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The Electoral College  
Federalism and the Election of the American President

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### Abstract

The system of the Electoral College for presidential elections should remain intact and not be replaced by national popular election. Looking back at the discourse during the ratification of the Constitution, the Framers of the Constitution chose to devise the Electoral College to ensure the president would be truly a statesman, not a politician. Additionally, the Framers recognized that the “one person, one vote” system of popular election would not be sufficient to elect the president. Furthermore, since the President is an officer of the states, the Framers created a federal electoral system whereby small states have disproportionate representation in order to ensure that all states have a voice in the election.

## I. Introduction

In America, there has been a popular movement afoot to replace the Electoral College system, the current method of electing the president, with a system based on a nationwide popular vote. Under the Electoral College system, the direct vote of the American people does not elect the president. As a result, the detractors of the constitutional system charge that since it violates the “one person, one vote” principle, it must be abandoned. However, despite the well-documented fact that the Electoral College violates the “one person, one vote” principle, it serves as the most important vestige of federalism in the American constitutional order and system. The Electoral College must be retained as the method for electing the president of the United States because it is the best way of maintaining stability in the electoral process and preserving a balance of power between the states and federal government.

If the Electoral College is abandoned, the entire American constitutional system is abandoned. This paper will examine the history of the development of the Electoral system of the United States in the Constitutional Convention of 1787 and the Twelfth Amendment. Additionally, the paper will survey the current state of the Electoral College, including its current functioning as well as the issues raised in the election of 2000. Finally, this paper will present the case for the retention of the Electoral College system, and will evaluate and debunk arguments in favor of its abolition.

## II. Content of the Electoral College

The United States Constitution, federal law, and state law all govern the operation of the Electoral College system. The Constitution forms the framework of the system, and the federal and state laws provide the functionality for the system. The United States

Constitution discusses the Electoral College system in Article II, Section 1, clauses two and three, as well as the Twelfth Amendment. The Constitution lays out the essential guidelines of the operation of the system. The Constitution begins its discussion of the Electoral College in clause two by stating, “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”<sup>1</sup> The number of electors that a state may appoint to represent it is equal to that state’s representation in Congress; this keeps power proportionally distributed between each state.<sup>2</sup> The second part of the clause stipulates that “no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”<sup>3</sup> The body of the electors is a separate entity from the national government. Electors can be part of a state government, but they cannot hold office at the national level.

The Constitution further discusses the Electoral College in the third clause, but the Twelfth Amendment has superseded that clause, so the Twelfth Amendment is what

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<sup>1</sup> U.S. CONST. art. II, § 1.

<sup>2</sup> Federal law provides further clarification on this, stating,  
The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice President to be chosen come into office; except, that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment of Senators and Representatives.

3 U.S.C. § 3 (2006).

<sup>3</sup> *Id.*

determines the law. However, before the Twelfth Amendment, an elector would vote for two choices for President.<sup>4</sup> The Framers' intent was that an elector would be a judge of character and vote for the best choices.<sup>5</sup> Each elector had two votes, so he could vote for a favorite son of his state if he wished. However, the second vote had to be for a person outside of his state.<sup>6</sup> Because of the politicization of the election of 1800 and the resulting deadlock in the Electoral College between Thomas Jefferson and Aaron Burr since each Republican elector voted on the Republican ticket, Congress adopted the

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<sup>4</sup> Article II, Section One, Clause Three states,

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; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. 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. 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; and if there be more than one 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; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. 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. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

U.S. CONST. art. II, § 1.

<sup>5</sup> THE FEDERALIST NO. 68, at 414 (Alexander Hamilton) (Garry Wills ed., 2003).

<sup>6</sup> U.S. CONST. art. II, § 1.

Twelfth Amendment to accommodate the American political party system.<sup>7</sup> The Twelfth Amendment states,

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President.<sup>8</sup>

This part states the responsibility of the Electors: to cast a vote for the offices of president and vice-president. It also gives the condition that the elector must vote for at least one person from a different state than himself or herself. This prevents each elector simply for voting only for candidates from his or her own state. Furthermore, at the state meeting of electors, the electors together

Shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate.<sup>9</sup>

This clause describes the process that states must follow in their role in the Electoral College. Each state has its own set of rules for how it conducts the vote as well as the certification of the election result. The Constitution goes on to specify the next step in the electoral process by specifying, “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

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<sup>7</sup> Section II will deal with this subject in detail. GEORGE GRANT, *THE IMPORTANCE OF THE ELECTORAL COLLEGE* 27–31 (2004).

<sup>8</sup> U.S. CONST. amend. XII.

<sup>9</sup> *Id.*

be counted.”<sup>10</sup> The Constitution is very clear in the operation of the process. The Twelfth Amendment goes on to discuss the outcomes of the vote and the resulting courses of action. The first result is the election of a candidate by a majority of the electors. The Constitution states, “The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed.”<sup>11</sup> As long as one candidate holds at least a one-vote majority in the Electoral College, that candidate becomes the office holder. The Constitution has a separate plan if there is not such a majority in the Electoral College:

If no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.<sup>12</sup>

Another contingency the Constitution provides for in the Twelfth Amendment is the inability of the House of Representatives to elect a presidential candidate by a majority. In such a case that “the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.”<sup>13</sup> The Twentieth Amendment supersedes

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

this part of the Twelfth Amendment.<sup>14</sup> Instead of March 4 being the deadline, the date is moved up to January 20, since that is currently the end of the term of the sitting president and vice-president.<sup>15</sup> In the selection of the vice-president, the Twelfth Amendment states, “The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed.”<sup>16</sup> The Twelfth Amendment provides the process of selecting the vice-president if the Electoral College does not provide a majority. In such a situation, “if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.”<sup>17</sup> The Twelfth Amendment ends with the stipulation that “no person constitutionally ineligible to the office of President shall be eligible to that of Vice-

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<sup>14</sup> The Twentieth Amendment adds to the Twelfth Amendment in that it provides for the contingency of the death of the President-elect. Section 3 states,

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

U.S. CONST. amend. XX, § 3.

<sup>15</sup> *Id.*, at § 1.

<sup>16</sup> U.S. CONST. amend. XII.

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

President of the United States.”<sup>18</sup> In certain circumstances, the vice-president may have to take on the office of the president.<sup>19</sup> Finally, the fourth clause of Article II, Section 1 grants power to Congress in the electoral process. Congress has the constitutional authority to “determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”<sup>20</sup> The Constitution is very clear on the operation of the process, and there is a plethora of Constitutional specifications regarding the operation of the Electoral College system.

The United States Code provides the statute law regarding the operation of the Electoral College in Title 3, Chapter 1. This provides regulations over a wide range of issues regarding the Electoral College, ranging from the date of choosing of electors to the procedure to follow in the case of the failure of a certificate of a state giving the state’s vote to reach Congress. The federal law sets the time for the appointment of the presidential electors “on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.”<sup>21</sup> If a state does not choose its electors on that particular day, known commonly as Election Day, “the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.”<sup>22</sup> If a vacancy occurs in the Electoral College, the state determines

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<sup>18</sup> *Id.*

<sup>19</sup> U.S. CONST. art. II, § 1.

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

<sup>21</sup> 3 U.S.C. § 1 (2006).

<sup>22</sup> 3 U.S.C. § 2 (2006).

how to fill that vacancy according to state law.<sup>23</sup> The appointed electors gather to vote “on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.”<sup>24</sup> Each state makes six certificates recording the electoral vote of the state, and the electors sign the certificates and seal them closed.<sup>25</sup> Each certificate contains a list of the presidential and vice-presidential votes.<sup>26</sup> The governor of each state plays a role in the Electoral College process. It is the duty of state governors to transmit the certificates of the electoral vote of the state to the archivist of the United States and provide each elector with a duplicate certificate as well.<sup>27</sup> The archivist provides copies of the certificates to Congress.<sup>28</sup>

When the electoral certificates reach Congress, federal law provides very specific instructions about what Congress must do. The entire Congress meets in the House of Representatives on January 6 at 1:00 p.m. following a presidential election.<sup>29</sup> Congress appoints four tellers who proceed to count the votes in order of the states.<sup>30</sup> The tellers present the result to the president of the Senate who announces the result and

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<sup>23</sup> 3 U.S.C. § 4 (2006).

<sup>24</sup> 3 U.S.C. § 7 (2006).

<sup>25</sup> 3 U.S.C. § 9 (2006); 3 U.S.C. § 10 (2006).

<sup>26</sup> 3 U.S.C. § 9 (2006).

<sup>27</sup> 3 U.S.C. § 6 (2006).

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

<sup>29</sup> 3 U.S.C. § 15 (2006).

<sup>30</sup> *Id.*

calls for objections to the result.<sup>31</sup> If a senator or representative objects that the vote was irregular, he must write his objection, and one representative and one other congressman must sign the objection.<sup>32</sup> At that point, the Houses reconvene in their separate places and vote on any objections.<sup>33</sup>

Additional regulation of the election occurs at the state level. In the Commonwealth of Virginia, for example, the state law specifies that at the general election, the citizens cast a vote for an entire slate of electors pledged to a certain candidate; the number of electors corresponds to the representation of the Commonwealth in Congress.<sup>34</sup> The electors “convene at the capitol building” in Richmond “at 12:00 noon on the first Monday after the second Wednesday in December following their election.”<sup>35</sup> If there is a vacancy, the electors present vote on who will fill the vacancy.<sup>36</sup> Each elector receives a pay of fifty dollars per day that his services are required, and the state compensates him for his travel as well.<sup>37</sup> Electoral law at the state level provides additional clarification on how the state carries out the election.

The Electoral College system is an amalgam of law at various levels. The Constitution provides the framework of the system. Federal statutes specify many

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> V.A. CODE ANN. § 24.2-202 (2007).

<sup>35</sup> V.A. CODE ANN. § 24.2-203 (2007).

<sup>36</sup> *Id.*

<sup>37</sup> V.A. CODE ANN. § 24.2-205 (2007).

aspects of the process. They give directions to states regarding the time of the election and certification of the electoral vote. Federal statutes also give directions to Congress concerning the counting of the electoral vote, and they provide a process for objections to the vote. Since each state plays an integral role in the process by essentially conducting its own election at a concurrent time with other states, the laws of each state specify the time and place of the meeting of the electors as well as other election provisions. Together, these three sources of law create the Electoral College system. Since laws at both the national as well as the state level govern the Electoral College, it is a system of federal nature.

### III. History of the Electoral College

The United States' Electoral College system for the choosing of the chief magistrate has been an unparalleled success story. For over two centuries, it has worked as intended in electing the president and vice-president of the United States. First, this section will examine the circumstances of its inception and any political precedent for the Electoral College system. Second, this section will survey the system that was the result of the Constitutional Convention. Third, this section will discuss the problem that the election of 1800 presented and the resulting solution of the Twelfth Amendment. Finally, this section will analyze the effective operation of the Electoral College under the Twelfth Amendment.

The entire American federalist system of government, of which the Electoral College is a part, is truly an astonishing feat and certainly differed from the monarchical systems operating at the time in Europe. The implementation of a written constitution as

the supreme law of the land is an American innovation.<sup>38</sup> The Framers of the American Constitution built upon the precedent of the British parliamentary and common law system during America's separation from British rule.<sup>39</sup> However, the American Constitutional Order and System owes a great debt to the Hebrew Commonwealth of Ancient Israel as well.<sup>40</sup> The Framers of the Constitution cited more from the Bible than any other source; they especially used the book of Deuteronomy that formed the covenant between God and Israel.<sup>41</sup> During the 1780s, the Constitutional era, 34 percent of all of the Framers' citations in their writings were to the Bible.<sup>42</sup> The next largest sources of citations by the Framers were to Montesquieu and Blackstone, and they used the Bible in their writings.<sup>43</sup> Both the precedent from the British system and the influence of the Bible meaningfully contributed to the development of the Constitution, including the Electoral College.

While the Hebrew Commonwealth was completely unrelated in form to the American Constitutional Order and System, it does provide an important point regarding the chief magistrate. After the death of Saul, the tribes of Israel come to David to make

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<sup>38</sup> DONALD S. LUTZ, *ORIGINS OF AMERICAN CONSTITUTIONALISM* 1 (1988).

<sup>39</sup> *Id.* at 5.

<sup>40</sup> DAVID BARTON, *ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION* 225–26 (2005).

<sup>41</sup> *Id.*; *see also* LUTZ, *supra* note 38, at 141.

<sup>42</sup> *Id.*; *see also* LUTZ, *supra* note 38, at 141.

<sup>43</sup> *Id.*; *see also* LUTZ, *supra* note 38, at 141.

him their king.<sup>44</sup> What is significant here is that David “made a compact” with the tribes of Israel before God.<sup>45</sup> The Hebrew Commonwealth presents the importance of justification of authority through an agreement. In the Bible, this is the covenant between God and Israel. Under the American Constitution, a voluntary covenant made between the states and the national government, the responsibilities of those in authority “derive all their force and efficacy from that covenant.”<sup>46</sup> The American constitution provides the authority for the offices of the federal government, including the chief magistrate. The famous English jurist William Blackstone provided a pertinent discussion on the mode of appointment of the chief magistrate. Although he was working under a monarchical system, he stated that he preferred an elected magistrate as opposed to an unelected, hereditary monarch.<sup>47</sup> However, he made the caveat that corruption in the electoral process often leads to tumult and “bloodshed.”<sup>48</sup> As a result, he understood the necessity of the hereditary monarch of England.<sup>49</sup> For an elective magistrate to work, the community must “continue true to first principles.”<sup>50</sup> Using Blackstone, the key to having a representative form of government and election of the magistrate is to avoid

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<sup>44</sup> *1 Samuel* 5:1.

<sup>45</sup> *1 Samuel* 5:3.

<sup>46</sup> JAMES SEDGWICK, REMARKS, CRITICAL AND MISCELLANEOUS, ON THE COMMENTARIES OF SIR WILLIAM BLACKSTONE 25 (1790).

<sup>47</sup> WILLIAM BLACKSTONE, 2 COMMENTARIES \*183, \*185–86.

<sup>48</sup> *Id.* at \*186.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at \*185.

corruption that brings the community into upheaval. The Constitutional Convention delegates such as James Wilson of Pennsylvania and Alexander Hamilton of New York proposed the Electoral College, a unique system, in order to prevent this “tumult” that had been a problem in earlier elective systems.<sup>51</sup> James Madison of Virginia noted that the systems of Germany and Poland, were examples of the “danger” of election by the national legislature where “No pains, nor perhaps expence, will be spared, to gain from the Legislature an appointmt. favorable to their wishes.”<sup>52</sup> Under the German system “the election of the Head of the Empire, until it became in a manner hereditary, interested all Europe, and was much influenced by foreign interference.”<sup>53</sup> Under the Polish elective system, the “election has at all times produced the most eager interference of foreign princes, and has in fact at length slid entirely into foreign hands.”<sup>54</sup> About the Electoral College system avoiding the problem of corruption, Madison stated, “As the electors would be chosen for the occasion, would meet at once, & proceed immediately to an appointment, there would be very little opportunity for cabal, or corruption.”<sup>55</sup>

The events surrounding the American War for Independence also had a direct contribution to the American Constitution. It was born out of the necessities of its time, and it embodies the essence of the system that the Framers of the Constitution established. The goal of the Framers was to avoid tyranny, and they closely associated a

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<sup>51</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 300 (Max Farrand ed., 1911).

<sup>52</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 109 (Max Farrand ed., 1911).

<sup>53</sup> *Id.* at 110.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 110–11.

monarchy with tyranny due to their experience under King George III of Britain. Thus, the Framers did not want a monarch in the position of the chief magistrate: the office of the president of the United States. They expressly saw a federal republican form of government as the most fitting government for the American nation.<sup>56</sup> One of the leading Federalists, James Madison remarked, “If the plan of the Convention therefore be found to depart from the republican character, its advocates must abandon it as no longer defensible.”<sup>57</sup> The Framers specifically wanted to advance a republican form of government, not monarchy or direct democracy, because they saw each of the alternatives as deficient; they advocated a federal republican system of divided authority and diffused power.<sup>58</sup> Their choosing of a federal republican form of government serves as the guiding purpose for their enactment of an electoral process for the selection of the president of the United States.

In America, state constitutions provided an important basis for the Electoral College system. Each state constitution had its own method for electing the chief magistrate of the state, and they tended to be either “democratic” or “aristocratic.”<sup>59</sup> The Constitutions of Massachusetts and Maryland were the most significant to the discussion

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<sup>56</sup> THE FEDERALIST NO. 9, at 47 (Alexander Hamilton) (Garry Wills ed., 2003). Aristotle remarks that democracy is a bad corruption of a polity, also known as a republic, J. BUDZISZEWSKI, WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW 34-35 (1997).

<sup>57</sup> THE FEDERALIST NO. 39 (James Madison).

<sup>58</sup> THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 56, at 44–46.

<sup>59</sup> DAVID A. MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES: A CRITICAL AND HISTORICAL EXPOSITION OF ITS FUNDAMENTAL PRINCIPLES IN THE CONSTITUTION AND THE ACTS AND PROCEEDINGS OF CONGRESS ENFORCING IT 212 (Fred B. Rotham & Co. 1993) (1878).

of the Electoral College.<sup>60</sup> The Constitution of Massachusetts provided precedent for the voting process of the Electoral College.<sup>61</sup> In Maryland, an Electoral College process determined the state senators.<sup>62</sup> Each Marylander voted for two people to serve as electors, and these electors would elect fifteen senators from among the candidates.<sup>63</sup> The Framers did not form the Electoral College in a vacuum; there is precedent in the state constitutions that the system draws from.

At the Convention, the discussion of how the president of the United States would come to power was an essential topic. Since America was to exhibit a republican form of government, the election of the president was a given. Disagreement centered about the method of election of the president. There were several propositions considered by the Convention. John Rutledge of South Carolina suggested election of the president by the Senate, since the legislative body often elected the chief executives of the state governments.<sup>64</sup> Charles Pinckney of South Carolina became another advocate of election of the executive by the “national legislature.”<sup>65</sup> Elbridge Gerry attacked this plan because it would cause “constant intrigue” in Congress.<sup>66</sup> Gerry proposed election by the state

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<sup>60</sup> *Id.* at 213.

<sup>61</sup> *Id.* at 215.

<sup>62</sup> MD. CONST. of 1776, art. XIV–XVI.

<sup>63</sup> *Id.*; *cf.* MCKNIGHT, *supra* note 59, at 221.

<sup>64</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 69 (Max Farrand ed., 1911); *cf.* MCKNIGHT, *supra* note 59, at 226.

<sup>65</sup> *Id.* at 91.

<sup>66</sup> *Id.* at 80.

governors instead.<sup>67</sup> The Convention considered “popular election,” but delegates such as Gerry did not like this option either.<sup>68</sup> The Convention “condemned” popular election “at once,” and the measure “at no time found rational support.”<sup>69</sup> Neither of these suggestions received final approval by the Constitutional Convention.

However, there was still another consideration. As debate heated up in the Convention over this topic, James Wilson suggested the underlying system that became the Electoral College. His plan met with support, as many of the Framers saw danger in the election of the president by Congress.<sup>70</sup> His plan was to apportion districts throughout the nation and have states vote for the elector of that district.<sup>71</sup> The Convention debated and amended the proposal, and the result was the final plan whereby states would appoint electors who were not to be part of the legislature.<sup>72</sup> If the Electoral College did not elect a singular candidate with a majority of the votes, the representatives of the citizens in the House of Representatives would elect the president.<sup>73</sup> The Convention agreed to the Constitution on September 17, 1787. The electoral system was “one of the most carefully considered parts of the instrument, and it issued from their

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<sup>67</sup> *Id.* at 175–76.

<sup>68</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 114 (Max Farrand ed., 1911).

<sup>69</sup> MCKNIGHT, *supra* note 59, at 227.

<sup>70</sup> *Id.* at 228–29.

<sup>71</sup> *Id.* at 228.

<sup>72</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 519–20 (Max Farrand ed., 1911).

<sup>73</sup> *Id.* at 519; *cf.* MCKNIGHT, *supra* note 59, at 230–31.

hands as nearly a perfect system as it was possible to make it under the circumstances.”<sup>74</sup>

In the Pennsylvania Ratifying Convention, James Wilson asserted that,

By [the Electoral College system] we avoid corruption; and we are little exposed to the lesser evils of party intrigue; and when the government shall be organized, proper care will undoubtedly be taken to counteract influence even of that nature. The Constitution, with the same view, has directed, that the day on which the electors shall give their votes shall be the same throughout the United States. I flatter myself the experiment will be a happy one for our country.<sup>75</sup>

In the North Carolina Ratifying Convention, James Iredell expressed a similar sentiment.

He maintained that with the Electoral College system,

Thus, sir, two men will be in office at the same time; the President, who possesses, in the highest degree, the confidence of his country, and the Vice-President, who is thought to be the next person in the Union most fit to perform this trust. Here, sir, every contingency is provided for. No faction or combination can bring about the election. It is probable that the choice will always fall upon a man of experienced abilities and fidelity. In all human probability, no better mode of election could have been devised.<sup>76</sup>

This system would prevent corruption and political pandering that Blackstone and the Convention delegates saw as a barrier to an effective elected chief magistrate.

During the state ratification debates, the Electoral College was widely accepted by both supporters and opponents of the Constitution. Alexander Hamilton stated, “The mode of appointment of the chief magistrate of the United States is almost the only part of the

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<sup>74</sup> MCKNIGHT, *supra* note 59, at 239.

<sup>75</sup> 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, 512 (Jonathan Elliot ed., 1836).

<sup>76</sup> 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, 107 (Jonathan Elliot ed., 1836).

system, of any consequence, which has escaped without severe censure, or which has not received the slightest mark of approbation from its opponents.”<sup>77</sup> One of the best speeches in the State Convention debates regarding the benefit of the Electoral College came from Mr. Parsons of Newburyport, Massachusetts who remarked that the Electoral College is far better than an oath in ensuring that the chief executive is a person of strong Christian character.<sup>78</sup> James Wilson noted that, “The manner of appointing the President of the United States, I find, is not objected to.”<sup>79</sup> He found it interesting,

How little the difficulties, even in the most difficult part of this system, appear to have been noticed by the honorable gentlemen in opposition. The Convention, sir, were perplexed with no part of this plan so much as with the mode of choosing the President of the United States.<sup>80</sup>

The Electoral College provision of the Constitution went through intense scrutiny and emerged with a consensus of approval.

The first section of Article II of the Constitution is the result of the Constitutional Convention. Each state provides a body of electors proportional to its representation in Congress, and these electors are separate from the federal government.<sup>81</sup> In the first few elections, each elector would then select two persons for the office of president, and one

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<sup>77</sup> THE FEDERALIST NO. 68 (Alexander Hamilton), *supra* note 5, at 413.

<sup>78</sup> 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, 88–89 (Jonathan Elliot ed., 1836).

<sup>79</sup> *Id.* at 511.

<sup>80</sup> *Id.*

<sup>81</sup> U.S. CONST. art. II, § 1.

of them had to be from a different state.<sup>82</sup> The Framers purposely intended to create a body that was both separate from the Congress and the citizenry to elect the president.<sup>83</sup>

The Constitution then provided for the counting of the votes of the electors and two contingency plans. The first is that if two candidates received an equal majority in the Electoral College, the House of Representatives would choose which candidate should be president.<sup>84</sup> The second is that if no candidate captured a majority of the vote in the Electoral College, the House of Representatives chose the president from among the top five candidates (with each state having one vote), and the candidate not chosen to be president but having a plurality in the Electoral College would be vice-president.<sup>85</sup> This system provided for a stable election process to produce a clear winner from among the presidential candidates.

This Electoral College system worked smoothly through the first three elections. In most of the state elections, the state legislatures voted for the electors, though there were some states that used popular vote.<sup>86</sup> The first election was the election of 1789. The election was a unanimous victory for George Washington as every elector cast a vote

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<sup>82</sup> *Id.*

<sup>83</sup> ROBERT M. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM* 85 (1994).

<sup>84</sup> U.S. CONST. art. II, § 1.

<sup>85</sup> *Id.*

<sup>86</sup> Andrew E. Busch, *The Development and Democratization of the Electoral College*, in *SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE* 27, 34 (Gary L. Gregg ed., ISI Books 2001).

for him.<sup>87</sup> In the election of 1792, Washington again received a unanimous victory in the Electoral College.<sup>88</sup> Partisan politics, which was largely absent from the first two elections due to the widespread popularity of Washington, became evident in the election of 1796.<sup>89</sup> Washington refused to run for a third term, so the Federalist faction and the Republican party prepared to run their own candidates for both president and vice-president; this was the first instance of a party ticket being run as previously the electors only considered two candidates for president.<sup>90</sup> However, an electoral scheme gone wrong resulted in an unanticipated result. Alexander Hamilton concocted a plan among Southern electors whereby the presidency would go to Thomas Pinckney, rather than John Adams in the Electoral College; when New England electors discovered the plan, they left Pinckney off their ballots.<sup>91</sup> Because they discovered Hamilton's scheme, the Federalist John Adams received the majority of electoral votes and became president while his "chief opponent," the Republican Thomas Jefferson received the second highest total and became vice-president.<sup>92</sup> Throughout the first three elections, the Electoral College operated for the most part as intended as it provided a winner with a clear claim to the office of president. The Electoral College decided the first three elections, so the elections did not go to the House of Representatives.

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<sup>87</sup> GRANT, *supra* note 7, at 23–24.

<sup>88</sup> *Id.* at 24.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 24–25.

<sup>91</sup> *Id.* at 25–26.

<sup>92</sup> *Id.*

The election of 1800 provided the most formidable challenge for the Electoral College from a procedural standpoint. By that time, the two-party system had become well entrenched in American politics. The original plan of the Constitution had been that the candidate with the most votes would become president and the candidate for president with the second-most votes would be vice-president. This was because the Framers assumed that no person of the “highest caliber” would run for the office of vice-president in its own right, so they wanted a presidential candidate to take the office of vice-president.<sup>93</sup> In the election of 1800, the Republican electors nominated both Thomas Jefferson and Aaron Burr for president, so the electors gave each candidate a majority votes in the Electoral College.<sup>94</sup> The Constitution stated that if two candidates received a majority in the Electoral College, the election went to the House of Representatives to choose the president and vice-president.<sup>95</sup> This created a major constitutional dilemma. The House of Representatives went through thirty-six ballots before finally choosing Thomas Jefferson for President and Aaron Burr for vice-president as intended by the Republican Party.<sup>96</sup> Since this proved to be an arduous process, another procedure was needed to adjust to the reality of the two-party system. Senator James Hillhouse of Connecticut noted that, “If every man were to act correctly, no party passions would prevail on an occasion so important.”<sup>97</sup> However, recognizing the situation he notes that

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<sup>93</sup> HARDAWAY, *supra* note 83, at 90.

<sup>94</sup> *Id.* at 91.

<sup>95</sup> U.S. CONST. art. II, § 1.

<sup>96</sup> GRANT, *supra* note 7, at 28.

<sup>97</sup> 13 ANNALS OF THE CONGRESS OF THE UNITED STATES, 129.

in the future, the original system may “carry the champions of two opposite parties to the House of Representatives, and instead of voting thirty-seven times before they decide, as on the last occasion, they will vote thirty hundred times.”<sup>98</sup> In the election of 1800, “one was intended by the people for President, and the other for Vice President; but the Constitution knows no vote for Vice President.”<sup>99</sup> His fear was that in the case of another deadlock, “neither party will give out,” and such a situation “will end in the choice of a third man, who will not be the choice of the people, but one who will, by artful contrivances,” become the President.<sup>100</sup>

The solution devised to remedy this procedural problem was the Twelfth Amendment, by which the Congress and states made two major changes in the electoral system. First, the Twelfth Amendment changed the ballot used by electors: instead of selecting two candidates for president, each elector would select one candidate for president and another for vice-president.<sup>101</sup> The second change only concerned elections thrown into the House of Representatives; while under the original Constitutional provision the House would consider five candidates, under the Twelfth Amendment, they only considered the top three candidates.<sup>102</sup> This aligned the Electoral College system to the reality of partisan politics that developed in the elections of 1796 and 1800 where political parties run candidates for both president and vice-president.

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 130.

<sup>101</sup> *Id.* at 29.

<sup>102</sup> U.S. CONST. amend. XII.

There have been a few elections where the candidate with the plurality of the national popular vote failed to capture a majority of Electoral College votes. The election of 1824 was the first of these, and the House of Representatives decided the election in the end. There were five candidates in this election, each with sectional loyalties.<sup>103</sup> Andrew Jackson won a plurality of the popular vote and electoral vote; however, he failed to capture a majority in the Electoral College.<sup>104</sup> The election went to the House of Representatives, which elected John Quincy Adams, one of the top three electoral vote winners, as president.<sup>105</sup>

The next contentious election was the election of 1876, and this election should be in a category unto itself. The Democrat candidate Samuel Tilden won the popular vote over Republican Rutherford Hayes, but neither candidate had a majority in the Electoral College because of disputed electoral votes in the states of Louisiana, Florida, South Carolina, and Oregon.<sup>106</sup> The dispute arose in the first place because of widespread voter fraud.<sup>107</sup> In order to solve the problem of the disputed votes, Congress passed the Act of 1877 authorizing the establishment of an Electoral Commission to determine which candidate would receive the disputed electoral votes.<sup>108</sup> This commission had eight

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<sup>103</sup> GRANT, *supra* note 7, at 34.

<sup>104</sup> Jackson won 42 percent of the popular vote, *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 39.

<sup>107</sup> *Id.* at 40.

<sup>108</sup> MCKNIGHT, *supra* note 59, at 277.

Republican members and seven Democrat members, and it voted along party lines.<sup>109</sup>

The Republican candidate, Rutherford B. Hayes, became president.<sup>110</sup>

The final incident before the election of 2000 where a candidate won a majority of the popular vote but lost the Electoral College vote was the election of 1888. This case is very simple: Grover Cleveland won the popular vote by a very slim margin because he had concentrated support in one region while his opponent Benjamin Harrison maintained a broad appeal to voters and thus captured the majority in the Electoral College.<sup>111</sup> Through these three instances, the Electoral College still worked as intended: it provided a clear winner in the election with a claim to the office of president.

The Electoral system in use in the United States to this day has not failed to produce a clear winner for the presidency, though there have been challenging situations. The history shows that the Electoral College system has worked very effectively with few problematic elections. The Twelfth Amendment remedied the problem of partisan politics that occurred in the election of 1800. Evidence to this fact of the efficiency of the Electoral College system is that the House of Representatives has only decided two presidential elections because one candidate usually receives a clear mandate through an Electoral College victory. No system can ever function perfectly, especially a political system, but the Electoral College has a proven record of success.

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<sup>109</sup> *Id.* at 278.

<sup>110</sup> GRANT, *supra* note 7, at 40.

<sup>111</sup> *Id.* at 41–42.

Despite its record of providing continuity and stability in the electoral procedure, the Electoral College system still has its critics. There have been cries to abolish it throughout its history. One of the most recent criticisms of the Electoral College came in the aftermath of the 2000 presidential election. Even with problems in the state of Florida, which delayed the outcome of the election for a few weeks, the Electoral College system still performed its duty.

#### IV. Election 2000

The election of 2000, which was between the Republican ticket of George Bush, Jr. and Richard Cheney and the Democrat ticket of Albert Gore and Joseph Lieberman, presented the most recent challenge to the Electoral College system. Problems in Florida created a controversy that went all the way to the Supreme Court. The Supreme Court cases and the difference in the election results between the national popular vote and the Electoral College raised a couple of constitutional issues. The main issue articulated in the court cases is there must be equal weight given to votes cast within the state's election. However, the real underlying issue is unequal weight given to voters on the national level, as the Republican ticket lost the national popular vote but won the Electoral College vote.

The Florida issue discussed the principle that voters within the same election have an equal say with other voters in the election. The problem started in Florida when the election results showed the Republican ticket ahead by "less than one-half of one percent of the votes cast," so in accordance with Florida statute, all ballots cast were tallied again

by means of a “machine recount.”<sup>112</sup> This statewide recount resulted in Bush’s “margin of victory” decreasing, so the Democrat Party exercised their prerogative asked for manual recounts of “undervotes” in the four Florida counties of Volusia, Palm Beach, Broward, and Miami-Dade.<sup>113</sup> Time was running out, as the deadline for certification of the votes was November 15, and the Secretary of State, Katherine Harris, stated that she would not consider the results of recounts after the deadline.<sup>114</sup>

In making her decision, Harris held that there were no “facts or circumstances that suggest the existence of voter fraud, ... substantial noncompliance with the state's statutory election procedures, coupled with reasonable doubt as to whether the certified results expressed the will of the voters,” or “facts or circumstances that suggest that Palm Beach County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control.”<sup>115</sup> Rather, the issue was that Palm Beach County “alleged ... [the] possibility that the results of the manual recount could affect the outcome of the election if certain results obtain.”<sup>116</sup> She did “not believe that the possibility of affecting the outcome of the election is enough to justify ignoring the statutory deadline,” and she found “that the facts and circumstances alleged,

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<sup>112</sup> *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 73 (2000).

<sup>113</sup> *Id.* at 73–74.

<sup>114</sup> *Id.* at 74.

<sup>115</sup> Letter from Katherine Harris to Palm Beach County Canvassing Bd. (Nov. 15, 2000).

<sup>116</sup> *Id.*

standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statutory deadline imposed by the Florida Legislature.”<sup>117</sup>

The Democrat Party filed a lawsuit against the State of Florida, and the case went to trial.<sup>118</sup> The trial court judge upheld Katherine Harris’ actions and understanding of Florida election law, but the Florida Supreme Court took up the case and overruled the lower court.<sup>119</sup> It is important to note that the Supreme Court took up the case without any litigant filing an appeal.<sup>120</sup> The Florida Supreme Court agreed with Gore that the selected counties should proceed with the manual recounts.<sup>121</sup> Gore’s selecting of three of the “heavily Democratic” counties was very deliberate. In his selection of these specific counties,

First, to the extent that errors by the counting machines were randomly distributed, Gore could expect to be a net gainer in these most heavily Democratic jurisdictions. Second, the hand recounts would be supervised by local elected officials, and the chances that such officials would be biased in Gore's favor (or at least not biased in Bush's favor) would be highest in the most heavily Democratic counties.<sup>122</sup>

Bush appealed to the United States Supreme Court on the basis that the Florida Supreme Court violated the process, “by effectively changing the State's elector appointment

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<sup>117</sup> *Id.*

<sup>118</sup> Palm Beach County Canvassing Bd. v. Harris, 777 So. 2d 1220, 1227 (2000).

<sup>119</sup> *Id.*

<sup>120</sup> Nelson Lund, *Votes and Voices: Re-evaluations in the Aftermath of the 2000 Presidential Election: The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219, 1230 (2002).

<sup>121</sup> Palm Beach County Canvassing Bd. v. Harris, 777 So. 2d, at 1240.

<sup>122</sup> Lund, *supra* note 120, at 1228–29.

procedures after election day, violated the Due Process Clause or 3 U.S.C. § 5.”<sup>123</sup> Bush alleged that “the decision of that court changed the manner in which the State's electors are to be selected, in violation of the legislature's power to designate the manner for selection under Art. II, § 1, cl. 2 of the United States Constitution.”<sup>124</sup> The United States Supreme Court agreed with Bush.<sup>125</sup> They stated unanimously that,

We are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2. We are also unclear as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5. The judgment of the Supreme Court of Florida is therefore vacated, and the case is remanded for further proceedings not inconsistent with this opinion.<sup>126</sup>

Disgruntled with the United States Supreme Court ruling, Gore proceeded to file another suit in Florida courts.<sup>127</sup> He cited “five instances” where he believed “the official results certified involved either the rejection of a number of legal votes or the receipt of a number of illegal votes.”<sup>128</sup> The first instance was “The rejection of 215 net votes for Gore identified in a manual count by the Palm Beach Canvassing Board as reflecting the clear intent of the voters.”<sup>129</sup> The second was “The rejection of 168 net votes for Gore,

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<sup>123</sup> Bush v. Palm Beach County Canvassing Bd., 531 U.S. at 73.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 78.

<sup>126</sup> *Id.*

<sup>127</sup> Lund, *supra* note 120, at 1236.

<sup>128</sup> Gore v. Harris, 772 So. 2d 1243, 1247 (2000).

<sup>129</sup> *Id.* at 1248.

identified in the partial recount by the Miami-Dade County Canvassing Board.”<sup>130</sup> The third case he brought up was “The receipt and certification after Thanksgiving of the election night returns from Nassau County, instead of the statutorily mandated machine recount tabulation, in violation of section 102.14, Florida Statutes, resulting in an additional 51 net votes for Bush.” The fourth case was “The rejection of an additional 3300 votes in Palm Beach County, most of which Democrat observers identified as votes for Gore but which were not included in the Canvassing Board's certified results.”<sup>131</sup> The final instance was “The refusal to review approximately 9000 Miami-Dade ballots, which the counting machine registered as non-votes and which have never been manually reviewed.”<sup>132</sup> In a 4-3 decision, the Florida Supreme Court upheld Gore’s logic.<sup>133</sup> The Florida Supreme Court ordered that the Miami-Dade County would “tabulate by hand the approximate 9,000 Miami-Dade ballots, which the counting machine registered as non-votes, but which have never been manually reviewed.”<sup>134</sup> Additionally, the court ordered that they would “add any legal votes to the total statewide certifications and to enter any orders necessary to ensure the inclusion of the additional legal votes for Gore in Palm Beach County and the 168 additional legal votes from Miami-Dade County.”<sup>135</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Lund, *supra* note 120, at 1237.

<sup>134</sup> Gore v. Harris, 772 So. 2d at 1262.

<sup>135</sup> *Id.*

Bush appealed this decision of the Florida Supreme Court back to the United States Supreme Court.

Nelson Lund, a legal scholar and professor at George Mason University, in his analysis of the decision by the Florida Supreme Court, notes that there was very weak legal reasoning behind the majority's decision.<sup>136</sup> Lund asserts the Florida court ignored the binding precedent of *Bush v. Palm Beach County Canvassing Bd.* in their decision.<sup>137</sup> He also maintains that Florida law "required Gore to prove the existence of errors sufficient to change or place in doubt the outcome of the election."<sup>138</sup> However, "the only evidence he had was the existence of some 9,000 'undervote' ballots that the Miami-Dade officials had found it impracticable to examine during the 'protest' period."<sup>139</sup> Despite these facts, "the court held that the mere existence of these ballots was sufficient to place the outcome of the statewide election in doubt, even though Gore had not proved that a recount of these ballots would even favor him."<sup>140</sup> Based on a partial recount in disproportionately Democrat precincts in Miami-Dade County, the Florida Supreme Court ordered 168 additional votes added to Gore's total.<sup>141</sup> The dissenters on the Florida Supreme Court, who were Democrats, noted that majority on the court as well as Democrat-controlled counties were tampering with the election result in a lawless manner

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1238

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1239–40.

that would invite intervention by the federal government.<sup>142</sup> In his dissent, Justice Wells maintained, “the majority's decision cannot withstand the scrutiny which will certainly immediately follow under the United States Constitution.”<sup>143</sup> This debacle occupied the attention of the nation for quite some time as the result of the election was uncertain, and it created many calls for alteration or outright abolition of the Electoral College system.

At that point, the fate of the recounts was in the hands of the Supreme Court. In its decision, the Supreme Court in a 5-4 majority ordered the end to the seemingly endless recounts, mandating that the result certified by the Katherine Harris be the result of the Florida election.<sup>144</sup> Chief Justice Rehnquist wrote for the majority, and Justices Kennedy and O’Conner held his opinion.<sup>145</sup> The Court found many problems with the procedures used in the recounts that it considered as violations of the Equal Protection Clause of the Fourteenth Amendment.<sup>146</sup> The court noted that it “is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work.”<sup>147</sup> First, each of the four counties used differing standards in determining what constituted a vote.<sup>148</sup> In addition, within the county canvassing boards, different people used various kinds of standards for

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<sup>142</sup> *Id.* at 1240.

<sup>143</sup> *Gore v. Harris*, 772 So. 2d at 1263 (J. Wells, dissenting).

<sup>144</sup> *Bush v. Gore*, 531 U.S. 98, 110 (2000).

<sup>145</sup> *Id.* at 98.

<sup>146</sup> *Id.* at 110.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 106–07.

determining a vote, and Palm Beach County even changed its standards midway through the recount!<sup>149</sup> Justices Scalia and Thomas joined concurring in the opinion.<sup>150</sup> An important distinction that Justices Scalia and Thomas made comes from a federalist standpoint. They note that “in most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law.”<sup>151</sup> However, since the Constitution “imposes a duty or confers a power” on the state legislature specifically in this case, that is the body to whom jurisdiction is given to determine the “method of appointment,” not the state courts.<sup>152</sup> The United States Supreme Court did not allow any more delay in the electoral process in Florida; the certified election result stood.

While many people, especially supporters of the Democrat ticket in the election, have argued that it decided the election against the will of the citizens, the Supreme Court made a good decision in terminating the recounts and mandating that the certified election results stand. Lund makes the case that the “selective and partial recounts” constituted an “inadvertent form of vote dilution” since “there is no meaningful difference between adding illegal votes to the count and selectively adding legal votes,” and the manual recounts fell in the latter category.<sup>153</sup> Essentially, the manual recounts were creating a corruption of the election result, and the Supreme Court made the right

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 112 (JJ. Scalia & Thomas, concurring).

<sup>152</sup> *Id.*

<sup>153</sup> Lund, *supra* note 120, at 1220.

decision by preventing further harm.<sup>154</sup> Lund asserts the fact that the four dissenters in the case did not have an adequate answer to the argument of the majority that the manual recounts violated the Equal Protection clause of the Fourteenth Amendment, interpreted through precedent such as *Reynold v. Sims* and *Harper v. Virginia Bd. of Elections*.<sup>155</sup> Finally, the Supreme Court protected the rule of law (which is the basis of the Electoral College) against the arbitrary standards employed by the successive recounts.<sup>156</sup> The Court noted, “The standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.”<sup>157</sup> One example was that “A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote.”<sup>158</sup> Additionally,

Testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal.

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<sup>154</sup> An important point that Lund makes in his critique of the case is Justice Stevens’ support of the legal realism school of jurisprudence. Stevens advocates the view that law is what judges say it is, whereas the majority on the Supreme Court rejected this philosophy in their decision, *Id.* at 1223.

<sup>155</sup> *Id.* at 1250; *see also* 531 U.S. at 104–05.

<sup>156</sup> Gary L. Gregg, *The Origins and Meaning of the Electoral College*, in *SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE* 1, 26 (Gary L. Gregg ed., ISI Books 2001).

<sup>157</sup> *Bush v. Gore*, 531 U.S. at 106.

<sup>158</sup> *Id.*

This is not a process with sufficient guarantees of equal treatment.<sup>159</sup>

The recounts were indeed unconstitutional under the Fourteenth Amendment. That is because “equal protection” applies to not only the “initial allocation of the franchise” but also “the manner of its exercise.”<sup>160</sup> Equal protection in this sense means that “the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.”<sup>161</sup> Since the recounts were using disparate standards to measure votes, the Supreme Court made the proper decision in ending the recounts even though supporters of Gore criticized the Court with handing the election to Bush based on their prejudices.

Much of the criticism of the case comes from the partisan lines along which the Supreme Court decided the case. The fact that the more conservative members of the Court, all appointed by Republican presidents, ruled in favor of Bush, is what angers many Democrat supporters.<sup>162</sup> However, Michael McConnell, a professor of law at the University of Utah College of Law, maintains that “the justices who voted in favor of the Gore legal position were the most ‘liberal’ of the Court, and may have had their reasons for preferring a Gore victory.”<sup>163</sup> Additionally, he makes the point that the Court was in a precarious position due to the partisan politics at the Florida Supreme Court. The Florida Supreme Court, “comprised entirely of Democratic appointees,” gave Gore “a more

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<sup>159</sup> *Id.* at 106–07.

<sup>160</sup> *Id.* at 104.

<sup>161</sup> *Id.* at 104–05.

<sup>162</sup> Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657, 658 (2001).

<sup>163</sup> *Id.*

sympathetic ear” than the lower Florida courts had given him by ruling in his favor ever time.<sup>164</sup> The Florida Supreme Court based its legal reasoning on “grounds that seemed dubious at best and disingenuous at worst.”<sup>165</sup> According to McConnell’s analysis, this put the United States Supreme Court in a bind because “it could either allow a state court to decide the national presidential election through what appeared to be one-sided interpretations of the law, or render a decision that would call its own position, above politics, into question” in the minds of its critics.<sup>166</sup> While supporters of Gore in the election of 2000 criticized the United States Supreme Court for their decision in *Bush v. Gore*, in the end, really the Florida Supreme Court deserved such criticism.

The underlying issue that came to the surface in the 2000 presidential election is the idea that each citizen should have an equal vote. The Supreme Court has affirmed in the majority view of the *Bush v. Gore* decision that political parties and courts cannot manipulate citizens’ votes through unconstitutionally run electoral manipulation schemes. In the election of 2000, opponents of the Electoral College system cite the disparity that although the Republican ticket lost the national popular vote by a half million votes, they still won a majority in the Electoral College (with Florida being the controversial state).<sup>167</sup> This has additional weight due to the myth of the election of 2000 being an election stolen from Al Gore by George Bush. Some commentators criticize the Electoral

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<sup>164</sup> *Id.* at 659.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> James R. Stoner, *Federalism, States, and the Electoral College*, in *SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE* 43, 45 (Gary L. Gregg ed., ISI Books 2001).

College as being an undemocratic relic of the past in a democratized system.<sup>168</sup> Victor Williams, a Professor of Law at John Jay College of the City University of New York, and Alison MacDonald, a judicial law clerk for the United States District Court, wrote an article criticizing the Electoral College system. Williams and McDonald condemn the Electoral College on the grounds that the Convention devised it because the South “sought an explicit ratification of the institution of slavery and an implicit guarantee of the South's dominance and control of the national government's political branches.”<sup>169</sup>

They go on to contend that

in securing this “peculiar” electoral method for selecting the President, the southern delegates postponed for decades the possibility of a presidential aspirant daring to say publicly of an African-American: “He is my equal ... and the equal of every living man.”<sup>170</sup>

Shortly after the 2000 election, newly elected Senator Hillary Clinton of New York made known her desire to abolish the Electoral College system for direct popular election.<sup>171</sup>

After a speech in Albany, she remarked that

We are in a very different country than we were 200 years ago. We have mass communications, we have mobility through transportation means to knit our country together that was not conceived of at the time of the founders’ proposals about how we elect our presidents. I believe

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<sup>168</sup> Victor Williams and Alison M. McDonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation’s Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 263–64 (1994).

<sup>169</sup> *Id.* at 206.

<sup>170</sup> *Id.*

<sup>171</sup> Dean E. Murphy, *In Upstate Victory Tour, Mrs. Clinton Says Electoral College Should Go*, N.Y. TIMES, Nov. 11, 2000, at B1.

strongly that in a democracy we should respect the will of the people.<sup>172</sup>

While the Electoral College has thus far weathered the opposition that it gathered in the 2000 presidential election, it is conceivable that should the popular vote winner lose the Electoral College election at some point in the future, there could be enough momentum to subvert or abolish the system provided for in the Constitution.<sup>173</sup> It is interesting to note that the system given such wide approval by the Framers of the Constitution has come under such attack today.

The election of 2000 has many ramifications for the future of the political process in America. Many argue that “the will of the people was thwarted” by “a politically motivated majority of the Supreme Court” as well as most notably by “an outmoded and undemocratic method of presidential election.”<sup>174</sup> These views stem from both a misunderstanding of the Supreme Court’s decision and a misunderstanding of the Electoral College system. The fact the Bush won the election in Florida is proven through “numerous post-election analyses of the Florida vote,” however, the “mythology of the ‘stolen’ election” is used to propose an end to the Electoral College since it has been (wrongfully) criticized as “an obstacle to the effectuation of the popular will.”<sup>175</sup> If America rejects the Electoral College system of electing the president in the future in

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<sup>172</sup> *Id.*

<sup>173</sup> Williams, *supra* note 168, at 44–45.

<sup>174</sup> Michael M. Uhlmann, *Creating Constitutional Majorities: The Electoral College after 2000*, in *SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE* 103, 103 (Gary L. Gregg ed., ISI Books 2001).

<sup>175</sup> *Id.* at 104.

favor of popular vote, that will be a travesty because the Electoral College system, though a very old system, provides a far better method of election than direct popular vote, and the Framers of the Constitution understood that fact. The 2000 presidential election provides grim evidence of what happens when a court, in this case the Florida Supreme Court, attempts to alter the course of an election. Stemming from the lessons of the 2000 election, one of the biggest dangers of a national direct election of the president is the debacle in Florida propagated on a nationwide scale in the case of a close popular vote election. The Founders specifically aimed for clarity of the election winner through the Electoral College system; they created a system “to afford as little opportunity as possible to tumult and disorder.”<sup>176</sup>

#### V. The Current State of the Electoral College

The Electoral College system has been in operation for the past 200 years with one major procedural constitutional change occurring to adjust the system to the reality of political parties in America. Since its inception, the Electoral College has maintained stability and continuity in the political process. For every election cycle, it has consistently elected “a president with a clear and immediate claim to the office.”<sup>177</sup> It has followed through on its purpose. Even if the Electoral College winner is not the winner of the popular vote, as happened in 2000 and before that in 1888, it still follows through

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<sup>176</sup> THE FEDERALIST NO. 68 (Alexander Hamilton), *supra* note 5.

<sup>177</sup> Walter Berns, *Outputs: The Electoral College Produces Presidents*, in SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE 115, 155 (Gary L. Gregg ed., ISI Books 2001).

on electing a candidate to the office of president.<sup>178</sup> It is extremely infrequent that the Electoral College winner loses the popular vote; however, many opponents of the Electoral College use such instances to argue for the abolition of the Electoral College.<sup>179</sup>

It is clear that the Electoral College is an integral part of the American political process. Its history stems from the experience of the Framers under tyranny and their desire to avoid tyranny under a new system of self-governance. The Framers carefully deliberated over a number of options in electing the president of the United States, and they settled upon the Electoral College as the best method to protect the interests of the states as well as the people. When the electoral system encountered a difficulty in the election of 1800, the Twelfth Amendment remedied the situation by aligning the principles of the Electoral College system to the realities of the entrenched two-party system in America. The election of 2000 represents the latest and most formidable obstacle to the Electoral College, and it has led to many cries for the abolition of the institution provided for in the Constitution. The modern American philosophy of government upholds the notion as articulated in *Bush v. Gore* that each vote cast demands fair treatment, and the manual recounts in Florida violated that fair treatment. However, the underlying issue stemming from the result of the election is that the candidate who was the choice of the people through the result of the popular election did not become president of the United States as the result of the Electoral College. It is this discrepancy that is at the heart of the attacks on the Electoral College system.

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<sup>178</sup> *Id.* at 115–16.

<sup>179</sup> *Id.*

While the Constitution is specific about the operation of the Electoral College, it still leaves many details of its implementation up to the states. Under the current operation of the Electoral College system, the people in each state vote for the state's representatives to the Electoral College.<sup>180</sup> As mentioned before, those electors then make their selection for president and vice-president according to the process stipulated by the Constitution and the Twelfth Amendment. These electors cast their vote representing the result of the election in their state, and each state has a certain number of votes according to their representation in Congress.<sup>181</sup> The District of Columbia also has three electoral votes.<sup>182</sup> States have a wide range of discretion in the choosing of the electors, and they can even decide what method to use to decide upon electors. Each state legislature holds "plenary" power in this area.<sup>183</sup> If a state legislature wanted to, it could choose to appoint electors instead of allowing the citizens of the state to vote for the electors.<sup>184</sup> The Supreme Court has made it quite clear that "the individual citizen has no federal constitutional right to vote for electors for the president of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College."<sup>185</sup> When a group of citizens brought a suit against Virginia in 1968, the federal court said that the state

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<sup>180</sup> Bush v. Gore, 531 U.S. at 104.

<sup>181</sup> U.S. CONST. amend. XII.

<sup>182</sup> U.S. CONST. amend. XXIII.

<sup>183</sup> Bush v. Gore, 531 U.S. at 104.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

legislature could use whatever manner it desired to choose electors.<sup>186</sup> The “time of choosing electors” and the time of the submission of their votes are the only items at the discretion of Congress.<sup>187</sup> The Supreme Court has added the stipulation that for states who use popular election for appointment of electors, as all states currently do, the election must conform to the Equal Protection Clause of the Fourteenth Amendment.<sup>188</sup> For the most part, state legislatures are given control over the operation of the electoral system within that state, and they can decide whether or not to choose electors through popular election by the citizens of that state.

Even though states have almost complete discretion over the appointment of electors, it is very unlikely today that a state legislature would end the popular election of that state’s slate of electors and replace it with another mode of appointment. The momentum rather seems to be towards the direct popular election on a national scale through the abolition or subversion of the Electoral College system. The impetus towards democratization has led many people to support a “majoritarian” system of election that the Framers opposed.<sup>189</sup> This reflects a change in the character of politics between the founding era and the current age. In the founding era, careful deliberation characterized politics, and the Electoral College reflects this.<sup>190</sup> However, modern politics is the age of

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<sup>186</sup> *Williams v. Va. State Bd. of Electors*, 288 F. Supp. 622 (E.D. Va. 1968), aff’d, 393 U.S. 320 (1969).

<sup>187</sup> *McPherson v. Blacker*, 146 U.S. 1 (1892).

<sup>188</sup> *Bush v. Gore*, 531 U.S. at 104–05.

<sup>189</sup> *Gregg*, *supra* note 156, at 4.

<sup>190</sup> *Id.* at 19.

“the thirty-second commercial, the six-second sound bite, and the racial divisions evident in our latest election for president.”<sup>191</sup> One of the best examples of this shift between the nature of politics in the founding era and the nature of politics in the post-modern era is the treatment of *The Federalist* and *The Anti-Federalist*, treatises published in newspapers read by the common citizen in the deliberation over the ratification of the Constitution. They were very important in that debate, and the average American had a good understanding of them. However, in this day and culture even those in college struggle to understand them.<sup>192</sup> There is much less deliberation in political issues, such as the presidential election, by Americans today than there was at the time of America’s Founding.

Today, many people understand the Electoral College in a different light than it was understood by the Framers. The current popular conception of the Electoral College is that it was designed not to work; it was designed so that the electors would “deadlock” and the election would consistently “throw the real selection of the President into the House of Representatives.”<sup>193</sup> This collides with the Framers’ understanding.<sup>194</sup> Hamilton remarks that the provision for the House of Representatives deciding the election is rather to have a contingency since “a majority of the votes might not always

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<sup>191</sup> *Id.* at 24.

<sup>192</sup> Gai Fardon, Professor of Gov’t, Liberty University, Lecture at Liberty University on Constitutional History (Oct. 18, 2007).

<sup>193</sup> Gregg, *supra* note 156, at 2.

<sup>194</sup> *Id.*

happen to centre on one man.”<sup>195</sup> The reason for this contingency is that “it might be unsafe to permit less than a majority to be conclusive.”<sup>196</sup> The House of Representatives must vote for a candidate by a majority for in order to elect that candidate as president.<sup>197</sup> However, the view that the Framers created an electoral system designed not to work is still the current view of the intent of the Electoral College, and it shapes the controversy surrounding the Constitutional institution. The understanding of politics and deliberation by most American citizens is far different than it was at the time of America’s Founding and the establishment of the Electoral College.

Several factors have contributed to this change in understanding of the Electoral College and American politics generally, between the Founding era and today. Instead of electors being independent to make their own decision, they are instead pledged by a party to vote for that party’s nominated candidate.<sup>198</sup> Those electors who decide to vote for a different candidate than the one they are pledged to are branded as “faithless electors” and are the subject of ire and ridicule, and many states “impose penalties on ‘faithless electors.’”<sup>199</sup> In addition, many citizens believe the current system of direct election of electors to be the only proper method of selecting the presidential electors, even though, as mentioned before, the Supreme Court ruled that state legislatures have the power of discretion in choosing the method of appointing electors and can even

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<sup>195</sup> THE FEDERALIST NO. 68 (Alexander Hamilton), *supra* note 5.

<sup>196</sup> *Id.*

<sup>197</sup> U.S. CONST. art. II, § 1.

<sup>198</sup> Andrew E. Busch, *supra* note 86, at 30.

<sup>199</sup> *Id.* at 31.

choose to appoint electors themselves.<sup>200</sup> The District of Columbia and every state, except for Maine and Nebraska, uses the winner-take-all allocation of electoral votes whereby the winning party of the popular election is granted all of the state's votes in the Electoral College.<sup>201</sup>

Two states use a district method, rather than a winner-take-all method, for assigning electoral votes.<sup>202</sup> Maine and Nebraska assign only two of their electoral votes in that manner; the other electoral votes are assigned to the winner of each district as defined by those states.<sup>203</sup> The state of California is considering whether to switch from a winner-take-all allocation of electoral votes to a district plan.<sup>204</sup> This is a heavily contested proposal, as California consistently awards its 55 electoral votes to the candidate with a majority of the popular vote, who usually the Democrat candidate, under the winner-take-all system.<sup>205</sup> A district plan would result in the Republicans receiving a significant amount of California's electoral votes.<sup>206</sup> The district-based allocation of electoral votes, along with the practice of pledging electors to a party's candidate result in a party-driven political process. The main inherent deficiency to the district system is the reality of gerrymandering where political forces create the district lines in order to benefit

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 39.

<sup>202</sup> HARDAWAY, *supra* note 83, at 143-45.

<sup>203</sup> Busch, *supra* note 86, at 39.

<sup>204</sup> Dan Morain, *GOP Eyes a Piece of California Pie for '08*, L.A. TIMES, Aug. 6, 2007, at A15.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

their party.<sup>207</sup> The Electoral College operates under the heavy influence of party politics and principles of popular vote, and this dynamic has led to a difference in the view that many hold of the Electoral College as an institution.

This reality has contributed to the democratization of the political process and has shaped the understanding of the Electoral College system. An excellent summation of the current state of the electoral system is that “presidential selection is now made by a direct conveyance of the popular will through the medium of preprogrammed partisan electors.”<sup>208</sup> Almost every state election operates through the democratic process whereby the simple majority determines the slate of electors, so the popular will is essentially dictated to the electors. Additionally, the Supreme Court has ruled that in each state election, each vote must be given equal weight in accordance with the Equal Protection Clause of the Fourteenth Amendment.<sup>209</sup> Those who support the direct, nationwide popular election of the president import the “one person, one vote” principle onto the nationwide election as a whole. The election of 2000 presented a problem with the Electoral College in the minds of many people because the result in the Electoral College (Bush winning) did not match the result in the nationwide popular vote (which had Gore winning).<sup>210</sup> This is because the election did not comport with the principle of

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<sup>207</sup> HARDAWAY, *supra* note 83, at 144.

<sup>208</sup> Busch, *supra* note 86, at 40.

<sup>209</sup> Bush v. Gore, 531 U.S. at 104–05.

<sup>210</sup> Al Gore probably contested the result of the election in Florida so adamantly because he led the popular vote nationwide, Stoner, *supra* note 167.

“one person, one vote” on a nationwide scale, but that was never the intention of the Electoral College.

Under the winner-take-all allocation of electoral votes, there are always disparities in the power of a vote between states in each state presidential election. For example, in the 1960 election a vote in Hawaii “carried 832 times the Electoral College impact” as a vote in Massachusetts.<sup>211</sup> Additionally, in the 2000 presidential election, a vote in Florida “carried 2,905 times the impact” of a vote in Utah.<sup>212</sup> This is because even if a candidate wins a small margin of the popular vote in a state (except for Maine and Nebraska which use proportional vote schemes as discussed earlier), that candidate receives the entirety of the state’s electoral votes. The Supreme Court set the standard that state elections must comport to the “one person, one vote” standard, but the nationwide presidential election does not comport to this standard.<sup>213</sup> However, one of the beneficial effects of the Electoral College system is that it has given the smaller states more influence than they would have had under a popular vote system.<sup>214</sup> This effect is derived precisely because votes are not given equal weight in each state.

Critics of the Electoral College system often attack the different weights given to voters in different states. They believe that as a democratized nation, America should use the most democratic method of electing the president—direct popular election. However,

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<sup>211</sup> Christopher Duquette & David Schultz, *One Person, One Vote and the Constitutionality of the Winner-Take-All Allocation of Electoral College Votes*, 2 TENN. J.L. & POL’Y 453, 477 (2006).

<sup>212</sup> *Id.* at 478.

<sup>213</sup> *Id.* at 481.

<sup>214</sup> Victoria Sutton, *The Electoral College—Now, More Than Ever*, 13 U. FLA. J.L. & PUB. POL’Y 103, 110 (2001).

the constitution is a barrier to enacting direct popular election. Attempting to sidestep this barrier, popular vote proponents have a new plan effecting change through an interstate compact.

## VI. Subversion of the Electoral College

A new movement is afoot nationwide to completely democratize the Electoral College. The title of the interstate compact is the National Popular Vote Interstate Compact, and in Maryland, its title is the Agreement among the States to Elect the President by National Popular Vote.<sup>215</sup> The plan is quite simple. Instead of casting a vote for the winner of the vote within a state, the electors cast a vote for the winner of the national popular vote. Maryland has been the first state to pass this legislation; however, it does not take effect until enough states to comprise a majority in the Electoral College sign on.<sup>216</sup> The interstate compact becomes operative once “states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state.”<sup>217</sup> The California legislature passed the proposal, but Governor Arnold Schwarzenegger vetoed the bill.<sup>218</sup> Additionally, Arkansas, Hawaii, and Colorado legislatures have discussed the proposal.<sup>219</sup> The Maryland statute reads, “After taking the oath ... the presidential

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<sup>215</sup> MD. CODE ANN., ELEC. LAW § 8-5A-01 (2007).

<sup>216</sup> John Wagner & Ovetta Wiggins, *Md. Looks To Dodge Electoral College*, WASH. POST, Mar. 29, 2007, at B1.

<sup>217</sup> MD. CODE ANN., ELEC. LAW § 8-5A-01 (2007).

<sup>218</sup> Wagner, *supra* note 216.

<sup>219</sup> *Id.*

electors shall cast their votes for the candidates for President and Vice President who received a plurality of the votes cast in the national popular vote.”<sup>220</sup> This is pursuant to the interstate agreement that Maryland signed and is waiting for other states to sign.<sup>221</sup>

The system works by each state first determining the popular vote winner within the state and agreeing about the national popular vote winner.<sup>222</sup> The interstate compact reads,

Prior to the time set by law for the meeting and voting by the presidential electors, the chief election official of each member state shall determine the number of votes for each presidential slate in each state of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a “national popular vote total” for each presidential slate.<sup>223</sup>

After the national popular vote winner is known, “The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the ‘national popular vote winner.’”<sup>224</sup> When it comes time for the state to appoint the electors, the state appoints the electors representing the national popular vote winner, not the state winner.<sup>225</sup> The state’s chief election official “shall certify the appointment in that official's own state of the elector slate nominated in that state in

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<sup>220</sup> MD. CODE ANN., ELEC. LAW § 8-505 (2007).

<sup>221</sup> MD. CODE ANN., ELEC. LAW § 8-5A-01 (2007).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

association with the national popular vote winner.”<sup>226</sup> Hypothetically, under the agreement, if the Democrat ticket wins the popular vote in the state of Maryland but the Republican ticket wins the nationwide popular vote, the state of Maryland would have to appoint the Republican electors to the Electoral College.

This proposal subverts the Electoral College by rendering the system impotent. It essentially moves the country to a national popular vote election while retaining the bare structure of the Electoral College.<sup>227</sup> This destroys the spirit of federalism behind the Electoral College system because it is essentially the same as a popular vote scheme without the Electoral College. The national popular vote winner becomes the Electoral College winner, regardless of the result of individual state elections.<sup>228</sup>

There is one case where the system would not abandon the Electoral College. One of the stipulations within the agreement is that “In event of a tie for the national popular vote winner,” the system reverts to the original Electoral College system.<sup>229</sup> In such a case, “the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state.”<sup>230</sup> However, with millions of votes constituting the national popular vote, this creates a situation that is ripe for disorder in the case of a politicized election that ends in a tie.

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<sup>226</sup> *Id.*

<sup>227</sup> Wagner, *supra* note 216.

<sup>228</sup> § 8-5A-01.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

Voter turnout in the 2004 presidential election was about 60 percent of 300 million citizens.<sup>231</sup> That means about 180 million people cast votes in the 2004 election. Out of the votes cast in the presidential election, a difference of only 1 percent of the popular vote is 1.8 million votes. The likelihood of an election actually ending in a tie in the national popular vote is extremely remote. A close election in the popular vote, where the difference is perhaps one million votes, presents substantial problems resulting in chaos. One of the biggest problems with this proposal is that in close elections, such as the 2000 election, there would quite possibly have to be a nationwide recount that would delay the result of the election and cause further uncertainty in the result.<sup>232</sup> The proposal would not create a clear winner in the event of a close election as its proponents claim. State Senator Michael G. Lenett from Montgomery County, Maryland, understands that “while the Electoral College is not flawless, the alternative might be far worse,” with “mass chaos” the result “if a national recount were necessary.”<sup>233</sup> Additionally, in such a situation, the uncertainty in the election result would mean the president would take office under a cloud since it would be unknown who is really the true winner.

Voter fraud would create this uncertainty, especially in a highly politicized election. There are several ways that persons working with political parties and candidates perpetuate voter fraud in elections. The first type of voter fraud is “the manipulation of the number of raw votes cast, as in stuffing the ballot box.”<sup>234</sup> One

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<sup>231</sup> *The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 591, 591 (2007).

<sup>232</sup> HARDAWAY, *supra* note 83, at 158–60.

<sup>233</sup> Wagner, *supra* note 216.

<sup>234</sup> Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 272 (2007).

important voter fraud concern is the susceptibility of computer voting equipment to “manipulation.”<sup>235</sup> Voter fraud can take place through someone with “special access” partaking in “tampering with the electronic counts on the voting equipment.”<sup>236</sup> A second method of voter fraud is “voting by individuals who are not eligible to vote. Perpetrators of this brand of fraud may have fraudulently registered, may vote on behalf of dead people, or may vote multiple times.”<sup>237</sup> It is important to note, “This type of fraud requires no special access to voting equipment.”<sup>238</sup> A third method is “absentee ballot fraud” that is successful as “one vehicle for accomplishing voting by ineligible individuals, because it is often harder to detect than in-person voting by ineligible individuals.”<sup>239</sup> This type of voter fraud “also encompasses voting by eligible voters who allow a third party to cast or influence their vote,” and this type of voter fraud is “one of the most common causes of election failures.”<sup>240</sup> A fourth method of voter fraud is “preelection deception of voters (or potential voters) in ways that may affect who votes or how they vote.”<sup>241</sup> Examples of this in 2004 and 2006 elections include “voters receiving

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<sup>235</sup> Stephanie Phillips, *The Risks of Computerized Election Fraud: When will Congress Rectify a 38-Year-Old Problem?*, 57 ALA. L. REV. 1123 (2006).

<sup>236</sup> Huefner, *supra* note 234.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 272–73.

<sup>241</sup> *Id.*

leaflets or phone calls announcing an incorrect voting day or location.”<sup>242</sup> A fifth type of voter fraud is “after-the-fact distortion of the raw vote, either through outright false reporting of precinct tallies or through the intentional alteration, destruction, damage, or loss of physical ballots or memory cards” accomplished by “those with official access to the ballots.”<sup>243</sup> Any of these types of voter fraud can be a substantial issue in any closely contested election. Changing the electoral system for presidential election to a system where the national popular vote determines the election would perpetuate these types of fraud on a national scale. In a close election, that would place a cloud of doubt over the winner of the popular election. This would ultimately demean the presidency, because it would potentially mean that a person who used dishonest means to win the election would serve as president.

The constitutionality of the interstate compact is doubtful. Article I, Section 10, Clause 3 reads that, “No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”<sup>244</sup> Congress has not consented to this interstate compact. That brings the constitutionality of the National Popular Vote Interstate Compact into debate because it clearly is not a compact arising from invasion or “imminent Danger.”<sup>245</sup> Therefore, if enough states

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> U.S. CONST. ART. I, § 3.

<sup>245</sup> *Id.*

were to actually enact the compact and it was to take effect, it would need the consent of Congress, or it would face review by the Supreme Court.

Finally, the proposal does not even follow from the rationale that its proponents in Maryland give for it. They passed it in the name of giving the state of Maryland “more of a voice in a national election.”<sup>246</sup> However, the proposal actually gives the state of Maryland no voice because its electoral slate would be determined by the results of elections in other states and not directly by the voters of the state of Maryland.

This movement is a complete travesty, and if it succeeds, it would be the death knell for the Electoral College system. The Electoral College system is already one of the few remaining aspects of the American constitutional system with any substance. This interstate compact agreement would completely erode any substance remaining in the system. Essentially, there is not much difference between this proposal and going to a direct vote arrangement. If enough states implement the proposal that comprise a majority in the Electoral College, the Electoral College simply becomes the slave of the national popular vote. In a member state such as Maryland, regardless of whether the people of the state overwhelmingly vote for one candidate, if the rest of the country votes by the slimmest of pluralities for a different candidate, it is the winner of the national popular vote, not the winner of the Maryland election, who receives Maryland’s electoral votes. Therein lies the contradiction of the interstate compact plan. Proponents will argue that they are for the will of the people, yet in the scenario just described, the system thwarts the will of the people of the state of Maryland. Additionally, the prospect of vote

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<sup>246</sup> Wagner, *supra* note 216.

manipulation, similar to what the Democrats attempted to do in Florida in 2000 but on a national scale, would be a disaster. Perhaps for proponents to grasp their error, it would take the people of Maryland voting overwhelmingly for the Democrat candidate but Maryland's electoral votes going to a Republican candidate who wins in the national popular vote.

The major difference between the interstate compact agreement and abolishing Electoral College through a constitutional amendment is that this strategy to obtain a national popular vote is easier to implement than a constitutional amendment. The interstate compact agreement needs only large states such as California, New York, and Florida and some others. As long as the states in the agreement have enough electoral votes to hold a majority of the Electoral College, the agreement works. The number of states required is far less than the three-fourths necessary for a constitutional amendment, as this compact could take affect with less than a majority of states ratifying it.<sup>247</sup> The reason that the proponents of this measure seek an interstate compact agreement to subvert the Electoral College is because it is a much easier means to achieve their end. It is up to the state legislatures all across the United States to have enough sense to oppose this revolutionary measure.

## VII. The Electoral College Must Be Retained

The Framers of the Constitution devised the Electoral College as the best way to ensure that a good president was elected who would not become a despot.<sup>248</sup> The

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<sup>247</sup> U.S. CONST. ART. V.

<sup>248</sup> THE FEDERALIST NO. 68 (Alexander Hamilton), *supra* note 5, at 414-15.

Framers decided that the election of the president was not meant to function along the lines of popular election but to be essentially a microcosm of federalism. However, America has become more democratized, and as a result, many people clamor for the popular election of the president.<sup>249</sup> However, the Electoral College as originally intended is the best way to ensure that a good candidate, one who will represent the general interest of both the several states and the people, is elected president.

One of the great advantages demonstrated over the life of the Electoral College not being based on the “one person, one vote” principle is that it requires successful candidates to focus on many different areas of the country geographically, especially the smaller states. As mentioned before, it gives those states a greater voting power that can make an impact on the election. Under a popular vote scheme, “less populous” areas of the country could be ignored because a candidate would simply need to have large popular vote margins in urban areas, and there “would be ... fewer states and localities in which there was genuine electoral competition.”<sup>250</sup> The interests of rural America would be superseded by the concerns of the urban electorate. Presidential candidates would ignore largely rural states such as Utah or Wyoming in their quest to build up votes in citified areas such as southern California or the northeastern states.

The Framers deliberately designed the Electoral College system so that the states, not the people, would be the focus of the presidential election. The president is the officer of the states, not the people at large. Madison makes the point that “Without the

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<sup>249</sup> Paul A. Rahe, *Moderating the Political Impulse*, in *SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE* 55, 68 (Gary L. Gregg ed., ISI Books 2001).

<sup>250</sup> *Id.* at 68.

intervention of the State legislatures, the President of the United States cannot be elected at all.”<sup>251</sup> The Framers saw the states playing the central role in the election of the president, as they even provided for the state legislature to appoint the electors itself.<sup>252</sup> This is a vertical check on the power of the federal government. Another intended check was that the “the senate will be elected absolutely and exclusively by the state legislatures.”<sup>253</sup> The Framers’ intent was also that the lower house of Congress, “though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the state legislatures.”<sup>254</sup> However, the Seventeenth Amendment ended the election of senators by state legislatures.<sup>255</sup> The intent of providing for election of the senate and president at the state level was that “the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them.”<sup>256</sup> A common misconception is that the presidential election is a national election. That is not the case, as in the current era, fifty-one elections actually occur simultaneously in each of the states and the District of Columbia to determine which

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<sup>251</sup> THE FEDERALIST NO. 45, at 240 (James Madison) (George W. Carry & James McClellan ed., 2001).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> U.S. CONST. amend. XVII.

<sup>256</sup> THE FEDERALIST NO. 45 (James Madison), *supra* note 251.

electors will represent each state and the District. Direct popular election would completely erode this check on federal power by the state governments, as the president would no longer be the officer of the states and be responsible to the states as intended.

Another problem of the popular vote scheme that the Electoral College avoids is that a popular vote scheme would inevitably be fraught with instability. Voter fraud would be a major issue “as parties inflated their vote in each and every one of the localities they controlled in order to secure a plurality nationally.”<sup>257</sup> Additionally, the Florida recount controversy from the election of 2000 would be repeated on a nationwide scale.<sup>258</sup> While it is not based upon “one person, one vote,” the Electoral College system maintains an equitable distribution of power between the several states, and it avoids the instability that is part of a popular vote scheme.

A third benefit of the Electoral College is the preservation of the two-party system that has become an ingrained part of American politics. A successful party must present a candidate who has broad appeal nationwide. This means that parties must “moderate regional enthusiasms ... compromise ideological principles, and ... unite voting blocs with very different cultural backgrounds and attitudes and very different economic interests and goals.”<sup>259</sup> The winner of the presidential election will be a person who will satisfy at least half of the constituency.<sup>260</sup> However, that is not likely to be the case in a

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<sup>257</sup> Rahe, *supra* note 249, at 68.

<sup>258</sup> *Id.* at 68–69.

<sup>259</sup> Michael Barone, *The Electoral College and the Future of American Political Parties*, in *SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE* 79, 81 (Gary L. Gregg ed., ISI Books 2001).

<sup>260</sup> *Id.*

popular vote system. Unlike under the Electoral College system, the people are more likely to end up with a winning presidential candidate who receives far less than a majority of the popular vote. This is because third parties (who tend to focus on one issue) are enticed into the race as they only need gain a plurality nationwide, and all of the different parties split the vote.<sup>261</sup> Thus, a very large portion of the electorate would not accept the candidate who wins.<sup>262</sup> The Electoral College system promotes the interests of the electorate by requiring candidates to maintain a broad influence nationwide.

When the Framers constructed the Electoral College system, the stability of the political process was one of their chief concerns. The Framers of the Constitution undertook great deliberation in constructing the Electoral College system. They made an extensive study of all of the classical attempts of democratic republican government and they understood their tumultuous nature often dissolved into tyranny.<sup>263</sup> As mentioned before, tumult and the resultant tyranny were exactly what the Framers wanted to avoid.<sup>264</sup> One of the most important ingredients of the American Constitution in maintaining stability is the system that has come to be known as checks and balances. This was implemented into the constitutional system in order to prevent tyranny. The Framers understood that a democracy governed through popular sovereignty could

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<sup>261</sup> *Id.* at 85.

<sup>262</sup> *Id.*

<sup>263</sup> Daniel P. Moynihan, *The Electoral College and the Uniqueness of America*, in *SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE* 87, 90 (Gary L. Gregg ed., ISI Books 2001).

<sup>264</sup> THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 56, at 44.

disintegrate into tyranny as readily as an aristocracy or monarchy could, and they wanted to avoid it.<sup>265</sup>

In the plans they considered at the Constitutional Convention, they considered the Electoral College to be the best system in promoting stability, not direct popular election. Hamilton remarked that the Framers wanted to “afford as little opportunity as possible to tumult and disorder.”<sup>266</sup> They understood the problems of demagoguery from a popular vote scheme, and they designed the Electoral College as the means of avoiding it. Hamilton went on to say, “The choice of several to form an intermediate body of electors, will be much less apt to convulse to community, with any extraordinary or violent movements, than the choice of one who was himself to be the final object of the public wishes.”<sup>267</sup> The Electoral College provides the people a voice, but it still avoids the problem of instability that would be an effect of direct election. In a close direct popular vote election, it is conceivable the same problem that occurred in Florida in 2000 would occur on a national scale. The Electoral College system promoted stability in 2000 through the “localization and containment of potentially destabilizing electoral disputes.”<sup>268</sup> This is because each state election is conducted separately; however, a national direct election is conducted on one unit. A discrepancy in a national election would trigger recounts in multiple states, not just multiple counties. Under the Electoral

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<sup>265</sup> John O. McGinnis, *The Law of Presidential Elections: Issues in the Wake of Florida 2000: Popular Sovereignty and the Electoral College*, 29 FLA. ST. U.L. REV. 995, 1003 (2001).

<sup>266</sup> THE FEDERALIST NO. 68 (Alexander Hamilton), *supra* note 5, at 414.

<sup>267</sup> *Id.*

<sup>268</sup> McGinnis, *supra* note 265, at 1002.

College system, the people have a voice through the popular vote in state elections, and each state has a voice through the apportionment of electors from each state.<sup>269</sup> The history of the Electoral College has proven the Framers' rationale to be correct. The Electoral College has been a consistent, stable system for over 200 years of operation.

The Electoral College respects the federal nature of the American Constitutional Order and System. It does not simply use a popular vote majority to determine the president of the United States; it enters each state into the equation in a system of "concurrent majorities."<sup>270</sup> The interests of the states are protected in the Electoral College system that maintains state borders in the election, much as the interests of states are protected in the Senate where each state is represented disproportionately to population but equally as a jurisdiction.<sup>271</sup> The Electoral College prevents a candidate who only carries a following in one state or region that gives him a nationwide popular vote majority from becoming president of the United States.<sup>272</sup> Each state is given a voice in the electoral process. Instead of a candidate being able to win by pandering to one region's interests and ignoring vast areas of the country, it is important for a candidate to have something meaningful to give to the voters of each state.

The main argument for direct popular election is that the president should be the direct choice of the people where each person's vote has an equal say with every other person's vote nationwide. Proponents of direct election base this argument on the idea of

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<sup>269</sup> Moynihan, *supra* note 263, at 92.

<sup>270</sup> Busch, *supra* note 86, at 41.

<sup>271</sup> Grant, *supra* note 7, at 19.

<sup>272</sup> *Id.* at 45.

political equality. George Edwards, a political science professor at Texas A&M University, argues for this view of political equality “on the basis of the Christian belief,” stating “we are all equally God’s children.”<sup>273</sup> At this point, he is right in his assertion, and the Framers would have agreed with his statement. The founding charter of the United States of America recognized “that all men are created equal.”<sup>274</sup> However, proponents of popular vote argue that political equality is not maintained because voters in some states have disproportionate voting power to those in other states.<sup>275</sup> They argue that the only way to maintain political equality is through direct popular vote with the candidate receiving a plurality of the national vote becoming president.<sup>276</sup> However, this contention ignores the nature of the presidential election. The presidential election is not a nationwide election. It is comprised of separate, simultaneous elections conducted in each of the fifty states and the District of Columbia where the Supreme Court has mandated that each state not allow people to manipulate the election results.

Another of the arguments for the abolishment of the Electoral College is that it is an antiquated system based on antiquated principles, and the Constitution must adapt to the prevailing views of the people. It is alleged that the Electoral College system should be “philosophically and politically scrutinized” as an institution that supported slavery in America.<sup>277</sup> This argument is that since the Electoral College is a relic from a time when

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<sup>273</sup> GEORGE C. EDWARDS, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA 32 (2004).

<sup>274</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>275</sup> EDWARDS, *supra* note 273, at 54.

<sup>276</sup> *Id.*

<sup>277</sup> Williams, *supra* note 168, at 230.

slavery existed, the people must throw it out.<sup>278</sup> Following the logic of the argument, the American people must overhaul entire federal constitutional order and system because the Framers espoused it during a period in history when slavery existed. Additionally, this assessment ignores the purpose and the results that the Electoral College has had in America. The guiding purpose behind the Electoral College as articulated by the Framers was to ensure stability in the electoral process and to produce a candidate with a clear claim to the office of president.<sup>279</sup> From its implementation to the current age, the Electoral College has fulfilled its purpose.<sup>280</sup> There have been slight problems along the way, but the Electoral College has still maintained stability in the process.

By desiring to abolish the Electoral College system, proponents of direct popular election seek to abolish federalism in its entirety. They charge, correctly, that the Electoral College operates “to affirm an extreme pre-Civil War ‘states rights’ philosophy whereby Americans were viewed primarily as citizens of state governments.”<sup>281</sup> However, they see this as a major problem because federalism represents “the extreme and paternalistic view that state governments are more qualified to represent their citizens to the national government; the people should not and, indeed, cannot be trusted to participate directly in the national political process.” This is a poor analysis of the view of the Framers. In fact, they lay out their reasons for creating a federal and not a national union explicitly in the Federalist Papers. The Framers did not want sovereignty

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<sup>278</sup> *Id.*

<sup>279</sup> THE FEDERALIST NO. 68 (Alexander Hamilton), *supra* note 5, at 414–15.

<sup>280</sup> Berns, *supra* note 177.

<sup>281</sup> Williams, *supra* note 168, at 231.

anywhere in any one portion of government, so they divided and diffused power between the states and the federal government to avoid tyranny. However, since the opponents of the Electoral College conclude that it limits “the rights of all citizens in the selection of their president, the republican and federal nature of the systems merit close inspection.”<sup>282</sup> In other words, they want to abolish it for a national arrangement.

The Electoral College is the last vestige of federalism remaining in the Constitutional system, and as such, it is the last bastion remaining between complete nationalization of America. It is one of the few areas where states retain a measure of sovereignty because each state decides the method of appointment of electors. After all, the president is the officer of the states. That is why the current system is not one national election but fifty-one elections running concurrently. The Electoral College represents the voice of each state. A popular election scheme renders the states completely irrelevant. That would mark the end of the federalist system because a system without the state voice represented sovereignizes the national government in its entirety. Thus, a popular vote scheme destroys the federal constitutional order and system.

### VIII. Conclusion

In the final analysis, the Electoral College system is superior to the direct popular election of the president. The Framers understood this, and even the opponents of the Constitution did not take issue with the electoral system as they did with other parts of the document as evidenced in the state convention debates. The Framers elected to use

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<sup>282</sup> *Id.*

the Electoral College system to avoid tyranny and promote stability in the selection of the president of the United States. The system was also designed to employ the mechanism of federalism: giving each state a say in the electoral process, not simply a national popular majority. History has proved the Electoral College to be a success. Its opponents decry its antiquated nature, but it has never failed to complete its task of selecting a president. A popular vote scheme would not provide the same benefits to America as the Electoral College system does. Candidates would not have to maintain the broad appeal to the people that they do now. They could simply win a slim plurality of the national vote and be elected to the office of president. Additionally, a direct popular election would encourage fraud and instability. The Electoral College system confines electoral problems to the state level as what happened in Florida in 2000. Popular vote offers no such protection; the recount fiasco in Florida would be emulated on a national scale. This could even create a situation where the result would produce no clear winner and thus invite court intervention on a regular basis to settle the dispute. This would undermine the legitimacy of the person in office because it would be unknown whether he truly won the election. Undermining the legitimacy of the person serving as president would demean the office of the presidency. It was the Framers' intention that a person of the highest character serve as the executive, not a person who would use dishonest means to gain election. The Electoral College must be retained as the system for electing the president of the United States. It is a system that has consistently produced a winning candidate for over 200 years, and it can be counted on to work in the future.