Defending the Fence: The Electoral College's Vital Role within Madison's Republican Model

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I'm a great believer in Robert Frost's saying, 'Don't ever take down a fence 'til you

know why it's been put up.' – JFK

In the closing weeks of the 2012 Presidential campaign, Democratic pundits and politicians faced a potential catastrophe. Ezra Klein of the Washington Post, in a late October analysis, observed that polls suggested "we're likely to see Mitt Romney win the popular vote and Barack Obama win the Electoral College – and, thus, the presidency." (Klein, 2012) This possibility, so antithetical to Democratic rhetoric following Al Gore's popular vote win in 2000, led a blogger with the Daily Kos, a leading progressive website, to proclaim "I propose that it is good old-fashioned racism that is at the heart of what appears to be a split between the Electoral College, which is set to re-elect the President, and the popular vote, which could really go either way (Bluegrass, 2012)."

Any Republican schadenfreude at this moment proved both fleeting and misplaced. Despite their adamant defense of the Electoral College in the wake of Bush's victory, reports in the weeks prior to the 2000 election alleged that Bush's campaign prepared "talking points" attacking the Electoral College in the event of a popular vote victory and electoral loss (Kramer, 2000). In the same report, an anonymous Gore aide contemplated what such an outcome would mean, saying "Then we win. You play by the rules in force at the time. If the nation were really outraged by the possibility, then the system would have been changed long ago (Kramer, 2000)."

These shifting positions on the Electoral College system, based largely upon which candidate may or may not benefit, reveal motives of political expediency rather than principled disagreement. The will of the majority is paramount, unless racism presumably determines the

popular vote. A president that loses the popular vote suffers from a lack of legitimacy, unless they are the perceived rightful and deserving victor. As a speechwriter for President Obama claimed, "No one likes the Electoral College, except perhaps those who were elected because of it (Bleyer, 2012)."

Yet the Electoral College, long maligned and misunderstood, enjoys a rich and complicated political and intellectual history drawing from the Enlightenment and the philosophies and history of Ancient Greece. Rather than being studied and evaluated in isolation, it should be understood as one element within a cohesive framework erected by the authors of the Constitution in order to "secure the blessings of liberty to ourselves and our posterity." (Constitution, 1787, para. 1). Though altered significantly over the past centuries from its original form and practice, the Electoral College remains an important bulwark of federalism and an effective reminder of our nation's republican, rather than democratic origins. The Electoral College confers constitutional legitimacy based upon key tenets of federalism and republicanism. The Electoral College, in short, deserves preservation.

Nonetheless critics continue aggressive campaigns to modify, replace or circumvent the Electoral College (FairVote, n.d.), and polls consistently find majority support for a popular vote system (Gallup, 2011). Though some valid criticisms exist, most reflect either a misunderstanding of what constitutes the Electoral College, a modernism bias, or an over confidence in the virtues of direct democracy. The Electoral College is neither a "political wisdom tooth (Daneman, 2004)" nor a "dangerous blot upon our Constitution (Fakhouri, 2009)", but rather a system worth understanding, worth preserving. As columnist Jeff Greenfield remarked, "After immersing myself in the mysteries of the Electoral College…I came away

believing that the case for scrapping it is less obvious than I originally thought (Greenfield, 2012)."

<center>Building the Fence</center>

The American colonists had a deep familiarity with and suspicion of despotism. The Declaration of Independence laid out a "long train of abuses" and accused the English monarch of "absolute tyranny (Declaration of Independence, 1776, para. 2)." Subject to arbitrary and capricious governance, refused a representative voice in their own affairs, the Revolutionary generation sought not only to secure independence, but to proclaim a "a new basis of political legitimacy in the sovereignty of the people (Hall, n.d.)," and to construct a government to protect every citizen's "inalienable rights" which arose from the "Laws of nature and nature's God (Declaration of Independence, 1776, para. 1)."

Yet the Founders, with a "common core of classical learning" also "looked to classical antiquity for lessons and guidance (Constantelos, 2002)." The great Greek philosophers Plato and Aristotle were concerned less with the source of sovereignty than exploring which type of government governed best by promoting virtue and avoiding tyranny. For Plato, the best government would consist of "philosopher-kings", acting in the enlightened interest of the state: "Then whom will you compel to become guardians of the city, if not those who have the best understanding (McPherran, 2010)?" Plato believed that this aristocracy, more closely the modern concept of meritocracy, could nonetheless degenerate over time into baser forms, with democracy above only tyranny.

Aristotle also feared democracy, though America's Founders found greater inspiration in his writings, with both John Adams and Thomas Jefferson crediting him as "one of the first

formularies of the principles of the American founding (Johnson, 2001)."   The Greek

philosopher originated the concept of separated powers, observing that government had three

functions: "the deliberative, the magisterial, and the judicatory (Pangle, 1989)." Regarding

democracy, he wrote, "ultimate democracy, like unmixed and final oligarchy, is really a tyranny

divided (Martin, Smith, & Stuart, 2003)." Whereas a just polity "governs according to the

common advantage (Martin, Smith, & Stuart, 2003)", a corrupted polity, or democracy, "in error

serve(s) the interest of the ruler…and tend(s) to have an element of despotism (Martin, Smith, &

Stuart, 2003)." This is precisely what America's Founders sought to avoid.

Following independence the greater fear lay in the fresh memories of King George's

"repeated injuries and usurpations (Declaration of Independence, 1776, para. 2)." The initial

compact between the states, the Articles of Confederation, contained no executive office at all,

with the legislature unable to enforce laws without consent from all thirteen states. This

arrangement proved unworkable, especially in matters of foreign affairs and trade, and calls for

modification of the compact emerged (Wood, 2010). George Washington, writing to Thomas

Jefferson in 1787 described the crisis: "The situation of the general government, if it can be

called a government, is shaken to its foundation, and liable to be overturned by every blast

(Washington, 1787)." Supporters of reform were successful in persuading the nation, and a

Constitutional Convention began deliberations on May 25th, 1787 (National Constitution Center,

2006).

With the mandate for an executive clear, worry over potential abuses again took center

stage, with one delegate referring to the executive as a potential "fetus of monarchy (Madison,

1787)." For our purposes in understanding the eventual construction of the Electoral College,

however, three other concerns also emerged during the debates: the issue of state sovereignty

within a federalist structure, the relative strength of states of different sizes, and the concerns

over what de Tocqueville would later call the "tyranny of the majority (De Tocqueville, 1835)."

What other principles could the Convention delegates use to navigate these four conflicting

interests?

Alongside classical sources, the Founders turned predominately to the great political

philosophers of the Enlightenment to resolve these conflicts. From both Montesquieu and John

Locke the Founders relied extensively, especially in building upon Aristotle's concept of distinct

governmental powers. Montesquieu in particular, whom James Madison called "the oracle (May,

2002)," advocated a model wherein the three distinct powers reside in different bodies of

government, as a guarantor of Liberty. In his famous treatise Spirit of Laws he proclaimed that

whenever these powers lie in one person "there can be no liberty (Madison, 1788)."

This separation of powers framework assuaged some delegates' worries over executive

abuses, but failed to address the three other concerns of state sovereignty, state equality and the

dangers of ochlocracy. For these, Madison and others advanced an intricate system of checks

and balances between the branches, a vibrant system of federalism, and some unique features

that combined elements of both. The Electoral College is one of the latter, not an arbitrary

contrivance but an important part of what historians label the "Madisonian model (Shane, 2009)."

This model established not merely separation of powers between the branches, but

endowed each branch with specific abilities to check the actions of the other branches.

Presidential veto power, legislative control of revenue and war, impeachment and other checks

all work as balancing forces, advancing Madison's concept that "ambition must be made to

check ambition (Madison, 1788b)." In addition to formal checks, the Convention delegates also

incorporated the Madisonian Model's principles into their compromises regarding the makeup and election of the legislative and executive branches.

As noted earlier, the various states struggled to reconcile the competing visions of small and large states. Benjamin Franklin summed up the disagreement succinctly:

> If a proportional representation takes place, the small states contend that their liberties will be in danger. If an equality of votes is to be put in its place, the large states say their money will be in danger. When a broad table is to be made, and the edges of planks do not fit, the artist take a little from both, and makes a good joint (U.S. House Historian, n.d.).

The ensuing compromise, creating a bicameral legislature with a directly elected lower house based upon population and an indirectly elected upper house with equal numbers per state, became known as the Connecticut, or Great, Compromise. This agreement not only prevented the convention from ending in acrimonious failure, it also added structural complexity to the Madisonian Model. Now, in addition to formal checks on power between branches, there would be a strengthening of state sovereignty with equal representation in the Senate, a voice for the popular and local will in the direct election of Representatives, and an effective state check upon the dangerous passions of that popular will in the indirect election of Senators.

The Great Compromise also provided a key component of the Electoral College structure by establishing the size of each state's congressional delegation, which would eventually be used also to determine the number of presidential electors. That arrangement would come later in the convention, as the original draft Constitution presented by the Committee of Detail limited the President to one seven year term with the national legislature making the selection (Butler, 1787).

Following the Great Compromise, various Committees of Eleven were selected to work on

remaining details, including the Article describing Executive power and selection. Their report

established the Electoral College as an alternative to the legislature (Kazin, 2012). Reactions

from the delegates were decidedly mixed, but critically, the delegates overwhelmingly voted

down James Wilson's idea of popular election (Beeman, n.d.).

Delegates approved and signed the final draft of the Constitution on September 17, 1787

(The Library of Congress, 2016), and then began the arduous process of convincing a majority of

states to ratify. Three of the most prominent delegates, including the "Father of the Constitution

(The Library of Congress, n.d.)" James Madison began writing essays extolling the virtues of the

Constitutional framework and defending each section from critics. Published under the pen

name Publius, these collective works became known as the Federalist Papers. In Federalist #10,

Madison extolled the virtues of the Constitutional diffusion of power and interests as the best

check against the "superior force of an interested and overbearing majority (Madison, 1787b)."

The Electoral College, though a hotly debated backup plan introduced at the last minute,,

itself built upon a momentous compromise, nonetheless advanced the vigorous checks and

balances inherent in the Madisonian Model. Of the four national offices (President, Senator,

Representative and Justice), each would be selected by different means, spreading power

throughout the federalist system while nonetheless giving the people a voice. In this manner,

the perils of majoritarianism could be mitigated while still honoring the democratic ideals of the

Revolution.

Changes and Challenges

The Electoral College immediately faced two difficulties in the years following ratification. First, the Founders did not anticipate the rise of parties, assuming that most presidential elections would be from amongst multiple competing candidates and therefore thrown to the Congress to decide (Madison, 1787b). Second, the original form contained a provision that each elector would cast two votes, circumventing the danger of favorite sons from every state dominating the slate. The candidate receiving the second most electoral votes would become Vice-President.

Despite Washington's warnings about the "fatal tendency (Milbank, 2014)" to form factions, parties arose immediately following his resignation. In the 1800 presidential election, Democratic-Republican candidate Thomas Jefferson faced Federalist and incumbent President John Adams. However, a strategic error by the Democratic-Republican party resulted in Jefferson and his Vice-Presidential pick Aaron Burr each receiving 73 electoral votes (The Miller Center of Public Affairs, University of Virginia, n.d.). The election thrown into the House, momentum quickly rose within the country to prevent this inadvertent situation from reoccurring. Submitted to Congress in late 1803, the 12th Amendment to the Constitution was ratified in June of 1804 and formally separated the electoral votes for President and Vice-President. This alteration prevented victors from opposite parties (such as had happened in 1796) and the President/Vice-President tie of 1800.

The issue arising from Jefferson's contested election resolved, the College worked effectively and without significant controversy for the ensuing twenty years. In 1824, however, chaos ensued. The dominant Democratic-Republican Party split between four candidates, preventing any from attaining an electoral majority. Andrew Jackson held a 99-84 electoral lead over John Quincy Adams in addition to an edge of almost forty thousand popular votes.

Unfortunately for Jackson, 131 electoral votes were required for a majority, and the election again moved to the House of Representatives. The top three candidates, Jackson, Adams and William Crawford competed for votes, yet the outcome became certain when fourth-place candidate Henry Clay threw his support behind Adams (Peters & Woolley, n.d.). The selection of Adams in 1824 would be the first time a candidate became President despite not achieving an Electoral or popular plurality. Embittered, Jackson accused Clay and Adams of a "corrupt bargain" (Spero, 2012), yet focused upon winning the 1828 election rather than attempting an alteration of the Electoral College process.

The winner of the popular vote would lose the electoral vote three more times in America history. In 1876, Samuel Tilden achieved 50.9% of the vote to Rutherford B. Hayes' 47.9%, but a controversial agreement to end Reconstruction in the South, known as the Compromise of 1877, threw twenty disputed electoral votes to Hayes (HarpWeek, 1998). In 1888, Democratic incumbent President Grover Cleveland won the popular vote by almost one hundred thousand, but fell far short in the Electoral College 233-168. Cleveland won overwhelming majorities in his power base states of the South, while his opponent Benjamin Harrison more narrowly carried the most populous Northern and Western states (Kimberling, 1997).

The most recent occasion of an electoral and popular vote mismatch of course occurred in 2000. As we saw earlier, this election enflamed partisan passions which eventually settled upon anger over the Electoral College and calls for its reform. Though Gore did win a plurality of the popular vote, 48.38% vs. Bush's 47.87%, most controversy initially surrounded vote counting procedures in Florida, accusations of suppression and fraud, and the myriad vote recount processes within Florida's counties. Eventually the Supreme Court, in Bush v. Gore, ended the recounts and enforced Florida's earlier certification of Bush as the winner (Pomper, 2001).

As in 1824, 1876 and 1888, a candidate received at least a plurality victory in the popular vote lost the election. Uniquely though, the 2000 election occurred in an age of instant communications and twenty-four hour news cycles. The cultural impact was monumental, with many learning about the electoral process for the first time. Citizens asked themselves why a democracy had such a system and how the Electoral College could be reconciled to ideas of fairness and the principle of "one man, one vote ("Baker v. Carr", 1962)."

Though the Electoral College *de jure* procedure has not changed since the 12th amendment, three major changes have occurred in the centuries following that substantially reshaped both the *de facto* process and the societal conception of our status as a democratic nation. As we've seen previously, national parties emerged that limited the slate of candidates and largely prevented elections from moving to the House of Representatives (Kimberling, 1997). This emergence of parties, according to a modern theory known as Duverger's Law (Duverger's, 1972), followed inevitably from the greater adoption by states of a winner-take-all allocation system for electoral votes.

In John Adams' victory of 1796, only two states employed winner-take-all electoral voting. By the time of his son's election in 1824, a majority of states had moved to this method (FairVote, n.d.). The trend continued apace, and by the modern era every state except Nebraska and Maine awarded all electoral votes to the candidate with the highest plurality. This feature is often incorrectly considered a formal part of the Electoral College. As former New York mayor Michael Bloomberg stated, "Last I looked - and I'm not a candidate - but last time I checked reading about the Constitution, the Electoral College has nothing to do with parties, has absolutely nothing to do with parties. It's most states are winners take all (Roberts, 2012).

Concurrent with that change, by 1836 all states save South Carolina had moved to electing electors by statewide popular vote (Kimberling, 1997).

The last profound change occurred within the courts. A series of landmark cases, especially Baker v. Carr in 1962, established the legal principle of "one man one vote" and effectively required states to eliminate all non-population based criteria when determining congressional districts. In effect, the court declared unconstitutional the tenets of the Great Compromise, at least as applied to state legislatures. Justice Frankfurter dissented strongly against this judicial oversight of state prerogative, warning of judges becoming "a new sovereign power in the republic…and one more dangerous, in theory at least, than the worst elective oligarchy in the worst of times ("Baker v. Carr", 1962)."

Taken together, these significant changes caused many Americans to view the Electoral College as an un-democratic relic of the past. During the Florida recounts of late 2000, Senator-elect Hillary Clinton said, "We are a very different country than we were 200 years ago. I believe strongly that in a democracy, we should respect the will of the people and to me, that means it's time to do away with the Electoral College and move to the popular election of our President (CBS News, 2000)." Polls suggest most Americans agree, with consistent majorities calling for a full popular vote for President in national polls (Gallup, 2011).

Serious proposals to alter the Electoral College followed the 1968 election of Richard Nixon, and quickened after Bush's controversial victory in 2000. These proposals all follow two primary forms: an amendment to the Constitution to repeal and replace the Electoral College, or attempts to circumvent the College by passing varying state-wide popular vote schemes. As of 2016, all of these attempts have been unsuccessful, failing to overcome objections from small

states who fear the loss of influence, and from partisans who fear temporary or long-term disadvantage.

The Bayh-Celler Amendment, introduced in 1969, quickly passed the House before succumbing to a bipartisan, and largely Southern filibuster in September of 1970. This amendment advocated replacing the Electoral College with a strictly popular vote, requiring only that victors reach a 40% threshold (Feerick, 1992). Similarly, an Amendment introduced in January 2005, known as the "Every Vote Counts Amendment", called for a popular vote for President. Though re-introduced in 2009, this Amendment failed to pass either House of Congress. Sponsor Gene Green, a Democratic Representative from Texas described the rationale for the amendment, with echoes of Clinton's earlier critique:

> Every citizen's vote should count in America, not just the votes of partisan insiders in the Electoral College. The Electoral College was necessary when communications were poor, literacy was low and voters lacked information about out-of-state figures, which is clearly no longer the case (Green, 2005).

Two other proposals take a non-Constitutional Amendment approach. Since the Constitution allows states to determine their own methods of electing electors, these plans attempt to convince a majority of states to alter their methods. The first, introduced in Michigan in 2013, would switch winner-take-all from statewide to congressional district. This effort failed amid charges of partisan gamesmanship, when an analysis by Emory Professor Alan Abramowitz showed Romney in 2012 would have prevailed under this system despite losing by five million popular votes to President Obama. (Abramowitz, 2013). Abramowitz concluded, "It is a corrupt and cynical maneuver to frustrate popular will (Abramowitz, 2013)."

The second approach, propounded by the organization National Popular Vote among others, seeks to circumvent the Electoral College by convincing an electoral majority of states to agree to select their own electors based upon the national popular vote. Their legislation "would guarantee the Presidency to the candidate who receives the most popular votes (National Popular Vote, n.d.)." As of mid 2016, eleven states totaling 165 electoral votes have passed the legislation, which would take effect only when passed by enough states to reach a majority of 270. Critics contend this would dramatically expand upon the possibilities of fraud and "the horror of a potential national recount (Gans, 2012)", as well as eliminating grass roots campaigning, minimizing incentives for coalition building and would result in an "distorted arms race of tit-for-tat unanswerable attack advertising" on an unprecedented nationwide scale (Gans, 2012).

Advocates for these initiatives, and more general Electoral College critics alike, contend that the current process suffers from several prominent flaws. These include frustrating the popular will, creating minority Presidents, suppressing voter turnout, creating so-called "wasted votes (Amy, 2000)", and the possibility of faithless electors. Each of these arguments are legitimate concerns, but all would either continue to exist under various alternatives, describe problems not directly related to the Electoral College, or discount the other stakeholders inherent within a federal system.

As for failing to reflect the popular will, four Presidents won election despite losing the popular vote to their opponent. In only one instance, 1876, did the losing candidate receive a majority rather than a plurality (HarpWeek, 1998). In every case except 1824, the winner reflected the popular will within states they won and accumulated enough state victories to claim the Electoral College. Yet the concept of a purely popular vote taps into American ideals of

democracy, heightened in the last century by Baker v. Carr, the Civil Rights movement and the writings of prominent political theorists such as Robert Dahl, who wrote "…every member must have an equal and effective opportunity to vote, and all votes must be counted as equal (Bugh, 2016)." The Founders instead expected successful candidates to pass two distinct tests, to achieve both a "sufficient popular vote" and a "sufficiently distributed" popular vote (Kimberling, 1997).

A republic recognizes other stakeholders, other interests as valuable in addition to popular will. "A large and diverse nation (Kimberling, 1997)" deserves a President with a "regional balance of support." The national motto, E Pluribus Unum, reflects this ideal that out of many interests, out of many competing factions one national voice can be found. In vetoing the National Popular Vote plan within California, then Governor Arnold Schwarzenegger defended states as sovereign stakeholders:

> I believe strongly in democracy and in honoring the will of the people…I appreciate the
> intent of this measure to make California more relevant in the presidential campaign, but
> I cannot support doing it by giving all our electoral votes to the candidate that a majority
> of Californians did not support. This is counter to the tradition of our great nation which
> honors states' rights and the unique pride and identity of each state (Winger, 2007)

The criticisms involving the possibility of minority Presidents are more disingenuous. Bill Clinton's 1992 victory took place without Electoral controversy, yet he claimed only 43% of the vote, significantly below George W. Bush's almost 48%. Abraham Lincoln in 1860 encountered no difficulties in claiming a mandate despite garnering only 40% of the total popular vote (National Archives, n.d.). Though the Electoral College may award a President who fails to

gain a plurality of votes, in those cases they do receive a majority of votes from the other important stakeholders within a federal system, namely the states.   Critics often call these situations misfires, yet they are instead the intended outcome, as candidates are prevented from winning without sufficient geographical appeal across regions..

Claims of depression of votes and the creation of wasted votes employ similar misguided reasoning. In effect, any vote for a candidate that loses could be considered in this approach as wasted, whether on a state or a national scale. As for depression of votes, though that has "a certain surface plausibility, it fails to account for the fact that presidential elections do not occur in a vacuum (Kimberling, 1997)." In no proposed alternative to the Electoral College are these two concerns alleviated. Similarly, faithless electors are a negligible concern, as there have been only eight from 1916-2016, with each occurring as either protest or mistake in elections in which the outcome could not be changed (FairVote, n.d.).

Conclusion

A timeless characteristic of reformers is the desire to discard institutions they perceive as archaic or anachronistic. Mrs. Clinton's formulation earlier, calling for repeal of the Electoral College because "we are a very different country than we were 200 years ago" is a typical manifestation of this modernist fallacy. Yet our extensive review of the historical developments reveals the Electoral College to be not an arbitrary and antiquated impediment to democracy, but a vital plank in Madison's republican model. In addition, reformers face the prospect of unintended consequences, with pollster and political analyst Nate Silver warning "that attempts to reform it could wind up exacerbating its flaws (Silver, 2013)."

Concerning the reformer's eternal desire to abandon institutions they do not understand, the British intellectual G.K. Chesterton wrote:

> In the manner of reforming things, as distinct from deforming them, there is one plain and simple principle; a principle which will probably be called a paradox. There exists in such a case a certain institution or law; let us say,…a fence or gate erected across a road. The more modern type of reformer goes gaily up to it and says "I don't see the use of this; let us clear it away." To which the more intelligent type of reformer will do well to answer: "If you don't see the use of it, I certainly won't let you clear it away….But the truth is that nobody has any business to destroy a social institution until he has really seen it as an historical institution ("Taking a fence down", 2011)

To the resounding credit of the authors of our Constitution, the United States enjoyed centuries of remarkable stability and growth following the adoption of the Constitution, despite many crises and even Civil War. For the past one hundred years or more, America also experienced a breathtaking expansion of the democratic ideal. Expansion of citizenship and suffrage, elimination of barriers to enfranchisement, and a radical shift toward our self-perception as a democracy rather than a republic, all serve as testament to the ideals of the Declaration of Independence. Yet the institutions of the Constitution, that far less glamorous document, should also receive credit for these advancements.

We are a democracy because of our republican institutions, not despite them. We expand the promise of freedom because we are protected from the excesses of it. We believe in the ideals of democracy because of the success of our republic. We are surrounded by the metaphorical fences, including the Electoral College, that were erected by James Madison and

other Founding Fathers. We would do well to understand why those fences are in our path

before we deign to destroy them.

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