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# THE PROSLAVERY ORIGINS OF THE ELECTORAL COLLEGE

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## INTRODUCTION

How did the United States come up with such a crazy way to elect a president? The electoral college system seems to make no sense. It is quite undemocratic. The tiny states have proportionally more power than the larger states. In addition, the winner-take-all process makes voting seem meaningless in many states.<sup>1</sup> As the 2000 election demonstrated, having more popular votes than your opponent does not guarantee that the candidate will win the election. This only reconfirmed what the nation learned in 1824,<sup>2</sup> 1888,<sup>3</sup> 1876,<sup>4</sup> and probably 1800.<sup>5</sup>

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<sup>1</sup> In 2000 Oklahoma's electoral votes went to George W. Bush by a huge margin, and everyone in the state knew this would happen. See CNN, Election 2000 Results for Oklahoma, at <http://www.cnn.com/ELECTION/2000/results/OK/frameset.exclude.html> (last visited Apr. 16, 2002) (reporting that in Oklahoma, Bush received 744,355 votes (60 percent), while Gore received just 474,326 (38 percent)). Voting for Gore was simply an exercise in futility. Similarly, voting for Bush in Massachusetts was a preordained wasted effort. See CNN, Election 2000 Results for Massachusetts, at <http://www.cnn.com/ELECTION/2000/results/MA/frameset.exclude.html> (last visited Apr. 16, 2002) (reporting that in Massachusetts, Gore received 1,610,175 votes (60 percent), while Bush received just 876,906 votes (33 percent)).

<sup>2</sup> Andrew Jackson won 153,544 popular votes to John Quincy Adams' 108,740 votes. William Crawford ran third with 47,136 and Henry Clay ran fourth, with 46,618 votes. Jackson won ninety-nine electoral votes, Adams eighty-four, Crawford forty-one, and Clay thirty-seven. 2 JAMES T. HAVEL, U.S. PRESIDENTIAL CANDIDATES AND ELECTIONS: A BIOGRAPHICAL AND HISTORICAL GUIDE 12 (1996). With no electoral majority, the contest went to the House, where each state cast a single vote. Clay, who was no longer in contention for the presidency, used his considerable political skills to secure the election in the House for Adams.

<sup>3</sup> Grover Cleveland won 5,540,309 popular votes while Benjamin Harrison won 5,444,337. Some 400,000 votes went to various third party candidates. However, Harrison had the majority of the electoral votes. *Id.* at 64.

<sup>4</sup> Massive voter fraud and the intimidation of black voters in the South, make it impossible to know who had the popular majority, or who would have had it, if the

The system seems to be unique in the United States—applying only to the presidential election—and unique to the United States. I know of no western or industrialized democracy that uses such a system. As far as I know, the presidency is the only elected office in the United States in which the person with the most votes in the final election does not necessarily win.<sup>6</sup> In every state, county, and local election, in all elections for members of the House of Representatives and the Senate the person with the most votes in the final election wins.<sup>7</sup>

How did we get such a system? The classic explanations, found in various textbooks and political science treatises, focus on the process argument, federalism, and the view that the framers were skeptical of the people voting.

The electoral college is of course based in part on the three-fifths clause. Thus there is an immediate connection between

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election had been conducted fairly. The returns in Louisiana, South Carolina, and Florida were all disputed, and an electoral commission made up of members of the House, the Senate, and the Supreme Court ultimately awarded all three states to Hayes, giving him an electoral majority. It is possible that Hayes would have had the popular majority if all of the blacks in the South had been allowed to vote freely. However, the official tally shows that Samuel Tilden won 4,300,590 popular votes and Hayes won only 4,036,298. *Id.* at 50.

<sup>5</sup> There are no records of popular votes in the 1800 election, as the electors were chosen by the state legislatures. Thomas Jefferson won seventy-three electoral votes while John Adams won sixty-five. However, Jefferson's margin of victory came from electoral votes created by counting slaves for purposes of representation, which then led to a greater number of electors for each state. Thus, in the states that Jefferson carried there were fewer voters. It seems likely that if this election had been decided by popular votes, Adams would have won. See Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 *YALE J.L. & HUMAN.* 442, 442-43 (2001); PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 179 (2d ed. 2001).

<sup>6</sup> Some offices require run-off elections if no candidate has an absolute majority of the votes, thus making it possible to "win" the first round of an election but later lose. In 1798, for example, Congressman Matthew Lyon of Vermont was reelected to the House of Representatives in a run-off election, because he did not have a majority of the votes in the initial election. See JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956). Oklahoma requires a run-off election in primaries. Thus, in the Oklahoma primary a candidate can win the most votes, but not a majority, and then lose to the candidate with the second largest number of votes in a run-off. *OKLA. STAT. ANN.* tit. 26, § 1-103 (West Supp. 2001).

<sup>7</sup> Prior to the passage of the Seventeenth Amendment the state legislatures chose U.S. Senators. This scheme was similar to the electoral college, and it was quite possible for the candidate with the greatest voter support to lose. A classic example is the 1858 senatorial election in Illinois. It is likely that more Illinois voters supported state legislative candidates who favored Abraham Lincoln than his opponent, Stephen A. Douglas. However, supporters of Douglas carried more legislative districts. The outcome of this and other senatorial elections were also affected by malapportionment of state legislative districts and population shifts. For example, between 1850 and 1860 the population of Chicago grew from 29,963 to over 112,000 people. That massive population growth would not have been reflected in the apportionment of state legislative districts, but would have been reflected in the popular vote.

slavery and the electoral college. At first glance this might seem coincidental, and most textbooks, in fact, offer other explanations for the creation of the electoral college.<sup>8</sup> The few that notice slavery mention it only in passing, and then ignore it, perhaps because an extended investigation of slavery and the electoral college would undermine traditional political science categories. *The Electoral College Primer*, for example, notes in passing that the one reason for the electoral college was “the loss in relative influence of the South because of its large nonvoting slave population.”<sup>9</sup> The authors of this book never again mention the subject, and do not include the word slavery in their index. Similarly, Robert M. Hardaway understands that slaves were counted for purposes of representation in the House,<sup>10</sup> but does not consider how slavery affected the decision to create an electoral college. This lack of discussion of slavery by scholars of the electoral college is surprising, because the records of the Convention show that in fact the connection between slavery and the college was deliberate, and very much on the minds of many delegates, including James Madison. Before turning to a more thorough examination the role of slavery in the creation of the electoral college, it is necessary to first consider the more common explanations for this system of electing presidents.

## I. UNDERSTANDING HOW WE GOT HERE: THE LIMITED AND PARTIALLY CORRECT TEXTBOOK VERSION

Textbooks and primers offer us two common explanations for the creation of the electoral college. Both are wrong, and both miss one of the central purposes of the electoral college, which was to insure that the largest state, Virginia, would be able to elect the national president, and that the slave states would be able to use their slave population to influence the election of the president.

### A. *The Mistrust of the People*

The first (mostly) wrong explanation for the Electoral College is that it was created because the Framers of the Constitution were

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<sup>8</sup> See *infra* Part I.

<sup>9</sup> LAWRENCE D. LONGLEY & NEAL R. PEIRCE, *THE ELECTORAL COLLEGE PRIMER* 18 (1996).

<sup>10</sup> See ROBERT M. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM* 79 (1994).

afraid to allow common voters to choose the president. This is the story I learned in public school, and I even saw it in college textbooks in the 1970s, when I first started teaching United States history.

The argument was that the Framers of the Constitution were elitists who feared that the average voter would be unable to choose a national candidate or worse yet would vote for some demagogue. So, instead, the voter would choose a local "elector" who would cast a more informed vote for president.

At the Constitutional Convention, Elbridge Gerry of Massachusetts took this position. Gerry was the father of the "Gerrymander" and a shrewd politician and businessman.<sup>11</sup> One proponent of this explanation cites Gerry's assertion at the Convention that "the evils we experience flow from the excess of democracy."<sup>12</sup> However, as Robert Hardaway, a conservative advocate of the electoral college notes, Gerry was "in the minority"<sup>13</sup> on this issue. Gerry, not surprisingly, believed, "[t]he popular mode of electing the Chief Magistrate would certainly be the worst of all."<sup>14</sup> He argued that, "the people are uninformed, and would be misled by a few designing men."<sup>15</sup> He believed that "The people do not want [lack] virtue; but are the dupes of pretended patriots."<sup>16</sup> Such comments by Gerry are the origin of the belief that the Framers feared the people. But almost no one else at the Convention accepted Gerry's argument on this issue.

First, local electors could also be "designing men" who could mislead the people at the local level, just as a national candidate might do so while campaigning for the presidency. Given the quality and fame of the national leaders—Washington, Adams, Hamilton, Jefferson—it was unlikely the people would be "misled" by those seeking the nation's highest office. Indeed, the nationalists who dominated the Convention, like Madison, Washington, Gouverneur Morris, Rufus King, Roger Sherman, Charles Cotesworth Pinckey, and James Iredell, were deeply

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<sup>11</sup> GEORGE A. BILLIAS, *ELBRIDGE GERRY: FOUNDING FATHER AND REPUBLICAN STATESMAN* (1976); David Gordon, *Gerry, Elbridge (1744-1814)*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 838-39 (Leonard Levy ed., 1986).

<sup>12</sup> HARDAWAY, *supra* note 10, at 75 (quoting WILLIAM PETERS, *A MORE PERFECT UNION: THE MAKING OF THE UNITED STATES CONSTITUTION* 43 (1987)); *see also* 1 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 48 (rev. ed. 1966) (providing the original quotation). Gerry said this in a debate that had nothing to do with the election of the president.

<sup>13</sup> HARDAWAY, *supra* note 10, at 75.

<sup>14</sup> Gerry debate of July 19, in 2 FARRAND, *supra* note 12, at 57.

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

<sup>16</sup> 1 FARRAND, *supra* note 12, at 48.

skeptical of local politicians.<sup>17</sup> They believed the greatest danger to the nation came from local politicians, like Patrick Henry in Virginia and George Clinton in New York. Thus, the Framers were more likely to trust national politicians—like themselves—than the local politicians, like Patrick Henry and George Clinton. The framers of the Constitution distrusted and disliked “local” politicians. In fact, from the perspective of the Framers, the whole purpose of the Convention was to maneuver around the local politicians to secure a national political structure. The electoral college, however, was clearly antithetical to the Framers’s goal of reducing the power of local politicians. Thus, its inclusion in the Constitution is all the more surprising.<sup>18</sup>

Second, in most places the voters were hardly the common people. It is true that Massachusetts had universal adult male suffrage, without regard to property ownership or race.<sup>19</sup> Perhaps this is why Gerry was so disdainful of “the people” and why he argued that “The evils we experience flow from the excess of democracy.”<sup>20</sup> But, most states had property requirements, and in a number, including Virginia, South Carolina, and Georgia, free black men could not vote. At this time only New Jersey allowed women to vote. Moreover, officeholding at this time was even more restrictive. With the exception of New York and Virginia, every state had a religious test for officeholding, with all requiring that officeholders be Christians, and with most requiring that they be Protestants.<sup>21</sup> In addition, most of the states had property requirements for officeholding that were even higher than those for voting.<sup>22</sup> Given who could vote and hold office, the Framers did not need to fear the rabble would elect some unknown person as president. In most places the rabble could not even vote, much less hold office.

Since most voters were literate property owners, the framers fully understood that the electorate was likely to be reasonably well aware of the issues and the candidates. Indeed, it is likely that American voters in the 1780s, even without the benefit of television, mass production of newspapers, or the Internet, were

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<sup>17</sup> Although he was not a leader of the Convention, Hamilton certainly fit into this category of nationalists.

<sup>18</sup> The localist, states’ rights aspect of the electoral college is illustrated by the title of one book supporting it. See HARDAWAY, *supra* note 10.

<sup>19</sup> See Paul Finkelman, *The First American Constitutions: State and Federal*, 59 TEX. L. REV. 1141, 1153 (1981).

<sup>20</sup> 1 FARRAND, *supra* note 12, at 48.

<sup>21</sup> See J. Jackson Barlow, *Officeholding: Religious-Based Limitations in Eighteenth-Century State Constitutions*, in RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA 346-48 (Paul Finkelman ed., 2000).

<sup>22</sup> See generally WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* (1981).

on average better informed than those who vote today.

This leads to the third fallacy of this analysis. Most of the delegates at the Convention were accomplished and successful politicians who had held elective office in their states.<sup>23</sup> Thus, they knew all too well that the people were not incompetent to choose who to vote for.

### B. *Protecting the Small States: Another Incorrect Explanation*

The second wrong explanation for the electoral college is that it was designed to protect the small states from dominance by the large. This is the explanation that the respected commentator, Daniel Schorr, gave on National Public Radio during the election crisis of 2000. It is also found in Robert Hardaway's *The Electoral College and the Constitution*, which begins its discussion of the origins of the Electoral College by quoting, totally out of context,<sup>24</sup> the statement of Delaware's Gunning Bedford, "I do not, gentlemen, trust you."<sup>25</sup> The implication of Hardaway's argument is that the electoral college was created to placate the small states. However, in all the debates over the executive at the Constitutional Convention, this issue never came up. Indeed, the opposite argument received more attention. At one point the Convention considered allowing the state governors to choose the president but backed away from this in part because it would allow the small states to choose one of their own.

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<sup>23</sup> One exception was Alexander Hamilton, who had in fact never been elected to office by the voters. An elitist, with aristocratic pretensions that were surely inconsistent with his illegitimate birth and early poverty, Hamilton was unlikely to appeal to voters. Hamilton is often used as an example of those who opposed the popular election of the president. Thus, one book on the Electoral College quotes him as saying "[y]our people, sir, are a great beast!" in order to show his opposition to the popular election of the president. DAVID W. ABBOTT & JAMES P. LEVINE, *WRONG WINNER: THE COMING DEBACLE IN THE ELECTORAL COLLEGE* 9 (1991). But these authors and others who use this quotation out of context fail to note that Hamilton had almost no influence in the Convention. In Hamilton's famous speech of June 18, he praised the monarchy, see 1 FARRAND, *supra* note 12, at 282-93, which alienated him from many at the Convention. Furthermore, the Convention rules required that a delegation have at least two members on the floor in order to vote, and after early July, when the rest of the New York delegation went home in disgust, Hamilton was the sole New York delegate remaining and thus he could talk, but not vote. See *id.*

<sup>24</sup> Bedford made this statement during a debate over representation in Congress, which had nothing to do with the election of the president. See 1 FARRAND, *supra* note 12, at 500. This debate is over apportionment in the Congress.

<sup>25</sup> HARDAWAY, *supra* note 10, at 69 (quoting Gunning Bedford of Delaware to delegates from the large states at the Constitutional Convention of 1787) (citations omitted); see also 1 FARRAND, *supra* note 12, at 500.

## II. THE EVOLUTION OF THE ELECTORAL COLLEGE

To understand the origin of the electoral college—and why it became necessary to include the clause in the Constitution—we first must see the various methods of picking a president that the delegates to the Constitutional Convention considered.

On May 29, Governor Edmund Randolph of Virginia proposed that the national executive “be chosen by the National Legislature” for a specific term of years and the president “be ineligible a second time.”<sup>26</sup> A day later Madison suggested that the president be selected by the lower house of Congress, which Madison believed should be chosen by popular election.<sup>27</sup> On June 1, the delegates debated a proposal by James Wilson of Pennsylvania that a “National Executive to consist of a single person be instituted.”<sup>28</sup>

This proposal led to a surprising silence among the delegates. No one seemed to want to debate this issue because of the presence in the Convention of George Washington, who everyone assumed would be the first chief executive of the nation. The debate began only after Benjamin Franklin, the one man at the meeting with possibly even more prestige than Washington, cajoled his colleagues into talking.

The discussion that followed produced serious disagreements among the delegates. Roger Sherman of Connecticut argued that the executive should be seen as “nothing more” than a vehicle “for carrying the will of the Legislature,” which should be free to expand or contract the number of executives, as needed.<sup>29</sup> Randolph feared an executive made up of a single person as the “foetus of a monarchy,” and proposed an executive made up of three different men.<sup>30</sup> Elbridge Gerry favored “annexing a Council [to the Executive],” which he thought would give the branch “weight & inspire confidence.”<sup>31</sup> More likely, however, he thought such a system would create a weak executive. John Rutledge did not fear a strong executive, held by “a single person,” as long as the executive did not have the power to unilaterally make war or peace.<sup>32</sup>

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<sup>26</sup> 1 FARRAND, *supra* note 12, at 63.

<sup>27</sup> *See id.* at 60-61.

<sup>28</sup> *Id.* at 63.

<sup>29</sup> *Id.* at 65.

<sup>30</sup> *Id.* at 66.

<sup>31</sup> *Id.* at 67.

<sup>32</sup> *Id.* at 65.



This debate was clearly going nowhere, and Wilson was probably relieved when Madison suggested that any discussion of the nature of the executive be postponed until the Convention had determined the “extent of the Executive authority.”<sup>33</sup> This was accomplished, although not without some more sparring on Madison’s wording.

Wilson then raised the question of how to choose the national executive. Although a conservative on many issues, here he proved to be a radical democrat, arguing for an “elect[ion] by the people,” citing the successful experience of the popular election of governors in New York and Massachusetts, and arguing that only the most famous people would be chosen under such a method.<sup>34</sup>

Roger Sherman on the other hand, favored having the legislature elect the president. Under this system, modeled on the British system, the president would be “absolutely dependent” on the legislature.<sup>35</sup> Although diametrically opposite of Wilson’s plan, Sherman’s goal could also be interpreted as democratic,<sup>36</sup> to the extent that legislature was elected by the people, and represented the people. However, at this point in the Convention Sherman believed the state legislatures should choose the members of Congress, and that each state should have an equal vote in Congress. Thus, Sherman was in fact arguing for an executive branch that was distant from the people, unresponsive to them, and did not represent them.<sup>37</sup>

The convention then considered the president’s term. Wilson and Sherman favored three years, with the notion that the president would be eligible for reelection. As Sherman declared, he was “ag[ain]st the doctrine of rotation as throwing out of office the men best qualified to execute its duties.”<sup>38</sup> Charles Pinckney favored seven years, as did George Mason, but only if the chief executive was prohibited from holding the office for more than one term.<sup>39</sup> Bedford of Delaware favored a three-year term, but would have limited the president to three terms.<sup>40</sup> Madison, on the

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<sup>33</sup> *Id.* at 66.

<sup>34</sup> *Id.* at 68.

<sup>35</sup> *Id.*

<sup>36</sup> Sherman’s goal would at least be considered “republican” within the late 18th century meaning of the term.

<sup>37</sup> In a debate over the make of the legislature, on May 31, Sherman had “opposed the election by the people, insisting that it ought to be by the [State] Legislatures. The people he said, [immediately] should have as little to do as may be about the Government. They want [lack] information and are constantly liable to be misled.” 1 FARRAND, *supra* note 12, at 48.

<sup>38</sup> *Id.* at 68.

<sup>39</sup> *See id.*

<sup>40</sup> *See id.* at 68-69.

other hand, “observed that to prevent a Man from holding an Office longer than he ought, he may for malpractice be impeached and removed; he is not for any ineligibility.”<sup>41</sup> George Mason, reflecting the fears of what Pauline Maier called “the old revolutionaries,” argued for a seven-year term, but with “an exclusion afterwards—thereby he is made independent of the Legislature, who are proposed as his Electors—if he is capable of reelection by the Leg[islature]: the Ex[ecutive] will be complaisant . . . the Executive will be subservient and court a reelection.”<sup>42</sup> The Convention then voted to for a seven-year term,<sup>43</sup> but without any limit on terms.

A day later, June 2, James Wilson proposed what would ultimately evolve into the electoral college. The draft document then under consideration provided for the election of the president by the national legislature, which Wilson opposed. He had already indicated his interest in direct election of the president. But, he clearly did not have much support for this. So, he suggested that each state be divided into “districts: and that the persons qualified to vote in each district” vote for “Members for their respective Districts to be electors of the Executive Magistracy.”<sup>44</sup> This idea went nowhere, with only two states supporting it. The Convention then voted for a seven-year term, with the president elected by the Congress, and not eligible for a second term.<sup>45</sup>

At this point the Convention ceased to spend much energy on the executive branch until July 17, when the Convention considered the entire draft of the Constitution. Gouverneur Morris began the debate by opposing election by the legislature, arguing for election by the people:

He ought to be elected by the people at large, by the freeholders of the Country. That difficulties attend this mode, he admits. But they have been found superable in N[ew] Y[ork] & in Con[necticu]t and would he believed be found so, in the case of an Executive for the U[nited] States. If the people should elect, they will never fail to prefer some man of distinguished character, or services; some man, if he might so speak, of continental reputation. If the Legislature elect, it will be the work of intrigue, of cabal, and of faction: it will be like the election of a pope by a conclave of cardinals; real merit will rarely be the title to the appointment.<sup>46</sup>

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<sup>41</sup> *Id.* at 74.

<sup>42</sup> *Id.* at 71-72.

<sup>43</sup> *See id.* at 69.

<sup>44</sup> *Id.* at 77.

<sup>45</sup> *See id.* at 77-78.

<sup>46</sup> *Id.* at 29.

Wilson supported this as well, while Sherman remained committed to the national legislature electing the president.

Charles Pinckney opposed direct election of the president, arguing that “[t]he most populous States by combining in favor of the same individual will be able to carry their points.”<sup>47</sup> This statement cannot, however, be taken at face value. Throughout the Convention Pinckney had voted with the large states, as had the rest of the South Carolina delegation. South Carolina saw itself as a large state. The issue here was not population, but the voting population. With about half of South Carolina populated by slaves, Pinckney could not afford to support the direct election of the president, because that would hurt his state.

Hugh Williamson of North Carolina was less coy than Pinckney. He offered the real reason that the South could not support popular election:

Mr. Williamson, conceived that there was the same difference between an election in this case, by the people and by the legislature, as between an appt. by lot, and by choice. There are at present distinguished characters, who are known perhaps to almost every man. This will not always be the case. The people will be sure to vote for some man in their own State, and the largest State will be sure to succede. This will not be Virga. however. Her slaves will have no suffrage.<sup>48</sup>

The Convention then rejected popular election of the president, with only Pennsylvania supporting it. However, the convention then accepted the idea that the president should be eligible for reelection. But, at the end of the day the Convention decided to reconsider this the next day.<sup>49</sup>

The next day the delegates had to consider the point made so powerfully by Elbridge Gerry early in the Convention. If the legislature chose the president, and the president was eligible for re-election, he would be “absolutely dependent” on the legislature. This system would destroy the separation of powers which the delegates wanted to build into the new constitution.

Thus, the delegates had to find another method of electing the president. On July 19, 1787, Oliver Ellsworth of Connecticut proposed “electors” appointed by the state legislatures. Under Ellsworth’s plan these would be apportioned on the basis of population, and thus the small states would have no special advantage.

At this point James Madison, a slaveholder from Virginia,

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<sup>47</sup> *Id.* at 30.

<sup>48</sup> *Id.* at 32.

<sup>49</sup> *See id.* at 32, 36.

weighed in. The most influential delegate, Madison argued that “the people at large” were “the fittest” to choose the president. But “one difficulty . . . of a serious nature” made election by the people impossible. Madison noted that the “right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes.”<sup>50</sup>

In order to guarantee that the nonvoting slaves could nevertheless influence the presidential election, Madison favored the creation of the electoral college.<sup>51</sup> Hugh Williamson of North Carolina was more open about the reasons for southern opposition to a popular election of the president. He noted that under a direct election of the president, Virginia would not be able to elect her leaders president because “[h]er slaves will have no suffrage.”<sup>52</sup> The same of course would be true for the rest of the South.

The Convention quickly moved to accept the idea of an electoral college, following the lead of Ellsworth, from the North, and Madison and Williamson, from the South. This sectional balance is revealing. Ellsworth almost always voted with the South on slavery-related matters, and the agreement here seems part of the same New England-Deep South coalition that led to the Slave Trade clause.<sup>53</sup> The Convention tied presidential electors to representation in Congress. By this time the Convention had already agreed to count slaves for representation under the three-fifths compromise, counting five slaves as equal to three free people in order to increase the South’s representation in Congress. Thus, in electing the president the political power southerners gained from owning slaves (although obviously not the votes of slaves) would be factored into the electoral votes of each state.

The truth of Williamson’s observation about the need of the South to have its slaves counted in choosing the president becomes clear when we examine the election of 1800 between John Adams, who never owned a slave, and Thomas Jefferson, who owned about 200 at the time. The election was very close, with Jefferson getting seventy-three electoral votes and Adams sixty-five. Jefferson’s strength was in the South, which provided fifty-three of his electoral votes. If Jefferson had received no electoral votes based on counting slaves under the 3/5ths clause, John Adams would have won the election.<sup>54</sup>

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<sup>50</sup> 2 FARRAND, *supra* note 12, at 57.

<sup>51</sup> *See id.* at 56-57.

<sup>52</sup> *Id.* at 32.

<sup>53</sup> *See* FINKELMAN, *supra* note 5, ch. 1.

<sup>54</sup> The complications of the 2000 presidential election suggest that this last

We cannot know how American history would have played out if Adams had won reelection in 1800, but the possibilities are intriguing. For example, when we purchased Louisiana we would have had a president opposed to slavery. In addition, when he left the Presidency, Adams was on the verge of extending diplomatic relations to Haiti. In contrast, Jefferson opposed relations with Haiti and did everything he could, short of war, to undermine the black regime there. If Adams had remained in office our whole relationship with Haiti would have been different, since we would probably have extended diplomatic relations with the young nation and expanded what was emerging as a useful economic and trade relationship.<sup>55</sup> The history of Haiti might also have been different, as that nation developed into a democracy with the help of what would have been its best trading partner. As Americans contemplate modern diplomatic and immigration problems with Haiti, it is at least worth wondering how different our situation might be if the Constitution had not used the electoral college, tied as it was to the three-fifths clause, to elect the president. More importantly, we can only wonder how American history might have played out if the founders had developed a method of choosing the president that was not weighted in favor of slavery.

### III. THE ELECTORAL COLLEGE IN HISTORICAL PERSPECTIVE

Over one hundred and thirty-five years ago the United States rid itself of slavery. Perhaps it is now time to rid ourselves of the last constitutional vestige of the peculiar institution: the electoral college. After all, it is surely the most peculiar aspect of our political system. Moreover, as the election of 2000 shows, it does not seem to be working very well. Now that slavery is no longer an issue, perhaps it is time to reexamine James Madison's original statement, "The people at large" are "the fittest" to choose the president, because "The people generally could only know & vote for some Citizen whose merits had rendered him an object of general attention & esteem."<sup>56</sup>

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constitutional vestige of the peculiar institution has outlived its usefulness. After all, it is surely the most peculiar aspect of our political system. Further, as election 2000 illustrates, the system does not seem to be working very well.

<sup>55</sup> FINKELMAN, *supra* note 5, at 179. On Jefferson and slavery, and the impact of proslavery ideology on politics, see generally *id.* at 129-196.

<sup>56</sup> 2 FARRAND, *supra* note 12, at 57.

Perhaps it is time to heed Madison's advice.

