

New Views of the Election of the President: How Direct Choice of Electors by State Legislators Could Affect Presidential Elections and the Presidency

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Introduction

Not since 1876 has a state legislature directly chosen its state's Presidential Electors under the Constitution's "Electoral College" system. Most states used this method in the first several Presidential elections.

This Paper will analyze why the Framers allowed state legislatures the latitude to directly choose Presidential Electors, why this approach was ultimately abandoned in favor of popular election of Electors in every state, the potential benefits of returning to direct legislative choice of Electors, and the corresponding effect this method might have on the process of nominating candidates, electing Presidents, and the Presidency itself.

To enhance the benefits of direct legislative choice, this study proposes that all states adopt measures to combine the district election method with direct legislative choice.

Preference for Direct Legislative Choice of Electors at the Convention

Among the most controversial issues at the Constitutional Convention was the method of selecting the President. The delegates debated this issue on 21 non-consecutive days and required 60 ballots, relating to seven distinct proposals, prior to obtaining consensus on the final provisions (Bowen 189; Slonin 35; Katz 2). Proposals included Congressional choice, state legislative choice, national popular vote, and an Electoral College system whereby Electors within districts of each state would be elected for the purpose of choosing the President (Farrand 21, 68, 80; vol. 1; Farrand 29, 31-32, vol. 2).

Gouverneur Morris' proposal that the people at large elect the President was defeated by a 9-1 vote, with George Mason of Virginia asserting: "It would be as unnatural to refer the choice of a proper character for a chief Magistrate to the people, as it would to refer a trial of colors to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the candidates" (Farrand 29, 31-32; vol. 2). Later in the Convention, Gouverneur Morris captured a primary motive of those who, like himself, favored popular election as being the preference of the lesser of two evils as compared to election of the President by Congress: "No body had appeared to be satisfied with an appointment by [Congress]. Many were anxious *even* for an immediate choice by the people" (emphasis supplied) (Farrand 500; vol. 2).

After debating the alternatives, Gouverneur Morris moved to treat the determination of the method of electing the President as "not being yet finally determined," which passed (Farrand 480; vol. 2). Consequently, the issue was referred to a special committee consisting of one delegate from each state. This committee introduced a plan involving indirect election by

Electors (Farrand 493-94; vol. 2), which was approved and included in the Constitution as signed and ratified. As subsequently modified by the Twelfth Amendment, this plan remains the Electoral College system in effect to date.

The Convention's special committee dictated that the selection of Presidential Electors was to be determined "in such Manner as the Legislature thereof may direct." This provision allows the broad discretion of state legislatures to directly choose Electors or popular election in contrast with the previous suggestion to confine the process to the election of members by the House of Representatives ("by the People of the several States" in Article I, Section 2) and senate ("chosen by the Legislature thereof" in Article II, Section 3 of the original Constitution).

Though the motion to have state Electors choose the President carried 6-3 when it was first approved, the more favorable vote of 8-2 was returned when the motion specified that Electors should be "*chosen by State Legislatures*" (Farrand 57-58; vol. 2). This voting data suggests a preference for direct legislative choice, rather than a popular election. This preference is further demonstrated by the provision produced by the special committee allowing state legislatures to exercise full discretion in respect to the selection of Electors. Considering this provision within the context of the final two weeks of the Convention, it is possible to conclude that it was an effort to placate delegates (such as Gouverneur Morris, a member of the special committee) who favored a popular election. Further, outspoken Morris likely influenced the special committee to adopt this broad language as a compromise to provide for one or more states to allow popular election of Electors. In fact, Morris, along with James Wilson, ensured that their home state of Pennsylvania chose their Electors for the first Presidential election by popular vote (McCormick 28). The pressure for direct legislative choice by key delegates like Morris (within the special committee and/or before the general Convention) risked prolonging the contentious Convention debate when a critical and heretofore elusive consensus on an overall final document was at hand.

Independent Electors Integral to Framers' Plan

Critical to the adoption of the Electoral College system was the unanimous consensus that Electors (no matter how chosen) were to act as entirely *independent* representatives of the people in casting their vote for President (McCormick 32). In Federalist No. 68, Alexander Hamilton wrote:

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. This end will be answered by committing the right of making it, not to any pre-established body, but to men chosen by the people for the special purpose, and at the particular conjuncture.

It was equally desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation, and to a judicious combination of all these reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation. ... [t]hey have not made appointment of the

President to depend on any pre-existing bodies of men who might be tampered with beforehand to prostitute their votes ... (412-413)

Further to this understanding, John Jay wrote in Federalist No. 64:

[T]hey have directed the President to be chosen by select bodies of Electors to be deputed by the people for that express purpose; ...[t]his mode has, in such cases, vastly the advantage [over] elections by the people in their collective capacity where the activity of party zeal, taking advantage of the supineness, the ignorance, and the hopes and fears of the unwary and interested, often places men in office by the votes of a small proportion of the Electors. ... [a]s the select assemblies for choosing the President ... will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence. (390-91)

Note that the Federalist essays were published in *New York newspapers* as part of Hamilton's successful effort to raise public support for ratification of the Constitution during these conventions, with particular emphasis on New York (Rossiter viii-ix). In this context, the two preceding excerpts reflect the desire of the Framers to convince the public that the Electoral College system provided for *independent* representatives of the people, "select assemblies" of the "most capable men" who were "distinguished by their abilities and virtue," and most ably suited to the critical task of electing the President.

The purported independence of Electors may have been responsible for mitigating the concerns of the delegates with respect to the means of choosing Electors. As independent representatives of the people, Electors would occupy a role similar to elected state legislators (albeit for a more narrow, specific purpose). Having expressed deep concern over direct popular election at the Convention, both in debate and by overwhelming negative votes against such proposals, the Framers would likely have firmly opposed popular election of directed, or "pledged," Electors. Conversely, however, *independent* Electors (regardless of whether they were chosen directly by the people or by state legislatures) guaranteed a degree of neutrality that sought to protect the integrity of the republican principles upon which the Constitution was structured by acting in a purely representative capacity. Accordingly, the assumption of the Electors' independence may explain why Convention delegates ceased debating the means of appointing Electors and devoted their remaining time to other provisions of the committee's Electoral College plan.

Understanding of the Appropriate Method for Choosing Electors

Following the Convention, there was a difference of opinion as to the appropriate method of choosing Electors within the broad discretion granted to state legislatures. Although delegates such as Elbridge Gerry stated at the Convention that he was "... not clear that the people ought to act directly even in [choice] of Electors, being too little informed ... and liable to deceptions" (Farrand 80), Alexander Hamilton and John Jay regarded the popular choice of Electors as the Framers' intent (Hamilton 413; Jay 390).

In *Federalist* No. 45 James Madison wrote: “Without the intervention of the state legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it” (291). Madison, however, later articulated (at the Virginia ratifying convention and again in 1823) an understanding that the people would choose Electors (McCormick 25). Convention delegate Charles Pinckney, however, supported the complete control and latitude granted state legislatures in the actual text of the subject provision, stating that this decision “was entrusted to the State Legislatures ... they must make provisions for all questions arising on the occasion” (qtd. in Glennon 3).

Scholars also disagree on the intention of the broad provision for choosing Electors. Richard McCormick asserts: “The general assumption was that they would be popularly elected” (25). Randall Holcombe conversely contends: “It is apparent from the wording of this provision of the Constitution that the Founders did not intend for Electors to be democratically elected (although they did not rule out the possibility)” (2). Further, Jeffrey Tulis explicitly presumes that the Framers intended direct legislative choice of Electors and that such was intended to further the fundamental Constitutional principle of representation. (34-35; note 15).

On the other hand, Michael Glennon asserts the neutral position implicit in the provision’s text: “Because delegates to the Constitutional Convention were so deeply divided on how the President should be chosen, the framers decided not to require the states to follow a given method of selection. Instead they chose to give the states broad discretion in deciding how to appoint Electors” (3). Perhaps Forrest McDonald most accurately portrayed the inherent compromise among the conflicting views of the factions at the Convention. In not requiring states to follow a specific method of choosing Electors, the Framers clearly intended greater control for state legislatures: “It provided that Electors be appointed in such manner as the several legislatures should direct; that took care of the objections of those who feared popular election, for it meant that the legislatures could elect the Electors if they chose to do so” (250).

Early Modes of Choosing Electors

In *Bush v. Gore* (2000), the Supreme Court affirmed that “the individual citizen has no federal constitutional right to vote for Electors for the President of the United State unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College ... [the state legislature] may, if it so chooses, select the Electors itself.” In fact, states utilized both direct selection by their state legislatures and popular election (in two general forms) for the first several Presidential elections. The three general modes employed were: (i) direct selection by the state legislature (hereinafter the “direct legislative choice method”); (ii) election of Electors by popular vote within separate districts of the state (hereinafter the “district election method”); and (iii) election of the entire slate of Electors by statewide “winner-take-all” popular vote (hereinafter the “general ticket method”).

Beginning with the first Presidential elections, political factions used the array of methods available for choosing Electors to seek implementation of the mode that would be most favorable to their candidates. As a result, state legislatures often changed their method of selection in a particular Presidential election year depending upon which method would yield the best result based on their partisan preferences or based on a compromise within a particular legislature between opposing parties. For example, from 1800 through 1820, Massachusetts

changed between the direct legislative choice method (in years where one party dominated the Legislature) and a district election method (when a split Legislature compromised to allow for a possible split of Electors). Similarly, New Jersey and North Carolina also engaged in switching methods based on partisanship during this period (McCormick 32, 109).

Further, states gravitated toward either direct legislative choice or the general ticket method. No state used the district election method by 1836, so that each state (or more specifically its dominant Party) could maximize its influence by casting all of its Electoral votes as a unit. Despite any potential advantages of the district election method, “self defense” compelled every state to adopt one of the unit methods because the other states had done so and to do otherwise would minimize that state’s effect on the selection of the President (McCormick 109, 111).

Problems with Direct Legislative Choice in Early Elections

In the first Presidential elections, in which many state legislatures directly chose Electors, the problem of the “split Legislature” arose. Most notable was the first election in which New York’s state Senate was Federalist controlled and its lower house, the Assembly, was composed of an Antifederalist majority. Since the two houses were unable to agree on the choice of Electors, no Electors being appointed at all. Consequently, New York did not participate in the election of George Washington as first President of the United States. Perhaps this is why New York’s “outraged citizenry” insisted on switching from direct legislative choice to a district election method by 1828. A similar problem within the New Hampshire legislature resulted in a deadlock that persisted until the day before the election when the lower house yielded to the upper house to prevent the state from forfeiting its participation (McCormick 29-30, 110).

Split legislatures continue to pose potential problems within the current direct legislative choice method. In each of the past six Presidential elections there have been no less than 11, and as many as 16, split legislatures (one house Democrat controlled and one house Republican controlled) (“Table of Partisan Control of State Legislatures” 1). Nebraska is the only state with a unicameral state legislature and thus not subject to a split legislature problem.

The prospect of a deadlocked legislature is a disadvantage of direct legislative choice as compared to popular election. On the other hand, direct legislative choice avoids the more potentially dangerous presence of voter fraud, or thin margins leading to allegations of voter error and demands for recounts, as is alleged in 1960 and 2000.

Rise of Parties

The Framers hoped that political Parties would not be necessary. It was thought that the narrow powers delegated to the federal government and Constitutional rule of law (the “organic unity of the republic”) would confine politicians to the same general goals and ideology within those restricted parameters of governance. Parties were seen as unnecessarily promoting contention and undermining election practices rather than elevating the most desirable candidates, those possessing integrity and a commitment to the public good (McCormick 6). In quoting Delegate Luther Martin, the notes of Constitutional Convention Delegate Robert Yates indicate, however, there were factions even at the Convention itself (qtd. in Taylor 49).

Nevertheless, as late as 1816, following his election as President, James Monroe remained hopeful that political parties would become unnecessary in the United States (McCormick 107). Certainly, the Framers expected that Parties might arise, but they also hoped that the various mechanisms built into the Constitution might contain the perceived evils they might engender in society. Along these lines, they hoped to circumvent party influence over the choice of President and promote the most qualified to office through indirect election by independent Electors (McCormick 9, 24, 26). Nevertheless, from the start, political forces recognized the weak link of the assumed independence of Electors. These forces converted Electors into mere straw men, voting as directed (McCormick 7).

The 1824 election, in which John Quincy Adams prevailed over Andrew Jackson in the House of Representatives despite the fact that Jackson won a plurality of the popular vote spurred vicious accusations. This election solidified the widely held perception that contingent elections were a scenario to be avoided by any means possible. Those means were manifested in the succession of two-party systems ultimately leading to the Republican-Democratic system in place today. The combination of directed Electors and the two party system lead to uniform adoption of the general ticket method by 1836 (in every state but one) to centralize and consolidate political party control and influence over the process of electing the President (McCormick 9, 120).

Attempts to Adopt the District Method as the Uniform Method

From 1800-1822, states varied among the three general methods of choosing Electors. The methods were continually changing depending upon the potential advantages to be gained by factions controlling or competing for control of the state legislatures in that particular election year (McCormick 32, 109). Consequently, a substantial debate took place in Congress over Constitutional Amendments to provide for a uniform method among the states to prevent manipulation and uncertainty. Senator Mahlon Dickerson summarized the general state of consternation, remarking that the President could be “elected or appointed by a rule so undefined, so vague, so subject to abuse, as that by which we elect the Chief Magistrate of the Union” (McCormick 110).

During this time, strong support existed for the adoption of the district election method as the uniform method for choosing Electors. Four times, a Constitutional Amendment to this effect received a requisite two-thirds vote in the Senate but failed in the House of Representatives due to the negative votes of the overwhelming Virginia and Pennsylvania delegations. From 1823 through 1826, Congress continued to wrestle with amending the Electoral College to provide uniformity and neutralize what many viewed as abuses of the political party system that had grown in the first decades of the Nineteenth century. In particular, the debates centered on the problems of the general ticket method that fostered, to the detriment of the people’s best interests, a dominant centralized Party machinery (McCormick 155-156).

George McDuffie of the House of Representatives proposed a Constitutional Amendment based on the district election method. He stated that if the general-ticket system were adopted in all states (as was the trend), “a central power would spring up in almost every state, consisting of the ruling politicians of the day, who would be *bound to the people by no tie of regular responsibility* and be, in every respect, more liable to cabal, intrigue, and corruption than the *Legislature itself*” (emphasis supplied)” (McCormick 156-57).

These proposed Amendments for a uniform district election method had two influential advocates: James Madison and Andrew Jackson (Jackson had lost the highly contentious 1824 Presidential election in the contingent House of Representatives election and would go on to win the 1828 election) (McCormick 156,159). Nevertheless, McDuffie's Amendment was defeated in the House by a 102-90 vote, and the Senate, after waiting for the result in the House, did not go forward thereafter (McCormick 159). Jackson continued to push for this amendment as President to no avail, and by 1836, with every state but South Carolina having adopted the general ticket method, the push for reform of the Electoral College along these lines was essentially dead (McCormick 159-60).

On the basis of the "federative principle" advanced principally by Virginia (large state) House of Representatives member Andrew Stevenson during the 1823-1826 period, a coalition of various interests opposed the district election method, and advocated the general ticket method. Stevenson argued that the phrase "Each State shall appoint, in such manner as the Legislature thereof may direct" meant that the Framers intended Electors to be chosen "by the states in their political characters." Further, he asserted that centralized Party activity and caucuses allowed "the views and wishes of the people to be carried into effect, and not scattered and broken" (McCormick 158).

Opponents of the district election method rallied around the federative argument, claiming that the Constitution's federal system required that each state commit its Electors as a unit. Doing otherwise would mean that the President would be representing the overall people of a consolidated nation rather than the people of the respective states as Constitutionally appropriate (McCormick 158).

The claim of "federative principle" above parallels James Madison's analysis in Federalist No. 39, in which Madison sought to portray the federal government as "partly federal and partly national" (246). Madison argued that popular election of the House of Representatives proportionate to population (within separate Congressional Districts created by every state to implement this provision of the Constitution) made the federal government partly national, while legislative selection (under the original Constitution) of two Senators representing each entire state made it partly federal (244).

Madison's analysis is incorrect because the people of each respective state *separately* elect members of the House of Representatives and those Representatives exclusively represent their own state in Congress. No Congressional Districts cross state lines. Thus, both the House and Senate are federal rather than national. Madison referred to the House of Representatives' source of power as the "people of America," even though the people of each respective state separately elect their own members to the House of Representatives to separately represent them in Congress (Madison 244; Taylor 109-110).

Similarly, Stevenson and his allies erroneously asserted that the district election method would somehow convert the President into a *national* representative of the "people of America" rather than the *federal* representative of the people of the respective states; the proposed Amendment, like all forms of the district election method, involved choosing Electors by districts *wholly within* each individual state. Accordingly, United States Representative Ralph Ingersoll and other federative principle advocates inaccurately associated directly the general ticket method with the sovereignty of the states. Correspondingly, he condemned the proposed Amendment to adopt the district election method as "destructive of the great principles on which our Constitution rests" (McCormick 158). Interestingly, Andrew Jackson, a strong proponent of the district election method, was the first President to advocate the concept of the President as

representing the “American people” and being responsible for championing policy consistent with the “will of the people” (Conley 3).

In recent times, dissatisfaction with the general ticket method has resulted in proposed Constitutional Amendments, including proposals for a uniform district election method in every state (Hardaway 12). Although these Amendments have not passed, Maine switched to the district election method starting with the 1972 Election and Nebraska followed starting with the 1992 Election (McCormick 210; note 5).

Proposed New Method:

Combine District Method with Direct Selection by State Legislatures

James Madison, known as the “Father of the Constitution” for his key role at the Constitutional Convention and in subsequent ratification efforts, wrote in 1823: “The district mode was mostly, if not exclusively, in view when the Constitution was framed and adopted; and was exchanged for the general ticket and legislative election as the only expedient for baffling the policy of the particular states which had set the example” (McCormick 157). The above statement, made at a time when the experiences of the first elections may have colored his recollection of the Convention, must be considered in conjunction with his assertion immediately following the Convention in Federalist No. 45, that state legislatures “will, perhaps, in most cases” directly choose Electors (291). These statements should be further measured alongside Madison’s expressed concern during the Convention that state legislatures, acting as an *overall body*, show a “strong propensity to a variety of pernicious measures” (Farrand 110, vol. 2).

Taken together, Madison’s above statements suggest a new, hybrid method for choosing Electors not previously used, which could mitigate many of the negatives of existing methods for choosing Electors while enhancing their benefits. This new method would utilize direct legislative choice within districts to determine each state’s Electors.

Under this method, state legislators would choose one Elector to represent each Congressional District and two Electors at large. The Electors would be selected by each house of the state’s legislature excepting Nebraska (which has a unicameral legislature, in which both at large Electors would be chosen by the same single body). This method corresponds with the exact number of Electors allocated to each state, which receives one Elector for each member of the House of Representatives in each Congressional District and for each of the two Senators representing the state at large.

A caucus of those state legislators representing all the legislative districts partially or wholly comprising part of a Congressional District would select that Congressional District’s Elector. For example, in the Third Congressional District of New Jersey, members of both houses of the New Jersey Legislature representing the Sixth, Seventh, Eighth, Ninth, and Tenth state legislative districts (i.e., the legislative districts that are contained, in whole or part, within the Third Congressional District) would caucus to vote for the Presidential Elector for that Congressional District. Deadlocks in any caucus would be broken by a general vote, first of the upper house, and then the lower house of the legislature in alternating order to avoid conflict in states with split legislatures (different parties controlling each house). Accordingly, those states with only the minimum three Electoral votes, the upper and lower house of the Legislature would each choose one Elector, and in the event of deadlock over the third Elector among the legislative caucus (which would involve every state legislator because that state’s sole

Congressional District would cover the entire state), the upper house would choose that Elector as well. Similarly, allowing each house of a state legislature to separately select one at large Elector would also avoid disputes in split legislature states. As to the special case of the District of Columbia, the 23rd Amendment provides that its three Electors are to be appointed as Congress directs. Congress could direct that the District's elected municipal legislature, its Council, choose its Electors in a manner similar to the above proposed method. A Constitutional Amendment adopting this procedure for all states (and perhaps the District of Columbia as well) would best ensure uniformity.

The proposed method is novel, not just in terms of combining two methods, but also in suggesting direct legislative choice of Electors. All proposals in the governmental and academic areas have heretofore focused on reforms that involve popular voting as an integral component (Katz 4-5; McCormick 210-11). Strong resistance would be expected from the public, government, and academia with respect to any proposal involving direct legislative choice as "undemocratic" (Diamond 50-58) (evidenced, for example, by the public uproar as well as political and judicial machinations regarding the disputed Florida vote in the 2000 Presidential Election (Caraley 2)). Several benefits unique to this method, however, merit its serious consideration.

Benefits of Direct Legislative Choice Method: Choosing the Best Individuals to Serve as President

The Electoral College was among the Framers' proudest and most innovative accomplishment, and received praise from Federalists (those generally favoring the Constitution) and Antifederalists (those generally opposing ratification) alike during the state ratifying conventions (Tulis 35; note 15). The Framers endeavored to devise a system that would raise "exalted characters" to the Presidency (McCormick 32). The system was intended to create a "constant probability of seeing the station filled by characters pre-eminent for ability and virtue" (Hamilton, "Federalist No. 68" 414). On the other hand, as Richard McCormick writes, "the Framers were not especially concerned with providing the President with a constituency, or ensuring extensive popular participation in his election, or guaranteeing that he would represent the choice of a majority of his countrymen" (24).

One would be hard pressed to argue that the Framers' system failed to elevate "exalted characters" to the office of President in the elections of the first five Presidents: George Washington, John Adams, Thomas Jefferson, James Madison, and James Monroe. These five men, perhaps the most "exalted" ever to serve as President, other than Abraham Lincoln, were elected during the only period in our history when most states chose Electors through either direct legislative choice or the district election method, rather than the general ticket method that has since predominated. One might assert on this objective basis that if the primary goal is to elect the best individuals to the Presidency, a method combining direct legislative choice and the district method to the exclusion of the general ticket method is advisable.

Under the current system, the key factors for success in obtaining election as President are fundraising and attracting favorable media attention (Polsby 53-62). No empirical data or rational analysis exists to connect fundraising acumen with effective governance as President. Further, state legislators admiring a candidate (a necessary component of success under the proposed hybrid method for choosing Electors) seems more important than a candidate's

attractiveness to the media; state legislators are precisely the individuals that the people of each state elect to represent their best interests.

Republican Representation over Popular Democracy

Article IV, Section 4 of the Constitution guarantees a republican form of government (self-government through elected representatives) to every state. On the other hand, the Constitution makes no guarantees regarding democracy nor does that word even appear in its text. The Framers (and Founders in general), Federalist and Antifederalist alike, expressed concern regarding democracy. Edmund Randolph of Virginia stated at the Constitutional Convention his desire to “restrain, if possible, the fury of democracy” (Farrand 58; vol. 1). Elbridge Gerry of Massachusetts also warned at the Convention: “The evils we experience flow from the excess of democracy” (Farrand 48; vol. 1).

Drew McCoy writes that James Madison “wanted to protect republican government as much as possible from the disruptive and unsettling effects of immediate popular influence – precisely because in America, as elsewhere, the large body of the people were not always or even ordinarily guided by enlightened reason” (50). In Federalist No. 10, Madison wrote further on the perils of democracy:

[C]ommon passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights or property; and have in general been as short in their lives as they have been violent in their deaths. (76)

And John Adams wrote, “Remember, democracy never last long. It soon wastes, exhausts and murders itself. There never was a democracy that did not commit suicide” (qtd. in Hoar 23-24).

Along these lines of ensuring republican, representative government rather than direct popular democracy, the Constitution vests authority to direct the choice of Electors for President in the very body through which the guaranteed republican form of government at the state level resides, state legislatures. Legislatures are the instrumentality by which the people of each state exercise the sovereignty reserved to them under the Tenth Amendment (Taylor 284). In light of this Constitutional principle of representation, Jeffrey Tulis states: “Because Electors were chosen by state legislatures for the sole purpose of selecting a President, the process was thought more democratic than potential alternatives, such as selection by Congress” (35; note 15).

Under a republican form of government the majority does not decide, but rather chooses the representatives who will decide (ideally) in the best interests of all the people and under the constraints of the rule of law. The Constitution, designed to protect the rights and interests of all, majority and minority alike, provides through republican, representative government a means of controlling the unfettered will of the majority (Berns 2). James Madison referred to this Founding principle of representation as “the delegation of the government to a small number of citizens elected by the rest” (Wood 596). As Nelson Polsby wrote, the Electoral College was designed “to check popular majorities from choosing Presidents unwisely” (Polsby 223).

Patricia Conley writes of the “ignorance of the American voter” in *Presidential Mandates*: “evidence indicates that a large proportion of voters are ignorant of the issues and cannot accurately identify the candidates’ platforms” (Conley 1, 4). On the other hand, largely insulated from media and advertising influence, and more cognizant of the issues and the relationship of those issues to the best interests of their constituents, state legislators are in a far better position to accomplish the true will of the people than are the people themselves. Elected state representatives, with a vested interest in effectively serving their constituents and the need to understand and deal with government issues on a regular basis, are seemingly more effective than the people themselves in deciding who should hold key offices in the federal government for the people’s sake. This perceived reality compelled the Framers to vest control over the means of choosing the President in state legislatures rather than directly in the people.

This same rationale led the Framers to direct state legislatures to choose United States Senators under the original Constitution. Senators chosen by legislatures had typically served the state, and were well known and accountable to the state legislatures who could, in their representative governmental capacity, keep track of what those Senators were doing better than the people they represented could. With popular election of Senators since ratification of the 17th Amendment in 1913, ultra affluent individuals like Jon Corzine in New Jersey, or celebrities with little connection to the state they represent, such as Hilary Clinton in New York, can satisfy the two key criteria for success in popular elections (funding, media acclaim, or both). Correspondingly, they have little accountability to the people of the state they represent nor significant incentive to serve their specific best interests. As with Senators, legislative choice of Presidential Electors would replace fundraising and media acclaim with service and accountability as key criteria for success.

Overcoming the Pledged Elector Problem

A critical feature of the Electoral College created by the Framers’ was their universal understanding that Electors, whether chosen by legislatures or popular vote, were to be independent officials of high esteem, well suited for the special representative purpose of exercising their unfettered discretion in casting their votes for President in the people’s best interests, a task not appropriate for a less informed populace (McCormick 32). By the first Presidential election, however, and certainly by the contentious election of 1796, pitting Federalist John Adams against Republican Thomas Jefferson, the key assumption of independent Presidential Electors was proven wrong in practice by partisan political forces (McCormick 33-35; 53-57).

The Framers’ intended independent Elector was thus replaced by the “pledged elector,” so much so that less than a dozen times in Presidential election history has an Elector broken ranks in voting for a different candidate, earning those few unique individuals the notorious label of “faithless elector” (“How U.S. States Choose Presidential Electors” 3). The most recent faithless elector was Republican Elector Dr. Lloyd Bailey of North Carolina who cast his vote for George Wallace rather than Richard Nixon in 1968 (Hardaway 53; Eddlem 1).

In fact, 21 states now legally bind Electors to vote according to the candidate they are pledged to, and 5 of those states impose a penalty for “faithlessness” (“How U.S. States Choose Presidential Electors” 1-2). In 1952, the United States Supreme Court overruled the Alabama Supreme Court in holding that pledged Electors, necessitated by the exigencies of Party politics,

did not violate the Constitution (Hardaway 104). Even proponents of the Electoral College view the faithless Elector “problem” as a threat to the system’s integrity and a weapon for those who would eliminate the Electoral College entirely by pointing to this “flaw” (Reagan 243; Hardaway 105-6; McCormick 210-11).

Nevertheless, the Framers may have left the method of choosing Electors to the broad discretion of state legislatures, not only to avoid further conflict in obtaining consensus on a Constitution, but because under any mode of choosing *independent* Electors the republican, representative nature of electing the President is preserved. With independent Electors fulfilling the *special* purpose of casting the state’s votes for President, popular election of those Electors would mirror popular election of state legislators for the *general* purpose of state lawmaking. Accordingly, under either direct legislative choice or popular election of independent Electors (as opposed to pledged Electors), the representative nature of Electors in exercising independent discretion to cast votes for President would be the same.

The reality of “pledged Electors” that quickly resulted from intense partisan interest in the “big prize” of the Presidency, and corresponding rise of successive two-party systems, however, has destroyed the capacity of the Electoral College to maintain its republican aspect (as compared to the popular democracy feared by the Framers) *unless* the choice of perfunctory Electors is made by the people’s elected state representatives (i.e., state legislators) rather than by popular vote. Popular voting for Electors who have no independent discretion is equivalent to the *direct democratic* election of the President by the people on a state-by-state basis.

Randall Holcombe writes: “Quite clearly, the process was not intended to be democratic, although it has evolved that way despite the fact that the Constitutional provisions for selecting a President remain essentially unchanged” (3). The pledged Elector transformed the Electoral College into a *direct democratic* institution without amending the actual words the Framers intended to ensure an *indirect republican, representative* mechanism for selecting the President.

Had the Framers understood their miscalculation regarding the lack of independence of Presidential Electors, it seems apparent from their anxiety regarding popular democracy that they would have insisted that state legislatures, as elected representatives of the people, directly choose such non-independent Electors or vote directly for President. Of course, the balance between large and small states, reflected in the number of Electors allocated per state, would make direct election of the President by state legislatures impractical or impossible. If the Framers had instead agreed that every state would have equal influence in choosing the President, then each state legislature could simply have cast one vote for President. Because the Framers compromise, however, provided for proportionate weighting of each state’s participation in Presidential elections, an additional category of representatives, in a number equal to each state’s allocated share of Electoral votes, was required to the special purpose of casting their state’s votes for President.

If the Framers intended Electors to be bound officials simply performing the mechanical function of reporting their state’s votes for President, then they likely would have found it unnecessary to impose restrictions on eligibility to serve (Article II, Section 1 prohibits Senators and members of the House of Representatives, and any other officer of the federal government, from serving as Elector) or even to have Electors at all (for example, each state’s Governor could have simply reported how its state cast its allocation of Electoral votes for President). Certainly, the Framers would not have wasted valuable time in the Convention discussing the importance of obtaining “capable men” for a role of such “vast importance,” as they did, for example, on July 24th (Farrand 99-100; vol. 2).

Mitigating Demagoguery

In creating a process of indirect election of the President through Electors intended to be independent, the Framers also expressed concern respecting “the danger that a powerful executive might pose to the system if power were derived from the role of popular leader” (Tulis 27). Demagogic appeals to the people by the President were anathema to the Framers. At the Constitutional Convention, Elbridge Gerry said: “The people do not want virtue; but are the dupes of demagogues” (Farrand 48; vol. 1). Similarly, in Federalist No. 1 and No. 85, Alexander Hamilton warned that tyranny is the objective and end result of demagoguery (35, 527).

By the 1830’s, however, largely through Andrew Jackson’s advocacy, Presidential demagoguery gained acceptance through the claim that the source of a President’s power rested with the overall American people rather than with the people of the United States as exercised through their state and local representatives (such as state legislatures and Presidential Electors) (Conley 3, 52; Tulis 29). Jackson’s assertion was entirely counter to the Framers’ intent who, according to Richard McCormick, “were not especially concerned with providing the President with a constituency, or ensuring extensive popular participation in his election, or guaranteeing that he would represent the choice of a majority of his countrymen” (24).

The view of the President as popular leader of the American people was logically consistent only with the popular election of Presidential Electors. Consequently, acceptance of this concept during President Jackson’s tenure corresponded with adoption of popular election of Electors in all but one state by 1836 (Caraley 1). Jackson’s notion correspondingly subordinated the Constitution and rule of law to the will and sovereignty of the American people, an extra-Constitutional principle solidified and completed under Woodrow Wilson (Tulis 118-19; 124-25). As a result, modern Presidents regularly claim a mandate to lead the people, an alleged delegation of power that apparently transcends the limitations of power delegated to the President and the overall federal government in the Constitution (Ceaser 17; Conley 3-4).

In “The Myth of the Presidential Mandate,” Robert Dahl describes the notion of a Presidential mandate as dangerous, one that wrongfully “elevates the President to an exalted position in our constitutional system at the expense of Congress” (365). Dahl’s analysis further asserts that “because the myth is almost always employed to support deceptive, misleading, and manipulative interpretations, it is harmful to the political understanding of citizens” (365).

This mandate concept, based on the hypothesis that the President is the representative of the overall American people, directly contradicts the Framers’ central objective of limiting and balancing central government power through the written Constitution they created. Because the reality of political parties makes independent Electors impossible, only a return to direct legislative selection of Electors can reverse the concept of the President as leader of the American people who is accountable only to them and not the Constitution, and thereby restore republican principles and Constitutional limitations on federal government power.

Reduced Costs and Burdens

The financial cost and related burdens of popular election of the President are staggering. Presidential campaign spending was \$750 Million in 2000, well more than double the level of \$325 Million in 1984 (Polsby 54; Table 3.1). Federal election laws compel taxpayers to substantially fund campaigns, even those of candidates they do not like (Polsby 67-68).

In addition, with popular election, incumbent Presidents seeking re-election, or other office holders seeking the Presidency, must allocate essentially all of their time for many months

leading up to Election Day to the campaign and away from their critical duties of office (Polsby 138-43).

Greater Representation of All People's Interests in Nominating and Electing Presidents

The shift from party caucuses to primaries in order to allow direct voter participation in the selection of major party nominees has instead created the reverse effect of disenfranchising most voters who do not happen to live in Iowa and New Hampshire, the first two states to hold voter events in the Primary season (Polsby 93-101). The voters of these two diminutive states can quickly kill the candidacies of most major party candidates, hardly a system that is responsive to the will of the people (Polsby 100).

Furthermore, artificial media and advertising influences distort choices of a largely uninformed electorate. The media's biases in determining who are "serious" candidates worthy of coverage, and its incentive to "jump on the bandwagon" to create excitement behind a particular candidate's momentum, often means that the major party candidates are in place long before voters have the opportunity to cast a meaningful vote in their state's primary (Polsby 69-76, 100-101).

On the other hand, nomination by party caucuses composed of representatives from all of the United States corresponds to the interests of all the people. This type of nominating system could be logically expected to resume if state legislatures chose Electors, as voter primaries would become irrelevant to the method of electing the President.

In addition, voter turnout is low in Presidential elections, ranging from 49% to 55% since 1972 (Polsby 9). Participating voters decide with respect to their own interests, leaving non-participating voters disenfranchised (albeit by their own inaction). State legislators, however, are charged with acting in the best interests of *all* their constituents, voter and non-voter alike. Accordingly, direct legislative choice would provide representation for all, rather than about half, the people in the Presidential elections.

Benefits of the Hybrid Method: Combining Direct Legislative Choice with a District Method

Direct legislative choice within districts would enhance the above benefits while offering a significant voice to the people, through their elected local representatives, in the nomination and election process. Unlike Presidential candidates, state legislators are generally accessible and susceptible to strong local influence by their constituents.

Combining direct legislative choice with a district method for so choosing would ensure that diversity within each state is reflected in casting Electoral votes ("United States Electoral College" 10). For example, in Pennsylvania (and other states), heavy Democratic voting in major cities like Philadelphia often turn the statewide majority vote total in favor of the Democratic candidate, even though many suburban and rural areas in that state are in Congressional Districts that are predominantly Republican (Madonna 2). The interests of the people in those districts are muted by the winner-take-all general ticket method. Similarly, in a diverse state such as New Jersey, Republican districts in Burlington County and the northwestern part of the state are unrepresented in a state that casts all its Electoral votes for the Democratic candidate except in the case of a Republican landslide such as the Reagan victories of 1980 and 1984 (Polsby 222; Table 6.2).

Several arguments are made against the district method. Historically, large states feared losing additional influence in Presidential elections (McCormick 114). This assertion is not technically accurate in that, under a district method, large states would still cast every one of the Electoral votes Constitutionally allocated to them.

On the other hand, the influence of people within different parts of large states, on the other hand, would be greatly enhanced under a district method. Unlike earlier periods in our history when the people's interests within each state were generally homogeneous, many states now have diverse local interests ("United States Electoral College" 10). This reality prompted the Conference of Delegates of the California Bar Associations to propose a Resolution for adoption of a district election method in California, the largest Electoral vote state, because the current general ticket method "disenfranchises voters and fails to reflect the often diverse makeup of each state by treating it as a unitary whole" (Weixel 1).

Nelson Polsby argues that the district method is undesirable because it would have given the loser of the popular vote in 1960 (Nixon, by the slightest of margins) victory, and would have deadlocked the 1976 election (as well as giving 12 more Electoral votes to independent candidate George Wallace in 1968) (221). Further, Polsby asserts that the district method still provides for a winner-take-all principle within each district (221).

Polsby's arguments are unconvincing. The current system also gave the loser of the popular vote in 2000, President George W. Bush, victory. Furthermore, a greater possibility of deadlock seems a small price to pay for granting influence in Presidential elections to people within districts locked in states dominated by opposing parties. In any event, the Framers provided a method for breaking deadlocks in the House of Representatives; many assumed deadlocks would be common and preferred that the House of Representatives choose the President in most elections (Farrand 512; vol. 2; McCormick 9, 25).

Polsby's argument that the district method retains the "winner take all" principle of the general ticket method seems implausible. Unless each Electoral vote were divided into fractions (which, among other things, is both exceedingly complex and perhaps not permitted under current Constitutional provisions), most variations of the district method, including the one proposed herein, reduces the winner take all attribute of the general ticket method (under which the statewide popular vote winner receives all that state's Electoral votes) to its smallest possible denominator, making it the opposite of a winner take all format.

Tara Ross argues that the district method would provide greater incentive for gerrymandering Congressional Districts (9). Under the proposed form of district method herein proposed, however, gerrymandering for this purpose would be impractical or impossible because legislators from state legislative districts included in one or more Congressional Districts would participate in choosing those Districts' Electors. Therefore, gerrymandering for this purpose would have to occur at both the Congressional districting and state legislative districting levels, an unlikely scenario in light of the complexity of doing so and its corresponding effect on the other myriad partisan and other purposes served at those two different governmental district levels. With multiple state legislative districts touching multiple Congressional Districts in most states, the ability to engage in effective gerrymandering for Electoral College purposes under the proposed hybrid system would be exceedingly difficult.

Conclusion

The Electoral College system represents the Framers' consensus for indirect election of the President by representatives of the people of each state - Electors. In adopting this system the Framers and the state ratifying conventions' delegates understood that these Electors would independently exercise their discretion in casting their Presidential votes. However, the immediate rise of factional partisan interests undermined the central Framing concept of the independent Elector and replaced it with the political reality of the pledged Elector. Ultimately, as Andrew Jackson branded the President as the direct representative of the overall American people, popular election of these pledged Electors became the norm in almost every state by the 1830's.

Retaining independent Electors (chosen by state legislatures or by popular election) assures that the republican, representative principle of the Electoral College is upheld. Under a system of pledged Electors, however, popular election of such perfunctory officials transforms the procedure of selecting the President from a representative, republican process to a state-by-state, democratic popular election rejected by the Framers. Consequently, the only means of preserving the implicit, integral republicanism of the Electoral College within the context of pledged Electors is by having the people's elected state representatives (their legislators) choose those Electors.

Direct legislative choice of Electors offers more advantages today than at the time of the Founding. These advantages include the ability to: (i) entrust the choice of President to elected state representatives who have a vested interest in advancing the best interests of the people of their state and a far greater understanding of the issues and candidates than the general public; (ii) restrain demagogic claims of Presidential power extending beyond Constitutional limitations derived from the American people rather than the Constitution's specific delegations of executive power; (iii) eliminate the exorbitant costs of Presidential campaigns, largely financed by taxpayers subsidizing candidates they may not support; (iv) provide real, proportionate representation to all states in the nomination of candidates rather than the grossly disproportionate influence accorded states such as Iowa and New Hampshire that hold early primary events; (v) mitigate undue media and advertising influence over the choice of President; (vi) provide representation to all people in all states in the choice of President, voter and non-voter alike; and (vii) increase the likelihood of elevating the best possible individuals to the Presidency.

Direct legislative choice of Electors in Congressional Districts under the hybrid approach proposed herein avoids the potential problem of deadlocked legislatures, grants greater representation to the varying interests and preferences of diverse parts of each state, and reduces central party machine control over the election process. To ensure uniform influence among all states in Presidential elections, a Constitutional Amendment incorporating this methodology would be advisable.

The period when direct legislative choice of Electors predominated gave the United States five of the most "exalted characters" ever to serve as President: Washington, Adams, Jefferson, Madison, and Monroe. This fact alone, despite current widespread belief that popular election is the only appropriate means of choosing the President, behooves reconsideration of this method, or some variation thereof, as a means of restoring the Framers' vision for a system that can elevate such remarkable individuals to the Presidency.

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