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Law, Rules, and Presidential Selection

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Law, Rules, and Presidential Selection, by Samuel Issacharoff

Abstract

Robert Dahl, in “How Democratic is the American Constitution?” criticizes the institution of the Electoral College as “morally, politically, and constitutionally wrong.” This Article addresses the third of those claims. Dahl’s critique, like many directed against the Electoral College, presumes a constitutional commitment to majoritarianism. This Article examines the rather commonplace departures from strict majoritarian rule in the Constitution, and concludes that the distortions from majoritarian preferences created by the Electoral College are actually much smaller in scope than those created by the U.S. Senate, the Article V amendment process and, to some extent, the House of Representatives. Moreover, subsequent constitutional developments—namely the “Reapportionment Revolution” of *Baker v. Carr* and later cases—have not enshrined a constitutional principle of simple majoritarianism that might undermine the constitutional foundation of the Electoral College. The Article then explores the controversies surrounding the presidential elections of 1800 and 1876 to argue that there are nonetheless important constitutional principles at stake in the operation of the Electoral College, namely in the manner in which Congress dictates rules for the settlement of disputes arising from presidential elections. The Article concludes by discussing one aspect of the Electoral College that could be susceptible to constitutional challenge: the “winner-take-all” system employed by nearly all states to allocate electoral votes. This practice, which is not mandated by the Constitution, could be challenged, not on the grounds that it is inconsistent with majoritarianism, but rather on the grounds that it gives the majority too much power—an argument that finds much stronger support in our constitutional jurisprudence.

Law, Rules, and Presidential Selection

Samuel Issacharoff¹

The 1960 World Series between the New York Yankees and the Pittsburgh Pirates is best known for Bill Mazeroski's dramatic ninth inning home run in the decisive seventh game. That home run was the first time in which a World Series ended upon the last batter reaching home plate – a feat that has been repeated only once by Joe Carter of the Toronto Blue Jays. But the 1960 World Series may also serve as a curious introduction to the topic at hand: the Constitution and presidential selection. For it turns out that Pittsburgh's triumph in 1960 was simply an artifact of the rules in force. By every conceivable measure, the Yankees had prevailed and the wrong team went home besplendored with Series rings. The Yankees outscored the Pirates 55-27; outhit them .338 to .256; and outpitched them, with a team ERA of 3.54, compared to the Pirates' 7.11.² In short, the 1960 World Series was a rout, except for the troubling fact that the losing team emerged victorious.

As best I can tell, not much popular outrage followed the World Series of 1960. I suspect most baseball fans understood the rules of a seven game series before the fall classic. And I suspect they understood that running up the score on weak middle relievers was simply irrelevant to the outcome of anything but one particular game. Indeed, more outrage seems to have been directed at Commissioner Bud Selig's decision to suspend play after eleven innings in the 2002 All Star game, an exhibition game of no consequence in the quest for the championship. A comparison of the baseball events of 1960 to 2002 leads to the conclusion that so long as the rules of the game are known *ex ante*, and are not subject of on-the-spot manipulation, baseball fans accept and even appreciate the anomalous possibilities that might ensue.

Not so, it seems, for presidential selection. Three times in the 200-plus years of the American republic, the most preferred presidential candidate has not been the victor as a result of votes

¹ Harold R. Medina Professor in Professional Jurisprudence, Columbia Law School. Michael Fischer provided excellent research assistance.

² I am indebted to Professor Michael Herz both for the statistics and for the direct analogy to the law of presidential selection. See Michael Herz, "How the Electoral College Imitates the World Series," *Cardozo Law Review* 23 (March 2002): 1191.

being channeled through the Electoral College.³ Once, in 1876, that candidate even won an outright majority of the popular vote. Although in terms of sheer frequency, such anomalous results appear about as often as Halley's comet, they cause political scientists, constitutional scholars, and pundits to start searching the skies for electoral asteroids. Or to return to a baseball metaphor, the interval of such anomalous presidential results is about on the order of successful World Series appearances by the Boston Red Sox. Indeed, in retrospect, we are more likely to rethink the outcomes of the 1960 presidential election than the World Series of the same year, with data much less reliable on the former than the latter.

It is of course possible to challenge the stability of electoral results were the presidential election to be simply a matter of direct popular selection. The 2000 election, to take the most recent example, could not possibly have unfolded in the same fashion under an alternative voting system. Would both parties have foregone serious advertising in Texas or New York under a system of direct selection? Could they possibly have conceded two of the most populous states if instead of being a safe electoral bloc they were a mass of potential individual votes? Or would the issues of the election have been the same? How did prescription drug coverage for elder citizens come to dominate the national agenda? Perhaps this is the cutting issue of our time. But perhaps the pre-election analyses that predicted Florida and Pennsylvania to be the decisive electoral battlegrounds had something to do with defining the terms of debate. Perhaps, just perhaps, the fact that Florida and Pennsylvania are first and second in proportion of senior citizens had something to do with the terms of electoral engagement in 2000.

But the role of the Electoral College in framing presidential selection is a more serious topic than merely questioning whether or not it proved truly decisive in a particular election. Channeling presidential selection through the Electoral College admits of the possibility of electoral results as seemingly anomalous as the outcome of the 1960 World Series – regardless of the particulars of the result in 2000. It becomes all the more serious when as eminent

³ The Electoral College failed to award the presidency to the winner of the popular vote in 1876, when Rutherford B. Hayes defeated Samuel Tilden, in 1888, when Benjamin Harrison defeated Grover Cleveland, and, of course, in 2000. In addition, in 1824, Andrew Jackson won a plurality of the popular vote and the Electoral College, but ultimately lost the presidency to John Quincy Adams after the election was decided by the House of Representatives.

a political scientist as Robert Dahl identifies American presidential selection as among the suspect features that calls into question, as he titles his sweeping Castle Lectures, “How Democratic is the American Constitution?” For Dahl, the Electoral College is emblematic of the democratic failings of an aging constitutional order. He invites contemporary opinion to reject the intentions of the Framers if Americans come to believe that those founding intentions “were morally, politically, and *constitutionally* wrong.”⁴

This paper addresses the last of these claims. Leaving aside commitments to more directly majoritarian or democratic ordering drawn from moral or political theory, what does it mean to challenge presidential selection through the agency of law or the Constitution? It is one thing to posit, as Jon Elster does as a matter of first order political theory, that democracy *is* “simple majority rule, based on the principle of ‘One person, one vote.’”⁵ It is quite another to try to fashion a claim from within law that such a narrow vision of majoritarianism is legally compelled. My argument will be that the invitation to engage in such constitutional claims regarding the Electoral College proves to be remarkably hollow. With one secondary aspect aside, the system of presidential selection is not only constitutionally enshrined (and hence immune from the charge of constitutional infirmity, at least from within the domestic constitution) but not significantly aberrant from the overall restraints of direct majoritarianism in the Constitution, nor so significant a departure from ultimate accountability to majoritarian preferences as to trigger the increasingly democratic gloss that judicially-crafted constitutional law has superimposed on the original constitutional design. The upshot is the modest conclusion that law operates primarily as a closed system of rules enforcement, not that unlike baseball, and that an appeal to constitutional law for an alteration of the mechanisms of presidential selection is not particularly fruitful. A change in presidential selection is a political decision best left in the domain of politics and law can at best inform some issues of institutional design.

⁴ Robert A. Dahl, *How Democratic is the American Constitution?* (New Haven: Yale University Press, 2001), 5 (emphasis added).

⁵ Jon Elster, “Introduction” in Jon Elster & Rune Slagstad, eds., *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1993) 1.

HOW MAJORITARIAN A CONSTITUTION?

The most controversial aspect of American presidential selection, and the most unique in terms of constitutional democracies, is undoubtedly the Electoral College. In questioning the commitment to democratic values in the American Constitution, Professor Dahl introduces two distinct critiques of the Electoral College. First, he presents a capsule historic account that shows, quite plausibly in my view, that the Electoral College was largely an historical accident.⁶ The constitutional debates were marked by repeated rejections of intermediaries between popular election and the actual selection of the executive. As Dahl presents the account, the Electoral College emerged only after several other far superior methods of executive selection failed to garner sufficient support, and only when an exhausted set of delegates lost heart in further deliberation. While this account calls into question the depth of the constitutional commitment to the Electoral College, it does little more. The Constitution was undoubtedly a product of its time and reflected the vision and limitations of its Framers. The absence of proportional representation from the initial American electoral design, another significant point of departure from almost all other constitutional democracies, is similarly a product of its time: proportional representation techniques had not yet been invented at the time of the American Constitution.

A more interesting question, which relates to Dahl's second critique, is whether the Electoral College is a constitutional aberration. It may well be that the Framers were exhausted and, anticipating W.C. Fields, eager to leave Philadelphia. But the provenance of the Electoral College can be separated from the question of how well it fits in to the overall constitutional scheme. Examined in this manner, the exceptionalism of the Electoral College begins to blur into a background commitment to intermediary political institutions designed to temper purely majoritarian preferences. Indeed, an examination of the Electoral College in constitutional context reveals little in the overall constitutional structure that can be described as truly majoritarian. This is the product, first and foremost, of the fact that whatever the weak attachment the Framers might have had to majoritarianism, they were unequivocal in maintaining an overriding commitment

⁶ Dahl, *How Democratic is the American Constitution?*, 74-79.

to the preservation of the states as political entities within the federal system. As a result, there is not a single representative institution created by our constitutional framework in which the will of the majority is not filtered through the states, at least to some degree. That is to say, the Senate, the House of Representatives, and the constitutional amendment process, like the Electoral College, all rely on the states as political entities. If, as Dahl argues, the Electoral College truly is “constitutionally wrong,” then certainly these other institutions must also fail to meet his rather strict criteria, whatever they might be.

Any system of government that relies on intermediaries such as states guarantees that, in certain cases, the will of the majority will be distorted. Thus, the argument that the Electoral College fails to preserve perfectly majoritarian preferences would likely have little hold on the Framers, at least relative to their commitment to preserving the importance of the states within our political order. When viewed as part of the overall constitutional commitment to a federal structure, what is most striking about the relation between the Electoral College and majoritarianism is actually the modesty of the effect of the Electoral College relative to other constitutional structures of governance.

The poster child for antimajoritarianism is clearly the Senate. Here too a story of constitutional happenstance may be told. The debates at the Constitutional Convention focused on the perceived need for a bicameral legislature to avoid the risk of “mob rule” that had been associated with the radical Pennsylvania commitment to a one-house legislature elected at-large from the entire state.⁷ But the Framers could not agree on the mechanism for the creation of an upper chamber, and the idea of state representation emerged as a default late in the Convention. Unlike the Electoral College, the resulting departure from a majoritarian ideal is of both substantial size and political consequence.

Beginning with the 2004 election, California, with a population of 33,930,798, will have fifty-five electoral votes; Wyoming, the smallest state, with a population of 495,304, will have three.⁸ In contrast, both states will continue to have two senators. Thus, while the Electoral College does slightly increase

⁷ Samuel Issacharoff, Pamela S. Karlan and Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 212 (New York: Foundation Press, rev. 2d ed. 2002), 212.

⁸ Population statistics are taken from U.S. Census Bureau, “Apportionment Population and Number of Representatives by State: Census 2000” (<http://www.census.gov/population/cen2000/tab01.pdf>), 28 December 2000. Accessed on 25 August 2002.

the power of small states at the expense of larger ones, its distorting effect is nowhere near as great as that of the Senate. Under this structure, it is very easy for senators representing a minority of the population to enact — or block — legislation opposed — or supported — by those representing the majority. In fact, since the filibuster requires only 41 votes to stop a bill, it is conceivable that senators representing slightly more than 11% of the American people could stop legislation supported by senators representing the other 89%. Similarly, the sixty senators from the thirty least populous states represent less than a quarter of the population; yet they have the ability to enact legislation over the opposition of senators representing the overwhelming majority of the nation.

A departure from majoritarianism of similar scope is found in the Article V amendment process. Although enacting a constitutional amendment requires ratification by a supermajority of state legislatures, it plainly does not require the support of state legislatures representing a supermajority of the American people. As with the Senate, California has no more influence than Wyoming or Alaska. In fact, since the thirty-eight least populous states contain barely 40% of the nation's population, it is conceivable that an amendment could be ratified by three-quarters of the states and still not have the support of states comprising even a simple majority of the American people. Similarly, the opposition of the thirteen least populous states — comprising less than 5% of the nation — would be enough to defeat any proposed amendment.

The point of this discussion is not to suggest that these scenarios are that likely — although some certainly are — but simply to show that the Electoral College is far less aberrational than its opponents would suggest. Like the Senate and the Article V amendment process, the Electoral College reflects a series of political choices. Like these institutions, it is a product of the time in which it was created. Even the Twelfth Amendment, adopted after early experience with both the Senate and the problem of contested presidential elections, committed itself to the votes for president being cast by state delegations — and not by individual members of the House of Representatives.⁹

⁹ The relevant section of the Twelfth Amendment provides: “But in choosing the President, the Votes shall be taken by States, the Representation from each State having one Vote . . .” U.S. Const. amend. XII.

In fact, even the system used to apportion seats in the House of Representatives creates more distortions than might be assumed. Article I, Section 2 states that “[e]ach state shall have at least one representative.”¹⁰ As a result, while the average Congressman represents 646,952 people, Wyoming’s lone representative represents just 495,304. Montana, despite having nearly twice the population of Wyoming, still only has one representative. In fact, while the Supreme Court has mandated that all representatives within a state’s delegation must represent the same number of people, the requirements of Section 2 render such equality across state borders impossible. The distortions created by the system of congressional apportionment are not systematic in nature — that is, they do not benefit small states at the expense of large, or vice versa — but they confirm the extent to which the overall constitutional design departs from any simple majoritarian claim.

Although beyond the scope of this paper, it is worth noting the common features of these departures from narrow majoritarianism. In each case the locus of decisionmaking is spread geographically to insure a diversity of support for the proposed course of conduct, whether it be the selection of the president, an amendment to the Constitution, or even the passage of ordinary federal legislation. One may argue that the focus on the states is a crude measure of depth of support for action taken at the national level. One may further draw on public choice theory to argue the rent-seeking mischief that may follow from granting local or regional strong hold-out powers in such a complicated federal arrangement. But these arguments do not do justice to the initial concerns over a fragile national endeavor in which important sectional interests, some worthy of respect and some an historic shame, would not have submitted to the new federal enterprise absent guarantees that their political fortunes did not rest on simple majority will.

EVOLVING CONSTITUTIONAL MAJORITARIANISM

Even if we accept that the Electoral College is not aberrant within the constitutional structure as created by the Framers, it may still be argued that subsequent developments in constitutional law have rendered it no longer viable within our constitutional

¹⁰ U.S. Const. art. I, § 2.

framework. Demetrious Caraley, for example, argues that evolving constitutional principles have rendered the Electoral College not outside the original constitutional framework, but likely violative of an evolving de facto constitutional right to direct election of the president.¹¹ Similar arguments premised on the notion of an evolved Constitution would suggest that the Electoral College is simply inconsistent with the equipopulation principle of “one person, one vote,” as spelled out in *Reynolds v. Sims* and other cases building on the legacy of *Baker v. Carr*.¹² In requiring equipopulation districts at the state legislative and congressional levels, these cases have essentially constitutionalized a more robustly majoritarian conception of American democracy than held sway at the time of the original Constitution. Thus, a claim may be raised that the evolving role of majoritarian commitment of American constitutional law requires a revisitation of constitutional practices that fail to conform. As a result, a constitutional mechanism, such as the Electoral College, that conforms to the original constitutional design may become obsolete or suspect as a result of subsequent amendments to the Constitution and the interpretive gloss that they inspired.

Lucas Powe makes a variant of this argument with regard to the most enshrined of constitutional actors, the Senate. He refers to the *Reynolds* opinion as “a direct slap at the United States Senate.” “There is no other reading of *Reynolds*,” Powe writes, “except one that concludes the United States Senate’s overrepresentation of the smaller state violates the nation’s principles of political fairness.”¹³ One could extend this argument to the Electoral College and conclude that the constitutional principles expressed in *Reynolds* and its progeny are simply inconsistent with any system which allows for the possibility that the popular vote winner could ultimately fail to triumph.

This argument rests, in my view, on an overly simple reading of the reapportionment cases, one that collapses a commitment to equality as a participatory right in the political process with a more difficult claim of a right of a majority necessarily to prevail electorally. It is certainly possible to argue, as Powe does, that the logic of equal participation compels a right

¹¹ Demetrious James Caraley, “Editor’s Opinion: Why Americans Deserve A Constitutional Right to Vote for Presidential Electors,” *Political Science Quarterly* 116 (Spring 2001): 1.

¹² *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

¹³ Lucas A Powe, Jr., *The Warren Court and American Politics* (Cambridge: Belknap Press, 2000), 252.

of majority entitlement to electoral victory.¹⁴ But the Supreme Court, even in the ambitious and often aspirational claims of the Warren Court, never enshrined as constitutional doctrine the principle that the majority must prevail on every issue, nor even in any particular election. Rather, the apportionment and participation cases that emerged in the 1960s state the claim in the negative. Not only would denials of individual rights of participation be overwhelmingly suspect, but the rules of electoral selection could not be structured so as to systematically thwart the majority time and time again. That is to say, the majority need not triumph all the time, but it cannot be so disenfranchised that it lacks the ability to implement its will over the long run.

This distinction between these two interpretations of the reapportionment cases is significant. Certainly, if the Constitution does stand for the principle that simple majoritarianism must prevail on every issue, then the Electoral College, the Senate, the amendment process, and, arguably, the House of Representatives, are all constitutionally suspect. But if it instead simply stands for the principle that the minority cannot be permitted to structure the rules so as to systematically thwart the will of the majority, the claim that these decidedly non-majoritarian institutions are constitutionally suspect is far more problematic.

If the test is a persistent and irremediable frustration of the will of the majority, the constitutional case against the Electoral College fails. After all, the Electoral College has failed to award the presidency to the winner of the popular vote only four times in our history – although once the final actor was not the electors but the House of Representatives – and only once in the last hundred years. Even the staunchest critics would be hard-pressed to argue, based on this evidence, that it systematically thwarts the will of the majority.

The same cannot be said of the situations presented by the redistricting cases. In the leading cases, such as in *Reynolds* itself, for instance, rural minorities simply disregarded state constitutional obligations to reapportion so as to perpetuate their dominance over local politics.¹⁵ State political majorities had no effective outlet for their political claims since the state legislatures were structured to impair their electoral power. This ultimately proved the justification for Court intervention to dislodge this

¹⁴ See *ibid.*

¹⁵ See *Reynolds*, 540-41.

lockhold on electoral accountability. Once the Court intervened, however, it went further than simply declaring that any redistricting scheme which threatened to systematically frustrate the will of the majority was unconstitutional. Rather, it insisted on complete equality in redistricting, under the “one person, one vote” standard. Indeed, Justice Stewart, writing in dissent in *Lucas v. The Forty-Fourth General Assembly of the State of Colorado*, argued unsuccessfully for a more flexible standard under which “any plan which could be shown systematically to prevent ultimate effective majority rule, would be invalid under accepted Equal Protection Clause standards.”¹⁶ Nonetheless, as John Hart Ely has argued, the emergence of the one-person, one-vote rule of apportionment was not so much the product of a principled attachment to majoritarianism as to a standard capable of judicial implementation: “So the Court entered, and *precisely because of considerations of administrability*, soon found itself with no perceived alternative but to move to a one person, one vote standard.”¹⁷ Approached in this fashion, even the most clearly majoritarian doctrines of modern constitutional law do not yield an easy condemnation of the Electoral College.

The Court itself has repudiated any reading of its reapportionment decisions to suggest that the Constitution requires the majority to prevail in all cases. In *Gordon v. Lance*, the Court was asked to consider a requirement of West Virginia law that prohibited any county or other political subdivision from incurring public debt without first garnering the support of 60% of the voters in a referendum.¹⁸ The Supreme Court of West Virginia had invalidated the provision, holding that it was inconsistent with the requirements of “one person, one vote.” The U.S. Supreme Court reversed, finding the state court’s reliance on the federal redistricting and voting rights cases “misplaced.”¹⁹ Chief Justice Burger, writing for the majority, declared that “there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue.”²⁰ More recently, the Court returned to the issue of the extent of its commitment to majoritarianism in the context of recognizing a claim for unconstitutional partisan gerrymandering. In assessing

¹⁶ 377 U.S. 713, 754 (1964) (Stewart, J., dissenting).

¹⁷ John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980), 124.

¹⁸ 403 U.S. 1 (1971).

¹⁹ *Ibid.*, 4.

²⁰ *Ibid.*, 6.

whether a districting configuration in Indiana would fall for not rewarding the majority party with a majority of legislative seats, the Court wrote:

And, as in individual district cases, an equal protection violation may be found only where the electoral system *substantially disadvantages certain voters in their opportunity to influence the political process effectively*. In this context, such a finding of unconstitutionality must be supported by evidence of *continued frustration of the will of a majority of the voters* or effective denial to a minority of voters of a fair chance to influence the political process.²¹

Thus, the question becomes not simply whether the Electoral College is exactly reflective of the majority will, but rather whether the distortions created by the Electoral College amount to a “continued frustration of the will of a majority of the voters.”

Finally, it is important to remember that the most fundamental difference between the redistricting situation and the Electoral College is that, inasmuch as redistricting is a process that takes place entirely at the state level, the federalism concerns that serve as the justification for the Electoral College’s very existence are completely absent. Thus, there is no significant constitutional interest, perhaps other than a general concern for states’ rights, which argues against the “one person, one vote” standard at the state level. In contrast, there is a very strong constitutional interest justifying the Electoral College. Here the analogy to the Senate is illuminating. At the height of the reapportionment revolution of the 1960s, the Court repeatedly struck down state apportionment practices that used non-population bases for the upper house, such as awarding state senate seats by county. The most forceful defense by the states was the argument that this practice essentially mirrored the division in the electoral bases of the two houses of Congress. This argument was brusquely rejected by the Court, which found the Senate to be an integral part of a federal compromise that insured the vitality of the states as compacting parties.²² The U.S. Senate’s extreme departure from the

²¹ *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (emphasis added).

²² In *Reynolds*, the Court approvingly quoted a lower court finding that the comparison with the Electoral College was inappropriate:

participatory equality premise of the apportionment cases corresponded to significant concerns of the federal structure and thus stood outside the growing force of constitutional majoritarianism. It is difficult to see why, as a matter of constitutional law or theory, the same would not apply to the Electoral College.²³

CONSTITUTIONS AND FIXED RULES

I do not want to leave the impression that there are no constitutional issues in the operation of the Electoral College. Thus far, the argument has been that the Electoral College is not constitutionally deviant for its non-directly majoritarian components, either as the Constitution was originally framed or as it has evolved through amendment and interpretation. Nonetheless, the Electoral College has shown itself to be constitutionally defective in its operation, not because of its departure from direct majority will, but because of its failure to specify with specificity the implicit constitutional need for fixed rules to govern the electoral process. By way of illustration, I turn not to the obviously salient election of 2000, but to two elections in which Electoral College defects nearly occasioned the collapse of the Republic.²⁴ In addressing this issue, it is useful to explore how Congress has responded to the election of 1800 and that of 1876. In both of the earlier elections, the Constitution's ability to set out functioning procedures for presidential succession was directly at issue – and nearly failed. Both of these elections led to reform efforts, one in the form of a constitutional amendment,²⁵ the other in the statutory form of the Electoral Count Act.²⁶ Yet, as the 2000

The analogy [between the U.S. Senate and the Alabama apportionment scheme] cannot survive the most superficial examination into the history of the requirement of the Federal Constitution and the diametrically opposing history of the requirement of the Alabama Constitution that representation shall be based on population. Nor can it survive a comparison of the different political natures of states and counties.

377 U.S. 548 (quoting [Sims v. Frink](#), 208 F. Supp. 431, 438 (D.C.M.D. Ala. 1962)).

²³ See *Gray v. Sanders*, 372 U.S. 368 (1963) for a brief discussion of the analogy between state-level reapportionment and the Electoral College.

²⁴ This is a condensed version of the argument presented in Samuel Issacharoff, "The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Selection," *Texas Law Review* ____ (forthcoming 2003).

²⁵ U.S. Const. amend. XII.

²⁶ Act of Feb. 3, 1887, ch. 90, 24 Stat. 373 (codified as amended at 3 U.S.C. §§ 5-6, 15-18 (2000)).

election made clear, the problem of counting electoral votes is, to say the least, not altogether solved.

I will begin with the election of 1800. In that election, John Adams, a Federalist and the incumbent President; Thomas Jefferson, a Republican and the incumbent Vice President; Aaron Burr, a Federalist; and Charles Cotesworth Pinckney, a Republican, were all on the presidential ballot, although Burr and Pinckney were understood to be running for vice president.²⁷ Because of a technical defect in the balloting for president, Jefferson and Burr each ended up with 73 electoral votes, Adams with 65 and Pinckney with 64. This unintended tie²⁸ between Jefferson and Burr triggered Article II, Section 1, Clause 3 of the original Constitution, which provided:

[I]f there be more than one [presidential candidate] who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President...But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote...and a Majority of all the States shall be necessary to a Choice.

The crisis arose because the Federalist Congress still in power was not inclined to vote in Thomas Jefferson, who had beaten their incumbent, Adams; and to vote in Burr would have made a mockery of the electoral process. Ultimately, however, the crisis passed without violence and the practice of presidential succession took hold in the young Republic. After 35 fruitless ballots, in which Jefferson received 8 votes,²⁹ Burr received 6, and two states did not vote, the Federalists finally relented. On the 36th ballot, Jefferson carried 10 states, and became the third president of the United States.

The Twelfth Amendment cured the immediate cause of the crisis of 1800 by providing that presidential electors must vote for

²⁷ For a detailed discussion of the election, its electoral vote counting process, and the days leading up to Jefferson's inauguration, see Bernard A. Weisberger, *America Afire: Jefferson, Adams, and the Revolutionary Election of 1800* (New York: William Morrow, 2000) 227-75. I rely significantly on these pages in the account that follows.

²⁸ *Ibid.*, 256 (“[T]he Republican managers had not made certain that one of their electors ‘threw away’ a second vote on someone other than Aaron Burr.”).

²⁹ At the time, there were sixteen states in the Union; to win the presidency, therefore, it was necessary to have the support of at least nine states.

president and vice president by “distinct ballots.” Ratified in 1804, and superseding Article II, Section 1, Clause 3 of the original Constitution,³⁰ the Amendment provides for separate presidential and vice presidential ballots, making it impossible for two candidates both to have a numerical majority of the electoral votes. But the Amendment does not clarify the procedure for *how* to count the electoral votes. Like the original Constitution, the Twelfth Amendment provides simply that “[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.”³¹ The ambiguity of this clause would lead to profound confusion in 1876.

The presidential election of 1876 pitted Rutherford B. Hayes, the Republican Governor of Ohio, against Samuel Tilden, a Democrat and Governor of New York. Tilden, like Al Gore in 2000, won the popular vote.³² But when several states, including Florida, Louisiana and South Carolina, turned in competing electoral slates, the composition of the Electoral College and with it the identity of the next president was thrown into dispute.³³ Amid great partisan anger over the election being stolen, the nation confronted another procedural void in the mechanisms for presidential succession.

To meet the March 4 deadline mandated by the Twelfth Amendment, Congress needed to find a solution. The one Congress settled on was to establish an Electoral Commission, which would decide upon the contested credentials of the

³⁰ The superseded clause reads, in pertinent part:

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each....The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed....In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President.

U.S. Const. art. II, § 1, cl. 3 (repealed 1804).

³¹ In the original Constitution, there is a slight difference in punctuation. It reads: “The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.” Ibid.

³² Tilden won by approximately 250,000 votes. Vasam Kesavan, “Is the Electoral Count Act Unconstitutional?” *North Carolina Law Review* 80 (June 2002): 1653, 1688.

³³ For a detailed account of the period from the election, on November 7, 1876, to the contest’s resolution, on March 2, 1877, two days before the inauguration date prescribed by the Twelfth Amendment, see Charles Fairman, *Five Justices and the Electoral Commission of 1877*, in Paul A. Freund and Stanley N. Katz, eds., *History of the Supreme Court of the United States, Supplement to Volume VII* (New York: MacMillan, 1988); Paul Leland Haworth, *The Hayes-Tilden Disputed Presidential Election of 1876* (New York: Russel & Russel, reprinted ed. 1966).

competing slates of electors in the disputed states. Through ill-fated partisan complications, it soon became apparent that the Commission had one more Republican on it than Democrat. Not surprisingly, the Commission resolved each electoral dispute in favor of Hayes by a margin of eight to seven along straight partisan lines. Although the Commission was seen by many to be completely fraudulent,³⁴ the Democrats did ultimately accept its results, and Hayes became president on March 4, 1877.

In the wake of the Hayes-Tilden debacle, Congress undertook an effort finally to resolve the problem of the electoral count.³⁵ The ultimate result was the Electoral Count Act of 1887.³⁶ The Act has two major provisions. First, it provides that state law procedures in place prior to the election are binding on Congress if they produce a definitive result at least six days prior to the day when the electors are scheduled to meet.³⁷ At the very least then, Congress binds itself to accept electoral votes from States that resolve any internal disputes before this six-day window closes. Second, the Electoral Count Act provides a mechanism for resolving disputes over whether to accept votes of electors.³⁸ If only one return has been submitted from a state, then that is accepted unless both houses of Congress, acting separately, agree that it should be rejected because the votes were not “regularly given.”³⁹ If multiple returns are submitted, then Congress is to accept the return that conforms to the state determination under Section 5, the so-called “safe-harbor” provision. If the houses of Congress agree upon which of several returns is the proper one, it is counted. If the houses disagree, then whichever return is “certified by the executive of the State” is counted.⁴⁰

It is worth at least noting that the “fix” following the election of 1876, unlike that which followed the election of 1800,

³⁴ Note, for example, the words of one Congressman from Kentucky, as it became clear on March 2, 1877 that Hayes would be elected president: “Today is Friday. Upon that day the Saviour of the world suffered crucifixion between two thieves. On this Friday, constitutional government, justice, honesty, fair dealing, manhood, and decency suffer crucifixion amid a number of thieves.” Haworth, *The Hayes-Tilden Disputed Election of 1876*, 280.

³⁵ For a discussion of previous attempts, see Kesavan, “Is the Electoral Count Act Unconstitutional?,” 1664-77; Samuel T. Spear, “Counting the Electoral Votes” *Albany Law Journal* 15 (1877): 156, 158-59.

³⁶ Act of Feb. 3, 1887, ch. 90, 24 Stat. 373 (codified as amended at 3 U.S.C. §§ 5-6, 15-18 (2000)).

³⁷ 3 U.S.C. § 5.

³⁸ *Ibid.* § 15.

³⁹ *Ibid.*

⁴⁰ *Ibid.* For a fuller discussion, see Samuel Issacharoff, Pamela S. Karlan and Richard H. Pildes, *When Elections Go Bad: The Law of Democracy and the Election of 2000* (New York: Foundation Press, rev. ed. 2001), 25-26.

was a statute rather than an actual amendment to the Constitution, ratified according to the procedural mechanisms laid out in Article V. This raises the possibility that the Electoral Count Act could in theory be unconstitutional,⁴¹ whereas the Twelfth Amendment by definition cannot be. Indeed, whether or not Congress has the power to bind future Congresses to a particular way of counting electoral votes was controversial then,⁴² as it is now.⁴³ Moreover, as a statute subject to repeal by a simple majority, it is possible that the Electoral Count Act simply does not command the respect of all institutional actors in a moment of crisis such as would be accorded a constitutional provision. Although a matter of conjecture, it is possible that the Supreme Court may have felt more at liberty to intervene in the Florida electoral crisis precisely because the Constitution does not prescribe the way to resolve electoral count disputes. The Electoral Count Act had never been applied or construed by the Supreme Court before the *Bush v. Gore* litigation; and while 3 U.S.C. § 15 loomed in the background as the possible final mechanism for resolving the 2000 election, it never came to be interpreted in the courts or employed in Congress.

This is, I think, one of the most important lessons to be learned from the 2000 election. As with baseball, it is essential that the rules of presidential selection be, insofar as possible, fixed *ex ante*, and that they have the respect of all relevant actors. In the case of the 2000 election, the rules of dispute resolution, while fixed *ex ante*, were not sufficiently respected by all the parties concerned. As a result, the Court, unwisely, in my view, felt free to disregard the existence of the procedures set forth in the Electoral Count Act and instead elected to devise its own solution to the dispute. Had the Court accepted the centrality of clear pre-existing rules of engagement, it would have had to have addressed the Electoral Count Act as more than an abstract commitment to rules in place prior to Election Day. Central to the statutory design is an anticipation that disputes over the proper slate of

⁴¹ For a contemporary argument that the Electoral Count Act is in fact unconstitutional, see Kesavan, "Is the Electoral Count Act Unconstitutional?"

⁴² Spear, "Counting the Electoral Votes," 159 (referring to an 1875 attempt by Congress to regulate the electoral count: "The bill, had it become law, would have commanded every future Congress upon which might devolve the duty of counting the electoral votes, to conduct the count in a particular way, to conform to a certain rule in respect to the right of debate in each house, and to settle all disputed questions in a particular manner. This, upon its face, is just what no Congress can do in respect to another.")

⁴³ Kesavan, "Is the Electoral Count Act Unconstitutional?" 1780 ("The Electoral Count Act clearly violates the anti-binding principle of rule-making.")

electors from a state may arise and a corresponding delegation of responsibility to Congress as the institutional actor best suited to resolve disputes.⁴⁴

The great unanswered question of Election 2000 may prove to be not the doctrines by which the Court intervened, but the timing of the Court's intervention and the seemingly willful disregard that Congress, a political branch, might actually have a say in the resolution of a first order political controversy. Although a matter of conjecture, it is nonetheless possible to speculate that the Court may not have so readily disregarded the institutional assignment of responsibility to Congress had the post-1876 recommitment taken the form of a constitutional amendment rather than a statute.

A SECONDARY FIX

As I mentioned at the outset, I think there is one aspect of our system of presidential selection where principles of constitutional law might have some application, and that is the method by which states choose to allocate their electoral votes among candidates. Nothing in the Constitution addresses how the electors are to be apportioned and, indeed, Article II, Section I leaves such matters firmly in the hands of the states. Forty-eight states and the District of Columbia apportion their electors based on a system in which the winner of the popular vote in a state receives all that state's electoral votes. That is, regardless of the size of the margin between the top two finishers, the winner receives all the state's votes, and the second-place finisher receives nothing. Thus, in 2000, Al Gore was awarded all five of New Mexico's electoral votes, despite receiving only 366 more votes than George W. Bush and failing to achieve even a simple majority of the popular vote in the state.⁴⁵

Only two states reject the winner-take-all approach. In Nebraska and Maine, the statewide winner receives the two electoral votes corresponding to the state's two senators. The other electoral votes - corresponding to the state's representatives - are given out, on an individual basis, to the winner of the popular vote in each congressional district. In practice, this system has proven to be no different from the winner-take-all approach for these two

⁴⁴ This argument is developed more fully in Samuel Issacharoff, "Political Judgments," *University of Chicago Law Review* 68 (Summer 2001): 637.

⁴⁵ Statistics from the 2000 election are taken from Michael Barone and Richard E. Cohen., *Almanac of American Politics 2002* (Washington: National Journal, 2001).

state, as neither Nebraska nor Maine has ever divided its electoral votes between candidates.

The impact the winner-take-all system has on our presidential campaigns is significant, particularly when one examines the manner in which candidates allocate their resources. Since the margin by which a candidate wins a state is irrelevant, campaigns focus their resources almost exclusively on those states in which polls indicate that the race is still close. As a result, states that are considered safely “out of play,” no matter how large their electoral delegations may be, are ignored by the candidates. In 2000, Texas and New York were both written off by the two major campaigns even before the race began. Candidates do not spend time or resources in these states because the outcomes in them are virtually preordained; the Democratic nominee has carried New York in every presidential election since 1988, while the Republican has carried Texas in every election since 1980. In fact, a report conducted soon after the 2000 campaign concluded that neither candidate nor their respective parties or allied interest groups spent any money whatsoever advertising on television in Texas or New York.⁴⁶ Voters living in the New York media market were bombarded with television commercials for Senate races in New York and New Jersey and for various congressional races around the region, but did not see a single advertisement for the presidential campaign.

Yet even more dangerous than the effect that it has on the distribution of the candidates’ time and resources is the effect that the winner-take-all system has on the issues that dominate campaigns. In 2000, few states were more important to determining the result of the presidential election than Florida and Pennsylvania. Coincidentally, those two states have the highest percentage of individuals aged 65 or older.⁴⁷ As a result, issues affecting seniors seemed to dominate the 2000 presidential campaign. Of course, seniors are a critical voting block in any election, but the attention paid to issues primarily affecting seniors in 2000 dwarfed that of previous presidential races. An overseas observer watching the two candidates might conclude that the two

⁴⁶ Craig B. Holman and Luke P. McLoughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* (New York: Brennan Center for Justice, 2002), 85.

⁴⁷ U.S. Census Bureau, “Population and Ranking Tables of the Older Population for the United States, States, Puerto Rico, Places of 100,000 or More Population, and Counties” (<http://www.census.gov/population/cen2000/phc-t13/tab02.pdf>), 3 October 2001. Accessed on 25 August 2002.

most pressing issues facing the United States in 2000 were how to create a prescription drug benefit for the Medicare program and how to protect the so-called Social Security surplus.

Thus, the prevalence of the winner-take-all system may have a far more distorting impact on the nature and outcome of campaigns than does the Electoral College itself, even if the result is masked behind the apparent immutability of counted votes. There are two lines of constitutional and even statutory law that may call into question the use of winner-take-all assignment of electors for the Electoral College. First, following on the ultimate justification for *Baker v. Carr* and the subsequent reapportionment cases, this is an area where there is no political incentive for any state to move away from the winner-take-all system. States that are consistently competitive benefit because the system guarantees that presidential candidates will lavish attention and resources on them. Yet even states that are rarely competitive have little incentive to do away with winner-take-all, because, under the current system, the dominant party in the state has to expend very little in the way of resources to be guaranteed all the state's electoral votes. If Texas had decided to adopt the system used in Maine and Nebraska, George W. Bush would have received ten fewer electoral votes from the state. It is obvious why Texas Republicans would never agree to such a change. Indeed, following the 2000 election, despite a variety of calls for states to change the manner in which they distributed their electoral votes, no state made a serious effort to move away from the winner-take-all approach.

Finally, unlike the case of the Electoral College itself, there may be constitutional principles at stake in the winner-take-all system. The constitutional argument against the Electoral College rests on the belief that it is inconsistent with a notion of majoritarianism which, as had already been pointed out, is nowhere enshrined in the Constitution and is, in fact, undermined by a variety of other constitutional institutions and processes. The argument against the winner-take-all system is not that it is inconsistent with notions of majority rule, but rather that it gives the majority *too much* power. The constitutional design exhibits greater concern over the excesses of majority power resulting from the risks of unbridled majority rule than it does in protecting the notion of majority rule itself. This is evident in the distinct structural features of the American Constitution, including

separation of powers, different terms of office and electoral bases for the House and Senate, the requirement of presentment for legislation, the practice of judicial review, and the structures of federalism. These structural arrangements reflect Madison's well-known concern for the risk of democracy succumbing to passion and the resulting capacity for majoritarian oppression, what he termed the risk of faction.

Most directly relevant is the several decades of case law under both the Constitution and the Voting Rights Act rendering suspect at large electoral systems. Through these cases, federal courts have dismantled local electoral systems that systematically overreward majorities who vote along racial lines, while denying a corresponding opportunity for representation to the minority.⁴⁸ The direct application of this body of law to the Electoral College is by no means clear. But oddly, the way the Electoral College operates in most states may be legally vulnerable not for an insufficient commitment to majoritarianism, as Dahl would argue, but for an excess of rewards to majorities.

CONCLUSION

It would be presumptuous to come before a gathering of political scientists to explain that, in the manner of very basic social choice insights, all rules shape outcomes. By way of conclusion, I would suggest the following about the history and constitutional role of the Electoral College:

1. The actual electoral impact of the Electoral College has been minimal. Only once, in 1876, has a candidate arguably holding a clear popular mandate been denied the presidency as a result of the vote in the Electoral College.
2. The constitutional argument against the Electoral College must fail. Not only is the Electoral College specifically created by the Constitution, but it is by no means an aberrant institution in the broad constitutional design.
3. The power to regulate the Electoral College at the federal legislative level is exceedingly small.

⁴⁸ See Chandler Davidson and Bernard Grofman, *Quiet Revolution in the South* (Princeton: Princeton University Press, 1995).

Not only is the Electoral College created at the constitutional level, but the clear command of Article II, Section 1 is to give oversight over the selection mechanism to state legislatures and not to Congress.

4. There is, however, a distinct federal interest in well-established, orderly rules of engagement for the electoral process, and an interest in having those established prior to self-interested actors seeking to manipulate them.
5. In response to the failure and controversy in 1800, Congress began the amendment process leading to the Twelfth Amendment. That successfully addressed one unanticipated issue in legitimate presidential succession.
6. In response to another failure and controversy in 1876, Congress responded statutorily to force the states to settle their electoral practices before the presidential election and to certify the slate of electors prior to a fixed date. That statute failed to direct the conduct of the Supreme Court in 2000. It is at least conceivable that the difference between the success of the Twelfth Amendment and the disregard of the procedures of the Electoral Count Act may be attributable to the latter not having the stature of a constitutional amendment.
7. The one feature of the Electoral College that seems most vulnerable under current law is the overreward of majorities as a result of the winner-take-all system in use in all states but two. Though less visible than the impact of the Electoral College when the lead vote-getter does not win the presidency, this feature of the Electoral College may have the most pronounced and most deleterious effect on presidential politics.