is more a matter of political strategy than a commitment to federalism.

In the end, the ostensible argument that a state-based system of presidential elections is tied to the vitality of federalism devolves into a very different claim: that it is essential not to preserve the structure of federal governance but rather to protect the vital interests of less populous states or communities, which will be adversely affected by the fact that they are, well, less populous—that they will be outnumbered by all those metropolitan areas where candidates will naturally prefer to hang out. The small states would be injured or simply ignored because they are members of a minority; or conversely, they should be favored or compensated (through the impact of the “senatorial bump” on the allocation of electors) precisely for that same reason. But this plaint, the source of our second fallacy, rests upon profound misconceptions about the nature of our political and civic interests.

Assume, then, that the principle of one person, one vote—a dominant norm in modern democratic discourse—should apply to presidential elections as it should apply to all others. The constructive fiction embodied in the Electoral College system is that size itself (here meaning the populousness of a state, not its square mileage) constitutes an interest deserving protection. But that presumption is obviously, patently, manifestly, transparently, self-evidently, and flagrantly false, falsifiable, and fallacious.<sup>39</sup> No one ever votes on the basis of the populousness of his or her state; no one ever asks, what is good for the large states or the small states. The political interests that citizens possess and upon which they act are not defined by the size of the states where they vote. They are instead affected and influenced by the nature of the communities wherein they reside and more directly by the markers of their social, cultural, and economic identity (or identities) that each of us possesses individually and carries with us as we migrate. To offer one trivial but irrefutable example: a resident of Texarkana will not change his or her presidential vote when moving from the eastern,

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<sup>39</sup> Here, I tacitly follow John Adams’ rules for good writing, which pivot on the supposition, why use one word when six will do just as well?

Arkansas part of town to its western, Texas side, even though that migration involves leaving the seventeenth smallest presidential constituency for the second most populous (and physically second largest) state in the Union.

Informed readers should suspect, nay understand, that this analysis (coming from this author) is inherently Madisonian in nature. It draws its authority from the Ur-text (or one Ur-text) of American constitutional theory: the discussion of faction in *Federalist* 10. Let us calmly and patiently explain why this text is relevant to the case, even though it says nothing at all about presidential elections. *Federalist* 10 famously argued that the American republic could not depend for its survival on the self-denying virtue of its citizens. The sources of faction—that is, the various impulses that animate observable political behavior—were, Madison declaimed, “sown in the nature of man.”<sup>40</sup> In place of the stale categories of “mixed government,” which imagined a society composed either of monarchy, aristocracy, and the people, or more neutrally, of the one, the few and the many; or the formal notion of a confederation uniting a corpus of autonomous jurisdictions, each claiming partial sovereignty, Madison substituted, in a remarkably concise paragraph, a realistic, complex, and modern sociology of a living and mutable political community, inhabited by individuals and groups acting on the basis of opinions, passions, and interests.

“The most common and durable source of factions,” Madison observed, lay in “the various and unequal distribution of property,” which in turn was derived from at least reflected “[t]he diversity in the faculties of men from which the rights of property originate.”<sup>41</sup> This is the observation that has dominated American constitutional theory ever since Charles A. Beard gave it pride of place in his *Economic Interpretation of the Constitution of the United States* (1913). But as influential as that point proved, it did not exhaust Madison’s framework of analysis. “A zeal for different opinions concerning religion, concerning government, and many other points” also mattered.<sup>42</sup> So did “an attachment to different leaders ambitiously contending for pre-eminence and power.”<sup>43</sup> Opinions, passions, and interests were not hermetically isolated categories of human behavior. Liberty itself gave rise to our differences in opinion, and “As long as the connection subsists between [man’s] reason and

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<sup>40</sup> THE FEDERALIST NO. 10, at 58 (James Madison) (Jacob Ernest Cooke ed., 1961).

<sup>41</sup> *Id.* at 58-59.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 59.

his self-love, his opinions and his passions will have a reciprocal influence on each other,” the latter reinforcing the former.<sup>44</sup>

These familiar passages may seem too abstract or theoretical or simply too abbreviated to carry weight in our case. Yet Madison’s explanation of the sources of faction is also notable for one significant omission. The purpose of *Federalist* 10, after all—like the other documents to which it should be linked<sup>45</sup>—was to explain why an extended national republic would be more resistant to the mischiefs of faction than the smaller republics of the states. But Madison never makes loyalty to a state, per se, an explanatory variable in his analysis. The option of doing so was certainly available. Madison could easily have said that overt provincial loyalties could provide a source of factious behavior. Elsewhere in *The Federalist*, he and Alexander Hamilton both argued that the propinquity of local and state government to the daily interests of citizens would ensure that the states could act as a counterweight to an abusive, encroachment-oriented federal government. Yet the idea that this kind of provincial patriotism would provide an independent source or cause of factious behavior was omitted from the argument—not because this kind of attachment would never exist, but rather because whenever it did form, it would be a function or byproduct of other factors, vizt., the aggregated opinions, passions, and interests of the electorate. To say that one voted as a resident of a particular state would simply treat that gross political or jurisdictional marker of political identity as a shorthand rendition of the collective interests that one believed a state possessed, which would itself be the product of the aggregated subjective preferences of its voters.

Viewed in this way, states are merely the geographic accidents or artefacts that define the distribution of substantive interests and preferences across the United States. As the *New York Times* journalist Jesse Wegman wisely observes (although without giving this point the emphasis it badly deserves): “Average citizens don’t cast their presidential ballots (or even their Senate ballots) based on what state they live in; they vote based on their party preference.” Wegman could drop the modifier “average” and translate “party preference” into the more complex set of variables it subsumes, but his basic holding still

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<sup>44</sup> *Id.* at 58.

<sup>45</sup> These would include the eleventh item in the April 1787 memorandum on the Vices of the Political System of the United States and the lengthy defense of the negative on state laws in his October 24, 1787 letter to Jefferson, written four weeks before the publication of *Federalist* 10. Memorandum from James Madison on the Vices of the Political System of the United States (Apr. 1787) in 9 THE PAPERS OF JAMES MADISON 354-57; Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 270 (Julian P. Boyd ed., 1955).

stands.<sup>46</sup> The same interests exist across our great land, “from the redwood forest, to the Gulf Stream waters,” with the flyover states visible in between, but are obviously distributed and concentrated in different proportions among the states according to their economy, demography, religiosity, patterns of settlement, et cetera. A latter-day Madisonian political geography of the United States would pay little attention to state lines. It would build instead on the kinds of county level maps of electoral outcomes that have become so popular in recent years, with their familiar red, blue, and purplish patterns that largely distinguish rural, urban, and suburban communities from each other. Clearly the kinds of opinions, passions, and interests these maps embrace would diverge from eighteenth-century antecedents. Madison would not have readily imagined, for example, that differences in the level of formal education across constituencies would become a potent variable accounting for their political preferences. Yet neither would he have found it difficult to incorporate this data into his model of “the latent causes of faction.”<sup>47</sup>

The moral of this analysis should be clear. The interests upon which citizens of small states vote in presidential elections are not qualitatively or substantively different from those that animate voters in their more populous counterparts. Small-state voters might claim that they are badly outnumbered in presidential elections. But the interests that determine their presidential ballots are those they share equally with their political kindred in other states. Again, the kind of community in which one resides will affect as well as represent the interests to which one is attached. But the populousness of the state wherein one votes, which the presidential election system inversely rewards through the “senatorial bump,” is wholly irrelevant to the decisions voters make.

The third fallacy relates to one final argument made in defense of a state-based system of presidential elections, but also builds directly upon recent experience, arguably beginning with the presidential contest of 1992. The past three decades have produced a delegitimization of the presidency, a phenomenon that manifestly reflects and reinforces the intense polarization of the entire political system. The sources of this polarization are manifold,

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<sup>46</sup> JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE 94 (2020).

<sup>47</sup> Like many of us, however, he would have been puzzled, nay strapped, to understand how the defense of the liberty that *Federalist* 10 also celebrated would cover a self-destructive refusal to take a life-protecting vaccine. THE FEDERALIST NO. 10, at 58-59 (James Madison) (Jacob Ernest Cooke ed., 1961).



and battalions of scholars are exploring its origins and potential dire consequences. What remains to be considered is not only the extent to which the mode of presidential election has contributed to this delegitimization of presidential power, but also the ways in which polarization is undermining the familiar claim that a state-based system of presidential elections facilitates the peaceful transfer of power by reducing the chaos that could result, Florida-style, from a hotly contested election.

One could plausibly argue that no president since George H. W. Bush (a.k.a. Bush 41 in our numerology) has enjoyed a full measure of presidential legitimacy, meaning a general acceptance by the national body politic that his election left the victorious candidate fully empowered to exercise the responsibilities of his office. For a variety of reasons, presidents 42-46 have all faced sustained campaigns to deny their legitimacy. In the case of Bill Clinton, one can speculate that Republican resentment over their surprising loss of the presidency, reinforced by the destructive tactics introduced by Speaker Newt Gingrich, led to a sustained campaign not only to oppose but also to undermine the Clinton presidency.<sup>48</sup> With the younger George W. Bush (43), the loss of the national popular vote and the Supreme Court's unprecedented and legally problematic intervention in the Florida recount in *Bush v. Gore* had a similar effect. With Barack Obama, one has to reckon with the sad fact that the election of the first African American president rejuvenated openly racist attitudes that many thought the United States had finally left behind. With Donald J. Trump, the disparity between the electoral and popular vote results in the 2016 election dwarfed the comparable situation in 2000 and demonstrated that the logic of the Electoral College could regularly elevate a runner-up candidate to the highest office in the land, even when three million more voters favored his opponent. And a majority of Republicans today evidently believe that Joe Biden, with his 7 million national majority, somehow pulled off the greatest political crime in American history, the Big Steal, to win the 2020 election.

This delegitimization of presidential power has multiple sources, and its causes do not depend solely on our presidential election system. Yet one can certainly propose that an election conducted through a popular vote in a single national constituency would work to enhance the legitimacy of the winner. Given the mounting likelihood of witnessing significant disparities between popular and electoral vote winners in future elections, this is not a

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<sup>48</sup> On Gingrich's uniquely destructive role, see JULIAN E. ZELIZER, *BURNING DOWN THE HOUSE: NEWT GINGRICH, THE FALL OF A SPEAKER, AND THE RISE OF THE NEW REPUBLICAN PARTY* (2020).

trivial concern. That concern would only be compounded if the production of electoral vote majorities came to be perceived as a byproduct of the manipulation of ballot-casting procedures driven by the voter suppression legislation of highly partisan state legislatures, embodying exactly the kind of provincial factionalism that Madison denounced in the late 1780s. One can round out this line of analysis by reminding readers that while the Civil War had many causes, its immediate precipitant was the presidential election of 1860.

Many commentators treat this devolution of authority to the states as an important latent virtue of the presidential election system, conjuring up a parade of political horrors that would ensue under a closely contested NPV. To take one representative example, Michael T. Morley concludes his recent critique of the NPVIC by contrasting the enormous difficulties, burdens, and threats that would arise from a hotly contested, narrowly decided NPV, on the one hand, with the limited and confined controversies that would ensue under the existing system, on the other. In his parade-of-horribles scenario, there is no question which alternative provides greater security to the political system. Indeed, avoiding the risk of contested national recounts appears to be, in Morley's judgment, the most attractive feature of the current system. "The Electoral College's greatest advantage," he concludes, "the Framers' unintended gift to future generations to promote the peaceful transfer of power and protect the public legitimacy of the electoral process—is its limitation of the scope of post-election proceedings."<sup>49</sup>

This is a curious way to justify the existing system of presidential election, not by identifying and enumerating its positive strengths, but by proposing that its greatest advantage is to avoid dangers that might rarely or never occur—or that might be dealt with in other ways. Congress is empowered under the Elections Clause of Article I, Section 4 to establish national criteria over the "Times, Places and Manner" of congressional elections, which could be easily extended to cover presidential elections as well. Arguably many of the anomalies that arise under our highly decentralized system of conducting elections—notably including Theresa LePore's design of the 2000 Palm Beach County "butterfly ballot," whose one non-trivial result was to cost Al Gore, the national popular vote winner, the presidential election—could be

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<sup>49</sup> Morley, *supra* note 37, at 126.

eliminated, not multiplied, by the deployment of this federal legislative power.<sup>50</sup>

Moreover, the aftermath of the 2020 presidential election casts other, more alarming doubts on how much we can truly relish this “unintended” or “inadvertent gift” from the Framers. How does it maintain the “peaceful transfer of power” to have attorneys general from seventeen Republican-controlled states sue to overturn the electoral decisions of the four “battleground” states that gave Joe Biden his margin of electoral victory? If the electoral college system is this great source of political stability, why do we see state legislatures contemplating how to use their plenary authority over the appointment to electors to empower themselves to supersede the voters’ choices? Rather than view this aspect of federalism as a deterrent or security against electoral malfunctioning in individual states, we would be better advised to explore and counteract the collective incentives it gives to partisan misbehavior in every state.

In theory, or at least *arguendo*, the goal of any constitutional system is to establish visible, transparent, generally accepted rules of political decision, so that disputes over policy do not degenerate into struggles over the legitimacy of the regime itself. The problem with the presidential election system is that the devolution of authority to the state legislatures creates latent incentives to elevate partisan calculations above established constitutional norms. The political era we are now inhabiting is distinguished by the transformation of the Republican Party into an authoritarian cult and, derivatively, by the conscious exploration of statutes and methods that will enable partisan state legislatures either to repress the popular vote or displace its outcome with a second choice of their own. The federal dimensions of the presidential election system are becoming an incipient danger to this larger goal of constitutional stability. But that danger cannot be removed by a device like the NPVIC. It would require an Article V amendment to secure this necessary change.

## CONCLUSION

Viewing these developments within the Madisonian framework that I have explored over a half century of academic study, dating to the Nixon years, it is not difficult to link the current state of the American body politic

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<sup>50</sup> I assume here that the plenary authority Congress could apply to federal elections would induce states to adjust their voting procedures for all other elections because the cost of maintaining two regimes of voting would be prohibitive.

to Madison's brilliant pre-Convention analysis of the Vices of the Political System of the United States.<sup>51</sup> The animus underlying that seminal text rested on his critique of the defects of the state legislatures, which he defined in terms both of their own institutional shortcomings and the underlying political conditions that best explained their behavior. We have reached a dramatic moment in the nation's history when the idea of asking how one could formulate a latter-day version of this memorandum and apply it to the current "vices" of our political system has its own allure. Madison's list numbered a simple dozen items; with legions of legal scholars and political scientists and a few oddball historians studying problems of constitutional governance, a modern catalog could run much longer.

However lengthy such a list could prove, the woes of the presidential election system would rank near its top. Its growing potential to yield substantially disparate results between the electoral and national popular vote; its vulnerability to partisan manipulation at the state level; its violation of the modern democratic norm that every citizen's vote should have the same weight, wherever cast; the specious and fallacious premises on which its ostensible defense rests; its division of the electorate into battleground states and entire regions where superfluous votes are "wasted": these factors demonstrate that the only way to reform this system is to do so comprehensively and conscientiously, through the rational design of a new system, and not through a political gimmick that would be fatally exposed to an array of objections. A change of this importance must be able to pass every test of constitutionality and political legitimacy, which—in the absence of a constitutional convention—only Article V can provide. The challenge, therefore, is not to lapse into a state of constitutional despair, but to "Stiffen the sinews, summon up the blood," and devise a better strategy to pursue the NPV by constitutional amendment. There is no other way.

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<sup>51</sup> And speaking of links, I hope my association with Madison is not fully equivalent to Arthur Link's association with Woodrow Wilson. Professor Link was probably the first academic historian I ever heard speak in public, when I was doing advanced placement U.S. history at Evanston Township High School, the year John Kennedy was assassinated.