

IN DEFENSE OF THE ELECTORAL COLLEGE

Allen C. Guelzo

The Electoral College was designed by the framers deliberately, like the rest of the Constitution, to counteract the worst human impulses and protect the nation from the dangers inherent in democracy. It has been a significant, if poorly comprehended, mechanism for stability, liberty, and legitimacy—all of which democracies can too easily come to undermine.

THERE IS HARDLY ANYTHING in the Constitution harder to explain, or easier to misunderstand, than the Electoral College. And when a presidential election hands the palm to a candidate who comes in second in the popular vote but first in the Electoral College tally, something deep in our democratic viscera balks and asks why.

Some argue that the Electoral College should be dumped as a useless relic of 18th-century white-gentry privilege. A month after the 2016 election, and on the day the members of the Electoral College met to cast their official votes, the *New York Times* editorial board published

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a scathing attack of this sort, calling the Electoral College an “antiquated mechanism” that “overwhelming majorities” of Americans would prefer to eliminate in favor of a direct, national popular vote. Others claim it is not only antiquated, but toxic—Akhil Reed Amar wrote in *Time* magazine that the Electoral College was deliberately designed to advance the political power of slaveholders:

[I]n a direct election system, the North would [have outnumbered] the South, whose many slaves (more than half a million in all) of course could not vote. But the Electoral College . . . instead let each southern state count its slaves, albeit with a two-fifths discount, in computing its share of the overall count.

The Electoral College is neither antiquated nor toxic; it is an underappreciated institution that helps preserve our constitutional system, and it deserves a full-throated defense.

Still others argue that, while the Electoral College may not be any more antiquated than the rest of the Constitution, the mechanism is simply ridiculous. “The winner is picked not by the laws of elections but by the serendipity of the casino,” complained E. J. Dionne, Jr., in the *Washington Post*. “If you’re lucky to hit the right numbers, narrowly, in a few states, you can override your opponent’s big margins in other states.” Or, shifting the metaphor, the Electoral College is bad sportsmanship. “Imagine,” Dionne demands, “basing the winner of a game not on the number of runs scored but the number of innings won, and with some innings counting more than others.” Eric Maskin and Amartya Sen at the *New York Review of Books* joined the demand for these “majorities” to prevail over the Electoral College. “The system . . . fails to reflect voters’ preferences adequately. It also aggravates political polarization, gives citizens too few political options, and makes candidates spend most of their campaign time seeking voters in swing states rather than addressing the country at large.”

Curiously, there have been only five occasions in which a closely divided popular vote for the presidency and the Electoral College vote have failed to point in the same direction. The first occurred in 1824, when Andrew Jackson won a plurality of the popular vote over John Quincy Adams, William Crawford, and Henry Clay, but failed to win a majority in the Electoral College. The election was then decided by the House of Representatives, which granted the victory to Adams. Samuel Tilden edged out Rutherford Hayes in the 1876 popular vote, only to see the laurel snatched away when a congressional election commission awarded Hayes enough contested electoral votes to give him a one-vote Electoral College victory. In 1888, the incumbent Grover Cleveland won the popular vote by less than one percentage point, but Benjamin Harrison won the presidency with 233 electoral votes to Cleveland’s 168. In 2000, Al Gore edged out George W. Bush in the popular vote by about half a million votes, but (after a razor-thin victory in Florida, contested all the way to the U.S. Supreme Court) Bush won a narrow Electoral College majority. And in 2016, Donald Trump

garnered 2.8 million fewer popular votes than Hillary Clinton, but won a decisive victory, 304 to 227, in the Electoral College.

So, having Electoral College decisions overshadow popular-vote victories is neither novel nor (as in the examples of 1876 and 2000) entirely the fault of the Electoral College. But 2016 set off a swell of complaints nonetheless. This is largely because it was the first time since 1888 that, in a two-major-candidate race, one candidate won the popular vote but lost the electoral tally. Hence the chorus of denunciation—the Electoral College is undemocratic; the Electoral College is unnecessary; the Electoral College was invented to protect slavery—and the demand to push the institution down the memory hole.

But these criticisms are misguided. The Electoral College was designed by the framers deliberately, like the rest of the Constitution, to counteract the worst human impulses and protect the nation from the dangers inherent in democracy. The Electoral College is neither antiquated nor toxic; it is an underappreciated institution that helps preserve our constitutional system, and it deserves a full-throated defense.

CONSTITUTIONAL ROOTS

THE DEMOCRATIC ENERGIES behind these denunciations offer a hint of the key problem with them. This is, after all, a constitutional republic, and even the most casual reader of the Constitution cannot fail to notice that the Electoral College is the only method specified by that document for selecting the president of the United States. For all the reverence paid to the popular vote in presidential elections, the Constitution says not a word about holding a popular vote for presidents.

Here is the election mechanism as it appears in Article 2, Section 1 (in a slightly abbreviated form, as it is the single longest part of the Constitution devoted to a single action, accounting for nearly a tenth of the Constitution’s original length):

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows: 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. . . . 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. . . . 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. . . .

This method was slightly altered by the 12th Amendment in 1804, but only slightly, and we have elected presidents in the same way ever since. There is no mention whatsoever of a popular vote, at any level. Each state is directed to appoint “a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.” The states may make these appointments by whatever means they choose, with a few restrictions on who can be appointed.

While it is true that, since the 19th century, each state has decided to appoint its electors by a popular vote, this is a compliment to our democratic predilections and is not required by the Constitution. And it should be noted that popular votes for electors occur only within each state; the electors then go on to do the presidential balloting. Ridding ourselves of the Electoral College would not automatically install a national popular vote for the presidency; that would require a highly complicated constitutional amendment specifying comprehensive details for casting such a national vote, and might even trigger calls for a complete rewriting of the Constitution by convention. Simply doing away with the existing process without putting a new one in its place could create the biggest political crisis in American history since the Civil War.

But the Electoral College system is not only embedded in the structure of our constitutional governance; it is also emblematic of the fact that we are a federal republic. The states of the American Union existed before the Constitution and, in a practical sense, existed long before the Revolution. Nothing guaranteed that the states would all act together in 1776; nothing guaranteed that, after the Revolution, they might not go their separate and quarrelsome ways (much like the German states of the 18th century or the South American republics in the 19th century). What is more, the Constitution’s predecessor, the Articles of Confederation, very nearly invited such division. The Articles were, in their own terms, only “a firm league of friendship with each other,” in which “[e]ach state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right.” The Confederation Congress had repeated difficulties assembling a quorum just to do business; even the treaty of peace with Great Britain that ended the Revolutionary War nearly expired because an insufficient number of delegates showed up for its rati-

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fication. The genius of the Constitutional Convention lay in its successfully drawing the American states toward a “more perfect union.” But it was still a union of states; we probably wouldn’t have formed a constitution or a country at all had we not embraced federalism.

Abolishing the Electoral College now might satisfy an irritated yearning for direct democracy, but it would also mean dismantling federalism. After that, there would be no sense in having a Senate (which, after all, represents the interests of the states), and eventually, no sense in even having states, except as administrative departments of the central government. We structure everything in our political system around the idea of a federation that divides power between states and the federal government—states had to ratify the Constitution through state conventions beginning in 1787; state legislatures are required for ratifying constitutional amendments; and even the Consti-

tution itself can only be terminated by action of the states in a national convention. Federalism is in the bones of our nation, and abolishing the Electoral College would point toward doing away with the entire federal system.

None of this, moreover, is likely to produce a more democratic election system. There are plenty of democracies, like Great Britain, where no one ever votes directly for a head of state. And there are federal republics that have maniacally complicated processes for electing leaders.

The German federal republic, for instance, is composed (like ours) of states that existed as independent entities long before their unification as a German nation, and whose histories as such have created an electoral system that makes our “antiquated” Electoral College look like a model of efficiency. In the German system, voters in 299 electoral districts each cast two votes in elections for the Bundestag (Germany’s parliament): the first for a directly elected member and the second for one of 34 approved parties (in 2017), whose caucuses then identify candidates. A federal president (Bundespräsident) is elected every five years by a federal convention that reflects the party majorities in the Bundestag and the state parliaments of the 16 German states. Finally, the federal president proposes the name of the de facto head of state, the chancellor (Bundeskanzler) to the Bundestag. By contrast, the Electoral College is remarkably straightforward. It is also useful to bear in mind the examples set by some of the nations that do hold direct elections for their heads of state: Afghanistan, Iran, Mexico, Russia, Turkey, Venezuela, and Zimbabwe are just a few. Jettisoning the Electoral College for direct popular elections would not automatically guarantee greater democracy.

It’s worth remembering, too, that in 1787, the Constitutional Convention did not inadvertently stumble upon the mechanics of electing a president—the delegates lavished an extraordinary amount of attention on the subject. Edmund Randolph’s original “Virginia Plan” for the Constitution had called for the creation of “a National Executive . . . to be chosen by the National Legislature”

with “a general authority to execute the National laws.” But the great Pennsylvania jurist James Wilson believed that “[i]f we are to establish a national Government,” the president must be chosen by a direct, national vote of the people. Wilson claimed that an executive appointed by either house of the new Congress would be beholden to the legislature and have no resources to restrain legislative overreach. Only “appointment by the people,” he insisted, would guarantee a national executive free of such dependence and fully able to keep Congress and the states from careening off the republican track. Gouverneur Morris joined Wilson in arguing (over the course of two days) that

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. . . . The Legislature will continually seek to aggrandize & perpetuate themselves; and will seize those critical moments produced by war, invasion or convulsion for that purpose. It is necessary then that the Executive Magistrate should be the guardian of the people, even of the lower classes, agst. Legislative tyranny, against the Great & the wealthy who in the course of things will necessarily compose the Legislative body. . . . The Executive therefore ought to be so constituted as to be the great protector of the Mass of the people.

But wise old Roger Sherman of Connecticut replied that it might be better to have the new Congress select the president; he feared that the direct election of presidents by the people might lead to monarchy. As Madison noted of Sherman, “An independence of the Executive [from] the supreme Legislature, was in his opinion the very essence of tyranny if there was any such thing.” Sherman

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was not trying to undermine the popular will, but to keep it from being distorted by a president who mistook a popular election for a mandate for dictatorship.

Most credit Wilson with being the first to propose a compromise—let the people vote, not for a national executive, but for a group of electors who would then select an executive (on the model of the princely electors of the Holy Roman Empire, who elected a new emperor at the death of an old one). But it was not until the formation of the Committee on Postponed Parts, near the conclusion of the Convention, that it was finally agreed, in the words of Pennsylvania delegate John Dickinson, “that the President should entirely owe his Elevation to the will of the people directly declared through their Organs the Electors.” This would grant the president “a broad and solid Base for him to stand upon.” And it was no less than James Madison who “took out a Pen and Paper, and sketched out a mode of Electing the President” by a college of “Electors . . . chosen by those of the people in each State, who shall have the Qualifications requisite.”

ONE MAN, ONE VOTE?

STILL, HISTORICAL ARGUMENTS often carry little weight against sound bites, so it is worthwhile to deal directly with three popular arguments against the Electoral College. The first, that the Electoral College violates the principle of “one man, one vote,” is rooted in the constitutional stipulation that each state appoint “a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.” This means, for instance, that the 39 million Californians (who have 53 representatives in Congress, along with their two U.S. senators) are allocated 55 electoral votes for a presidential candidate. Meanwhile, the half-million or so Americans who live in Wyoming get three electoral votes — which means that each Wyoming voter gets 3.6 times more Electoral College clout than each California voter.

This may not be quite equal or, some would argue, quite just. But it is worth remembering that the phrase “one man, one vote” occurs nowhere in the Constitution. It is a judicial creation from *Gray v. Sanders*, a 1963 case in which the Supreme Court stepped in to end Georgia’s use of a county-unit system of counting votes on the grounds that it violated the 14th Amendment. This principle was expanded the next year in *Wesberry v. Sanders*, which countered inequalities in federal congressional dis-

tricts, and again a few months later in *Reynolds v. Sims*, similarly countering deliberate inequalities in state-drawn legislative districts. It was reiterated again four years later in *Avery v. Midland County*, which concerned municipal districts. Significantly, the Supreme Court has shied away from applying this rule to the U.S. Senate, since the Constitution mandates that every state, no matter its population, elects only two U.S. senators.

A far more likely candidate for judicial scrutiny under the “one man, one vote” rule would be the states themselves. California gave 61.5% of its popular vote to Hillary Clinton, and she collected all 55 of California’s electoral votes as a result. But that majority was won in 33 counties, mostly clustered around San Francisco, Los Angeles, and San Diego. The rest of the state—25 counties—went for Trump. These counties had no say whatsoever in how California’s electoral votes were cast, despite making up a solid block of the state north of San Francisco. Is the best solution to such inequity, then, to break up the Electoral College? Or would it be just as equitable, not to say easier, to break up California into two states? Northern Californians could then be represented the way they want—as they have been demanding, in fact, since 1941, when the first proposals were put forward to create a new state from the rural counties of northern California and southern Oregon. (In all likelihood, this would mean adding two more Republican senators and about 20 more Republican House members, which is why it is unlikely that this particular inequity will be corrected any time soon.)

The disparity in Illinois was even more dramatic. Of the 102 counties in that state, only 11 went Democratic in the 2016 presidential election. Nevertheless, Clinton won the state’s popular vote, 3.1 million to 2.1 million, thanks mostly to the Democratic counties clustered in the Chicago area. She was thus granted all of Illinois’s 20 electoral votes. Is that fair to the rest of the state? So, break up Illinois—and send still more Republican senators and representatives to Congress. Those who complain that the Electoral College subverts the “one man, one vote” principle should also object to the way the system operates within the states.

SLAVERY AND THE ELECTORAL COLLEGE

THE SECOND POPULAR ARGUMENT against the Electoral College is that it was designed to protect slavery. The Constitution mandates that each state choose electors up to the combined number of its rep-

representatives and senators. The number of representatives is determined by state population, and the Constitution originally permitted states in which slavery was legal to include three-fifths of their slave populations for the purpose of determining the number of representatives they could send to Congress. Hence, states where slavery was legal could artificially inflate their representation in Congress by counting three-fifths of people who were held in bondage—and who had no political standing whatsoever.

Those states received extra, and illegitimate, political leverage. Because that “extra” representation also factored into the number of electoral votes a state could cast, it would seem that the infamous “three-fifths clause” gave slave states an advantage in presidential elections. The clincher for this argument against the Electoral College comes in Akhil Reed Amar’s description of how Thomas Jefferson was elected president in 1800:

Southerner Thomas Jefferson, for example, won the election of 1800–01 against Northerner John Adams in a race where the slavery-skew of the electoral college was the decisive margin of victory: without the extra electoral college votes generated by slavery, the mostly southern states that supported Jefferson would not have sufficed to give him a majority. As pointed observers remarked at the time, Thomas Jefferson metaphorically rode into the executive mansion on the backs of slaves.

What this leaves out of the equation, however, is the fact that in 1787 and 1788, as the Constitution was being ratified, slavery was practiced in all of the states (though the Massachusetts Supreme Court had ruled it to be in violation of the state constitution in 1780, and Vermont had officially banned it in 1777). If the three-fifths provision operated to give slave-holding states extra leverage in the Electoral College, it gave that leverage to every state, North and South alike. Pennsylvania adopted a gradual emancipation plan in 1780, but it still had slaves in 1840. New York didn’t free its last slaves until 1840. And there were still 18 lifetime “apprentices” in New Jersey when the Civil War broke out. The three-fifths clause gave no advantage to slave states until the Northern states, one by one, abolished slavery.

It could perhaps be argued that there was a vast difference between Northern states, which allowed slavery

but had tiny slave populations, and Southern states with mammoth slave populations. But would this have really made a difference in the Electoral College in 1787? Take New York and Virginia, the largest slave states in the North and South, respectively, according to the 1790 census, just after the Constitutional Convention. Subtract the slave population of New York entirely—in other words, no three-fifths clause—and you would be left with a population of 319,000. Do the same thing for Virginia, and you would get a population of 404,000. Even without the three-fifths clause, Virginia would have been allotted more representatives in Congress and a larger electoral vote.

Amar seeks to find the hidden hand of slavery in the debates of the Convention itself, and it is true that the Convention had no shortage of acrimonious discussion of slavery. But none of it occurred in connection with the equally acrimonious and lengthy debates over the presidency, apart from one peculiar statement uttered by James Madison on July 19, 1787:

If it be a fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be separately exercised, it is equally so that they be independently exercised. There is the same & perhaps greater reason why the Executive shd. be independent of the Legislature, than why the Judiciary should: A coalition of the two former powers would be more immediately & certainly dangerous to public liberty. . . . There was one difficulty however of a serious nature attending an immediate choice by the people. 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. The substitution of electors obviated this difficulty and seemed on the whole to be liable to fewest objections.

This statement is exceptionally opaque, and it seems to have no logical connection to the speeches made either before or after concerning the method of electing a president. This has led some to doubt whether Madison even uttered it at the time; he may have interpolated it in one of the many revisions of his notes on the Convention

debates. But even taking it at face value, the best sense that can be made of it is that Madison was complaining that Northern states had looser (“more diffusive”) rules for determining voter qualifications than Southern states, and thus might have an unfair advantage in a presidential-election system based solely on a direct, popular vote (since, at least proportionally, more Northerners than Southerners would be eligible to vote).

Madison seems to have believed that the three-fifths clause would not adequately mitigate the effects of lenient Northern voter-eligibility rules because no-fifths of the slave population could vote. He appears to have concluded that an Electoral College system based on representation would improve this balance and keep presidential elections from becoming sectional affairs. The idea that the Electoral College was proposed to protect Southern slavery stretches the imagination; if anything, Madison seems to be suggesting that an Electoral College would mute unfair sectional advantages.

Ultimately, the Electoral College contributed to ending slavery, since Abraham Lincoln, having earned only 39.9% of the popular vote in 1860, nevertheless won a crushing victory in the Electoral College—leading many Southern slaveholders to stampede to secession in 1860 and 1861. They could run the numbers as well as anyone, and realized that the Electoral College would only produce more anti-slavery Northern presidents.

STABILITY AND LIBERTY

FINALLY, SOME ARGUE that the Electoral College is simply too cumbersome. And it is cumbersome. But the Constitution never set out to create a streamlined national government. The Constitutional Convention was interested in liberty, not efficiency. As such, the Electoral College embodies a fundamental instinct in the founders: Slow down. Ours is a deliberately sedate government, prone to gridlock and unresponsive to immediate pressures. There is good reason for this: The members of the Constitutional Convention had seen how the Revolution produced hyperactivity in state governments eager to distance themselves from the past by mak-

ing everything into “one man, one vote,” all the time. This produced spontaneity; it also produced stupidity.

The Pennsylvania constitution of 1776 is a case in point. It proposed to govern Pennsylvania through a simple, unicameral “assembly of the representatives of the free-men.” It abolished all property qualifications for voting (apart from paying “public taxes”), limited legislators to one-year terms and no more than four terms every seven years, and stipulated that elections be held annually every October. But without the checks and balances provided by a bicameral legislature, the new Pennsylvania Assembly bolted ahead to revoke a college charter, override judicial decisions, fix the price of grain, issue £200,000 in tax-anticipation notes, and revoke (temporarily) the charter of Robert Morris’s Bank of North America.

This new legislature aligned with the side of the angels by inaugurating a long-term phase-out of slavery in Pennsylvania, but its angels could be inquisitorial: The Assembly passed legislation “for the suppression of vice and immorality” that criminalized “profane swearing, cursing, drunkenness, cock fighting, bullet playing, horse racing, shooting matches and the playing or gaming for money or other valuable things,

fighting of duels and such evil practices which tend greatly to debauch the minds and corrupt the morals of the subjects of this commonwealth.” It also seized the property of suspected Tories and pacifists, imposed loyalty oaths, and shut down the College of Philadelphia for “an evident hostility to the present Government and Constitution of this State, and in divers particulars, enmity to the common cause.” It revived the English practice of passing bills of attainder, and its courts tried 28 people for treason against the commonwealth. Cooler heads in a second house might have tactfully pigeon-holed such legislation. Gouverneur Morris sarcastically asked whether any “man if he confides in the State of Pena...will lend his money or enter into contract? He will tell you no. He sees no stability. He can repose no confidence.”

The Constitutional Convention, meeting in Pennsylvania, had a front-row seat for observing the impact of the state’s constitution. They walked hurriedly away from it and deliberately diffused decision-making through a separation of powers and a series of checks and balances

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between the three branches of the new national government—expressly to prevent even well-intentioned power from endangering liberty.

And it bears recollecting that holding a direct presidential election might not be any less cumbersome than the Electoral College. Counting (and worse, recounting) votes on a nationwide basis when the margin between two candidates is half a percent (as it was in 2000) would be even more unwieldy than the current system.

There are, in fact, some unsought benefits in the Electoral College (unsought in the sense that they formed no part of its original rationale). First, the Electoral College forces candidates to appeal to a wider range of voters. A direct, national popular vote would incentivize campaigns to focus almost exclusively on densely populated urban areas; Clinton's popular-vote edge in 2016 arose from Democratic voting in just two places—Los Angeles and Chicago. Without the need to win the electoral votes of Ohio, Florida, and Pennsylvania, few candidates would bother to campaign there. Of course, the Electoral College still narrows the focus of our elections: Instead of appealing to two states, candidates end up appealing to 10 or 12, and leave the others just as neglected. But campaigning in 10 or 12 states is better than trying to score points in just two.

Another unsought benefit of the Electoral College is that it discourages voter fraud. There is little incentive for political parties to play registration or ballot-box-stuffing games in Montana, Idaho, or Kansas—they simply won't get much bang for their buck in terms of the electoral totals of those states. But if presidential elections were based on national totals, then fraud could be conducted everywhere and still count; it is unlikely that law enforcement would be able to track down every instance of voter fraud across the entire country.

A final unforeseen benefit of the Electoral College is that it reduces the likelihood that third-party candidates will garner enough votes to make it onto the electoral scoreboard. Without the Electoral College, there would

be no effective brake on the number of “viable” presidential candidates. Abolish it, and it would not be difficult to imagine a scenario in which, in a field of dozens of micro-candidates, the “winner” would need only 10% of the vote, and would represent less than 5% of the electorate. Presidents elected with smaller and smaller pluralities

would only aggravate the sense that the executive branch governs without a real electoral mandate.

The fundamental problem in all democracies is legitimacy—if sovereignty resides in the people, and all the people have a say, what is to keep the people from breaking up into tiny splinters of violent political difference? The Electoral College, then, is an engine of legitimacy: Since 1900, 17 out of 29 U.S. elections have been decided by 200 or more electoral votes.

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A CONSTITUTIONAL BRAKE

THE ELECTORAL COLLEGE has been a significant, if poorly comprehended, mechanism for stability, liberty, and legitimacy—all of which democracies can too easily come to undermine. There is little substance to the complaint that the Electoral College was intended as an elitist brake on the popular will, since electors have rarely bucked the popular vote in their states. (For example, one District of Columbia elector cast a blank ballot in 2000; one Minnesota John Kerry elector cast a vote for John Edwards in 2004; and in 2016 five Clinton electors and two Trump electors bolted for other candidates.) And the idea that a national popular vote would lead to clearer and more representative results ignores the nature of our constitutional republic and fails to contemplate the challenges that a truly national election in our vast country would involve.

If anything, the Electoral College was designed to act as a brake on over-mighty presidents, who might use a popular majority to claim that they were authorized to speak for the people against Congress. And from that, we may well have a lot more to fear than from the Electoral College. ■

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